Models of Religious Freedom

Marcel Stuessi, Swiss Human Rights Lawyer

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MODELS OF RELIGIOUS FREEDOM

SWITZERLAND, THE UNITED STATES, AND SYRIA
BY ANALYTICAL, METHODOLOGICAL, AND ECLECTIC REPRESENTATION

MARCEL STÜSSI

A STUDY IN COMPARATIVE CONSTITUTIONAL LAW
To my family
To Nadja

ubi dubium ibi libertas
Acknowledgments

I am very grateful to my doctoral advisors Professor Paul Richli and Professor Adrian Loretan for their conscientious support throughout the past four years. Not only did they give me excellent advice on the religious-freedom topic, but – both advisors equally – taught me that interdisciplinarity is not an option but a necessity. To Professor Loretan I am also thankful for having been given the opportunity on three occasions (in May 2007, September 2008 and May 2009) to present this doctoral thesis to a highly motivated academic group composed of theologians, philosophers, and lawyers alike. The religious law/religious constitutional law colloquium of the University of Lucerne is a great place to gain experience in defending one’s chosen method and content. To Professor Richli I would like to express special thanks for creating the best work environment imaginable. To work as an assistant and lecturer at his chair was instructive and pleasurable at the same time.

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# Contents

## TABLE OF ABBREVIATIONS .......................................................... 14

## I. THE THESIS ARCHITECTURE .................................................... 16

  1.1 General Introduction and Overview ........................................... 17  
  1.2 Why this Method Instead of Another? ....................................... 21  
  1.3 Why this Content Instead of Any Other? ................................. 29

## II. ANALYTICAL REPRESENTATION ............................. 36

  1. SWITZERLAND & THE UNITED STATES OF AMERICA .................. 37
     1.1 Historical Background ....................................................... 37  
     1.2 Public Use of Religious Symbols ....................................... 118  
     1.3 Proselytization ................................................................. 152  
     1.4 Religious Objections to Public Education ......................... 172  
     1.5 Excusals for Religious Purposes ......................................... 211  
     1.6 Land Uses by Religious Adherents .................................... 237  
     1.7 State Recognition of Religious Communities .................... 286  
     1.8 Expressing Religious Hatred ............................................. 349
  2. THE SYRIAN ARAB REPUBLIC ................................................. 375
     2.1 General Introduction and Overview .................................... 375  
     2.2 Religious and Ethnic Landscape ........................................ 378  
     2.3 Historical Background ...................................................... 379  
     2.4 Constitutional Entrenchment ............................................ 397  
     2.5 Personal Status Laws ....................................................... 398  
     2.6 Public Endowments .......................................................... 411  
     2.7 Adoption, Change, and Renunciation of Religion ................. 417
  3. THE THREE MODELS COMPARED AND CONTRASTED ................ 422

## III. METHODOLOGICAL REPRESENTATION ...................... 425

  1. SWITZERLAND ................................................................. 426
     1.1 General Introduction and Overview .................................... 426  
     1.2 Scope of the Right ............................................................ 428  
     1.3 Justifiable Limitations ...................................................... 432
  2. UNITED STATES .............................................................. 443
     2.1 General Introduction and Overview .................................... 443  
     2.2 Free Exercise Tests ........................................................... 445  
     2.3 Anti-Establishment Tests .................................................. 450
  3. THE TWO MODELS COMPARED AND CONTRASTED ................. 456
  4. DETERMINING THE SCOPE ................................................... 458

## IV. ECLECTIC REPRESENTATION ................................................. 462
Detailed Contents

TABLE OF ABBREVIATIONS ............................................................................. 14

I. THE THESIS ARCHITECTURE .................................................................... 16
  1.1 General Introduction and Overview ....................................................... 17
  1.2 Why this Method Instead of Another? ................................................... 21
  1.3 Why this Content Instead of Any Other? .............................................. 29

II. ANALYTICAL REPRESENTATION ............................................................. 36
  1. SWITZERLAND & THE UNITED STATES OF AMERICA ............................ 37
     1.1 Historical Background ....................................................................... 37
     1.1.1 General Introduction and Overview ............................................... 37
     1.1.2 Common Heritage ......................................................................... 40
         1.1.2.1 Early Religious Concepts and Power Distribution ...................... 40
             a. Tertullian .................................................................................... 40
             b. Emperor Constantine .................................................................. 41
             c. Christianity the Official Religion ................................................. 42
             d. Saint Augustine ........................................................................... 43
             e. Investiture Struggle .................................................................... 44
             f. Saint Thomas Aquinas ................................................................. 45
         1.1.2.2 Secular Concepts and Power Distribution .................................... 46
             a. Machiavelli .................................................................................. 46
             b. Thomas Hobbes ........................................................................... 47
     1.1.3 Switzerland .................................................................................... 48
         1.1.3.1 Regional Divisions ................................................................... 48
             a. Catholic Regions ......................................................................... 50
                 a.a Uri, Schwyz, and Unterwalden .............................................. 50
                 a.b. Lucerne and Zug .................................................................. 52
                 a.c. Fribourg and Solothurn .......................................................... 56
             b. Protestant Regions ....................................................................... 57
                 b.a. Zurich .................................................................................... 57
                 b.b. Bern ....................................................................................... 62
                 b.c. Basel and Schaffhausen .......................................................... 64
             c. Parity Regions ............................................................................... 67
                 c.a. Glarus ..................................................................................... 67
                 c.b. Appenzell ............................................................................... 68
         1.1.3.2 Federal Developments ................................................................ 70
             a. Helvetic Republic and Mediation 1798–1813 ................................ 70
             b. Restoration and Regeneration 1813–1848 .................................... 73
             c. Federal Constitution of 1848 .......................................................... 75
             d. Partial Revision of 1866 ................................................................. 77
1.4.2.3 Attire ............................................................................................... 183
   a. Introduction.......................................................................................... 183
   b. Teachers ............................................................................................. 184
   c. Students............................................................................................. 185
   d. Concluding Remarks.......................................................................... 185

1.4.2.4 Religious Coercion ........................................................................ 186
   a. Introduction.......................................................................................... 186
   b. Attaching a Crucifix ............................................................................ 186
   c. Classes on Religion ............................................................................. 187
   d. Concluding Remarks.......................................................................... 189

1.4.3 United States ..................................................................................... 190
1.4.3.1 Socio-Legal Contours ................................................................... 190
1.4.3.2 Secular Curriculum ...................................................................... 191
   a. Introduction.......................................................................................... 191
   b. Sports Lesson ...................................................................................... 191
   c. Science Lesson ................................................................................... 192
   d. Reading Lesson .................................................................................... 193
   e. Sex and Health Education .................................................................. 194
   f. Use of Technological Equipment ....................................................... 194
   g. Concluding Remarks.......................................................................... 194
1.4.3.3 Attire ............................................................................................... 195
   a. Introduction.......................................................................................... 195
   b. Teachers ............................................................................................. 196
   c. Students............................................................................................. 197
   d. Concluding Remarks.......................................................................... 198
1.4.3.4 Religious Coercion ........................................................................ 199
   a. Introduction.......................................................................................... 199
   b. Posting Religious Text ....................................................................... 200
   c. Bible Reading ..................................................................................... 201
   d. Prayers .............................................................................................. 201
   e. Outside Religious Groups .................................................................... 202
   f. Concluding Remarks.......................................................................... 204

1.4.4 The Two Models Compared and Contrasted .................................... 206

1.5 Excusals for Religious Purposes ......................................................... 211
1.5.1 General Introduction and Overview ............................................... 211
1.5.2 Switzerland ..................................................................................... 213
   1.5.2.1 Socio-Legal Contours ................................................................. 213
   1.5.2.2 Employees’ Absences ................................................................. 214
      a. Introduction.......................................................................................... 214
      b. Federal Act on Work in Industry, Crafts and Commerce ............... 214
         b.a. Religious Activities During Work Hours .................................... 214
         b.b. Religious Holiday or Holidays ..................................................... 215
c. Concluding Remarks

1.5.2.3 Students’ Absences
a. Introduction
b. Sabbath
c. Several Holidays
d. Concluding Remarks

1.5.2.4 Prisoners’ Rights
a. Introduction
b. Jum‘ah
c. Orthodox Easter
d. Concluding Remarks

1.5.3 United States
1.5.3.1 Socio-Legal Contours
1.5.3.2 Employees’ Absences
a. Introduction
b. Sabbath
c. Several Holidays
d. Jum‘ah
e. Dhuhr
f. Concluding Remarks

1.5.3.3 Students’ Absences
a. Introduction
b. Several Holidays
c. Jum‘ah
d. Catechism Classes
e. Concluding Remarks

1.5.3.4 Prisoners’ Rights
a. Introduction
b. Security Concerns
c. Jum‘ah
d. Equality Rights
e. Concluding Remarks

1.5.4 The Two Models Compared and Contrasted

1.6 Land Uses by Religious Adherents
1.6.1 General Introduction and Overview
1.6.2 Switzerland
1.6.2.1 Socio-Legal Contours
1.6.2.2 Noise Protection
a. Introduction
b. Christian Bell Ringing
c. Islamic Calls to Prayer
d. Concluding Remarks
1.6.2.3 Aesthetic Interest Protection
1.6.2.4 Cemeteries and Grave Sites .............................................................. 252
a. Introduction .......................................................................................... 252
b. Freedom from Coercion ................................................................. 252
c. Respectful Burial .............................................................................. 253
d. Concluding Remarks ........................................................................ 254
1.6.2.5 Anti-Minaret Clause ......................................................................... 255
a. Introduction .......................................................................................... 255
b. Domestic Level ..................................................................................... 256
c. United Nations Level (Excursus) ...................................................... 257
d. Concluding Remarks ........................................................................ 258
1.6.3 United States .............................................................................................. 260
1.6.3.1 Socio-Legal Contours ................................................................. 260
a. Interwoven Strand .............................................................................. 260
b. Separate Strand ................................................................................ 263
1.6.3.2 Land Use and Institutionalized Persons Act ................................ 266
a. Introduction .......................................................................................... 266
b. General Litigation .............................................................................. 267
c. Special Litigation on Accessory Uses .............................................. 269
d. Concluding Remarks ........................................................................ 271
1.6.3.3 Aesthetic Interest Protection .......................................................... 272
a. Introduction .......................................................................................... 272
b. Historic Zones ..................................................................................... 273
c. Landmark Preservation ..................................................................... 273
d. Concluding Remarks ........................................................................ 275
1.6.3.4 Native American Graves and Sacred Sites ................................... 276
a. Introduction .......................................................................................... 276
b. Indian Interests Lost ........................................................................... 277
c. Preferential Treatment ...................................................................... 279
d. Indian Interests Prevailed ................................................................. 280
e. Concluding Remarks ........................................................................ 280
1.6.4 The Two Models Compared and Contrasted ............................................. 282
1.7 State Recognition of Religious Communities ............................................. 286
1.7.1 General Introduction and Overview ................................................... 286
1.7.2 Switzerland ....................................................................................... 290
1.7.2.1 Socio-Legal Contours ................................................................. 290
1.7.2.2 Legal Structuring of Religious Communities .............................. 290
2.3.2.4 Tax Levied on Non-Muslims ............................................................ 383
2.3.2.5 Tolerance Towards Non-Muslims .................................................... 385
2.3.2.6 Religious Coercion, Crusades, and Mongol Invasions ..................... 386
2.3.2.7 Ottoman Empire ............................................................................... 387
2.3.3 Syrian Struggle for Identity ....................................................................... 389
2.3.3.1 Emergence of Arab Nationalism ...................................................... 389
2.3.3.2 French Mandate ................................................................................ 389
2.3.3.3 Independence .................................................................................... 391
2.3.3.4 United Arab Republic ....................................................................... 392
2.3.3.5 Constitutional Development ............................................................. 393
2.3.4 Concluding Remarks ................................................................................. 395
2.4 Constitutional Entrenchment ......................................................................... 397
2.5 Personal Status Laws................................................................................. 398
2.5.1 Introduction ......................................................................................... ...... 398
2.5.2 Islamic Community ................................................................................... 400
2.5.3 Non-Muslims and the Druze Community .................................................. 402
2.5.4 Structural Clash and Differences ............................................................... 405
2.5.4.1 Roots ................................................................................................. 405
2.5.4.2 Clash of Laws ................................................................................... 406
2.5.4.3 Two Solutions to One Problem......................................................... 407
2.5.5 Concluding Remarks ................................................................................. 409
2.6 Public Endowments................................................................................. 411
2.6.1 Introduction ......................................................................................... ...... 411
2.6.2 Nature and Function of Public Waqf in General ........................................ 411
2.6.3 The Syrian Waqf in Particular ............................................................... 412
2.6.3.1 Precursors ......................................................................................... 413
2.6.3.2 Islamic Waqf .................................................................................... 413
2.6.3.3 Non-Muslim Waqf ........................................................................... 415
2.6.4 Concluding Remarks ................................................................................. 415
2.7 Adoption, Change, and Renunciation of Religion ...................................... 417
2.7.1 Introduction ......................................................................................... ...... 417
2.7.2 Conversion Away “from” an Islamic Cult ............................................. 418
2.7.3 Conversion “to” an Islamic Cult .......................................................... 420
2.7.4 Concluding Remarks ................................................................................. 421
3. The Three Models Compared and Contrasted ............................................. 422

III. METHODOLOGICAL REPRESENTATION .............................................. 425
1. Switzerland ................................................................................................. 426
1.1 General Introduction and Overview ....................................................... 426
1.2 Scope of the Right ..................................................................................... 428
1.2.1 Ample Sphere ....................................................................................... 428
1.2.2 The Irreducible Core ............................................................................ 428
1.2.3 Interference with the Scope of the Right .............................................. 430
**Table of Abbreviations**

Common abbreviations as well as American law review titles are not listed in the following table. These shortened forms are listed within the 19th edition of The Bluebook.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>Allg. Best.</td>
<td>Allgemeine Bestimmung (General Provision)</td>
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<tr>
<td>Ann.</td>
<td>Annotations</td>
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<td>Art.</td>
<td>Article</td>
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<td>BBI</td>
<td>Bundesblatt (Official Gazette of the Swiss Confederation)</td>
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<tr>
<td>BGE</td>
<td>Bundesgerichtsentscheid (Decision of the Swiss Federal Supreme Court)</td>
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<tr>
<td>CE</td>
<td>Common Era</td>
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<tr>
<td>Chap.</td>
<td>Chapter</td>
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<tr>
<td>E.</td>
<td>Erwägung (case reasoning)</td>
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<tr>
<td>GLS</td>
<td>Great Lakes Society</td>
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<tr>
<td>I.R.C.</td>
<td>Internal Revenue Code</td>
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<tr>
<td>IRS</td>
<td>Internal Revenue Services</td>
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<tr>
<td>ISKON</td>
<td>International Society for Krishna Consciousness</td>
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<tr>
<td>N.Y.</td>
<td>New York</td>
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<tr>
<td>NEPA</td>
<td>National Environmental Protection</td>
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<td>P.</td>
<td>Page</td>
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<tr>
<td>Para.</td>
<td>Paragraph</td>
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<tr>
<td>RFRA</td>
<td>Religious Freedom and Restoration Act</td>
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<tr>
<td>RLUIPA</td>
<td>Religious Land Use and Institutionalized Persons Act</td>
</tr>
<tr>
<td>Trans.</td>
<td>Translation</td>
</tr>
<tr>
<td>UAR</td>
<td>United Arab Republic</td>
</tr>
<tr>
<td>Va.</td>
<td>Virginia</td>
</tr>
<tr>
<td>VWBES</td>
<td>Verwaltungsgericht des Kantons Solothurn (Administrative Court of the Canton of Solothurn)</td>
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</tbody>
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I. THE THESIS ARCHITECTURE
1.1 General Introduction and Overview

‘To understand, inhabit, and evaluate space it is crucial to recognize its temporal aspect. Space does not simply exist ‘in time; it is of time.’’

With this quote, artist Olafur Eliasson appears to assert that users of space continuously create structures. On a practical level, it is common for architects and designers to be thought of as such users of space. However, in a more abstract sense lawmakers, too, are builders of new forms and spaces. They use their sovereignty to decide to what extent individuals and communities are given room to do or omit things at their own sweet pleasure. How that room is construed depends on the lawmakers’ philosophical, religious, social, and other allegiances. If they are, for instance, predominantly liberal, they find it just when limits to freedoms are built fairly and consistently so that individuals of all shades of opinion and walks of life can benefit. If they are predominantly communitarian, they find it ideal when one or more community is legally and socially established so that this collectivity can foster civic virtues among the people. But regardless of whether a legal system is built mainly on liberal or communitarian ground, both types of lawmakers enact new norms with the expectation that they will be followed.

At first, such expectation is more in the hypothetical realm than the concrete and real. This is because the lawmakers do not know how the citizenry will receive a new law: Will they comply with it or disobey? Are public authorities willing and able to enforce the law as expected? Can the law be brought into accordance with international or transnational legal agreements? Such and other uncertain-

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1 Olafur Eliasson, Models are Real, in MODELS 19 (Emily Abruzzo et al. eds., 306090, Inc.).
2 The lawmakers must necessarily be representatives of the citizenry, but can be the people themselves (e.g. by way of popular initiatives). To a limited extent, the lawmakers may also be the judiciary (by means of judge-made law) or the executive (while creating ordinances, decrees, and bylaws).
ties about a norm’s actual internalization and enforcement capacity means that the lawmakers are, indeed, building a virtual image. An image that is only a representation of reality without being real itself. This is what a legal norm inherently is. When there are several norms bundled together and enacted in view of a specific concept or greater idea, it is suitable to speak of a model. Within every legal system, various models exist; for instance, a model of how property can be owned, or should be distributed among the citizenry; a model of social justice, as to whether access to a system of health, social security or education should be open to all or just a select few; and then, among others, there is usually a religious-freedom model in place. This regulates the ambit of individual or collective liberty in belief or disbelief, as well as the resulting configurations between religious institutions and the state. In the following we will devote ourselves to the religious-freedom model exclusively. It functions, like any other model, as a producer of reality if the citizenry eventually acts as expected.

A now famous example of model development has occurred only recently. The Swiss decided in November 2009 that towers on mosques, known as minarets, should no longer be built. The sovereign wrote into its domestic Constitution that minarets were henceforth prohibited. And did so despite the fact that some years earlier, the same sovereign promised the international community to respect religious freedom, including the right to build minarets. The majority of the people has created an image that would fit into their concept of justice if the challenged law were eventually upheld. However, as cases before the international courts are pending, the likelihood is high that international judges will ultimately decide that the Swiss have to stick to their promise. Until the last word has been spoken, there is nothing the Swiss lawmakers can be sure about.

So in this case, also, the law is under constant review. Religious freedom models encompass stable components as well as developing components that are expected to tackle new social challenges or clarify or modify older laws. In this respect, they are truly a work in progress at every governmental level.

4 Drawing on Olafur Eliasson, _Models are Real, in MODELS_ 19 (Emily Abruzzo et al. eds., 306090, Inc.).

5 By way of implied consent because the Swiss Sovereign took no referendum against the conclusion of international human rights agreements when there was the chance to do so.

6 The fact that the European Court of Human Rights did not decide in favour of two recent human rights violation claims – which were triggered by the Swiss minaret ban – does not mean that it will not do so in the future. The two claimants failed (only) because they were not regarded as victims of human rights violations. Decision 66274/09 _La ligue des musulmans de Suisse et autres v. Switzerland_ of 28 June 2011; Decision 65840/09 _Hafid Ouardiri v. Switzerland_ of 28 June 2011.

7 Regardless of whether the provision was unfair to the minority of the Swiss electorate.
For this study in comparative constitutional law, three varying countries have been chosen: Switzerland, the United States, and Syria. The reason for this is threefold. Firstly, the constitutional experiences of these countries include a great variety of structured approaches to the religious-freedom question (with varying degrees of state-religion identification to religion-state separation). This produces the opportunity to compare and contrast differences and similarities systematically. Secondly, the secular lawmakers of all three countries have experimented with the religion-state relationship during a long period of time. In the process, they have not only introduced gradual changes, but have also adopted concepts that have endured since time immemorial. It is, therefore, interesting to look more closely at these historical situations in the following investigation. Thirdly, there exist in all three nations not one single faith or a few faiths, but a great variety of beliefs. This makes it particularly difficult for governments to accommodate all beliefs fairly without discriminating against one or the other. Hence, it will be fascinating to see how Swiss, US American, and Syrian lawmakers have tackled the difficulties triggered by the interaction of a heterogeneous citizenry. These reasons together make the elected national jurisdictions worthwhile subjects for the study of comparative constitutional law. The idea is to further the reader’s process of understanding how patterns of religious-freedom work in law. It may be important to note that the thesis does not build models in itself, but visualizes the otherwise invisible by tracing legal forms that already exist. This comparative study is, thus, primarily descriptive and explanatory rather than prescriptive. Nonetheless, to a limited extent the thesis goes beyond simple tracing by suggesting future developments as well. As in concrete architectural design, the Swiss, US American, and Syrian models will be illustrated in three dimensions, but this abstract plane requires more appropriate substitutes for the architect’s plan, elevation and section views; here the presentation will take the form and substance of an Analytical, a Methodological, and an Eclectic Representation.

The Analytical Representation comprises more than statements of positive law or mechanical comparison. Each chapter is introduced by thought-forms predominant in the respective legal culture. It is commonly recognized that the law does not simply consist of the raw legal sources. This representation is designed to lead on to the methods of constitutional interpretation applied in the three countries under investigation. Much effort is made to describe and com-

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8 I do not, however, claim that the illustration of the three legal systems in question produces greater insight than the comparison of other systems.


The Thesis Architecture

ment on variations and similarities of constitutional doctrine and principle. In addition, the first chapter offers a historical overview of important stages of the religion-state relationship, as well as the development of freedom of religious exercise. Subsequent chapters mainly explore positive and negative rights to religious freedom. These and other topics are treated prominently because they are perceived as being rationalized stations in the lawmakers’ process of creating just and balanced models of religious freedom.

Next, attention is drawn to the Methodological Representation. The objective is to investigate the logic and legitimate pattern by which the Swiss and US American judiciary methodologically come to the conclusion that an alleged governmental interference is covered under the right to religious freedom. It is generally believed that national constitutions are too vague to settle most disputes. Hence, the methodological dimension illustrates the way judges examine and weight all relevant circumstances whenever allegations are made that a state action violates the constitution. Jurisprudence to a certain extent enjoys a methodological autonomy and develops its own, inner criteria of what constitutes a just standard.\(^{11}\) It will also be demonstrated that legal methodology possesses an inherent function of producing legal certainty in that possible judicial reasoning becomes predictable. However, in this part, only the Swiss and US American jurisdictions are dealt with. The reason for leaving Syria out of this evaluation is the circumstance that its courts have, as far as can be established, not developed a comprehensive pattern for deciding religious-freedom cases yet.\(^{12}\)

The last dimension, which is the Eclectic Representation, pursues a dual aim. Firstly, the idea is to develop an actual guideline of religious-freedom rules, and secondly, to evaluate how much religious freedom is internalized in the Swiss, American, and Syrian legal systems. Addressing the first aim, the guideline as a practical tool derives its content from a range of legal sources treated in the Analytical Representation. The objective of this approach is to produce an authoritative collection of laws that can be consulted every time a religious-freedom conflict occurs. As we will later see, the value of such rules lies in their reconciliatory effects on varying views. For lack of constitutional resources as well as for the circumstance that only a few religious-freedom questions have ever been raised in Syria’s courts, this thesis cannot offer a practical guideline on the Arab nation’s case law. However, when it comes to the second aim – the measurement – all three jurisdictions are once again subject to the thesis’s investigation. The third dimension represents a theoretical effort to measure the level of state interference with individual religious self-determination and collective religious autonomy, as well as the proximity between religious and government-

\(^{11}\) Id.
\(^{12}\) Due to the lack of resources, Syria’s entire Methodological Representation is beyond the scope of this thesis.
tal institutions. The comparative study thereby generates a hypothesis on the extent of religious freedom found in each nation. It will be shown that the models’ effects and different settings are, indeed, testable. Contrary to the procedure in the analytical part of the study, differences in the countries’ legal cultures are not reflected at this hypothetical stage. This makes it possible to compare and contrast – at least theoretically – all three legal systems alongside each other. The study’s aim is to undertake an experiment, notwithstanding the fact that this type of science can never be fully precise.\(^{13}\)

The overall objective of this thesis is to show that spaces are shaped by intentions, power relations, and desires that function within society, and that it is the lawmakers that construct spaces according to their specific understanding of justice.\(^ {14}\) This condition must not necessary be a loss, as the structuring of society through restrictions carries liberating potential. In this sense, the thesis seeks to find possible answers to the following questions of prime importance: How much freedom should the individual enjoy on her or his way to personal fulfilment? To what extent should a religious community be given room to organize and administer its affairs in accordance with belief? How can the lawmakers be considerate and respectful towards all members of society, whatever their beliefs or disbeliefs might be? These and other legal inquiries will be tackled in the thesis that follows, but before doing so, it is necessary to explain why this method and content was selected instead of another.

### 1.2 Why this Method Instead of Another?

Is there a “right” way forward to compare and contrast three varying legal systems? Is it legitimate to take whatever route seems reasonable? Or, can it be said with sufficient certainty that one way is better than its rivals? Admittedly, I was unable to find a definite answer to these questions during the entire conceptual and writing phase. Especially at the beginning I was troubled by uncertainty about whether there would, indeed, be a specific way in which this study needed to be conducted from a scientific perspective. But while digging deeper and deeper into the Swiss, American, and Syrian fundamentals, it became clear that there could be no universal formula for this type of legal adventure. The countries’ allegiances to political democracy and constitutional government would be too different, resulting in opportunities and difficulties that are unique and di-

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\(^{13}\) As mentioned above, without taking into account the socio-legal contours of each country under investigation, an investigation can only be superficial and theoretical.

\(^{14}\) Drawing on Olafur Eliasson, *Models are Real*, in *MODELS* 19 (Emily Abruzzo et al. eds., 30690, Inc.).
rectly dependent on a given jurisdiction’s independent constellation. There must be a great variety of ways and methods of doing comparative law research. This multiplicity appears to be one of the distinctive features of comparative law. I concluded that the method for this thesis had to be tailored exclusively and with regard to the objectives sought. However, the thorough study of state-of-art academic literature on comparative constitutional law also made me realize that certain scholarly principles on comparative constitutional law had been developed, which needed to be respected in any case. Otherwise the likelihood is great that a thesis will obscure matters rather than clarifying them. It is these insights that make the following explanations necessary. For reasons of simplicity, each of the three comparative representations is described in turn.

**Analytical Representation** – In this part the aim is to examine the most relevant elements and legal structures of the Swiss, American, and Syrian models of religious freedom. The original plan was to treat all three countries together under specific topic headings (like “Public use of religious symbols,” or “Pro-lytization,” or “Religious objections to public education”) so that they could be drawn up in parallel columns of development. The idea was to produce conclusions that could be read and given effect in direct relation to all three jurisdictions respectively. This approach would have been especially convenient for the reader, who could then have browsed through the topics easily. However, after this approach failed in the testing phase, I came to the conclusion that the ap-

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proach could not comply with several recognized comparative law principles, including the requirement that: (a.) legal situations to be compared fit with, or are at least similar to each other; (b.) legal structures under scrutiny are largely of the same legal quality; and (c.) contents of secular and religious laws are not mixed. These requirements could not be fulfilled by the Syrian legal system, for which reason it made sense to take the Arab system separately from the two Western models. Having said that, it is necessary to explain the decision taken in the light of the comparative law principles mentioned.

(a.) As a matter of fact, disputes that occur in Syria rarely match the religious-freedom issues raised in Switzerland or the United States. For instance, the question of whether a student has a right to wear or not to wear a headscarf during public school hours is not a topic that is usually brought to Syrian courts by the student (through her parents) or the school authority challenging that type of religious conduct. In Syria most disputes over religious freedom possess a collective and almost never an individual dimension. It is established practice that if discontent occurs with regard to one’s religious exercise, an adherent seeks advice from the respective religious leader (such as a patriarch, bishop, or imam). In case of dispute, religious leaders settle the matter out of court, and sometimes in concert with the ruling government. This implies that in the Arab Republic, there exist very few judicially decided cases in matters pertaining to religious freedom. Conversely, Switzerland and the United States feature courts that have produced an entire body of jurisprudence. Thus, this special situation cannot easily be reconciled with the requirement to use resources fittingly.

(b.) Another reason why Syria must be treated separately from the other two models is the circumstance that it has implemented a highly centralized constitutional government. It means that, in contrast to the Swiss and American systems (where federal, state, and local levels exist), all branches of government function on the national level only. This situation makes the models unsuitable subjects for direct comparative constitutional law, as each level possesses its own inherent quality. Mixing those qualities adds to legal uncertainty – a mistake that the thesis tries to avoid. Another aspect which makes it inappropriate to take Syria alongside the Swiss and American systems is that the constitutional spaces created in the Arab Republic are not democratic in the strict interpretational sense. This is so because the Syrian Constitution holds that the leading party in society and the state must be the socialist Arab Ba‘ath party. Thus, the Constitution binds future parliaments by requiring the Ba‘ath Party to constitute the leading party. Ba‘ath has held the majority of the seats in the Syrian unicameral parlia-

17 However, in terms of quality and quantity, Switzerland cannot rival the United States. The breadth and depth of American judicial reasoning is far greater than that exercised by their Swiss counterparts. In Switzerland it is general practice that only the majority opinion is published, comprising no concurring or dissenting opinions.
ment ever since it seized power. Because of this, the Syrian Arab Republic cannot be regarded as a fully democratic nation in the Western understanding of the term.

(c.) Moreover, the Arab model comprises structures and governmental functions that simply do not exist in the two Western systems. In other words, Syria has internalized, within a secular political culture, structural components that are religious in nature and extent. For instance, the waqf ministry (which to a great extent controls the finances of the Syrian state) comprises important religious law components, in that half of its personnel is part and parcel of the Sunni Islamic clergy. Moreover, the established leader, the Grand Mufti, is a chief advisor to the Syrian parliament in matters pertaining to Islam. These special features cannot directly be compared with the Swiss and American governments, but need to be explained in relation to the country’s societal development.

So for all of the above reasons, it was decided that the most suitable way of overcoming these differences is by addressing Syria separately from Switzerland and the United States. On the other hand, the reason why two Western models can fittingly be presented in parallel columns of development is because these important comparative denominators match. In this sense, many Swiss and American religious-freedom disputes are similar today as in the past; both systems are decentralized (although the United States has far greater decentralization in the area of criminal law);18 democratic government is treasured a great deal; and the constitutions are exclusively based on the secular (and not religious) laws of each land. Despite the circumstance that it was necessary to treat Syria on a separate strand, very similar analytical formats were used for all three systems. The idea was to keep the process of comparison as coherent as possible, regardless of the above differences.

The analytical formats comprise: (i.) a general introduction; (ii.) a description of the most relevant socio-legal contours; (iii.) a main analysis; (iv.) concluding remarks; and (v.) last but not least, a comparative law exercise. These five formats together constitute the main elements on which the analytical part is based. Hence, it would be negligent from a scientific perspective not to address their use and purpose in detail.

(i.) The general introduction format draws on the previously stated idea that spaces are created by intentions, power relations, and desires that function within society. This causes, in many instances, strained connections between people as each and every person possesses her or his own interests. To illustrate the phenomenon, each chapter starts with the introduction of a famous conten-

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tion that has been mooted on a specific topic. Thereby, a lens is held up to the vital matter at issue, as a device to focus the reader’s attention. But the general introduction format is designed to do more than that. It is designed to give valuable information on the legal difficulties found in each country in question. It raises the reader’s awareness about specific complexities that may not exist in her or his own legal system. To give a concrete example: in Switzerland, criminal law is generally regulated at federal level, whereas in the United States the same branch of law is governed at state level. Before it is possible to compare the two systems, it is necessary to appraise, at least rudimentarily, this structural difference. It means that in each country legal interpretation is confronted with a distinct and separate difficulty. If the reader is not introduced to this special difference beforehand, it is virtually impossible to read the law in accordance with its quality. In this sense, the general introduction format provides valuable information on legal difficulties that the reader is confronted with. Moreover, the same format gives a succinct overview of the issues to be treated.

(ii.) The socio-legal contours format should provide an opportunity to ponder over predominant thought-forms, and to link them with concrete laws of the land. This feature should not only equip the reader with a deeper insight as to why a specific contention has been put forward, but also say how the contention is to be construed with regard to a particular legal culture. Without the socio-legal contours format, it is difficult if not impossible to understand judicial decision making in a broader context. To illustrate this idea a representative example can be stated. American courts have decided that it is not necessary for all students to attend mixed-gender sports classes, whereas Swiss courts find that it is important for sports classes to be held co-educationally, regardless of whether such practice is against a student’s beliefs. The mere reference to such case-outcomes lacks a contextual dimension. In such instances, what the reader really desires to know is, first, the reasoning whereby the courts came to a particular conclusion, and second, how this reasoning is to be read and given effect in relation to larger questions that might have affected the judicial decision-making process. The socio-legal contours format provides precisely the information necessary to understand judicial rulings from a bird’s-eye perspective. This reflects the belief that, in order to interpret a constitutional text, one must look beyond the text itself. In this sense, law without broader meaning is like a skeleton without life. It is the reasoning behind the law that makes it a living


Any sensible inquiry into legal processes must thus be driven by history and culture, as they are both highly lively and extremely inclusive. Nations differ to such an extent that without the socio-legal contours format, no meaningful comparison of constitutional law across the national boundaries is possible.

(iii.) The plan of the analysis format, as its name suggests, is to investigate the actual law relevant to the topics raised. The way I have analysed the law is inextricably linked with question of legal sources. The sources used for this thesis include the constitutions themselves, as well as several other written or unwritten sources such as Acts, ordinances, bylaws, decrees, rulings, and expert opinion. They serve to separate the province of law from the realm of non-law. Only propositions that are derived from a valid source of law are genuinely legal propositions. However, in order to diversify external aids, and in an attempt to bypass the inconvenient circumstance that religious-freedom claims under the Syrian Constitution are rarely litigated in courts, several Syrian religious and political leaders of minority groups as well as of the Sunni Islamic establishment are given the opportunity to speak their minds on the country’s constitutional interpretation. This special type of source is treated just like other (non-law) expert opinion. In this respect, the thesis endeavours to treat the sources as they are acknowledged and prevail in the respective legal system.

Among scholars it is commonly agreed that there exists a hierarchy of legal sources, and that levels should be kept separate whenever possible. This, for instance, means that an abstract provision found in an Act should not be directly compared with an individual court decision. Moreover, expert opinion, however meaningful it might be, is not given parity with the opinion of a judge. In order to stay on the safe side, this thesis treats like sources alike, and unlike sources

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23 Stefan Vogenauer, Sources of Law and Legal Method in Comparative Law, in The Oxford Handbook of Comparative Law 870 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2008).

24 Id.

25 The questionnaire used for Syrian interviews can be found in the appendix to this doctoral thesis.

26 Future studies will have to investigate how such opinions have to be qualified. They will, inter alia, have to find out whether or not leaders’ opinion are, indeed, part of Syria’s Constitution despite the fact they are not discernible in, or directly derivable from, portions of its text. There is still much research to be conducted in this field of law and society.

according to their differences. Otherwise there are pitfalls lurking for the comparative lawyer who wants to determine another system’s sources of law and the methodological approach prevailing there.28

(iv.) The function of the concluding remarks format goes beyond the summing-up of the scholarly arguments traced in the socio-legal contours and legal analysis format. Its purpose is to comment on existing religious-freedom arrangements and to make concrete suggestions on possible future developments. This is the place for reflection. This format presents thinking about where to draw the troublesome line between liberty and limitation. It restricts itself to national problem-solving. Each country is tackled in isolation, in view of its unique circumstances. At this stage there is no cross-country comparison, as this is the goal of the next format.

(v.) The comparative law format is, finally, utilized to demonstrate similarities and differences among national laws. It mirrors the idea that comparative constitutional law can contribute to the growth of one’s own constitutional law. The study can give a valuable indication as to how the systems work in detail, thereby defining shades of difference and casting light into the constitutional structures. This suggests that through the discovery of differences, comparative elaborations make a reasonable degree of interchange between the models possible.29 As we will later see, in this way they reflect the multifaceted functions of the differences and similarities between the respective systems.

What make the countries adequate subjects for the study of comparative constitutional law are not just their similarities, but also their differences. Past scholarship too often appears insufficiently sensitive to national differences that generate differences in domestic constitutional law.30 The aim is not only to present an accumulation of comparative knowledge as an end in itself, but also to demonstrate that comparative constitutional law is concerned with the creation, application, and interpretation of legal spaces. The laws of the world should emerge strengthened from this demonstration of interrelationships and broader forms of


intellectual justification. These important matters having been explained, it is now possible to address the method used for the two remaining parts.

**Methodological Representation** – This part describes and compares the interpretative methods that have employed by courts in Switzerland and the United States. It also seeks explanations for differences between their practices. Swiss and American courts have developed specific substantive-law standards for determining whether a particular governmental activity has unconstitutionally infringed the right to religious freedom. The courts have, thus, answered questions of method by themselves. The following will trace mainly court-produced substantive law tests. This will be done by illustrating the process in a flow chart and then by explaining in detail how each stage is treated by the judiciary. In order to keep things clear and simple, Switzerland and the United States are illustrated separately from one another. Otherwise it would be difficult to show consistently how courts apply varying utility-based tests to establish whether there is sufficient legitimacy for restricting rights to individual, collective, or corporative religious freedom. The motive of this description is to make case outcomes predictable. When one knows how courts function, it is possible to anticipate how they are likely to rule, even if to some extent such predictions will remain vague.

Additionally, this part tackles an area of Swiss and American judicial methodology which is still in need of clarification. It is the dilemma of deciding whether or to what extent a specific religion is concerned. In other words, at the end of the day judges invariably have to decide whether a specific action is of a religious nature or not, even if they are personally unsure. The decision as to whether a governmental activity or omission interferes with religion is pivotal, as it determines whether the issue alleged falls under rights protected by the Swiss or the American Constitution, as the case may be. Difficulties might arise especially as new, unusual, or emerging religious communities increasingly take their claims to civil courts. So the methodological part will also consist of a brief résumé of the relevant substandards developed up to the present day, which will then be developed by combining them into a new three-stage test for constitutional review.

**Eclectic Representation** – The method chosen for this part depended directly on the aim of developing an actual guideline of religious-freedom rules, and of evaluating how much religious freedom is internalized in the Swiss, American, and Syrian legal systems.

The guideline is derived from a range of legal sources treated in the previous part. The idea of this approach is to produce an authoritative collection of laws that can be consulted every time a religious-freedom conflict occurs. This should allow readers to discern which rules are likely to apply in similar cases. In combination with the constitutional review standards described in the *Methodological Representation*, the guideline provides an even more powerful tool to predict case outcomes before they are actually decided. However, the guideline that follows is anything but complete. Not all available case reasonings have been worked into the collection. A careful selection was made so as to reflect the most important religious-freedom developments. It represents a first effort to give a concrete overview of today’s most pivotal applicable law. The information provided still requires cautious handling, because at no time can it serve as a complete substitute for thorough legal research on religious-freedom issues. The two main reasons for this situation are, firstly, that the guideline captures only a few aspects of an exceedingly broad realm of peoples’ religious lives, and secondly, that Swiss and American judges in the process of constitutional review enjoy great discretion in dispensing justice according to the specific circumstances of a case.

For the very last chapter, the thesis turns to theory by developing a method to assess the extent of religious freedom. It represents an effort to provide a framework of the right to individual or collective religious freedom, as well as resulting configurations between religious institutions and the state. The complexity found in specific countries is reduced, as the plan is to produce salient differences that can be illustrated in perceptible terms along a straightforward linear continuum. Thereby the theory omits to address the issue of how shifts in degrees of religious freedom come about. It also gives no consideration to legal processes, and captures all three dimensions as one time-event. Furthermore, descriptions embark from the assumption that moderation is a prime virtue of pluralist societies. The objective is to find balanced accounts of religious freedom. The middle ground sought in this thesis is one determined by considerateness and respect towards all participants in society, whatever their beliefs might be.

### 1.3 Why this Content Instead of Any Other?

This doctoral thesis is not a comprehensive and all-embracing treatment of religious-freedom issues. It can only depict selected issues on a topic that appears as rich in complexity as the peoples themselves. A full treatment would include a detailed evaluation of the leading alternatives. This would be too large a task for a single volume. It was necessary to choose content and perspectives selectively in the light the thesis objectives. For this reason, it is worth recalling that the
The Thesis Architecture

idea of the Analytical Representation is to sketch some of the most disputed areas of religious-freedom laws by providing a plausible picture of the comparative terrain. The purpose of the Methodological Representation is to explain court mechanics, that is the procedure judges employ when deciding whether constitutional spaces or constraints are justified. The motive of the Eclectic Representation is to give a practical and theoretical dimension on religious freedom. Practical, in the sense that the readers no longer need to consult lengthy court rulings when they seek a first overview of already decided religious-freedom cases. Theoretical, in the sense that the thesis illustrates how much religious freedom can be found in each of the three countries. The thesis does not claim that the underlying picture is the only one possible, but tries to show that when reasonable compromises are made by all participants of society, there is a chance to find balanced accounts of religious freedom. I believe that it is this condition which paves the way for secure, just and tolerant societies. It is also necessary to state that this area of theory is still at the exploratory stage, and that it will need the efforts of many people (not just academics) to find a just approach to religious freedom. All three representations should bear testimony that the dichotomy of the Swiss, US American and Syrian legal systems is rooted in the fundamental question as to the function of the secular state in respect to religious communities and the individual adherent. This doctoral project endeavours to contribute to the understanding of religious freedom by way of systematic analysis. The achievements of the thesis lie in the comparative work and its findings. Moreover, for the very first time, a project sheds light on Syria's constitutional configurations from a religious-freedom perspective. This bears the hope that the analysis and discussion of the Arab nation might prompt a positive impulse towards a culturally, ethnically and religiously conflict-torn region.

The thesis does, however, not treat legal interpretation of the right to religious freedom at the level of the United Nations. The reason for this is that the thesis intents to establish a bottom-up, and not a top-down approach to possible patterns of religious freedom. The idea is to treat the topic at its roots, and subsequently to construct inductively an eclectic theory (comprising an evaluation how much religious freedom is internalized in the Swiss, American, and Syrian legal systems) out of basic, country-specific interpretation.

Turning our attention more closely to the actual content of the thesis, a selection of topics was necessary only with regard to the Analytical Representation, since the other representations build on this main part. For the comparison between Switzerland and the United States, a total of eight topic headings were selected. These are: Historical Background; Public Use of Religious Symbols; Proselytization; Religious Objections to Public Education; Excusals for Religious Pur-

\[32\] Admittedly, a truly liberal thought.
poses; Land Uses by Religious Adherents; State Recognition of Religious Communities; Expressing Religious Hatred. These themes are contested on either side of the Atlantic and were chosen because they include individual as well as collective elements of religious freedom. As for the Syrian analysis, six topic headings were picked out: Religious and Ethnic Landscape; Historical Background; Constitutional Entrenchment; Personal Status Laws; Public Endowments; Adoption, Change, and Renunciation of Religion. Again the idea is to analyse individual and collective rights and obligations. As mentioned above, these results are then used as building blocks for the construction of the Swiss, US American, and Syrian model in the remaining parts. Apart from that, all topics chosen are suitable to portray the concept of positive and negative rights to religious freedom. It is now time to look at each of these topic headings in turn – first with regard to Switzerland and the United States, and subsequently with reference to Syria.

Switzerland & the United States

**Historical Background** – The objective of this chapter is to summarize some of the most important early theoretical church-state concepts, and subsequently to sketch religious-freedom innovations at regional and state level. The thesis’s focus rests on finding clues about the extent of religious freedom enjoyed by all members of Swiss and American society. It includes the tackling of individual, collective, and corporative rights. The overall objective is to identify relevant pieces of history and arrange them so that the work reflects a basis on which today’s religious clauses are likely to stand. The chapter covers the development of the initial 13 Swiss regions, and 13 English colonies only. In view of space constraints, and in order to generally review some of the most striking moments of history, a limited investigation must suffice, and hence not all 26 Swiss cantons and 50 US states could be treated in this thesis.

**Public Use of Religious Symbols** – The goal here is to show that not each and every religious-freedom question can be answered by a single sided analysis, however broad the terminology used might be. Because legal concepts are multifaceted and far-reaching, a comparative analysis must address the same question from varying angles and at several levels of development. In this sense the topic tackles the definition of religion and the predominant religious-symbol cases. The topic acts (apart from the historic background topic) as an introductory chapter to the thesis. Cases analysed in this chapter are also relevant in other chapters.\(^{33}\) This is because the reasonings of several cases were interpreted from

\(^{33}\) E.g. in Religious Objections to Public Education, Excusals for Religious Purposes,
varying perspectives. As a consequence, some case facts and ratios stated under one heading overlap with the same information referred to under another heading.

Proselytization – The topic treats prominent issues such as state-sponsored anti-proselytization campaigns; proselytization on public ground; and door-to-door religious canvassing. The question here is whether canvassers have a right to profess their religion freely, or whether they must necessarily play by certain rules even when such are not in accordance with their distinct faith. As such, this is a far-reaching topic that intersects with the rights to freedom of expression, information, assembly, and privacy. It is not possible to tackle all these intersections in this thesis. Furthermore, although this chapter deals largely with court decisions, it provides neither an overall review of all religion/state cases (as there are simply too many in this area) to date, nor a detailed analysis of the reasoning the courts have used to justify them. Rather, it evaluates a representative series of those decisions in the light of the particular subject addressed. The idea is to illustrate what might happen, were a court to decide similar cases on the topic raised.

Religious Objections to Public Education – This is one of the most prominent religious-freedom topics that exist. As such, it is not possible to treat all aspects relevant in school cases. This chapter tackles the areas of secular curriculum, attire, and coercion. Aspects like the relationship of religion to private education, details about questions of control, international education law, home schools, details about dual enrolment programmes, financing education options, details about school choice, students’ extra-curricular activities, or the creation of school district boundaries for religiously identifiable groups, have been deliberately excluded from this chapter.

Excusals for Religious Purposes – This captures employees’ absences, students’ absences, and prisoners’ rights, without claiming to treat all aspects that would be relevant for these issues, nor to provide a comprehensive case-to-case analysis. The chapter focuses on excusal for religious purposes on days and times other than officially recognized. Laws regulating Sundays and other officially recognized holidays are still roughly treated in the socio-legal contours section of each country. The treatment of this chapter will demonstrate that the main exempt activities are those which need to be available to people to enhance their safety, comfort, and life enjoyment.

Land Uses by Religious Adherents – This chapter treats a broad area of law, including: noise protection; aesthetic interest protection; cemeteries and grave sites; the Anti-Minaret Clause; the American Land and Use and Institutionalized Persons Act; Native American graves and sacred sites. The reason why the
Swiss right to Christian bell ringing and Islamic prayer call is prominently analysed and discussed within the noise protection section, is that the same issue has, as far as is known, never been raised in US courts. However, the likelihood that similar cases will occur is great – especially in the light of the circumstance that the religious landscape including the Islamic faith is growing on both sides of the Atlantic. The reason why the rights of Native Americans were given great attention is less for comparative purposes than to illuminate this dark area of law. In fact, federal protection for the Indigenous Population is seen as America’s greatest loophole in the area of civil rights. While cautious respect for the achievements of US constitutional law appears adequate, the Native American tragedy behind its development should be taken into contemplation. At this stage it is also necessary to mention that the thesis does not normally refer to international law. The minaret issue as presented at UN level is to be regarded as an excursus of the thesis.

State Recognition of Religious Communities – Again, this title refers to an exceedingly broad topic. At no time is it possible to treat all the aspects that would be encompassed under this theme. It is not possible to present a complete, that is to say, all-embracing analysis of the scope of legal structuring of religious communities, respect for internal affairs, the grant of tax immunities, and support through material aid. It might be necessary to mention that under the grant of tax immunities section, the right of religious communities to tax their members and/or adherents is lightly touched upon only. This is because it is relatively clear for both countries that no person is obliged to pay taxes devoted to the special expenses of the ritual of a religious community to which she or he does not belong. This topic is approached from a state aid perspective only. Moreover, the support through material aid section does not encompass the issue of state-funded higher education, although it would fit into the thesis. The reason for the decision is the limited space available. Moreover, the chapter does not treat immaterial aid to religious communities. An exception to this might be the understanding that making available specific legal structures can also be regarded as immaterial aid.

Expressing Religious Hatred – This chapter tackles the main statutory provisions and legal decisions in this highly disputed area of law. The thesis does not meticulously explore all guilty conducts that need to be satisfied in order that a person can be made liable to an offence, but focuses on circumstances and


\[35\] Complex issues like “partial renunciation of church membership” (\textit{partieller Kirchenaustritt}) or interfamil family taxes are omitted in this thesis.
classes of speech that are relevant in this rudimentary investigation. Several legal concepts that would be important for any thorough analysis on Swiss and American hate-speech law have been completely left out. These are constructions regarding the meaning of “publicly” or “public fora”, as well as “participation, aiding, and abetting”. None of these concepts were taken into contemplation in the thesis that follows.

Syria

In the light of the above explanations, the choice of content in respect to Syria is quickly outlined. Religious and Ethnic Landscape – The topic has been chosen to introduce the Western reader to Syria’s social and religious terrain. As there are still very few works on Syria’s constitutional government, it seemed useful also to provide basic information on the country’s social setup. Historical Background – In order to understand today’s constitutional configurations of the mainly Arab nation, it is necessary to look at past occurrences and development. This applies especially to Syria where historical interpretation is of prime importance. Constitutional Entrenchment – This was chosen as a topic because for the reader it is necessary to know that in Syria a single party exists, which by virtue of the Constitution has to be the ruling party. Syria’s constitutional law is therefore entrenched since the country has not adopted a fully democratic system from a Western point of view. Therefore, the topic traces what constitutional entrenchment means in Syria. Personal Status Laws, Public Endowments as well as Adoption, Change, and Renunciation of Religion – These try to show the functioning of the three religious-freedom elements: individual and collective rights, as well as the resulting configurations between religion and the state. It will be demonstrated that group autonomy is generally considered more important than individual liberty (save for certain exceptions). The Syrian analysis is also an instrument to discuss rudimentarily the possibility, purpose, and sense of introducing religious personal status laws and the waqf system into Western societies.

An overall investigation on religious freedom as applied in the Arab nation is not the objective of this thesis. Last but not least, it is necessary to say why Syria was chosen instead of Egypt, the Lebanon, Jordan, Turkey, or any other pluralistic country in that region. The answer to this is twofold. Firstly, it is generally perceived that Syria is the most liberal (predominantly) Islamic nation in the region. This is due to the fact that throughout history the country has found a

36 For a more detailed account Nael Georges, Le droit des minorités: le cas des chrétiens en Orient arabe 276 (Université Grenoble II, Ph.D. dissertation) (on file
very unique way of accommodating its religious communities. Secondly, it is Syria in which the ancient concept of religious tolerance between Judaism, Christianity, and Islam started to evolve, and did so long before similar concepts developed on Western territory.

Perils of Copy-Cat Law – Ultimately, it appears worthwhile to say that this study of comparative constitutional law should deepen the field’s analytical foundations. The inherent danger of comparing legal systems is that one might become convinced that one system is superior to its rivals; moreover, if that were the case, one might even be inclined to believe that what is “best” for one system would be equally be best for others too, and that sharing of one’s knowledge is an altruistic gesture.\textsuperscript{37} In this sense, Vicki C. Jackson and Mark Tushnet rightly caution: “[d]ifferent legal systems can accomplish roughly similar goals in quite different ways. But each system may be so closely tied up with its political, economic and cultural surroundings that each legal system’s arrangements may be truly necessary as part of the ‘ensemble’ of legal, political, cultural and other institutions.”\textsuperscript{38}

Having presented a general introduction on models of religious freedom, and explained why this instead of another method and contents were chosen, it is now time to delve into the thesis’s comparative adventure.

\textsuperscript{37} For the description of a famous misfit\textsuperscript{37} MARGARET A. BLANCHARD, EXPORTING THE FIRST AMENDMENT: THE PRESS-GOVERNMENT CRUSADE OF 1945–1952 (Longman1986).

\textsuperscript{38} VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 142 (2nd edn. 2006).
II.  **Analytical Representation**
1. Switzerland & the United States of America

1.1 Historical Background

1.1.1 General Introduction and Overview

“Why then can others do it, if you cannot? Why cannot you, if others can? I suppose we Christians are by nature aliens, grotesque monsters, with fangs like aliens and monstrous energies for incestuous lust! If you believe this of a human being, you too can do it. You are human, as a Christian is. If you cannot do it, you ought not to believe it. For a Christian is a human being no less than you.”

(Tertullian)\(^{39}\)

In Tertullian’s time (approximately CE 160–225) Christianity seemed both subversive and atheistic to the religious Roman of the day. Already back then, the truth was that one person’s bizarre cult was another’s true path to salvation.\(^{40}\) Matters appear not to have changed fundamentally ever since. People still struggle to accept other’s religion. From all that is uttered and written about the great history of Western civil liberties, it might come as a surprise that the Supreme Court of the United States of America ruled on the famous Free Exercise Clause, introduced in 1791, for the very first time in 1940,\(^{41}\) and had never found any governmental practice to be incon-

\(^{39}\) In Apology 8.4-5 quoted as in David Wright, Tertullian’s Life and Achievement, in EARLY CHRISTIAN WORLD 1038 (Philip Francis Elser ed., Routledge 2000).

\(^{40}\) Harvey Cox, Playing the Devil’s Advocate, As It Were, N.Y. TIMES, Feb. 16, 1977, at 25.

\(^{41}\) The first full-fledged judicial analysis was permitted in Cantwell v. Connecticut, 310 U.S. 296 (1940). The reason for this was that the First Amendment applied only to acts of Congress until the Clauses were incorporated. The few free exercise cases decided by the federal courts before 1940 involved challenges to federal authority. Reynolds v. United States, 98 U.S. 145 (1878) and Davis v. Beason, 133
sistent with the Anti-Establishment Clause of the same vintage before 1947. Similarly, in Switzerland, religious liberty clauses were for centuries only part of the vision of liberal or radical minds. On both sides of the Atlantic they were not at work in the judicial process beyond their restricted literal meaning. The Helvetic Constitution of 1798 or the subsequent Swiss Federal Constitutions of 1848 and 1874 guaranteed fundamental freedoms in fragmentary fashion only. From Switzerland it is reported that not until the end of the Second World War did any widespread desideratum exist to widen the application of fundamental rights further than their originally accepted scope.

However, for a general historical overview like the one envisaged in this chapter, the description of important stages of the religion-state relationship, as well as the development of freedom of religious exercise, matters all the same. In other words, although the judicial and scholarly search for legitimate limits to human liberties is a relatively new reality, models of religious freedom need to be examined within the early matrix that produced such concepts. This chapter does not claim to offer a comprehensive analysis of the issues in relation to every aspect of religious-freedom history. It is not intended to be anything but the barest outline in order to give some idea of legal progress, since it is not possible to capture the full richness and complexity of many centuries of the history of religious freedom of major and highly diverse parts of the world in a single work. Instead, the purpose here is to distil some of the most pertinent features of that history, and to provide the factual background and context of specific practices or policies found in Switzerland and the United States.

The broad approach taken in this thesis requires at least a rudimentary layout of early-stage developments. It includes the description of concepts put for-

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42 Prior to *Everson* there was no judicial review on the Anti-Establishment Clause. *Everson v. Board of Education*, 330 U.S. 1 (1947). The Supreme Court nevertheless addressed the meaning of the ban on laws “respecting an establishment of religion” on two prior occasions in rudimentary fashion. These were *Bradfield v. Roberts*, 175 U.S. 291 (1899) and *Quick Bear v. Leupp*, 210 U.S. 50 (1908).

43 Exceptions to this general understanding might be the decisions in *Renk* (1909) and *Issaef* (1926), which, *inter alia*, explored the meaning of “religion.” BGE 35 I 42, E. 3, p. 47; BGE 52 I 254, E. 1, p. 260.

44 There was still no actual body of law. Hölger Schäfer, *Die ungeschriebenen Freiheitsrechte in der Schweizerischen Bundesverfassung von 1874 im Vergleich mit dem Grundgesetz 31 ff.* (Peter Lang 2002).

45 Alfred Kölz, *Neue Schweizerische Verfassungsgeschichte, ihre Grundlinien in Bund und Kantonen seit 1848* at 817 (Stämpfli 2004).
ward by the Catholic Church fathers, as well as the first secularist thinkers. As we will later see, the ancient differentiation between the natural world and the supernatural can play into the process of lawmaking even today.\textsuperscript{46} A discussion on religious-freedom models needs also to encompass an illustration of pivotal moments in Swiss and US-American history that are so nearly alike that they can readily be placed alongside each other in parallel columns of development.\textsuperscript{47} In this sense, the regional divisions column lays out religious clauses that progressed inside the initial 13 Swiss and American regions, whereas the federal developments column treats crucial instances in federal constitutional law-making as well as the special case of Native Americans. This historical chapter will then be concluded with a country-specific comparing and contrasting exercise.

\textsuperscript{46} Arguably, the believing or disbelieving responsible Sovereign tailors the law, as far as possible, in such a manner that reason does not contradict faith, nor philosophy or theology.

1.1.2 Common Heritage

1.1.2.1 Early Religious Concepts and Power Distribution

a. Tertullian

Roman religion encompassed acknowledging the quasi-divine status of the Caesar.\textsuperscript{48} Citizens were expected to add a pinch of incense before the images of the Caesar at the public baths. Yet such a practice was wholly inconsistent with the Christian view of Jesus the Lord,\textsuperscript{49} and implied apostasy of faith in the Great Commandment, which reads: “You shall have no other God to set against me.”\textsuperscript{50} Christians declared that they were worshippers of one God, that they had no master but God alone, and that those who the Romans regarded as masters were only humans.\textsuperscript{51} “[J]esus said to them, ‘Give to the Emperor the things that are the Emperor’s, and to God the things that are God’s’.”\textsuperscript{52} But Caesar Domitian ordered strict observance of Emperor-worship in the provinces. Gods had not been fittingly honoured, he found. As a consequence, exercising Christian belief meant a decision between life or death.\textsuperscript{53} Persecution of Christians was still in process when the Latin writer Tertullian taught that whatever differences in belief and lifestyle may exist between Christian and non-Christian Carthaginians, there is still much that they have in common as fellow citizens of the city.\textsuperscript{54} Tertullian appealed to a common humanity and claimed religious liberty.\textsuperscript{55} To him it meant choice of deity and an end to forced worship.\textsuperscript{56} It is worth mentioning that

\textsuperscript{49} ANDREAS FELDTKELLER, \textit{IDENTITÄTSSUCHE DES SYRISCHEN URCHRISTENTUMS: MISSION, INKULTURATION UND PLURALITÄT IM ÄLTESTEN HEIDENCHRISTENTUM} 23 (Universitätsverlag Freiburg 1993).
\textsuperscript{50} Deuteronomy, 5:7.
\textsuperscript{52} Mark, 12:13-17.
\textsuperscript{53} HENRIKE MARIA ZILLING, TERTULLIAN, \textit{UNTERTAN GOTTES UND DES KAISERS} 88 (Ferdinand Schöningh 2004).
\textsuperscript{54} In \textit{Apologeticum} 42, 2 quoted as in DAVID IVAN RANKIN, \textit{FROM CLEMENT TO ORIGEN: THE SOCIAL AND HISTORICAL CONTEXT OF THE CHURCH FATHERS} 70 f. (Ashgate Publishing 2006).
\textsuperscript{56} “See whether this too may not contribute to the chargesheet of irreligion – remov-
Tertullian had matchless confidence in the superiority of the Christian religion. Christians would soon demand from the Romans equal privileges and immunities, as already granted to the Jews, as well as an end to control of Christians’ and Jews’ property. However, not until 311 CE was an Edict of Toleration for Christians issued by the Emperor Galerius.

b. Emperor Constantine

Of greater impact than the earlier toleration order issued by Galerius was the “Edict of Milan” of 313 CE, as promulgated by both the Emperors Constantine and Licinius. The Edict ended persecution and required provincial officials throughout the empire to guarantee that Christians were tolerated as professing a “tolerated religion” (religio lícita), and that the churches should receive back property that had previously been confiscated. This recognition enabled churches to exercise their capacities to receive, hold and accumulate property, thereby laying the foundation for a divine structure. Constantine defeated Licinius in a war, which he promulgated as a religious crusade to rescue the Christians of the East from persecution. Yet scholars note that Constantine was fightingLiciniustowin the previously shared Empire for himself, and not for the sake of Christianity alone. “The policy of Constantine was one of toleration. He did not make Christianity the sole religion of the state. That was to follow under later Emperors. He continued to support religious liberty and forbidding free choice of deity, so that I am not allowed to worship whom I will but am forced to worship whom I would not. No one, not even a human being, wants to be worshipped unwillingly [...]” Tertullian in Apology 24.6, 8, 9-10 quoted as in David Wright, Tertullian’s Life and Achievement, in EARLY CHRISTIAN WORLD 1038 (Philip Francis Elser ed., Routledge 2000).

57 E. I. KOURI, TERTULLIAN UND DIE ROMISCHE ANTIKE 15 F. (Schriften der Luther Agricola Gesellschaft 1982).
58 Jews were free to exercise religious practices and to establish synagogues in virtually every province of the Empire. HENRIKE MARIA ZILLING, TERTULLIAN, UNTER TAN GOTTES UND DES KAISERS 87 (Ferdinand Schönigh 2004). In addition, Roman law provided exemptions for Jews “from many external acts of the Roman cult and from all secular activities on the Sabbath [...]” EDWARD H. FLANNERY, THE ANGUISH OF THE JEWS: TWENTY-THREE CENTURIES OF ANTI-SEMITISM 16 (Macmillan 1965).
61 Timothy Barnes, Constantine, Athanasius and the Christian Church, in CONSTANTINE: HISTORY HISTORIOGRAPHY AND LEGEND 7 (Routledge 1998).
both paganism and Christianity [...]. What is pivotal, however, is the fact that under Constantine, Christians confronted a new phenomenon, namely, an Empire whose Head was not only actively pro-Christian, but also, most importantly, received baptism shortly before his death.

c. Christianity the Official Religion

Then, in 380 CE, Christianity became the official religion of the Roman Empire. A decree of the Emperors Valentinia, Theodosius, and Arcadius announced their will that the people they ruled should “[p]ractice that religion which the divine Peter the Apostle transmitted to the Romans [...]. We command that those persons who follow this rule shall embrace the name of Catholic Christians.” Hitherto the Church was regarded as an independent entity, organized entirely on a model of its own. After the imperial influence it entered into an alliance with mundane powers. Internal discipline of the Church was actively interfered with. Priests were prohibited from having unrelated women in their homes, privileges were denied to non-Catholics such as “heretics and schismatics.” There was also a zealous attempt to remove Pagans from the government and the army. By 396 CE Paganism was destroyed, primarily because Ambrose’s religious jurisprudence held

64 Hans A. Pfohlsander, Constantine 25 (Routledge 1996).
66 Charles Hardwick, A History of the Christian Church: Middle Age 49 (Macmillian 1894).
67 The Code reads: “It is not seemly that a man who lives a commendable life of stern discipline in this world should be tarnished by the association [consortium] of a so-called ‘sister’. If any person, therefore, relies upon any rank whatever in the priesthood, or is distinguished by the honor of the clergy, he shall know that consorting with extraneous women is forbidden to him.” Theodosian Code: and Novels and the Sirmindian Constitutions 16.2.44 at 448 (Clyde Pharr trans., Princeton University Press 1952).
68 The same Code says: “The privileges that have been granted in consideration of religion must benefit only the adherents of the Catholic faith [Catholica lex, 16, I, n. 5.]. It is Our will, moreover, that heretics and schismatics shall not only be alien from these privileges but shall also be bound and subjected to various compulsory public services.” Id. at 450.
that “idolatrous worship of fabulous deities, and real deamons, is the most abominable crime against the Supreme Majesty of the Creator.”

With the collapse of the Western Roman Empire in the fifth century, the Church alone remained a viable political organization. The Church’s proselytizing mission began in Western Europe. Germanic and Celtic Kings were enmeshed in kingship structures. The Church taught that kingship is a sacred office, that political authority stemmed from God, and that the King rules by divine right. Accordingly, a King should rule as God would have him, not as a barbarian war leader, but justly and for the common good, which meant, a fortiori, as defender of the faith.

The problem that arose alongside that teaching was that it created a potential rival source of authority. This new circumstance raised the question of how the Church could come to terms with Kings without conceding religious functions and priestly authority.

d. Saint Augustine

Saint Augustine elaborated a comprehensive Christian theory in his City of God. To him the theory was divinely ordained, and as such, absolute. Augustine found that the legitimacy of kingships was given by the guarantee of social order, and not as the embodiment of moral virtue. Augustine believed in the falleness of human nature. The evidence for it could be seen around him. Augustine opined that the violence which undermined social harmony constituted the most urgent and the most basic problem of politics. For the Saint, virtue was an otherworldly matter that could be realized only within the Church. Thus, the moral development of the subjects constituted the exclusive power of those who belonged to the Church. Augustine thereby accorded a higher status to the Church than to the Empire and secular authority because he saw in the Church a higher spiritual end or purpose. The Saint said in this regard: “The sovereignty of the Church reflects

70 Edward Gibbon, Decline and Fall of the Roman Empire 75 (ElecBook 1788).
73 Uwe Neumann, Augustine 62 ff. (Rowohlt 1998).
the glory and grace of God; the kingdoms of this world are the results of greed and audacity.”

**e. Investiture Struggle**

During what is known as the Investiture Struggle or Gregorian Reform, confrontation between the Church and Monarchy set in once again. The ideals of Pope Gregory VII encompassed primarily the absolute, unquestioned obedience to the will of God. Gregory identified himself with Saint Peter and was convinced that his actions would be in accordance with the voice of the Saint. To him it seemed self-evident that these papal activities should be free of all error on the basis of Christ’s prayer for Peter and the Church. Pope Gregory put forward that he himself was possessed of supreme authority. He created a feudal ecclesiastical state of the church, which was henceforth the dominant tradition for the Latin West. The writings entered the record as “papal claims” (*dictatus papae*) in 1075 CE. Scholar Ute-Renate Blumenthal notes that “the Pope alone, by means of his identification with Peter, ‘would always be a true Christian,’ and thus able to recognize who was of God and who was of the devil.”

Gregory was convinced of his divine mission and claimed the right to depose not only bishops but also secular rulers. When King Henry IV provoked Pope Gregory with his renunciation of obedience in 1076 CE at Worms, the

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76 Quoted as in R.W. Dyson, *St Augustine of Hippo* 143 (Continuum International Publishing 2006).

77 Johann Englerberer, *Gregor VII und die Investiturstreite, Quellenkritishe Studien zum angeblichen Investiturstreit von 1075 an 1075 ff.* (Böhlau 1996).

78 Ute-Renate Blumenthal notes that Gregory himself “felt as if being pressed into service constantly – and he expected the same willingness to serve from others. Personal desires and personal will had to subject themselves to the overriding call of God to duty.” Ute-Renate Blumenthal, *The Investiture Controversy: Church and Monarchy from the Ninth to the Twelfth Century* 117 (University of Pennsylvania Press 1988).


81 Ute-Renate Blumenthal, *The Investiture Controversy: Church and Monarchy from the Ninth to the Twelfth Century* 118 (University of Pennsylvania Press 1988).

82 Johannes Laudage, *Der Investiturstreit, Quellen und Materialien* 2 ff. (Böhlau 1989).
Pope pronounced the superiority of the priestly power in the spiritual realm, and subjugated the secular power to the spiritual one.\textsuperscript{83} Gregory was of the view that an autonomous kingship was at variance with the religious self-conception of the Church.\textsuperscript{84} To legitimize his position he took recourse to the theological teaching of Pope Gelasius I. Gelasius curtailed the scope of imperial power by ascertaining the superiority of priesthood over kingship. To him, as to St. Augustine before him, spiritual power was higher in dignity and importance. Gelasian dualism was especially expressed in the allegory of two swords at the time of the Gregorian reform. It derived from the Gospel of Luke,\textsuperscript{85} in which the respective powers, material or spiritual, were distinguished. However, the conflict between the powers of the “priesthood” (\textit{sacerdotium}) and “kingship” (\textit{regnum}) would last for many centuries to come. The theological idea of the two swords proved ambiguous in practice, as subsequent popes and mundane rulers construed its meaning by virtue of their own interest. The Papacy used it to assert the superiority of sacred over temporal authority and claimed that the material sword had been given to the mundane rulers by the Church. The mundane rulers, for their part, employed it to legitimize their independence from papal intervention in what they regarded as their affairs.

\textbf{f. Saint Thomas Aquinas}

Saint Thomas Aquinas was another for whom the divine constituted the final source and was therefore to be regarded more highly than the natural world. Thomas was of the view that kingship was the ideal polity, not only for political reasons but because it mirrored God’s monarchical rule of the universe.\textsuperscript{86} Thomas comprehended natural law to be rooted in the divine law of God that governs both the physical and the moral order of the universe. Historian Brian R. Nelson notes that “what Thomas had changed in theoretical terms was not the traditionally asserted superiority of the sacerdotium, but the possibility of thinking about regnum in its own terms as a natural good without calling into question the ultimate superiority of the church and the

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\textsuperscript{83} \textsc{Werner Goez, Kirchenreform und Investiturstreit} 911–1122 AT 120 ff. (Kohlhammer 2000).
\textsuperscript{84} Papst Gregor VII., \textit{Brief an alle Getreuen im Reich of 3 September 1076}, in \textsc{Quellen zum Investiturstreit, erster Teil Ausgewählte Briefe Papst Gregors VII.} 233 (Franz-Josef Schmale trans., Wissenschaftliche Buchgesellschaft Darmstadt 1978).
\textsuperscript{86} \textsc{Volker Leppin, Thomas von Aquin} 124 ff. (Aschendorff 2009).
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supernatural good that it proclaimed to be its proper domain.” However, the practical difficulties with the relationship between regnum and sacerdotium, that is to say, the tangible elements of the scope of authority amid the rivalry between the powers, persisted.

1.1.2.2 Secular Concepts and Power Distribution

a. Machiavelli

The theoretical innovations of the Late Middle Ages reflect the immediate problems with which medieval thinkers were confronted. Most significant was the deterioration of feudalism and the expansion of towns which eventually gave rise to the emergence of the modern state. In Switzerland, a medieval town generally stood outside the imperial system of personalistic political relationships. It developed its own governing system that emphasized the autonomy of the towns from outside control. As a result, towns in some places become quasi-independent regions. In central Europe, the urban bourgeoisie would grow and would later become dominant in some modern national and territorial states. Machiavelli, who came from a small Italian city-state, tailored the first modern theory of politics by writing a detailed guide, The Prince, on how mundane rulers should act to regain power. The Renaissance thinker asserted, for instance, that “a prince who wants to keep his authority must learn how not to be good,” and that one who becomes prince through the favour of the people “ought to keep them friendly, and this he can easily do seeing they only ask not to be oppressed by him.” Brian R. Nelson interprets these famous phrases by stating: “[I]n theoretical terms, it spelled the final end of the classical theory of the state premised upon a ‘unity of ethics and politics’ and the late medieval concept of a unified Christendom organized around the concept of ‘higher ends.’”

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88 Nicolas Stockhammer, Das Prinzip Macht, Die Rationalität politischer Macht bei Thukydidès, Machiavelli und Michel Foucault 125 (Nomos 2005).
89 Michael Szurawitzki, Contra den “rex iustus / rexiniquis”? 65 f. (Königshausen & Neumann 2005).
91 Id. at 15.
velli was the first to employ the term “state” (*lo stato*) in referring to the locus of an earthly ruler’s powers.\(^93\)

**b. Thomas Hobbes**

A century later, Thomas Hobbes’s answer to stop the enduring war of powers was the presentation of a theoretical concept in which the Church would be completely left out. To presumably the most radical secularist of the time, there needed to be a covenant “[o]f every man with every man, in such manner, as if every man should say to every man, I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.”\(^94\) This done, he called the united multitude “commonwealth” (or *civitas*). Hobbes wrote, at the time, of religious wars and opined on the matter of religion that “[s]eeing there are no signs, no fruit in Religion, but in Man only [...]”,\(^95\) it “is the fools who put their faith in religion rather than right reason.”\(^96\) However, in the following sections of this introductory chapter it is shown that it took a long time before the contours of the Hobbesian idea of individual consent,\(^97\) rather than collective unity, became identifiable also at the secular normative end.

Now after addressing early religious and secular concepts, it is time to tackle specific developments at the level of Swiss and US American constitutional law.

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\(^93\) The term *lo stato* was derived from the Latin word “status,” which meant condition. As Brian R. Nelson points out “in the High Middle Ages the *status regis* initially referred to the personal condition of the King, his wealth for example, but it began to be used in a more public sense during the later thirteenth century to refer to the King’s authority within the territory.” *Id.* at 67.


\(^95\) *Id.* at 52.

\(^96\) *Id.* at 53.

\(^97\) Hobbes embarks from the theory of a “condition of war” pitting “every one against every one.” To him this condition is a result of human nature that is inherently power seeking whereby “man is a wolf to man.” For Hobbes the real issue is not “[w]hy do we consent to the formation of the state?” as we clearly have not choice, but “[w]hat are the terms of the contract?” *Id.* at 87.
1.1.3 Switzerland

1.1.3.1 Regional Divisions

Centuries before the emergence of actual statehood, in August 1291 the Swiss people formed a perpetual Alliance between the three forest “places” (Orte) of Uri, Schwyz, and Unterwalden. By way of the so-called “Letter of Alliance” (Bundesbrief) the men swore “In the name of God, amen” mutual assistance in the struggle to preserve their traditional rights against the worldly Habsburg dynasty. The union’s first and foremost objective was the prevention of foreign dominance. The “fellows under oath” (Eidgenossen) would no longer tolerate interference from any outsiders in their respective territories.

The three Orte were later joined by further places: Lucerne, Zurich, Zug, Glarus, Bern, Fribourg, Solothurn, Schaffhausen, Basel, and Appenzell. And it is these initial 13 Orte to which our attention will turn in the following subsections.

The Alliance did not grow out of affection or respect, but pure necessity. It was constituted of units of governance, each of which was prepared to go to war to preserve its jurisdictional autonomy in questions of economy, politics, morality, and religion. All 13 rival Orte were both discrete and distinct, legally and jurisdictionally. Especially the latter meant a stark rejection of foreign judges in spiritual as well as mundane affairs. The political structure of the individual Orte varied greatly; some were ruled by guilds, others by aristocratic regimes, and still others were managed by the medieval democracy system known as the “Peoples’ Assembly” (or Landsgemeinde).

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98 However, there is historic evidence to support the thesis that the three ancient Orte had already formed a quasi alliance by 1114, or earlier. C. Hilty, Die Bundesverfassungen der Schweizerischen Eidgenossenschaft 8 ff. (Wyss 1891); also Otto Hunziker, Der eidgenössische Bundesbrief von 1291 und seine Vorgeschichte 13 ff. (2nd edn, Polygraphischer Verlag 1934); Karl Meyer, Der Ursprung der Eidgenossenschaft 285 ff. (Gebrüder Leemann 1941).

99 “In nomine domini, amen” the famous invocation reads. Letter of Alliance of August 1291 (Bundesbrief) quoted as in Otto Hunziker, Der eidgenössische Bundesbrief von 1291 und seine Vorgeschichte 163 (2nd edn, Polygraphischer Verlag 1934).

100 Otto Hunziker, Der eidgenössische Bundesbrief von 1291 und seine Vorgeschichte 14 (2nd edn, Polygraphischer Verlag 1934).


102 Hans Nabholz & Paul Kläui, Quellenbuch zur Verfassungsgeschichte der Schweizerischen Eidgenossenschaft und der Kantone von den Anfängen bis zur Gegenwart 33 (Sauerländer 1940).
the imperial free cities of Zurich, Basel, and Schaffhausen, the government was elected by guilds into a Small and a Grand Council. These Orte did not have political, but rather, corporative oligarchic constitutions. Bern, Lucerne, Fribourg, and Solothurn imposed an aristocratic system in which patrician family members were appointed as city councillors. Uri, Schwyz, Unterwalden, Zug, Glarus, and Appenzell set themselves apart from the city places. They were not ruled by guilds or aristocratic families, but in most instances, peasant landowners organized under rural private law, who enjoyed sovereignty over their own affairs through local Peoples’ Assemblies.\(^{103}\)

In the sixteenth century, Catholic Orte convened a conference on religion in the Catholic stronghold of Baden in May 1526 to counter the spread of Zwingli Protestantism in the Confederacy.\(^{104}\) However, some Orte still turned Protestant. In Switzerland the lines between Catholic and Protestant places became firmly drawn after 1529.\(^{105}\) Basel, Bern, and Schaffhausen joined Zurich, while Uri, Schwyz, Unterwalden, Lucerne, Zug, Fribourg and Solothurn remained Catholic. Glarus and Appenzell adopted a system of dual establishment by accommodating both confessions alongside each other. Appenzell was divided in 1597 into Appenzell Innerrhoden and Appenzell Ausserrhoden, the former being determined by the Catholic religion, and the latter by Protestantism.

From the sixteenth century onwards, all Orte defended the right to determine their religion-state affairs. This was later regarded as an unwritten version of the principle “whose realm, his religion” (or *cuius regio, eius religio*). The Thirty Years’ War (1618–1648) increased divisions in faith and threatened the unity of the region. However, towards the end of the conflict, the Swiss managed to organize a common Protestant and Catholic defence against outside intrusion. The Swiss Orte were not officially recognized as independent state until the Peace of Westphalia in 1648. The treaty acknowl-

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103 Rulers first allowed the landowners to decide together about the region’s order and administration. Voting rights were in most instances given only to those people who owned land. So legal privileges were attached to land ownership. This excluded a large class of people from enjoying equal rights. HANS RUDOLF STAUFFACHER, **HERRSCHAFT UND LANDSGEMEINDE, DIE MACHTLINIE IN EVANGELISCH-GLARUS VOR UND NACH DER HELVETISCHEN REVOLUTION** 54 (Tschudi 1989).

104 STEVEN E. OZMENT, **THE AGE OF REFORM (1250-1550) AN INTELLECTUAL AND RELIGIOUS HISTORY OF LATE MEDIEVAL AND REFORMATION EUROPE** 334 (Yale University Press, 1980).

105 It must be noted that several Orte tolerated either Catholic or Protestant enclaves within their territories. For this reason it appears difficult to clearly categorize the Swiss Orte either into Catholic, Protestant, or parity-governed regions.
edged essentially what had been political reality for quite some time. From this short account, it can be inferred that the origins of Swiss religious clauses vary from one region to another, and that in order to trace their roots they must be tackled separately from developments on the more abstract federal level.

**a. Catholic Regions**

**a.a. Uri, Schwyz, and Unterwalden**

When the three forest Orte of the central valleys united in a special Alliance in 1291 their people felt responsibility to the Emperor and to God alone. Other claims over their land were particularly unwelcome and vehemently fought against. The peasants of the three forest places learnt a lesson of organization and of mutual help, and received an inestimable political education from the very perils that surrounded them. It is clear from history that the people of Uri, Schwyz, and Unterwalden continued to regard themselves not as Habsburg subjects, but as free members of the “Empire community” (**Reichsgemeinde**). The relationship between the Alpine people and Catholicism was self-confident and devout at once – self-confident because from 1294 onwards the Peoples’ Assembly was used as an instrument of direct democracy to take action against the dominance of the Church; devout because the people of Schwyz believed that the supreme power emanated from religion, and was only delegated to the magistrates. This Swiss paradox found expression, for instance, in the circumstance that the land owners of Schwyz agreed in an open-air Peoples’ Assembly to forbid anyone to sell or give land to monasteries in the valley, or to strangers dwelling outside, under the pain of heavy fines. By the will of the electorate, monasteries had to pay the same taxes as all the other members of the community, or else they were excluded from common lands. Moreover, resident peasants revolted against special privilege, and against the monopoly of land by ecclesiastical corporations and absentee landlords. Not only Schwyz, but also Uri, and

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109 **Louis Carlen, Die Landsgemeinde in der Schweiz, Schule der Demokratie** 7 (Jan Thorbecke 1976); also **Cyprian P. Moser, Die kirchenrechtliche Stellung der Pfarrei Einsiedeln** 16 ff. (Verlagsanstalt Benziger 1937).
Unterwalden grew into pure direct democracies. In spite of their uprising against church organization, Roman Catholicism determined not only their thinking and feeling, but also their customs and law.

Several centuries later, when the quasi independence of the ancient Orte was quashed by the French, and these regions were no longer called Orte, but cantons, locals agreed to accept the French-imposed Helvetic Constitution only on condition that all their popular liberties should be guaranteed to them. Modern ideas and ideals of the Helvetic had little effect on the constitution-making of the Catholic Peoples’ Assembly democracies. Due to their topographical isolation and their determination to protect their own values and customs, the citizens of Uri, Schwyz, and Unterwalden (now commonly referred to as Nidwalden and Obwalden) appeared to be immune to French innovations. They deeply resented changes, and saw them as injurious to their particular way of life. The peasants found the concept of religious freedom not only heretical and ungodly, but denounced it quickly as jeopardizing the spirituality of religion. The 1804 cantonal Constitution of Schwyz made crystal clear that “the protection and maintenance of the Catholic religion […] is the first and foremost sacred duty of all authority and powers established in the Canton.”

Likewise during the Restoration period, the constitutions of the Swiss central valleys reconfirmed the Catholic character of the state and the people. The Constitution of the half-canton of Nidwalden stipulated: “The canton of Unterwalden nid dem Walde is undivided in professing the Roman Catholic religion.”

Also the citizens of Uri wrote into their 1820 basic legal framework: “The religion of the Swiss canton of Uri is Roman Catholic.”

The wording of these regional Constitutions mirrored the strong discontent with liberal tendencies. The ancient forest cantons expressed their resistance against any attempt to introduce legal parity between the Roman Catholic

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and the Evangelical Reformed confessions. Neither Protestants nor Jews enjoyed any court-enforceable right to settle freely within these territories – let alone political and economic rights. Only at the territorial periphery of the canton of Schwyz, where social, business, and political contacts with Protestants were inevitable, the concept of religious tolerance was steadily gaining ground. In the year 1850, two years after the introduction of the federal right to freedom of settlement and religion, the canton of Uri counted no more than 12, Nidwalden 28, and Schwyz 155 Protestant inhabitants.

Today, in Uri, Schwyz, as well as the two half-cantons Nidwalden and Obwalden, the Roman Catholic and the Evangelical Reformed churches have been treated equally for some time. However, the applicable Constitution of Nidwalden declares that from a symbolic perspective the two rival churches are not at absolute parity with each other. It reads, in Article 34(1): “The Roman Catholic Church is the cantonal church.” The term “cantonal church” (or Kantonalkirche) is interpreted as reflecting the high esteem in which the Catholic community is held for its public benefit in the region. Religious communities, other than the “public-law recognized” (öffentlichrechtlich anerkannt), are regulated within the realm of private law in all central cantons. Religious freedom of individuals and religious communities is cantonally guaranteed.

a.b. Lucerne and Zug

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113 E.g. the Protestant community was allowed to build its first church in 1875. KURT REICHLIN, KIRCHE UNDSTAAT IM KANTON SCHWYZ 38 ff. (Buchdruckerei Jos. Casanova’s Erben 1958).

114 PAUL STEINER, DIE RELIGIOSE FREIHEIT UND DIE GRUNDUNG DES SCHWEIZERISCHEN BUNDESTAATES 227 (Paul Haupt 1976).


116 The term Kantonalkirche or Landeskirche was used interchangeably. For more details PIUS HAFNER, STAAT UND KIRCHE IM KANTON LUZERN, HISTORISCHE UND RECHTLICHE GRUNDLAGEN 304 f. (Universitätsverlag Freiburg Schweiz 1991).


118 Verfassung des Kantons Uri [Cantonal Constitution of Uri] of October 28, 1984, SR 131.214, art. 12d; ld. para. 2(1); ld. at art. 1(1); ld. at art. 13a.
After siding with the Habsburg dynasty, the burghers of Lucerne joined the men of Uri, Schwyz, and Unterwalden in 1332. Through the adoption of an aristocratic system, patrician and plebeian classes were clearly divided from one another. Patrician family members possessed many privileges and were consulted on important political matters. These aristocrats were not above the Catholic Church, as their organizations existed alongside each other. Then, in the seventeenth and eighteenth centuries, spiritual and mundane powers were largely fused. For instance, the Synod of Lucerne was given the power to make ecclesiastical and secular law. At the beginning of the nineteenth century, Lucerne enjoyed a reputation of being the most tolerant Catholic canton. Historian Hans Wicki comments that “[... ] the urban upper class proved to be particularly receptive to new ideas of Enlightenment.” By 1826 the Protestant society was allowed to hold Evangelical services on a regular basis and, seven years later, was permitted to operate its own elementary school. Yet the first Protestant Church was not inaugurated until 1861. The number of non-Catholics increased steadily from a paltry 80 to 1563 persons in 1850. Lucerne, regardless of its initial liberal tendencies, was unquestionably determined by the Catholic religion.

122 Hofer Walter, Das Verhältnis zwischen Kirche und Staat im Kanton Luzern 10 (Paul Haupt 1924).
124 “[... ] die städtisch-bürgerlichen Oberschichten erwiesen sich als ganz besonders empfänglich für das neue Gedankengut der Aufklärung.” Id. at 44.
126 Carl Gareis & Philipp Zorn, Staat und Kirche in der Schweiz 192 (Bd. 1, Orell Füssli 1877).
127 Stefano Franscini, Neue Statistik der Schweiz 331 (Haller’schen Buchdruckerei 1851).
stitution guaranteed equality before the law, freedom of opinion and press freedom to all citizens, regardless of belief, the right to vote and to stand for election was a privilege enjoyed by Catholic citizens only.\(^{130}\) Free settlement for non-Catholics was not constitutionally assured, but socially tolerated only.

During the Regeneration period, conservative forces felt the urge to protect the unity of the Catholic religion. Resentment grew steadily among the rural population about the liberal ideas of wealthy and powerful city-dwellers. Joseph Leu, a pious peasant leader, acted as the catalyst for the Catholic debate against the introduction of new ideas and the preservation of long-standing values or traditions. Conservatives had little understanding of constitutional and church reforms initiated mainly by Lucerne’s urban population. Leu’s political programme would combine the instrument of direct democracy with Catholic conservatism. He not only accused Lucerne’s government of denying the canton’s Catholic character, but set out a political programme that was approved by the Roman Pontiff himself.\(^{131}\) The leader’s democratic peoples’ movement pursued its political course most successfully. In May 1841, after winning over most of the rural masses to his cause, a new and more compromising cantonal Constitution was adopted. It stipulated in Paragraph 3: “The apostolic Roman Catholic religion is the religion of [all] people of Lucerne, and as such is the religion of the state.”\(^{132}\) The provision plainly denied the existence of non-Catholics within Lucerne’s territory, the idea being to preserve the one and only religious tradition.\(^{133}\) Swiss historian Paul Steiner critically comments that Lucerne “turned from the liberal outpost in the heart of Switzerland [...] to a stronghold of rigidly followed Catholic conservative politics.”\(^{134}\) It took Lucerne almost another century to grant to the Evangelical Reformed and the Christian Catholic

\(^{130}\) Paul Steiner, Die religiöse Freiheit und die Gründung des Schweizerischen Bundesstaates 212 (Paul Haupt 1976).


\(^{134}\) “Aus dem liberalen Vorposten im Herzen der Schweiz [...] wurde ein kraftvoller Mittelpunkt streng katholisch-konservativer Politik.” Paul Steiner, Die religiöse Freiheit und die Gründung des Schweizerischen Bundesstaates 221 (Paul Haupt 1976).
Church, which was now understood as a separate church from its Roman Catholic counterpart, equal legal recognition. Today matters are such that the legislative council of Lucerne can “recognize other religious communities as public law corporations.” But actual recognition is not (yet) possible as there is no adequate law that would define the requirements necessary and the actual process of how a community can be elevated to public law status. Thus, this kind of special status has not so far been afforded to any other religious community.

In 1352, Zug entered the Confederate Alliance as its seventh member. In Zug a distinction must be made between the city proper and the “country district” (Amt). The two together formed a democracy system after the model of the forest Orte, but the city had its own “Mayor” (Schultheiss) and Council. In the nineteenth century, liberal thinking was well received by the city dwellers, whereas the rural peasant population stuck to their old tried-and-tested ideas. Zug intended to curb the influence of the clergy in 1814. That excluded church servants from voting rights at Peoples’ Assemblies. The Catholic character of the canton was still maintained in good order. The basic constitutional contract of 1814 read, in Article 1: “The Christian religion according to the Roman Catholic creed is the religion of the canton of Zug.” But non-Catholics enjoyed no rights of citizenship, and neither did Zug enter into the confederate concordat for free settlement. By 1850 the canton counted merely 125 Evangelical Reformed residents. In 1841 Zug was drawn into the wake of the conservatism of Lucerne. The cantonal Constitution of 1894, which is still in force today, guarantees religious free-

135 ULRICH LAMPERT, KIRCHE UND STAAT IN DER SCHWEIZ 27 (Bd. 2, Rütschi und Egloff 1938).
139 Id. at 308.
141 STEFANO FRANSCINI, NEUE STATISTIK DER SCHWEIZ 331 (Haller’schen Buchdruckerei 1851).
dom and recognizes various local church communes, but no official Church at cantonal level.

**a.c. Fribourg and Solothurn**

In 1298, Fribourg became a confirmed partisan of Austria and led an attack against their hated rivals of the city of Bern. In 1481 it was nevertheless agreed for strategic reasons that Fribourg as well as Solothurn should be admitted into the Confederation. The city republic of Fribourg was particularly eager to defend the Catholic faith during the Reformation period. It randomly expelled Protestant adherents from its territory “for all time thereafter” (auf ewige Zeiten). This harsh initial policy against all religious dissenters was later waived to some extent. For example, the Protestant district of Murten, which was once situated within the territorial command of Protestant Bern, became legally recognized in 1803. In the year 1814 the cantonal Constitution expressed the district’s status in the following way: “The Catholic religion is the religion of the canton. Yet the Constitution assures to the district of Murten free and unlimited exercise of Protestant worship.” This basic provision did not guarantee freedom of cultic activities in the entire canton and limited such freedom geographically to Murten. Fribourg managed to accommodate religious divisions by separating Catholics from Protestants.

With greater demand for industry and trade, the Protestant Church was increasingly tolerated and given the opportunity to hold its first church service outside Murten in 1835. Moreover, the first Protestant church and school were built with private funds in the canton’s capital in 1837. Church bell ringing was prohibited as Catholics still feared the continuous spread of

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143 Id. at para. 72.
144 CARL GAREIS & PHILIPP ZORN, STAAT UND KIRCHE IN DER SCHWEIZ 367 (Bd. 2, Orell Füssli 1877).
145 “Die christkatholische Religion ist die Religion des Kantons; die Verfassung sichert aber die freie und uneingeschränkte Ausübung des protestantischen Gottesdienstes dem Amtsbezirke Murten zu.” Verfassung der Stadt und Republik Frenburg [Constitution of the City and Republic of Frenburg] of 1814, art. 31 quoted as in PAUL USTERI, HANDBUCH DES SCHWEIZERISCHEN STAATSRECHTS 303 (Heinrich Remigius Sauerländer 1821).
146 RUDOLF ALBERT BÄHLER, DIE GRÜNDUNG DER EVANGELISCH-REFORMIRTEN GE- MEINDE KIRCHE UND SCHULE ZU FREIBURG IN DER SCHWEIZ, NEBST DEN AN IHNEN ERSTEN FESTEN GEHALTENEN GEBETEN, PREDIGTEN UND REDEN 38 (1838).
Protestant teachings. A real breakthrough in religious affairs was presented by Fribourg’s cantonal Constitution of 1848. It guaranteed adherents of Protestantism free exercise of religion throughout the entire canton.\(^{147}\) The new basic provision put an end to religiously divided districts. Today, special status can also be claimed by non-traditional religious communities that are socially significant and act in accordance with fundamental laws of land.\(^{148}\)

Initially, the people of Solothurn also viewed the rise of the new Protestant religion with abhorrence. But Solothurn developed more liberally than Fribourg. The canton appears to have had a confessionally moderate and conciliatory strategy from the eighteenth century onwards. A Protestant enclave called Bucheggberg existed there, with several thousand adherents. The cantonal Constitution in Article 48 expressly guaranteed the exercise of the Evangelical Reformed religion as early as 1814.\(^{149}\) Nevertheless, the same basic social contract left no shadow of doubt, in 1841, that Solothurn was a Catholic region.\(^{150}\) After the adoption of the Federal Constitution of 1848, Solothurn became the first Catholic canton that introduced legal parity between the Roman Catholic and the Evangelical Reformed Church.\(^{151}\) In today’s applicable Constitution, religious communities other than the two official churches may receive public law status.\(^{152}\)

\(b.\) Protestant Regions

\(b.a.\) Zurich

Zurich, too, united in hostility to Habsburg. When it became a member of the Alliance in 1351, the city adopted an oligarchic form of government. Zurich was at first ruled by guilds in a two-chamber City Council. Working

\(^{147}\) DIETER KRAUS, SCHWEIZERISCHES STAATSKIRCHENRECHT, HAUPTLINIEN DES VERHÄLTNISSES VON STAAT UND KIRCHE AUF EIDGENÖSSISCHER UND KANTONALER EBENE 212 (J.C.B Mohr Paul Siebeck 1993).

\(^{148}\) Verfassung des Kantons Freiburg [Cantonal Constitution of Fribourg] of May 16, 2004, SR 131.219, art. 142(1) and (2) in association with art. 141(1).

\(^{149}\) PAUL STEINER, DIE RELIGIÖSE FREIHET UND DIE GRUNDUNG DES SCHWEIZERISCHEN BUNDESTAATES 271 (Paul Haupt 1976).


\(^{151}\) PAUL STEINER, DIE RELIGIÖSE FREIHET UND DIE GRUNDUNG DES SCHWEIZERISCHEN BUNDESTAATES 277 (Paul Haupt 1976).

\(^{152}\) Verfassung des Kantons Solothurn [Cantonal Constitution of Solothurn] of June 8, 1986, SR 131.221, art. 53(2).
people like common labourers and artisans were neither eligible to stand for office, nor permitted to vote. The ruling class awarded the appointments in the Council to suit their particular interests. The Catholic Church existed alongside oligarchic structures. At the time of the Late Middle Ages, consciousness of civil and of intellectual independence was awakening. It was obvious that a strong under-current of hostility to Rome had stirred and rankled in the people of Zurich for quite some time. Huldrych Zwingli began the Swiss Reformation as an attempt to reform the Catholic Church from within. In 1519 Zwingli became the “people’s priest” (Leutpriester) of the city’s principal church, the Great Minster. In his new post he soon abandoned the traditional liturgical cycle to preach systematically from the Gospels. He broke with tradition by holding that God’s law was not violated by those who decided not to fast, and along with nine other priests he requested the bishop’s permission to marry. For him, scripture offered lucid and irresistible truths that had been obscured by Catholic Church innovations. What was needed, he argued, was a return to evangelical primitive Christianity. For this reason, Zwingli called on Zurich’s magistrates to realize his vision of a pure Christian community. Upon reaching the conviction that his first approach was impossible, Zwingli implemented new spiritual and political programmes by founding a Swiss Protestant arm of the Christian Church. He was convinced that political acts alone could save the reform. Zwingli resigned from his post as priest in 1522 so that he could pursue the reformist agenda under the authority of the City Council of Zurich in the form of a purely civic appointment.

The Reformation developed through a series of public “debates” (Disputationen) adjudicated by the city magistrates. Zwingli questioned inter alia

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155 Robert C. Walton, Zwingli’s Theocracy 70 f. (University of Toronto Press 1967).
156 Steven E. Ozment, The Age of Reform (1250-1550) An Intellectual and Religious History of Late Medieval and Reformation Europe 326 (Yale University Press, 1980).
papal authority, the nature of the Mass, purgatory, prayers to the saints, and devotion to images.\textsuperscript{160} The bishop’s men found themselves required to justify these from scripture alone rather than from ecclesiastical tradition.\textsuperscript{161} Zurich’s magistrates declared that the disputation had ended in success for Zwingli. His movement became the first Protestant polity outside Germany in 1523.\textsuperscript{162} Zurich’s clergy were ordered to confine their preaching to scripture, by which ruling Zurich in effect publicly declared itself a Protestant city. From 1524 to 1525, images from Zurich’s churches were removed, Dominican and Augustinian monastic houses were confiscated, and the Mass was abolished.\textsuperscript{163}

In the theology of the Reformer, authority developed strictly from above by virtue of God’s intention to heal. He rejected the right to resistance against authority,\textsuperscript{164} and, with regard to worldly matters, demanded absolute obedience.\textsuperscript{165} Zwingli was convinced that the true and just authority must be Christian.\textsuperscript{166} Only the Christian authority was capable of measuring with the true moral scale, and of complying with the commandments of Christ. The Reformer’s perception of the relationship between the ecclesiastical and the mundane changed over time. At first he believed that the earthly authority’s position ranked immediately behind that of the ministry’s.\textsuperscript{167} He then later taught that the two powers together formed a unity.\textsuperscript{168} As a consequence, the municipality (\textit{bürgerliche Gemeinde}) was fused with the ecclesiastical commune (\textit{Kirchgemeinde}) into one homogeneous entity.\textsuperscript{169} As soon as spiri-

\textsuperscript{160} Huldreich Zwingli’s Sämtliche Werke 804 ff. (Emil Egli et al. eds., vol. iv, Kraus 1981).


\textsuperscript{162} When in 1523 the publication of his 67 “final disputation” (\textit{Schlussreden}) brought charges of Lutheranism, he protested his independence from Luther and insisted that he had at his own initiative preached directly from the Bible in Glarus and Einsiedeln long before he knew anything of Luther. Steven E. Ozment, The Age of Reform (1250-1550): An Intellectual and Religious History of Late Medieval and Reformation Europe 322 (Yale University Press 1980).

\textsuperscript{163} Id. at 328.

\textsuperscript{164} Hans Ulrich Jäger, Zwinglis gesellschafts- und staatspolitische postulate 40 (Bildungshaus Bad Schönbrunn 1985).

\textsuperscript{165} Berndt Hamm, Zwingli’s Reformation der Freiheit 100 (Neukirchner 1988).

\textsuperscript{166} Huldrych Zwingli, Von Warem und Valschem Glosem 17 ff. (Christoffel Froeschauer 1526).

\textsuperscript{167} Alfred Farner, Die Lehre von Kirche und Staat bei Zwingli 86 ff. (Mohr Siebeck 1930).

\textsuperscript{168} Roger Ley, Kirchenzucht bei Zwingli 27 (Zwingli Verlag 1948).

\textsuperscript{169} Alfred Farner, Die Lehre von Kirche und Staat bei Zwingli 112 (Mohr Siebeck 1930).
tual and political matters became commingled, the latter took the upper hand. Religious laws were implemented and enforced. The newly established theocratic community would then enforce the church order in concert with the political entities of the city’s constitution. The creation of an inextricable bond between spiritual and mundane affairs eventually gave way to the so-called “state church” (or Staatskirchentum).

Zwingli’s tolerance was religious in nature and limited in extent. Historian Steven E. Ozment opines that reformer’s devotion to cultic unity made it impossible for him to accept religious diversity and minority religious viewpoints. There was no liberty to believe or disbelieve in the modern sense. Religious tolerance meant that no one could be coerced to a particular belief. But if that conviction happened to be different from the belief taught by Zwingli, one was excluded from Zwingli’s Christian community. This intolerant situation applied to Catholics and Anabaptists alike. Zwingli retained the Catholic practice of baptizing all infants soon after birth. Conversely, Anabaptists believed that the New Testament scripture required individuals to profess a Confession of Faith before they could be baptized. As a result, they argued, baptism must be limited to adults. The Anabaptist dissenters were all but silent or discreet about their cause. When they began to baptize adults, Zwingli was of the opinion that the Anabaptists should remain in the city despite their differing belief because they believed in the force of God’s word. When the Anabaptist teachings eventually lead to riots, the City Council took action against them. The first Anabaptist was executed for sedition. Adult rebaptism became a capital offence in Zurich in 1525.

171 KÜNGOLT KILCHENMANN, DIE ORGANISATION DES ZÜRCHERISCHEN EHEGERICHTS ZUR ZEIT ZWINGLIS 9 (Zwingli Verlag 1946).
172 ALFRED FARNER, DIE LEHRE VON KIRCHE UNDSTAAT BEOZWINGLI 119 (Mohr Siebeck 1930).
177 ALFRED FARNER, DIE LEHRE VON KIRCHE UNDSTAAT BEOZWINGLI 89 (Mohr Siebeck 1930).
178 MaryAnn Schlegel Ruegger, Audience for the Amish: A Communication Based
Scholars estimate that later, between 1526 and 1618, at least 850 and perhaps as many as 5,000 Anabaptists were legally executed by burning, decapitation, and drowning.\textsuperscript{179} Families who refused to submit their children for baptism had eight days to reconsider and obey the law or face expulsion from the city.\textsuperscript{180} In the eighteenth century such barbaric laws were relaxed somewhat. Despite its brutal side, Zurich’s form of Protestantism remained strongly accepted among the people.\textsuperscript{181}

In the nineteenth century, the cantonal Constitution of 1814 described the Protestant faith as “the dominating state religion.”\textsuperscript{182} It implied that Protestants possessed a privileged status. Rights of citizenship were given to the Evangelical Reformed adherents only. An exception to this general rule was presented by the municipality of Rheinau and Dietikon, where religious equality was guaranteed by virtue of a Decree of Tolerance of 1807.\textsuperscript{183} Only in these two districts was Catholic worship allowed.\textsuperscript{184} Until 1830, Zurich’s government exerted great influence over the affairs of the Evangelical Reformed Church. For instance, the Grand Council of Zurich possessed the power to veto the appointment of every single church councillor or church official. Moreover, city councillors sat as judges in ecclesiastical courts. After 1831 it was decided that the fusion between judicial and legislative powers introduced by Zwingli should be abrogated.\textsuperscript{185} This constitutional reform meant that the Evangelical Reformed Church no longer acted as the


\textsuperscript{179} MARIA BAUMGARTNER, \textsc{Die Tauffer und Zwingli, Eine Dokumentation} 23 (Theologischer Verlag Zürich 1993).

\textsuperscript{180} STEVEN E. OZMENT, \textsc{The Age of Reform (1250-1550) An Intellectual and Religious History of Late Medieval and Reformation Europe} 331 (Yale University Press, 1980).


\textsuperscript{182} “[... ] die herrschende Landesreligion.” Staatsverfassung für den eidgenössischen Stand Zürich [State Constitution of Swiss Canton of Zurich] of June 11, 1814, art. 1 quoted as in PAUL USTERI, \textsc{Handbuch des Schweizerischen Staatsrechts} 215 (Heinrich Remigius Sauerländer 1821).

\textsuperscript{183} For details about the Toleranzdekret [Decree of Tolerance] of September 10, 1807 quoted as in EDUARD WYMANN, \textsc{Geschichte der Katholischen Gemeinde Zürich 129 f.} (Börsig 1907).

\textsuperscript{184} PAUL STEINER, \textsc{Die religiöse Freiheit und die Gründung des Schweizerischen Bundesstaates} 326 (Paul Haupt 1976).

\textsuperscript{185} HANS STRAULI, \textsc{Verfassung des eidgenössischen Standes Zürich} 12 (Geschwister Ziegler 1902).
state church. It was eventually transferred into the more autonomous variant known as the cantonal church.  

Further decouplement was achieved, in that secular structures were increasingly kept separate from religious organization. However, complete separation between religion-state affairs was never envisaged by the majority of the people. Today there is no longer any structural fusion between the powers. But cantonal government still exercises ample control over the affairs of established communities in general, and the Evangelical Reformed Church in particular. All other religious communities are accommodated by means of federally tailored civil law. Zurich’s Constitution guarantees religious freedom in a similar fashion as the Swiss Federal Constitution does.

b.b. Bern

Bern repeatedly refused to pay imperial taxes, over which the city was subjected to battle and obliged to yield to the sovereign’s demands. Like all other Swiss Orte, Bern had a perfect reason for uniting in hostility over Habsburg with the members of the Confederation in 1353. The city became wealthy and aristocratic. Burghers as quasi-feudal lords ruled the city and controlled its politics. Bern turned Protestant in 1528 and began to welcome the Anabaptist exodus on similar grounds as Zurich before it. It is reported that city officials even paid emigration agents for each troublesome Anabaptist they succeeded in moving out of the region. As defenders of the one and only true faith, the government declared the Evangelical Reformed Church the state church. Fusion between ecclesiastical and mundane powers remained largely intact until and up to the beginnings of the nineteenth cen-

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187 Every once in a while the question surfaces whether absolute separation between religion and state should be adopted. Until today such intentions could not gain majorities among Zurich’s electorate.
188 Officially recognized are the Evangelical-Reformed, the Roman Catholic, and the Christian Catholic Church, as well as the Jewish community. Verfassung des Kantons Zürich [Cantonal Constitution of Zurich] of February 27, 2005, SR 131.211, art. 130(2) and 131(1).
189 Verfassung des Kantons Zürich [Cantonal Constitution of Zurich] of February 27, 2005, SR 131.211, art. 10(1).
190 Murray J. Luck, A History of Switzerland, the First Hundred Thousand Years, Before the Beginnings to the Days of the Present 260 (Palo Alto 1985).
tury, when the old state church regime was dissolved and the decoupling made way for a less rigorous cantonal church system.

Protestant Bern maintained a half-hearted policy with regard to rival confessions. Catholics were nearly equal in terms of numbers of adherents. However, in 1816 the Schultheiss and the Small and Grand Council declared: “The Evangelical Reformed religion is and continues to be the dominant religion of the canton.” Regardless of that, Catholics in the district of Jura enjoyed confessional equality alongside political rights. Returning Anabaptists were also increasingly tolerated. Bern assured them of a limited right of freedom to practise private cultic activities on condition that they would not breach applicable cantonal laws. All of this constituted a remarkable step in the history of Swiss religious tolerance. The right to exercise one’s religion freely was still constrained in the sense that religious assemblies, other than those of the Official Church, needed express state authorization. Moreover, public proselytization was strictly prohibited. A decisive move towards liberal accommodation practices was reached with the introduction of the 1846 Constitution. Article 80 held that “the exercise of any other kind of worship is permitted within the limits of decency and public order.” More than a century later, Bern started to guarantee full equality between the Evangelical Reformed, the Catholic, and the Christian Catholic churches. In addition to this, the Israelite community was also recognized in public law. All other religious communities may be elevated from general private law to special public law status if certain requirements are satisfied.

192 ALBERT COMMENT, GUTACHTEN ÜBER DIE VEREINIGUNGSURKUNDE DES JURA MIT DEM KANTON BERN 42 (Bern 1948).
193 RICHARD FELLER, GESCHICHTE BERNs, GLAUBENSKÄMPFE UND AUFLÄRUNG 160 (Herbert Lang, vol. II, 1974).
194 PAUL STEINER, DIE RELIGIÖSE FREIHEIT UND DIE GRÜNDUNG DES SCHWEIZERISCHEN BUNDESTAES 433 FF. (Paul Haupt 1976).
196 Id. at art. 121(1).
197 Id.
198 Id. at art. 126(2).
b.c. Basel and Schaffhausen

In 1501 the towns of Basel and Schaffhausen, as old and trusted allies on many occasions, were definitively received into the Confederation. They became the eleventh and twelfth members. Basel adopted the Protestant religion in 1529. It meant that henceforth only evangelical-reformed cultic activities and services were permissible. Any other kind of worship was strictly prohibited. By 1800 the city admitted Jews within its borders. However, guilds requested limitations to their settlement rights. As a consequence, citizenship was not granted to Jews. Fear of economic rivalry and the desire to keep the city purely Protestant were stated as the two main reasons why Jews should not possess equal rights. Article 16 of the cantonal Constitution of 1814 read: “The State Constitution assures religious exercise, to which the Canton pledges commitment.” The Catholic faith was restricted by the prohibition of street processions and the act of ringing church bells. The Catholic clergy were also prevented from any activities that could be seen as direct or indirect proselytization.

Serious political conflict arose in 1831 when disaffected residents in the rural communities around Basel launched a rebellion against the city oligarchs. After a brief civil war they managed to secede and form their own half-canton of Basel-Landschaft, separate to this day from Basel-Stadt. After the 1831 incident, the development of religious constitutional law proceeded separately in the two half-cantons. Basel-Stadt entrenched freedom of cultic activities to a fundamental right of the canton in 1833. This liberty was limited to Christian rites only, however. Paragraph 15 of the 1833 Constitution incorporated the following provision: “The cantonal church is the Evangelical Reformed. The exercise of every other Christian creed is guaranteed within the limits of the law. Changes of religion and mixed marriages cannot cause any restriction on cantonal and municipal citizens’ rights.”

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203 “Die Landeskirche ist die evangelisch-reformierte, die Ausübung jedes anderen
however, Basel-Stadt abrogated the pre-Helvetic state church regime and, like many other cantons, adopted decoupled structures between religious and state affairs. Some years later, religious worship also became constitutionally assured to all Christian communities including so-called sects. Historian Paul Steiner notes that “even when the catalogue of freedom rights was more complete in other cantons than in the Constitution of Basel, until 1846 Basel-Stadt featured the comparatively freeest religious constitutional law of Switzerland.”

To the lawmaker of Basel-Landschaft it was important to guarantee the right to freedom of conscience and freedom of assembly in its basic social contract. The 1832 Constitution stated in Article 10: “Religious freedom is inviolable. The rights of existing Protestant and Roman Catholic Churches are guaranteed in their respective municipalities, and only the [church] servants of these two denominations are paid a salary. Mixed marriages have no legal disadvantage.”

The lawmaker sought confessional justice between the two main churches. It might be noteworthy that state remuneration of the offici-
cial clergy constituted a privilege that was also enjoyed in other cantons. But only here the prerogative made its way into the canton’s basic legal framework. Legal equality between the Evangelical Reformed and the Roman Catholic churches in Basel-Landschaft was not achieved until 1946, and this type of recognition took until 1972 in Basel-Stadt. Today, both half-cantons provide the possibility for non-traditional religious communities to be cantonally recognized.

The development of Schaffhausen’s religious constitutional law is similar. The introduction of a general provision that guaranteed the freedom of belief and cult failed in Schaffhausen due to confessional quarrels. Article 31 of the 1814 Constitution held that the Evangelical Reformed religion would be the dominating cantonal religion. However, the Catholic enclave called Ramsen was constitutionally guaranteed free religious exercise. In a cantonal Act of 1847, Schaffhausen essentially confirmed tolerance towards the Catholic faith. In addition to a place of worship, the construction of a cemetery and a school were state-approved. No legal protection was accorded to the numerous Pietists and Anabaptists. Their assemblies were dependent upon the tolerance of the secular local authority. Catholics were granted legal equality no earlier than 1967. In today’s applicable Constitution, the Evangelical Reformed, the Roman Catholic, and the Christian Catholic churches are all recognized as corporations of public law. And here, too,
the Cantonal Council can grant public-law recognition to other religious communities.216

c. Parity Regions
c.a. Glarus

Glarus and Appenzell are the only regions that adopted a system of dual establishment from the start of Protestantism. Glarus entered the Confederacy in 1352. Centuries later, in 1529, when the new Protestant belief was accepted by many people of Glarus, each religious commune whether Catholic or Protestant received legal recognition. The two confessions entered into a first religious contract in the same year. Article 1 held: “Firstly, that everyone lets alone the Mass and images where they still exist in churches and chapels, and that a church choir is allowed even when it gains more members; but where there are no images and the Mass, so let things be my Lord’s. However, where a woman or man asks for the sacraments in mortal fear or for other reason they should be permitted and nothing denied, and no one must be despised, vexed, or ridiculed for it.”217 Despite such express determination to tolerate one another, religious strains between the divided factions set in. The government of Glarus was required to adopt two separate church organizational structures by 1683; one regulating the affairs of the Catholic commune, and the other governing the Protestant community.218 Today Article 135 of the 1988 Constitution regulates the relationship between state and religious communities. It holds that both the Evangelical Reformed and the Catholic Church are state-recognized corporations, and that the legislative council can grant further religious communities public-law status.219

216 Id. at art. 108(2).
217 Zum ersten, dass jedermann die mess und bilder, wo sy noch in kilchen oder cap- pelen ufrecht sind, bliben lasse, unz dass ein kilchchöri selbs ein anders darum me- ret; wo aber die bilder und mess dannen ton, darby lands min herren ouch bliben. Doch wo dasselbst wib- oder manspersonen wärend, die des sacraments in todsnö- ten oder sunst begeren wurden, soll inen nachglassen oder nüd abgeschlagen werden, und darum nieman anderen verachten, vexieren noch verspotten.” Quoted as in JOHANNES STRICKLER, ACTENSAMMLUNG ZUR SCHWEIZERISCHEN REFORMATIONS- GESCHICHTE 31 (vol. II., bei Meyer & Zeller 1878-1884).
219 Verfassung des Kantons Glarus [Cantonal Constitution of Glarus] of May 1, 1988, SR 131.217, art. 135(1) and (2).
c.b. Appenzell

The history of Appenzell shares some similarities but still differs in other respects from that of Glarus. The Roman Catholic and the Evangelical Reformed Churches were accommodated equally in the sixteenth century Ort of Appenzell. In this region, ecclesiastical communes of both confessions existed alongside each other. Appenzell, which joined the Swiss Confederacy in 1513, was the first place to give both rival churches legal recognition. By 1526 the Peoples’ Assembly of Appenzell decided not only that no person should be coerced to attend church services, but also that no person should be prevented from such attendance. This openness did not hold good for long. Religious mistrust and fights over truth came to a head, and each political municipality was made to decide by plebiscite whether they accepted the new confession within their local territory. As a result of this, Appenzell was divided in 1597 into Appenzell Innerrhoden and Appenzell Ausserrhoden, the former being determined by the Catholic religion, and the latter by Protestantism. Henceforth the people of Innerrhoden and Ausserrhoden lived separately from each other – in physical proximity, but spiritually all the more distanced. During the Regeneration period, Innerrhoden’s Constitution of 1814 mirrored the split most clearly. It stipulated: “The Catholic religion is exclusively the religion of Innerrhoden; the Reformed religion is the religion of Ausserrhoden.” Likewise, the half-canton of Ausserrhoden insisted in its 1814 Constitution on the conviction that the people would “acknowledge the Evangelical Reformed religion completely.” Today, the situation is such that the Roman Catholic and the Evangelical Reformed Church is recognized in public law in both half-cantons. Other religious communi-

220 PAUL STEINER, DIE RELIGIÖSE FREIHEIT UND DIE GRÜNUNG DES SCHWEIZERISCHEN BUNDESSTAATES 25 (Paul Haupt 1976).
222 “[...] bekennen sich sämtlich zur evangelisch-reformierten Religion.” Staatsverfassung des Kantons Appenzell der äussern Rhoden [State Constitution of the Canton of Appenzell outer Rohden] of June 28, 1814, general provision quoted as in Id. at 335.
ties are governed by private law. In Ausserrhoden they may receive public-law recognition when they comply with cantonal and federal constitutional law.\textsuperscript{224}
1.1.3.2 Federal Developments

a. Helvetic Republic and Mediation 1798–1813

At the end of the eighteenth century, modernization in neighbouring countries, industrialization, and the ideas and ideals of the French Revolution triggered demands for the adoption of modern conceptions and stronger centralization. The attempts to bring the initial 13 Swiss cantons more closely together and to legislate for the whole were constantly frustrated by the reluctance of the people to accept a central authority. The loose Confederation was held together by an interlocking network of Alliances and Charters, but no written Federal Constitution.225 In 1798 Napoleon’s troops invaded Swiss cantons and by ratification of the First Helvetic Constitution on 12 April 1798 created a highly centralized state in accordance with the French prototype.226 The league of initially 13 regions collapsed like a house of cards. Napoleon handed down the Constitution under the principle of force majeure, which presented itself as the lesser of two evils: complete annexation to France, or acceptance of the Helvetic Constitution.227 The Swiss opted for the latter and the vanquishers forced upon them a basic contract which, considered from the country’s historical context, was foreign in every respect. Scholars note that Switzerland became nothing more than a French satellite state.228

Not surprisingly, the First Helvetic Constitution was doomed from the beginning to invite ideological hostility and even armed resistance.229 The Swiss found their new Constitution not only doctrinaire in character, but also, and most importantly, oblivious to the lessons learned from hundreds of years of political and legal experience. The first Article of the imposed Con-

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226 Markus Kutter, Der Anfang der modernen Schweiz. Übergang von der alten Eidgenossenschaft zur Helvetischen Republik (1748-1803) at 176 (Christoph Merian 1996).
227 Lukas Vogel, Gegen Herrn, Ketzer und Franzosen, der Menzinger “Hirtenhemml” Aufstand vom April 1799 at 126 f. (Chronos 2004).
228 E.G. J. F. Aubert, Petite Histoire Constitutionnelle de la Suisse (Francke Éditions 1974); also Andreas Heusler, Schweizerische Verfassungsgeschichte 307 f. (Frobenius 1920).
229 The fierce French suppression of the Nidwalden Revolt in September 1798 is an example of the oppressive presence of the French army and the local population’s resistance to the occupation. Andreas Heusler, Schweizerische Verfassungsgeschichte 312 (Frobenius 1920).
stitution read: “The Helvetic Republic is one and indivisible.” Historian Murray J. Luck aptly notes, “this was thrust upon the Swiss who for centuries had treasured cantonal autonomy and independence, who had little respect for federalism but a profound distaste for centralism, and could hardly be expected to bow down to the highly centralized government that the rest of the Constitution particularized.” The reform destroyed the vestiges of aristocratic and oligarchic organization of the cantons, which were preserved for administrative convenience only. They were stripped of all legislative powers and rights of sovereignty. Moreover, the Constitution stipulated in Article 6:

Freedom of conscience is unlimited; manifesting religious beliefs is subject to the spirit of concord and peace. All religions are allowed if they do not disturb public order, or affect preeminent rules. The police monitor them, and have a right to inquire into their doctrines, and their duties to teach. A sect’s relations with a foreign power should affect neither politics nor the prosperity and the enlightenment of the people.

The grand ideals of the French Revolution foisted upon ordinary peasant people and merchants a concentrated state government and the idea that belief was something personal. If anything, the innovations only made many Swiss feel more alienated in their own country, regardless of how modern the French ideas were. Attachment to the Roman Catholic or the Evangelical

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230 “La République helvétique est une et indivisible.” Constitution de la République helvétique [Helvetic Constitution] of April 12, 1798, art. 1 quoted as in ALFRED KÖLZ, QUELLENBUCH ZUR NEUERN SCHWEIZERISCHEN VERFASSUNGSGESCHICHTE, VOM ENDE DER ALTEN EIDGENOSSENSHAFT BIS 1848 AT 126 (Stämpfli 1992).


232 “La liberté de conscience est illimitée; la manifestation des opinions religieuses est subordonnée aux sentiments de la concorde et de la paix. Tous les cultes sont permis s’ils ne troublent point l’ordre public et n’affectent aucune domination ou prééminence. La police les surveille et a le droit de s'enquérir des dogmes et des devoirs qu’ils enseignent. Les rapport d’une secte avec une autorité étrangère ne doivent influer ni sur les affaires politiques, ni sur la prospérité et les lumières du peuple.” Constitution de la République helvétique [Helvetic Constitution] of April 12, 1798 quoted as in ALFRED KÖLZ, QUELLENBUCH ZUR NEUERN SCHWEIZERISCHEN VERFASSUNGSGESCHICHTE, VOM ENDE DER ALTEN EIDGENOSSENSHAFT BIS 1848 AT 127 (Stämpfli 1992); also WILLIAM DENISON MCCrackan, THE RISE OF THE SWISS REPUBLIC 88 ff. (2nd edn, Henry Holt and Company 1901).
Reformed Church was very strong at local level. Their bonds could not easily be swept away. The Constitution was purely artificial; it was superimposed, and therefore unacceptable to the majority of the people. Two great parties emerged, the Liberals and the Conservatives. The latter was convinced that the Helvetic Constitution was ill-suited to the requirements of the country.

Bitter hostility between Catholic and Protestant cantons frequently rose to the surface and threatened the country’s fundamental stability. Napoleon could no longer ignore the internal conflict in Switzerland and, on 19 February 1803, imposed another Constitution called the “Act of Mediation” (Mediationsverfassung). This new Constitution was much more federalist than the former Constitution. Napoleon as the self-proclaimed médiateur de la Suisse restored regional sovereignty to a large extent, but retained the dominance of French influence. In addition to the thirteen old cantons, six new ones were formed. Much of cantonal autonomy was recovered and many of their local institutions were re-established. The new Constitution was short and obscure, but church affairs were handed back to the cantons once again. With the exception of the provision that demanded general restitution of convent property, the new Constitution contained no religious clauses.

234 The Liberals were further divided into a radical and a moderate wing. Conservative forces defended regional distinctiveness and the good old order, whereas Liberals fought for modern free thinking and federal government. Later, from 1840 onwards, the radical wing grew in might and saw its anti-conservative and anti-Catholic positions become concrete law. Liberal thinking began with Swiss aristocratic families, which were mostly but not exclusively of the Protestant faith. Liberals also gained ground in Catholic urban areas such as Lucerne. A time came when neither political party could be ascribed distinctly to one confession or the other. For detailed analysis Oechslil Wilhelm, Geschichte der Schweiz im Neunzehnten Jahrhundert 567 ff. (Hirzel 1913); aso Joseph Wharton, Civic Training in Switzerland: A Study of Democratic Life 48 (University of Chicago Press 1930).
237 Oechslil Wilhelm, Geschichte der Schweiz im Neunzehnten Jahrhundert 63 ff. (Hirzel 1913).
239 Act de médiation [Act of Mediation] of February 19, 1803, art. 1 quoted as in ALF-
As mentioned earlier, some cantonal Constitutions by express declaration guaranteed both the profession of the Catholic and the Reformed faith; others guaranteed one of the two denominations only. So after the troubled years of the Helvetic Republic, during the Mediation period Switzerland found its tranquillity restored. This political success lies, as constitutional scholar Alfred Kölz puts it, “in the fact that during this transformation period a more or less tolerable form was given to such a culturally, linguistically, economically, and confessionally diverse country.”

b. Restoration and Regeneration 1813–1848

When Napoleon’s fall appeared imminent and the Swiss were no longer being oppressed in their own territory, the federal body called the “Diet” (or Tagsatzung) suspended the Act of Mediation in 1813. With the adoption of the “Federal Pact” (Bundesvertrag) on 7 August 1815, Switzerland returned to its ancien régime. The Pact was not a Constitution in the proper sense but was, in reality, a sort of bargain effected by the independent sovereign cantons. The now 22 cantons were once again sovereign in their religious affairs. State churches were re-established in Catholic as well as Protestant regions. In this restored Confederation, cantons enjoyed almost all the rights and competences. The Diet did not guarantee fundamental liberties,

RED KÖLZ, QUELLENBUCH ZUR NEUEREN SCHWEIZERISCHEN VERFASSUNGSGESCHICHTE, VOM ENDE DER ALTEN EIDGENOSSENSCHAFT BIS 1848 AT 185 (Stämpfl 1992).

MARKUS KUTTER, DIE SCHWEIZ VON VORGESTERN, VOM WIENER KONGRESS BIS ZU DEN KANTONALEN REVOLUTIONEN (1814–1830) AT 106 (Christoph Merian 1997).

“[…] liegt vor allem darin begründet, dass dem kulturell, sprachlich, wirtschaftlich und konfessionell so ungleich gearteten Land eine für die damalige Übergangszeit einigermaßen erträgliche Form gegeben wurde.” ALFRED KÖLZ, NEUERE SCHWEIZERISCHE VERFASSUNGSGESCHICHTE, IHRE GRUNDLINIEN VOM ENDE DER ALTEN EIDGENOSSENSCHAFT BIS 1848 AT 193 FF. (Stämpfl 1992).

For more details on the role of the Tagsatzung CHRISTOPH ANDRÉ SPENLÉ, DAS KRAFTEVERHÄLTNIS DER GLIEDSTAATEN IM GESAMTGEFÜGE DES BUNDESTAATES: UNTER BESONDERER BERÜCKSICHTIGUNG DES KONZEPTS DES SCHWEIZERISCHEN ZWEIKAMMERSYSTEMS 194 FF. (Helbing & Lichtenhahn 1999).


PAUL ÜSTERI, HANDBUCH DES SCHWEIZERISCHEN STAATSRECHTS 5 FF. (Heinrich Remigrus Sauerländer 1821).

Wallis, Neuchatel, and Geneva joined the Confederation. Id. at 16.
but brought them back under the control of cantonal governments.\textsuperscript{246} In some cantons equality between established state churches became increasingly acceptable. Moreover, the Jewish religion and other Christian sects like the Anabaptists were to some extent tolerated.\textsuperscript{247}

However, in the Regeneration period it was Swiss internal dissension that created the most serious problems for the Confederation. Troubles attended by violence broke out in the new canton of Aargau. The convents of Aargau were widely regarded by Radicals and Liberals as centres of resistance to the dissemination of new ideas and advocacy of change.\textsuperscript{248} The cantonal government promptly ordered the suppression of the eight Catholic convents then existing in Aargau.\textsuperscript{249} The repercussions were more serious than ever anticipated. The Papal Nuncio and the Austrian Ambassador intervened in favour of restoration of the convents, and even Protestant Prussia expressed its displeasure over the action of the cantonal government. A number of cantons, principally Catholic, demanded a convocation of the Diet, which in 1841 declared that suppression of the convents was incompatible with the Federal Pact. As a consequence four convents were re-opened.

These troubles were joined by concerns over the actions of Jesuits. Several Catholic cantons suffered under widespread poverty. At first they welcomed Jesuits as the responsible order for higher education.\textsuperscript{250} Later the peasants of rural Lucerne demanded that the Jesuits should vigorously defend the Catholic faith. This fanned the flames of controversy between the liberal forces on the one side, and the Conservatives on the other. The political leaders of several cantons were not hesitant in regarding Jesuit activities as embittering the relations between the Catholic and Protestant cantons. The Papal government in Rome was urged to recall the Jesuits from several Swiss cantons. Many were of the view that the threat of civil war would disappear by virtue of that move.

\textsuperscript{246} William Denison McCrackan, \textit{The Rise of the Swiss Republic} I 110 (2nd edn, Henry Holt and Company 1901).


\textsuperscript{248} Murray J. Luck, \textit{A History of Switzerland, the First Hundred Thousand Years Years, Before the Beginnings to the Days of the Present} 357 ( Palo Alto 1985).

\textsuperscript{249} Gottfried Zeugin, \textit{Das Jesuitenverbot der schweizerischen Bundesverfassung} 16 ff. (Diss. Univ. Zürich 1933).

\textsuperscript{250} Oechslil Wilhelm, \textit{Geschichte der Schweiz im Neunzehnten Jahrhundert} 537 (Hirzel 1913).
Catholic cantons began, in 1841, to hold sessions of their own to decide upon questions of strategy. They created a central Catholic authority as a force against liberalism. The Catholic cantons considered that they were seriously menaced by the aggressive anti-clericalism of the Protestant regions. So they formed a defensive union with seven Catholic cantons. In 1846 this “Special Alliance” (called the Sonderbund) was made known as it prepared for a Secret War Council. A year later the Diet ordered the dissolution of the Sonderbund as incompatible with the Federal Pact. The Sonderbund refused to comply and the Diet decided to dissolve the Sonderbund by force. Due to the federal body’s superiority of arms, one Catholic canton surrendered after the other. The mini-war lasted 26 days only, and represented the last violent conflict in the history of Switzerland. All of the dissident cantons agreed to renounce their union and to accept the decision of the Diet to expel the Jesuits.

c. Federal Constitution of 1848

Because the Sonderbund was quickly brought under control, Switzerland was not drawn into the turbulent waters of the revolutions of 1848. The country’s constitutional framers could devote themselves to reforms. A strong anticlerical sentiment greatly subsided when the new Constitution was drafted and liberal groups tempered the basic framework. However, constitutional framing was anything but an easy undertaking and required the coalescence of several forces. On the one side, there were demands for a highly centralized government, and on the other, the request to preserve the ancient principle of cantonal sovereignty. Moreover, some Catholics feared that they would suffer from Protestant oppression, and that cantons with small populations would be rendered powerless against heavily populated

252 A total of 128 people were killed and 435 wounded. ALFRED Kolz, NEUERE SCHWEIZERISCHE VERFASSUNGSGESCHICHTE, IHRE GRUNDLINIEN VOM ENDE DER ALTEN EIDGENÖSSENSCHAFT BIS 1848 AT 587 (Stämpfli 1992).
253 Id. at 587.
255 KOROLEVA-BORSODI, OSNOVY KONSTITUCIONNOGO PRAVA SVEICARII 43 (Justinian 2009).
cantons like Bern and Zurich. The final draft document, as presented to the Diet, was written and edited by Johannes Conrad Kern and Henri Druey. The Diet made only a few changes in the document and on 12 September 1848 the Electoral Commission reported that the new Constitution had been approved. It was then declared to be accepted and recognized as the fundamental law of land.

From a religious constitutional law perspective, the first Federal Constitution was particularly relevant because some church-state relations were handed over to federal government. Cantonal sovereignty was recognized insofar as it was not limited by the Federal Constitution. Article 44 read in this respect:

(1) The free practice of religious ceremonies is guaranteed to recognized Christian confessions within the entire territory of the Confederation.

(2) The Cantons and the Confederation may take the necessary measures to maintain public order and peace between confessions.

By the formulation of these religious clauses, the 1848 Federal Constitution protected confessional harmony in the first place, and in the second, guaranteed the fundamental liberty to exercise one’s Christian religion in fellowship with one another. So the main task of the new provision was to help reduce sectarian tensions and overcome divisions in matters of faith. The 1848 Constitution did not generally guarantee the right to individual religious freedom, or freedom of all cultic activities. Article 44 limited the free profession of religion to Christian church services only. Scholar L.R. von Salis notes: “The Swiss Confederation intends, by guaranteeing freedom

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256 Alfred Kötz, Neuere Schweizerische Verfassungsgeschichte, Ihre Grundlinien vom Ende der Alten Eidgenossenschaft bis 1848 at 583 (Stämpfli 1992).


258 (1) “Die freie Ausübung des Gottesdienstes ist den anerkannten christlichen Konfessionen im ganzen Umfange der Eidgenossenschaft gewährleistet.”

(2) “Den Kantonen, sowie dem Bunde bleibt vorbehalten, für Handhabung der öffentlichen Ordnung und des Friedens unter den Konfessionen die geeigneten Massnahmen zu treffen. Id.

of religion and cult, nothing less than the Dechristianization of Swiss citizens.”

**d. Partial Revision of 1866**

The right to settle freely within the country’s territory and equality under the law were both prerogatives exclusively enjoyed by Swiss citizens of the Christian religion. Opponents to equal treatment feared economic disadvantage. They were content that the 1848 Constitution did not afford equal rights to the Jewish population. This lack of basic justice was recognized when Switzerland entered into a Settlement Treaty with France in 1864, by virtue of which Swiss Jews possessed inferior rights of residence to their French fellow adherents.

The legislature proposed to abate the passage “Christian Confessions” (christliche Konfessionen) in Articles 41 and 48 and thereby to guarantee settlement rights and equality before the law to all Swiss, regardless of belief. Moreover, the newly created executive “Federal Council” (or Bundesrat) considered the moment opportune to bring decisive changes to the content of the religious clauses.

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262 Alfred Kölz, Quellenbuch zur neueren schweizerischen Verfassungsgeschichte, von 1848 bis in die Gegenwart 125 (Stämpfli 1996).  
263 It was proposed that Article 44 should be amended in the following way:  
(1) “Freedom of belief is inviolable.” (Die Glaubensfreiheit ist unverletzlich).  
(2) “Exercise of civil and political rights may not be restricted by any religious or ecclesiastical conditions or prescriptions whatever.” (Um des Glaubensbekennnisses willen darf Niemand in den bürgerlichen oder politischen Rechten beschränkt werden).  
(3) “The free practice of religious ceremonies is guaranteed to all recognized Christian confessions, and within the limits of public order and decency also to all other religious associations in the entirety of the Swiss Confederation.” (Die freie Ausübung des Gottesdienstes ist den anerkannten christlichen Konfessionen, so weit innerhalb der Schranken der Sittlichkeit und öffentlichen Ordnung auch jeder anderen Religionsgenossenschaft im ganzen Umfang der Eidgenossenschaft gewährleis tet).  
(4) “The Cantons and the Confederation may take the necessary measures to maintain public order and peace between confessions and religious associations.” (Den Kantonen, so wie dem Bunde bleibt vorbehalten, für Handhabung der öffentlichen Ordnung und des Friedens unter den Kofessionen und Religionsgenossenschaften
These plans to revise the Federal Constitution drew on a Helvetic constitutional dimension in that they covered individual and collective religious freedom. Yet the Swiss people were not ready for such progress; they still could not agree to a liberal stance and rejected the draft religious clauses on 14 January 1866. The free settlement rights of Jews became accepted, however.\textsuperscript{264} Henceforth, all Swiss had a right to obtain settlement in any part of the Swiss territory. The continuous attempt to revise the Federal Constitution was met with suspicion and resistance by the Conservatives. To them constitutional innovation could only mean a determination of the Radicals to subordinate the church to the state and strip it of much of its powers. This ongoing “culture struggle” (\textit{Kulturkampf}) took on even greater dimensions in 1870 when Pope Pius IX and the Vatican Council proclaimed the Doctrine of Papal Infallibility. The dogma reawakened confessional strife, divided the Catholics,\textsuperscript{265} and created a rift in the conservative party.

\textbf{e. Total Revision of 1874}

The Swiss Federal Council had its own interpretation of the 1870 Doctrine of Infallibility. It stated in its official comment concerning further Revisions of the Federal Constitution that the Vatican would “aim for three things: inner strength and church consistency; transmission of increased church powers into a single capacity; and the use of this potential might against the state, science and adherents of other faiths.”\textsuperscript{266} The Council’s defensive and liberal attitude did not come unexpectedly. Already in 1864 the Roman Pontiff Pius IX had promulgated a “collection of heresies” (or \textit{collectio errorum})

die geeigneten Massnahmen zu treffen). \textit{Id.} at 126.

The majority of the people living in Catholic cantons rejected equality of settlement for Jews. The voices in the liberal cantons were greater in number and so the Jews received equal rights despite conservative opposition. ALFRED KÖLZ, \textsc{Neuere Schweizerische Verfassungsgeschichte, Ihre Grundlinien in Bund und Kantonen seit 1848} at 508 (Stämpfli 2004).

In the cantons with liberal majority, many Catholic adherents formed ecclesiastical communes that were independent of Rome. This was the case in Bern, Solothurn, Aargau, Basel-Landschaft, Basel-Stadt, and Zurich. The newly created entities quickly became recognized in public law. Later they would call themselves Christian Catholics. \textit{Id.} at 519.

\textsuperscript{266} “Es werden von ihm namentlich drei Dinge angestrebt: die innere Kräftigung und einheitliche Zusammenfassung der Kirche; die Übertragung dieser verstärkten kirchlichen Gewalt in eine einzige Hand und die Verwendung dieser potentiellen Macht gegen den Staat, die Wissenschaft und die Andersgläubigen.” BBI 1870 III 689.
in which Pantheism, Naturalism and Rationalism were condemned.\textsuperscript{267} This Catholic Syllabus also outlawed the understanding that Protestantism was a variant form of the same true Christian religion. The collection of heresies moreover rejected individual religious freedom as well as secular person-made laws that were regarded above the Roman Catholic faith, and defended its spiritual jurisprudence. In addition, the teachings turned against the separation between church and state, the introduction of civil marriage, as well as the concept of divorce, which was accepted in civil law.\textsuperscript{268} Dominant liberal politics interpreted the Catholic promotion of the Syllabus as a systematic counter-revolution, which would still fight vehemently against the ideals of the French Revolution.\textsuperscript{269} The Doctrine of Papal Infallibility reinforced the Swiss Kulturkampf. The liberal force understood its struggle for reform as protection of the secular state culture against interferences and encroachments by the Roman Catholic Church.\textsuperscript{270} Conversely, liberally determined ideas and ideals meant the loss, for Conservatives, of centuries-old and highly esteemed customs and practices, and they felt the preservation of Swiss cultural identity was at stake. But the will of the stronger faction eventually subdued Catholic conservative tradition.

The objective of amending the 1848 Constitution was strengthened continuously by the atmosphere of political hostility. The Liberals used the provocative actions of the Vatican for their own objectives. They envisaged greater and more tangible state centralization. By 1870 the Federal Council proclaimed that state powers would always prevail over religion. To the government this did not necessarily include adoption of new compulsory measures against the Catholic faith, but a liberal approach to guarantee confessional harmony through the instrument of religious freedom.\textsuperscript{271} The Council made crystal clear that “it neither defends a confession, nor a church; it merely defends the individual by guaranteeing to him the respect of his faith and the freedom of conscience. On that basis, there is no mention in the Constitution of the various churches and confessions, but it protects the citizen, on the one hand from church interferences with his individual liberty, and on the other hand from interferences which the legislature or the politi-

\begin{itemize}
\item \textsuperscript{267} Pope Pius IX, \textit{Encyclical, Quanta Cura & The Syllabus of Errors} 4 ff. (Angelus Press 2006), and as promulgated on 8 December 1864.
\item \textsuperscript{268} Heinrich Denzinger, \textit{Kompendium der Glaubensbekenntnisse und kirchlichen Lehrentscheidungen} 798 f. (Herder 1991).
\item \textsuperscript{269} Peter Stadler, \textit{Der Kulturkampf in der Schweiz, Eidgenossenschaft und Katholische Kirche im europäischen Umkreis 1848–1888} at 184 (Verlag Huber 1984).
\item \textsuperscript{270} Alfred Kölz, \textit{Neuere Schweizerische Verfassungsgeschichte, Ihre Grundlinien in Bund und Kantonen seit 1848} at 519 (Stämpfli 2004).
\item \textsuperscript{271} BBI 1870 III 689.
\end{itemize}
cal power which a canton might seek to exert over the realm of his conscience.”

The revised religious clauses should put an end to old regional divisions and allow the free profession of religion anywhere and to anyone. The predominant motive of the proposed amendment was the emancipation of the individual and the creation of a court enforceable right of every person against public authorities. Liberal thinkers opined that the old 1848 constitution guaranteed religious freedom merely to those who were members of the recognized churches, and that the individual profession of faith as well as a person’s internal most intimate sphere should be protected also. Although by 19 April 1874 political forces had not coalesced, the people and the cantons approved the totally revised Federal Constitution by a substantial margin. The liberal forces were the most successful at embedding their ideals into the new Constitution. It read, in Article 49:

272 “Er verteidigt weder eine Konfession noch eine Kirche; er verteidigt lediglich das Individuum, indem er diesem die Respektierung seines Glaubens und die Freiheit seines Gewissens sichert. Hiervon ausgehend, findet sich in der Bundesverfassung keine Erwähnung der verschiedenen Kirchen und Konfessionen, aber es schützt dieselbe den Bürger einerseits dagegen, dass eine Kirche seine individuelle Freiheit antastet, und auf der anderen Seite gegen die Überbriffe, welche die Gesetzgebung oder die politische Gewalt eines Kantons sich auf dem Gebiete seines Gewissens herausnehmen möchte.” BBI 1873 II 965.

Two years later an actual draft was written that protected both belief and conscience. The proposed reform was agreed in Federal Parliament despite the opposition’s arguments that it would interfere too much with cantonal church competencies, and gave undue weight to individualistic thinking. It was also feared that the new clauses could open the flood gates to federal law proceeding. The liberal proposal did not, however, gain a majority among the people and was rejected by a small margin on May 12, 1872. Bundesgesetz betreffend die Revision der Bundesverfassung vom 12. September 1848 [Federal Act of 1872 on the Revision of the Federal Constitution of 1848] of March 5, 1872 quoted as in ALFRED KÖLZ, QUellenbuch zur Neuern Schweizerischen Verfassungsgeschichte, von 1848 bis in die Gegenwart 128 ff. (Stämpfli 1996).

273 ALFRED KÖLZ, Neure Schweizerische Verfassungsgeschichte, Ihre Grundlinien in Bund und Kantonen seit 1848 at 623 (Stämpfli 2004).

(1) “Die Glaubens- und Gewissensfreiheit ist unverletzlich.”
(2) “Niemand darf zur Theilnahme an einer Religionsgenossenschaft, oder an einem religiösen Unterricht, oder zur Vornahme einer religiösen Handlung gezwungen, oder wegen Glaubensansichten mit Strafe irgend welcher Art belegt werden.”
(3) “Über die religiöse Erziehung der Kinder bis zum erfüllten 16. Altersjahr verfügt im Sinne vorstehender Grundsätze der Inhaber der väterlichen oder vormundschaftlichen Gewalt.”
(4) “Die Ausübung bürgerlicher oder politischer Rechte darf durch keinerlei Vorschriften oder Bedingungen kirchlicher oder religiöser Natur beschränkt werden.”
(1) Freedom of conscience and belief is inviolable.

(2) No person may be compelled to be a member of a religious association, to receive a religious education, to take part in a religious ceremony, or to suffer punishment of any sort by reason of religious opinion.

(3) The father or guardian has the right to determine the religious education a child shall receive, in conformity with the principles stipulated above, until the child’s sixteenth birthday.

(4) Exercise of civil or political rights may not be restricted by any religious or ecclesiastical conditions or prescriptions whatever.

(5) No person is released from performance of his civil duties by reason of his religious beliefs.

(6) No person is obliged to pay taxes devoted especially to the special expenses of the ritual of a religious community to which he does not belong. More detailed implementation of this principle is reserved to Federal legislation.

Article 50 went on to stipulate:276

(5) “Die Glaubensansichten entbinden nicht von der Erfüllung der bürgerlichen Pflichten.”


276 (1) “Die freie Ausübung der gottesdienstlichen Handlungen ist innerhalb der Schranken der Sittlichkeit und öffentlichen Ordnung gewährleistet.”

(2) “Den Kantonen sowie dem Bunde bleibt vorbehalten, für Handhabung der Ordnung und des öffentlichen Friedens unter den Angehörigen der verschiedenen Religionsgenossenschaften, sowie gegen Eingriffe kirchlicher Behörden in die Rechte der Bürger und des Staates die geeigneten Massnahmen zu treffen.”

(3) “Anstände aus dem öffentlichen oder Privatrechte, welche über die Bildung oder Trennung von Religionsgenossenschaften entstehen, können auf dem Wege der Beschwerdeführung der Entscheidung der zuständigen Bundesbehörden unterstellt werden.”

(4) “Die Errichtung von Bisthümern auf schweizerischem Gebiete unterliegt der Genehmigung des Bundes.” Id. at 167.
The free practice of religious ceremonies is guaranteed within the limits of public order and decency.

The Cantons and the Confederation may take the necessary measures to maintain public order and peace between adherents of different religious associations, and to combat the encroachments of ecclesiastical authorities on the rights of citizens or of the state.

Conflicts of public or private law arising out of the creation of new religious associations or a schism of old ones may be brought on appeal before the competent federal authorities.

No bishoprics may be set up on Swiss territory without the consent of the Confederation.

The strengthening of individual religious self-determination was at the core of liberal religious politics. Conservatives clung to the idea that Switzerland was a Christian state and missed any express recognition of their confession in the 1874 Federal Constitution. Conservatives interpreted the new Total Revision as a direct attack on their politics and beliefs. Some provisions were even declared “fighting Articles” (Kampfartikel) because they legalized religious discrimination against the Catholic faith. Under the new revised Federal Constitution, competences in matters of expulsion were widely extended to apply to other orders in addition to the Jesuits “whose activity is dangerous to the state or disturbs the peaceful relationship of religious denominations.” Likewise, “the establishment of new convents or religious orders, and the re-establishment of those which have been suppressed” was henceforth “forbidden.” Moreover, no Catholic bishopric could be created without the consent of the Confederation. Finally, a plain demonstration of radical power provided the state with the legitimacy to

279 “[…] andere geistliche Ordem, deren Wirksamkeit staatsgefährlich ist oder den Frieden der Konfessionen stört.” Bundesverfassung der schweizerischen Eidgenossenschaft [Swiss Federal Constitution] of May 29, 1874, art. 51(2) quoted as in ALFRED KÖLZ, QUELLENBUCH ZUR NEUEREN SCHWEIZERISCHEN VERFASSUNGSGESCHICHTE, VON 1848 BIS IN DIE GEGENWART 168 (Stämpfli 1996).
280 “Die Errichtung neuer und die Wiederherstellung aufgehobener Klöster oder religiösen Orden ist unzulässig.” Id.
281 Id. at 167.
protect itself against encroachments of church authorities.\footnote{282} The use of the word “encroachments” implied that the Federal Constitution contained first and foremost a political manifesto or programme.\footnote{283}

Other innovations represented a more general approach to implement liberal ideals. So non-members of a confession could no longer be required to pay the ecclesiastical imposts to which the church administrations had been entitled.\footnote{284} Parental control of their children in matters of faith should last until the age of sixteen.\footnote{285} At that stage of life, people should be free to choose their preferred religion or to declare their intention to join or not to join a religious group. The totally revised Federal Constitution continued to guarantee to every citizen the right to settle anywhere in Swiss territory, on condition of submitting a certificate of origin, or a similar document.\footnote{286} General church powers were particularly fettered by the constitutional requirement that civil status and the keeping of records thereof were subject to civil authority.\footnote{287} Control of burial places was also subject to civil authority, which henceforth was to take care of every deceased person.\footnote{288} Civil powers had to be supreme even if this meant the curbing of ecclesiastical authority or the powers of any religious establishment. Civil marriage was approved alongside the ecclesiastical form.\footnote{289} Church jurisdiction was abolished.\footnote{290}

\footnote{282} Id.
\footnote{283} Ulrich Häfelin, Art. 49, in Commentaire de la Constitution fédérale de la Confédération suisse du 29 mai 1874 at 1 (Jean-François Aubert et al. eds., Helbling & Lichtenhahn 1987–1996).
\footnote{284} Bundesverfassung der schweizerischen Eidgenossenschaft [Swiss Federal Constitution] of May 29, 1874, art. 49(6) quoted as in Alfred Kötz, Quellenbuch zur neueren schweizerischen Verfassungsgeschichte, von 1848 bis in die gegenwart 167 (Stämpfl 1996).
\footnote{285} Id.
\footnote{286} Id. at 165.
\footnote{287} Id. at 168.
\footnote{288} Id.
\footnote{289} For the record, it might be interesting to state Article 54 in its entirety. It stipulated: (1) “The right to marriage is under the protection of the Confederation.” (Das Recht zur Ehe steht unter dem Schutze des Bundes). (2) “No bar to marriage can arise from considerations of religious belief or from the poverty of one or other partner, or from past conduct or from other considerations of public policy.” (Dieses Recht darf weder aus kirchlichen oder ökonomischen Rücksichten noch wegen bisherigen Verhaltens oder aus andern polizeilichen Gründen beschränkt werden). (3) “A marriage contracted in a canton or in a foreign country, conformably to the law which is there in force, shall be recognized as valid throughout the Confederation.” (Die in einem Kanton oder im Auslande nach der dort geltenden Gesetzgebung abgeschlossene Ehe soll im Gebiete der Eidgenossenschaft als Ehe anerkannt werden).
and civil rights of the citizenry were henceforth independent of the churches. Religious or economic reasons could no longer be invoked to prevent a marriage. Virtually total freedom was granted to men and women of marriageable age to select a spouse.291

f. Partial Revisions of 1893 and of 1973

From the beginning of 1866 onwards, the canton of Bern and Aargau enacted laws292 which prohibited kosher butchering.293 It meant that Jews living in these cantons were deprived of their right to ritual slaughter according to their religious dietary rules. The religious community opined that the law in question was enacted by a lawmaker who did not understand, failed to perceive, or chose to ignore the fact that the canton’s official action violated the country’s essential commitment to religious freedom under Article 49 of the Federal Constitution. To the Jews, the challenged laws had an impermis-

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(4) “By marriage the wife acquires the citizenship of her husband.” (Durch den Abschluss der Ehe erwirbt die Frau das Heimatrecht des Mannes).
(5) “Children born before the marriage are made legitimate by the subsequent marriage of their parents.” (Durch die nachfolgende Ehe der Eltern werden vorehelich geborene Kinder derselben legitimiert).
(6) “No tax upon admission or similar tax shall be levied upon either party to a marriage.” (Jede Erhebung von Brauteinzugsgebühren oder andern ähnlichen Abgaben ist unzulässig). Id.

Article 58 read:
(1) “No person shall be deprived of his constitutional judge. Therefore no extraordinary tribunal shall be established.” (Niemand darf seinem verfassungsmäßigen Richter entzogen, und es dürfen daher keine Ausnahmegerichte eingeführt werden).
(2) “Ecclesiastical jurisdiction is abolished.” (Die geistliche Gerichtsbarkeit ist abgeschafft). Id. 169.

In general, however, the total revision of 1874 did not change the state organization decisively. A further novelty was the introduction of a facultative referendum, and the permanent institution of the Federal Supreme Court. It was established as a permanent institution of the state and empowered to adjudicate disputes in civil commercial law between the federal government and the cantons. The Federal Court was, and still is not permitted to pass on the constitutionality of a federal law.

For a detailed discussion on those laws PASCAL KRAUTHAMMER, DAS SCHACHTVERBOT IN DER SCHWEIZ 1854-2000 AT 34 FF. (Schultheiss 2000).

“Kosher butchering” (or shechita) is performed by cutting the animal’s throat by drawing a very sharp knife horizontally across it, severing the carotid arteries and jugular veins, and allowing the blood to drain out. PASCAL KRAUTHAMMER, DAS SCHACHTVERBOT IN DER SCHWEIZ 1854-2000 AT 22 (Schultheiss 2000).
The Swiss General Assembly agreed on that point and invalidated the challenged enactments in summer 1891. However, proponents of such a ban asserted that “certain” religions engaged in practices which were inconsistent with public morality. They insisted that the Confederation should reiterate its commitment to a prohibition against any and all acts of Jews which were inconsistent with public decency. In that statement, animal protection and anti-Semitic motives resonated in a complex interrelationship. The “Jewish issue” (or Judenfrage) meant growing emancipation of Jews in their country. However, animal protection groups collected sufficient signatures for the country’s first Partial Revision launched through the instrument of a popular initiative. The text read in Article 25bis:

(1) Slaughter of animals without torpidity prior to blood withdrawal is prohibited without exception for each slaughter method and livestock.

Although scientific organizations showed that the method killed quickly and with a minimum of pain, the people and the cantons approved the new proposal in summer 1893. Kosher butchering was henceforth banned in the entire country, and constituted the first such prohibition worldwide. Throughout all the years that followed, the provision was upheld, but in 1978 was regarded as a classic “police clause.” The ban was then transposed


299 The proposal was written into the Federal Constitution under Article 25bis. *Id.*

into the Federal Animal Protection Act of 1978.\textsuperscript{301} In the official comment on the 1978 Act, the Federal Council stated that it was fully aware of the viewpoint that such a prohibition could be seen as a violation of the right to freedom of belief. The Swiss government held, however, that such freedoms could legitimately be curbed by the will of the people.\textsuperscript{302} The act of slaughtering mammals without torpidity continues to be a criminal offence even today.\textsuperscript{303} Nonetheless, the law permits the import of specific amounts of Jewish kosher and Islamic halal meat into Switzerland for general food consumption purposes.\textsuperscript{304}

By 1973 the Swiss Federal Constitution still contained several “exceptional confessional Articles” (\textit{konfessionelle Ausnahmeartikel}). Two of these were invalidated through a plebiscite on 20 May 1973.\textsuperscript{305} To the sovereign, there no longer existed any religious organizations whose activities were dangerous for the state or disturbed the peace among the different creeds. Altered circumstances and keen interests in constitutional modernity deprived the fighting Articles of their importance. Even before the said amendment, Jesuits had ceased to be prohibited from teaching in schools, acting as clergy, or preaching in churches. Apart from that, the federal power to control Catholic convents and orders was also abrogated. Most cultural frictions between Liberals and Conservatives were overcome by 1973.

\textbf{g. Failed Partial Revision of 1980}

Also in 1973, a federal popular initiative was launched which sought complete separation between church and state. According to the will of the initiators a new clause should be written into Article 51 of the Federal Constitution. It read:\textsuperscript{306}

\begin{itemize}
  \item \textsuperscript{301} During the transitional period the offence was written into a temporal clause, but then incorporated into the Tierschutzgesetz [Animal Protection Act] of December 16, 1978, SR 455.
  \item \textsuperscript{302} BBl 1977 I 1075.
  \item \textsuperscript{303} Tierschutzgesetz [Animal Protection Act] of December 16, 1978, SR 455, art. 21 and 16.
  \item \textsuperscript{305} Invalidation of Articles 51 and 52 of 1973, BBl 1973 I 1660.
\end{itemize}
(1) Church and state are completely separate.

The word “complete” meant, to many, a new fighting provision. It was envisaged that all established, i.e. public-law recognized, religious communities should be dissolved and forced to incorporate as private-law organizations. In the minds of zealous Separatists there was no room for establishment. To their minds, all existing state-religion relations needed to be cut rigorously and without pardon. The initiative should have put an end to: public authorities’ collection of church tax; bible and religious education in public elementary schools; cantonally operated theological faculties; religious services for military personnel, hospital patients and prison inmates, and many other forms of state-religion interaction. To most people the proposals’ realization was difficult to imagine. No wonder that a complete break with all religious ties could not gain majorities among the Swiss population. Widespread uncertainty over the existence of established communities led people to reject the initiative on 2 March 1980.307

h. Total Revision of 1999

The Total Revision of 1999 could only be achieved in piecemeal fashion. The document’s coherence benefited from such a Revision because it was heavily loaded with innumerable amendments. Despite Switzerland’s political stability, the Swiss Federal Constitution is one of the most revised social contracts in the world. It is truly a living document, in which the lawmaker has constantly added new bits and pieces here, and struck out others there. With regard to the 1999 Total Revision, amendment primarily meant a restructuring of pre-existing written or unwritten constitutional provisions.308 It now reads in Article 15:309

307 It is important to note that the proposition to decouple state and church affairs had been roundly defeated once before, in 1870. Back then, political municipalities and public school communes were formed. Proponents of a complete separation pictured a country where church communes ceased to exist. Today only the cantons of Geneva and Neuchâtel know more rigorous state-religious decouplement. But even in those, it would go too far to call the relationship “complete separation” between church and state affairs.


309 (1) “Die Glaubens- und Gewissensfreiheit ist gewährleistet.”
(2) “Jede Person hat das Recht, ihre Religion und ihre weltanschauliche Überzeugung frei zu wählen und allein oder in Gemeinschaft mit anderen zu bekennen.”
(1) Freedom of belief and conscience is guaranteed.

(2) All persons have the right to choose their religion or philosophical convictions freely, and to profess them alone or in community with others.

(3) All persons have the right to join or to belong to a religious community, and to follow religious teachings.

(4) No person shall be forced to join or belong to a religious community, to participate in a religious act, or to follow religious teachings.

Article 72 of the Federal Constitution reads: 310

(1) The regulation of the relationship between church and state is a cantonal matter.

(2) The confederation and the cantons may, within the framework of their powers, take measures to maintain public peace between the members of the various religious communities.

(3) No bishoprics may be set up without the consent of the Confederation. 311

The interpretation of the 1999 Federal Constitution that is applicable today will be addressed in the analyses that follow. For now, it is sufficient to mention that two further relevant amendments to the same constitutional text have taken place, namely those of 2001 and 2009.

310 (1) “Für die Regelung des Verhältnisses zwischen Kirche und Staat sind die Kantone zuständig.”
(2) “Bund und Kantone können im Rahmen ihrer Zuständigkeit Massnahmen treffen zur Wahrung des öffentlichen Friedens zwischen den Angehörigen der verschiedenen Religionsgemeinschaften.”

311 (3) “Bistümer dürfen nur mit Genehmigung des Bundes errichtet werden.” SWISS CONST. ART. 72.
i. Partial Revisions of 2001 and of 2009

On 10 June 2001 the last remaining fighting Article clearly directed against the Catholic Church was invalidated. It was decided that the federal competence to consent to the creation of Catholic bishoprics should no longer have any legal effect. It marked an official end to a policy that had ceased to exist for quite some time.\(^\text{312}\)

The very recent and now world-famous Partial Revision of 2009 represents something that is neither new, nor unique. The adoption of fighting Articles which clearly discriminate against a specific religion or confession is, from a historical perspective, very much a traditional Swiss reaction. Where chill gusts once blew into the faces of Catholics and Jews, winds changed and found a new object to buffet.\(^\text{313}\) It appears that the Swiss Islamic community has become a perfect scapegoat for much that has been perceived as wrong, in and outside the country.\(^\text{314}\) The instrument of the “popular initiative” allows the Swiss sovereign to mark out a specific sphere of social difficulties or popular concern and channel it into a normative expectation, regardless of whether such act is logical or legitimate to the effects envisaged. The Swiss minaret ban was never about the Islamic tower. First and foremost, it was argued that the legal proposal symbolized the endeavour to preserve Switzerland’s values, customs, practices, and the law.\(^\text{315}\) So whether the targeting of

\(^{312}\) Article 50(4) became invalidated. BBI 2001 4660.

\(^{313}\) It seems that the use of stereotypes found an easy passage from individual to collective guilt.

\(^{314}\) Perceived wrongs might be the high rate of criminal offences committed by non-Swiss; overly open migration policies of the past; the economic recession and the general unwillingness to put up with it; transnational attacks on bank secrecy laws; turbulences caused by inadequate actions of the Geneva police force against the son of the Libyan leader Muammar al-Gaddafi; and last but not least, daily television and radio programmes on the war against Islamic fundamentalists. For more on Switzerland’s apparent identity crisis, Hannes Nussbaumer, *Krise? Welche Krise? Uns geht es doch gut!* Tagesanzeiger, March 3, 2010, at 12.

\(^{315}\) The Egerkinger Committee argued: “The construction of a minaret has no religious characteristics. Neither in the Qur’an, nor in any other holy scripture of Islam is the minaret expressly mentioned at any rate. The minaret is far more a symbol of precisely that religious-political power claim, which in the name of alleged religious freedom denies fundamental rights of third parties – such as the equality of all, and especially in the sense of gender rights. Thus, such demand is in contradiction with the Constitution and legal system of Switzerland. Whosoever puts religion above the state – as it is actually the case in Islam – or assigns more powers to religious doctrines than to the applicable, and democratically enforced legal system of Switzerland, invariably falls foul of the Federal Constitution. This contradiction is una-
Swiss Muslims is reasonable or not, the Egerkinger Committee made up of members of the Swiss People’s Party and the Federal Democratic Union launched a federal popular initiative against what they understood as an Islamic power claim in 2007.\(^{316}\) The Committee proposed an amendment to Article 72 of the Swiss Federal Constitution. It reads:\(^{317}\)

(3) The construction of minarets is prohibited.

After a hotly debated campaign the amendment was approved on 29 November 2009 by 57.5 percent of the participating voters. The precise objective of the new provision is subject to widespread speculation. The majority of the Swiss only agreed that the construction of minarets should be prohib-

\(^{316}\) VOX-Analyse zur Minarettverbots-Initiative makes clear that the Swiss are generally against the expansion of Islam, but not against Swiss Muslims in particular. For more on the minaret vote, see VOX-Analyse zur Minarettverbots-Initiative, gsf.bern and Institute für Politikwissenschaft (on file with University of Bern, Jan. 25, 2010).

ited from now on. With a “simple” yes or no vote their motives behind the ban will never be revealed and are likely to be as diverse as the citizens themselves. Be that as it may, the building of minarets is no longer permitted. The Federal Council was quick to respond that the four pre-existing minarets would not be affected by the new law, and that it would also be possible to continue to construct mosques.\footnote{Swiss Federal Council, media information of Nov. 29, 2009.} The new provision is very likely to fall within the category of special law. It will therefore be construed as narrowly as possible. Any other approach would give way to legal uncertainty. Swiss history teaches that it will take quite some time until the Swiss accept Muslim symbols into their multireligious landscape and overcome apparent differences.
1.1.4 United States

1.1.4.1 Regional Divisions

Once again, for the purposes of describing the evolution of the North American religious clauses it is necessary to go way back in time. When Pilgrims sailed off course in 1620, and landed at Cape Cod before continuing their journey to Plymouth Rock in present-day Massachusetts, these religious radicals were eager to covenant the biblical commands of life. It is said that Pilgrims, from the very beginning, had visions of a specific social order. Many of them signed the Mayflower Compact at Cape Cod, which included the following passage:

In ye name of God, Amen. We [...], covenant & combine our selves together into a civill body politick, for our better ordering & preservation & furtherance of ye ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just & equall lawes, [...] for ye generall good of ye Colonie, unto which we promise all due submission and obedience [...].

The Mayflower Compact gave the Pilgrims broad powers of self-governance. The Compact’s chief significance was its affirmation of their “body politick,” which meant that they were bound to just and equal laws for the general good of the people. They believed that government was a form of covenant, and to be legitimate, it must derive from the people. Their Compact remained the basis of the Plymouth government only until 1691, when the colony was united with Massachusetts as a defence against the Native Americans. Early American scholars depicted Pilgrims as strong believers who were, in the view of the great Puritan party within the Church of England, unacceptable extremists. Today, it is generally perceived that Plymouth’s significance falls well short of its mythologized standing in the American imagination. The settlers of Plymouth were both too small in

320 The original document was lost, but William Bradford’s transcription is accepted as accurate. BRADFORD’S HISTORY OF BLIMOTH PLANTATION (Ted Hildebrandt et al. eds., Wright & Potter Printing Co. 1898) (1620).
number and too divided by dissenters to attract notice from the world beyond their plantation in any meaningful way. In colonial times the relationship between religion and state differed geographically. The history of the New England colonies was different from that of the Middle Colonies, or the Southern Colonies. The following focuses especially on Massachusetts and Virginia. This is because the two colonies have had the greatest influence on judicial reasoning about the legal contours of US-American religious liberty.

a. New England Colonies

a.b. Massachusetts Bay Colony

Of far greater historical importance than the Pilgrims at Plymouth were the second group of dissenters: the Puritans at Massachusetts Bay. Although they were also regarded as radicals by the Church of England, they sailed with a royal charter to the bay. The charter was a combination of political and religious interests at the core of governance in the colony. The Puritans originally had no intention of separation from the Church of England. Moreover, Puritans intended to create a perfect union between the powers. Despite the fact that they disagreed with the direction of the Church of England, they did not formally separate from the mother church. As independents, they remained formally within the church. Their interest was to form independent churches decoupled from the church hierarchy, letting each church be a congregation unto itself. Communalism, or local government, was seen as the ideal method of regulation. Law was developed by the general court, the legislative branch of government in the Massachusetts Bay

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325 JOHN J. PATRICK & GERALD P. LONG, CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: DOCUMENTARY HISTORY 10 (Greenwood Publishing Group 1999).
Colony that provided for public support of the Puritans’ religious institutions and practices.  

Scholar Mark A. Noll emphasizes that Puritans “[d]id not come to America in search of freedom as such, nor were they the Calvinist tyrants […]” In Noll’s view the Puritans sought liberty to establish a society that “followed the law of God as they understood it.” Rules of governance were based on Puritan religious belief and were literally interpreted from the Gospels. For instance, public worship on Sundays was required, swearing was a serious crime and the Ten Commandments formed the basic law of society. In 1631 Congregationalism became the state church. The government of Massachusetts was formed by fully religious means. This, for instance, included that church ministers were usually consulted by the civil authorities before taking any kind of civil action. Officially the clergy limited themselves to religious affairs. Ministers had no right to hold public office. They still possessed great political importance. The reason for this was the circumstance that no one was admitted to the church without prior consent of the ministers. All attended the church but only church members possessed a right to vote. Hence, ministers had a direct control over voting. However, the clergy created no ecclesiastical courts to enforce marriage laws, probate wills, or assign fines for moral lapses. In Massachusetts no central religious authority was formed, but rather local congregations only.

Historian Thomas J. Curry emphasizes that Puritans “who moved to the New World presupposed that truth existed, and that they possessed it more fully than any other people […].” They believed that in order to prosper, their colony must be united in one truth. Roger Williams was an English Puritan minister who began to point at those who had come to the New World in search of a life in accordance to their belief, but who began to impose on others’ consciences. To Williams the respect for Calvin as a theologian did not necessitate slavish subscription to his theology. Williams’s plea for tolerance was, however, left unheard by Massachusetts’ rulers. He was ban-

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330 Mark A. Noll, Protestants in America 42 (Oxford University Press 2000).
331 Id.
333 Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 4 (Oxford University Press 1986).
334 Id. at 5.
ished as a dissenter from the colony in the mid-1630s. In 1644 the General Court passed a law banishing Anabaptists. Quakers who arrived in New England faced menacing attitudes on the part of their neighbours. Four Quakers were hung for returning to the colony after being expelled. By the late 1660s, Baptists were spared from being expelled from Massachusetts as prominent members of the colony requested tolerance. Scholar William Alfred Speck emphasizes that it can still be said that “Puritans in New England retained their integrity against ‘innovations in religion’ from whatever source they came.” Baptists started to complain about their treatment by Congregationalists at the time of the First Continental Congress in 1774. Their protest concerned the issue that the Baptists were forced to pay taxes to support Congregationalist ministers. In addition, Baptists objected to the requirement that they obtain certificates exempting them from taxation in support of ministers. In their view, such a requirement proved that the Congregationalist Church was the established church in Massachusetts. The criticism was received with bewilderment by the public officials, as in their view such certificates did not create an “establishment” of the Congregational church.

After the colonies declared their independence from Great Britain, the Massachusetts Constitution was adopted in 1780. It granted local towns the option of choosing the established religion; the vast majority were Congregational anyway. The Constitution allowed the towns to tax their residents “for the support and maintenance of public Protestant teachers of piety, religion and morality.” In 1811 the Religious Freedom Act was passed, permitting a citizen tax for the support of a “public teacher of religion” to apply the amount “to the support of the public teacher or teachers of his own religious sect or denomination [...].” It also allowed any person who “shall become a member of any religious society” to be “exempt from taxation for the sup-

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337 MARK A. NOLL, PROTESTANTS IN AMERICA 42 (Oxford University Press 2000).
338 Curry writes that Quakers not only provoked and endured persecution, but actually sought it by obstreperous or shocking behaviour, such as interrupting church services or going naked to symbolize the condition of their opponents’ spiritual state. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 21 (Oxford University Press 1986).
port of public worship and public teachers of religion in every other religious corporation whatsoever, so long as he shall continue such membership.

The churches were not de jure disestablished until 1833. From then on, the amended state Constitution gave members of religious communities the sole authority to “elect their pastors or religious teachers”, and provided equal protection of the laws to “all religious sects and denominations,” rather than solely to “every denomination of Christians.” It is reported that the Massachusetts system of local established churches lasted de facto longer than any other state establishment.

a.b. Rhode Island

Rhode Island was founded by Roger Williams, who was, as already mentioned, forced to leave Massachusetts for speaking out against the Puritan establishment. Williams sailed back to England in order to obtain a royal patent to the Colony of Rhode Island. With the patent in his hands, Williams became an omnipotent ruler. Once back in the New World he formed the first Baptist Church on American soil. Williams was of the view that the separation of church and state was a means to preserve religion from state interference. But even in the time before he came to Rhode Island, Williams had adopted liberal views concerning civil government and the church, and was an avowed Separatist. He believed that government was man-made and rested upon common consent of equal subjects. Historian Steven D. Smith comments that “Williams’s [...] ‘separation’ arguments are primarily calculated to support a ‘secular’ civil jurisdiction; freedom of conscience would be at best a byproduct.”

Williams and his associates adopted a plantation covenant in which they agreed to abide by the will of the majority but “only in civil things.” In

345 Jerome A. Barron & Thomas Diener C., First Amendment Law in a Nutshell 423 (Thomson & West 2008).
The Bloudy Tenent of Persecution for Cause of Conscience, Williams wrote “God requireth not an uniformity of Religion to be inacted and inforc'd in any civill state; [...] True civility and Christianity may both flourish in a state or Kingdome, notwithstanding the permission of divers and contrary conscience, either of Jew or Gentile.”\textsuperscript{349} The colony’s original articles of incorporation extended the power of the state only to civil matters. In 1663 its charter stated: “[Noe] person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, and doe not actually disturb the civil peace of our sayd colony; but that all and eveyre person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments [...]\textsuperscript{350}

The charter remained the guiding Constitution of Rhode Island until 1842. Historian Sweet believes that diversity of religious belief and toleration was not primarily due to the charter but thanks to Rhode Island’s specific circumstances. Firstly, he says, a great number of dissenters fled from persecution in the Old World to Rhode Island. Secondly, and even more importantly, the necessity of attracting new settlers for the prosperity and success of the colony required the “letting down of religious bars.”\textsuperscript{351} So throughout its history it permitted Baptists, Antinomians, Quakers, and other dissenting Protestants to worship freely. Protestant Christianity “enjoyed an exalted status” however.\textsuperscript{352} This preference meant that Roman Catholics or Jews were neither permitted to vote nor to hold public office in Rhode Island during the colonial period. In spite of that, no tax for the public support of religion was ever imposed.

\textbf{a.c. Connecticut and New Hampshire}

The religious constitutional history of Connecticut and New Hampshire is quickly told. Originally Connecticut was colonized based on the Massachusetts charter but became a separate colony in 1636. The Church of England

\textsuperscript{350} FEDERAL AND STATE CONSTITUTIONS 3213 (Francis Newton Thorpe ed., Government Printing Office vol. vi 1906).
\textsuperscript{351} WILLIAM WARREN SWEET, THE STORY OF RELIGION IN AMERICA 66 (Harper & Brothers 1950).
enjoyed a kind of parity with the Congregational Church. Establishment was abolished with the adoption of a new Constitution in 1818.\footnote{Michael S. Ariens, \textit{Robert A. Destro, Religious Liberty in a Pluralistic Society} 54 (2nd edn, Carolina Academic Press 2002).}

New Hampshire was initially also settled as part of the Massachusetts Bay Colony in 1641.\footnote{Thomas J. Curry, \textit{The First Freedoms: Church and State in America to the Passage of the First Amendment} 3 (Oxford University Press 1986).} It became a separate colony in 1679. Here, too, Congregationalism was established by law. The colony adopted theocratic units of local government, which meant that a man had no legal rights outside the church, that being the only system of local government.\footnote{Chester James Antieu et al., \textit{Freedom from Establishment: Formation and Early History of the First Amendment Religious Clauses} 13 (Bruce Publishing Company 1964).} The end of establishment came in 1819.

\textbf{b. Middle Colonies}

\textbf{b.a. New York, Pennsylvania, Delaware, New Jersey, and Maryland}

The constitutional story of the middle colonies is similarly short. New York was settled by the Dutch in 1624. In 1669, the English began exercising civil authority in the colony. At the time of the American Revolution, the Church of England was established in four counties in and around New York City. It adopted a system of multiple establishments, which meant equal privileges and benefits to all incorporated churches.\footnote{Id. at 7.} This system was abolished by New York’s 1777 constitution. It provided for “free exercise and enjoyment of religious profession and worship, without discrimination or preference.”\footnote{Federal and State Constitutions 2625 (Francis Newton Thorpe ed., Government Printing Office vol. v 1906).} However, in 1788 the New York legislature passed a test oath for all public officials, effectively banning Catholics from holding office for the remainder of the 18th century.\footnote{Thomas J. Curry, \textit{The First Freedoms, Church and State in America to the Passage of the First Amendment} 161 (Oxford University Press 1986).} Catholicism had traditionally been deemed an enemy of the state. It was directly linked to England’s rivals for empire in ways that posed a direct threat to New York.\footnote{Jason K. Duncan, \textit{Citizens or Papists? The Politics of Anti-Catholicism in New York, 1685-1821} at 19 (Fordham University Press 2005).} After active protests in 1806,
that clause was excluded to permit conscientious Catholics to hold office.\textsuperscript{360} Not all constraints were dissolved. In 1820 the Supreme Court of New York decided that one who disbelieved in the existence of God and the future state of rewards and punishments could not be a witness in a court of justice.\textsuperscript{361}

Pennsylvania received its name from William Penn who was granted a colonial charter in 1681. Penn was a Quaker who experienced for himself what religious intolerance meant. In most colonies Quakers were not free to practise their religion. They were whipped, fined, jailed, or even put to death.\textsuperscript{362} Penn extended the right of conscience and civil liberties to any person who believed in one God. This encompassed freedom of religious conscience for both Jews and Roman Catholics. The 1776 Pennsylvania Constitution granted liberty of conscience to all citizens, although it required all legislators to acknowledge their belief in “God, the creator, and the governor of the universe,”\textsuperscript{363} a divine inspiration of the Old and New Testaments.\textsuperscript{364} In 1790 the Pennsylvania Constitution eliminated this bar to office, stating “no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of these religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.”\textsuperscript{365}

Delaware was originally part of Pennsylvania. Its constitutional provisions of 1776 were very similar to those of Pennsylvania, also limiting office-holding to a particular sect (here the Trinitarian Christians). The religious test for office was eliminated in 1792.\textsuperscript{366}

New Jersey’s constitution proclaimed liberty of conscience, but as in other colonies, public office was limited to persons “professing a belief in the faith

\textsuperscript{360} MICHAEL S. ARIENS, ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 60 (2nd edn, Carolina Academic Press 2002).
\textsuperscript{361} Jackson v. Gridley, 18 Johnson 98, 104 (N.Y. 1820).
\textsuperscript{362} JOHN J. PATRICK & GERALD P. LONG, CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: DOCUMENTARY HISTORY 16 (Greenwood Publishing Group 1999).
\textsuperscript{363} Before the members elected to the 1776 Pennsylvania Constitutional Convention could take their seats they were required to subscribe to the following declaration: “I – do profess faith in God, the father, and in Jesus Christ, his eternal son, the true God, and in the Holy Spirit, one God Blessed for everyone, and do acknowledge the holy scriptures of the old and new testament, to be given by divine inspiration.” FEDERAL AND STATE CONSTITUTIONS 3081 (Francis Newton Thorpe ed., Government Printing Office vol. v 1906).
\textsuperscript{364} WILLIAM ADDISON BLAKELY, AMERICAN STATE PAPERS AND RELATED DOCUMENTS ON FREEDOM IN RELIGION 65 (The Religious Liberty Association 1949).
\textsuperscript{365} FEDERAL AND STATE CONSTITUTIONS 3100 (Francis Newton Thorpe ed., Government Printing Office vol. v 1906).
\textsuperscript{366} Id. at 582.
of any Protestant sect.”

This limitation of public office to Protestants remained until passage of the New Jersey Constitution of 1844, which forbade religious tests for public office.

Maryland was founded in 1632 by the Calverts who had converted from Anglicanism to Roman Catholicism. The Calverts were granted a charter from the Crown giving them complete control of the colony. The colony became a safe haven for Catholics who suffered persecution for their religious beliefs in England and in other American colonies. Among all the early colonies, it was Maryland alone that established no official church.

In 1649 the colonial government passed an Act of Toleration of the religious beliefs of all Christian settlers of Maryland. The law encompassed the first recorded use of the words “free exercise” with reference to religion. However, in 1654 when the Puritans came to power in Maryland as well, this law was repealed and both Catholics and Anglicans lost the right to enjoy their beliefs.

Maryland passed a Blasphemy Act in 1723 which stipulated that offenders would be bored through the tongue and fined twenty pounds or imprisoned for six months. Scholar Chester James Antieau notes: “Most probably these people believed that they elevated the holiness of their religion by placing harsh ‘earthly’ penalties on moral transgressors.”

Limited religious liberty was achieved with the passing of the Constitution of Maryland in 1776. It guaranteed that “all persons professing the Christian religion, are equally entitled to protection in their religious liberty.” It permitted the legislature to tax the citizens “for the support of the Christian religion.” Moreover, in 1795 the constitution was amended requiring all public officeholders to “subscribe a declaration of his belief in the Christian religion.”

This provision, though later amended to require a belief in God, remained until the Supreme Court held the test unconstitutional in the mid-20th century.

367 Id. at 2597.
368 Id. at 2599.
373 Id. at 1690.
374 Id. at 1702.
375 MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC
c. Southern Colonies

c.a. North and South Carolina, and Georgia

North Carolina was chartered as a colony in 1663. It granted liberty of conscience by virtue of its 1776 Constitution. But again, it barred from public office anyone “who shall deny the being of God or the truth of the Protestant religion.” This limitation of office was not ended until 1868. South Carolina became a separate colony of the original Carolina in 1735 and would eliminate its religious test of office and the establishment of the Christian Protestant religion until the constitutional amendment of 1790.

In 1732, Georgia became the last of the original thirteen states to be chartered. Although a large part of the colony’s population consisted of Protestant dissenters, the Church of England was formally established from 1758 until 1777. Anglicanism was never declared as the official religion of the colony. The 1798 constitution included a religious freedom clause that stipulated: “No one religious society shall ever be established of any civil right merely on account of his religious principles.”

c.b. Virginia

Virginia was permanently settled by the English in 1607, in Jamestown. The primary purposes of colonial Virginia’s founders were commercial and political, not religious. Nonetheless, the Church of England was formally established. Virginia imposed drastic laws by 1610. Speaking impiously or maliciously against the blessed trinity, or against the “known articles of Christian faith,” meant “pain of death.” Presbyterians and Baptists were

SOCIETY 61 (2nd edn 2002).
Id. at 3264.
JOHN J. PATRICK & GERALD P. LONG, CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: DOCUMENTARY HISTORY 8 (Greenwood Publishing Group 1999).
Death penalty for blasphemy law of the colony of Virginia as cited in WILLIAM
quickly growing in number and political power, yet were still being mocked, spat upon, assaulted, and otherwise abused. Physical violence was usually reserved for Baptists, against whom there was social as well as theological animosity. Scholar Edwin Scott Gaustad observes that “the persecution of the Baptists made a strong, negative impression on many leaders. Their loyalty to principles of civil liberty would exceed their loyalty to the Church of England in which they were raised.”

James Madison and Thomas Jefferson aided Baptist and Presbyterians who found themselves summoned, arrested and imprisoned for the offence of asserting their religious opinion. In order to put an end to that obnoxious situation the government proposed adopting a declaration. The Virginia Declaration as adopted on June 12, 1776 and read in Article 16: “That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.”

Despite the fact that the Virginia Declaration of Rights assured liberty of conscience, the legislator’s actions “left religion in Virginia and particularly the established church in an ambiguous situation.” Dissenters were not made to support the established church, or their own churches, but public officials retained the discretion over whether to license dissenting meeting houses, and the established church remained under the state’s regulatory control. Virginia’s laws implied that free exercise of religion could co-exist with an establishment of religion, and stated plainly that the Church of England remained established in the state. Financial aid and encouragements to the established religious institution was still approved. Baptists

ADDISON BLAKEY, AMERICAN STATE PAPERS AND RELATED DOCUMENTS ON FREEDOM IN RELIGION 19 (The Religious Liberty Association 1949).


THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787 at 36 (University of Virginia Press 1977).


Some of the most significant forms of governmental cooperation with religion were the following: publicly owned lands were made available to the church and to its affiliated religious educational institutions; public funds were provided to the church and to its church-related educational institutions; tax exemption was given to the church and to the affiliated religiously orientated educational institutions; the
were not satisfied to let matters rest with a simple declaration. They soon started to ask to have the philosophy of religious liberty applied. Although Jefferson was an Anglican himself, he fought at the forefront for free exercise of religion. Jefferson designed a bill “for Establishing Religious Freedom” in 1779 which placed religion on a completely voluntary basis. It did not pass, however, and Jefferson had to wait for many forces to coalesce before his bill could eventually become law.\textsuperscript{388}

In the 1784–5 session of the Virginia General Assembly, a proposed bill taxing citizens of Virginia to pay for teachers of Christian religion was introduced. By virtue of that proposal, persons would be able to declare the denomination to which they wished their assessment to go, but if no declaration was made the money would be used to encourage schools in the respective counties. Additionally, the bill affirmed that “the Christian Religion shall in all times coming be deemed and held to be the established Religion of this Commonwealth.”\textsuperscript{389} The Baptists saw a flaw in the language of that bill and stood staunchly in opposition.\textsuperscript{390} In their avowal of the principle of separation of church and state, they declared the bill “to be repugnant to the spirit of the Gospel for the legislature thus to proceed in matters of religion, that no human laws ought to be established for this purpose.”\textsuperscript{391} Thomas Jefferson, George Mason, and James Madison, the authors of the Virginia Declaration of Rights, joined the Baptist opposition. As a consequence the Assembly voted after the third parliamentary reading to distribute copies of the assessment bill throughout the commonwealth and invited the people to signify their opinion of the Bill.

Madison anonymously\textsuperscript{392} wrote his now famous Memorial and Remonstrance against the proposed Bill, and had circulated his paper too. He urged Virginians to secure as many signatures as possible. This action brought forth a veritable torrent of petitions. Madison argued in his Remonstrance...
not only “that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence” but also that “If ‘all men are by nature equally free and independent,’ all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights.”

The Remonstrance combined political and religious arguments into a balanced and resounding whole. Because of the huge success of the Remonstrance, the bill was abandoned without being voted on in 1785. Madison then brought forward the “Bill for Establishing Religious Freedom” that Jefferson had drafted in 1779, but which had failed to pass in the intervening years. It passed both the House of Delegates and the Senate to become law on January 16, 1786, thereby ensuring the permanent “separation” of church and state. Section II reads thus:

Whereas Almighty God hath created the mind free; [...] (2) Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

This model of religious liberty was soon to spread throughout the country. The year that followed the War of Independence was a time of constitution-making, both within the states and in the ecclesiastical entities. Between 1784 and 1800 Methodists, Protestant Episcopalians, Presbyterians, Roman Catholics, and the Reformed Churches broke with Old World controls and nationalized their ecclesiastical organizations.

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393 Id. at 298 ff.
1.1.4.2 Federal Developments

a. United States Constitution of 1787

In May to September 1787 the Federal Constitution was being formulated at the Constitutional Convention in Philadelphia. The Federal Constitution’s draft version included references to religion. The idea of this was, primarily, to ensure that no religious test or qualification became annexed to oath or office. Due to opposition, no such provision eventually found its way into the original Constitution of 1787. The primary objection to a Bill of Rights was that the government to be formed under it would be one of limited powers. Historian Richard E. Labunski notes: “Unlike state governments, which had plenary authority to act on behalf of their citizens, the federal constitution would create a government whose powers would mostly be confined to those authorized in the original document.” Madison regarded religious clauses as a poor strategy for protecting individual rights because in his view a specific definition of rights would unduly tend to limit them. Alexander Hamilton argued that such clauses would present a dangerous pretext for an ambition that “[o]ften lurks behind the specious mask of zeal for the rights of the people [...]”. Jefferson, on the other hand, did not share their opinion that there was any undue risk that the religious clauses could be misused by federal government. He was disappointed that the Constitution did not contain a Bill of Rights, especially a provision on liberty of conscience. Nonetheless, the state representatives and exponents agreed upon the idea that the Federal Constitution was an experiment that remained open to further experiments.

b. First Amendment of 1791

It soon became clear to the state delegates that the basic framework as drafted in Philadelphia needed amendments to protect certain core liberties. Beginning in mid–1789, the United States Congress began working on a Bill of Rights. The final text of its First Amendment read:

Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof.

Ten of the initial thirteen states, as well as Vermont, ratified the First Amendment. The Bill of Rights became effective on December 15, 1791, after Virginia ratified its amendments. Georgia and Connecticut refused to adopt the Bill. Massachusetts never enacted a Bill’s signifying assent. In fact, Massachusetts did not formally adopt the Bill of Rights until 1939.

Confusion about the precise meaning of the religious clauses persists until today. This uncertainty is created by the circumstance that the two main authors of the bill, Jefferson and Madison, disagreed on the premises regarding religion and its appropriate relation to the state.

To Jefferson’s mind, religious tolerance was best achieved by “building a wall of separation between Church and State.” Jefferson was of the view that public life would not be corrupted if the metaphorical “wall” served to separate state and nation in matters pertaining to religion. He emphasized...
reason and was sceptical of religious dogmas. While he greatly valued personal freedom of conscience and religious belief, Jefferson was suspicious of institutional religion and was fearful that it might have a corrupting influence on the “body politic,” and destroy the liberties of the people.  

James Madison, on the other hand, treasured the importance and value of institutional religion in public life. In his opinion, religion bolstered public morality and was an essential part of fostering civic virtue. Madison denied the civil magistrate any power over religion because, to him, religious truth and the means of salvation were beyond the concerns of the state. For Madison, religious freedom was best guaranteed by preserving and encouraging a multiplicity of religious sects. In this way, no one denomination would become dominant. He wrote 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 degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.” Madison believed this approach was required in order to protect the church from the state, that is to say, the authenticity and purity of religion. Hence, both men agreed on the principle of separation of church and state. But their perception of how to achieve such liberty differed, in that Jefferson feared religion would corrupt the state whereas Madison feared the state would corrupt religion.

c. Fourteenth Amendment of 1868

The Fourteenth Amendment to the Constitution was proposed to the states’ legislatures in 1866. President Andrew Johnson said in his State of Union Message in 1865: “[T]he American system rest[ed] on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness.” The

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408 JEROME A. BARRON, C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 422 (Thomson & West 2008).
409 Id. at 423.
412 JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 423 (Thomson & West 2008).
413 Cited as in WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 91 (Harvard University Press 1988).
amendment was ratified by twenty-eight legislatures out of thirty-seven in 1868. But it took more than another century until Johnson’s words of political principle could be channelled into concrete law in all North American states. The last state to ratify the amendment was the state of Kentucky in 1976. The Fourteenth Amendment provides in the relevant parts:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Amendment does not expressly mention the right to religious liberty. It did, however, make it possible to argue that the provisions of the Bill of Rights were among the rights of the citizens of the United States. The Supreme Court dismissed this argument in the Slaughterhouse Cases v. The Crescent City (1873), but left room for the possibility that the Anti-Establishment Clause might someday apply to the states also. According

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414 The amendment was subsequently ratified by Alabama, July 13, 1868; Georgia, July 21, 1868 (after having rejected it on November 9, 1866); Virginia, October 8, 1869 (after having rejected it on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected it on October 27, 1866); Delaware, February 12, 1901 (after having rejected it on February 8, 1867); Maryland April 4, 1959 (after having rejected it on March 23, 1867); California, May 6 1959; Kentucky, March 18, 1976 (after having rejected it on January 8, 1867). THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED, H.R. DOC. NO. 108-95 (1st Sess. 2003).


416 Quoted as in HENRY BRANNO, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 7 (Cincinnati 1901).


418 Slaughterhouse Cases v. The Crescent City, 83 U.S. 36 (1873).

419 Already before the enactment of the Fourteenth Amendment, the Supreme Court of the United States in Permoli v. Municipality No. 1 of the City of New Orleans (1845) made plain that the Establishment Clause would not apply to the state governments. The clause presented a difficult case for incorporation. United States
to the court, the Fourteenth Amendment protects those “privileges and immunities, which are fundamental.” In spite of that, the question of whether the anti-establishment concept could be regarded as “fundamental” was left unanswered, partially because during the time the First Amendment was adopted, several states had still officially established churches.

The First Amendment was widely perceived as not applying to the states. With mounting pressure for it to do so, the Supreme Court’s ruling in *Palko v. Connecticut* (1937) brought a paradigm change to its earlier decisions by creating the so-called “incorporation doctrine.” The justices opined that “liberty” as protected by the Due Process Clause of the Fourteenth Amendment incorporates the “fundamental rights” contained in the Bill of Rights, and makes it applicable to the states. The court declared that religious liberty is a right “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” As mentioned earlier, the Supreme Court incorporated the free exercise guarantee for the first time in *Cantwell v. Connecticut* (1940), and the non-establishment guarantee in *Everson v. Board of Education* (1947). Scholars Michael S. Ariens and Robert A. Destro state: “The full implications of the Incorporation Doctrine remain to be worked out in the context of religious liberty, but the fact of incorporation is no longer open to serious question.”

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420 Slaughterhause Cases v. The Crescent City, 83 U.S. 36, 76 (1873).
424 It was considered that the bill bound state officials to enforce it against the states by virtue of their oath to support the United States Constitution. *Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment* 182 (2nd edn 1997).
1.1.4.3 Native Americans

a. Colonial Aspirations

All these laws and policies of religious liberty are, from today’s civil rights perspective, immensely flawed. The reason for this is the fact that the Bill of Rights did not apply to the Native American population. Indians were “others”, beyond the pale of civilization. During the colonization period, the British Crown treated the Indian tribes de iure as foreign sovereign nations. Freedom, in the Indians’ country, often meant the obligation to assimilate to the culture and customs of the white European settlers. America’s indigenous people found a “New World” of closed opportunities and exclusion, which was built on their old territory. As Alan Gallay observes: “[T]he English would provide the dominant societal framework that replaced the chiefdoms that had prevailed for so long.” Colonial aspirations were justified by a combination of discovery and the propagation of Christianity, as well as profit. The company that founded the colony in Virginia commented “their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government.” The New England colonies, too, used conversion of the Indians as a justification for their endeavour. For example, the original seal of the Massachusetts colony featured an Indian man with the words “Come Over and Help Us,” written on a ribbon issuing from the Indian’s mouth. The attempt to convert was an important step in Euroamerican-Amerindian relations. Both Protestant and Catholic clergies shared the determination to convert foreign heathens.

b. Reservation System and Systematic Christianizing

By 1848 a “reservation system” was proposed. It meant a new federal Indian policy under which tribes would be confined on smaller reservations of land.

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Federal agents possessed the power to lead the savages towards civilization if need be. Official reports document the ideas behind this treatment of the Native Americans; one example reads: “Stolid and unyielding in his nature, and inveterately wedded to the savage habits, customs, and prejudices […], nothing can induce him to resort to labor, unless compelled to do so by a stern necessity; and it is only then that there is ground to work upon for civilizing and Christianizing him.”\textsuperscript{432} In the 1870s the federal government began administering schools for Native American children. Much of the effort came from Christian missionaries, for whom education and Christianization were interchangeable terms.\textsuperscript{433} The teaching of the Indians was regarded as the ultimate reform and an important shift in the federal assimilation policy. Up to that date, education was limited to providing funding and personnel for educational efforts by missionary societies and tribes themselves. The purpose of Indian boarding schools was to separate children from their families and tribes in order to fully and systematically inculcate them with American Christian culture and language. The same purpose was described by the movement’s leaders as “[k]ill the Indian in him to save the man.”\textsuperscript{434} Not surprisingly, some of today’s scholars refer to such activities as “examples of genocidal acts and crimes against humanity.”\textsuperscript{435}

c. New Deal Era

A paradigm change is presented by what is known as the “Indian New Deal Era” (1928 to 1947). After centuries of destroying Native American tribes and coercing their people into a particular way of life, the federal government would encourage development of tribal governments, economies, and cultures for the first time. The Indian Reorganization Act of 1934 sought “to get away from the bureaucratic control of the Indian Department, and […]


\textsuperscript{434} Quoted as in ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 113 (Thomson & West 2008).

give the Indians the control over their own affairs." However, the Act was of little success. The American scholar Robert T. Anderson notes: “While both the Act and its implementation can be criticized for failing to fulfill these goals, the era remains a watershed in federal Indian policy.” The new deal encompassed tools for Indians to achieve something, economically and socially. The deal quickly came to an end as politicians disagreed on policy considerations. “The goal of Indian education should be to make the Indian child a better American rather than to equip him simply to be a better Indian [...] The present Indian education program tends to operate too much in the direction of perpetuating the Indian as a special status individual rather than preparing him for independent citizenship. Corruption and inefficiency in social and health services eventually became the grounds for terminating special federal responsibility for Indians.

**d. Collective Religious Self-determination at Last**

Not until the late 1960s did resistance occur against the termination policy. Francis Paul Prucha observes that “the new Indian drive for recognition reflected the earlier agitation of American blacks, and Indians adopted techniques of protest from the black community.” Claims were made for the respect of Indian religious and civil rights, recognition of land uses, programs of education and health care, as well as the old concept of tribal sovereignty. Eventually Congress passed the Indian Civil Rights Act of 1968. The primary effect of the 1968 Act was that tribes were partially made subject to the Bill of Rights of the American constitution. Traditionally, the tribal governments, which were treated just like foreign nations, had not been liable to constitutional restraints in their governmental actions. This was because those restraints were imposed either on federal government or,

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436 The Indian Reorganization Act of 1934, 78 Cong. Rec. 11125 (1934).
439 Id. at 1085.
441 Application of the full Bill of Rights did not make sense and would have been in contradiction with governing principles. Especially crucial was the prohibition against the establishment of religion, which would have obstructed the quasi-theocracies that ran some Indian communities. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 1107 (University of Nebraska Press 1984).
by the 14th Amendment, upon the states. The tribal governments were neither one nor the other, which meant that constitutional rights and responsibility did not apply to them.\textsuperscript{442}

In 1975 Congress established the American Indian Policy Review Commission to undertake a comprehensive review of federal Indian policy and to consider alternative methods to strengthen tribal government. The new policy seemed to be based on a model of continuing pluralism. It recognizes that tribes exist and will remain for the indefinite future. A pivotal element in the Native’s advance toward self-determination and cultural freedom was freedom of religious belief and practice. As American society became more tolerant of pluralism in religion and other aspects of culture, Native American religions were no longer directly attacked. The concept was confirmed by the highest court of the country. The Supreme Court stated in \textit{Lyng v. Northwest Indian Cemetery Protective Association}\textsuperscript{(1988)} that Native Americans enjoy equal rights – but no special treatment – by holding that Natives would “not be coerced by the government’s action to violate their beliefs, nor would [the] governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.”\textsuperscript{443} It can be concluded that the federal government has tried many different federal Indian policies. At the end of the day, Indians’ interests became swallowed up to a great extent by the domination of the state and federal American legal system. Nonetheless, the continuing tension between the policy shifts of the past inclines scholar William C. Canby to declare it “unsafe to assume that national Indian policy has found its final direction.”\textsuperscript{444}

\textsuperscript{442} Talton v. Mayes, 163 U.S. 376, 382 (1896).
\textsuperscript{444} \textsc{William C. Canby, Jr.}, \textsc{American Indian Law in a Nutshell} 11 (4th edn, Thomson & West 2004).
1.1.5 The Two Models Compared and Contrasted

The constitutional histories of both Switzerland and the United States reveal that the concept of religious freedom is, and has always been, ambiguous. At no time in the past did the framers on either side of the Atlantic state with perfect clarity what the term was intended to convey. Today as ever, religious freedom cannot simply be poured into a solid mould but represents a complex fluid, subject to change and development. The desire to be free to think, act, or let things rest, is existential. Appeals to such common humanity are found as early as Tertullian. Many centuries ago, when Christianity became the official religion of the Roman Empire, the Catholic Church integrated existing Germanic and Celtic kingship structures into its organization. This gave way to a potential rival source of authority. Henceforth, a differentiation between priesthood and mundane powers was made, and as a direct consequence of that, disagreement over competences arose. In the sixteenth century the Catholic tradition became spiritually divided through the formation of new Protestant arms. It meant that no longer did one unified Catholic Church rise up against an expanding secular force, but that several churches and mundane powers all fought for their cause.

A clear line between spiritual and earthly authority could never be drawn. Swiss Protestant regions opted for a particularly proximate relationship between both powers. For instance, in Zurich the people and the church were enmeshed in rules, which were literally interpreted from the Gospels. Likewise, the first European Pilgrims sought at Massachusetts a life in accordance with their distinct beliefs and organized their laws accordingly. In both countries the tax system was used as means of supporting the established church or churches. Then, in the late eighteenth century, with the adoption of the first written constitutions, such ancient regimes largely came to an end. From an American liberal perspective, European settlers in America had two very appreciable advantages over the Swiss: the task of founding a modern state structure was much easier because the fabric of feudalism was already torn, and a few intellectuals possessed the ability and power to draft a social contract based on the ideals of the Enlightenment. Although oligarchic and aristocratic regimes were increasingly abrogated in Switzerland, too, the idea of starting something radically new was vehemently fought against.  

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445 As for certain Swiss cantons, this still applies today.
In the United States, churches were made to submit to civil law. The American lawmaker enacted new secular rules that marked out specific spheres of church autonomy. But the 1000-year-old tension between spiritual and mundane powers was deeply carved into the consciousness of the US constitutional framers. To them, the true allocation of religion-state competences proved to be no less equivocal than centuries before. Some framers feared that religion would corrupt the state, and others, that the state would corrupt religion. Both categories of people agreed, however, that spirituality was an essential part of humankind, and as such religious communities required adequate legal and social accommodation. Moreover, they believed that if the newly created state identified itself with a particular faith, the liberty to exercise one’s religion freely could not be guaranteed. In America a common federal agenda to disestablish churches was accepted and followed by the regions to a great extent.

It is this policy which presented a significant difference between the Swiss and the American system. In Switzerland the framers held that religious toleration was assured best by preserving and encouraging either or both official faiths at cantonal level. The Swiss federal lawmaker accepted the idea that public morality was best bolstered by preserving religious establishment. To the cantonal authority, religious determination meant that it was the duty of the state to protect and advance the cause of specific confessions. Religious tolerance was not construed in the sense that all religions were equally important or unimportant. Various traditional communities remain officially recognized today. Whether the cantonal lawmaker still sees multiple-establishment as a valuable concept to foster an essential part of civic virtue is questionable, however.

The above remarks do not detract from the circumstance that Switzerland and the United States share significant religion-state characteristics. So, for instance, in the initial American colonies and Swiss Orte, the relationships between church and secular forms of organization were far from being uniform. In Switzerland and in America alike, municipalities grew into sovereign regions before they entered into alliances. Later, in the seventeenth and eighteenth century, the policy prevailed that it would be overly risky to give federal government too much power in religion-state affairs. It was feared that through a strong federal government, regional identity could be lost. So in most parts of America, it was not until 1868 that federal religion-state competences were applicable also to state jurisdictions. In Switzerland the first permanently accepted religious clauses that were applicable in the entire country, and at all levels of the Swiss legal system, existed from 1848 onwards. Even today in both countries the corporative side of religious autonomy continues mainly to be governed at regional level.
Switzerland and the United States share further similarities. Both countries have in common that before the emergence of statehood, there existed no real choice of deity but, in many instances, forced worship only. To the early Swiss reformer, Zwingli, devotion to cultic unity made it impossible for him to accept religious diversity and minority religious viewpoints. In Zurich, Anabaptists were legally executed by burning, decapitation, and drowning. Religious toleration between the Roman Catholic and the Evangelical Reformed Church was achieved only by separating religious adherents geographically. The religious boundaries therefore coincided with the political boundaries. In the beginnings of the nineteenth century, those church members who remained in the diaspora were not allowed to profess their religion freely. So for instance, Catholics living in Protestant Basel-Stadt were prohibited from taking part in street processions, whereas Protestants living in Catholic Fribourg were not allowed to ring church bells. And again, the adoption of the 1848 Swiss Federal Constitution presented a real breakthrough in religious politics.

On the other side of the Atlantic, matters were not all that different. There, too, religious toleration developed as a collective rather than an individual right. During the American colonial era, it generally meant reluctant toleration or mild hostility between Christians. However, for a long period, Catholics remained at odds with Protestant America. In many instances they suffered unjustified molestation and punishment or death. Jews lived without experiencing direct persecution, but they exerted little influence on the development of the relationship between religion and state. The story of Native Americans is completely different. Tribes were either brutally killed or systematically inculcated with American Christian culture and language. The white “elite class” could not come to terms with the difficulties posed by the religion of the Natives. There was a sacred and indissoluble bond between the Indigenous people and areas within their aboriginal lands. This meant a real threat to European economic ventures.

Apart from that, American religious toleration evolved into concrete religious acceptance from the nineteenth century onwards. Depending on the state, religion was henceforth left to individual choice and voluntarism. People were free to exercise their religion.\footnote{An exception to this understanding might be the acceptance of Jehovah’s Witnesses. From their foundation in the late nineteenth century until the end of World War II, they were officially regarded as a militant and unpopular faith with a fanatical zeal. Prince v. Massachusetts, 321 U.S. 158, 173 (1944).} This liberal stance is a clear break with the Swiss tradition that prevailed at the time. Although in Switzerland freedom of religion and cultic activities was guaranteed with the enactment of the Federal Constitution in 1848, Catholic culture and Jewish tradition...
was subdued; the Jesuit order was banned and the authority of the Catholic Church severely restricted. Moreover, in the 1890s, anti-Semitic feeling loomed up out of the darkness. The first Swiss federal popular initiative was used to attack Jewish tradition by prohibiting kosher butchering in 1893. Another very sharp contrast between Swiss and American constitutional thinking is seen in the newly adopted minaret ban against the Swiss Muslim community. In America, not every single social difficulty or popular concern can give rise to a constitutional amendment in this way. Ultimately it can be concluded that although the histories of Swiss and American religious clauses differ in many ways, the number of similar or even shared characteristics is also striking.
1.2 Public Use of Religious Symbols

1.2.1 General Introduction and Overview

“It is surely the quintessence of the spirit of Christmas that those who believe in the divinity of the infant in the crib should not seek to impose their view on others who do not share that faith.”

(Robert F. Drinan)448

Whether in form of a Christmas crib or any other kind of representation, religious symbolism seems important to many. Some express its significance with a small cross worn around the neck, others with a loose-fitting scarf to cover their hair, and still others with a red dot on their foreheads. People choose to wear religious symbols for cultural and aesthetic reasons. The symbol may serve as a reminder of a particularly meaningful experience. Or, as is the case in many instances, it may give the wearer a sense of spiritual proximity to a specific invisible deity or value. Apart from these few examples, there are countless other reasons why religious symbols are held dear. However, a great number of individuals do not wish to see or interact with religious symbols. Some of them adhere to their own, in their view more truthful, system of belief. Others reject a priori anything that can be associated with religion. One possible reason why individuals do not feel at ease with confronting other peoples’ religious symbols might be their position towards them. They may find the symbols’ meanings opaque, or even inappropriate. But countless other explanations are also possible for an aversion to the outward carrying of religious symbols into the visible public sphere.

One way of tackling the problem of colliding interests could be the banning of religious symbols altogether. And, indeed, the above premise can quickly lead to the conclusion that where there are no religious symbols, there is no

448 Reverend, quoted as in ALBERT J. MENENDEZ & EDD DOERR, GREAT QUOTATIONS ON RELIGIOUS FREEDOM 28 (Prometheus Books 2002).
discontent, and therefore social harmony. Persons who wish not to see any religious symbols (or some specific religious symbol) in public might be particularly inclined to support that solution. The intriguing question that arises is whether it could truly prevent all contentious human interaction – or whether there is a need for another more balanced approach, since that way will not result in overall happiness of all the people. In Switzerland and the United States, it is not the government's duty to artificially clear public ground so that no one can be reminded of another person’s religious values and cultural identity. Looking at today’s applicable law (not politics), it appears that the Swiss and North American lawmakers generally expect that an undifferentiated prohibition of all religious symbols produces disrespect or creates even an atmosphere of hostility towards one religion or another. A general outlawing of a particular symbol purely and simply because it is religious can hardly be justified.

The legal systems of both countries have neither adopted a complete prohibition policy, nor do they embark from the practice that allows religious symbols if certain criteria are satisfied. They have opted for a more liberal approach by providing all persons with equal freedoms to enjoy religious symbolism as long as content-neutral and generally applicable law does not restrict its use. The Constitutions of the two countries do not define what the liberal use of religious symbols means in the general normative sense – let alone the detailed regulation of when and where religious freedom must necessarily stop. The Swiss Federal Constitution reads in Article 15(1) and (2): “Freedom of belief and conscience is guaranteed. All persons have the right to choose their religion or philosophical convictions freely, and to profess them alone or in community with others.” The First Amendment of the United States American Constitution stipulates: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [...].”

From these basic texts judges are left with little guidance as to the intent of the lawmaker. The Supreme Court of the United States observed in this respect: “We must go elsewhere, therefore, to ascertain its meaning [...].” The statement refers to the circumstance that judges are required to look beyond the literal meaning of the constitutional provisions, and consult intrinsic as well as extrinsic aids in order to speak justice in religious symbol

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449 This might especially apply to the newly adopted Swiss prohibition on the construction of Islamic minarets, which presents an exception to the above formulations.
450 **Swiss Const. art. 15(1) and (2).**
451 **U.S. Const. Amend. I.**
452 Reynolds v. United States, 98 U.S. 145, 162 (1878).
conflicts. The judicial act of balancing varying interests against each other is not the only problem. Difficulties begin as soon as the attempt is made to define religious symbols. For example, Philosopher Louis Dupré states that “every object is potentially religious [and] no object is sacred in itself.” Another philosopher, Susanne Langer, goes even further than that. In her analysis, religious symbols “denote any vehicle that represents a thing.” Less catchy, but all the more meaningful is the note of psychoanalyst Hans Loewald. In his view, religious symbols are a prime vehicle of “return, on a higher level of organization, to the early magic of thought, gesture, word, image, emotion, fantasy, as they become united again with what in ordinary nonmagical experience they only reflect, recollect, represent or symbolize […] a mourning of lost original oneness and a celebration of oneness regained.”

So what do judges have to make of all that? At the practical end, it is generally perceived that a social phenomenon like religion and its representation through symbols is impossible to define comprehensively. Legal scholars Ahdar Rex and Ian Leigh even caution: “[when] the prime objective of the definition of the term is to mark out a sphere of unlimited acts and omissions of adherents there is the danger that the whole answer to the question of the scope of, and limits to, religious freedom may be concluded at the initial terminological stage.” As we will later see, Swiss and North American justices appear to be fully aware of such complications and practical dilemmas. Yet they know that courts ought to decide either for or against religious symbols at the end of the day.

So here in this chapter only two main topics will be tackled, which will lead on to a third. It explores how and to what extent the term religion is construed in law. If freedom of religion is a fundamental right affording special privileges and protections, then one must start by saying what religion is, in order to divide what is embraced by this freedom from what is not. The chapter also takes a look at religious symbols that have already been judicially recognized. It explains when and where they can be used in the public

454 LANGER SUSANNE, PHILOSOPHY IN A NEW KEY, A STUDY IN THE SYMBOLISM OF REASON, RITE, AND ART 60 F. (Harvard University Press 1942).
455 HANS LOEWALD, SUBLIMATION 81 (Yale University Press 1988).
sphere. The two countries are treated separately by referring primarily to relevant case law. In the comparative stage the initial analysis helps to carve out country-specific similarities and differences. The following does not address all cases or case interpretations that are available, but captures some of the most representative examples only. Before embarking on our legal adventure it appears necessary to describe the socio-legal contours of both countries.
1.2.2 Switzerland

1.2.2.1 Socio-Legal Contours

One of the most prominent religious symbols in the legal context can be found in the Federal Constitution, which in Switzerland takes direct recourse to God. The Constitution’s Preamble holds: “In the name of God the Almighty! The Swiss People and the Cantons [...] adopt the following Constitution.” It is reasonably clear that these introductory words do not possess legal validity, and it is certain that the framers intended to convey that constitutional law is somehow God related. The invocatio dei can be interpreted as a strong symbol that the state is open to the people’s religiousness, and that it is considerate of, if not friendly towards, the religious convictions of its citizens. Whether this symbolic call on God relates to one or more gods, or a particularly defined God, is subject to dispute. Religious symbol conflicts have a long and enduring tradition in Switzerland. They refer not only to metaphorical speech but also to concrete expectations. For instance, Catholic Fribourg once limited the act of Protestant church bell ringing because of its symbolic meaning. People who opposed the Catholic practice of putting up wayside relics, crosses and crucifixes provoked disagreement for quite some time. The latest and now most famous row over symbolism is the 2009 prohibition on the construction of minarets. According to the new law’s initiators, the prohibition of minarets was introduced because they...

458 “Im Namen Gottes des Allmächtigen! Das Schweizervolk und die Kantone […] geben sich folgende Verfassung.” SWISS CONST. PREAMBLE.


460 DIETER KRAUS, SCHWEIZERISCHES STAATSKIRCHENRECHT, HAUPTLINIEN DES VERHÄLTNISSES VON STAAT UND Kirche Auf eidgenössischer und kantonaler Ebene 134 (J.C.B Mohr Paul Siebeck 1993).


462 RUDOLF ALBERT BÄHLER, Die Gründung der evangelisch-reformirten Gemeinde Kirche und Schule zu Freiburg in der Schweiz, nebst den an ihren ersten Festen gehaltenen Gebeten, Predigten und Reden 38 (unkown publisher 1838).

463 The last such dispute arose when, in 2010, Patrick Bussard, a Swiss mountaineer, destroyed several Catholic crosses erected on mountain tops, for ideological reasons. Olivia Kühl, Ja ich habe die Kreuze zerstört, Tages Anzeiger, March 16, 2010, at 1.
contain unwanted symbolic messages – namely, the intention eventually to push through a shari’a-orientated legal system, and Islamic dominance of men over women.\textsuperscript{464} So in a country like Switzerland there have always been symbols with legal quality and form. They come and go, like tides – full of force.

\subsection*{1.2.2.2 Defining “Religion”

\textbf{a. Introduction}}

The Swiss Federal Constitution refers to the term “religion,” as well as to “conscience,” “belief,” and “philosophical conviction.”\textsuperscript{465} Moreover, Article 15 is headed by the words “freedom of belief and conscience,” representing a construction that is very similar to the lexical meaning of the word “religion,”\textsuperscript{466} but not comprising a clear definition. Although it is recognized that these legal terms cannot be construed comprehensively, public authorities and scholars have still accepted the necessity of drawing some boundary around them. It must be emphasized that Swiss judge-made law and scholarly interpretation do not take an active part in the development of social sciences, but give these terms a normative dimension.\textsuperscript{467}

In order to illustrate the importance of providing meaning to terminology, a hypothetical example can be sketched. In this sense, suppose that the superintendent of a local public authority makes Anton, who just converted from Protestantism to the Rastafarian movement, redundant because of his persistent refusal to cut his dreadlocks. As a Rastafarian, Anton claims that his hairstyle represents a religious symbol. So the question that arises is whether the local authority is required to accommodate his religion by allowing Anton to enjoy his special hairstyle. Imagine further that, in court, the evidence testified by Anton is such that it cannot clearly be said whether his allegation is sincere, nor can the court come to the conclusion that the average passerby


\textsuperscript{465} \textsc{Swiss Const. Art. 15(1) and (2)}.

\textsuperscript{466} “The belief in and worship of a superuman controlling power, especially a personal God or gods.” \textsc{Judy Pearsall et al., New Oxford Dictionary of English} 1567 (Oxford University Press 2001).

\textsuperscript{467} \textsc{Dieter Kraus, Schweizerisches Staatskirchenrecht, Hauptlinien des Verhältnisses von Staat und Kirche auf eidgenössischer und kantonaler Ebene} 3 (J.C.B Mohr Paul Siebeck 1993).
would regard dreadlocks as a religious symbol rather than a distinctive hairstyle like many others. To make the point, without some idea of what “conscience,” “belief,” “philosophical conviction,” or “religion” constitutes, it would be arbitrary and therefore unjust to say when and why an individual or group of persons should be protected by the fundamental right of religious freedom. In order to find a fair solution to the conflict, it is useful for Anton and his supervisor to take recourse from certain legal definitions. So let our attention now turn to judicial and scholarly or otherwise official constructions that may serve this purpose.

b. Constitutional Constructions

In the leading Schwimmunterricht I (1993) decision, the Federal Supreme Court defined “belief” as “a concept that encompasses all types of relationships between humans and the divine, or transcendence,”468 regardless of its quantitative recognition. In the court’s view, not all opinions or worldviews constitute belief in the sense protected under Article 49 and 50 (now Article 15), particularly where the alleged belief is not manifested through a sufficiently “substantial” (grundsätzliche) and “all-embracing philosophy” (Gesamtsicht der Welt). According to the judicial body, a philosophy qualifies as belief if “it expresses a coherent view of fundamental questions” (eine zusammenhängende Sicht grundlegender Probleme).469 The same court stated in the Vêtements Régieaux ruling (1997) that belief would be the “external freedom to express, practice and communicate one’s religious convictions and one’s vision of life.”470 In addition, the official comment to the Total Revision of 1999 states that belief can be in one God, several Gods, or no God at all.471 To some scholars this means that the term is a precious asset for sceptics, atheists, agnostics, and the unconcerned.472

469 “[...] religiös fundierte, zusammenhängende Sicht grundlegender Probleme [...]” BGE 119 Ia 178, E. 4b, p. 183.
470 “[...] ainsi que la liberté extérieure d'exprimer, de pratiquer et de communiquer ses convictions religieuses ou sa vision du monde,[...]” BGE 123 I 296, E. 2b, S. 300.
471 BBI 149 I 1996 155.
472 JÖRG PAUL MÜLLER & MARKUS SCHEFER, GRUNDRECHTE IN DER SCHWEIZ, IM RAHMEN DER BUNDESVERFASSUNG, DER UNO-PAKTE UND DER EMRK 258 (4th edn, Stämpfli 2008); REGINA KIENER & WALTER KALIN, GRUNDRECHTE 267 (Stämpfli 2007); PETER KARLEN, DAS GRUNDRECHT DER RELIGIONSFREIHEIT IN DER SCHWEIZ 237 (Schulthess 1988).
The Federal Constitution also covers “conscience” as a constitutionally protected concept. The highest court has provided express determination as to whether and when a subject matter is constitutionally guaranteed. Conscience is commonly regarded as the inner sphere of human awareness. The court held in the 1997 *Vêtements Religieux* decision already mentioned that it covered the “inner freedom of belief,” the right “not to believe and to change one’s religious conviction continuously.” Scholarly interpretation of conscience has been subject to development. Where in the past conscience was primarily construed as internal divine call of moral virtue, today’s understanding of the term encompasses more and more anthropological determinants such as self-fulfilment and self-expression. In this sense “conscience” could be an operation of the ego which is determined and at the same time determining; it may be responding to a complex of inner and other determinants while it asserts in the same act its autonomy and self-direction.

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474 “[...] comporte la liberté intérieure de croire,” and “de ne pas croire et de modifier en tout temps et demanière quelconque ses propres convictions religieuses, [...]” BGE 123 I 296, E. 2b, p. 300.


476 E.g. Saint Thomas Aquinas stated: “There are many who say ‘Who will show us what is good?’ In answer to this he says: The light of your countenance, O Lord, is sealed upon us as much as to say that the light of natural reason whereby we distinguish good and evil, which is the function of natural law, is nothing else but the impress upon us of the divine light itself.” in Summa Theologica, I-III q. 91, a. 2 quoted as in Joseph V. Dolan, *Conscience in the Catholic Theological Tradition, in Conscience, Its Freedom and Limitations* 11 (William C. Bier ed., Fordham University Press 1971); or as Johannes Calvin is reported to have written: “For our conscience does not allow us to sleep a perpetual insensible sleep without being an inner witness and monitor of what we owe God, without holding before use the difference between good and evil and thus accusing us when we fail in our duty.” Quoted as in David Little, *A View of Conscience within the Protestant Theological Tradition, in Conscience, Its Freedom and Limitations* 25 (William C. Bier ed., Fordham University Press 1971).

477 Peter Karlen, *Das Grundrecht der Religionsfreiheit in der Schweiz* 42 (Schultess 1988).

Some legal scholars choose to approach the same term from a philosophical angle. So for instance Jörg-Paul Müller and Markus Schefer draw on Immanuel Kant’s definition to describe the term. To them “Conscience is to be understood in the sense of precisely that critical internal judgement which establishes an ethical and moral standard of individual life and actions.”

Dieter Kraus notes that “a conscientious decision can, but does not have to be religiously determined.” In its full capacity, the term covers religious as well as secular internal judgements. Conscience seen as personal countenance may also be important as it strengthens the moral fabric of a society. Commentator Martin Hilti is of the view that the Federal Supreme Court does not recognize conscience as an independent fundamental right alongside freedom of belief.

The phrase “philosophical conviction” has so far received little authoritative interpretation. The Federal Council opines that communities are covered by the term if they “represent an all-embracing philosophical conviction.” Swiss scholars find that the term’s scope must be differentiated from belief or religion. It is generally perceived that philosophy is a specific set of views or theories held by one or more persons on a particular issue concerning life. To Jörg-Paul Müller and Markus Schefer, philosophical “conviction” necessitates that one’s views are accompanied by a significant decree of “firmness, cogency, and cohesion.” For this reason, philosophical convictions need to be distinguished from experiments of thought or rhetorical argumentation, as they both lack personal devotion, according to Müller and Schefer. Regina Kiener and Walter Kälin make a further differentiation.

479 Although here it is especially difficult to distinguish philosophy from religion or a particular confession.


482 MARTIN HILTI, DIE GEWISSENSFREIHEIT IN DER SCHWEIZ 29 (Dike 2008).

483 “[...] eine alles umfassende Weltanschauung vertreten.” BB1 149 I 1996.

484 BERNHARD SCHMITHÜSSEN, GELIGIONSFREIHEIT UND GLAUBENSERFAHRUNG DARGE- STELLELT AM BEISPIEL ENTHEOGENER GLAUBENSGEMEINSCHAFTEN 60 (Schulthess 2007); Urs J. Cavelti, Art. 15 BV, in DIE SCHWEIZER BUNDESVERFASSUNG AT 16 (Bernhard Ehrenzeller et al. eds., Schulthess 2002); JÖRG PAUL MÜLLER & MARKUS SCHEFER, GRUNDRECHTE IN DER SCHWEIZ, IM RAHMEN DER BUNDESVERFASSUNG, DER UNO-PAKTE UND DER EMRK 258 (4th edn, Stämpfli 2008).
They hold that philosophical “views”, in contrast to philosophical convictions, are primarily political in nature. Philosophical views, according to the two legal experts, cannot meet the necessary requirements under Article 15. Commentator Konrad Sahlfeld points to the particularly close relationship between “philosophical conviction” and “belief.”

Neither has any Swiss public authority comprehensively defined “religion.” The official comment to the Total Revision of 1999 states that it is to be given a very wide meaning, “[...] embracing any relationship between humans and divinity or transcendence.” The same official comment holds that “all religions and sects are protected, regardless of the quantity of their members in Switzerland as long as they can be regarded as of substantial, philosophical weight, and include an all-embracing philosophy.” In the old, but still applicable Renk 1909 decision, the Federal Supreme Court left it open as to whether the call of a medium for spiritualistic meetings and a subsequent “magnetic condition” (magnetischer Zustand) is a “religious” exercise. However, the same court denied in Issaef (1926) that fortune-telling constitutes religion. The federal body saw such an exercise as belonging more in the therapeutic realm than that of actual spirituality. It feared that the latter’s recognition would open the floodgates to abuse. It is, however, likely that in these early decisions the Federal Court was led by a Christian understanding of the term religion. Scholar Kraus notes that since the state no longer has the function of bringing its citizens to salvation, it would make no difference whether the term relates to a Christian or any other religion. Finally, Bernhard Schmithüsen summarizes the purpose of religion in that “it endeavours to explain the world as a whole.”

485 REGINA KIENER & WALTER KÄLIN, GRUNDRECHTE 267 (Stämpfli 2007).
486 KONRAD SAHLFELD, ASPEKTE DER RELIGIONSRECHTLICHEN RECHTSFREIHEIT IM LICHTE DER RECHTSPRÜFUNG DER EMRK-ORGANE, DES UNO-MENSCHENRECHTSAUSSCHUSSES UND NATIONALER GERICHTE 264 (Schulthess 2004).
488 “Es sind daher sämtliche Religionen und Sekten geschützt, ungeachtet ihrer zahlenmäßigen Bedeutung in der Schweiz, sofern sie eine gewisse grundsätzliche und philosophische Bedeutung haben und sofern sie eine alles umfassende Weltanschauung vertreten.” BBI 149 I 1996 156.
489 BGE 35 I 42, E. 3, p. 47.
490 BGE 52 I 254, E. 1, p. 260.
491 DIETER KRAUS, SCHWEIZERISCHES STAATSSTIRCHENRECHT, HAUPLINEN DES VERHÄLTNISSES VON STAAT UND KirCHE AUF EIDGENÖSSISCHER UND KANTONALER EBENE 85 (J.C.B Mohr Paul Siebeck 1993).
492 “In der Religion wird versucht, die Welt als Ganzes zu erklären.” BERNHARD SCHMITHÜSEN, RELIGIONSRECHTLICHEN GlaUBENSFAHRUNG DARGESTELLT AM BEISPIEL ENTHOEGER GlaUBENSGEMEINSCHAFTEN 55 (Schulthess 2007).
c. Concluding Remarks

Looking back at the above formulations, it may strike the reader that the terms “religion,” “belief,” and “philosophical conviction” constitute a single whole. Each part hangs on the others, and each presumes what the others have to offer. Not even the term “conscience” as a person’s internal determination is free from conceptual overlapping. The reason for this is that human awareness may be motivated by religion, belief, and philosophical conviction alike. No wonder that public authorities and scholars have trouble drawing a clear boundary around the terms. Definitions of law do not necessary have to match the definitions of other social sciences. Any attempt to define the above legal concepts must methodologically embark from the understanding that the state is committed to impartiality, and that it is thus barred from assessing the belief or unbelief of its citizens. This also means that legal terms as such should not, as far as practicable, be determined by a specific worldview or theology. Otherwise the potential scope of religious freedom is limited illegitimately.493 As far as a Rastafarian like Anton is concerned, public authorities must admit that the definition of religion is also attached to public policy considerations. In other words, legal terms are generally construed in a way that they are tolerable to society. Absolute freedom from state concerns appears not to be possible. Especially Swiss judges seem to have learned both the blessing and the curse of definite legal definitions. They are hesitant in construing an all-embracing meaning of an expression because a clear-cut formulation is simply unattainable, or even unnecessary. This might also be why Swiss Supreme Court Justice Hans-Jörg Seiler states that “the importance of ‘religion’ is limited by the very fact that Article 15, Paragraph 2, not only protects religion, but equally guarantees ‘philosophical conviction.’ Even when a symbol is not religious, it can still have a philosophical meaning, and therefore fall into the protected area.”494

1.2.2.3 Religious Symbol Cases

493 Peter Karlen, Das Grundrecht der Religionsfreiheit in der Schweiz 201 (Schulthess 1988).
494 “Die Wichtigkeit der religiösen Tragweite ist [...] dadurch relativiert, als ja Art. 15 Abs. 2 BV nicht nur die Religion, sondern gleichrangig auch die Weltanschauung schützt. Auch wenn ein Symbol nicht religiös i.e.S. ist, kann es doch weltanschauliche Bedeutung haben und deshalb in den Schutzbereich fallen.” Letter from Hansjörg Seiler, Supreme Court Justice (December 12, 2008) (on file with the author).
a. Introduction

Having broadly analysed how the courts and scholars give meaning to the term religion and others, it is possible to go a step further by doing a similar analysis as to whether and when the public use of religious symbols is judicially allowed or disallowed. Courts must decide and give reasons why one interest should prevail over all other interests. In deciding religious conflict cases, the Federal Supreme Courts has developed eloquent balancing-of-interest tests. But an examination of these interesting matters lies outside the scope mapped out for the present chapter. For now, it is sufficient to investigate some of the most representative judicial reasonings.

b. Crucifixes and Religious Garb

In the Crocifisso decision of 1990, the dispute before the Federal Supreme Court involved the question of whether crucifixes that were attached to the walls of every classroom breached the doctrine of state impartiality. The court in its ratio decidendi stated “actions, which might offend the religious sensitivities of pupils and parents,” are inappropriate in the school environment.\(^{495}\) It further held that: “[I]t is conceivable that those who attended the school will see in this symbol the will to follow concepts of the Christian religion in education, or the will to place teaching under the influence of that religion. Nor can it be excluded that some persons feel offended in their religious beliefs by the constant presence of a religious symbol which belongs to another religion.”\(^{496}\) Moreover, the court added, opiter dictum, that “the same case would probably be decided differently if we had to rule on the presence of a crucifix in a part of the school premises which is commonly used – such as the lobby, corridors, or refectory.”\(^{497}\) In its decision the court did not question whether a crucifix is a religious symbol. It simply presumed

495 “[…] comportamenti suscettibili di offendere la sensibilità religiosa di allievi e genitori […].” BGE 116 Ia 252, E. 6a, p. 261.

496 “È pertanto concepibile che chi frequenta la scuola pubblica veda nell’esposizione di tale simbolo la volontà di rifarsi a concezioni della religione cristiana in materia di insegnamento o quella di porre l’insegnamento sotto l’influsso di tale religione. Non è neppure escluso che alcune persone si sentano lese nelle loro convinzioni religiose dalla presenza costante nella scuola di un simbolo di una religione alla quale non appartengono.” BGE 116 Ia 252, E. 7, p. 262 f.

497 “Il giudizio sarebbe forse stato diverso ove si fosse trattato di statuire sulla presenza del crocifisso nei locali scolastici adibiti ad uso comune, come ad esempio l’atrio, i corridoi, il refettorio o, evidentemente, dove esistano [...].” BGE 116 Ia 252, E. 7c, p. 262 f.
so by stating that a crucifix “is in Western cultures a symbol of Christianity.” The question of whether a crucifix is specifically used by particular denominations was not raised at all.

The contrary was the case in the Genevan Vêtements Réligieux decision of 1997. There, the question of whether a specific thing represented a religious symbol was pivotal. A teacher who had converted from Catholicism to Islam wanted the Supreme Court to regard her special clothing, which covered all parts of her body except her face, as “for aesthetic reasons” (pour des raisons esthétiques). The judges were, however, wholly unconvinced by her claim, and made reference to the precious Qur’an (sura 24:31, and sura 33:59). To the judicial body: “There is no doubt, the headscarf and loose-fitting clothing is not for aesthetic reasons but to follow a religious commandment.” The court then concluded that the special clothing in question is a strong religious symbol because its signalling effect “[Is] immediately visible to others, indicating that the person wearing it belongs to a specific religion.” In spite of that, it was held in the same decision that the scope of religious exercise – in the form and quality of religious practice – generally covers the right to wear religious clothing, by stipulating: “Practice guarantees that freedom of religion encompasses not just cults [...] and religious requirements, but also other expressions of religious life, provided that they are held within certain limits. Restrictions apply to the religious clothing of individuals, and concern the dress requirements of Muslim women especially.” On the balance of reasonableness, the court ruled that it was likely that the religious feelings of pupils and their parents were affected by the teacher’s wearing of religious garb. Her clothes were therefore held to contradict the concept of state impartiality. The court in its positive obligation said that its aims were not only to protect persons with religious beliefs, but

498 “[…] simbolo nella civiltà occidentale del cristianesimo [...]” BGE 116 Ia 252, E. 7b, p. 262 f.
499 In fact, the claimant was well aware that in the school environment religious freedom was given a narrow meaning, and for this reason sought protection under the fundamental right to personal freedom, that is Article 10(2) of the Federal Constitution. BGE 123 I 296, E. 2a, p. 299.
500 “[…] il ne fait aucun doute que la recourante porte le foulard et des vêtements amples non pas pour des raisons esthétiques mais afin d’obéir à une exigence religieuse […]” BGE 123 I 296, E. 2a, p. 299.
501 “[...] un signe immédiatement visible pour les tiers, indiquant clairement que son porteur adhère à une religion déterminée.” BGE 123 I 296, E. 2a, p. 300.
502 “L’exercice garanti de cette religion ne comprend pas seulement les cultes [...] et les besoins religieux, mais aussi d’autres expressions de la vie religieuse, pour autant qu’elles se tiennent dans certaines limites, par exemple le port de vêtements religieux particuliers concernant précisément les prescriptions vestimentaires de la femme musulmane.” BGE 123 I 296, E. 2a, p. 300.
also, and especially, to ensure religious harmony. “[It] should be noted that
the school might become a place of confrontation if teachers were allowed to
express their strong beliefs by means of religious garb.”503

Religious clothing seems not to be treated in the same way in all cases. In
the canton of Ticino, a school board prohibited a pupil from wearing an Is-
lamic scarf at a public primary school. This decision was reversed by the
Conference of Ministers of Public Education, which authorized all pupils
equally to wear traditional religious symbols.504 The Conference made a
clear distinction between pupils and teachers who wear a religious symbol.
The ministers concluded that teachers as public employees represented the
state, and their actions could be regarded as indirect state exercise.

The protection of religious symbols was also raised in the naturalization
context. Recently, in the Birr decision of 2008, the Supreme Court had to
consider a migrant’s naturalization application, which had been rejected by
the Municipal Citizens’ Assembly (Einwohner-Gemeindeversammlung) on
the grounds that his wife’s headscarf represented not only a religious sym-
bol, but also meant insufficient integration as well as non-compliance with
Swiss basic laws.505 The Assembly argued: “The headscarf gives women a
different gender and social role, which contradicts the principle of equality,
guaranteed in general by universally applicable human rights, and in particu-
lar by the Swiss Constitution. It is therefore contested that Mr. K. [...] re-
spects, minds, and lives in accordance with equality between men and
women.”506 The court ruled against the decision of the Assembly. It con-
cluded that: “[the] unequal treatment of the claimant as a result of a religious
manifestation, and the compliance with religious practices by his wife cannot
be justified on qualified or objective grounds whatsoever. Beliefs which are

503 “[...] il faut relever que l’école risquerait de devenir un lieu d’affrontement
religieux si les maîtres étaient autorisés par leur comportement, notamment leur
habillement, à manifester fortement leurs convictions dans ce domaine.” BGE 123 I
296, E. 4a, p. 305.
504 Second Periodic Reports of Switzerland, submitted by states parties under Article
505 It is noticeable that the right to freedom of belief and conscience as protected under
Article 15 of the Constitution received no direct or independent meaning in this de-
cision. It is the fundamental right to equality that was predominantly in question
here. Freedom of belief and conscience played a secondary role only, BGE 134 I
56, E. 4.1, p. 59.
506 “Das Kopftuch weist Frauen eine geschlechtlich und sozial differente Rolle zu, die
im Gegensatz zum Gleichheitsgrundsatz der universell gültigen allgemeinen Men-
schenrechte und insbesondere der Schweizerischen Bundesverfassung steht. Somit
wird bestritten, dass Herr K. [...] die Gleichstellung von Mann und Frau respektiert,
achtet und danach auch lebt.” BGE 134 I 56, p. 57.
based upon religious motivation or advice to wear certain clothes are generally not to be examined or valued.”

Similarly, in the Buchs ruling of 2008 the naturalization of a migrant was initially refused because she was wearing a headscarf. The Municipal Citizens’ Council (Einwohnerrat) justified the refusal by stating that the migrant’s wearing of a headscarf “manifested a fundamentalist belief” (bezeuge eine fundamentalistische Glaubensrichtung). In addition, the Council claimed that the headscarf was not a religious symbol, but a “visible expression of the subjugation of women by men.” The Supreme Court held the local Council’s ruling unconstitutional and responded: “The wearing of a headscarf by women, […] who believe in Islam is an expression of religious conviction,” [and] “allegations of individual municipal councillors, which deny the religious character and symbol of the wearing of a headscarf, cannot rebut this reasoning.” It might be necessary to stress that the question of whether a headscarf can, indeed, be regarded as a religious symbol was neither posed, nor commented on by the court.

c. Architectural Constructions

Religious symbol cases can also be found in the area of architectural constructions. The Supreme Court’s Aluminiumkreuz decision (2004) concerned Swiss construction and building laws. It ruled – without any further consideration – that a 7.38-meter high, blue illuminated cross erected on the property of the claimant was to be regarded as a religious symbol that received general Article 15 protection. In casu, the court denied the continuance of its presence on the claimant’s property on the grounds that the cross was likely to cause visual disturbance to neighbours. In a recent controversy, the public raised the question of whether the tower of a mosque (minaret) could be viewed as a religious symbol. The Supreme Court has so far not had the

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508 BGE 134 I 49, Sachverhalt, p. 50.

509 “[…] sichtbarer Ausdruck der Unterwerfung der Frau unter den Mann.” Id.

510 “Daran vermögen die Behauptungen einzelner, die Einbürgerung ablehnender Einwohnerräte, die dem Tragen des Kopftuches den Charakter eines religiösen Symbols aberkennen, nichts zu ändern.” Id.

opportunity to decide upon that contested question.\textsuperscript{512} Nevertheless, the Cantonal Administrative Court of Solothurn said in the \textit{Wangen-Minarett} decision of 2007, which involved the legality of the construction of a minaret on the roof of an Islamic community centre, that: “[A] church without a tower is still a church. A prayer room without a minaret is still a prayer room. Through the construction of a minaret, which is anyway merely symbolic, the use of prayer rooms is unchanged.”\textsuperscript{513}

Swiss courts do not always rule that a particular thing which, to some, might represent a religious symbol, qualifies as such. In the Glockengeläut Bubikon ruling of the year 2000, the Supreme Court wrote in its ratio: “Church bells possess for many people a melodious sound, and their steady tone – even early in the morning – is regarded as a widespread ancient tradition. Church bell ringing has been carved into the consciousness of people far beyond the circle of the faithful. It is also capable of moving the feelings of religiously indifferent people, and is, for a great proportion of the population, part of the fixed daily routine.”\textsuperscript{514}

\textit{d. Concluding Remarks}

The above analysis has presented a fairly rough picture of when other interests override the legitimate use of religious symbols. It can be deduced that treating people differently solely because of their use of religious symbols raises the suspicion that such an action is illegitimate. Ruthless intolerance and discrimination must not threaten the existence of any religious community. In the case of Islam, the Federal Supreme Court emphasized that religious symbols should not rashly be interpreted as containing political messages or even fundamentalist views.\textsuperscript{515} According to applicable constitutional

\textsuperscript{512} BGE 1P.26/2007, E. 4.1.2.
\textsuperscript{515} BGE 134 I 56, E. 5.2, p. 63; BGE 134 I 49, p. 50; also ALEXANDER SCHAER, “MANN MUSS GOTT MEHR GEHORCHEN ALS DEN MENSCHEN!” DAS RECHT ALS LÖSER INTERKONFESSIONELLER KONFLIKTE AM BEISPIEL DES ISLAMS IN DER SCHWEIZ 17 F. (Lit 2009).
law, people of whatever belief have a right to express their selfhood and carry it into the visible public sphere.\footnote{Especially with regard to the burqa controversy the question re-surfaces of how far personal identity in the public sphere should be freely determinable. For an inspiring discussion on the clash between self and public identity, see Martin Meyer, \textit{Von der Maske zum Gesicht – und umgekehrt}, NZZ, May 29, 2010.} This is equally true with regard to the much debated abaya cloak or burqa. In Switzerland it has been a cornerstone of liberal thought that the state is not justified in interfering with a person’s liberty where the action in question affects that person alone, as opposed to cause causing harm to others.\footnote{Adrian Loretan, \textit{Religiöse Symbole in multireligiöser Gesellschaft: Kopftuch und Minarett, in IST MIT RELIGION EIN STAAT ZU MACHEN? ZU DEN WECHSELBEZIEHUNGEN VON RELIGION UND POLITIK 69 ff. (Béatrice Acklin Zimmermann et al. eds., Theologischer Verlag Zürich 2009).}

However, in the circumstance of a person closely associated with the state (e.g. a teacher, or military officer), religious freedom rights might necessarily be circumscribed, the idea being that the impartial state is not identifiable with a specific religion.\footnote{BGE 9C_301/2008, Urteil vom 2. July 2008, E. 4.} Where there is no such close relationship, the likelihood that religious symbol interests will override all other interests is higher.\footnote{However, religion-state proximity is not given in the case of school students. A ban on their wearing of religious symbols is very likely to be unconstitutional. The Council Public Education of the canton of St. Gallen issued a circular prohibiting Muslim girls from wearing a headscarf. This recommendation appears not to be in compliance with Article 15 of the Federal Constitution. Erziehungsrat des Kantons St. Gallen, \textit{Erziehungsrat empfiehlt Gemeinden ein Kopfbedeckungsverbot während des Schulbetriebes}, Kreisschreiben (Aug. 5 2010).} To Swiss courts a thing in itself cannot be sacred. It is the way someone looks at something that makes it religious. The test to decide whether a thing is religious is an objective one. Difficulties may occur where, to the eye of the average reasonable observer, a thing does not appear to be a religious symbol because it represents, for instance, an unusual religion. As in the above-mentioned example of the Rastafarian employee, it can be suggested that judges might under certain circumstances speak greater justice if they consulted expert advice on any question about religion.\footnote{It may very well be the case that both parties in conflict sought expert advice in order to bolster their positions. This was, for instance, the case in the \textit{Schwimmunterricht II} decision of 2008 when the Imam of the great mosque of Geneva was asked to issue an explanation whether Muslim boys need by excused from co-educational swimming lessons for religious reasons. BGE 2C_149/2008, Urteil vom 24. Oktober 2008, E. 4.2. A further expert opinion requested by the court would then be unnecessary and thus obsolete.} This means that judges, in areas where they have very limited knowledge if any, can reasonably be supported by experts who possess comprehensive or au-
Thoritative proficiency in the religion or belief-system concerned. It is up to judicial discretion to decide when such advice is appropriate.
1.2.3 United States

1.2.3.1 Socio-Legal Contours

Religious symbolism also appears to be part of US American identity. For instance, the opening Paragraph of the Declaration of Independence of 1776 reads: “We hold these truths to be sacred & undeniable: that all Men are created equal and independent [...]”\textsuperscript{521} Declarations which represent a particular belief are nothing unusual in America. Accordingly, the national motto on the US currency holds: “In God We Trust.” Government also fosters the language “One nation under God” as part of the Pledge of Allegiance to the American flag. The sessions of the United States House of Representatives and the United States Senate begin with an invocation given by a chaplain. Even the sessions of the Supreme Court start with the Marshal saying, “Oyez, oyez, oyez. God save the United States and this Honorable Court.”\textsuperscript{522} Such religious heritage is seen as part and parcel of American culture.\textsuperscript{523} But the question that arises is whether symbolic practices have lost their religious significance over time since they only commemorate historical facts about a piety of the founding generation.\textsuperscript{524} Before we analyse courts’ reasonings for admitting or rejecting these and other religious symbols in public use, we should take a closer look at what actually constitutes religion, from a legal perspective.

1.2.3.2 Defining “Religion”

\textit{a. Introduction}

At the start comes the matter of definition. The First Amendment of the US Constitution stipulates: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [...]”\textsuperscript{525} Little about religion is discernible by reading the two clauses. Their literal mean-

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\textsuperscript{521} Quoted as in JOHN T. NOONAN, JR. & EDWARD McGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 189 (Foundation Press 2001).

\textsuperscript{522} Quoted as in JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 477 (Thomson &West 2008).


\textsuperscript{525} U.S. CONST. AMEND. I.
ing solely provides the obligation not to intermingle religion with what the Constitution calls “establishment,” while the “exercise” thereof seems to be permissible. Although the American Constitution provides no information about what religion constitutes, it can still be said that the term must somehow be the determining factor of both clauses – a centrepiece on which the scope of each depends. On the level of federal statutory norms, for instance, it is the Federal Civil Rights Act of 1964 that provides a definition of religion.\textsuperscript{526} Title 42 reads, inter alia: “[The] term ‘religion’ includes all aspects of religious observance and practice, as well as belief […].”\textsuperscript{527} What the Act basically suggests is that religion must not be understood narrowly in the sense that the term refers to the closely bounded limits of theism, but that it accounts for the multiplying forms of recognizably legitimate “beliefs”. The necessity of drawing some boundary around religion was accepted not only by the lawmaker but also, and especially, by American courts and scholars.

\textbf{b. Constitutional Constructions}

A leading American decision, \textit{United States v. Seeger} (1965), involved a conscientious objector to combatant training and service in the armed forces. The Supreme Court had to decide whether the plaintiff qualified for an exemption because of the conflict with his religion. It concluded that religion related to “an individual’s belief in a relation to a ‘Supreme Being’ rather than the designation ‘God’.”\textsuperscript{528} The judicial body further stated that the term embraces “all religions” but “excluded essentially political, sociological, or philosophical views.”\textsuperscript{529} “[Under] this construction, the test of belief ‘in a relation to a Supreme Being’ is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God. [...] Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is ‘in a relation to a Supreme Being’ and the other is not,” according to the majority of the justices.\textsuperscript{530}

In a later decision, \textit{Wisconsin v. Yoder} (1972), the Supreme Court was confronted with Amish parents who for reasons of belief refused to send their

\textsuperscript{526} There are various other laws that make references to “religion.” For list of those see Friedman v. Southern California Permanente Medical Group, 102 Cal. App. 4th 39, headnotes (2002), cert. denied, 538 U.S. 1033 (2003).


\textsuperscript{528} United States v. Seeger, 380 U.S. 163, 165-6 (1965).

\textsuperscript{529} \textit{Id.}

\textsuperscript{530} \textit{Id.}
children to public school after they had completed the eighth grade. In that case the court was, inter alia, required to construe the differentiation between “philosophical beliefs” and “religion.” The court wrote: “[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority […], their claims would not rest on a religious basis.” However, in another decision, *Larson v. Valente* (1982) the same court recognized that the term religion need not necessarily be tantamount to having a great number of adherents. In that case the judicial body struck down statutory rules that were particularly burdensome to newer and smaller faiths unable to raise most of the funds they needed from their own membership.

Another famous case is that of *Thomas v. Review Board* of 1981. The Supreme Court pondered the question of a claimant's articulation qualities. It involved an employee and member of the Jehovah’s Witnesses who was transferred to a department that produced turrets for military tanks. The employee objected on the grounds that the production of armaments was contrary to his religious beliefs, but struggled in expressing them. As a consequence the lower court came to the conclusion that employee’s reason for objection was more a personal philosophical choice rather than a religious belief. On certiorari the United States Supreme Court reversed and held: “Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” In addition, the Supreme Court said “courts should not undertake to dissect religious beliefs because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.” The highest court of the country made also clear that intrafaith differences were not uncommon among followers of a particular creed, and the judicial process would be singularly ill equipped when it resolved such differences in relation to the religion clauses. The guarantee of free exercise was not limited to beliefs which are shared by all of the members of a religious sect. “Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation” the US Court emphasized.

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534 *Id.* at 715.
535 *Id.* at 716.
In a relatively recent decision, the Court of Appeal of California had to determine whether veganism was a religious creed. In *Friedman v. Southern California Permanente Medical Group* (2002) the court used an objective analysis and said “religion: (1) addresses fundamental and ultimate questions having to do with deep and imponderable matters; (2) is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching; and (3) can often be recognized by the presence of certain formal and external signs.” In light of these three indicia, the court concluded that veganism was a moral and ethical creed limited to the single subject of highly valuing animal life and ordering one’s life on that perspective and was a moral and secular, rather than religious or spiritual, philosophy. It also stated that although the plaintiff’s veganism governed his behaviour in several respects, such as food, clothing and product use, it was not sufficiently comprehensive in nature. Finally, according to the court there were no formal or external signs of a religion, such as teachers or leaders, services or ceremonies, structure or organization, orders of worship or articles of faith or holidays.

So in the Californian court’s view, religion is not confined to the relationship of man with his Creator, either as a matter of law or as a matter of theology. Even theologians of traditionally recognized faiths have departed from a strictly theistic approach in explaining their own religions. Michael S. Ariens and Robert A. Destro comment that “such movement, when coupled with the growth in the United States, of many Eastern and non-traditional belief-systems, suggest that the older, limited definition would deny religious identification to faiths now adhered to by millions of Americans.” However, scholars W. Cole Durham and Elizabeth A. Sewell add meaningfully: “Definition of religion is not merely a propositional undertaking. It is not simply a matter of dictionaries or grammar. Ultimately it is about the interaction of normative universes which overlap, intertwine, sometimes conflict, and inevitably exert gravitational influence on each other.”

c. **Concluding Remarks**

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US courts in their early cases were hesitant in defining religion. It appears that courts have now moved away from Western-biased definitions of religion. In the early 1965 Seeger case, religion was construed narrowly as an individual’s belief in a relation to a “Supreme Being.”\(^{539}\) To the court the test of belief in a relation to a Supreme Being was whether a given belief that was sincere and meaningful occupied a place in the life of its possessor parallel to that filled by the orthodox belief in God.\(^{540}\) The American Court never addressed the meaning of the word “parallel.” In this sense scholar Jesse H. Choper critically asks whether a particular belief must, despite its possible unusualness, possess similar characteristics as mainstream beliefs do in order to be judicially recognized as religion.\(^{541}\) This might be why recent court interpretations have adopted a broader approach. Courts must examine the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion. This in turn raises serious problems of excessive breadth and vagueness or under-inclusiveness. Clarity problems in US constitutional law also appear to exist by means of the externalities of a “religion” upon which courts should not properly rely. They could include, for instance, the number of its adherents, its social value, the acceptability of its logic, consistency, or comprehensibility, or the consistency of practice among adherents (including intrafaith differences). However, according to Choper, the most pivotal aspect about the recognition of a religion is the sincerity of an adherent’s claim.\(^{542}\) A person intending to benefit from the justice system must come with clean hands to the courts.

1.2.3.3 Religious Symbol Cases

a. Introduction

The above analysis has shown that one pivotal problem of defining religion definitively is that there appear to be endless varieties of religious experience. However, once a symbol has been recognized as being “religious”, the question is whether its particular use is permissible in the given circumstances of the

\(^{540}\) Id.
\(^{541}\) Jesse H. Choper, Earl Warren Professor of Public Law, Teaching Constitutional Law: First Amendment at the University of California, Berkeley Boalt Hall (April 14, 2009).
\(^{542}\) Id.
case. There is apparent tension between the Anti-Establishment Clause and the Free Exercise Clause that stipulate: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [ ... ].” The Supreme Court has recognized that the government may accommodate religious practices without violating the Anti-Establishment Clause. The limits of permissible state accommodation to religion are not co-extensive with the noninterference mandated by the Free Exercise Clause. However, at some point accommodation may devolve into an unlawful fostering of religion. This means that a line between permissible and impermissible public use of religious symbols needs to be drawn. So the following section analyses where this line might be.

b. **Posters, Seals, Displays**

*Stone v. Graham* of 1980 involved a contention over a Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of each public school classroom in the State. The Supreme Court held that the statute was unconstitutional despite the fact that the posters were purchased with funds from private contributions, and at the bottom of each display it required the notation “the secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.” To the court such an “avowed secular purpose” was not sufficient to avoid conflict with the Establishment Clause. It found: “[The] pre- eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.” Moreover, in the court’s opinion the posting of such a religious text on the classroom walls did not serve an appropriate educational function.

The Supreme Court in *Lynch v. Donnelly* (1984) distinguished its ratio from the one developed in *Stone*. The case facts in Lynch concerned the city of Pawtucket, which annually erected a Christian display in a park owned by a nonprofit organization and located in the heart of the city’s shopping district. The display additionally included such objects as a Santa Claus house, a

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543 U.S. CONST. AMEND. I.
546 Id.
Christmas tree, or a crèche or nativity scene. The plaintiffs brought an action in the Federal District Court, challenging the inclusion of the crèche in the display on the ground that it violated the Establishment Clause of the First Amendment. The court upheld the challenge and permanently enjoined the city from including the crèche in the display. The Court of Appeals later affirmed. However, the Supreme Court reversed as a result of its pondering over the meaning and necessary effect of Thomas Jefferson’s “wall of separation.” The justices drew the inference that it was not a wholly accurate description of the practical aspects of the relationship between church and state. Judge Burger, writing for the court, stated: “No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. It has never been thought either possible or desirable to enforce a regime of total separation.”

The court in the same decision emphasized that the US government actually subsidizes religion, for instance, by granting official holidays, or by prescribing references to the American religious heritage, such as displaying paintings predominantly inspired by one religious faith in the setting of publicly funded art galleries. Hence, in the court’s view the Establishment Clause erects a “blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship” instead of a “wall” in the strict sense. The judicial body made clear: “Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as “Christ’s Mass,” or the exhibition of literally hundreds of religious paintings in governmentally supported museums.” To the judicial body it would have been stilted overreaction if a single passive symbol of a particular historic religious event was rendered violative of the Establishment Clause.

A similar case involved a state government’s use of a seal, which bore a Latin cross and the Spanish motto: “With This We Conquer” (Con Esta Vencemos). The seal was displayed on county documents, stationery, motor vehicles, and the shoulder patches of sheriff’s department officers. In Friedman v. Board of County Commissioners of Bernalillo County (1985) the Court of Appeals reasoned: “The existence of a non-secular effect is to be judged by an objective standard, which looks only to the reaction of the average receiver of the government communication or average observer of the

548 Id. at 673.
549 Id. at 679.
550 Id. at 683.
government action. This contrasts with the subjective examination under the purpose test. If the challenged practice is likely to be interpreted as advancing religion, it has an impermissible effect and violates the Constitution, regardless of whether it actually is intended to do so. 551 In addition, the court held that the resulting advancement of religion “need not be material or tangible,” and “implicit symbolic benefit” was sufficient. 552 The judges held that the seal conveyed a strong impression to the average observer and that Christianity was being endorsed. So they reasoned on rehearing the case en banc that the Establishment Clause was violated.

Another important Supreme Court decision received less public support. Capitol Square Review and Advisory Board v. Pinette (1995) concerned Ohio law, which made the statehouse plaza in Columbus to a forum for discussion of public questions and for public activities. To use the square, a group had simply to fill out an official application form and meet several speech-neutral criteria. The government denied the application of the Ku Klux Klan to place an unattended cross on the square during the 1993 Christmas season on Establishment Clause grounds. The Klan filed suit. The District Court entered an injunction requiring issuance of the requested permit, and the government permitted the Klan to erect its cross. The Sixth Circuit affirmed the judgment, adding to a conflict as to whether a private, unattended display of a religious symbol in a public forum violates the Establishment Clause.

On certiorari Justice Scalia delivering the opinion of the Supreme Court. The Justice held that the cross as a religious display was to be regarded as a “private expression,” as opposed to a government expression, and highlighted the importance of its recognition by stating: “Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.” 553 Scalia emphasized in addition that free speech also protected religious proselytizing. The right to use government property for private expression depended upon whether the property was by law or tradition given the status of a public forum, or whether it was reserved for specific official uses only. If the former applied, a state’s right to limit protected expressive activities was sharply circumscribed. “It may impose reasonable, content-neutral time, place, and manner restrictions [...], but it may regulate expressive content only if such a restriction is necessary.

551 Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777, 781 (10th Cir. 1985), cert. denied 476 U.S. 1169, (1986).
552 Id.
and narrowly drawn, to serve a compelling state interest.” In casu, these strict standards applied because Capitol Square was found to be a genuinely public forum. It was the government’s policy to allow a broad range of speakers and other gatherings of people to conduct events on the square, and to allow a variety of unattended displays. To the justices it was clear that a “state may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.” Finally, the court decided on the above reasoning that the state must not bar the Klan’s cross from the square.

c. School Prayer and Moments of Silence

*Engel v. Vitale* (1962) involved the well known case in which school officials required students to pray before each class in the morning: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” Shortly after that practice was introduced, parents of ten pupils brought actions in a New York state court insisting that use of this official prayer in the public schools was contrary to constitutional law. The New York Court of Appeals sustained an order of the lower state court which had upheld the power of New York to use the Regents’ prayer as a part of the daily procedures of its public schools so long as the schools did not compel any pupil to join in the prayer over his or his parents’ objection. The Supreme Court granted certiorari to review that important decision.

Justice Black writing for the court found that: “By using its public school system to encourage recitation of the Regents’ prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.” To the court there was no doubt that New York’s program of daily classroom invocation of God’s blessings as prescribed in the Regents’ prayer was a religious activity, that is to say a “solemn avowal of divine faith and supplication for the blessings of the Almighty.” The constitutional prohibition against laws respecting an establishment of religion meant that it was no part of the business of government to compose official prayers for any group of the American people. Moreover, the court stated: “It is a matter of history that this very practice of establishing governmentally composed

554 *Id.* at 761.
555 *Id.* at 769.
557 *Id.*
prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.\textsuperscript{558} The Supreme Court reversed the decision of the Court of Appeals of New York by holding that school-organized classroom prayer violated the Establishment Clause because it was considered to be a religious exercise, whether or not it was conducted by teachers or by students, and whether or not it was voluntary.

\textit{Wallace v. Jaffree} (1985) presented the question of whether an Alabama statute authorizing public school teachers to hold a one-minute period of silence for “meditation or voluntary prayer” each day violated the Establishment Clause of the First Amendment. A father of children enrolled in the school sought an injunction and a declaratory judgment barring the maintenance of regular religious prayer services. The United States District Court found that this statute was intended to encourage religious activity, but held that it was constitutional because a state has the power to establish a state religion if it chooses to do so, and accordingly dismissed the challenge to that statute. The United States Court of Appeals reversed, holding that such statutes, though permissive in form, are nevertheless state involvement respecting an establishment of religion and are thus unconstitutional.

On appeal, the United States Supreme Court affirmed. Justice Stevens stated that a statute must have a secular legislative purpose, but the legislation was described by its sponsor, Senator Holmes, as an “effort to return voluntary prayer” to public schools.\textsuperscript{559} In addition, the same sponsor also confirmed that the statute inherently had no other purpose. So in the Supreme Court’s view, the state did not satisfy the requirement to present evidence of a statutory secular purpose. The court interpreted the voluntariness of the law as indicating that “the state intended to characterize prayer as a favored practice.”\textsuperscript{560} Justice Stevens stated: “The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority.”\textsuperscript{561} So the law was held unconstitutional despite the fact that the prayers were a voluntary activity.

The case of \textit{Brown v. Gilmore} (2001) was different. Legislation in the state of Virginia permitted school districts to have a moment of silence during the school day. The purpose of the legislation was to give students an opportunity for quiet reflection. The law said that “each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent

\textsuperscript{558} \textit{Ibid.} at 426.
\textsuperscript{560} \textit{Id.} at 60.
\textsuperscript{561} \textit{Id.} at 51.
activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.” The Virginia Board of Education adopted guidelines which said that teachers could not indicate their own views on whether students should use the time to pray or not to pray, and that neither the teacher nor any of the students could use the time to pray out loud. A legal challenge was brought on the theory that the statute’s inevitable effect, in light of its broad application to young, impressionable children, was to promote prayer. The United States Court of Appeals held that the practice did not violate the Establishment Clause. To the judges “quiet reflection” had a secular purpose, and the fact that “students could use the time to think about any religious or secular subject” was not considered as endorsement of religion. So in the opinion of the judicial body the government did not become entangled with religion. As a consequence the plaintiffs applied to the Supreme Court. Justice Rehnquist distinguished Brown from Wallace by the fact that the state was able to demonstrate a secular purpose (quiet reflection), and there was no claim that Virginia teachers had done anything to encourage students to pray during the moment of silence.

d. Concluding Remarks

From the above judicial reasoning it can be concluded that religious symbols are in most instances specific “objects.” To a limited extent, however, they can also refer to a “symbolic religious activity,” as the resulting advancement of religion need not be material or tangible; implicit symbolic benefit will do. Moreover, in the view of American courts, symbolic representation can have a dual purpose, namely both secular and religious at once. Pivotal in the US system is the legal exploration of whether, from an objective point of view, a religious thing can be said to be so proximate to government that it constitutes entanglement with the religion it represents. This is because government must not be identifiable with a religious symbol. However, the Establishment Clause does not require that the public sphere be insulated from all things which have religious significance or origin. State

563 “The silence is designed to be undirected and unthreatening; it is designed to compromise no student’s belief or nonbelief; and it is designed to exert no coercion except that of maintaining silence.” Id. at 276.
564 Id. at 274.
565 As expressly found in Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777, 781 (10th Cir. 1985), cert. denied 476 U.S. 1169, (1986).
support of one particular religion may still be constitutional. The US Supreme Court held that the Establishment Clause erects a “blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship” instead of a “wall” in the strict sense.\(^{567}\) This language may permit a certain religiousness, which would otherwise not pass. A symbol of a specific religion should still not receive full out favouritism. It can be suggested that courts need to recognize the inescapable tension between the objective of preventing unnecessary intrusion of either a religious community or the state upon the other, and the reality that total separation of the two is not possible.

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The socio-legal contours of Switzerland and the United States appear to be strikingly similar. In both countries, symbolic acknowledgments of religion can be seen as part of the nations’ identity and benevolence towards the religiousness of the people. The Swiss Federal Constitution’s invocatio dei or the American motto: “In God We Trust” appear to commemorate historical fact about the piety of the founding generation. Also these days, such theological symbolism is not seen as being inconsistent with state neutrality as long as it does not play concrete favourites. From this perspective it might not be surprising that the term “religion” was first interpreted as it was found in the West. The Swiss Federal Supreme Court saw, for instance, no reason why fortune-telling with an Asian origin should be a religious, rather than a therapeutic practice. Similarly, the United States Supreme Court held that religion necessarily related to “an individual’s belief in a relation to a ‘Supreme Being’.”

Unusual religions were willingly excluded from realm of Western fundamental law.

Today, the Swiss Federal Constitution refers to “conscience,” “belief,” “philosophical conviction,” and “religion.” The basic contract pays particular heed to the terms “belief and conscience,” but not necessarily to “religion.” This implies that terms are more broadly construed than in the past. So the word “religion” in the United States includes “all aspects of religious observance and practice, as well as belief.” Swiss interpretation has given “religion” a wide meaning also. It embraces “any relationship between humans and divinity or transcendence.” The official comment of the Swiss Federal Council points to the necessity that “religion” must be of “substantial, philosophical weight, and include an all-embracing philosophy.” Similarly, at least one higher American court applied a three-fold test to decide whether a subject matter was within the scope of religion. It held that religion addresses: “(1) fundamental and ultimate questions having to do with deep and imponderable matters; (2) is comprehensive in nature; consists of a belief-

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568 Though probably not to the same extent.
569 It is questionable whether political freedom can flourish without belief. Andreas Kley, “Und der Herrgott, Herr Bundespräsident?” Zivilreligion in den Neujahr ansprachen der schweizerischen Bundespräsidenten, in SCHWEIZERISCHES JAHRBUCH FÜR KIRCHENRECHT 15 (Dieter Kraus ed., vol. 12, Peter Lang 2007).
570 BGE 52 I 254, E. 1, p. 260.
572 SWISS CONST. ART. 15(1) AND (2).
574 BBI 149 I 1996 155.
575 BBI 149 I 1996 156.
system as opposed to an isolated teaching; and (3) can often be recognized by the presence of certain formal and external signs.\textsuperscript{576}

Public authorities of both countries agree that religion must not necessarily be tantamount to having a great number of adherents.\textsuperscript{577} And the US Supreme Court added in this regard “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”\textsuperscript{578} Both jurisdictions exclude mere “political, sociological, or philosophical views” from possessing the quality of religion.\textsuperscript{579} The US Supreme Court moreover makes clear that a “subjective evaluation and rejection of the contemporary secular values” cannot be regarded as religious exercise.\textsuperscript{580} In either country “conscience” is regarded as the inner sphere of human awareness. The Swiss Federal Court held that it would cover the “inner freedom of belief,” the right “not to believe and to change one’s religious conviction continuously.”\textsuperscript{581}

The symbolic representation of religion has also received ample interpretation. But in neither country does any concrete list exist which sets out what religious symbols constitute. In general terms it can be said that they do not necessarily refer to a specific “thing,” but can mean a religious “act,” or “expression” also. Thereby the advancement of religion “need not be material or tangible,” and “implicit symbolic benefit” is sufficient.\textsuperscript{582} Swiss courts regard crucifixes,\textsuperscript{583} crosses,\textsuperscript{584} religious garb (including headscarves),\textsuperscript{585} and minarets\textsuperscript{586} as religious symbols. US courts found that the display of a nativity scene,\textsuperscript{587} or a cross\textsuperscript{588} was symbolic and religious. In at least one decision a US court considered that a period of silence for meditation and voluntary

\textsuperscript{577} BBI 149 I 1996 156; Generally, Larson v. Valente, 456 U.S. 228 (1982).
\textsuperscript{581} BGE 123 I 296, E. 2b, p. 300.
\textsuperscript{582} Id.; also Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777, 781 (10th Cir. 1985), cert. denied 476 U.S. 1169, (1986).
\textsuperscript{583} BGE 116 I 252, E. 7, p. 262 f.
\textsuperscript{584} BGE 1P.149/2004, E. 2.1.
\textsuperscript{585} BGE 123 I 296, E. 2a, p. 300; BGE 134 I 49, Sachverhalt, p. 50; BGE 134 I 49, Sachverhalt, p. 50.
\textsuperscript{586} Administrative Court Decision of the Canton of Solothurn (VWBES.2006.293, E. 2b).
prayer was a symbolic religious activity.\textsuperscript{589} However, courts in Switzerland and the United States have recognized that they must generally not engage in religious interpretation.\textsuperscript{590} In cases where the circumstances are less evident, courts apply an objective evaluation, which looks at the reaction of the average person.\textsuperscript{591} In this respect, US courts refer to the conveyance of a “strong impression” to the average person that a specific religion is at stake.\textsuperscript{592} Swiss courts in the same regard say that its signalling effect must be “immediately visible” to others “indicating that a symbol belongs to a specific religion.”\textsuperscript{593} In cases where that objective standard yields no satisfactory results, courts in Switzerland and the United States can seek expert advice.\textsuperscript{594}

Whether symbols represent traditional or non-traditional religions, there are specific considerations as to why they can, or cannot be used in the public sphere. So for instance, the Swiss Supreme Court held that “actions, which might offend the religious sensitivities of pupils and parents,” are inappropriate in the school environment.\textsuperscript{595} Likewise, its American counterpart found a religious symbol like the Ten Commandments posted on schoolroom walls, or daily prayers, to be at variance with the prohibition on establishment of a religion.\textsuperscript{596} Crucifixes that were displayed in Swiss classrooms met the same fate. They were seen as breaching the concept of state neutrality.\textsuperscript{597} Teacher’s clothes that symbolize a specific religion are generally unconstitutional in the school environment.\textsuperscript{598} The Swiss court emphasized its concern that “the school might become a place of confrontation if teachers were allowed to express their strong beliefs by means of religious garb.”\textsuperscript{599} However, both Swiss and American justices have made clear that it was not desirable to enforce a general regime which does not permit religious sym-

\textsuperscript{591} BGE 123 I 296, E. 2a, p. 300; Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777, 781 (10th Cir. 1985), cert. denied 476 U.S. 1169, (1986).
\textsuperscript{592} Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777, 781-2 (10th Cir. 1985), cert. denied 476 U.S. 1169, (1986).
\textsuperscript{593} BGE 123 I 296, E. 2a, p. 300.
\textsuperscript{595} BGE 116 Ia 252, E. 6a, p. 261.
\textsuperscript{597} BGE 116 Ia 252, E. 6a, p. 261.
\textsuperscript{598} BGE 123 I 296, E. 2a, p. 300.
\textsuperscript{599} Id. at 305.
bols in the public sphere. The right to religious freedom does, according to the courts, include expressions in form and quality of symbolism. In America the right to use government property like a public square for private expression depends upon whether the property is given the status of a public forum by law or tradition, or whether, on the other hand, it is reserved for specific official uses only. If the former applies, a state’s right to limit protected expressive activities is sharply circumscribed. From all of this we can draw the following inferences. Firstly, it is not possible to answer all religious-freedom questions by simply analysing the constitutionality of allowable or disallowable use of religious symbols. Secondly, there needs to be further investigation of several aspects so that religious-freedom models can be effectively compared and contrasted. Lastly, it might be more important to find a logical and legitimate pattern as to how judges should methodologically come to their conclusions, than to draw some definite boundary around a term.

600 Id. at 300; and BGE 134 I 56, E. 5.2, p. 63; also Lynch v. Donnelly, 465 U.S. 668, 673 (1984).
602 For this reason, the Methodological Representation part will treat the issue in detail.
1.3 Proselytization

1.3.1 General Introduction and Overview

“Now the eleven disciples went to Galilee, to the mountain to which Jesus had directed them. When they saw him, they worshiped him; but some doubted. And Jesus came and said to them, ‘All authority in heaven and on earth has been given to me. Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything that I have commanded you. And remember, I am with you always, to the end of the age.’”

(Matthew, 28:16-20)

The Great Commission is seen as a biblical basis for a variety of activities relating to sharing religious faith with others. However, this type of exchange of belief is not always welcome when it turns into zealous or even aggressive proselytization. There must be limits to the exercise of people’s liberties, however sincere they might be. By way of illustration, imagine that Joe, a devout Jehovah’s Witness, knocks on the door of a total stranger at 4:00 on a Sunday afternoon. The son of the household answers, and at Joe’s request, calls his mother from the kitchen. His mother had previously been annoyed about having to go to the door to receive leaflets, particularly since this was not the first time she had been fetched to the door by a Witness. Joe shoves through the door so that his circular can be delivered. The mother cannot do much more than take it. She thinks that no one should be sent from door to door to tell her how to worship.

From the situation sketched, the question arises as to whether canvassers have a right to profess their religion freely, or whether they must necessarily play by certain rules even when such rules are not in accordance with their distinct faith. In this sense, we commence with a quick look at the two coun-

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tries’ socio-legal contours relevant to our investigation. Subsequently, the chapter tackles the issue of state-sponsored anti-proselytization campaigns as they have occurred in Switzerland. Then, it deals with American door-to-door religious canvassing. Proselytization on public ground is analysed and discussed also. Finally, the chapter demonstrates similarities and differences between Swiss and American proselytization laws.
1.3.2 Switzerland

1.3.2.1 Socio-Legal Contours

Preaching a sermon to an assembled group of people in order to proselytize for converts represents an age-old form of Christianity in Switzerland. In the 1520s, Protestants sought to extend their faith to mandated territories, while Catholic places recognized such an act as an open door to Protestant proselytization. Armed conflict between Protestant and Catholic cantons broke out after Catholics executed a captured Protestant preacher, Jacob Kaiser. The action was the culmination of a long dispute over religious policy in the mandated territories – areas jointly governed by the Confederacy as a whole and traditionally Catholic. But in those times, the act of converting Catholic peasants of the central valleys constituted a virtually impossible mission. New ideals rolled off these loyal alpine people like water off a duck’s back. Ever since, the inhabitants of cities like Zurich, Bern, Basel, and Geneva, or the people living in the Swiss north-eastern countryside, appear to have been more receptive to varying religious interpretations.

History shows, however, that foreign religious offshoots had it particularly hard to receive mainstream acceptance. The reputation of non-traditional or unusual religious groups declined sharply in 1995 when sixteen members of the Solar Temple committed mass suicide. It was later revealed that the destructive Order used insidious psychological methods to convince their members to kill themselves. Some people feared psychological and physical harm as a cause of fanatical religious teachings. Swiss parliamentarians were asked to generally clamp down on all potentially dangerous religious organizations, commonly referred to as “sects” (Sekten). The doctrine of vague-

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605 For a more complete list of unusual religious organizations, see Philipp Flammer, “Sekten:” der Wille zur neuen Gesellschaft zwischen Esoterik, Fundamentalismus und profanem Erfolgsstreben, in “SEKTEN,” PSYCHOGRUPPEN UND VEREINNAHMENDE BEWEGUNGEN 63 (infoSekta ed., NZN Buchverlag 2000).

606 In Switzerland the word “sect” or (Sekte) is often used to label an unusual religious group that allegedly uses unfair practices to gain new members, or is thought to do psychological or physical harm to its members, for instance, by way of awareness-changing methods. So the term sect in Switzerland is not used in its literal Latin meaning as “following” a path to salvation, but has a strong pejorative connotation. Which group is to be regarded as a “sect” instead of a schismatic organization, is highly disputed. For a detailed discussion on the issue MANUEL BRANDENBERG, SEKTENINFORMATION DURCH BEHÖRDERN 4 FF. (Schulthess 2002).
ness made the government refuse to take up undifferentiated policy considerations in late 1990s. Seeing the pain and trouble caused by the Solar Templars, many Swiss began to reject religious views that were not mainstream Catholic or Protestant. In the wake of that fatal Templar incident, religious organizations that were suspected of luring people into membership were legally targeted. One such organization was the Church of Scientology, whose expansion plans were hit hard in 1998. The canton of Basel-Stadt effectively banned the community from distributing religious information in publicly accessible places because of their alleged obstructive and aggressive canvassing methods. The prohibition was tailored neutrally and applied to all individuals regardless of belief. It was still clear that after the Templar incident the lawmaker intended to protect individuals from the clutches of fanatic organizations.

In spite of that, the situation of religious canvassers (including that of Scientologists) seems largely to have normalized today. Various unusual religious movements now appear to be socially tolerated and no longer at odds with the public at large. This might be especially so since overly zealous colporteurs realized that they would have to make compromises with the rest of Swiss society if they wanted to stay visible. Non-traditional religious organizations have also started to demand their part in political participation so as to make their causes heard. Activities of various religious communities give the impression that, in Switzerland, proselytization is on the increase again. Traditional churches are also attempting to recruit new members or stop existing ones from leaving. Hence, as the competition between various religious rivals is likely to increase, so will the importance of fair and religiously neutral regulation.

### 1.3.2.2 Anti-Proselytization Campaigns

607 Frédéric Burnand, *Swiss more fearful of Islam than Scientology*, swissinfo.ch, June 7, 2009.

608 The minaret ban can be seen as religious political success in the fight over religious territory. For more details Mathias Herren, *Freikirchen kommen auf den Geschmack der Politik*, NZZ Online, Mar. 6, 2010.

609 A new report shows that much needs to be done in order to combat the trend. It is reported that the Evangelical-Reformed Church would lose a third of its members by 2040 if nothing was done about it. SDA, *Näher mein Volk zu dir: Die reformierte Kirche Schweiz sucht Rezepte gegen den Mitgliederschwund*, NZZ Online, April 8, 2010. In 2009, posters made citizens aware of the Church’s benefits by stating: “8280 bedside visits,” “1720 children and young people in recreation camps,” “509 baptisms, confirmations and weddings.” Mathias Herren, *“Mrs. Eintritt” wirbt für die Kirche*, NZZ Online, April 19, 2009.
a. Introduction

Article 15 of the Federal Constitution holds, on the one hand, that all persons have a right to profess their religion alone or in community with others, and on the other, that no one must be forced to join or belong to a religious community, or to participate in a religious act, or to follow religious teachings. To put it another way, Swiss law protects citizens from unwarranted acts of religious coercion. This state duty refers to a positive step the government must take in order to ensure that people are safe from harm caused by religious communities. The question that arises is how far the public authorities are allowed to interfere with practices such as religious canvassing without breaching the fundamental rights of third parties. So for instance, in 1991 infoSekta was launched as a special project to guarantee citizens’ well-being. At its initiation the Executive Council of the canton of Zurich granted the project financial aid for the formation of an association organized under private law. In addition, infoSekta received financial support and expert advice from the public-law recognized entities of the Evangelical Reformed and the Roman Catholic Church. Since then the NGO has continued to offer information, advice and counselling regarding religious sects. The project intends to protect people from group control mechanisms and awareness-changing methods that are used to bring religious followers under control. The programme was challenged by Scientology in 1992 on grounds that it breached constitutional law.

b. State Sponsorship under Review

Scientology claimed that the ulterior motive behind infoSekta was not the prevention of harm, but to halt the rapid decline in membership numbers of the two established churches. Because infoSekta received public subsidies, Scientology argued further that the project possessed a public character and was therefore at variance with the doctrine of state neutrality. In 1992 the Federal Supreme Court responded to these allegations in the infoSekta decision. The judges held that religious freedom protects the individual, and

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610 SWISS CONST. ART. 15 (2) AND (4).


612 A psychiatric standpoint on why the prevention of dangerous organizations is needed. Norbert Nedopil, Risiken von Sektenzugehörigkeit aus psychiatrischer Sicht, in SEKTEN UND OKKULTISMUS, KRIMINOLOGISCHE ASPEKTE 297 (Marco Borghi et al. eds., Verlag Rüegger 1996).
religious communities, first and foremost from illegitimate state intervention. In the case of infoSekta, the court said that the state did not transfer a public function to a private organization by way of contract or legal prescription. In the view of the judicial body, infoSekta could not therefore be classified as a quasi-state institution. State backing of infoSekta’s activities did not change that finding. To the judges, public support could be unconstitutional only if a canton took sides with a private organization that was in dispute in matters of truth. Public money must not be used in controversies over religious authority or dogma, the court found. In the justices’ opinion, Zurich did not violate the doctrine of neutrality because infoSekta was an independent and non-denominational organization and could not be regarded as a manipulative tool, either of the state or of the two official churches. The main reason for this finding was that infoSekta employed primarily secular individuals from various professions (such as psychologists, social workers, and jurists) and was only occasionally supported by advice from members of the established churches. Moreover, the highest court of the country said: “Basically, the right to freedom of belief and conscience does not provide a right be spared from confrontations with other religious or philosophical views, or from criticism about one’s own religious conception by other private persons. Since religious freedom encompasses, among other things, the right to advertise a particular religion in order to win new adherents, that is to say, to entice them away from other beliefs, it must logically include the permission to utter criticism of other’s religious perceptions.” Consequently, the court disagreed with Scientology’s unfair competition claim.

c. Concluding Remarks

The Swiss concept of religious freedom includes not only the negative obligation to refrain from interfering in religious exercise, but also the positive duty to protect people from the violation of their fundamental rights. Government acts in constitutional compliance if it sponsors the uncovering of unlawful treatment such as manipulation, group pressure, or awareness-

613 BGE 118 Ia 46, E. 4c, p. 56.
614 Id. at 58.
615 “Die Glaubens- und Gewissensfreiheit gibt grundsätzlich keinen Anspruch darauf, von Konfrontationen mit anderen religiösen oder weltanschaulichen Ansichten oder von Kritik an der eigenen Glaubensauffassung durch andere Private verschont zu bleiben. Da die Religionsfreiheit u.a. das Recht enthält, für eine bestimmte Religion zu werben, um neue Anhänger zu gewinnen bzw. solche einem andern Glauben abzuwerben, muss sie folgerichtig auch die Befugnis zur Kritik an andern Glaubensauffassungen in sich schliessen.” Id. at 56.
changing methods.\textsuperscript{616} A government that sponsors NGOs to give advice about potentially dangerous religious organizations should – contrary to the above-mentioned infoSekta decision – be held accountable for it.\textsuperscript{617} It is recommended that public authorities strike a reasonable balance between the prevention of harm and religious freedom. This could mean that the state regularly oversees private institutions in their fight against harmful religious organizations and makes it fully transparent which private institutions benefit from public support. Organizations like infoSekta must not inform and give advice in matters of truth, unless it is undisputedly clear that the matter at issue is causing psychological or physical harm.

1.3.2.3 Proselytization on Public Ground

\textit{a. Introduction}

As already mentioned, people do have a right to profess their religion, alone or in community with others, in the form and quality of active proselytization. Freedom rights of canvassers and persons canvassed might clash, because not everyone wishes to face religious propaganda. Missionaries have more trouble than the average religious believer in accepting the fact that adherents of other faiths and philosophical persuasions do not share her or his religious belief. A reason for this is the conviction that bearing witness to one’s faith is a religious duty, rather than a matter of choice.\textsuperscript{618} The law must find a dividing line between methods which are constitutionally permissible and those which are not. The conflicting religious or non-religious sensitivities of the other participants in society are worthy of protection. In this sense, it is pivotal how a canvasser convinces, entices, or converts an individual. So far, there have been very few cases in this area of law. The following situation involves a single case in which Scientology challenged a law banning their colporteurs from Basel’s inner city area.

\textit{b. Sidewalks, Streets, and Parks}


\textsuperscript{617} MANUEL BRANDENBERG, \textit{SEKTENINFORMATION DURCH BEHÖRDEN} 87 (Schulthess 2002).

\textsuperscript{618} Matthew, 28:16-20.
The legislative Grand Chamber of the canton of Basel-Stadt transferred in 1996 to the Executive Council a motion for the protection of consumers. The legislative body was especially concerned about the practices applied by Scientology canvassers, and demanded that the executive drafted an offence which prohibited “persons of obvious and proven sectarian behaviour from recruiting new adherents on public ground by way of aggressive, suggestive, and inconsiderate methods.” In 1998 the Grand Chamber of Basel-Stadt implemented Paragraph 23a into the Summary Offences Act of 1978. The 1998 offence reads: “By virtue of this Act whosoever by deceptive or unfair practices recruits or tries to recruit passers-by on the Allmend [a district of Basel] shall be criminally liable. The police are empowered to ban access to specific places or generally to expel recruiters if there is sufficient indication that their recruiting is unlawful, especially if deceptive or else unfair practices are adopted, or passers-by are unduly harassed.”

Scientology, which considered itself unconstitutionally targeted, brought a case against the Act based on its right to religious freedom. The Federal Supreme Court in its Konsumentenschutz decision of 1999 held that it was undisputed that general dissemination of religious information was encompassed by the scope of the right. However, the court also made it clear that religious freedom did not protect recruitment activities under the guise of religion, where in reality the objectives pursued are purely financial, or socially harmful; religious freedom would similarly protect the liberties of passers-by, namely, the right to belong to a different religious community. The justices found some recruitment and service-selling methods of Scientology questionable, and in the particular instance even fraudulent.

Moreover, because the Church of Scientology’s members would have difficulties in leaving the institution, the introduction of a special but generally applicable offence was a legitimate aim to protect state citizens, the judicial body found.

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621 BGE 125 I 369, E. 5c, p. 379.

622 Id. at 384.
with public interest considerations if the canton aspires to prevent deceptive and unfair practices when recruiting activities by Scientologists or other groups employing similar techniques are actually taking place on the Allmend." However, the court also referred to the requirement of pressing public interests for any encroachment on the right to proselytize. It held that such a requirement was satisfied by state-protected police interests like public peace, order, safety, health, morals and the concept of good faith in business relations. The justices came to the conclusion that the challenged norm could be read and given effect in compliance with religious-freedom guarantees.

c. Concluding Remarks

Today there is little dispute as to whether unlawful, deceptive or unfair recruiting should be banned. The right to convince one’s neighbour must not be exercised in such a way that it impairs the authority of a lawful and effective government, interferes with the administration of justice, causes offence, invades someone’s privacy, or causes a reduction in public order. People are free to do or omit anything other than what is prohibited by law. It is the legitimate concern of every lawmaker to protect citizens from detrimental practices. It is still necessary for norms to be tailored neutrally and of general applicability. This can mean that limitations apply as much to secular product-promoters as they apply to religious canvassers.

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623 "Bei dieser Sachlage entspricht es einem öffentlichen Interesse, wenn der Kanton auf der Allmend schon bei der Anwerbung durch Scientologen oder durch andere Gruppierungen, die gleich vorgehen sollten, täuschende und unlautere Praktiken unterbinden will." BGE 125 I 369, E. 7a, p. 384.

624 Id. at 383.
1.3.3 United States

1.3.3.1 Socio-Legal Contours

Hostile acts between rival religious factions are as old as the United States itself. Whether Baptists, Antinomians, Quakers, Anabaptists, or Presbyterians, all have found themselves summoned, arrested and imprisoned for the offence of proselytization in one or more instances of American history. The adoption of the now famous Virginia Declaration of 1776 brought some easement to this obnoxious situation, but no actual end to it. Years later, Jehovah’s Witnesses were still being prosecuted for distributing, or selling their literature without a license during World War I.\textsuperscript{625} Not until the 1930s were such prosecutions stopped as the Supreme Court invalidated ordinances on the grounds that they unconstitutionally abridged the Witnesses’ freedom of speech and the freedom of press. Free exercise standards did not begin to emerge before about 1940.

Until that time, Jehovah’s Witnesses were regarded as a militant and unpopular faith with a fanatical zeal.\textsuperscript{626} To them befell the burden of testing the constitutional guarantees of religious freedom. The Witnesses’ victory was largely the work of the American Civil Liberties Union (then called the American Liberties Union), which had come to the Witnesses’ assistance.\textsuperscript{627} Justice Murthy in his dissenting opinion in \textit{Prince v. Massachusetts} (1944) wrote: “No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs.”\textsuperscript{628} But the right to practise religion in unconventional ways was far from secure.

Since then, the Supreme Court has asserted federal law protecting freedom of thought and religion.\textsuperscript{629} The instrumental approach to the First Amend-

\textsuperscript{625} Rutherford and six other defendants were sentenced to twenty years in the federal penitentiary for his book and advice. Rutherford v. United States, 258 F. 855, 865 (2d Cir. 1919). Other Jehovah’s Witnesses received long prison sentences for distributing \textit{The Finished Mystery}. Stephens v. United States, 261 F. 590 (9th Cir. 1919).


\textsuperscript{627} JOHN T. NOONAN, JR. \& EDWARD McGLYNN GAFFNEY, JR., \textit{RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT} 351 (Foundation Press 2001).


\textsuperscript{629} MICHAEL S. ARIENS \& ROBERT A. DESTRO, \textit{RELIGIOUS LIBERTY IN A PLURALISTIC
ment has been the marketplace of ideals theory. It was given its classical American expression in the judicial writings of Justice Holmes: “But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” However, critics challenge the assumption that a marketplace of ideas will produce truth. Nonetheless, and as we will now see, this concept has won the most favour with the courts.

1.3.3.2 Door-To-Door Religious Canvassing

a. Introduction

Canvassers spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers. They take literally the mandate of the Scriptures and in doing so believe that they are obeying a commandment of God. As mentioned above, in the United States the distribution of religious tracts is an age-old form of missionary evangelism, – as old as the history of printing presses, – and it had been a potent force in various religious movements down through the years. The Supreme Court of the United States still questioned whether this form of religious activity should occupy the same high estate under the First Amendment as worshipping in the churches and preaching from the pulpits, and whether it should have the same claim to protection as the more orthodox and conventional exercises of religion. An answer to this question was given in the following ruling.

b. Distribution of Books and Pamphlets

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631 JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 7 (Thomson & West 2008).
Cantwell v. Connecticut (1940) involved three Jehovah’s Witnesses who were arrested and tried in New Haven by virtue of a Connecticut statute which prohibited the solicitation of services “for any alleged religious [...] cause, [...] unless such cause shall have been approved by the secretary of the public welfare council [...].” On the day of their arrest the Witnesses were engaged in going singly from house to house on Cassius Street in New Haven. They distributed books and pamphlets on religious subjects in return for money, or gave religious pamphlets away freely upon condition that they would be read. The Connecticut trial court sustained the convictions, and the Witnesses appealed.

To the Supreme Court of the United States, the constitutional inhibition of legislation on the subject of religion had a double aspect. “On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” The court qualified its holding by making clear that “nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct.” According to the justices, the state was likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience.

c. Concluding Remarks

Cantwell marked a turning point in that its ratio meant that a state must not unduly infringe the right to religious canvassing. The Supreme Court’s ruling did not, however, contain a blank cheque for unlimited actions. It held that it would be at the discretion of the legislators to frame laws which protected people from the danger of coercive activities of those who in their religious fervour would deprive others of their equal right to exercise their liberties. The crux of the matter was that government no longer had a perfect

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634 Id.
635 Id. at 304.
636 Id.
right to prohibit all open offences against the sentiments of others. The court held that, henceforth, public authorities must justify both the nature and degree of the burdens imposed on religious exercise. It also found that the essential characteristic of religious freedom was that opinion and belief can develop unmolested and unobstructed. Today, this legal shield is particularly necessary in American pluralist society, which is a melting pot of many beliefs, disbeliefs, cultural understandings, and races.

1.3.3.3 Proselytization on Public Ground

a. Introduction

The main difference between door-to-door religious canvassing and proselytization on public ground is that the former involves mainly activities exercised on private land, whereas the latter largely concerns the same or similar activities in the public domain, such as metro stations, airports, sidewalks, parks, or public squares. But here, too, the problems are the same. Many people find missionaries arrogant, ignorant, hypocritical, and meddlesome. For the American courts, the question that arose was whether this difference in place also meant a difference in the laws applicable to religious canvassing, and whether all public ground was equally subject to the law.

b. State Fairgrounds

_Heffron v. International Society for Krishna Consciousness, Inc._ (1981) involved circumstances in which the head of the Krishna Society’s temples filed suit against Minnesota officials because a state fair rule required “any person, group, or firm desiring to sell, exhibit, or distribute printed or written material within the state’s fairgrounds during the state fair to do so only from a fixed location.” The complainant asserted that the rule violated the First and Fourteenth Amendments to the United States Constitution by suppressing the practice of sankirtan, a religious ritual that enjoins the Society’s members to go into public places, to wander around, and to distribute or sell religious literature, and to solicit donations for the support of the Krishna religion. The state trial court upheld the constitutionality of the rule, but the Supreme Court of Minnesota reversed.

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On certiorari the United States Supreme Court reversed again, and re-
manded. Justice White, delivering the opinion of the court, stated: “the First
Amendment does not guarantee the right to communicate one’s views at all
times and places or in any manner that may be desired. As the Minnesota
Supreme Court recognized, the activities of ISKCON [International Society
for Krishna Consciousness, Inc.], like those of others protected by the First
Amendment, are subject to reasonable time, place, and manner restrictions.
We have often approved restrictions of that kind provided that they are justi-
fied without reference to the content of the regulated speech, that they serve
a significant governmental interest, and that in doing so they leave open
ample alternative channels for communication of the information.”

The requirement that solicitation was permissible only at an assigned location
was, in the opinion of the majority of the justices, a significant governmental
interest of maintaining orderly movement of the crowd, given the large
number of exhibitors and persons ordinarily attending a state fair. “A State’s
interest in protecting the ‘safety and convenience’ of persons using a public
forum is a valid governmental objective,” the body found.

c. Airports

Another case occurred in International Society for Krishna Consciousness v.
Lee (1992). Again, a Krishna religious group sought a declaratory judgment
that a regulation limiting distribution of literature and solicitation at an air-
port to areas outside the terminals violated their First Amendment rights, and
sought an injunction preventing the respondent police superintendent from
enforcing the regulation. The lower court granted the petitioner’s motion as
to distribution of literature, but denied it as to solicitation. The United States
Supreme Court affirmed. In an opinion by Justice Rehnquist, it was held that
for the purposes of the First Amendment’s free speech guarantee, an airport
terminal operated by a public authority was a “nonpublic forum.” Given
that airport terminals had not immemorially been held in the public trust and
used for purposes of expressive activity “it is only ‘in recent years [that] it
has become a common practice for various religious and nonprofit organiza-

638 Emphasis in brackets added by the author. Id. at 647-8. The Court reasoned that the
society was not being prevented from conducting any desired activity anywhere
outside the fairgrounds, nor being excluded from the fairgrounds, and not being de-
nied the right to mingle with the crowd and orally propagate its views or to arrange
for a booth and distribute and sell literature and solicit funds from that location on
the fairgrounds. Id. at 655.
639 Id. at 650.
tions to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities.”641 What is striking is that the court held that “face-to-face solicitation presents risks of duress that are an appropriate target of regulation.”642 The inconveniences to passengers and the burdens on Port Authority officials flowing from solicitation activity “may seem small, but viewed against the fact that ‘pedestrian congestion is one of the greatest problems facing the three terminals,’ the Port Authority could ‘reasonably worry that even such incremental effects would prove quite disruptive.’”643

d. Sidewalks, Streets and Parks

It was not just in International Society for Krishna Consciousness that the judicial definition of a “traditional” as opposed to a “non-traditional” public forum was pivotal to the decision-making process. Long before, in Hague v. Committee for Industrial Organization (1939), the Supreme Court held that religious exercise conducted on non-traditional public fora receive somewhat less constitutional protection than equal or similar exercise on traditional public fora. Justice Roberts concluded that individuals have a right to use “streets and parks for communication of views,” reasoned that such a right flowed from the fact that “streets and parks [...] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”644 In Marsh v. Alabama (1946) the Supreme Court of the United States ruled that, even where a company owned a whole town, it could not assert its private property interests in such a way as to restrict the “fundamental libert[y]” of a Witness to use the sidewalks of a downtown block in this town to distribute religious literature.645 Similarly, in Niemotko v. Maryland (1951) and Poulos v. New Hampshire (1953) the Su-

641 The Justices were of the view that Airport terminals were not intentionally opened by their operators to such activity, and although many airports had expanded their function beyond merely contributing to efficient air travel, such terminals did not have as a principal purpose the promotion of free exchange of ideas. They had not as “‘immemorially [...] time out of mind’ been held in the public trust and used for purposes of expressive activity.”Id. at 680-3.
643 Id. at 685.
preme Court held that religious groups were entitled to use city streets and parks for meetings and rallies.  646

e. Residential Areas, Court Grounds, and Others

In Frisby v. Schultz (1988), the Supreme Court held that a residential street was also a traditional public forum.  647 Other cases provide additional guidance on the characteristics of a public forum. In Cornelius v. NAACP Legal Defense and Educational Fund, Inc., (1985) the Supreme Court noted that a traditional public forum is property that has as “a principal purpose [...] the free exchange of ideas.”  648 Moreover, the court held that government “has power to preserve the property under its control for the use to which it is lawfully dedicated.”  649 In United States v. Grace (1983) the highest court of the country reversed a conviction prohibiting expressive activity “in the Supreme Court Buildings or grounds.” The court invalidated the application of the statute to a woman carrying a sign displaying the text of the first amendment on the sidewalks which “by long tradition or by government fiat have been devoted to assembly and debate.”  650

The government does not, however, create a public forum by inaction. Nor is a public forum created “whenever members of the public are permitted freely to visit a place owned or operated by the Government.”  651 The decision to create a public forum must instead be made “by intentionally opening a nontraditional forum for public discourse.”  652 As a consequence, in United States v. Kokinda (1990) the Supreme Court ruled that the sidewalk in front of a post office was not a “traditional public forum” for purposes of expressive activity.  653

f. Concluding Remarks

In any case, the answer to whether a particular vicinity is to be regarded as traditional or non-traditional public forum is an uncertain one. Some scholars are generally unsatisfied with the court’s attempt to overlay a distinction among fora. For instance, John T. Noonan and Edward McGlynn Gaffney raise concern especially with reference to the holding in *International Society for Krishna Consciousness*. Airports, they point out, are used for all sorts of speech, including political speech and commercial speech. “Candidates for political office often hold news conferences at airports. Business deals are frequently negotiated in the airports. And vendors of secular newspapers and magazines are given stalls to sell their goods. Does this raise a problem of equal access, even to a limited public forum?” they ask.

Among scholars there is concern over the question of whether people – by virtue of the above rulings – are sufficiently free to profess their religions in public places. In this respect, the American churchman Richard John Neuhaus coined the catchy phrase “the naked public square” to describe the rise of the ideology of secularism that would exclude recognizable religion and religiously grounded values from the conduct of public business. Neuhaus extended this metaphor to criticize the vacuum with respect to political and spiritual truth that is created once the religious voice is excluded from political discourse. He also says, “while social theorists might talk about ‘civil religion,’ the courts dare not do so, for that too would be an unconstitutional ‘establishment’ of religion.”

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656  *Id.* at 81.
1.3.4 The Two Models Compared and Contrasted

The constitutional right to proselytize for converts has a short history in both Switzerland and the United States of America. People were initially summoned, arrested and imprisoned for the offence of canvassing unorthodox beliefs. Free exercise standards did not begin to emerge before the 1940s in either country. Since then, it is has been recognized that Swiss and American government secures a just democratic society in which a multitude of incompatible and irreconcilable doctrines – religious, philosophical, and moral – can coexist. These include an adherent’s command to convince his or her neighbour by way of door-to-door religious canvassing or other forms of proselytization. This type of liberty has developed, in some American quarters, into a special kind of belief. People have expressed their conviction that a free market of ideas and ideals generates truth.  

To their minds, free trade in ideas is the best test of the competitiveness of veracity. John Stuart Mill provided the first rationale for protecting the marketplace of ideas against censorship, which still endures: “If the opinion is right, [humanity is] deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.” However, in Switzerland, state abstention from interference in rivalling beliefs and competition for new members is hardly seen as a truth-seeking function, but “simply” part of people’s fundamental liberty of choice between various belief-systems.

Courts on both sides of the Atlantic are unanimous that proselytization, however fruitful it might be, cannot be unlimited. According to both Swiss and US law, religious freedom “does not guarantee the right to communicate

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657 Most prominently discussed by Justice Holmes in Abrams v. United States, 250 U.S. 616, 634 (1919). American critics question the assumption of the marketplace advocates that there is an objective category of truth or that truth is necessarily the highest value at stake in the battle of ideas. Steven D. Smith argues that efforts to find a principle of religious freedom in the “original meaning” are fruitless because the clauses were purely jurisdictional in nature. Generally STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (Oxford University Press 1995). However, William Dean finds that theology needs a new form, one that will make American religious empiricism into a faithful historicism, a continual reinterpretation of the religious past. Generally WILLIAM DEAN, AMERICAN RELIGIOUS EMPIRICISM (State University of New York Press 1986).


659 BGE 118 Ia 46, E. 4c, p. 56.
one’s views at all times and places or in any manner that may be desired.\textsuperscript{660} The Swiss Federal Constitution makes clear that persons have a right to profess their religion alone or in community with others, but that no person must be forced to join or belong to a religious community, or to participate in a religious act, or to follow religious teachings.\textsuperscript{661} Swiss courts have also decided that “persons of obvious and proven sectarian behaviour” must be prohibited “from recruiting new adherents by way of aggressive, suggestive, and inconsiderate methods on public grounds.”\textsuperscript{662} Police are empowered to “ban access to specific places or to generally expel recruiters if there is sufficient indication that their methods are unlawful, especially deceptive or else unfair practices are adopted, or passers-by are unduly harassed.”\textsuperscript{663}

People in both countries are subject to reasonable time, place, and manner restrictions. However, in Switzerland and the United States, restrictions of that kind must not make reference to the content of regulated speech, must serve a significant governmental interest, and must leave open ample alternative channels for communication of information.\textsuperscript{664} A significant or pressing governmental interest can be the maintenance of orderly movement of the crowd, given that there are a large number of persons. The state has an interest in “protecting the ‘safety and convenience’ of persons using public ground.”\textsuperscript{665} To the American courts, pedestrian congestion is “one of the greatest problems facing freedom of religious solicitation.”\textsuperscript{666} From a methodological perspective it is interesting that US courts distinguish between places that are regarded as a “public forum” and those which are seen as a “non-public forum.”\textsuperscript{667} A public forum is a place that has “immemorially been held in public trust and used for purposes of expressive activity.”\textsuperscript{668} Non-public fora receive somewhat less constitutional protection than equal or similar exercise on public fora. This differentiation flows from the fact that some places have always been used for assembly, communicating thoughts between citizens, and discussing public questions.\textsuperscript{669}

\textsuperscript{660} Swiss Const. art. 15(2) in conjunction with (4); Heffron v. International Society for Krishna Consciouness, Inc., 452 U.S. 640, 647-8 (1981).

\textsuperscript{661} Swiss Const. art. 15(2) in conjunction with (4).

\textsuperscript{662} BGE 125 I 369, Sachverhalt, p. 370.

\textsuperscript{663} Id. at 384.


\textsuperscript{665} Id. at 383; Id. at 650.


\textsuperscript{667} Id. at 680.

\textsuperscript{668} Id.; also Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 (1985).

The Swiss Federal Court is convinced that state-sponsored campaigns, which offer information, advice and counselling about dangerous sects are not at variance with the principle of state neutrality.\textsuperscript{670} However, public support is unconstitutional if the state takes sides with a religious organization in matters of truth. The state is prohibited from backing a specific religious authority or dogma.\textsuperscript{671} The same court said: “Basically, the right to freedom of belief and conscience does not provide a right to be spared from confrontations with other religious or philosophical views […]”.\textsuperscript{672} In the United States this also applies to door-to-door encounters. According to the Supreme Court, distribution of religious tracts by this method is an age-old form of missionary evangelism, and enjoys the same claim to protection today as the more orthodox and conventional exercises of religion. However, the justices emphasized that “persons may not commit frauds upon the public under the cloak of religion.”\textsuperscript{673} And, that penal law available to punish such conduct would not be unconstitutional.\textsuperscript{674}

\textsuperscript{670} BGE 118 Ia 46, E. 4e/aa, p. 58.
\textsuperscript{671} Id.
\textsuperscript{672} Id. at 56.
\textsuperscript{673} Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).
\textsuperscript{674} Id.
1.4 Religious Objections to Public Education

1.4.1 General Introduction and Overview

“Children are often caught between the Scylla of obeying their parents’ religious teachings and the Charybdis of obeying the commands of their teachers and school authorities.”

(Judge Bownes)\textsuperscript{675}

Children may find themselves between conflicting interests because both the Swiss and the American educational system requires compulsory school attendance. It means that parents are not absolutely free to decide about their children’s education. Both countries have a compelling interest in teaching students so that they are prepared for life after school. Regardless of belief, parents possess no constitutional right to deprive their children of an education.\textsuperscript{676} If public elementary schools in Switzerland and in the United States have almost turned into battlegrounds of words on occasions, the most predominant catalyst has been the expectation that the state, and its public schools, should be neutral about religion.

To some, neutrality means that the state may not generally prefer one religion over others and may not prefer religion over non-religion. In addition to that, there seems to be a fairly great number of contestants who believe that the state should be able to give preferential treatment to the country’s traditional religions. Other critics appear to think that the state should be able to

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\textsuperscript{676} The second Sentence of Article 62(2) of the Federal Constitution holds: “Primary school education shall be mandatory and be managed or supervised by the state.” (Der Grundschulunterricht ist obligatorisch und untersteht staatlicher Leitung oder Aufsicht.) Federal Constitution of 1999 (Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999, SR 101). The U.S. Federal Supreme Court confirmed the compulsory nature of public elementary education, but accommodated the religious objections of the Amish by foregoing two additional years of compulsory education. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).
prefer Christianity as the traditional religion of Switzerland and the United States. But nowadays it seems safe to say that almost no one believes neutral constitutions should allow one version of Christianity to be preferred over all others. Despite this controversy, it looks as if virtually everyone agrees that certain indoctrinations by means of belief are unconstitutional. So the all-intriguing question that arises is where courts drop a reasonable line between the lawful and the unlawful references to, and preferences of, religion or non-religion.

It is useful to start exploring this question by looking at a particular set of topics chosen from some of the most contested school issues. They include objections to the secular curriculum, the attire of teachers and students, and other activities such as posting religious text on the schoolroom walls or holding Bible readings. In the pages that follow, the analysis will examine ways in which religion or non-religion touches the public school system, and what courts have stated about constitutional limits. A broader aim will be to discern how judicial decisions and opinions serve as subjects for critical examination as well as setting the parameters for what now counts as constitutionally permissible. Because varying legal cultures exist, the Swiss and American systems will be dealt with separately. At the comparative stage this initial analysis will help to carve out country-specific similarities and differences. The following does not address all cases or case interpretations that might be available, but captures some of the most representative examples only. Before embarking on this legal adventure, it will first be necessary to state the relevant socio-legal contours for each country.

677 The argumentative construction of this paragraph is based upon the account of Kent Greenawalt in DOES GOD BELONG IN PUBLIC SCHOOLS? 3 (Princeton University Press 2005).
1.4.2 Switzerland

1.4.2.1 Socio-Legal Contours

Swiss churches were for several centuries the only recognized institutions to provide public elementary education.\textsuperscript{678} This confessionally determined school system was taken out of religious hands, by virtue of the Federal Constitution of 1874, and transformed into a full-fledged secular system.\textsuperscript{679} Since then, “public elementary schooling” (called the \textit{Volksschule}) concerns the first nine to eleven years of a child’s formal education, often encompassing primary and secondary school.\textsuperscript{680} Rules regulating various aspects of education are not a discrete branch of law. Education law refers rather to a collection of several established legal branches like constitutional law, administrative law, and the laws of contract and tort.\textsuperscript{681} Switzerland has adopted a decentralized school system, which means that educational powers are to a great extent reserved to the cantons or municipalities, as well as individual schools.\textsuperscript{682} Parents are free to send their children either to public or to private schools and can largely decide about the religious upbringing of their child.\textsuperscript{683} Pupils are not seen as reaching religious maturity until the age of sixteen.\textsuperscript{684} In all the cantons of Switzerland, state funding of private schools is rare.\textsuperscript{685} This can mean that a student who is not particularly happy with a local school – for instance, because the school curriculum conflicts with her beliefs – must unequivocally come to terms with the services of-

\textsuperscript{678} \textsc{Benedikt Weissenrieder, \textit{Die Schulhoheit, Grundlagen und Ausgestaltungsf"ormen des Sta"altlichen Schulrechts} 163 (Universit"atsverlag Freiburg 1953).}
\textsuperscript{679} \textsc{Herbert Plotke, \textit{Schweizerisches Schulrecht} 13 (2nd edn, Haupt Verlag 2003).}
\textsuperscript{681} \textsc{Herbert Plotke, \textit{Schweizerisches Schulrecht} 53 (2nd edn, Haupt Verlag 2003).}
\textsuperscript{682} \textsc{Swiss Const. Art. 62(1).}
\textsuperscript{683} \textsc{Schweizerisches Zivilgesetzbuch [Federal Civil Code] of December 12, 1907, SR 210, art. 303(1).}
\textsuperscript{684} \textsc{BGE 41 434, E. 2, p. 435.}
\textsuperscript{685} But it is not completely absent. Although the citizens of the canton of Basel-Landschaft have voted against an initiative that proposed free school choice, a counter proposal of the government was accepted in late 2008. Under that proposal, parents who do not wish to send their children to a public school receive 2,500 CHF per child per year. The amended law has been in force since August 1 2009. Bildungsgesetz, ""Änderung [Cantonal Education Act of Basel-Landschaft] of September 11, 2008, Nr. 36.0873, para. 100(2)."
ffered by the public system, unless her parents possess sufficient funds to choose alternative education. Another cause for dispute is the recent influx of foreign workers and their children. Cantonal school systems struggle with rising numbers of immigrant students who lack a good command, or sometimes any grasp at all, of the language commonly spoken in the region. In the case of foreign nationals, cultural differences add to the difficulty of following the prescribed syllabus. For this reason, schools have set up special programmes to integrate students better into Swiss society.

1.4.2.2 Secular Curriculum

a. Introduction

Religious objections to the secular curriculum involve an impasse whereby state laws or actions conflict with the religious beliefs of students or their parents. The teaching of apparently secular subjects can raise issues of conscience. The question is whether the state should accommodate parental religious concerns This might be the case, for instance, where students are required to read historical texts that refer to a specific faith, or where mathematics are explained on the example of a religious calendar, or biology lessons are approached by means of Darwinian experiments. Despite great potential for dispute, objection to the secular curriculum is an area of conflict in law that has not generated many court rulings at federal and cantonal level so far. Nonetheless, the Federal Supreme Court has ruled twice in this matter. Both decisions are considered to be highly valuable because the court’s rationes decidendi not only tackled the actual case facts, but went well beyond that, by summarizing existing and by setting new basic standards. For this reason, the two leading decisions will be followed by a special comment.

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687 ETIENNE PIGUET, L’IMMIGRATION EN SUISSE 43 (Presses polytechnique et universitaires romandes 2004).
689 HERBERT PLOTKE, WER HAT RECHT? EIN SCHULRATGEBER FÜR DEN SCHULALLTAG 45 (Haupt Verlag 2004).
b. Swimming Lessons I

In 1991 a female student at a public primary school in Dietikon applied to the local school authority for an exemption on grounds that coeducational swimming lessons were prohibited by her faith. The local, district, and cantonal authorities all refused to accept her application because they held that such lessons were, regardless of religion, part and parcel of the cantonal compulsory school curriculum. As a consequence of this negative decision, the plaintiff student and her parent sought review. On appeal before the Federal Supreme Court the student alleged, inter alia, that her right to freedom of belief and conscience under Article 49 (now Article 15) of the Federal Constitution was violated.

In this so-called Schwimmunterricht I ruling (1993) the highest court of the country approached the allegations of the plaintiff’s claim by first considering the scope of the fundamental right in question. It held that religious freedom protected not only imperative religious commandments, but also daily conduct that was generally motivated by religion. The court acknowledged, however, that in view of the various ways in which people understand religion, it was inevitable for clashes of interest to occur. Some people would restrict their beliefs to a most personal, and merely cognitive sphere; others however, saw in religion the everyday obligation to act and interact in accordance with their faith, said the justices. So to the court, a commandment requiring the student not to engage in coeducational swimming lessons is covered under the fundamental right to religious freedom. It held that religious freedom must not be construed in such a way as to render civic duties, such as compulsory school courses, ineffective. Although civic duties take priority in many ways over religious commandments, the court also stipulated that the proportionality requirement is not satisfied in the event that the state enforced civic duties unconditionally. In the situation of conflict between a religious commandment and a civic duty, a “pressing public interest” (dringendes öffentliches Interesse) is required for the latter to prevail.

Turning its attention to the actual case facts, the court stated that the obligation to attend elementary education courses guaranteed adequate basic education to all children, and that the motive behind compulsory swimming lessons was to prevent drowning cases in a country of numerous rivers and lakes. The judges explained that public schools rendered school services not in their own interest, but for the “welfare of children” (das Wohlergehen der Kinder). To the body, this also explained why the attendance of certain

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691 BGE 119 Ia 178, E. 4c, p. 184.
692 Id. at 190.
Analytical Representation

courses was compulsory in spite of religion. However, the judges reiterated that the interference with fundamental rights was legitimate only if the religious commandments at issue threatened the welfare of a child in a “concrete and decisive manner” (konkret und in massgeblicher Weise). As to the meaning of a “concrete and decisive” threat, the court held that such existed where the health of the child was in jeopardy, or where equality of opportunities, or equality between genders could no longer be guaranteed.\(^{693}\) The court also prescribed that: “Public schools need to embark from an all-embracing perspective while exercising their obligations. In matters of teaching and organization the school must adjust to the broadest possible common denominator, and ensure coherence by means of student groups and teaching. And yet the allowance of religious commandments of individual students – regardless of whether they are rooted in a Swiss traditional religious conviction, or in any other – finds its limitation at the point where the orderly and efficient school organization can no longer be maintained.”\(^{694}\)

The justices also said, “[...] religious conduct of one student must not lead to hurting the religious feelings of others.”\(^{695}\) In casu they reasoned that a swimming course exemption did not threaten the welfare of the student. Neither did it undermine the concept of equality between genders, nor was it evident that there could be an adverse effect on the student’s opportunities in the time after school.\(^{696}\) Further, the father of the student asserted that his daughter would take external swimming lessons if the exemption were permitted. For the court, this was sufficient evidence to drop the defendant authorities’ drowning or health argument. Finally, the court did not see how the school could face significant organizational difficulties, or a sharp decrease in its efficiency, if the student was excused from the course. So the Federal Supreme Court eventually approved the appeal in favour of the student.

c. Swimming Lessons II

\(^{693}\) Id. at 194 f.


\(^{695}\) “[...] es darf das religiös geprägte Verhalten nicht dazu führen, dass die anderen Schüler in ihren religiösen Gefühlen verletzt werden.” Id.

\(^{696}\) Id. at 195.
Only recently, in 2006, a very similar case occurred because the school council of Schaffhausen decided that coeducational swimming courses were mandatory for all children despite the Supreme Court’s *Schwimmunterricht* I ruling in 1993. Local, and cantonal public authorities turned the exemption request of two Tunisian Muslim boys down on grounds that the religious commandment concerned did not represent a central and widely accepted doctrine of faith, and the overwhelming public interest to integrate emigrants better into Swiss society demanded that students attended all school courses even if it caused friction with their faith. After being turned down, the two boys appealed to the country’s highest court.

In 2008 the Supreme Court made clear in *Schwimmunterricht* II that it reverses an earlier decision only provided that a new solution generated a better rationale. This could be necessary if external conditions changed or legal opinions developed. Otherwise, it was indispensable to maintain the current practice, the judicial body found. It held that the longer the practice was followed, the more compelling the developments must be. The justices tackled the two main arguments of the defendant authorities separately. On the question of whether the commandments represented a central and widely accepted doctrine of faith the court upheld the ratio of the 1993 ruling by stating: “The religiously neutral state cannot review the theological truth of religious doctrines; in particular, it cannot access their compliance with Holy Scriptures. The religiously neutral state is additionally barred from examining the significance of a religious rule, and from determining thereby its weight against general public interest considerations.” In the court’s opinion, the lower authorities ignored that concept “[…] when they judge a rule that bans coeducational swimming courses as of lower priority just because to the majority of the Muslims it does not represent a central command of their faith.” The Supreme Court acknowledged that this case was all about the circumstance where the father particularly disagreed with some of his fellow adherents in matters of belief, and that the test needed to be a subjective one. As a consequence, the lower authorities’ first argument failed before the Supreme Court.

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699 “[…] wenn sie dem Verbot des gleichgeschlechtlichen Schwimmens deshalb einen geringen Stellenwert einräumt, weil es für die Mehrheit der Muslime nicht zu den zentralen Forderungen ihres Glaubens gehört.” *Id.* at 4.4.
The justices then gave heed to the defendants’ allegation that an effective integration policy required a change in legal practice. The court applied a two level test in order to find out whether such a change was actually needed. In a first step it referred to available statistical immigration data, and in a second, held whether these data triggered the need for a policy change. The data revealed that the social and religious demography of Switzerland had changed significantly since the court’s last decision in 1993.\textsuperscript{700} Justices recognized that not only foreign nationals, but also Swiss citizens of Muslim faith were affected by the row. In spite of that, the court said that the great majority of the cases concerned immigrants, and that the fairly new multicultural school reality was not home-grown but a plain effect of migration.\textsuperscript{701} Hence, the majority of the judges were of the view that: “Schools require today more than ever before that efforts be made for the adaptation and involvement of children and youngsters from other cultures to the social conditions applicable here.”\textsuperscript{702}

Only by this measure could free and equal participation in economic, social and cultural life be guaranteed in a lasting way. Moreover, the judicial body saw the function of ensuring internal cohesion between all participants of Swiss society as one of its prime obligations. Such cohesion was necessary in order to uphold respect and common tolerance between the people, said the court. In this sense: “It can and must be expected from foreign nationals that they are ready to live side by side with the Swiss population, and that they accept the democratic principles and the rule of law of the Swiss legal system, as well as the local social and communal conditions, which the state is required to preserve even against culturally divergent demands.”\textsuperscript{703} The court expressed the view that a person who immigrates to another country must regularly come to terms with restrictions and changes in daily routine

\textsuperscript{700} In 1990 a total of 152,200 Muslims lived in Switzerland. Ten years later in 2000 they numbered roughly twice as many adherents, namely 310,800. 88.3 percent of all Muslims living in Switzerland were immigrants (56.4 percent from former Yugoslavia, and Kosovo; 20.2 percent from Turkey). Only a fraction of these, 3.9 percent, were Swiss citizens who had adhered to Islam since birth. In 2008 the number of Muslims living in Switzerland was estimated at about 400,000. Id. at 7.2.

\textsuperscript{701} \textit{Id.}

\textsuperscript{702} “Diese verlangt heute noch vermehrt als früher Anstrengungen zur Angewöhnung und Einbindung der Kinder und Jugendlichen aus anderen Kulturen in die hier geltenden gesellschaftlichen Rahmenbedingungen.” \textit{Id.}

\textsuperscript{703} “Von Ausländern darf und muss erwartet werden, dass sie zum Zusammenleben mit der einheimischen Bevölkerung bereit sind und die schweizerische Rechtsordnung mit ihren demokratischen und rechtsstaatlichen Grundsätzen - die der Staat auch gegenüber kulturell begründeten abweichenden Ansprüchen zu bewahren hat - sowie die hiesigen sozialen und gesellschaftlichen Gegebenheiten akzeptieren.” \textit{Id.}
and habits. At no time would that require the right to religious freedom to be abrogated. According to the court: “The subject in question is regularly not about the curbing of the core essences of fundamental rights, but regards, a fortiori, the collision between Swiss applicable laws and certain culturally or religiously entrenched norms of conduct that apply to the every day life of emigrants.”

Faith could not generally absolve from the obligation to fulfil civic duties. The majority of the justices opined also that the civic duty provision, which was formerly mentioned in the 1874 Federal Constitution, still applied today. “In the social integration process, public schools play a particularly important role. Their prime purpose is to provide basic education. This objective can be achieved only if the pupils are obliged to attend the compulsory school subjects and events. In return, the school must provide an environment that is open and proximate to the conditions of the Swiss society, and strictly adhere to the concept of ideological neutrality and laïcité.”

The court held further: “In this context and in view of the great importance of mandatory subjects, the schools can demand that their courses are compulsory, and they must not necessarily permit school exemptions that are based upon personal desires. This equally applies to exceptions that are granted in order that pupils can observe religious commandments that clash with the basic school curriculum.”

While balancing the two interests against each other, the court said that the appellants’ contention was that they must not be forced to see certain parts of the female body in the area from the navel down to the knees. It would be obvious that such forbidden glimpses cannot always be avoided during mixed-gender swimming lessons. The court was of the view, however, that similar circumstances applied for many areas of everyday life. There was no

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704 “Es geht dabei regelmässig nicht um den Kerngehalt dieses Grundrechts, sondern lediglich um Konflikte, die daraus entstehen können, dass gewisse kulturell-religiös verankerte, inhaltlich aber das Alltagsleben betreffende Verhaltensnormen mit den hier geltenden Regeln kollidieren.” Id.

705 “Im sozialen Einbindungsprozess kommt der Schule eine besonders wichtige Aufgabe zu (vgl. BBl 2002 3800 f.). Sie soll zunächst eine Grundbildung vermitteln. Dieses Ziel kann sie nur erreichen, wenn seitens der Schüler die Verpflichtung besteht, die obligatorischen Fächer und Veranstaltungen zu besuchen. Im Gegenzug muss die Schule ein ofenes, gesellschaftsübliches Umfeld bieten und den Geboten der weltanschaulichen Neutralität und der Laizität strikt nachleben.” Id.

706 “In diesem Rahmen darf die Schule angesichts der grossen Bedeutung des Pflichtangebots aber darauf bestehen, dass ihre Lehrveranstaltungen für alle obligatorisch sind und dass sie nicht für alle persönlichen Wünsche eine abweichende Sonderregelung vorsehen oder zulassen muss. Dies gilt auch für Ausnahmen zur Beachtung religiöser Gebote, die mit dem Schulprogramm kollidieren.” Id.
way to prevent the appellants from seeing precisely these body parts on a daily basis. This was because everywhere they go in Switzerland, they would be confronted with women and girls who did not cover their bodies entirely. “Cropped tops and short skirts are (also) part of the normal street scene in Switzerland.” So the court made clear that in everyday life, the claimants could not be spared from a confrontation with Swiss popular clothing styles at any time. This similarly applied to other European countries. “In all those countries, children encounter barely dressed human bodies of the opposite sex not only in the streets, but also by means of media images. They must learn to deal with it.”

So for the majority of the judges (in a two to three judgment), the defendant authorities’ public integration argument took priority over the right to freedom of belief and conscience under the Federal Constitution. “[...] Exceptions to this general rule are to be granted hesitantly. Physical education significantly serves the socialization of pupils. This purpose can be met only if all lessons are – as is common practice in Switzerland – held [...] coeducationally.” The court closed by stating: “The recognition of a right to exempt children of Muslim faith from swimming lessons collectively would run counter to the diverse efforts towards group integration. It would make it considerably more difficult for the children affected to adapt to the natural interaction with the opposite sex that is commonplace in Swiss society.”

d. Special Comment

The decision taken in Schwimmunterricht II (2008) was primarily one of policy rather than law. The Supreme Court already considered integration

707 “Bauchfreie Bekleidung und kurze Röcke gehören (auch) in der Schweiz zum üblichen Strassenbild.” Id.

708 “In all diesen Ländern werden Kinder nicht nur durch Begegnungen auf der Straße, sondern auch durch Abbildungen in den Medien mit knapp bekleideten menschlichen Körperrn des anderen Geschlechts konfrontiert und müssen damit umzugehen lernen.” Id.

709 “[...] allfällige Ausnahmen nur mit Zurückhaltung zu gewähren sind. Der Sportunterricht dient zudem in hohem Mass der Sozialisierung der Schüler. Diesen Zweck kann er nur erfüllen, wenn der Unterricht [...] in der Schweiz allgemein üblich, gemeinsam stattfindet.” Id. at. 7.2.

710 “Die Anerkennung eines Rechts, muslimische Kinder generell vom kollektiven Schwimmunterricht zu befreien, würde den vielfältigen Bestrebungen zur Integration dieser Bevölkerungsgruppe zuwiderlaufen. Namentlich würde damit den betroffenen Kindern erheblich erschwert, sich an das in der hiesigen Gesellschaft übliche natürliche Zusammensein mit dem anderen Geschlecht zu gewöhnen.” Id.
arguments in the 1993 ruling, but saw no need to follow them. The new ruling seems in line with adjusted expectations of the Swiss lawmaker.\textsuperscript{711} The 2005 Federal Act on Foreign Nationals stipulates: “It is necessary that foreign nationals deal with the social circumstances and living conditions of Switzerland [...].”\textsuperscript{712} Moreover, the same Act holds: “Integration should permit permanent and legal foreign nationals to participate in the economic, social, and cultural life of society.”\textsuperscript{713} So the question of whether the duty of compulsory schooling should override the right to religious freedom was not a purely legal, but primarily a policy consideration stipulated by the Foreign Nationals Act as amended in 2005.\textsuperscript{714}

The trouble with the second ruling is not its prima facie compliance with federal law. Its inherent flaw is that all school-aged boys must be treated in the same way. Justices in the 2008 ruling appear not to have pondered the general question of whether students could not be adequately integrated because of absence. To put this differently, it could be argued that a student who attends voluntary coeducational courses such as housework, handicraft, cooking, photography, typing, and computing is better integrated and prepared for life after school than a student who skips all those courses (because they are voluntary), but instead attends compulsory swimming lessons. The Federal Supreme Court has chosen a wrong approach because it left school boards no choice but to require all male students to attend swimming lessons regardless of their personal needs.\textsuperscript{715}

Moreover, the court’s integration argument does not rest on firm foundations due to the fact that by the year 2000, Switzerland’s registration offices already counted more than 36,000 Swiss nationals of Muslim faith.\textsuperscript{716} If integration means making “foreign nationals” tolerable to Swiss society, than it is difficult to see how this concept should apply to people who are already Swiss and who may have lived their entire life in the country. The Supreme Court’s line of reasoning is ambiguous because it contradicts its previously-

\textsuperscript{711} The Court expressly refereed to the policy of the federal Act on Foreign Nationals in its ruling. \textit{Id.}


\textsuperscript{713} “Die Integration soll längerfristig und rechtmässig anwesenden Ausländerinnen und Ausländern ermöglichen, am wirtschaftlichen, sozialen und kulturellen Leben der Gesellschaft teilzuhaben.” \textit{Id.} at 4(2).


\textsuperscript{715} The case is different as it regards girls. The Court made clear that exemptions may still be granted to girls. \textit{Id.}

\textsuperscript{716} Statistics as discussed in \textit{Id.}
developed religious accommodation approach. For instance, the court held that a Christian student should be allowed to observe the religious Feast of Tabernacles despite his absence for eight consecutive days each year.\footnote{BGE 114 Ia 129, E. 5b, p. 137.} Similarly, the same body decided to exempt a Jewish student from writing exams on Saturdays because of the student’s faith.\footnote{BGE 134 I 114, E. 6.6, p. 123.} It can, thus, be argued that under the doctrine of state neutrality and by means of the prohibition against discrimination, the new decision requires strict adaptation to mainstream ideals and practices regardless of religion. Whether the court intended to change its earlier practice from an accommodationist to a separationist approach is unclear. What is more certain, however, is that the court can no longer recognize the Swiss Muslim community under the auspices of the integration argument.

\section*{e. Concluding Remarks}

Although the 2008 \textit{Schwimmunterricht II} decision presents a legitimate step towards guaranteeing cultural harmony and social cohesion, public authorities including school boards should still be able to decide on a case-to-case basis whether it is appropriate to grant special exemptions. A general prohibition on school excusals appears illegitimate in the light of the fact that students do not get along better in everyday life if they per se attend all school courses. Boys and girls should be allowed not to attend certain school subjects that are at odds with their faith if the impact of their absence does not threaten their welfare, or obstruct orderly school operation. On the other hand, the public can expect its young generation to be interested in preserving social stability, justice, and the country’s unity. It follows that students have not only a right to develop their own personal identity, but a limited duty to pursue what is generally regarded as a meaningful life.

\subsection*{1.4.2.3 Attire}

\section*{a. Introduction}

Religious attire of teachers and students is regulated at the level of cantonal laws and practices. As far as can be seen, there are no uniforms in Swiss public schools whatsoever. This makes the differentiation between the al-
lowed and disallowed practices particularly interesting. In spite of that, this particular type of controversy is one that rarely seems to make it into Swiss courts. Disputes over the right to wear specific clothes are most often settled out of court by students, teachers, school boards and parents themselves. One often-cited Federal Supreme Court decision exists, which concerns religious care in the school environment. The following discussion will not only be devoted to that decision’s rationale, but will also state what the law can generally be expected to say in similar cases.

b. Teachers

In the Genevan vêtements religieux decision of 1997, a teacher who had converted from Catholicism to Islam wanted the Federal Supreme Court to regard her special garb, which covered all parts of the body except her face, as “for aesthetic reasons” (pour des raisons esthétiques). The teacher claimed that she possessed a constitutionally protected right to personal freedom. The justices were entirely unconvinced by her demand and held: “There is no doubt, a headscarf and loose-fitting clothing are not for aesthetic reasons but to follow a religious commandment.” To the court her Islamic cloak was a strong religious symbol because its signalling effect “is immediately visible to others, indicating that the person wearing it adheres to a specific religion.”

The justices then reiterated that the scope of religious freedom, in the form and quality of religious practices, generally covered the right to wear religious garb, by stipulating: “Practice guarantees that freedom of religion encompasses not just cults [...] and religious requirements, but also other expressions of religious life, provided that they are held within certain limits. Restrictions apply to the religious garb of individuals, and concern the dress requirements of Muslim women especially.”

So although the justices did not accept her claim under the fundamental right to personal freedom, they found that the wearing of her religious garb was

719 BGE 123 I 296, E. 2a, p. 299.
720 “[...] il ne fait aucun doute que la recourante porte le foulard et des vêtements amples non pas pour des raisons esthétiques mais afin d’obéir à une exigence religieuse [...]” BGE 123 I 296, E. 2a, p. 299.
721 “[...] un signe immédiatement visible pour les tiers, indiquant clairement que son porteur adhère à une religion déterminée.” Id. at 300.
722 “L’exercice garanti de cette religion ne comprend pas seulement les cultes [...] et les besoins religieux, mais aussi d’autres expressions de la vie religieuse, pour autant qu’elles se tiennent dans certaines limites, par exemple le port de vêtements religieux particuliers concernant précisément les prescriptions vestimentaires de la femme musulmane.” Id.
covered under Article 49 (now Article 15) of the Federal Constitution. The judicial body ruled, however, that it was likely that the religious feelings of pupils and their parents would be negatively affected by the teacher’s wearing of an Islamic cloak. Her religious expression was held to contradict the doctrine of state neutrality. The court said that the state in its positive obligation to obey religious neutrality would not only have to protect religious beliefs, but also, and especially, ensure religious harmony. It reasoned: “It should be noted that the school might become a place of confrontation if teachers were allowed to express their strong beliefs by means of religious garb.”

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\[...\) il faut relever que l’école risquerait de devenir un lieu d'affrontement religieux si les maîtres étaient autorisés par leur comportement, notamment leur habillement, à manifester fortement leurs convictions dans ce domaine.” Id. at 305 f.


c. Students

The freedom to wear religious clothing seems not to be treated in the same way in all cases. In the canton of Ticino, a school board prohibited a pupil from wearing an Islamic scarf at a public primary school. The decision was reversed by the Conference of Ministers of Public Education, which authorized all pupils to wear traditional or religious attire. According to the ministers they are free to wear whatever clothes did not unduly disrupt the educational process or interfere with the rights of other students. However, the ministers made it equally clear that children have no independent legal right to religious freedom in the intact and united family. What is meant by “independent” is separate from the parents’ religious liberty.

d. Concluding Remarks

Swiss courts have given cantonal and local lawmakers and authorities relatively wide discretion with regard to regulating teachers’ and students’ attire. From the above decision it can be concluded that the highest court of the country is rigorously protecting the religious neutrality of public elementary schools. Teacher must waive certain freedoms because they are regarded as agents of the state. This special status requires that their attire is not identifiable with a specific religion. However, in a cosmopolitan environment as found in cities like Geneva, Zurich, and Basel, where teachers and students
largely possess a multi-cultural and multi-religious background, it is difficult to see why teachers should not be able to live up to their personal identities as well. Arguably, a student who faces the realities of a religiously diverse society is better prepared to interact with, distinguish, and prefer one religion to another religion, or none. Which of the two policies is more reasonable for the child’s success in tomorrow’s pluralistic society is a matter for empirical sciences to investigate.

1.4.2.4 Religious Coercion

a. Introduction

Protection from unlawful religious actions is constitutionally guaranteed by Article 15(4) of the Federal Constitution, which holds: “No person shall be forced to […] participate in a religious act, or to follow religious teachings.” The provision partially qualifies the material irreducible core of the right to freedom of religion or belief. Because of this the protected guarantees under Paragraph 4 may not be vitiated in serious cases. The Federal Supreme Court held in this respect: “[s]chool curriculums, teachings or organization methods, which are determined by a specific faith, or which are hostile against a particular religious conviction, are unconstitutional.”

Questions of coercion have occurred in the following contexts.

b. Attaching a Crucifix

For instance, in the crocifisso decision (1990) the Federal Supreme Court had to decide whether crucifixes that were attached to the walls of every classroom breached the doctrine of state neutrality. The court said in its ratio decidendi: “actions which might offend the religious sensitivities of pupils and parents,” might not be state imposed.” It further held that it was “conceivable that those who attended the school will see in this symbol the will to follow concepts of the Christian religion in education, or the will to place teaching under the influence of that religion. Nor can it be excluded that

725 SWISS CONST. ART. 15(4).
726 “[…] Lehrinhalte und -methoden oder Organisationsformen, die konfessionell ausgerichtet oder religiösen Auffassungen feindlich sind, sind verfassungswidrig.” BGE 119 Ia 178, E. 1c, p. 180.
727 “[…] comportamenti suscettibili di offendere la sensibilità religiosa di allievi e genitori […].” BGE 116 Ia 252, E. 6a, p. 261.
some persons feel offended in their religious beliefs by the constant presence of a religious symbol which belongs to another religion.” Moreover, the court added, obiter dictum, that “the same case would probably be decided differently if we had to rule on the presence of a crucifix in a part of the school premises which is commonly used such as the lobby, corridors, or refectory.”

c. Classes on Religion

The subject of teaching specific values system is in Switzerland undergoing profound changes. At the time when Switzerland was predominantly a Christian country, school curriculums included either Protestant or Catholic religious teachings. Jews were generally exempt from such lessons. Some applicable cantonal Constitutions still mirror this historic understanding of public elementary education. Paragraph 2 of the Elementary School Act of Zurich, for instance, reads: “Elementary schooling educates a behaviour, which is based upon Christian, humanist and democratic values.” Similarly, the School Act of St. Gallen states that the school syllabus is determined by “Christian principles” (*christliche Grundsätze*). The social and legal cultures of most local municipalities were largely Catholic or Protestant in their origin and orientation, so it should not be surprising that some of regional statues still speak in explicitly Christian terms. However, these provisions are applicable at the level of declaration only. As a general rule the Fed-

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728 “È pertanto concepibile che chi frequenta la scuola pubblica veda nell’esposizione di tale simbolo la volontà di rifarsi a concezioni della religione cristiana in materia di insegnamento o quella di porre l’insegnamento sotto l’influsso di tale religione. Non è neppure escluso che alcune persone si sentano lese nelle loro convinzioni religiose dalla presenza costante nella scuola di un simbolo di una religione alla quale non appartengono.” Id. at 262 f.

729 “Il giudizio sarebbe forse stato diverso ove si fosse trattato di statuire sulla presenza del crocifisso nei locali scolastici adibiti ad uso comune, come ad esempio l’atrio, i corridoi, il refettorio o, evidentemente, dove esistano [...]” Id.

730 They might be representative examples that show that the cantonal Sovereign’s will is not always in tune with abstract federal constitutional law.

731 “Die Volksschule erzieht zu einem Verhalten, das sich an christlichen, humanistischen und demokratischen Wertvorstellungen orientiert.” Volksschulgesetz [Elementary School Act of the Canton of Zurich] of February 7 of 2005, Nr. 412.100, art. 3(1).

732 Id.

733 [Peter Karlen, *Das Grundrecht der Religionsfreiheit in der Schweiz* 387 (Schultess 1988); Benedikt Weissenrieder, *Die Schulhoheit, Grundlagen und Ausgestaltungsformen des staatlichen Schulrechts* 163 ff. (Universitätsverlag Freiburg 1953)].
eral Supreme Court made it crystal clear that religious teachings are lawful provided that students are free to attend such classes.\textsuperscript{734} Cantons, local authorities and even individual schools have all found their own ways to deal with the altered religious landscape. A thorough investigation of the 26 cantonal school systems is, however, beyond the scope of this thesis.\textsuperscript{735}

On general terms it can still be stated that the use of public school premises for religious teachings is, in many Swiss schools, a privilege enjoyed by public-law recognized religious communities.\textsuperscript{736} Practices were, and in some instances still are, such that a local priest or teacher gives lessons on religion for those students who attend these classes on a voluntary basis.\textsuperscript{737} Where too many students choose not to attend classes on religion, the state is required to provide alternative means of education.\textsuperscript{738} In recent years, schools have opted for a system that allows multiple religion classes, including the teaching of non-traditional faiths and value systems. An example of this is the canton of Zurich. In that region the school subject “about” religion is compulsory for all students who attend the public elementary school. Teachings no longer include a particular religion, but treat the world’s most significant religions and belief-systems that are relevant in Switzerland’s pluralistic society.\textsuperscript{739} It might also be important to state that school facilities are not usually used as public forum outside of the school day.\textsuperscript{740} Religious communities, youth groups, or political parties frequently possess their own private facilities. Outside of school-day use, though unusual, would not necessarily conflict with the doctrine of state neutrality as long as every community or none is allowed to enjoy such a privilege.\textsuperscript{741}

\textsuperscript{734} BGE 119 Ia 178, E. 1c, p. 180; also BGE 125 I 347, E. 4a, p. 356.
\textsuperscript{735} For more details on the topic Karin Furrer, \textit{Religionsunterricht an der öffentlichen Schule: Betrachtungen aus staatskirchenrechtlicher Perspektive unter besonderer Beachtung der Situation im Kanton Zürich} (unpublished master thesis on file with the University of Lucerne 2003).
\textsuperscript{736} CHRISTOPH WINZELER, \textit{EINFÜHRUNG IN DAS RELIGIONSVERFASSUNGSRECHT DER SCHWEIZ} 136 (2nd edn, Schulthess 2009).
\textsuperscript{737} BENEDIKT WEISSENRIEDER, \textit{DIE SCHULHOHEIT, GRUNDLAGEN UND AUSGESTALTUNGSFORMEN DES STAATLICHEN SCHULRECHTS} 153 (Universitätsverlag Freiburg 1953).
\textsuperscript{738} PIETER KARLEN, \textit{DAS GRUNDBERECHT DER RELIGIONSFREIHEIT IN DER SCHWEIZ} 395 (Schulthess 1988).
\textsuperscript{739} Bildungsdirektion Kanton Zürich, Lehrplan der Volksschule 2008, Kantonaler Lehrlmittelverlag Kanton Zürich 2008.
\textsuperscript{740} However, there are cantons that allow outside of school day use. ADRIAN LORETAN, \textit{RELIGION IM KONTEXT DER MENSCHENRECHTE} 201 (Theologischer Verlag Zürich 2010).
\textsuperscript{741} PIETER KARLEN, \textit{DAS GRUNDBERECHT DER RELIGIONSFREIHEIT IN DER SCHWEIZ} 392 (Schulthess 1988).
It is commonly agreed that religious coercion may harm the integrity of a person. In the school environment where young students are particularly impressionable, the law requires the necessary instruments to be provided to protect the welfare of children. Teachers need to be fully aware of their responsibilities. This includes the teaching of subjects in such a way that they do not inculcate a specific religion or belief-system, and that the teaching methods do not offend the religious feelings of students and their parents. The duty also encompasses the creation of a religiously harmonious school reality. However, students and their parents can be expected to cope with some limited confrontations with religion or belief-systems which may or may not be their own. The state has no obligation to protect children or their parents from all kinds of religious interaction. As long as classes on religion are voluntary, they are consistent with the Federal Constitution. The use of public premises for the purpose of religious teaching is likely to be constitutionally compliant if all interested religious communities are treated equally.

742 HERBERT PLOTKE, SCHWEIZERISCHES SCHULRECHT 97 (2nd edn, Haupt Verlag 2003).
1.4.3 United States

1.4.3.1 Socio-Legal Contours

America has adopted a decentralized school system in which states or counties possess great educational discretion. The public mandate for universal, free and compulsory education did not develop until mid-1900. From the time the first Pilgrims arrived in the New World through the early nineteenth century Americans looked to their churches to provide education. Then, immigration changed America’s religious demographics, and was a driving force in the development of the momentum towards common schools. State-supported primary and secondary education is rooted in the demographic changes brought about by the first great waves of immigration in the 1820s. Not only were there concerns about the preservation of national identity and culture that accompany any great influx of immigrants; there was also the very practical need to socialize the new arrivals, teach them English, and provide them with the knowledge necessary to become active members of the political community.  

Today, schools have the same intentions to provide basic components of education, to socialize children, and assimilate them into the social, political and cultural life of the community. Basic education in the United States starts with early childhood education, followed by primary and secondary school, mostly starting from the age of four, and continuing up to age eighteen. Parents are not restricted to sending their offspring to public schools in order to obtain an education. They can choose between several alternatives including the use of nonsectarian or sectarian private schools or home schooling. Most American states have created so-called voucher programs that allow individual students and their parents to determine which kind of school they wish to attend. The system allocates a particular sum of money that can later be used for payment of the school fee. Depending on the state, the programs may be designed to include secular private schools or all private schools, including sectarian ones, that meet certain academic or other qualifications. The US voucher system seems especially attractive to all those who find their local public school lacking in educational quality, or in breach of the rules of their faith. Yet national figures show that the practical

745 All alternative types of schooling must meet certain requirements in order to constitute a valid alternative to public schools.
746 Ronna Greff Schneider, Education Law, First Amendment, Due Process, and Discrimination Litigation 325 (Thomson & West 2004).
importance of the voucher system should not be overestimated. The percentage of all students attending private schools in the US declined from eleven percent in 1984 to nine percent in 2008.\textsuperscript{747}

1.4.3.2 Secular Curriculum

a. Introduction

Religious objection to the secular curriculum means that parents or students usually allege that a specific element of the secular curriculum conflicts with their faith, and that for this reason they are subject to interference with their basic right to free religious exercise. Because of this clash, courts cautiously weight the interests involved against each other. Students and their parents have fought for all sorts of objections to the basic curriculum. Teaching materials especially have been a cause of conflict for many reasons. Inevitably, the books and materials chosen for a curriculum embody a distinct philosophy or worldview about the subject, and on occasion this has given rise to conflict, as will now be seen.

b. Sports Lessons

Coeducational physical classes have given cause for legal dispute in the United States. Moody v. Cronin (1979) involved a case where religion prohibited students from attending gender-mixed sports classes in which they were required to view and interact with members of the opposite sex that were wearing “immodest apparel.”\textsuperscript{748} The plaintiffs claimed that “modest dress” was a traditional way of their life, and that compulsory attendance at a

\textsuperscript{747} Along with the changing level of private school enrolment, the distribution of students across different types of private schools changed. Roman Catholic schools continued to have the largest percentage of total private school enrolments, but the distribution of students shifted from Roman Catholic to other religious and nonsectarian private schools at basic school level, the annual report of the National Center for Education Statistics finds. Michael Plany et al., The Condition of Education 2008 IV (National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education 2008).

\textsuperscript{748} “Immodest apparel” was given a rather wide definition as being attire that exposes and reveals parts of the body that are associated with sexual provocation; and that would include gym shorts, mini-skirts, sleeveless blouses, and that sort of attire which exposes the bosom or the chest. Moody v. Cronin, 484 F. Supp. 270, 275 (C.D. III 1979).
coeducational class was in sharp conflict with the religious rules mandated by the Pentecostal religion. Judge Ackerman of the District Court acknowledged that it was obvious that compulsory attendance engendered great concern and conflict in the family through daily exposure of the children to worldly influences in terms of attitudes and values of dress contrary to their religious beliefs. Moreover, the court agreed with the plaintiffs that the exposure substantially interfered with the religious development of the Pentecostal children and their integration into the way of life of the Pentecostal faith community at the crucial adolescent stage of development. Ackerman reasoned: “To compel attendance in coeducational physical education, it must appear either that the state does not deny the free exercise of religious belief by its requirement, or that there was a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”

The defendant school authority argued that there was no denial of free exercise because the quantity or quality of exposure to “immodest apparel” was not demonstrably any greater in coeducational physical education classes than in other classes in the school or in normal human interaction outside of school. Thus, the defendant authority contended in other words that if the non-physical education exposure did not rise to the level of objectionable interference with religious beliefs, then the physical education exposure was likewise not violated. But to Ackerman the defendant’s non-denial argument failed, as trial testimony showed that “the degree of visual and physical contact inherent in physical education” was not present in other classes. So the judge entered a permanent injunction in favour of the students.

c. Science Lessons

Also controversial is the science curriculum in public schools. The continuing debate over science is reflected in the next case. In *Write v. Houston Independent School District* (1973) students, on direction of their parents, contended that the teaching of the Darwinian theory of evolution inhibited them in the free exercise of their religion. They were of the view that the

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749 *Id.* at 277.

750 Trial testimony established that there was no dress code at the schools and some students attended in shorts, sleeveless T-shirts, halter tops, braless, and other attire which violated the plaintiffs’ standards of immodest apparel. The judge also said “by far the majority of students (perhaps as many as 90% during the colder portions of the school year) wore modest clothing during normal classes while virtually 100%, including teachers, wore “immodest attire” by plaintiffs’ criteria during physical education class.” *Id.* at 275.
theory was presented without critical analysis and without reference to other theories which purported to explain the origin of the human species. The students preferred the explanation derived from the Bible, the basis of which is that God created man. Moreover, they claimed that the theory of evolution was so inimical to the Creation account that its presentation as part of the school curriculum was a direct attack upon their religious beliefs. Judge Seals of the district court disagreed with the students. He made clear that: ‘There has been no suggestion that Plaintiffs, or any other students, have been denied the opportunity to challenge their teachers’ presentation of the Darwinian theory. The state, at most, has a general policy of approving textbooks, which present the theory of evolution in a favourable light. No position regarding human origins is even indirectly proscribed by state or district.’\textsuperscript{751} As the students could not persuade the court that they were made subject “to suppression of opposing ideas,” they lost their case.

d. Reading Lessons

In\textit{ Mozert v. Hawkins County Board of Education} (1987) a group of public school students and their parents, who described themselves as “born again Christians,” claimed that a textbook, which involved a story about mental telepathy, violated their First Amendment rights. The same plaintiffs also claimed to have found several other passages in textbooks that promoted secular humanism, futuristic supernaturalism, pacifism, magic and false views of death, all in contradiction with the protection of free exercise. Judge Lively, writing for the Court of Appeals, held: “Governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required.”\textsuperscript{752} To the court this meant that distinctions needed to be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion. In the opinion of Lively the challenged action must be shown to have “a coercive effect” in order to establish a violation. He also reasoned that public schools serve the purpose of teaching fundamental values essential to a democratic society and described the school’s interest in tolerating divergent religious views as “a civil tolerance, not a religious one.”\textsuperscript{753} This concept did not require a person to accept any other religion as the equal of the one to which


\textsuperscript{752} Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1068, (6th Cir. 1987).

\textsuperscript{753} \textit{Id.} at 1069.
that person adheres. It merely required “a recognition that in a pluralistic society one must live and let live.”

**e. Sex and Health Education**

In *Brown v. Hot, Sex and Safer Productions, Inc.* (1995) parents alleged that their minor children were compelled to attend an indecent AIDS and sex education program conducted at their public high school. Chief Justice Torruella of the Court of Appeals straightforwardly wrote that the First Amendment was not offended by neutral, generally applicable laws, unless burdening religion was the object of the law. And also, in *Leebaert v. Harrington* (2002), where the father of a child claimed that health education was against his religious beliefs, the court did not command strict scrutiny because the law was a neutral law of general applicability, and as such, did not have to be justified by a compelling state interest even if it substantially burdened a religiously motivated activity. To the court there was no shadow of doubt that the school’s mandatory health curriculum served a legitimate state interest and was reasonably related to a legitimate educational objective.

**f. Use of Technological Equipment**

In *Davis v. Page* (1974) a parent protested against the use of TV and video in class because such technology was against Apostolic Lutheran faith. District judge Bownes held, however, that the parental interest to maintain the faith of their children was to be ranked lower than the state interest to educate and prepare its citizenry for life after school. Bownes simply doubted that a child could reasonably be expected to succeed in modern life if it was denied the opportunity of education by technology.

**g. Concluding Remarks**

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754 *Id.*
To what extent do, or should, parents have a right to enforce their objections to the content of the education their children receive from the state? From the above cases it can be inferred that the threshold in religious objections to secular curriculum claims is high. In other words, US courts do not easily give in to religious objections to the secular curriculum, but a fortiori hold that a pluralist society requires that one must live and let live. As Ralph Gerstein puts it: “Since religious groups vary so widely in their views, nearly any portion of the curriculum potentially offends the religious beliefs of someone.”\(^\text{758}\) So while releasing a student may be desirable, the evidences considered by the courts show that such tolerance is virtually impracticable.\(^\text{759}\) However, scholarly critic Warren A. Nord questions the American secular system altogether. To his mind, a secular curriculum would considerably be shaped by “the philosophical assumptions and cultural agenda of modernity.” As a direct consequence of this, Nord thinks that the American curriculum was not viewpoint-neutral. For him the problem lies in the “underlying philosophical commitments,” that is, in the ways the subject-matter is conceptualized. He says: “Students are not just taught subjects, they are taught ways of thinking.”\(^\text{760}\)

### 1.4.3.3 Attire

#### a. Introduction

Where religious issues of public school teachers are at stake, courts no longer need to embark from the initial inquiry of what Congress intended by prohibiting discrimination based on religion. This is because Title VII of the 1964 Federal Civil Rights Act stipulates inter alia: “It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”\(^\text{761}\) The same Act holds further: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demon-
strates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business. Title VII requires accommodation, or what is sometimes considered as prerogative or preferential treatment for certain employees. In other words, the Act demands that employers, such as public schools, accommodate the religious beliefs and observances of their employees, unless doing so would cause the employer undue hardship. So the most important question is what “undue hardship” actually constitutes, and when a school is required to “accommodate the religion” of a teacher. There is no specific Act that protects a student’s free exercise rights beyond constitutional guarantees. US courts have addressed both issues in a number of cases.

b. Teachers

In 1985 a Sikh teacher was suspended for wearing religious clothing in class on grounds that such an act was inconsistent with an Oregon state rule. The appellate court reversed the superintendent’s order, holding that it violated the teacher’s First Amendment rights. On appeal in Cooper v. Eugene School District Ruling (1986) the Supreme Court of Oregon ruled that “a rule against such religious dress is permissible to avoid the appearance of sectarian influence, favoritism, or official approval in the public school.” The question of whether the school was required to accommodate the teacher’s religion was answered in the negative because the judges unanimously held that it was the lawmaker “who must make a policy choice, and that the court’s role is to see whether the rule stayed within that authority and within the condition and, if necessary, to give the rule a constitutional interpretation.” So without giving further consideration as to the constitutionality of the rule in question the court adopted the state’s sovereign decision to: “Maintain the religious neutrality of the public schools, to avoid giving children or their parents the impression that the school, through its teacher, would approve and share the religious commitment of one group and perhaps finds that of others less worthy.” Moreover, the judicial body held that freedom of religion implied official sponsorship of none, and that

765 Id.
766 Id.
this principle had been established with the growing diversity of the nation itself.

In United States v. Board of Education (1989) the factual circumstances were very similar to those in the Cooper decision. A teacher came to school in Muslim garb, but the principals of the schools refused to let her do so because a Pennsylvania law prohibited teachers from wearing religious attire.767 Judge Kelly of the district court decided not to follow the Cooper decision. He held that “the wearing of her head scarf and other attire was a result of her sincere and good faith belief that her religion requires her to be attired in such clothing while in public.”768 To him the school board had not engaged in nor proposed any reasonable accommodation to the teacher’s religious practice. Moreover, according to Kelly there was no evidence that the teacher’s dress “would be likely or probable to create a perception among students that the school, the school district, or the municipal or state governmental entity endorsed the religion of the teacher.”769 The judge based his decision on the expert opinion which found that it was unlikely for the teacher’s garb to cause religious indoctrination. However, Kelly’s ruling did not last for long as the Court of Appeals reversed it.770 The higher court decided to follow the Cooper decision that gave way to the neutrality considerations set forth by the state’s lawmaker.771

The rationale of a more recent decision was not any different. In Downing v. West Haven Board of Education (2001) a district court held that prohibiting a teacher from continuing to wear a T-shirt with the words “Jesus 2000-J2K” on it did not violate either her free speech or free exercise rights, as allowing her to continue wearing the shirt raised “legitimate concerns about the potential Establishment Clause violation in a public school.”772

c. Students

767 It reads: “That no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination.” Pennsylvania’s Garb Statute of 1895 enacted under Public Law No. 282.
769 Id. at 38.
771 Id.
A representative example of First Amendment law practice is *Alabama Tribes v. Trustees of the Big Sandy Independent School District* (1993). It involved tribal parents and students who contended that the school’s dress code, which prohibited the wearing of long hair, violated their constitutional right to the free exercise of religion. The district court agreed with the plaintiffs’ argument by stating “it is evident that the Tribe has an interest in the preservation of its Native American heritage, culture, and religion, and in encouraging its members, especially its young people, to observe and participate in its sacred ceremonies.” Even if the wearing of long hair was not a fundamental tenet of Native American religious orthodoxy, “proof that the practice is deeply rooted in religious belief is sufficient” the court said. Moreover, the judges opined that although the practice can also be regarded as “a matter of tradition, the wearing of long hair for religious reasons is a practice protected from government regulation by the Free Exercise Clause.” The judicial body could not see how long hair could unduly disrupt the educational process or interfere with the rights of other students. The judges decided in favour of the plaintiffs. However, in *Wilkins v. Penns Grove-Garneys Point Regional S.D.* (2005) the Appeals Court rejected a challenge by a non-religious mother. The school district adopted a mandatory school uniform policy, but exempted students that objected to the uniforms, in part, on “sincerely held religious beliefs.” The superintendent denied the request for an exemption, citing the lack of any evidence that atheism was incompatible with school uniforms. The district court denied the mother’s request for a preliminary injunction and granted summary judgment to the defendants. The Court of Appeals affirmed.

**d. Concluding Remarks**

The ratios of these decisions mean that school teachers must come to terms with some sacrifice of religious self-expression, and that Title VII protection is of limited use. In other words, for school authorities the threshold to win a case is not particularly high. They can easily produce the necessary evidence to claim “undue hardship” on their behalf. In the view of Ronna Greff Schneider this is especially because “the more flexible the state acts in order
to ensure that a person is not deprived of free exercise rights, the more likely it is that the state will run afoul of the establishment prohibition.”

The court in Downing stated that in order to accommodate such tension “school officials must be accorded some leeway [...] even if the limitations it imposes might restrict an individual’s conduct that might well be protected by the Free Exercise Clause if the individual were not acting as an agent of government.”

The law treats students differently from teachers. As they are not employees and therefore not seen as agents of the state, there is no anti-establishment dimension that could conflict with their free exercise rights. For this reason they enjoy a more ample right to free exercise of religion. The physical appearance of students is generally viewed as a form of self-expression reflecting the child’s, religious and non-religious values, background, culture, and personality. So although there is no specific Act that protects a student’s free exercise rights beyond constitutional guarantees, religious freedom is particularly associated with it. Student cases primarily concern the state’s interests that free exercise does not unduly disrupt the educational process or interfere with the rights of other students.

Once the student has proven the sincerity of belief, the burden shifts to the public authority to show that the regulation advances an unusually important governmental goal, and that an exemption would substantially hinder the fulfillment of that goal.

1.4.3.4 Religious Coercion

a. Introduction

The question is what constitutes a religiously neutral environment, and where coercion and religious inculcation start. Does it mean that nearly everything that is worth transmitting, everything that gives meaning to life, may permissibly be taught in public schools? Or, does the Establishment Clause require mechanical invalidation of all governmental conduct conferring benefit on or giving special recognition to one or more particular religions?

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777 Ronna Greff Schneider, First Amendment, Due Process and Discrimination Litigation 7 (Thomson & West 2004).
Is it neither of the above, and the First Amendment law permits a more moderate position in which case decisions depend on all circumstance of a particular relationship? The following will shed more light upon one of the most-discussed topics in US constitutional law.

b. **Posting Religious Text**

One of the most prominent Supreme Court cases, *Stone v. Graham* (1980), involved a Kentucky statute that required that a copy of the Ten Commandments be posted on the wall of each public classroom in the state.\(^{781}\) Some private citizens claimed that the statute violated their First Amendment rights and sought an injunction against its enforcement. The US Court said: ‘The pre-eminent purpose for posting the Ten Commandments on school-room walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.’\(^{782}\) Hence, in the court’s opinion the commandments were not to be integrated into the public school curriculum because their inherent religious nature was likely to amount to unconstitutional religious endorsement. The court held that if the commandments had an effect, than: “it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.”\(^{783}\) The ruling’s obiter dictum differentiated, however, between the manners in which religious texts are used. The judges said: “the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”\(^{784}\)

So the Supreme Court decided that not all religious influences need to be fenced off to protect public schools, but that such influence, where it existed, “must not be excessive.” Justice Rehnquist dissented however. To him the judges’ majority opinion interpreted neutrality too narrowly, by giving too little room to religious influences of whatever kind. He reasoned instead: “I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is

\(^{781}\) Kentucky Revised Statutes, 13 § 158.178 (2008).
\(^{783}\) *Id.* at 42.
\(^{784}\) *Id.*
saturated with religious influences, derived from paganism, Judaism, Christianity – both Catholic and Protestant – and other faiths accepted by a large part of the world’s peoples.”

**c. Bible Reading**

*Hall v. Board of School Commissioners of Conecuh County* (1981) demonstrated that obiter in Stone is not interpreted as an unconditional blueprint for any kind of Bible use. In that case a parent on behalf of his children brought an action against Repton High School, which permitted students to conduct morning devotional readings and taught an elective Bible literature course. The Court of Appeals found that such Bible lessons were “a fundamentalist Christian approach,” which, devoid of “any discussion of its literary qualities,” was in clear contradiction of the Establishment clause. US courts have not always required a thorough discussion or even critical debate when religious materials were used for educational purposes. In *Daugherty v. Vanguard Charter School Academy* (2000) a student had offered a “Veggie Tales” children’s animated videotape for viewing by the class around Christmas time. The videotape related to the origins of Christmas and the birth of Jesus. The teacher allowed the class to view the tape, but did not say anything about it. The District Court found that the teacher’s omission to discuss the issue was not in breach of First Amendment law. The court based its decision on the fact that the teacher did not use the occasion “as a springboard for indoctrination.”

**d. Prayers**

Although *Rhodes v. Laurel Highlands School District* (1988) did not involve an establishment or free exercise, but fair hearing claim, it might still be relevant here. In that case a tenured school teacher who taught general science at a public school received complaints because he was allegedly imposing his religious views upon the students in class. He did not deny the allegations and stated that “he was a Christian and that part of his mission was in a sense evangelistic.” The teacher did not bother about the Superintendent’s

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785 *Id.* at 46.
786 *Hall v. Board of School Commissioners of Conecuh County*, 656 F.2d 999, 1003 (5th Cir. 1981).
warnings, and on another occasion made a student who had disturbed his class pray with him as a condition of re-entering the classroom. The teacher was suspended and later dismissed. In court Justice MacPhail, writing for the Commonwealth Court, reiterated that “the Court recognizes and has recognized” that the law provided for courses relating to religion, and that discussions about religion, where relevant to classroom course material, were permissible. “Where, however, a teacher indicates his preference for a particular type of religion and seeks to promote that religion or any religion among his students, the teacher’s constitutional right to freedom of religion and speech must give way to our country’s historic Establishment Clause, also set forth in the First Amendment.”

So the court affirmed the order upholding the dismissal.

e. Outside Religious Groups

The use of school premises by outside religious groups has been especially contended in recent years. In Dove v. Porter (2002) a county board of education brought in students from a local Bible college to conduct voluntary religion classes for students in their public schools. As a consequence, parents claimed that the board violated the Establishment Clause. The district court held that the First Amendment did not permit the state to use its public school systems “to aid any or all religious faiths or sects in the dissemination of their doctrines.” In the opinion of the court this did not mean that the public schools needed to be hostile towards religion. The Constitution demanded only that they be neutral. The defendant’s argument that “Rhea County is a place where they respect the Bible,” was a misunderstanding of the Constitution in the court’s opinion, and accordingly it said: “It is probably true that the citizens of Rhea County who are of the Christian faith are in the majority. This, however, does not give them license to teach their religion in the public schools. The Constitution in this area and others protects persons who happen to be in the minority. We all – the majority and the minority – live in the same Nation. The Constitution protects each one of us, including those who may not have the same religious views as the School Board.” Hence, the court granted a declaratory judgment in favour of the parents.

Also in Oxford v. Beaumont Independent School District (2002) a district court took a dim view of permitting outside religious groups to conduct activities during the school day. In that case the court struck down a “Clergy in

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Schools” program under which clergy volunteers were invited into elementary and secondary schools to counsel students on secular subjects. The court held that the school district impermissibly preferred religion over non-religion because the program was not neutral and, in fact, endorsed religion even though the clergy members were instructed not to discuss religion, abortion or prayer, and not to wear clerical garb. The problem was that no secular volunteers (for instance psychologists or social workers) were invited. By giving religious representatives the exclusive right to conduct the volunteer counselling sessions, the court found that the school was endorsing religion.\footnote{Oxford v. Beaumont Independent School District, 224 F.Supp.2d 1099, 1115 (E.D. Tenn. 2002).}

Legal matters seem to be handled differently when it comes to the use of public school premises by religious groups outside of the school day. For instance, under New York state law, local school districts were authorized to permit various uses of school property when such property was not in use for school purposes.\footnote{New York Education Law, 1 § 414(c) (2008).} Among the permitted uses was the holding of social, civic, and recreational meetings and entertainments, but the list of permitted uses did not include meetings for religious purposes. Pursuant to the state law the school authority prohibited the latter. A local church applied to the board twice for permission to use school premises to exhibit for public viewing, outside of school hours, a six-part film series dealing with family and child-rearing issues and advocating Christian family values. The board denied both applications on the grounds that the film appeared to be “church related.” Thereafter the church and its pastor brought suit against the board. The district court, in granting summary judgment for the board, characterized the board’s school facilities as a “limited public forum,” and concluded that the denials in question were “viewpoint neutral.”\footnote{Lambs v. Chapel v. Center Moriches Union Free School District, 736 F.Supp 1247, 152-155 (D.N.J. 1990).} The United States Court of Appeals affirmed.

However, on certiorari, the United States Supreme Court reversed the lower courts’ decisions. The justices held in \textit{Lambs Chapel v. Center Moriches Union Free School District} (1993) that the rule, which prohibited the use of school premises for religious purposes, violated the First Amendment’s free speech clause, given that the school board permitted the use of school property for social or civic purposes. In the opinion of the court: “The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”\footnote{\textit{Id.} at 394.} Kennedy, J., concur-
ring in part and concurring in the judgment agreed that the board’s action constituted viewpoint-based discrimination that contradicted the free speech clause. Scalia, J., joined by Thomas, J., concurring in the judgment, expressed the view that allowing the church to use school facilities would have posed no realistic danger of a violation of the establishment of religion clause, because giving the church such access would not have signified state or local embrace of a particular religious sect. In Good News Club v. Milford Central School of 2001 the Supreme Court had to treat the same issue in a similar case. The court confirmed its decision in Lambs by holding that denying access to the use of school premises immediately after school for the meetings of a religious youth organization conducting religious activities for elementary-school-age children with parental permission constituted unconstitutional viewpoint-based discrimination. 794

f. Concluding Remarks

The above cases showed that if the ulterior motive of an exercise is to inculcate a religion than such conduct is likely to breach the United States Constitution. However, courses about religion are constitutionally permissible as long as the course is being taught for, or such materials are being used for, informational rather than indoctrinatory purposes. So long as students are not forced to pray, the argument continues, the public schools are only accommodating religion, not establishing it. 795 In this respect Michael S. Ariens and Robert A. Destro question critically: “To what extent do students have a right to be exposed as a part of the curriculum, not only to religious ideas, but also to divergent religious beliefs and practices of their fellow students’? 796

American judge-made law differentiates between religious use of school premises during and outside of the school day – the former being impermissible, whereas the latter is not. So far courts have not decided whether the definition of school day should extend beyond actual instructional hours, such as immediately before or after the instructional time period. 797 The concept of neutrality in public schools is narrowly interpreted. During the school

795 JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL 466 (Thomson & West 2008).
797 RONNA GREFF SCHNEIDER, EDUCATION LAW, FIRST AMENDMENT, DUE PROCESS, AND DISCRIMINATION LITIGATION 293 (Thomson & West 2004).
day there is little room for outside religious groups to be active on public 
school ground for fear of religious coercion. However, scholar Ralph M. 
Gerstein is of the view that had the school board in the Oxford case invited 
“all qualified volunteers, whether religious or secular, to conduct the ses-
sions, then the practice might well have been lawful […]” 798 Church groups 
and state officials have responded in a variety of ways to the assertion that 
public schools are organized on the premise that secular education can be 
isolated from all religious training. Considerable doubt remains as to 
whether such a disjunction is possible, and if so, whether it is wise. 799 War-
ren A. Nord notes a general absence of any effort to require students to un-
derstand the religious way of thinking and feeling. He says that occasional 
insights into historical religion acquired here and there counted for little 
when measured against the years of study spent of secular history, math, and 
social science. His concern is that “public education makes it all but impos-
sible for students to think reasonably about the alternative.” 800

798 RALPH M. GERSTEIN, EDUCATION LAW, AN ESSENTIAL GUIDE FOR ATTORNEYS, 
TEACHERS, ADMINISTRATORS, PARENTS, AND STUDENTS 298 (Lawyers and Judges 
799 MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC 
800 WARREN A. NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATION-
1.4.4 The Two Models Compared and Contrasted

Courts of both countries have recognized that parents possess legal, moral and religious obligations to protect and maintain the health, welfare, and safety of their children. Moreover, they have acknowledged that such responsibilities encompass the interest that children follow the religious beliefs of their parents, and that it is traditionally the parents who are responsible for the upbringing of their children. At the same time the judicial bodies have emphasized that the state’s interest is also clearly defined. The United States Supreme Court described the objectives of public elementary school systems as: “A principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”

The socio-legal contours of both countries have shown why these aims are similar yet different in the area of religious objections to the secular curriculum. The United States experienced an influx of new arrivals of various faiths as early as the 1820s, whereas in Switzerland the greatest wave of religiously diverse immigrants arrived from 1990 onwards. In America the state has had far greater time to socialize a large mass of immigrant children, teach them English, and provide them with the knowledge necessary to become active members of the political community. Religious and cultural plurality is not a new development in the United States but has been an established reality for a long period of time. On the other hand, Switzerland has undergone this kind of “societal upheaval” only recently. People now require the necessary time to settle down, and to establish the lowest common denominator that will be widely acceptable to old and new participants in public life. Change is under way, not only to the country’s face, but also in matters of substance. New rigorous measures were tailored in order to fortify public school unity, understanding, and respectfulness of all and towards all. This means that the Swiss school environment must be distinguished from its American counterpart. Lawmakers and courts have reacted to the changed circumstances of the Swiss cultural and religious landscape.

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802 In spite of that, the United States saw extraordinary religious dynamism and diversity at the turn of the twenty-first century. There, too, increased immigration has altered the religious and cultural demographics of many, if not most, of the nation’s communities. Moreover, it is necessary to mention that in the mid-1970s, there was a significant resurgence of religious faith and practice in the United States, as well as an increase in the number of Americans professing no religion at all.
803 BENEDIKT WEISSENRIEDER, DIE SCHULHOHEIT, GRUNDLAGEN UND AUSGESTALTUNGSGORMEN DES STAATLICHEN SCHULRECHTS 48 (Universitätsverlag Freiburg 1953).
Judge-made law shows that greater religious or cultural constraints exist in Switzerland for the sake of social cohesion. Once that goal is reached, schools might grant exemptions more generously.

It is now time to compare and contrast the above-described judicial ratios. On both sides of the Atlantic, courts have recognized that the religion of students and their parents is generally protected under the Constitutions.\textsuperscript{804} The highest Swiss Court argues that compulsory school attendance is a civic duty that may take priority over religion, provided that it is rightfully balanced against public interest considerations.\textsuperscript{805} The US Supreme Court reasoned similarly that “to compel attendance in coeducational physical education, it must appear either that the state does not deny the free exercise of religious belief by its requirement, or that there was a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”\textsuperscript{806} However, the American court did not find it necessary for all students to attend gender-mixed sports classes in order to become accustomed to interaction with their fellow students in all spheres of life.\textsuperscript{807} Moreover, it does not appear to share the concern of its Swiss counterpart that “physical education significantly serves for the socialization of pupils. This purpose can be met only if all lessons are – as it commonly applies to Switzerland – held [...] coeducationally.”\textsuperscript{808}

So, as mentioned earlier, what we have here are two similar legal systems, but which do not face the same social difficulties. The Swiss court apparently finds the refusal of a swimming exemption necessary so that the two boys “learn to adapt to the natural interaction with the opposite sex,”\textsuperscript{809} and regard women as equal partners from early on. The judge’s broader aim is to ensure social cohesion and the maintenance of an orderly and efficient school organization.\textsuperscript{810} The Swiss Federal Supreme Court put this goal in the following way: “Schools require today more than ever before that efforts be made for the adaptation and involvement of children and youngsters from other cultures to the social conditions applicable here.”\textsuperscript{811} Moreover, the body made crystal clear that: “It can and must be expected of foreign nationals that they are ready to live side by side with the Swiss population, and that they accept the democratic principles and the rule of law of the Swiss legal

\textsuperscript{805} Id. at 190.
\textsuperscript{807} Id. at 275.
\textsuperscript{809} Id.
\textsuperscript{810} BGE 119 Ia 178, E. 7e, p. 193.
system, as well as the local social and communal conditions, which the state is required to preserve even against culturally divergent demands.” The same body also concluded: “The subject in question is regularly not about the curbing of the core essences of fundamental rights, but regards, a fortiori, the collision between Swiss applicable laws and certain culturally or religiously entrenched norms of conduct that apply to the everyday life of emigrants.”

Apart from the fact that differences exist, courts of both countries argue very similarly on the legitimacy of refusing school exemptions. American judges find that a challenged curriculum must be shown to have “a coercive effect” in order to establish a violation. The Swiss Federal Court similarly says that schools “must not necessarily permit exemptions that are based upon personal desires.” American and Swiss judges agree that “public schools serve the purpose of teaching fundamental values essential to a democratic society and have described the school’s interest in tolerating divergent religious views as “a civil tolerance, not a religious one.” The threshold to win a curriculum claim is in both countries very high.

The religious accommodation of teachers may be limited also. Swiss and US judges regard teachers as a category of agents of the state. By means of their attire “they must not foster sectarian influences, favoritism, or official approval in the classroom.” Neutrality is maintained provided that the state avoids giving children or their parents the impression that the school, through its teacher, approves and shares the religious or non-religious commitment of one group and finds that of others less worthy. The Swiss Federal Court is concerned “that the school might become a place of confrontation if teachers were allowed to express their strong beliefs by means of religious garb.” Courts have acknowledged their positive obligation not only to protect religious and non-religious belief, but also, and especially, to ensure religious harmony in the public school environment. Teachers must come to terms with some sacrifice of religious self-expression. Hence, the laws of both countries treat their teachers very similarly on matters of religious attire. Students generally enjoy more ample religious-freedom rights in

813 Id.
818 Id.
819 Id. at 305 f.
terms of their attire. They are free to wear “whatever does not unduly disrupt the educational process or interfere with the rights of other students.”820 Judges in Switzerland and the United States have taken up a critical position towards the question of whether religious objects or texts can be attached to schoolroom walls. The Swiss Federal Court held: “actions which might offend the religious sensitivities of pupils and parents,” might not be state imposed.821 Its American counterpart stated even more clearly that such exercise “will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey,” religion.822 Differences exist between the countries in the area of Bible reading. Swiss constitutional law generally permits Bible reading classes during school hours if their attendance is voluntary.823 However, the US Court of Appeals found that Bible lessons were not per se unconstitutional, but required an ample “discussion of its literary qualities.”824 So both Swiss and American justices do not require mechanical invalidation of all state conduct conferring benefit on, or giving special recognition to religion. American jurisprudence emphasizes that courses “about” religion are constitutionally permissible as long as the course is being taught for, or such materials are being used for, informational rather than indoctrinatory purposes. School programs must not convey a message of endorsement or disapproval, but leave room for the inherent values of the systems themselves. In both countries it is generally agreed that the limited teaching of humanist, or Christian values, profoundly embedded in the traditions of Switzerland and the United States, does not necessarily violate religious-freedom laws as long as such teaching can be made subject to contention.825 In this regard US courts speak of “benevolent neutrality” in contrast to religious endorsement.

In Switzerland religious instruction by religious groups during the school day is in compliance with the Federal Constitution. Not so in the US, where such practice is regarded as religious endorsement. In America institutional religious determination is kept strictly separate from public schools, whereas

821 BGE 116 Ia 252, E. 6a, p. 261.
824 Hall v. Board of School Commissioners of Conecuh County, 656 F.2d 999, 1003 (5th Cir. 1981).
in Switzerland such interaction is seen as a partnership between state and religion.
1.5 Excusals for Religious Purposes

1.5.1 General Introduction and Overview

“Observe the sabbath day and keep it holy, as the Lord your God commanded you. Six days you shall labor and do all your work. But the seventh day is a sabbath to the Lord your God; you shall not do any work [...]”

(Deuteronomy, 5: 12-15)

In Switzerland as in the United States it is common practice to close businesses, shops, schools, museums, or other state institutions on certain holidays. These can include Sundays, or Saturdays, but also annually occurring holidays and times of rest and worship such as Good Friday or Easter Monday. Such religiously rooted practice is held, in the opinion of US and Swiss courts, not to violate the US Establishment Clause, nor the Swiss doctrine of state neutrality under the constitutionally entrenched right to religious freedom. It is justified in secular terms, in that all people regardless of their religious affiliation (if any) get one or more days off.

Even if the courts’ rationale can be seen as non-discriminatory, the question that remains is how the lawmaker treats adherents of religions and belief-systems which demand specific times of rest or worship on days other than those which are officially recognized.

Several faiths demand religious days and times of rest and worship. For example, the Qur’an with regard to Jumu’ah, or the Friday prayer, demands:

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826 What might now be seen as secular practice emanated from Emperor Constantine’s decree that Sunday be a day of rest. This law set the trend for most governments down to the present. ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 81 (5th edn, Markham Press Fund of Baylor University Press 1996).


“Believers! When the call to prayer is made on the day of congregation, go quickly to the prayer and leave off your trading – that is better for you, if only you knew […].”\(^{829}\) But in none of the 26 Swiss or 50 American states is Friday recognized as an official day of worship, and yet the Qur’an clearly demands that Muslims lay down their work for prayer. The official fixing of holy days is not just troublesome to Muslims. For example, members of the Church of God celebrate the seven-day Feast of Tabernacles either in late September or October, often not coinciding with official holy days, and in their community failure to observe the annual convocation is regarded as a sin.\(^{830}\)

So do devout people have to put up with the fact that there can be no multitude of religious days and times of rest because it would mean extensive absenteeism? Or, alternatively, despite the undeniable significance of Swiss and American productivity rates, is there still enough room for religious accommodation of all participants in society even if it means a reduction in economic efficiency? Similarly, is it possible to run public schools if all students possess a court-enforceable right to be exempt on certain unofficial holidays? And, what about prisoners? Should prisoners enjoy the freedom to attend in-house religious services even if they are regarded as dangerous to their enclosed community?

The analysis as pursued in this chapter includes excusals for religious purposes in the work, school, and prisoner environment. To be precise, the chapter treats employees’ absences, student exemptions, and inmates’ rights to religious liberty in enclosed facilities. All three topics are explored with respect to excusals for days and times of rest other than those officially recognized, and as always, both countries are treated separately. The chapter begins with an overview of the major social settings, laws and regulations governing the issues raised, and then considers the way in which the law reflects the content of policy. Once again, the chapter is concluded by way of a country-specific comparing and contrasting exercise.

\(^{829}\) Qur’an, 62:9.

\(^{830}\) As discussed in BGE 114 Ia 129, E. 5a, p. 137; also Church of God (Worldwide, Texas Region) v. Amarillo Independent School District, 511 F. Supp. 613, 616 (N.D. Tex. 1981), judgment aff’d, 670 F.2d 46 (5th Cir. 1982).
1.5.2 Switzerland

1.5.2.1 Socio-Legal Contours

In Switzerland, the initial Sunday work prohibitions safeguarded the Christian Sabbath from profanation and not because of the mere usefulness of the day as a day of rest and cessation from worldly labour. However, with the advent of secularization, days and times of rest have been justified more and more on mundane rather than on religious grounds. For instance, the Federal Factory Law Act of 1914 gave each canton the power to fix eight holidays a year, on which labour was to enjoy the same privileges as on Sundays.\(^{831}\) Today Sunday work is still prohibited throughout the entire country.\(^{832}\) The prohibition means, for instance, that Sabbath-observing members of minority religions have to close their shops on Sundays because of blue laws (Sunday closing laws) and on yet another day because of their own faith. Federal law provides for exemptions, however.\(^{833}\) The Supreme Court held that such laws do not constitute an impermissible government preference in favour of the dominant religion consisting of Sunday and other observances. Neither do such blue laws constitute an invalid government benefit favouring religion over non-religion.\(^{834}\)

Regardless of that, absences for religious purposes on days and times other than those officially recognized can still be requested. The workforce of Switzerland’s economic sectors is not only multicultural, but also multifaith. For this reason many employers are accustomed to adjusting work schedules to accommodate an employee’s faith; for example, accommodating Fridays off for religious observance if an adequate substitute is available or if the employee’s absence is otherwise reasonably practicable. Swiss lawmakers are mindful that religious absences strike a balance between and among the many individual and collective interests that co-exist. Because religious beliefs and practices are pervasive influences in the lives of both individuals and communities, it is inevitable that those beliefs will affect the way in which individuals and communities conduct their lives. The workplace,


\(^{832}\) Bundesgesetz über die Arbeit in Industrie, Gewerbe und Handel [Federal Act on Work in Industry, Crafts and Commerce] of März 13, 1964, SR 822.11, art. 18(1).

\(^{833}\) E.g. activities which involve necessities are exempt. Bundesgesetz über die Arbeit in Industrie, Gewerbe und Handel [Federal Act on Work in Industry, Crafts and Commerce] of March 13, 1964, SR 822.11, art. 19.

\(^{834}\) BGE 54 I 103, E 3, p. 234; also BGE 117 Ia 311, E. 4a, p. 317.
school, or prison environment are all specialized communities, devoted to a specific purpose. As a result, the nature of the activity or inactivity that takes place there is an important consideration in any analysis of the "place" that religion or non-religion has, or should have, in the particular circumstance.

1.5.2.2 Employees’ Absences

a. Introduction

Where excusals of governmental or non-governmental employees for religious days and times are at stake, Swiss courts might no longer need to take direct recourse from Article 15 of the Federal Constitution. Article 20a(2) and (3) of the 1964 Federal Act on Work in Industry, Crafts and Commerce (amended as per August 1, 2000) has substituted the abstract construction of religious freedom in matters regarding religious absences. The amended statute expresses great effort to accommodate religious adherents fairly vis-à-vis their non-practising co-workers. The 1964 Act differentiates between absences caused by religious activities (such as worshipping or times of rest), and religious holidays (one or more entire days) other than those officially recognized.

b. Federal Act on Work in Industry, Crafts and Commerce

b.a. Religious Activities During Work Hours

By virtue of Article 20a(2) (first sentence) of the 1964 Federal Act, Swiss employees are permitted to be absent for religious activities at times other than officially recognized holidays. However, such special absences are not regarded under employment laws as regular “working hours” (Werktage), but time off.835 According to Paragraph 2 (second sentence) employees are required to inform the employer about their absence at least three days in advance. This allows the employer to make arrangements where necessary.

Scholarly commentator Urs F. Meyer is of the view that the minimum three-day information period is reasonable as adherents normally know the dates and times of religious worship or rest.\textsuperscript{836} However, an employee who is absent for religious activities under Article 20a(2) is not entitled to wages for the duration of the absence. An exception to this might be collectively or individually tailored labour agreements.\textsuperscript{837} In the event that an employer authorizes a request, Article 11 (first sentence) of the same Act applies. It holds that an employee who is justifiably absent from work can be required to make up the working hours missed.

b.b. Religious Holiday or Holidays

If an employee requests to attend one or more religious holidays other than the ones officially recognized, under Article 20a(3) an employer must grant such excusal if that is “practicable” (\textit{nach Möglichkeit}). The condition of practicability means that the right is not unlimited. It is the employer who has to decide reasonably in the specific circumstances of the case whether such a request is feasible and when it is not. Unofficial religious holidays are treated by Swiss employment laws as “extraordinary leisure time” (\textit{ausserordentliche Freizeit}).\textsuperscript{838} There is no entitlement to wages for the time an employee is absent,\textsuperscript{839} save otherwise contracted terms with the employer. If an employer authorizes a request, the employee, in accordance with Article 11 (first sentence), can be made to compensate missed working hours.\textsuperscript{840}

c. Concluding Remarks

\textsuperscript{836} Urs F. Meyer, \textit{Das Arbeitsgesetz, Ein Handbuch für die Praxis} 55 (Schweizerischer Arbeitgeberverband 2000).
\textsuperscript{839} Urs F. Meyer, \textit{Das Arbeitsgesetz, Ein Handbuch für die Praxis} 55 (Schweizerischer Arbeitgeberverband 2000).
The greatest difference between rules regulating absences caused by religious activities and those caused by religious holidays is that the latter must be “practicable” to the employer. This condition appears to be particularly reasonable if the absence of an employee would disrupt the operation or management of an institution. It is nothing but fair that an employer be given sufficient time to arrange religious excusals. Observance of unofficial days and times of rest must not be to the detriment of the employer. It can be suggested that in cases of longer and re-occurring absences (e.g. for yearly holidays and feasts) the employee should be required to contract her or his excusals by way of special agreement with the employer. The employer can be expected to be reasonably considerate of employees’ religious needs. This does not mean that an employer is required to accommodate every single personal preference, but that sincere religious requests are treated benevolently.

1.5.2.3 Students’ Absences

a. Introduction

In Switzerland, education is seen as one of the most important functions of cantonal and local governments. There is no doubt that in pursuance of this function government can enact laws and enforce compulsory attendance statutes mandating attendance of certain school subjects. Despite this policy, religious excusals protected under Article 15 guarantees are permissible. So again, this issue concerning education illustrates graphically opposing tensions within the concept of religious freedom. As the following analysis demonstrates, a sincerely held belief that requires children to attend specific days and times of rest or observances can give rise to times of legitimate release. As will be seen, religious demands in this area have generated Supreme Court rulings.

b. Sabbath

In the Samstags Schuldispens ruling of 1991, the Federal Supreme Court had to decide whether a cantonal school regulation which foresaw no school exemption for Saturdays was in contravention of religious-freedom guarantees. The court held that the regulation was too rigid because it did not take
the interests of minority religions into account. The body reasoned that applicable law must accommodate non-traditional religious needs by allowing adherents to use Saturdays for religious contemplation and to engage in cultic activities. A similar claim was made only recently. In the *riposo sabbatico* ruling of 2008, the Federal Supreme Court had to decide whether compulsory attendance of exams which coincide with religious days and times of rest was unconstitutional. The case involved a school board refusing to grant a Saturday absence request by a pious student on grounds that such excusal would disrupt the school syllabus. On appeal the Federal Supreme Court held: “The interest [...] to observe the Shabbat is greater than the public interest that all students take certain examinations on Saturday. This is the case even if it means an additional commitment for schools [...].” The justices emphasized, however, that such excusal could be permitted only if the school was able to accommodate students’ religious needs and additional work caused by the absence was not overly burdensome to teachers.

c. Several Holidays

In another case the daughter of the claimant attended the public primary school in the canton of Zurich and applied for five consecutive free days in order to celebrate the Feast of Tabernacles. The “Education Council of Zurich” (*Erziehungsrat des Kantons Zürich*) was of the view that claimants celebrated the same feasts as members of the Jewish religion did, and that for this reason cantonal educational laws needed be interpreted analogously. In other words, the amount of days granted to one student served, in the Council’s view, as a reference guide for the maximum number of days to be granted to another student. So the school authority held that only four instead of five consecutive “free” days could be allowed. However, the father of the pupil was dissatisfied with the ruling and after exhausting all lower court remedies took the matter before the Federal Supreme Court. In the *Laubhüt-

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841 BGE 117 Ia 311, E. 3b, p. 316.
842 Id. at 319.
843 “L’interesse degli [...] avventista a poter osservare il precetto del riposo sabbatico risulta infatti prevalente rispetto all’interesse pubblico a far svolgere a tutti i matu-
randi taluni esami al sabato, anche se ciò comporta per gli istituti scolastici un im-
pegno supplementare [...].” BGE 134 I 114, E. 6.6, p. 123.
844 Verordnung betreffend das Volkschulwesen des Kantons Zürich [Public Education Regula-


tenfest decision of 1988 the court reasoned: “If cantonal laws on school exemption accommodate the interests of members of religious communities to a great extent, it is likely that school exemption claims, which go beyond the will of the lawmaker, are regularly outweighed by public interest considerations.”

However, in casu the court found that the permission for four days instead of five would not be adequate for the claimant and his daughter from a practical perspective, as they could not celebrate the Feast in accordance with their religious conviction. The judges also said that for the claimant it would be significant whether his daughter received five or only four days of exemption because “the refusal of a single additional day threatens the observance of the entire 8-days Feast of Tabernacles.”

On the balance of reasonableness the court regarded the interference with the school regulation less significant and ordered, thus, the reconsideration of the Education Council’s decision.

d. Concluding Remarks

The most important reason that not every excusal can be granted is that extensive absenteeism is contrary to the public ideal that students must be prepared for life after school.

Public schools which allow all their students to stay away from school whenever they need religious days and times of rest or observance, may as well simply shut down in today’s pluralistic environment. School boards must be rigid and allow exceptions only in circumstances that are not disruptive and overly burdensome. Although students must generally be treated equally, this does not necessarily imply that the number of days granted to one student must serve as a reference guide for the maximum number of days to be granted to another student.

It can be suggested that in cases where an excusal appears reasonable, students must be required to make up the lessons missed. The competence to decide about

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845 “Kommt eine kantonale Regelung über die Schuldispensation den Interessen von Angehörigen von Religionsgemeinschaften weit entgegen, so dürfte das öffentliche Interesse daran, dass nicht über den Willen des Gesetzgebers hinausgehende Schuldispensationen beansprucht werden, regelmässig überwiegen.” BGE 114 Ia 129, E. 5a, p. 137.

846 “Wegen eines einzigen zusätzlichen Tages, für den nicht Dispensation erteilt wird, steht die Einhaltung des 8tägigen Laubhüttenfestes als Ganzes in Frage.” Id. at 137.


848 BGE 114 Ia 129, E. 4b, p. 135.
school absences should be within the powers of teachers and school boards because they know the needs of their pupils best.\textsuperscript{849}

\section*{1.5.2.4 Prisoners’ Rights}

\textit{a. Introduction}

In Switzerland it is generally perceived that lawful incarceration results in the necessary withdrawal or limitation of many privileges and rights, and is a reaction justified by the considerations underlying the Swiss penal system.\textsuperscript{850} When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. However, this does not imply that an inmate is absolutely deprived of his or her right to religious freedom under the Swiss Federal Constitution. A regulation must have a logical connection to the legitimate governmental interests invoked to justify it.\textsuperscript{851} Nonetheless, incarceration by its nature denies a prisoner participation in the “wider human” community. At least two prominent cases have made it as far as the Federal Supreme Court, both contesting excusals for religious purposes.

\textit{b. Jum’ah}

In the \textit{Freitagsgebet} decision of 1987 the Federal Supreme Court had to decide whether Islamic inmates possessed a right to collective Friday prayer. Prison officials found that such assembly was not reasonably practicable, and that refusal of it did not breach religious-freedom rights under the Federal Constitution. Muslim inmates felt discriminated against because inmates of the Evangelical Reformed and Roman Catholic Church were allowed to hold regular religious services in collectivity. After exhausting all lower court remedies, the Muslim prisoners appealed to the highest court of the country. It decided in favour of the right to hold Friday prayers. However, the court reminded the parties in dispute that such a right was not absolute and could readily be circumscribed if orderly operation of the state prison

\textsuperscript{849} \textsc{Herbert Plotke}, \textsc{Schweizerisches Schulrecht} 310 f. (2nd edn, Haupt Verlag 2003).
\textsuperscript{850} \textsc{Walter Dubi}, Handbuch über den Straf- und Massnahmenvollzug 48 (Schaub 1971).
\textsuperscript{851} \textsc{Andrea Baechtold}, Strafvollzug, Straf- und Massnahmenvollzug an Erwachsenen in der Schweiz 181 (Stämpfli 2005).
could not be guaranteed, or the prison regime was burdened excessively.\textsuperscript{852} The justices found that the latter includes constraints on the rooms available and general organizational difficulties. At the same time, the body emphasized that the two official churches enjoyed no prerogatives in comparison to less traditional religious groups. The body stated that “If solely adherents of public-law recognized religious communities were allowed to gather for cultic activities, there would essentially be no religious freedom.”\textsuperscript{853} Different treatment that cannot be reasonably justified is unconstitutional, the justices said. “Especially here, where the far-reaching deprivation of the freedom of movement prevents the prisoner from responsibly claiming the remaining fundamental rights, and where he finds himself in an extraordinary dependence on the enforcement authorities, the state neutrality concept must prove its value.”\textsuperscript{854} In this sense, every prison regime must give the opportunity to attend collective worship and to hold religious services for the greatest possible number of prisoners. The court also found that in cases where the religion of an inmate is particularly unusual, inter-denominational or inter-religious services must suffice. “Each Christian creed cannot claim to hold its own religious services conducted by its own cleric if it is possible to participate in an inter-denominational Christian celebration.”\textsuperscript{855} To the justices the same consideration applies to various Muslim denominations.\textsuperscript{856}

c. **Orthodox Easter**

In a similar case, authorities did not allow an inmate to attend the Orthodox Easter sermon, which was then held in the prison prayer room. Officials saw their decision as warranted because the appellant, a murderer and rapist, had been held for some time within the prison division especially built for potentially dangerous or escape cases. Later, when the same prisoner was transferred into ordinary detention division he refused to work on the official days of rest of Orthodox Christianity. He claimed that on those days he

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\textsuperscript{852} BGE 113 Ia 304, E. 3, p. 306.

\textsuperscript{853} “Wäre nur Angehörigen von als Landeskirchen anerkannten Glaubensgemeinschaften erlaubt, sich zum Kultus zusammenzufinden, könnte von religiöser Freiheit nicht mehr die Rede sein.” \textit{Id.} at 307.

\textsuperscript{854} “Gerade hier, wo der weitgehende Entzug der Bewegungsfreiheit den Gefangenen hindert, die ihm verbleibenden Grundrechte selbstverantwortlich in Anspruch zu nehmen, und er sich in ausserordentlich grosser Abhängigkeit von den Vollzugsorganen befindet, muss sich die religiöse Neutralität des Staates bewahren.” \textit{Id.}

\textsuperscript{855} “Christliche Sekten können so nicht für sich beanspruchen, unter Beizug eines eigenen Geistlichen einen eigenen Gottesdienst abzuhalten, wenn sie an einer interkonfessionellen christlichen Feier teilnehmen können.” \textit{Id.} at 307 f.

\textsuperscript{856} \textit{Id.} at 308.
would pray more often and contemplate deeply on his religion. As a reaction to his refusal to work, prison officials re-transferred him for three consecutive days into solitary confinement. The prisoner felt unconstitutionally treated and took the matter before the courts. Having had no success in the lower courts, he eventually appealed to the Federal Supreme Court, claiming that his constitutionally protected right to freedom of belief and conscience was violated.

In the *orthodoxe Feiertage* decision of 2003 the Federal Court held that prison regimes were to be eased only if it could reasonably be assumed that a prisoner is not dangerous to the safety of persons within the prison (personnel and other inmates), and there is no risk of the prisoner escaping. In view of the seriousness of the crimes committed by the appellant, the court found it reasonable that prison authorities first considered the extent of danger to personnel and other inmates. For the justices it was also legitimate that the prisoner was held within special prison divisions, as such a measure was, in the court’s view, necessary and adequate. 857 “It would be far from reasonable if it were possible to demand of the authority that the investigation period be shortened just because of the Easter celebration,” said the court. 858 Similarly, it could not be up to the free will of every prisoner to decide on which calendar days he or she intended to work. In a prison with 400 inmates such freedom could not always be upheld. The judicial body did not agree with the appellant’s claim that his situation could be compared with the right to collective Friday prayers enjoyed by other inmates. Muslims were entitled to stop working slightly before the end of the ordinary workday so that they could attend Friday prayer. The court said that Friday prayers were regularly held and could for this reason be easily accommodated. 859 The court refused the appellant’s request on grounds that his religious requests caused extensive burdens to prison operators.

**d. Concluding Remarks**

Incarceration by its nature changes an individual’s status in society. Prison officials have the difficult and often thankless job of preserving security in a potentially explosive setting, as well as of attempting to provide rehabilitation that prepares some inmates for re-entry into the social mainstream. Both

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857 BGE 129 I 74, E. 4.4, p. 79.
858 “Es würde zu weit führen, vom Amt zu fordern, die Aklärungsphase nur wegen der Osterfeier abzukürzen.” *Id.*
859 *Id.* at 82-83.
these demands require the curtailment and elimination of certain rights.  

However, if the assembly conditions of a ceremony are not dangerous, prison officials have no right to completely forestall inmates’ participation in it. It is recommendable that officials demonstrate that the restrictions they have imposed are necessary to further an important government interest, and that these restrictions are no greater than necessary to achieve prison objectives. Inmates should be allowed to receive religious print and electronic material. It can also be recommended that costs generated by such religious requests must be reasonably proportionate. Finally, it is necessary to take into consideration that the denial to affirm membership in a spiritual community may extinguish an inmate’s least source of hope for dignity and redemption. Such denial requires ample justification.

861 Peter Karlen, Das Grundrecht der Religionsfreiheit in der Schweiz 237 (Schulthess 1988).
862 Andrea Baechtold, Strafvollzug, Straf- und Massnahmenvollzug an Erwachsenen in der Schweiz 168 (Stümpfli 2005).
1.5.3 United States

1.5.3.1 Socio-Legal Contours

Among the first laws passed by the states were laws regulating economic and other pursuits on Sundays. The purpose of such laws, as noted by an Alabama court, “was evidently to promote morality and advance the interest of religion, by prohibiting all persons from engaging in their common and ordinary avocations of business, or employment, on Sunday.”

So Sunday closing laws structure the official working week around the majority’s observance of the Christian Sabbath. In recent years the issue presented has changed due to the increasing religious and cultural diversity of the United States. Given the importance of religion in the lives of individuals and communities the question is what balance, if any, should the government be permitted to strike between the legitimate needs of the labour market and legitimate concerns for religious liberty?

The Supreme Court decided in *Braunfeld v. Brown* (1962) that Sunday law simply regulated a secular activity and would operate so as to make the practice of religious beliefs more expensive. It also found that to allow people who rest on a day other than Sunday to keep their business open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day. Since the court decided Braunfeld most American states have relaxed or abolished their Sunday closing laws. The question that remains is how government should generally accommodate the needs of workers, students, or prison inmates to participate in religious observances other than officially recognized holidays.

1.5.3.2 Employees’ Absences

a. Introduction

The nation’s first law prohibiting religion-based employment discrimination can be found in the Constitution itself. The Religious Test Clause stipulates

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863 O’Donnell v. Sweeney, 5 Ala. 467, 469 (1843).
866 Id.
that “no religious test shall ever be required as a qualification to any Office or public Trust under the United States.” Whether targeted at classes of believers or non-believers, the imposition of a religious test or oath is, in American constitutional history, one of the purest examples of intentional religious discrimination because it involves inquiry into the substance of personal religious belief and practice. The prohibition on discriminating against employees on grounds of religion has also permeated into federal statute law. By virtue of the 1964 Federal Civil Rights Act, courts have a statutory guideline to interpret employees’ religious-freedom claims. As already mentioned in the “Religious Objections to Public Education” chapter, the Act requires “reasonable accommodation” of an employee’s religion unless such accommodation causes “undue hardship” for the employer. The question is primarily what “undue hardship” constitutes in the context of excuses for religious days and times of rest. US courts have addressed the issue in a number of cases.

b. Sabbath

An early case in this regard involved an employee whose religion required him to observe his Sabbath day on Saturday. He refused to work on Saturdays and was discharged for that reason. Although the employee had earlier held a job with the employer where the employee had sufficient seniority to allow him to avoid Saturday work, when the employee sought and received a transfer to a different job with the employer, he was placed near the bottom of a new seniority list. Due to his low seniority on the new job, the employee was called upon to work on Saturdays. The employer refused to unilaterally violate the seniority provisions and also refused to allow the employee to work only four days a week. Following his discharge, the employee brought an action for injunctive relief in the Western District Court of Missouri, alleging that his discharge constituted religious discrimination. The District Court ruled in favour of the employer, but the United States Court of Appeals reversed the judgment in favour of the employee, holding that the employer had not satisfied its duty to accommodate the religious needs of the employee. On certiorari, the United States Supreme Court reversed in Trans World Airlines v. Hardison (1977) once more. It held that the duty to accommodate did not require “substantial expenditures” by the employer. So

867 U.S. Const. Art. VI, cl. 3.
870 In violation of 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 USCS 2000e-2(a)(1)).
the employer was not required to breach the collective bargaining agreement and the seniority system, which were not shown to have a discriminatory purpose. The court reasoned that if accommodation required anything more than de minimis expenditures, it created an undue hardship. 871

c. Several Holidays

In Niederhuber v. Camden County Vocational & Technical School District (1981) a teacher took a first absence for religious reasons, and a second absence for personal reasons. The teacher was discharged for refusing to explain the personal reasons. He than challenged his dismissal on the basis that he was terminated from employment for exercising his rights under US First Amendment Law. The District Court rejected the school authority’s claim that only the latter absence formed the basis for the discharge, because the teacher had been absent for only one class period. Also, the court reasoned that the teacher’s religious absences were the motivating factor in his discharge because the supervisor’s letter recommending discharge had referenced the teacher’s prior absence due to religious beliefs. The court found that the school board had violated the teacher’s free exercise of religion under First Amendment law, by compelling him to forfeit his position in order to practise his beliefs. It also held that the school board had no business necessity to discharge the teacher, and was required to accommodate religious absences of between five and ten days per year. 872 So in believing that the discharge was unwarranted, the court found in favour of the teacher.

d. Jum’ah

US courts have also analysed employer’s accommodations of Muslim requests to attend Jum’ah worship services on Friday afternoons. In Hussein v. Hotel Employees & Restaurant Union, Local 6 (2000), for example, a Muslim waiter sued his union for refusing to change its roll call procedures to accommodate his religious obligation of worship on Friday afternoons. The union operated a hall that referred waiters and other hotel workers to fill open jobs on an on-call basis. Under the union’s procedure, which was based on a seniority system, union members were assigned a number, attended an afternoon roll call and were dispatched to different jobs. The waiter con-

tended that attendance on the Friday afternoon roll calls conflicted with his religious belief, which required him to partake in midday prayers at his mosque. The New York Federal District Court dismissed his action, finding that as long as the system applied was a neutral one, Title VII did “not require the accommodation of personal preferences, even if wrapped in religious garb.”\textsuperscript{873} The court found that it would not only be an undue hardship on the union to compel its seniority system to give way in order to accommodate the waiter’s religious beliefs, but also an economic hardship on those waiters who attended the roll call but did not get job referrals for that particular day.

\textbf{e. Dhuhr}

Similarly, in \textit{Farah v. Whirlpool Corporation} (2004) a jury found that it would be an undue hardship for an employer to be required to allow numerous Muslim factory workers to take a break for their sunset prayers. In that case, the employee, a native of Somalia, and eight other Muslim employees sued Whirlpool Corp. claiming failure to accommodate their sunset prayer requirement. Whirlpool argued that to accommodate the employees’ request would result in an undue hardship because, on the production line alone, 40 Muslim employees would have to be off the line at the same time, and the line would have had to shut down. Whirlpool noted that it had previously accommodated its Muslim employees religious practices by allowing certain apparel, adjusting cafeteria menus and posting employee notices in languages other than English.\textsuperscript{874}

\textbf{f. Concluding Remarks}

Religion becomes an issue when employers learn that an employee has specific needs that must be accommodated if the employee is to preserve both job and her or his religious faith. The 1964 Federal Civil Rights Act includes the obligation that an employer should reasonably accommodate the observances and practices of its employees. Where the employer fails to do so, it will be liable for religious discrimination. On the other hand, where accom-

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modation results in “undue hardship” to the employer, a specific action or omission does not constitute discrimination. All of the above judgments provide us with clear indication that US judicial authorities make it particularly difficult for religious people to succeed under Title VII claims. Their bargaining power seems to be especially weak when matters come to the policy choice between religion and economy. In the United States it is often stated that the workplace is a highly competitive, dynamic market where human activity, intellect and labour are traded for money, goods or services. Scholars Michael S. Ariens and Robert A. Destro find that “for some, workplace participation is purely a matter of trade. Such workers have labor, services, or talent to sell, and expect reasonable compensation in return.” Commentator David Meakin notes, however, that for an increasing number of individuals work is “an integral part of our humanity and our intelligence.” So when employees such as the latter are involved, the stakes in work-related disputes can involve far more than money alone. They may affect the very identity of the persons and organizations involved.

1.5.3.3 Students’ Absences

a. Introduction

The request to take one or more days off, or to be excused for a certain duration, for religious purposes is similarly delicate in the school environment. American basic education is compulsory and yet students may be released because of their religious affiliation. Students’ absences for religious days and times of rest are protected by the Free Exercise Clause of the First Amendment. The concept of “released time” is designed to include religious training during the course of a student’s normal school day. The children are “released” to the custody of their parents or religious authorities to attend religious holidays, worship, education classes or programs. So it is very common for school boards to sanction excusals which allow students to go outside the school for their religious education. The cases which follow show that parents have been creative in requesting school absences and the courts have responded to that.

b. Several Holidays

In *Church of God v. Amarillo Independent School District* twenty-four students (who were all church members) sought to enjoin the enforcement of Amarillo school district’s absence policy, which limited the number of excused absences for religious holidays to two days each school year, on grounds that it was a fundamental tenet of the Church that its members abstained from secular activity on seven annual holy days. The students claimed that members needed to attend a seven-day religious convocation on the Feast of Tabernacles. The failure to observe the annual holidays and the seven-day convocation was considered a sin and resulted in the loss of Church membership. So the student plaintiffs contended that the school district’s policy was unconstitutional. The State Court found that the district’s rigid policy posed an unquestionable burden on the students’ religious beliefs. The defendant district contended that accommodating the holidays of various and diverse religious groups would place an unreasonable burden on the teachers. However, the court concluded that requiring the teachers to grade the make-up work of students did not result in an unreasonable burden and there was, thus, no compelling interest that justified the substantial interference. The judicial body granted the plaintiffs’ motion for summary judgment.878

c. Jum’ah

The defendant parents in *Commonwealth v. Bey* (1950) consistently refused to send their children of compulsory attendance age to school on Fridays for the reason that it was the sacred day of Islam. In a summary proceeding before an alderman, defendants were convicted of violating a school law which required parents of children between the ages of eight and seventeen to send their children to school continuously through an entire term. The trial court confirmed the alderman’s judgment. On appeal, the Supreme Court of Pennsylvania affirmed the trial court’s decision. Judge Reno, writing for the court, held: “The provision that children shall attend continuously through the entire term recognizes the obvious fact that each day’s school work is built upon the lessons taught on the preceding day. It is virtually impossible properly to educate a child who is absent one day a week. Friday’s instruc-

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tion is the foundation for understanding Monday’s lesson. By such regularly recurring absences the child loses not only one-fifth of the instruction, but the continuity of the course of study is broken and the pupil is not able to keep pace with his classmates.”

So the judge held that the requirement was all the more reasonable and enforceable in view of the fact that parents were not compelled to send their children to public schools exclusively and debarred from attending parochial or private schools. Since the parents could avail themselves of these, their status was not regarded as interfering with constitutional rights. The state Supreme Court affirmed the judgment of the trial court.

d. Catechism Classes

Similarly, in Keller by Keller v. Gardner Community Consolidated Grade School District (1982) a student filed suit against the school district challenging the constitutionality of the enforcement of a basketball practice attendance rule, because the practice schedule conflicted with his out-of-town catechism classes, which he wanted to attend. The rule was that only personal illness or a death in the family excused an absence, and otherwise the student could not participate in the next game. On hearing, the court granted summary judgment in favour of the school because it found that the classes were not mandatory for the fifth grade student, but that a closer church offered comparable classes at times that did not conflict with practice. The court refused to interfere with the school’s policy based solely on the student’s personal preference, and that the burden on the school to change practice outweighed the burden on the student to accommodate the practice schedule. So the court granted summary judgment in favour of the school.

e. Concluding Remarks

There needs to be a compelling interest that justifies substantial interference with a student’s free exercise rights. Such an interest exists if it is virtually impossible to properly educate a child. Proper education means that a religious student is equally able to keep up with the information taught. This will not be the case if a student is absent on a regular basis.

exclusion of a child from secular school activities in order to maximize religious inculcation would, in effect, deprive the child of her or his opportunity to lead an autonomous life on reaching adulthood. Also crucial for a decision-making process is whether parents can choose between parochial or public education. In general terms a student’s personal preference should not give rise to constitutional protection. Courts refuse to interfere with a school’s policy whenever such omission is adequate to the specific circumstances of the case.

1.5.3.4 Prisoners’ Rights

a. Introduction

In Gittlemacker v. Prasse (1970) Judge Aldisert described the inherent difficulty in applying First Amendment religious freedom to inmates as: “The requirement that a state interpose no unreasonable barriers to the free exercise of an inmate’s religion cannot be equated with the suggestion that the state has an affirmative duty to provide, furnish, or supply every inmate with a clergyman or religious services of his choice [...]. This may be rationalized on the basis that since society has removed the prisoner from the community where he could freely exercise his religion, it has an obligation to furnish or supply him with the opportunity to practice his faith during confinement. Thus, the Free Exercise Clause is satisfied.”

But the claim that the Free Exercise Clause demands, in addition to the possibility to practise, the active supply of clergy as well, is an interpretation approach that comes dangerously close to rigorously guarded frontiers of the Establishment Clause.

b. Security Concerns

In Knuckles v. Prasse (1970) the appellant Muslim prisoners and appellee prison officials all sought review of a District Court judgment, which granted the prisoners partial relief in their claim under the Civil Rights Act. The Court of Appeals affirmed the judgment of the District Court, agreeing that the authorities should have permitted collective religious ser-

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882 Id. at 141.
883 Glittlemacker v. Prasse, 428 F.2d 1, 7 (3rd Cir. 1970).
884 JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 107 (8th edn, Matthew Bender & Company, Inc. 2006).
vices conducted by accredited ministers of the Muslim faith, unless there was a “clear and present danger.” In *Jones v. Willingham* (1965) the court refused to grant the Black Muslims the right to assemble for worship. The court based its decision on the duty of the warden to prevent breaches of security. It asserted that, in view of the possibility of disruptions resulting from a congregation of Black Muslims, the restriction was a valid exercise of the warden’s duty.

**c. Jum’ah**

In *O’Lone v. Estate of Shabazz* (1987) the Supreme Court of the United States was required to consider the standard of review for prison regulations claimed to inhibit the exercise of constitutional rights. Respondents were prisoners and members of the Islamic faith in New Jersey’s state prison. They challenged policies adopted by prison officials which resulted in their inability to attend Jum’ah. However, the highest court of the country found that the regulation in question did not offend the Free Exercise Clause, because respondents were not deprived of all forms of religious exercise, but instead freely observed a number of their religious obligations. The court agreed that the very stringent requirements as to the time at which Jum’ah may be held made it extraordinarily difficult for prison officials to assure that every Muslim prisoner was able to attend the service. They said “the right to congregate for prayer or discussion is virtually unlimited except during working hours, and the state-provided imam has free access to the prison.” The judicial body concluded that “we think this ability on the part of the respondents to participate in other religious observances of their faith supports the conclusion that the restrictions at issue were reasonable.”

**d. Equality Rights**

In *Larson v. Valente* (1982) Justice Brennan wrote: “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” Accommodation of the religious obser-

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887 The Honorable Elijah Muhammad, often called Muslims or Black Muslims, is a particular cult of the Islamic religion.
890 *Id.*
vances of prisoners should not depend on the religious community of which they are a member. A rule favouring members of one group over another entails difficulties of breeding resentment among prisoners. However, in *Samad v. Ridge* (1970) prison rules and policies prohibiting inmates from leading religious services and requiring that all services be conducted in an interfaith chapel did not violate the equal protection clause.\(^{892}\)

**Concluding Remarks**

The primary emphasis of decisions concerning an inmate’s religious freedom has been on the fact that the prison is a closed environment.\(^{893}\) In spite of that, inmates enjoy religious freedom in that prisoners must be permitted to receive religious advice, or hold religious services, unless there is a clear and present danger.\(^{894}\) In fact, security considerations are the most cited justifications for limiting an inmate’s religious freedom.\(^{895}\) Specific restrictions might be a legitimate response to critical overcrowding in a state’s prisons and a valuable tool to ease tensions. However, the right of inmates to exercise their religion is supported by empirical research showing that participation in religious activities is a persistent and noncontingent inhibitor of adult crime.\(^{896}\) The concept of equality of laws protects all inmates in the same way. This means that if members of one faith can practice their religious beliefs, the equivalent opportunity must be available to members of another faith.\(^{897}\) But all in all, a gloomy light of dashed claims hovers over inmates. This is because it is judicially recognized that “a man in jail is not a free man; the denial of his right to drink fully from the cup of freedom is the very hypostasis of confinement.”\(^{898}\)


\(^{893}\) *John W. Palmer, Constitutional Rights of Prisoners* 136 (8th edn, Matthew Bender & Company, Inc., 2006).

\(^{894}\) *Knuckles v. Prasse*, 435 F.2d 1255, 1257 (3rd Cir. 1970).

\(^{895}\) *John W. Palmer, Constitutional Rights of Prisoners* 109 (8th edn, Matthew Bender & Company, Inc. 2006).


\(^{898}\) *Glittlemacker v. Prasse*, 428 F.2d 1, 4 (3rd Cir. 1970).
1.5.4 The Two Models Compared and Contrasted

Holiday exemptions date back many centuries to the beginnings of the Christian era. In both Switzerland and the United States, they once gained widespread religious acceptance also. However, with the advent of secularization, days or times of rest have been justified more and more on mundane rather than religious grounds. Today, all people regardless of their religious affiliation enjoy several days off. The Swiss and US governments have a strong interest in providing free time for their populations. An increase in religious and cultural diversity has prompted adherents of non-traditional faiths, especially, to claim specific days and time of rest other than the ones officially recognized. The law has responded in the following ways to these demands.

On both sides of the Atlantic, lawmakers created special provisions to protect the religious accommodation of private and public employees. A person might be exempt from work if such excusal is reasonably “practicable.” Similarly, the American law requires the accommodation of an employee’s religion unless it causes “undue hardship” for the employer. Courts found that the undue hardship requirement is satisfied even if no “substantial expenditures” on behalf of the employer are involved. US judges reasoned that if accommodation requires anything more than “de minimis” expenditures, it potentially creates an undue hardship. In Switzerland, as far as can be seen, no case law exists on the question of when an absence is to be considered “practicable” and when it is not. From an economic point of view it is likely that a similarly high benchmark as in North America applies. In Switzerland, unofficial religious holidays are treated as “extraordinary leisure time.” Consequently, there is no entitlement to wages for the time an employee is absent. Employees can be required to compensate missed working hours. Not so in America where an employer is judicially required to accommodate religious absences of between five and ten days per year, and still pay the employee’s salary.

904 Niederhuber v. Camden County Vocational & Technical School District, 495 F.
However, US employers are in most instances not required to accommodate the religious activities of their employee’s during the workday. Courts decided that the accommodation concept did not include a waiter’s request to attend midday prayer at his mosque. The judicial body based its decision on the grounds that personal preference would not be covered by First Amendment law, even if wrapped in religious garb. Neither was another American employer required to allow several Muslim factory workers to take a break for their sunset prayers. On the other hand, Swiss employees are permitted to be absent for religious activities during working hours. However, under Swiss employment laws such special absences are not regarded as time off, but regular working hours. Hence, employees are required to inform the employer about their absence at least three days in advance. Moreover, an employee who is absent for religious activities can be required to compensate the working hours missed.

Students’ requests to take days and times off for religious purposes are a delicate area of law in both Switzerland and the United States because basic education is compulsory. Such requests are treated very similarly in both jurisdictions. In Switzerland, student absences are covered under Article 15 guarantees of the Federal Constitution, whereas in the US the Free Exercise Clause of the First Amendment applies. Swiss and American courts have found that pupils that are excused for religious purposes must be able to keep pace with classmates. There are no absolute numbers of days and times of rest or observance that a student can claim on religious grounds. Swiss case law suggests that the number of days granted to one student must not necessarily serve as a reference guide for the maximum number of days to be

910 Id. at art. 11 (first sentence).
Analytical Representation

granted to another student.\textsuperscript{912} In both countries analysed, the permissibility of exemptions depends on the particular circumstances of the case. Neither in Switzerland nor in the United States is the requirement of teachers to grade make-up work due to students’ religious absences regarded as substantial burden on the school. Such interests cannot generally override the religious-freedom interests of students.\textsuperscript{913} Limits of liberty are reached in both countries if it is virtually impossible to properly educate a child.\textsuperscript{914} Regular absences are especially likely to fall into that category.\textsuperscript{915} American courts have emphasized that a student’s “personal preferences” do not give rise to constitutional protection.\textsuperscript{916} They generally take the possibility of school choice into consideration. The voucher system enables American families to choose between public law education, and private, parochial education for their children.\textsuperscript{917} In theory, Swiss families possess similar freedoms. In reality, however, they are often barred from such choice because there is no voucher system,\textsuperscript{918} and they cannot afford private, parochial education themselves.

Prisoners also enjoy a fundamental right to religious freedom. It means that inmates must be permitted to practise individual worship or attend collective religious services unless there is a “clear and present danger.”\textsuperscript{919} Breaches of security or disruptions are causes for permissible restrictions on the inmates’ freedoms.\textsuperscript{920} Inmates of both countries must come to terms with the fact that religious services may be conducted in an interfaith chapel.\textsuperscript{921} Judges in Switzerland and the US have decided that the state has no affirmative duty to provide, furnish, or supply every inmate with a clergyman or religious services of his choice. The state provides, at best, facilities for worship and the

\textsuperscript{912} BGE 114 Ia 129, E. 4b, p. 135.
\textsuperscript{913} Id. at 123; Church of God (Worldwide, Texas Region) v. Amarillo Independent School District, 511 F. Supp. 613, 617 (N.D. Tex. 1981), judgment aff’d, 670 F.2d 46 (5th Cir. 1982) (per curiam).
\textsuperscript{918} Save certain minor exceptions.
\textsuperscript{919} BGE 129 I 74, E. 4.4, S 79; Knuckles v. Prasse, 435 F.2d 1255, 1257 (3rd Cir. 1970).
\textsuperscript{920} Id.; JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 109 (8th edn, Matthew Bender & Company, Inc. 2006).
opportunity for some clergy to visit the institution.\textsuperscript{922} In both countries the concept of equality of laws protects all inmates equally. This means that if members of one faith can practice their religious belief and possess religious materials, equivalent opportunity must be available to members of another faith.\textsuperscript{923} Swiss courts have also made it clear that religious freedom is limited by the organizational possibilities of individual prisons.\textsuperscript{924} Courts in either jurisdiction are unanimous that a person in prison must not be treated like a person who is free. Inmates behind Swiss as well as US bars must put up with the fact that their religious freedoms generally tend to be more limited.

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\textsuperscript{922} \textit{Id.} at 306; Glittlemacker v. Prasse, 428 F.2d 1, 7 (3rd Cir. 1970).
\textsuperscript{923} \textit{Id.} at 307; Newton v. Cupp, 474 P.2d 532, 536 (Or. App. 1970).
\textsuperscript{924} \textit{Id.} at 306.
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1.6 Land Uses by Religious Adherents

1.6.1 General Introduction and Overview

“I will give to you, and to your offspring after you, the land where you are now an alien, all the land of Canaan, for a perpetual holding; and I will be their God.”

(Genesis, 17:08)

For much of history, religious land-use claims have been a cause for human conflicts. For example, between the eleventh and the thirteenth century, Christian kings acting on religious orders led crusades into the Near East. Belief in the Hebrew Bible that Canaan is deemed holy land, because it is part of the divine promise to the ancient Patriarch Abraham and all his descendants, created and still creates contentious relations. Fights over land, power, and faith also led to one of Europe’s most ferociously fought wars – the so-called Thirty Years’ War (1618–1648). To overcome divisions in faith, land uses eventually became divided. The principle “whose realm, his religion” meant that the religion of the ruler was also the religion of the people. Any subject who could not come to terms with the ruler’s religion was forced to leave the territory. Ardent Protestants went away to America because they could not put up with precisely that formula. To them a divine religion could never be geographically divided. They pursued a life in greater accordance with their distinct beliefs. Many early European settlers romanticized and idealized the New World as a heavenly land, similar to that of the Garden of Eden before the fall. These radical believers appropriated biblical texts to warrant their actions in the name of God. But once again, the use of land justified by religion became the principal

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925 Canaan is an ancient expression for a region covering modern-day Israel and Lebanon, the Palestinian Territories, as well as adjoining coastal lands and parts of Jordan, Syria and northeastern Egypt.

cause of a disastrous war between European settlers and the Native American population.

Today, several centuries later, land-use conflicts on Western territory have not ceased to exist. However, the means by which the (mini) battles are fought have substantially changed. One representative example of such a controversy occurred in Switzerland from 2007 onwards. Members of the Swiss People’s Party and the Federal Democratic Union launched a federal popular initiative that sought a constitutional ban on minarets throughout the country. Not surprisingly, the justification for the politicians’ action was once more founded in beliefs about another religion. They alleged, inter alia, that “[t]he construction of a minaret has no religious meaning. Neither in the Qur’an, nor in any other holy scripture of Islam is the minaret expressly mentioned at any rate.”927 To the politicians the minaret is “far more a symbol of religious-political power claim.”928 Moreover, in their eyes Swiss territory is Christian land.929 And not surprisingly, in America similar problems can be found. The same belief that estates must be preserved in their traditional religious use spurred a local residents’ group in the United States to oppose the erection of an Albanian mosque. Members of the group were against the construction since they disapproved of the Moslem practice of saying prayers five times daily.930

However, in Switzerland and North America, the state is generally regarded as being neutral towards all beliefs. Planning law is employed as an impartial procedure to allow municipalities to consider justly the impacts of a great variety of land-use objectives. Planning is pivotal because the amount of land mass is finite. The compelling need for intelligent planning, for specification of new social goals and the means for achieving them, is manifest.931 Zoning on the other hand is the legal tool that implements the land-use plan. It regulates, inter alia, the permissible uses of land in various locations like

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928 Id.
929 The newest propaganda of the Swiss People’s Party finds that Switzerland is determined by the Christian tradition. Generalsekretariat SVP Schweiz, Volksbetrachtung zur Asyl- und Ausländerpolitik, 2010, at. 14. Although this might represent an exception rather than the rule, as for Switzerland it is no longer clear whether all such claims are purely religious, or represent a civil desire to keep historic land within the control of traditional religious communities.
city centres, residential areas, and industrial or business districts. Hence, today’s religious land-use concepts are far more sophisticated than they once were. Land-use controls are strict in order to protect the countries’ economy, private property values, public health and safety. Decentralization in matters of land use has a long and enduring tradition in both countries. For this reason, the nature and level of planning and zoning powers are similar in Switzerland and the United States. For instance, the general exercise of state police power\textsuperscript{932} is a main source for public land-use controls at regional, or at local level in both jurisdictions.\textsuperscript{933} Likewise, the regional legislature can delegate its lawmaking powers to municipalities. Many Swiss cantons and US states have enabling acts that establish or authorize land-use control systems for aesthetics in general, or historic district and landmark preservation in particular. The regional competence to enact rules to promote health, safety, morals and general welfare is mainly restricted by the federal constitutions.

Although planning and zoning laws do potentially curb basic rights such as the free exercise of religion, and the freedom to enjoy property, they are not necessarily constitutionally non-compliant.\textsuperscript{934} As we will see later, this does not mean that public powers are infinite and unchallengeable. This chapter focuses only on some of the most disputed areas of planning, building and environmental law. The governmental system for controlling land use in both countries is multi-layered and far-reaching. In this analysis, complexity is deliberately reduced, and at no time does the following elaboration claim to be complete. It is important to re-emphasize that the objective of this thesis is to formulate models of religious freedom, and not to scrutinize all relevant laws. A comparative obstacle is posed by the situation that the two systems do not readily fit together. This is because religious land-use litigation has occurred sometimes for the same, and sometimes for different reasons. Despite the above-mentioned similarities, the methodology underlying Swiss and American land-use law varies in substance and effect. As a consequence of this, it is not possible to use the same content structures for both country analyses. The reason why it is all the more interesting to compare this area of Swiss and American law is its distinct response to changing societal circumstances.

\textsuperscript{932} Police power is the term for the general governmental power to protect the health, safety, morals, and general welfare of the citizenry.

\textsuperscript{933} Daniela Ivanov, Die Harmonisierung des Baupolizeirechts unter Einbezug der übrigen Baugesetzbgebung 21 (Schulthess 2006); Peter Hänni, Planungs-, Bau- und besonderes Umweltschutzrecht 11 (5th edn, Stämpfli 2008); Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law 47 (2nd edn, Thomson West 2007).

\textsuperscript{934} BGE 1P.149/2004, E. 3.1-3.2; Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
So although specific case facts do not match in many instances, the legal experiences of one country may still act as a precursor for the other and vice versa. In this sense, this thesis treats Swiss laws to control noise generated by religious land uses, while it also tackles recent litigations brought by religious communities under the relatively new US “Religious Land Use and Institutionalized Persons Act.” It then takes a look at Swiss laws regulating cemeteries and grave sites, and subsequently explores the laws governing Native American graves and sacred sites in particular. The minaret issue is given limited attention also. The constitutionality of aesthetic interest protection in both nations can be tested under the same title. This chapter will then be concluded with a country-specific comparing and contrasting exercise. Before starting with the actual analysis, it is necessary to give at least some thought to the two countries’ socio-legal contours.
1.6.2 Switzerland

1.6.2.1 Socio-Legal Contours

In Switzerland, religious land uses meant a territorial demand of two rival Christian denominations: the Roman Catholic and the Evangelical Reformed Church. Most cantons were determined by one or the other denomination. This entailed restrictions on settling within the territory or canton of one’s choice. Efforts to overcome divisions in faith came through the enactment of the Federal Constitution of 1848. The basic social contract guaranteed to all Swiss Christians, for the first time after the great confessional split, the right to reside freely within the whole of the country.\(^{935}\) However, until the Constitution’s first revision of 1866, the Jewish community was wilfully excluded from that privilege. An amended provision would change this obvious discrimination by assuring all Swiss, regardless of belief, of the freedom to reside where they chose.\(^{936}\) Over the years the state became more protective. In 1886 the Federal Supreme Court in *Schass und Konsorten* set a first threshold for public authorities to circumscribe free exercise of religion in publicly accessible places even if such practice offends others. In that case members of the Salvation Army gathered to engage in proselytization and thereby provoked a mob that happened to pass by the assembly. The judicial body found that police interests could not limit the Salvation Army’s right to religious assembly and canvassing unless the police were not capable of guaranteeing public order and of protecting the assembled religious participants from the threats posed by an angry mob.\(^{937}\)

With the advent of industrialization in the 1890s, Switzerland went from being a country of emigration to one of immigration. Attractive working conditions and full freedom of movement influenced immigrants to come to Switzerland from neighbouring countries. Switzerland became a haven of refuge for the many malcontents and political exiles who fled to the alpine country. In spite of that, no new religions were introduced. Favourable economic conditions after World War II resulted in a great demand for foreign labour. But because guest workers were mostly Italian Catholics, religious

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\(^{935}\) Bundesverfassung der Schweizerischen Eidgenossenschaft [Swiss Federal Constitution] of September 12, 1948, art. 41(1) quoted as in ALFRED KOLZ, QUellenBUCH ZUR NEUEREN SCHWEIZERISCHEN VERFASSUNGSGeschICHTE, Vom Ende der Alten Eidgenossenschaft bis 1848 at 461 (Stämpfli 1992).

\(^{936}\) Änderung [Amendment] of 1866, art. 41(1) quoted as in ALFRED KOLZ, QUellenBUCH ZUR NEUEREN SCHWEIZERISCHEN VERFASSUNGSGeschICHTE, Von 1848 bis in die Gegenwart 125 (Stämpfli 1996).

\(^{937}\) BGE 12 I 93, E. 5, p. 109.
land uses were largely kept within the bounds of the traditional churches and the Jewish community. In the 1970s an influx of foreign workers from Muslim parts of Yugoslavia and Turkey brought the first and lasting religious transformations to Swiss society. The number of legally resident foreigners rose steadily under the effect of family reunification. In addition to that, a large number of people came to Switzerland as refugees. Several thousand refugees from Tibet, China and Indochina were admitted in 1968. Buddhism and Hinduism were no longer religions of distant cultures and peoples, but became part and parcel of Swiss social life. Numbers of Muslim and Eastern Orthodox asylum seekers from the West Balkans peaked at 46,000 yearly applications in 1999.

The result of several waves of immigrants was that Switzerland became a truly pluralistic society. On top of that, many of the Swiss left the two traditional Swiss churches or adopted other Christian denominations. Some of them changed their religion entirely. The demand for greater participation of non-traditional religious communities in public life increased steadily. The laws regulating religious land uses became particularly important to all those communities wanting to build new or operate existing temples, mosques, churches, or any other place of worship.

1.6.2.2 Noise Protection

a. Introduction

In many instances the use of land for religious purposes is associated with noise emissions generated by the operation or erection of the building itself, or the people using the site. The Federal Act of 1983 on Environmental Protection and the Federal Noise Protection Regulation of 1986 govern noise emissions resulting from the building and operation of religious con-

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938 TINDARO GATANI, I RAPPORTI ITALO-SVIZZERI ATTRAVERSO I SECOLI 13 ff. (Unione per la Tutela degli Interessi Lavoratori Emigranti 1978).
939 ETIENNE PIGUET, L’IMMIGRATION EN SUISSE 43 (Presses polytechnique et universitaires romandes 2004).
941 Id. at 63 ff.
Sites that were built after the enactment of the 1983 Act are subject to more restrictive noise-protection measures than older ones. Claims of personal discomfort are balanced against the degree and type of interference, as well as the circumstances that can reasonably be expected in a particular locality. The following analysis treats disputes over Christian bell ringing, and Islamic calls to prayer.

b. Christian Bell Ringing

The Glockengeläut Bubikon ruling of 2000 involved a resident bothered by noise emissions who claimed that “early morning church bell ringing” (Frühgeläut) needed to be rearranged to a later hour in the light of noise protection considerations. The Federal Supreme Court held that the religious practice of bell ringing is encompassed by the right to freedom of belief and conscience, but suggested that such a right can be limited for the protection of “public quietness” (öffentliche Ruhe). The court made clear that there “is no right to absolute quietness, and that one must come to terms with minor and insignificant interferences.” According to the justices an adequate evaluation of noise levels requires that the emission’s characteristics are taken into consideration. This may include the time and frequency of its occurrence, as well as an area’s general “susceptibility to noise” (Lärmempfindlichkeit). It is not a person’s individual sensitivity to noise that serves as a reference for the process of judicial evaluation, but an objective consideration of people with a heightened susceptibility to noise. In the court’s view, activities that have as their very objective the making of noise (such as church or cow bell ringing), could not be entirely prevented without questioning their actual purpose. When such activities represent local customs, or are based upon tradition generally, public authorities possess discretion to decide the merits of a case. Moreover, the court stated: “Bell ringing [...] does not disturb most of the people. Like music it cannot be equated with

944 KLAUS A. VALLENGER & RETO MORELL, UMWELTRECHT 246 f. (Stämpfli 1997).
945 Christoph Jäger, Kultusbauten im Planungs-, Bau- und Umweltschutzrecht, in BAU UND UMWANDLUNG RELIGIÖSER GEBÄUDE 133 (Réne Pahud de Mortanges & Jean-Papiste Zufterey eds., Schulthess 2007).
946 This might be especially true when it comes to electronic amplification aids.
948 “Es gibt keinen absoluten Anspruch auf Ruhe; vielmehr sind geringfügige, nicht erhebliche Störungen hinzunehmen.” BGE 126 II 366, E. 2b, p. 368.
949 Id. at 368-9; also BGE 126 II 300, E. 4c/aa, p. 307; BGE 123 II 74, E. 5a, p. 86.
noise caused by traffic, or factories. Church bells possess for many people a melodious sound, and their steady tone – even when practised early in the morning – is regarded as a widespread ancient tradition. Church bell ringing has been carved into the consciousness of people far beyond the circle of the faithful. It is also capable of moving the feelings of religiously indifferent people, and is, for a great proportion of the population, part of the fixed daily routine.”

To the judicial body it is reasonable to give more weight to the preservation of tradition or custom than the request for quietness by an upset resident. The protection of religious freedom thereby appears to be of secondary importance only. The court seems to put great emphasis on the secular effect (the value of the sound regardless of religion) of the bell-ringing practice, and pay little heed to its inherent religious purpose (calling adherents to the service).

In a very similar Glockengeläut decision of 2006 the “community council” (Gemeinderat) of Gossau turned down another resident’s claim that held that the local church was required to restrict its hourly bell strikes at night. On appeal the Supreme Court followed its earlier Bubikon ruling by stating that if the hourly chimes were generally accepted in the municipality, and if there was a public interest in the preservation of that tradition, such a decision over public quietness was at the discretion of the local authorities and not the Supreme Court.

Noise emissions stemming from the practice of church bell ringing are to be vetted by means of case-to-case analysis, the judges said. Competing interests must be carefully balanced, and must lead to an optimum for all parties involved despite possible concessions.

c. Islamic Calls to Prayer

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952 BGer. 1A.159/2005 of 20/02/2006, E. 3.3.

953 Id.

At this stage, Islamic communities appear to abstain from calls to prayer in Switzerland. The issue as to whether such calls are protected by the right to freedom of belief and conscience has, as far as can be established, never been raised in the courts. There are at least two ways by which the judiciary can evaluate the constitutionality of calls to prayer in the future. A first approach can include the consideration of whether prayer calls fall within the scope of a community’s religious self-conception. Provided that courts find that prayer calls are part of an Islamic doctrine, such practice would be covered under Article 15 guarantees. From this it can then be concluded that the decision to call or not to call for prayer is up to the religious community, but can still be restricted if the necessary requirements under Article 36 of the Federal Constitution are satisfied.

A second approach could include the direct comparison of Islamic prayer calls with Christian bell ringing, and the Jewish call of the Shema. All three monotheistic religions share the belief that “God calls the human person to a life of holiness.” However, such judicial comparison may come dangerously close to violating the self-imposed ratio which holds that theological truth may not be judicially reviewed, and that each religious community is to be treated as a separate and unique entity. However by virtue of the constitutional concepts of equality and non-discrimination, the Islamic, Christian and Jewish calls must be treated alike. This implies that if the calls of the Christian or Jewish religion are permissible, the practice of the Islamic call to prayer also needs to be permissible.

As for both approaches, a further judicially developed principle needs to be taken into consideration. The Bubikon ratio introduced above presents a line of reasoning that justifies different treatment. Islamic prayer calls might not enjoy the same extent of protection as Christian calls for prayer in the form and quality of church bell ringing. This is because the Federal Supreme Court regarded the Christian practice as of traditional nature and opined that it was the communal authority which decides on such disputes. Hence, by

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955 All three of the world’s great monotheistic religions propagate a strong sense of the divine call. John J. Coughlin, Address at the Symposium on Law & Politics as Vocation, as in 20 ND J. L. Ethics & Pub Pol’y 1, 2 (2006) (discussing the divine call of all three monotheistic religions); also Irshad Abdal-Haqq, Islamic Law: An Overview of Its Origin and Elements, 7 J. Islamic L. & Culture 27, 58 (2002) (discussion the practice of Khalif Uthman).

956 John J. Coughlin, Address at the Symposium on Law & Politics as Vocation, as in 20 ND J. L. Ethics & Pub Pol’y 1, 2 (2006) (discussing the divine call of all three monotheistic religions).

957 BGE 119 Ia 178, E. 4c, p. 185.

958 BGer. 1A.159/2005 of 20/02/2006, E. 3.3.
the merits of that ruling, traditions or customs which coincide with religion are likely to receive greater protection than purely religious practices.

Probably for that reason, legal scholar Bernhard Waldmann opines that there might be greater restrictions on Islamic prayer calls than on Christian bell-ringing practices, without breaching the constitutionally entrenched anti-discrimination and religious-freedom provisions. Conversely, this raises the concern that while in a predominantly Christian state noise emissions from church bells will be tolerated, the same level of noise emissions produced by the prayer calls of an Islamic muezzin might not. It could readily be argued that if Western constitutional states, which continuously advocate the universality of fundamental human rights, including the freedom of religion, want to remain credible, they must identify and stop discrimination against the minority religions of immigrants. In this view, the dominant religion, regardless of whether it is part of the country’s tradition, must not receive preferential treatment. Of a similar opinion is scholarly commentator Pahud de Mortanges, who emphasizes the importance of a case-to-case analysis. In general terms he says, however: “Where a church is allowed, so is a mosque” and “where bell ringing exists, prayer calls must be allowed also.”

### d. Concluding Remarks

Swiss courts rule out direct religious favouritism. Preferential treatment of one religion over another religion must be of a coincidental nature. Courts are generally neutral towards religion and if they allow greater discretion with reference to specific kinds of noise, such a decision must not be motivated by religious bias, but must reflect the public interest to preserve local traditions or customs. It can be suggested that courts must be particularly clear about their decisions where cultural preservation meets religion. It is also recommendable that they develop zone- and district-specific criteria, which give guidance for future decisions. In general terms however, individuals must accept minor interferences with public quietness, regardless of whether these derive from Islamic prayer calls or church bell ringing, or any

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other source of noise. The law is not considerate of a person’s abnormal sensitivity to noise. Planning authorities may still instruct religious communities to lower the decibels of their noise emissions if they prove to be so loud that they might inflict health problems on the neighbours. Thus, noise dampening requirements may also be imposed. As long as content-neutral rules justifiably protect the environment from detrimental noise, they are not necessarily in conflict with the right to profess one’s religion under Article 15 of the Constitution. From this point of view an absolute ban on Islamic prayers is likely to be unconstitutional.

1.6.2.3 Aesthetic Interest Protection

a. Introduction

Clauses protecting aesthetics are construed as a general expectation to protect the visual value of architectural patterns. A person may find a building or construction tasteful if it contains the form, size, and surface characteristics that make the object look fancy, appealing, or decorative. However such clauses do not protect subjectively perceived aesthetics, but the general and objective value of building patterns. Because this understanding varies from one region to another, it is cantonal or communal building ordinances that contain provisions relating to aesthetics. This type of law does not prohibit building in general, but is intended to save a town or city from architectural blunders. In many instances, historic monument and landmark preservation is somewhat difficult to distinguish from aesthetic interest protection. Even a building’s age or historic significance may affect the appreciation of what is beautiful. A construction may be of average architectural quality and still look beautiful. This is especially the case in Switzerland, where almost all older or ancient constructions and buildings are protected for aesthetic and/or historic interest. However, where a construction is entirely new, only the laws of aesthetics apply. Ordinances may divide a city or commune into land-use districts, or zones. Different categories of aesthetics

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961 Peter Hanni, Planungs-, Bau- und Umweltschutzrecht 38 (5th edn, Stämpfli 2008); also Marcel Steiner, Die Ästhetik-General-Klauseln, im Baurecht 117 (Mitteilungen zum privaten und öffentlichen Baurecht 1994).
962 Ernst Kistler & René Müller, Baugesetz des Kantons Aargau, Gesetz über Raumplanung, Umweltschutz und Bauwesen 112 (Merker im Effingerhof 2002).
apply to varying zones. As will be shown in the analysis below, these laws allow the use of land only for the purpose permitted in the applicable zone.

b. Residential Zones

The purpose of residential zones is, as its name suggests, residential use. In some instances, smaller non-obtrusive businesses are allowed also. Religious land uses in this zone are mostly non-conforming because of their size and emissions. For example, in the 2004 Aluminiumkreuz decision the communal building authority of Gerlafingen refused a construction permit for a 7.38-meter high, blue illuminated Dozulé cross that was already erected in the garden of the petitioners’ property. On appeal the Federal Supreme Court agreed with the petitioners that the dissemination of one’s own conviction through the construction of that cross was protected by Article 15 rights. However, the court disagreed with the petitioners’ opinion that such rights could not justifiably be limited in the circumstances of the case. The judges opined that the scope of religious freedom could be curbed by content neutral, generally applicable planning and building laws. In casu Paragraph 145(1) of the 1978 Cantonal Planning and Building Act of Solothurn applied. It reads: “Buildings […] must be typologically in keeping with existing structures.” According to the same decision the requirement “to be in keeping” is satisfied “if place and dimension of the structure does not disturbingly change the character of the residential area, and if it is in compliance with the surrounding area’s building style and materials.” The court held the material change of the property was increased beyond the bounds of planning prudence. Moreover, because of the construction’s size it was not in keeping with the residential area, and was likely to cause visual as well as ideological disturbance to neighbours, the justices found.

c. Town and Core City Zones

964 The Court argued that a building permit was necessary according to Paragraph 3(1) of the Kantonale Bauverordnung des Kantons Solothurns [Cantonal Building Regulation of Solothurn] of July 3, 1978, Nr. 711.61; BGE 1P.149/2004, E. 3.1-3.2.
966 “[…] wenn Standort und Ausmass das Gefüge der Eigenarten der Siedlung und ihren Haushalt nicht störend veränderten und wenn sie sich an die Form- und Materialsprache der Umgebung hielt.” BGE 1P.149/2004, E. 3.3.
967 Id. at 3.3-3.4.
In a historically developed town or city centre there is little room for peculiar or ostentatious constructions.\textsuperscript{968} In other words, the more dominating a building design is, the more stringently aesthetic or historic interest protection regulations are to be construed.\textsuperscript{969} In order to set criteria of aesthetics, the construction and the surrounding area is to be taken into consideration. It is common for this type of zoning regulations to protect not only general historic or ancient sites, but also the buildings and constructions of traditional churches. As long as such norms are written in a language which is content neutral, and the privileged position of particular churches coincides with the objective to preserve Swiss culture, they are regarded as constitutional.\textsuperscript{970} The clauses protect the beauty, the uniqueness and the tradition of the country. Their purpose is neither state-sponsored favouritism, nor the identification with a particular religion at the expense of other religions. The state is neutral towards any type of belief or disbelief. Nonetheless, requests for new religious buildings will rarely be granted.

d. Commercial and Industrial Zones

Religious land uses by new or small religious communities are often located in industrial or commercial zones, or mixed commercial-industrial zones. The law thereby protects aesthetic interests of the majority population by excluding specific constructions from zones such as town, core city, or residential zones. In this light, the new Buddhist temple of Gretzenbach, the religious centre of the Sikh community in Langenthal, and the temple of the Tamil community in Bern, were all built in commercial or industrial zones. A prominent example is the 6-metre high minaret on the premises of the Turkish cultural association in Wangen bei Olten that was erected in 2008, also in a commercial zone.\textsuperscript{971} Accordingly, the threshold of aesthetics in these zones is considerably lower than in other zones.

\begin{footnotesize}
\begin{enumerate}
\item[969] DANIEL GSPONER, \textit{Die Zone für öffentliche Bauten und Anlagen, unter besonderer Berücksichtigung des Luzerner Planungs- und Baurechts} 133 (Studentendruckerei 1999).
\end{enumerate}
\end{footnotesize}
e. Public Interest Zones

Other zones that may be relevant with regard to religious land uses and aesthetics are those which are made available for the purpose of public interest. As such they are mainly used for public buildings and constructions. In addition, the erection and operation of churches and cemeteries have traditionally been authorized within this zone. Permitted categories are religious buildings as well as buildings or constructions that can be brought into close association with religious exercise. In this type of zone, cantons accept land use by public-law recognized religious communities especially. Several Swiss commentators are of the view that the buildings and constructions of new religious communities should be allowed only if they are accessible to the public at large, and the religious community in question has gained public recognition within the relevant municipality. With regard to aesthetics, the threshold of this zone must be expected to be more or less as high as it is in town and core city zones. This is because public interest zones are in many instances close to or even within the centre of cities and towns, where architectural patterns possess historic or traditional values.

f. Protecting Zones and Agricultural Zones

Protecting zones are used to preserve historic interests and landmarks. This type of zone may overlap with other types of zones. For instance, parts of towns can be protected not only by norms regulating density levels and use, but also by norms preserving specific sites and properties from alteration. In the opinion of the Federal Supreme Court, the protection of specific landmarks is to be regarded as among the interests of the public at

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972 For instance, the administrative court of Schwyz held that it was questionable whether privately organized communities had a right to access public-interest zoning. It regarded this type of zone as reserved for public-law recognized churches. Entscheide der Gerichts- und Verwaltungsbehörden des Kantons Schwyz 1991, Nr. 7.


974 Bundesgesetz über die Raumplanung [Federal Planning Act] of June 22, 1979, SR 700, art. 17(1).

975 Id. at 18(1).
large. The public-interest dimension of landmark preservation has continuously developed. Whereas in the past, historic buildings and constructions were especially kept safe from architectural harm, these days it is property that has a specific character and value which is preservation-worthy. For these reasons, religious land uses of new communities may fit into this category of zoning. However, in agricultural zones only buildings and constructions are permitted which are used for agricultural purposes or horticulture. Religious land uses do not comply with the purpose of this zone.

**g. Concluding Remarks**

Aesthetic interest protection, if arbitrarily applied, carries considerable potential for discrimination against religious communities which are not as firmly established as their public-law recognized counterparts, and which are still in need of access to new land. It is recommendable that building laws are framed, as far as it is feasible, in such a manner that cultural differences of new religious communities are not affected detrimentally. Clauses on aesthetics need to be foreseeable by having a norm that is formulated with sufficient precision. A clause should enable citizens to regulate their conduct. What that means is that an average person must be able to reasonably foresee the consequences which a given action will entail. For this reason, it can be suggested that public authorities should give access to that category of information which they regard as significant for the valuing of building or construction design. Public authorities must be neutral towards any religion or belief-system when considering whether aesthetic requirements are satisfied. Provided that a building permit is denied, it is indispensable for the authority concerned to give detailed reasons for its decision. The test to decide whether a religious building or construction fits into the surrounding area is an objective one. This means that the aesthetic understanding of the hypothetical average person is taken into judicial contemplation. The subjec-
tive view of neighbours, who might oppose the realization of particular pro-
ject, must not affect an authority’s decision.

1.6.2.4 Cemeteries and Grave Sites

a. Introduction

The enactment and enforcement of burial orders is generally within the ca-
pacity of the cantons, and not the Confederation. In Switzerland it has been tradition that burial orders blank out confessional differences and estab-
lish equality between the deceased. In most cantons there are public ceme-
teries, as well as special, privately operated ones. As an effect of several waves of immigration, the number of non-Christian adherents has increased steadily. Some religions require compliance with their own specific rules for the burial of the dead. These may go beyond ordinary Christian religious practices and contain particular rules and requirements. However, many new religious communities do not (yet) possess their own private cemeteries. Thus, the difficulty with which authorities are confronted is the adequate accommodation of non-Christian religions in publicly operated cemeteries and grave sites. In that respect, relaxing the legal tradition that all the deceased must receive equal treatment seems to be a particularly challenging factor for the development of new practice.

b. Freedom from Coercion

The positive right to religious freedom under Article 15 encompasses any kind of burial practices and manifestations as long as they are religious in nature. The negative right to religious freedom under the same article covers the state duty not to obstruct burial practices, and to refrain from imposing a specific type of religion or belief. Under Article 15(4) of the Constitution, individuals possess, inter alia, a negative right not to be forced to participate

980 The exception to this general rule is the law regulating military burials. Dienstreg-
981 WOLF S. SEIDEL, RAUMPLANUNG IM FOKUS DER IMMIGRATION, MIT HINWEISEN AUF DAS U.S. – AMERIKANISCHE ANTIDISKRIMINIERUNGS- UND PLANUNGSRECHT 217 (Dike 2008).
Parts of Article 15(4) are interpreted as the fundamental essence, or irreducible core, of the right to freedom of belief and conscience. An often-cited example of religious coercion is the so-called Friedhofsreglement Hünenberg ruling of 1975. The decision concerned a local cemetery ordinance that required the authorities to build a symbolic cross next to every grave. On appeal the Federal Supreme Court held that the “state is prohibited from forcing or requiring someone to engage in an action or express an opinion which is part of a religious belief.” Such a compulsory cross must not contradict with a person’s innermost intimate sphere, even if such a right is transferred to the family of the deceased.

The judges expressed the opinion that the cross symbolized not only Christian or religious contents, but was to be regarded as an embodiment of Christian faith. The requirement to use that symbol for any grave, regardless of person’s divergent belief, violated the right to freedom of belief and conscience. The fact that 98 percent of the commune’s residents were of Christian faith was not reasonable justification for state action. The concept of coercion is likely to comprise not only physical pressure, but also indirect means of coercion. Practices or policies which have the same intention or effect are likely to be similarly inconsistent with Article 15(4) of the Federal Constitution. However, interference based on religion-neutral criteria and effect, such as general health, hygienic requirements, or security considerations, may not breach Article 15 guarantees if pursued in compliance with Article 36 of the Federal Constitution.

c. Respectful Burial

A prominent example of a conflict between religious commandments and public law is the schickliches Begräbnis decision of 1995. In this case a Muslim filed an application for his family and himself to be buried in accordance with Islamic practices. The communal authority rejected the application on grounds that the requirement of eternal peace of the dead, as required by Islam, was incompatible with the practice of grave rotation. The applicant appealed to the Federal Supreme Court by, inter alia, claiming that his right to freedom of belief and conscience, as well as his right to respectful burial,
was violated. The highest judicial body of the country dismissed both claims. It was of the view that without the concept of grave rotation cemeteries would expand continuously, causing problems of space in Switzerland’s congested cities and towns. Moreover, the court held that the Islamic concept of eternal peace would run counter to laws regulating special use of public ground. By virtue of those laws, grave sites could not be bought for an indefinite period of time. Authorities that established permanent grave sites for the Muslim community would act ultra vires, that is to say, beyond the bounds of their discretionary powers, the court said.986

To the judges, respectful burial meant that “the dead human body deserves respect also. Which kind of burial and which acts are to be seen as an expression of respect or disrespect is a question of custom and local practice. The right is violated if the deceased is denied whatever constitutes the prevailing practice to honour the dead.”987 The state has a negative duty not to obstruct a specific kind of burial, but at the same time it has no positive obligation to guarantee any kind of ceremonial act that is regarded as respectful burial. The court opined, therefore, that the clearing of a grave after a certain period of time is nothing dishonourable in itself, but merely complies with the regulations that generally apply to publicly run cemeteries.988 Neither did the judicial body see a violation of the right to freedom of belief and conscience because the authorities did not prohibit the Muslim community to build their own, private cemeteries. That fact that no private Islamic cemetery existed in the canton of Zurich at that time was not taken into judicial consideration.989

d. Concluding Remarks

It appears difficult to strike a reasonably clear line between the state duty to refrain from interference in religion and the state obligation to act upon religion. The former holds that the state must not impose a specific religion on the deceased, or the family commemorating the deceased. The later requirement is less clear. In the schickliches Begräbnis ruling, the court refused to make public cemetery ground available so that a dead person could rest in

986 BGE 125 I 300, E. 3b/bb, p. 308.
987 “Das entsprechende Gebot beruht auf dem Gedanken, dass auch dem toten menschlichen Körper Achtung gebührt. Welche Bestattungsart und welche Handlungen als Ausdruck von Achtung oder Missachtung zu gelten haben, ist eine Frage der Sitte und des Ortsgebrauchs. Der Anspruch ist verletzt, wenn dem Toten das verweigert wird, was der herrschende Gebrauch zur Ehre der Toten fordert.” Id. at 305-306.
988 Id. at 306.
989 Id. at 307.
eternal peace.\textsuperscript{990} The judges saw no state duty to act upon the Islamic requirement. It is suggested that the judicial holding means that the state might still be required to act positively in circumstances other than the ones treated in the \textit{schickliches Begräbnis} decision. For instance, the requirement to separate graves according to the religious affiliation of the dead could be a requirement that is readily implementable without the need to breach public law.\textsuperscript{991} Today, the rigid application of the tradition that all dead must receive equal treatment seems to be incompatible with the right to freedom of belief and conscience, as well as the right to respectful burial. Different treatment may be a necessity so that religions and belief-systems other than the main Christian beliefs are not illegitimately disadvantaged. Conceivably, the just application of constitutional guarantees requires the public to establish the basis for a society affording distinct opportunity to all participants.

1.6.2.5 Anti-Minaret Clause

\textit{a. Introduction}

The Swiss minaret controversy began in a small municipality in the northern part of Switzerland in 2005. The contention involved the Turkish cultural association in Wangen bei Olten, which applied for a construction permit to erect a six-metre-high minaret on the roof of its Islamic community centre. The project faced opposition from surrounding residents, who had formed a group to prevent the tower’s erection. The Turkish association claimed that the building authorities improperly and arbitrarily delayed its building application. They also believed that the members of the local opposition group were motivated by religious bias. The Communal Building and Planning Commission rejected the association’s application. The applicants appealed to the Building and Justice Department, which reversed the decision and remanded. As a consequence of that decision, local residents (who were members of the group mentioned) and the commune of Wangen brought the

\textsuperscript{990} So far there is no solution to the incommensurability of eternal peace claims and special use of public ground laws. Interview with Paul Richli, Chair on Theory of Legislating, Agricultural and Administrative Law, University of Lucerne (Dec. 15, 2009).

\textsuperscript{991} Since the 1995 decision, several cities have improved the burial conditions for minority religions. For instance, in 2002 the City Council of Zurich approved a CHF1.85 million project for the construction of Muslim burial grounds within the public cemetery. The cities of Bern and Basel realized similar projects even earlier, in the year 2000. Lugano opened a separate burial ground for Muslims in 2002, and several other Swiss cities have followed this practice since.
case before the Administrative Court of the Canton of Solothurn, but failed with their claims. On appeal the Federal Supreme Court affirmed the decision of the lower court. 992 The six-metre high minaret was eventually erected in July 2009.

From 2006 until 2008, members of the Swiss People’s Party and the Federal Democratic Union launched several cantonal initiatives against the erection of minarets. The cantonal citizenry never had the opportunity to vote on it because all cantonal parliaments held the initiatives unconstitutional and therefore void. In 2007, in response to the political defeats at cantonal level, the Egerkinger committee launched a federal popular initiative against minarets. The committee’s proposed amendment to Article 72 of the Swiss Federal Constitution read: “The building of minarets is prohibited.”993 After a hotly debated campaign the amendment was approved on 29 November 2009 by 57.5 percent of the participating voters.

b. Domestic Level

Before the federal vote, the building of Islamic towers was subject to ordinary restrictions arising out of generally applicable and content-neutral planning and zoning laws.994 Since 29 November 2009, the construction of Islamic minarets is constitutionally prohibited without exception. From a legal perspective the new law is at odds with the rest of the Federal Constitution. The provision conflicts with several constitutionally entrenched fundamental rights. First and foremost, Article 15(2) of the Swiss Federal Constitution holds that all persons have a right to profess religion alone or in community with others. The erection of a minaret can readily be seen as collective religious profession.995 Moreover, Article 8(2) of the same Constitution stipulates that no one must be discriminated against on grounds of religion.996 But there is no legitimate reason why the Muslim community should be treated differently from all other religious organizations. The minaret ban clashes clearly with the prohibition on discriminating between religious adherents. The 2009 amendment is also likely to infringe the guarantee to freedom of property under Article 26(1) of the Constitution.997 In addition to these obvi-

993 BBl 2008 7603.
995 SWISS CONST. ART. 15(2).
996 Id. at ART. 8(2).
997 Id. at ART. 26(1).
ous ambiguities, it is strange that the new provision was written into a section of the Constitution that would normally regulate the relationship between church and state affairs. It all implies that the minaret ban has a vicious role alien to the Constitution’s liberal nature. It is recommendable to have this misfit provision invalidated as soon as possible.

c. United Nations Level (Excursus)

The new provision, which seeks the different treatment of the Swiss Islamic community on grounds of religion, is challengeable by means of international obligations. Although Swiss citizens may seek via a popular initiative to enact, revoke, or alter this and any constitutional provision as they see fit, there are material bars to Swiss constitutional amendments. The reason for this is that the Swiss created binding legal relations with the international community. A “simple” yes vote does not release the electorate from binding legal commitments. A measure discriminating against a specific faith violates, inter alia, Article 18 of the International Covenant on Civil and Political Rights. The act of building places of worship is intrinsic to the right to freedom of thought, conscience and religion.

998 Article 72 of the Federal Constitution bears that title “Church and State.”
999 There are plenty of other constitutional lawyers who think exactly the same; here are a few: Felix Müller, Rechtliche und politische Aspekte der eidgenössischen Volksinitiative “Gegen den Bau von Minaretten,” in Streit um das Minaret: Zusammenleben in der religiös pluralistischen Gesellschaft 63 ff. (Mathias Tanner et al. eds., Theologischer Verlag Zürich 2009); Andreas Kley & Alexander Schaefer, Gewährleistet die Religionsfreiheit einen Anspruch auf Minarette und Gebensruf?, in Streit um das Minaret: Zusammenleben in der religiös pluralistischen Gesellschaft 87 ff. (Mathias Tanner et al. eds., Theologischer Verlag Zürich 2009); Felix Hafner, Von Kreuzen und Minaretten: Die Religionsfreiheit als aufstrebender Stern am Grundrechtshimmel, ius full Forum für juristische Bildung 6 at 254-262 (2007); Erwin Tanner, Ein bundesverfassungsrechtliches Minarettverbot, Schweizerische Kirchenzeitung, Nr. 38, 177. Jahrgang (2009); Giusep Nay, Diskriminierend, unnötig, nicht umsetzbar, in Von der Provokation zum Irrtum: Die Auseinandersetzung um die Minarette 96 ff. (Andreas Gross et al. eds., St-Ursanne 2009).
1000 Apart from the provisions of the International Covenant on Civil and Political Rights, mentioned below, there are commitments arising out of the European Convention on Human Rights, which Switzerland ratified on November 28 1974. However, the European dimension of the issue is beyond the scope of this book.
1002 Human Rights Committee, General Comment Nr. 22 of 30 July 1993 (CCPR/C/21/Rev.1/Add.4) para. 4.
Switzerland ratified the said International Covenant on 18 June 1992. The enactment of it was never challenged despite the fact that the citizens would have been able to do so via a referendum.\textsuperscript{1003} Hence, by implied consent, the Sovereign created legal obligations to the international community. Moreover, Switzerland declared its recognition of the UN Human Rights Committee’s competences,\textsuperscript{1004} as it had recognized, many years before, the compulsory jurisdiction of the International Court of Justice.\textsuperscript{1005} Non-enforcement of the new ban on minarets does not question the authority of the Swiss people because the locus of Swiss citizens’ action is limited only to the scope of self-imposed international laws. So the actual bar to their power lies in the will to comply with human rights. “Agreements must be kept” (\textit{pacta sunt servanda}) – this is a basic principle of civil and international law. It can therefore be suggested that Swiss building authorities should continue to adhere to the legal promise given to the international community and allow minarets to be built.

Article 5(4) of the Swiss Federal Constitution stipulates: “The Confederation and the Cantons shall respect international law.”\textsuperscript{1006} Switzerland must abide by international law because both systems together form a unity. Any state action needs to be in accordance with fundamental material justice. It applies not only to interpretations of applicable law, but also to new law.\textsuperscript{1007} This spirit seems traditionally to be reflected in the Preamble to the Swiss Federal Constitution, which reads: “[w]e are mindful of our responsibility towards creation; resolve to renew our alliance to strengthen liberty and democracy, independence and peace in solidarity and openness towards the world; are determined to live our diversity in unity respecting one another.”\textsuperscript{1008}

d. Concluding Remarks

\textsuperscript{1003} \textsc{Swiss Const.} art. 141(d)(1).
\textsuperscript{1004} Switzerland officially declared under Article 41 of the International Covenant on Civil and Political Rights of 1966 that it recognizes the competence of the Human Rights Committee to receive and consider communications if obligations under the Covenant are not fulfilled. It also seems necessary to point out that such communications must not be confused with court decisions as they are legally non-binding. \textit{Internationale Pakt über bürgerliche und politische Rechte} [\textit{International Covenant on Civil and Political Rights}] of December 16, 1966, SR 0.103.2.
\textsuperscript{1005} \textit{Statut des Internationalen Gerichtshofs} [\textit{Statute of the International Court of Justice}] of June 26, 1945, SR 0.193.501, art 36(1).
\textsuperscript{1006} \textsc{Swiss Const.} art. 5(4).
\textsuperscript{1007} Nay Giusep, \textit{Soll der Bund Volksinitiativen ungültig erklären, wenn sie gegen nicht zwingendes Völkerrecht verstossen?}, plädoyer, Nr. 3, 2007, at 4.
\textsuperscript{1008} \textsc{Swiss Const.} preamble.
For the advantage of the greater community, Swiss citizens should be able and willing to construct the actual meaning of a particular human rights provision. Their willingness to do so may depend on two factors. Firstly, they should be aware of the possible implications of any particular popular initiative. Secondly, they should understand that the protection of international human rights law depends on the proper exercise of citizenship rights, both individually and collectively. The Swiss should be taught from early on the meaning and scope of human rights, because through the direct democracy system they bear greater responsibility than other nations. They should be required to see and comprehend the necessity of such fundamental values. Simultaneously the Swiss, like any other nation, are required to adopt a critical position towards human rights, for instance, in that lessons are learned from history. They need to become fully aware of the fact that in the Swiss direct democracy system the majority can unjustly inflict constraints on the minority. Otherwise there is a risk that basic rights of the minority could be illegitimately vitiated.

I therefore propose that every popular initiative which interferes with fundamental rights becomes assessed on its own merits including a conjectural analysis of its legal implications if enacted. On the question of whether such a function should be within the powers of the Swiss General Assembly some of the leading Swiss academic commentators have already voiced their opinion. According to the editorial board of the Revue de Droit Suisse, the General Assembly would not be the proper institution to provide such legal vetting because the power to guarantee the rule of law lies with the judiciary and not the legislature. For these reasons it would be necessary to seek judicial review in the Federal Supreme Court.

1009 Although Swiss citizens are sovereign, they must respect international human rights law.
1011 Id.
1.6.3 United States

1.6.3.1 Socio-Legal Contours

The socio-legal contours of US land uses comprise a separate and an interwoven strand. Interwoven, because throughout the country’s history, European intruders claimed land that was possessed by indigenous Americans. Separate, because the same Europeans built a system of religious land uses outside the relationship with the Native American population. Early colonists treated Natives de iure as foreign nations. This unique North American circumstance needs to be reflected in the structure of the description that follows. US socio-legal contours are so closely tied to the law applicable today that it is necessary to briefly recount the American Indians’ deeply disturbing and tragic story. In an attempt to describe America’s religious land uses from a First Amendment law perspective, this section gives special heed to one of the most unjust actions of Western “civilization:” the arbitrary taking of Native American land.

a. Interwoven Strand

Historian Edwin S. Gaustad notes that “from the very first moment of the Europeans setting foot on the soil of the New World, conflict between the new arrivals and Native Americans set the tone of their relationship.”\footnote{EDWIN S. GAUSTAD EDWIN, RELIGIOUS HISTORY OF AMERICA 10 (Harper 2004).} Spiritual beliefs of most Natives were, and still are, site-specific and inextricably bound to the use of land.\footnote{LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION, 485 U.S. 439, 460-1 (1988) (Brennan, J., dissenting).} There is a sacred and indissoluble bond between the Indigenous and areas within their aboriginal lands. European settlers were particularly intolerant towards this cultural identity and the unique relationship Natives had with the natural world, and use of the land. In the zealous minds of the English elite class, which invested a great deal of their wealth into the cultivation of goods in their quest for economic opportunity, indigenous people were blessed with plenitude. The New World was still “romanticized and idealized as heavenly land” similarly to that of the “Garden of Eden before the fall.”\footnote{EDWIN S. GAUSTAD EDWIN, RELIGIOUS HISTORY OF AMERICA 10 (Harper 2004).} In paradise there was no concept of adverse possession of property belonging to someone else.\footnote{LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION, 485 U.S. 439, 473 (1988).}
words, English enthusiasm for the expansion of the first settlements was enhanced by the fact that the Indigenous were ignorant to the concept of land titles and its accompanying rights and responsibilities. The Europeans, on
the other side, were wilfully ignorant to the religious views of Native Americans and the sacred character of the land.\textsuperscript{1017}

The new paradise was regarded as a “biblical discovery” justified by the story of Abraham, who was called forth by God to leave his own land and to “go and take possession” of the land of others.\textsuperscript{1018} The European settlers in the New World were now thought to have a “Manifest Destiny” to rule the continent from coast to coast.\textsuperscript{1019} For instance, Virginia minister Robert Gray argued in 1609 that native residents had no property claims that the colonizers needed to recognize. He opined with regard to Indians: “In Virginia the people are savage and incredibly rude, they worship the divell, offer their young children in sacrifice unto him, wander up and downe like beastes, and in manners and conditions, differ very little from beastes, having no Arte, no science, nor trade, to imploy themselves. [T]he Savages have no particular propriety in any part or parcel of that Countrey, but only a general residence there, as wild beastes have in the forest […] so that if the whole land be taken from them, there is not a man that can complaine of any particular wrong done unto him.”\textsuperscript{1020}

The relationship between colonialists and Native Americans deteriorated on their dispute over land. This presented a real threat to all colonial ventures which was, in the eyes of the trading company stake-owners, an unacceptable situation that cried out for a practical solution. Belief in Christ was used to view indigenous people as idolaters, and hence deserving of killing. Captain John Underhill, an English colonist and ruthless soldier in the Pequot

\textsuperscript{1017} Native Americans have traditionally been polytheists, with some gods and goddesses ranking higher than others. Indian gods and goddesses have taken the shape of animals (including birds and reptiles) and natural objects (including the sun, moon, stars, winds, mountains, woods, lakes, rivers, and the like). For a more detailed discussion on the differences between the Native American and Christian religion Anastasia P. Winslow, \textit{Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites}, 38 Ariz. L. Rev. 1291, 1296 (1991) (discussing the meaning of God in the Native American religion).

\textsuperscript{1018} \textit{Daniel Friedmann, To Kill and Take Possession, Law, Morality, and Society in Biblical Stories} 75 ff. (Hendrickson Publishers 2002).


War of 1637 and Long Island War of 1644, replied “We had sufficient light from the word of God for our proceedings” when being questioned back in England about the reasons for the slaughtering of women and children during the Puritan war. Not without mockery, Sydney E. Ahlstrom, comments: “History in its earliest and primal form celebrates the deeds of men and of Gods, often of god-like men and man-like Gods.” The war between the European settlers and the Native Americans caused massive loss of life. John and Matthew McManus refer to such brutal incidents as the Trail of Tears, the Sand Creek Massacre and The Pequot War as “examples of genocidal acts and crimes against humanity.” Scholars estimate that approximately 10 million Native Americans resided in the United States at the time when Christopher Columbus arrived. That number has since fallen to approximately 2.4 million.

Later in US history, the government commenced the use of treaties as a method of taking land from Native tribes. Most of the early treaties consisted less of written documents than the ceremonial negotiation and affirmation of the relationship between Indian and European governments. In entering into these unwritten treaties, the colonists were forced to accommodate native interests and ideas of proper procedure, forging a cross-cultural diplomacy that was neither Indian nor European but a unique product of this encounter between peoples. Although land transfers did result from armed conflicts, much more land was acquired through such negotiations. Treaties gave tribes or groups of Natives isolated reservations in return for ceding part or

1024 While this population decrease cannot be attributed solely to the actions of the US government, John and Matthew McManus are of the opinion that “they certainly played a key role.” John McManus & Matthew McManus, Native Americans, in, Encyclopedia of Genocide and Crimes Against Humanity 740 (Dinah L. Shelton ed., vol. II, Thomson Gale 2005).
all of their aboriginal territory. Tribes were often cheated by fraud or coerced into such contracts. Moreover, US Congress by virtue of its plenary power over the Native population had a right to unilaterally abrogate treaties. Thus, two main circumstances caused tribes to lose much of their ancestral land: the making of treaties and their subsequent abrogation by the US government.

In 1871, Congress formally ended the practice of making treaties with Indian tribes. But the General Allotment Act of 1887 provided for the transfer of reservation land from tribes to individual Indians who were expected to assimilate to an agricultural lifestyle and Christian norms. Vast amounts of tribal land not needed for these individual allotments were declared surplus lands and opened to white settlement. Tribal consent was required to sell these surplus lands, but if a tribe refused or demanded a high price, federal officials in “at least on occasion […] resorted to manipulation and outright fraud.”

In 1994, 44 sacred sites were identified as threatened by government development. Today, federal agencies are responsible for administering public lands that encompass Native American sacred sites.

b. Separate Strand

The United States of America is typically a country of immigration, and as described, early settlers had little or no regard to land claims of the Native American population. In the period of the colonies, churches were largely

1027 Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L.J. 1, 7 (1995) (discussing federal Indian policy that was primarily oriented towards the separation of tribes and citizens).
1033 Michelle Kay Albert, Obligations and Opportunities to Protection Native American Sacred Sites Located on Public Lands, 40 Colum. Human Rights L. Rev. 479, 480 (2009).
planted by religious extremists, being radical in both their religious and political views. First Puritans, and later Mennonites, Dunkers, Moravians, and Schwenkers erected churches in the colonies. The principles of Baptists and Quakers struck at the very foundations of the seventeenth century state and ecclesiastical organization, and were considered in the more conservative colonies, such as Virginia and Massachusetts, as dangerously radical.\textsuperscript{1034} Adherents of either denomination were expelled from these colonial territories. Catholicism had traditionally been deemed an enemy of the state in New York.\textsuperscript{1035} On the other hand, Maryland was founded in 1632 by the Calverts who had converted from Anglicanism to Roman Catholicism. In Connecticut the Church of England enjoyed a kind of parity with the Congregational church.

From the colonial period until World War II, the North American territory mainly saw an influx of Christian immigrants from northern Europe. However, access to American land was particularly important to all those Jews who escaped Nazi Germany’s oppression and ruthlessness. In the last three to four decades, the majority of immigrants to America have come from Latin America and Asia. Today, land is used by peoples from all shades of opinion and walks of life, claiming intellectual space as well as physical presence. In 2008 the US religious landscape comprised more than three hundred Christian denominations, all major world religions, and numerous smaller ones.\textsuperscript{1036} Although land mass is finite even in the United States, Alexis de Tocqueville found “the love of property keener” in the United States than elsewhere. He observed that Americans “display less inclination towards doctrines that in any way threaten the way property is owned.”\textsuperscript{1037} Indeed, American lawmakers were of the opinion, at least up to the period after World War II, that religious institutions should be free to decide about religious land uses because their activities were seen as inherently beneficial to residential areas.\textsuperscript{1038} The presence of a religious institution, typically a church or synagogue, set the moral tone for a neighbourhood, and its building was a centre

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\bibitem{1034} \textsc{William Warren Sweet}, \textit{The Story of Religion in America} 2 ff. (Harper 1950).
\bibitem{1035} \textsc{Jason K. Duncan}, \textit{Citizens or Papists? The Politics of Anti-Catholicism in New York, 1685-1821} at 19 (Fordham University Press 2005).
\bibitem{1037} \textsc{Alexis de Tocqueville}, \textit{Democracy in America} 314 (Henry Reeve trans., Sever and Francis 1862).
\bibitem{1038} \textsc{Julian Conrad Juergensmeyer & Thomas E. Roberty}, \textit{Land Use Planning and Development Regulation Law} 487 (2nd edn, Thomson /West 2007).
\end{thebibliography}
of community activity. Whenever city authorities tried to exclude religious uses from residential areas, courts often found such exclusions arbitrary.\textsuperscript{1039}

Later decisions are more differentiated with regard to land-use regulations. Michael S. Ariens and Robert A. Destro suggest that the reason for this may be the changing perception of the value of churches in communities.\textsuperscript{1040} In this respect, the so-called “mega church” trend can be mentioned. It led to land-use projects of sizeable dimensions, and its frequent and varied activities were seen by some as intrusive in the neighbourhood, difficult to ignore, and sometimes hard to appreciate.\textsuperscript{1041} To borrow a phrase from Jennifer S. Evans-Cowley and Kenneth Pearlman “mega churches have created a mega-headache for some communities.”\textsuperscript{1042}

Moreover, residents of some US cities, towns or counties began to oppose the construction of new churches, synagogues, and mosques in their community because to them it meant an increased amount of traffic congestion, brought a large number of children to the area, and contributed to additional noise. The government therefore started to utilize zoning restrictions to regulate religious constructions in the community. Moreover, intolerance or suspicion of diverse faiths played a role in community acceptance when the new neighbour was not the traditional church but a religious institution new to the area. These factors led some local authorities to regulate religious land uses more stringently than in the past. Sometimes, and particularly with regard to religious communities that are uncommon to a specific locality, religious land uses can be more restrictive in comparison to similar uses by religious communities that are well known to community residents. The increase in regulation simultaneously prompted an increase in First Amendment challenges,\textsuperscript{1043} the effect of which was that in some areas of the country, religious land uses received little or no First Amendment protection.

\textsuperscript{1039} Eg. State ex rel. Lake Drive Baptist Church v. Village of Bayside Board of Trustees, 12 Wis.2d 585 (1961).


\textsuperscript{1043} JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTY, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 487 (2nd edn, Thomson & West 2007).
1.6.3.2  Land Use and Institutionalized Persons Act

a.  Introduction

Early American zoning ordinances of the 1920s were drafted by the least restrictive means. However, by the 1990s, building constraints were so far-reaching that the United States Congress intervened. The federal legislature introduced the Religious Freedom and Restoration Act of 1993 (RFRA) in and attempted to restore free exercise rights and remedy what were regarded as flaws of constitutional interpretation. The Supreme Court in *City of Boerne v. Flores* (1997) held, however, that Congress had exceeded its powers, and struck down some provisions of RFRA restricting the competences of the states. Congress in a further attempt to restore First Amendment rights enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in the year 2000. RLUIPA replaced the void provisions of RFRA, and prohibited the government from imposing substantial burdens on religious exercise unless a compelling governmental interest existed and the burden was the least restrictive means of satisfying the governmental interest. To avoid RFRA’s fate, Congress tailored the Act narrowly and wrote that RLUIPA would apply only to regulations regarding land use and prison conditions.

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1044 For representative examples of limited free exercise rights in religious land-use cases: Seward Chapel, Inc v. City of Seward, 655 P.2d 1293, 1301 (Alaska 1982); Lakewood, Ohio Congregation of Jehovah’s Witnesses v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983); Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir. 1983); and Cohen v. City of Des Plaines, 8 F.3d 484, 494 (7th Cir. 1993), cert. denied, 512 U.S. 1236 (1994).

1045 The Supreme Court in *Smith* affirmed that the Free Exercise Clause of the First Amendment “does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct.” Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-82 (1990). The effect of the decision in *Smith* was that religious exercise claims in the land-uses context became even more tenuous. Several courts treated zoning ordinances as laws of general applicability, which meant that they refused to apply strict scrutiny.


1047 Not all provisions were struck down; e.g. the ones applying to Native Americans were upheld. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).


1049 Wyatt v. Terhune, 315 F.3d 1108, 1112 (9th Cir. 2003).

The Supreme Court of the United States has so far never had the opportunity to review the constitutionality of RLUIPA. In spite of that, the United States Court of Appeals for the Ninth Circuit found that RLUIPA was in compliance with the Federal Constitution because it addressed documented, unconstitutional government actions in a proportional manner. Since its enactment, the Act has become a real success story for the interests of all sorts of religious institutions. In recent years this has made it more difficult, but not impossible, for the courts to restrict the right to build new churches, synagogues, temples, and mosques.

b. General Litigation

Commentators Julian Conrad Juergensmeyer and Thomas E. Roberty say that the reason for the surge of religious land-use litigation is partially due to the fact that local legislators and administrators are not well informed about the obligations imposed by the Act. Another reason for the generation of myriad of lawsuits in matters of religious uses of land, according to the American scholars, is the inevitable clash between new religious organizations and those residents who live near the land where the development is proposed.

The case of Guru Nanak Sikh v. Country of Sutter (2006) involved precisely such contention. A non-profit Sikh organization attempted to obtain a conditional use permit (CUP) for the construction of a temple, a gurudwara, on its property in Yuba City. The property was in an area designated for low-density residential use, intended mainly for large lot single-family residences. However, at a public meeting, the Planning Commission voted unanimously to deny the CUP. The denial was based on citizens’ voiced fears that the resulting noise and traffic would interfere with the existing

1051 “While the constitutionality of RLUIPA has not been tested, several scholars have questioned whether RLUIPA would pass muster if the Supreme Court chose to analyze its constitutionality.” Karen L. Antos, How The Federal Religious Land Use And Institutionalized Persons Act Affects State Control Over Religious Use Conflicts, 35 B.C. Envtl. Aff. L. Rev. 557, 591 (2008) (discussing the constitutionality of RLUIPA).
1052 Guru Nanak Sikh v. Country of Sutter, 456 F.3d 978, 993 (9th Cir. 2006).
1055 Guru Nanak Sikh v. Country of Sutter, 456 F.3d 978, 993 (9th Cir. 2006).
neighbourhood, and with agricultural use, as well as lowering property values. The Sikh organization brought the matter before the District Court under RLUIPA. The court granted summary judgment in favour of the temple. The City appealed and the United States Court of Appeals for the Ninth Circuit reconsidered the case. The court affirmed the application of RLUIPA and held: “[F]or a land use regulation to impose a ‘substantial burden,’ it must be ‘oppressive’ to a ‘significantly great’ extent.” In casu, the court found that the county imposed a substantial burden on the Sikh organization’s religious exercise because the stated reasons and history behind the denial lessened the possibility of the Sikhs constructing a temple in the future to a “significantly great extent.” It said further: “[T]o meet the ‘substantial burden’ standard, the governmental conduct being challenged must actually inhibit religious activity in a concrete way, and cause more than a mere inconvenience.” Accordingly, the court affirmed the district court’s order that granted summary judgment for the Sikh organization.

Albanian Associated Fund v. Township of Wayne (2007) addressed a similar dispute. The Albanian Associated Fund claimed that the building authorities improperly and arbitrarily delayed its land development application to build a mosque in Wayne. Throughout the application process, the Fund faced opposition from surrounding residents, who had formed a group, together with others in the community, called the “Property Protection Group” to prevent the mosque’s location. The Fund believed that the members of that group were motivated by religious bias because the protection group described the mosque project as a “public nuisance”, for instance. Based on hearsay and beliefs about Islam, the members of the group also opposed the mosque based on the Moslem practice of saying prayers five times daily, and because they asserted that the mosque would apply loudspeakers as a means to call for prayer despite the fact that there was no such evidence or motivation by the Fund. Finally, the protection group opposed the idea of having a minaret in their neighbourhood.

In summer 2006 the Fund filed a federal lawsuit in the District Court of New Jersey against the Township of Wayne, charging violations of the United States and New Jersey Constitutions as well as RLUIPA. The court (simply) held: “defendants have deprived and continue to deprive the Albanian Mosque [the Albanian Associated Fund] of its rights to free exercise of religion, as secured by the First Amendment of the United States Constitution and made applicable to the States by the Fourteenth Amendment, by substantially burdening its ability to freely exercise its religious faith and by

1056 Id. at 988.
1057 Id. at 984.
discriminating against the Albanian Mosque because of its religious charac-

ter.\textsuperscript{1058}

In an even more recent decision, \textit{Great Lakes Society v. Georgetown Charter Township} (2008), the Circuit Court for Ottawa County Michigan ruled that Georgetown Charter Township illegally denied the Great Lakes Society (“GLS”) its right to build a house of worship for the chemically sensitive and disabled. GLS first applied for a special-use permit to build a house of wor-

ship on its land. GLS’s plans for the church included a sanctuary for group worship, prayer and meditation rooms, restrooms, a library, a garage, a health ministry and other features common to churches. But the Township unexpectedly informed GLS that “the proposal as submitted for this site is not, in fact, a church for purposes of the Georgetown Township Zoning Or-

dinance.”\textsuperscript{1059} Judge Bosman disagreed and noted that the Zoning Board’s action, “effectively prevents the members of GLS from worshipping at all. It would be difficult to conceive of a burden on religious exercise more sub-

stantial than this.”\textsuperscript{1060}

c. \textbf{Special Litigation on Accessory Uses}

Having the above cases in mind, it is necessary to note that RLUIPA does not “provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations […]”.\textsuperscript{1061} Neither does it impair the power of states and lo-

calities to enforce fire codes, building codes, and other measures to protect the health and safety of people using the land or buildings, such as children in childcare centres, schools, or camps run by religious organizations.\textsuperscript{1062} Zoning ordinances may regulate religious conduct as long as the regulation is reasonably related to a permissible state interest, such as protecting public health, safety, or welfare, and the regulation does not regulate religious be-

\begin{footnotesize}


\textsuperscript{1060} Id.

\textsuperscript{1061} 146 \textsc{Cong. Rec.} S774-01.

\textsuperscript{1062} Id. at S10992-01.
\end{footnotesize}
Such regulations must have both a secular purpose and a secular effect.

However, at least one special limitation in the land-use context remains highly contested. The question is whether a religious institution that intends to develop land, or change the construction or use of existing property, for reasons other than religious ones should be afforded the same level of constitutional protection as land-use projects which are inherently religious in nature and extent. The difficulty of this question becomes apparent in view of the language adopted by RLUIPA. The Act defines religious exercise as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” It also provides that the “use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” Moreover, the same Act holds also that it “shall be construed in favour of a broad protection of religious exercise, to the maximum extent permitted.”

On a literal interpretation of the legal provisions, they can mean that all actions conducted by religious communities are covered by RLUIPA. Such an exceedingly broad definition of the term “religious exercise”, however, does not reflect, and therefore clearly departs from, the meaning given to the same term by some American courts. In Messiah Baptist Church (1988), for instance, the Tenth Circuit Court held that the construction of a house of worship on the particular tract of land was not “integally related to the church’s beliefs.” Moreover, the Supreme Judicial Court of Massachusetts in Jesus of New England (1990), rejected the building authority’s argument that the design and placement of such items as the altar and organ in a church were merely “secular question[s] of interior decoration,” holding

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1063 Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 824 (10th Cir. 1988).
1066 Id.
1067 42 U.S.C. § 2000cc-3(g).
1069 Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 824 (10th Cir. 1988).
instead that the “configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the Jesuits’ religious worship.”

The two cases are concrete evidence for the inference that American courts before the enactment of RLUIPA struck a dividing line between religious institutions’ exercises “integrally related to a belief,” and those exercises that needed primarily to be regarded as of “secular” nature. Conceivably, if the earlier distinction between religious affairs and accessory uses is no longer applicable, doors to the construction of free exercise rights are swung wide open. Legal commentator Shelley Ross Saxer appears to welcome precisely this move. She notes: “When religious organizations extend their activities and associated facilities beyond traditional worship services, these accessory uses (such as homeless shelters, food kitchens, and fellowship centers) should be protected against government regulations that substantially burden the organization’s religious exercise.”

Conversely, scholars Jennifer S. Evans-Cowley and Kenneth Pearlman opine in respect of “accessory uses” of religious communities that “are not central to the practice of religion and can be treated similarly to how they are in any other area of the community.” To the scholars the key issue is “the treatment of religious facilities in a manner similar to other like uses. Regulations should focus on the land use impacts rather than the religious components of the use.”

**d. Concluding Remarks**

RLUIPA has generated a great number of lawsuits in recent years. The above-stated and analysed cases represent a fraction of these only. It can still be said that courts tend to focus on the specific burdens that ordinances place on religious institutions, and the governmental interest that is furthered through their enactment, in determining whether or not the specific regulations violate the Constitution. It appears reasonable to recommend that the words “free exercise” should be given a narrower meaning than prima facie anticipated by the bare letter of the RLUIPA definition. As Jesse H. Choper suggests, legal statutes require to be read and given effect in their factual

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This would seem especially appropriate here, where a literal approach would invite favouritism. A church or any other religious institution might enjoy preferential treatment if all aspects of its exercise, such as land-use developments for reasons other than religious ones, in their entirety are encompassed by the Act. Hence, sufficient interpretative room should remain to drop a reasonable line between commercial enterprises that happen to be owned by religious institutions, and enterprises that operate for religious ends. Moreover, in order to distinguish between free exercise and other rights that are constitutionally protected, the religious self-conception of a religious community as well as the sincerity of a claim need to be taken into judicial consideration. It must be admitted that the differentiation between religious and non-religious exercise is a difficult one. It requires an in depth case-by-case analysis. It can still be concluded that categorical preferential treatment of religious institutions in competition with secular charitable organizations and other corporations under the cloak of RLUIPA is likely to fall foul of the Establishment Clause of the United States Constitution.

1.6.3.3 Aesthetic Interest Protection

a. Introduction

Zoning can be used to protect the community’s aesthetic, historic and landmark preservation interests. Today aesthetics has permeated into many aspects of land use such as housing codes, variances, smart growth, and planned development. Despite the current prevalence of rules that regulate aesthetic and cultural interests, these were not considered valid subjects of regulation until the mid-1950s. The Supreme Court changed that legal attitude towards aesthetic zoning in Berman v. Parker (1954) by stipulating “the concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that a community should be beautiful as well as healthy [...].” The highest court of the country established a precedent that local officials could rely on when enacting ordinances that protect aesthetic values. The decision in Parker set the stage for using zoning and other land-use regulation tools for the protection of aesthetic and

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1073 Interview with Jesse H. Choper, Earl Warren Professor of Public Law, UC Berkeley, in Berkeley, Cal. (May 5, 2009).
1074 JOHN R. NOLON & PATRICIA E. SALKIN, LAND USE IN A NUTSHELL 298 (Thomson & West 2006).
cultural resources of the given community.\textsuperscript{1076} The federal government has been active in promoting landmark preservation, beginning with the Antiquities Act of 1906.\textsuperscript{1077} In 1966, Congress passed the Historic Preservation Act, and it remains in effect today.\textsuperscript{1078} The Act authorizes the Department of the Interior to create and maintain a registry of historic places for the purpose of identifying structures and districts that are in need of preservation.

\textbf{b. Historic Zones}

Historic preservation is achieved through delegated police power. In the United States the creation of a historic district is focused on the protection of historic areas consisting of multiple buildings, rather than the protection of individual structures.\textsuperscript{1079} In \textit{Sante Fe v. Gamble-Skogmo} (1964) the Supreme Court of the State of New Mexico upheld zoning that was focused on preserving historic architectural patterns in a particular neighborhood.\textsuperscript{1080} In the opinion of the judge, historic zones or districts receive different treatment because such an area possesses some kind of aesthetic value that creates a unique economic, educational, or cultural opportunity which contributes to the welfare of the community. At least one American court points to the methodological differentiation between laws that regulate pure aesthetics, and those which govern aesthetics in direct association with historic preservation. In \textit{A-S-P Associates v. City of Raleigh} (1979) the Supreme Court of North Carolina observed “while most aesthetic ordinances are concerned with good taste and beauty […] a historic district zoning ordinance is not primarily concerned with whether the subject of regulation is beautiful or tasteful, but rather with preserving it as it is, representative of what it was, for such educational, cultural, or economic values as it may have. Cases dealing with purely aesthetic regulations are distinguishable from those dealing with preservation of a historical area or a historical style of architecture.”\textsuperscript{1081}

\textbf{c. Landmark Preservation}

\textsuperscript{1076} JOHN R. NOLON & PATRICIA E. SALKIN, LAND USE IN A NUTSHELL 299 (Thomson & West 2006).
\textsuperscript{1077} 16 U.S.C § 431-433.
\textsuperscript{1078} Id. at 470 \textit{et seq.}
\textsuperscript{1079} JOHN R. NOLON & PATRICIA E. SALKIN, LAND USE IN A NUTSHELL 309 (Thomson & West 2006).
\textsuperscript{1080} Sante Fe v. Gamble-Skogmo, 389 P.2d 13 (N.M. 1964).
\textsuperscript{1081} A-S-P Associates v. City of Raleigh, 298 N.C. 207, 216 (N.C. 1979).
The concept of landmark preservation has given rise to clashes between interests of aesthetics or cultural protection on the one side, and free exercise claims on the other. Despite the fact that historic district law is similar to landmark preservation law, the latter focus on the preservation of individual landmarks, as opposed to a defined area that is found to have some historical or cultural significance. Prior approval is required in order to demolish or alter a designated landmark. These ordinances have also been largely upheld as a valid exercise of the police power to protect and promote general welfare.

Because many architectural treasures are owned and administered by various religious communities, efforts to landmark buildings are often attacked as interfering with the free exercise of religion. For instance, in St. Bartholomew’s Church v. City of New York (1990) the City of New York was able to prevent the Episcopal Diocese from selling the rights to the air space above its vestry building located on Park Avenue. The church had been offered 50 million dollars for the development rights, and it intended to use the money to further its mission and social programs sponsored in the community. The court noted that the landmarks law was a “facially neutral regulation of general applicability,” and concluded that Supreme Court free-exercise precedents were applicable. “The critical distinction is [...] between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously orientated.” The fact that the denial of the church’s plan to construct an office tower drastically restricted the church’s ability to raise revenues did not render the decision invalid because neutral regulations that diminish the income of a religious organization do not implicate the Free Exercise Clause, said the court.

Also in City of Boerne v. Flores (1997) the interests of landmark preservation prevailed over First Amendment rights. The case involved the circumstances in which the Archbishop of San Antonio gave the parish permission to plan alterations to enlarge the Catholic church of St. Peter, built in 1923. However, local zoning authorities denied the Catholic archbishop a building permit to enlarge the church under an ordinance governing historic preservation. The archbishop brought a suit challenging the ordinance. On appeal the Supreme Court reasoned that: “It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise

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1082 JOHN R. NOLON & PATRICIA E. SALKIN, LAND USE IN A NUTSHELL 312 (Thomson & West 2006).
of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.”

However, the Supreme Judicial Court of Massachusetts in *Jesus of New England v. Boston Landmarks Commission* (1990) reached the opposite conclusion when faced with the application of a landmarks preservation regulation to the interior of a church building in Boston. Applying the free-exercise clause of the Massachusetts Constitution, the court held that the designation of the interior of a church as a landmark and the requirement that plans for the renovation of the interior be reviewed and approved by the Boston Landmarks Commission violated the free-exercise rights of the Jesuits who owned the church building. The court rejected the Commission’s argument that the design and placement of such items as the altar and organ were merely “secular question[s] of interior decoration,” holding instead that the “configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the Jesuits’ religious worship.”

### d. Concluding Remarks

Especially municipalities have used aesthetic zoning ordinances to regulate the appearance of structures within their communities. These ordinances have been upheld as a valid exercise of the police power. The law can prevent the construction of unsightly, grotesque, and unsuitable structures regardless of belief in specific neighbourhoods. Norms regulating aesthetics are a valid use of public exercise to protect property values and the general appearance of a town or city. Although courts have upheld beauty clauses, municipalities are recommended to be careful in the drafting of local laws and regulations that contain standards and review criteria. Specific criteria for the review of building applications should be particularly clear and not leave exactions at the whim or caprice of the building inspectors. Landmark preservation for aesthetic reasons will also be upheld if the regulations are not so severe as to rise to the level of an uncompensated taking. However, landmark preservation ordinances seeking to dictate how property may be

1084 City of Boerne v. Flores, 521 U.S. 507, 535 (1997). Following the trial, the Catholic Diocese of Boerne negotiated an agreement with the city that would allow construction of new facilities while preserving the façade of the existing structure.

owed have been struck down as improper and unconstitutional. It can be suggested that landmark preservation ordinances must be fairly applied so that they do not breach free exercise rights.

### 1.6.3.4 Native American Graves and Sacred Sites

#### a. Introduction

From the socio-legal contours described above it seems virtually impossible to restore what native tribes once possessed. Michelle Kay Albert notes: “Many Native American religious practitioners face a challenge not typically confronted by adherents of Judeo-Christian religious traditions. Native American religious beliefs are tied to the land, not to a church. If native practitioners cannot access and use their sacred land, they cannot access their church.”

Religious land uses of Native Americans are to a great part regulated by judge-made law. Although the Religious Freedom Restoration Act (RFRA) of 1993 applies to decisions of the federal government, RFRA is thought to be of little or no help for Indian land-use interests. This is because Natives’ ability to conduct uninterrupted religious practices often rests within the discretion of federal land managers. In theory two additional laws can be used to protect places of spiritual significance. So far, however, they have never been successfully applied in practice. These are the National Environmental Protection Act (NEPA) and the National Historic Preservation Act (NHPA). NHPA requires that government consultations with tribes “must recognize the government-to-government relationship and are to be conducted in a manner respectful of tribal sovereignty and sensitive to the concerns and needs of the Indian tribe.” NHPA is similar

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1086 Michelle Kay Albert, Obligations and Opportunities to Protection Native American Sacred Sites Located on Public Lands, 40 Colum. Human Rights L. Rev. 479, 479 (2009).


1088 E.g., Hankins v. Lyght, 441 F.3d 96, 105 (2d Cir. 2006) (explaining that since Boerne, “every appellate court that has squarely addressed the question has held that the RFRA governs the activities of federal officers and agencies”).

1089 Michelle Kay Albert, Obligations and Opportunities to Protection Native American Sacred Sites Located on Public Lands, 40 Colum. Human Rights L. Rev. 479, 480 (2009).

1090 Pit River Tribe v. USFS, 469 F.3d 768, 787 (9th Cir. 2006).

1091 42 U.S.C §§ 4321-4335.

1092 16 U.S.C §§ 470-470x-6.
to NEPA except that it requires consideration of historic sites, rather than the environment.

b. Indian Interests Lost

The most prominent example of lack of consideration is the US Supreme Court’s decision in *Lyng v. Northwest Indian Cemetery Protective Association* (1988). In that decision the court denied sacred sites protection under the First Amendment’s Free Exercise Clause. It involved the US Forest Service’s plan to build a six-mile road through a national forest, an area that had historically been used by members of three Native American tribes to conduct a wide variety of specific religious rituals for the purpose of personal spiritual development. According to a study commissioned by the Forest Service, successful religious use of the area depended on privacy, silence, and an undisturbed natural setting, and constructing a road along any of the available routes would cause serious and irreparable damage to the sanctity of the area. Nonetheless, the Forest Service decided to proceed with the construction and the Native Americans sought justice in the American court system. The District Court found that the decision violated the free exercise of religion clause and issued an injunction forbidding timber harvesting or road building in a large tract of the forest. The United States Court of Appeals affirmed the District Court’s decision in the pertinent part, concluding that the Government had failed to demonstrate a compelling interest in the completion of the road. However, on certiorari the United States Supreme Court reversed and remanded.

Justice O’Connor, who delivered the opinion, recognized that the building of a road or the harvesting of timber on publicly owned land would interfere significantly with private persons’ ability to pursue spiritual fulfillment according to their own religious beliefs. Yet he held that the affected individuals would ‘not be coerced by the government’s action to violate their beliefs, nor would [the] governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.”\(^{1093}\) The court underlined that “incidental effects of government programs, which may make it more difficult to practise certain religions but which have no tendency to coerce individuals into acting contrary to
their religious beliefs, could not require government to bring forward a compelling justification for its otherwise lawful actions.\(^{1094}\)

Moreover, the court reasoned that the words “to prohibit” of the Free Exercise Clause were “written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.”\(^{1095}\) In the court’s view the First Amendment must apply to all citizens alike, and it can give none of them a veto over public programs that do not prohibit the free exercise of religion. Finally, O’Connor said: “Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.”\(^{1096}\)

Nonetheless, within months of the decision in Lyng, the Congress of the United States, acting by virtue of its spending power,\(^{1097}\) withheld authorization from the Secretary of the Interior to build the proposed road.\(^{1098}\) John T. Noonan, JR., and Edward McGlynn Gaffney opine that: “The motivation for this legislative response could have been as much to curb public subsidy of the private interests of the logging industry as it was to protect the religious freedom of Native Americans, but the effect at least was more ‘sensitive’ to the religious needs of the American Indians.”\(^{1099}\) What is important, however, is that Lyng was never overturned, and is thus still applicable law today.

In a more recent decision, Navajo Nation v. USFS (2008), Native tribes sought to prohibit the federal government from allowing the use of artificial snow for skiing on a portion of a public mountain which is sacred to their religion. The tribe claimed the use of such snow on a sacred mountain desecrated the entire mountain, deprecated their religious ceremonies, and injured their religious sensibilities. The appellate court found that there was no violation because the presence of recycled wastewater on the mountain did not coerce the tribes to act contrary to their religious beliefs under the threat

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\(^{1094}\) Id. at 451.

\(^{1095}\) Id.

\(^{1096}\) Id. at 453.

\(^{1097}\) U.S. CONST., ART. I, § 8, CL. 1.

\(^{1098}\) Amendments to Department of the Interior and Related Agencies Appropriations Act, Pub. L. 100-446, 102 Stat. 1826 (Sept. 27, 1988); H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) (“prohibit[ing] the use of funds for construction of the Gasquet-Orleans (G-O) road in California, pending further review of the issue of Indian religious rights that would be significantly affected by the road construction”).

of sanctions, nor did it condition a governmental benefit upon conduct that would violate their religious beliefs.\textsuperscript{100}

c. Preferential Treatment

There is no set of court decisions that would reliably guarantee the sanctity of sacred Indian places. Instead, Natives’ ability to conduct uninterrupted religious practices often rests, as earlier mentioned, in the hands of federal land managers.\textsuperscript{101} The story of the Native American’s religious freedoms is marked by little success. From the ratio in \textit{Lyng} it is clear that religious land use of indigenous people is interpreted in such a way that historic circumstances are not preferentially taken into judicial contemplation. There is only a single exception to this rule: in an earlier, still applicable Supreme Court decision, \textit{Morton v. Mancari} (1974), a statute that established a preference in favour of Native Americans in the filling of vacancies within the Bureau of Indian Affairs was upheld by the highest court of the country. The justices were unanimous on the opinion that the federal government had a legitimate interest arising out of its special relationship with the Indian tribes. The preference in favour of Native Americans was not the kind of invidious discrimination that the civil rights legislation sought to eliminate.\textsuperscript{102}

Giving preferential treatment to Native Americans flatly, has raised concerns, among some scholars, that the Establishment Clause could be violated. Julian Juergensmeyer and Thomas E. Robery state in this respect: “The dilemma then for regulators is to deal with the Catch 22 of the First Amendment: regulating religious uses may lead to free exercise claims but not regulating religious uses may lead to establishment clause claims.”\textsuperscript{103} Not all scholars agree that the protection of Native sacred sites could fall foul of the Establishment Clause. For instance, Anastasia P. Winslow is of the view that traditional Establishment Clause rules “should not pose a barrier to sacred-site protection.” Winslow opines that “Sacred-site protection serves secular governmental interests in preserving land, accommodating minority religious practices, maintaining cultural diversity, and addressing a history of religious discrimination.” She supposes that most Americans

\begin{flushright}\textsuperscript{100}Navajo Nation v. USFS, 535 F.3d 1058, 1112 (9th Cir. 2008).
\textsuperscript{101}Michelle Kay Albert, \textit{Obligations and Opportunities to Protection Native American Sacred Sites Located on Public Lands}, 40 Colum. Human Rights L. Rev. 479, 480 (2009).
\textsuperscript{103}JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTY, \textit{LAND USE PLANNING AND DEVELOPMENT REGULATION LAW} 487 (2nd edn, Thomson & West 2007).\end{flushright}
would not conclude upon seeing undeveloped park land that the government was endorsing a religion. So to her mind, there should be “no fear that preserving this land will give the appearance that the government is promoting religion.”

d. Indian Interests Prevailed

In spite of all that, in recent years claims of Native Americans have been more successful. Courts gave specific heed to preventing harmful effects on Indian spiritual practices. So far, these are minor cases only. For instance, in *Bear Lodge Multiple Use Association v. Babbitt* (1999) climbing on Devils Tower was restricted so that the harmful effects on Indian spiritual practices could be reduced. Similarly, in a case before the District Court of Utah, *Natural Arch and Bridge Society v. Alston* (2002), the Park Service’s policy requested respect of cultural differences by stipulating that people should voluntarily refrain from walking underneath Rainbow Bridge. *Mount Royal Joint Venture v. Kempthorne* (2007) involved a case in which several thousands of acres of land were temporarily withdrawn from mining access in order to protect areas of traditional religious importance to Native Americans.

e. Concluding Remarks

When adopting the language introduced in the socio-legal contours of this chapter, neither American lawmakers, nor judges have (yet) taken a bite from the forbidden fruit. It seems as if the risk of losing “paradise,” and therefore land, made the Supreme Court refuse to recognize the constitu-

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1106 Devils Tower refers to a monolithic igneous intrusion or volcanic neck.
1108 Rainbow Bridge refers to a large natural arch. It is made from sandstone and formed during the end of the Triassic and the Jurassic periods. *Natural Arch and Bridge Society v. Alston*, 209 F. Supp. 2d 1207 (D. Utah 2002).
tional dimension of Natives’ injuries. For all of the above reasons it has been stated that the lack of federal protection for indigenous sacred sites “is the most glaring loophole in federal Indian law today.”\footnote{Oversight Hearing on the American Indian Religious Freedom Act of 1978: Before the Senate Committee on Indian Affairs, 11, 108th Cong. (2004) (statement of Walter Echo-Hawk, Staff Attorney, Native American Rights Fund) (“Echo-Hawk”).} The concern that acceptance of their claim could potentially strip the government of its ability to manage and use the vast tracts of federal property has made it act over-cautiously. The dissenting Justice Brennan in \textit{Lyng} aptly said: “Rather than address this conflict in any meaningful fashion, however, the court disclaims all responsibility for balancing these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the federal legislature.”\footnote{\textit{Lyng v. Northwest Indian Cemetery Protective Association}, 485 U.S. 439, 473 (1988).} Whatever land-use rights American Indians may have today, at no time do they reflect what they once possessed. And even if complete restoration is virtually impossible, government ought to be considerate – because after all, it was their land.
1.6.4 The Two Models Compared and Contrasted

The historic contours of Swiss and American religious land uses are comparable and distinguishable at the same time. Distinguishable because in the past Switzerland’s land uses had largely been determined by the Christian religion, whereas North American territory needed to be shared between Native communities and Christian settlers from the very beginnings of colonial adventures. Comparable because the past idea that Christian traditional land uses should receive benevolent treatment was firmly established in both jurisdictions. The two countries also share the circumstance that non-traditional religious communities have increasingly started to demand greater participation in public life. As these aspects are similar and still different, so are today’s concerns found in each country.

For example, in the United States the question of whether the exercise of church bell ringing prevails over the interest of public quietness has never yet been raised, as far as can be ascertained. For its part, the Swiss Federal Supreme Court has already had the opportunity to voice its opinion on the matter. The court held that there exists no claim to “absolute quietness, and that one must come to terms with minor and insignificant interferences.” The justices said further that “Bell ringing [...] does not disturb most of the people. Like music it cannot be equated with noise caused by traffic, or factories. Church bells possess for many people a melodious sound, and their steady tone – even when practised early in the morning – is regarded as a widespread ancient tradition [...].” The Swiss Court gave greater weight to the interest of a religious practice over a request for less noise, not primarily to protect the religious freedom of Christian churches, but to preserve a custom that has endured over a long period of time. In Switzerland an inherently religious practice with no traditional use appears to receive less constitutional protection than a practice that happens to be traditional and religious at the same time. In this sense, it is probable that due to its (present) lack of a tradition, an Islamic prayer call does not enjoy the same level of protection as the practice of church bell ringing does.

In the United States religious land use can constitute “any exercise of religion, whether or not compelled by, or central to, a system of religious belief;” The law also provides that the “use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property

1112 BGE 126 II 366, E. 2h, p. 368.
1113 Id. at 371.
for that purpose.\footnote{Id.} In addition, American courts have set standards of protection in several religious land-use cases. In respect of a zone designated for low-density residential use, it was held that claims under the First Amendment may arise when regulations impose a “substantial burden” on a religious exercise such as the erection of a temple. “[T]o meet the ‘substantial burden’ standard, the governmental conduct being challenged must actually inhibit religious activity in a concrete way, and cause more than a mere inconvenience.”\footnote{Id. at § 2000cc-2(b).} Moreover, free exercise rights are considered to be “deprived” if a building project is simply denied “because of its religious character.”\footnote{Albanian Associated Fund v. Township of Wayne, 2007 WL 2904194 (D.N.J. 10/1/07).} At least in one decision an American court ruled that the “substantial burden” requirement was clearly satisfied if a law “effectively prevents” religious members “from worshipping at all.”\footnote{Great Lakes Society v. Georgetown Charter Township, 2008 WL 4823972 (MI App. 10/30/2008).} This in turn does not mean that religious communities are immune “from land use regulations,”\footnote{146 Cong. Rec. S774-01.} if such regulations “have both a secular purpose and a secular effect.”\footnote{Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984).}

In both Switzerland and the United States, zoning can be used to protect the aesthetic, historic, and landmark preservation interests of a community. In both countries it is within the power of the regional or local legislature to determine that a community should be beautiful. Where American courts generally focus on preserving historic architectural patterns in a particular neighbourhood,\footnote{Sante Fe v. Gamble-Skogmo, 389 P.2d 13 (N.M. 1964).} their Swiss counterparts have been more detailed on the matter. The Swiss Federal Supreme Court ruled that “Buildings […] must be typologically in keeping with existing structures.”\footnote{E.g. Planungs- und Baugesetz des Kantons Solothurns [Cantonal Planning and Building Act of Solothurn] of December 3, 1978, Nr. 711.1.} The requirement “to be in keeping” is satisfied “if place and dimension of the structure does not disturbingly change the character of the residential area, and if it is in compliance with the surrounding area’s building style and materials.”\footnote{BGE 1P.149/2004, E. 3.3.} In the United States, laws regulating landmark preservation may comply with religious-freedom standards even when they impose a substantial interference or burden on the free exercise of religion. The US Supreme Court made it clear, however, that such interference must be incidental “by a law of general ap-
A differentiation between Swiss and American landmark preservation law is that the latter system focuses on the preservation of an individual landmark only, whereas the former can include an individual landmark and a defined area that is found to have some historical or cultural significance. In the US, no equivalent to the “homeland preservation” (Heimatsschutz) concept exists. Another great difference between laws is presented by Switzerland’s absolute ban on Islamic minarets.

In most Swiss cantons public cemeteries exist as well as special, privately operated cemeteries. Religious burials are covered under Article 15 of the Federal Constitution, whereby no person “must be forced to participate in a religious act.” According to the highest Swiss court “forcing” means to require “someone to engage in an action or express an opinion, which is part of a religious belief.” The compulsory requirement to use a cross for any public cemetery grave, regardless of a dead person’s, or the bereaved family members’ faith, violates their right to freedom of belief and conscience. The same judicial body held that the right to a “respectful burial” means that “the dead human body deserves respect also. Which kind of burial and which acts are to be seen as an expression of respect or disrespect is a question of custom and local practice. The right is violated if the deceased is denied whatever constitutes the prevailing practice to honour.”

The state has a negative duty not to obstruct a specific kind of burial, but at the same time it has no positive obligation to guarantee any kind of ceremonial act that is regarded as a respectful burial.

It appears that there are no US court decisions that have decided the merits of free exercise claims in relation to grave and sacred sites other than Native American cases. In respect of the Indigenous Population, the US Supreme Court opined back in 1988 that no individual could be “coerced by the government’s action to violate their beliefs […].” Moreover, the court reasoned, in a similar way as the Swiss Court did in 1995, that the words “to prohibit” of the Free Exercise Clause were “written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.” In the view of the courts of both countries, religious freedom must apply to all citizens alike, and it can give no

1126 SWISS CONST. ART. 15(4).
1127 BGE 101 Ia 392, E. 3b, p. 397.
1128 BGE 125 I 300, E. 2a, p. 305-306.
1129 Id. at 306.
1131 Id. at 451.
person a veto over public programs that do not prohibit the free exercise of religion.
1.7  State Recognition of Religious Communities

1.7.1  General Introduction and Overview

“The best thing government can do for religion is to leave it alone.”
(James M. Dunn)\(^{1132}\)

The governments of Switzerland and the United States of America do not appear to share the conviction that absolute divorce between religion and state produces the greatest possible justice. The legal systems of both countries recognize religious communities by at least four major kinds of state acknowledgments, namely: making available legal structures; respect for internal affairs; granting tax immunities; and providing support through material aid. As we will soon see, all four types of state recognition are inextricably bound to each other. And it is this factor that generates kaleidoscopic patterns of reciprocal rights and obligations. Looking at one pattern in isolation cannot reveal the breadth and profundity of legal interactions concerned. Patterns of recognition need to be rotated so that new perspectives can emerge. This adds up to a confusing image of laws that can sometimes be difficult to grasp. Therefore, in a first effort to clarify matters between religious communities and the state, let us take a brief look at each major kind of state acknowledgment.

The recognition of specific structures refers to various legal frameworks that are made available by the state to organize and administer religious groups. While some of these legal contours are granted to a wide variety of groups – including secular forms of charities, and business associations – others are exclusively tailored for specific religious denominations or groups. This special situation applies to both the Swiss and the American legal system. In North America it is state legislation that grants the privilege of incorporation

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\(^{1132}\) Executive director of the Baptist Joint Committee, quoted as in ALBERT J. MENENDEZ & EDD DOERR, GREAT QUOTATIONS ON RELIGIOUS FREEDOM 144 (Prometheus Books 2002).
for religious purposes. In Switzerland it is both cantonal and federal law that provide the legal framework for religious incorporation. A large part of these privileges are attributed to the long history of religious corporations and the adaptation of some concepts and considerations from the past. For example, in some Swiss cantons public-law recognition of certain Christian denominations can be seen as a direct adaption both to the practice of granting special legislation, and to the established status of some early religious communities. In the United States of America, matters are not radically different. Several states grant special legal provisions for the incorporation of certain Christian churches. And again, in those states, such privilege can be seen as a direct adaption from times when churches were established by way of corporate charter. In the following analysis we will consider the various forms of corporation or unincorporation of religious communities. In addition to that, specific heed will be given to the question of whether a religious community can choose its structural form when the state makes more than one form available. This section closes with a cursory glance at recent or probable developments in regional constitutional law.

The subsequent analysis and discussion will move on to the internal affairs of religious communities. The term means the extent of autonomy by which a religious community is free to organize and administer itself, free of state (external) intervention or control. In pluralistic societies it is common practice for religious communities, be they of Christian, Jewish, Muslim, Hindu, Buddhist or any other faith, to claim a specific locus of self-governance. Regional law has primarily handled such matters in Switzerland as well as the United States. An adequate grant of religious autonomy involves a well-defined institutional or group interest, and not an individual claim. The following analysis is a modest effort to make sense of a community’s autonomy claim vis-à-vis state concerns. Every academic observer knows that a whole series of overlapping but distinct theoretical and practical issues make such elaboration extremely difficult.

This is especially true with regard to the Swiss legal system as the relationship between cantons and religious communities can be particularly close. Arguably, the responsible cantonal legislature is not only required to enact religious corporation laws that are compatible with the secular state structure, but also, and especially, needs to be highly considerate of a community’s religious self-conception. Justice demands that legal framers take recourse from, and interact with, theologians or religious experts from the communities concerned. Partial sense at the most.

For a full-fledged account on the inclusion of relevant disciplines in the lawmaking process Paul Richli, Interdisziplinäre Daumenregeln für eine faire Recht-
also to their American counterparts. For reasons of space, it is not possible to present a complete, that is to say, all-embracing analysis of the scope of the right to collective and corporative religious self-determination as it has been developed in Switzerland and the United States up to the present day. Rather, those laws which can be seen as representative examples have been carefully selected and laid out. In both countries, difficulties between state powers and collective or corporative religious autonomy claims arise primarily in the course of disputes over property, personnel, labour law, and fundamental rights in general. Other questions that develop, for example, over malpractice, defamation, privacy, and data protection, are not treated in this analysis. Neither will attention be paid to mergers between religious communities.

As mentioned above, the third type of state acknowledgment takes the form of tax exemptions to religious communities. It is perceived that the secular state cannot offer all the services needed by society. For this reason some contributions provided by religious communities – in concert with other social partners – to the general public, do not go unnoticed. The state awards economic relief to religious communities in return for bearing burdens that would otherwise be imposed upon the public to be met from general taxation. The state imposes tax in order to pay for a civilized society. Where the needs of the public match the welfare programmes rendered by religious communities, some or all activities may be tax exempt. In Switzerland as well as in the United States, the topic of tax refers to a complex pattern of federal, state, and even local policies that govern the taxation and exemption of religious communities, their income, properties, and activities. In order to understand tax problems facing religious communities it is believed that one must have a working knowledge of the existing statute and regulations, a thorough comprehension of the economic theories on which a particular tax is based, and an appreciation for the sometimes conflicting political and revenue goals that the legislature had in mind when it adopted the provisions in question.

With regard to the wide-ranging scope of tax law, it is clear that a thorough investigation would be out of bounds here. The objective of this section is far more limited. Our focus rests primarily upon the question of tax exemptions, and in what instance an activity can be expected to be tax immune. And although this section deals with relevant legislation and court decisions, it provides neither an overall review of all tax exemption cases to date nor a detailed analysis of the reasoning the courts have used to justify them. Instead of that we evaluate a representative series of relevant decisions only.

SETZUNG, EIN BEITRAG ZUR RECHTSETZUNGSLEHRE IM LIBERALEN SOZIAL UND ÖKLOGISCH ORIENTIERTEN RECHTSSTAAT (Helbing & Lichtenhahn 2000).
Heed is given to the question of what extent of recognition the state is willing or capable to afford. A positive side-effect of this approach is the ability to discern what might happen when a court is to decide similar cases.

The fourth and last sort of state recognition regards material aid to religious communities. The term material aid means primarily direct or indirect monetary contributions rendered by the state to religious communities. Two issues have sparked deep rifts between justices, legal scholars, and litigants alike. In the United States there are no less than twenty-two Supreme Court cases which address direct or indirect state aid to religious schools, or religious affiliated education programmes. In Switzerland the number of Supreme Court disputes in matters of religious tax levy on the profits of secular businesses is lower in number (a total of sixteen cases), but not necessarily less in extent. Apart from that, material aid can also take the form of administrative or structural help. However, immaterial support such as special permissions\textsuperscript{1135} is not given any attention in this chapter.

To sum up, this chapter is primarily about the collective and corporative sides of religious freedom, in that none of the above-mentioned rights or obligations ordinarily apply to individual claimants\textsuperscript{1136}. State recognition of religious groups is not merely a compound or aggregation of individual members’ freedom rights; it is the right the group asserts to its own religious exercise, legally separate and distinct from the rights and interests of its members\textsuperscript{1137}. In this respect, the chapter deals with the availability of corporate or unincorporated structures, and the scope of the right to choose among them. Subsequently, it endeavours to identify how and to what extent the state respects the internal affairs of religious communities. Then, considers tax immunities, and looks at several kinds of state material aid to religious communities. Finally, the two countries concerned are compared with, and contrasted to each other. But before embarking on the comparative adventure, we will have a cursory glance at the two countries’ social-legal contours.

\textsuperscript{1135} E.g. a priest’s permission to deliver his services to public school students and patients in state-run hospitals.

\textsuperscript{1136} An exception to this proposition might be the understanding that material aid in the form and quality of the American school voucher programme is seen as supporting the individual rather than the religious community receiving the funds.

\textsuperscript{1137} \textsc{Rex Ahdar} & \textsc{Ian Leigh}, \textit{Religious Freedom in the Liberal State} 325 (Oxford University Press 2005).
1.7.2 Switzerland

1.7.2.1 Socio-Legal Contours

State recognition of religious communities had been determined for a large part of Swiss history by the establishments of the Roman Catholic and the Evangelical Reformed Church. People believed that religious toleration was best assured by preserving and encouraging either or both official faiths. The two major churches were given a special status that smaller groups like the Anabaptists’ congregations or the Jews’ organizations did not enjoy. Special status was seen as an equivalent to public esteem and respect, and had always been mutually interested. On the one hand, the established church gave the canton an aura of public legitimacy, and on the other, the canton granted certain prerogatives for the church’s provision of social services. Today, such joint efforts no longer suggest religious identification on the part of the canton. Switzerland’s regional governments are similarly neutral and free, as is the Confederation. The twenty-six cantons no longer favour one theology over another. Regional governments nonetheless continue to mirror the social significance of traditional religious communities through establishment and the granting of certain prerogatives. As social circumstances have evolved, non-traditional religious groups have gained ground. Because of such transformations, new demands for greater equality are now challenging existing accommodation modes and pressing the Swiss cantons to reflect on their official state acknowledgements.

1.7.2.2 Legal Structuring of Religious Communities

a. Introduction

1138 CLA RETO FAMOS, DIE ÖFFENTLICHREchtliche Anerkennung von ReligiOns-gemeinschaften im Lichte des Rechtsgleichheitsprinzips 27 (Universitätsverlag Freiburg Schweiz 1999).
1139 BGE 125 I 347, E. 3a, p. 354.
1141 Religion still permeates into state affairs. A representative example can be found at every open-air Peoples’ Assembly in Appenzell-Innerrhoden. The electorate swears in the name of the Christian doctrine of the Trinity that it will vote and elect in good faith.
State recognition can take the form of legal structures that are made available to religious communities. Article 15(3) of the Swiss Federal Constitution covers not only the right to join or to belong to a religious group, but also the right to set up and dissolve a religious organization. Although not expressly mentioned in the Federal Constitution, the right is interpreted as a corporative right of religious adherents. The relevant body of law is not aimed essentially at controlling or subsidizing individual or group action, but at simply providing legal mechanisms that people can use to structure their own affairs. In Switzerland, associational forms are available by way of either public-law or private-law organization. Regional law mainly governs public-law organization, whereas federal law regulates private-law organization. Applicable federal private law does not offer special structures or legal vehicles which are tailored to suit religious communities especially. Until today, all private-law enterprises – be they commercial, philanthropic, or religious – must organize under the same statutory federally-enforced frameworks. The case is different with regard to public-law organized religious communities. Cantons may adapt structural forms to suit special democratic needs and/or religious self-conceptions. Except for Geneva and Neuchâtel, every Swiss canton grants public-law organization. In the subsection that follows, the various legal forms will be examined with a view to answering the question of whether religious communities are free to choose among all the available structures.

b. Public Law Organization

Because there are corporate and unincorporated forms available we can speak of collective as well as corporative rights. CHRISTOPH RUEGG, DIE PRIVATRECHTLICH ORGANISIERTEN RELIGIONSGEMEINSCHAFTEN IN DER SCHWEIZ: EINE BESTANDSAUFNAHME UND JURISTISCHE ANALYSE 32 (Universitätsverlag Freiburg Schweiz 2002).

Although the named cantons do not provide for public law organization, they still allow symbolic public recognition of the Roman Catholic or the Evangelical Reformed Church.

Forms that are theoretically available but are practically never chosen for religious purposes will not be treated below. These are, for example, the “limited liability corporation” (Gesellschaft mit beschränkter Haftung), “business corporation” (Aktiengesellschaft), “collective partnership and limited partnership business entity” (Kollektivgesellschaft und Kommanditgesellschaft), as well as the “cooperative” (Genossenschaft).
The term public-law organization refers to a sui generis corporate form that has historically been made available to the Roman Catholic Church, the Evangelical Reformed Church, and the Christian Catholic Church. Today, several cantons may grant public-law organization to non-traditional Swiss churches as well. So far, apart from the churches named, only a few Jewish communities have opted for this special form of incorporation. A few Islamic groups have begun to express their interest in taking up public-law organization also. Public-law organization comes alongside a special status called “public-law recognition.” There is no uniform catalogue of requirements that need to be satisfied in order that a religious group can be given public law organization. Most cantons make this special kind of organization dependent upon a community’s willingness to comply with the rule of law, fundamental rights, democratic organization, and social significance in the region. Some cantons additionally require that a religious group which intends to be elevated into public law status should count more

1146 Except for the cantons of Geneva and Neuchâtel, all Swiss cantons provide for public-law organization in respect of the Roman Catholic and the Evangelical Reformed churches. The Christian Catholic Church is public-law organized in nine cantons (Zurich, Bern Solothurn, Basel-Stadt, Basel-Landschaft and Aargau (all at constitutional level), Lucerne, Schaffhausen and St. Gallen (through legislative decision). ADRIAN LORETAN, RELIGION IM KONTEXT DER MENSCHENRECHTE 126 (Theologischer Verlag Zürich 2010); also Gregor A Rutz, Die öffentlich-rechtliche Anerkennung in der Schweiz: Bestandesaufnahme und Entwicklungstendenzen, in DIE ZUKUNFT DER ÖFFENTLICH-RECHTLICHEN ANERKENNUNG VON RELIGIONSGE MEINSCHAFTEN 29 (René Pahud de Mortanges et al. eds., Universitätsverlag Freiburg 2000).

1147 This is the case in Basel-Stadt, Bern, Freiburg and St. Gallen. In the canton of Waadt the Israelite community is not public-law recognized, but public-interest determined. This refers to a symbolic rather than a legal recognition. ADRIAN LORETAN, RELIGION IM KONTEXT DER MENSCHENRECHTE 126 (Theologischer Verlag Zürich 2010).

1148 By the time of writing, they had not yet received such special status. Several Islamic organizations express their intention to incorporate under the laws of public-law recognition. SANDRO CATTACIN ET AL., STAAT UND RELIGION IN DER SCHWEIZ: ANERKENNUNGSKAMPE, ANERKENNUNGSFORMEN 33 ff. (Eidgenössischen Kommission gegen Rassismus 2003); Erwin Tanner, Öffentlichrechtlicher Körperschaftsstatus für islamische Gemeinschaften? (Teil 1), Schweizerische Kirchenzeitung, Nr. 22, 175. Jahrgang (2007).

than three thousand adherents and should have existed for at least thirty years.\footnote{1150}

Cantonal competences stem from Article 3 of the Federal Constitution. The provision holds: “The Cantons are sovereign insofar as the Federal Constitution does not limit their sovereignty; they shall exercise all rights which are not transferred to the Confederation.”\footnote{1151} Moreover, Article 72(1) of the same Constitution stipulates: “The regulation of the relationship between church and state is a cantonal matter.”\footnote{1152} The latter is interpreted to possess declaratory character only, emphasizing the significance of the relationship between the state and religious communities. The regional power to govern religion-state affairs is limited to the extent that it must not conflict with applicable federal law.\footnote{1153} A canton decides in consultation with an applicant community whether and to what extent there should be a special relationship between them. No regional government can compel a religious community to organize under its public-law recognition structure.\footnote{1154} On the other hand, private-law organized religious communities have no court-enforceable right to be recognized in public law.\footnote{1155}

Since each canton has officially established its own historically-evolved degree of religion-state proximity, there is no comprehensive definition of

\footnotetext[1150]{E.g. Zürcher Gesetz über das Gemeindewesen [Municipality Act of the Canton of Zurich] of June 6, 1926, LS 131.1, para. 39a(2)(1-3).}
\footnotetext[1151]{“Die Kantone sind souverän, soweit ihre Souveränität nicht durch die Bundesverfassung beschränkt ist; sie üben alle Rechte aus, die nicht dem Bund übertragen sind.” SWISS CONST. ART. 3.}
\footnotetext[1152]{Id. at ART. 72(1).}
\footnotetext[1153]{BGE 125 II 56, E. 2b, p. 58.}
\footnotetext[1154]{Louis Carlen, Zum Verhältnis von Kirche und Staat im Wallis, in Kirche in einer sakularisierten Gesellschaft 34 ff. (Dieter Binder et al. eds., Studienverlag GmbH 2006); also Daniel Kosch, Das Miteinander von kirchenrechtlichen und öffentlichrechtlichen Strukturen als Lernchance, in Das Kreuz der Kirche mit der Demokratie: Zum Verhältnis von katholischer Kirche und Rechtsstaat 69 (Adrian Loretan & Toni Bernet-Strahm eds., Theologischer Verlag Zürich 2006).}
any regional public-law structure. The term can be seen as an empty vessel, which is filled with meaning through the prescription of cantonal laws, concordats, parliamentary or judicial decisions, international agreements, as well as custom. This highly adaptable corporative form can vary from one community to another. In a religion-friendly cantonal setting, regional government is considerate as to the character and self-conception of communities concerned. It can still generally be said that any public-law recognized corporation is a secular entity, operating under state auspices and subject to the general laws of the state in respect of corporate procedure and contractual and proprietary matters. Although public-law recognized quasi-church entities are seen as serving both religious and secular purposes, the regional incorporation privilege is directed to the secular aspects of its operation.

It is important to note that cantons no longer identify with public-law recognized religious communities. Neither can this special status be regarded as comprising state functions. The Federal Supreme Court in the Buchdruck-
erei Elgg decision of 1976 noted in this respect: “Today it appears that recognized cantonal churches or their ecclesiastical communes are among wide circles of the population no longer regarded as vehicles of public functions and sovereign power – that enjoy in respect to their affairs equal rights as political municipalities do – but rather as personal-based entities similar to forms of private-law associational corporations.”

The reason why public-law recognized religious communities are still seen as more proximate to the state than private-law organized religious communities is primarily because total structural decouplement between those entities has not been reached, also bearing in mind the historical circumstance that this special type of recognition grew out of the concept of state churches.

c. Private Law Organization

c.a. Associations

In Switzerland the great majority of private-law organized religious communities are formed as associations under the 1907 Civil Code. Article 60(1) foresees religious communities by express provision. The formation of a religious association requires at least three people and an express statement

1161 “Die anerkannten Landeskirchen bzw. ihre Kirchengemeinden werden wohl heute in weiten Kreisen der Bevölkerung nicht mehr als Träger öffentlicher Aufgaben und hoheitlicher Befugnisse betrachtet, die in ihrem Bereich den politischen Gemeinden gleichzustellen wären, sondern eher als den privatrechtlichen Personenverbänden ähnliche Körperschaften auf rein personeller Grundlage.” BGE 102 Ia 468, E. 3b, p. 475.

1162 An often-cited example is the relatively new cantonal Constitution of Zurich. Article 130(3)(a-d) provides an exhaustive list of religion–state issues that must be regulated by the cantonal lawmaker. The provision holds that cantonal secular laws regulate “(a) the ground structure of church entities; (b) the right to levy tax; (c) state subsidies;” and “(d) the competence and procedure of the election of priests, as well as the duration of their office.” (Das Gesetz regelt: (a) die Grundzüge der Organisation der kirchlichen Körperschaften; (b) die Befugnis zur Erhebung von Steuern; (c) die staatlichen Leistungen; (d) die Zuständigkeit und das Verfahren für die Wahl der Pfarrerinnen und Pfarrer sowie deren Amtsdauer.) Verfassung des Kantons Zürich [Constitution of the Canton of Zurich] of February 27, 2005, SR 131.211.

of their religious objective in the articles of association.\textsuperscript{1164} There is no registration requirement as long as the community does not possess any business objectives.\textsuperscript{1165} Islamic communities, the Divine Light Zentrum, the Mormons, Jehovah’s Witnesses, or Methodists are all examples of private-law organized associations.\textsuperscript{1166} Jewish communities are either private- or public-law organized depending on the canton. Every religion or belief-system which carries a certain weight or importance may be organized by means of this associational form of government.\textsuperscript{1167} The quantity of adherents must, however, be such that they can at least form the necessary organs.\textsuperscript{1168} These are the association’s assembly and the board of management.\textsuperscript{5169}\textsuperscript{1169} Swiss associations enjoy relatively great autonomy in the light of their organization.\textsuperscript{1170} This applies especially to questions regarding competence and procedure.\textsuperscript{1171} Associational incorporation is particularly appropriate for congregational style communities and umbrella religious associations.

c.b. Partnerships

The institutional form of associations may be inadequate if it cannot provide the necessary freedom to collective religious determination. For instance, the appointment of a Bishop for life may be in conflict with the members’ right to dismissal under Article 65(3) of the Swiss Civil Code.\textsuperscript{1172} In such an instance, it may be more appropriate to regulate a religious community accord-

\begin{footnotesize}\begin{enumerate}
\item\textsuperscript{1164} \textit{Id.} at art. 60(2).
\item\textsuperscript{1165} \textit{Id.} at art. 61(2)(1).
\item\textsuperscript{1166} CHRISTOPH RÜEGG, \textsc{Die privatrechtlich organisierten Religionsgemeinschaften in der Schweiz: Eine Bestandesaufnahme und juristische Analyse} 48 ff. (Universitätsverlag Freiburg Schweiz 2002); also Sarah Beyeler & Virginia Suter Reich, \textit{Inkorporation von zugewanderten Religionsgemeinschaften in der Schweiz am Beispiel der Aleviten und der Ahmadiyya}, Schweizerische Zeitschrift für Religions- und Kulturgeschichte, 102. Jahrgang (2008), at 241.
\item\textsuperscript{1167} BBI 149 1996 Bd. I, p. 156.
\item\textsuperscript{1168} Schweizerisches Zivilgesetzbuch [Swiss Civil Code] of December 10, 1907, SR 210, art. 63(a) to 69(c); as to the consequences if the necessary organs are not formed \textsc{ANTON HEINI ET AL.}, \textsc{Grundriss des Vereinsrechts} 102 ff. (Helbing Lichtenhahn Verlag 2009).
\item\textsuperscript{1169} \textit{Id.} at art. 64 and 69.
\item\textsuperscript{1170} JEAN-FRANÇOIS PERRIN, \textsc{Droit de l’association} 57 ff. (Schulthess 2008).
\item\textsuperscript{1171} \textsc{ANTON HEINI ET AL.}, \textsc{Grundriss des Vereinsrechts} 17 (Helbing Lichtenhahn Verlag 2009).
\item\textsuperscript{1172} Christoph Winzeler, \textsc{Kirchen in der staatlichen Rechtsordnung: Eine vergleichende Umschau aus schweizerischer Sicht, in Die Zukunft der öffentlich-rechtlichen Anerkennung von Religionsgemeinschaften} 80 (René Pahud de Mortanges et al. eds., Universitätsverlag Freiburg 2000).
\end{enumerate}\end{footnotesize}
Analytical Representation

Partnerships are a subsidiary form of organization if the requirements of other forms cannot or should not be satisfied. In Switzerland, partnerships do not possess legal personality and can take up any purpose that is not in contravention of applicable law. In this sense a religious partnership is a nominate contract between individuals who, in spirit of cooperation, agree to contribute to religious purposes, but do not wish to incorporate. The concept of partnerships might be particularly appealing to those religious groups which envisage the greatest possible autonomy. They are nevertheless relatively rare in Switzerland.

**c.c. Foundations**

For the organization of religious property, communities may choose the institutional form of a foundation under Article 80 ff. of the Swiss Civil Code. The lawmaker gave specific consideration to the special circumstances and requirements of the Roman Catholic Church. In this sense, registration and compulsory supervision exemptions are initially Catholic prerogatives that are now also enjoyed by all other religious communities incorporated under the Article 80 ff. of the Code. Swiss foundations acquire legal personality and hold assets in their own name for the religious purposes set out in their constitutive documents. Incorporating assets allows for perpetual succession without changing the existing legal relationship. Every founda-

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1175 Walter Fellmann et al., *Berner Kommentar: Kommentar zum schweizerischen Privatrecht 95 ff.* (Stämpfli 2006).
1176 For more details Lukas Handschin & Reto von Zun, *Die einfache Gesellschaft 19 ff.* (Schulthess 2009).
1178 Schweizerisches Zivilgesetzbuch [Swiss Civil Code] of December 10, 1907, SR 210, art. 87(1)(bis); also BBl 2003 8153.
tion must have a beneficiary, which can be a religious purpose. The foundation wields all the power given by the statutes. Apart from churches, Islamic communities increasingly opt for the legal form of foundations alongside the corporative form of association.

d. Concluding Remarks

Religious communities are free to choose among the available private-law forms of organization. However, the use of regionally determined public-law structures is limited. Some cantons do not provide for public-law organization, others restrict its application to religious communities that satisfy certain requirements. As long as such criteria are content-neutral and generally applicable, a canton’s decision to deny public-law organization appears to be in compliance with the Swiss Federal Constitution. Moreover, if the social significance of a private-law organized religious community increases beyond the importance of a religious community already organized under public law, it is nothing other than reasonable for the canton concerned to welcome that private community to take up public-law organization as well, or at least to grant de facto public recognition. Justice requires that not only traditional but also new and emerging religious communities receive a fair share in unfettered organization. Legal structures are designed to facilitate rather than to impede the religious activity that is chosen by the people. Therefore, the responsible civil lawmaker must not only ask constantly whether the legal forms available are sufficiently suitable to live up to de-
mands of the people, but also, and especially, acts in accordance with its evaluation for the good and the right of all participants of Swiss society.

1.7.2.3  Respect for Internal Affairs of Religious Communities

a.  Introduction

Looking back at the above considerations, it can be concluded that a legal structure is the organizational framework in which the law permits internal affairs to be conducted. The Swiss Federal Constitution comprises no express provision that would guarantee respect for the internal affairs of a religious community.\(^{1185}\) This is because the Federal Constitution gives more heed to individual than to collective rights.\(^{1186}\) A community’s right to autonomy must be read and given effect in association with several fundamental rights. As such they can comprise the right to freedom of association,\(^{1187}\) the right to freedom of expression and of information,\(^{1188}\) the right to freedom of assembly,\(^{1189}\) and the right to freedom of belief and conscience.\(^{1190}\) However, respect for internal affairs is not tantamount to legal immunity. Religious organizations are equally subject to private and criminal law as are all other non-religious organizations. Although it is certain that they cannot be exempt from the civil laws of the land, it has never been entirely clear to what extent adherents should be free to administer or organize religious communities. So in respect of these organizational competences, we will look at some of the most important approaches developed so far.

b.  Prescription Approach

\(^{1185}\) Nevertheless, there are several cantonal Constitutions that refer to religious communities’ internal autonomy. E.g. Verfassung des Kantons Zürich [Cantonal Constitution of Zurich] of February 27, 2005, SR 131.211, art. 130(2); or Verfassung des Kantons Bern [Cantonal Constitution of Bern] of June 6, 1993, SR 131.212, art. 122(1) and (2).

\(^{1186}\) KARLEN PETER, DAS GRUNDBRECHT DER RELIGIONSFREIHEIT IN DER SCHWEIZ 236 ff. (Schulhess, Zürich 1988).

\(^{1187}\) SWISS CONST. ART. 23.

\(^{1188}\) Id. at ART. 16.

\(^{1189}\) Id. at ART. 22.

\(^{1190}\) Id. at ART. 15.
According to the Federal Constitution it is cantonal government that regulates the relationship between public-law recognized communities and the state. Private-law organized religious communities are governed by federally enacted law. At both levels of government, the scope of the right to collective religious freedom is dependent upon and correlated to the legal structure made available to a community. Swiss religious organizations possess no positively formulated right to autonomy, but enjoy their freedoms within the bounds of civil laws. It means that the state dominates the way people organize themselves for religious purposes. In other words, because religious communities are clothed in state-given garb, they are bared from wearing their uniquely tailored religious apparel. This unilateral prescription method has given rise to conflict, since some people value the democratic legitimacy of legal frameworks above all else, whereas others treasure the untouchability of divinely sanctioned rules above all else. Experiences in the past have demonstrated that the two positions cannot easily be reconciled whenever the former clashes with the latter. In the following we will see how the Federal Supreme Court has begun to resolve this classic impasse by way of compromise.

**c. Bar to Departure from Religious Doctrine Approach**

The “bar to departure from religious doctrine” approach was developed in the *Schwimmunterricht I* ruling of 1993. The highest court of the country stated: “As long as the content of a religious doctrine is at stake, the Federal

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1191 *Id. at ART. 3 AND 72(1); also BGE 55 I 113, E. 3, p. 129.*

1192 For a detailed description CHRISTOPH RUEGG, *DIE PRIVATRECHTLICH ORGANISIERTEN RELIGIONSGEMEINSCHAFTEN IN DER SCHWEIZ: EINE BESTANDSAUFNAHME UND JURISTISCHE ANALYSE* 305 (Universitätsverlag Freiburg Schweiz 2002); also Felix Hafner & Kathrin Ebnöther, *Staatliche Förderung religiöser Aktivitäten, in KOOPERATION ZWISCHEN STAAT UND RELIGIONSGEMEINSCHAFTEN NACH SCHWEIZERISchem RECHT* 134 (Schulthess 2005).


1194 It gives rise to a wide variety of problems regarding the adequate allocation of competences. For details Daniel Kosch, *Perspektiven für ein partnerschaftliches und streitbares Miteinander pastoraler und staatskirchenrechtlicher Strukturen, in SCHWEIZERISCHES JAHRBUCH FÜR KIRCHENRECHT* 81 FF. (Dieter Kraus ed., vol. 10, Peter Lang 2005).
Supreme Court must act with great restraint. In any event, the assessment of a religious attitude or rules, or even the review of theological truth – in particular the interpretation of the relevant parts in Holy Scriptures – remains barred to the Federal Supreme Court, unless and until boundaries of arbitrariness are overstepped. So the courts’ refusal to interpret religious doctrines is as vital as the maintenance of religious policies is for spiritual courts. An exception to this understanding might be a religious exercise claim that is so unreasonable that no reasonable court could ever agree to an autonomy claim. The legal threshold is thus set very high. Moreover, a specific belief need not be shared by all adherents of a religious community in order to receive constitutional protection. Also, differing religious views may be encompassed by religious-freedom rights under Article 15 of the Federal Constitution.

d. Conceptual Overlapping Approach

Another method, which is the conceptual overlapping approach, was given legal meaning in the Röschenz decision of 2007 by the High Court of the canton of Basel. The case involved the revocation of the parish administrator’s missio canonica by the diocesan bishop. The question in dispute was whether secular public law or spiritual church law governed the matter. In the opinion of the High Court “the regulation of the working contract is part of combined affairs” whenever it regards public-law recognized religious communities. The expression “combined affairs” referred to the shared competences of state-made quasi-church bodies and Catholic spiritual entities. As a consequence, the diocesan bishop was bound by state secular procedural requirements as well as canon law. Since the bishop failed to give

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1195 “Allerdings hat sich das Bundesgericht insofern große Zurückhaltung aufzuzeigen, als der Inhalt der Glaubenslehre in Frage steht. Eine Bewertung der Glaubenshaltung und -regeln oder gar eine Überprüfung ihrer theologischen Richtigkeit, insbesondere eine Interpretation der einschlägigen Stellen heiliger Schriften, bleibt dem Bundesgericht jedenfalls so lange verwehrt, als nicht die Grenzen der Willkür überschritten sind.” BGE 119 Ia 178, E. 4c, p. 185.


1197 Kantonsgemeindesgericht Basel-Landschaft [High Court Decision of the Canton of Basel], BJM 9/2007 Nr. 06.

1198 A spiritual working permit or official competence to participate in the mission of the Roman Catholic Church.

actual reasons for his decision to dismiss the administrator, he had breached
the secular administrative-law principle of “fair hearing.” Thus, his action
was held unlawful even if it had been in perfect compliance with canon law.
By virtue of the secular court’s decision the two legal systems became in-
terwoven and inseparable. As for this and subsequent cases, it means that a
clear-cut differentiation between external and internal church affairs may not
always be feasible.

e. Criminal Law Boundary

In Switzerland, criminal law sets a decisive boundary to religious autonomy
claims. The former Federal Constitution of 1874 under Article 56 held that
“citizens have a right to association as far as the intended purpose or finan-
cial means are not illegal or state subversive.” In the case of Kampfbund
gegen Faschismus and Harst der Nationalen Front of 1934, the Federal
Supreme Court decided to dissolve two militant associations by force. The
judges feared that the associations’ political convictions could provoke street
clashes and social unrest. Although Article 56 is no longer part of the
now applicable Swiss Federal Constitution of 1999 and Swiss political par-
ties have become more or less moderate, it is not far-fetched to think that a
similar decision could apply to dangerous religious communities. The
state has a positive duty to protect its citizens from detrimental acts and or-
ganizations. On 4 and 5 October 1994 when fifty-three people were killed in
religious rituals in Switzerland and in Canada, the state failed clearly to
comply with its positive obligation to protect adherents from group suicides.
They showed signs of violence and suffering when they were found dead in
the incinerated centres of a neo-Templar movement. Thus, the right to

1200 “Recht auf Begründung des Entscheids.” Id. at E. 9/10.
1201 FELIX HAFNER & URS BROS, BISCHÖFliche PERSONALENTScheIDE UND LANDES-
KIRCHLICHES REcht, GUTACHTEN 4 (Helbing Lichtenhahn 2007).
1202 “Die Bürger haben das Recht, Vereine zu bilden, sofern solche weder in ihrem
Zweck noch in den dafür bestimmten Mitteln rechtswidrig oder staatsgefährlich
sind.” Bundesverfassung der schweizerischen Eidgenossenschaft [Swiss Federal
Constitution] of May 29, 1874 quoted as in ALFRED KOLZ, QUellenBUch ZUR
NEUeren SCHweIZERischen VErFassungSGeschichte, von 1848 BIs IN Dae GEG-
ENWART 166 F. (Stämpfli 1996).
1203 BGE 60 I 349, E. 1, p. 350.
1204 For a detailed analysis looking into forced dissolutions and the legal basis which
could serve such objectives MARKUS KICK, DIE VERBOTENe JURISTISCHE PERSon:
UNTER BESONDERER BERÜCKSICHTIGUNG DER VERMöGENSVERWENDUNG NACH
ART. 57 ABS. 3 ZGB 168 FF. (Universitätsverlag Freiburg 1993).
1205 LEWIS JAMES R., THE ORDER OF THE SOLAR TEMPLE: THE TEMPLE OF DEATH
determine one’s religious precepts ends where it conflicts with secular-adopted criminal law of the land.

\textbf{f. Concluding Remarks}

The prescription approach seems particularly critical in respect to public-law organized religious communities. A reason for this is that, in some instances, secular law qualifies what constitutes a religious community’s internal affairs by express provision. As concepts such as dogma, promulgation, cult, and pastoral care differ from one community to another, the state prescription method may create legal uncertainty and rigidity. The bar to departure from religious doctrine approach provides greater flexibility. It means that courts are per se reluctant to determine disputes of a religiously sensitive nature. Secular judges can decide – if need be in consultation with expert advice – whether in the specific circumstances of a case they should refrain from intervention or control. Arguably, the religiously impartial state owes a reasonable duty of abstention at all levels of government.\footnote{Especially in recent cases, the federal court seems to be more aware of its obligation, and has started to give particular heed to the self-conception of religious communities. E.g. BGE 134 I 75, E. 5.1, p. 78.}

This does not mean that religious organizations are, as such, somehow above secular law or fully exempt from its rules. The question of whether government should refrain from interfering with a community’s breach of fundamental civil rights is hotly debated.\footnote{For a thorough and most meaningful analysis on the topic \textsc{Felix Hafner, Kirche im Kontext der Grund- und Menschenrechte} 293 ff. (Universitätsverlag Freiburg 1992).} The support of general accountability could create legal difficulties, for instance, in a field like employment equality, where women in some religious communities do not have the same opportunities as men.\footnote{For far more details on that issue generally \textsc{Denise Buser & Adrian Loretan, Gleichstellung der Geschlechter und die Kirchen; ein Beitrag zur menschenrechtlichen und ökumenischen Diskussion} (Universitätsverlag Freiburg 1999); also Adrian Loretan, \textit{Impulse des staatlichen Gleichstellungsrechts für die Kirchen, in Das Kreuz der Kirche mit der Demokratie: Zum Verhältnis von katholischer Kirche und Rechtsstaat} 49 ff. (Adrian Loretan & Toni Bernet-Strahm eds., Theologischer Verlag Zürich 2006).} The same might be true with regard to a person’s sexual orientation, which can be a bar to particular religious offices. Few would disagree that public-law organized entities with a religious purpose should be held just as liable to federally enacted fundamental rights as state entities.
or other quasi-state organizations are. But even if this proposition is almost universally accepted, it is unclear what should be the case with those communities that operate by means of dual legal structures.

This applies to the Roman Catholic Church especially, which in Switzerland has an “external” public law quasi-church structure alongside an “internal” divine canon law system. In view of the fact that only “external” quasi-church institutions are recognized in public law and therefore subject to Swiss constitutional law, the “internal” systems of organization are generally free from such constraints. The act of placing the “internal” canon law system onto the same legal footing as public-law organized entities would virtually deprive the divine church of much of its legal autonomy.

The underlying issue is whether the “internal” Catholic Church in a liberal and democratically organized state needs to internalize and mirror society’s general values, including constitutionally protected fundamental rights. It could readily be argued that it need not, where to do so would destroy another important value – freedom of collective religious self-determination. Provided that all religious communities are required to adapt to basic constitutional rights at all level of their affairs, the effect would be to homogenize religious and other differences and, in the process, diminish religious and cultural

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1209 The Federal Constitution stipulates that public authorities must ensure third party effect if practicable. SWISS CONST. ART. 35(3). Because of the state proximity of public-law recognized religious communities, it is unclear whether they should be treated differently from private-law organized communities. What is more certain, however, is that general fundamental rights might clash with the right to religious freedom. Where this is the case, the latter prevails as the right would otherwise be vitiated. Generally HAFNER FELIX, Kirchen im Kontext der Grund- und Menschenrechte (Universitätsverlag Freiburg 1992). Giusep Nay points to the scholarly opinion that public-law corporations are subject to constitutional rights and obligations where they enjoy privileges such as the right to tax legal persons. Giusep Nay, Organisatorische Verselbständigung als Leitidee: Staatsrechtliche Überlegungen zum kirchlichen Selbstbestimmungsrecht, in WEITERENTWICKLUNG DES STAATSKIRCHENRECHTS: AKTUELLE HERAUSFORDERUNGEN IM LICHT DER DEMOKRATIE: ZUM VERHALTNS VON KATHOLISCHER KirCHE UND RECHTSSTAAT 41 (Adrian Loretan & Toni Bernet-Strahm eds., Theologischer Verlag Zürich 2006).

1210 Scholar Adrian Loretan points therefore to the necessity of an internal process leading to the acceptance of fundamental human rights, but a general absence of state interference into the Church’s internal affairs. Adrian Loretan, Grundrechte in den Kirchen, in Wo bleibt die Gerechtigkeit? Antworten aus Theologie, Philosophie und Rechtswissenschaft 242 f. (Paul Richli ed., Schulthess 2005).
diversity. From this it can be suggested that any answer to this question is rather one of policy than law.1211

In any situation, scholar Adrian Loretan points out that civil judges ought to give heed to the particular circumstances of the case, including the religious self-conception of the community concerned.1212 It is clear that the spiritual-secular distinction does not always admit easy application or balancing of interests. Rex Ahdar and Ian Leigh suggest that “the complication of autonomy is therefore the product of the confusion and contestedness inherent in the self-understanding of each side to the encounter, multiplied by the haze of misperception and misunderstanding that separates them.”1213 But the existential demands of the encounter, not to mention good faith and human decency between fellow adherents, require that each side forge ahead in a spirit of trust and partnership.

1.7.2.4 Tax Exemptions to Religious Communities

a. Introduction

It is generally recognized that the secular, utilitarian- determined state cannot offer all services needed by society. It therefore awards economic relief by way of tax exemption to religious communities in return for their rendering of public benefit. Government imposes tax in order to pay for a civilized society, but where these needs match the welfare programmes provided by religious communities, some or all activities may be tax exempt. In the following, our focus turns to the question of whether a specific activity of a religious community can be expected to receive tax immunity. As we will later see, this question is particularly interesting where it regards the selling and distribution of religious books and pamphlets as a part of religious proselytization, generally covered under Article 15 guarantees.

b. General Exemption

1211 To my understanding religious politics must grow from within, and are of little use when they are imposed on a community by the secular lawmaker.
The Swiss Confederation possesses a general right to tax natural as well as legal persons.\textsuperscript{1214} However, the 1990 Federal Act on Direct Federal Tax foresees tax exemptions on the profits of private-law organized legal persons that pursue cultic purposes in the entire country.\textsuperscript{1215} The provision implies that the immunity concept does not cover property held by a profit-making legal person. Moreover, in practice the words “cletic purposes” are given a narrow meaning encompassing belief-systems only.\textsuperscript{1216} At cantonal level, tax immunities apply to the profits and property of those religious communities which pursue cultic activities either in the canton or the Confederation as a whole.\textsuperscript{1217} Public-law organized religious communities are totally immune from tax at federal level. The 1990 Act holds that “ecclesiastical communes and other territorial corporations of the cantons” are tax exempt.\textsuperscript{1218} As for public-law recognized communities, the same is true at cantonal level.\textsuperscript{1219} The following case demonstrates, however, that not all cultic activities are tax-exempt; for example, if it is found that a private-law organized community has no charitable or a profit-making purpose.

\textbf{c. Bar to Tax Exemption}

In 1994 the administrative police chief of the city of Zurich barred the Scientology Church from disseminating its personality test and flyers on public land, on the grounds of its failure to have a valid license or pay sales tax. The chief of police based the decision upon a cantonal regulation that held: “The dissemination of printed materials and promotional items for commercial purposes is prohibited on public ground,”\textsuperscript{1220} without a license agree-
Analytical Representation

After exhausting all court instances the Church took the matter before the Federal Supreme Court. In the so-called *Werbeaktionen* decision of the year 2000, the highest court of Switzerland stipulated: “The dissemination of the printed materials in question serves [...] primarily for the non-gratuitous distribution of courses and books. From the content of the materials the objective of religious proselytism is not apparent. Whoever [...] intends to sell non-gratuitous benefits and does not make clear to prospective clients that religious proselytism may be a directly connected objective, must come to terms with the fact that his or her promotions are regarded as commercially motivated, and are treated in accordance with the laws concerned.”

**d. Concluding Remarks**

It appears reasonable for the state to charge tax for activities that constitute ordinary commercial practices even if exercised by religious communities. However, the mere fact that a religious service is sold instead of being donated should not transform the activities of religious communities into commercial enterprises. This might especially apply to private-law recognized religious communities, which depend on all possible sources of income. It might be necessary to circumscribe similar activities of public-law recognized religious communities more restrictively, because they receive financial contributions that are either state furthered or facilitated. As for the activities of both organizational forms (private or public law determined), it is difficult to drop a generally applicable line between religious or commercial activities. A reason for this might be the circumstance that in some beliefs both categories overlap. From this it can be concluded that reasonable distinctions have to be made on a case-to-case analysis.

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**Stefan Streiff, Kirchenfinanzen in der pluralistischen Gesellschaft: Die Einnahmen reformierter Kirchen in der Schweiz aus theologischer Perspektive 64 ff. (Schulthess 2008)**.
1.5.2.5 Material Aid to Religious Communities

a. Introduction

The granting of state aid to religious communities is another response to their rendering of public benefit. This topic involves primarily financial contributions enjoyed by private- and public-law organized religious communities. The Swiss Federal Supreme Court has affirmed the position that such mild establishment is not in contradiction of the Federal Constitution. The right to religious freedom encompasses, under Paragraphs 2 and 3 of Article 15, the state duty to respect religious activities. State aid to religious communities is part of this positively enforceable obligation. A just analysis of the changes to the Swiss religious and cultural landscape will, however, tell whether today’s material state aid setting is still legitimate or whether it needs to be adapted to developments over time. In the following subsections this broad issue will be examined in respect of three disputed aspects only. These are contribution through tax exemption, religious tax levy on legal persons, and the system of financial support, repayments, and restitutions.

b. Contribution Through Tax Exemption

In Switzerland a grant of tax exemption is generally seen as in accordance with the principle of state neutrality. The idea that such immunities are to be regarded as unconstitutional state endorsement of belief has never gained ground. Still, it seems necessary to mention that remarkable differences exist between the treatment of public-law recognized religious communities and their private-law organized counterparts. The profits of private-law organized communities are tax exempt; however, the state can still levy tax on their capital. Conversely, public-law recognized religious communities are totally immune from tax at federal, cantonal, and municipal level. Total

\[ \text{BGE 107 Ia 126, E. 4c, p. 134.} \]
\[ \text{Peter Karlen, Das Grundrecht der Religionsfreiheit in der Schweiz 345 (Schulthess 1988).} \]
immunity applies to their profits, property, and activities. Further, the state contributes special aid to public-law recognized religious communities by collecting, and if necessary enforcing, the religious tax of their members. Through the communities’ special status they also have the right to receive personal data from local public authorities in case of an adherent’s relocation to and from a municipality.

c. Religious Tax Levy on Legal Persons

The compulsory tax levy on the profits of legal persons (e.g. business companies) and its subsequent distribution only among public-law recognized religious communities is a highly disputed topic. The Federal Supreme Court confirmed its positive stance towards the privilege for more than a century. The first contention occurred in Spar- und Leihkasse Aegerithal of 1878, when the ecclesiastical commune of Aegeri decided to levy religious tax on the profits of legal persons doing business on its territory. The local credit institution Spar- und Leihkasse Aegerithal challenged the action under the then applicable Article 49(6) provision, which held: “No person is obliged to pay taxes devoted especially to the special expenses of the ritual of a religious community to which he does not belong.” However, the court read the words “no person” restrictively by stating, “it is clear that only physical persons with corporal existence are capable of possessing a right to religious belief and conscience.” It also found that legal persons like associations and corporations would have neither a belief nor a conscience. They could not therefore claim a right in relation to those human qualities. The justices were of the view that a grant of locus standi was beyond their powers but within the legitimate capacity of the legislature. The Spar- und Leihkasse could therefore be made subject to religious tax.
In the *Baumann* decision (1891) the Supreme Court differentiated its reasoning by holding that partnerships with no legal personality were religious-tax immune. The justices based their decision on the understanding that partnerships are nominate contracts between the will of physical persons and therefore covered under Article 49(6) of the 1874 Federal Constitution. In 1969 in the case of *Neuapostolische Kirche*, the Federal Supreme Court developed its ratio further by finding that legal persons which themselves strive for religious purposes, are religious-tax immune also. In the 1976 ruling of *Buchdruckerei Elgg*, the Supreme Court reconsidered its earlier decisions but came to the same conclusion that the now century-old practice could not readily be overruled. This decision was particularly influenced by the circumstance that, by then, most cantonal legislators had introduced religious taxes on the profits of legal persons.

The Federal Supreme Court’s hesitation to interfere with cantonal religion-state affairs can be explained from the body’s historical abstinence approach in matters of religion. Moreover, the framers of the Federal Constitution’s Total Revision in 1999 reaffirmed the court’s reasoning in not proposing any change to the disputed area of law. Parliamentary debates foregoing the adoption of the constitutional amendment made no mention of allowing legal persons tax immunity. Thus, the Federal Supreme Court in the *Model AG* decision could do nothing more than reaffirming its earlier reasonings. Today, nineteen cantons levy religious tax on legal persons. No such contribution is required in Aargau, Basel-Stadt, Appenzell Ausserrhoden, Schaffhausen, Geneva and Waadt, although Waadt finances cultic activities of public-law recognized religious communities by way of ordinary taxation. The practice remains highly contested, as it is exclusively the public-law recognized religious communities, which receive these monetary contributions. Private-law organized religious communities have so far not enjoyed these privileges.

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1232 BGE 17 I 557, E 1, p. 559; also BGE 4 I 539, E 1, p. 541; BGE 9 I 416, E 1, p. 458; BGE 13 I 374, E 1, p. 566.
1233 BGE 35 I 333, E 1, p. 335.
1234 BGE 95 I 350, E 1, p. 354; before that decision the Court followed its ruling also in the decisions BGE 37 I 20; BGE 41 I 169; and BGE 52 I 115; the same is true with regard to two non-published rulings as indicated in BGE 95 I 350, E 1, p. 353, namely the decisions of May 24, 1940 A. Wander AG as well as of December 23, 1947 societé coopérative la fraternelle.
1235 BGE 102 Ia 468, E. 2, p. 471.
1236 BGE 126 I 122, E. 5bb, p. 131.
1237 BGE 126 I 122, E. 5e, p. 132.
In Switzerland, material aid can also take the form of direct financial support, repayments, and restitutions. Financial support refers to voluntary state monetary contributions to private-law organized or public-law recognized entities for their acts in furtherance of public interests. The 2007 Church Act of the canton of Zurich provides a representative example. In that region, the Evangelical Reformed, the Roman Catholic, and the Christian Catholic Church all receive financial support for services such as educational training or the setting up of social and cultural programmes.\textsuperscript{1238} Aid is measured in proportion to the number of members. So the largest active community receives the greatest monetary contributions.\textsuperscript{1239} However, aid is given for non-cultic activities only.\textsuperscript{1240} The cantonal statute holds that that any support must be “significant to public life as a whole.”\textsuperscript{1241}

Repayments are financial contributions given for activities that would otherwise be exercised by the state. This type of material state aid therefore represents a remuneration for a state function. Examples may be church-run orphanages or old people’s homes.\textsuperscript{1242}

The third type, restitution, is money paid to some public-law recognized religious communities in exchange for property deprivations of the past. These “historically protected interests” (historische Rechtsgüter) have endured since the times when church property was claimed and secularized by the state. This type of state aid, again, is not to be confused with state subsidies because it is paid in the quality and character of redemptions.\textsuperscript{1243} Exam-
ple of such state contribution can take the form of salary payments of priests and the maintenance of religious real property.\textsuperscript{1244}

\textbf{e. Concluding Remarks}

Material aid is granted to religious communities for providing services to the public at large. Public-law organized religious communities enjoy ample prerogatives not enjoyed by their private-law organized counterparts. This differential treatment appears to be legitimate as long as public-law organized communities possess wider public interests. This might be the case if they reach out to “all” citizens alike, for instance by caring for the sick and the poor regardless of their religious affiliation. Admitting private-law organized religious communities to the same privileges that established communities enjoy is necessary in the situation where equal treatment is demanded by the principles of non-discrimination and proportionality.\textsuperscript{1245} In this respect, we might ask the critical question as to why a secular business-orientated corporation – which employs thousands people from different walks of life and all shades of opinion – should pay compulsory religious tax to a few public-organized religious communities only? Is the public benefit rendered by these privileged communities so great that it is only fair for them to receive the bulk of tax money paid by the country’s workforce, who may or may or may not share their religion or beliefs?

\begin{footnotes}
\item[1244] For a thorough account \textit{Ernst Moor, Die Unterhaltpflicht des Kantons Zürich gegenüber der zurcherischen reformierten Landeskirche} 127 ff. (Buchdruckerei Dr. J. Weiss 1937).
\item[1245] Felix Hafner & Kathrin Ebnöther, \textit{Staatliche Förderung religiöser Aktivitäten, in Kooperation zwischen Staat und Religionsgemeinschaften nach schweizerischem Recht} 158 (Schulthess 2005).
\end{footnotes}
1.7.3 United States

1.7.3.1 Socio-Legal Contours

Colonialists borrowed extensively from common law under which a religious corporation could exist only upon grant of charter by the English Crown and Parliament. During that period a number of colonies, and later the states, had established churches. In states where established churches were found, the territorial parish concept was predominant. Like the English models on which they were based, the parish in, for example, Colonial Virginia or New England was a local governmental institution that administered both church and local affairs without any distinction being made between the two, either in law or custom. Membership privileges and obligations came with residence within the parish, and the vestry controlled many aspects of local affairs. Due to abuses inherent in the charter system, many but not all states gradually replaced the special charter system with general incorporation statutes.

What remain up to the present day, however, are the special provisions for particular denominations. The state statutes vary considerably in the number of denominations included in their special statutes. Illinois, Louisiana, Minnesota, and New Hampshire name only one denomination in their special statutory provisions for particular denominations. New York provides for more than thirty-five different Christian denominations. However, most states specify no more than seven denominations. Similarly, the states differ in which denominations they include. For example, only two states provide for the Universalist Church, and only three states include

1246 This description draws largely on the accounts of Michael S. Ariens, Robert A. Destro, Religious Liberty in a Pluralistic Society 542 (2nd edn 2002).
Lutheran churches of various kinds. The four most common denominations written into the various statutes are, in order, the Protestant Episcopal Church, Methodist Churches, the Roman Catholic Church, and the Eastern Orthodox Church. So in the United States, many religious communities are not seen as corporations like "any other kind of business" because need has always been afforded to their particular self-conception. Mark De-Wolfe Howe points out that "the logic of the Supreme Court’s opinions inexorably leads to the conclusion that churches and other religious groups have a constitutional status wholly unlike other have claimed from the government more than the mere right to form legal entities by incorporation."

1.7.3.2 Legal Structuring of Religious Communities

a. Introduction

Religious organizations in America have made use of various structures to gain legal acknowledgment through status and rights. Religious communities adopt a secular-law corporate form, for instance, in order to limit liability, to own and control property in the name of the community, and to take advantage of benefits available to corporations under tax and other regulatory provisions in state and federal law. Hence, state law is the primary source for the formation, structure, and operation of religious communities. Religious entities are different from their secular counterparts. The primary legal difference lies in the words of the First Amendment to the Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These clauses, free

1258 Bailey v. Trustees of Methodist Episcopal Church of Freeport, 71 Me. 472, 476 (1880).
1259 U.S. CONST. AMEND. I.
exercise and nonestablishment, clearly place some limits on how and to what extent government and religious institutions can interact—limits that do not apply to secular organizations.\textsuperscript{1260} In view of the multiple options that are available, any group of persons who wish to incorporate, merge or change incorporation need to inquire into the particular burdens or advantages that attend each option. Religious communities are required to evaluate their choices carefully when considering the type of legal structure to adopt. On the other hand, the states’ legislature must ask whether the legal structures available are sufficiently flexible to facilitate full and free expression of a community’s self-understanding.\textsuperscript{1261} In the following we will look at the relevant types of structure available, and consider whether religious communities are free as to their selection.

\textbf{b. Nonprofit Corporation}

A nonprofit corporation is one of the most common organizational structures utilized by religious and religiously affiliated corporations. A corporation is a creature of statute, formed under state laws, by persons pursuing a common goal or enterprise. A principal advantage of a corporation over other possible organizational options is that the corporate entity is recognized, in all states, to be its own person for legal purposes, distinct from its members. Provided that a corporation is properly formed and operated, it can offer considerable protection from personal liability claims.\textsuperscript{1262} The Model of Nonprofit Corporation Act of 1964 reads, in Paragraph 2(a), that a nonprofit corporation is “a corporation, no part of the income or profit of which is distributable to its members, directors or officers.”\textsuperscript{1263} The requirements for nonprofit and charitable status vary from state to state. There are, however, common characteristics. Such shared elements include the requirement of the purpose clause, a procedure to incorporate,\textsuperscript{1264} an enumeration of general

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\bibitem{1262} LISA A. RUNQUIST ET AL., \textit{GUIDE TO REPRESENTING RELIGIOUS ORGANIZATIONS} 23 (American Bar Association 2009).
\bibitem{1263} The definition of “nonprofit” is not encompassed by the 1987 Revised Act.
\bibitem{1264} The Model Non-Profit Corporation Act provides a typical procedure for incorporation. Under this Act, one or more parties may serve as incorporators and must sign articles of incorporation containing the name of the corporation, its period of duration, its purpose, the address of its initial registered office, the name of the original
\end{thebibliography}
powers, a method for merger and consolidation, and a provision for distribution of assets upon dissolution. State statutes generally require one or more individuals to act as incorporators who sign the articles of incorporation, which include basic information concerning the corporation, and particularly the purpose for which the corporation exists, and file them in the office of the Secretary of State.

c. The Charter Form

As mentioned previously, prior to the adoption of modern incorporation statutes, all corporations were formed by direct grant of authority from the state. This enabled religious communities to match their religious precepts and legal requirements. Such statutes for particular denominations are viewed as a continuation of the special charter system. In states that adopted the statutorily based charter system, a religious community applies for a charter in a manner similar to the old-style incorporation practice. It must obtain formal approval by the appropriate authority, often a court, before its charter becomes effective. The charter is a document allowing for the incorporation of a specific religious community, and the procedure requires formal review and certification that the organization is being formed for a religious purpose. Examples of states that still permit this form of corporate existence include Pennsylvania, Maine, and New York.

d. Corporations Sole

registered agent, and the number, names, and addresses of the initial board of directors and the incorporators. Duplicate originals of these articles are filed with the secretary of state, who endorses them, files one, and returns the other with a certificate of incorporation.


1266 “Charters will be refused where the real or ultimate purpose of incorporation is not disclosed in its articles of incorporation and is found to be an unlawful one.” Application for Charter of the Conversion Center, Inc., 388 Pa. 239, 244 (1957).


Corporation sole exists in several American states.\textsuperscript{1270} Again, to understand its legal dimension we have to go back in time. The common law corporation sole is a reflection of the practical needs of the Anglican Establishment in America. Virginia was one of the colonies to adopt the device as a means of governing the affairs of the Episcopal Church in that state. Because the church was organized by territorial parish, the common law needed to recognize that the church had an existence independent from that of the parish, and should be capable of receiving endowments and holding property in its own right. The common law device utilized for this purpose was that of the persona ecclesiae, the sole corporation embodied in the minister who, during his tenure, was seized of the free hold of its property and who was capable of transmitting such inherited property to the successor.

Hence, this form provides an individual officeholder with the right to hold corporate privileges. Upon the death of the officeholder, property passes to her or his successor for the benefit of the religious community, rather than passing to the officeholder’s heirs.\textsuperscript{1271} Corporation sole grants perpetuity to the individual in her or his capacity as an officeholder. Any presiding officer of any church or religious community is authorized by statute to form a corporation sole if the matrix conforms with the rules (such as canons) of the religious entity and if title to the property is vested in that person.\textsuperscript{1272}

Churches, like Orthodox and Catholic churches, have a particular hierarchical structure. Whenever the attempt is made to fit corporate law to churches


\textsuperscript{1271} E.g. “One principal purpose of the corporation sole is to insure the continuation of ownership of property dedicated to the benefit of a religious organization [...].” Berry v. Society of Saint Pius, 81 Cal. Rptr. 2d 574, 581 (Cal. Ct. App. 1999); also County of San Luis Obispo v. Ashurst, 194 Cal. Rptr. 5, 6-7 (Cal. Ct. App. 1983).

\textsuperscript{1272} For instance, the Nevada statute stipulates that: “An archbishop, bishop, president, trustee in trust [...], who has been chosen, elected or appointed in conformity with the constitution, canons, rites, regulations or discipline of the church or religious society or denomination, and in whom is vested the legal title to property held for [...] the church or religious society or denomination, may make and subscribe written articles of incorporation.” Nev. Rev. Stat. § 84.020 (1997).
of this type, special legislation is required. The corporation sole is suited to the needs of religious communities organized in hierarchical form, in so far as it provides for internal autonomy over church polity and structure. In terms of the Roman Catholic Church, this can mean that the bishop is solely capable of administering and managing the affairs, property and temporalities of the church. In other words, it places corporate governance, assets and other powers of the corporation in one person, who is invested with the right to carry on all the corporation’s affairs. Gerstenblith comments that the Roman Catholic Church favours this corporate form “because it most closely mirrored the theological and doctrinal polity of the church and, in particular, it assured that church property would be controlled by the church hierarchy.”

**e. Charitable (Trustee) Corporation**

In colonial times it was not uncommon for property dedicated to a charitable or religious purpose to be held in trust, rather than obtaining a corporate charter through special legislative action. The trust type of incorporation derives from the common law practice of using trustees to hold the assets of an unincorporated religious association. Incorporating the trustees allowed for perpetual succession on the property without changing the existing legal relationships. Every trust must have a beneficiary, which is an entity or group of persons who are to receive benefits from the trust. Beneficiaries of a trust cannot be defined individuals; they may be an undefined group or purpose. In that sense public good is the ultimate beneficiary. Hence, a trustee corporation is a form of corporate body made up of elected trustees or other officials with similar powers and duties. The trustees themselves are the corporate body and wield all of the power given thereto except to the extent that a statute limits the scope of exercise of the power or imposes specified duties upon the trustees themselves. Because of the level of control, the fiduciary standard applicable to trustees is generally higher than the standard applicable to directors of corporations or unincorporated associa-

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1275 The following description draws largely on the accounts of LISA A. RUNQUIST ET AL., *GUIDE TO REPRESENTING RELIGIOUS ORGANIZATIONS* 19 (American Bar Association 2009).
tions. In addition, the replacement of individual trustees must occur periodically.

The benefit of using a trust format over a corporation is that the charitable purpose may be harder to change. The charitable purpose set forth in the trust will generally not admit modification unless the trust agreement allows for such modification, or a court can be convinced that the modification is necessary and appropriate. A religious trust corporation may apply for tax immunities in the same manner as other nonprofit entities. However, its use has been rather severely curtailed in recent years, and today it is restricted to just eighteen jurisdictions which still recognize trustee corporations.

f. Membership Corporations

Membership corporations are based on the traditional business corporation model. This form is readily adaptable to churches having a congregational structure and management. The membership corporation is recognized in the vast majority of American jurisdictions. It may be tax-exempt provided that it complies with the laws of non-profit corporations. Some forty separate jurisdictions recognize it. Despite the corporation form’s statutory nature, it retains several common law characteristics. The most notable of these is oversight of the corporate board’s activities by the Attorney General, who is

1276 LISA A. RUNQUIST ET AL., GUIDE TO REPRESENTING RELIGIOUS ORGANIZATIONS 20 (American Bar Association 2009).
charged by statute with the general duty to assure that the assets are used in accordance with their intended purpose.1279

g. Unincorporated Associations

An unincorporated association is a group of people who have joined together for “purpose of promoting common enterprise or prosecuting common objective.”1280 Usually an unincorporated association has a document, such as articles of association or a constitution that generally describes its purpose and how it will be governed. As unincorporated associations do not file their papers with the Secretary of State, they simply commence and continue operations, taking no action to obtain an independent legal identity.

A century ago some religious communities were unincorporated. The Roman Catholic religious orders, in particular, were unincorporated associations where corporations sole were not made available. In recent years, eight percent of religious organizations are still organized as unincorporated associations.1281 The constitutions of Virginia and West Virginia historically barred the incorporation form of any church or religious denomination.1282 Remaining unincorporated generally means that such communities have no independent legal or juridical status. This means that unincorporated groups cannot hold property in the name of the association, nor can they sue or be sued. Although an unincorporated group could not traditionally be held liable in contract, tort, or other law for conduct taking place in its name, its members are still held accountable for their individual acts and omissions.1283

Commentators Ariens and Destro note that “many religious groups and churches operating schools believe that incorporation indicates an allegiance to the state that poses a conflict with their allegiance to God. For others, tenets of faith do not permit the church to bind itself to any formal organiz-
tional model." One example is Methodism, which “has continued for more than two centuries to proclaim a freedom of spirit as opposed to the bondage of an organization, and its appeal has been based on the reality of a personal experience of spiritual emancipation through faith in Christ.” Courts have tended not to interfere in the internal affairs of unincorporated associations unless property rights were involved. These days many states have enacted legislation dealing especially with unincorporated associations with regard to their legal accountability. The benefit of an unincorporated association is that the entity can be structured in whatever way is desired. Today, tax-exempt status can be established for an unincorporated association, just as with other nonprofit entities. Lisa A. Runquist advises that an unincorporated association is seldom the form of entity chosen by an experienced practitioner, because of the uncertainty of the practical aspects of their operation. Nonetheless, at least twenty-three jurisdictions recognize unincorporated voluntary religious associations.

h. Concluding Remarks

Many of the American states permit religious communities to incorporate under whatever statutory form they choose. Limits of choice exist especially to new, unusual, and emerging religious communities in that some state-tailored structural forms comply with the religious precepts of traditional religious communities only. The existence of denominationally related stat-


\[1288\] Lisa A. Runquist notes that to function effectively, “the unincorporated association members should adopt organizational documents that set forth the organization’s purposes, mission and procedures, similar to articles of incorporation, bylaws, and other documents required for more formally established entities such as nonprofit corporations.” Lisa A. Runquist et al., Guide to Representing Religious Organizations 21 (American Bar Association 2009).

utes may raise the question of whether an unconstitutional preference is thereby granted to particular groups. For example, scholar Patty Gerstenblith argues in this respect “any situation in which a state acts as more than a ‘rubber stamp’ to the religious organization’s choice of corporate form raises a possible problem of ‘excessive entanglement.’” The act of statutorily selecting particular groups implicitly limits the choices of those groups that do not have the benefit of such traditional provisions. This may restrict a new group’s ability to select the legal form best suited to its religious self-conception.

In the leading case of *Everson v. Board of Education* (1947), the Supreme Court stated that the First Amendment means at least “[N]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.” This kind of structural preferentialism, as referred to above, has never been challenged in American courts. However, if the no-aid language of *Everson* is literally construed, a formidable case can be made against the validity of any statute that grants a legal device to particular denominations. A solution to this could be that states make available a totally free array of structural forms, so that religious communities are permitted to adopt the kind of form which is most in line with their religious doctrines. In this perspective, religious liberty can co-exist with a mild form of religious establishment. Rex Ahdar and Ian Leigh go as far as to claim, “establishment is consistent with religious freedom.” The scholars opine that establishment is inescapable if religious freedom is to be realized in some way or another because “even if a state does not have an established church it will have an established position on religion.” The question of whether this alternative of benevolent neutrality can withstand the ratio as uttered in *Everson* remains open.

### 1.7.3.3 Respect for Internal Affairs of Religious Communities

**a. Introduction**

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1293 *Id.*
Drawn from the religious clauses of the First Amendment, together with the Speech Clause and the implicit right to freedom of association, the right of religious communities’ autonomy is the right to be free from state intervention, and control with regard to their internal affairs. The Free Exercise Clause functions primarily as an individual right with its guarantee to pursue a life in accordance with one’s religious beliefs. The function of the Establishment Clause is different. Its purpose is to limit governmental action from using its powers in matters that are considered to belong within the realm of religion. The apparent difficulty with collective religious self-determination claims is that the principle straddles the Establishment as well as Free Exercise Clause. The two Clauses do not rival each other, but are complementary. They combine the same objective, and that is religious freedom. For instance, Justice Goldberg once noted: “[T]he single end [of the clauses is] to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.” Complex questions arise at the points where distinct and separate lines between religion and state need to be drawn. As a result of this, it seems virtually impossible to clearly affix matters of law to either the nonestablishment or free exercise sides of the First Amendment. Some cases are more likely to belong to the intermediate realm between both clauses especially where facilitation of self-determination is at stake. Over the years, US courts have developed several tests so as to decide between constitutional and unconstitutional intervention and control.

b. The Doctrine of Excessive Entanglements

The doctrine of excessive entanglements is an Establishment Clause test developed by the Supreme Court in *Walz v. Tax Commission* (1970). In the spiritual-secular dichotomy, the court found that the purpose of the Establishment Clause is to avoid intrusion by civil authorities into internal religious affairs. Government may not engage in programs or enact laws that

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require extensive surveillance by secular authorities of the activities of religious institutions, since such surveillance entails the risk of entangling the state in matters of religious significance. The excessive entanglements idea suggests at least that the state may run afoul of the First Amendment if it attempts to regulate internal church matters that have a significant religious aspect and may properly be regarded as falling within the sphere of the church’s autonomy.

c. Bar to Departure from Religious Doctrine Approach

The “bar to departure from religious doctrine” approach embarks from the question “who is to be the judge” in matter of religious doctrine, discipline, or order. Who has the right to say conclusively, in case of controversy, that one party or the other has, for instance, “rightly” departed from a specific religious doctrine? The Supreme Court of the United States answered this question by stating that it cannot be a state secular body, including the court, which answers questions of religion. This landmark decision was held in the early case of *Watson v. Jones* (1871). The highest court of the country said: “The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals.”

This line of reasoning is recognized as the bar to the departure from doctrine approach. “Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and binding on them, in their application to the

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1299 The Court said: “In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case.” *Id.* at 675.


case before them.”

It is necessary to note that the ban seems neither absolute, nor all-embracing. For instance, a more subtle method than the one in Watson was applied in the case of *Davis v. Scher* (1959) by the Supreme Court of Michigan. While prima facie the decision looks like a banned exercise of the departure from doctrine approach, that court did not actually construe religious doctrines for itself, but relied on undisputed expert advice. So while the court was unable to interpret the meaning of religious questions, it accepted help by undisputed proficient testimony.

d. **Polity Approach**

The ruling in Watson is significant not only for rejecting departure from religious doctrines, but also for developing the polity approach. The case involved a division of its members into two distinct bodies, each of which claimed the exclusive use of the property held and owned by that local church. Justice Miller, who delivered the opinion of the Supreme Court, first recognized that the religious communities who came before the court were treated “in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, were equally under the protection of the law, and the actions of their members subject to its restraints.”

Miller said: “In this country the full and free right to entertain any religious belief, to practise any religious principle and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”

Thus, what the Justice basically stated was that a civil court may not look to the religious issue that divided two church factions and hold that one side or the other is, by that church’s creed, right. The Supreme Court made clear that “it would be a vain conceit and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could

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1303 In that case a rabbi was sworn in court and testified in answer to questions. Davis v. Scher, 356 Mich. 291, 296 (1959).
1304 Plaintiffs were elders and elected trustees of a church. A disagreement ensued among the trustees, which eventually led to the defection of defendant trustees. The defendants than refused to recognize plaintiffs’ authority, or to open the church for meetings.
1306 *Id.* at 728-9.
appeal to the secular courts and have them reversed." In this, the polity approach goes further than a mere bar to the departure from doctrine approach. This is because the polity approach holds that where a particular issue – property claims especially – is governed by a religious doctrine, secular courts have no authority to decide upon that issue. This also suggests that where state secular law overlaps with religious law, the later may prevail.

The polity approach as developed in Watson was also applied in a later decision of the Supreme Court, namely Serbian Eastern Orthodox Diocese v. Milivojevich (1976). In that case the judicial body exercised procedural abstention. The case involved American-Canadian Diocese of the Serbian Orthodox Church who had suspended and removed its bishop of their church. The bishop and others brought an action to declare that the proceedings of the church were procedurally and substantively defective under church internal regulations. The church itself filed a separate complaint seeking declaratory relief that the bishop had been properly removed by the diocese, and that the diocese had been properly reorganized into three entities. Pursuant to internal regulations, the church had the exclusive power to remove, suspend, defrock, or appoint diocesan bishops. The state court held that the bishop’s removal and defrockment was arbitrary and had to be set aside because the proceedings were not conducted according to the church’s constitution and penal code.

On certiorari, Justice Brennan, in delivering the opinion of the Supreme Court of the United States, reversed the lower court’s decision, since the Justice held that its probe into the allocation of power within the church in order to decide religious law violated the United States First Amendment. Brennan said: “To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide [...] religious law [governing church polity] would violate the First Amendment in much the same manner as civil determination of religious doctrine.” The court reiterated the general rule that religious controversies were not the proper subject of civil court inquiry.

e. Neutral Principles of Law Approach

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1307 Id. at 729.
1308 This inference is unlikely to apply to property cases. Id. at 603.
1309 A hierarchical church whose Seat is the Patriarchate in Belgrade, Yugoslavia.
However, in *Jones v. Wolf* (1979), just three years after the Serbian Eastern Orthodox Diocese decision, the Supreme Court held that it was not constitutionally bound to apply the polity approach in intra-church disputes. \(^{1311}\) The case concerned a schism that developed in a local church affiliated with a hierarchical church organization, when a majority of the local church’s members voted to separate from the church organization while others opposed the separation. The majority faction united with another denomination, while the minority, although remaining on the church rolls for three years, conducted its religious activities elsewhere. A dispute arose over the ownership of church property, held either in the name of trustees for the local church or simply in the name of the church itself. \(^{1312}\) Eventually, representatives of the minority faction brought a class action to establish their right to exclusive possession and use of the local church property but failed with their claim twice.

On certiorari, the United States Supreme Court held that states may, consistently with the First and Fourteenth Amendments, resolve disputes over the ownership of church property by adopting a neutral principles of law approach. This also meant that courts were not required by the First Amendment to adopt a rule of compulsory deference to religious authority in resolving such disputes. The crux of the matter was that the neutral principles of law approach entailed settling intra-church disputes on the basis of documents such as deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property. In other words, this approach holds that only when such documents contain references to religious doctrine must secular courts look to the appropriate religious authority.

The neutral principles of law approach cannot be an alternative solution to all kinds of intra-church disputes, but is primarily applied by means of internal property disagreements. This becomes clearly evident by the language of the court itself. The court acknowledges that the idea was “[to] use standard objective, well-established concepts of trust and property law familiar to


\(^{1312}\) Under the policy of the national church, the government of the local church is committed initially to its “session,” but the actions of this assembly or “court” are subject to the review and control of higher church courts. In response to the schism, a higher church court appointed a commission to investigate the dispute, and this commission ruled that the minority faction constituted the “true congregation” of the local church, thereby withdrawing all authority from the majority faction. The majority took no part in this inquiry, and did not appeal the ruling to a higher church tribunal.
lawyers and judges.”¹³¹³ The ulterior motive of the neutral principles approach is, however, not to be interpreted as a carte blanche to authorize courts to invoke any “wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations”, the highest New Jersey court once found.¹³¹⁴

f. **Criminal Law Boundary**

Criminal law may present a clear boundary to a religious community’s autonomy claim. The most famous dispute in this area of law involved two members of the Native American Church that were made redundant because they ingested peyote (a prohibited hallucinogenic drug) for sacramental purposes at a ceremony of their church. When they applied for unemployment compensation, the Employment Division determined that they were ineligible for benefits because they had been discharged for work-related misconduct. The claimants filed suit against that decision by virtue of their right to free exercise under First Amendment law, but Oregon’s courts declined to rule on the issue of whether such an exemption is constitutionally required. On certiorari in *Employment Division v. Smith* (1990)¹³¹⁵ Justice Scalia stated that if Oregon prohibited the religious use of peyote, and if that prohibition was consistent with the Federal Constitution, the state was free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation. Scalia re-emphasized that “Laws [...] are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”¹³¹⁶ The Justice asked critically “Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”¹³¹⁷

The right to religious freedom in the form of collective self-governance ends at the point where religious exercise violates generally applicable, content-neutral criminal law. This same principle applied in *State ex rel. Swann v. Pack* (1975).¹³¹⁸ Members of the Dolly Pond Church of God took literally

¹³¹⁶ Id. at 879.
¹³¹⁷ Id.
the verses of Mark which read: “And He [Jesus] said to them: “Go into all
the world and preach the Gospel to every creature. Whoever believes and is
baptized will be saved; but whoever does not believe will be condemned.
These signs will attend those who believe: in my name they shall cast out
devils, they shall speak in new tongues; if they carry snakes or if they drink a
lethal drink, it shall not harm them; they shall lay hands upon the sick and
they shall be well.” In that case church members handled rattlesnakes and
drank poison as “signs that God said would follow the believers – signs to
confirm the Word of God.” The district attorney at Newport, Tennessee,
sought an injunction prohibiting the pastor and certain elders of the church
from handling poisonous snakes and drinking strychnine.

The Supreme Court of Tennessee said, “[W]e recognize that to forbid snake
handling is to remove the theological heart of the Holiness Church.”\footnote{1319} But
the court held that “the handling of snakes in a crowded church sanctuary,
with virtually no safeguards,”\footnote{1320} posed a serious danger to public health.
The court continued, “Our state and nation have an interest in having a
strong, healthy, robust, taxpaying citizenry capable of self-support and of
bearing arms and adding to the resources and reserves of manpower.”\footnote{1321}
This interest in preserving the life of these citizens was sufficient to support
an injunction against drinking poison, and therefore to curb the autonomy of
the church.

g. Concluding Remarks

The Supreme Court of the United States approached the right to respect in-
ternal affairs of religious communities from various directions. However, the
court appears reluctant to be bound to one approach or another. To the high-
est judicial body it seems exceedingly important to be free to choose be-
tween various approaches depending on the specific circumstances of a case.
Dialogue between state involvement and a religious community’s internal
affairs provides for dual capacities in which religious corporations operate. It
is generally perceived that the handling of business matters and the acquisi-
tion and disposition of property is a secular affair and therefore subject to the
laws of the state. Moreover, religious corporations are subject to the state’s
usual laws respecting contract, property, and association law. So when these
areas of law are at issue, courts may be required to resolve the matter. How-

\footnote{1319} Id.
\footnote{1320} Id.
\footnote{1321} State ex rel. Swann v. Pack, 527 S.W.2d 99, 113 (Tenn. 1975), cert. denied, 424
ever, with regard to religious communities’ own spiritual affairs, Paul G. Kauper and Stephen C. Ellis point to the scholarly understanding that “[the] admission or expulsion of members, the election or dismissal of a minister, and questions of doctrine, ecclesiastical organizations continue to be viewed as unincorporated associations and are free to make their own decisions without interference by the state.” So whatever the answer might be, it will be complex, and deeply contextual.

1.7.3.4 Tax Exemptions to Religious Communities

a. Introduction

General church tax would have been particularly ambiguous during the times when state organization could not be readily distinguished from church organization. As William G. Torpey notes, “The church was an agency of the state, and for the state to tax its own instrumentality was considered an unsound financial practice.” The laws of taxation have a long history. For instance, the Virginia’s “Bill Establishing a Provision for Teachers of the Christian Religion” had an impact far beyond its specific provisions. And even today, American scholars ask themselves how Jefferson’s “wall of separation” is to be understood when it is said that religious communities can be made subject to tax, and that tax immunities are the exception, not the rule. However, there is a general right for religious communities to apply for tax-exemption if they file with the Internal Revenue Service (IRS) of the US Department of Treasury, and sometimes with their state. If a community is exempt from filing to establish its exempt status, it will still not be exempt unless it has complied with all of the requirements that apply to that particular type of organization. In the following subsection the tax issue will be reviewed more specifically. The question that arises is in which circumstances or for which activities a community may be tax immune.

b. General Exemption

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A glimpse at the federal tax structure reveals that it is the legislature which possesses the capacity and power to tax. Article I, § 8, cl. 1 of the US Constitution provides, for instance, Congress with the power to “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States,” however, Article I, § 9 clauses 5 and 6 curb Congressional discretion by requiring apportionment of direct taxes, and that “all Duties, Imposts and Excises shall be uniform throughout the United States.”

State constitutions contain similar provisions limiting the legislature’s power to tax.

Prior to 1894, the federal government was financed by import duties and an occasional apportioned direct tax. At that time federal tax issues did not involve churches, because the activity of importing printing plates for bibles or the furnishing of churches with bells and paintings from Europe was tax exempt. The introduction of the Revenue Act of 1894 did not bring much change in policy for the churches. The current version of the Internal Revenue Code (I.R.C.) dates to 1954. Unlike the 1894 Act, which contained both a list of entities to be taxed and a “catch-all” provision designed to capture those subject to tax but not mentioned, the current Code imposes a general tax on individuals and corporations, and adjusts its coverage by creating exemptions and special taxing categories.

It is generally perceived that imposition of federal tax is in compliance with First Amendment law in respect of payments for goods or services, certain gifts, bequests, and most income-producing activities, including employment, investment, or operation of a trade business.

The 1954 Code treats “religious activity” as an exempt function, and recognizes a wide range of religious communities as immune entities to taxes. Moreover, it draws a clear line between “churches” and the many kinds of corporations which operate either as a part of a church, or in conjunction with one. Churches enjoy a privileged status in that they are not only exempt from taxes on the income generated by the exempt functions; they are also exempt from a number of critical filing requirements. Churches need not file tax returns, and are presumed to be exempt. All other religious communi-
ties must demonstrate their eligibility for exempt status by filing an application on a form prescribed by the IRS.

In order to qualify for tax-exempt status, a community’s purpose and activities may not be illegal or violate fundamental public policy. In Bob Jones University v. United States (1983) a religious college lost its tax-exempt status on the basis that it engaged in racial discrimination, even though it was perceived that the university was exercising a firmly held belief. The Internal Revenue Code and analogous provisions of state statutory and constitutional law still recognize a wide range of exempt activities that are not inherently religious. Among these are public and private charity, scientific research, political activity, education, and the endeavours of mutual benefit societies. It is well established that, in order to be tax exempt, an activity – whether religious or charitable – must be dedicated to the benefit of the public. Not all activities that are charitable on the face of it may qualify as such. Organizations which operate in the public interest, but which have a commercial hue are not tax immune. It is this, and other, requirements that have given rise to the subsequent case law.

c. Bars to Tax Exemption

Murdock v. Pennsylvania (1943) involved Jehovah’s witnesses, who sold religious books and pamphlets as part of their door-to-door religious canvassing by accepting donations for the publications. None of the Jehovah’s witnesses had a license under the city’s ordinance or paid the license tax. Before they were arrested each had made sales of books. The petitioners were convicted and fined for violation of the city’s ordinance. Their judgments of conviction were sustained by the Superior Court of Pennsylvania. On certiorari, the Supreme Court of the United States noted that the alleged justification for the exaction of a license tax was the fact that the religious literature was distributed with a solicitation of funds. “When a religious sect uses ordinary commercial methods of sales of articles to raise propaganda funds, it is proper for the state to charge reasonable fees for the privilege of canvassing.”

The court acknowledged that at times it was difficult to determine whether a particular activity was religious or purely commercial and said: “The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have a civil appeal, or a moral platitude appended. […] The mere fact that the religious literature is ‘sold’ by itinerant preachers rather than ‘donated’ does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one’s views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.”

In order to qualify for tax exemption, the selling activities of sects need be “merely incidental and collateral to their main object which is to preach and publicize the doctrines of their order.”

In *Murdock* the Supreme Court reversed the decision of the lower court because it feared that if the Witnesses were taxed they could no longer practice their religious exercise. The judicial body emphasized: “Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.”

In 1990, the issue of state tax came before the Supreme Court once again. *Jimmy Swaggart Ministers v. California State Board of Equalization* (1990) involved a very similar question as posed in *Murdock*, namely whether the religion clauses of the First Amendment prohibit a state from imposing a generally applicable sales and use tax on the distribution of religious materials by a religious organization. California’s Sales and Use Tax Law requires retailers to pay a sales tax “[f]or the privilege of selling tangible personal property at retail.” The religious organization brought action seeking refund of sales and use taxes paid under protest. The Superior Court of San Diego County refused refund, and the religious organization appealed. The Court of Appeal affirmed, but the religious organization appealed again. Justice O’Connor, writing for the Supreme Court, emphasized that the tax at issue was to be distinguished from the court’s decision in *Murdock*. In *Jimmy

1337 *Id.* at 111.
1338 *Id.*
1339 *Id.* at 112.
there was no precondition to the exercise of evangelistic activity, but the tax was “akin to a generally applicable income or property tax.” To the court the refusal of tax exemption constituted no significant burden on the organization’s religious practices. Neither did the justices find that the imposition of sales and use tax resulted in excessive entanglement between government and religion. Hence, the court opined that the two religious clauses of the First Amendment were not violated. The judgment of the lower court was affirmed. From the Jimmy Swaggart decision it can be concluded that a general burden is unlikely to be an argument which will suffice to invalidate an otherwise valid tax.

United States v. Lee (1982) concerned an employer, a member of the Old Order Amish, who was a farmer and carpenter, and who employed several other Amish. He failed to file the required social security tax returns, with- hold social security tax from his employees, or pay his share of social security taxes. The employer contended that the Amish religion prohibited the acceptance of social security benefits and barred all contributions by Amish to the social security system. Thus, the employer argued that the statutory requirement was an unconstitutional infringement upon the free exercise of their religion. The government argued in turn that payment of social security taxes did not threaten the integrity of the Amish religious belief or observance. The United States District Court for the Western District of Pennsylvania held that the statutes requiring payment of the taxes were unconstitutional as applied. The government appealed.

Subsequently, the Supreme Court held that although compulsory participation in the social security system interfered with the employer’s free exercise rights, it would be “only the beginning, however, and not the end of the inquiry.” Once again, the court stated, “Not all burdens on religion are unconstitutional.” To the court, the requirement was valid because it was essential to accomplish an overriding governmental interest. The justices were of the view that “because the social security system is nationwide, the governmental interest is apparent. The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs

1340 “[...] the registration requirement, and the tax itself do not act as prior restraints - no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message.” Jimmy Swaggart Ministries v. California State Board of Equalization, 493 U.S. 378, 390 (1990).
1341 Id.
1344 Id.
shared by employers and employees.\textsuperscript{1345} The court found that it was necessary for the tax imposed on employers to support the social security system to be uniformly applicable to all.

\textbf{d. Concluding Remarks}

Every power to tax analysis commences by examining the power of Congress or the states to impose a specific tax on religious communities by reviewing the nature and extent of the legislative power granted by the Constitution. The legislature acts ultra vires if it exercises its power beyond its constitutionally foreseen scope. It appears that the Supreme Court generally concedes the power to tax religious communities, but at the same time posits that certain inherently religious activities are not proper subjects to tax.\textsuperscript{1346} The Supreme Court approves a barrier between religion and state by means of certain religious activities, properties, and funds, but on the other hand, holds that a general tax, particularly levied on the sale of goods, need not necessarily violate the First Amendment. As John Marshall long ago observed, “the power to tax involves the power to destroy.”\textsuperscript{1347} Marshall advocated careful scrutiny of taxes planned to be imposed on religious communities when significant economic or administrative burdens would result as a consequence.

\textbf{1.7.3.5 Material Aid to Religious Communities}

\textbf{a. Introduction}

As previously mentioned, some kinds of material aid to religion are constitutional. For instance, \textit{Capitol Square Review and Advisory Board v. Pinette} (1995)\textsuperscript{1348} involved the government policy to finance and erect a lighted tree during the Christmas season on a publicly accessible square. Justice Scalia, who delivered the opinion of the Supreme Court on appeal, announced that such religious expression cannot violate the Establishment Clause, because it “occurs in a traditional or designated public forum” such as a square and “is

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{1345}] Id. at 259.
\item[\textsuperscript{1346}] \textsc{Michael S. Ariens \& Robert A. Destro, Religious Liberty in a Pluralistic Society} 727 (2nd edn 2002).
\item[\textsuperscript{1347}] \textsc{McCulloch v. Maryland}, 19 U.S. 316, 431 (1819).
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\end{footnotesize}
open to all on equal terms. The following forms of material aid to religion are more contested, however.

**b. Contribution Through Tax Exemption**

In theory tax exemptions can be seen as indirect contributions and, as such, amount to religious establishment. In *Walz v. Tax Commission* (1970), the plaintiff, a New York real estate owner, sought an injunction in the New York courts to prevent the City’s Tax Commission from granting property-tax exemptions to religious organizations for religious properties used solely for religious worship. The appellant property-owner’s contention was that the Tax Commission’s grant of an exemption to church property indirectly requires the appellant to support religious worship and thereby violates the Anti-Establishment Clause of the First Amendment. The New York courts rejected that argument, and the Supreme Court affirmed in an opinion delivered by Chief Justice Warren Burger.

The majority of the justices stressed that “[t]o the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.” The court expressed the view that the legislative purpose of the property tax exemption was neither the advancement nor the inhibition of religion, sponsorship or hostility. The judicial body conceded that “[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit” and that the administration of tax exemptions “also gives rise to some, but yet a lesser, involvement than taxing them.” However, the practice of granting an exemption is, in the court’s opinion, an act “simply [to] abstain […] from demanding that the church support the state.” By virtue of this reasoning and the fact that tax exemption

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1349 *Id.* at 770. For more detail infra, see poster, seals, displays in “Religious Symbols in the Public Sphere.”
1351 *Id.* at 668.
1353 In its reasoning the court pointed to the fact that “[d]etermining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations
tions for places of worship were accepted by all fifty states, the court concluded that federal or state grants of tax exemption were not a violation of the Religious Clauses of the First Amendment.

c. Religious Schools

In the United States, material aid to religion is an old controversy with regard to education. The system of public schools is a mid-nineteenth century invention. In the 1840s and 1850s, states began to establish schools as a direct activity of government, except for Virginia, which did not have a public school system until 1871. The development of religious or parochial schools is related to the vast numbers of immigrants that came from Europe in the early 1830s. Many of these immigrants were Roman Catholics, and their Church began a massive effort to form Catholic schools. Traditionally, Catholics insisted that the education of children should be performed at church schools as they did not believe that education provided by the secular state would fit the Catholic philosophy of education. The Bishop of Trenton went so far as to state that “[t]he idea that the state has a right to teach [...] is not a Christian idea. It is a pagan one.” Catholic Church leadership insisted that education must include religion in order to instil a sense of morality in children.

Consequently, when the bishops of the American Catholic Church met in 1884, they planned to build a school next to every Catholic church. But Catholics were not the only ones who established religious or parochial schools. A great number of Jewish congregations did so too. The reason for that practice was an obvious one; they could not accept the syllabus of public schools. However, Catholic Church efforts to create parochial schools intensified anti-Catholicism sentiments. Court disputes were the direct result of that contention. In Pierce v. Society of Sisters (1925) the Supreme Court held, under the Liberty Clause of the Fourteenth Amendment, that the Oregon law impermissibly denied private and parochial schools the right to do business and interfered with the liberty of parents to educate their children as they chose. This case is often called the “Magna Carta” of religious

schools, as from then on it was clear that religious schools had a right to exist. The Catholic Church continued its efforts to obtain state aid for its schools, an effort that had been started as early as 1840.\footnote{1358}

More than twenty years passed before a case concerning state aid to religious schools came before the Supreme Court. In \textit{Everson v. Board of Education} (1947)\footnote{1359} the contested issue involved the decision of the New Jersey educational authorities to reimburse parents for the cost of bus fares for children enrolled in public and non-profit private schools. In the majority view of the court, free bus transportation was a public service akin to police and fire protection, and states could provide such services to students in religiously affiliated schools if they chose to do so. Justice Black in delivering the opinion of the court said: “Parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate.”\footnote{1360}

Thereby the justices adopted the “child benefit” theory and viewed transportation services for school children as part and parcel of the public safety program. The dissenting justices (by a five to four margin) refused to draw that distinction. In their view, aid to the students is aid to the school. And because, in their view, the school was an essential component of the religious mission of the Church, they were of the view that the First Amendment prohibits any aid to religious schools.\footnote{1361} Nonetheless, the majority’s decision suggested to proponents of state aid to church-related schools that a wide range of aid programs could become a reality. At the time, however, it was unclear to what extent aid was permissible.\footnote{1362} Since \textit{Everson} was decided in 1947, case law on aid to students has developed by no less than twenty-two Supreme Court rulings. A detailed list of what kind of state aid is constitutionally permissible or impermissible has been created over the years.\footnote{1363} The precise details of every single case is beyond the scope of this

\begin{itemize}
  \item \footnote{1358} \textsc{Robert T. Miller & Ronald B. Flowers}, \textsc{Toward Benevolent Neutrality}: \textsc{Church, State, and the Supreme Court} 617 (4th edn 1992).
  \item \footnote{1359} \textit{Everson v. Board of Education}, 330 U.S. 1 (1947).
  \item \footnote{1360} \textit{Id.} at 17-8.
  \item \footnote{1361} \textit{Id.} at 19 ff.
  \item \footnote{1362} \textsc{Robert T. Miller & Ronald B. Flowers}, \textsc{Toward Benevolent Neutrality}: \textsc{Church, State, and the Supreme Court} 618 (4th edn 1992).
  \item \footnote{1363} The full list can be found in \textit{Everson v. Board of Education}, 330 U.S. 1 (1947); \textit{Board of Education v. Allen}, 392 U.S. 602 (1971); \textit{Tilton v. Richardson}, 403 U.S. 672 (1971); \textit{Hunt v. McNair}, 413 U.S. 734 (1973); Committee for Public Education
thesis. In the remainder of this subsection we will consider some of the most striking decisions only.

*Lemon v. Kurtzman* (1971)\textsuperscript{1364} involved a Pennsylvania statute that provided financial support to nonpublic elementary and secondary schools by reimbursing the cost of teachers’ salaries, textbooks, and instructional materials in specified secular subjects. Pennsylvania paid religious schools for teaching specific secular subjects such as mathematics, modern foreign languages, physical sciences, and physical education. On certiorari, the Supreme Court held that the statute was unconstitutional, affirming the Rhode Island District Court’s conclusion that the Act fostered excessive entanglement between government and religion.\textsuperscript{1365} The court held: “Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.”\textsuperscript{1366}

The issue of providing religious schools with state aid was far from settled. Those in favour of state aid to church-related schools had to come to terms with further blows. *Commission for Public Education & Religious Liberty v. Nyquist* (1973)\textsuperscript{1367} concerned a case challenging the validity of a New York law under the Establishment Clause. The Act provided for direct monetary grants from the state to “qualifying” nonpublic schools, to be used for the maintenance and repair of school facilities and equipment. It also provided for tuition reimbursements to parents of children attending elementary or

\textsuperscript{1364} Lemon v. Kurtzman, 403 U.S. 602 (1971).

\textsuperscript{1365} To be valid against attack under the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [...]; finally, the statute must not foster ‘an excessive government entanglement with religion.’” Id. at 612-3.

\textsuperscript{1366} Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

secondary nonpublic schools as well as state income-tax relief to parents of nonpublic school children. On appeal, the United States Supreme Court held, in an opinion by Justice Powell, that the maintenance and repair provisions were invalid under the Establishment Clause because they had a primary effect of advancing religion, since no attempt was made to restrict payments to the upkeep of facilities used exclusively for secular purposes. The tuition reimbursement provisions were invalid for much the same reasons, and the tax-relief provisions for parents of nonpublic school children were insufficiently restricted to assure that they would not have the impermissible effect of advancing the sectarian activities of religious schools.\textsuperscript{1368}

In \textit{Mueller v. Allen} (1983)\textsuperscript{1369} the Supreme Court somewhat changed its approach towards certain tax immunities of parents. The case involved the question as to whether a state can provide financial aid by allowing tax deductions to parents who send their children to any school. The deduction was available to all parents who had children in school, whether the schools were private, church-related, or public. However, parents of children attending parochial schools benefited primarily from the deduction because tuition, textbooks, and transportation were provided free to public school children. The district court and court of appeals both held that the statute did not violate the Establishment Clause, and the claimants appealed. On certiorari, Justice Rehnquist wrote for the court that because the exemption could finance educational expenses at either public or parochial schools, it showed that the plan had the secular purpose of providing for a well-educated citizenry, and that it did not have the primary effect of advancing religion.\textsuperscript{1370} The court decided in favour of the tax deduction, taking the view that it was the taxpayers that benefited from it, and not the sectarian schools.

\textit{Agostini v. Felton} (1997)\textsuperscript{1371} involved New York City’s program under which the city sent public school teachers into parochial schools during regular school hours to provide remedial education to disadvantaged children. The program’s services were available to all children, no matter what the students’ religious beliefs or where the students went to school. Earlier in 1985 the United States Supreme Court held, in \textit{Aguilar v. Felton} (1985), that the program created an excessive entanglement of church and state.\textsuperscript{1372} But in 1995 a group of parents and students filed a motion contending, among other matters, that the law had changed since the Aguilar decision so as to make the program legal. On certiorari, the Supreme Court agreed in Agostini

\textsuperscript{1368} Id. at 779-798.
\textsuperscript{1370} Id. at 395.
\textsuperscript{1371} Agostini v. Felton, 521 U.S. 203 (1997).
with the claimants and overruled its earlier decision taken in Aguilar. In an opinion delivered by Justice O’Connor it was held that the program was not invalid under the establishment of religion clause, as the program did not result in governmental religious indoctrination, or define aid recipients with reference to religion so as to give the recipients any incentive to modify their religious beliefs or practices in order to obtain services. Neither did the contested program create an excessive entanglement that advanced or inhibited religion. This significant change in the Supreme Court’s post-Aguilar establishment of religion clause law entitled the board and the parents to relief.

Economic relief of parents became a Supreme Court issue again with regard to school choice programs. School choice in the United States covers two widely available choices only. Firstly, to attend a school run by the government and funded by tax dollars, or, secondly, to attend a school which is run and funded, either in whole or in part, by the private sector (including home schooling). School choice in the form of state voucher programs is one of the most hotly debated issues in the public policy arena today. Supporters argue that publicly funded vouchers give families who are unhappy with public school performance – particularly low-income families – an opportunity to choose a better alternative for their children. Opponents contend with equal emotion that spending tax dollars on voucher programs will drain scarce funds from the already-overburdened public education system, and that payment of tax dollars to religious schools violates the First Amendment Clause.

In Zelman v. Simmons-Harris (2002) precisely that issue was at stake. It involved an Ohio pilot program to provide educational choices to families with children who reside in the Cleveland City School District. Cleveland’s public schools had been among the worst performing public schools in the nation. The program provided tuition aid for students to attend a participating public or private school of their parents’ choosing and tutorial aid for students who chose to remain enrolled in public school. The Supreme Court held that the program was entirely neutral with respect to religion. It provided benefits directly to a wide spectrum of individuals, defined only by

The court stated: “We therefore conclude that our Establishment Clause law has ‘significantly changed’ since we decided Aguilar.” Agostini v. Felton, 521 U.S. 203, 237 (1997).

Id. at 234-5.

MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 506 (2d edn 2002).


financial need and residence in a particular school district. It permitted such
individuals to exercise genuine choice among options, public and private,
secular and religious. The program was therefore a program of true private
choice. In keeping with an unbroken line of decisions rejecting challenges
to similar programs, the court held that the program did not offend the Estab-
lishment Clause.

d. Concluding Remarks

Court decisions indicate that direct grants and subsidies to religious schools
are unconstitutional. This is because religious schools are seen as an arm of
the religious community. Their principal purpose is believed to be the in-
struction of children in the community’s doctrine and the advancement of its
religious mission. Hence, to the US courts, any form of material aid which
directly contributes to this cause is in breach of First Amendment law. However, certain kinds of state aid, indirect aid in most instances, may be
made available to religious schools, such as student’s transportation, text-
book loans, and services for the educational health and welfare of students,
as long as it is manifestly clear that the performance of these services is
secular, and equally available to non-religious schools. The pivotal ques-
tion is whether funding only public schools is unfair to parents who, for reli-
gious reasons, object to the kind of education and environment that public
schools provide and elect to enrol their children in religious schools. The
Supreme Court has, to some extent, answered this question in the affirma-
tive, but requested that it is the secular purpose which benefits from such
aid.

1378 Id. at 662.
1379 ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY:
1380 Kenneth W. Starr, The Equality Principle, in THE FUTURE OF SCHOOL CHOICE 33
1381 JAMES G. DWYER, VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO
EDUCATION REFORM 149 (Cornell University Press 2002).
1382 Jesse H. Choper, The Establishment Clause and Aid to Parochial Schools, in THE
FIRST AMENDMENT: THE ESTABLISHMENT OF RELIGION CLAUSE, ITS CONSTITU-
TIONAL HISTORY AND THE CONTEMPORARY DEBATE 160 (Alan Brownstein ed.,
Prometheus Books 2008).
1.7.4 The Two Models Compared and Contrasted

Casting our minds back to the language employed in the “General Introduction” of this chapter, several polychromatic patterns have developed in the process of analysis. For instance, it was shown that regionally tailored incorporation statutes have a direct impact on the scope of the right to religious autonomy. At first sight it can be concluded that the more specific the regional statutes governing religion-state affairs, the smaller the scope of the right to corporate religious self-determination. However, if the hypothetical kaleidoscope is rotated a few degrees further, a second and probably more accurate picture emerges, which speaks to the fact that as long as secular statutes are framed in such a way that they respect a community’s inherent religious self-understanding, corporate autonomy may still be protected adequately.

In addition to this, another interesting pattern has moved into view. From close scrutiny of the pattern of taxation, it can be deduced that legal statuses depend directly upon the manner of how religious communities are structurally organized. So the suitability of a community’s organization is not only pivotal with regard to possible autonomy claims, but also to the extent that it can be made subject to tax. This conclusion might be particularly significant to all those religious communities that are unsatisfied with their current tax situation. In order to improve it, they may have to consider the adoption of another form of organization, or the re-negotiation of their existing form.\footnote{Depending on the community, re-negotiation might be more or less difficult, as state policy dimensions can be involved.}

There also appears to be a direct nexus between the laws governing tax exemptions, structural availability, and the concept of material aid to religion. The grant of tax exemptions and the provision of specific corporation laws can be viewed as the functional equivalent of indirect state aid to religious communities. It is interesting to note that these interpretations apply in similar fashion to both the Swiss and the US-American legal settings. Having said that, let us now take a look at country-specific circumstances.

The socio-legal contours and the legal structuring topics seem comparable in both countries. Most Swiss cantons as well as American states include special statutory provision for traditional religious communities. In both nations, the act of singling out particular groups for special status is not antithetical to religious freedom. It means that religious communities that belong to one of these denominations can tailor their religious precepts and legal requirements more closely than would be possible in the absence of such incorpora-
Some accommodation schemes pertain only to special statutes for particular denominations. On both sides of the Atlantic, the special corporation status can be regarded as an extension or decoupling of an earlier-established status of specific churches. Once the law of a religious community becomes codified by a state, the community loses its ability to modify its own rules, for a change in organizational structure has no legal effect without a corresponding amendment of the statute. In Switzerland, where religion-state relations are particularly proximate, state-tailored norms may conflict with federal constitutional provisions that prohibit favouritism by the cantonal legislature.

A stark difference between the two countries’ systems is that Swiss public-law recognition may exclusively be granted to religious communities that satisfy certain requirements like compliance with the rule of law, democratic organization, and respect of fundamental rights. Conversely, in North America limits of choice exist for new, unusual, and emerging religious communities in that some state-tailored structural forms comply with the religious precepts of traditional religious communities only. In Switzerland, private-law organized religious communities are regulated under the same federal statutory frameworks as are commercial and philanthropic organizations, whereas in the United States, regionally governed civil law affords great heed to religious communities’ varying self-conceptions. Both jurisdictions nevertheless have in common that by making available structural forms, they enable religious communities to enter into binding legal relations, and to acquire and hold property. The privilege becomes a means of promoting the exercise of collective religious self-determination and can be viewed as benevolent state recognition. Secular law is, hence, the primary source for the formation, structure, and operation of religious communities in Switzerland and the United States. In both countries, the legislature must ask whether the legal structures available are sufficiently flexible to facilitate full and free expression of a community’s self-understanding.

The Catholic Church possesses its own divine legal structure. As for Switzerland the secular state positioned next to Catholic canon law entitles quasi-church secular corporations for organization of the membership. From a purely religious perspective it cannot be said that these state-made corporations enable the Catholic Church to accommodate its religion more closely than would be possible in the absence of such a secular incorporation form. From the view of Swiss Catholic Church members, for a very long period of time, religious leaders have had to put up with direct democracy, that is the peoples’ will also to have a say in some church affairs. So the situation of the Catholic Church in Switzerland presents itself as a classic paradox.

It might be important to mention that regional legislatures are not considerate of all religious communities, and that such civil law statues vary greatly from state to state.
Respect for the internal affairs of religious communities means, in both jurisdictions, that the state clearly acknowledges the independent juridical and normative dignity of religious institutions and unincorporated religious organizations. Non-intervention is generally guaranteed in return for organizing and administering a religious group by way of state-enacted laws. The scope of autonomy afforded by the government depends on the type and character of the religious community and its amenability to being construed by secular courts. The question of whether state-tailored laws really override religious self-determination might be contingent on whether the state’s secular legal categories have put the religious community in a straitjacket, or have, on the contrary, given it the means by which to successfully express its own constitutive forms.

There may be situations in which Swiss and American courts need to look beyond express formulations of religious autonomy to religious realities that a reasonably objective secular court is capable of discerning. In both countries the “bar to departure from religious doctrine approach” can have the advantage of insulating secular courts from intervening with religious affairs except on terms expressly specified by the religious groups themselves.

It appears that in the US, the primary state interest in religious corporation laws is facilitating religious activity. In Switzerland, on the other hand, it seems that the first state interest in cantonal religious corporation laws is the furtherance of direct democracy, and the second interest the facilitation of religious activity. So where in the United States flexibility in terms of corporate laws is appropriate, and even demanded by classical free exercise analysis, in Switzerland it is the political powers of the citizens that may seek to enact, revoke and alter any law as they see fit. In the Alpine country there is a long and enduring tradition that direct democracy may intrude deeply into theology. The state’s guarantee of popular decision-making comes at a price. It is primarily paid for by the hierarchically structured, public-law recognized religious communities, or to rephrase the point, the limits to internal religious autonomy are the currency with which the Swiss system reimburses the protection of direct democracy. On American soil, the law treats the organization of the state and the organization of religious communities (whether derived from religious doctrine or not) as more separate and distinct entities. It appears that in the United States, in contrast to Switzerland, it is easier to restrict state action when it involves the civic arm in inherently

1388 Save certain exceptions.
religious matters. State and religious structures are not as intermingled, and the likelihood of state functions overlapping with the internal affairs of a religious community is thereby diminished. The Establishment Clause can protect the American voluntarist approach towards religion to a great extent. So Switzerland, as compared with the United States, has not adopted at cantonal level a system that affords broad flexibility to religious groups in structuring their affairs. This means that a variety of puzzles and dilemmas remain.

In both countries it is generally recognized that the imposition of federal tax is in compliance with religious-freedom law with regard to payments for goods or services, certain gifts, bequests, and most income-producing activities, including employment, investment, or operation of a trade business. In America, churches enjoy a privileged status in that they are not only exempt from taxes on the income generated by the exempt functions, but are also exempt from a number of critical filing requirements. In Switzerland, public-law organized religious communities are similarly immune from tax at federal, cantonal, and local level. In both jurisdictions, in order to be tax exempt, an activity – whether religious or charitable – must be dedicated to the benefit of the public. The highest courts of both countries are strikingly unanimous that when a religious organization uses ordinary commercial methods of sales of articles to raise propaganda funds, it is proper for the state to charge reasonable fees for the privilege of canvassing. The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have a civil appeal or a moral platitude appended. The US Supreme Justices still caution “that the mere fact that the religious literature is ‘sold’ by itinerant preachers rather than ‘donated’ does not transform evangelism into a commercial enterprise. If it did,

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1390 Bundesgesetz über die direkte Bundessteuer [Federal Act on Direct Federal Tax] of December 14, 1990, SR 642.11, art. 56(c).
1392 Although in Switzerland it is presumed that cultic purposes are of public benefit. Bundesgesetz über die direkte Bundessteuer [Federal Act on Direct Federal Tax] of December 14, 1990, SR 642.11, art. 56(g) and (h); Davis. United States, 495 U.S. 472 (1990).
then the passing of the collection plate in church would make the church service a commercial project.\textsuperscript{1395} Selling activities of religious communities in both Switzerland and the United States need to be incidental and collateral to their main object, which is to preach and publicize the doctrines of their order.\textsuperscript{1396} So not all burdens on religion are unconstitutional. A tax requirement can still be valid because it is essential to accomplish an overriding governmental interest.\textsuperscript{1397} Nonetheless, careful scrutiny of taxes planned to be imposed on religious communities is particularly necessary when significant economic or administrative burdens would result as a consequence.

Neither in Switzerland nor in the United States is government “neutral” towards religion in a strict interpretational sense. State material aid involves what is sometimes termed “benevolent neutrality” or “mild establishment.” It can be said that the US Supreme Court is not concerned with the strict enforcement of the non-establishment principle.\textsuperscript{1398} Even if strict separation may once have been the dominant motivation, it appears that US courts are moving away from this. Among American scholars it is nowadays perceived that mild establishment does not illegitimately curb the religious belief or practice of others.\textsuperscript{1399} The act of granting tax exemptions to religious communities cannot be interpreted as unconstitutional advancement or inhibition of religion.\textsuperscript{1400} Moreover, certain kinds of material state aid may, for instance, be made available to religious schools as long as it is manifestly clear that the performance of the state supported services is secular, and equally available to non-religious schools.\textsuperscript{1401} The US Anti-Establishment Clause is, however, likely to be breached if religious organizations receive direct sponsorship or financial support.\textsuperscript{1402} In the United States, two core ideas exist underlying non-establishment; these are that “religion flourishes in greater purity without the aid of Government”\textsuperscript{1403} and that free trade in ideas and ideals is the best way to test the competitiveness of veracity.\textsuperscript{1404}

In Switzerland the case is different. The Federal Constitution contains no Anti-Establishment Clause. Its scholarly developed counterpart – which is

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\textsuperscript{1395} \textit{Id.}

\textsuperscript{1396} BGE 126 I, E. 3b, 133 p. 134; Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

\textsuperscript{1397} \textit{Id.} at 134; United States v. Lee, 455 U.S. 252, 259 (1982).

\textsuperscript{1398} Walz v. Tax Commn., 397 US. 664, 669 (1970).

\textsuperscript{1399} REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 154 (Oxford University Press 2005).


\textsuperscript{1404} Justice Holmes in Abrams v. United States, 250 U.S. 616, 634 (1919).
the state neutrality doctrine – seems not to have the same restrictive effects. In that country, material aid to religious communities can take the form of direct financial support, repayments, and restitutions. In addition to this, the highest court of the country found that a compulsory tax levy on the profits of legal persons (such as business corporations) and its subsequent distribution only among public-law recognized religious communities is in compliance with the Swiss Federal Constitution.1405 Public-law organized religious communities enjoy ample prerogatives not enjoyed by private-law organized religious communities. This all means that in Switzerland, religious freedom jurisprudence can take hugely ambiguous forms, and it seems evident that such blatant inequality cannot be understood without taking the long history of cantonal corporation laws into consideration.

1405 BGE 41 533, E. 4, p. 536.
1.8 Expressing Religious Hatred

1.8.1 General Introduction and Overview

“No onepretends that actions should be as free as opinions. On the contrary, even opinions lose immunity, when the circumstances in which they are expressed are such as to constitute their expression as positive instigation to some mischievous act. Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.”

(John Stuart Mill)

Should a speaker be allowed to utter his or her religious opinions against adherents of another faith freely, if such speech is considered harmful and offensive? According to John Stuart Mill, quoted above, the state is obliged to protect persons from infringements on their right to be left in peace. The Swiss Federal Constitution in Article 16(2) stipulates, however: “Everyone has the right freely to form, express, and impart their opinions unrestrictedly.”

The US First Amendment provides similarly, “Congress shall make no law [...] abridging the freedom of speech, or of the press.” From the bare letters of the two provisions stated, one could interpret the words “no law” to mean that no law must curb speech, and equally, that the term “unrestricted” (ungehindert) establishes an unrestricted right to speech. Does that mean that in Switzerland as well as in the United States speech is inviolable, and thus, absolute?


1407 “Jede Person hat das Recht, ihre Meinung frei zu bilden und sie ungehindert zu äussern und zu verbreiten.” Swiss Const. Art. 16(2).

1408 U.S. Const. Amend. I.
For the purpose of illustration, imagine the incident in which an Islamic preacher urges a mixed crowd of religious adherents to “struggle” (jihad) against encroachments on Islam and calls Jewish and Christian theology inferior to his own. As a result, various listeners feel insulted and discriminated against. Moreover, a small group of young Muslims, having listened to the preacher, commit assault and battery against non-Muslims in the audience. Clearly, the group members are responsible for the harm inflicted on these people as it is a direct consequence of their own intentional action. However, does the same situation apply to the preacher himself? Could the preacher be made liable for a criminal offence in that circumstance, or is it his fundamental right to speak his religious opinion devoid of limitations and regardless of whether his words have the potential to inflict mental as well as bodily harm? Does it matter whether the very purpose of the speech is to induce the crowd to struggle? Would the preacher still be responsible in the event that security personnel prevented those attackers from committing a crime? And, what would the law be if the preacher’s words did not cause any kind of outward reaction, but caused insult to Jewish and Christian listeners only? Would that make a difference?

There can be few other examples that have provoked more controversy than the one sketched. Expressions that offend or even cause physical harm continue to be one of most rigorously debated and analysed topics in law and society. Why should government protect a preacher’s fundamental right to free speech, when he himself deprives others of similar rights by, for instance, attacking their human dignity and respect? Are limits necessary to prevent a veneer of religious justification from providing an excuse for intolerant, oppressive behaviour towards others?

The religious hate-speech topic as presented in this chapter is symbolically placed at the end of the Swiss and US American analytical part. At the same time, it marks the bounds of modern religious freedom concepts. This means that the following analysis is more in the realm of the right to freedom of expression, rather than that of religion. Even so, it is sometimes difficult to differentiate between the concepts, since speech can be religious in nature and form. As Supreme Court Justice Scalia put it: “Indeed, in Anglo-

1409 Please note that the term jihad is subject to various interpretations depending on the school of thought. It does not necessarily comprise violent religious “struggle”; rather, it can be construed as peaceful means to reach truth. Generally Ahmad Kufhtar, The Way of Truth (Eriq Horler trans., Yaser Alolabi 2004) (1995).


American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. \(^{1412}\) It is thus debatable whether limitations on religious hate-speech should be regarded as protection of religious freedom. Apart from these conceptual overlaps, the comparative exercise gives rise to other difficulties. The religious hatred topic cannot be approached from the same angle of investigation in Switzerland and in the United States. Before embarking on the comparative adventure, some structural differences merit at least a rudimentary introduction.

In Switzerland, criminal law is generally regulated at federal level. \(^{1413}\) However, the highest court of the country has no power to decide whether the Federal Criminal Code is in compliance with the Swiss Federal Constitution. \(^{1414}\) The Federal Court exceeds its jurisdiction by considering the constitutionality of statutes at federal level. In such a case, judicial review is not available to an applicant. In Switzerland the construction of federal law is not considered suitable for judicial decision making as this non-justiciable area is left to Parliament. This is because the Swiss Sovereign believes that judicial review should not intervene with the functions of the federal lawmaker. Thus, the courts’ challenge is posed by the difficulty of reading federal criminal provisions in such a way that they are constitutionally compliant. \(^{1415}\)

Conversely, the American Constitution does not give the federal government the right to compel statutory uniformity among the states. \(^{1416}\) State criminal law may be subject to judicial review at all levels of the American legal system. Courts are often called upon to determine whether a criminal statute, or the punishment of the offender pursuant to statute, violates one or more con-

\(^{1413}\) SWISS CONST. ART. 123(1).
\(^{1416}\) JOSHUA DRESSLER, FRANK R. STRONG & MICHAEL E. MORITZ, UNDERSTANDING CRIMINAL LAW 38 (4th edn. 2008). In 1962, however, the American Law Institute approved and published its Proposed Official Draft of the Model Penal Code, containing general principles of criminal responsibility, definitions of specific offences, and sentencing provisions. Although the Code, as such, is not the law in any jurisdiction, it stimulated adoption of revised penal codes in many states. Many criminal law scholars treat the Model Penal Code as principal reference for interstate comparisons, because its influence on the law has been so significant. \textit{Id.} at 33.
stitutional principles. America’s federal judges, as appointees for life, are not only required to decide the constitutional compliance of a state statute, but must also intrude on the lawmaking domain of elected representatives of the people. Such exercise of power can be critical, as legislators are viewed as more immediately subject to the will of the public. For this reason, American courts presume the constitutionality of any given criminal statute, and the party challenging must demonstrate its constitutional invalidity. So each country’s judiciary is confronted with a distinct and separate difficulty.

The following analysis will address the question of expression and responsibility. It will begin by giving the reader an idea of the relevant country-specific socio-legal contours. We will then look at the main Swiss statutory provisions that regulate religious expressions, and their judicial interpretation. This chapter will also explore the categories of speech that are either protected or unprotected under American First Amendment law. At the concluding remarks stage for each country, the legal fate of the Islamic hate-preacher from the earlier example will be considered. Finally, the chapter analyses the similarities and differences between Swiss and American constitutional law.

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1417 Id. at 37.
1418 Id. at 38. See especially City of Boerne v. Flores, 521 U.S. 507 (1997) in which the Supreme Court struck down the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, also known as RFRA.
1.8.2 Switzerland

1.8.2.1 Socio-Legal Contours

In 1848, the Swiss federal government acknowledged its duty to take positive steps in order to protect people from religious hatred. Ever since, the cantons and the Confederation have possessed the power to take the necessary measures to maintain public order and peace between different religious confessions. However, as early as 1886 the Federal Supreme Court in *Schass und Konsorten* set a high threshold for public authorities to circumcribe the free exercise of religion in publicly accessible places even if it offends others. In that case, members of the Salvation Army gathered to engage in proselytization and thereby provoked passers-by who happened to see the assembly. The judicial body found that police interests could not limit the Salvation Army’s right to religious assembly and canvassing “unless it [the police] is not capable of guaranteeing public order and of protecting assembled participants by less restrictive means.”

Over the decades the state has become a formidable and experienced protector of religious tolerance. Positive protection was also given a prominent position in the current version of the Swiss Federal Constitution. Only recently, the Federal Supreme Court in its *Protegez Vos Enfants* ruling of 2003 rea-

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1420 Offizieller Text, Bundesverfassung der Schweizerischen Eidgenossenschaft, nebst sämmlichen in Kraft stehenden Kantonsverfassungen 13 ff. (2nd edn., Marchand und Comp. 1856) art. 44(2).

1421 Emphasis in brackets added by the author. “Sofern sie nicht im Stande ist, durch andere Mittel die Ordnung aufrecht zu halten und die Teilnehmer an der betreffen- den Versammlung zu schützen.” BGE 12 I 93, E. 5, p. 109.

1422 Federal government reiterated this state function especially in 1873 when the Swiss cultural struggle reached its peak. BBI 1873 II 965. However, the discussion on the criminal provisions that follows is relatively new. Article 261 has been part of the Swiss Criminal Code since 1942. Article 261bis took effect on January 1 1995, and was created as a direct consequence of Switzerland’s ratification of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965, and the International Covenant on Civil and Political Rights of 16 December 1966. Marcel Alexander Niggli, Rassendiskriminierung: Ein Kommentar zu Art. 261bis StGB und Art. 171c MStG mit Rücksicht auf das Übereinkommen vom 21. Dezember 1965 zur Beseitigung jeder Form von Rassendiskriminierung und die entsprechenden Regelungen anderer Unterzeichnerstaaten 44 ff. (2nd edn., Schulthess 2007).

1423 Andreas Auer, Droit constitutionnel Suisse 223 (2nd edn., Stämpfli 2006).

1424 It reads very similarly: “The Confederation and the cantons may, within the framework of their powers, take measures to maintain public peace between the members of the various religious communities.” Swiss Const. art. 72(2).
soned: “In a pluralistic society where varying religious communities meet each other, it is necessary to establish mutual respect between followers of various communities – vis-à-vis non-believers – in order to ensure public peace. The concept of tolerance in religious matters represents, thus, an essential tool for generating internal peace within a modern state.”

Religious protection is state-guaranteed, regardless of whether people profess their religion to other people’s liking. Scholar Detlef Krauss aptly says “on the one side, the problem of contradicting interests projects specific light upon the modern legal system’s treatment of religion and worldviews, and on the other, demands legitimacy for the question of how the state and society tackles multifaceted provocations […] But at times of renewed religious tensions, the prevention of attacks on people’s religious beliefs may increasingly be warranted.

1.8.2.2 Main Statutory Prohibitions

a. Introduction

Apart from general criminal law there are essentially two types of criminal offences which have been exclusively tailored to protect people from serious attacks on their religious precepts. In Switzerland, various types of hate-speech have been made a punishable offence under Article 261 and Article 261bis of the Federal Criminal Code. Both crimes have the potential to

1425 “Dans une société pluraliste où se côtoient différentes communautés religieuses, il convient en effet d'imposer le respect mutuel entre les fidèles des diverses communautés ainsi que vis-à-vis des non-croyants pour assurer la paix sociale. La tolérance dans les questions religieuses représente un élément essentiel de la paix intérieure dans un Etat moderne.” BGE 68.148/2003 vom 16. September 2003, E 2.4.


1427 Generally TAREK NAGUB ET AL., RECHT GEGEN RASSISTISCHE DISKREMINIERUNG: ANALYSE UND EMPFEHLUNGEN (Eidgenössische Kommission gegen Rassimus 2009).

circumscribe the scope of the right to freedom of opinion and expression as protected under the Swiss Constitution. It is therefore interesting to analyse how courts have read and given effect to the offences so that they are in constitutional compliance. Substantive criminal law is mostly concerned with what act and mental state, including what attendant circumstances or consequences, are necessary ingredients of various crimes. From a systematic point of view it makes sense to take a look, first, at specifically relevant elements of actus reus, and then to state the necessary requirements of mens rea. It is important to mention that the following does not tackle all types of guilty conduct, but addresses some of the most relevant aspects only.

**b. Religious and Other Forms of Discrimination**

**b.a. Actus Reus**

Religious discrimination is a criminal offence by virtue of Article 261bis of the Federal Criminal Code. The provision reads: 1429

1. Whosoever publicly invokes hatred or discrimination against a person or a group of persons because of their race, ethnicity, or religion;

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1429 “Wer öffentlich gegen eine Person oder eine Gruppe von Personen wegen ihrer Rasse, Ethnie oder Religion zu Hass oder Diskriminierung aufruft;
(2) wer öffentlich Ideologien verbreitet, die auf die systematische Herabsetzung oder Verleumdung der Angehörigen einer Rasse, Ethnie oder Religion gerichtet sind;
(3) wer mit dem gleichen Ziel Propagandaaktionen organisiert, fördert oder daran teilnimmt;
(4) wer öffentlich durch Wort, Schrift, Bild, Gebärden, Tätigkeiten oder in anderer Weise eine Person oder eine Gruppe von Personen wegen ihrer Rasse, Ethnie oder Religion in einer gegen die Menschenwürde verstossenden Weise herabsetzt oder diskriminiert oder aus einem dieser Gründe Völkermord oder andere Verbrechen gegen die Menschlichkeit leugnet, gräßlich verharmlost oder zu rechtfertigen sucht;
(5) wer eine von ihm angebotene Leistung, die für die Allgemeinheit bestimmt ist, einer Person oder einer Gruppe von Personen wegen ihrer Rasse, Ethnie oder Religion verweigert;
(2) Whosoever publicly disseminates ideologies, which seek the systematic humiliation or defamation of affiliates of a race, ethnicity, or religion;

(3) Whosoever organizes, assists, or participates in activities of propaganda, which seek the same objective;

(4) Whosoever publicly by word, writing, illustration, gestures, and assaults or in another manner humiliates or discriminates a person or a group of persons because of their race, ethnicity, or religion in a way that seriously violates human dignity, or because of one of such grounds denies, gravely trivializes, or tries to legitimize genocide or other crimes against humanity;

(5) Whosoever denies the acceptance of one’s service offer, which is intended for use by the general public, to a person or a group of persons because of their race, ethnicity, or religion;

(6) Shall be liable to imprisonment for a term not exceeding three years or to a fine.

The scope of the offence is framed broadly, including race, ethnicity and religion as basic categories of discrimination. Paragraphs 1 to 5 encompass various types of guilty conduct. The Federal Supreme Court in its Protegez Vos Enfants ruling of 2003 produced some authoritative interpretation relevant to our investigation. This case involved various persons who published information pamphlets to raise public awareness about the dangers of paedophile Catholic priests. The information in question reads: “In the past 20 years, thousands of Catholic priests have been condemned throughout the world for sexual abuse of children or paedophilia – sometimes with the protection of their bishops […]. This presents only the tip of the iceberg. With a single priest convicted only, it is likely that dozens of Catholic paedophile priests continue their activities with impunity […]. Protect your children from paedophilia: stop sending them to catechism […].” The highest court of the country opined that such information invokes hatred and discriminates against an entire group of people. The pamphlets directly and adversely affected the dignity of human beings “by lowering it, and by mak-

Such expression was found discriminatory because different treatment was exclusively based upon persons’ religious affiliation. The judicial body held further that in order to satisfy Paragraph 1 of Article 261bis an expression must necessarily “arouse the feeling of hatred or call for discrimination.” The justices associated the term “hatred” with “aversion of a kind that wishes someone evil or is pleased by an evil that happens to someone.” However, because prosecutors failed to show that defendants acted intentionally, they were not convicted under the offence.

In the 2004 Scherrer ruling, the Federal Supreme Court had to decide on a similar situation. The question was whether a specific internet publication about immigrants from Kosovo was, inter alia, in violation of Article 261bis. The court made clear that any criticism against a specific group of persons must be based on facts and reason. It held, “in a democracy it is of central importance that also viewpoints can be expressed, which are disliked by the majority, and have a shocking effect to many. Criticism must thereby be allowed up to a certain breadth, and at times in exaggerated form. As so often in public debates, it is not always possible right away to tell the difference between untrue, half-true, or reasonable criticism. If a narrow interpretation of the criminal offence creates an overly high threshold for expressing one’s criticism, there is the danger that even reasonable criticism will no longer be uttered.” The justices cautioned, however, that the scope of the fundamental right to freedom of expression should not be as broadly construed as to vitiate the substance and effect of the prohibition against discrimination under Article 261bis. Conversely, the same court found that in a democracy like Switzerland it must be possible to level reasonable criticism at the behaviour and activities of specific groups. So the question of whether an act constitutes humiliation or defamation cannot easily be answered in the affirmative in political debates. Finally, for the judicial body, the actus reus

1431 “Il doit la rendre méprisable, la rabaisser.” Id. at E 2.5.
1432 “Par inciter, il faut entendre le fait d’éveiller le sentiment de haine ou d’appeler à la discrimination.” Id.
1433 “Par haine, on entend une aversion telle qu’elle pousse à vouloir le mal de quelqu’un ou à se réjouir du mal qui lui arrive.” Id.
of the offence is not satisfied if a person merely offends members of a specific group and expresses her or his criticism on objective grounds.\footnote{1435}

\textbf{b.b} \hspace{1em} \textbf{Mens Rea}

In order to satisfy the mens rea of Article 261\textsuperscript{bis} it is necessary to show that the defendant intended to commit the crime. In the \textit{Jahreskonferenz Toronto} decision of 1997 the Federal Supreme Court decided that oblique intent is sufficient also. This can be presumed if the perpetrator foresaw the risk that something might happen as a result of his or her behaviour and, with that foresight, went on, without justification, to take that risk.\footnote{1436} Oblique intent requires not just subjective recklessness but the element of objective recklessness. According to the \textit{Rassendiskriminierendes Buch} ruling of 2000, it can be presumed if the risk is obvious to the reasonable person. The Supreme Court held: “The extent of the risk as such is relevant only in respect of mens rea. The higher the risk, the more solid it is to accuse the originator of the expression that he took the risk by means of oblique intent […]”.\footnote{1437}

\textbf{c.} \hspace{1em} \textbf{Violation of Freedom of Belief and Cult}

\textbf{c.a} \hspace{1em} \textbf{Actus Reus}

Apart from the above-mentioned criminal situations, violation of belief or cult is also a punishable offence under Article 261. The provision stipulates:

\begin{quote}
\textbf{(1)} “Wer öffentlich und in gemeiner Weise die Überzeugung anderer in Glaubenssachen, insbesondere den Glauben an Gott, beschimpft oder verspottet oder Gegenstände religiöser Verehrung verunreinigt; \\
\textbf{(2)} wer eine verfassungsmässig gewährleistete Kultushandlung böswillig verhindert, stört oder öffentlich verspottet; \\
\textbf{(3)} wer einen Ort oder einen Gegenstand, die für einen verfassungsmässig gewährleisteten Kultus oder für eine solche Kultushandlung bestimmt sind, böswillig verunreinigt; \\
\end{quote}

\footnote{1435}{\textit{Id.}} \footnote{1436}{BGE 123 IV 202, E. 4c, p. 210.} \footnote{1437}{“Das Ausmass des Risikos ist als solches nur in Bezug auf den subjektiven Tatbestand von Bedeutung. Je höher das Risiko ist, desto eher wird man dem Urheber der Äusserung vorwerfen können, er habe die allfällige Realisierung dieses Risikos im Sinne des Eventualvorsatzes in Kauf genommen […]” BGE 126 IV 176, E. 2e, p. 181.} \footnote{1438}
(1) Whosoever publicly and in a vile manner insults or ridicules the conviction of others in matters of belief, especially the belief in God, or despises religiously revered objects;

(2) Whosoever maliciously interferes with, interrupts or publicly ridicules constitutionally protected cultish acts;

(3) Whosoever maliciously despises a place or an object, which is meant for a constitutionally protected cult or cultish act;

(4) Shall be liable to a fine not exceeding 180 day-rates.

The offence establishes criminal liability for violating public peace. In the 1944 *Schmähische* ruling of the Cantonal Court of Appeal of Zurich, the question was whether a letter sent to four publishing houses could be regarded as sufficiently offensive as to generate criminal liability. The verb “to insult” under Paragraph 1 of the offence was interpreted as scornful and abusive remarks against a specific group of people. To the court it was important that only the kind of speech an average person would never use was made punishable by the law. Expressions that would launch critical debates, with no intention to harm, insult or ridicule are, in the court’s view, constitutionally guaranteed by the right to freedom of expression. To the judicial body a person is liable of the criminal offence if she or he uses hate-speech in a serious and extreme way. The actus reus is not satisfied if a person treats other people’s faiths with disrespect only. \(^{139}\)

In the *Gespengst* decision of 1987 the same court came to rule on the legality of an allegedly blasphemous movie, which was presented to a few persons in a small movie theatre. \(^{140}\) And in this decision, too, the cantonal court made clear that “anyone who sees in the essence of Article 261 a muzzle for church critics misjudges its purpose.” \(^{141}\) To the judge, the lack of courtesy was no criminal offence. The actus reus element of “conviction of others in matters of belief, especially the belief in God” does not protect religion, but

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\(^{139}\) *Obergericht des Kantons Zürich [Cantonal Court of Appeal Zurich] Blätter für Zürcherische Rechtsprechung, Band 41, Jahrgang 1943, Nr. 65, Orell Füssli, 1944, at 209.*

\(^{140}\) *Obergericht des Kantons Zürich [Cantonal Court of Appeal Zurich] Blätter für Zürcherische Rechtsprechung, Band 85, Jahrgang 1986, Nr. 44, Orell Füssli Zürich 1987, at 98.*

\(^{141}\) “Wer in Art. 261 einen Maulkorb für Kirchenkritiker sieht, verkennt seine Zweckbestimmung.” *Id.* at 100.
the conviction of others in matters of belief and cult. The Cantonal Appeal Court stated in this regard: “Contrary to a widespread misconception, God or a specific deity is not the object of protection, as the law regulates interpersonal relationships, and God requires no earthly protection.”

**c.b. Mens Rea**

Moreover, Article 261 of the Swiss Criminal Code is not based solely on the commission of acts. Liability only arises where an autonomous rational individual has a guilty mind while commissioning a prohibited act. So mens rea of the offence is satisfied provided that the defendant acted intentionally. But apart from intent, the adjectives “vile” and “malicious” in Paragraph 1 to 3 imply that a defendant’s guilty conduct must aim to cause great injury to the feelings of a particular group of people.

**d. Concluding Remarks**

Thinking back to the hypothetical example introduced at the beginning of this chapter, it can be concluded that the Islamic preacher may be liable under the Swiss Federal Criminal Code, regardless of whether his words have any potential to cause physical injury. Neither would it make any difference whether security personnel prevented listeners from committing assault and battery on others. What counts, however, is the question of whether his expressions invoke hatred and discriminate against an entire group of people. The words expressed must adversely affect the dignity of Jews and Christians by making them look despicable. His speech must arouse the feeling of hatred in the audience and call for discrimination. Moreover, to commentator Alexandre Guyz, the circumstance must be such that speech inflicts psychological harm, threatens and intimidates. Also, commentator Roberto Pe-

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1442 “Entgegen einem verbreiteten Irrtum ist nicht etwa Gott selbst oder die Gottheit Schutzobjekt, da das Recht zwischenmenschliche Beziehungen ordnet und Gott keines weltlichen Schutzes bedarf.” *Id.* at 97.
duuzzi emphasizes that the mere utterance of discriminatory speech will not satisfy the definition of criminal conduct. The preacher has a constitutionally protected right to express his viewpoints even if they are unpalatable or shocking to many. Criminal law scholar Marcel A. Niggli finds that no speech has to be politically correct. He says: "[u]ncivilized and rude words are still allowed." It can be suggested that the actus reus of either offence is not satisfied if a person denigrates, insults, vilifies or causes limited emotional distress. Thus, based on the hypothetical situation as described, it is not possible to say conclusively whether the Islamic preacher violated Swiss criminal law. Nevertheless, some clues have been gained as to what might happen if a Swiss court were to decide on similar cases.

1446 ROBERTO PEDUZZI, MEINUNGS- UND MEDIENFREIHEIT IN DER SCHWEIZ 188 ff. (Schulthess 2004); also ROBERT ROM, DIE BEHANDLUNG DER RASSENDISKRIMINIERUNG IM SCHWEIZERISCHEN STRAFRECHT 166 (Huber Druck 1995). He, however, says that freedom of speech must not be misused to further highly undemocratic and discriminatory values such as racial bias. Roberto Peduzzi, Ist das Verbot der Rassendiskriminierung revisionsbedürftig?, mediaLEX, 2007, at 17.

1.8.3 The United States of America

1.8.3.1 Socio-Legal Contours

In the past it was commonly agreed that America’s first freedom protects religious and other forms of speech not because it is devoid of harm, but despite the harm it may cause.\textsuperscript{1448} The United States developed a strong tradition of free speech to protect even the most offensive manners of expression.\textsuperscript{1449} Ever since, the First Amendment has been celebrated as the facilitator of the most precious liberty of all: the right to express oneself and to participate in the democratic process.\textsuperscript{1450} Advocates of unlimited speech generally hold that rules prohibiting hate-speech are unwise because they increase minorities’ vulnerability. Their argument supports the idea that forcing speakers to bottle up their dislike of minority group members means that they will be likely to say or do something more hurtful later. They opine that speech functions like a pressure valve, allowing tension to dissipate before it reaches a dangerous level.\textsuperscript{1451} However, not all legal scholars share this kind of socio-psychological reasoning.\textsuperscript{1452} Especially in recent years the number of scholars calling for a general overhaul of the system has been increasing.\textsuperscript{1453} For example, Richard Delgado and David Yun controvert traditional

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\textsuperscript{1448} First Amendment jurisprudence emerged from the court’s cocoon in the early 1900s. Virginia v. Black, 538 U.S. 343, 365 (2003).
\textsuperscript{1449} JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION 45 (The University of Chicago Press 2005).
\textsuperscript{1450} SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 1 (University of Nebraska Press 1994).
\textsuperscript{1451} Michael Blain, Group Defamation and the Holocaust 65, in GROUP DEFAMATION AND FREEDOM OF SPEECH (Monroe H. Freedman & Eric M. Freedman eds., 1995).
\textsuperscript{1452} In fact, most American commentators appear to base their opinions on personal belief, rather than concrete empirical evaluations. E.g. Rex Ahdar and Ian Leigh state: “We believe that [free speech] is the best defence for a tolerant open society in which diversity of religious expression flourishes.” REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 395 (Oxford University Press 2005). As far as can be established, there is still a lack of thorough analysis on the psychological effects of various degrees of religious hate-speech. As regards our legal discussion, it would be very useful if the social sciences produced such a study in the near future.
\textsuperscript{1453} Some of them have published legal proposals to the control of group defamation. Joseph Ribakoff, Model Group Defamation Statute 336-41, in GROUP DEFAMATION AND FREEDOM OF SPEECH (Monroe H. Freedman & Eric M. Freedman eds., 1995). Others call generally for change. So for instance, Richard Delgado and Jean Stefancic who write: “[I]n the area of free speech, archaic formulas such as the prohibition against content regulation, the maxim that the cure for bad speech is more speech, and the speech/act distinction continue to hold sway, creating a system of
ideas by observing, “hate speech may make the speaker feel better, at least momentarily, but it does not make the victim safer. Social science evidence shows that permitting one person to say or do hateful things to another increases, rather than decreases, the likelihood that he or she will do so in the future.”  

1454 Intellectuals appear deeply divided over the appropriate scope of free speech protection. Whether America’s judges are clearer about the matter in question will be addressed in the case analysis that follows.  

1.8.3.2 Leading Decisions  

a. Introduction  

The US First Amendment stipulates: “Congress shall make no law [...] abridging the freedom of speech, or of the press.”  

Moreover, the Fourteenth Amendment explicitly compels the states and federal government to follow constitutional commands. The history of Supreme Court litigation regarding freedoms of speech and press is brief in years but enormous in extent. The court’s first major encounters with free speech claims did not come until after World War I; yet, in the decades since, claimed infringements of First Amendment rights have become a staple of court business and a source of frequent controversy.  

Where religious communities are insulted or mocked for their particular religious precepts or practices, their freedom is potentially threatened, at least when the attack reaches a sufficiently intense level.  

US constitutional law guarantees not only the freedom of majority viewpoints, but that fundamental rights of minorities are not trampled upon. For some time, there has been a broad consensus that not all expression or communication is included within free speech. Constitutional law that operates in robotic fashion, failing to take account of context, nuance, history, and the harms that speech can cause to disempowered people.”  


U.S. Const. Amend. I.  


provisions also serve as a minority rights charter, in the sense that the constitutional framers intended to place some limits on the extent to which the majority will may prevail over the interests of the less powerful. The effect of this is that not all classes of speech are constitutionally protected. As will now be seen, some may, others may not readily become circumscribed.

b. Hostile Audiences

An early case, *Terminiello v. Chicago* (1949), involved a petitioner who “vigorously, if not viciously” criticized various political and racial groups and condemned “a surging, howling mob” gathered in protest outside the auditorium in which he spoke. He called his adversaries “slimy scum,” “bedbugs,” and the like. Those inside the hall could hear those on the outside yell, “Fascists, Hitlers!” The crowd outside tried to tear the clothes off those who entered. Outside, many windows were broken; stink bombs were also thrown. The trial court instructed the jury that any misbehaviour which “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance,” violated the Ordinance. However, on appeal Justice Douglas, writing for the majority of the Supreme Court, struck down the breach of peace Ordinance by holding: “[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”

Although *Terminiello* is still good law, its reasoning was subject to judicial erosion in *Feiner v. New York* (1951). That case involved a petitioner who made a speech to a mixed crowd of 75 to 80 black and white persons on a city street of a predominantly black residential neighbourhood. He made derogatory remarks about President Truman, the American Legion, and local political officials; endeavoured to rouse the blacks against the whites; and urged that blacks rise up in arms and fight for equal rights. The crowd, which blocked the sidewalk and overflowed into the street, became restless. Its feelings for and against the speaker were rising, and there was a threat of violence. After observing the situation for some time without interference,

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1459 *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).
police officers, in order to prevent a fight, requested the petitioner twice to get off the box and stop speaking. After his third refusal, and after he had been speaking over 30 minutes, they arrested him. He was then convicted of violating the Penal Code of New York for incitement of a breach of the peace. Two New York courts on review affirmed that conviction.

On appeal, Chief Justice Vinson said: “The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.”

The court supported the findings of the New York courts as to the condition of the crowd and the refusal of the petitioner to obey the police requests. In the majority view the conviction of the petitioner for violation of public peace, order and authority did not exceed the bounds of proper state police action. To the court it is “one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.”

In 1960’s US courts became once again more protective of speech due to the country’s free-speech movement. In Brandenburg v. Ohio (1969) the petitioner, a leader of the Ku Klux Klan, was convicted by the Ohio courts after a television news report was aired broadcasting speeches made by the petitioner. He was charged with violating Ohio’s criminal syndicalism statute, which made it unlawful, inter alia, to advocate crime or methods of ter-

1461 Id. at 321.
1462 “Every time Martin Luther King, Jr., marched for freedom, protested for the right to vote, paraded across bridges or down Main Streets in the South, every time black and white arms were linked together, every time a demonstration was organized to dramatize Southern oppression to the rest of the country, the First Amendment came to the rescue. Every one of these initiatives was met with resistance, arrests, repression, and censorship. And most of the early court cases that beat back this resistance and gave the civil rights movement room to function and flourish.” Henry Louis Gates et al., Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties 2 (New York University Press 1994). For a detailed account on American free speech history Samuel Walker, Hate Speech: The History of an American Controversy (University of Nebraska Press 1994).
rorism or to voluntarily assembly with any group to teach or advocate doctrines of syndicalism. However, the Supreme Court of Ohio upheld his conviction on appeal. The United States Supreme Court granted review and concluded, “[The] constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. The mere abstract teaching […] of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” Thus, a statute which impermissibly fails to draw this distinction intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. As a result, the court reversed the petitioner’s conviction.

c. **Definable Group of Persons**

*Chaplinsky v. New Hampshire* (1942) is a well-known case which involved a Jehovah’s Witness who, in the course of proselytizing on the streets, denounced organized religion. Despite the city marshal’s warning to “go slow” because his listeners were upset with his attacks on religion, the Witness continued. As a consequence, a police officer led the Witness towards the police station, without arresting him. While en route, the Witness again encountered the city marshal who had previously admonished him. He then said to the marshal: “You are a God damned racketeer” and “a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.” The Witness was convicted of violating a statute forbidding anyone who is lawfully in any [public place] [or] call[ing] him by any offensive or derisive name.” On appeal, Justice Murphy, writing for the Supreme Court, held that the First Amendment did not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. To the court it was well understood that the right of free speech is not absolute at all times and under all circumstances. The majority of the justices held that unprotected speech “[I]nclude the lewd and obscene, the profane, the libellous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” The court also said that the test to decide whether fighting words were “offensive” was not about what the particular addressee thinks, but what persons of common intelligence would think bad.

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enough to make an average addressee fight back. So the court decided that the challenged law did not contravene the US First Amendment.

The *Chaplinsky* class of unprotected speech was also the pivotal issue in *R.A.V. v. City of St. Paul* (1990). That case involved a petitioner and several other teenagers who assembled a crudely-made cross by taping together broken chair legs. They then burned the cross inside the fenced yard of a black family that lived across the street from the house where the petitioner was staying. Although this conduct could have been punished under any of a number of laws (including laws against terrorist threats, arson, and criminal damage to property), one of the two provisions under which St. Paul chose to charge the juvenile petitioner was the St. Paul Bias-Motivated Crime Ordinance which provides: “Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”

The petitioner alleged that the Ordinance was substantially overbroad, because speech did not lose First Amendment protection for merely provoking “anger, alarm or resentment in others.” However, Minnesota Supreme Court rejected the petitioner’s overbreadth claim because the modifying phrase “arouses anger, alarm or resentment in others” limited the reach of the Ordinance to conduct that amounts to Chaplinsky “fighting words,” that is to say “conduct that itself inflicts injury or tends to incite immediate violence [...]”. The same court also concluded that the Ordinance was not impermissibly content-based because, in its view, “the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.” On appeal, this was reversed by a deeply divided Supreme Court. Justice Scalia, delivering the opinion: “[The] reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression – it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious)

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1465 Terminiello v. Chicago, 337 U.S. 1, 4 (1949).
1466 *Id.*
manner. Rather, it has proscribed fighting words of whatever manner that
communicate messages of racial, gender, or religious intolerance. Selectivity
of this sort creates the possibility that the city is seeking to handicap the
expression of particular ideas. That possibility would alone be enough to
render the ordinance presumptively invalid [...]." So to the court the Or-
dinance was unconstitutional in that it prohibited otherwise permitted speech
solely on the basis of the subjects the speech addresses.  
In a more recent decision, *Virginia v. Black* (2003), the Supreme Court
eroded its ratio decidendi in *R.A.V.* In that case, the first respondent burned a
cross during a Ku Klux Klan rally, and the second and third respondents
burned a cross in the yard of an African-American neighbour who com-
plained about one respondent’s use of his backyard as a firing range. The
respondents were convicted separately of violating a Virginia statute that
makes it a felony “for any person […], with the intent of intimidating any
person or group […], to burn […] a cross on the property of another, a high-
way or other public place.” The statute specifies, “any such burning […] shall
be prima facie evidence of an intent to intimidate a person or group.” The
respondents contended that their expressive conduct in burning the crosses
was protected by their constitutional right to freedom of speech. The state
Supreme Court held the statute unconstitutional by virtue of the ratio of
*R.A.V.*, but this was reversed by the United States Supreme Court.
Justice O’Connor held that the prohibition of cross burning with the intent to
intimidate was not unconstitutional since it banned conduct rather than ex-
pression. O’Connor reasoned that while cross burning could constitute an
expression, such expressive conduct was not proscribed unless it was done
with the intent to intimidate. To her, targeting cross-burning was reasonable
because burning a cross was, from a historical point of view, “a particularly
virulent form of intimidation.” She held “a ban on cross burning carried
out with the intent to intimidate is fully consistent with this court’s holding
in *R.A.V.* Contrary to the Virginia Supreme Court’s ruling, *R.A.V.* did not
hold that the First Amendment prohibits all forms of content-based discrimi-
nation within a proscribable area of speech. Rather, the court specifically
stated that a particular type of content discrimination does not violate the
First Amendment when the basis for it consists entirely of the very reason its
entire class of speech is proscribable. Thus, the statute involved was
within the exception of *R.A.V.* that permits a state to ban only the most harm-
ful instances of an unprotected category of speech. O’Connor came to the conclusion that Virginia’s statute did not run afoul of the First Amendment insofar as it bans cross-burning with intent to intimidate.

d. Public at Large

The leading American case in regard to crowds or the public at large is Collin v. Smith (1978). In the 1970s the American Nazis planned to hold marches and meetings in Illinois that spurred a range of efforts by local government to block the demonstrations. Most of the plans focused on a proposed march in Skokie, a community with a large Jewish population, including many survivors of Nazi persecutions. In 1977 Skokie enacted three ordinances to prohibit demonstrations such as the one the Nazi contemplated. The first established a comprehensive permit system for parades and public assemblies, requiring permit applicants to obtain 300,000 dollars in public liability insurance and 50,000 dollars in property damage insurance. The second prohibited the “dissemination of any materials within Skokie, which intentionally promote and incite hatred against persons by reason of their race national origin, or religion.” The third ordinance prohibited public demonstrations by members of political parties while wearing “military-style” uniforms. As a consequence the National Socialist Party of America and its leader brought a federal court action to challenge the Skokie ordinances on First Amendment grounds. Judge Decker of the District Court held the Ordinances unconstitutional commenting “it is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear.” The Court of Appeals upheld the right of the American Nazi Party to march in Skokie.

On appeal the Federal Supreme Court stated that: “Although the Village introduced evidence in the district court tending to prove that some individuals, at least, might have difficulty restraining their reactions to the Nazi demonstration, [the] Village does not rely on a fear of responsive violence to justify the ordinance, and does not even suggest that there will be any physical violence if the march is held. This concession takes this case out of the scope of Brandenburg, and Feiner (intentional “incitement to riot”

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1475 Id.
1476 Brandenburg v. Ohio
1477 Feiner v. New York, 340 U.S. 315, 321 (1951) (intentional “incitement to riot” may be prohibited).
may be prohibited). The concession also eliminates any argument based on the fighting words doctrine of *Chaplinsky*. The court in *Chaplinsky* affirmed a conviction under a statute that, as authoritatively construed, applied only to words with a direct tendency to cause violence by the persons to whom, individually, the words were addressed.” The majority of the justices did not accept the argument that the Nazi march, involving the display of uniforms and swastikas “will create a substantive evil that it has a right to prohibit: the infliction of psychic trauma on resident holocaust survivors and other Jewish residents.”

Instead they reasoned: “The problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from speech that ‘invite[s] dispute [...] induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.’ Yet these are among the ‘high purposes’ of the First Amendment. It is perfectly clear that a state may not ‘make criminal the peaceful expression of unpopular views.’ Likewise, ‘mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms.’ Where, as here, a crime is made of a silent march, attended only by symbols and not by extrinsic conduct offensive in itself, we think the words of the *Court in Street v. New York* are very much on point: ‘Any shock effect [...] must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’

Moreover, the justices did not agree with the argument that the “march is not speech, or even ‘speech plus,’ but rather an invasion, intensely menacing no matter how peacefully conducted.” To the court: “[T]here] need be no captive audience, as Village residents may, if they wish, simply avoid the Village Hall for thirty minutes on a Sunday afternoon, which no doubt would be their normal course of conduct on a day when the Village Hall was not open in the regular course of business. Absent such intrusion or captivity, there is no justifiable substantial privacy interest to save [the ordinance] from constitutional infirmity, when it attempts, by fiat, to declare the entire Village, at all times, a privacy zone that may be sanitized from the offensiveness of Nazi ideology and symbols.”

1480 Id. at 1205.
1483 Id. at 1207.
Attention will now be turned once more to the hypothetical scenario introduced at the beginning of this chapter. An Islamic preacher in the United States is not protected from criminal liability if his words are likely to produce a clear and present danger of a serious substantive evil.\textsuperscript{1484} The principle of free speech does not sanction incitement to violence. Neither does religious liberty connote the privilege to exhort others to physical attack upon those belonging to another sect. So when there is a clear and present danger that the preacher’s expressions lead to an immediate threat upon public safety, the state possesses the power to punish. Scholar Steven J. Heyman observes, “Even if the listeners are already inclined to attack […], the speech can nevertheless have an impact by encouraging them to do so, by assuring them that others support them, by overcoming their hesitations, and by making the action appear to be legitimate.”\textsuperscript{1485} Hate speech may lead listeners to transform their relatively inchoate thoughts and feelings into a definite intention to act.

So provided that the clear and present danger test is satisfied, a preacher can still be held responsible in the event that security personnel prevent listeners from committing assault and battery. However, the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action. It cannot be said that a hate-preacher is in every case liable for the infliction of harm by others. Moreover, US courts have held that content of speech must embody a particularly intolerable and socially unnecessary mode of expressing whatever idea the speaker wishes to convey. Fighting words must be such that they communicate ideas in a threatening as opposed to a merely obnoxious manner.

As for our hypothetical example it means that listeners must not only be insulted, but intimidated also. Otherwise the preacher cannot be held criminally liable. American law makes still another difference where a speaker expresses her or his words to the public at large (e.g. on TV, radio, the internet, or a large crowd at an open-air event). Speech that invites dispute, induces unrest, creates dissatisfaction, or stirs people to anger may under these circumstances still be protected by First Amendment law. The differentiation appears to be legitimized by the fact that in the US the right to express one-

\textsuperscript{1484} Terminiello v. Chicago, 337 U.S. 1, 4 (1949).
\textsuperscript{1485} STEVEN J. HAYMAN, FREE SPEECH AND HUMAN DIGNITY 129 (Yale University Press 2008).
self and to participate in the democratic process has always been treasured above all else. Otherwise it would be difficult to see how words transmitted to the general public should potentially be less harmful than those directed towards a small crowd.
1.8.4 The Two Models Compared and Contrasted

The two approaches initially chosen by Switzerland and the United States could not be more different. In Switzerland the state was primarily seen as the protector against attacks on either of the official denominations, whereas in America, government had always been viewed as the arbitrator between various rival faiths. The US First Amendment introduced in 1791 guaranteed religious and other forms of speech not because they were devoid of harm, but despite the harm they caused. The United States developed a strong tradition of allowing even the most offensive manners of expression. On the other side, Switzerland’s 1848 Federal Constitution was used as means to protect confessional tolerance, the fragility of which had threatened the country’s political stability. Despite the fact that the two countries’ initial differences were largely based on assumptions, rather than empirical proof, today hate-speech is treated similarly in both countries.

Whoever publicly invokes hatred, seeks to systematically humiliate or defame a person’s faith is not protected under the Swiss right to freedom of expression and information.1486 Neither does a person enjoy these freedoms for vilely or maliciously insulting, ridiculing, interfering, interrupting, or despising a religion or cult.1487 In America, unprotected speech includes, for instance, “the lewd and obscene, the profane, the libellous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”1488 To US justices, the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content “embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.”1489 Swiss courts, on the other side, focus less on the objective quality of speech than on its actual effect on the people. To the Federal Supreme Court, speech is punishable if it adversely affects the dignity of persons attacked “by lowering it, and by making it look despicable.”1490 Switzerland’s judges make clear that “even viewpoints that are disliked by the majority can be expressed.”1491 Similarly, America’s judges have found that it is “one thing to say that the police cannot be used as an instrument for the suppression of

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1487 Id. at art. 261.  
1491 BGE 131 IV 23, E 3.1, p. 28
unpopular views, and another to say that, when as here the speaker passes
the bounds of argument or persuasion and undertakes incitement to riot.”

But still there are at least three differentiations in American laws that do not
apply to the Swiss legal system. US jurisprudence imposes the precondition
that expressions are “likely to produce a clear and present danger of a serious
substantive evil that rises far above public inconvenience, annoyance, or
unrest,” before they can be circumscribed. This has been interpreted to
mean that constitutional guarantees of free speech and free press do not per-
mit a state to forbid or proscribe advocacy of the use of force except “where
such advocacy is directed to inciting or producing imminent lawless action
and is likely to incite or produce such action.” US courts have also said
that “the mere abstract teaching of the moral propriety or even moral neces-
sity for a resort to force and violence, is not the same as preparing a group
for violent action and steeling it to such action.” A second bar to free
speech limitation is presented by the requirement in American law that an
expression must be used with “intend to intimidate.” The third and last
contrast is the circumstance that the United States differentiates between
speech directed at a definable group of persons and that directed at the public
at large. The latter also protects speech that “invites dispute, induces unrest,
creates dissatisfaction, or stirs people to anger.” So it can be concluded
that expressions, whether inherently religious or of any other form, are more
likely to be guarded against censorship or punishment in the United States
than in Switzerland.

1493 Terminiello v. Chicago, 337 U.S. 1, 4 (1949).
1495 Id.
2. The Syrian Arab Republic

2.1 General Introduction and Overview

“[D]istance is needed to gain a vantage on who we are and what we are doing and thinking. Distancing can be described as an attempt to break away from firmly held beliefs and settled knowledge and as an attempt to resist the power to prejudice and ignorance.”

(Günter Frankenberg)

Frankenberg’s comment may be interpreted in the sense that caution is generally needed for any kind of comparative adventure. The act of taking reference from distant legal systems can still provide valuable insight into the experiences of other constitutions, and can at the same time help to comprehend complex functions of one’s own legal system.

The inherent difficulty with regard to a Near Eastern analysis lies in the circumstance that the commentator is required to reset some, but not all, knowledge on Western values unless she or he wants to be trapped by specific modes of thinking. While in the West, fairness means that the state protects a more or less autonomous society in which individuals are free to form a variety of allegiances and bonds of solidarity along any lines they choose (leisure, political, religious, cultural, racial, sexual etc.), in the Near East the justice system requires the state to assure that the individual is related to the religious community as part of a larger organism. In other words, in Syrian culture the religious community is highly valuable as a positive human good, and as such, fully responsible for promoting the good


1499 ANDREW F. MARCH, ISLAM AND LIBERAL CITIZENSHIP: THE SEARCH FOR AN OVERLAPPING CONSENSUS 156 (Oxford University Press 2009).

of its members. Those members perpetually recognize a reciprocal obligation to act for the welfare of the community and their fellow adherents. In contrast, individuals in Western society find their place through the exercise of their individual freedom in competition or association with others. Thereby the law facilitates individual self-fulfilment first and foremost. The apparent conflict between Western and Near Eastern value and identity systems cannot easily be reconciled. Syria’s system includes structures and governmental functions that are not comparable with legal standards of Western systems. It is these factors that make the following analysis a risky undertaking. Nonetheless, having duly acknowledged the difficulties inherent to the task, I will endeavour in this chapter to formulate a balanced account of Syrian constitutional values.

Because of the topic’s complexity and breadth, the following analysis requires at least a rudimentary layout of the country’s historical contours, such as were gradually carved into the system. As we will soon see several writers have dealt very capably with public endowments and the personal status system. The historical developments of these two concepts are also central to the religious freedom exploration that follows, and will thus be afforded most attention. In order to trace religious-freedom laws, readers are also required to develop some rough knowledge about Syria’s modern legal and political history, and especially those exceedingly important occurrences that took place between the country’s independence until the adoption of the present-day constitution. However, other general developments, which might also be considered important but are not absolutely necessary to this very specific discussion, will either be touched upon lightly or not considered at all. The contemporary legal system of the Syrian Arab Republic has so far not been widely discussed. Little heed has been given in Western and Eastern literature to the religion-state relationship in that country. Matters


The exceptions to this finding are the groundbreaking doctoral theses of ANNA-BELLE BOTTCHER, SYRISCHE RELIGIONSPOLITIK UNTER ASSAD (Freiburger Beiträge zu Entwicklung und Politik 1998) and Nael Georges, Le droit des minorités: le cas des chrétiens en Orient arabe 174 (Université Grenoble II, Ph.D. dissertation) (on file with University Library 2010), the former being a pioneering work written within the realm of political science, the latter being a thorough legal thesis on the rights of minorities in general, and the case of Near Eastern Christians in particular. As far as overseable there is no comprehensive work regarding Syria’s religious freedom clauses yet. A comprehensive Syrian constitutional law text book has been wirtten in Arabic by Kamil Khali in AL-QANUN AL-DUSTURI WA-L-NUZUM AL-SIYASIYYA [Syrian Constitutional Law and Political System] (University of Aleppo Press 1996).
pertaining to the construction of religious freedom, including the right to collective religious self-determination have escaped thorough scrutiny altogether. The present work cannot make up for this academic neglect, but traces some important concepts only, in the hope of laying useful foundations for that purpose. The following analysis is largely based on parliamentary and presidential decrees, statutes, judicial decision-taking and scholarly commentaries. In order to diversify external aids, and in an attempt to bypass the inconvenient circumstance that religious-freedom claims under the Syrian Constitution are rarely litigated in courts, several religious and political leaders of minority groups as well as of the Sunni Islamic establishment are given the opportunity to speak their minds on the country’s constitutional interpretation.

So in a nutshell, this chapter lays out the religious and ethnic landscape of the Arab Republic. Subsequently, it takes the reader through the relevant parts of Syria’s legal history. It then presents an account of the country’s constitutionally entrenched religious clauses. It proceeds to explore the concept and institution of personal status laws and the public endowments in their contemporary constitutional context. And finally, it gives heed to the special circumstances of the right to adoption, change, and renunciation of religion, the idea being to test the proposition that the system protects individual religious self-determination less than collective religious unity. This will be followed by a comparing and contrasting exercise involving all three systems – Syria, Switzerland, and the United States.

1503 It appears not to be the normal course of action to fight for one’s personal right to religious freedom in Syria’s secular court system. Instead it is established practice that if discontent occurs with regard to one’s religious exercise, an adherent seeks advice from her or his respective religious leader (such as a patriarch, bishop, or imam). In case of dispute, religious leaders settle the matter out of court, and sometimes in concert with the ruling government. It is similarly rare that collective religious freedom claims are taken to the country’s secular or religious courts.
2.2 Religious and Ethnic Landscape

Syria’s eighteen million population is a mosaic of ethnically, culturally, and religiously distinct communities. In the cradle of civilizations, ninety percent of the population is Arab in ethnicity; another roughly nine percent is Kurdish, with Armenians, Circassians, and Turkomans filling out the mix.\textsuperscript{1504} It is estimated that Sunni Muslims make up seventy-four percent of Syria’s overall population. As such, Sunnis provide the central symbolic and cultural orientation. Of these, a minority are of the Yazidi faith, reducing the core Sunni Arab majority to roughly two-thirds of the populace.\textsuperscript{1505} Approximately another sixteen percent of the population, while Arab in ethnicity, consists of a few Twelver Shi’a, and various offshoots of Shi’ a Islam – ‘Alawis, Druze, and Isma’ ilis. The ‘Alawis are by far the largest community in the category of non-Sunni Muslims. Their number is estimated at eleven percent of the overall population. Christians, of various Orthodox and Uniate traditions and the Latin Rite, along with a smattering of Protestants, make up ten percent of the population. Syria’s Arab Jewish community has to a great extent disappeared as a result of emigration in the early 1990s.\textsuperscript{1506}

\textsuperscript{1504} The official language, Arabic, is spoken by nearly ninety percent of the population. Kurdish, Armenian, Turkic, and Syriac is spoken by small minority groups. Some French and English is spoken in cities. Richard F. Nyrop et al., Area Handbook for Syria (U.S. Government 1971).

\textsuperscript{1505} Flynt Leverett, Inheriting Syria: Bashar’s Trial by Fire 2 (Brookings Institution Press 2005).

\textsuperscript{1506} In 1993 it was reported that there were 3,655 individuals of the Jewish faith comprising 584 families distributed throughout the various Syrian governorates. U.N. Economic and Social Council [ECOSOC], Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. Doc. E/CN.4/1993/62 (January 6, 1993) para. 3.
2.3 Historical Background

2.3.1 Ancient Greater Syria

In the third century, the Near East was influenced by two great rival civilizations: the Byzantine empire, with its capital in Constantinople, and the Sasanian empire, located across the eastern border of present-day Syria.\(^{1507}\) Back then the modern-day territories of Syria, the Lebanon, Jordan, Palestine, Israel, parts of Iraq and Turkey were all called Syria.\(^{1508}\) It is believed that this “Greater Syria” benefited enormously from the cultural diversity of the people who came to claim parts or all of it and who remained to contribute and participate in the remarkable spiritual and intellectual flourishing that characterized the area’s cultures from ancient times until today.\(^{1509}\) The Eastern Roman Empire’s identification with Christianity started with Constantine and was completed before the reign of the sixth century successor Justinian. As early as 380 CE Christianity became the official faith of the Roman Empire.\(^{1510}\) As a consequence, religious diversity declined sharply. For instance, emperor Theodosius had the temple of Jupiter destroyed in Damascus and built a cathedral in honour of John the Baptist. Roman territories were largely Christianized. The new truth carved its path most successfully. Christians and Jews became the majority among the peasantry and the urban populations in the region. Jewish communities inhabited the Mediterranean regions, principally Israel, Palestine, Syria, Egypt and along the North African coast.\(^{1511}\) People identified themselves first and foremost as Christians or Jews, rather than Romans, let alone Greater Syrians or Egyp-

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\(^{1508}\) The name was given by the ancient Greeks to the land bridge that links three continents.

\(^{1509}\) Andreas Feldtkeller, Identitätssuche des syrischen Urchristentums: Mission, Inkulturation und Pluralität im ältesten Heidenchristentum 23 (Universitätsverlag Freiburg 1993).

\(^{1510}\) Theodosian Code: And Novels and the Sirmondian Constitutions 16.1.2.1 At 440 (Clyde Pharr trans., Princeton University Press 1952).

\(^{1511}\) Bat Ye’or, The Decline of Eastern Christianity under Islam: from Jihad to Dhimmitude 34 (Fairleigh Dickinson University Press 1996).
tians. This primary identification with religion had the deepest of roots, extending back to the most ancient Mesopotamian states.\footnote{LEVON AVDOYAN, LIBRARY OF CONGRESS NEAR EAST COLLECTIONS: AN ILLUSTRATED GUIDE 13 (Library of Congress 2001).}

2.3.2 Islamic Conquest and Civilization

2.3.2.1 Emergence of Islam and its Success

Muslims scholars believe that the rule of Prophet Muhammad and the time of the first four “rightly guided” (rashidun) Caliphs marks the greatest spiritual and intellectual period of Islamic history.\footnote{It is believed, however, that the history of Arabs began before the coming of Muhammad.} As interpreter of the will of God, Muhammad established the Islamic society. Islam means literally “surrender,” and provides that humankind should give itself to God, surrender the soul completely, and leave everything in God’s hands. Many of his fellow Arabs converted to a new religion, which was understood as the continuation and fulfilment of the Judeo-Christian tradition. The new belief constituted a complete code of living. It sought to regulate not only the individual’s relationship with God, but all human social interchange. Temporal and religious powers were brought into unity with each other.

In the seventh century, religious fervour and pressure from an expanding population impelled Muslim Arab tribes to invade lands to the north of the Arabian Peninsula into Greater Syria. Historian Fred McGraw Donner notes “this land seems to have been a goal of the Muslims’ expansionist ambitions from a very early date.”\footnote{FRED MCGRAGW DONNER, THE EARLY ISLAMIC CONQUESTS 97 (Princeton University Press 1981).} The Prophet Muhammad said “struggle” (jahad) is a communal obligation.\footnote{BURHAN AL-DIN AL-FARGHANI AL-MARGHINANI, AL-HIDAYA [The Guidance] AT 287 (Imran Ahsan Khan Nyazee trans., vol. 2, Amal Press 2006).} Some cities and towns were pillaged ruthlessly. Arabs burst into the Fertile Crescent from the remote and inhospitable desert peninsula to the West. The historian Jonathan P. Berkey comments that “virtually all accounts of the rise of an Islamic state and then empire in the seventh century stress its extraordinary character, suddenness of the appearance on the scene of the Muslim Arabs and the wholly unexpected nature of their success [...].”\footnote{JONATHAN P. BERKEY, FORMATION OF ISLAM: RELIGION AND SOCIETY IN THE NEAR EAST, 600-1800 AT 50 (Cambridge University Press 2002).} Nothing prepared the citizens of Damascus for
Analytical Representation

the tremendous victories of the Arabs over Byzantine and Sasanian forces. Islamic scholar Sayed Kotb muses “[t]he victory of Islam here was the victory of a spiritual philosophy embodied in mortal men, [...]”.

Muslim Arabs called the western region the land of “dignity” (waqar), indicating the high regard most of them had for the area of Canaan, and Damascus especially. The city was vanquished in 635 under Caliph ‘Umar, by the troops of general Khalid ibn al-Walid. Damascus remained one of many provincial towns of the Islamic empire. In 659 the city was chosen as the administrative centre. As the Islamic society grew in number and size, the cathedral of Saint John was reluctantly conceded to the Muslim community in return for a large sum of cash. Parts of the cathedral were destroyed so that the “greatest mosque of all times” as a symbol of the new Muslim empire could be built in its place. Arabs made no attempt to impose their faith on the new subjects at first. They “invited the inhabitants to accept Islam.” Muslims, who lived aloof from the local people, remained a small minority of the total population of the Near East.

In 661 CE Ibn Abi Sufyan, who was the governor of Syria during the early Arab conquest, proclaimed himself caliph and established the Umayyad Caliphate with its capital at Damascus. The caliph cultivated good relationship with the Christian Syrians, recruited them for the army at double pay, and appointed Christians to high offices. From Damascus he conquered enemies to the east, south, and west and fought the Byzantines to the north. Under his leadership, Syria became the most prosperous province of the caliphate. The Ummayads administered the lands in the manner of the Byzantines, giving almost complete authority to provincial governors. At the end of the seventh century the Umayyad administration replaced the Greek by Arabic as “official” language and thereby made the region’s Arabness more complete. They minted coins, built hospitals, and constructed underground canals to bring water to towns.

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1518 Canaan is an ancient expression for a region covering modern-day Israel and Lebanon, the Palestinian Territories, as well as adjoining coastal lands and parts of Jordan, Syria and northeastern Egypt.
1519 KAMIL KHALL, AL-QANUN AL-DUSTURI WA-L-NUZUM AL-SIYASIYYA (Syrian Constitutional Law and Political System) AT 502 (University of Aleppo Press 1996).
2.3.2.2 Islamic Trust Law

Economic and intellectual prosperity in Umayyad Greater Syria is thought to be inseparably bound to the Islamic tradition of “pious endowment” (waqf). Waqf is essentially a concept of trust law that provided Muslims with control over the disposition of their wealth. Some civilizations knew trust laws before the emergence of Islamic waqf. Scholar Peter C. Hennigan argues, however, that “it is only the Islamic world in which trusts became a major, if not the dominant, economic strategy.”

Revenues of public waqf were used for the interest of the society as a whole. Local projects such as orphanages, libraries, schools, scholarly institutions, the sick and the poor were all financed with waqf money. Islamic law required that the remainder interest of endowments be a charitable purpose. To Muslims, this symbol of piety was seen as the only way to secure salvation in the hereafter. Property that was transferred into Islamic trust, received divine, that is sacrosanct status. The act of transformation was supervised and protected against corrupting influences by the “learned” ('ulama’), who were responsible for the waqf institution. Apart from these charitable objectives, waqf and the control of its properties was utilized as a political and military war tool. The waqf institution was incorporated into the mechanisms of power utilized by the Muslim state to ensure its stability and perpetuation.

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1523 E.g. already the Greeks developed a concept of a “living legal heir” to whom property could be given in perpetuity during a person’s life with the consent of his natural heirs. Marion R. Fremont-Smith, Foundation and Government: State and Federal Law and Supervision 14 (Russell Sage Foundation 1965).


1529 Richard Van Leeuwen, Waqf and Urban Structures 89 (Brill 1999).
lim societies, and can readily be seen as one of the most important parts of Islamic state structure.\textsuperscript{1530}

### 2.3.2.3 Seizure of Non-Muslim Property

Divine revelations justified the seizure of property possessed by the vanquished. The property of non-Muslims constituted booty (\textit{fay'}\textsuperscript{1531}) to be shared between the Muslim fighters, a fifth of every seizure being reserved for the “Muslim community” (\textit{umma}). “And know that out of all the booty that ye many acquire (in war), a fifth share is assigned to Allah, and to the Apostle [...]”.\textsuperscript{1532} According to verses in the Qur’an, Muhammad was entrusted with managing seized property for the benefit of the entire Muslim community.\textsuperscript{1533} At Muhammad’s death it was the ‘ulama’, who took over trust responsibilities. “What Allah has bestowed on His Apostle (and taken away) from the people of the townships, - belongs to Allah, - to His Apostle and to kindred and orphans, the needy and the wayfarer; in order that it may not (merely) make a circuit between the wealthy among you [...]”\textsuperscript{1534} The Islamic society grew in strength and reach because of its philanthropic nature.

### 2.3.2.4 Tax Levied on Non-Muslims

However, provided that Jews, Christians, and Zoroastrians paid tribute and accepted the conditions of conquest, they possessed a right to freedom of worship, and security of property.\textsuperscript{1535} The “leader of a community” (\textit{imam}) could negotiate with conquered representatives and grant them a “treaty of protection” (\textit{dhimma}), which conferred on them a status of “tributaries”

\textsuperscript{1530} Oded Peri, \textit{The Waqf as an Instrument to Increase and Consolidate Political Power: The Case of Khāsksi Sultān Waqf in Late Eighteenth-Century Ottoman Jerusalem}, in \textit{STUDIES IN ISLAMIC SOCIETY: CONTRIBUTIONS IN MEMORY OF GABRIEL BEAR 48} (Gabriel R. Warburg & Gad G. Gilbar eds., Haifa University Press 1984).

\textsuperscript{1531} “If we conquer the enemy territory, then his real property (lands and buildings) are \textit{fay’} (booty).” Quoted as in \textit{BURHAN AL-DIN AL-FARGHANI AL-MARGHINANI, AL-HIDAYA [The Guidance] at 291} (Imran Ahsan Khan Nyazee trans., vol. 2, Amal Press 2006).

\textsuperscript{1532} Qur’an, 8:41.

\textsuperscript{1533} \textit{Id.} at 59:6-8.

\textsuperscript{1534} \textit{Id.} at 59:7.

\textsuperscript{1535} BAT YE’OR, \textit{THE DECLINE OF EASTERN CHRISTIANITY UNDER ISLAM: FROM JIHAND TO DHIMMITUDE 39} (Fairleigh Dickinson University Press 1996).
(dhimmi). The “per capita tax on non-Muslims” (jizya) was required to be paid by those who refused to embrace Islam. Tributary status prohibited pillage, massacre, and enslavement inherent in the razzias of the Bedouins. This principle of just war in Islam curbed – to a large, though not a complete extent – barbarity and infliction of harm on the vanquished population. When they “commence payment, then they have the same rights as the Muslims, and they have the same liabilities like those of the Muslims.” The specific socio-political and religious category of protégés was formed. Tax levied on the conquered people was first transferred to the Islamic treasury, and then reserved exclusively for the Islamic society, in the form and quality of waqf. Not infrequently, however, town populations suffered massacre and slavery when they fell into hands of tribes. For example, Homs and Damascus were pillaged in 902 CE.

Some inhabitants of the region converted to Islam in order to escape the personal and agricultural taxes levied on non-Muslims. The original legal justification of the tribute was based on the qur’anic verse: “Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which hath been forbidden by Allah and His Apostle, nor acknowledge the Religion of Islam, and if they cease not, fought you and slain them and take spoil from them as recompense that they may refrain.”

“Tributary status prohibited pillage, massacre, and enslavement inherent in the razzias of the Bedouins.”

In addition, another category of non-Muslims living the dar al-Islam were the musta’ mun. These were foreigners, primarily merchants or emissaries, who were granted a year’s permission to travel within Muslim lands. They were granted an aman, a document of safe passage. DAVID D. GRAFTON, THE CHRISTIANS OF LEBANON, POLITICAL RIGHTS IN ISLAMIC LAW 17 (Tauris & Co Ltd 2004).


the Truth, (even if they are) of the People of the Book, until they pay the jizya with willing submission, and feel themselves subdued.”\textsuperscript{1544} It also represents the early status of Islamic jurisprudence since it fixed not only the nature and quality of taxation, but also legislation applicable to non-Muslim inhabitants. At this period, only dhimmis were subject to this kind of tax. However, Muslims paid the “alms giving” (zakat), which was a specific percentage\textsuperscript{1545} of a Muslim’s income, to charity.\textsuperscript{1546} The Qur’an reads: “Your Lord said, call upon Me, and I shall answer you.”\textsuperscript{1547} “And do not kill your children because of poverty; We shall provide for you and for them.”\textsuperscript{1548} In Islamic belief humanity is an essential unity, and poor tax is a social responsibility with a religious significance.\textsuperscript{1549}

### 2.3.2.5 Tolerance Towards Non-Muslims

The Umayyds developed a concept of religious tolerance by following earlier traditions of the Hellenistic civilization and the Byzantine empire. They held that the vanquisher’s personal status law, such as marriage and inheritance, is to be applied only to those of the same faith. For non-Muslims this meant that it was not the Islamic shari'a, but their own particular set of religious laws that was applicable to them. This concept would shape the contours of the relationship between the Muslim state and non-Muslim communities for centuries to come. It is important to note that Islam retained authority over the conquered lands and masses. Christian and Jewish religious leaders administered and controlled the laws of their communities. Patriarchs and bishops were given the opportunity to run their own waqfs. Christian leaders, assisted by the notables, administered the colossal revenues constituted by the taxes levied on their fellow adherents. The fiscal role assigned to the religious authorities contributed to the enrichment of churches and convents and to the accumulation of fortunes of considerable size. Not surprisingly, these arrangements suited the representatives of the conquered

\textsuperscript{1544} Qur’an, 9:29.

\textsuperscript{1545} Depending on the extent of irrigation of a particular plot of land.

\textsuperscript{1546} “Zakat is obligatory for each free, sane and major Muslim when he owns the nisab (minimum scale) through complete ownership and a year has passed over such ownership.” Quoted as in \textit{Burhan al-Din al-Farghani al-Marghini, Al-Hidayah [The Guidance]} at 291 (Imran Ahsan Khan Nyazee trans., vol. 2, Amal Press 2006).

\textsuperscript{1547} Qur’an, 40:60.

\textsuperscript{1548} \textit{Id.} at 6:152.

populations. Non-Muslim communities exercised considerable autonomy over their internal affairs. However, political and military power remained Islamic. By 750 CE the majority of the Syrian population was still tribal or Christian, and only the minority Arab-Muslim. As the courts of the Christians and Jews were on a subordinate level to Muslim jurisdictional authority, Islam played a role as arbiter and peacemaker in disputes arising between Christian rites.\(^\text{1550}\)

### 2.3.2.6 Religious Coercion, Crusades, and Mongol Invasions

The Qur’an forbids forced conversions by stating: “Let there be no compulsion in religion. Truth stands out clearly from Error; whoever rejects evil and believes in Allah has grasped the most trustworthy handhold that never breaks.”\(^\text{1551}\) However, scholarly critic Bat Ye’or argues that at no period in history was it respected in absolute terms. Apostasy and blasphemy became punishable by death. To her, the Islamic principle of religious tolerance was more in the realm of theory than reality. Scholar Samir K. Samir comments more circumspectly that in many instances it was not clear whether non-Muslims were converted to Islam by compulsion, but that it is likely that at least some Christians and Jews were converted both peacefully and through pressure.\(^\text{1552}\) The difficulty of adopting religious tolerance derived from tribes’ reluctance to abide by Islamic law. As a result of that, Muslim rulers were sometimes unable or unwilling to protect their subjects against the hordes of immigrants who left barren Arabia for the rich lands of booty. Generally, however, Muslim leaders were far more eager to make treaties with towns and provinces in return for payment of tribute than to simply destroy that valuable source of income.\(^\text{1553}\)

The first West European venture in the Near East took the shape of the Crusades from 1097 CE onwards. But Saladin inflicted mighty blows against the Crusaders in Syria by taking the Krak des Chevaliers fort in 1187. When

\(^{1550}\) **Bat Ye’or**, *The Decline of Eastern Christianity under Islam: From Jihad to Dhimmitude* 151 (Fairleigh Dickinson University Press 1996).

\(^{1551}\) Qur’an, 2:256.


\(^{1553}\) “If the imam deems it proper to negotiate the cessation of hostilities with the residents of the dar al-harb or with one group among them, and in this there is the securing of the interest of the Muslims, then there is no harm in it […]”. Quoted as in **Burhan al-Din al-Farghani al-Marghini, Al-Hidaya [The Guidance]** at 295 (Imran Ahsan Khan Nyazee trans., vol. 2, Amal Press 2006).
Saladin died, Syria broke into small dynasties centred in Aleppo, Hamah, Homs, and Damascus. By the fourteenth century, after repelling repeated invasions by Mongols from the north, Mamluk sultans of Egypt ruled from the river Nile to the Euphrates. In 1516 the Ottoman sultan in Turkey defeated the Mamluks at Aleppo and made Syria a province of the Ottoman Empire.

### 2.3.2.7 Ottoman Empire

The Ottomans were nomadic Muslim Turks from Central Asia who had been converted to Islam by Umayyad conquerors in the eighth century. In 1453 they conquered Constantinople and in the sixteenth century conquered all of the Middle East. Beginning in 1516, the Ottomans ruled Syria through pashas, who governed with unlimited authority over the land under their control. Pashas were both administrative and military leaders. As long as they collected their taxes, which were then partially turned into waqf property, maintained order, and ruled an area not of immediate military importance, the Sultan conferred all necessary authority to them. Ottoman administration followed patterns set by the Umayyad rulers. Religious heads of each non-Muslim community administered all personal status law and performed certain civil functions. Each community constituted a so-called millet, which literally means “civitas” or “nation.” Only four millets existed at the time of the classical Ottoman period. At the top was the Islamic millet. Ranked respectively second and third were the two Christian millets: the Greek Orthodox and the Armenian. In fourth place came the Jewish millet.

Under Ottoman rule Christian and Jews enjoyed greater privileges than they had under the Umayyads. These included not only administrative, or fiscal autonomy through waqf, but also a right to cultural and educational self-governance.\(^{1554}\) Christian and Jewish structural accommodation was regarded by early caliphs as a mere “treaty of protection.” By the time of the multi-racial and multi-confessional Ottoman empire, they received the status of autonomous administrative units. The concept of millet strengthened communities’ identity, because it allowed groups to retain their local ethnic and linguistic distinctiveness. The millet system was, thus, a socio-cultural form of organization beyond matters of belief.\(^{1555}\) The close affinity between relig-

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\(^{1555}\) Kemal Karpat, Millets and Nationality: The Roots of Incongruity of Nation and State in the Post-Ottoman Era, in CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY 141 (Benjamin Braude & Bernard Lewis
tion and ethnicity, which had been the cornerstone of group identity, was preserved and adapted to the exigencies of the Ottoman system. Millets became a rather unique institution in the annals of social history.1556 Scholar May Davie notes: “The word millet never referred to a particular legal status and religion in isolation to each other, it meant a unit that presupposed a continuity, a ‘complementarity’ in the Ottoman administrative chain, which was complex and of multiple mechanisms.”1557 Each millet became a quasi-autonomous entity within the greater Islamic society. Although the Ottomans recognized the judicial capacity of the religious courts belonging to minority religions, the authority granted to such courts never reached the scope of the jurisdictional capacity granted to the shari’a courts. Scholar Maurus Reinowski points out that “[t]he Ottoman millet system may have granted to religious groups autonomy in religious and certain judicial affairs, but always in the context of Ottoman rule and the dominance of the Islamic umma […]. Moreover, the millet system was not interested in a liberal, open from of rule within the semi-autonomous nations.”1558

Tanzimat are the Ottoman 1839 reforms, which adopted equality of civil rights between the Sultan’s subjects. In the course of the nineteenth century, fifteen millets gained formal recognition from the High Porte, including, inter alia, Orthodox, Monophysite, Catholic, Eastern Catholic, and from 1850 onwards, the Protestant Church. The Druze community did not readily fit within the framework of the Ottoman millet system. While the Ottomans treated people of that community as Muslims for administrative purposes and taxed them on that basis, they never looked upon them as being “genuine” Muslims. “Islamic rulings” (fatawa) were even made, declaring it legal to kill Druzes and confiscate their property, because they were neither Muslims nor dhimmis, and therefore not entitled to protection by the Muslim state. Little wonder that the Druzes rebelled whenever they had the opportunity. The Druze opposition to Ottoman rule continued for most of the re-

1556 KEMAL H. KARPAT, STUDIES ON OTTOMAN SOCIAL AND POLITICAL HISTORY: SELECTED ARTICLES AND ESSAYS 612 (Brill 2002).
remaining years of that decade, provoking further punitive expeditions into the Shouf Mountains. The Ottomans failed to break down the Druze resistance and establish any degree of regular administration.

2.3.3 Syrian Struggle for Identity

2.3.3.1 Emergence of Arab Nationalism

The search for an external focus of national Arab identity was first felt in the mid-nineteenth century. Sultan Abdul Hamid II acquired a reputation as the most oppressive Ottoman ruler. Opponents died quickly and taxes became heavy. He tried to earn the loyalty of his Muslim subjects by preaching pan-Islamic ideas. However, because of the sultan’s cruelty and increasing Western cultural influences his policies were of little success. Nonetheless, Arabs across the Ottoman empire felt the desire to achieve unity – in the form of an independent state – with other Arabs of the Near and Middle East. The emerging Arab nationalism meant solidarity among all those sharing the common language, culture, and history. Arab nationalism awakened under the influence of, and as a reaction against, European nationalism. It is based on the strong belief that there is an Arab nation, and that it should form a single independent unit for the benefit of all its members.1560

2.3.3.2 French Mandate

After World War I when Ottoman rule came an end in 1918, Syria would become a virtual laboratory for constitution making. George N. Sfeir notes that “it experimented with practically every kind of regime one can think of: monarchical, presidential, parliamentary, military, democratic, socialist, just as it tried to accommodate every political ideology [...]”1562 In 1919 the Syrian National Congress established by constitutional convention the first Syrian Arab state with King Faisal as its head. However, the secret

1559 MUNDIR ANABTAWI, ARAB UNITY IN TERMS OF LAW I (Martinus Nijoff 1963).
Sykes-Picot agreement between Britain and France meant the former power consented to gear up its sphere of influence and control for Jordan and Palestine, and the latter for Syria and the Lebanon. Consequently, French troops moved into, and occupied Damascus in summer 1920. Arab resistance was brutally crushed. French authorities gave Turkey the Syrian districts of Antioch and Alexandretta, established the state of Lebanon, and attempted to partition what was left of truncated Syria into several petty states. From the Syrians’ viewpoint, this excess of powers presented the basis for modern Arab nationalism and a central ideological concept of future pan-Arab parties such as today’s ruling Ba’ath (Arab Socialist Resurrection) Party. The Ba’ath Party quickly started to strive for regional leadership among Arabs regardless of belief. George N. Sfeir states that “the trauma of this first search for constitutional identity has left an indelible mark on the political psyche of the Syrian people.”

French rule was oppressive in that nearly every feature of Syrian life came under French control. The occupiers organized a local military unit within Syria. Sunni Arabs scarcely participated. That circumstance cleared the way for ‘Alawis to become conscripts. The ‘Alawi sect was responsible for the control and stability of the country by breaking up Sunni nationalist demonstrations and for stopping labour strikes on behalf of the French colonial rulers. Scholar Barri Rubin is of the view that these actions laid the basis for later ‘Alawi domination of the military and eventually made it possible to seize power of government. No less than fifteen French-inspired organic decrees and two full-fledged constitutions affecting the composition of the country’s administration were issued between 1922 and 1943. In one of the most far-reaching reforms, the French incorporated the waqf institution into Syria’s state administration, and established for its administration and

1565 George N. Sfeir, Modernization of the Law in Arab States: An Investigation into Current Civil, Criminal and Constitutional Law in the Arab World 193 (Austin & Winfield 1998).
1566 Barry Rubin, Truth About Syria 37 (Palgrave Macmillan 2007). Although Syrian original sources speak about several minority religions that supported the mandate authorities Kamil Khalil, Al-Qanun Al-Dusturi Wa Al-Nuzum Al-Siyasiyya [Syrian Constitutional Law and Political System] at 508 (University of Aleppo Press 1996).
1567 George N. Sfeir, Modernization of the Law in Arab States: An Investigation into Current Civil, Criminal and Constitutional Law in the Arab World 194 (Austin & Winfield 1998).
control a High Council of Awqaf (*Contrôle Général des Wakfs Musulmans*) in 1921.\textsuperscript{1568} Non-Muslim awqaf, those of the Druze, Christians and Jews, were not included under the program of the mandate reforms, but left in control of their respective religious leaders. Throughout the mandate, Syrian forces, whether they were of political or religious nature, rebelled against the dominant, heavy-handed French occupation.

2.3.3.3 Independence

Finally, after World War II, in February 1946 a United Nations resolution called on France to evacuate. The French acceded and by April 1946 all French soldiers were off Syrian soil. On April, 17, Syria celebrated Evacuation Day.\textsuperscript{1569} With the formal recognition of Syria’s independence, a new House of Representatives was elected, and a parliamentary form of government established. Kemal H. Karpat notes that the newly born state of Syria attached itself “to territorial bonds of secular citizenship and historical memories while their group identity, internal cohesion and socio-political values as a nation were determined by their long experience in the millet system.”\textsuperscript{1570} By June 14 1947 the waqf institution was taken completely out of private hands and transformed into public institutions entirely run by the state.\textsuperscript{1571}

Agreement among leaders on how to organize and administer the new state could only be described as floundering. From 1946 to 1956 Syrians saw twenty different cabinets and four different Constitutions. Between 1949 and 1970 there were ten successful coups and a lot of failed ones. Barry Rubin calls Syria from the time between 1949 to 1970 “the world’s most instable country.”\textsuperscript{1572} Because of the many coups that took place, Syria struggled to adopt a cohesive legal system and national identity. Independence sharpened rather than relaxed Syria’s internal search for distinctiveness. But Syria took Arab nationalism serious, and aspired to develop Arab unity under its leadership. Efforts were employed to establish a modern independent Arab state by

\begin{itemize}
\item \textsuperscript{1568} Deguilhem-Schoem Randi Carolyn, History of Waqf and Cases Studies from Damascus in Late Ottoman and French Mandatory Times 135 (New York University Ph.D. dissertation) (on file with University Library 1986).
\item \textsuperscript{1569} KAMIL KHALL, AL-QANUN AL-DUSTURI WA AL-NUZUM AL-SIYASIYYA [Syrian Constitutional Law and Political System] AT 509 (University of Aleppo Press 1996).
\item \textsuperscript{1570} KEMAL H. KARPAT, STUDIES ON OTTOMAN SOCIAL AND POLITICAL HISTORY: SELECTED ARTICLES AND ESSAYS 611 (Brill 2002).
\item \textsuperscript{1571} Al-marsum al-tashri’ [Parliamentary Decree] Nr. 68 of 14 June 1947.
\item \textsuperscript{1572} BARRY RUBIN, TRUTH ABOUT SYRIA 27 (Palgrave Macmillan 2007).
\end{itemize}
introducing new legislation. After the coup d’état by the army leadership in 1949, several modifications in legal practice were made. New civil, commercial, and penal codes were framed, based on French and Islamic legal philosophies. The idea of enacting secular laws was that they functioned as a complement to Islamic jurisprudence. Syria’s legal system became a complex amalgam of French secular laws along with Ottoman legal structures and Islamic practices. On September 4, 1950, the Assembly approved a new Constitution. However, the leaderless civilians were unable to maintain authority. It was suspended by a military junta which dissolved parliament and took over power in yet another coup. In a July 1953 referendum, Syrians yet again approved a new Constitution. By 1955 the balance began to swing in favour of left-wing elements, notably the Ba’ath and the Communist party. These were the only two parties with effective organizations that were not based on sectarian interests. Until 1958 most governmental powers were put into the hands of the leaders of the two parties.

2.3.3.4 United Arab Republic

Because of multiple internal forces, Syria was regarded as ungovernable. Discussions about a union between Syria and Egypt had already been held in 1956. The United Arab Republic (UAR) was announced on February 1, 1958. Syria was still deeply troubled by political rifts which, Syrians thought, only a union with Egypt could coalesce. A now famous indication of the difficulties is what Syrian President Shukri al-Quwatli supposedly told Gamal ‘Abd al-Nasser when the two countries temporarily united under the latter’s rule: “You have no idea, Mr. President, of the immensity of the task entrusted to you […]. You have just become a leader of a people all of whom think they are politicians, half of whom think they are national leaders, one-quarter that they are prophets, and one-tenth that they are gods. Indeed, you will be dealing with a people who worship God, Fire and the Devil.” The form in which the United Arab Republic emerged was not what the Ba’ath Party had envisioned. The Egyptians’ condition for union was that the two countries be completely integrated and centralized, not just federated as the Syrians proposed. Syrians became increasingly dissatisfied


with Egypt’s domination. On September 28, 1961, in another coup, a group of nationalists revolted and threw the Egyptians out. The Syrian Constitution of 1950 was restored, only to be suspended, amended, and replaced by subsequent coups in 1962, 1963, 1964, and 1966. As a result of this, political disorder broke out once again. After the disentanglement of the United Arab Republic, the first Syrian secular lead awqaf Ministry was established. As the new Ministry’s competences overlapped with those of the High Council of awqaf, the influence of Sunni religious leaders was diminished.

2.3.3.5 Constitutional Development

On March 8, 1963, the Ba’ath Party seized power. It appears that it was under the rule of the secular pan-Arab Ba’athists that Syria felt sufficiently unified to cautiously assert a national identity all of its own. The Ba’ath theoretician Michel Aflaq associated religion with the old corrupt social order, oppression, and exploitation of the weak, seemingly influenced by a mixture of radical Hobbesian and Marxist views on religion. The constitution of 1964, however, still made it clear that “Islamic jurisprudence shall be ‘‘the’ main source for legislation.” Despite this proviso there were a number of Sunni Muslims who felt that the secularization of the law had gone too far. Muslim Brothers pressed for Islam as a state religion, by demanding that all laws contrary to Islam should be abrogated. Their beliefs encompassed the understanding that the essential elements of the unity of Syria is the shari’a which includes laws adequate to organize all aspects of this worldly life and the hereafter, at the level of the individual, the family, the nation and the state.

In March 1966 Hafiz al-Assad, an ‘Alawi Syrian Air force lieutenant, established a left-wing revolutionary government and eventually, after a bloodless

1575 George N. Sfeir, Modernization of the Law in Arab States: An Investigation into Current Civil Criminal and Constitutional Law in the Arab World 200 (Austin & Winfield 1998).
1577 Weismann Itzchak, Sufi Reformist Diffusion and the Rise of Arabism in Late Ottoman Syria, in From the Syrian Land to the States of Syria and Lebanon 125 (Philipp Thomas & Schumann eds., Ergon 2004).
1578 Barry Rubin, Truth About Syria 37 (Palgrave Macmillan 2007).
coup, took power in 1970. This brought about a bitter schism within the Ba’ath Party between the Syrian and Iraqi wings. Nevertheless, from the time he was nominated president in 1971 until his death in 2000, almost three decades, al-Assad managed to run his government. The fact that the ‘Alawi minority group came to power is a paradox with regard to the country’s turmoil and Sunni Arab religious domination. For the first time since independence in 1946, al-Assad succeeded in imposing a strong, durable, and stable government. Daniel Pipes comments that “[t]he impact of the ‘Alawis taking power can hardly be exaggerated.” There was an underlying tension that stemmed from sectarian differences between the majority Sunni Muslims and the minority ‘Alawis. The immediate focus of the opposition to the regime was the demand by Sunni Muslims that Islam be declared the state religion in the Constitution. The draft Constitution was adopted by the People’s Council at the end of January 1973 but had no provision to that effect. Viewing the Constitution as the product of an ‘Alawi dominated, secular, Ba’athist ruling elite, Sunni militants staged a series of riots in February 1973 in conservative and predominantly Sunni cities such as Hamah and Homs. A number of demonstrators were killed or wounded in clashes between the troops and demonstrators. As a result of these demonstrations, the Assad regime had the draft charter amended to include a provision that the president of Syria must be Muslim. On March 13, 1973, the new Constitution (which is still applicable today) went into effect. Islam was not declared the state’s religion, but instead a compromise was adopted in that the Constitution reads, in Article 3(1) and (2):

The religion of the President of the Republic has to be Islam. Islamic jurisprudence is a main source of legislation.

Paragraph 2 of Article 3 declares that Islamic jurisprudence is “a” source of law, but not “the” absolute source. Bernard Botiveau notes that from a Ba’athist perspective “Islam was one of the fundamental components of Arabness, but required to be located at the religious, and not the political

The provision constitutes a political compromise. Sunni Shaykh, Muhammad al-Habash, interprets the provision to mean that “‘a’ refers to the situation where there is another source of law. Islam is a main source, but not the unique source. There are other sources for a wide area of law.”

Scholarly commentator Nael Georges supposes that if there is no Islamic law that regulates a specific circumstance, secular law is applied. However, Georges concludes that there is not strict separation between Islam and the state in its present constitutional setup. Despite this proviso, it can hardly be said that the Syrian state adheres to an official Islamic ideology. But there is an express appeal to one particular ideology that should constitute the prime source of the state’s regulatory and normative functions. Moreover, the Constitution strengthened the late al-Assad’s already formidable presidential authority. The Syrian Constitution reads, in the first sentence of Article 8:

The leading party in the society and the state is the socialist Arab Ba’ath party.

In other words, the provision binds future parliaments by requiring the Ba’ath Party to constitute the leading party. Ba’ath has held the majority of the seats in the Syrian unicameral parliament ever since it grabbed power. Because of the first sentence of Article 8, the Syrian Arab Republic cannot be regarded as a fully democratic nation in the Western understanding of the term.

2.3.4 Concluding Remarks

At its surface the Syrian constitution has been exposed to dangerous rip tides, forcing it to take up many different forms from the time of Syrian In-

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1585 “[...] l’islam était considéré comme l’une des composantes fondamentales de l’arabité mais devait être situé sur un plan religieux et non politique [...]. BERNARD BOTIVEAU, LOI ISLAMIQUE ET DROIT DANS LES SOCIÉTÉS ARABES 236 (Karthala 1993).

1586 Interview with Muhammad al-Habash, His Eminence Shaykh Muhammad al-Habash, Member of the Syrian Parliament, in Damascus (Jan. 15, 2007).

1587 For a similar conclusion Nael Georges, Le droit des minorités: le cas des chrétiens en Orient arabe 207 (Université Grenoble II, Ph.D. dissertation) (on file with University Library 2010).

dependence until and up to its current version. However, there are two strong and decisive undercurrents which have contributed largely to the country’s ground level stability. Both appear to have received little scholarly attention in the context of constitutional interpretation so far. Conceivably, this is because they are part and parcel of the unwritten or invisible Syrian constitution. First, the structural availability of the concept of waqf, which enables all religious adherents to care for their respective community members as a whole instead of using private funds exclusively for themselves, is a legal institution and belief-system that has endured since time immemorial. Although the laws of religious endowments were made subject to legal amendments, for instance, in that they were transformed from a private sphere into a public one, it can still be regarded as an enduring, preponderant, and somehow coup-resistant constitutional custom. The second undercurrent partially overlaps with the first. It is remarkable that from Ottoman times until today, each non-Islamic community has enjoyed the right to self-identity with little or no limits in respect to culture, language, and belief. Despite political and religious turmoil, the respect for religious communities’ autonomy, including matters pertaining to personal status laws, has prevailed.

It can thus be argued that precisely these two kinds of constitutional custom have been carved deeply into the Syrian legal system, and that once the current political turmoil has ceased, they could effectively be written into the nation’s constitution.

However, these considerations present only half (or maybe not even that much) of the story, and the reason for that will be addressed in the analysis that follows.
2.4 Constitutional Entrenchment

Religious freedom is guaranteed in Article 35 of today’s Syrian Constitution. It stipulates in Paragraphs (1) and (2) respectively: 1589

The freedom of faith is guaranteed. The state respects all religions. The state guarantees the freedom to hold any religious rites, provided they do not disturb public order.

The Syrian Constitution is entrenched by the need for a two-thirds majority vote of the “People’s Assembly” (majlis al-sha’b) as well as the President’s assent in order to effect any constitutional amendment. 1590 The government interprets the relevant provision to mean that “[f]reedom of belief is inviolable and the State respects all religions and guarantees full freedom of religious observance […].” 1591 It reports further that “Accordingly, the right of every religious community to profess and practise its religion and exercise its religious rights is firmly established in the Constitution and the laws in force.” 1592 The comprehensive structure of the Syrian constitutional system has evolved and continues to evolve mainly around collective dimensions of religious tolerance. 1593 The extent of autonomy by which a religious community is free to organize and administer itself devoid of state (external) intervention or control in the Arab Republic is largely determined by personal status laws and public endowments. As already argued, their underlying concepts can be seen as constitutional customs. In the following subsection both legal concepts are described, analysed, and discussed in today’s constitutional context.

1589 “Hurriyyat al-i’tiqad masuna wa tahtarim al-dawla jami’ al-adyan. Takful al-dawla hurriyyat al-qiyyam bi-jami’ al-sha’a’ir al-diniyya ‘ala an la yakhull dhaliq bi’il-nizam al-‘amm.” Id. at ART. 35 (1) and (2).
1590 Id. at ART. 149(1).
1592 Id.
1593 This applies not only to Syria, but other Arab states also. KAMEL KHALI, AL-QANUN AL-DUSTURI WA AL-NUZUM AL-SIYASIYYA [Syrian Constitutional Law and Political System] at 585 (University of Aleppo Press 1996).
2.5 Personal Status Laws

2.5.1 Introduction

The Syrian Constitution identifies “freedom” (hurriya) as a “sacred right” (haqq muqaddas).\(^{1594}\) Moreover, the state has an obligation to protect the “personal freedom of the citizens” (al-hurriya al-shakhiyya) and to safeguard their “dignity and security” (al-karama wa-l-amn).\(^{1595}\) The state does not generally interfere with the internal affairs of religious communities, and is for this reason believed to respect the personal freedom and dignity of religious adherents. For example, the Armenian religious leader, Pastor Bchara Moussa Oghli, states that the scope of autonomy as enjoyed in Syria gives the community the ability to retain its specific Armenian identity. He says that an advantage of the Syrian system is that Armenian citizens are “fully integrated,” but that there would be no need to be “fully melted.”\(^{1596}\) Armenian Bishop Armash Nalbandian comments similarly: “We do not see our identity as ‘Christians in Syria,’ but as ‘Syrian Christians,’ in that we generally enjoy equal rights and obligations just like all other Syrian citizens.”\(^{1597}\) Syrian identity appears to be formed by a conglomerate of Syrian-ness, Arab and non-Arab multiculturalism including religion, as well as strong historic ties. The land of dignity, as Muslim Arabs call Syria for its cultural distinctiveness, is to Islamic scholar and Shaykh Muhammad al-Habash a “blessed land,”\(^{1598}\) where all three monotheist religions can flourish in harmony with each other.\(^{1599}\)

\(^{1594}\) AL-DUSTUR AL-SURI [SYRIAN CONST.] ART. 25(1) FIRST SENTENCE.

\(^{1595}\) Id. at SECOND SENTENCE.

\(^{1596}\) “We can live here our own cultural identity including our gatherings, ceremonies and cuisine. Unlike Armenians who are in the diaspora, in Europe and the United States, we are not obliged to melt and lose our cultural identity. In Syria, as every religious minority, we are allowed to remain as we are. We enjoy the social freedom by displaying our cultural identity entirely.” Interview with Bchara Moussa Oghli, Pastor of the Armenian Protestant Church of Christ, in Aleppo (Dec. 2, 2006).

\(^{1597}\) Interview with Armash Nalbandian, His Excellency Bishop of the Armenian Diocese of Damascus, in Damascus (Nov. 29, 2006).

\(^{1598}\) Interview with Muhammad al-Habash, His Eminence Shaykh Muhammad al-Habash, Member of the Syrian Parliament, in Damascus (Jan. 15, 2007).

\(^{1599}\) On the other side, the Syrian government appears to underestimate the importance attached to a specific cultural identity including religion by reporting to the United Nations Human Rights Committee that “[I]t should be noted that, although Islam constitutes one of the mainstays of public order in Syria, which regards religious observance as a basic human right, a citizen’s religion or his exercise of this right in no way forms a basis for the establishment of his Syrian identity.” U.N. Human
personal status laws mirrors the constitutional guarantee not to interfere in, or control, collective religious self-determination. For instance, the incorporation of personal status laws and the grant of judicial capacities made it possible to accommodate Christian communities’ hierarchical structures. As Archbishop Bedros Miratian says: “[W]e do not have to seek a specific place in society. It was given to us long ago.”

The institution of personal status law is an area of regulation in which the process of modernization has had the least effect. In present-day Syria personal status is governed by parliamentary enacted codes, religious rules or doctrines, custom, and practice. It refers to circumstances in which each legally recognized religious community runs its own body of institutions, including a court system. Eighteen religious cults are legally recognized. Although Syrian public law allows religious communities to regulate and administer their own sphere of internal affairs, such activities must not contradict with generally applicable secular laws of land. Pluralism in the Arab Republic means that the personal status law of all Islamic communities is regulated by the shari’a, whereas Christian rites are governed by the Gospel, and the Jewish community by talmudic law.

Today, the Druze community, as a fully recognized religious organization, is subject to its own spe-
specific religious code. Personal status law issues of non-Syrian citizens are governed by their respective national law.

In Syria, two kinds of judicial systems exist: a secular and a religious one. Secular courts hear matters of public, civil and criminal law. Religious courts that exercise specialized jurisdiction are divided into shari’a courts, doctrinal courts, and spiritual courts. They hear personal status law cases only. Shari’a courts regulate disputes among Syrian Muslims, whereas doctrinal courts are empowered to guarantee the personal status decisions of members of the Druze cult. Spiritual courts settle personal status matters for Jewish, Christian and other non-Muslim groups. Decisions of all of the religious courts may be appealed to the canonical and spiritual divisions of the Court of Cassation.

2.5.2 Islamic Community

Islamic rules of personal status and domestic relations were first codified in the Ottoman law of family rights and continued to apply until the enactment of Syrian personal status laws. A compendium of personal status provisions was promulgated in 1953. According to its explanatory memorandum, the laws stem from five sources: (i.) the customary family laws, on which court rulings are based; (ii.) the Egyptian law modified to suit the local conventions; (iii.) Muhammad Qadri Pasha’s shari’a provisions on personal status questions; (iv.) an eclectic adoption by the legislative committee of

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1607 Al-marsum al-tashri’ [Parliamentary Decree] No. 133 of October 8, 1953; also United Nations Development Programme (UNDP), Programme on Governance in the Arab Region on Syria, http://www.pogar.org/ (search for “Syria;” then follow “UNDP-POGAR: Arab Countries” hyperlink); also DINA CHARIF FELLER, LA GARDE (HADANAH) EN DROIT MUSULMAN ET DANS LES DROITS ÉGYPTIEN, SYRIEN ET TUNISIEN 36 (Librairie Droz 1996).
1609 Marsum al-ra’is [Presidential Decree] No. 59 of September 17, 1953.
1610 Egyptian pasha who issued a code of personal status in 1875. For more detail Oussama Arabi, The Regimentation of the Subject, Madness in Islamic and Modern Arab Civil Laws, in STANDING TRIAL, LAW AND THE PERSON IN THE MODERN MIDDLE EAST 269 (Baudwin Dupret ed., Tauris 2004).
Analytical Representation

rulings under doctrines other than the Hanafi, and (v.) the personal status law draft by the first Damascus judge. In addition, Presidential Decree No. 59 of 1953 regulates matters such as marriage, divorce, parentage, custody, legal capacity, wills and inheritance.

The Sunni Islamic community as the predominant religious cult of the country enjoys a privileged legal position. Syria incorporated the Sunni Islamic ifta’ organization into its Ministry of Justice in 1953. No other religious community possesses equal legal recognition. Ifta’ refers to the Sunni mufti organization which gives religious opinions, inter alia, on behalf of personal status law queries sought by shari’a judges and private individuals. Moreover, the most senior mufti of the Syrian Arab Republic, the so-called Grand Mufti, has significant religious and political influence. He provides religious opinions not only to lower muftis, fatwa secretaries, and shaykhs, but also, and especially, to parliamentary commissions which are empowered to draft new legislation. The latter means that within the lawmaking process, the Grand Mufti may be consulted to vet whether a draft bill that touches aspects of Islamic personal status law is compliant with religious teachings. No equivalent check exists in respect to non-Sunni religious leaders. If the Grand Mufti finds that a particular draft bill violates Islam, however, he possesses no power to prevent it from becoming applica-

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1611 The Hanafi school is one of the four schools of jurisprudence within Sunni Islam.
1612 Marsum al-ra’is [Presidential Decree] No. 59 of September 17, 1953. The Decree was later amended by the Qanun [Act] No. 34 of December 31, in 1975 in respect to polygamy, dower, fostering, custody, maintenance and guardianship.
1613 Al-marsum al-tashri’ [Parliamentary Decree] No. 4 of June 15, 1953, art. 2.
1614 A mufti is a legal and religious expert who, in the Syrian Arab Republic, has the power to give legally non-binding recommendations in matters of Islamic jurisprudence.
1615 The Grand Mufti as the most senior mufti of the country is appointed by legal “Decree” (marsum) and chosen by cabinet from a list with three names which the Sunni Islamic waqf minister provides. Al-marsum al-tashri’ [Parliamentary Decree] No. 146 of October 23, 1967; in association with AL-DUSTUR AL-SURI [SYRIAN CONST.] ART. 119. The authority to dismiss the Grand Mufti lies within the powers of the Prime Minister, who in turn may be appointed and dismissed by the President. AL-DUSTUR AL-SURI [SYRIAN CONST.] ART. 95; also DIETER STURM, ZUR FUNKTION DES GROSSMUTFI IN DER SYRISCHEN ARABISCHEN REPUBLIK 60 (Halleische Beiträge zur Orientwissenschaft 4, 1982).
1616 ANNABELLE BOTTCHER, SYRISCHE RELIGIONSPOLITIK UNTER ASAD 52 (Freiburger Beiträge zu Entwicklung und Politik 1998).
1618 Interview with Georges Jabbour, former Member of the Syrian Parliament, in Damascus (Jan. 8, 2007).
ble law. Syria’s Grand Mufti is a chief advisor, but not a law “vetoter” or even lawmaker at parliamentary level.

2.5.3 Non-Muslims and the Druze Community

As mentioned earlier, in the times of the Umayyads the vanquished non-Muslim people were afforded protected status in return for a per capita tax. During four centuries of Ottoman rule, that initial recognition became more ample with the introduction of the millet system by those authorities granted jurisdictional powers over their members. Nonetheless, Islamic shari’a courts historically enjoyed the widest jurisdictional authority in matters of personal status law. Today, the millet system is no longer in effect. Article 25(3) of the Syrian Constitution stipulates: “The citizens are equal before the law in their rights and duties.” The government reports, “all citizens enjoy the same rights, without any discriminatory treatment on grounds of race, origin, language or religion.”

Seen in this light, Muslim and non-Muslim Syrian citizens have parity with each other. This also means that since the enactment of the Syrian Constitution it is unconstitutional for a Muslim citizen to claim a higher status than a non-Muslim citizen.

Article 307 of the Personal Status Act of 1949 holds that Christians, the Jewish and the Druze communities are governed by their own laws of personal status. Recognized religious communities enjoy official legal status. The jurisdictional capacity afforded by Islamic courts is, in its essence, no differ-

1619 Muhammad al-Habash states in this respect “[…] according to our constitution we have the power to create laws. No authority of Islamic leaders can do so. The Grand Mufti has no powers to say that this law is right or wrong. If we need to ask him on questions of religion it is our right. We respect the opinion of Islamic leaders. In this sense the tradition to create new laws is fully secular. We don’t need the Grand Mufti’s assent. Interview with Muhammad al-Habash, His Eminence Shaykh Muhammad al-Habash, Member of the Syrian Parliament, in Damascus (Jan. 15, 2007).


1622 Ignatius IV makes clear by stating that whether “[C]hristians or Muslims, we are individual citizens with equal rights and obligations.” Interview with Ignatius IV (Hazim), His Beatitude Patriarch of the Greek Orthodox Church of Antioch, in Damascus (Nov. 28, 2006).

1623 Qanun al-ahwal al-shakhsiyya [Personal Status Act], part 1, at 278.
ent from the capacity granted to non-Muslims and the Druze judicial bodies. Such communities are free to appoint their clergy, to serve as judges in their ecclesiastical courts, and to determine their internal court structure by virtue of their religious doctrines. Christian communities appoint local clergy who provide various religious services to their community according to the mandates of the patriarchs. For example, the personal status law of Catholic rites encompasses norms regulating: engagement; marriage; the rights of a child; adoption; custody of children; compensation due to invalid marriages; inheritance and wills; procedural rights and limitations; courts and tribunals. According to that law the patriarch and bishops possess the power to exercise judicial functions. However, most cases are decided by appointed judges known as judicial vicars.

The application of Christian, Jewish or Druze denominationally-dependent personal status laws is not limited to Syrian territory, but reaches beyond national borders to all its members. This means that personal status laws that are applicable in Syria are equally, or similarly, applicable in the Lebanon, Palestine, Jordan, and Israel. For this reason religious judges need not possess Syrian nationality, as their authority is limited to a specific religious region, but not a national boundary. This practice does not apply to candidates who seek an appointment in Syrian Islamic or secular courts. Such candidates are obliged to hold Syrian citizenship.

Religious leaders of minority communities, like patriarchs and other religious leaders, have a de facto capacity to propose new law within the ambit of the personal status laws of their community. Such legal initiatives enter through the Prime Ministry into Syria’s People’s Assembly.

1624 For a detailed analysis Dina Charif Feller, La Garde (HADANAH) EN DROIT MUSULMAN ET DANS LES DROIT ÉGYPTIEN, SYRIEN ET TUNISIEN 64 ff. (Imprimerie Chabloz 1995).


1627 Amendments to the Personal Status Law of the Catholic rites were proposed and received presidential assent in summer 2006. Archbishop Bedros Miratian reports: “As Catholic communities we are particularly glad to have seen all our propositions of ius proprium to be turned into ecclesiastical reality, and to become fully approved by the Syrian state.” Interview with Bedros Miratian, His Excellency Archbishop of the Armenian Catholic Eparchy of Aleppo, in Aleppo (Dec. 2, 2006). One such new provision included a change in the personal status laws of succession so that they reflected Catholic faith. Under applicable law a son received two-thirds
initiates a new law that applies to his religious community and is not inconsistent with the Syrian Constitution, it is a common political practice that it is accepted. Archbishop Bedros Miritian comments that such acts of parliament are to “guarantee and stabilize our social equilibrium.”1629 Although most if not all Syrian politicians are members of a specific religious community, or adhere to a specific faith, it is perceived as unusual and contrary to the Republic’s political ideals if parliamentarians lobby for their religious group in matters other than their own personal status laws.1630 It appears important to stress that religious communities in Syria, unlike in other Near Eastern countries, are not systematically represented in parliament by its members. In other words, there is no statutorily or constitutionally entrenched law that regulates the proportion of parliamentarians by means of their religious affiliation.1631

The personal status law-making capacity of religious minority groups is seen as a sign of recognition, and as a necessity to compromise and to preserve unity among the various groups. However, with regard to equality between religious communities, scholar George N. Sfeir notes critically: “While Non-Muslim communities continue to enjoy independence in legislating their own family laws and need only notify the state of any new legislation, the laws of the Muslim community, to which the overwhelming majority of

and a daughter one-third of, for example, a father’s estate at his death. The law was changed to the effect that both sons and daughters would inherit equal shares in their father’s estate. Id. at art. 180(1)(f).

Bishop Armash Nalbandian observes that “[O]nce such bill enters the Assembly there is often no debate on the subject matter in question. Political tradition holds that religious groups are allowed to regulate their personal status affairs by themselves.” Interview with Armash Nalbandian, His Excellency Bishop of the Armenian Diocese of Damascus, in Damascus (Nov. 29, 2006).

Interview with Bedros Miratian, His Excellency Archbishop of the Armenian Catholic Eparchy of Aleppo, in Aleppo (Dec. 2, 2006).

The National Isma’ili Council in response to the author’s question as to whether they needed to fight for their recognition in parliament: “We are citizens of the country we belong to, but we are not a political lobby group. We practice our faith within the constitution, but we do not push for reforms. That does not mean that an Isma’ili cannot be a politician or be otherwise politically engaged. He then is exercising this capacity as a private person, and not necessarily in the name of the Isma’ili religious community. Interview with the National Isma’ili Council of the Arab Syrian Republic, presided over by Naser Al Maghout, in al-Salamiyya (Dec. 1, 2006).

In fact, the law makes no difference between the electorate’s religious affiliation. Al-marsum al-tashri’ [Parliamentary Decree] No. 26 of April 14, 1973, art. 2.
Arabs belong, were caught up in the codification drive of the Ottoman and subsequently of the independent Arab states.1632

2.5.4 Structural Clash and Differences

2.5.4.1 Roots

The Syrian government respects, to a great but not complete extent, the internal affairs of religious communities by making available specific structural accommodations. As the Arab Republic has a predominantly religious population, that system seems to be a real blessing for most. Citizens enjoy a constitutionally protected right to bring their life into accordance with their community’s shared culture, tradition, and religion. What appears to be important is the ability to regulate the most intimate sphere of a person’s life in harmony with one’s faith. In Syrian society, it is the family in first place that determines a special sphere of social, cultural, and religious identity. Article 44(1) of the Syrian Constitution reflects that proposition by stipulating: “The family is the basic unit of society and shall be protected by the state.”1633 The provision seems to be key to the understanding and appreciation of the right to religious self-determination. It means that the family into which she or he is born gives a person their identity. In Syria the family appears to be everything. It plays a great, if not the greatest part in everyday life. Academic commentator Tove Stang Dahl observes that “[f]amily life determines people’s lot as individuals: whether they are on the whole happy or unhappy; whether each day is pleasant or not.”1634

The Syrian government has put it in the following way: “[...] the family constitutes the social unit from which individuals derive all their social and humanitarian values from childhood to old age and which plays the major role in the upbringing of future generations and the provision of the human resources which society requires.”1635 The Arab system favours the fusion of

1632 George N. Sfeir, Modernization of the Law in Arab States: An Investigation into Current Civil, Criminal, and Constitutional Law in the Arab World 55 (Austin & Winfield 1998).
the family and the community. The latter can be regarded as an “overgrown family” that provides a sound basis for the preservation of grassroots ethnic identity and customs of a given group. As a natural consequence, the family requires to be regulated by a body of law that is perfectly suited for its specific identity. As such the laws of personal status are nothing other than the laws of overgrown families. It is a common practice that families – which, in Syria unlike in Western societies, also includes the families of sisters, brothers, cousins and so forth – interact strongly and form a community. Sometimes these communities are blood-related; sometimes they are greater in number and extent including several hundred or thousand members, which do not necessarily have common ancestors.

Seen in this light, it is common sense that Syrian law regulates, for instance, marriage in a particular way that is religiously and community-approved, and not primarily as a secular private-law contractual obligation. The secular state recognizes marriage’s “inviolable and sacrosanct nature” by giving each and every religious community the opportunity to govern the status of marriage according to its divine law. This structural availability is the reason why, in Syria, there is no civil law of the land that would regulate such matters. Likewise, there is no secular state marriage registration office. As a cornerstone of the basic unity in society and its special nature, all marriages take place in religious ceremonies and are approved by a religious judge of the community concerned.

### 2.5.4.2 Clash of Laws

All religious ceremonies are exercised in line with the rules of a particular recognized religious cult. As long as women and men marry within their faiths, and no one converts from one religion to another religion, the personal status concept functions smoothly. It means that the personal status laws of one rite are not challenged by the personal status laws of another rite. However, where interfaith marriages take place it is inevitable that the faith of one partner clashes with the faith of the other. Similar conflicts arise when someone adopts a new religion. Systematic incompatibilities are exposed by comparing religious laws of one or more cults.

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1636 Kemal H. Karpat, *Studies on Ottoman Social and Political History: Selected Articles and Essays* 613 (Brill 2002).

For example, a separate set of personal status laws applies to the Druze community as distinct from other Muslim communities. Within the Muslim community a man is, under certain circumstances, permitted to marry up to four women. The Qur’an stipulates: “If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.” Conversely, the Druze community does not allow polygamy. Article 10 of the Laws of Personal Status of 1953 holds that “wedlock with more than one wife is null and void.”

Thus, if a Druze woman marries a Muslim man the question that arises is whether he is allowed to marry more women or not. Such an impasse unavoidably calls into question which of the two legal systems must prevail. Similar difficulties may occur with regard to the laws of inheritance. In Islam, succession to the estate of the deceased is regulated by the compulsory rules of the Qur’an. For example, if a father dies leaving behind one son and one daughter, the former will receive two-thirds of the total of the father’s estate, whereas the latter receives one-third. The Qur’an stipulates: “God decrees a will for the benefit of your children; the male gets twice the share of the female.” However, the Personal Status Law of the Catholic Rites holds, conversely, that both the son and daughter inherit equal shares in their father’s estate at his death. So if a Catholic woman changed her faith to Islam, a question could be whether she could still inherit half or only one-third of her father’s estate.

2.5.4.3 Two Solutions to One Problem

Syrian laws offer two solutions to tackle the incompatibilities arising out of personal status laws. The first solution is an answer to the question of which

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1638 Qur’an 4:3. It must be noted that in Syria, marriage with four women is more of an exception than a rule. Some scholars believe that Sura 4:3 implies that monogamy is still the best form of cohabitation. TOVE STANG DAHL, THE MUSLIM FAMILY: A STUDY OF WOMEN’S RIGHTS IN ISLAM 181 (Ronald Walford trans., Scandinavian University Press 1997). Moreover, a non-Muslim wife can stipulate in her marriage contract that her Muslim husband shall not take another wife and can retain to herself the right to terminate the marriage on her own. JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 84 (2nd, Graham & Trotman 1990).


1640 Qur’an, 4:11.

religion must predominate. The system thereby brings varying personal status laws into line with each other. The second solution is an alternative to those individuals who cannot come to terms with the first solution. Where a non-Muslim man desires to marry a Muslim woman, he is required to change his religion provided that he intends to create binding marital relations with his future wife.\textsuperscript{1642} The personal status laws of the Muslim community commence to apply to the husband who embraces Islam.\textsuperscript{1643} His rights and obligations with regard to the spiritual courts are no longer in effect.\textsuperscript{1644} However, if the husband refuses to convert to Islam, the judge should keep the spouses apart.\textsuperscript{1645} Positive Syrian law declares invalid the marriage of a Muslim woman to a non-Muslim man.\textsuperscript{1646} Conversion to Islam is necessary because it is the personal status law of the husband that is applicable in the circumstance of mixed marriages. This is also why no legal difficulties arise where a Muslim man marries a Christian or Jewish woman.\textsuperscript{1647} Both partners can retain their respective faiths. As for children of mixed marriages, “if one of the two spouses is Muslim, the child will follow the religion of the Muslim.”\textsuperscript{1648} Solution I. may be not satisfactory to some. It systematically intends to sort out all difficulties by making available the possibility to convert to one religion, and thereby introduce a common religious denominator. For the above-mentioned example of the Catholic woman who adopts Islam freely and willingly, this may constitute no real obstacle. She may readily accept that from the moment she embraces Islam, her brother gets twice the share of her


\textsuperscript{1643}\textit{Qanun al-ahwal al-shakhsiyya} [Personal Status Act] of 1949, rule 219, at 259; also Court of Cassation Case No. 189 of May 18, 1955.


\textsuperscript{1645}Id. at rule 212, p. 254.

\textsuperscript{1646}Id. at rule 207, p. 251. Moreover, scholars of shari‘a are generally unanimous on the point that a contract of marriage of a Muslim female with a polytheist male is not valid. \textit{Tanzil-ur-Rahman, A Code of Muslim Personal Law} 38 (Hamdard Academy 1978).

\textsuperscript{1647}The Qur’an sanctions such marriages by holding: “This day all good things are made lawful for you. The food of those who have received the Scripture […] and virtuous women of those who have received the Scripture before you, give them their marriage portion and live with them in honor; not in fornication, nor taking them in secret as concubines.” “It is permitted to marry (more than one) Kitābī woman […]” Quoted as in \textit{Burhan al-Din al-Farghani al-Marginani, Al-Hidaya} [The Guidance] at 483 (Imran Ahsan Khan NYazee trans., vol. 1, Amal Press 2006).

father’s estate, and that her right to equality under Christian inheritance law no longer applies. However, a non-Muslim man may not be so comfortable in changing his religion only because he intends to marry a Muslim woman. In some instances, varying personal status laws are irreconcilable with each other. Citizens may not be ready to accept the systematic consequences of solution I.

The Syrian state provides for an alternative. The Muslim woman and her non-Muslim partner are allowed to register their relationship with the public authorities. All Syrian citizens have a right to settle mutual rights and obligations by means of private law. At no time, however, is such a contractual relationship regarded as a valid religious marriage. Bishop Armash Nalbandian opines that “this is also the reason why this option is rather unpopular.” The possibility of such an “opt-out” means that the Syrian legal system accommodates those non-Muslim citizens who by their individual will cannot agree to embrace Islam. In spite of that it can still be argued that the Republic does not observe strict equality of laws and citizens’ rights. In other words, it is difficult to say that all Syrians are equally subject to the law, when there is the possibility that a non-Muslim man may be prevented from a divine marriage contract because of his faith. However, the legal and social significance of the difficulties that may arise out of interfaith relationships need not be exaggerated, in the view of Archbishop Bedros Miratian. He says that although “interfaith relationships are on the increase in recent years it is still not an everyday problem.” According to the same Archbishop, the great majority of people marry within their religious communities. In Syria there is no statistic available which would show the number of persons affected by such systematic incompatibilities. In order not to fall foul of the constitutional provisions pertaining to basic freedoms such as religion, expression and equality, the Syrian government discourages inter-faith relationships altogether.

### 2.5.5 Concluding Remarks

1649 Interview with Armash Nalbandian, His Excellency Bishop of the Armenian Diocese of Damascus, in Damascus (Nov. 29, 2006).

1650 In this regard it is necessary to mention the case of Mr. Rezekallah Hanush, who in order to become legally married, needed to convert to his wife’s (Muslim) faith. High Court Case No. 515 of May 5, 1999 quoted as in Nael Georges, Le droit des minorités: le cas des chrétiens en Orient arabe 323 (Université Grenoble II, Ph.D. dissertation) (on file with University Library 2010).

1651 Interview with Bedros Miratian, His Excellency Archbishop of the Armenian Catholic Eparchy of Aleppo, in Aleppo (Dec. 2, 2006).
The above mentioned contradictions in the Syrian legal system arise out of the circumstance that there are varying religious laws which are, in case of interfaith marriages and conversion, incompatible with each other. The reason for this is that they do not draw for their legitimacy on the same enabling source. In a religious country like Syria, conflicts are diminishable, but not completely inescapable. The two solutions mentioned have contributed to discontent among non-Muslim religious people. Bishop Antoine Odo criticizes that “where there are interfaith relationships, the faith of the majority prevails.” To the Bishop, there exists “no full religious freedom in Islam.” As a non-Muslim “you are always considered as a ‘free’ subject under the control of Islam, and not on the same level as Islam.” So although the hierarchical Ottoman millet system is abrogated, the Islamic doctrine – which demands non-Muslim men to embrace Islam in case of an interfaith marriage – bears a theological and socio-psychological undertone of inferiority that can be sensed even today.

A further restriction is presented by the fact that the main religious group, the Sunni Islamic community, enjoys limited collective autonomy despite its establishment. This is because the Sunni personal status concept became implemented into the Ifta’ organization and Personal Status Act. Moreover, the Sunni religious leader – the Grand Mufti of the Syrian Arab Republic – is controlled by the Waqf Minister, the Prime Minister, as well as the President. The Sunni community has no authority to appoint its leader devoid of governmental influence. The Grand Mufti is a person chosen by leading government officials. Scholars believe that he cannot win his appointment if he is anti-government, or anti-system. The Grand Mufti’s functions (especially with regard to the vetting of new parliamentary Bills) are all the more to be seen as an important moral instance between the ‘Alawi dominated government, and Sunni Islam.

George N. Sfeir, Modernization of the Law in Arab States: An Investigation into Current Civil, Criminal and Constitutional Law in the Arab World 81 (Austin & Winfield 1998).

Interview with Antoine Odo, His Excellency Chaldean Bishop of Aleppo and neighbouring Chaldean Diocese, in Aleppo (Dec. 2, 2006).

Id.

Interview with Jørgen Nielsen, Professor in Islamic Studies in the Faculty of Theology of the University of Copenhagen, in Damascus (Jan. 13, 2007); Commentator Annabelle Böttcher suggests similarly that for the nomination of a Grand Mufti, his loyalty to the ruling government is more important than his professional competences. Annabelle Böttcher, Syrische Religionspolitik unter Asad 47 (Freiburger Beiträge zu Entwicklung und Politik 1998).
2.6 Public Endowments

2.6.1 Introduction

The second preponderant element of collective religious self-determination under Article 35 of the Syrian Constitution is the ability to manage and control public waqf. Making available the waqf institution is not so much a new innovation of the Syrian state, but all the more a continuation of an ancient practice which has its roots in Byzantine and Sasanian trust law.\(^{1656}\) As mentioned above, mainly the Umayyads and the Ottomans developed what can nowadays be seen as constitutional custom. For historians the waqf institution provided the foundation for much of what is considered Islamic civilization.\(^{1657}\) Prior to referring to Syria’s particular arrangement of waqf, it is necessary to state what waqf generally means in law.

2.6.2 Nature and Function of Public Waqf in General

The institution of waqf refers to an inalienable trust, organized for religious purposes, for the good of the Islamic community.\(^ {1658}\) It consists of property \((mawquf)\) that is endowed to a particular pious purpose for eternity. The institution’s untouchability constitutes one of the basic features of the endowment tradition.\(^ {1659}\) The word “waqf” means literally “dead hand” which refers to the idea that this special kind of property is decoupled from the sphere of commercial transactions, that of purchase and sale, and caused to

\(^{1656}\) E.g. Peter C. Hennigan points to the speculation that the concept of \(waqf\) may at least partially lie in foreign origins such as Byzantine and Persian institutions. Peter C. Hennigan, The Birth of a Legal Institution: The Foundation of the Waqf in Third-Century A.H. Hanafi Legal Discourse 52 ff. (Brill 2003).

\(^{1657}\) Peter C. Hennigan, The Birth of a Legal Institution: The Foundation of the Waqf in Third-Century A.H. Hanafi Legal Discourse xiii (Brill 2004); moreover, Rani Carolyn Deguilhem-Schoem opines that “[o]ne cannot understand the functioning of Islamic society without considering the major role played by \(waqf\)” Deguilhem-Schoem Randi Carolyn, History of Waqf and Cases Studies from Damascus in Late Ottoman and French Mandatory Times 65 (New York University Ph.D. dissertation) (on file with University Library 1986).


\(^{1659}\) Id. at 199.
stop and stand still. In forming waqf the settler or founder (waqif) makes the principal (‘asl) of a revenue-producing property inalienable in perpetuity and assigns the “usufruct, res sacrae, or yields” (manfa’a) of the property to a specified purpose. Waqf revenues that go to religious, educational or charitable institutions and projects are likely to be in compliance with belief. Islamic law requires that the remainder interest of public endowments be a charitable purpose. Trust income is primarily generated through lease of property real. Property is placed in possession (nominal ownership) of a trustee, or fiduciary (wali or mutawalli) who administers the trust for the benefit of the third party. Waqf usually takes the form of a “dedication deed” (waqfiyya). It cannot be utilized for purposes displeasing to God, as it must necessarily acquire merit in the sight of God and reward in the next world. Waqf is a symbol of piety because the endowment’s founder secures his salvation in the hereafter. Moreover, waqf is in many instances donated to enhance one’s reputation and social status during one’s lifetime.

2.6.3 The Syrian Waqf in Particular


1663 ANNETTE KAISER, ISLAMISCHE STIFTUNGEN IN WIRTSCHAFT UND GESSELLSCHAFT SYRIENS VOM 16. BIS 18. JAHRHUNDERT 23 (Klaus Schwarz Verlag 1999).

1664 GERHARD CONRAD, DIE QUDAT DIMASK UND DER MADHAB AL-AUZA‘I: MATERIALEN ZUR SYRIISCHEN RECHTSGESCHICHTE 756 (Beiruter Texte und Studien 1994).


2.6.3.1 Precursors

Since ancient times, divinely sanctioned waqf property was placed into the hands of religious leaders in whom confidence was placed to administer and protect waqf wealth. For example, the Islamic ‘ulama’, Christian patriarch or bishop were responsible for the preservation of moral and spiritual values, and their supervision and protection against corrupting influences. With the advent of the Tanzimat reforms, the Ottomans established a first waqf Ministry in 1840, which was later incorporated into the Treasury in 1875. In 1921 the French occupying forces forged ahead and reformed public waqf a second time by establishing a High Council of Awqaf, the so-called Contrôle Général des Wakfs Musulmans. This new state institution was regarded as a control and advisory council composed of notable Sunni Islamic scholars (‘ulama’) and other Sunni Muslim leaders. The French High Commissioner was, however, entrusted with the final authority over the High Council of Awqaf. Non-Muslim awqaf, those of the Druze, Christians, and Jews, were not included under the program of the mandate reforms, but continued to be administered by the leaders of the respective religious community.

2.6.3.2 Islamic Waqf

In 1947 the Syrian waqf administration, headed by the Prime Minister, was formed. Inspired by the ideals of Mustafa Kemal Atatürk, in 1949 the Syrian political leadership disempowered parts of the Sunni Islamic establishment in order to pave the way for a full-out secular system. For the

1668 Id. at 68.
1669 JOHN R. BARNES, AN INTRODUCTION TO RELIGIOUS FOUNDATIONS IN THE OTTOMAN EMPIRE 156 (Brill 1986). To some Muslim scholars this transfer of waqf from the private into the public legal sphere undermined Islamic society. Deguilhem-Schoem Randi Carolyn, History of Waqf and Cases Studies from Damascus in Late Ottoman and French Mandatory Times 133 (New York University Ph.D. dissertation) (on file with University Library 1986).
1671 Deguilhem-Schoem Randi Carolyn, History of Waqf and Cases Studies from Damascus in Late Ottoman and French Mandatory Times 135 (New York University Ph.D. dissertation) (on file with University Library 1986).
1673 ANNABELLE BOTTCHER, SYRISCHE RELIGIONSPOLITIK UNTER ASAD 19 (Freiburger
first time in Syrian history, the members of the High Council of Awqaf were nominated and not voted for.\textsuperscript{1674} The law was later reversed, as in the year 1961, and a new statutory source came into effect.\textsuperscript{1675} Parts of the Council’s initial authority\textsuperscript{1676} were definitely curtailed in 1965.\textsuperscript{1677} The competences to nominate leaders and teachers of mosques as well as religious administrators were eventually transferred to the powers of the Syrian Prime Minister in 1966.\textsuperscript{1678}

In spite of that, notable Sunni Islamic leaders retained their influence in the waqf administration and Ministry in that they were given important offices.\textsuperscript{1679} Today, the competences of the waqf Ministry encompass, inter alia: the administration of waqf wealth (which includes much of Syria’s property);\textsuperscript{1680} mufti organization;\textsuperscript{1681} administration of mosques and shari’a schools; control of charitable state functions; and the preparation of parliamentary bills.\textsuperscript{1682} The waqf administration as part of the waqf Ministry,\textsuperscript{1683} is composed half of secular\textsuperscript{1684} and half of religious personnel.\textsuperscript{1685} Its minister

\textsuperscript{1674} Al-marsum al-tashri’ [Parliamentary Decree] No. 127 of June 11, 1949, art. 1.
\textsuperscript{1675} Id. at No. 204 of December 11, 1961.
\textsuperscript{1676} Which included, \textit{inter alia}, the vetting of parliamentary bills, and budgets of the waqf administration, as well as legal disputes, the nomination of leaders and teachers of mosques, and religious administrators. Al-marsum al-tashri’ [Parliamentary Decree] No. 204 of December 11, 1961, art. 24 quoted as in Al-jarida al-rasmiyya [Official Legal Gazette] Nr. 20, 1961, at 2705 ff.
\textsuperscript{1678} Id. at No. 24 of April 13, 1966.
\textsuperscript{1679} Annabelle Böttcher speaks thereby of a “conciliatory gesture” (\textit{versöhnliche Geste}) of the Assad regime towards the majority Sunni population. ANNABELLE BÖTTCHER, SYRISCHE RELIGIONSPOLITIK UNTER ASAD 22 (Freiburger Beiträge zu Entwicklung und Politik 1998).
\textsuperscript{1680} Precise figures are undisclosed by the Syrian authorities.
\textsuperscript{1681} In Syria a mufti is a legal and religious expert (\textit{fuqih and ‘alim}) who has the power to give legally non-binding recommendations (sing. \textit{fatwa}, pl. \textit{fatawa}) in matters of Islamic law. Such experts respond in writing to religious and legal queries. A mufti must observe strict equality between the persons who seek his recommendations. Queries which are either sought by a shari’a judge or private individuals regard the personal status laws of the Muslim community only. In the Arab Republic fatawa are given neither to public authorities nor to individual civil servants, nor do fatawa have direct effect on the Christian communities. Interview with Georges Jabbour, former Member of the Syrian Parliament, in Damascus (Jan. 8, 2007).
\textsuperscript{1682} Al-marsum al-tashri’ [Parliamentary Decree] No. 204 of December 11, 1961, art. 2.
\textsuperscript{1683} Id. at art. 5.
\textsuperscript{1684} What is meant by secular is that they do not have an official religious function. Interview with Muhammad al-Habash, His Eminence Shaykh Muhammad al-Habash, Member of the Syrian Parliament, in Damascus (Jan. 15, 2007).
is nominated by the President of the Syrian Arab Republic. Since the establishment of the Ministry, waqf ministers have always been adherents of Sunni Islam.

### 2.6.3.3 Non-Muslim Waqf

Non-Muslim waqf – those of the Druze, Christians, and Jews – were not included under the French programme and mandate reforms. Non-Muslim waqf continue to be administered by the leaders of the respective religious community, but is overseen by the waqf Ministry. Act No. 31 of 2006 contains an entire body of legal provisions regulating the waqf institution of the Catholic rites. Similar Acts were adopted for all non-Muslim waqf institutions. Many Christian or Jewish founders of pious trusts donated the revenues to their non-Muslim institutions. This kind of public waqf pays for the construction and maintenance of churches, synagogues, schools, or the salaries of their personnel. Waqf revenues likewise pay for religious orders and other religious constructions and buildings such as cemeteries and tombs. Waqf funds are used for libraries, translation centres, and students’ scholarships. Orphanages, needs of widows, the blind or other handicapped or poor people are all cared for with waqf money.

### 2.6.4 Concluding Remarks

The revenues of waqf which support religious communities are seen as a just return to society from those who live within it and enjoy its structures and organization. Today, waqf acts as a welfare fund for many people bereft of finances. Its objective is to provide a means to have material possessions serve the interest of the religious community as a whole, both in a spiritual and a material sense. In many ways, waqf is a positive institution which has served as a cohesive factor in society. The hermeneutical legitimacy underlying the formation of waqf is the idea of alms-giving or dedicating objects to charitable purposes. Muslim and non-Muslim religious communities incor-

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1686 *Al-marsum al-tashri*[ Parliamentary Decree] No. 204 of December 11, 1961, art. 3.
1687 Interview with Georges Jabour, former Member of the Syrian Parliament, in Damascus (Jan. 8, 2007).
porate into specific religiously and denominationally-dependent statutory forms. The Syrian state especially respects the right of non-Muslim religious communities to collective religious self-determination. Christian and Jewish organizations are given a wide scope of autonomy. They are free to govern their waqf money devoid of state interference. Conversely, the right to autonomy of the Sunni Islamic community is somewhat diminished in that the High Council of Awqaf is required to share its competences with the appointed (secular) government. Finally, because of its religious personnel, Syria’s waqf Ministry must not be regarded as a fully secular government department.
2.7 Adoption, Change, and Renunciation of Religion

2.7.1 Introduction

Syrians are free to engage or refrain from engaging in belief or religious observance in any manner other than is prohibited by law. Article 35(1) of the Syrian constitution holds that: “Freedom of faith is guaranteed […].” The provision includes the freedom to retain or chose one’s religion, or to replace the current religion with another, or to adopt atheistic views. There is no official legal punishment under Syrian law for apostasy of Islam, or any other religion. Islam unequivocally affirms the right of each individual to freedom of thought and religion. The late Grand Mufti Ahmad Kuftaro stated that the Prophet Muhammad and his close followers built “a society based on love, leniency, justice and brotherhood.” The Qur’an commands: “Let there be no compulsion in religion.” Kuftaro opines that Islam insists that all people, not just Muslims, enjoy freedom of religion and worship. Article 35(2) of the Syrian Constitution stipulates that “the state guarantees the freedom to hold any religious rites […],” as long as “they [the apostates] do not disturb public order.” As far as can be established, there is no Syrian case law that would define the prohibition to “disturb public order.” The provision is interpreted by scholarly means in the sense that a person who wishes to convert is free to do so as long as such activity is “made in private.” The meaning of the words “in private” in association with the requirement not to “disturb public order” need to be looked at from

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1690 Al-Dustur Al-Suri [Syrian Const.] Art. 35(1).
1691 E.g. Shaykh Muhammad al-Habash teaches “God is one, but his names are many; Reality is one, but its ways are many; Spirituality is one but religions are many; Hearts are many but love is one.” Interview with Muhammad al-Habash, His Eminence Shaykh Muhammad al-Habash, Member of the Syrian Parliament, in Damascus (Jan. 15, 2007).
1693 Qur’an, 2:256.
1695 Emphasis in brackets added by the author.
1696 Justice Heitham Maleh states “There is national belief that if you want to change your belief there is no problem. This is the same case with drinking alcohol for example. As long as you do it privately anyone is free to do it.” Interview with Haitham Maleh, Former Judge and Attorney at Law, in Damascus (Jan. 24, 2007).
two varying angles: converting from a specific Islamic cult to another cult, or none; and vice versa.

2.7.2 Conversion Away “from” an Islamic Cult

A Muslim is disallowed by virtue of Islamic jurisprudence to challenge society. Former Judge Haitham Maleh comments, “any Syrian Muslim is allowed to change his religion provided that conversion is exercised behind closed doors and without affecting neighbours.” Judge Maleh reiterates more specifically, “an effect must not even be felt by the closest family members.” This can be construed to mean that in Syria the most intimate sphere of a person’s freedom is inviolable. However, whenever a person’s conscience is transferred into acts of belief, including all sorts of expressions, that right is limited. An apostate from an Islamic cult has no right to speak about or act upon her or his new belief. The word “private” means the forum internum of a person. This interpretation approach is also reflected, for instance, in the general inability to change a Muslim’s birth certificate or other personal documents. Moreover, it is a generally accepted practice that there are no religious ceremonies for such personal, highly intimate events. As a matter of fact, no Syrian Muslim can officially change her or his religion.

The first and foremost reason why Syrian Muslims cannot change their religion is not the passive role of the state, but Syrian society. Father Paulo comments “freedom of religion is virtually unthinkable with regard to the cultural role religion plays in everyday Syrian society.” He opines that the “replacing of one’s current religion would not only mean the complete loss of one’s social ties, including one’s own family, friends, and acquaintances, but maybe also professional position.” From this perspective there are no legal but a fortiori social sanctions. Islamic scholar Jørgen S. Nielsen says in the same regard “the state obviously discourages it because it simply rocks

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1697 For a full-fledged analysis of the topic ABDULLAH SAEED & HASSAN SAEED, FREEDOM OF RELIGION, APOTASY AND ISLAM 87 ff. (Ashgate Publishing Ltd. 2004).
1698 Interview with Haitham Maleh, Former Judge and Attorney at Law, in Damascus (Jan. 24, 2007).
1699 Id.
1700 Interview with Armash Nalbandian, His Excellency Bishop of the Armenian Diocese of Damascus, in Damascus (Nov. 29, 2006).
1701 Interview with Paolo Dell’Oglio, Jesuite Father, Deir Mar Mousa (Nov. 25 2006).
1702 Id.
However, the desire to adopt a new religion is a relatively rare phenomenon. Father Paulo believes that “there are only a few such cases.”

In Syria the often-cited Hadith Sahih of al-Bukhari is of no direct legal effect. So the provision that demands, “If someone changes the religion you have to kill him” is not incorporated into the Syrian Penal Code of 1949. Judge Maleh argues that the idea of Sahih of al-Bukhari in 9:57 was “to protect the Islamic society from Muslims who change their religion and start to work as enemies against Islam.” Shaykh al-Habash muses similarly “maybe Prophet Muhammad mentioned it for someone who changed his religion and began to fight as an enemy against Islam at that moment in history.” Al-Habash cannot accept it as tradition that generally applies to all people changing from one religion to another, even in the case of Islam. To him, this tradition is not part of the precious Qur’an, but “is a statement made by Prophet Muhammad and was later narrated by the people.” Finally, Shaykh al-Habash emphasizes, “ninety-nine percent of all Syrian Muslims believe that it is forbidden to use force against others.”

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1703 Interview with Jørgen S. Nielsen, Professor of Islamic Studies and Director, Centre for the Study of Islam and Christian-Muslim Relations, University of Birmingham, in Damascus (Jan. 13, 2007).

1704 Interview with Paolo Dell’Oglio, Jesuit Father, Deir Mar Mousa (Nov. 25 2006).

1705 Muhammad’s teachings are written down in what is called hadith. The hadith is a record of Muhammad’s words and deeds according to his wives, relatives, and companions. Next to the Qur’an, it is considered as the most important part of Islamic jurisprudence. Interview with Muhammad al-Habash, His Eminence Shaykh Muhammad al-Habash, Member of the Syrian Parliament, in Damascus (Jan. 15, 2007).

1706 Sahih of al-Bukhari, 9:57.


1708 Interview with Muhammad al-Habash, His Eminence Shaykh Muhammad al-Habash, Member of the Syrian Parliament, in Damascus (Jan. 15, 2007). Tribes which in the sixth century CE did not convert to Islam, remained hostile to the Prophet and Islam, and used any available means to inflict maximum harm on the Muslim community. These circumstances are important in any understanding of developments in the area of freedom of religion. ABDULLAH SAEED & HASSAN SAEED, FREEDOM OF RELIGION, APOSTASY AND ISLAM 20 (Ashgate Publishing Ltd. 2004).

1709 Interview with Muhammad al-Habash, His Eminence Shaykh Muhammad al-Habash, Member of the Syrian Parliament, in Damascus (Jan. 15, 2007).

1710 Shaykh al-Habash believes that in today’s Syrian Sunni Islamic society one can find three kind of interpretations of the named Hadith; namely a: conservative (ninety-four percent of all Syrians), reformist (five percent), and radical one (one percent). Interestingly, it is the reformist approach, which appears to predominate
2.7.3 Conversion “to” an Islamic Cult

Conversion to an Islamic cult is similarly regarded as private affair with one significant difference. Rule No. 212 of the Personal Status Act of 1953 holds that when a Muslim woman marries a non-Muslim man, Islam is offered to the husband. Moreover, the same rule reads, if he becomes Muslim his change in faith is written down in their marriage contract. But if he declines, the judge should keep them apart. In cases other than interfaith relationships, the act of conversion to Islam is not state institutionalized. Moreover, it is prohibited by Islamic fatwa to change religion once a person has converted to Islam. Conversion from a Christian cult to another Christian cult or Islam is also problematic. Negative implications are felt on one’s social ties including relations with family, friends and acquaintances. Patriarch

in today’s applicable law. Shaykh al-Habash says “Conservatives believe that we do not need ijtihad [Islamic concept that allows flexibility in interpretation], they believe that we have to follow our holy texts, and that we do not need new ideas, or new answers, as the old ones are sufficient.” Moreover, “conservatives believe that there is only one religion, there is only one way to God; and there is only one true religion.” They believe that “everyone should by himself convert to Islam because other religions are false. They also find that to convert to Islam means to find a way to God.” However, “that does not mean that the conservative approach has any desire to use force against others. On the other side, “conservatives believe that a Muslim is forbidden to change to another religion.” To them “if you desire to change your religion there is a responsibility to kill you.” Conversely, “Reformers find that it is not enough to believe in holy texts. We need to think newly all the time over and to find answers. There is a need of ijtihad and modernity. This is the modern understanding of Islam. Reformers think that there is more than one true religion. There is more than one true way to God. Reformers find it not necessary that all people convert to Islam. We believe that there is more than one way to God. We struggle against any kind of monopolies, monopoly of god, monopoly of the life thereafter, monopoly of reality, monopoly of religion.” And, than there are also the radicals. “The problem with the radicals lies in their radical position towards apostasy. Radicals believe that we Muslims have a responsibility to use force against converts. They also hold that unbelievers must embrace Islam, or pay per capita poll tax levied on non-believers, or else Muslims have to wage war against unbelievers.” Id.

1711 The Act refers directly to Quadri Pasha’s Article No. 126 quoted as in Qanun al-ahwal al-shakhsiyya [Personal Status Act] of 1949, rule 212.

1712 Id.

Ignatius IV expresses his aversion to community members who adopt the faith of another Christian rite, by stating: "There are new sects coming from Europe and America to Syria. As long as they are of Christian faith they are subject to few limitations. From the Greek-Orthodox point of view we dislike them, because not only are they involved in missionary work, but divide us as a Christian community. We are fully against any division, we want to stay visible. Our belief is that Jesus comes from Bethlehem, and not from London or New York."  

2.7.4 Concluding Remarks

In interpreting Syria’s laws and social circumstances, the inference can be drawn that conversion may be tolerated, but that there is nothing resembling encouragement of the exercise of a person’s right to self-determination. Religious rivals, which compete with each other for new adherents are particularly unwelcome in the Republic. The state, by its omission to facilitate adoption, change, or renunciation of religion, implicitly protects the unity of religious communities. The individual wish – however rare it may be – to convert and live according to new beliefs is to be considered less important than the protection of societal cohesion. The thoughtful observer respects that, in Syria, justice entails that collectivism takes priority over individualism in case of a clash. It is nonetheless a matter of fact that individual converts are deterred from acting according to their new beliefs. From a Western point of view, religious freedom is emasculated because there is no right to express and practise one’s religious belief freely. Regardless of that, an irreducible core of individual self-determination exists in Syria, namely, the inward exercise to think, to change an opinion, or conviction. This most basic freedom cannot be made subject to any limitation arising out of the Syrian Constitution.

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1714 Interview with Ignatius IV (Hazim), His Beatitude Patriarch of the Greek Orthodox Church of Antioch, in Damascus (Nov. 28, 2006).
3. The Three Models Compared and Contrasted

Syria’s legal architecture turns the country into an interesting subject for the study of comparative law and produces opportunities for academic insight. The above analysis has demonstrated that the safeguarding of varying religious personal status laws alongside a secular law system may trigger two kinds of problems: conflicts between religious laws and secular laws of the land; and systematic incompatibilities between religious laws. The above account has taught that religiously dependent personal status rules preordain that people do not mix; that they live and interact in homogenous communities. For most of Syria, the multi-religious personal status law system appears to be a blessing because it allows the pious nation to foster an essential part of religious virtue.

In Switzerland and the United States, social realities are different and so is the law. In those nations most citizens live and work together with people of several nationalities, cultures, and belief-systems. Many cohabit, marry, divorce, raise children, and die outside or inside a religiously determined community. It is a common reality for citizens to change their denomination or adopt new religions. And it is these societal factors that explain why most Swiss and Americans treasure the secular law system as a reasonable compromise. Seen in this light, it is anything but a surprise that appeals to reintroduce religious personal status systems into Swiss and American society face fierce opposition. People fear, inter alia, that religious laws could tear their social ties apart and that, as a consequence of this, they could lose the liberty to connect, interact, and establish family relations with persons adhering to any other belief-system or none.

It might be interesting to state that Switzerland abrogated its religious personal status system in 1875 because of the common understanding that such matters should no longer be religious, but a fortiori civil in nature. Ulrich Lampert, Kirche und Staat in der Schweiz 436 (Bd. 2, Rütschi und Egloff 1938).

But research is still needed in order to evaluate whether there are other ways in which religion and civil society can be accommodated. It might no longer be necessary to divorce religious standpoints so rigorously from liberal contractualist views; they might even reinforce one another. For example, the possibility exists that the Islamic shari’a or Catholic Canons (and their interpretations) are applied in complementary and consolidating manner and form. Both belief-systems regulate virtually every aspect of an adherent’s life. As long as these rules do not clash with secular laws, there is room for their application. Adherents enjoy limited freedoms to bring their lives into accord with their distinct understanding of justice. This liberty can include the creation (or maintenance) of private tribunals for the decision
Similar considerations can be weighed with regard to the organization of religious property. In Switzerland and the United States, no immediate equivalent exists to the Syrian waqf form of institutional organization. Waqf developed independently of the Roman and Anglo-Saxon legal traditions. There are still striking similarities between Western and Near Eastern legal forms of incorporation. Both the Swiss foundation and American charitable trustee corporation share with the waqf organization that their objective is the improvement of humankind. Adjectives such as philanthropic, eleemosynary, charitable, and benevolent can be used to describe the nature of all three legal concepts. Waqf may be established only for a purpose recognized as laudable by religion and characterized by perpetuity. The primary difference from Western foundations and charities is that waqf remains always under religious sanction. In Muslim belief, the waqf institution is in unity with the mundane and spiritual powers and presents a social responsibility system with a religious significance. On the other hand, foundations and charitable trustee corporations may but need not necessarily have a religious objective. A shared characteristic is that property can be endowed to a particular pious purpose for eternity, and that its usufruct can be used to pay for the activities of a religious community. In this view, all three legal systems make specific corporative forms available so that religious groups can organize and administer their property adequately. The introduction of foundations or charities in the Near East, or the adoption of the waqf system in the West, is not required in order that people are free to determine their identity within the greater social system. This is because these structural forms already available provide ample liberties in religious organization, that is to say, they are readily adaptable to specific religious needs.

In any case, there are several technical questions which would have to be answered first before such policy steps could ever be taken. For example: would the waqf concept conflict with the concept of free market economy? Even if waqf property can under certain circumstances be brought back into the sphere of commercial transactions, is the shari’a-conforming “exchange” (istibdal) concept sufficiently flexible as to fit Western freedom of property standards? Conversely, as with regard to a Near Eastern system, the question arises as to whether civil forms of foundations or charities are in accordance with basic legal principles and concepts, and with Islamic jurisprudence especially.

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Turning to the individual freedom to adopt, change, or renounce a religion, the Syrian system is once again very different from that found in Switzerland or the United States. Although the Republic grants de minimis rights to individual religious selfhood, in that the state does not interfere with religious choice or the replacement of one’s current religion with another, individual rights are more virtual than concrete and real. A person who wishes to convert is free to do so as long as such an activity is exercised internally and is therefore of spiritual nature only. There is no right to manifest one’s individual belief. In other words, Syrians possess very limited or no rights to enjoy practices of worship, use of ritual formulae and objects, and the observance of holidays and days of rest other than those of officially recognized religious communities. As for the Arab Republic, a dividing line must be drawn between individual exercise as part and parcel of an established religion, and different practices expressing a person’s sincere, but highly individual conviction.

Conversely, in Switzerland and the United States the right to freedom of belief and conscience is primarily couched as an individual rather than a collective right. All citizens are equally free to think upon, as well as to manifest and profess their convictions. There exists absolutely no justification for limiting the very essence of the right to free exercise. At the heart and core of the concept lies the idea that no one must be coerced into a distinct belief, even by having grown up in a specific community. The Swiss and US Constitutions protect people’s freedom to choose a religion or none, and to live according to it. It appears that Swiss and American law reflects the conviction that citizens are neither undifferentiated societal subjects living in spiritually self-sufficient communities, nor that they are alienated, free-floating society members. Rather, it expects that people enjoy communal attachments, but those loyalties stretch to more than one particular community, and that their interactions may change over time. In contrast, Syrian law mirrors the expectation or the moral attitude that adherents will identify with only one community for their entire life – that is the religious community (as part of an overgrown family) into which they are born. The law invariably treats official religious communities as a positive human good, and is as such fully responsible for promoting the good of their members.
III. METHODOLOGICAL REPRESENTATION
1. Switzerland

1.1 General Introduction and Overview

Swiss courts apply a three-stage substantive legal standard for determining whether a particular governmental activity has unconstitutionally infringed the right to freedom of belief and conscience. This may be explained and illustrated through a simple flow chart, as shown in Figure 1.1 (below). The scope of the right to religious freedom can be divided into an outer, ample sphere and an inner, most basic core. At letter A. of Stage I., judges ask first whether the issue contested is within the ample religious sphere of the rights protected under Article 15 of the Federal Constitution. Letter B. means that if government impinges on the concept’s most basic and inviolable aspects, the point has been reached at which the judges’ scrutiny must come to an end. This is because the so-called “irreducible core” (Kerngehalt) of religious freedom cannot justifiably be limited. As illustrated on the right-hand calculation of the first stage, if either A. or B. is satisfied, judges continue, in Stage II., to evaluate whether the statute, regulation, ordinance, actual activity or omission in question interferes with the rights protected under Article 15.\textsuperscript{1719} When this prerequisite is given, courts devote themselves, in the third and last stage of review, to the question of whether the contested governmental interference can reasonably be justified.

Constitutional scholar René Rhinow emphasizes that only the third stage of Swiss constitutional review addresses the actual legitimacy of a particular interference with fundamental rights.\textsuperscript{1720} The basic standard could only be achieved in piecemeal fashion by way of judicial practice under the former 1874 Federal Constitution.\textsuperscript{1721} The constitutional Total Revision of 1999 did not bring fundamental change to the long-standing mechanics applied by Swiss courts whenever they were called upon to decide religious-freedom

\textsuperscript{1719} Walter Haller et al., Allgemeines Staatsrecht 283 (4th edn, Helbing Lichtenhahn 2008).
\textsuperscript{1720} René Rhinow, Grundzüge des Schweizerischen Verfassungsrecht 201 (Helbing & Lichtenhahn 2003).
\textsuperscript{1721} Although actual case law on religious freedom did not emerge after World War II. The differentiation between the scope of a right and its justifiable limitations is much older, dating back to 1875, as developed in Graf, BGE I I 98, E. 2., p. 99.
cases. What the amendment did, however, was to entrench already existing prerequisites and tests by having them directly written into Article 36 of the Federal Constitution. The basic provision now lists legal prescription, public interest or the protection of the fundamental rights of others, and the principle of proportionality as express substantive-law requirements that need to be satisfied before religious-freedom interests can legitimately be curbed.

In this sense, letter A. of Stage III. shows that the courts ask themselves whether an alleged interference is based on law. Restrictions on religious-freedom rights must comply with the rule of law by satisfying a sufficient level of foreseeability and degree of formality. Then, letter B. stands for the fact that courts must also question whether a public interest or fundamental right of third parties is affected under the specific circumstances of the case. This objective component can take various forms, such as the interest to protect people from breaches of religious peace, the necessity for the state to be neutral, or exceptions arising out of the requirement to render civic duties, and to be religiously loyal. Once courts come to the conclusion that at least one of these interests is satisfied, they proceed to letter C. by balancing public and third-party interests against religious ones.

It is worth noting that religious persons may be likely to have less confidence in this utilitarian search for proportionality than secular courts do. Not only is a devout person apt to disagree with the secular judge that a certain restriction of the community's religious autonomy is reasonably justifiable, but she or he may well argue that the criterion to which the government is appealing is not a distinctively reasonable one. Nevertheless, to this day, Swiss secular courts apply varying utility-based tests in order to establish whether there is sufficient legitimacy for restricting rights to individual, collective, or corporative religious freedom. In this view, a religious liberty claim is disproportionate if: public interests are predominant; or public interests are pressing and weighty; or it crosses the boundary of criminal law. As all of this may sound far more complex than it actually is, we will now continue to explore these methodological stages more closely by looking at each of them separately.

[here goes the chart called: “Figure 1. – Swiss Religious Freedom Review Standard”]

1.2 Scope of the Right

1.2.1 Ample Sphere

Case law has developed the concept by which the scope of freedom of belief and conscience comprises an irreducible core as well as a more ample sphere. A right that touches the ample sphere can justifiably be limited, whereas a right that impinges on the irreducible core is absolute. As demonstrated in the “Analytical” part of this thesis, almost every judicial analysis on the scope of religious freedom ordinarily starts by taking the express provisions under Article 15 of the Federal Constitution into consideration. An exception to this approach might be excusals for religious days and times of rest. In the circumstance of governmental or private employees, Swiss courts no longer need to take direct recourse from Article 15 since provisions of the 1964 Federal Act on Work in Industry, Crafts and Commerce have substituted the highly abstract construction of religious-freedom law in these matters.\(^{1723}\)

In most other cases it is Article 15 that constitutes the basis for constitutional review. The sphere of religious-freedom interests might be exceedingly ample since individuals and groups vary so widely in their views. There are belief-systems that regulate virtually every aspect of a person’s life. Most human behaviour can be given a spiritual dimension. For Christians, “the righteous will live by faith,”\(^{1724}\) “everything that does not come from faith is sin,”\(^{1725}\) and “whether you eat or drink or whatever you do, do it for the glory of God.”\(^{1726}\) On this view there is no activity which is not generated by one’s obedience (or disobedience) to God. The religious conscience ascribes to life a divine dimension that infuses all aspects of being. The authority of the divine extends to all decisions, actions, times, and places in the life of the devout. It follows that every governmental activity has the potential to offend the religious belief of at least someone.

1.2.2 The Irreducible Core

\(^{1724}\) Galatians, 3:11 (quoting Habbakuk 2:4).
\(^{1725}\) Romans, 14:23.
\(^{1726}\) 1 Corinthians 10:31.
The requirement not to impinge on the irreducible core of fundamental rights is put at the very end of the review list under Article 36 of the Federal Constitution. In spite of that, it makes sense from a methodological point of view to address this very important prerequisite first. The reason for this is that whenever a state activity unequivocally interferes with the inviolable sphere, judges will find that the Constitution is violated. So there will be no subsequent balancing of competing interests as there is absolutely no justification for limiting the very essence of the right. However, if there is no such case, or judges are unsure about the precise extent of the irreducible core, they usually continue to explore questions regarding actual interference, public and third party interests, and proportionality requirements.

The question that arises is, what kind of issues are part of the inviolable core? Apart from the idea that the core must be exceedingly narrow, the Federal Supreme Court has given little guidance in the matter. In the Kirchaustritt ruling of 1978 the court found that the absolute right embraces freedom from compulsion to think, to change an opinion, and to hold a conviction, as well as the right to remain silent about one’s religious conviction. It mostly refers to an internal freedom that is characterized by a purely personal determination often called forum internum. In the 2004 Aluminiumkreuz decision, the same court said that it would not necessarily cover religious acts, but opinions especially. It follows that the absolute right is more virtual than concrete and real. It protects, for example, the right to take up a new religion or none at all, as well as the right to keep one’s religion. However, the concept seems not to protect anyone from missionary influences such as legally compliant activities aimed at convincing one’s neighbour to take up a new or different religion (or none).

At the heart and core of the concept lies the idea that no one must be coerced into a distinct belief. Under Article 15(4) of the Federal Constitution, individuals possess a negative right “not to be forced to join or belong to a religious community, to participate in a religious act, or to follow religious

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1728 This appears to be why most Swiss constitutional scholars refer to the irreducible core issue at the end of every investigation. For reasons of simplicity and because a later investigation of the core makes little sense when it is obvious that it is satisfied, this aspect of constitutional review is treated in this thesis at the beginning of the process.
1729 BGE 104 Ia 79, E. 3a, p. 84.
1731 BGE 104 Ia 79, E. 3a, p. 85; BGE 129 I 68, E. 3.4, p. 72.
Coercion interpreted in the light of the irreducible core is likely to comprise not only physical pressure but also other means of compulsion, such as the use of awareness-changing methods or medication with psychoactive substances. Practices or policies which have the same intention or effect are likely to be similarly inconsistent with the Federal Constitution. In addition, the Supreme Court, in *Friedhofsreglement Hünenberg* (1975), ruled that a state cemetery regulation which compelled non-believers to be buried “under” a Christian cross, violated the absolute sphere of the right. Scholar Markus Schefer notes that the irreducible core protects from attacks on the centrality of human existence that is the dignity of persons. But mild forms of coercion (whether direct or indirect) do not, under certain circumstances, necessarily permeate into the absolutely protected sphere of the right. So for instance it is questionable whether a school syllabus that requires all public school students to learn about the history of the Catholic Christian Church violates the untouchable sphere if taught from a scientific perspective. In this respect, Article 15(4) cannot simply be equated with the irreducible core of the right to religious freedom, as it also protects mild forms of religious compulsion that can nevertheless reasonably be justified.

### 1.2.3 Interference with the Scope of the Right

Once courts have decided whether an issue alleged is within the scope of Article 15 of the Federal Constitution and that it does not touch the irreducible core, they proceed by questioning whether the religious activity is prevented by the state from continuing or being carried out. Governmental interference can take the form and quality of “statute” (*Gesetz*), “regulation” (*Verordnung*), “individual ordinance or decision” (*Verfügung*), or “specific activity” (*Realakt*). The latter is interpreted to mean an action that is associated with the state. For instance, the specific activity of attaching crucifixes to the walls of every classroom interferes with students’ rights not to be subjected to a specific religion. Intervention can also take indirect forms in

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1732 *Swiss. Const. Art. 15(4).*  
1733 BGE 124 I 304, E. 4b, p. 309.  
1734 BGE 101 Ia 392, E. 3b, p. 397.  
1736 *Pierre Tschannen, Staatsrecht der Schweizerischen Eidgenossenschaft* 135 (Stämpfli 2004); also Walter Haller et al., *Allgemeines Staatsrecht* 283 (4th edn, Helbing Lichtenhahn 2008).  
1737 BGE 116 Ia 252, E. 6a, p. 261.
that, for example, a private institution is supported with state sponsorship in its fight against dangerous sects.\textsuperscript{1738} The concept of religious freedom not only imposes a negative obligation, in the sense that the state is required to abstain from interfering with religion, but also comprises a positive obligation to prevent violations on a person’s belief and conscience. Hence, if government fails to act where it would otherwise be necessary and reasonable, interference by way of omission might be given.

\textsuperscript{1738} Although it is necessary to mention that the Federal Supreme Court did not answer conclusively whether such indirect intervention could be regarded as state interference with Article 15 of the Federal Constitution. BGE 118 Ia 46, E. 4e, p. 58.
1.3 Justifiable Limitations

1.3.1 Legal Prescription

Article 36(1) of the Federal Constitution holds that a restriction upon constitutionally entrenched rights requires a basis in Swiss domestic law. In other words, the Constitution entitles a public authority to justify interference with fundamental rights provided it can show that it has acted in a manner prescribed by law. Scholar Ulrich Häfelin highlights the underlying idea of the legal prescription requirement by stating that restrictions on rights must comply with the rule of law by satisfying a sufficient level of foreseeability, and degree of formality.

1.3.1.1 Foreseeability

Foreseeability regards the substantive sense of a legal basis in that a norm needs to be formulated with sufficient certainty. According to the Federal Supreme Court’s Vermummungsverbot ruling of 1991, a norm cannot be regarded as law unless it is formulated with sufficient precision to enable each individual citizen to regulate their conduct in that she or he must be able to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action will entail. Thus, a law which confers discretion on a public authority must be formulated in such a way that its scope is foreseeable. According to scholar Walter Haller, this entails legal certainty and serves the principle of equal treatment of individuals. However, absolute precision is unattainable. The court in its Konsumentenschutz decision (1999) stated that in order to avoid excessive rigidity and to keep pace with changing circumstances, many laws are couched in terms that are to some extent vague. It can, however, generally be said that the description

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The relevant paragraph holds: “Restrictions on fundamental rights must have a legal basis.” In its German version the same paragraph stipulates: “Einschränkungen von Grundrechten bedürfen einer gesetzlichen Grundlage.” SWISS. CONST. ART. 36(1) FIRST SENTENCE.

ULRICH HäFELIN ET AL., SCHWEIZERISCHES BUNDESTAATSRCHET 93 FF. (7th edn, Schulthess 2008).

BGE 117 Ia 472, E. 3e, p. 480.

WALTER HALLER, THE SWISS CONSTITUTION IN A COMPARATIVE CONTEXT 159 (Dike 2009).

BGE 109 Ia 273, E. 4d, p. 284.

BGE 125 I 369, E. 6, p. 379.
of criminal offences must be more precise than other norms.\footnote{Id. at 380. This especially applies to offences such as the prohibition to express religious hate speech under Articles 261bis and 261 of the 1937 Swiss Federal Criminal Code (Schweizerisches Strafgesetzbuch vom 21. Dezember 1937, SR 311.0).} Conversely, the Supreme Court held in the Schwimmunterricht I ruling (1993) that it is legitimate that a specific norm does not regulate every detail, but is given a broad wording if the contested law regulates a “special status” (Sonder-status).\footnote{Id. at 178, E. 6b, p. 188; also BGE 2C_149/2008, Urteil vom 24. Oktober 2008, E. 6.2.} Such laws may leave the regulation of specific aspects to the discretion of public authorities, said the court.\footnote{BGE 99 Ia 407, E. 4, p. 412.}

1.3.1.2 Formality

Where foreseeability is concerned with the substantive sense of a legal basis, this requirement category needs to be understood in the formal sense. Statute, that is formal law, can only legitimize grave interferences with freedom of belief and conscience,\footnote{The Swiss Federal Constitution speaks a clear language in this regard. “Significant restrictions must have their basis in statute.” In its orginal German version it holds: “Schwerwiegende Einschränkungen müssen im Gesetz selbst vorgesehen sein.” SWISS. CONST. ART. 36(1) SECOND SENTENCE.} whereas minor limitations can be foreseen by administrative regulations. By differentiating varying procedures of drafting, and enacting new law, the formality requirement holds that interferences into the constitutionally entrenched freedom of belief and conscience must be democratically legitimized.\footnote{ULRICH HÄFELIN ET AL., SCHWEIZERISCHES BUNDESTAATSRECHT 94 (7th edn, Schulthess 2008).} In this sense the more gravely some state interference affects a person, the more democratic legitimacy is required, and the more precisely a norm must be formulated.\footnote{BGE 99 Ia 247, E. 2, p. 250.} The differentiation between grave and trivial interferences with fundamental rights depends on the specific circumstances of a case.\footnote{BGE 119 Ia 178, E. 6b, p. 188; also BGE 2C_149/2008, Urteil vom 24. Oktober 2008, E. 6.2.} To commentator Peter Karlen, grave interferences are, for instance, the prohibition on holding religious services or religious processions, whereas the regulation of church-bell ringing, or the
prohibition of religious canvassing on Sundays are regarded by the commentator as more trivial interferences with religious freedom.\textsuperscript{1752}

\section*{1.3.1.3 Real, Imminent and Inevitable Danger}

Article 36 of the Federal Constitution contains an exemption to the legal prescription requirement. In the event of “real, imminent, and inevitable danger,”\textsuperscript{1753} the “general police power clause” (\textit{polizeiliche Generalklausel}) may temporarily provide sufficient legitimacy.\textsuperscript{1754} For example, during a mass procession or burial ceremony, a particular danger such as panic may arise and therefore threaten the security of persons attending the event. Another instance that could trigger the applicability of the general police clause is where hostile religious adherents confront each other, or when religious views are exploited for violent political interests. According to the Federal Supreme Court in \textit{Botta} (2002), not all threats and dangers to public safety and public order can be foreseen by statute or administrative regulation even if they are regarded as grave.\textsuperscript{1755} Therefore, constitutional scholar Walter Haller comments: “[i]t might happen that there is at a given time no legal basis for state measures which are indispensable to avert serious and imminent danger.”\textsuperscript{1756}

\section*{1.3.2 Public Interest and Third Party Rights}

Interference with the right to freedom of belief and conscience must also, according to Article 36(2), be justifiable by public interest considerations, or serve for the protection of the fundamental rights of others.\textsuperscript{1757} The provision

\textsuperscript{1752} \textsc{Peter Karlen}, \textsc{Das Grundrecht der Religionsfreiheit in der Schweiz} 295 (Schulthess 1988).

\textsuperscript{1753} The Constitution stipulates: “The foregoing does not apply in cases of real and imminent danger where no other course of action is possible.” In German it says: “Ausgenommen sind Fälle ernster, unmittelbarer und nicht anders abwendbarer Gefahr.” \textsc{Swiss. Const. Art. 36(1) Third Sentence}.

\textsuperscript{1754} BGE 130 I 369, E. 7.3, p. 132.

\textsuperscript{1755} BGE 128 I 327, E. 4.2, p. 340.

\textsuperscript{1756} \textsc{Walter Haller}, \textsc{The Swiss Constitution in a Comparative Context} 159 (Dike 2009).

\textsuperscript{1757} “Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.” Original: “Einschränkungen von Grundrechten müssen durch ein öffentliches Interesse oder durch den Schutz von Grundrechten Dritter gerechtfertigt sein.” \textsc{Swiss. Const. Art. 36(2)}. 
entitles public authorities to justify a prima facie restriction on Constitutional guarantees by identifying specific objectives which make the restriction legitimate. The term “public interests” cannot be coined in a single, generally applicable formula. It is a complex legal term that not only changes over time, but depends upon the particular circumstances of a case.\textsuperscript{1758} Public interest embraces measures at all level of government, be they of federal, cantonal, or municipal nature. The concept is in its essence contingent on a fair balance being struck between the interests of the public at large vis-à-vis individual or group concerns.

One clearly identifiable category of public interests is named “police interests” (\textit{polizeiliche Interessen}). It encompasses interests in the form of measures pertaining to order, peace, security, morality, health among citizens, as well as good faith in business relations.\textsuperscript{1759} For instance, in the \textit{Schutzhelmpflicht} case of 1993, the Federal Supreme Court held that it was compulsory to wear a helmet while riding a motorbike for a Sikh who refused to do so on religious grounds.\textsuperscript{1760} Scholar Häfelin stresses that police interests must not be equated with all existing forms of public interest as there are central public considerations which do not regard police powers.\textsuperscript{1761} Some examples, for instance, are interferences arising out of environmental protection, planning and building laws.\textsuperscript{1762} As for the latter, in the 2004 \textit{Aluminiumkreuz} decision, the communal building authority of Gerlafingen refused a construction permit for a 7.38-metre high, blue illuminated Dozulé cross that was already erected in the garden of the petitioners’ property. On appeal the Federal Supreme Court held that the material change of the property was increased beyond the bounds of planning prudence. The construction’s size did not fit into the residential area, and was likely to cause visual as well as ideological disturbance to neighbours, justices found.\textsuperscript{1763}

However, the range of public interests justifying a limitation varies, depending on the affected rights. In the following we will rudimentarily treat a few important public interest categories which may arise in religious-freedom conflicts – some of which are expressly qualified by the Federal Constitution, while others are court developed. Public-interest and third-party rights can include: protection from breaches of religious peace; protection of fun-
damental rights of others; the doctrine of state neutrality; and exceptions arising out of civic duties; and religious loyalty.

### 1.3.2.1 Protection from Breaches of Religious Peace

As early as 1886, the Federal Supreme Court in *Schass und Konsorten* recognized that for the protection of public peace and prevention of social unrest, religious exercise may justifiably be limited. The court set a high threshold for public authorities to circumscribe the profession of religion in publicly accessible places. In that case, members of the Salvation Army were gathering to engage in proselytization and thereby provoked passers-by who happened to see the assembly. The judicial body found that police interests could not limit the Salvation Army’s right to religious assembly and canvassing “unless it [the police] is not capable of guaranteeing public order and of protecting assembled participants by less restrictive means.”\(^{1764}\) The federal body generally applies a reconciliatory approach towards possible breaches of religious peace. In *Rivara* (1982) the highest court of the country found that “it is legitimate to demand a certain degree of mutual tolerance between religious communities and their adherents.”\(^{1765}\) In this respect, any interference with the freedom to manifest or express religion or belief is not, in the court’s opinion, justifiable on grounds that religious feelings are merely offended. The court held that “it further requires that community life be disturbed or threatened by the conduct emanating from a public assembly, and that the resulting state of affairs be dangerous. Such is the case if the nature of the assembly is on objective grounds inappropriate and provocative in relation to local circumstances.”\(^{1766}\)

### 1.3.2.2 Protection of Fundamental Rights of Others

\(^{1764}\) Emphasis in brackets added by the author. “Soforn sie nicht im Stande ist, durch andere Mittel die Ordnung aufrecht zu halten und die Teilnehmer an der betreffenden Versammlung zu schützen.” BGE 12 I 93, E. 5, p. 109.

\(^{1765}\) “[…] on doit pouvoir exiger de toutes les communautés religieuses et de leurs adhérents un certain degré de tolérance réciproque […]” BGE 108 Ia 41, E. 2a, p. 43.

\(^{1766}\) “Il faut en outre que la vie en commun soit perturbée ou menacée par le déroulement de la manifestation en public et qu’il en résulte un état de tension préjudiciable. Tel sera le cas si la nature de la manifestation apparaît objectivement inopportune et provocatrice au regard des circonstances locales.” *Id.*
No person or institution can rely on absolute freedom other than a few rights protected by the irreducible core. The fact is that in every society the scope of freedom is defined through its limitations. The liberty enjoyed by one person must not become the burden of another. This basic understanding of justice is now also expressed in Article 36(2) of the Federal Constitution in that it presumes that restrictions on persons’ liberties are designed to protect the freedoms of others. On this basis, claims to religious practice that harm other people or infringe their rights can rightly be limited. Public authorities face the task of striking a reasonable balance between conflicting rights. In some instances the exercise is delicate, while in other instances matters are quite simple. For example, a parent who for religious reasons refuses to let his sick child obtain medical treatment is unlikely to have a valid defence to a charge of child neglect if that religious conduct harms the health of the child. Similarly, female genital mutilation is a crime regardless of whether the parents of the affected girl acted in accordance with their tradition or belief. In some instances there is problem as to what counts as harmful to others. Physical harm might seem to be a clear case, but even here questions can be raised over whether transient degrees of physical discomfort should constitute an absolute bar.

In other situations, more complex problems can emerge. For instance, the balancing of a person’s right to express his religious views freely even if they offend or menace others continues to generate vigorous debates. Up to now, it is not entirely clear what degree of irritation and threat is necessary before religious or anti-religious expressions can be circumscribed. The difference between personal offence and personal menace is likely to be a gradual one. So there are several difficulties with applying a sharp distinction between self and others in this way. Nonetheless, it is generally perceived that contentions between opposing rights may coincide and mutually reinforce one another, thereby creating the essential foundations of the Swiss democratic society.

1.3.2.3 Doctrine of State Neutrality

The doctrine of neutrality requires that the state be impartial between competing conceptions of what constitutes a good or worthwhile life. In Schwimmunterricht I (1993) the highest judicial body of the country held that the neutral state cannot review theological truth or religious doc-

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1767 Examples of criminal offences are found in the Swiss Federal Criminal Code (Schweizerisches Strafgesetzbuch vom 21. Dezember 1937, SR 311.0) art. 261 and 261bis.
This requirement comprises not only the effect of guaranteeing individual claims of fundamental rights, but also, and especially, the function of keeping the state and religious belief or disbelief at a certain distance from each other. For instance, in the crocifisso decision of 1990, the Federal Supreme Court found that in the education environment the state is not impartial if a school gives parents the impression that it places certain teaching practices under the influence of a specific belief. Persons who are in a special relationship with the state must waive the freedom of belief to a certain extent. This can affect teachers, soldiers, public hospital workers, medical doctors, or civil servants especially. The doctrine of neutrality requires that the beliefs or disbeliefs of these so-called agents of the state are not identifiable with the Swiss government.

However, the establishment of certain religious communities (such as the Roman Catholic and the Evangelical Reformed Church) does not in itself violate the doctrine, as long as this special recognition does not impair the enjoyment of other peoples’ rights under Article 15, nor discriminate against adherents to other belief-systems. The Federal Supreme Court continues to allow regional government to grant material aid in the form of financial support, repayments, and restitutions to official religious communities. In this regard, it can be suggested that socially significant private-law organizations (such as Free Church communities, Buddhists, or Islamic groups) should increasingly enjoy similar or equal prerogatives if regional authorities do not want to fall foul of the doctrine of state neutrality.

### 1.3.2.4 Civic Duty Exception

Civic duties may also take priority over religious-freedom interests. The Federal Constitution of 1874 already foresaw two major kinds of civic duties: the Swiss (male) obligation to serve in the military, and the general obligation to attend primary school regardless of whether education programmes are against a person’s belief. Both exceptions are still good law. It has, nonetheless, been recognized that government is not granted a blank cheque to curb religious freedom. In order to be legitimate, both ex-

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1769 BGE 116 Ia 252, E. 7, p. 262 f.
1770 BGE 113 Ia 304, E. 4c, p. 307; BGE 129 I 74, E. 4.1, p. 76.
1771 Swiss Federal Constitution of 1874 (Bundesverfassung der schweizerischen Eidgenossenschaft vom 29. Mai 1874) art. 18(1) and art. 27(2). ALFRED KOLZ, QUELLENBUCH ZUR NEUEREN SCHWEIZERISCHEN VERFASSUNGSGESCHICHTE, VON 1848 BIS IN DIE GEGENWART 166 f. (Stämpfli 1996).
1772 SWISS CONST. ART. 59(1) AND ART. 62(2).
ceptions must – as far as practicable – be read and given effect in compliance with Article 15 guarantees.\footnote{BBI 149 1996 Bd. I, p. 157.} It means that the state is required to provide for an alternative compulsory service to be rendered by those individuals who cannot, because of their beliefs, come to terms with the obligation to serve in the armed forces.\footnote{In Switzerland the state provides for a civilian service. Swiss Federal Civilian Service Act (Bundesgesetz vom 6. Oktober 1995 über den zivilen Ersatzdienst, SR 824.0).} Or, it requires that a religious student be allowed to be absent from education lessons when such an exemption can reasonably be accommodated.\footnote{E.g. BGE 134 I 114, E. 6.6, p. 123.} However, in recent years the law has increasingly demanded that foreign students who permanently live in Switzerland should integrate into Swiss society by participating in, and adapting to, Swiss economic, social, and cultural life.\footnote{Swiss Federal Act on Foreign Nationals of 2005 (Bundesgesetz über die Ausländerinnen und Ausländer vom 16. Dezember 2005, SR 142.20) art. 4(2).} Despite the fact these civic duties can legitimate encroachments on religious freedom, public authorities are required to bring them into line with constitutional guarantees. In this sense, the state is not allowed to limit the right to freedom of belief and conscience further than is absolutely necessary, and only proportionately to the objective to be achieved.\footnote{BGE 117 Ia 311, E. 2b, p. 315; also BGE 119 Ia 178, E. 7a, p. 190.)} 

### 1.3.2.5 Religious Loyalty Exception

A special category of reservation regards religious loyalty. In other words, the rights protected under Article 15 may be circumscribed if a person’s special loyalty is part and parcel of her or his relationship to a specific religious community. A contract of employment may contain a clause imposing duties of loyalty towards a religious organization. The constitutional guarantees protected under Article 15 can justifiably be limited to the extent that such reservation is necessary and proportionate. For example, a person who holds the office of a priest may not freely change religion or belief for the time she or he intends to hold that office. The office-holder waives the right to change her or his religion for the duration of the mission.\footnote{For a more detailed analysis of the proximity between religious office-holders and the state Christian R. Tappenbeck & René Pahud de Mortanges, Abschaffung des Beamtenstatus bei Pfarrpersonen? Kirchenrechtliche Überlegungen zu einer aktuellen Diskussion, in Schweizerisches Jahrbuch für Kirchenrecht 115 ff. (Dietter Kraus ed., vol. 14, Peter Lang 2009).} A waiver might be effective only if it is established in an unequivocal manner and is
attended by the minimum safeguards commensurate with its importance. In this respect it might be important to note that the right to leave a religious community cannot be limited.\footnote{1779}

\section*{1.3.3 Principle of Proportionality}

Article 36(3) of the Federal Constitution holds further: “Restrictions on fundamental rights must be proportionate.”\footnote{1780} The provision gives guidance for the balancing dimension if the government imposes restrictions upon civil liberties.\footnote{1781} The concept of proportionality requires that there be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective.\footnote{1782} Proportionality is directly linked to the above-mentioned aspects in that a limitation may go no further than is required by public interests or for the protection of the fundamental rights of others. There exist two tests which have been developed so far. These are the “predominant public interests” (überwiegende öffentliche Interessen) test and the “pressing and weighty public interests” (dringende und gewichtige öffentliche Interessen) test. In addition to that, there is an absolute criminal law boundary to the use of the principle of proportionality.

\subsection*{1.3.3.1 Predominant Public Interest}

A predominant public interest is given in the event that a three-fold test comprising suitability, necessity, and proportionality in the narrow sense is satisfied:\footnote{1783}

\begin{itemize}
\item \footnote{1779} BGE 104 Ia 79, E. 3a, p. 84; BGE 129 I 68, E. 3.4, p. 72; and BGE 134 I 75, E. 6, p. 79.
\item \footnote{1780} “Einschränkungen von Grundrechten müssen verhältnismässig sein.” \textit{SWISS CONST. ART.} 36(3).
\item \footnote{1781} The doctrine itself originated in Prussia in the nineteenth century. It developed to restrict the discretionary powers of police authorities. \textit{MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW: A COMMON LAWYER’S VIEW} 81 ff. (Springer 1985).
\item \footnote{1782} BBI 149 1996 Bd. I, p. 131.
\item \footnote{1783} \textit{Id.} at 133. In fact the test had been applied already before it was written into the Swiss Federal Constitution in 1999. E.g. in BGE 109 Ia 273 E. 7, p. 289.
\end{itemize}
(i.) suitability: an administrative or legal power must be exercised in a way which is suited to achieve the purpose intended and for which the power was conferred; and

(ii.) necessity: the exercise of the power must be necessary in the sense that no milder means to attain the goal pursued are available to achieve the relevant purpose; and

(iii.) proportionality in the narrow sense: the exercise of the power must not impose burdens or cause harm to other legitimate interests which are disproportionate to the importance of the objective achieved.

So the principle of proportionality is directly linked to the doctrine of fair balance between the general interests of the public or third parties and the interests of the individual or group, the search for which is often said to be inherent in the whole of the Federal Constitution. When applying the principle of proportionality, the courts restrict themselves to questioning whether interference is justifiable in principle and proportionate, and whether there is a reasonable relationship between the interference and the legitimate aim pursued. Further, courts ponder over the question of whether in the specific circumstances of the case the individual or group concerned can reasonably be expected to act counter to a religious commandment or doctrine in order to give priority to public-interest or third-party considerations. Interference is likely to be unreasonable, the more it conflicts with the centrality of a person’s belief, and the less significant public interests or the fundamental rights of others are. This judicially developed principle applies to children, especially, as they are often caught between the Scylla of obeying their parents’ religious teachings and the Charybdis of obeying the commands of their teachers and school authorities.

1.3.3.2 Pressing and Weighty Public Interest

In the Schwimmunterricht I ruling of 1993, the Supreme Court applied a more rigorous balancing approach, particularly in the context of civic duties where it takes the view that interference with freedom of belief must be narrowly interpreted and the necessity for any restrictions must be convincingly

1784 BGE 119 Ia 178, E. 8a, p. 194 f.
established. Thus, in the 1993 decision the court applied a three-fold alternative standard:1785

(a.) whether the interference complained about corresponded to a pressing and weighty public interest; and
(b.) whether it was proportionate to the legitimate aim pursued; and
(c.) whether the reasons given by the public authority to justify it were relevant and sufficient.

The test for providing pressing and weighty public interest is satisfied, according to the Schwimmunterricht I ruling, if the government can show that it acted for the welfare of a child. It must be threatened in a “concrete and decisive manner” (konkret und in massgeblicher Weise). As to the meaning of a concrete and decisive threat, the court said that such circumstances existed where the health of the child was in imminent jeopardy, or where a child’s right to equality of opportunities, or equality between genders could no longer be guaranteed.1786

1.3.4 Criminal Law Boundary

Criminal law sets a decisive boundary to religious-freedom claims. In other words, the right to determine one’s religious precepts ends where it conflicts with the secular-adopted criminal law of the land. In this sense, it is necessary to point out the limits of any proportionality test. No balancing-of-interests exercise is applied in the event that cultural or religious activities constitute criminal offences, such as honour killings, serious forms of child neglect, female genital mutilation, and other offences like duress, indecent assault, and hate speech.1787 The same is very likely to apply to prohibitions such as forced marriages,1788 and offences against public decency, like polygamy, or animal protection, like kosher butchering.1789 The lawmaker will not hesitate to prevent someone from sacrificing his daughter to his Gods, and in fact, the Swiss lawmaker has not been hesitant to prevent people from

1785 Id. at 190.
1786 BGE 119 Ia 178, E. 8a, p. 194 f.
1787 REGINA KIENER & WALTER KÄLIN, GRUNDRECHTE 281 (Stämpfli 2007).
1788 In contrast to arranged marriages.
fulfilling their religious obligations in much less extreme cases. To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto her- or himself.

2. United States

2.1 General Introduction and Overview

Figure 2.1 (below) shows the process of substantive constitutional law review as developed by US American judges. The first task facing a court asked to review a First Amendment claim is to determine which of its clauses applies. The Free Exercise Clause functions primarily as an individual right with its guarantee of freedom to pursue a life in accordance with one’s religious beliefs. The function of the Anti-Establishment Clause is different. It seeks to guarantee the separation between religious communities and state in a nation characterized by religious pluralism. The Clause erects a “blurred, indistinct, and variable barrier” depending on all the circumstances of a particular relationship. In some instances, it is virtually impossible to clearly affix matters of law to either the nonestablishment or the free exercise side of the First Amendment. As a result of this, both Clauses undergo judicial evaluation. Once a court can say with sufficient certainty that both or either clause applies (these alternatives are represented by letters A, B, or C.), it continues its constitutional review by applying the relevant tests.

At this stage it might be necessary to mention that case law from the mid-1860s through the first three decades of the 20th century is a chronicle of the growth and breadth of religious and cultural diversity in the United States. However, until 1940 there were few reported federal cases discussing the meaning of the First Amendment’s religious-freedom guarantee. Because the amendment applied only to acts of Congress, the few free-exercise cases decided by the federal courts before 1940 involved challenges to federal authority. Ever since, American courts have applied specific methodological tests of constitutional review. As indicated in A. to C. of the “Free Exercise Box,” a court must decide whether the regulation or law at issue burdens the free exercise of religion. Subsequently, the restriction on the free exercise of religion must be balanced against the importance of the state’s interest in the regulation or law. Even if the state’s interest appears to be of greater magnitude, the regulation or law will be invalid if the state’s interest can be

achieved by a less restrictive alternative means.\textsuperscript{1791} Letter D. shows that within this methodological matrix, courts have developed five additional tests, known as the tests of belief-action distinction; undue infringement; indirect-direct burdens; strict scrutiny; and limits to judicial exemptions. They will be addressed in a more detailed description that follows below.

The basic review procedure of the Anti-Establishment law is different. The three-part Lemon test was used by the Supreme Court in 1971 for the first time. As illustrated in A. to C. within the “Anti-Establishment Box,” it held that in order to pass muster against a challenge, the state action must have a secular purpose, its principal or primary effect must be one that neither advances or inhibits religion, and it cannot result in an excessive government entanglement with religion.\textsuperscript{1792} The Lemon test has remained the standard of review most often applied in Anti-Establishment Clause cases. In spite of that it has been widely criticized and occasionally ignored by both the Supreme Court and lower courts. So it has never been entirely clear how the Lemon test relates to the principles enshrined in the Establishment Clause. Additional tests have been developed and are now referred to under letter D. as the endorsement, coercion, and history tests. Some of the justices treat them as independent inquiries; others integrate them into their understanding of the Lemon test. As for the following, all three additional tests are described independently from each other. For both clauses it must also be emphasized that the highest court of the United States has not found a single mechanical formula that can accurately draw the constitutional line in every case.\textsuperscript{1793}

\[\text{[here goes the chart called: “Figure 2. – US American Religious Freedom Review Standard”]}\]


\textsuperscript{1792} Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

\textsuperscript{1793} Drawing on JEROME A. BARRON AND C. THOMAS DIENES IN FIRST AMENDMENT LAW IN A NUTSHELL 509 (Thomson & West 2008).
2.2 Free Exercise Tests

2.2.1 Belief-Action Distinction

A simple approach to limit religion is the rigid invocation of the belief-action distinction. The idea that regulation of beliefs was beyond the role of the state, which had jurisdiction only over actions, was advanced by John Locke and Thomas Jefferson.\textsuperscript{1794} This directly influenced the Supreme Court’s construction of First Amendment law. The first cases in which the Supreme Court started to interpret the Free Exercise Clause are rooted in the federal anti-polygamy campaign that began in the mid-nineteenth century. The court rejected the practice of plural marriage in \textit{Reynolds v. United States} (1879) by distinguishing between belief and action: “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.”\textsuperscript{1795} The reasoning indicated that regardless of the burden that government regulation might impose on the religious adherent, the Free Exercise Clause is not violated if the regulation does not interfere with religious belief or opinion. So the claimant could believe in polygamy but he could not practise it. To commentator Ira C Lupu, Reynolds’s belief-action distinction “reduced the free exercise clause to a primarily rhetorical commitment to protecting religious liberty.”\textsuperscript{1796} A mere right to hold beliefs is contradictory and, arguably, hypocritical.\textsuperscript{1797} In spite of that, the distinction between belief and action had also come to the focus in \textit{The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States} (1980). The court made its point clear by stating: “The State has a perfect right to prohibit all open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced.”\textsuperscript{1798}

\textsuperscript{1794} \textsc{Rex Ahdar \& Ian Leigh, Religious Freedom in the Liberal State} 160 (Oxford University Press 2005).
\textsuperscript{1795} Reynolds v. United States, 98 U.S. 145, 164 (1879).
\textsuperscript{1797} \textsc{Rex Ahdar \& Ian Leigh, Religious Freedom in the Liberal State} 161 (Oxford University Press 2005).
\textsuperscript{1798} The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1, 50 (1890).
2.2.2 Undue Infringement

By 1940 a free-exercise standard was beginning to emerge. In *Cantwell v. Connecticut* (1940) the Supreme Court reaffirmed the belief-action distinction made in Reynolds. “[Free exercise] embraces two concepts,” namely, “freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. [In] every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.”\(^{1799}\) The substantial difference between *Late Corporation* and *Cantwell* is the circumstance that the state did not have “a perfect right to prohibit all open offences against the enlightened sentiment of mankind.” Even when attaining a permissible end, the state may no longer unduly infringe a protected freedom. States would have to justify both the nature and the degree of the burdens their laws imposed on religious exercise. Laws would be subject to a searching judicial scrutiny in which the court would balance the nature and importance of the rights involved against the regulatory interests of the state. If the burden imposed were reasonable under the circumstances, the judges would defer to legislative or executive authority. If the burden was deemed excessive, the law was unconstitutional.

2.2.3 Indirect-Direct Burdens

In *Braunfeld v. Brown* (1961) a sharp distinction between direct burdens on religious conduct and indirect burdens was drawn. The majority of justices rejected the proposition that the Free Exercise Clause requires an exemption whenever a burden is proved, but suggested that it might make adjustments on a case-by-case basis. The court noted that: “[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.” The plurality also concluded that “[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.”\(^{1800}\) Scholarly criticism notes that the *Braunfeld* court had merely substituted one conceptual distinction for another. It abandoned the simplistic dichotomy between religious belief and action that yielded little free-exercise protection.

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for religious conduct. In its place, it substituted a new formulism of direct versus indirect burdens. The state was subject only to marginal limitations flowing from the Free Exercise Clause when it imposed indirect burdens on religious conduct. As long as the state used reasonable means to achieve secular objectives, and there were no alternatives that would achieve the same end as effectively, state regulation was valid regardless of the severity of the indirect burden on religion.\textsuperscript{1801}

2.2.4 **Strict Scrutiny**

In 1963 the Supreme Court searched for a different method to decide Free Exercise Clause cases. In *Sherbert v. Verner* (1963) the court held that the state could not deny unemployment compensation benefits to an otherwise eligible individual simply because the claimant refused to work on Saturday, the Sabbath day of the claimant’s faith. The justices embarked from the premise that the fact that the burden was only indirect was “only the beginning and not the end” of constitutional analysis. The critical factor was that the state had imposed an unconstitutional condition. The availability of benefits depended upon the religious believer’s “willingness to violate a cardinal principle of her religious faith [which] effectively penalizes the free exercise of her constitutional liberties.”\textsuperscript{1802} Having found that the state statute represented a significant burden on a fundamental right, the court continued with the next question: Could the state justify this burden? It concluded that it could not. The court was not satisfied that the law before it reasonably served a secular state interest. Instead, the judicial body indicated that if a law withstands a constitutional challenge, “[i]t must be either because […] it represents no infringement by the State of the constitutional rights of free exercise, or because any incidental burden on the free exercise of the appellant’s religion may be justified by a ‘compelling state interest.’”\textsuperscript{1803}

This is the so-called strict scrutiny standard of review which effectively held that the constitutional guarantee of free exercise requires the state to provide an exemption from a generally applicable law. In *Wisconsin v. Yoder* (1972), the strict scrutiny standard was employed once again. However, its language made the balancing exercise less clear. The court stated: “[O]nly those interests of the highest order and those not otherwise served can overbalance

\textsuperscript{1801} As drawn from the scholarly account of JEROME A. BARRON AND C. THOMAS DIENES IN FIRST AMENDMENT LAW IN A NUTSHELL 509 (Thomson & West 2008).
\textsuperscript{1803} *Id.*
legitimate claims to the free exercise of religion.”\textsuperscript{1804} But invocation of strict
scrutiny does not necessarily mean that an exemption from a general law
will always be constitutionally required. And indeed, at times the state is
able to demonstrate that a compelling justification for denying such an ex-
emption exists. For instance, \textit{United States v. Lee} (1982) upheld the social
security tax against the free exercise-based refusal of an Amish employer to
participate in the social security system on behalf of his employees. The
court said: “The State may justify a limitation on religious liberty by show-
ing that it is essential to accomplish an overriding government interest.”\textsuperscript{1805}
In applying this standard, the justices held that the government had justified
its refusal to grant an exemption. Nonetheless, to constitutional scholars
Jerome A. Barron and C. Thomas Dienes “the compelling interest analysis
places a finger on the balancing scale. That finger weights heavily for the
free exercise claim. It creates a presumption in favor of the religious adher-
ent who seeks an exemption from a general religiously neutral law.”\textsuperscript{1806}

\subsection{2.2.5 Limits to Judicial Exemptions}

Over the years, the strict scrutiny analysis brought the Supreme Court to
decide cases in an environment such as the military and prisons where it had
traditionally been more deferential to government and less protective of fun-
damental rights. Signs of disaffection with the court’s approach appeared
among scholars and some justices themselves. So the court increasingly
characterized laws regulating religious conduct as not involving a significant
burden on the free exercise of religion. Hence, the laws were not subjected to
a compelling interest analysis. In 1990 the highest judicial body once again
refused an exemption flowing from religious belief. In \textit{Employment Division
v. Smith} (1990) the justices stipulated: “We have never held that an individ-
ual’s religious beliefs excuse him from compliance with an otherwise valid
law prohibiting conduct that the State is free to regulate.”\textsuperscript{1807} The majority
opinion in Smith also held that “if prohibiting the exercise of religion is not
the object of the [contested law] but merely the incidental effect of a gener-
ally applicable and otherwise valid provision, the First Amendment has not
been offended.”\textsuperscript{1808} The court justified the erosion of the strict scrutiny stan-

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\textsuperscript{1804} Wisconsin v. Yoder, 406 U.S. 205, 256 (1972).
\textsuperscript{1806} JEROME A. BARRON AND C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUT-
SHELL 519 (Thomson & West 2008).
\textsuperscript{1808} \textit{Id.}
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standard by stating: “Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious [beliefs]. Precisely because ‘we are a cosmopolitan nation made up of people of almost every conceivable religious preference,’ and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.” 1809

2.3 Anti-Establishment Tests

2.3.1 Lemon

In *Lemon v. Kurtzman* (1971) the so-called Lemon test was for the first time used by the Supreme Court. The highest judicial body of the country held that in order to pass muster against an Establishment Clause challenge, the state action: “(i.) must have a secular purpose; (ii.) its principal or primary effect must be one that neither advances or inhibits religion; and (iii.) it cannot result in an excessive government entanglement with religion.” All three prongs must successfully be challenged in order that courts recognize that government acted at variance with the Establishment Clause. Because the Lemon test is a synthesis of the cumulative criteria the court has developed over the years, it is not surprising that each of its three components has been supplemented, modified, and clarified many times in the more than thirty years since Lemon was decided.

(i.) The secular purpose requirement has only recently been interpreted to mean that when government “acts with the ostensible and predominant purpose of advancing religion,” it cannot be said to have a secular purpose and therefore violates the central Establishment Clause value of official religious neutrality. To scholarly commentators Michael S. Ariens and Robert A. Destro, such an unconstitutional situation may arise when “the state intended by its action to accomplish a religious goal such as encouraging attendance at religious services, or that the legislature had religious reasons for the way that it resolved a disputed issue of public policy, such as a ban on further use of the death penalty.” In other words, when officials participate in or appear to endorse the distinctively religious elements of this otherwise secular event, they encroach upon First Amendment freedoms. However, the existence of a purpose to aid religion will not itself doom a law so long as a legitimate public welfare purpose can be invoked to support it. So at least to one American court, a traditional symbol such as a Christian nativity crib has a strong secular element because viewers “may fairly understand that its purpose negates the message of endorsement.” It is, thus, viewed within

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1811 McCREARY COUNTY v. ACLU, 545 U.S. 844, 856 (2005).
the boundaries set by the Establishment Clause. Unless some facts appear in
the record that call the actual purpose of the statute into doubt, the courts
will generally presume that the purpose the legislature sought to achieve is
within its powers.\textsuperscript{1815} The term “secular purpose” therefore appears to be
synonymous with “otherwise legitimate public purpose.”\textsuperscript{1816}

(ii.) The second prong – that is the primary effect requirement – prohibits
government from advancing or inhibiting religion. Key to it is how justices
understand and apply the concept of state neutrality. That understanding
will, in turn, affect the type of evidence required in order to make the case
that a given programme is, or is not, neutral.\textsuperscript{1817} Courts have used the term
“neutral” to characterize state action in at least four different contexts:
namely to describe a government policy that neither encourages nor discour-
ages religion; to draw a distinction between the types of rules and pro-
grammes that are otherwise within the power of government to enact; to
describe criteria for government action; and to describe a relationship be-
tween the government and religious associations characterized by mutual
independence and separation.\textsuperscript{1818} In this sense, it is necessary to mention that
law, which indirectly, remotely, and incidentally advances or burdens relig-
ion will not result in its invalidation. Moreover, US justices have long been
divided over whether, and under what circumstances, institutions receiving
government assistance must also be religiously neutral. It was eventually
held that religious institutions can participate in government programmes
offering “true private choice” among a wide range of organizations and insti-
tutions.\textsuperscript{1819}

(iii.) Last but not least, government action must not foster an excessive en-
tanglement with religion. The word “entanglement” has been interpreted to
mean at least three distinct forms, namely: doctrinal; administrative, and
political. Doctrinal entanglement may occur when a court or government
body makes a decision that passes judgment on the doctrine of religious
communities. These issues most commonly arise when a court is called upon
to resolve, for instance, intra-church disputes.\textsuperscript{1820} Administrative entangle-
ment may arise when the state has an oversight role in the day-to-day opera-
tions of religious communities. Though the court recognized that “The Con-

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\item \textsuperscript{1815} Wallace v. Jaffree, 472 U.S. 38, 56 (1985).
\item \textsuperscript{1816} Michael S. Ariens, Robert A. Destro, Religious Liberty in a Pluralistic
\item \textsuperscript{1817} Id. at 289.
\item \textsuperscript{1818} Mitchell v. Helms, 530 U.S. 793, 879 (2001).
\item \textsuperscript{1819} Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002).
\item \textsuperscript{1820} Michael S. Ariens, Robert A. Destro, Religious Liberty in a Pluralistic
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\end{footnotesize}
stitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn. Most of the cases where excessive entanglement is cited as a reason for striking down the programme involve aid to education. In the labour, tax, and fiscal oversight contexts, including bankruptcy, the courts have been unsympathetic to allegations that Lemon requires invalidation of a continuing oversight role. Political entanglement was described as “[a] broader base of entanglement of yet a different character” that focuses on “the divisive political potential of these state programs.” The theory is that the court has a special responsibility in construing the Establishment Clause to protect against political division along religious lines. However, in the years since Lemon, the Supreme Court has recognized that the potential for political divisiveness cannot be used as an independent factor that would invalidate an otherwise constitutional policy. So the clause permits government some latitude in recognizing and accommodating the central role religion plays in American society. Any other approach less sensitive to the American heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular. Finally, “excessive” entanglement is likely to be satisfied the more the law fosters a continuing relationship between religious institutions and the state, or is likely to produce divisiveness in the community.

2.3.2 Endorsement

In *Lynch v. Donnelly* (1984) it was held that a focus on institutional entanglement and on endorsement or disapproval of religion clarifies the Lemon test as an analytical device. The court reasoned: “The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. Government can run afoul of that prohibition in two principal ways: One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to governmental or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines [...].

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second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not fully members of the political community, and an accompanying message to adherents that they are insiders, members of the political community. Disapproval sends the opposite message.”1824

The court’s endorsement analysis has provoked a lively debate among academic commentators. For instance, scholar Jesse H. Choper contends that the endorsement test avoids some of the infirmities of both the Lemon test and the doctrine of state neutrality because it clearly permits “some government accommodations for both minority and mainstream religions” and in this respect “its solicitude for the free exercise values” is a step forward. Yet Professor Choper does not believe endorsement is a satisfactory standard: “by finding a constitutional violation on mere feelings of indignity or offense, the endorsement test proves too restrictive of governmental attempts to acknowledge religious interests.”1825 Commentator Steven D. Smith is also displeased with the test. He finds the theoretical justifications for the test are unpersuasive as “some beliefs must, but not all beliefs can, achieve recognition and ratification in the nation’s laws and public policies.” Smith critically suggests that “a right not to feel like an ‘outsider,’ constitutes a utopian vision rather than a realistic basis for formulating constitutional doctrine.1826

2.3.3 Coercion

It has been court-recognized that the Lemon test fails to capture the central purpose of the Establishment Clause. In Lee v. Weisman (1992) the Supreme Court observed that: “It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or practice in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.”1827 So what the direct or indirect coercion test intends to protect is that a state act or programme does not create any pressure on individuals to participate in a religious exercise.

In the view of Steven G. Gey, the coercion standard is tailor-made for “reversing the court’s separationist tendencies in government endorsement cases, which include two of the most frequently litigated Establishment Clause subjects: government-supported religious displays at holidays and prayer in public schools.” To commentators Jerome A. Barron and Thomas C. Dienes, the coercion test, in contrast to the endorsement test, can be interpreted “as more susceptible to an accommodationist approach than endorsement, since, in this view, coercion by the state might be more difficult to prove than endorsement by the state.” Therefore it can be suggested that a standard that prohibits only “coercive” practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle way that government can show favouritism to particular beliefs or convey a message of disapproval to others, would not adequately protect the religious liberty or respect the religious diversity of the members of the pluralistic political community.

2.3.4 History

As mentioned earlier, history is nowadays rarely determinative in Establishment Clause litigation, but it is influential nevertheless. Historical materials have two basic functions in Establishment Clause litigation. The first is to illuminate the practices the Establishment Clause was designed to eliminate. The second function of historical materials is to provide the factual background and context of a specific practice or policy. An accurate understanding of historical context is essential if the court must draw conclusions regarding the purpose or the primary effect of the government’s action. Otherwise practices such as the national motto “In God We Trust” or the Pledge of Allegiance are in danger of invalidity. But although history may

1829 Jerome A. Barron & C. Thomas Dienes, First Amendment Law in a Nutshell 430 (Thomson & West 2008).
affect the constitutionality of nonsectarian references to religion, official
discrimination against non-traditional religious communities has no place in
the jurisprudence of the Establishment Clause.\textsuperscript{1833}

\textsuperscript{1833} Allegheny County v. ACLU, 492 U.S. 573, 582 (1989).
3. The Two Models Compared and Contrasted

Over the decades the US Supreme Court has formulated diverse and competing theories and tests for religious-freedom claims. It is therefore not surprising that the very ferment which is mirrored by the religious-freedom clauses has generated a sense of tentativeness in the Supreme Court’s analysis and a sense of uncertainty about the doctrine of freedom of religion cases. Even for experienced constitutional lawyers it has become difficult to discern the standard of review the court is most likely to apply. Although the Swiss Supreme Court developed a basic review standard applicable to all civil liberties alike, predicting the outcome of a case is similarly complex. A reason why it is not easy to foresee a Swiss decision is that individual claims largely depend on the specific circumstances of a case. Another ground is that judges enjoy relatively great discretion in balancing competing interests against each other. Still another cause is the development of certain preponderate policy considerations. So for instance, without being aware that Switzerland has changed from a traditional accommodationist approach to a new legal policy demanding active integrative steps and efforts from foreign nationals permanently living in Switzerland, it is difficult to understand the latest interpretative erosions of the Swiss Supreme Court.

In the past, the reason why American courts generally tended to accommodate religion more generously than their Swiss counterparts was the requirement that the American government needed to show that public interests are of the highest order so as to overbalance legitimate claims to the free exercise of religion. To put it differently, where adherents experienced a significant burden on their liberties the state had to present a “compelling interest” that made a limitation on religious freedom necessary. Conversely, during the same years the Swiss government enjoyed greater room for possible intervention because all they had to demonstrate was that on the balance of reasonableness there was a “predominant public interest.” So the difference between the two tests meant that the American compelling inter-

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1834 Save certain minor differentiations the three part-step – comprising questions of scope, interference, and justifiable limitations – applies to religious freedom claims as it does to personal freedom, or freedom of expression, as well as several other civil liberties.
est analysis tipped the scale in favour of religious-freedom claims in competition with other public interests.

Newer case law shows, however, that the trends are now going in the opposite directions. US jurisprudence is becoming more restrictive by granting religious exemptions, whereas Swiss judicial reasoning has in at least one instance approved greater religious accommodation. In some areas the Swiss Supreme Court has started to demand that the interference complained about corresponds to a “pressing and weighty public interest.” On the other hand, the American Supreme Court has stipulated only recently that if prohibiting the exercise of religion is not the object of the contested law but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. From this it can be inferred that although the outcomes of free exercise claims are difficult to predict, it is wrong to say that their fate is at the whim of Swiss or American courts.

The greatest difference between the two methodologies is the circumstance that in Switzerland there is no Anti-Establishment Clause. It has been judicially recognized that at regional or local level certain religious entities may exist close to, or even alongside governmental ones. The Swiss doctrine of state neutrality demands that there is no direct state identification with a particular belief, but does not restrict structural entanglement between official religious communities and the state. Although in the US it can hardly be said that religious organizations and the state are kept strictly separate from each other, it is still safe to conclude that the degrees of entanglement as found in most Swiss cantons would violate the Anti-Establishment Clause. The American Lemon or endorsement test does not allow the level and extent of proximity (especially when it comes to financial support) between religious communities and the state that Swiss standards of judicial review apparently do.

1838 An exception to this understanding might certainly be the Swimmunterricht II ruling with regard to integration cases. BGE 2C_149/2008, Urteil vom 24. Oktober 2008.
1839 BGE 119 Ia 178, E. 7a, p. 190.
4. Determining the Scope

Need for a New Substantive Law Test?

At this stage it appears necessary to tackle an area of Swiss and American judicial methodology which is still in need of clarification. It is the dilemma of deciding whether or to what extent a specific religion is concerned. In other words, at the end of the day judges invariably have to decide whether a specific action is of a religious nature or not, even if they are personally unsure. The decision as to whether a governmental activity or omission interferes with religion is pivotal as it determines whether the issue alleged falls under rights protected by the Swiss or the American Constitution, as the case may be. Difficulties might arise especially as new, unusual, or emerging religious communities increasingly take their claims to civil courts. So the remaining part of this section will consist of a brief résumé of the relevant substandards developed up to the present day, which will then be developed by combining them into a new three-stage test for constitutional review.

The difficulty starts with the rulings that Swiss and American secular courts must not engage in religious interpretation. The Swiss Federal Court found in this respect: “As long as the content of a religious doctrine is at stake, the Federal Supreme Court must act with great restraint. In any event, the assessment of a religious attitude or rules, or even the review of theological truth – in particular the interpretation of the relevant parts in holy scriptures – remains barred to the Federal Supreme Court unless and until boundaries of arbitrariness are overstepped.” The words “limits of arbitrariness” can be interpreted to mean that as long as a religious claim is not so unreasonable that no reasonable court could ever agree to such claim, judges must not decide the nature and extent of religion. The Supreme Court of the United States answered the same question by stating that it cannot be a state secular body, including the court, that answers questions of religion.

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1841 JEROME A. BARRON AND C. THOMAS DIENES IN FIRST AMENDMENT LAW IN A NUTSHELL 509 (Thomson & West 2008).
1843 “Allerdings hat sich das Bundesgericht insofern grosse Zurückhaltung aufzuerlegen, als der Inhalt der Glaubenslehre in Frage steht. Eine Bewertung der Glaubenshaltung und -regeln oder gar eine Überprüfung ihrer theologischen Richtigkeit, insbesondere eine Interpretation der einschlägigen Stellen heiliger Schriften, bleibt dem Bundesgericht jedenfalls so lange verwehrt, als nicht die Grenzen der Willkür überschritten sind”. BGE 119 Ia 178, E. 4c, p. 185.
holding: “The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals.”

The self-imposed threshold is very high because the judicial bodies recognize that secular courts’ refusal to interpret religious doctrines is as vital as the maintenance of religious policies is for spiritual courts.

However, in cases of civil relevancy in contrast to purely religious relevancy, secular courts exercise their judicial capacities by applying an objective evaluation. It means, for instance, that the Swiss Supreme Court considers the reaction of the average observer. The same is true with regard to American courts. At least one US court stated that the existence of religiosity “is to be judged by an objective standard, which looks only to the reaction of the average receiver [...] or average observer [...].” The problem of the use of the average observer test is that it can create injustice, because to the eye of the average person a new or unusual exercise might not appear religious even if it actually were. For example, Oriental religious conceptions are usually very different from Western ones. It is commonly believed that original Buddhist writings themselves contain views which are more or less unfathomable to the average Western mentality. In addition to that, it is widely recognized that different religions do possess objective qualities that can be categorized, but these characteristics can never be deduced from an a priori form, nor can they be reduced to a common denominator. So an exercise may be religious even if this quality is not clearly identifiable by anyone. In this circumstance an objective test cannot solve the dilemma of deciding whether or to what extent the scope of religious freedom is concerned.

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1845 A case possesses civil relevancy whenever a religious claim affects constitutionally protected public or third-party interests.
1846 BGE 123 I 296, E. 2a, p. 300.
1847 Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777, 781 (10th Cir. 1985), cert. denied 476 U.S. 1169, (1986).
1848 E.g. Carl Gustav Jung highlights the conception that Zen is anything but a philosophy in the Western sense of the word. To him it is difficult for the Western mind to grasp what a mystic understands by “enlightenment,” or what is known as “enlightenment” in religious parlance. Carl Gustav Jung in his foreword on D. T. SUZUKI, AN INTRODUCTION TO ZEN BUDDHISM IX (Grove Press 1964).
What is required is an alternative providing the Swiss and American justice systems with greater clarity and fairness for the circumstance that individuals or groups bring their case to the civil courts. It can be argued that civil courts perform better if they consult expert advice in particularly new or unusual cases. It is not to be supposed that the average judge in a civil court can be as competent in religious questions as the ablest person in each area in reference to their expertise. It is therefore appropriate that a more learned person gives advice. The times when civil powers felt an urge to illustrate superiority over their religious counterparts are definitely over. Relations between civil and religious authorities must nowadays be characterized by mutual respect and appreciation. This still means that where disputed issues possess civil relevancy, it remains within the discretion of secular courts to decide whether such advice is adequate under the specific circumstances of a case. This type of counselling does not mean a personal opinion, but a scientific view about the matter in question. The expert consultation may require two or more experts depending on the complexity of a case. Judges can subsequently decide which expert opinion is the most convincing. In any case the stronger opinion should prevail. So what the above is endeavouring to suggest is that, provided that the circumstances of the case allow it, Swiss and American civil judges can consult one or more experts who possess comprehensive or authoritative proficiency in the religion or belief-system concerned. Swiss and American courts are recommended to be impelled by a well-ordered structure for that special kind of differentiation. In this sense, the following three-stage test can be applied.

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1849 It may very well be the case that both parties in a conflict sought expert advice in order to bolster their positions. This was the case, for instance, in the Schwimmunterricht II decision of 2008 when the Imam of the great mosque of Geneva was asked to issue an explanation as to whether Muslim boys needed to be excused from co-educational swimming lessons for religious reasons. BGE 2C_149/2008, Urteil vom 24. Oktober 2008, E. 4.2. A further expert opinion requested by the court would then be unnecessary and thus obsolete.

1850 According to Felix Hafner, the question of who that objective expert should be is a question that needs to be answered by the social sciences within the concept of fair court procedures. Hafner’s response to the author’s address at the Monastery of Engelberg, Interdisciplinary Seminar: Kopftuch, Kippa, Kreuz, Religiöse Symbole als Provokation? (Dec. 4-6, 2008). According to Paul Richli, as well, it is not obvious who that expert should be. However, he is of the opinion that religious groups should not simply be deprived of their collective religious self-conception because of such a lack of knowledge. Letter from Paul Richli, Chair on Constitutional and Administrative Law, University of Lucerne (Dec. 7, 2008) (on file with the author).

1851 Advice of Paul Richli, Chair on Constitutional and Administrative Law, University of Lucerne (July 6, 2011).
(i.) Civil courts are generally required not to engage in purely religious interpretation unless a claim is so unreasonable that no reasonable civil court could ever come to the same conclusion.

(ii.) Where a claim is of civil relevancy, the civil courts’ determination as to whether it is within the scope of the right to religious freedom is to be evaluated by looking at the reaction of an average observer.

(iii.) Where a claim is of civil relevancy, but is still unclear, new, or unusual to the understanding of the average observer, the civil courts’ determination as to whether it is within the scope of the right to religious freedom can reasonably be supported by one or more experts on the issue concerned.

Lastly, it is necessary to note that this new test is not intended to operate as a sort of evaluative straitjacket. Difficult decisions confront the courts and a flexible, contextual, casuistical approach is then the way forward.1852

IV. ECLECTIC REPRESENTATION
1.1 Guideline to Swiss & US Religious Freedom

1.1.1 General Introduction and Overview

In order to add a concrete and practical dimension to the above considerations, it appears worthwhile to derive an actual guideline of religious-freedom rules from a range of legal sources treated in the previous parts. The idea of this approach is to produce an authoritative collection of laws that can be consulted every time a religious-freedom conflict occurs. For example, if a public school board wishes to know under what circumstances a student is likely to enjoy a right to release-time for religious purposes, it can directly seek advice from the corresponding rules mentioned in the guideline. Another instance in which this legal collection might be useful is for reasons of comparative law. A public administrative body that is on the verge of drafting new law is generally interested in how other countries than its own regulate similar situations. The guideline can then serve as a convenient tool for looking up some of the most important religious-freedom rules that might be relevant for the project envisaged. Still another reason why the guideline can be practical is for possible use in court proceedings. A judge need not go to the trouble of searching all available aids in order to gain a first clue as to how she or he could decide a case. Especially lower court judges, who have to decide a great number and variety of cases in little time, might be interested in consulting the authoritative collection. What follows are two important consequences: consistency and certainty. If there is one thing worse than losing, it is the litigant’s feeling that she or he has been treated differently from someone else in the same situation. Thus, the guideline ensures that there is no longer the need to reinvent the wheel every time a person tries to work out an answer to a particular religious-freedom problem.

However, some important country-specific preconditions need to be stated. The legal sources mentioned in the guideline range from the Constitution, statutes, regulations, and official explanatory memoranda, to individual case reasonings. As we will soon see, it is especially the latter that constitute a main source of religious-freedom interpretation. The treatment of judicial reasoning in Switzerland differs from that in the United States, however. The
American system relies heavily on court precedent in formal adjudications. When the American Constitution or a statute is at issue, judicial determinations in earlier court cases are extremely critical to the court’s resolution of the matter in dispute. Because of the so-called stare decisis principle a court is obligated to follow the rule or holding established by an earlier case. It basically means that courts are bound by superior courts, and all courts except the Supreme Court of the United States are bound by previous decisions of their own courts. Courts are never bound by courts of a lower level. A holding stated in one case is relevant in a later case, which means that any lower court judgment must be decided in the same way as an earlier one if its material facts (those which are legally relevant) are the same.

Conversely, the Swiss civil law system relies less on court precedent and more on the Constitution, statutes, and regulations themselves. It is essential to state that when a Swiss judge needs to go beyond the letter of an abstract norm in settling a dispute, the judge’s “reasoning” (Erwägung) will not become binding in subsequent determinations involving other parties. A Swiss court is not bound to follow a decision which was reached in previous cases. It either implicitly or expressly overrules an earlier decision. Nevertheless, when time allows, judges still pay a lot of attention to what they themselves or previous judges have said. If the court is not obliged to follow precedents established in earlier cases, but may do so if it is convinced by the reasoning used, the precedential effect is of a persuasive nature only. The highest court of the country allows for reversal or amendment, either if a decision is later considered to be wrong or if attitudes or policy change.

1853 WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 66 (4 edn, Thomson & West 2006).
1855 ELISABETH CHIARIELLO, DER RICHTER ALS VERFASSUNGSGERBER? – ZUR FORTBILDUNG VON GRUNDLAGEN DES RECHTSTAATS UND DER DEMOKRATIE DURCH HOCHSTE GERICHTE 341 (Dike 2009).
1856 For a detailed account on this issue GIOVANNI BIAGGINI, VERFASSUNG UND RICHTERRECHT: VERFASSUNGSRECHTLICHE GRENZEN DER RECHTSFORTBILDUNG IM WEGE DER BUNDESGERICHTLICHEN RECHTSPRECHUNG 79 and 376 (Helbing & Lichtenhahn 1991).
1857 In 2008 the Supreme Court made clear in Schwimmunterricht II that it reverses its earlier decision only provided that a new solution generated a better rationale. Such could be necessary if external conditions changed or legal opinions developed. Otherwise, it was indispensable to maintain the current practice, the judicial body found. It held that the longer the practice was followed, the more compelling a demanded change must be. BGE 2C_149/2008, Urteil vom 24. Oktober 2008, E. 3.
What does all of that mean for our guideline? It basically holds that, for Switzerland, rules referring to case reasonings are non-binding, whereas in the United States the same type of rules possess binding legal effect. Thus, the authoritative guideline that follows is to be handled according to these country-specific circumstances. This differentiation is crucial because, for both legal systems, case reasonings constitute a major source of rules. As a matter of fact, much of Swiss and American modern constitutional law has never been written into the Constitution or put into statutory, or regulatory form, but is to be found in individual specific cases. Since case-law possesses no binding effect in Switzerland, it is recommendable to put the following guideline in statutory form.

It is also important to mention that the guideline that follows is anything but complete. Not all available case reasonings have been worked into the collection. A careful selection was made so as to reflect the most important religious-freedom developments. It represents a first effort to give a concrete overview of today’s applicable law – nothing more and nothing less. Moreover, the information provided requires a cautious handling. This is because it can at no time substitute thorough legal research on religious-freedom issues. And, especially the certainty of most rules should not be overestimated. What if everyone thinks the first decision was wrong? Even if it was the correct, times change and so will judicial interpretation.

As mentioned earlier, the guideline draws essentially from sources analysed in the previous parts. It includes the topics of: public use of religious symbols; proselytization; religious objections to public education; excuses for religious purposes; land uses by religious adherents; state recognition of religious communities; and expressing religious hatred. Rules either apply to one or both countries. A simple indicator: (CH) for Switzerland, (US) for the United States has been applied in order to illustrate to the reader which rule is relevant in which country. The guideline is then followed by some final considerations.

### 1.1.2 Public Use of Religious Symbols

Swiss and US courts have judicially recognized the use of several religious symbols. The following summarizes not only when and where these can be used in the public sphere, but also what the term “religion” can mean in civil law. If freedom of religion is a fundamental right affording special privileges
and protections, then one must start by saying what religion is, in order to divide what is embraced by this freedom from what is not.

1.1.2.1 Defining Religion

The above Analytical Representation revealed that authorities proposed definitions that did not lapse into a sea of endless construction, but produced concrete constitutional interpretation. However, different definitions can still serve different purposes and may not always be commensurable. Generally speaking, there appears to be no Archimedean point from which a neutral definition can be propounded. The openly framed terminology that follows can be taken as a starting reference for later case-by-case constructions.

- (CH) Religion embraces any relationship between humans and divinity or transcendence, must be of substantial philosophical weight, and include an all-embracing philosophy. The concept covers belief, and philosophical conviction also.

- (US) Religion addresses fundamental and ultimate questions having to do with deep and imponderable matters, is comprehensive in nature, consists of a belief-system as opposed to an isolated teaching, and can often be recognized by the presence of certain formal and external signs. This includes all aspects of religious observance and practice, as well as belief.

- (CH/US) Conscience is regarded as an inner sphere of human awareness that can be religious or secular.

- (CH/US) A religion need not be tantamount to having a great number of adherents. However, mere political, sociological, or philosophical views are not considered religious.
Eclectic Representation

- (US) Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit religious-freedom protection.\(^\text{1867}\)

1.1.2.2 Religious Symbol Constructions

The symbolic representation of religion has received ample interpretation also. The Swiss concept of state neutrality and the US Anti-Establishment Clause do not require the public sector to be insulated from all things, expressions, or acts which have religious significance or origin. Applicable ratio decidenda of the cases cited can be reformulated and restructured into the following way.

- (CH/US) Religious symbols do not necessarily refer to a specific thing, but can mean a religious act or expression also. Their use need not be material or tangible; symbolic representation is sufficient.\(^\text{1868}\)

- (CH/US) Courts must not engage in religious interpretation.\(^\text{1869}\) Judges apply an objective evaluation which looks at the reaction of the average person.\(^\text{1870}\) In cases where that objective standard yields no satisfactory results, courts can seek expert advice.\(^\text{1871}\)

- (CH) The use of religious symbols which offend the religious sensitivities of others may be unconstitutional.\(^\text{1872}\) Public places must not become a platform for religious confrontation.\(^\text{1873}\)

- (US) The right to use government property for private expression depends upon whether, by law or tradition, the property is given

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\(^{1868}\) BGE 123 I 296, E. 2a, S. 300; Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777, 781 (10th Cir. 1985), cert. denied 476 U.S. 1169, (1986).


\(^{1870}\) BGE 123 I 296, E. 2a, S. 300; Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777, 781 (10th Cir. 1985), cert. denied 476 U.S. 1169, (1986).


\(^{1872}\) BGE 116 Ia 252, E. 6a, p. 261.

\(^{1873}\) BGE 123 I 296, E. 4a, p. 305 f.
the status of a public forum, or whether, on the other hand, it is reserved for specific official uses only. If the former applies, a state’s right to limit protected expressive activities is sharply circumscribed.1874

1.1.3 Proselytization

It took a long time until proselytization in Switzerland and the United States gained constitutional acceptance. For instance, Jehovah’s Witnesses were prosecuted for distributing, or selling their literature without a licence. Also other pious people were regarded as militant and unpopular faiths that pursued fanatical purposes. Today, Swiss and American federal law protects door-to-door religious canvassing, as it does proselytization on public ground. Under certain circumstance, Swiss jurisprudence allows state-sponsored information campaigns against “dangerous” sects also.

1.1.3.1 On Public Ground

By the very nature of proselytization, the freedom rights of canvassers and persons canvassed can clash. Swiss and American law have found a dividing line between the methods which are constitutionally permissible and those which are not. The following constitutes a summary of those laws.

- (CH/US) Religious freedom does not guarantee the right to communicate one’s views at all times and places, or in any manner that may be desired.1875

- (CH) Persons have a right to profess their religion alone or in community with others. No person must be forced to join or belong to a religious community, or to participate in a religious act, or to follow religious teachings.1876

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1876 Id.
- (CH) Persons of obvious and proven sectarian behaviour must be prohibited from recruiting new adherents by way of aggressive, suggestive, and reckless methods on public grounds.\textsuperscript{1877}

- (CH) Police are empowered to ban access to specific places or to generally expel recruiters if there is sufficient indication that their methods are unlawful, especially deceptive, or else if unfair practices are adopted or passers-by are unduly harassed.\textsuperscript{1878}

- (CH/US) People are subject to reasonable time, place, and manner restrictions. Restrictions must not make reference to the content of the regulated speech, must serve a significant governmental interest, and must leave open ample alternative channels for communication of information.\textsuperscript{1879}

- (CH/US) The state has an interest in protecting the safety and convenience of persons using public ground.\textsuperscript{1880}

- (US) Activities in non-public fora receive somewhat less constitutional protection than equal or similar religious exercise in public fora.\textsuperscript{1881} A public forum is a place which has immemorially been held in public trust and used for purposes of expressive activity.\textsuperscript{1882} This differentiation flows from the fact that some places like parks and sidewalks have always been used by the public for assembly, communicating thoughts between citizens, and discussing public questions.\textsuperscript{1883}

1.1.3.2 Anti-Proselytization Campaigns

The Swiss government is allowed to counteract “dangerous” missions by colporteurs. Religious freedom includes not only the negative obligation to refrain from interfering in religious exercise, but also the positive duty to protect individuals as well as religious communities from violations of their fundamental rights.

\textsuperscript{1877} BGE 125 I 369, Sachverhalt, p. 370.
\textsuperscript{1878} Id. at 384
\textsuperscript{1880} Id. at 383; Id. at 650.
\textsuperscript{1882} Id.; also Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 (1985).
- (CH) State sponsored campaigns which offer information, advice and counselling about “dangerous” sects are not inconsistent with the concept of state impartiality. “Dangerous” activities are unfair treatment through manipulation, group pressure, or awareness-changing methods.\textsuperscript{1884}

- (CH) Public support is unconstitutional if the state take sides with a religious organization in matters of truth.\textsuperscript{1885} However, the right to freedom of conscience and belief does not entail a right to be spared from confrontations with other religious, anti-religious, or philosophical views.\textsuperscript{1886}

### 1.1.3.3 Door-to-Door Religious Canvassing

Especially in the USA, canvassers disseminate their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full- or part-time workers. Judicial limits have also been imposed on this form of religious exercise.

- (US) Distribution of religious tracts by way of door-to-door religious canvassing is an age-old form of missionary evangelism, and enjoys the same claim to protection as the more orthodox and conventional exercises of religion. However, individuals may not commit frauds upon other people under the cloak of religion. Penal law available to punish such conduct is not unconstitutional.\textsuperscript{1887}

### 1.1.4 Religious Objections to Public Education

The main legitimacy for encroachments on religious freedom in the school environment is the same in both countries – namely, the objective to provide students an education that enables them to actively participate in life after school. However, while balancing state versus student or parental interests, public authorities must take religious and non-religious views as they find

\begin{itemize}
  \item \textsuperscript{1884} BGE 118 Ia 46, E. 4e/aa, p. 58.
  \item \textsuperscript{1885} Id.
  \item \textsuperscript{1886} Id.
  \item \textsuperscript{1887} Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).
\end{itemize}
them. This requires that authorities look directly into the sincerity of a person’s claim.

1.1.4.1 Secular Curriculum

Objections to secular curriculum have occurred in Switzerland as well as the United States. Courts of both countries have rarely granted exemptions. The judicial ratios of both countries can be summarized in the following way.

- (CH) School attendance takes priority over religion in cases where public interest considerations are pressing.\(^{1888}\) The welfare of a child constitutes a pressing public interest. It might not be assur-able by the state if a student’s health is put in jeopardy, or the concept of equality of opportunities or equality between genders is violated.\(^{1889}\)

- (CH) Physical education significantly serves for the socialization of pupils. This purpose can be met only if all lessons are held co-educationally.\(^{1890}\) Schools require today more than ever before that efforts are made to ensure the adaptation and involvement of children and youngsters from other cultures to the pertaining social conditions.\(^{1891}\)

- (US) To compel attendance in coeducational physical education, it must appear either that the state does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.\(^{1892}\)

- (US) A challenged curriculum must be shown to have a coercive effect in order to establish a violation.\(^{1893}\)

- (CH) Schools must not permit exemptions that are based upon personal desires.\(^{1894}\)

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1888 BGE 119 Ia 178, E. 7a, p. 190.
1889 Id. at 194-195.
1891 Id.
- (CH/US) Public schools serve the purpose of teaching fundamental values essential to a democratic society and describe the school’s interest in tolerating divergent religious views as a civil tolerance, not a religious one.\textsuperscript{1895}

1.1.4.2 Attire

The state needs to accommodate the religious beliefs and observances of teachers as well as students. The question is how far that requirement goes in the area of religious attire. The following shows that the courts of both countries have a clear view on the topic.

- (CH/US) Teachers are agents of the state. They must not foster sectarian influences, favouritism, or official approval in the classroom through the wearing of religious or anti-religious garb.\textsuperscript{1896}

- (CH/US) Neutrality is maintained provided that the state avoids giving children or their parents the impression that the school, through its teacher, approves and shares the religious or non-religious commitment of one group and finds that of others less worthy.\textsuperscript{1897}

- (CH/US) Students generally enjoy ample religious-freedom rights in terms of their attire. They are free to wear whatever clothes do not unduly disrupt the educational process or interfere with the rights of other students.\textsuperscript{1898}

1.1.4.3 Religious Coercion

Religious coercion covers the act of teaching religion compulsorily.\textsuperscript{1899} The activity interferes with free exercise considerations, as well as the state neutrality or anti-establishment concept. In the jurisprudence of both countries,

\begin{flushright}
\textsuperscript{1895} \textit{Id.}; also Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1069, (6th Cir. 1987).  \\
\textsuperscript{1896} BGE 123 I 296, E. 4a, S. 305 f.; Cooper v. Eugene School District, 301 Ore. 358, 373 (Ore. 1986).  \\
\textsuperscript{1897} \textit{Id.}; \textit{Id.} at 373.  \\
\textsuperscript{1899} An exception to the following \textit{ratios} are voluntary classes on religion.
\end{flushright}
tangible ratios have been developed which can be applied to many cases to come.

- (CH) Teachings or organization methods which are determined by a specific faith, or which are hostile to a particular religious conviction, are unconstitutional.\textsuperscript{1900}

- (CH) Actions which might offend the religious sensitivities of pupils and parents may not be state-imposed.\textsuperscript{1901}

- (US) Any exercise which is used to induce schoolchildren to read, meditate upon, perhaps to venerate and obey religion is unconstitutional.\textsuperscript{1902}

- (CH) State neutrality refers not only to a negative obligation in the sense that a school authority must refrain from preferring one religion over any other religion, or religion over non-religion, or non-religion over religion, but a positive duty to actively provide for a common and socially shared environment that is, at its base, widely acceptable to any kind of religion or non-religion.\textsuperscript{1903}

- (US) Neutrality means a negative obligation to keep a basic curriculum free from entanglement with a particular religion or non-religion while accepting certain compromises that arise out of natural interaction between teacher, students, and parents who are either religious or non-religious.\textsuperscript{1904}

- (CH/US) Limited teaching of humanist, or Christian values, profoundly embedded in tradition does not necessarily violate religious-freedom laws as long as such teaching can be made subject to contention.\textsuperscript{1905}

\section{Excusals for Religious Purposes}

\textsuperscript{1900} BGE 119 Ia 178, E. 1c, S. 180.
\textsuperscript{1901} BGE 116 Ia 252, E. 6a, S. 261.
The right to be excused for religious purposes is part and parcel of the concept of religious freedom, in both Switzerland and the United States of America. However, the lawmakers in both jurisdictions have carved out specific rules for where such liberty must necessarily encounter limits. The following gives an overview of that framework in the areas of employees’ and students’ absences, as well as prisoners’ rights.

1.1.5.1 Employees’ Absences

Employees’ religious absences mean a reduction in the efficiency of an undertaking. As the following laws show, Switzerland and the United States do not strike the same balance between these conflicting interests.

- (CH) An employee’s requests concerning a religious holiday other than one officially recognized must be granted by the employer if that is practicable. Unofficial religious holidays are treated as extraordinary leisure time. There is no entitlement to a wage for the time an employee is absent. Employees can be required to make up missed working hours.

- (US) An employee’s religion must be accommodated unless such accommodation causes undue hardship for the employer. The requirement of undue hardship is satisfied even if no substantial expenditures on the part of the employer are involved. If religious accommodation requires anything more than de minimis expenditures, it creates an undue hardship to the employer.

- (US) Employers are not required to accommodate religious activities by their employee during the workday. The accommodation requirement does not include a request to attend midday prayer at a mosque. Employers are not required to allow factory workers

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1908 Id.


to take a break for sunset prayers.\textsuperscript{1912} Personal preferences are not covered by First Amendment law even if wrapped in religious garb.\textsuperscript{1913}

- (CH) Employees are permitted to be absent for religious activities during working hours.\textsuperscript{1914} Absences are not regarded as regular working time but time off. Employees are required to inform the employer about their absence at least three days in advance.\textsuperscript{1915} Employees who are absent for religious activities can be required to compensate the working hours missed.\textsuperscript{1916}

\subsection*{1.1.5.2 Students’ Absences}

In both countries teachers grant excusals as long as students do not disrupt school organization or control, and as long as they compensate the time missed and continue to gain good grades. The following summarizes the most important rationes decidendi that exist in this quickly developing legal area.

- (CH/US) Pupils that are excused for religious purposes must be able to keep pace with classmates.\textsuperscript{1917}

- (CH) There are no absolute numbers of days and times of rest or observance that a student can claim on religious grounds. The amount of days granted to one student need not necessarily serve as a reference guide for the maximum of days to be granted to another student.\textsuperscript{1918}

\begin{thebibliography}{10}
\bibitem{1915} \textit{Id.} at (second sentence).
\bibitem{1916} \textit{Id.} at art. 11 (first sentence).
\bibitem{1918} BGE 114 Ia 129, E. 4b, S. 135.
\end{thebibliography}
(CH/US) The permissibility of exemptions depends on the particular circumstances of the case.\(^{1919}\)

(CH/US) The requirement upon teachers to grade make-up work due to students’ religious absences is not regarded as substantial burden on the school.\(^{1920}\)

(CH/US) The limits of liberty are reached if it is virtually impossible to properly educate a child.\(^{1921}\) Regular absences, especially, are likely to fall under this category.\(^{1922}\)

(US) A student’s personal preferences do not give rise to constitutional protection.\(^{1923}\)

### 1.1.5.3 Prisoners’ Rights

Today, many prisons have staff chaplains or imams who minister to the religious needs of prisoners. Inmates have relatively easy access to clergy and others involved in various types of prison ministry. Because prisoners live in an enclosed environment, they have to come to terms with greater restrictions than free individuals do.

(CH/US) Inmates must be permitted to take part in individual worship or collective religious services unless there is a clear and present danger.\(^{1924}\) Breaches of security or disruptions are causes for permissible restrictions on the inmates’ freedoms.\(^{1925}\)

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\(^{1922}\) Id.; Id.


\(^{1924}\) BGE 129 I 74, E. 4.4, S 79; Knuckles v. Prasse, 435 F.2d 1255, 1257 (3rd Cir. 1970).

- (CH/US) Religious services may be conducted by way of interfaith worship. The state has no affirmative duty to provide, furnish, or supply every inmate with a clergyman or religious services of his or her choice. The state provides, at best, facilities for worship and the opportunity for some clergy to visit the institution.

- (CH/US) The concept of equality of laws protects all inmates equally. It means that if members of one faith can practice their religious beliefs and possess religious materials, the equivalent opportunity must be available to members of another faith.

- (CH) Religious freedom is limited by the organizational possibilities of individual prisons.

1.1.6 Land Uses by Religious Adherents

Land is finite. This necessarily entails the sharing of a given territory by various players, be they religious or not. The religious landscape of both Swiss and American society has fundamentally changed. New religious groups and denominations have emerged, others have disappeared, and still others have been introduced by an influx of foreign labour. Many new religious communities demand greater participation in public life. The right to religious freedom under the Swiss and the American Constitution has been interpreted to encompass, inter alia, the right to build, alter, and operate places of worship such as temples, churches, mosques, cemeteries and grave sites. Religious-freedom rights can still be made subject to restrictions stemming, for instance, from land planning, building, or environmental laws. Although relatively few disputes over religious land uses have been brought before either Swiss or US American courts to date, the few cases that exist have mainly arisen over: the amount of noise permissible; the right to change a religious property’s use; clashes between the freedom to build new buildings and constructions versus aesthetic and historic interest protection as well as landmark preservation; and the right to be buried or use grave and sacred sites in compliance with one’s beliefs. Applicable statutory provisions


1927 BGE 113 Ia 304, E. 3, p. 306; Glittlemacker v. Prasse, 428 F.2d 1, 7 (3rd Cir. 1970).

1928 Id. at 307; also Newton v. Cupp, 474 P.2d 532, 536 (Or. App. 1970).

1929 Id. at 306.
and the rationes decidendi of the few cases decided can be reformulated and
restructured as follows. The purpose is to give a quick oversight into the
frameworks for land uses as they have been developed so far.

1.1.6.1 Meaning of Land Uses by Religious Adherents

In the Religious Land Use and Institutionalized Persons Act of 2000, the US
lawmaker gave the constitutional free-exercise provision in relation to reli-
gious land uses an exceedingly wide meaning. It is likely that the ulterior
motive behind this liberal approach is the conviction that future case-to-case
analyses will narrow down specific kinds of land uses. Moreover, the
American legislature appears to be aware that a narrow definition at an ini-
tial terminological stage would run into the danger of answering the whole
question of the scope of, and limits to, free exercise at a statutory stage. This
openly framed terminology can thus be taken as a starting reference for judi-
cial, case-dependent constructions.

- (US) Religious land use can be any exercise of religion, whether or
  not compelled by, or central to, a system of religious belief.

- (US) Use, building, or conversion of real property for the purpose
  of religious exercise shall be considered to be religious exercise of
  the person or entity that uses or intends to use the property for that
  purpose.

1.1.6.2 General Limitations to Land Use

US courts have had the opportunity to describe specific aspects of legitimate
state interferences in the freedom of land uses by religious adherents. It is
notable that American judicial bodies put the threshold of constitutionality
rather low, and thereby give wide discretion to state or local lawmakers and
governments.

- (US) Any governmental conduct being challenged under religious-
  freedom rights must actually inhibit religious activity in a concrete
  way, and cause more than a mere inconvenience.

1931 Id.
1932 Id. at § 2000cc-2(b).
- (US) Free-exercise rights are considered to be unconstitutionally deprived if a building project is simply denied because of its religious character. The “substantial burden” requirement is clearly satisfied if a law effectively prevents religious members from worshipping at all.

- (US) Religious communities are not immune from land use regulations, if such regulations have both a secular purpose and a secular effect.

1.1.6.3 Noise Protection

The Swiss Supreme Court in its leading religious noise decision opted for a historical interpretational approach. The ruling’s reasoning is significant because it not only considers country-specific tradition and custom but also religion, by pursuing an optimum for both. It is reasonably foreseeable that jurisdictions other than Swiss domestic ones might follow the ratio of this ruling in cases like Christian bell ringing, and others.

- (CH) There is no claim to absolute quietness. Every person must come to terms with minor and insignificant interferences.

- (CH) An inherently religious practice with no secular use receives less constitutional protection than a practice that happens to be customary, or traditional, and religious at the same time.

- (CH) Ordinary bell-ringing practices, as a widespread ancient tradition, take priority over other noise disturbance claims.

1.1.6.4 Aesthetic Interest Protection

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1935 146 CONG. REC. S774-01.
1937 BGE 126 II 366, E. 2b, S. 368.
1938 Id. at 371.
1939 Id.
Aesthetic interest protection is a topic especially relevant in all those towns and cities where ancient and historic architectural patterns are regarded as of great value. The Swiss Federal Supreme Court reasoned that aesthetic standards for designs must apply to all buildings and constructions regardless of whether they are used by, or for, religious communities.

- (CH) Buildings and constructions must be typologically in keeping with existing structures.\(^{1940}\)
- (CH) The requirement to be “in keeping” is satisfied if the place and dimension of the structure does not disturbingly change the character of a specific area, and if it is in compliance with the surrounding area’s style and materials.\(^{1941}\)

### 1.1.6.5 Cemeteries, Graves, and Sacred Sites

In the area of cemeteries, graves, and sacred sites, Swiss and American Supreme Courts have developed similar standards of law. From the tone of their reasoning it can be heard loudly and clearly that religious freedom is primarily couched as a personal right, instead of a positive state duty to act and sponsor religious exercise. There is an impression that this area of law is truly a work in process.

- (CH/US) No person must be coerced by the government’s action to violate his or her beliefs.\(^{1942}\)
- (CH) Coercion means to force someone to engage in an action or express an opinion which is part of an expression of religious belief.\(^{1943}\)
- (CH) The dead human body deserves respect. Which kind of burial and which acts are to be seen as an expression of respect or disrespect is a question of custom and local practice. The right is vio-

\(^{1940}\) E.g. Cantonal Planning and Building Act of Solothurn of 3 December 1978 (Planungs- und Baugesetz des Kantons Solothurns vom 3 Dezember 1978 (PBG), Nr. 711.1).

\(^{1941}\) BGE 1P.149/2004, E. 3.3.


\(^{1943}\) BGE 101 Ia 392, E. 3b, S. 397.
lated if whatever constitutes the prevailing practice to honour the
dead is denied to the deceased.\textsuperscript{1944}

- \textbf{(CH/US)} The state has a negative duty not to obstruct a specific
kind of burial, but it has no positive obligation to guarantee any
kind of ceremonial act that is regarded as respectful burial.\textsuperscript{1945}

\section*{1.1.7 State Recognition of Religious Communities}

State law is the primary source for the formation, structure, and operation of
religious communities.\textsuperscript{1946} The state permits religious institutions to conduct
their own internal affairs, nevertheless. Either in Switzerland or the United
States of America, religious communities possess no positively formulated
right to autonomy, but enjoy their freedoms within the bounds of state-made
civil law.

\subsection*{1.1.7.1 Legal Structuring of Religious Communities}

Switzerland and the United States provide for special status forms if certain
requirements are satisfied. But the existence of religion-related statutes may
raise the question as to whether an unconstitutional preference is thereby
granted to particular groups. The act of statutorily selecting particular groups
implicitly limits the choices of those groups that do not have the benefit of
such traditional provisions. The law as it has developed so far can be sum-
marized in the following way. It is reasonably clear that the topic of legal
structuring of religious communities is likely to undergo changes in the near
future.

- \textbf{(CH/US)} Religious freedom covers not only the right to join or to
belong to a religious group, but also the right to set up and dis-
solve a religious community.\textsuperscript{1947}

\textsuperscript{1944} BGE 125 I 300, E. 2a, S. 305-306.
\textsuperscript{1945} Id.; Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 451
(1988).
\textsuperscript{1946} Religious communities adopt civil-law corporate forms, for instance in order to
limit liability, to own and control property in the name of the community, and to
take advantage of benefits available to corporations under tax and other regulatory
provisions of state and federal law.
\textsuperscript{1947} As implied from SWISS CONST. ART. 15(3); Bailey v. Trustees of Methodist Episco-
(CH) Public-law recognition is dependent in most cantons upon a religious community’s willingness to comply with the rule of law, fundamental rights, democratic organization, and to have some social significance in the region concerned.¹⁹⁴⁸

(CH) Public-law recognized religious communities are no longer regarded as vehicles of public functions and sovereign power, but as person-based entities similar to those corporations formed under federal private law.¹⁹⁴⁹

(US) States grant special statutory provisions to a number of traditional denominations.¹⁹⁵⁰

### 1.1.7.2 Respect for Internal Affairs of Religious Communities

At the time of writing, it is not entirely clear to what extent adherents should be free to administer or organize religious communities. The following represents the law as it has been expressed by the courts.

(US) Government may not engage in programs or enact laws that require extensive surveillance by secular authorities of the activities of religious institutions, since such surveillance entails the risk of entangling the state in matters of religious significance.¹⁹⁵¹

(CH/US) As long as the content of a religious doctrine is at stake, the Federal Supreme Court must act with great restraint. In any event, the assessment of a religious attitude or rules, or even the review of theological truth – in particular, the interpretation of the relevant parts in holy scriptures – remains barred to the Federal Supreme Court unless and until the boundaries of arbitrariness are being overstepped.¹⁹⁵² The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the

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¹⁹⁴⁹ BGE 102 Ia 468, E. 3b, S. 475.
¹⁹⁵² BGE 119 Ia 178, E. 4c, S. 185.
discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals.\textsuperscript{1953}

- (US) To permit civil courts to probe deeply enough into the allocation of power within a hierarchical church so as to decide religious law governing church polity violates the First Amendment in much the same manner as civil determination of religious doctrine.\textsuperscript{1954}

- (CH) As for public-law recognized religious communities, contractual matters such as working agreements are in the realm of combined, i.e. state and religious, affairs. Civil as well as religious courts possess the power to rule on cases in these circumstances.\textsuperscript{1955}

- (US) Courts can invoke any secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations, such as well-established concepts of trust and property law familiar to lawyers and judges.\textsuperscript{1956}

- (CH/US) The right to religious freedom in the form of collective self-governance reaches its limit where some religious exercise violates generally applicable, content-neutral criminal law.\textsuperscript{1957}

1.1.7.3 Tax Exemptions to Religious Communities

The highest courts of both countries are strikingly unanimous when it comes to the tax issue on religious communities.

\begin{itemize}
\item \textsuperscript{1953} Watson v. Jones, 80 U.S. 679, 732 (1871).
\item \textsuperscript{1954} Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976).
\item \textsuperscript{1955} High Court Decision of the Canton of Basel (BJM 9/2007 Nr. 06, E. 67, Kantonsgericht Basel-Landschaft).
\item \textsuperscript{1956} Jones v. Wolf, 443 U.S. 595, 603 (1979); also Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School, 696 A.2d 709, 723 (N.J. 1997).
\item \textsuperscript{1957} BGE 60 I 349, E. 1, p. 350; Employment Division v. Smith, 494 U.S. 872, 879 (1990).
\end{itemize}
(CH/US) The imposition of federal tax is in compliance with religious-freedom law with regard to payments for goods or services, certain gifts, bequests, and most income-producing activities, including employment, investment, or operation of a trade business. 1958

(CH/US) An activity – whether religious or charitable – to be tax exempt must be dedicated to the benefit of the public. 1959

(CH/US) In case of ordinary commercial methods of sales of articles to raise propaganda funds, it is proper for the state to charge reasonable fees for the privilege of canvassing. 1960

(CH/US) The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have a civil appeal or a moral platitude appended. 1961

(US) The mere fact that the religious literature is sold by itinerant preachers rather than donated does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. 1962

(CH/US) Selling activities by religious communities need to be incidental and collateral to their main object, which is to preach and publicize the doctrines of their order. 1963

(CH/US) Not all burdens on religion are unconstitutional. A tax requirement can still be valid because it is essential to accomplish an overriding governmental interest. 1964

1.1.7.4 Material Aid to Religious Communities

In both Switzerland and the United States it has been affirmed that some sort of regional establishment is not at variance with the Federal Constitutions. However, the means and extent by which material aid to religious organizations is permitted differs in both countries.

- (CH/US) Property tax exemptions to religious communities cannot be regarded as unconstitutional indirect material aid.\(^{1965}\)

- (CH) Material aid in the form of direct financial support, repayments, and restitutions to public-law recognized religious communities for their rendering of public benefit is in compliance with the Federal Constitution.\(^{1966}\)

- (CH) Compulsory tax levy on the profits of legal persons and its subsequent distribution only among public-law recognized religious communities is in compliance with the Federal Constitution.\(^{1967}\)

- (US) Sponsorship, financial support, and active involvement of the sovereign in religious activity is at variance with the Anti-Establishment Clause.\(^{1968}\)

- (US) Material state aid may be made available to religious schools as long as it is manifestly clear that the performance of the state-supported services is secular, and equally available to non-religious schools.\(^{1969}\)

### 1.1.8 Expressing Religious Hatred

Switzerland and the United States have both undertaken measures to protect religious adherents from verbal attacks upon their person. This appears to be due, in part, to people’s persistent inclination to cling to familiar and accepted opinion and to dislike what is new, but other reasons are not difficult


\(^{1966}\) BGE 107 Ia 126, E. 4c, S. 134.


to discover. Some types of speech are clearly within the scope of freedom of expression, while others are entitled to less protection, or are excluded altogether. The following shows when the governmental interests are sufficient to justify lesser or no protection of speech.

1.1.8.1 Protected/Unprotected Speech

Free expression has been thought to serve the following principal values: advancing knowledge and truth in the marketplace of ideas and ideals, facilitating representative democracy and self-government, and promoting individual autonomy, self-expression and self-fulfilment.\textsuperscript{1970} It is generally believed that freedom of expression warrants protection because of its value to society and the individual. But what is deemed to justify curbing it? Freedom of expression laws in Switzerland and the United States have given some answers to that question.

- \textit{(CH)} Whoever publicly invokes hatred, seeks the systematic humiliation or defamation of a person’s beliefs is not protected under the fundamental right to freedom of expression and information.\textsuperscript{1971} No person enjoys freedom of expression or information for the purpose of vilely or maliciously insulting, ridiculing, interfering with, disrupting, or despising a religion or cult.\textsuperscript{1972}

- \textit{(US)} Unprotected speech includes fighting words such as the lewd and obscene, the profane, the libellous, and verbal insult or aggression – words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.\textsuperscript{1973}

- \textit{(US)} Fighting words are categorically excluded from the protection of the First Amendment because their content embodies a particularly intolerable and socially unnecessary mode of expressing whatever idea the speaker wishes to convey.\textsuperscript{1974}

\begin{itemize}
\item \textsuperscript{1970} Kathleen M. Sullivan & Gerald Gunther, First Amendment Law 4 (3rd ed., Thomson & West 2007).
\item \textsuperscript{1971} Swiss Federal Criminal Code (Schweizerisches Strafgesetzbuch vom 21. Dezember 1937, SR 311.0) art. 261bis.
\item \textsuperscript{1972} \textit{Id.} at art. 261.
\item \textsuperscript{1973} Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
\end{itemize}
- (CH) Any form of speech is punishable if it adversely affects the dignity of the person attacked, by lowering it, and by making it look despicable.  

1975

- (CH) Viewpoints which are disliked by the majority, and have a shocking effect on many, can be expressed freely.  

1976

- (US) Police cannot be used as an instrument for the suppression of unpopular views.  

1977

1.1.8.2 Speech Directed at Definable Group of Persons

US courts have grappled repeatedly with the line between “opinion” and “instigation.” To them it is necessary for further requirements to be satisfied before the government can curb free speech. They can be summarized in the following way.

- (US) Expression can be limited if it is likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.  

1978

- (US) Constitutional guarantees of free speech and press freedom do not permit a state to forbid or proscribe advocacy of the use of force except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.  

1979

- (US) The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action.  

1980

- (US) An expression must have the intent to intimidate before First Amendment protection can be denied.  

1981

1.1.8.3 Speech Directed at the Public at Large


1976 BGE 131 IV 23, E 3.1, S. 28


1980 Id. at 448.

The right to express oneself and to participate in the democratic process has always been treasured above all else in the United States. For this reason, US jurisprudence differentiates between speech directed at a definable group of persons and that directed at the public at large. The latter receives the greatest possible protection.

- (US) Speech directed at the public at large is protected even if it invites dispute, induces unrest, creates dissatisfaction, or stirs people to anger.\(^{1982}\)

### 1.1.9 Concluding Remarks

The above guideline presents a first endeavour to group relevant rules under specific topic headings. The idea of this is to allow readers to discern which rules are likely to apply in similar cases. In combination with the constitutional review standards described in the *Methodological Representation* of this thesis, the guideline provides a powerful tool to predict case outcomes before they are actually decided. To give a simple and concrete example, imagine that the mother of a public school student wants to know whether her daughter is allowed to wear a headscarf during school hours despite the head teacher’s opposite claim. Thanks to the above guideline and methodological explanation, she can foresee the outcome that is likely to apply. By looking at the above “Religious Objections to Public Education” section, she will find the rule which holds that students generally enjoy ample religious-freedom rights in terms of their attire.\(^{1983}\) When considering the mechanics that courts apply to decide a case, she will additionally learn that judges balance her daughter’s interests against those of the public or third parties. This, inter alia, means that a student is free to wear whatever headscarf she wishes as long as it does not unduly disrupt the educational process or interfere with the rights of other students.\(^{1984}\) From this, the mother can relatively safely conclude that her daughter’s religious exercise of wearing a headscarf is likely to be constitutionally protected. However, when contemplating upon possible levels of predictability, the above legal tools are sometimes of limited help. The two main reasons for this situation are, firstly, that the guide-

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line captures only a few aspects of an exceedingly broad realm of peoples’ religious lives, and secondly, that Swiss and American judges in the process of constitutional review enjoy great discretion in dispensing justice according to the specific circumstances of a case.
1.2 Assessing the Extent of Religious Freedom

1.2.1 General Introduction and Overview

Up to this point, I have mainly considered practical indicators on religious freedom. In this final chapter, I turn to theory by developing a method to assess the extent of religious freedom. The objective is not, however, to posit yet another typology of the issue, but to consider the constitutional law analysed above from a theoretical perspective. It represents an effort to provide a framework of possible patterns of the right to individual or collective religious freedom, as well as resulting configurations between religious institutions and the state. With this aim in mind, the thesis claims two things. Firstly, that the extent of the constitutionally protected right to religious freedom can be assessed along three dimensions – one measuring the level of state interference with individual religious freedom, another involving the amount of collective religious autonomy granted by the state, and a third representing the proximity between religious and governmental institutions. Secondly, that these theoretical accounts can be applied to varying national jurisdictions, especially to those governing pluralistic societies.

At this stage some important preliminary points require to be mentioned. Theorizing is involved when one makes a choice of concepts by which to undertake a classification. The term religious freedom reminds us that religion and freedom are related in various ways and intersect on a number of different planes including the political, philosophical, legal, theological, natural, and psychological. In view of the latter, the de iure freedoms may

1986 Resulting configurations between individual adherents and religious institutions are not treated here as a separate, that is to say, a fourth dimension. The reason for this is that Swiss, American, and Syrian constitutional law does not regulate the relationship between “private parties,” unless the state is obliged to act positively for the protection of religious freedom.
1987 Although such an evaluation can never be accurate from a scientific perspective and, thus, will also remain vague in this thesis.
not necessarily coincide with the de facto connections. Society’s disposition towards a religion or religions in general, in reality, be friendly, hostile, or ignorant, whatever stance the constitutional position espouses. However, in the following, the thesis will restrict itself to the constitutional and philosophical planes. Additional planes mentioned – despite their apparent meaningfulness – are screened out. Moreover, it is presumed that religious freedom derives from a legal relationship which involves the individual, the religious communities, and the state. And, although in reality religious freedom is far-reaching, intermingled, multilayered, and complex, the propositions soon to be made are deliberately oversimplified. It also means that the complexity found in specific countries is reduced, at this theoretical level, the idea being the production of salient differences that can be illustrated in perceptible terms along a straightforward linear continuum.

Additional points need to be stated. The theory omits to address the issue of how shifts in degrees of religious freedom come about. It gives no consideration to legal processes, and captures all three dimensions as one time-event. Furthermore, descriptions embark from the assumption that moderation is a prime virtue of pluralist societies. The objective to find balanced accounts of religious freedom is consoling and encouraging because no one must ultimately choose between extremes. The middle ground sought after in this thesis is one determined by considerateness and respect towards all participants in society, whatever their beliefs might be.

The three dimensions will be treated separately from each other in order to illustrate the environment of religious-freedom laws as adequately as possible. The chapter begins by sketching philosophical ideas regarding individual religious freedom. This is then followed by the development and identification of the theoretical indicators necessary to assess individual aspects of religious freedom. Next, these theoretical indicators are applied to concrete

1989 An exception to this approach must be applied to Syria, a country in which politics and law are sometimes separate and sometimes overlap.
constitutional law found in Switzerland, the United States, and Syria. The objective of this method is to illustrate the extent to which individual religious freedom has been internalized by the respective legal system. Subsequently, the same approach is taken with regard to the right to collective religious freedom. It means that consideration is initially given to a philosophical reason why collective religious freedom is important; then theoretical indicators are established; and finally, concrete constitutional law is applied and illustrated. As for the proximity dimension a slightly different objective is pursued. Although the same method is utilized, the proximity dimension does not search for degrees of any justiciable right, but for the resulting configurations between religious institutions and the state. The question is how close public authorities come to religious organizations. So the issue is one of legal structure, but not one of claimable right. Finally, some insights will be given into the interplay between the dimensions, and last but not least, an overall conclusion will be drawn. It must be re-emphasized that this chapter, once again, is bedevilled by questions of scope. At no time is it possible to answer comprehensively all the issues raised.
1.2.2 Individual Dimension

1.2.2.1 Theoretical Indicators

Liberal philosophy claims that silencing the expression of individual belief is tantamount to robbing the human race of its essential characteristic. This idea refers to the conviction that the individual needs the freedom and challenge of using reason to distinguish right from wrong and good from bad. In this sense, government should respect people’s individual choices in matters of religion and abstain from teaching how to pursue the good life. Most if not all pluralist nations have responded to the significance of individual religious freedom. Country-specific interpretations, however, pay varying heed to the importance of this type of liberty. And, it is this difference that interests us for the remaining part of this subsection.

It is assumed that the degree of individual religious freedom can be evaluated by means of a straightforward linear continuum as depicted in Figure D.1(t) below. Poles A. and B. represent the polar extremes of either complete absence or complete presence of individual religious freedom. Between them lie various intermediate indicators referred to as Area AB. They are presumed indefinite since it is not really known how many intermediate indicators exist. Once these basic features are recognized, refinements need to be introduced that help fine-tune and describe significant subfeatures along the continuum. From the left to the right, they correspond to three major areas of gradation, namely as a “narrow,” a “balanced,” or a “broad” constitutional right. Arguably, these refinements make it possible to identify salient differences among country-specific interpretations, and will later help us to plot the Swiss, US American, and Syrian models along the continuum. For now, however, we take a closer look at the features’ actual meaning.

[here goes the chart called: “Figure D.1(t) – individual religious freedom”]

Pole A.

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1994 In other words, the subfeatures “narrow,” “balanced,” or “broad” correspond to a “small,” “medium,” and “large” scope of the right to religious freedom. So degrees of religious freedom increase from left to right on the spectrum.
Suppose that at Pole A. there is a complete absence of the right to individual religious freedom. The state denies religious freedom to the individual by granting no rights whatsoever to religious experience. In other words, it means that the state neither approves an individual right to contemplate, nor a right to act upon one’s own inner convictions. In this primitive state of affairs people possess, for instance, no means to individual salvation for the greater glory of one or more Gods, and cannot decide by force of their independent will what they desire to believe. This implies that everyone is banned from joining or belonging to a religious community, from participating in religious ceremonies, or from following religious teachings. Complete absence of religious freedom also connotes to the circumstance in which no person is free to think, or change an opinion or conviction. Hence, by means of this fictitious situation, people are largely deprived of the qualities that make them human. From a religious perspective government makes the life of individuals poor, nasty, brutish, and short.\footnote{1995} So Pole A. represents a hypothetical extreme of a hostile secular state that can hardly be regarded as real, but nevertheless provides some first valuable indicators along the basic continuum.

Intermediate points along $AB$.

*Narrow interpretation* – Assume that at the far left, though inside the “narrow” field, the state begins to grant de minimis rights to personal religious liberty. It can mean that individuals are free to opine, but not as yet to act upon their conviction. They are allowed to hold their own judgements as formed by their mind operating, inter alia, on reason, feelings, and intuition. People may retain or choose among beliefs by replacing the current religion with another. At this uninvolved stage, government restricts itself from interfering with the freedom of thought, conscience, and belief,\footnote{1996} though the liberty to manifest one’s conviction still impairs the limited rights enjoyed at this level. Now, shifting slightly towards the right within the same “narrow” field, people start to receive very limited freedoms to manifest and profess their convictions. They may enjoy the right to worship in the form of ritual and ceremonial acts giving direct expression to belief. At an even more developed stage, additional indicators stand for the circumstances in which

\footnote{1995}{The situation alludes to Thomas Hobbes’ Leviathan or The Matter, Forme, & Power of a Common-Wealth, Ecclesiastical and Civill 87 (Printed for Andrew Crooke, at the Green Dragon in St. Paul’s Church-yard, 1651).}

\footnote{1996}{This may include the absence of threat and physical force, or penal sanctions for having a distinct belief.}
more individual liberties are being granted. Individuals may choose to observe religious customs such as dietary regulations, or wear distinctive clothing or headcoverings. Moreover, practices integral to worship, including the erection of religious constructions, use of ritual formulae and objects, and the observance of holidays and days of rest are no longer pre se prohibited.

However, the crux of the matter is that within the entire “narrow” interpretative demarcation, people must fear deprivations of earlier assigned rights. The reason for this is that there still exist no criteria by which government would balance individual religious adherents’ interests against those of other people. For instance, if a particular religious exercise disturbs others, it may be limited, however unreasonable that claim might be. To put this in another way, at this interpretative stage individuals may have to concede to arbitrary deprivations since already assigned rights are given “highly nominal” status only. It means that the scope of rights can be reduced whenever it conflicts with the interests of the public or third parties. It is thus presumed that, at the “narrow” level, citizens live with the uncertainty of unpredictable legal readjustments setting in, and as a consequence of this possibility, new distributions of individual rights and obligations might unfold that may not only be detrimental, but also illegitimate.¹⁹⁷

_Balanced interpretation_ – When constitutional construction reaches a “balanced” stage, matters become more sophisticated. At the outset, the state respects the freedom of each person to do, omit or believe his or her own thing as an objective worth pursuing. Proportional considerations then question what should happen if mutual agreement on the boundary of freedom did not exist. What if one person is disturbed by the wearing of a Muslim headscarf while other individuals want to allow such a head covering? The secular state in its function as a reasonable mediator then employs a balancing-of-interest test in order to ensure that overt external interference with personal religious freedom is not countenanced. The test basically asks how interests of a special religious domain of life reasonably outwe igh whatever interests may conflict with them. So by virtue of that balancing, the state no longer arbitrarily interferes with religion whenever such exercise is challenged. Before taking action, or abstaining from action, the state asks itself (i.) whether its powers are exercised in a manner suited to achieve the purpose intended; (ii.) whether its intervention is necessary in the sense that there are no milder means to attain the objectives pursued; and (iii.) whether it does not impose burdens or cause harm to other legitimate interests of

¹⁹⁷ The concept of “highly nominal” rights draws on James Buchanan’s account in _The Limits of Liberty: Between Anarchy and Leviathan_ 76 ff. (University of Chicago Press 1975).
individuals which are disproportionate to the importance of the objectives achieved.\textsuperscript{1998}

It can be presumed that this balancing-of-interests test requires the state powers to enable specific degrees of mutual concessions or modifications along the “balanced” indicators along the continuum. The openness of the formula may generate varying results. This is, among other things, because people have varying understandings of what measures are suited to achieve specific objectives, and what might constitute milder means to pursue these objectives. The doctrine can, thus, be seen as an empty vessel which is filled with meaning by whatever is considered just and equitable in the specific circumstances of a case. In this intermediate sphere, individual adherents must still be prepared to put up with changes in their “relatively nominal” freedoms to religious exercise. But they are now provided with a standard against which things may be compared or assessed. In this view, a religious neighbour may be prevented from erecting an over-sized religious construction in his garden, but is free to erect a similar construction that does not disturbingly change the character of the area in which he is living; or a prison regulation may permit a religious inmate to attend in-house church services, if he does not pose a threat to personnel and co-inmates. The idea of finding “balanced” accounts is consoling and encouraging to anyone who wishes to believe that her or his individual interests are taken equally seriously as those of the public or third parties.

It is thinkable that, within the “balanced” demarcation, the secular state also applies a more rigorous balancing approach. This might be the case where government takes the view that interferences with individual freedom of religion must be interpreted in such a way that they are convincingly established. In this respect, the state may ask whether the interference complained about (a.) corresponds to a pressing or compelling public interest; (b.) whether it is proportionate to the legitimate aim pursued; and (c.) whether the reasons given by the national authority to justify it are relevant and sufficient.\textsuperscript{1999} The strictness of this second proportionality test places a finger on the balancing scale, weighting it more heavily in favour of individual religious-freedom claims. It is necessary to mention that, within the “balanced” demarcation as well, individual rights are still “nominal” and not “absolute.” Conceivably, the difference between the “narrow” and the “balanced” level is that citizens are more likely to be treated equally fairly as the balancing process represents a suitable way of addressing each party’s reason, and

\textsuperscript{1998} The proportionality doctrine as applied today in many jurisdictions originated in Prussia and was developed to restrict the discretionary powers of police authorities.
\textsuperscript{1999} As developed in Sherbert v. Verner, 374 U.S. 398, 422 (1963); or BGE 119 Ia 178, E. 7a, S. 190.
Eclectic Representation

explaining it within conceptions of social justice. Central to this theoretical concept is that the state is impartial towards religion, and that it reasonably allows adherents to act in a particular and definite manner, to choose this or that good, to incarnate a certain good in this or that way, and to follow what she or he judges to be good upon honest internal investigation. Social organization in accordance with the techniques as balanced above then provides for efficient means of achieving individual religious objectives.

Broad interpretation – It can be assumed that within the “broad” interpretation field, religious claims will receive direct and concrete preferential treatment in competition with non-religious interests. So, for instance, problems posed by the laws of privacy, or equality such as the ordination of women or of practising homosexuals, may not be accorded equal concern and respect, as the law ascribes a higher value to religious-freedom interests than to any other fundamental right. Consequently, non-religious rights are treated as subordinate rights in instances where they do not coincide with religion. The state can implement this approach by describing the scope of other fundamental rights (other than religious ones) narrowly, or by plainly conceding that individual religious liberties are more fundamental than others, and must take priority in the event of conflict. Moreover, at this level, some aspects of religious liberty are increasingly treated as inviolable (e.g. the right to worship individually, to wear distinctive clothing, or build religious constructions). They are thus no longer “nominal,” but “absolute.” The situation is characterized by a government that is fond of individual religious manifestation. So the greater freedoms adherents enjoy and the less concessions they have to make, the closer the proximity to Pole B. on the spectrum.

Pole B.

The right end of the of the spectrum stands for complete individual religious freedom. This assumed position can mean that individuals in their belief are completely free to do and to omit anything at their own sweet pleasure. A person may, to unlimited width and breadth, hold to religious law, attitudes, and values, observe religious rites and customs, act in public as well as in private on the basis of religious commitments, and promote her or his faith through teaching and proselytizing. Total freedom is tantamount to being unconfined, unfettered, and unconstrained, and is associated with the condi-

tion of being able to choose and to carry out any purposes whatever. In that special situation, the state guarantees that every person can be creative in spontaneously realizing her or his own truth. Moreover, it can be expected that at this extreme, any sort of state intervention or control is non-existent. In turn, the state protects the individual from any form of coercion in matters pertaining to religion.

However, this hypothetical situation creates ground for contestedness and confusion. Not all individuals' freedoms are maximized when optimal legal configurations for one's belief are different from those of other people's. Also in this hypothetical set-up, a sincerely held belief of one adherent can clash with that of another. As all freedoms are absolute, everyone claims to have the same inviolable, that is “absolute” rights. In competition over perfect rights, government risks at Pole B. that the will of the stronger party will eventually prevail. From this perspective, both extremes of the spectrum may start or end with negative freedoms, leading to hostility and persecution. It can be assumed that if either denial or complete liberty of one’s religious exercise rights lie at both extremes of the continuum, intermediate points along AB. produce the greatest prospects for just, secure, and tolerant pluralistic societies.

1.2.2.2 Practical Indicators

In applying the described theory to practice, it is possible to consider where the Swiss, US American, and Syrian legal systems are to be plotted along continuum D.1(p) below. The process will reveal what type or model each of the jurisdictions is. In this respect, neither Pole A. nor B. applies to one of the nations in question. As to the former, evidence for this is presented by the legal situation that Swiss, American, and Syrian citizens all enjoy a constitutionally entrenched right to individual religious freedom. And, as to the latter, individuals in their belief are not completely free to do and omit anything they please. This is because activities based on religion can justifiably be limited in all three countries. From this point of view, it is clear that the jurisdictions in question must be placed somewhere along Area AB.

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2002 SWISS CONST. ART. 15; U.S. CONST. AMEND. 1; AL-DUSTUR AL-SURI [SYRIAN CONST.] ART. 35.
2003 Id. at ART. 36; also Reynolds v. United States, 98 U.S. 145, 164 (1879); AL-DUSTUR AL-SURI [SYRIAN CONST.] ART. 35(2).
Starting with Syria, it can be claimed that Arab government grants de minimis rights to individual religious selfhood in that the state does not interfere with religious choice, or the replacement of one’s current religion with another. The Republic restricts itself from limiting freedom of thought, conscience, and belief. In the entire country, apostasy is not a punishable offence under the criminal law of the land. However, a person who wishes to convert is only free to do so as long as such activity is exercised beyond the pale of society – that is, behind closed doors and without affecting the public, or private family members. This is why Syrians, despite being unrestrained in beliefs, are not free to act upon their new conviction.

Their freedom in this respect is more theoretical than concrete and real. The liberty to manifest one’s new belief impairs the very limited rights guaranteed under the Constitution. Individuals are discouraged from converting to or from another belief. A person who nevertheless changes from Sunni Islam to some other preferred belief-system may face social isolation or even persecution, without the government doing much to prevent it. It follows that individuals possess very limited rights to enjoy practices of worship, use of ritual formulae and objects, and the observance of holidays and days of rest other than those of officially recognized religious communities. In other words, in Syria a dividing line must be drawn between individual exercise as part and parcel of an established religion, and different practices expressing a person’s sincere but highly individual or unusual belief. The legal circumstances are such that no criteria exist by which government would balance an individual adherent’s interests against those of the wider community or third parties. If a new, or unusual religious exercise disturbs public order, it may be restricted, however meaningful it might be. In other words, rights to individual expressions and practices other than those officially warranted are “highly nominal.” It must, however, be emphasized that


2005 An exception to this understanding is presented by the circumstance of a Syrian who converts to an Islamic cult. As held in *Quadri Pasha’s Article No. 126 quoted as in Qanun al-ahwal al-shakhsiyya* [Personal Status Act] of 1949, rule 212.

2006 The Syrian state had on several occasions been accused of turning a blind eye to vigilantism or even reducing the punishment of perpetrators who acted in the name of respected families. The UN Human Rights Committee [UNHCR], Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Report, Syria, U.N. Doc. CCPR/C/SYR/2004/3 (October 19, 2004) para. 410 ff. An exception to this is that conversion to an Islamic cult is state-facilitated if a non-Muslim man marries a Muslim woman. Islam is then offered to him. *Quadri Pasha’s Article No. 126 quoted as in Qanun al-ahwal al-shakhsiyya* [Personal Status Act] of 1949, rule 212.
it is believed that exceedingly few individuals live in fear of losing earlier assigned liberties, as the broad majority of Syrians appear not to bother about diverse forms of individual religious self-determination. Most religious expressions are made in collectivity with others in the sense of following a traditional religion. The “absolute” right to hold or change an individual conviction is of very limited use as it is not coupled with the right to manifest one’s new or unusual religion. So although the system knows limited (and mostly theoretical) aspects of “absolute” rights (which would otherwise fall within the “broad” field) it still appears necessary to place the Syrian model within the beginnings of the “narrow” field for the apparent insignificance, and limited legal protection, of individual religious aspects.

The legal situation in the Swiss Confederation is different. The right to freedom of belief and conscience is primarily couched as an individual, rather than a collective right. All citizens are equally free to espouse, manifest and profess their own convictions. No one is categorically banned from joining or belonging to a religious community, from participating in religious ceremonies, from following religious teachings, or from promoting her or his faith through proselytizing. National jurisprudence is first and foremost concerned with what should happen in the event that no mutual agreement exists on the boundary of freedom. Justices apply specific standards to figure out whether, on the balance of reasonableness, individual claims outweigh specific interests or vice versa. The test most often applied in Switzerland requires a “predominant public interest.” It holds that any state interference must be appropriate, necessary, and proportionate to the objective to be achieved, and thereby secures certain degrees of mutual concessions or modifications along the “balanced” field. In Switzerland, a more rigorous balancing approach is employed sparingly. Justices may still take the view that interferences with individual religious freedom can only be warranted by a “pressing public interest.” The Swiss judiciary does not usually find that a limitation of individual religious freedom must be interpreted in a way

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2007 SWISS CONST. ART. 15 IN ASSOCIATION WITH ART. 8. The only exception to this is a person’s right to build an Islamic minaret. Id. at ART. 72(3).
2008 BGE 125 I 369, E. 5c, S. 379.
2009 Such interests can be police interests, other public interests, and interests of third parties. SWISS CONST. ART. 36(1) AND (2).
2010 A few examples where the proportionality test was applied are BGE 109 Ia 273 E. 7, S. 289; BGE 113 Ia 304, E. 4c, S. 307; BGE 116 Ia 252, E. 7, S. 262; BGE 123 I 296, E. 2a, S. 299; BGE 125 I 369, E. 5c, S. 379; BGE 126 II 366, E. 3c, S. 371; BGE 134 I 56, E. 5.2, S. 63.
2011 Enshrined since 1999 in SWISS CONST. ART. 36(2) AND (3).
2012 BGE 119 Ia 178, E. 7a, S. 190.
that cannot be refuted. Seen in this light, the Swiss model can be assigned to the left side of the “balanced” field.

This evaluation gains legitimacy when considering the fact that individual free-exercise claims do not receive direct or concrete preferential treatment in competition with other fundamental rights. However, the Swiss system also recognizes the concept of inviolability. There exists absolutely no justification for limiting the very essence of the right to freedom of belief and conscience. This “absolute” right embraces freedom to think, to change an opinion, and to hold a conviction, all without compulsion, as well as the right to remain silent about one’s religious conviction. At the heart and core of the concept lies the idea that no one must be coerced into a distinct belief. Thus, “absolute” rights that protect the centrality of human existence are exceedingly few. And because of this important factor, it makes sense to keep the Swiss model within the beginnings of the “balanced” demarcation.

In North America the right to individual free exercise is interpreted similarly, but still differently. It is believed that drafters of the United States Federal Constitution were concerned with prohibiting official favouritism toward one religion, but were not concerned with official favouritism toward religion rather than irreligion. The importance of the right to individual religious freedom had largely been determined by the idea that each and every person should be able to hold religious views, attitudes, or values, and observe religious rites and customs, celebrate religious festivals, and act in public as well as in private on the basis of his or her religious commitments. In the past few decades, the American judiciary has adopted the approach that public authorities must justify both the nature and degree of the burdens imposed on individual religious exercise. This is indicative of the conclusion that the US system grants “relatively nominal” rights. In the large majority of American cases, judges found that the curbing of an appellant’s religious manifestation may be legitimized only by a “compelling

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2013 E.g. the right to equality and non-discrimination under Article 8 of the Federal Constitution is as important as the right to freedom of belief and conscience under Article 15 of the Constitution. As found e.g. in BGE 134 I 56, E. 5.2, S. 63.

2014 SWISS CONST. ART. 36(4).

2015 BGE 104 Ia 79, E. 3a, S. 84.

2016 As guaranteed in SWISS CONST. ART. 15(4).


2018 This policy does, however, not go as far as privileging religious liberty over other fundamental rights.

public interest.” So for instance, judges held that a student need not attend mixed-gender sports classes where interaction with members of the opposite sex is against his religious conviction. The public interest to compel co-educational attendance was not seen as being of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

Similarly, American courts found that students had an individual right to attend a seven-day religious convocation on the Feast of Tabernacles since any limitation of their right posed an unquestionable burden on student’s religious belief.

To use the language already indicated, the “compelling public interest” places a finger on the balancing scale, weighting it more heavily in favour of individual religious interests. This appears to be the main reason why US American religious-freedom construction needs to be placed towards the right of the Swiss model but still within the “balanced” field. In recent years the judiciary has, however, been less protective of individual liberties. It has held in a few rulings that where there is merely an incidental effect of a generally applicable and otherwise valid provision, the First Amendment is not necessarily offended.

In the North American system, “broad” interpretative points can also be found. Congress is generally deprived of all legislative power over mere opinion, but is left free to reach actions which were in violation of social duties or subversive of good order. Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. In other words, the protection of a person’s belief in polygamy is “absolute,” but not so the practice of it. The belief-action distinction means that only the individual’s most intimate sphere, the belief in something, is inviolable. Besides that, the law does not per se ascribe a higher value to religious-freedom interests than to other fundamental rights. All of this hints at the circumstance that the American model needs to be plotted on the right-hand side within the “balanced” field.

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2025 The fact that many US authors call religious freedom America’s “first freedom”
So although the above explanations are anything but precise, it is still possible to say by looking at Figure D.1(p) that today’s applicable scope of the right to individual religious freedom is narrower in Syria than in Switzerland, while the locus of the same right is amplest in the United States.

[here goes the chart called: “Figure D.1(p) – individual religious freedom”]

It is now time to turn our attention to the collective side of religious freedom. This second section starts by considering a purpose of allowing citizens to assemble, join or belong to a religious community.
1.2.3 Collective Dimension

1.2.3.1 Theoretical Indicators

In communitarian philosophy it is generally believed that people need to share values to attain true well-being. And indeed, values and virtues in the form and quality of religion are seldom solely an individual experience. While a lone individual may clearly follow her or his own uniquely chosen path, the vast majority of human beings only find it meaningful to pursue theirs together with other like-minded individuals. It can readily be argued that a single human being does not attain complete satisfaction, since people self-categorize in terms of the community into which they are born.

While keeping the possible significance of group freedoms in mind, the all-intriguing question is what degree of collective religious freedom pluralistic nations afford to religious groups existing in their jurisdictions. To address the issue it is necessary to establish a method designed to measure the scope of the right to collective religious freedom. The approach taken in this thesis can be depicted as in Figure D.2(t) below. On this second continuum, once again, the polar extremes are demarcated by Poles A. and B., while Area AB. is subdivided by intermediate reference points or indicators. However, the subfeatures “narrow,” “balanced,”” and “broad” now refer to the ambit or scope of the right to collective – instead of individual – religious freedom. So what changes is the features’ hypothetical contents. It is these fictitious qualities to which attention will now be turned, before commencing a country-specific evaluation including Switzerland, the United States, and Syria.

[here goes the chart called: “Figure D.2(t) – collective religious freedom”]

Pole A.

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2026 E.g. as Aristotle taught, “[...] as he is a human being, and [hence] lives together with a number of other human beings, he chooses to do the actions that accord with virtue. [...] A person whose activity accords with understanding and who takes care of understanding would seem to be in best condition, and most loved by the Gods.” (Emphasis in brackets added by the author) Aristotle in *Nicomachean Ethics*, book X, ch. 9 quoted as in Michael L. Morgan, Classics of Moral and Political Theory 375 (Hackett Publishing Company 2005).

First, assume that the collectivity line extends from Pole A, where there are absolutely no rights that might be rooted in shared belief. It represents a hypothetical extreme position in which the right to collective religious self-determination is totally impoverished. Government prohibits people from assembling, or from joining and belonging to any form of religious association. No relations or interactions are allowed that would give way to some kind of common religious recognition between individuals – let alone the right to benefit socially from religious exchange. State secular authorities are persistently reluctant to grant any sort of framework that would allow people to organize themselves for gaining merit according to their religious precepts. It also implies that citizens have absolutely no means to move in collectivity towards a specific conviction, and this, despite the presumption that they would naturally need to acknowledge a certain set of qualities as virtues and the corresponding set of defects as vices. The radically secular state described here is, by law, ignorant of all that. Pole A. reflects the expectation that the state is an omnipotent ruler that is brutal towards and inconsiderate of the collective necessities of the people. Thus, in recognition of the human motivation for infractions – in this case, a group’s urge for collective worship – this powerful state is prepared to enforce rules for harsh and uncompromising punishment of violators.

Intermediate points along AB. 

Narrow interpretation – The “narrow” field mirrors the situation in which people are still largely subjected to government and forced to abide by standards of behaviour a religious community has not selected. The state grants no more than basic collective autonomy. Nonetheless, authorities begin to allow limited freedoms in order that adherents can express their belief in community with others. Such a restricted guarantee can include allowing people under specific circumstances to assemble and worship together. It may also mean that they are given limited opportunities to establish religious meetings on the basis of loose associations. However, as one shifts slightly along to the right of the “narrow” field, the state begins to loosen its constraints and recognizes the existence of religious assemblies by providing communities with their first signs of status and rights. It alludes to a situation in which adherents are permitted to opt for state-provided secular associational forms. They may then incorporate and interact with other legal and natural persons. It follows that incorporated religious groups are made sub-

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As believed by Alasdair MacIntyre in \textit{After Virtue: A Study in Moral Theory} 151 (Duckworth 2007).
ject to limited liability and enjoy the right to own and control property in the name of the organization. It can also entail that they enjoy benefits available to corporations under tax and other regulatory provisions. However, pivotal for the “narrow” construction field are two conditions: firstly, that faith based communities must operate in state-given legal garb, and have no rights to wear uniquely tailored religious apparel. So public authorities treat religious communities no better than any other economic adventure because the state is simply ignorant of the heightened aspirations of religious groups and their objective to render public benefit. Secondly, that their rights to autonomy are still “highly nominal” and therefore at whim of the secular lawmaker.

**Balanced interpretation** – Within the “balanced” demarcation, the opinion gains weight that government’s responsibility is to do more than simply providing civil means of incorporation. Presumably, the state begins to recognize that it can be made accountable for granting communities realistic opportunities to fulfil their aims. It becomes increasingly clear that civil government and religious communities need to interact together for the benefit of all. Once this insight is turned into a concrete normative expectation, the state offers specifically tailored legal frameworks in which religious communities can suitably administer and organize their affairs. This implies that civil authorities no longer define all powers and refrain from regulating organization and administration as far as reasonable.

A significant turning point in this hypothetical construction occurs when the state begins to abide by self-imposed rules and thereby limits itself in the matter of interfering with religion. As a result, religious communities begin to enjoy reasonably balanced, “relatively nominal” rights. It is supposed that there are many ways by which civil government can restrict itself from acting beyond certain powers. As for the evaluation that follows, a few such rules may be stated only. A first such norm can hold that where a religious doctrine is at stake, government must act with great restraint. A second rule may find that the interpretation of holy scriptures is generally in a realm outside civil capacities. A third rule can include the expectation that the attempt to regulate internal matters may properly be regarded as falling

2029 As for those communities that are of benefit and not the opposite – that is societal destruction.

2030 At the left side of the balanced field it may still mean that government treats traditional religious communities differently as long as such different treatment is not to the detriment of new or emerging religious communities.

2031 Developed as in BGE 119 Ia 178, E. 4c, p. 185.

2032 *Id.*
within the sphere of the community’s autonomy.\textsuperscript{2033} And, finally, a fourth rule may encompass the enforced commitment that decisions of religious courts are final and that they are the best institutions to judge religious precepts and the discipline of the community.\textsuperscript{2034}

From this perspective, the state tailors the law in such a way that it is natural for individuals to live in community with many, and recognizes that there is an ineradicable collective or communal dimension of religious freedom. It equally acknowledges that religious organizations are formed to give effect to their communal aspirations and what they consider a life of virtue.\textsuperscript{2035} Civil law then reflects that accepting a religious community as an organic entity and not as a mere aggregation of individuals is crucial. So the more government is willing to comply with these and other rules and ideas recognizing religious group autonomy, the further one shifts to the right within the “balanced” field. It is, thus, axiomatic that communities are allowed to conduct religious affairs according to their distinct beliefs. They can also be expected to be immune from matters regarding civil constitutional rights that would otherwise regulate equality, malpractice, defamation, privacy, and many other societal values. Criminal law then presents a clear boundary to a religious community’s autonomy claim.

\textit{Broad interpretation} – If we stay within the dichotomy indicated, a “broad” scope of the right to collective religious freedom is reached when government relinquishes its hold on religious organizations, and secures to them legal areas that could otherwise be governed by civil laws of the land. It is assumed that at this high level of autonomy it is no longer the state that, for instance, regulates and enforces personal status laws such as marriage, divorce, custody, adoption, and so forth, but religious communities themselves. Religious institutions can then be regarded as largely autonomous entities functioning within the remaining parts of the secular state system.

As a consequence, adherents are no longer dispersed among the greater society but maintain their social normative web around their core institutions. Conceivably, the justice system requires every person to be strictly related to her or his religious community as part of a larger organism. It can also be presumed that at an even more ample stage along the “broad” field, virtually all social affairs are subjected to religious law. The state is then degraded to a simple enforcing agent and its rights are increasingly transferred to religious communities that are given the power to enforce their laws in such a manner that they are “absolute.” The state’s remaining function is the protec-
tion from infliction of harm. In its role, government then acts as guardian of several faiths and remains with very limited assignments of duties and rights. When this level is reached it also implies that laws of religious communities comprise almost the entire social dimension of human existence. Government will no longer enjoy the competence to set out or to define its rights and obligations.

Pole B.

Now, at Pole B. reckon that the scope of the right to collective religious freedom is fully extended. The point stands for the extreme situation in which religious communities establish completely self-governed regimes, thereby totally absorbing the state’s remaining functions. It can be assumed that each and every community exists from the necessity of its own nature alone and its actions are self-determined. In this radical setup, communities have the power to command, enforce obedience, influence opinion and behaviour, judge, and so forth. In pluralist nations there is not just one community that possesses these powers but several. All branches of the law (constitutional, administrative, commercial, personal, and criminal) are regulated in accordance with the spiritual laws of each group.

In this hypothetical situation the question that arises is what happens if the faith of one autonomous system clashes with another? Presuming that complete systematic isolation is unattainable, and also that religious adherents remain fallible human beings, disputes over truth inevitably occur. The problem is that the civil government is fully replaced and there no longer exists any impartial protector which would silence attacks on peoples’ way of life. In this view, Pole B. is characterized by an impasse classically referred to as “Quis custodiet ipsos custodes?” Without an effective protector at hand it can reasonably be assumed that adherents may plunge into societal anarchy. With this in mind, it does not appear far-fetched to believe that differences between various religious communities would manifest themselves with varying success in the continuous struggle for survival. Eventually it will

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2036 This account draws on Baruch Benedict Spinoza in *Ethics* (1677), part 1, definition 7 quoted as in JAY NEWMAN, ON RELIGIOUS FREEDOM 4 (University of Ottawa Press 1991).
2037 “Who will guard the guards themselves?” is a Latin phrase from the Roman poet Juvenal and here quoted as in MICHAEL L. MORGAN, CLASSICS OF MORAL AND POLITICAL THEORY 272 (Hackett Publishing Company 2005).
be the truth of the stronger that predominates. Hence, it can be concluded that at both extremities of the encounter (Pole A. or B.), our continuum starts or ends with rancour, discrimination, and tyranny caused by either an omnipotent secular state or religious community.

1.2.3.2 Practical Indicators

Having reached this stage, it is once more possible to employ the above theoretical indicators to the legal circumstances found in Switzerland, the United States, and Syria. Proof that none of the jurisdictions analysed touches on Pole A. is that all three constitutions either expressly or implicitly protect the basic right to manifest religious freedom in community with others.\textsuperscript{2039} The three legal frameworks guarantee several collective aspects like the right to worship, the use of ritual formulae and ceremonial acts, or the right to display symbols representing a shared belief.\textsuperscript{2040} Nor are the extreme conditions under Pole B. satisfied, as in all three nations, religious communities cannot be seen as completely self-governed regimes that exist from their own nature alone. The secular state has a firm grip on the organization of society, which means that the countries are mainly determined by civil laws of the land. They thus need to be assigned somewhere in the intermediate Area $AB\text{,}$ and not at either extremity of the continuum.

In order to establish greater detail about each country’s placement on the continuum, this time I start with Switzerland. A first reference point represents the fact that the Swiss government grants all religious communities status and rights, and therefore goes beyond mere toleration of collective religious expression. Any religious group can take up secular associational forms so as to interact with other legal or natural persons.\textsuperscript{2041} A second indicator characterizes the situation that under Swiss federal constitutional law, religious organizations possess no positively formulated right to autonomy, but enjoy their freedoms within the bounds of state-made civil laws.\textsuperscript{2042} It

\textsuperscript{2039} In the United States the right is implied. In Switzerland and Syria the right is express. \textit{Swiss Const. Art. 15(2); Al-Dustur Al-Suri} [\textit{Syrian Const.} Art. 35(1) and (2)].

\textsuperscript{2040} E.g. BGE 123 I 296, E. 2a, S. 300; Guru Nanak Sikh v. Country of Sutter, 456 F.3d 978, 993 (9th Cir. 2006); \textit{Al-Dustur Al-Suri} [\textit{Syrian Const.}] Art. 35(2).

\textsuperscript{2041} E.g. \textit{Schweizerisches Zivilgesetzbuch} [\textit{Swiss Civil Code}] of December 10, 1907, SR 210, art. 60(1).

\textsuperscript{2042} A competence enjoyed by the secular state. \textit{Swiss Const. Art. 5} e.g. by way of partnership, \textit{Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches}, \textit{Fünfter Teil: Obligationenrecht} [\textit{Swiss Code of Obligations}] of March 30, 1911, SR 220, art. 65(3).
follows that the state dominates the way people organize themselves for religious purposes. With regard to private-law-organized religious communities, government treats them very similarly to any other economic or philanthropic venture. They have the right to organize themselves according to existing forms, but enjoy no right to negotiate new forms if all available structural forms are unsuitable to their religious precepts.\textsuperscript{2043} This also means that the system may leave no leeway to choose the most appropriate associational form.\textsuperscript{2044} From this perspective, the Swiss model needs to be plotted somewhere at the right side of the “narrow” interpretation field.

But matters are more complicated than that. Swiss law also expresses the expectation that government must do more than simply providing basic means of incorporation. The secular state restricts itself from interfering with religious doctrine, discipline, or order.\textsuperscript{2045} This can include, for instance, the freedom to choose religious leaders, priests and teachers, as well as the freedom to administer finances in order to pay for religious objectives. Thus, the assessment of a religious attitude or rules, or even the review of theological truth – in particular the interpretation of the relevant parts in holy scriptures – remains barred to the state, unless and until boundaries of arbitrariness are overstepped.\textsuperscript{2046} The law recognizes that Swiss civil courts’ refusal to interpret religious doctrines is as vital as the maintenance of religious policies is for spiritual courts. An exception to this understanding might be a religious-exercise claim that is so unreasonable that no reasonable court could ever agree to an autonomy claim. The legal threshold is thus set very high, which means that the system includes indicators that need to be placed within the “balanced” field.

However, when it comes to public-law recognized religious institutions, differentiation between civil and religious affairs is (democratically) state-imposed. Civil law governs issues such as finances, personnel, and real property, regardless of whether they have a religious meaning.\textsuperscript{2047} On the

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\textsuperscript{2043} What is meant by negotiation is a direct agreement between the government and the religious community. Negotiation here does not refer to political processes that could, if successful, allow religious communities to take up new organizational forms.

\textsuperscript{2044} Government does not check whether the legal forms available match the religious self-conception of newly incorporating communities. It presupposes that the forms already available are adequate for the community concerned.

\textsuperscript{2045} BGE 119 Ia 178, E. 4c, S. 185. As demonstrated below, this approach does not necessarily apply to dual Catholic Church structures as found in many Swiss cantons.

\textsuperscript{2046} \textit{Id}.

\textsuperscript{2047} E.g. in most Swiss cantons the Catholic Church is established by way of a dual legal structure: a civil-law structure comprising “external” public law quasi-church
Eclectic Representation

other hand, civil government abstains from regulating inherently religious affairs like dogma, promulgation, liturgy, and counselling. Under the Swiss system, the citizens’ democratic participation is treasured more highly than the guarantee of religious autonomy. From this viewpoint, it is exceedingly difficult to clearly affix the Swiss jurisdiction to either the “balanced” or the “narrow” interpretational field. What is more certain, however, is that the domestic interpretation of the right to collective religious freedom in Switzerland has not reached a “broad” level. It can convincingly be stated that Swiss (regional) government has all but relinquished its hold on religious organization.

Nevertheless, the uncertainty over the jurisdiction’s place along the spectrum can be resolved by way of reasonable compromise. In this sense, it appears that “narrow” indicators somewhat outweigh “balanced” indicators, for which it is possible (though not accurate) to place the Swiss model at the far right within the “narrow” field on the spectrum. But certainly, this approach is very imprecise from a scientific perspective. It might still gain greater acceptance once the plotting of the Swiss model can be brought into relation with the assignment of the US American and Syrian models.

The legal situation found in the United States is less difficult to identify and characterize. Once a religious community is incorporated under available civil laws, the state deprives itself of the power to engage in programs or enact laws that require extensive legal surveillance of the activities of that institutions (which govern church finances, personnel, and real property); and a second divine structure comprising “internal” divine canon-law-determined church bodies (which regulate dogma, promulgation, liturgy, and counselling). Where competences between divine and civil church institutions overlap, it is the latter that prevail. The effect of this is that within the scope of overlapping affairs, “internal” divine bodies must also adhere to general principles of Swiss civil law. To give an example, a Catholic bishop is not free to revoke his parish administrator’s “spiritual working permission” (missio canonica) if the procedure is not exercised in compliance with civil public law. Kantonsgericht Basel-Landschaft [High Court Decision of the Canton of Basel], BJM 9/2007 Nr. 06. E. 9/10.

An example of this is the relatively new cantonal Constitution of Zurich. Article 130(3)(a-d) provides an exhaustive list of religion-state issues that must be regulated by the cantonal lawmaker. The provision holds that cantonal secular laws regulate “(a.) the ground structure of church entities; (b.) the right to levy tax; (c.) state subsidies;” and “(d.) the competence and procedure of the election of priests, as well as the duration of their office.” (Das Gesetz regelt: (a.) die Grundzüge der Organisation der kirchlichen Körperschaften; (b.) die Befugnis zur Erhebung von Steuern; (c.) die staatlichen Leistungen; (d.) die Zuständigkeit und das Verfahren für die Wahl der Pfarrerinnen und Pfarrer sowie deren Amtsduer.) Verfassung des Kantons Zürich [Constitution of the Canton of Zurich] of February 27, 2005, SR 131.211.
Religious groups, inter alia, enjoy the liberty to administer their finances in order to pay for religious schools, erect places of worship, and so forth. In contrast to the Swiss public-law recognized communities, an American incorporated community generally possess the exclusive power to remove a religious administrator or leader, even if such an act would be arbitrary and therefore unlawful in respect to civil laws of the land. The US government finds it self-evident that communities are allowed to conduct religious affairs according to their distinct beliefs, whatever status the religious community concerned might have. They can be expected to be immune from matters regarding civil constitutional rights that would otherwise regulate equality, malpractice, defamation, privacy, and many other governmental restrictions under the United States Constitution. This is clear indication that the American model allows somewhat greater collective religious autonomy than its Swiss counterpart in respect of public-law recognized religious bodies.

Moreover, most state governments in the US make more options available to any group of persons who wish to incorporate, merge or change incorporation for religious purposes. The lawmaker has traditionally asked itself whether the legal structures available are sufficiently flexible to facilitate full and free expression of a community’s self-understanding. Religious communities have mostly been free to choose among the available forms. For example, the associational form called “corporate sole” was tailored to the exclusive needs of religious communities that organize in a hierarchical manner, in so far as it provides for internal autonomy over church polity and structure. This can mean that the bishop alone is capable of administering and managing the affairs, property and other temporalities of the church. In other words, it places corporate governance, assets and other powers of the corporation in the hands of one person, who is invested with the right to carry on all the corporation’s affairs.

2051 As for Switzerland, this claim applies to public-law recognized religious bodies only. In America, this case is regulated by the ratio of Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976).
2053 For instance, the Nevada statute stipulates that: “An archbishop, bishop, president, trustee in trust […], who has been chosen, elected or appointed in conformity with the constitution, canons, rites, regulations or discipline of the church or religious society or denomination, and in whom is vested the legal title to property held for […] the church or religious society or denomination, may make and subscribe written articles of incorporation.” Nev. Rev. Stat. § 84.020 (1997).
The reason that a fully balanced scope of collective religious freedom is not found in the US either is that per data regional government has not made available a totally free array of structural forms. Limits of corporate choice are encountered by new, unusual, and emerging religious communities. The available structural forms comply with the religious precepts of existing religious communities, but not necessarily with those of new, or emerging religious groups. However, because the American state still affords greater administrative and organizational autonomy to the religious communities operating within the jurisdiction, it seems adequate to place the model jurisdiction along the medium “balanced” field of continuum D.2(p).

In Syria the same issue is treated differently again. This government affords traditional religious communities a broad ambit of collective autonomy in that it has never tried to gain legal hold over their organization and administration. It generally secures – rather than assigns – to religious institutions the freedom to regulate personal status laws such as marriage, divorce, separation, adoption, or inheritance. Conceivably, communities’ liberty to regulate matters pertaining to personal status is “absolute” in that the civil lawmaker abstains from governing these matters in all cases. The personal status laws of Islamic communities are regulated by the shari’a, whereas Christian rites are governed by the Gospel, and the Jewish community by talmudic law. In Syria, there exist two kinds of judicial systems: one secular and one religious. Secular courts hear matters of public, private and criminal law. Religious courts that exercise specialized jurisdiction are divided into shari’a courts, doctrinal courts, and spiritual courts. They hear personal status law cases only. Shari’a courts regulate disputes among Syrian Muslims, whereas doctrinal courts are empowered to guarantee the personal status decisions of members of the Druze cult. Spiritual courts settle disputes of religious law for Jewish, Christian and other non-Muslim groups.

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2054 New and emerging religious communities enjoy no rights to incorporate by way of institutional forms other than charitable or economic enterprises. However, as far as can be established, they are virtually non-existent. For this reason, no heed is given to them in this evaluation.


2057 Al-marsum al-tashri’i [Parliamentary Decree] No. 133 of October 8, 1953; also United Nations Development Programme (UNDP), Programme on Governance in the Arab Region on Syria, http://www.pogar.org/ (search for “Syria;” then follow “UNDP-POGAR: Arab Countries” hyperlink); also DINA CHARIF FEELLER, LA
cisions of all religious courts may be appealed to the canonical and spiritual divisions of the Court of Cassation.  

Syrian law reflects the expectation that every person is strictly related to her or his religious community as part of a larger organism. Interfaith marriages are not legally accommodated as they risk systematic differences or structural collapse between group-dependent personal status laws. Syrian jurisdiction does not, apart from personal status laws, regulate other social affairs according to religious law. Legal branches such as constitutional, administrative, criminal, or commercial law, as well as other private-law-determined rights and obligations, are regulated by state-enacted civil law. This is the main reason why the Syrian model is to be assigned to the lower end of the “broad” interpretative field. This finding can be bolstered by the fact that the law treats government not as a simple enforcing agent that retains very limited assignments and duties, but, according to the Syrian Constitution, government enjoys great powers in setting out or defining its rights.

The Syrian legal system also incorporates elements of “narrow” religious-freedom interpretation. The majority’s belief-system, that is the Sunni Islamic Establishment, faces serious legal constraints. By law it is, for example, disempowered from choosing its highest religious leader (the so-called Grand Mufti) without governmental interference, and barred from exercising religious powers in the area of public endowments (which still constitute a large part of Syrian wealth). Thus the Republic, too, interprets the right to collective religious freedom depending on the community concerned. Looking at the predominant factors, it can still be concluded that Syria must be placed somewhere within the “broad” interpretational field, while keeping it relatively close to “balanced” indicators.

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GARDE (HADANAH) EN DROIT MUSULMAN ET DANS LES DROITS ÉGYPTIEN, SYRIEN ET TUNISIEN 36 (Librairie Droz 1996).


2059 For a comprehensive catalog of powers AL-DUSTUR AL-SURI [SYRIAN CONST.] ART. 50 ff.

2060 The Grand Mufti as the most senior mufti of the country is appointed by legal “Decree” (marsum) and chosen from cabinet of a list with three names which the Sunni Islamic waqf minister provides. Al-marsum al-tashri’ [Parliamentary Decree] No. 146 of October 23, 1967; in association with AL-DUSTUR AL-SURI [SYRIAN CONST.] ART. 119. The authority to dismiss the Grand Mufti lies within the powers of the Prime Minister, who in turn may be appointed and dismissed by the President. AL-DUSTUR AL-SURI [SYRIAN CONST.] ART. 95.

2061 E.g. the High Council of Awqaf is a Sunni body that once administered a great part of Syrian wealth. Al-marsum al-tashri’ [Parliamentary Decree] No. 386 of October 11, 1961.
All of this in a nutshell means that, as illustrated in Figure D.1(p), today’s applicable scope of the right to collective religious freedom is narrower in Switzerland than in the United States, while the scope of the same right is broadest in Syria.

[here goes the chart called: “Figure D.2(p) – collective religious freedom”]

When looking back at the above considerations, it can be concluded that the patterns of individual and collective religious freedom can be treated as separate dimensions from each other. As we will soon see, the same clear separation is not possible when it comes to the “proximity” and “collective religious freedom” dimensions. The former will partially be construed out of aspects already identified by the latter. The reason why pursuing the proximity evaluation still produces varying results is because its emphasis lies not on the search for degrees of collective autonomy, but on the resulting configurations between religious institutions and the state. Hence it is no longer possible to speak of a right, as persons possess no court-enforceable means of being proximate to or remote from the secular state. Rather, a situation determined by structural arrangements is implied. The discussion of assumed indicators starts out, once again, from theory.
1.2.4 Proximity Dimension

1.2.4.1 Theoretical Indicators

For theologians a life of virtue and happiness is achieved if society is both political in character and religious in purpose.\textsuperscript{2062} In this view the state arises out of religious and moral purposes.\textsuperscript{2063} From a modern constitutional perspective, however, it is up to the theologians to spread the belief that religious establishment is a valuable concept to foster an essential part of societal virtue.\textsuperscript{2064} Civil lawmakers regard earthly and divine powers as not necessarily in unity with each other.\textsuperscript{2065} State affairs are seen in their own terms as a natural good.\textsuperscript{2066} In pluralist societies, civil lawmakers do not consider whether mundane or spiritual values are superior every time they enact new law. This is because civil law expresses the conviction that earthly and religious affairs possess their independent domains.\textsuperscript{2067}

\textsuperscript{2062} E.g. Saint Thomas Aquinas stated: “In the universe of material substances, a primary material substance, namely, the heavenly body, governs other material substances by an ordination of God’s providence, and rational creatures by his ordination govern the use of all material substances.” Thomas Aquinas in On Kingship, to the King of Cyprus, book I, ch. 1 quoted as in MICHAEL L. MORGAN, CLASSICS OF MORAL AND POLITICAL THEORY 458 (Hackett Publishing Company 2005); similarly EBERHARD SCHICKENHOFF, ETHIK DES LEBENS: GRUNDLAGEN UND NEUE HERAUSFORDERUNGEN 626 ff. (Herder 2009); RUEDI IMBACH, PENSER AVEC THOMAS D’AQUIN: ETUDES THOMISTES PRÉSENTÉES PAR RUEDI IMBACH 111 ff. (Louis-Bertrand Geiger ed., Editions Universitaires Fribourg Suisse 2000); JEAN-PIERRE TORREL, MAGISTER THOMAS: LEBEN UND WERKE DES THOMAS VON AQUIN 89 ff. (Katharina Weibel trans., Herder 1995); ANTONIO ROSMINI, THE PHILOSOPHY OF THE RIGHTS: INTRODUCTION, MORAL SYSTEM, THE ESSENCE OF RIGHT 98 ff. (Durham 1993).


\textsuperscript{2064} JEAN-PIERRE TORREL, MAGISTER THOMAS: LEBEN UND WERKE DES THOMAS VON AQUIN 89 (Katharina Weibel trans., Herder 1995).

\textsuperscript{2065} For one of the most lucent accounts on modern constitutional law LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 45 ff. (Oxford University Press 2008).

\textsuperscript{2066} Such a modern constitutional viewpoint contradicts – obviously – the belief that religious law completes secular law, and thus that secular law is always imperfect without religion. In the words of Saint Thomas Aquinas: “\textit{Gratia non destruit, sed supponit et perficit naturam}.” Thomas Aquinas, Summa Theologica, 1a.1.8, quoted as in VOLKER LEPPIN, THOMAS VON AQUIN 127 (Aschendorff 2009).

two worlds are somewhat separate, and yet are inextricably linked, is not ordinarily mirrored in today’s applicable civil law. This in turn does not mean that the secular state is hostile or ignorant towards religion. Civil constitutions either expressly or implicitly grant legal accommodation to religions.

With these pivotal caveats in mind, the question that arises is how proximate or remote religious organization can be in relation to the state. In the following it is presumed that degrees of religion-state proximity can once again be assessed along a basic linear continuum. Although the main features remain the same, some changes need to be made on the continuum’s refinements. The subfeatures “low,” “balanced,” or “high” now refer to greater or lesser religion-state nearness. As mentioned earlier, the distance between the institutions can no longer be characterized as a claimable right, but must be regarded as resulting configurations. Poles A. and B. represent the extremes of either complete absence of proximity versus complete presence of proximity between religion-state affairs. Having said that, it is now possible to give more meaning to the method envisaged.

[here goes the chart called: “Figure D.3(t) – religion/state proximity”]

Pole A.

Pole A. represents a system of civil totalitarianism and implies full out remoteness between religion-state competences. It describes a hypothetical situation in which it is assumed that there is simply no structural or ideological connection between religious communities and the state system whatsoever. The state offers no structures by which religious communities could interact with government or other civil organizations. Relations between adherents are loose. Anyone who wishes to practise his or her religion is forced to do so in her or his personal capacity. The position of the state is such that it is not merely indifferent or impartial towards religious communities, but actually discourages, restricts, and prohibits any institutional manifestation of religion. It follows that zealous denial of any sort of accommodation may trigger legal hostility towards religion, such that it is even marginalized to vanishing point. Moreover, an unduly rigorous or overtly hostile relationship between religion and the state may be regarded as an established state belief in itself. So at this extreme stage, it is unclear

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whether complete absence refers to a hostile environment, full out remoteness between the powers, or represents a state religion in itself.

Intermediate points along $AB$.

**Low degree** – A “low” position on religion-state affairs means that the state hardly acknowledges that religious communities exist and that they should have the power to organize themselves. They are therefore placed on the same basis as other civil organizations. However, the two authorities are still strictly kept separate from each other. At this level there is a strong desire to restrict, if not eliminate, all clerical and religious influence over the state. Public authorities still exert considerable pressure on religious institutions to keep away from civil government. It can also be expected that mild forms of hostility towards religion will (occasionally) be introduced, as a natural consequence of this rigorous separation regime. The “low” proximity stage also refers to the legal circumstance in which there is disagreement about who or what represents a legitimate religious authority. So the question of strict separation takes on much greater significance. The law expects the setting for political culture and public institutions to remain largely religion-free.2069

**Balanced degree** – Among the “balanced” indicators the system recognizes that religious authority and civil authority will necessarily and inevitably come close to each other as a result of being major forms of authority. The state tailors the law in such a way that civil authority has no justification for interfering in purely religious affairs, and religious societies have no justification for attempting to use purely civil institutions for their own religious purposes.2070 In this setup, government is independent of institutional religion or ecclesiastical control and, in turn, institutional religion is independent of state or political control. Religious communities are allowed to prescribe, legislate, and judge ethical matters that are not regulated by civil law. So the state assumes no jurisdiction over religious affairs, not because it regards religious affairs as beneath the concerns of the state, but rather because religious concerns are viewed as of a different sphere not to be subject to the prevailing will of civil authorities or to popular sovereignty.

2069 As indicated by JAY NEWMAN, ON RELIGIOUS FREEDOM 116 (University of Ottawa Press 1991).
2070 Drawing on John Locke in A letter Concerning Toleration (Epistola de Tolerantia) (1689) quoted as in PATRICK ROMANELL, LIBRARY OF LIBERAL ARTS 17 (Bobbs-Merrill 1955).
The state is no longer hostile or unconcerned, uncommitted and indifferent towards religion. Nonetheless, any suggestion of direct public or financial support for one or more religions is deemed inappropriate. At this level, the state aims for broad even-handedness amongst faiths under the rubric of neutrality. It can mean that no religious community is treated better or worse than any other community. As one moves slightly to the right within the “balanced” field, the state can be expected to give more consideration to the background and context of certain religious practices. This may even allow public authorities to make declarations representing a particular belief if that is seen as religious heritage or part and parcel of the present societal culture. The state is not blind to genuine and important claims of religious communities that may require different treatment. This type of recognition does not mean, however, that official discrimination against whatever religious community can gain a place within the “balanced” demarcation.

*High degree* – At a higher level, religious acknowledgment goes further. It can include official recognition of particularly significant religious communities, and implies that some religious organizations are structurally drawn closer to the state. Established religions receive special preferences and privileges. For instance, the state awards economic support to established religions in return for looking after the poor and the sick. For some faiths, a special legal status thus becomes the equivalent of public esteem and respect, which is in mutual interests. The law expects the established religion to lend an aura of public legitimacy to the state, and the state grants certain prerogatives for the religious community’s provision of social services. But as one moves to an even higher level, the state allows certain official communities to implement religious functions into government. It means that religious communities of this type are still structurally independent, yet to some extent, they are treated similarly as other public institutions under the direct leadership of government.

**Pole B.**

At the other end of the spectrum, it is not the civil government but the religious institution that turns totalitarian. In such a regime, religious functions completely overlap with state competences. The proximity dimension is such that the two can no longer be kept separate from each other but form a perfect unity. In a completely theocratic regime, religion is supreme and the machinery of the mundane is to further religious interests only. It can be assumed that religion controls the entire life of the people because a theocracy describes a regime in which rulers purport to represent the divine on Earth, both directly and immediately. According to divine law, the lawmak-
ers are God’s spokespersons. They claim to interpret God’s will for the nation. This entails that there are no longer several religious communities, but only one true organization. The sole ruling religious community and the state meld into one indivisible entity. The primary purpose of government is to implement and enforce divine laws.

1.2.4.2 Practical Indicators

It is once more time to apply this theoretical configuration to country-specific indicators. The level of religion-state proximity to be found in Switzerland, the United States, and Syria is illustrated in Figure D.3(p) below. When considering the above formulations, it is impossible to say, either in respect to the Swiss, the US American, or the Syrian jurisdiction, that there is anything resembling complete absence or presence of religion-state proximity. Pole A. is irrelevant because in all three countries, religious communities are expected to possess certain rights and obligations. These legal elements acknowledge implicitly that religious institutions exist and that their adherents have a right to organize and administer themselves. The relationship produces basic structural connections between religious and state entities. Thus, there is no full out remoteness between the authorities. Neither does Pole B. possess any practical meaning. None of the countries in question have adopted complete identification between religion and state affairs. The prime reason for this is that in these nations most interactions between natural and legal persons are regulated by way of civil and not religious law. The same is true in respect to the Syrian Arab Republic. For this country, too, the assertion that all Syrian lawmakers are God’s spokespeople is wrong. The highest framework organizing Syrian society is not divine scripture, but the country’s secular Constitution. It cannot reasona-

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2071 REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 70 (Oxford University Press 2005).
2072 SWISS CONST. ART. 15; U.S. CONST. AMEND. I; AL-DUSTUR AL-SURI [SYRIAN CONST.] ART. 35.
2073 E.g. if a community does not adhere to civil law, government has the power to enforce civil law even against a community’s will.
2074 In Switzerland and the United States, all branches of law are governed by civil law. In Syria, only the personal status system is regulated by divine laws. E.g. Qanun al-ahwal al-shakhsiyya lil-duruz [Personal Status Act of the Druze] No. 59 of 1953, as amended by Kanun [Act] No. 34 of 1975.
2075 Islamic jurisprudence is “a” main source, though not “the” main legal source. AL-DUSTUR AL-SURI [SYRIAN CONST.] ART. 3(2). Divine laws unfold their capacity only within the area of personal status law. This limited area of law can then be seen as standing alongside, but not above the civil laws of land.
bly be claimed that one of the governments in question allows total fusion between religious and mundane powers. Several distinct and largely separate religious institutions can be found, not one sole ruling divine authority.

The issue that arises is where the three countries lie along the intermediate indicators of AB. Commencing the evaluation with the U.S., there is little difficulty in assigning that model to a place on the continuum. From the “Analytical” part of this thesis, it will be recalled that constitutional framers believed that religious tolerance was best achieved by building “a wall of separation” between religion and state. They were convinced that public life would not be corrupted if a metaphorical wall served to separate state and nation in matters pertaining to religion. Especially Thomas Jefferson was suspicious of institutional religion and was fearful that it might have a corrupting influence on the state. Today, it is generally perceived that the catchy phrase “a wall of separation” does not adequately describe the practical circumstances found in the United States legal system. This language can be regarded as more from the realm of metaphor and symbol than legal and concrete. According to the United States Supreme Court, the Establishment Clause erects a “blurred, indistinct, and variable barrier” depending on all the circumstances of a particular relationship instead of a solid “wall.”

The acknowledgment of a particular religious group has always been sanctioned by legislation. However, religious groups have long ago lost their independence and been subjected to the civil authority. In turn, religious communities have, by means of various forms of incorporation, gained a place and preference in the civil life of wider American society. In that setup, government at all levels is independent of institutional religion or ecclesiastical control and, for its part, institutional religion is independent of state or political control. The First Amendment must protect religion effectively from the tentacles of government intervention.

A further indicator of why the United States model needs to be placed within the “balanced” field is its neutral stance towards religious institutions. Although many states are prepared to fund social programs indirectly by way of tax deductions, the main reason why such recognition does not reach “high” levels of religion-state proximity is the system’s prohibition on grant-

2079 They are tax exempt e.g. I.R.C. 26 U.S.C. §§ 170, 501(c)(3), 6033; also Bob Jones University v. United States, 461 U.S. 574 (1983).
ing direct financial aid to certain religious communities. The rationale of the Anti-Establishment Clause generally forbids government expenditures for strictly religious purposes and bars governmental action for these purposes if infringement of religious liberty follows.\textsuperscript{2081} In American legal thinking, no religious community ought to be favoured by law in preference to others. However, limited declarations representing a particular belief are not regarded as preferential treatment. For example, the national motto on the US currency holds: “In God We Trust.” Government also fosters the language “One nation under God” as part of the Pledge of Allegiance to the American flag. Such religious heritage is seen as part and parcel of American culture.\textsuperscript{2082} These circumstances are important to the conclusion that the United States’ indicators must be positioned slightly to the right side of the “balanced” field.

Continuing the evaluation with Switzerland, it becomes clear that for this third dimension it is virtually unachievable to make accurate claims. The Swiss system once again comprises indicators that are to be allocated among two subfeatures. In order to affix the Swiss system, complexity must be reduced and concessions made. The idea is that eventually, only the most significant indicators are reflected on the spectrum.

As mentioned earlier, in Switzerland both public-law and private-law-organized religious communities exist. Starting with the latter, it can be said that this institutional form is placed on the same legal footing as other associational, charitable, or business organizations.\textsuperscript{2083} It means that communities within this category enjoy a minimum of relations with the state only. For instance, Islamic communities, which are in most cases formed as private-law associations, may hold property and organize themselves relatively freely within the laws laid down by the state. A minimum of relations also include that cantonal government may provide communities of this type with access to state-run facilities such as a hospital, a military compound, or a prison in order to render their religious services.\textsuperscript{2084} But regardless of such interaction, all private-law-organized religious communities are distinct and kept separate from governmental entities. From this perspective there is no concrete identification but legal acceptance. The situation can therefore be qualified as rather limited proximity between religion and the state, and means that indicators would have to be placed within the “low” proximity field.

\textsuperscript{2081} E.g. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).
\textsuperscript{2083} E.g. Schweizerisches Zivilgesetzbuch [Swiss Civil Code] of December 10, 1907, SR 210, art. 60 or art. 80 ff.
\textsuperscript{2084} Relations are then mostly private-law contractual ones.
A different picture emerges when taking the second organizational category, that is public-law recognized religious communities, into consideration. Most Swiss cantons indirectly identify with one or more traditional religious institution. Religious establishment can symbolically go as far as a canton stating that: “The Roman-Catholic Church is the cantonal church [of Nidwalden].”\footnote{Verfassung des Kantons Unterwalden nid dem Wald [Cantonal Constitution of Nidwalden] of October 10, 1965, SR 131.216.2, art. 34(1).} The reason why such a declaration is still to be seen as indirect and not direct is that regional governments do not actually recognize a particular religion (or denomination), but the social significance of one or more communities. The more adherents a religious community numbers, and the greater social benefit it provides, the higher the esteem a community enjoys. This basic formula is mirrored in the law at regional level.

However, in some cantons such a declaration is not only symbolic, but also concrete and real. Regional government may in some instances award economic relief to public-law recognized communities (to date, either to one or more traditional Christian denominations or to the Jewish community) in return for bearing burdens that would otherwise be imposed upon the public sphere (e.g. for the running of food shelters, promotion of culture, or maintenance of historically significant real property).\footnote{Kirchengesetz des Kantons Zürich [Church Act of the Canton of Zurich] of July 9, 2007, Nr. 180.1, para. 19(2).} Apart from this type of support, public-law recognized religious communities must not be regarded as part and parcel of regional government. Most interests of official religious institutions and regional government are, by law, not synonymous. Governmental functions are kept separate from religious ones. This also explains why public-law recognized religious communities are seen as “quasi-religious bodies” and not as “quasi-state entities.” Thus, Swiss regional governments are not neutral in a strict interpretational sense. Only public-law-organized religious communities possess ample prerogatives, which is sufficient indication for a “high” degree of religion-state proximity.

Because the institutional relationships found in Switzerland touch upon more than one subfeature, this evaluation restricts itself to assigning the country to the “high” religion-state proximity level. It is assumed that in the Swiss setup, “low” indicators are not as significant as their “high” counterparts. The reason for this assumption is twofold. Firstly, the religion-state relationship of the public-law organizational form has far greater weight than that of private-law-organized religious communities. This judgement can be bolstered by the fact that the number of people who are members of public-law recognized religious communities outweigh the number of people belonging...
to private-law organizations by far.\footnote{Seventy-seven percent of the Swiss population is either Roman Catholic or Evangelical Reformed. Claude Bovay, \textit{Religionslandschaft in der Schweiz. Eidgenössische Volkszählung 2000}, Bundesamt für Statistik 2004, at 63 ff.} Secondly, the amount of financial support paid by regional governments can be crucial, as opposed to being only trivial. For example, the canton of Zurich is reported to have paid twenty million Swiss Francs to the Roman Catholic Church and thirty million to the Evangelical-Reformed Church in 2009. No such support was granted to private-law-organized religious communities also operating in the canton’s territory.\footnote{Petra Schanz, \textit{Reformierte müssen mehr bezahlen}, Tagesanzeiger (Feb. 16 2009), at 4.} The practice of providing financial support to public-law recognized religious communities exclusively has been defended persistently,\footnote{Mostly by means of Supreme Court decisions as well as the will of the cantonal civil lawmaker. E.g. BGE 17 I 557, E 1, p. 559; also BGE 4 I 539, E 1, S. 541; BGE 9 I 416, E 1, p. 458; BGE 13 I 374, E 1, p. 566; or Kirchengesetz des Kantons Zürich [Church Act of the Canton of Zurich] of July 9, 2007, Nr. 180.1, para. 19.} despite its apparent conflict with the right of equality and non-discrimination.\footnote{As guaranteed by the Swiss Constitution. \textit{SWISS CONST.} ART. 8.} Both reasons together give sufficient indication to place the Swiss model at the beginning of the “high” field of religion-state proximity.

In Syria, the government recognizes that religious authority and political authority almost necessarily and inevitably come close to each other as a result of being major forms of authority. Civil authority, nevertheless, has no justification for interfering in purely religious affairs, and religious societies to a large extent have no justification for attempting to use purely civil institutions for their own religious purposes. Religious communities are allowed to prescribe, legislate, and judge all ethical matters that are not regulated by civil law.\footnote{In contrast to Switzerland and the United States this includes an entire body of personal status laws. E.g. \textit{Qanun al-ahwal al-shakhsiyya lil-katulik} [Personal Status Act of the Catholic Rites] No. 31 of 2006, enforced on Jan. 1, 2007.} The government is friendly towards recognized religious communities as it offers specifically tailored legal frameworks in which they can suitably administer and organize their affairs.

Proximity between religious institutions and government is higher in Syria than it is in Switzerland and the United States. This is because the distribution of social services is partially shared between mundane and spiritual powers. It means that large amounts Syrian public property – which is entrusted in pious endowments called waqf – is jointly regulated. Waqf cannot be utilized for purposes displeasing God, as it must necessarily acquire merit
in the sight of God and reward in the next world. This is a reason that Syria’s waqf wealth is mainly administered by religious and not secular personnel within the Waqf Ministry. The institution’s minister is nominated by the President of the Syrian Arab Republic. By custom the highest waqf official (the minister) has to be of the Sunni Islam faith. Waqf money is used for all sorts of social services such as state hospitals, libraries, schools, poor houses and many other public beneficiaries. Thus, the Sunni Islamic establishment as the predominant waqf administrator, takes an important position within the overall state structure.

A second reason why Syria’s model has to be allocated within the “high” proximity field is the circumstance that the most senior Mufti of the Republic (the Grand Mufti) enjoys significant influence. He provides religious (law) opinions not only to lower Muftis, fatwa secretaries, and Sheikhs, but also, and especially, to parliamentary commissions which are empowered to draft new legislation. The latter means that within the lawmaking process the Grand Mufti may be consulted to vet whether a draft Bill that touches aspects of Islamic personal status law is at variance with religious teachings. No equivalent check exists in respect to non-Sunni religious leaders. If the Grand Mufti finds that a particular draft Bill violates Islam, however, he possesses no power to prevent it from becoming applicable law. Syria’s Grand Mufti is a chief advisor, but not a law “vetoer” or even lawmaker at parliamentary level. It is therefore wrong to conclude that the Syria’s legal system is theocratic. It does not assume that religion is supreme at all social and legal ends and that the machinery of state serves to further the one and only religion. This is enough indication for plotting Syria close to the intermediate “high” field along the continuum.

[here goes the chart called: “Figure D.3(p) – religion/state proximity”]

After evaluating the three countries’ positions on the continuum, the models can be depicted in the following way. Religion/state proximity is lower in the United States than in Switzerland, and highest in Syria.

2094 Id. at No. 204 of December 11, 1961, art. 3.
2095 Interview with Georges Jabbour, former Member of the Syrian Parliament, in Damascus (Jan. 8, 2007).
1.2.5 **Final Remarks**

After having evaluated the extent of religious freedom, it is possible to consider the interplay between the dimensions, and draw some overall conclusions. During the evaluation it has already been demonstrated that there exists a certain relationship between the “collective” and the “proximity” dimension. The question is whether this relationship is, indeed, directly linked to changes in the degrees of either dimension. In other words, when looking at Figures D.2(p) and D.3(p), can it reasonably be expected that a broad right to collective religious freedom necessarily triggers low degrees of proximity between religious institutions and the state? The affirmative answer suggests that movement along the collective freedom spectrum requires some corresponding movement on the proximity spectrum and vice versa.

When considering the Syrian system, this assumption is contradicted because increasing collective freedoms are not synonymous in every case with decreasing religion-state proximity. The main reason for this decoupled situation is the fact that the government allows religious establishment. The Sunni Islamic institution is given the opportunity to implement parts of its religious organization (e.g. public endowments called awaqf) into the greater civil administration. As a direct consequence of this, the state guarantees high degrees of religion-state proximity. Simultaneously, government grants to traditional non-Sunni religious communities (such as Druze, Christian, and Jewish communities) a broad right to collective religious freedom in that they enjoy the freedom to set up their own personal status system, free from governmental interference and control. Thus, increasing proximity indicators need not necessarily be associated with decreasing collective freedom indicators when civil government treats different religious communities differently from each other. If the state singles out one or more religious communities in order to afford them special privileges and prerogatives, direct relationships between the dimensions are loosened or even disconnected.

However, although the two dimensions should be evaluated on distinct and separate spectra, they are in some instances interrelated nevertheless. A good example of interrelation is the following: in Switzerland, religious institutions may receive public law status. The act of granting this special legal status is, inter alia, dependent on an institution’s willingness to comply with societal values enshrined in the country’s Federal Constitution (e.g. the right to equality or non-discrimination). It implies that close relations with the government are reserved for those religious institutions that can incorporate and identify with what the greater society finds equitable. This also means that the more a religious institution organizes itself in accordance with civil constitutional values, the less freedom it enjoys to determine its organization
and administration by divergent religious ideals (if it has any). Thus, in Switzerland, degrees of religion-state proximity can in some instances be interpreted in direct relation with degrees of collective religious freedom.

When turning our attention to continua D.1(p) and D.3(p), it appears that in the above setup, no direct link exists between the right to individual freedom and religion-state proximity. Changes made along the individual continuum do not necessarily cause corresponding changes on the proximity continuum. This is because governments afford no special recognition to individual religious exercise. For instance, an individual receives no direct financial support from public authorities for pursuing her or his personal religion. Also, the state does not tailor its laws in a way that they identify with a single person’s individual belief. So although individuals enjoy legal relationships with the state, for instance, via their constitutional rights and obligations, this type of interaction seems to say nothing about religion-state proximity configurations.

The same quest for interrelatedness produces different results when it comes to individual and collective religious freedom. To give an example, Figures D.1(p) and D.2(p) revealed that, in Syria, a broad right of collective religious freedom inevitably results in a narrowly construed right to individual liberty. The Syrian system puts considerable emphasis on shared values of various religious communities. Common good takes centre stage because in this country the law reflects the expectation that it can provide a justification or explanation of a coherent and feasible social order. On the other side, indicators show that the laws of the Arab Republic give very limited heed to individual religious freedom. In can be deduced that when religious organizations enjoy the freedom to structure themselves, they require uniformity amongst all who espouse commitment to their mission. The legal system then appears incapable of extending the same array of freedoms to individual adherents as religious communities claim for themselves.

Overall, however, it is virtually impossible to select one of the three jurisdictions and claim undisputedly that it is best in respect to religious freedom. All three systems have internalized country-specific convictions, which appear to have been carved deeply into each respective national psyche. As illustrated earlier, such convictions possess sometimes contradictory, sometimes resolving effects on how religious freedom is to be interpreted. In Switzerland the law reflects the belief that people’s ability to participate democratically in traditional, public-law recognized religious communities is more just than the adoption of hierarchical forms of religious organization. Syria’s norms mirror the understanding that citizens find true happiness better within a specific religious community than by seeking their own uniquely chosen path. And, US legal structures express the expectation that a free
market of ideas and ideals generates greater truth than an absence of competition of veracity. The law pays specific emphasis to these and other convictions, resulting in concrete differences in religious-freedom interpretation. Each conviction offers significant insights and sets of practices, and so all three model jurisdictions remain potent possibilities for accommodating religion legally.

There is, in spite of such differences, a common legal denominator. The above evaluations brought to light that irrespective of legal system, in Switzerland, the United States, or Syria, the ability to accept religious pluralism is a necessary condition of religious tolerance, and that the recognition of religious pluralism inevitably leads to some sort of secularism. The reason for this is that secular laws provide for effective means to evade clashes of religious law. The act of concluding a social contract between individuals, organizations, and the state in a “religion-free” zone is consoling because no one must prove that one person’s religion is worth more than another’s.

The secular system is dependent on and characterized by religious neutrality. The state presents itself as an institutionalized arbitrator. Its function is to maintain and foster impartiality between religious players and enforce common secular denominators where necessary. What is crucial is the secular state’s capability to unite people of divergent religious convictions by making a minimum of moral claims on the community and its members. Looking at our three model jurisdictions, there is little shadow of doubt that the impartiality concept is key to the secular mission. The evaluation of the Swiss, US American, and Syrian legal system has demonstrated that the more neutral the stance of public authorities towards religion, the lesser the likelihood of illegitimate discrimination against religious adherents or religious institutions. This in turn, does not mean that the impartial state is barred from facilitating religious expression (especially that of well-established communities) that is for the benefit of all participants of society.

Secular law, though, need not necessarily be grounded in enlightened sentiments developed by Western civilization. Arguably, secular law can take varying forms (e.g. Near, Mid, or Far Eastern forms and many others) and need not necessarily be determined by Western or Christian understandings of justice and right. Secularism can also be a value-free concept that can be used to characterize aspects of shared social life.

From a traditional perspective secular law is not “religion-free.” However, the question is whether today’s legal enactments and judicial decisions are still religion based, or far more “religious-neutral” than before. Another possibility is that today’s secular law is viewed as a kind of mixture of several belief systems or none. The actual nature of contemporary secular law is still to be investigated. But that task is definitely beyond the scope of this thesis.

Admittedly, another truly liberal thought.
At the same time it is important to remind ourselves that secular law does not stand in direct competition with religious law. Their aims are different and, for this reason, should not be played off against each other. Religious law mostly intends to give people specific directions. If believers follow them they secure to themselves and others a life of happiness and love. The function of secular law is different. It guarantees to all participants in society the ability to enjoy basic freedoms, whenever the enforceability of such interests is judged reasonable. It thereby protects persons from being harmed illegitimately and punishes those who commit a wrong (including the state itself). The expectation is that secular law develops effects which promote and maintain peace. In this view, secularism is not tantamount to hostility towards religion, or disengagement of society from religion. In fact, in pluralist societies the two sides are co-implicated.

The above legal exploration has made crystal clear that citizens’ acceptance to make concessions to their religious exercise is pivotal for the secular state to be able to unfold its powers. The challenge is to be flexible enough to allow secularism to occur. Once in effect, it means that not every person can act according to her or his belief in every possible circumstance of life. Secular law permeates into spheres of societal interaction that could otherwise be regulated by religious law. Thus, the less space religious law occupies, the more room there is for secular law to evolve and take its place. It is a precondition of secularism that citizens are prepared to make reasonable compromises in the way they exercise religion. To what extent they are willing to accept a decline in religious self-determination so as to avoid conflict with the interests of others is for the citizens to decide. This implies that in an ideal setup, secular law is both robust and flexible.

2099 Here I do not make a distinction between secular and civil law; the two terms are readily interchangeable.

2100 Secularism from a liberal perspective does not necessarily challenge the supremacy of divine law. The secular state is, nonetheless, in need of a pliable citizenry which recognizes that actual interaction between the powers is one of parity. No doubt this view runs counter to the belief that secular law is of complementary character only, and that it is religion which enables nature to come to its proper end. Generally LEO STRAUSS, NATURRECHT UND GESCHICHTE (Suhrkamp 1977).

2101 Also, it is necessary to re-emphasize here that this modern constitutional idea conflicts with the conviction that religious and earthly powers are to be understood in dynamic unity with each other. Eberhard Schockenhoff, Beruht die Menschenwürde auf einer kulturellen Zuschreibung?, in VOM RECHTE, DAS MIT UNS GEOBOREN IST: AKTUELLE PROBLEME DES NATURRECHTS AT 248 FF. (Härle Wilfried ed., Herder 2007).

Differences in degrees of secular-law acceptability have been made visible on the above spectra. Since in Syria, matters pertaining to marriage, separation, adoption, and inheritance are social fields which are regulated by religious law, it can be concluded that Syrians are less willing to make room for secular law than is the case in Switzerland and the United States, where the same issues are governed by civil law. In the area of personal status, Syrian law thus follows the ideology of legal pluralism instead of legal secularism. For the Arab nation this system works as long as people stay and organize their lives within the religious community into which they are born. In Switzerland and the United States, however, the same concept of legal pluralism would very likely fall prey to the fact that people mix and change – e.g. they marry and divorce partners of different faiths and sexes; they take up new religions or reject them altogether. If legal pluralism was also adopted in the two Western societies, varying religious expressions would collide with each other like billiard-balls.

Thus, since all three legal systems are different, each and every one is ultimately required to find its own answers to questions of religious freedom while maintaining the universal goal of promoting true well-being. The future will tell whether Switzerland, the United States, and Syria are capable of re-designing and re-interpreting their basic constitutional frameworks so as to meet the changing realities of their own unique social and historic settings, and to establish a just approach to religious freedom.\(^{2103}\)

Bibliography

The following resources are in accordance with the 19th edition of The Blue-book.


AHDAR REX & LEIGH IAN, RELIGIOUS FREEDOM IN THE LIBERAL STATE (Oxford University Press 2005).


ANABTAWI MUNDIR, ARAB UNITY IN TERMS OF LAW (Martinus Nijoff 1963).


ATKINS E. M. & DODARO R. J., AUGUSTINE: POLITICAL WRITINGS (Cam-
bridge University Press 2001).

AUBERT J. F., PETITE HISTOIRE CONSTITUTIONNELLE DE LA SUISSE (Francke ÉDITIONS 1974).

AUER ANDREAS, DROIT CONSTITUTIONNEL SUISSE (2nd edn., Stämpfl 2006).


BAECHTOLD ANDREA, STRAFVOLLZUG, STRAF- UND MASSNAHMENVOLLZUG AN ERWACHSENEN IN DER SCHWEIZ (Stämpfl 2005).

BÄHLER RUDOLF ALBERT, DIE GRÜNDUNG DER EVANGELISCHREFORMIRTEM GEMEINDE KIRCHE UND SCHULE ZU FREIBURG IN DER SCHWEIZ, NEBST DEN AN IHREN ERSTEN FESTEN GEHALTENEN GEBETEN, PREDIGTEN UND REDEN (unkown publisher 1838).

BAKER GRENFELL F., MODEL REPUBLIC, A HISTORY OF THE RISE AND PROGRESS OF THE SWISS PEOPLE (H. S. Nichols 1895).

BARNES JOHN ROBERT, AN INTRODUCTION TO RELIGIOUS FOUNDATIONS IN THE OTTOMAN EMPIRE (2nd edn Brill 1987).

Barnes Timothy, Constantine, Athansius and the Christian Church, in CONSTANTINE: HISTORY HISTORIOGRAPHY AND LEGEND (Routledge 1998).

BARRON JEROME A. & C. DIENES THOMAS, FIRST AMENDMENT LAW IN A NUTSHELL (Thomson &West 2008).

BAUMGARTNER MARIA, DIE TÄUFER UND ZWINGLI, EINE DOKUMENTATION (Theologischer Verlag Zürich 1993).


Bernet Walter, Defizite schon vor dem Schulgeginn erkennen, NZZ, March 2, 2010.

Beyeler Sarah & Reich Virginia Suter, Inkorporation von zugewanderten Religionsgemeinschaften in der Schweiz am Beispiel der Aleviten und der Ahmadiyya, Schweizerische Zeitschrift für Religions- und Kulturgeschichte,


BLAKELY WILLIAM ADDISON, AMERICAN STATE PAPERS AND RELATED DOCUMENTS ON FREEDOM IN RELIGION (The Religious Liberty Association 1949).


BORSODI KOROLEVA, OSNOVY KONSTITUCIONNOGRO PRAVA SVEJCARII (Justinian 2009).

BOTIVEAU BERNARD, LOI ISLAMIQUE ET DROIT DANS LES SOCIÉTÉS ARABES (Karthala 1993).

BÖTTCHER ANNABELLE, SYRISCHE RELIGIONSPOLITIK UNTER ASAD (Freiburger Beiträge zu Entwicklung und Politik 1998).


BRADFORD’S HISTORY OF BLIMOTH PLANTATION (Ted Hildebrandt et al. eds., Wright & Potter Printing Co. 1898) (1620).

BRANDENBERG MANUEL, SEKTENINFORMATION DURCH BEHÖRDERN (Schulthess 2002).
BRANNON HENRY, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (Cincinnati 1901).


BUCKLEY THOMAS E., CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787 (University of Virginia Press 1977).


Burnand Frédéric, Swiss more fearful of Islam than Scientology, swissinfo.ch, June 7, 2009.

BURNHAM WILLIAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES (4 edn, Thomson & West 2006).

BUSER DENISE & LORETAN ADRIAN, GLEICHSTELLUNG DER GESCHLECHTER UND DIE KIRCHEN: EIN BEITRAG ZUR MENSCHENRECHTLICHEN UND ÖKUMENISCHEN DISKUSSION (Universitätsverlag Freiburg 1999).

BÜSSER FRITZ, HULDRYCH ZWINGLI, REFORMATION ALS PROPHETISCHER AUFRAG (Musterschmidt Göttingen 1973).


CANBY WILLIAM C., JR., AMERICAN INDIAN LAW IN A NUTSHELL (4th edn, Thomson & West 2004).

CARLEN LOUIS, DIE LANDSGEMEINDE IN DER SCHWEIZ, SCHULE DER DEMOKRATIE (Jan Thorbecke 1976).

Carlen Louis, Zum Verhältnis von Kirche und Staat im Wallis, in KIRCHE IN EINER SÄKULARISIERTEN GESELLSCHAFT (Dieter Binder et al. eds., Studienverlag GmbH 2006).


CATTACIN SANDRO ET AL., STAAT UND RELIGION IN DER SCHWEIZ: ANERKENNUNGSKÄMPFE, ANERKENNUNGSFORMEN (Eidgenössischen Kommissi-
on gegen Rassismus 2003)


Center for Church/State Studies, DePaul University College of Law, 1994 Report on the Survey of Religious Organizations at the National Level, Q 4 (unpublished survey, on file with the Center for Church/State Studies, DePaul University College of Law).


Coughlin John J., *Address at the Symposium on Law & Politics as Vocation*, as in 20 ND J. L. Ethics & Pub Pol’y 1, 2 (2006) (discussing the divine call of all three monotheistic religions)

Curry Thomas J., *The First Freedoms: Church and State in America to the Passage of the First Amendment* (Oxford University Press 1986).


Dean William, *American Religious Empiricism* (State University of
Deguilhem-Schoem Randi Carolyn, History of Waqf and Cases Studies from Damascus in Late Ottoman and French Mandatory Times (New York University Ph.D. dissertation) (on file with University Library 1986).


DENZINGER HEINRICH, KOMPENDIUM DER GLAUBENSBekenntnisse und Kirchlichen Lehrentscheidungen (Herder 1991).


DORSEN NORMAN, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (Thomson & West 2010).


DÜBI WALTER, HANDBUCH ÜBER DEN STRAF- UND MASSNAHMENVOLLZUG (Schaub 1971).


Durham Cole W. Jr., & Sewell Elizabeth A., Definition of Religion, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES, A STUDY OF IDENTITY, LIB-

Durhan Cole W., Jr., Legal Structuring of Religious Institutions, in RELI-
GIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY,
LIBERTY, AND THE LAW (James A. Serritella et al. eds., 2006).

Dwyer James G., VOUCHERS WITHIN REASON: A CHILD-CENTERED AP-
PROACH TO EDUCATION REFORM (Cornell University Press 2002).

Dyson R.W., ST AUGUSTINE OF HIPPO (Continuum International Publishing
2006).


Eliasson Olafur, Models are Real, in MODELS (Emily Abruzzo et al. eds.,
306090, Inc.).

Englberger Johann, Gregor VII. UND DIE INVESTITURFRAGE, QUEL-
LENKRITISCHE STUDIEN ZUM ANGEBLICHEN INVESTITURVERBOT VON 1075
(Böhlau 1996).

Accommodation Provision To Redeem, 76 Tex. L. Rev. 317, 320 (1997)
(discussing the meaning of accommodation).

Esbeck Carl H., The American System of Church-State Relations: And its
Bearing on Church Autonomy, in CHURCH AUTONOMY: A COMPARATIVE
SURVEY (Gerhard Robbers ed., 2001).

Eusebius, The Ecclesiastical History (Kirsopp Lark trans., vol. I, Har-

Evans-Cowley Jennifer S. & Pearlman Kenneth, Six Flags over Jesus:
(discussing the ordinance analysis).

Famos Cla Reto, Die öffentlichrechtliche Anerkennung von Reli-
gionsgemeinschaften im lichte des Rechtsgleichheitsprinzips
(Universitätsverlag Freiburg Schweiz 1999).

Farner Alfred, Die Lehre von Kirche und Staat bei Zwingli (Mohr
Siebeck 1930).

Federal and State Constitutions (Francis Newton Thorpe ed., Gov-
ernment Printing Office vol. vi 1906).

Feldtkeller Andreas, Identitätssuche des syrischen Urchristen-
tums: Mission, Inkulturation und Pluralität im ältesten Heiden-
CHRISTENTUM (Universitätsverlag Freiburg 1993).

FELLER DINA CHARIF, LA GARDE (HADANAH) EN DROIT MUSULMAN ET DANS LES DROITS ÉGYPTIEN, SYRIEN ET TUNISIEN (Librairie Droz 1996).

FELLER RICHARD, GESCHICHTE BERNS, GLAUBENSKÄMPFE UND AUFKLÄRUNG (Herbert Lang, vol. II, 1974).

FELLMANN WALTER ET AL., BERNER KOMMENTAR: KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT (Stämpfli 2006).


FRANSCINI STEFANO, NEUE STATISTIK DER SCHWEIZ (Haller’schen Buchdruckerei 1851).


FRIEDRICH UELI, Kirchen und Glaubensgemeinschaften im pluralistischen Staat, zur Bedeutung der Religionsfreiheit im schweizerischen Staatskirchenrecht (Stämpfli 1993)

FRIEDMANN DANIEL, TO KILL AND TAKE POSSESSION, LAW, MORALITY, AND SOCIETY IN BIBLICAL STORIES (Hendrickson Publishers 2002).


**GAREIS CARL & ZORN PHILIPP, STAAT UND KIRCHE IN DER SCHWEIZ** (Bd. 1, Orell Füssli 1877).

**GATANI TINDARO, I RAPPORTI ITALO-SVEZZERI ATTRAVERSO I SECOLI** (Unione per la Tutela degli Ineressi Lavoratori Emigranti 1978).


**GIBBON EDWARD, DECLINE AND FALL OF THE ROMAN EMPIRE** (ElecBook


Hafner Felix, *Kirche und Demokratie: Betrachtungen aus juristischer Sicht,
in SCHWEIZERISCHES JAHRBUCH FÜR KIRCHENRECHT 2 (Lang 1997)


HAFNER PIUS, STAAT UND KIRCHE IM KANTON LUZERN, HISTORISCHE UND RECHTLICHE GRUNDLAGEN (Universitätsverlag Freiburg Schweiz 1991).


HALLER WALTER, THE SWISS CONSTITUTION IN A COMPARATIVE CONTEXT (Dike 2009).


HAMM BERNDT, ZWINGLI’S REFORMATION DER FREIHEIT (Neukirchner 1988).

HANDSCHIN LUKAS & VONZUN RETO, DIE EINFACHE GESELLSCHAFT (Schulthess 2009).

HÄNNI PETER, PLANUNGS-, BAU- UND BESONDERES UMWELTSCHUTZRECHT (5th edn, Stämpfli 2008).


Harvey Cox, Playing the Devil’s Advocate, As It Were, N.Y. TIMES, Feb. 16, 1977.

HAYMAN STEVEN J., FREE SPEECH AND HUMAN DIGNITY (Yale University Press 2008).

HEINI ANTON ET AL., GRUNDRISS DES VEREINSRECHTS (Helbing Lichtenhahn Verlag 2009).

HEINZ MARLIES, ALTSYRIEN UND LIBANON: GESCHICHTE, WIRTSCHAFT UND KULTUR VOM NEOLITHIKUM BIS NEBUKADNEZAR (Wissenschaftliche
Buchgesellschaft 2002).


HERINGA AALT WILLEM, CONSTITUTIONS COMPARED: AN INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW (Intersentia 2007).


HEUSLER ANDREAS, SCHWEIZERISCHE VERFASSUNGSGESCHICHTE (Frobenius 1920).


HILTI MARTIN, DIE GEWISSENSFREIHEIT IN DER SCHWEIZ (Dike 2008).


HILTY C., DIE BUNDESVERFASSUNGEN DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT (Wyss 1891).

HOBBES THOMAS, LEVIATHAN; OR, THE MATTER, FORME, & POWER OF A COMMON-WEALTH, ECCLESIASTICAL AND CIVILL (Printed for Andrew Crooke, at the Green Dragon in St. Paul’s Church-yard, 1651).


HOLLOWAY ROSS R., CONSTANTINE AND ROME (Yale University Press 2004).


HORANYI SYBILLE, DAS SCHÄCHTVERBOT ZWISCHEN TIERSCHUTZ UND RELIGIONSFREIHEIT, EINE GÜTERABWÄGUNG UND INTERDISZIPLINÄRE DARSTELLUNG VON LÖSUNGSANSÄTZEN (Hellbing & Lichtenhahn 2004).


HUGHES CHRISTOPHER, THE FEDERAL CONSTITUTION OF SWITZERLAND

**Hunziker Otto, Der eidgenössische Bundesbrief von 1291 und seine Vorgeschichte** (2nd edn, Polygraphischer Verlag 1934)


Ismail Amin, Überlegungen aus islamischer Sicht, in Die Zukunft der öffentlich-rechtlichen Anerkennung von Religionsgemeinschaften (René Pahud de Mortanges et al. eds., Universitätsverlag Freiburg 2000).

**Ivanov Daniela, Die Harmonisierung des Baupolizeirechts unter Einbezug der übrigen Baugesetzgebung** (Schulthess 2006).

**Jackson Vicki C. & Tushnet Mark, Comparative Constitutional Law** (Foundation Press 2006).


**Josef Cavelti Urs, Die öffentlich-rechtlichen Religionsgemeinschaften im schweizerischen Staatskirchenrecht** (Universitätsverlag Freiburg 1954).


**Kälin Walter, Grundrechte im Kulturkonflikt: Freiheit und Gleichheit in der Einwanderungsgeellschaft** (NZZ Verlag 2000).

Karlen Peter, *Das Grundrecht der Religionsfreiheit in der Schweiz* (Schulthess 1988).


Kiener Regina & Kälin Walter, *Grundrechte* (Stämpfli 2007).


Kley Andreas & Schär Alexander, *Gewährleistet die Religionsfreiheit einen Anspruch auf Minaret und Gebensruf?, in Streit um das Minarett: Zusammenleben in der religiösen pluralistischen Gesellschaft* (Mathi-
as Tanner et al. eds., Theologischer Verlag Zürich 2009).


Kölz Alfred, Neuere Schweizerische Verfassungsgeschichte, Ihre Grundlinien im Bund und Kantonen seit 1848 (Stämpfli 2004).

Kölz Alfred, Quellenbuch zur Neueren Schweizerischen Verfassungsgeschichte, vom Ende der Alten Eidgenossenschaft bis 1848 (Stämpfli 1992).

Kölz Alfred, Quellenbuch zur Neueren Schweizerischen Verfassungsgeschichte, von 1848 bis in die Gegenwart (Stämpfli 1996).


Kosch Daniel, Perspektiven für ein partnerschaftliches und streitbares Miteinander pastoraler und staatskirchenrechtlicher Strukturen, in Schweizerisches Jahrbuch für Kirchenrecht (Dieter Kraus ed., vol. 10, Peter
Lang 2005).


KOURI E. I., TERTULLIAN UND DIE RÖMISCHE ANTIKE (Schriften der Luther Agricola Gesellschaft 1982).


KRAUS DIETER, SCHWEIZERISCHES STAATSKIRCHENRECHT, HAUPTLINIEN DES VERHÄLTNISSES VON STAAT UND KIRCHE AUF EIDGENÖSSISCHER UND KANTONALER EBENE (J.C.B Mohr Paul Siebeck 1993).


KUTTER MARKUS, *DER ANFANG DER MODERNEN SCHWEIZ, ÜBERGANG VON DER ALTEN EIDGENOSSENSCHAFT ZUR HELVETISCHEN REPUBLIK (1748-1803)* (Christoph Merian 1996).

KUTTER MARKUS, *DIE SCHWEIZ VON VORGESTERN, VOM WIENER KONGRESS BIS ZU DEN KANTONALEN REVOLUTIONEN (1814–1830)* (Christoph Merian 1997).


LAMPERT ULRICH, *KIRCHE UND STAAT IN DER SCHWEIZ* (Bd. 2, Rütschi und Egloff 1938).

LANDERT CHARLES, *DIE NEUORDNUNG DES VERHÄLTNISSES ZWISCHEN DEM KANTON ZÜRICH UND DEN ÖFFENTLICHERECHTLICH ANERKANNTEN KIRCHEN UND WEGE ZUR FINANZIERUNG KIRCHLICHER LEISTUNGEN* (unknown publisher Bericht 2003).


LATOURETTE SCOTT KENNETH, *A HISTORY OF THE EXPANSION OF CHRIS-
TIANITY (Harper & Brothers 1953).


Laudage Johannes, Der Investiturstreit, Quellen und Materialien (Böhlau 1989).

Leeuwen Richard Van, Waqf and Urban Structures (Brill 1999).

Leppin Volker, Thomas von Aquin (Aschendorff 2009).

Leverett V, Inheriting Syria: Bashar’s Trial by Fire (Brookings Institution Press 2005).


Ley Roger, Kirchenzucht bei Zwingli (Zwingli Verlag 1948).


Loewald Hans, Sublimation (Yale University Press 1988).


Loretan Adrian, Impulse des staatlichen Gleichstellungsrechts für die Kirchen, in Das Kreuz der Kirche mit der Demokratie: Zum Verhältnis von katholischer Kirche und Rechtsstaat (Adrian Loretan & Toni
Bernet-Strahm eds., Theologischer Verlag Zürich 2006).

Loretan Adrian, Öffentlich-rechtliche Anerkennung, in KOMMENTAR DER KANTONSVERFASSUNG LUZERN 665 ff. (Richli Paul & Franz Wicki eds., Stämpfli 2010)

LORETAN ADRIAN, RELIGION IM KONTEXT DER MENSCHENRECHTE (Theologischer Verlag Zürich 2010).

Loretan Adrian, Religiöse Symbole in multireligiöser Gesellschaft: Kopftuch und Minarett, in IST MIT RELIGION EIN STAAT ZU MACHER? ZU DEN WECHSELBEZIEHUNGEN VON RELIGION UND POLITIK (Béatrice Acklin Zimmermann et al. eds., Theologischer Verlag Zürich 2009).


MACINTYRE ALASDAIR, AFTER VIRTUE: A STUDY IN MORAL THEORY (Duckworth 2007).


MCCLUSKEY NEIL G., CATHOLIC EDUCATION IN AMERICA (Teachers College Press 1964).


McHugh James T., COMPARATIVE CONSTITUTIONAL TRADITIONS (Lang 2002).


Meyer Karl, *Der Ursprung der Eidgenossenschaft* (Gebrüder Lehmann 1941).


Meyer Urs F., *Das Arbeitsgesetz, Ein Handbuch für die Praxis* (Schweizerischer Arbeitgeberverband 2000).


Müller Hebert J., *Issues of Freedom: Paradoxes and Promises*

NABHOLZ HANS & KLÄUI PAUL, QUELLENBUCH ZUR VERFASSUNGSGESCHICHTE DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT UND DER KANTONE VON DEN ANFÄNGEN BIS ZUR GEGENWART (Sauerländer 1940).

NAGUIB TAREK ET AL., RECHT GEGEN RASSISTISCHE DISKRIMINIERUNG: ANALYSE UND EMPFEHLUNGEN (Eidgenössische Kommission gegen Rassimus 2009).


Nay Giusep, Diskriminierend, unnötig, nicht umsetzbar, in VON DER PROVOKATION ZUM IRRTUM: DIE AUSEINANDERSETZUNG UM DIE MINARETTE (Andreas Gross et al. eds., St-Ursanne 2009).


Nedopil Norbert, Risiken von Sektenzugehörigkeit aus psychiatrischer Sicht, in SEKTEN UND OKKULTISMUS, KRIMINOLOGISCHE ASPEKTE (Marco Borghi et al. eds., Verlag Rüegger 1996).


NEUMANN UWE, AUGUSTINUS 62 (Rowohlt 1998).
NEWMAN JAY, ON RELIGIOUS FREEDOM (University of Ottawa Press 1991).
NOLL MARK A., PROTESTANTS IN AMERICA (Oxford University Press 2000).
NOLON JOHN R. & SALKIN PATRICIA E., LAND USE IN A NUTSHELL (Thomson & West 2006).
OFFIZIELLER TEXT, BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENÖSSISCHEN, NEBST SÄMMGLICHEN IN KRAFT STEHENDEN KANTONSVERFASSUNGEN (2nd edn, Marchand und Comp. 1856).
Papst Gregor VII., Brief an alle Getreuen im Reich of 3 September 1076, in QUENTEN ZUM INVESTITURSTREIT, ERSTER TEIL AUSGEWÄHLTE BREIFE PAPST GREGORS VII. (Franz-Josef Schmale trans., Wissenschaftliche Buchgesellschaft Darmstadt 1978).
PATRICK JOHN J. & LONG GERALD P., CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: DOCUMENTARY HISTORY (Greenwood Publishing Group 1999).


PEDUZZI ROBERTO, MEINUNGS- UND MEDIENFREIHEIT IN DER SCHWEIZ (Schulthess 2004).


PERRIN JEAN-FRANCOIS, DROIT DE L’ASSOCIATION (Schulthess 2008).

PEYER HANS CONRAD, VERFASSUNGSGESCHICHTE DER ALTEN SCHWEIZ (Schulthess Polygraphischer Verlag 1978).

PICARD JACQUES, DIE SCHWEIZ UND DIE JUDEN 1933–1945 (Chronos 1994).

PIGUET ETIENNE, L’IMMIGRATION EN SUISSE (Presses polytechnique et universitaires romandes 2004).


PLOTKE HERBERT, SCHWEIZERISCHES SCHULRECHT (2nd edn, Haupt Verlag 2003).


POLLOCK FREDERICK, A FIRST BOOK OF JURISPRUDENCE (1896) quoted as in Stefan Vogena, Sources of Law and Legal Method in Comparative Law, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 870 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2008).

POPE PIUS IX, ENCYCLICAL, QUANTA CURA & THE SYLLABUS OF ERRORS (Angelus Press 2006), and as promulgated on 8 December 1864.


PRUCHA FRANCIS PAUL, THE GREAT FATHER: THE UNITED STATES GOV-
ERNMENT AND THE AMERICAN INDIANS (University of Nebraska Press 1984).

RAHMAN TANZIL-UR, A CODE OF MUSLIM PERSONAL LAW (Hamdard Academy 1978).


RHINOW RENÉ, GRUNDZÜGE DES SCHWEIZERISCHEN VERFASSUNGSRECHT (Helbing & Lichtenhahn 2003).


RICHLI PAUL, INTERDISZIPLINÄRE DAUMENREGELN FÜR EINE FAIRE RECHTSETZUNG, EIN BEITRAG ZUR RECHTSETZUNGSLEHRE IM LIBERALEN SOZIAL UND ÖKOLOGISCH ORIENTIERTEN RECHTSSTAAT (Helbing & Lichtenhahn 2000).


Robbers Gerhard, Religious Freedom in Germany, 2001 B.Y.U.L. Rev. 643,


**ROM ROBERT, DIE BEHANDLUNG DER RASSENDISKRIMINIERUNG IM SCHWEIZERISCHEN STRAFRECHT** (Huber Druck 1995).

**ROMANELLI PATRICK, LIBRARY OF LIBERAL ARTS** (Bobbs-Merrill 1955).


Royster Judith V., *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 7 (1995) (discussing federal Indian policy that was primarily oriented towards the separation of tribes and citizens).

**RUBIN BARRY, TRUTH ABOUT SYRIA** (Palgrave Macmillan 2007).

**RÜEGG CHRISTOPH, DIE PRIVATRECHTLICH ORGANISIERTEN RELIGIONSGEMEINSCHAFTEN IN DER SCHWEIZ: EINE BESTANDESAUFNAHME UND JURISTISCHE ANALYSE** (Universitätsverlag Freiburg Schweiz 2002).


**RUNQUIST LISA A. ET AL., GUIDE TO REPRESENTING RELIGIOUS ORGANIZATIONS** (American Bar Association 2009).


Rutz Gregor A, *Die öffentlich-rechtliche Anerkennung in der Schweiz: Bestandesaufnahme und Entwicklungstendenzen, in Die Zukunft der öffentlich-rechtlichen Anerkennung von Religionsgemeinschaften* (René Pahud de Mortanges et al. eds., Universitätsverlag Freiburg 2000);

**SAEED ABDULLAH & SAEED HASSAN, FREEDOM OF RELIGION, APOSTASY AND ISLAM** (Ashgate Publishing Ltd. 2004).

**SAHLFELD KONRAD, ASPEKTE DER RELIGIONSFREIHEIT IM LICHTE DER RECHTSPRECHUNG DER EMRK-ORGANE, DES UNO-MENSCHENRECHTSAUSSCHUSSES UND NATIONALER GERICHTEN** (Schulthess 2004).


SCHAEKER ALEXANDER, “MANN MUSS GOTT MEHR GEHORCHEN ALS DEN MENSCHEN!” DAS RECHT ALS LÖSER INTERKONFESSIONELLER KONFLIKTE AM BEISPIEL DES ISLAMS IN DER SCHWEIZ (Lit 2009).


SCHÄFER HOLGER, *DIE UNGESCHRIEBENEN FREIHEITSRECHTE IN DER SCHWEIZERISCHEN BUNDESVERFASSUNG VON 1874 IM VERGLEICH MIT DEM GRUNDEGESETZ* (Peter Lang 2002).


SCHMITTHÜSEN BERNHARD, *GELIGIONSFREIHEIT UND GLAUBENSERFAHRUNG DARGESTELLT AM BEISPIEL ENTHEOGENER GLAUBENSGEEMNSCHAFTEN* (Schulthess 2007)

SCHNEIDER RONNA GREFF, *EDUCATION LAW, FIRST AMENDMENT, DUE PROCESS, AND DISCRIMINATION LITIGATION* (Thomson & West 2004).


SCHOCKENHOFF EBERHARD, *ETHIK DES LEBENS: GRUNDLAGEN UND NEUE
HERAUSFORDERUNGEN (Herder 2009).


SEIDEL WOLF S., RAUMPLANUNG IM FOKUKUS DER IMMIGRATION, MIT HINWEISEN AUF DAS U.S. – AMERIKANISCHE ANTIDISKRIMINIERUNGS- UND PLANUNGSRECHT (Dike 2008).


SNELL LUDWIG, HANDBUCH DES SCHWEIZERISCHEN STAATSRECHTS (Orell Füssli, vol. II, 1844).


SPENLÉ CHRISTOPH ANDRÉ, DAS KRÄFTEVERHÄLTNIS DER GLIEDSTAATEN IM GESAMTGEFÜGE DES BUNDESSTAATES: UNTER BESONDERER BERÜCKSICHTIGUNG DES KONZEPTS DES SCHWEIZERISCHEN ZWEIKAMMERSYSTEMS (Helbing & Lichtenhahn 1999).


STADLER PETER, DER KULTURKAMPF IN DER SCHWEIZ, EIDGENOSSENSCHAFT UND KATHOLISCHE KIRCHE IM EUROPÄISCHEN UMKREIS 1848–1888


Stockhammer Nicolas, *Das Prinzip Macht, Die Rationalität politischer Macht bei Thukydides, Machiavelli und Michel Foucault* (Nomos 2005).


Sträuli Hans, *Verfassung des eidgenössischen Standes Zürich* (Geschwister Ziegler 1902).


Sturm Dieter, *Zur Funktion des Grossmufti in der syrischen Arabischen Republik* (Hallesche Beiträge zur Orientwissenschaft 4, 1982).


Sullivan Kathleen M. & Gunther Gerald, *First Amendment Law*
SUZUKI D. T., AN INTRODUCTION TO ZEN BUDDHISM (Grove Press 1964).


SZURAWITZKI MICHAEL, CONTRA DEN “REX IUSTUS / REXINIQUUS”? (Königshausen & Neumann 2005).


TRIBE LAURENCE H., THE INVISIBLE CONSTITUTION (Oxford University
Press 2008).

Tschannen Pierre, Staatsrecht der Schweizerischen Eidgenossenschaft (Stämpfli 2004);


Usteri Paul, Handbuch des Schweizerischen Staatsrechts (Heinrich Remigius Sauerländer 1821).

Vallender Klaus A. & Morell Reto, Umweltrecht (Stämpfli 1997).

Van Leeuwen Richard, Waqf and Urban Structures (Brill 1999).

Vogel Lukas, Gegen Herrn, Ketzer und Franzosen, der Menzinger “Hirtenhemmlit” Aufstand vom April 1799 (Chronos 2004).

Vogenauer Stefan, Sources of Law and Legal Method in Comparative Law, in The Oxford Handbook of Comparative Law (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2008).

Von Salis L.R., Die Entwicklung der Kultusfreiheit in der Schweiz (L. Reinhart 1894).

Waldmann Bernhard, Moscheebau und Gebentsruf, in Muslime und Schweizerische Rechtsordnung (Pahud de Mortanges & Tanner Erwin eds., Freiburger Veröffentlichungen zum Religionsrecht 2002).

Walker Samuel, Hate Speech: The History of an American Controversy (University of Nebraska Press 1994).


Walter Hofer, Das Verhältnis zwischen Kirche und Staat im Kanton Luzern (Paul Haupt 1924).

Walton Robert C., Zwingli’s Theocracy (University of Toronto Press 1967).


WEISSNIEDER BENEDIKT, *Die Schulhoheit, Grundlagen und Ausgestaltungsformen des staatlichen Schulrechts* (Universitätsverlag Freiburg 1953).


WILHELM OECHSLI, *Geschichte der Schweiz im Neunzehnten Jahrhundert* (Hirzel 1913).


WINZELER CHRISTOPH, *Strukturen von einer “anderen Welt,” Bis-

Wright David, Tertullian’s Life and Achievement, in EARLY CHRISTIAN WORLD (Philip Francis Elser ed., Routledge 2000).

WYMANN EDUARD, GESCHICHTE DER KATHOLISCHEN GEMEINDE ZÜRICH (Börsig 1907).

YE’OR BAT, THE DECLINE OF EASTERN CHRISTIANITY UNDER ISLAM: FROM JIHAND TO DHIMMITUDE (Fairleigh Dickinson University Press 1996).

ZEUGIN GOTTFRIED, DAS JESUITENVERBOT DER SCHWEIZERISCHEN BUNDESFÄHSSUNG (Diss. Univ. Zürich 1933).

ZILLING HENRIKE MARIA, TERTULLIAN, UNTERTAN GOTTES UND DES KAIERS (Ferdinand Schönigh 2004).


ZUMSTEIN BEAT, DIE ANWENDUNG DER ÄSTHETISCHEN GENERALKLAUSEL DES KANTONALEN BAURECHTS (Band 3, Schriftenreihe des Instituts für Rechtswissenschaft und Rechtspraxis 2001).

ZWINGLI HULDRYCH, VON WAREM UND VALSCHM GLOUBEN (Christoffel Froschouer 1526).


Table of Interviews


Al-Habash Muhammad, His Eminence Sheikh, Member of the Syrian Parliament, in Damascus (Jan. 15, 2007).

Choper Jesse H., Earl Warren Professor of Public Law, UC Berkeley, in Berkeley (May 5, 2009).

Dell’Oglio Paolo, Jesuite Father, in Deir Mar Mousa (Nov. 25 2006).

Gegorius III, His Beatitude Patriarch of the Antioch, Melkite Greek Catholic
Church, in Damascus (Nov. 6, 2006).
Ignatius IV (Hazim), His Beatitude Patriarch of the Greek Orthodox Church of Antioch, in Damascus (Nov. 28, 2006).
Jabbour Georges, former Member of the Syrian Parliament, in Damascus (Jan. 8, 2007).
Maleh Haitham, Former Judge and Attorney at Law, in Damascus (Jan. 24, 2007).
Nalbandian Armash, His Excellency Bishop of the Armenian Diocese of Damascus, in Damascus (Nov. 29, 2006).
Nielsen Jørgen S., Professor of Islamic Studies and Director, Centre for the Study of Islam and Christian-Muslim Relations, University of Birmingham, in Damascus (Jan. 13, 2007).
Odo Antoine, His Excellency Chaldean Bishop of Aleppo and neighbouring Chaldean Diocese, in Aleppo (Dec. 2, 2006).
Richli Paul, Chair on Theory of Legislating, Agricultural and Administrative Law, University of Lucerne (Dec. 15, 2009).

Appendix

Questionnaire

The following questions were posed to Syrian interview partners by Patrick Huser, Tobias Schwerna, and the author during September 2006 and February 2007.
1. The right to freedom of religion is guaranteed by Art. 35 of the Syrian Constitution of 1973. What does the constitutionally entrenched right mean to Syrian minority religions?

2. From a Western understanding of the term “religious freedom” the state has not only a duty to abstain from encroaching on individual freedoms, but is also obliged to guarantee positive freedoms by preventing private violations. What does the Syrian state do against advocacy of religious hatred, or incitement to religious discrimination e.g. uttered by private individuals?

3. Art. 3 of the Syrian Constitution of 1973 holds that Islamic jurisprudence is a main source of law. How is that to be understood?

4. To what extent have individual religious freedom rights and duties been internalized into the Syrian legal system?

5. Can new religious communities receive official legal recognition in Syria?

6. Would you say that there is any specific area of religious freedom law that is still unjust? If so which one?

7. Are all religious rites in Syria free to manifest their religion or belief, including a broad range of acts such as ritual, ceremonial acts giving direct expression to belief?

8. Are Syrians entirely free to have or adopt any religion or belief? If not what constraints are there?

9. Would you say that in Syrian public schools Islam receives greater attention than other non-Islamic rites? Would you go as far as saying Islam is inculcated into Syrian students?

10. Would you say that there are country-specific circumstances that are difficult to discern by the average Western thinker? If so, why do you think that religious freedom is understood differently than in the West? What makes the difference to you?