

1-1-1997

The Crucifix Case: Germany's *Everson v. Board of Education*?

Lark E. Alloway

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [Comparative and Foreign Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Alloway, Lark E. (1997) "The Crucifix Case: Germany's *Everson v. Board of Education*?" *Penn State International Law Review*: Vol. 15: No. 2, Article 5.

Available at: <http://elibrary.law.psu.edu/psilr/vol15/iss2/5>

This Comment is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Comments

The Crucifix Case: Germany's *Everson v. Board of Education*?

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.¹

I. Introduction

On August 10, 1995, the German Constitutional Court struck down a Bavarian law which mandated that all state schools hang crucifixes in their classrooms.² This decision is known popularly as the *Crucifix Case*.³ The Court found that the Bavarian law violated the Basic Law's⁴ provision in Article 4, which declares

1. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

2. Das sog. "Kruzifix-Urteil," 32 BVerfGE (1995) [hereinafter *Crucifix Case*].

3. *Id.*

4. The Basic Law is Germany's Constitution. Grundgesetz [Constitution] [GG] (F.R.G.) [hereinafter Basic Law]. Following World War II, the Western Allies proposed to the eleven German states comprising West Germany a framework for establishing a German federal state. DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 9 (1994). One of the three documents known as the "Frankfurt Documents" authorized the eleven prime ministers to call a Constitutional convention. According to the document,

that "freedom of faith and conscience as well as freedom of creed, religious or ideological, are inviolable."⁵ A family of atheists brought this constitutional complaint and the Court held that the law violated the atheist students' guarantee of "religious freedom."⁶ School officials were subsequently ordered to remove the crucifixes from those classrooms occupied by the objecting students.⁷ The holding of the Constitutional Court in the *Crucifix Case* marked a major departure from what had been the acceptable contact between church and state in Germany. The United States has also reexamined the relationship between church and state. In *Everson v. Board of Education*,⁸ the United States Supreme Court began the process of defining the constitutionally proper relationship between education and the Establishment Clause.⁹ Since the *Everson* decision, the church-state relationship¹⁰ in education has been uncertain and regrettable. Has Germany started down the same path the United States did almost fifty years ago?

The purpose of this Comment is to compare the current trends of Germany's church-state relationship with the already developed Establishment Clause caselaw in the United States. As a preliminary matter, Part II of this Comment will contrast the pertinent provisions affecting the relationship between church and state in the German and United States constitutions. Part III will explore the differences between the development of German and United States church-state law. This analysis will include, specifically, the differences between church-state law as it relates to public education in Germany and the United States. Applying the main

the proposed Constitution would receive Allied approval if it provided for three things: "democracy, federalism, and fundamental rights." *Id.* The Basic Law was drafted by a Parliamentary Council (elected by the State parliaments), ratified by two-thirds of the Lander Parliaments, and became effective on May 23, 1949. *Id.* at 10.

5. Basic Law, art. 4.

6. Uta Winkhaus, *Schools Ignore Court, Keep Crucifixes*, NEWS TRIB., Aug. 17, 1996, at A6.

7. Stefanie Kreiss, *Bavaria Crowd Protests Ruling on Crucifixes*, SALT LAKE TRIB., Sept. 24, 1995, at A13.

8. 330 U.S. 1 (1947) (holding that a New Jersey statute permitting boards of education to reimburse parents for transportation by bus of children attending parochial schools was constitutional under the Establishment Clause, but, in the process, severely restricting public aid to religion).

9. *See id.*

10. For purposes of this Comment, "church-state relationship" means the relationship between religion or a religious body and any person or entity that qualifies as a state actor.

Establishment Clause test articulated by the United States Supreme Court, the *Lemon*¹¹ test, to the specific facts involved in the *Crucifix Case*, Part IV will analyze the outcome of the *Crucifix Case* had it been decided by the United States Supreme Court. The similarities between the recent decision in the *Crucifix Case* and comparable cases in the United States will be explored in Part V. As litigation under the United States' church-state law is more developed than similar litigation in Germany, Part VI of this Comment will draw an important parallel between the evolution of First Amendment litigation in the United States and possible developments in Germany's church-state law following the *Crucifix Case*.

II. Overview of the Constitutional Provisions Affecting the Relationship Between Church and State in the United States and Germany

The U.S. Constitution has only one provision affecting the relationship between church and state. This provision, the First Amendment, provides that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"¹² This provision has traditionally been subdivided into two clauses, the Establishment Clause and the Free Exercise Clause. Claims brought under the Free Exercise Clause are usually brought by a plaintiff who believes that a specific governmental practice or law burdens his ability to practice his religion. On the other hand, claims brought under the Establishment Clause are generally brought by a plaintiff who believes that a specific governmental practice or law either advances a certain religion over other religions or advances religion generally over nonreligion.¹³

11. The *Lemon* test was first formulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

12. U.S. Const. amend. I. Although the First Amendment is prefaced by the phrase, "[c]ongress shall make no law," *id.*, the provisions in the First Amendment were made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). This clause provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The First Amendment was incorporated through the Fourteenth Amendment in *Cantwell*, 310 U.S. 296.

13. Traditionally, the members of the Supreme Court have split on whether the Establishment Clause was meant to prevent the advancement of religion over nonreligion. At the time the framers of the Bill of Rights drafted the First

Germany's Basic Law, in contrast, contains various provisions affecting the relationship between church and state. The centerpiece of the free exercise provisions is found in Article 4, which provides, in part, that "[f]reedom of faith and conscience as well as freedom of creed, religious or ideological, are inviolable."¹⁴ The counterpart to Article 4 is Article 137 of the Weimar Constitution, which was incorporated into the Basic Law. Article 137(1) declares that "[t]here shall be no state church."¹⁵ Although numerous other provisions address the church-state relationship,¹⁶ these two are the provisions relevant to the ensuing discussion.

Interesting differences emerge from a comparison of the United States and German provisions. First, some American constitutional scholars assert that the meaning of the Establishment Clause embodies only the prohibition of a national church. The Weimar Constitution's Article 137 explicitly states that prohibition. Thus, while the Establishment Clause of the First Amendment cannot be read so narrowly as to apply only to the establishment of a national church, Article 137 cannot be read so broadly as to prohibit governmental support of all religions.

Second, while the First Amendment has both an affirmative clause (the Free Exercise Clause) and a negative clause (the Establishment Clause) for religious persons, the Basic Law has only one clause that can be used as a double-edged sword. For

Amendment, American society, as a whole, was predominantly Protestant. It was not until 1961 in *Torcaso v. Watkins*, 367 U.S. 488 (1961), that the Supreme Court applied the protection of the Establishment Clause to atheists. *Id.*

In *Torcaso*, the Court struck down a Maryland constitutional provision requiring appointees to public office to declare a belief in the existence of God. *Id.* Justice Black wrote that neither the state nor federal government can "aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.* at 495.

14. Basic Law, art. 4(1). This was the constitutional provision under which the complainants in the *Crucifix Case* sought relief.

15. Basic Law, art. 140 (Weimar 137(1)).

16. Basic Law, art. 3(3) provides that "[n]obody shall be disadvantaged or favored because of his . . . faith . . . or religi[on]." *Id.* Article 33(3) ensures that the "[e]njoyment of civil and political rights, eligibility for public office, and rights acquired in the public service shall be independent of a person's religious denomination." *Id.* Article 56 allows for the oath of office taken by the Federal President to be said without the "religious affirmation" of "[s]o help me God." *Id.* Article 136(4) of the Weimar Constitution declares that "[n]o one may be compelled to perform any religious act or ceremony, to participate in religious exercises or to take a religious form of oath." *Id.*

example, the complainant in the *Crucifix Case*, Ernst Seler, claimed that Bavaria's law violated his children's right to free exercise of religion under Article 4.¹⁷ If Seler had brought this claim under the First Amendment, he would have invoked the Establishment Clause as protection, not the Free Exercise Clause. Thus, the very clause that gives religious persons the protection of the Basic Law to practice their religious beliefs can also be used to curb their practice of religion.

One United States Supreme Court opinion illustrates this irony. In *West Virginia State Board of Education v. Barnette*,¹⁸ students who were Jehovah's Witnesses sought to enjoin the school board from ordering that all students recite the pledge of allegiance.¹⁹ The Supreme Court held that the school board could not compel such behavior because it infringed the students' guarantee of free exercise of religion.²⁰ Justice Frankfurter, in dissent, wrote about the irony that would result if the Court declared that Bible reading in public schools violated the Establishment Clause.²¹ Many parents, he wrote, would have an equally compelling complaint that prohibiting Bible reading in schools violated the Free Exercise Clause.²²

It seems that the irony about which Justice Frankfurter wrote is illustrated in the very structure of Article 4 of the Basic Law. While the structure of the First Amendment results in a tension between the Establishment Clause and the Free Exercise Clause, Article 4's provision results not in tension, but in irony. Just as Mr. Seler complained that Article 4 is violated by the crucifixes hanging on classroom walls, other parents could conceivably complain that Article 4 is violated by the absence of crucifixes on classroom walls. It remains to be seen how this irony will be resolved.

17. Uta Winkhaus, *All Is Quiet One Year After German Crucifix Law*, AUSTIN AMERICAN-STATESMAN, Aug. 17, 1996, at A20.

18. 319 U.S. 624 (1943).

19. *Id.* at 629.

20. *Id.* at 642.

21. *Id.* at 659 (Frankfurter, J., dissenting).

22. *Id.* Justice Frankfurter gave another example: "The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account." *Id.*

III. Differences Between United States and German Church-State Law

In the United States, although the state activities which constitute an establishment of religion are still being litigated, the boundaries are basically settled, although inconsistent. Under Supreme Court jurisprudence, the most "aid" the government can give a church is tax-exempt status.²³ It is quite clear that a state may neither fund a school that provides sectarian religion classes on the school's property²⁴ nor directly finance a parochial school.²⁵

In Germany, the lines between church and state are much "fuzzier."²⁶ The Basic Law permits religious instruction in state-supported schools²⁷ and permits churches, as "public corporations"²⁸ to tax their members.²⁹ Apart from the authority of the church to tax its members, the Basic Law also guarantees annual cash grants to churches.³⁰ The state is obligated to pay for the education of those clergy on university theology faculties.³¹ In addition, new university chairs in theology, social sciences, and pedagogic studies "are appointed with the consent of the diocese bishop."³²

23. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

24. *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

25. *See, e.g., Lemon*, 403 U.S. 602.

26. Justin Burke, *Germans Give High Court a Cross to Bear After Rulings*, CHRISTIAN SCI. MONITOR, Aug. 23, 1995, at 6.

27. Basic Law, art. 7(3) provides: "Religious instruction shall form part of the curriculum in state schools except non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the doctrine of the religious community concerned. Teachers may not be obliged to give religious instruction against their will." *Id. But see McCollum v. Board of Educ.*, 333 U.S. 203 (1948). In *McCollum*, the Supreme Court declared that the school board's policy of allowing religious education in public schools was unconstitutional. Although the classes were voluntary and students were permitted to attend only upon request of the students' parents, the Court held that the practice was in violation of the Establishment Clause. *Id.*

28. Basic Law, art. 140 (Weimar 137(5)).

29. Basic Law, art. 140 (Weimar 137(6)).

30. FREDERIC SPOTTS, *THE CHURCHES AND POLITICS IN GERMANY 193-94* (1973).

31. *Id.* at 192.

32. Ramesh Jaura, *Germany: Crucifix Ban Opens Debate of German Secular State*, INT'L PRESS SERV., Aug. 14, 1995.

Education is one of the main functions of the state in both the United States and Germany. Thus, it is natural that much of the litigation over church-state matters takes place in the context of education. In the United States, the seminal First Amendment education case was *Everson v. Board of Education*.³³ The *Everson* Court upheld a school board's policy of reimbursing parents for the cost of busing their children to Catholic parochial schools. However, the *Everson* opinion, written by Justice Black, is much more notable for the way in which it limited state aid to parochial schools than for its holding.

In *Engel v. Vitale*,³⁴ the Court held that a compulsory state-composed prayer to be said by students at the beginning of each school day violated the Establishment Clause. The decision in *Engel* seemed to turn on the fact that the compulsory prayer had been composed by the state.³⁵ However, twenty years later, in *Wallace v. Jaffree*,³⁶ the Court declared unconstitutional an Alabama statute which permitted public school teachers to begin their classes with a moment of silence.³⁷ During the moment of silence, willing students could engage in either silent meditation or voluntary silent prayer.³⁸ The statute violated the Establishment Clause because the intent of the legislature was "to return prayer to the public schools."³⁹

The German Constitutional Court has addressed a similar issue. In the *School Prayer Case*,⁴⁰ the Constitutional Court was asked to decide the constitutionality of school prayer outside of religion class in compulsory state schools when a student's parents object to the prayer. At stake were competing constitutional rights. First, Article 6(2) provides that "[t]he care and upbringing of

33. *Everson*, 330 U.S. 1.

34. 370 U.S. 421 (1962).

35. Writing for the majority, Justice Black wrote, "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people chose to look to for religious guidance." *Id.* at 435.

36. 472 U.S. 38 (1985).

37. *Id.* at 40.

38. *Id.*

39. *Id.* at 48 n.30.

40. 52 BVerfGE 223 (1979), reprinted in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 466 (1989).

children are a natural right of parents."⁴¹ Articles 4(1) and 4(2) guarantee the freedom of religion and the right to the undisturbed practice of one's religion.⁴² Finally, Article 7(1) requires that the "entire school system . . . be under the supervision of the state."⁴³

The German Constitutional Court recognized that a voluntary prayer led by a teacher while at school may result in tension between the principles of free exercise and those of nonestablishment, but attributed this tension to the inherent nature of the terms of the Basic Law.⁴⁴ Although a minority of parents may not want their children to receive religious instruction, "the incorporation of Christian references is not absolutely forbidden when establishing public schools"⁴⁵ However, the school may not limit its educational goals to affirming Christian principles except in religion classes which one cannot be forced to attend.⁴⁶

Essentially the same principles apply in the case of school prayer in compulsory schools. As long as no parents object to their children taking part in a compulsory prayer, then the state may allow for prayers to become a part of the morning exercise.⁴⁷ However, if any parents object to the prayer, then the prayer must become solely a voluntary exercise.⁴⁸ This principle is in contrast to the holdings of the United States Supreme Court, which prohibit voluntary prayer even if there are no objections.⁴⁹

The discussion of the German Constitutional Court in the *School Prayer Case* is especially interesting in light of some of the

41. Basic Law, art. 6(2).

42. Basic Law, arts. 4(1) and 4(2).

43. Basic Law, art. 7(1).

44. 52 BVerfGE 223, reprinted in KOMMERS, *supra* note 40, at 470.

45. *Id.* at 468. This principle was established in the Interdenominational School Case, 41 BVerfGE 29 (1975), reprinted in KOMMERS, *supra* note 40, at 477.

46. 52 BVerfGE 223, reprinted in KOMMERS, *supra* note 40, at 468.

47. See generally *id.*

48. The same approach was taken by the Constitutional Court in the *Crucifix Case*. One of the members of the Court who joined the majority opinion, Johann Friedrich Henschel, clarified the Court's decision in an interview. Cacilie Rohwedder, *German Court Concedes Error in Its Crucifix Ruling*, WALL ST. J. EUR., Aug. 22, 1995, at 4. The ruling in the case did not prohibit crucifixes in classrooms. *Id.* Instead, the court declared the Bavarian law requiring crucifixes in classrooms unconstitutional. *Id.* Justice Henschel said that if all parents and students in a particular school desire that the school hang crucifixes, then the practice is permissible. Jaura, *supra* note 32. The presence of crucifixes in the classroom is only impermissible when a student, parent, or teacher objects. *Id.*

49. See *Engel*, 370 U.S. 421, and *Wallace*, 472 U.S. 38.

concerns expressed by the United States Supreme Court in the case of religion in education. One of the main reasons given by the Supreme Court for opposing religious expression in public schools is the effect coercion may have on the children.⁵⁰ If a child does not wish to engage in a teacher-led prayer, the child may be ostracized by his classmates for refusing to participate in the prayer or may be forced to participate because of his own fear of embarrassment. The German Constitutional Court expressed this same concern, however it said that:

An assessment of the conditions under which the prayer is to occur, the function that the teacher has in connection with this exercise, and the actual conditions in the school leads us to conclude that we need not fear discrimination against a pupil who does not participate in the prayer⁵¹

It seems that the Constitutional Court has more faith in a teacher's control over the classroom than does the Supreme Court.

IV. The *Crucifix Case* Analyzed Under Supreme Court Doctrines

Over the years, the Supreme Court has articulated various tests to help determine whether a particular state action violates the Establishment Clause. First, in *Abington School District v. Schempp*,⁵² the Court enunciated the first two prongs of what would eventually become known as the *Lemon* test.⁵³ The third prong was formed in *Lemon v. Kurtzman*.⁵⁴

In recent years, the future of the *Lemon* test has been put in jeopardy. Justice O'Connor has proposed an alternative: the "endorsement test."⁵⁵ Four other Justices have offered another alternative: the "coercion test."⁵⁶ This section will examine the fate of the *Crucifix Case* if it were to be analyzed under any of these three tests.

50. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

51. 52 BVerfGE 223, reprinted in KOMMERS, *supra* note 40, at 472.

52. 374 U.S. 203 (1963).

53. *Id.* at 222.

54. 403 U.S. 602.

55. See *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

56. See *County of Allegheny v. ACLU* 492 U.S. 573, 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

A. *The Lemon Test*

Under the *Lemon* test, a state law must meet three requirements in order to be permissible under the Establishment Clause. First, the law must have a secular legislative purpose.⁵⁷ Second, the law's primary effect must neither advance nor inhibit religion.⁵⁸ Finally, the law must not result in an excessive entanglement with religion.⁵⁹

Applying the *Lemon* test to the Bavarian law at issue in the *Crucifix Case*, it is obvious that the law would not survive the inquiry. Even assuming that the Bavarian law had a secular legislative purpose, the law would fail the remaining two prongs of the test. The primary effect of the law advances religion and the law involves excessive entanglement of religion with government.

The law's primary effect advances Christianity at the expense of all other religions. The crux of the Selers' complaint was that parents should have control over the religious instruction of their children.⁶⁰ According to the Court, the Bavarian law forced children in public schools to learn "under the cross,"⁶¹ and stripped from parents the control of their children's religious education. If one accepts the contention of the majority of the German Constitutional Court that the crucifix is a religious symbol, then the presence of the crucifix connotes government support of Catholicism over all other religions and over nonreligion.

The United States Supreme Court is sensitive to the presence of religious symbols in the classroom.⁶² Since children are young and impressionable, the presence of a religious symbol is especially threatening. According to the Court, children, unlike adults, are more apt to assume that any presence of religion in the classroom

57. *Lemon*, 403 U.S. at 612.

58. *Id.*

59. *Id.* at 613. Although *Lemon v. Kurtzman* was a case involving state aid to parochial schools, the Court has since extended the entanglement prong of the test to the presence of religion in public schools. *Lee*, 505 U.S. 577.

60. Dan Fesperman, *Religion Overtakes Oktoberfest*, BALTIMORE SUN, Oct. 3, 1995, at 9A.

61. Stephen Kinzer, *Crucifix Ruling Angers Bavarians*, N.Y. TIMES, Aug. 23, 1995.

62. *See Edwards*, 482 U.S. 578.

means that the government supports a particular religion or religion in general to the detriment of nonreligion.⁶³

The problem with the Supreme Court's analysis is that it would tend to insulate children from any reference to religion in the classroom, whether the reference is integrated into the curriculum or is student-initiated. Historically, the United States has treated the classroom as a marketplace of ideas.⁶⁴ Yet the Court's assertion that children will be unable to interpret references to religion as anything other than government support of religion undermines the concept of the classroom as a marketplace of ideas. Instead, the classroom becomes a place that is devoid of all traditional concepts of religion and, in its place, the school's curriculum advances secular humanism, which the Court has indicated is itself a form of religion.⁶⁵

In analyzing the third prong of the *Lemon* test, the Court has recognized two kinds of entanglement. First, administrative entanglement is the result of a law that involves government control over religious activities or control over government functions.⁶⁶ Second, political entanglement is the result of the law if the church-state relationship engenders divisiveness between religions.⁶⁷ The Bavarian law falls prey to political entanglement. Compliance with the law by schools has created animosity between religion and nonreligion, as evidenced by the suit brought by Mr. Seler.⁶⁸

63. *Lemon*, 403 U.S. 602.

64. *Keyishian v. Board of Regents*, 385 U.S. 589, 603. The Court stated: "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372).

65. *Torcaso*, 367 U.S. at 495 n.11.

66. *Meek v. Pittenger*, 421 U.S. 349, 372 (1975). See also *Lemon*, 403 U.S. 602.

67. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982). See also *Meek*, 421 U.S. at 372.

68. Mr. Seler, a disciple of Rudolf Steiner's school of anthroposophy, has received numerous death threats since the Constitutional Court's ruling. Fiona Fleck, *Bavarians at School Amid German Crucifix Uproar*, REUTERS NORTH AMERICAN WIRE, Sept. 12, 1995.

B. The "Endorsement Test"

In *Lynch v. Donnelly*,⁶⁹ Justice O'Connor first articulated her alternative to the outdated *Lemon* test in a concurring opinion. She suggested that the "purpose" and "effect" prongs of the *Lemon* test ought to be revised. Under the "purpose" prong, the Court should ask "whether government intends to convey a message of endorsement or disapproval of religion."⁷⁰ Likewise, under the "effect" prong, the Court should ask whether a government practice has the "effect of communicating a message of government endorsement or disapproval of religion."⁷¹ Justice O'Connor noted that "[t]he meaning of a statement to its audience depends both on the intention of the speaker and on the objective meaning of the statement in the community."⁷² Assuming *arguendo* that the intention of the Bavarian lawmakers who authored this law was entirely valid, the objective meaning must still be examined.

The objective meaning of the crucifix in Bavaria is disputed. Since Bavaria is a highly Catholic state, it is possible that the meaning the crucifix conveys to the reasonable person is religious in nature. However, the majority in the *Crucifix Case* conceded that the presence of a crucifix in the classroom does not exert a "compulsion to identification with Roman Catholicism."⁷³ Nonetheless, according to the majority, the sheer presence of the crucifix in the classroom communicates to the viewer that the "contents of the faith symbolized in [the crucifix] are exemplary and worthy of adherence."⁷⁴

Given the United States Supreme Court's paternalistic attitude toward children in cases involving symbols in schools, the reasonable person standard that the Court usually applies under this analysis would differ in the education context. That is, the

69. 465 U.S. 668.

70. *Id.* at 691.

71. *Id.* at 692.

72. *Id.* at 690. According to O'Connor, "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 688.

73. *Federal Constitutional Court Banishes Crosses From Bavarian Schoolrooms*, THE WEEK IN GERMANY, Sept. 8, 1995, at 6.

74. *Id.*

reasonable person to which the Court will look in the context of education is a reasonable child with the naive mentality that the Court assigns to children in cases involving religious symbols. Thus, the analysis will hardly differ at all from the analysis used in the *Lemon* test and, under O'Connor's test, the law would not pass constitutional muster under the First Amendment.

C. The "Coercion Test"

In *County of Allegheny v. ACLU*,⁷⁵ Justices Kennedy, White, Scalia, and Chief Justice Rehnquist joined in a dissenting opinion which articulated a competing alternative to the *Lemon* test. According to these four Justices, the Establishment Clause contains two limiting principles. First, government may not coerce anyone to support or participate in the exercise of any religion.⁷⁶ Second, government may not "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"⁷⁷

The Bavarian law receives a much more favorable analysis under the coercion test. First, as even the majority in the *Crucifix Case* conceded, the presence of a crucifix in a classroom does not coerce anyone to support or participate in the exercise of Roman Catholicism.⁷⁸ This argument is especially persuasive if one accepts the assertion that the crucifix is simply a symbol of Bavarian culture.⁷⁹

Second, the presence of a crucifix in a classroom does not promote religion to the extent that it establishes a state religion. According to Justice Kennedy, "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."⁸⁰ Thus, the coercion test requires a showing that the symbolic accommodation actually establishes a religion or tends to do so.

75. 492 U.S. 573.

76. *Id.* at 659.

77. *Id.* (quoting *Lynch*, 465 U.S. at 678).

78. See *Federal Constitutional Court Banishes Crosses From Bavarian Schoolrooms*, *supra* note 73.

79. The three dissenting judges in the *Crucifix Case* argued that "crosses are not so much symbolic of Christianity as of a culture shaped by Christianity." *Crossed Lines and Crucifixes*, *THE ECONOMIST*, Aug. 19, 1995, at 42.

80. *Allegheny*, 492 U.S. at 662.

In determining whether a governmental action constitutes the establishment of a state religion, the test looks to other types of church-state contacts that have existed throughout the country's history or have been found permissible in caselaw.⁸¹ Adhering to this principle in *Allegheny*, Justice Kennedy found that the city's display of a creche presented no more potential for establishment than did the employment of a chaplain by a state legislature.⁸²

Applying these principles to the Bavarian law, it is evident that Bavaria's law would be permissible under the United States Constitution. Germany's church-state relationship does not justify labeling the presence of a crucifix in a classroom an establishment of religion. Germany's subsidy given to churches⁸³ and its constitutional provision permitting religious instruction in public schools according to the state's predominant religion⁸⁴ present no more potential for establishment than does the presence of a crucifix in a classroom.

V. United States Caselaw Similar to the *Crucifix Case*

The Supreme Court and two other federal courts have decided cases remarkably similar to the *Crucifix Case*. In two of the three cases, the courts have declared the state action unconstitutional under *Lemon*.⁸⁵ These cases raise a single question: When does a symbol, such as the crucifix, have enough tradition behind its meaning so as to rid the symbol of its religious nature?

A. *Stone v. Graham*

*Stone v. Graham*⁸⁶ is the United States' equivalent to the *Crucifix Case*.⁸⁷ The Kentucky legislature passed a statute

81. *Id.*

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

83. *See Spotts, supra* note 30.

84. Basic Law, art. 7(1).

85. *Stone v. Graham*, 449 U.S. 39 (1980); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994).

86. 449 U.S. 39.

87. One interesting difference between the United States' system and Germany's is illustrated by the *Stone* case. Among the plaintiffs in *Stone* were taxpayers. *Stone*, 599 S.W.2d 157, 159 (Ky. 1980). Because the First Amendment prohibits a law "respecting an establishment of religion," the taxpayers had standing to ask the Court to enjoin the school from posting the Ten Commandments. In the *Crucifix Case*, on the other hand, only a student, or parent of a student, has standing to seek relief from the Court. This is due to the structure

requiring the posting of the Ten Commandments on the wall of each public school classroom in the state.⁸⁸ Evaluating the statute under the *Lemon* test, the Supreme Court did not proceed past the first prong. The Court's opinion stated that the main purpose of Kentucky's statute was "plainly religious in nature" and had no secular legislative purpose, even though the legislation included a statement of avowed secular purpose.⁸⁹

Irrelevant to the Court's reasoning was the fact that the Bible verses were to be posted rather than read aloud. Nor was the Court persuaded that there was no governmental action because the copies of the Ten Commandments were to be financed by voluntary private contribution.⁹⁰ Instead, the Court insisted on disbelieving the avowed secular purpose of the Kentucky legislature and, without independently inquiring into the "actual" purpose, declared the statute void.⁹¹

Although the Ten Commandments was said by the Kentucky statute to have been adopted "as the fundamental legal code of Western Civilization and the Common Law of the United States,"⁹² the Court ignored the tradition behind the Commandments. However, in *Marsh v. Chambers*,⁹³ the Court held that the practice of opening sessions of the Nebraska Legislature with a prayer did not violate the Establishment Clause. Central to the Court's decision was the fact that "[t]he opening of sessions of

of the Basic Law. Because the only provision that can be invoked under the Basic Law is freedom of religion, only students can claim that their guarantee to freedom of religion was infringed by the presence of a crucifix on the classroom wall. A taxpayer would not have standing to claim that his guarantee of freedom of religion had been infringed because his religious beliefs would not be curbed merely by requiring that he pay taxes to the school.

See generally KOMMERS, *THE FEDERAL CONSTITUTIONAL COURT* 13 (1994). Thus, in the United States, because of the Establishment Clause, the pool of possible plaintiffs is much larger than in Germany.

88. KY. REV. STAT. ANN. § 158.178 (Baldwin 1978).

89. The Kentucky statute required that each posted copy contain the following notation at the bottom of the copy: "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." KY. REV. STAT. ANN. § 158.178(2).

90. KY. REV. STAT. ANN. § 158.178(3).

91. *Stone*, 449 U.S. at 41.

92. KY. REV. STAT. ANN. § 158.178(2).

93. *Marsh*, 463 U.S. 783.

legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."⁹⁴

The *Marsh* Court traced the history of legislative prayer and found that, because the framers of the Constitution continued to open each legislative session with prayer, such a practice clearly was not constitutionally invalid.⁹⁵ If this same standard were applied to *Stone*, the Court would have had no choice but to validate the statute. The Ten Commandments is a document that has been accepted as the fundamental legal code of both the secular and religious world.⁹⁶ Much of Western Civilization has recognized the Ten Commandments in a secular context; however, apparently such recognition is not sufficient to establish the Commandments as part of tradition.

One may wonder why it is necessary to strip a symbol of all its religious meaning before it can survive Establishment Clause scrutiny. After all, the framers of the Constitution condoned and participated in various religious activities that were state-supported. For example, the legislative prayer in *Marsh* was permitted because history shows that the first Congress opened each session of the legislature with prayer.⁹⁷ Absent such a showing, however, the prayer by the Nebraska legislature would not have been permitted. The practice would not have been upheld if, for example, the reason for the prayer was because the legislators wanted to invoke the protection and blessing of God before the start of each day. Yet, the first Congress most certainly engaged in prayer for that very reason - not for the traditional and wholly secular reason that today's Court insists upon finding before validating a religious practice.

B. *Washegesic v. Bloomington Public Schools*

In *Washegesic*,⁹⁸ the district court held that the display of a two-foot by three-foot portrait of Jesus outside the principal's office violated the Establishment Clause.⁹⁹ Applying *Lemon* to the state action, the court found that all three prongs were violated. First,

94. *Id.* at 786.

95. *Id.* at 786-91.

96. *See* KY. REV. STAT. ANN. § 158.178(2).

97. *See Marsh*, 463 U.S. at 787-88.

98. 813 F. Supp. 559 (W.D. Mich. 1993).

99. *Id.* at 562.

the school had no secular purpose.¹⁰⁰ Second, the court determined that the primary effect of the picture was to “advance religion in general and Christianity in particular.”¹⁰¹ Third, the display of the picture by the school excessively entangled government in religion.¹⁰²

On appeal, the Sixth Circuit affirmed the holding of the district court.¹⁰³ Judge Guy, in a concurring opinion, protested the reasoning of the majority opinion on the ground that the picture of Jesus was simply a reproduction of a famous portrait.¹⁰⁴ The portrait, “Head of Christ” by Warner Sallman, had been reprinted 500 million times.¹⁰⁵ According to Judge Guy, the portrait “no more conveys the notion of the establishment of a religion than a statue of Robert E. Lee in a park suggests we should dissolve the Union.”¹⁰⁶ Dismissing the idea that the portrait constituted an establishment of religion, Judge Guy wrote:

For me, at least, a discussion of “psychological damage” resulting from viewing this picture does implicate an establishment - but not one of religion. What is established is a case of “eggshell” plaintiffs of a delicacy never before known to the law. I can well understand that someone (perhaps this plaintiff) in some sense could be offended by this portrait, but “injured” is another matter. In this multicultural world that young persons are entering today, I would hope our schools are turning out people with a little more resiliency than is evidenced here. . . . I do not mean to suggest that the “appropri-

100. The school claimed to have a secular purpose, but the school officials could not assert any purpose behind the original decision to display the picture. During their deposition, the officials stated that the only reason they would not take the picture down was to avoid censorship. *Id.* at 562 n.7.

101. *Id.* at 562. The court stated, “If in no other way, the display of the portrait advances Christianity because it exposes students to the fundamental figure of the Christian religion without providing them access to portrayals of leaders, prophets, or divinities of other religions or to depictions of advocates of nonreligion.” *Id.* at 562 n.8.

102. According to the court, the fact that the picture hung in the hallway implied endorsement of the picture by the school. The court expressed its “concern” that students may feel pressure to, if not believe in the teachings of Jesus, at least suppress any disagreement they might have with the Christian religion. *Id.* at 563.

103. *Washegesic*, 33 F.3d 679.

104. *Id.* at 684.

105. *Id.* at 684 n.2.

106. *Id.* at 684.

ateness" of this picture in the school is not a legitimate issue for discussion, but it ought to be resolved within the school context.¹⁰⁷

Judge Guy suggested that students offended by the picture could take various forms of action. First, they could form clubs promoting other religious groups or philosophies.¹⁰⁸ Second, the students could lobby for courses in comparative religions.¹⁰⁹ Third, students could wear tee-shirts "proclaiming the virtues of agnosticism."¹¹⁰ Although these statements may be dismissed as sarcasm, Judge Guy makes an important point. In our society we have become all too willing to resort to the courts for a judicial remedy and, in the process, have become all too reluctant to combat problems with our own unique solutions.

C. *Clever v. Cherry Hill Township Board of Education*

In *Clever*,¹¹¹ a district court declared that a school district policy which required classrooms to maintain calendars depicting various national, ethnic, and religious holidays and which permitted seasonal displays containing religious symbols¹¹² did not violate the Establishment Clause. Applying the *Lemon* test, the court determined that the school policy did not offend the First Amendment.

First, the court found that the school board had a secular purpose of promoting religious diversity.¹¹³ Second, the primary effect of the school policy was to show "benevolent neutrality" toward religion.¹¹⁴ The opinion noted that the absence of religious displays in school may appear to the young viewer to be

107. *Id.* at 684-85.

108. *Washegesic*, 33 F.3d at 685.

109. *Id.*

110. *Id.* Judge Guy concluded his concurrence by issuing a plea to students: "[I]f I am permitted to use the expression, for heaven's sake, stay out of the courthouse and quit trivializing the Constitution!" *Id.*

111. 838 F. Supp. 929 (D.N.J. 1993).

112. The policy provided that displays should be centrally located in the school building. Displays would consist of religious symbols indicating the specific holiday which was to be celebrated. The policy mandated that any religious symbol displayed must appear with at least one other religious symbol and one cultural or ethnic symbol. School officials were to remove religious displays after ten days. *Id.* at 934.

113. *Id.* at 939.

114. *Id.* at 940.

government hostility towards religion, which would also violate the effects prong of the *Lemon* test.¹¹⁵ Finally, the court determined that allowing such a policy would not result in excessive entanglement between government and religion.¹¹⁶

The decision in *Clever* was clearly in line with Supreme Court precedent. In *Allegheny*,¹¹⁷ the Court invalidated a city's practice of displaying a creche during the Christmas season. Because the creche stood alone without any secular symbol detracting from the display, the Court found that "nothing in the context of the display detract[ed] from the creche's religious message."¹¹⁸ The Court distinguished its holding in *Lynch v. Donnelly*¹¹⁹ on the ground that, in *Lynch*, the city's display of the creche was permissible because various religions were represented in the display, and nonreligious objects were displayed.¹²⁰

Many cities planning holiday displays label the rule that comes out of *Allegheny* the "reindeer rule."¹²¹ This rule exhibits the absurdity of the majority's ruling. In order for a state-sponsored display to pass constitutional muster, the state actor must ensure that a plethora of religions and nonreligions are represented in the display. Essentially, the state actor has to put a few plastic reindeer next to the creche or menorah in order to be able to display the religious symbol.

Thus, the rule emerging from *Allegheny* was that if a state actor wished to commemorate a specific religious holiday, the state must ensure that it gives each religion equal treatment. Presumably, this is because the religious message is sufficiently diluted so as to disclaim governmental support of any particular religion.

115. *Id.* at 940-41. See also *Lee*, 505 U.S. 577, and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 112 S. Ct. 2141 (1993).

116. *Clever*, 838 F. Supp. at 941.

117. *Allegheny*, 492 U.S. 573.

118. *Id.* at 598.

119. *Lynch*, 465 U.S. 668. The display at issue in *Lynch* included a Santa Claus house, reindeer pulling Santa's sleigh, carolers, colored lights, a Christmas tree, a banner that read "Seasons Greetings," and a creche. *Id.* at 671.

120. *Id.* at 679-80.

121. Michael McGough, *Menorah Wars: What the Reindeer Rule Hath Wrought; Religious Displays on Public Grounds*, THE NEW REPUBLIC, Feb. 5, 1990, at 12.

VI. The Evolution of Church-State Litigation in Germany and the United States—The Transformation of Education as a Church Function to Education as a State Function

Until *Everson*,¹²² litigation under the Establishment Clause was quite rare.¹²³ Once *Everson* was decided however, the Court's opinion left many questions open under the Establishment Clause. Thus, from 1946 until the present, the Establishment Clause has become a source of great controversy, especially in the realm of education.

On the other hand, litigation under the Basic Law's Article 4 is relatively rare. Prior to the *Crucifix Case*, very few Article 4 disputes took place in the context of education.¹²⁴ The Constitutional Court's decision in the *Crucifix Case* has made many Germans aware of the controversy over religion and education. Since the dispute in the *Crucifix Case* took place in Bavaria, a highly Catholic state, the likelihood of complaints in less religious states is great, as there will be greater religious diversity among citizens.

After so many quiet years in the area of church-state litigation, why has this controversy erupted? Commentators have given various reasons for the phenomenon in the United States. This section will analyze whether a particular reason for the change is present in Germany and whether future litigation over the relationship between church and state can be expected to become commonplace in the aftermath of the *Crucifix Case*.

The education systems of both Germany and the United States originated as functions of the church. In the United States, education became the duty of the states beginning in the 1830s and 1840s.¹²⁵ Early public schools, the "common schools," were quite different from their non-public predecessors due to efforts to promote national unity.¹²⁶

122. *Everson*, 330 U.S. 1.

123. See generally J.M. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949).

124. See *School Prayer Case*, 52 BVerfGE 223; *Interdenominational School Case*, 41 BVerfGE 29.

125. JOEL SPRING, THE AMERICAN SCHOOL: 1642-1985 70 (1986).

126. *Id.* at 71.

Beginning in the twentieth century, the federal government became significantly involved in public education. For example, the federal government has assumed responsibility for ensuring that students receive equal educational opportunities.¹²⁷ As the Court said in *Brown v. Board of Education*:¹²⁸ "Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society It is the very foundation of good citizenship."¹²⁹

It was not until the establishment of public schools that conflicts occurred between church and state in education. As the idea of religious education was still relatively fresh in the citizenry's mind, conflicts between religion and education did not begin immediately after the formation of public schools.¹³⁰ Initially, suits were brought by parents who objected to sectarian instruction in the schools.¹³¹ However, these suits were all brought under state constitutions¹³² as the First Amendment was not incorporated through the Fourteenth Amendment until *Cantwell v. Connecticut*.¹³³

While controversy concerning the proper place of religion in public education was brewing much earlier than the seminal education case, litigation was taking place in the state courts under state constitutional provisions.¹³⁴ Thus, Establishment Clause litigation in the educational arena began in 1947 with the *Everson*¹³⁵ decision.

Germany's education system also has undergone a similar transformation. Virtually from the time of the Reformation until

127. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

128. *Id.*

129. *Id.* at 493.

130. See generally O'NEILL, *supra* note 123, at 141.

131. *Id.* at 141.

132. *Id.*

133. *Cantwell*, 310 U.S. 296. Some commentators attribute the confusion existing in church-state relations to the separate incorporation of the Establishment Clause and the Free Exercise Clause. It is said that the Establishment Clause was meant to complement the Free Exercise Clause not create a separate cause of action.

134. O'NEILL, *supra* note 123, at 141.

135. *Everson*, 330 U.S. 1.

1918, German schools were run by the church.¹³⁶ Disagreements between the church and government arose in the early nineteenth century and escalated until 1968. The controversy centered on whether the church or the state should control elementary education. In addition, disputes arose over whether schools should be confessional¹³⁷ or denominational¹³⁸ and, after national unification, whether such decisions should be left to the Reich or Land¹³⁹ government to decide such matters.¹⁴⁰

The first serious effort to break the church's monopoly on elementary education came in 1918, after Germany's collapse.¹⁴¹ In drafting the Weimar constitution, the national assembly formulated the Weimar school compromise. Although this recognized "parents" rights,¹⁴² it prohibited turning interconfessional schools into confessional schools.¹⁴³ Nevertheless, in 1933, eighty-three percent of the elementary schools in Germany were confessional.¹⁴⁴

After World War II and during the Allied occupation of West Germany, the current version of the Basic Law was adopted.¹⁴⁵ The Basic Law now contains an entire article on school education.¹⁴⁶ This section specifically provides that it is the responsibility of the Lander to establish schools.¹⁴⁷

136. Spotts, *supra* note 30, at 208.

137. A confessional school is usually Catholic or Protestant. KOMMERS, *supra* note 40, at 477.

138. An interdenominational school is "a Christian-oriented school designed to serve students of all denominations." *Id.* at 478.

139. The Lander governments are those of the individual federal states. Uwe Thaysen, *THE BUNDESRAT, THE LANDER & GERMAN FEDERALISM* 9 (1994).

140. Spotts, *supra* note 30, at 208. The school system varied from area to area. For example, in Prussia, during the early nineteenth century, the state took formal responsibility for education but gave the clergy responsibility over school supervision. On the other hand, Baden established interdenominational schools in 1876. Nevertheless, it still gave the church a controlling influence over them. Matters involving church and school were handled by the same agency, the Kultus ministry. *Id.*

141. *Id.*

142. Weimar Constitution, Article 146.

143. Weimar Constitution, Article 174.

144. Currie, *supra* note 4, at 10.

145. R.H. SAMUEL & R. HINTON THOMAS, *EDUCATION AND SOCIETY IN MODERN GERMANY* 103 (1949).

146. Basic Law, art. 7.

147. *Id.* Article 7(1) provides that "[t]he entire school system shall be under the supervision of the state." *Id.*

Apart from the *School Prayer Case*,¹⁴⁸ the *Crucifix Case* is the Constitutional Court's only pronouncement on the meaning of the freedom of religion clause in the context of education. Essentially, the *Crucifix Case* is Germany's equivalent to *Everson*. While this observation may be premature, the controversy in the American church-state relationship in education started much the same way.

VII. Conclusion

Germany's church-state relationship in the context of education is in a period of transition. Much can be learned from the more developed church-state controversy in the United States. Litigation under the Establishment Clause began in an innocent manner with the Court declaring constitutional the reimbursement to parents of the cost of busing children to parochial schools. Even though the decision held such practice constitutional, the Supreme Court severely restricted the future relationship between church and state. Very few people could have predicted the absurd extreme to which the Court would take the Establishment Clause.

Much the same is true in Germany. The *Crucifix Case* may appear on its surface to be a rather innocuous decision since the German Constitutional Court declared that a crucifix must be removed only if there is an objection to its presence in the classroom. Some Bavarians may blindly accept the Court's interpretation of Article 4's freedom of religion provision. However, if the evolution of the church-state relationship in the United States is any indication, it will not be long before Article 4 is used to curb the rights of religious persons entirely.

Lark E. Alloway

148. 52 BVerfGE 223.

