

# SOME PROBLEMS OF CHURCH AND STATE IN THE WEIMAR CONSTITUTION

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## THE HISTORICAL BACKGROUND\*

BECAUSE the United States was a comparatively new nation when its constitution was drafted, it could in many areas—among which church and state is one of the most important—embark upon a revolutionary political and social experiment without having to clear away the debris left by previous builders. The compromises crystallized in the Weimar constitution, on the other hand, represented but one stage in a lengthy process of interaction which had already molded both church and state. Consequently, although both the Weimar and the Philadelphia documents were products of a political revolution, any examination of the historical background of the 1919 provisions should serve not only to make the compromises they contained more explicable, but simultaneously to demonstrate why the two situations cannot be equated.<sup>1</sup> The delicate structures which embody institutional compromises, unlike Scottish castles, rarely survive trans-Atlantic voyages.

In Germany, the institutional role of religion and churches was inextricably connected with the rise of the nation-state itself. During the Middle Ages, for example, because the territorial magnates who controlled vast tracts of land under the nominal authority of the Holy Roman Emperor in fact represented competing centers of secular authority, the Emperor was forced to turn to church officials for the performance of imperial administrative tasks. This tradition, deriving from the time of the Carolingian Renaissance in the ninth century, resulted in so close a relationship between church and state that Papal efforts to reform the German church in the eleventh century—aimed at the achievement of institutional independence—inevitably led to open conflict with the Emperors. The ensuing Papal victory was complete, the ruling Hohenstaufen line having been literally exterminated by 1268, and the resultant weakening of the central authority played a significant role in permitting centrifugal elements to prevent the unification of Germany until well into the nineteenth century. The heritage of open conflict between church and state, furthermore, was to play an important role in German history in the period immediately following unification.

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\*The constitutional provisions are being analyzed in legal rather than historical terms. The historical introduction is presented primarily to provide background rather than to explain details of the compromises and underlying historical factors. Historians interested in why the compromises mentioned herein took the form they did must be content with the cited, and other, historical literature.

1. For an attempt to account for the disparities between European and American political developments in general terms, see HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955). An insightful analysis of one of the material bases of the ideological superstructure delineated by Hartz is contained in POTTER, *PEOPLE OF PLENTY* (1954).

In the interval, however, religion had made yet another contribution to the disunity which characterized much of German history. The Reformation began in Germany. More important, it neither wholly succeeded nor wholly failed there. After more than a century of warfare, German territories and people—though physically devastated—remained religiously polyglot. The formula first worked out in 1528, moreover, by which religions were chosen for their territories by the various territorial princes, once again created considerable pressures towards reciprocal interaction of state and church. Even as late as 1870, a large proportion of German Catholics opposed what they perceived as an attempt on the part of Protestant Prussia—with an established church headed by the monarch—to absorb the Catholic states of southern Germany. And partially as a result of such pressures, the “unified” German Empire of 1871 was in fact a distinctly federal rather than unitary nation, with wide areas of competence reserved to the constituent states.

The extent to which Bismarck, the Prussian Chancellor who was the architect of German unification, regarded the Catholic church as a dangerous political competitor was underlined by the *Kulturkampf* which he initiated in the Prussian territories of the new German state. Bismarck's attempt to curb the political influence of the Catholic church was largely unsuccessful. But it did serve to make the Catholic church more aware than ever of its anomalous position as the representative of a large proportion of a nation whose governmental apparatus was largely controlled by officials representing Protestant Prussia. The church's response was two-fold. It consolidated its influence on the administrations of predominantly Catholic states, thus working within the institutional machinery of government, and, more important, made increasingly intensive efforts to develop social as well as political positions of strength. In the field of labor organizations, for example, the Catholics responded to the work of the Socialists by creating a parallel set of institutions of their own. As a result, in a far more significant sense than was true in the United States, the drafters of the Weimar constitution, when they turned their attention to problems of church and state, were writing on an already crowded slate.

#### WEIMAR

A significant portion of the provisions of the Weimar constitution concerning church and state never became effective. Thus, the constitutional provision concerning the commutation of contributions to churches by states was to become effective in accordance with general principles embodied in a national law.<sup>2</sup> Since no such law was passed by the national legislative bodies, however, the various German states were effectively debarred from changing the particular church-state relationships which existed as of August, 1919, when the Weimar constitution became effective.<sup>3</sup> Similarly, the constitutional provisions concern-

2. WEIMAR CONST., ch. I, art. 173. A selection of excerpts from the constitution is appended following the text. Hereinafter all citations to the appendix will be given by article number only.

3. See ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHS 651 (3d Bearbeitung [rev. ed.] 1929). [Hereinafter cited as ANSCHÜTZ.]

ing the school system remained ineffective due to the lack of a national law on the subject.<sup>4</sup> Where the constitutional provisions were so drafted as to become operative without enabling legislation, on the other hand, subsequent laws were often utilized to delay their implementation. In connection with the abolition of private preparatory schools, for example, a law passed by the National Assembly in 1920 provided for a gradual process of extirpation, scheduled to be completed only in the 1929-1930 school year.<sup>5</sup>

The National Assembly which drafted the Weimar constitution was an elected body representing the entire spectrum of social and political views. Consequently, even in the absence of later developments, a study of the debates concerning the relevant constitutional provisions, together with an analysis of those provisions, should serve to illuminate the underlying bases of a variety of political and social views on church and state problems. Because those views were expressed in the context of a political debate, however, it is essential that any analysis be preceded by a description of the events which culminated in the calling of the National Assembly, and of the relative positions of various political parties within that body.

The fall of the German monarchy at the close of World War I produced the anomaly of two governments exercising effective power simultaneously. Officially, the imperial cabinet had been succeeded by a caretaker government dominated by members of the Social Democratic Party. While this government effectively controlled the national administrative machinery, however, more radical political elements emerged in a series of local revolutions, and these groups, in effective control of many of the larger municipalities, established a nation-wide system of Labor and Soldiers' Councils headed by a National Congress. In the ensuing struggle for power, the Social Democrats outmaneuvered the more radical Independent Socialists—who were attempting to transfer all governmental power to the Councils—and eventually persuaded the National Congress of Labor and Soldiers' Councils to agree to the election of a National Constituent Assembly.<sup>6</sup> The Spartacist revolt, which was crushed by the central government three days before the elections were held, represented a final attempt on the part of some Independent Socialist elements to forestall an

4. Unsuccessful attempts to pass such legislation took place in 1921, 1925 and 1927. *ANSCHÜTZ* 589. Some states nevertheless acted in the sphere of church-state relations in disregard of the applicable constitutional provisions. Bavaria, for example, concluded a Concordat with the Catholic Church in 1924, which provided for certain commutation measures in return for a law favoring the establishment of confessional schools. See *id.* at 563, 589.

5. See *BRUNET, THE NEW GERMAN CONSTITUTION* 233 (1922). The legislation in question was largely supported by the Center and the conservative parties. See the statement by Mumm (German Nationalist) stressing the need to protect private schools from drastic economic harm during the dissolution process, in *DIE DEUTSCHE REICHsverFASSUNG vom 11. AUGUST 1919*, at 307 (Puritz ed. 1919) (*Ergänzungsband [Supp.] to series, DER EUROPÄISCHE KRIEG IN AKTENMÄSSIGER DARSTELLUNG*). [Hereinafter cited as *DOCUMENTS*.]

6. See generally *MATTERN, PRINCIPLES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE GERMAN NATIONAL REPUBLIC* 65-85 (1928).

election which was certain to result in a shift of power to more conservative groups.<sup>7</sup> The prediction implicit in the revolt proved to be accurate. The Independent Socialists won only 22 seats, as compared with the Social Democrats—the government party—who won 163. The conservative German Nationalists and the German People's Party captured 42 and 22 seats respectively. The two remaining significant parties—the Center, with 89 seats, and the Democrats, with 74—had taken intermediate views on most of the issues which the Assembly was to consider.<sup>8</sup>

The constitution which the Assembly produced was largely the work of a coalition between the two moderate parties and the Social Democrats. It was adopted on July 31, 1919, by a vote of 262 to 75, with both conservative parties and the Independent Socialists voting in opposition. And some doubt has been expressed as to whether any agreement would have been reached in the absence of strong pressures placed on the Assembly by the victorious powers.<sup>9</sup>

Due to the composition of the Assembly, the Social Democrats were forced to rely on the support of the Center and Democrats, the former avowedly a Catholic party. In order to obtain the aid of the Center for the economic and political portions of their program, the Social Democrats often supported the Center on religious matters.<sup>10</sup> And because the Protestant elements in the Assembly were represented in a variety of parties, there was lacking—throughout the constitutional debates—a united force which could oppose the positions taken by the Center on religious issues.<sup>11</sup> The Center, for its part, together with the conservative parties,<sup>12</sup> opposed many of the provisions requiring separation of church and state, but the party leaders accepted a certain measure of compromise in order to avoid the chaos which they feared would result from a failure to reach agreement with the government party.<sup>13</sup>

The result was that the original programs of both the Center and the Social Democrats were seriously modified in the course of the Assembly debates. Because they were primarily concerned with economic and political innovations, however, the Social Democrats often made considerably greater concessions on religious matters than the Center was willing to extend in return. In connection with the Center's demand for "establishment" of Sunday and legal holidays "under the protection of law,"<sup>14</sup> for example, the Social Democrats agreed to

7. See generally BRUNET, *op. cit. supra* note 5, at 20-24.

8. *Id.* at 25-28.

9. HARTUNG, *DEUTSCHE VERFASSUNGS-GESCHICHTE VOM 15. JAHRHUNDERT BIS ZUR GEGENWART* 218 (4th rev. ed. 1933) (Reihe II, Abteilung 4 of *GRUNDRISS DER GESCHICHTS-WISSENSCHAFT* [Meister ed.]).

10. See VERMEIL, *LA CONSTITUTION DE WEIMAR ET LE PRINCIPE DE LA DEMOCRATIE ALLEMANDE* 249-50 (1923). [Hereinafter cited as VERMEIL.]

11. See BRACHER, *DIE AUFLÖSUNG DER WEIMARER REPUBLIK* 93 (1955).

12. See, e.g., Veidt (German Nationalist), in *DOCUMENTS* at 284; Kahl (German People's Party), *id.* at 190.

13. See, e.g., letter from Centrist leader Erzberger to Cardinal Eugenio Pacelli, February 24, 1919, printed in EPSTEIN, *MATTHIAS ERZBERGER AND THE DILEMMA OF GERMAN DEMOCRACY* 288-89 (1959).

14. See art. 139.

support the Center position on the basis that it provided a "day of rest" on social and ethical rather than religious grounds.<sup>15</sup> It was recognized, however, that the resulting constitutional provision in fact abridged the religious freedom of non-Sunday observers,<sup>16</sup> and a leading commentator characterized it as motivated by "specifically religious" considerations.<sup>17</sup>

Similarly, three types of schools were under consideration in connection with the problem of religious education: confessional schools, wholly secular or laic schools, and the "common" school, in which each sect offered religious classes to students of its own faith within the context of a wholly secular, common curriculum. The original school compromise, formulated by both moderate parties together with the Social Democrats, envisaged a parity among these three types of schools. Between the first and second readings of the constitution, however, the Social Democrats and Center successfully replaced this plan with a "second compromise," establishing the common school as the basic unit of the educational system, and permitting the establishment of confessional or laic schools only in exceptional circumstances; a shift which led the Democrats to charge that the government party had wholly abandoned the announced principles of its school program.<sup>18</sup>

#### RELIGIOUS ORGANIZATIONS

The Weimar constitution specifically provides that "There is no state church."<sup>19</sup> The resignation of the German Emperor, who had been head of the Protestant church in Prussia, effectively solved the problem of dissolving the personal tie between church and government in that state. And laws passed by the legislatures of other states in accordance with the constitutional declaration effectively abolished state supervision of the *religious* activities of churches.<sup>20</sup> The connections between churches and governments prior to the Weimar constitution had encompassed far more than strictly religious activities, however, even extending to state employment of church officials in secular tasks. Consequently, the removal of state supervision of religious activities alone by no means constituted "separation" of church and state as understood in the United States.

15. See VERMEIL 197. For a commentary adopting this position, see Kaisenberg, *Feiertagschutz*, in 2 DIE GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHsverFASSUNG 429-30 (Nipperdey ed. 1930).

16. See Mirbt, *Glaubens- und Gewissensfreiheit*, in 2 DIE GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHsverFASSUNG 319, 351 (Nipperdey ed. 1930).

17. ANSCHÜTZ 565.

18. See, e.g., Seyfert (Democrat), in DOCUMENTS at 287. Even certain of the Social Democrats expressed dissatisfaction: e.g., Schulz (Social Democrat), *ibid.* But see Katzenstein (Social Democrat), *id.* at 288 (claiming that the Democrats' refusal to participate in the new compromise represented a lack of political responsibility).

19. Art. 137, para. 1. See Ebers, *Religionsgesellschaften*, in 2 DIE GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHsverFASSUNG 361, 362, 369 (Nipperdey ed. 1930). The provision was originally introduced by Albasz (Democrat) and Katzenstein (Social Democrat). DOCUMENTS at 196.

20. See Ebers, *supra* note 19, at 405-07.

Prior to the Weimar constitution, religious organizations had been divided into three categories.<sup>21</sup> The larger sects, such as the Catholic and Evangelical churches, were given the status of public corporations: a status which entailed certain privileges under applicable state law, including the power to discipline and to tax their own members. Furthermore, although such churches remained functionally separate from the state, their organizations were regularly utilized in the performance of official governmental functions.

Smaller sects, such as Lutherans, Baptists, and Jews, were given the status of private juridical corporations. Like the public corporations, such bodies received state subsidies and were placed under state supervision<sup>22</sup>—especially in secular affairs—but they were not expected to co-operate in the performance of state functions. Voluntary religious organizations, with no state ties, constituted the third category of religious organization.

The struggle over separation was primarily concerned with the status to be accorded to the public corporations. The Social Democrats originally opposed the retention of governmental powers of taxation and discipline by such bodies.<sup>23</sup> But they eventually reversed this stand,<sup>24</sup> and the constitution provided that "Existing religious societies remain, to the same extent as heretofore, public bodies corporate."<sup>25</sup> Despite requests from various representatives,<sup>26</sup> the Assembly failed to promulgate a precise definition of the rights and duties of "public bodies corporate." With the exception of the power to raise taxes on the basis of the civil tax rolls—explicitly granted to the "public" religious societies in the constitution<sup>27</sup>—the various other rights attached to this status were to be defined by applicable state law. In general, however, commentators agreed that religious organizations under the Weimar constitution were not public in the sense that the state could employ them to fulfill governmental purposes as such.<sup>28</sup> On the other hand, such organizations were subject to general governmental directives, and the state retained final authority to determine the boundary between private internal affairs and public duties.<sup>29</sup> Similarly, although church officials could not be employed by the state in wholly secular

21. On the pre-Weimar treatment of religious organizations, see generally VERMEIL 317.

22. Because of their special status, public corporations were subject to considerably more state supervision than those religious societies organized as private juridical corporations. In this connection, see ANSCHÜTZ 551; OPPENHEIMER, *THE CONSTITUTION OF THE GERMAN REPUBLIC* 207 (1923).

23. The Independent Socialists, while they supported this portion of the Social Democratic program, also advocated confiscation of church property. See, e.g., Kuhnert (Independent Socialist), in *DOCUMENTS* at 284-85.

24. See VERMEIL 318.

25. See art. 137, para. 5.

26. See, e.g., Groeber (Center), in *DOCUMENTS* at 194.

27. Art. 137, para. 6. See generally ANSCHÜTZ 558.

28. See Ebers, *supra* note 19, at 388-89; HUSEMEYER, *GEISTLICHE UND ANDERE KIRCHENBEAMTE ALS BEAMTE IN SINNE DER REICHsverFASSUNG* 51-52 (1932) (Heft 7 in *AUHANDLUNGEN ZUR REICHsverFASSUNG* [Jellinek ed.]).

29. See HUSEMEYER, *op. cit. supra* note 28, at 54.

capacities,<sup>30</sup> they were regarded as public officers, and constitutional provisions regulating the conduct of public officials were applied to officials of public bodies corporate.<sup>31</sup>

The taxation power retained by the religious societies also necessitated a close interaction between church and state. Thus, a national law passed in December of 1919 authorized federal revenue authorities to administer church taxes upon the request of the religious societies,<sup>32</sup> and the constitutional provision permitting inquiries about religious affiliation "only so far as rights and duties are dependent thereon"<sup>33</sup> was regarded as authorizing inquiries concerning liability for such assessments. Similarly, although the state was forbidden to control church financial affairs on the grounds that such control would compromise the freedom of religious organizations,<sup>34</sup> supervision over both the tax collection process and the uses to which such revenues were put was permissible.<sup>35</sup>

While the designation of religious societies as public bodies corporate permitted such organizations to exercise a considerable range of governmental powers, it also made possible a degree of governmental supervision which decisions such as *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*<sup>36</sup> have denied to governmental authorities in the United States. Article 10 of the constitution, for example, explicitly reserved to the national government the authority to prescribe "fundamental principles concerning . . . the rights and duties of religious associations,"<sup>37</sup> and such authority also would presumably have been exercised by state governments in connection with the application of new religious societies for the status of public bodies corporate.<sup>38</sup> Similarly, results such as those reached by the Supreme Court of the United States in *Board of Education v. Barnette*,<sup>39</sup> *Prince v. Massachusetts*,<sup>40</sup> and *Murdock v. Pennsylvania*,<sup>41</sup> might well have been precluded by a constitutional provision that "civil and political . . . duties are neither conditioned upon nor limited by the exercise of religious liberty,"<sup>42</sup> a

30. *Id.* at 52.

31. *Id.* at 42.

32. See OPPENHEIMER, *op. cit. supra* note 22, at 207-08.

33. Art. 136, para. 3.

34. See Ebers *supra* note 19, at 424.

35. *Id.* at 422-23. Similarly, the constitutional provision forbidding confiscation of church property (art. 138, para. 2) was not construed as barring property or income taxes. ANSCHÜTZ 564.

36. 344 U.S. 94 (1952).

37. Art. 10(1). See generally OPPENHEIMER, *op. cit. supra* note 22, at 206-07.

38. See art. 137, para. 8. In Prussia, such status could only be granted by a special act of the legislature. In most other states, applications were granted or denied by administrative officials alone. ANSCHÜTZ 558. In either case, the constitution required that any religious society applying for "public" status "offer a guaranty of permanence." Art. 137, para. 5.

39. 319 U.S. 624 (1943).

40. 321 U.S. 158 (1944).

41. 319 U.S. 105 (1943).

42. Art. 136, para. 1.

command which was read as eliminating defenses based on religious conviction if the act involved had been prohibited by state law as dangerous to public order or morals or on "any other ground," so long as the applicable law was not directed against a particular belief, as such.<sup>43</sup>

The Social Democrats made several unsuccessful attempts to convert the ideals of political and social democracy embodied in the constitution generally into rules of constitutional law governing the internal affairs of the religious societies. Thus, proposals were offered which would have forbidden rights of members of religious organizations to be made dependent on the amounts of their financial contributions.<sup>44</sup> Similarly, an attempt was made to draft a constitutional guarantee that "No one may be forced . . . to take part in any religious exercise"<sup>45</sup> so as to protect individuals from coercion on the part of churches as well as the state.<sup>46</sup> Both these attempts failed,<sup>47</sup> however, and the Social Democrats succeeded only in ensuring that associations for the "cultivation of a system of ethics" would be accorded the same privileges which the constitution extended to church organizations.<sup>48</sup>

The Social Democrats, in other words, accepted the extension of privileges to non-religious societies in return for a "separation" of church and state in the form of removal of governmental supervision of a religious organization's internal relationships. Such a result, of course, might well be regarded as desirable.<sup>49</sup> But if the maximization of individual freedom is one of the ends sought by means of the legal guarantee of "separation," then the efficacy of that means depends on the prior existence of a social structure in terms of which the possibility of "private" coercion on the part of religious groups is perceived as less threatening than the consequences of potential governmental pressure. And in the Germany of 1919, religious organizations not only exercised a significant measure of quasi-governmental authority over their members, but were also socially "established," in the sense that changes in individual religious affiliation were less easily effectuated than, for example, in the United States. Given these differences, it is at least possible—once the status of public bodies corporate had been conceded to certain religious societies—that individual freedom would have been further advanced by the extension of governmental supervisory powers than by the grant of equal status to "ethical" organizations.

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43. ANSCHÜTZ 540.

44. DOCUMENTS at 284.

45. Art. 136, para. 4.

46. See Quarck (Social Democrat), in DOCUMENTS at 191-92.

47. On the failure of article 136 to offer protection against coercion by churches, see ANSCHÜTZ 544. The Social Democrats did succeed, however, in abolishing the requirement that oaths include a religious affirmation. See art. 177.

48. See art. 137, para. 7. This provision was originally introduced by Katzenstein (Social Democrat). See DOCUMENTS at 195.

49. Cf. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952). Even within this tradition, however, courts have, in exceptional circumstances, intervened in the relations of a church with its members. See, e.g., *Randolph v. First Baptist Church of Lockland*, 120 N.E.2d 485 (C. P. Ohio, 1954) (review of expulsion proceedings).



## THE ISSUE OF SCHOOLS

One of the issues on which the Assembly found itself most deeply split concerned the organization of the school system. The Independent Socialists desired to utilize the school solely as a means for the development of national unity. In furtherance of this end, they advocated that religious teaching be superseded entirely by instruction in laic morality.<sup>50</sup> The conservative parties, on the other hand, while agreeing on the need to develop national unity through the medium of the school system,<sup>51</sup> vehemently opposed the abolition of religious instruction in favor of laic morality.<sup>52</sup> The Center representatives opposed the position taken by the Independent Socialists and denied as well the overriding importance of the goal of national unity. If public schools were to be wholly secular in accordance with Independent Socialist desires, they argued, a separate system of private confessional schools was necessary to preserve the right of parents to educate their children in accordance with their own beliefs;<sup>53</sup> a rationale strikingly similar to that accepted by the United States Supreme Court in *Pierce v. Society of Sisters*.<sup>54</sup> Private schools, furthermore, would conserve national revenues by educating children without the expenditure of public funds.<sup>55</sup>

Both the Democrats and Social Democrats firmly opposed the preservation of private schools on the ground that such schools tended to perpetuate social and economic class distinctions.<sup>56</sup> Similarly, confessional schools were regarded by some Social Democrats as likely to retard the development of feelings of national unity. Several of the party's representatives also opposed sectarian instruction in the schools—even where the local population would clearly have favored it—on similar grounds, and one proposed a released-time system as a suitable alternative.<sup>57</sup> Others, however, argued that a wholly secular school system necessarily abridged the freedom of religion of some parents.<sup>58</sup>

The final result was the compromise which established the common school as the basic unit of the educational system.<sup>59</sup> Given the Social Democrats' goal of a system of free public education under state control,<sup>60</sup> this formula represented a considerable measure of success. Thus, although private schools had been subject to a measure of supervision by the individual states even before

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50. See VERMEIL 203.

51. VERMEIL 200.

52. *Id.* at 206; Traub (German Nationalist), in DOCUMENTS at 287.

53. See Kaas (Center), in DOCUMENTS at 192. See VERMEIL 201.

54. 268 U.S. 510 (1925). Clearly, the Oregon statute involved in *Pierce*, which required all students to attend public schools, went further than the German provisions, which merely excluded religious training from state schools. There was, nevertheless, a marked similarity in the rationale employed in each case by those who opposed the existing laws.

55. See VERMEIL 201.

56. VERMEIL 202.

57. See VERMEIL 206, describing the position taken by the Social Democrat Quarck.

58. See VERMEIL 204, describing the position taken by the Social Democrat Katzenstein.

59. See text at note 18 *supra*.

60. See VERMEIL 200-01.

1919,<sup>61</sup> the inspectors performing these supervisory tasks had often been clergymen untrained in education rather than state officials.<sup>62</sup> Under the Weimar provisions, on the other hand, the state was given full responsibility for establishing qualifications for teachers,<sup>63</sup> approving those private schools which were justified by exceptional local circumstances,<sup>64</sup> and maintaining a staff of trained inspectors.<sup>65</sup> Furthermore, although provision was expressly made for consideration of the desires of religious minorities—including the acceptance of lack of public facilities for instruction according to the tenets of a given sect as one of the grounds which justified the establishment of private schools<sup>66</sup>—the majority even of confessional schools were to be wholly public in nature, with administration and supervisory powers in the hands of state rather than church officials.<sup>67</sup> Similarly, schools operated by public bodies corporate were classified as private rather than public in nature, and were therefore to be dissolved unless they came within the stringent exceptions embodied in the constitution.<sup>68</sup>

The Weimar constitution provided that religious instruction be "imparted in accordance with the principles of the religious society concerned,"<sup>69</sup> and church officials were consequently permitted to advise the school authorities and even to appoint clerics to offer such instruction.<sup>70</sup> Since it was "included in the regular school curriculum,"<sup>71</sup> however, religious instruction was also subject to state supervisory activities,<sup>72</sup> thereby creating a situation potentially dangerous to both church and state. The instruction in question consisted, not of generalized courses in ethics or the history of religion, but training in religious belief and dogma.<sup>73</sup> As a result, since the state bore ultimate responsibility for all portions of the school curriculum, there would often be no alternative for a government official but to decide questions which were essentially theological in content. Similarly, the constitutional provision which continued theological faculties at state universities was interpreted as giving the state power to dis-establish such faculties.<sup>74</sup> The inclusion of religion within a public school system, in short, had been obtained only at the price of potential state involvement in matters of religious dogma.

Attempts were made to guard against certain of the consequences of such state involvement. Thus, students at common schools could be excused from

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61. ANSCHÜTZ 590.

62. OPPENHEIMER, *op. cit. supra* note 22, at 209.

63. Art. 143, para. 2.

64. Art. 147, para. 1.

65. Art. 144. See VERMEIL 208.

66. Art. 147, para. 2.

67. ANSCHÜTZ 589.

68. *Id.* at 590.

69. Art. 149, para. 1.

70. ANSCHÜTZ 597.

71. Art. 149, para. 1.

72. ANSCHÜTZ 597; Landé, *Bildung und Schule*, in 3 DIE GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHsverFASSUNG 84 (Nipperdey ed. 1930).

73. Landé, *supra* note 72, at 85-86.

74. ANSCHÜTZ 598.

religious instruction upon parental request, and this exemption also applied to such school activities as prayers and pageants with a religious theme.<sup>75</sup> The constitution specifically provided, furthermore, that "In the instruction in public schools care shall be taken not to hurt the feelings of those of differing opinion."<sup>76</sup> The Independent Socialists, however, in the course of an attack on the Social Democrats for having succumbed to the Center position regarding the school system,<sup>77</sup> expressed serious reservations as to whether any such provision could effectively be implemented without the exclusion of all religions from the schools.<sup>78</sup> The Social Democrats responded by stressing the need for developing national unity, and Katzenstein—the Social Democrat who had first proposed that "ethical" societies be given the same privileges as religious organizations<sup>79</sup>—specifically defended the "Christian-national" school on this ground.<sup>80</sup> The conjunction of the two adjectives—especially in view of Katzenstein's position on the question of religious organizations—would appear to provide strong support for the position taken by the Independent Socialists. Such a conjunction of "Christian" and "national" was not a new one in German history. On the contrary, the persistent mingling of religious and political aims and functions had made such an identification almost inevitable during many periods. Perhaps as a result, the Social Democrats clearly failed to take into account the extent to which majority religions might utilize their positions in the common schools to enforce unity on the basis of conformity with their views.

There were, moreover, other factors which militated against a whole-hearted effort by Social Democrats to introduce a secular educational system. Although the Reformation had left the German population more or less equally divided among Protestantism and Catholicism, the distribution of religious sects was not uniform throughout the various states. Consequently, the population in individual states was often religiously homogeneous and strongly opposed attempts to enforce a separation between church and state.<sup>81</sup>

Centrifugal forces had considerably outweighed centripital ones in pre-Weimar Germany, at least in part as a result of the concessions demanded by the predominantly Catholic states of southern Germany as the price for adherence to a German union dominated by Prussia. The central government, for example, had few field offices outside Berlin, and even such matters as finance and army administration were under the control of the various states. The fact that the National Assembly had been constituted on the basis of nationwide elections, however, foreshadowed an attempt on the part of the revolutionary

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75. Landé, *supra* note 72, at 90.

76. Art. 148, para. 2.

77. See, e.g., Kunert (Independent Socialist), in DOCUMENTS at 288.

78. Haase (Independent Socialist), in DOCUMENTS at 288-89.

79. See note 46 *supra* and accompanying text. Katzenstein had also introduced the provision repudiating a state church. See note 19 *supra* and accompanying text.

80. Katzenstein (Social Democrat), in DOCUMENTS at 308.

81. See in this connection, note 4 *supra*.

government to create a more centralized set of governmental institutions, and the preliminary draft of the constitution submitted to that body by Professor Hugo Preuss envisaged a unitary system of government.<sup>82</sup>

Aware of the political stakes at issue, the states had utilized the period between the elections and the convening of the Assembly to call a conference of state representatives who drafted a constitution which reserved many of their old powers to the states.<sup>83</sup> The submission of this draft to the Assembly did not succeed in reversing entirely the trend to a more centralized form of government, but the constitution which the Assembly finally approved provided for a form of government considerably less unitary in nature than that originally envisaged.<sup>84</sup> And the political forces commanded by the states demonstrated sufficient strength to force concessions from the government party in each substantive area which the constitution attempted to regulate.

Within the context of the issue of religious education in schools, the Center combined with these forces in order to maximize the possibilities for giving religious instruction a predominant position within the educational system.<sup>85</sup> Thus, although the common school was established by the constitution as the basic unit of the school system, the Center succeeded in obtaining a provision allowing common confessional schools to be established in accordance with state laws "in so far as this does not interfere with a system of school administration."<sup>86</sup> The Social Democrats succeeded in including schools established by "ethical" sects within this provision,<sup>87</sup> but it was clear to the Assembly that the overwhelming majority of schools thus established would be confessional in nature.<sup>88</sup> For similar reasons, the Center successfully proposed that existing state school systems be constitutionally guaranteed until a national law implementing the constitutional provisions was enacted.<sup>89</sup> During this phase of the debate, the Center did not employ arguments based on religious freedom, but rather successfully employed the Social Democrats' avowed adherence to the ideals of

82. MATTERN, *PRINCIPALS OF THE CONSTITUTIONAL JURISPRUDENCE OF THE GERMAN NATIONAL REPUBLIC* 88-92 (1928).

83. See HARTUNG, *DEUTSCHE VERFASSUNGSGESCHICHTE VOM 15. JAHRHUNDERT BIS ZUR GEGENWART* 216-17 (4th rev. ed. 1933) (Reihe II, Abteilung 4 of *GRUNDRISSE DER GESCHICHTSWISSENSCHAFT* [Meister ed.]).

84. *Id.* at 218-22.

85. See VERMEIL at 198, 250, 319-20.

86. Art. 146, para. 2.

87. For a description of the various school systems existing in the states at this time, see VERMEIL 249. On the disparate desires of state populations in connection with schools, see *id.* at 205. A brief outline of the factors to be considered by state administrations in allowing exceptions to the inter-denominational common school model is contained in the remarks of State Secretary Schulz to the National Assembly in *DOCUMENTS* at 306.

88. See, e.g., Seyfert (Democrat), in *DOCUMENTS* at 287. It was also predicted that the possibility of exceptions to the common school model would result in a continuation of the National Assembly school debate within each state. Philipp (German Nationalist) and Luppe (Democrat), *id.* at 288.

89. See ANSCHÜTZ 588, 652-54.

popular sovereignty to gain acceptance of a compromise on the school program.<sup>90</sup>

The Social Democrats' school program had originally been based on the 1849 Constitution drafted by the Frankfurt "Paulskirche" Assembly during the revolution of 1848. This document had provided for free public education under wholly secular auspices, and since it failed to mention confessional schools, was interpreted as abolishing all such institutions.<sup>91</sup> Having established the principle of free public education under state supervision in the Weimar debates, the Social Democrats regarded the new constitution as a faithful embodiment of the theories contained in the earlier Frankfurt document.<sup>92</sup> The government party had succeeded in securing the gradual abolition of private preparatory schools and in placing severe restrictions upon the establishment of private elementary schools on the ground that the goal of national unity required the elimination of social and economic class divisions perpetuated by such institutions.<sup>93</sup> And provision was made in the constitution for the development of loyalty to the nation through the medium of the school system.<sup>94</sup> By allowing exceptions to be made on such bases as conditions in the various states, however, the practical result of the program endorsed by the government party was to permit the continuation of a sizeable group of confessional schools. What separated the Social Democrats at Weimar from the Frankfurt Assembly, then, was an unwillingness to accept national goals as sufficiently overriding in importance to justify imposing unpopular school systems upon the constituent states of the German nation.

Similarly, in order to justify the exclusion of religion from the schools the Social Democrats would have had to follow the lead of the Independent Socialists in explicitly advocating a laic morality in the form of loyalty to the nation as a replacement for the loyalties developed through religious instruction. Such a position, moreover, would have required frank recognition of the fact that certain parents' freedom of religion might be abridged in the name of national political and social goals. This choice the Social Democrats refused to make, being unwilling to face the charges of a new *Kulturkampf* which would have resulted from any attempt to relegate religion solely to the home and church. As a result, the government party permitted the insertion of religion into the curriculum and was also persuaded—in the name of national unity—to accept the common school as preferable to a system which would have encouraged the establishment of separate laic and confessional public institutions, thus establishing an educational system which mingled political and religious loyalties in place of the original goal of schools which could be utilized solely to fulfill secular social and political ends.<sup>95</sup>

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90. See VERMEIL 205.

91. See *id.* at 327.

92. Cf. VERMEIL 319-20. For a commentary supporting this view, see ANSCHÜTZ 586.

93. Cf. BRUNET, *THE NEW GERMAN CONSTITUTION* 233 (1922); OFFENHEIMER, *THE CONSTITUTION OF THE GERMAN REPUBLIC* 211 (1923).

94. Art. 148, paras. 1, 3.

95. See, *e.g.*, Meerfeld (Social Democrat), in *DOCUMENTS* at 189-90.

## CONCLUSION

That the Social Democrats failed fully to implement the program of the Frankfurt Assembly seems clear. The reasons for that failure, and the degree to which it represented an abandonment of the goals of the Assembly, present considerably more difficult questions. The Assembly felt no disparity in pursuing simultaneously the goals of a strong national state and individual liberty. But it seems difficult to argue from this premise that the Social Democrats, in subordinating the former goal to the latter—by agreeing to an expansion of the spheres of competence of the individual states<sup>96</sup>—were thereby abandoning the ideals of their predecessors rather than responding to complexities which had previously been ignored. Similarly, given the extent to which German Catholics had already developed autonomous social and political institutions, it is by no means clear that the common school of the second compromise was a less effective means of securing national unity than the establishment of dual systems of secular and confessional schools envisaged by the first compromise.<sup>97</sup>

The difficulties encountered in assessing the differences between 1849 and 1919 are not resolved, however, by noting that loyalty to a given end does not necessarily entail adherence to specific means. Nor is an analysis couched solely in terms of the relative strength of rival parties likely to be wholly accurate, for—as the contradictory elements in the positions taken by men like Katzenstein indicate<sup>98</sup>—the compromises hammered out at Weimar reflect not only what the Social Democrats were forced to accept but equally what they were willing to decree. Thus, the essential difference between 1849 and 1919 is not that the men of Frankfurt knew what they wanted while the men of Weimar did not, but rather that the latter were participating in the constitutional debates as representatives of a party in effective control of the government.

The test of practicability is by no means an unerring method for the divination of constructive political and social goals. But it does often serve to illuminate the complex considerations which must be weighed in defining those goals. It thus seems difficult to believe that the men of 1849, had they been granted effective political power, would not have been as troubled by the abridgement of religious freedom involved in the Frankfurt program as the men of 1919 were.<sup>99</sup> Indeed, given the long tradition of established religious institutions, the considerable elements of society which would have been alienated by a policy of doctrinaire separation might well have made impossible—either in 1849 or in 1919—a Germany characterized both by individual liberty and national unity.<sup>100</sup> The question of whether the men of Weimar compromised the ideals of Frankfurt seems therefore to be an irrelevant one. Both the Germany of 1849 and the Germany of 1919, after all, continued to exist as societies because

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96. See text at notes 82-94 *supra*.

97. See text at note 18 *supra*.

98. See notes 79 and 80 *supra* and accompanying text.

99. See note 58 *supra* and accompanying text.

100. Cf. the analysis of the consequences of the church and state provisions of the Spanish revolutionary constitution in THOMAS, *THE SPANISH CIVIL WAR* 46-47 (1961).

of a demonstrated capacity for compromising the demands of competing ideals.<sup>101</sup> The relevant question, rather, is whether, given the Germany of 1919, the balances struck were the proper ones.

#### APPENDIX

#### *Excerpts from the Weimar Constitution*<sup>1</sup>

#### Chapter I

#### Structure and Functions of the Commonwealth

#### Section I

#### Commonwealth and States

#### Article 10

The Commonwealth may prescribe by law fundamental principles concerning:

1. The rights and duties of religious associations; . . .

#### Chapter II

#### Fundamental Rights and Duties of Germans

#### Section III

#### Religion and Religious Societies

#### Article 135

All inhabitants of the Commonwealth enjoy complete liberty of belief and conscience. The free exercise of religion is assured by the Constitution and is under public protection. This Article leaves the general laws undisturbed.

#### Article 136

Civil and political rights and duties are neither conditioned upon nor limited by the exercise of religious liberty.

The enjoyment of civil and political rights as well as eligibility to public office is independent of religious belief.

No one is under any obligation to reveal his religious convictions. The authorities have a right to inquire about religious affiliation only so far as rights and duties are dependent thereon or in pursuance of a statistical enumeration prescribed by law.

No one may be forced to attend any church ceremony or festivity, to take part in any religious exercise, or to make use of any religious oath.

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101. Nor did the need for striking complex balances in the area of church and state end in 1919. In 1957, for example, legislation by the state of Lower Saxony establishing a system of common, non-denominational education for all school children was challenged in the German Constitutional Court by the central government on the ground that the legislation violated the German-Vatican Concordat of 1933, which had guaranteed separate educational facilities for Catholic students. Although the Concordat was held to be binding on the central government, the state legislation was upheld on the ground that enforcement of the Concordat provisions depended solely on federal-state comity. Judgment of March 26, 1957. Bundesverfassungsgericht (II. Senat) (Ger. Fed. Rep.), 6 Entscheidungen des Bundesverfassungsgerichts 309, discussed in McWhinney, *Judicial Restraint and the West German Constitutional Court*, 75 HARV. L. REV. 5, 22-23 (1961).

1. The English translation of the Weimar constitution used in this study is taken from William B. Munro and Arthur N. Holcombe, "The Constitution of the German Commonwealth," in Volume II, No. 6 (December, 1919) of the *League of Nations Pamphlet Series* published by the World Peace Foundation. A copy of the German text is contained in the volume by Gerhard Anschütz, cited in note 3 *supra*.

## Article 137

There is no state church.

Freedom of association in religious societies is guaranteed. The combination of religious societies within the Commonwealth is not subject to any limitations.

Every religious society regulates and administers its affairs independently within the limits of the general law. It appoints its officers without interference by the state or the civil municipality.

Religious societies may be incorporated in accordance with the general provisions of the civil law.

Existing religious societies remain, to the same extent as heretofore, public bodies corporate. The same rights shall be accorded to other religious societies if by their constitution and the number of their members they offer a guaranty of permanence. If a number of such public religious societies unite, this union is also a public body corporate.

The religious societies, which are recognized by law as bodies corporate, are entitled on the basis of the civil tax rolls to raise taxes according to the provisions of the laws of the respective States.

The associations, which have as their aim the cultivation of a system of ethics, have the same privileges as the religious societies.

The issuance of further regulations necessary for carrying out these provisions comes under the jurisdiction of the States.

## Article 138

State contributions to religious societies authorized by law, contract, or any special grant, will be commuted by State legislation. The general principles of such legislation will be defined by the Commonwealth.

The property of religious societies and unions and other rights to their cultural, educational, and charitable institutions, foundations, and other possessions are guaranteed.

## Article 139

Sundays and legal holidays remain under the protection of law as days of rest and spiritual edification.

## Article 140

The members of the armed forces shall be granted the necessary leave for the performance of their religious duties.

## Article 141

In so far as there is need for religious services and spiritual care in hospitals, prisons or other public institutions, the religious societies shall be permitted to perform the religious offices, but all compulsion shall be avoided.

#### Section IV Education and Schools

## Article 142

Art, science and the teaching thereof are free. The state guarantees their protection and takes part in fostering them.

## Article 143

The education of the young shall be provided for through public institutions. In their establishment the Commonwealth, States and municipalities co-operate.

The training of teachers shall be regulated in a uniform manner for the Commonwealth according to the generally recognized principles of higher education.

The teachers in the public schools have the rights and duties of state officers.

## Article 144

The entire school system is under the supervision of the State; it may grant a share therein to the municipalities. The supervision of schools will be exercised by technically trained officers who must devote their time principally to this duty.



## Article 145

Attendance at school is obligatory. This obligation is discharged by attendance at the elementary schools for at least eight school years and at the continuation schools until the completion of the eighteenth year. Instruction and school supplies in the elementary and continuation schools are free.

## Article 146

The public school system shall be systematically organized. Upon a foundation of common elementary schools the system of secondary and higher education is erected. The development of secondary and higher education shall be determined in accordance with the needs of all kinds of occupations, and the acceptance of a child in a particular school shall depend upon his qualifications and inclinations, not upon the economic and social position or the religion of his parents.

Nevertheless, within the municipalities, upon the petition of those entitled to instruction<sup>2</sup> common schools shall be established of their faith and ethical system, in so far as this does not interfere with a system of school administration within the meaning of Paragraph 1. The wishes of those entitled to instruction<sup>2</sup> shall be considered as much as possible. Details will be regulated by State laws in accordance with principles to be prescribed by a national law.

To facilitate the attendance of those in poor circumstances at the secondary and higher schools, public assistance shall be provided by the Commonwealth, States, and municipalities, particularly, assistance to the parents of children regarded as qualified for training in the secondary and higher schools, until the completion of the training.

## Article 147

Private schools, as a substitute for the public schools, require the approval of the State and are subject to the laws of the States. Approval shall be granted if the private schools do not fall below the public schools in their educational aims and equipment as well as in the scientific training of their teachers, and if no separation of the pupils according to the wealth of their parents is fostered. Approval shall be withheld if the economic and legal status of the teachers is not sufficiently assured.

Private elementary schools shall be only permissible, if for a minority of those entitled to instruction<sup>2</sup> whose wishes are to be considered according to Article 146, Paragraph 2, there is no public elementary school of their faith or ethical system in the municipality, or if the educational administration recognizes a special pedagogical interest.

Private preparatory schools shall be abolished.

The existing law remains in effect with respect to private schools which do not serve as substitutes for public schools.

## Article 148

All schools shall inculcate moral education, civic sentiment, and personal and vocational efficiency in the spirit of German national culture and of international conciliation.

In the instruction in public schools care shall be taken not to hurt the feelings of those of differing opinion.

Civics and manual training are included in the school curriculum. Every pupil receives a copy of the Constitution on completing the obligatory course of study.

The common school system, including university extension work, shall be cherished by the Commonwealth, States and municipalities.

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2. The German word which Munro and Holcombe translate as "those entitled to instruction" is "Erziehungsberechtigten." Where this phrase is used in connection with the establishment of elementary schools, it is unlikely that the drafters were referring to the wishes of students, who would be the persons "entitled to instruction." "Erziehung," however, may also be translated as "upbringing." It is believed, therefore, that a translation of "Erziehungsberechtigten" as "those entitled to control upbringing" would be preferable as indicating more clearly that it was parental wishes which were to be considered. *But see* the variant form used in Article 149, para. 2.

## Article 149

Religious instruction is included in the regular school curriculum, except in the non-sectarian (secular) schools. The imparting of religious instruction is regulated by the school laws. Religious instruction is imparted in accordance with the principles of the religious society concerned, without prejudice to the right of supervision of the State.

The imparting of religious instruction and the use of ecclesiastical ceremonies is optional with the teachers, and the participation of the pupils in religious studies and in ecclesiastical ceremonies and festivities is left to the decision of those who have the right to control the religious education of the child.

The theological faculties in the universities will be continued.

## Article 150

The artistic, historical and natural monuments and scenery enjoy the protection and care of the State.

The prevention of the removal of German art treasures from the country is a function of the Commonwealth.

## Transitional and Final Provisions

## Article 173

Until the adoption of the national law according to Article 138, the existing state contributions to the religious societies, whether authorized by law, contract or special grant, will be continued.

## Article 174

Until the adoption of the national law provided for in Article 146, Paragraph 2, the existing legal situation will continue. The law shall give special consideration to parts of the Commonwealth where provision for separate schools of different religious faiths is not now made by law.

## Article 177

Wherever by existing laws it is provided that the oath be taken in the form of a religious ceremony, the oath may be lawfully taken in the form of a simple affirmation by the person to be sworn: "I swear." Otherwise the content of the oath provided for in the laws remains unaltered.