

# Religious and Philosophical Norms in the Constitutions of Germany and the United States

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## 2<sup>nd</sup> European/American Conference on Church Autonomy and Religious Liberty

Trier, Federal Republic of Germany

May 27 - 30, 1999

In examining the issue of religious freedom in Germany and the United States, at least two fundamental questions must be answered. First, what is meant by the term religion? And second, what are the limits of the freedom sought? Although historically, Germany and the United States have approached church-state relations from different perspectives, in recent times, it appears that a certain convergence is evident as the United States slowly lowers the wall of strict separation, and parts of the former German Democratic Republic challenge certain assumptions regarding the cooperation between church and state.<sup>1</sup> In both countries, courts have varied in their definition of religion for purposes of protecting free exercise and guarding against the establishment of religion.<sup>2</sup> Likewise, the battles continue over the scope of freedoms and authority that religion ought to be granted in the public sphere. What the debates thus far seem to be missing, however, is the realization that these two fundamental questions are not always separate inquiries. Rather, a clear answer to the first question, when viewed in light of the founding principles behind the constitutions of both countries, will often go a long way to settling some of the more controversial aspects of the second question.

Needless to say, the interests of church and state have various points of intersection. The general area of morality, ethics, and human rights is one of those areas, and it is the area which this

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<sup>1</sup> The 1996 debate over religious instruction in public schools in Brandenburg is an example of this emerging controversy.

<sup>2</sup> For example, in the United States, courts have recognized that "many and various beliefs meet the constitutional definition of religion." *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C.Cir. 1979)

paper will address. Looking first at morality and ethics, one observes that religion is generally understood to involve two components: belief and action, or, in other words, faith and morals. Modern states such as Germany and the United States recognize that the freedom to profess the faith of one's choice, the essence of religious liberty, is perhaps the most basic of all human rights. In fact, the dignity of the person, which is the basis for all human rights, is revealed first and foremost through the person's self-acknowledged status as somehow ontologically inferior to, yet participating in, the transcendent source of his being. Moreover, through the operation of the person's conscience and his capacity to freely acknowledge and accept this transcendent source along with any related dogmas of faith, it is axiomatic that the person is not then the creator of his own dignity. Rather this dignity is *given* to the person as part of his existence, an existence which flows from the same transcendent source of being. At the level of "revealed" religion, this is the component of faith. Morality then flows from this faith. Yet, it is crucial to realize that revealed religions, such as Christianity or Judaism, do not have a monopoly on claiming that the dignity of the person derives from the person's relationship to a transcendent or supernatural source. Traditionally, this has also been the province of philosophy,<sup>3</sup> a discipline based on reason, not historical revelation.<sup>4</sup> It has been designated by various names including philosophy of being, metaphysics, first philosophy, and even philosophy of God or "natural theology." In the realm of action, its corollary has been moral philosophy or ethics as well as political philosophy. Many of the actions and behaviors to which such philosophies concern themselves are also of legitimate interest to religion. What is important to note is that these two approaches--the religious and the philosophical--often reach the same conclusions. Those opposing such conclusions, however, often assume that these conclusions were illegitimately injected into law and politics from religion, while in fact they were legitimately derived from philosophy. The constitutions of both Germany and the United States guard against the establishment of religion, not the establishment of philosophy, especially when a particular philosophy may be at the very basis of the respective constitutions.<sup>5</sup>

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<sup>3</sup> Although it is to be admitted that not all philosophies concern themselves with the *source* of dignity or the existence of the non-empirical.

<sup>4</sup> Philosophy is therefore akin to law, which, *qua* law, must also be considered grounded in reason in order to distinguish it from politics, or the popular will.

<sup>5</sup> In order for a philosophy to legitimately inform constitutional hermeneutics, it must be a philosophy present in the original intent and as such a philosophy that is "part of" the text. This is the primary constraint on the judge which prohibits him from adjudicating at will based merely on the philosophy of his preference. As a more general matter, although many philosophies will be eliminated from consideration based on this original intent restriction, the language courts use to define religion in other contexts may lead to the banishment of legitimate philosophy into the realm of prohibited religious establishment. For example, although considering a "philosophy" that clearly was not part of the original intent of the Constitution's framers, the United States

It is best not to speak of these distinctions only in the abstract. Both Germany and the United States are governed under the rule of law, and in both countries that rule of law is reflected in a constitution. Therefore, in order to explore the purely philosophical support for various legal and political positions taken by religious persons, groups, and institutions, we must look carefully at these constitutions, and when ambiguities arise, our hermeneutical analysis must look carefully at the principles behind the texts, as intended by the framers of both documents. Upon so doing, a context emerges for adjudicating competing rights claims, both between individuals, whether believer or non-believer, and between individuals and competing majorities. The most heated of debates over these rights have been precisely over the alleged rights and issues of most interest to religious persons and institutions.<sup>6</sup> They include abortion, drugs, gambling, prostitution, homosexual unions, adultery, polygamy, suicide, and euthanasia. The question of religious freedom arises first and foremost when religious groups or persons are directly or indirectly prohibited from arguing or acting in accordance with their moral convictions on one of these issues.

### **The German Basic Law (*Grundgesetz*)**

The 1949 German Basic Law well illustrates the aforementioned philosophical basis for human dignity and its consequent moral demands. Moreover, upon further analysis of the precise philosophical basis for this dignity, it becomes clear that the freedom it gives birth to is not without limitations. While many of these limitations could be seen as consequences of religious belief, in fact, their constitutional basis appears to be more a function of the philosophy of the human person as envisioned by the framers. This concept of the person is in large part a product of the framers' notions of natural law and the person *qua* person.<sup>7</sup>

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District for the District of New Jersey stated: "Whether 'God' is considered an ultimate universal principle or being or essence or entity or field of life on which the universe is based, has no bearing on the religious nature of the concept. It cannot be doubted that concepts of 'God' or an ultimate level of life or ultimate reality are religious concepts." *Malnak v. Yogi*, 440 F. Supp. 1284, 1322 (D.N.J. 1977). Although the Court was referring to the "Science of Creative Intelligence/Transcendental Meditation," its language, if transplanted, could effectively put the establishment clause at odds with traditional spheres of philosophical discourse.

<sup>6</sup> Most fundamentally, the right to religious freedom itself is often found on the balance opposite some competing state interest.

<sup>7</sup> For an expanded analysis of the role of natural law and personalism in the *Grundgesetz*, see Edward M. Andries, *On the German Constitution's Fiftieth Anniversary: Jacques Maritain and the 1949 German Basic Law (Grundgesetz)*, 13 EMORY INT'L L. REV. 1 (Spring 1999).

In the years following World War II, natural law jurisprudence resurfaced in Germany, in part as a reaction to the Nazi experience. For example, already in 1945, a decision of the lower court (*Amtsgericht*) in Wiesbaden held: "The laws which declared that the property of Jews had become forfeited to the state" were "incompatible with natural law," and, therefore, "void at the very time of their enactment."<sup>8</sup> Furthermore, looking closer at the Basic Law's historical background, it is clear that during the formative process the Western Allies licensed German parties and interest groups and granted only limited numbers access to the official proceedings.<sup>9</sup> It has been said that the churches and trade unions had privileged access to the drafters because they were least suspect of Nazi collaboration.<sup>10</sup> The churches helped to secure provisions dealing with church-state relations, social morality, religious education, and rights concerning marriage and family.<sup>11</sup> Not surprisingly, the churches were also very interested in defending an authentic philosophy of the person<sup>12</sup> as well as the natural law. However, the fact that the churches were among those groups advocating natural law should not be used as a basis for inextricably linking natural law to the Christian religion, or any other religion for that matter.

It is also interesting that in the immediate aftermath of the war, the Catholic Church held a position of trust from the standpoint of the Allies. This position is well illustrated by the comments of Russell Luke Sedgewick, the Controller-General of Religious Affairs for the British zone, concerning the first post-war Bishops Conference held in August 1945:

The Bishops have great significance in the future of Germany and have, above all, a strong sense of international order; they are the conscious guardians of the spiritual

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<sup>8</sup> 1 *Süddeutsche Juristen Zeitschrift* 36 (1946) (cited in Ernst von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 NATURAL LAW FORUM 111-12 (Notre Dame Law School, 1959).

<sup>9</sup> KLAUS VON BEYME, *THE POLITICAL SYSTEM OF THE FEDERAL REPUBLIC OF GERMANY* 1 (St. Martin's Press, 1983)

<sup>10</sup> *Id*

<sup>11</sup> Donald P. Kommers, *Constitutional Jurisprudence of Germany*, *supra* note 92, at 32; *See also* Klaus Gotto, *Die katholische Kirche und die Entstehung des Grundgesetzes*, in *KIRCHE UND KATHOLIZISMUS 1945-1949* 89, 94 (Anton Rauscher ed., Ferdinand Schöningh, 1977) (Perhaps the best known church statements influencing the Parliamentary Council were the various writings of Cardinal Frings in 1948 and the Declaration of the German Bishops concerning the *Grundgesetz* on the occasion of the Bishop's Conference of February 10-11, 1949 in Pützchen. The declaration of Pützchen, which threatened non-acceptance by Catholics if certain suggestions were not incorporated, was an extraordinarily public exertion of church influence on the discussions of the Parliamentary Council.)

<sup>12</sup> It is illuminating to trace the historical development of the term "person" from its Greek (*prosopon*) and Latin (*per-sonare*) roots through the broadened use of the term resulting from Christianity's attempt to articulate the Trinitarian mysteries. Since approximately the fourth century, the term has implied aspects of relatedness to others, including the Supreme Other, God. *See generally*, Kenneth L. Schmitz, *Reconstructing the Person, A Meditation on the Meaning of Personality*, *CRISIS*, April 1999, at 26 - 29.

tradition of Western Europe, especially in regard to the rule of law. . . . Hence, in my opinion, there is probably no considerable section of the German people with whom it is so easy for us to make contact and find understanding, so far as regards international order and political stability within Germany.<sup>13</sup>

A statement by one of the drafters, Professor Susterhenn, an influential member of the parliamentary council, to the delegates at the second plenary session well represented the Catholic position:

We must get back to recognizing that man does not exist for the State, but the State for man. For us, freedom and the dignity of human personality have the highest value. The State serves these ends by creating the external conditions and institutions which enable the individual to realize his physical and spiritual capacities and freely to develop his personality within the limits set by natural moral law. . . . The State ought not to be an end in itself, but must be deliberately confined to fulfilling a subsidiary function vis-a-vis the individual and the various groups within the community. . . . The State is not for us the source of all law, but is itself subject to the law. There are . . . rights prior to and superior to the State, resulting from the nature and being of man and his various associations which the State has to respect. Every power of State finds its bounds in these natural, God-given rights of the individual, the family, the local communities of town and country, and the occupational groups.<sup>14</sup>

Moreover, early decisions relying on natural law jurisprudence had been noted repeatedly by German constitutional scholars throughout the 1950's, including mention by Professors Ernst von Hippel and René Marcic.<sup>15</sup> These commentators point to many cases in the immediate aftermath of the Basic Law where natural law won out. Such results and other developments "indicated a tendency towards a substantial rule of law."<sup>16</sup> Furthermore, as another commentator has noted:

The heterogeneous composition of the civil rights section of the Weimar constitution was abhorred by the founding fathers. The constitutional ideology in post-war Germany was characterized by an aversion to the positivistic and legalistic approach to civil rights predominant among the constitutional lawyers of the Weimar republic. There was a serious revival of the new natural law concept of civil rights.<sup>17</sup>

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<sup>13</sup> Quoted in Gotto, note 11, *supra*, at 89.

<sup>14</sup> Plaen. 2s. 8/9/48, p. 20, quoted in John Ford Golay, *THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY* 176-77 (1958).

<sup>15</sup> Ernst von Hippel, review of *Von Gesetzestaat zum Richterstaat. Recht als Mass der Macht Gedanken uber den demokratischen Rechts- und Socialstaat*, by Rene Marcio, 4 *NATURAL LAW FORUM* 165 (Notre Dame Law School, 1959).

<sup>16</sup> *Id.*

In the years following the ratification of the Basic Law, the Federal Supreme Court (*Bundesgerichtshof*) repeatedly emphasized the fact of an objective, pre-political moral order by referring to "natural law," "moral law," or the "dictates of morality." For example, in 1954, the Court Declared:

The true compelling force of the law consists precisely in its correspondence with the dictates of the moral law. . . . The precepts of the moral law derive their validity from themselves. Their absolute compelling nature not only rests upon a given order of moral values which simply must be accepted, but is founded on a set of moral imperatives which regulate human communal life. These precepts remain in force whether or not they are generally accepted. Their content and meaning does not change simply because opinions about what is right or wrong may vary.<sup>18</sup>

The principle of human dignity, the highest value of the Basic Law, is the ultimate basis of the constitutional order, and the foundation of all guaranteed rights. Furthermore, as previously noted, this dignity should be understood as fundamentally *received*, not *created* by man.<sup>19</sup> This guarantee is supplemented by the right to self fulfillment, or the "free development of his personality," in Article 2, but only "in so far as he does not violate the rights of others or offend against the constitutional order or the moral code."<sup>20</sup> Furthermore, the received nature of the person's dignity, as well as the constitutional emphasis on notions of the common good and the "moral code," indicate that the dignity and related rights are not of an individualistic sort; rather, the freedoms must be exercised within a certain teleological view of the person and society.

Also significant is the general requirement and condition of *equality*, which is both enumerated and presupposed in the German Basic Law. Article 3 of the Basic Law expresses the general principle that all people are equal before the law by providing that no one shall be prejudiced

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<sup>17</sup> von Beyme, note 9, *supra*, at 7.

<sup>18</sup> *Entscheidungen des Bundesgerichtshofs*, 9 JURISTENSEITUNG 509 (1954) cited in Ernst von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 NATURAL LAW FORUM 114-15 (Notre Dame Law School, 1959). Furthermore, although not pointed out by von Hippel, it should be clear that the "given order" of moral values and imperatives to which the Court refers is not an order relying exclusively on what might be called situation-ethics, an order such as that flowing from the Kantian tradition. Such an approach would upset the Rule of Law by offending the treasured constitutional principle of legal certainty. Under this principle, the combined public law and private law effect of the constitution would not be able to accommodate a legal philosophy that is essentially unable to put persons on notice as to what is and is not acceptable under law. The Kantian approach suffers from this deficiency largely because of its emphasis on *intent* rather than *action*. If the morality of an act is said to depend on the hidden will or intent motivating the actor, then the legality of such acts becomes much more difficult to predict and verify.

<sup>19</sup> A dignity which man essentially creates would correspond more to a Kantian notion of human dignity whereby dignity is in large part a product of the proper use of one's freedom.

or favored because of their sex, birth, race, language, national or social origin, faith, religion or political opinions, nor may anyone be discriminated against on account of their disability.<sup>21</sup> The fact that all public authority is said to emanate from the people and must be recognized and approved by them indicates that German political society is, therefore, constituted at least partially by the consent of the German people. Of course, any such consent, to be at all meaningful, presupposes a certain natural equality at a basic level. This is not an egalitarian equality of results, but an equality in dignity by virtue of one's status as person. Moreover, because this equality is a product of the dignity of each person, equality can in no sense be prior to dignity. Rather it must come from an ontological source greater than nature itself--the same source from which dignity is given. If this were not the case, there would be no logical reason for presupposing equality among human beings that have very different characteristics and skills, some undoubtedly more valuable on the mere natural level than others.<sup>22</sup>

The point to be grasped here is that accepting a higher ontological source for equality, and thereby accepting equality itself, brings with it certain other necessary conclusions. Most importantly, it points to how one must interpret the various freedoms provided for in the Basic Law, as well as the "moral code" as that term is used in Article 2. The broader framework sets the parameters for ascertaining when liberty deteriorates into license, and when freedom is abused in such a way as to upset the moral code. When one's dignity and therefore one's equality is understood as grounded in one's creaturely and inferior status vis-à-vis the source of this dignity, then the idea of liberty may never be used to reject or defy those other things universally *given* to nature, such as, the laws of nature, that find their source to be other than nature. Therefore, under the German Basic Law, our equal status as beings with a received dignity and a rational nature would obligate us to be open to, be aware of, and obey the laws of nature, human nature included. As Professor Kommers has pointed out:

To be sure, the Basic Law's list of fundamental rights protects the ideological pluralism and moral diversity of the German people. But some rights, such as that of free development of personality, are limited by the "moral code," as these terms are used within the meaning of Article 2(2), as well as by certain conceptions of man

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<sup>20</sup> GRUNDGESETZ, art. 2, § 1.

<sup>21</sup> See GRUNDGESETZ, art. 3.

<sup>22</sup> Moreover, it would evidence a complete misunderstanding of the source and essence of equality to propose that such varied characteristics and skills should be leveled or homogenized, inevitably leading not to additions for those who are in some sense lacking, but rather only to subtractions from those who possess those things of value.

and society found by the Federal Constitutional Court to be implicit in the constitutional concept of "human dignity". The Constitutional Court itself rejects the notion of a value-neutral state. Instead, . . . it speaks of a constitutional polity deeply committed to an "objective order of values."<sup>23</sup>

As early as 1952, Günter Dürig had noted this objective order of values and its hierarchical structure by distinguishing the dignity of the person recognized in Article 1 from the right to the free development of personality in Article 2.<sup>24</sup> Dürig observed that the notion of dignity is not to be considered a basic right in the same sense as the protection afforded personality in Article 2.<sup>25</sup> Rather, the dignity of the person is a "norm of objective law"<sup>26</sup> that guides and orders the protection of personality, a right contingent on and derived from the dignity of the person. He points out that "person" as that term is used in the Basic Law is an ontological concept of being, whereas "personality" is an axiological concept which is better considered as an attribute or value in the person.<sup>27</sup> In this respect, one can see how the notion of the "person" (and its corollary--dignity) is anterior to and a prerequisite for the protection of "personality."

However far modern German jurisprudence may have drifted from the implications of personal dignity and the natural law principles within and behind the Basic Law, the fact remains that such principles were present and are of continued relevance if one hopes to successfully navigate the waters of a somewhat ambiguous constitutional text. Only by recognizing natural law and an authentic notion of the person, implicit in the Constitution, can judges properly adjudicate between seemingly contradictory rights found in the text.

For example, the Court's 1975 decision on abortion,<sup>28</sup> an issue of obvious concern to religious groups, demonstrated at least to some extent, the basic philosophical framework for prioritizing competing rights. Starting from an analysis of Article 2, Para. 2 of the Basic Law, which

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<sup>23</sup> Donald P. Kommers, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 33, 34 (Duke University Press, 1997)(internal citations omitted).

<sup>24</sup> Günter Dürig, *Die Menschenauffassung des Grundgesetzes*, JURISTISCHE RUNDSCHAU No.7, 260 (Walter de Gruyter & Co., 1952).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (" . . . er ist eine aktuelle Norm des objektiven Rechts.")

<sup>27</sup> *Id.* Dürig was also convinced that the Christian concept of personality was received into the Basic Law. He believed that the basic Christian orientation of the German people, whether they were aware of it or not, led to the reception of this personalist thought. *Id.* at 260. See also, note 12, *supra* (concerning the Christian heritage of the term "person").

<sup>28</sup> Abortion I Case (1975) 39 *BverfGE* I.



provides that "[e]veryone has the right to life and bodily integrity," the Court concluded, partially on the basis of legislative history that referenced the particularly high value placed on human life in reaction to the Nazi experience, that "everyone" included every life-possessing human being, and not merely every "finished" person.<sup>29</sup> The Court's analysis evidenced its commitment to the notion that the Basic Law embodies and reflects an "objective order of values" (*objective Wertordnung*) involving not only defensive rights against the State but a positive obligation incumbent on the State to see that the values are actualized. Because the right to life constitutes a preeminent value within the general constitutional scheme, the State's obligation to protect developing life not only barred direct State action which might infringe on fetal rights; it also implied a duty for the state to protect fetuses from illegal abortions, and--most controversially--to protect the fetus from its own mother. The Court acknowledged that denial of the right to obtain an abortion could result in significant restrictions on the "free unfolding" of the mother's personality (also guaranteed by Article 2 of the Basic Law), but held that in the absence of extenuating circumstances, the fetal right to life outweighed the maternal interest in personal autonomy.<sup>30</sup> Again, as stated in Article 2, the right to "free unfolding of personality" extends "only so far as the rights of others are not injured and the constitutional order and moral law are not infringed."<sup>31</sup> Accordingly, the Court at least attempted to interpret the competing rights within the natural law framework of Article 2.

In more recent times, confusion created by competing rights claims seems to have increased as judges have had less resort to an established constitutional philosophy. This confusion will likely continue in the context of individual rights claims relating to drugs, euthanasia, and various homosexual issues--rights denied by many religious groups on both religious and philosophical grounds.

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<sup>29</sup> It is also interesting to note that the dignity of the person as being integrally linked to the person's social nature would maintain the unity of the Basic Law by pointing out that persons have rights precisely because of their status as persons, and their status as persons is manifested and actualized in part through their relationships with others. *See* note 12, *supra*.

<sup>30</sup> *Id.* The Court also recognized extenuating circumstances under which carrying the pregnancy to term could not fairly be expected of the woman, but in the absence of any such circumstances, the state was obliged to maintain a stance of disapproval toward abortion. Accordingly, an overriding reason was required in order for a pregnancy to be terminated. New German legislation was therefore introduced that allowed abortions only within the first 12 weeks of pregnancy, and dependant on various medical factors. (With the reunification of Germany, abortion law has again been modified to partially accommodate the more liberal laws of the former German Democratic Republic.)

<sup>31</sup> *See* GRUNDGESETZ, art. 2, § 1.

Lastly, from the political side, it should also be noted that the German government has a great deal of power to promote, through its various funding arrangements, certain viewpoints and messages. As pointed out by Ingrid Brunk Wuerth, the Basic Law provides support to religious groups in part because they foster values that the framers considered important to the success of democracy.<sup>32</sup> Today, as religious diversity increases in Germany, and religious groups cannot be classified simply as, for example, predominantly either Protestants or Catholics, the government seems less certain that all religious groups will promote the desired values.<sup>33</sup> These current government concerns were foreshadowed as early as 1975 in a case involving the question of government religious speech in the schools, where the Court noted the cultural and historical significance of the Christian faith and stated that "the affirmation of Christianity refers primarily to the recognition of its influence on culture and education, not to the truth of the faith, and is therefore in this sense justified--also against non-Christians--through the history of western culture."<sup>34</sup> This raises the question of what precisely it is about the predominant groups--Protestants and Catholics--that has resulted in their promotion of values (grounded in faith but often also in philosophy) that work for the benefit of a democratic society. Here, the basic fact that both Protestants and Catholics are Christians, and as such should recognize some of the deeper implications of the term "person,"<sup>35</sup> including its aspect of relatedness to others, cannot be ignored. Nevertheless, recognizing an authentic notion of the person, just like recognizing the existence and authority of natural law, is properly within the domain of philosophy, which can be detached from any discussion about revealed religion.

## **The United States Constitution**

As Germany faces the challenges that come with religious pluralism, the United States is seen to struggle increasingly with the problem of how to include religion in public life.<sup>36</sup> This transition in the United States comes after recognizing that the exclusion of religion from public life improperly disadvantages it vis-à-vis secularism. This realization, made long ago in Germany, but only recently

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<sup>32</sup> See Ingrid Brunk Wuerth, *Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech*, 31 Vand. J. Transnat'l L. 1127, Part IV (Nov. 1998).

<sup>33</sup> See *Id.* at 1147.

<sup>34</sup> 41 BverfGE 29, 64 (1975), as cited in Wuerth, *supra* (citing in part Kommers, *supra*.)

<sup>35</sup> See note 12, *supra*.

<sup>36</sup> Wuerth, note 32, *supra*, at 1131.

in the United States, seems to have brought German and American case law much closer in Establishment Clause matters.<sup>37</sup> But again, in the public debate over morality and law, the question is: the establishment of what? Religion or philosophy?

Although it is commonly argued that the United States Constitution is based on principles deriving much more from the Enlightenment notion of natural rights than from traditional natural law theory, such arguments overlook much significant history. It must be remembered that prior to Jefferson's attempt to win support from the French by, to some extent, casting the Declaration of Independence in French-appealing terms of inalienable rights, the United States legal system was imported from the common law of England, not apart from the influence of the great English jurist William Blackstone and his *Commentaries on the Laws of England*, published between 1765 and 1769.<sup>38</sup> The framers of the American Constitution accepted Blackstone's view of natural law, according to which the validity of all laws derived from the natural law, and that this law, dictated by God himself, is binding all over the globe, in all countries, and at all times.<sup>39</sup> Furthermore, as pointed out by Russell Kirk, the influence of the Anglican divine Richard Hooker was also manifest:

The reality of natural law was taken for granted by the Americans of the Revolutionary era and of the years in which the Constitution was framed and ratified. Generally speaking, theirs was what we may venture to call the Catholic apprehension of natural law, fundamentally. It should be remembered that the Church of England had been the church established by law in most of the Thirteen Colonies; so the natural law teachings of Richard Hooker and other Anglican divines were imparted from American pulpits. It should be remembered, also, that Hooker's *Laws of Ecclesiastical Policy*, with its exposition of natural law, had the endorsement of Pope Clement VIII: "There is no learning that this man hath not searched into," wrote Clement. "This man indeed deserves the name of an author; his books will get reverence by age, for there is in them such seeds of eternity that if the rest be like this, they shall last until the last fire shall consume all learning."<sup>40</sup>

The common law, into which much natural law had entered in England over the centuries, was perhaps the most important vehicle for the transmission of natural law philosophy from England

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<sup>37</sup> *Id.* at 1132.

<sup>38</sup> See Russell Kirk, *Natural Law and the Constitution of the United States*, 69 *Notre Dame L. Rev.* 1035, 1038. (1994).

<sup>39</sup> See *Id.* at 1038-39 (1994). Of Course, although natural law philosophy clearly can be said to be a part of the principles behind the constitution, this is not to say that revealed religion was not also very influential. It has been recognized that "all aspects of the political, constitutional, and philosophical debate were strongly conditioned by an ethics and ontology grounded in the ample range of religious convictions." Ellis Sandoz, *Philosophical and Religious Dimensions of the American Founding*, 30 *Intercollegiate Review* 27 (Spring 1995).

<sup>40</sup> Kirk, note 38, *supra*, at 1038 (internal citations omitted).

to the United States.<sup>41</sup> The natural law orientation received in large part from England is distinguishable from the eighteenth century school of natural rights. Accordingly, as Kirk and others have observed, the natural rights affirmed in the Declaration of Independence cannot be used to inject natural law into the Constitution by making the Declaration a preamble to the Constitution. Nevertheless, the Declaration has been pointed to by some as a reliable source for discerning the original intent of the framers.<sup>42</sup>

In explaining his intentions and sources in drafting the Declaration, Jefferson himself was clear that Locke was only one of many writers considered: "All its [the Declaration's] authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc."<sup>43</sup> It is evident that Jefferson's appeal was fundamentally to the common sense of mankind. Furthermore, "popular sovereignty, the basis of free government, was seen as workable by Jefferson only on the terms that Tocqueville expressed so well when he wrote that the 'Anglo-Americans . . . have been allowed by their circumstances, their origin, their intelligence, and *especially by their morals*, to establish and maintain the sovereignty of the people."<sup>44</sup>

The Federalist Papers may be yet a better source for discerning the original intent of the framers. Madison's language in Federalist No. 51 explains the constitutional innovations of separation of powers and system of checks and balances as the way to attain a government of laws and not of men. In Federalist No. 51, Madison states that "experience has taught mankind the necessity of auxiliary precautions."<sup>45</sup> As Ellis Sandoz put it:

*Experience*, illuminating the present and future by the light and lessons of the past, is the cardinal touchstone of validity. It also is the one that indelibly distinguishes the

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<sup>41</sup> *Id.* at 1044-45.

<sup>42</sup> See, e.g., Harry V. Jaffa, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION, A DISPUTED QUESTION (Regnery Publishing: 1994).

<sup>43</sup> Thomas Jefferson, Letter to Henry Lee, May 8, 1825, in Morton Frisch and Richard Stevens, editors, *The Political Thought of American Statesmen* (Itasca, Illinois: 1973), p. 12.

<sup>44</sup> Walter Nicgorski, *The Significance of the Non-Lockean Heritage of the Declaration of Independence*, 21 AM. J. JURIS. 156, 169-70 (1976) (internal citation omitted). Nicgorski also cites similar statements by Samuel Adams ("neither the wisest constitution nor the wisest laws will secure liberty and happiness of a people whose manners are universally corrupt") and notes that it has been shown that John Adams "found the basis for any law's validity in 'principles of justice,' and that John Adams defended the 'transcendent theonomous character of natural law.'" *Id.* at 172.

<sup>45</sup> As cited in Sandoz, note 39, *supra*, at 28-29.

American Founders from those they ironically helped greatly to inspire, the soon-to-appear Jacobin revolutionaries of France inebriated with utopian rationalism. . . . In August, 1787, during the Convention, John Dickinson famously observed that "experience must be our only guide. Reason may mislead us." . . . The rule of law grounded in both natural and historical jurisprudence distinguishes American constitutionalism, as does also a political order devoted to *salus populi* and to the protection of every individual person's life, liberty, and property within the limits of possibility. . . . What, indeed, may be possible can be decided only by prudential judgment anchored in experience.<sup>46</sup>

The emphasis on experience as a check against the possible abuses of reason is especially significant because it disqualifies many Enlightenment notions of natural law which tended to postulate "natural" principles without much, if any, reference to nature or experience. As Sandoz points out, however, the jurisprudence underlying the U.S. Constitution utilizes both reason and experience, the natural and the historical. This jurisprudence recognizes the existence of a higher law than the Constitution, keeping in mind that the recognition of this higher law does not of itself justify an appeal to it *against* the Constitution. However, as Kirk observed, we are safe in saying that the framers believed in the reality of natural law and had no intention of contravening it by the document they drafted in Philadelphia; nor did anyone suggest during the debates over ratification that the Constitution might in any way conflict with the truths of natural law.<sup>47</sup>

To the extent that the American Constitution was born out of the natural rights philosophy of John Locke rather than the more traditional natural law theories, even Locke's philosophy recognized that natural rights were limited by natural law. Locke's social contract presupposed moral citizens and the idea that people can regulate their own lives.<sup>48</sup> It was Locke who wrote: "But Freedom is not, as we are told, *A Liberty for every Man to do as he lists*: . . . But a *Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions . . . within the Allowance of those laws under which he is. . . ."<sup>49</sup> Also: "The *Natural Liberty* of Man is to be free from any Superior Power on Earth . . . but to have only the Law of Nature for his Rule."<sup>50</sup>

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<sup>46</sup> Sandoz, note 39, *supra*, at 29 (internal citations omitted).

<sup>47</sup> Kirk, note 38, *supra*, at 1039.

<sup>48</sup> Locke, fairly read, does not counsel unrestrained pursuit of self-interest, but instead urges obedience to natural law, which, through the exercise of "Reason," the individual is able to discern. (See J.Locke, *Essays on the Law of Nature* Nos. 6-8 (W. von Leyden ed. 1954); J.Locke, *The Second Treatise of Government*, in *Two Treatises of Government* § 42, at 188 (P.Laslett ed. 1970) (discussing the individual's obligation to assist persons in need).

<sup>49</sup> John Locke, *Two Treatises of Government* 324 (Peter Laslett ed., 2d ed. 1967) (bk. II, Ch. VI, § 57).

<sup>50</sup> *Id.* at 301 (bk. II, ch.IV, § 22).

Modern natural rights theories, although less commonly associated with religion than medieval natural law philosophy, nevertheless stand on the shoulders of the medieval synthesis of faith and reason. In the ancient world, the notion of human freedom was lacking. In that world, the ruler had unlimited power, both temporal and spiritual. Each human being was seen as part of the state and subservient to it. The individual was a mere *part* that together with other parts, made up the more important *whole*.<sup>51</sup> The Christian era changed this worldview. With Christianity, not only is nature ordered and created by God, but since God chose to become man, the very place of the human person, and the connotation of the term "person" itself,<sup>52</sup> was elevated to a new stature. No longer could the State be considered superior to the dignity of the human person.<sup>53</sup> In this sense, modern natural right theories, including Locke's notion of natural rights, can be said to be historically dependent on Christianity's elevation of the material individual to the status of spiritual person.

Perhaps the most fundamental principle of the United States Constitution is that the source of legitimate political authority is found in the consent of the governed. The framers associated rights with consent because they believed, like Locke, that all men are created equal.<sup>54</sup> However, as Charles Kesler and others have observed, the recognition that all men are created equal and free and thus have rights vis-à-vis one another does not change the fact that what they can legitimately do with those rights is limited by the law of their nature.<sup>55</sup> Nevertheless, it is also true that the people have not consented to be ruled by natural law in the abstract; they have consented only to be ruled by the Constitution.<sup>56</sup> The Constitution of the United States was not meant to be a license for judges to deduce or invent natural rights as an alternative to following the strict demands of the text. It is in precisely such situations that the text and its principles, including its natural law basis tends to be betrayed in favor one judge's views about natural justice in a particular factual setting. Left to

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<sup>51</sup> As Thomas Pangle rightly points out, concern for certain fundamental rights does figure in classical republican political life and theory. However, this is not the chief concern of the classic republic. Furthermore, the rights were mainly rights of *citizens* or specific groups of citizens (e.g., classes, neighborhoods, or families). Thomas L. Pangle, *The Classical Challenge to the American Constitution*, 66 Chi.-Kent L. Rev. 145 (1990).

<sup>52</sup> See note 12, *supra*.

<sup>53</sup> And here arises the logical necessity of church autonomy in relation to the State.

<sup>54</sup> The source and implications of equality are not specific to geography or nationality, whether the analysis is under the German Constitution or that of the United States. See *supra*, p. 7-8 (discussing the nature of constitutional equality).

<sup>55</sup> Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 S. CAL. INTERDIS. L.J. 549, 552 (Summer 1996).

<sup>56</sup> See *Id.* at 558.

their several private judgments about what is "natural," it is inevitable that some judges would do harm to both the person and the polity.

One of the clearest examples of purported natural rights, or at least constitutional rights, invented by judges would be the "right to privacy" *as articulated* by the Supreme Court in its *Roe v. Wade* abortion decision, where the right amounted to a declaration of the "natural rights" of the mother to destroy her child. Such individualistic "lifestyle" natural rights are bound to flow from the pens of judges if they are not constrained by the more substantial notions of natural law and natural rights intended by the framers. Even with such constraints however, judges must exercise prudence in appealing to natural law principles. Even authentic notions of natural law and natural rights may only be properly appealed to when unavoidable ambiguities exist in the constitutional text, and only insofar as these ideas were a component of the original intent of the framers.<sup>57</sup>

As pointed out by Charles Kesler, the original intent of the framers is the text and its principles. He laments, however, that

some conservatives admit these points and agree that citizens and statesmen should be versed in natural law principles, but maintain that judges should be legal positivists. This suggestion is plagued by at least three major difficulties. One is that it neglects the teaching function of the courts and judges. Their decisions, not to mention their speeches and writings off the bench, are imbibed by lawyers, professors, citizens, students, and politicians, who risk believing the judges when they proclaim that there is no right and wrong but what believing makes it so. Second, the positivist judge may commit injustice when faced with cases, for example, where the meaning of "due process," "equal protection," and even "person" turns on the natural law principles informing the Constitution. *Dred Scott* was such a case; *Plessy v. Ferguson* and the *Bakke* case, too. Third, for a related reason, the positivist judge is but a lukewarm friend of the limited Constitution. His rule of thumb is to defer to legislative or popular majorities whenever possible, which renders him a weak defender of the Constitution against such majorities, and a poor champion of private rights, to boot.<sup>58</sup>

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<sup>57</sup> The misuse of natural law jurisprudence has often been attributed to activist judges who speak of dignity in the abstract as a means of achieving some purported public policy objective. In theory, the problem with this tendency is clear, namely, judges are usurping the power of the legislature. In practice, the problem is felt when the principles and objectives of "public policy" are detached from the principles and objectives of the Constitution. Today, it is quite rare to hear public policy articulated by judges in terms of historically grounded principles, but this was not always the case. To cite just one example, a New York appellate court in 1918 explained that "'public policy' in conflicts of law doctrine has been said to be 'some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted *tradition of the commonweal*.'" *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (Ct.App.1918).

<sup>58</sup> Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 S. CAL. INTERDIS. L.J. 549, 564 (Summer 1996).

Clearly, one runs into problems when either of the extreme positions is taken, whether strict judicial positivism, or unrestrained appeal to purported natural law principles which are not present in or behind the constitutional text. The middle position would seem to require both courage and prudence on the part of the judge.

## **Religion and Philosophy Revisited**

Thus far, we have been dealing with three distinct topics: (1) the distinction between religion and philosophy; (2) the historical position of philosophy and, to some extent, religion in the constitutions of Germany and the United States; and (3) the content of philosophy and, to some extent, religion insofar as they relate to these constitutions.

We now turn to the question of how all of these topics relate to the autonomy of religious organizations and the freedom of these organizations and their members. In order to do this, we should look once again to the issue of defining religion. In many countries today, there has been a tendency to dilute the definition of religion and not distinguish it from terms such as "thought," "conscience," or "conviction."<sup>59</sup> This broadened use of the term brings with it various problems. First, it has the capacity to taint both religion and philosophy. On the one hand, essential aspects of religion, or at least some religions, may be misunderstood to be merely a product of thought, conscience, or conviction. This would present no problems for the unbeliever, but it is for the believer to define his religion, not the unbeliever. On the other hand, given the common Enlightenment based perception that religion is somehow not compatible with the language of reason, the inclusion of thought, conscience, or conviction in this bundle of so-called irrationality leaves room only for a very narrow and limited definition of "reason" that may "respectably" be engaged in public debates.<sup>60</sup> The limited breadth of reason which remains is so narrow that it is unable to justify moral claims with more than the most basic and primitive concepts, such as "survival."

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<sup>59</sup> The implications vary depending on which of these terms is used. "Conscience," for example, has religious overtones which the terms "thought" and "conviction" do not necessarily have. "Conscience" has traditionally implied a relationship to something in some sense apart from and greater than oneself which is ultimately the Source of one's moral inclinations.

<sup>60</sup> Ironically and unfortunately, "thought," "conscience" or "conviction" become in effect tainted by association with religion.



Furthermore, under a broadened use of the terms "faith" or "religion," anyone, for virtually any reason, would be in a position to challenge generally applicable laws on the basis that they conflict with tenets or norms of their "faith" or their "thought," "conscience" or "conviction." The potential for such a situation can be seen particularly in those countries where the secular humanists, as an organized and united group, claim to be a legitimate "faith community."<sup>61</sup> In such situations, the secular humanists perhaps conveniently forget that the basis for religious freedom and autonomy, like the ultimate basis for all human rights, is inextricably related to the person's received dignity, by which he is more than a mere part of the material whole, the state. Such groups could further their credibility by furthering their consistency and accordingly either redefine what it means to be a secular humanist, i.e., including a belief in an ontologically superior right-giving or dignity-giving Source, or simply give up their pretensions to having any coherent free exercise or autonomy rights as a faith community, *per se*.

Once religion is properly distinguished, without necessarily being separated, from philosophy, we can then properly address the relation and interaction between the religious and the non-religious, or what has been referred to as the church and the state. The idea that both the state and the faith communities, as different types of associations, are sovereign in their own sphere is, at one level, a logical corollary to the respective material and spiritual domains with which the two types of entities are concerned. However, at a deeper level, if the distinction between spheres grows into a strict separation of spheres, one may see the problem of a double edged sword, carving out the necessary space for religious freedom and autonomy, but in turn also cutting religious communities out of the public arena, removing them as a group capable of influencing either politics or law. Although some dualistically inclined religions or sects may voluntarily exclude themselves from all things "of the world,"<sup>62</sup> most religious people recognize a relationship between the material and the spiritual and seek to order their material lives in a way that will advance, or at least not impair, their spiritual lives. The involvement of religious persons and organizations in politics and law

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<sup>61</sup> This appears to have occurred in Norway in recent times.

<sup>62</sup> Such tendencies seem to presuppose some type of Manichaeian evil creator of this world and a benevolent supreme god ruling some other world. With regard to Christianity, such approaches, which may be linked to gnosticism in one form or another, are contrary to the Council of Chalcedon wherein nature, and certainly human nature, was validated with the clarification that Jesus Christ was fully human and fully divine. Many Christian sects, while not tending towards Manichaeism, may tend instead toward Deism, whereby, although the God of this world is good, there is an unbridgeable distance between God and the world; and the world, desacralized, is mere matter, a tool for manipulation, and as such is considered to be irrelevant to the spiritual life of individual Christians and others.

is especially appropriate when these persons or groups use the language of reason and philosophy, particularly those philosophies upon which their countries were built. With this in mind, it would seem that any theory of sphere sovereignty put forward by members of a faith community should take precautions against the development of a trickle-down effect which, due to the implied strict separation between the spiritual and material realms, results in political complacency on the part of its lay members.

By way of illustration, in the United States, a public controversy recently arose over a proposed Gay Rights law in the State of Maryland, a proposal which ultimately did not survive deliberations in the Maryland Senate.<sup>63</sup> The bill would have categorically required individuals and businesses to hire gays or to rent apartments or homes to them. Opponents of the bill were labeled by the Governor of Maryland as being "mean-spirited," "hateful," and "divisive."<sup>64</sup> In the public and legislative debates over this proposed law, the language of natural law was not to be heard. Rather, in this situation and others like it, one could only expect to hear about exclusions from the generally applicable law for the so-called "irrational religious." This illustrates how, as a general rule, it is now presupposed that freedom is no longer limited by reason, except maybe in a more narrow and utilitarian sense of the word. It seems that freedom can now only be limited, if at all, by merely accommodating those holding "irrational" religious convictions. Of course, a silence on the part of religious citizens is precisely what advocates of such proposed laws desire. The silence, however, pertains to more than their religious convictions. It is also an intellectual silence. In the effort to keep religion, *per se*, out of the public sphere, philosophy and reason seem to have been banished as well.

It is the status of the person *qua* person that provides, on the one hand, the basis for, and on the other hand, the protection from, state regulation of human behavior, whether such behavior is religiously motivated or not. The person *qua* person is both in and above the state. As materially situated within the state, the person's actions can be regulated to some extent, for example, for the protection of the public's health or welfare. At the same time, the person's spiritual status as above or outside the state provides the basis for church autonomy, religious freedom, and a variety of other rights. When engaging in activities where the government also has a legitimate interest, religious

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<sup>63</sup> See Robert E. Pierre, *Glendening's Gay Rights Bill Can't Get Past Senate Panel*, The Washington Post, Tuesday, April 13, 1999, A05.

organizations must expect some minimal regulation, notwithstanding their essential freedom. Government may regulate with the justification of protecting the public's health and welfare, but doing so presupposes some substantive definition of "public health and welfare."

Article Nine of the European Convention on Human Rights provides that the "freedom to manifest one's religion or beliefs" may be limited based on the "public order, health or morals." The Article seems to imply that religious morality *could* conflict with the morality of the polity or the state. The resolution of such conflicts would depend in part on the extent to which each party's moral position is grounded in reason, will, religious conviction, or some combination thereof. Further problems arise when one seeks to define the scope of reason, *per se*. Those excluding all metaphysics from the scope of reason, for example, will generally dispense with the aforementioned notions of natural law and personalism. They will instead derive their politics strictly from the combined and competing wills of the citizens who enter into a social contract to secure their survival. Such individuals or governments use reason in a very narrow sense, merely for advocating their position, which is admittedly based on their will, and rarely if ever claiming to be objectively, rather than subjectively, correct.<sup>65</sup> So, if "public order, health or morals" can legitimately override religious freedom in some circumstances, on what basis can it do so? The modern state using the so-called narrow definition of reason would claim the right to override religious freedom if it is contrary to the "public order, health or morals" according to the will of the majority. This approach places considerable trust in the will of the majority, seemingly ignoring many lessons of history, including twentieth century European history. A more sensible alternative would be that the person, group, or state able to justify its position based on more than its will, but adding to that a substantive justification grounded in reason, thus allowing for a more coherent and constructive public debate on the issue, is the party that should have the presumption of propriety in such conflicts. Moreover, a legal presumption of sorts ought to be gained by the party whose reason is in accord with the founding principles informing the constitutional text. In this way, the element of reason would be the tie-breaker in many conflicts between religious freedom and "public order, health or morals." But again, the relevant definition of reason here must be broad enough to articulate a substantive basis for religious freedom and church autonomy. In other words, the articulation of the person *qua*

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<sup>64</sup> *Id.*

<sup>65</sup> Fortunately, this is not the view of reason taken by the framers of the constitutions of either Germany or the United States.

person, without which religious rights cannot be reliably defended, cannot be dismissed as grounded in something other than reason. Once this is agreed to, the debate can begin with regard to any particular action, right, or duty claimed by or on behalf of a person, religious community or state.

It is perhaps because the essential terms of the debate have not been adequately defined or even discussed, that the above referenced debate has yet to begin. In the United States, this absence of substantive debate could be seen in, among other examples, the City of San Francisco's 1997 battle with the Archdiocese of San Francisco over a local "domestic-partners benefits" law.<sup>66</sup> The law required all companies doing business with the city to treat their married and unmarried employees equally, extending the same health, pension and other benefits to both spouses and domestic partners, homosexual or heterosexual. The archdiocese argued that if it complied with the law, some people would assume that it was equating domestic partnerships with traditional marriage, something they were unwilling to do.<sup>67</sup> The city countered that the archdiocese contracts with the city not as a religious institution, but as a service provider, and therefore no "religious exclusion" was appropriate. The non-religious aspects of the inherent constitutional conflict between the supposed rights of domestic partners and the rights of a traditional moral community were largely ignored. This controversy, however, should have been a welcome opportunity to conduct an interpretive analysis of the respective rights within the context of the original intent of the framers.

A similar problem could be seen in Georgetown University's 1987 confrontation with the law of the District of Columbia forbidding any type of discrimination on the basis of homosexuality.<sup>68</sup> As a Roman Catholic university, Georgetown refused to officially recognize a student gay-rights group. Its religious, and specifically Catholic, identity did not allow it to maintain a position of support or even neutrality toward homosexuality as a legitimate sexual alternative. This refusal was at odds with District of Columbia law which was held to override Georgetown's right to enforce its religious morality even within a private religious school. Again, in situations such as this, one cannot help but wonder if the framers would have intended that Georgetown be kept from conforming its rules and policies to the requirements of the natural law. One might further speculate that if the framers were to sit as judges in this case, their interpretation and application of the District of

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<sup>66</sup> See Peter S. Goodman, *Church, City Battling Over Domestic Partner Law*, The Washington Post, February 2, 1997, A1. A compromise was eventually reached between the archdiocese and the city.

<sup>67</sup> *Id.*

<sup>68</sup> *Gay Rights Coalition of Georgetown Univ. Law Ctr. V. Georgetown Univ.*, 536 A.2d 1 (D.C.App. 1987).

Columbia law would have been quite different from that of the D.C. appellate court. It is likely that the framers' reasoning would note that it is in the very nature of government to make distinctions, and that the relevant question is whether any distinction, as applied, is invidiously unjust.<sup>69</sup>

Similar issues are presented in the case of Catholic hospitals which, by virtue of their Catholic identity, refuse to provide abortion services or in any way condone contraceptive practices.<sup>70</sup> While religious groups would see this as a free exercise issue,<sup>71</sup> certain advocates of women's rights would argue that the receipt of government funds by such hospitals constitutes an impermissible establishment of religion if such institutions are not forced to provide abortion or other services in accordance with purported rights recognized by federal courts. Here again, if the argument by religious groups is cast in term of moral convictions grounded in an authentic philosophy of the human person or natural law, rooted in reason rather than revelation, and historically present behind the constitutional text, the establishment accusation should be without basis. Rather than provide an exception for those holding religious beliefs,<sup>72</sup> the better, yet more difficult approach would be to revisit the laws and decisions declaring the existence of the constitutionally suspect rights (e.g., abortion), and restate the law in a manner consistent with the original intent of the

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<sup>69</sup> Under the framers' reasoning, a legal preference given to heterosexual marriage (and institutions advancing this model), would be justified because, apart from other natural law arguments, it benefits society by strengthening the basic unit of society, the family, and because it is good for children.

<sup>70</sup> See, e.g., *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9<sup>th</sup> Cir. 1974); See generally Lisa C. Ikemoto, *When a Hospital Becomes Catholic*, 47 MERCER L. REV. 1087 (Summer 1996) (arguing against the elimination of "women's services.");

<sup>71</sup> A more interesting situation arises when religious groups are not merely on the defensive trying to salvage their rights to conduct their organizations in a manner consistent with their beliefs, but rather when religious groups go on the offensive by putting their voice into the public arena and actively promoting legal or political positions. Most fundamentally, this is an issue concerning "free speech." See Charles R. Spies, Report to the Fair Government Foundation on Regulation of Issue Advocacy by Sec. 501 (c)(3) Organizations, 1999. In the United States, the free speech rights of religious groups have been limited in at least two ways: first, by the regulations of the Federal Election Commission, and second, by the Internal Revenue Service. *Id.* The IRS, which has declared a "zero tolerance for charitable groups involved in politics," is especially problematic for religious groups wishing to voice their opinion on political questions. *Id.* Furthermore, as the "power to tax is the power to destroy," the danger exists, despite limited protections for qualifying "churches," of ideologically motivated tax audits and related evaluations of the content of issue-oriented speech by religious organizations receiving government tax benefits under Section 501(c)3 of the IRS Code. *Id.* Recent cases have illustrated that practices such as the distribution of "voter guides" may place the tax status of religious organizations at risk. *Id.* These cases raise the compelling question of whether a religious organization's non-profit character, and consequent tax benefits, should automatically disenfranchise it from the public arena and the battleground of political ideas. If anything, such a position would only handicap religious organizations and tend toward the establishment of secular humanism, atheism, or whatever else remains.

<sup>72</sup> See, e.g., 42 USC § 300a-7 granting individuals the right to non-performance of certain medical procedures if contrary to "religious belief or moral conviction." By adding "moral conviction," Congress effectively blurred the line between religion, *per se*, and what it had previously referred to in its 1948 amendment to the Selective Training and Service Act as "essentially political, sociological or philosophical views or a merely personal moral code." Under 42 USC § 300a-7, any of these justifications would appear to be a sufficient basis for not

framers.<sup>73</sup> This of course requires judges educated enough and courageous enough to understand the philosophies underlying the text of the constitution, and then to act on the text as understood.

The question arises as to whether there should ever be more than a superficial conflict between free exercise and autonomy rights and secular human rights. Inevitably, if governments believe that such conflicts will arise, they will increasingly be inclined to carve a human rights exception out of religious free exercise rights, thus putting into question the security of free exercise rights. This of course raises further questions about proper jurisdictions and spheres of authority, as well as the question of why governments often promote religion in the first place.

I have suggested that reason, in the broader and more complete sense of the word, be the judge in situations where rights conflict. As I have attempted to show, this is also the sense of the word "reason" understood and used by the framers of the constitutions of Germany and the United States. On the surface, the argument for reason as judge might seem vulnerable to the allegation that many of the norms of action flowing from religion are not derived from reason, and therefore are not necessarily compatible with reason. For example, one might cite the issue of the non-ordination of women in the Catholic Church as a norm of action which is not in the first instance derived from reason. Here, it is worth noting that, at present, most countries continue to respect the autonomy of religious organizations with regard to their internal policies and structures. However, as the international human rights lobby gains power, and if control of this group continues to move into secular, and to some extent, anti-religious hands, it can be assumed that the day will come when religious organizations are susceptible to state coercion with regard to rights deemed more fundamental than religious rights. Under such a scenario, internal church matters such as the non-ordination of women in the Catholic Church would be vulnerable to attack by external forces. In the face of such threats to religious autonomy, one should not back away from the proposition that reason is capable of adjudicating between the religious rights and secular human rights. In the example of an hypothetical legal attack against the Catholic Church for violations of a secular human right concerning equality between the sexes, the Church's position would survive an analysis grounded in reason, despite the fact that the source of the Church's position transcends reason, i.e.,

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complying with federal law.

<sup>73</sup> (recalling that "the original intent of the framers is the text and its principles," *supra*, p. 16, citing Charles Kesler)

it is grounded in revelation and the tradition which carries this revelation through history. Here, tradition is distinguished from reason, but not unreasonable.<sup>74</sup>

## Conclusion

In some ways, it may seem quite unrealistic to expect judges, or even legislatures, to be guided in their textual analysis and interpretations by the original intent of the framers, considering how far many of them have drifted from such concerns. Add to that, the fact that many judges simply do not agree with many of the original natural law principles, and the future of reason might seem even more bleak. However, if constitutions truly are "evolving," (and evolving away from original intent) as supposed by some, why have a written constitution at all? Why not simply be guided by custom or by the trusted intelligence and benevolence of judges? The point is that if rights are subject to "evolution," in the hands of creative judges, they would be no more secure in a written constitution than in an unwritten one. In either case, the judge's freedom is not really constrained. Moreover, the separation of powers system created by the framers of both constitutions, in Germany and the United States, did not contemplate that politics and "will" would replace law and "reason." Therefore, an assumption that the constitutions must always mirror the will of the people (as interpreted by judges) would in turn undermine the very purpose of having a constitution and a judicial branch of government.

In order to make the constitutions of both Germany and the United States viable instruments capable of fulfilling their purposes as stated in their respective preambles and formative documents, the question of constitutional morality cannot be ignored. In arguments over rights, whether labeled human rights or natural rights, the constitutional text is rendered powerless without the interpretive assistance of the framers' original understanding of law as grounded in natural law, and the corresponding implications for the rights of human "persons." Moreover, ascertaining natural law is not entirely dependent on theoretical or abstract reasoning; rather it is a function of practical reason

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<sup>74</sup> In other words, the believer in Christianity (as a revealed, historical religion), depends on tradition (either written or spoken) to know the historical revelation, and hence the religion. As St. Paul said, "faith comes from what is heard." Rom. 10:17. Given that it is a revealed religion with its founding events situated in time, tradition then becomes a requirement of reason for the believer. Because it is a product of tradition, the non-ordination of women cannot be said to be unreasonable. It may be unequal in some sense, but given the aforementioned basis of equality that is and must be at the root of most constitutional provisions concerning equality, there is nothing about this superficial inequality that necessarily offends dignity. This is even more the case because religious organizations are voluntary associations and members are free to leave and join a different religious organization, or none at all, if they are so inclined.

and practical agreement, thus rendering it feasible as a practical matter. Whereas Thomas Jefferson spoke of the "inherited sentiments" of mankind, St. Thomas Aquinas would speak of natural law as the actual working principles of practical reason. First, an apprehension of "the good" comes by way of practical reason. Then, this perception of "the good" can be checked against the lessons of history and the "inherited sentiments," which will generally separate those inclinations truly conducive to man's good from whatever warped inclinations of the purported good may be advocated from time to time. These are first and foremost philosophical arguments, grounded in the original intent and philosophy of the framers of the constitutions of Germany and the United States. Religious persons and organizations have as much of a right to invoke these arguments as any other group in society, and furthermore, their interest in doing so is perhaps greater than any other.