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Jehovah’s Witnesses v. Land Berlin: Requiring Religious Communities Seeking Public Corporation Status in Germany to Satisfy the “Meaning and Purpose of Corporation Status” Test

I. INTRODUCTION

Since 1949, Germany has had a strong commitment to neutrality in church-state relations.¹ Such a commitment to neutrality prevents the German government from being “identified with an [established] Church” and from taking “decisive action in the affairs of religious communities.”² In contrast to the strong separationist mold of American church-state relations,³ the German neutrality principle still allows a strong form of cooperation between the government and certain religious communities⁴ in Germany.⁵

This cooperation between the German government and certain religious communities has resulted in a two-tiered church-state structure in Germany.⁶ At one level, religious communi

1. See Gerhard Robbers, Minority Churches in Germany, 10 EUR. CONSORTIUM FOR CHURCH-STATE REL., 153, 156 (stating that the German Basic Law of 1949 obliges the state to “complete neutrality”).
2. Gerhard Robbers, State and Church in Germany, in STATE AND CHURCH IN THE EUROPEAN UNION 57, 60 (Gerhard Robbers ed., 1996) (stating that the Basic Law, adopted in 1949, structured the German state-church system around neutrality, tolerance, and parity); see also GRUNDEGESETZ [Constitution] [GG] art. 137(1) and (3) (F.R.G.).
4. See Martin Heckel, The Impact of Religious Rules on Public Life in Germany, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 191, 201 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (“[T]he [German] constitution does not refer to ‘the Church,’ but speaks simply of ‘religious communities’.”).
5. See Robbers, supra note 2, at 60 (describing Germany’s church-state system, in comparison with other European countries, as “a middle of the road approach between that of having a State Church and having a strict separation between Church and State”).
6. See id. at 61-62 (“The religious communities with large memberships in Germany, but also a considerable number of the smaller religious communities, have the status of public corporations. . . . Other religious communities receive their legal
ties can be recognized as private organizations under private law. Private organization status is relatively easy to obtain and entitles a religious community to religious freedom protections under the German constitution. At the next level, religious communities can apply for and obtain public corporation status under public law. In order for a religious community to obtain public corporation status, it must satisfy a permanency requirement and demonstrate Rechtstreue (loyalty to the law). Public corporation status is more difficult to obtain than private organization status because it entitles the religious community not only to the religious freedoms guaranteed under the German constitution but also to numerous other privileges from the German government.

Because public corporation status confers extensive privileges and prestige on qualifying religious communities, the Jehovah's Witnesses (hereinafter “Witnesses”) have sought to...
obtain public corporation status in Germany. Most recently, Land Berlin (i.e., the State of Berlin, which is structurally similar to a state in the United States) denied the Witnesses’ request for public corporation status. Subsequently the Federal Administrative Court of Germany, on June 22, 1995, agreed with Land Berlin that the Witnesses were not entitled to public corporation status. Although the court admitted that the Witnesses had met the “permanency” requirement under Articles 137(5) and 140 of the Basic Law and that the Witnesses were Rechtstreue (loyal to the law), the court denied the Witnesses public corporation status because they failed to meet a hitherto unheard of “meaning and purpose of a corporation” test. The constitutional issues raised by the Federal Administrative Court’s decision are now being appealed to Germany’s Federal Constitutional Court.

This Note examines the Federal Administrative Court’s decision, Jehovah’s Witnesses v. Land Berlin. Part II provides the background of religious freedom and separation of church and state in Germany. Part III contains the facts of the Jehovah’s Witnesses case and a detailed paraphrasing of the court’s reasoning. Finally, Part IV analyzes the reasoning of the court. This Note concludes that the Federal Administrative Court erred in applying the “meaning and purpose of corporation status” test; instead, the court should have deemed it sufficient that the Witnesses had met both the constitutional
"permanency" and the Rechtstreue (loyalty to the law) requirements.

II. Background

In the post-World War II era, Germany—in part because of the intense desire to distance itself from the tragic events of the National Socialist period—has typically gone the extra mile in protecting human rights.\(^{20}\) In particular, Germany has established an enviable record in its protection of religious freedom. This section of the Note will examine the establishment and current state of religious freedom and church-state relations in Germany. In addition, this section will briefly examine pertinent religious doctrines of the Witnesses and their history in Germany.

A. Religious Freedom in Germany

In keeping with the expansion of religious freedoms throughout the world,\(^{21}\) Germany’s law on religious freedom is “liberal in principle and tries to avoid the constraints of anti-religious radicalism.”\(^{22}\) Beginning in 1919, Germany ratified the so-called Weimar Constitution, which included five articles protecting religious freedom.\(^{23}\) These articles were later

\(^{20}\) See Kommers, supra note 3, at 298. Kommers wrote:

The Basic Law places human dignity at the center of its scheme of constitutional values. Article I (1) declares: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority." Paragraph 2 underlines the inseparability of human dignity and basic rights: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world."

Thus basic rights and human dignity as a normative concept embrace one another in German constitutional law.

\(^{21}\) See Durham, supra note 11, at 3.


\(^{23}\) See Grundgesetz [GG] art. 136-139, 141 (F.R.G.). The pertinent Article for
incorporated into the German Grundgesetz (i.e., the Basic Law or Constitution) of 1949 by Article 140.24 The centerpiece of religious protectionism in the 1949 Basic Law is Article 4, which reads: “(1) Freedom of faith, of conscience, and of creed, religious or ideological, shall be inviolable. (2) The undisturbed practice of religion is guaranteed. (3) No one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.”25

Before a religion and its members can enjoy the religious freedom guarantees of Articles 4 and 140, however, it must first be classified as a religious community. It is the right and duty of the state to make the final determination of whether a particular organization is a religion.26 In doing so, the state is “bound” by that religious community’s “definitions and understanding of their [own] ‘belief,’ ‘confession,’ and ‘religious practice.’”27 On the other side, the qualifying religious

\[\text{id. at art. 137.}\]

24. Article 140 states that “The provisions of Articles 136, 137, 138, 139, and 141 of the German Constitution of August 11, 1919, shall be an integral part of this Basic Law.” \text{id. at art. 140.}\n
25. \text{id. at art. 4.}\n
26. \text{See Heckel, supra note 4, at 203.}\n
27. \text{id. at 204.}\n
community has “to be in fact by its spiritual contents and its outer appearance a religion and a religious community.”

B. Church-State Relations in Germany

1. Cooperation between the church and state, and the principles of neutrality, tolerance, and parity

As mentioned in the introduction, Germany is widely known as a “cooperationist regime.” In other words, the Basic Law separates church from state, but the government still cooperates with religious communities in important ways. Cooperation is “structured around three basic principles: neutrality, tolerance, and parity.” Neutrality requires that the state not be partial towards any one religious community nor pass judgment on that community’s religious beliefs. Tolerance requires the state to “maintain a sphere of positive tolerance that makes room for the religious needs of the society.” Finally, parity obligates the state to “treat equally all religious communities.”

2. The two-tiered structure of church-state relations

Although every religious community qualifies for protection under Article 4 and is thereby treated with neutrality, tolerance, and parity by the state, a religious community that does not qualify for corporation status does not enjoy the same state-conferred privileges that qualifying religious communities do. In fact, members of many minority religions often feel like second-class citizens because the state can “treat or support

28. Robbers, supra note 1, at 166.
29. See supra note 5 and accompanying text; see also Durham, supra note 11, at 20.
30. See Robbers, supra note 2, at 60.
31. Id.
32. See id. (”Neutrality therefore means, more than anything else, non-intervention: the State is not allowed to take decisive action in the affairs of religious communities.”).
33. Id. The phrase “make room for” is an awkward translation from the German word Einräumung. It essentially means “accommodation.”
34. Id.
35. See Durham, supra note 11, at 24 ("[T]here is always a sense in [cooperationist] regimes that smaller religious communities have a kind of second-class status, and to the extent that public funds are directly supporting programs of major churches, there is a sense that members of religious minorities are being
[religious communities] differently according to their secular performance."\(^{36}\) In other words, religious communities that have a significant impact on society—those which build and maintain hospitals, for example—may receive special treatment from the government.

In theory, the state does not decide which religious communities will be given preferential treatment under the Basic Law. Instead, when a religious community obtains the valid status of a religion under Article 4, the community may choose between one of two classifications: a private society under private law\(^ {37}\) or a public corporation under public law.\(^ {38}\) a. Private society under private law. A large number of minority religions in Germany have the status of a private society under private law.\(^ {39}\) To obtain this status, an organization must satisfy four requirements: (1) the organization must have at least two members and be founded with long-lasting goals; (2) the organization must comply with the constitutional order; (3) in accordance with the words “religious community,” the organization’s cause and purpose must create a common religion for its members; and (4) the organization must intend to perform its tasks thoroughly.\(^ {40}\) As for deciding who is entitled to the status of a private society under civil law, the German government and, if necessary, the German courts, make the final determination.\(^ {41}\) When a religious community obtains the status of a private society under private law, the German government guarantees both freedom of faith and that “the peculiarities of a religion must be taken into account. Where necessary, the civil law conditions coerced to support religious programs with which they do not agree.”).  

\(^{36}\) Heckel, supra note 4, at 197.  
\(^{37}\) See Robbers, supra note 2, at 60.  
\(^{38}\) See id. at 61-62. Robbers also notes that there is a major difference between religious public corporations and regular public corporations: “Unlike other public corporations, the religious communities with this status are not integrated in the State’s structure. They retain their complete autonomy, even as public corporations.” Id.  
\(^{40}\) See id. at 690-94.  
\(^{41}\) See id. at 694-95.
must be adjusted to meet the religious requirements." In other words, if a particular aspect of the religious community conflicts with the civil law, the civil law may be adjusted for the religious community rather than requiring the religious community to conform to the civil law.

b. Public corporation under public law. Under Article 137(5), religious societies are entitled to corporation status upon a showing of permanency. They are also required to demonstrate Rechtstreue, which consists of three parts: first, the religious community must satisfy Article 9(2) of the Basic Law; second, it must be in harmony with the existing law; and, third, the religious community must show that its actions and works are within inherent constitutional limits that ensure religious freedom.

A religious community must apply for public corporation status in each German Land. Each Land can choose which government organization will decide whether to award or deny public corporation status. For example, in Berlin the Landesregierung (legislative body) makes the decision, while in Bavaria it is the minister for education and cultural affairs who

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42. Robbers, supra note 2, at 62 (Robbers directs the reader to compare his statement with BVerfGE 83, 341); see also the Baha’i case, BVerfGE 83, 341 (354); infra note 153 and accompanying text.

43. In accordance with Article 137(5), religious societies “shall be granted . . . [public corporation status], if their constitution and the number of their members offer an assurance of their permanency.” Grundgesetz [GG] art. 137(5) (F.R.G.).

44. See Entscheidungen, supra note 13, at 2397 ("Wegen der mit dem Korporationsstatus verbundenen staatlichen Begünstigung setzt die Anerkennung einer Religionsgemeinschaft als Körperschaft des öffentlichen Rechts über die in Art. 137 V 2 WRV genannten Merkmale hinaus zunächst deren, Rechtstreue voraus.").

45. See id.; see also infra note 90 and accompanying text; Grundgesetz [GG] art. 9(2) (F.R.G.) ("Article 9 . . . (2) Associations whose purposes or activities conflict with criminal laws or are directed against the constitutional order or the concept of international understanding are prohibited.").

46. See Entscheidungen, supra note 13 at 2397; see also infra note 91 and accompanying text.

47. See Entscheidungen, supra note 13 at 2397; see also infra note 92 and accompanying text.


49. See id. at 686-89.
decides. In addition, each Land can determine how many members a religious community must have to satisfy the "permanency" requirement. Because the ultimate determination of public corporation status is placed with each state, inconsistent treatment has resulted as states have interpreted the same permanency requirement differently. For example, the Christian Science religion has public corporation status in Bavaria, but not in the adjacent Land Baden-Württemberg.

C. The Jehovah’s Witnesses’ Struggle for Religious Status in Germany

One minority religion that is noticeably absent from the public corporation status list of every Land is the Jehovah’s Witnesses. The Witnesses, familiar with struggles between church and state, have had to endure discrimination and persecution throughout the world. The Witnesses have played a major role in challenging religious intolerance in the courts of the United States and before the European Court of Human

50. See id. at 687.
51. See Robbers, supra note 1, at 164-65 ("It would be necessary, however, that [the religious community] would be sufficiently big, since the collection of church taxes by the state is only worthwhile, if there are enough members to tax, otherwise expenses would be inadequately high. In Northrhine-Westfalia the law requires a size of at least 40,000 members, in Bavaria at least 25,000.").
52. See id. at 159-64 (citing a now somewhat dated list of which religious communities have been recognized as public corporations by each state).
53. See M. James Penton, Apocalypse Delayed: The Story of the Jehovah’s Witnesses 143-45 (2d ed. 1997) (noting that Witnesses have historically faced discrimination in almost every country they have been in, but currently face tremendous persecution for refusing to support “one-party dictatorships”).
54. See id. at 136, 143 (summarizing the major court battles the Witnesses fought in the United States; see also Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136 (1987) (holding that a Witness’ refusal to work on the Sabbath, her subsequent firing, and a refusal to award her unemployment compensation benefits violated the free exercise clause of First Amendment); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding that Witnesses were free to distribute literature without having to pay a city imposed preaching tax); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), rev’d Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (holding that Witness schoolchildren had to salute the American flag); Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that religious freedom principles allowed the Witnesses to go door to door trying to convert new members).
Rights. Even still, the Witnesses continue to face persecution in many countries generally considered to be tolerant.

The first major struggle the Witnesses faced in Germany began with the rise of Hitler and the Third Reich. Because the Witnesses refused to support the Nazi government, salute the Nazi flag, and fight in the War, they were placed in concentration camps and received treatment comparable to that experienced by the Jews. After the War, the Witnesses were granted religious freedom under Article 4. Within the last seven years, however, the Witnesses have faced a new type of discrimination in Germany: the denial of public corporation status because of their religious beliefs.

The religious doctrine that has been the source of recent controversy in Germany stems from the teachings of Pastor Russell, the founder of the Jehovah's Witnesses. Russell taught that all Christians should separate themselves from the world, or more specifically that "Bible students should avoid voting, holding public office, or enlisting in military service." Although Russell's teachings remain in force, they are

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57. See Penton, supra note 53, at 142. Penton quotes John S. Conway, who commented:

The resistance of the Witnesses was centered chiefly against any form of collaboration with the Nazis and against service in the army. . . . [I]t was no surprise when a special law was passed in August 1938 laying down that refusal or incitement to refuse to serve in the armed forces was to be punishable by death, or in lesser cases by imprisonment or protective custody. Since such refusal was an article of belief for Jehovah's Witnesses, they were thus all practically brought under sentence of death. Many in fact paid the penalty; others were sentenced to enforced service with the troops, while others were consigned to lunatic asylums, and large numbers were transported to Dachau.

Id. (quoting John S. Conway, The Nazi Persecution of the Churches: 1932-1945, at 196-97 (1968)).

58. See Penton, supra note 53, at 14-46 (giving a brief history of Pastor Russell).

59. Id. at 138.
tempered by the complimentary belief that the “ostensible object of all governments organized among men has been to promote justice and the well-being of all the people” and that “[Jehovah’s] followers ought to obey secular authority to a great extent.”60 Along these lines, Russell urged his followers to render obedience to the laws of their land “without murmur.”61 Therefore, while it is no exaggeration to say that Witnesses absolutely refuse to vote, it is also fair to say that they are generally loyal to their respective governments.62 However, it is not just the Witnesses’ refusal to vote that has been criticized, but also its doctrine that members who do vote must leave the organization.63 It is in fact this doctrine that led Germany’s Federal Administrative Court in Jehovah’s Witnesses v. Land Berlin64 to reject the Jehovah’s Witnesses’ appeal for status as a public corporation.

III. Jehovah’s Witnesses v. Land Berlin

A. The Facts

In March 1990, the Minister of Interior for the former German Democratic Republic (GDR) revoked a forty-year ban on the Jehovah’s Witnesses.65 This revocation recognized the Witnesses as a legal religious community which could meet and worship together in the GDR.66 Seven months later (October 1990), after the GDR had reunited with West Germany, the Witnesses applied for public corporation status in Land Berlin.67 For six months the Witnesses waited for a response from the Landesregierung, Berlin’s governing body authorized to grant corporation status.68 On April 8, 1991, the Witnesses

60. Id.
61. Id. at 138-39.
62. See id. at 140 (“Since 1962 Jehovah’s Witnesses have been model citizens in some ways.”).
63. See Entscheidungen, supra note 13, at 2398 (“Wie die Kl. in der mündlichen Verhandlung vor dem erkennenden Senat bestätigt hat, kann ein Zeuge Jehovas, der auf der Teilnahme an staatlichen Wahlen beharrt, nicht in ihrer Gemeinschaft verbleiben.”).
64. See Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] [Federal Administrative Court], reprinted in 36 Neue Juristische Wochenschrift 2396 (1997).
65. See id. at 2396.
66. See id.
67. See id.
68. See id.
sent a precautionary letter to Land Berlin renewing their request that, in accordance with Article 137(5), they be recognized as a public corporation.69

Although the Landesregierung had received these letters from the Witnesses, it did not release its decision denying their request until two years later.70 The Landesregierung maintained that the Witnesses were not entitled to corporation status based on their legal status as a religious community in the former GDR. First, although Witnesses were legally recognized, public corporation status, as such, was nonexistent under the former regime; further, the Unification Treaty failed to recognize the Witnesses as having any corporation rights. More fundamentally, the Landesregierung also maintained that Article 137(5) was not relevant because the beliefs of the Witnesses were at odds with the Constitution. That is, in the view of Landesregierung, the Witnesses did not adhere to the principles of tolerance and had a structurally negative understanding of the State.71

Consequently, the Witnesses brought a claim against Land Berlin in the Berlin State Administrative Court demanding public corporation status. The court held for the Land Berlin on the issue of the Witnesses’ status in the GDR and under the Unification Treaty, but held that the Witnesses were indeed entitled to public corporation status in accordance with Article 137(5).72

Both parties appealed to the Berlin State Court of Administrative Appeals, which affirmed the holding of the Berlin State Administrative Court.73 The parties then appealed to the Federal Administrative Court (the highest court in the hierarchy of administrative courts in Germany). The Federal Administrative Court held that, although the Witnesses satisfied the permanency and Rechtstreue requirements, they nevertheless were not entitled to corporation status because

69. See id.
70. See id.
71. See id.
72. See id.; see also Entscheidung des Verwaltungsgerichts Berlin [VG Berlin] [State Administrative Court] (F.R.G.), reprinted in NvwZ 5, 609.
73. See Entscheidungen, supra note 13, at 2396; see also Entscheidung des Oberverwaltungsgerichts Berlin [OVG Berlin] [State Court of Administrative Appeals] (F.R.G.), reprinted in NvwZ 5, 478.
they failed a new test which the court dubbed the “meaning and purpose of corporation status” test.

B. The Federal Administrative Court’s Reasoning

1. The Rechtstreue requirement

While there was no serious debate that the Witnesses satisfied the “permanency” requirement, Land Berlin did argue that the Witnesses failed the Rechtstreue requirement. The court began its discussion of this issue by noting that a religious community that is Rechtstreue must satisfy three elements. First, in accordance with Article 9(2), the religious community’s activities must not be criminal in nature, must not be contrary to the constitutional order, and must not contradict fundamental norms of society. Second, because public corporation status includes a transfer of state taxing power to the religious community, the community must be in harmony with existing law. Third, the religious community, through its actions and works, must uphold the constitutionally protected rights of both its own devotees and outsiders.

The arguments of the Land Berlin focused on this third element. First, the Land argued that the Witnesses failed to satisfy the Rechtstreue requirement because they imposed an unconstitutional Zwangssystem (compulsory system) upon their members. The court rejected this argument for three reasons: first, a religious community’s doctrines do not have to follow a democratic model to qualify for public corporation status; second, the German constitution protects the way in which a religious community structures its hierarchy or positions of authority; and third, Article 4 protects the freedom of every person to join and remain with whatever religious community the individual chooses. Next, the Land Berlin claimed that the Witnesses violated the constitution because they harmed the

74. See Entscheidungen, supra note 13, at 2397.
75. See id.
76. See id.
77. See id. at 2398 (“Der Bekl. will der Kl. die gebotene Rechtstreue des weiteren mit dem Hinweis absprechen, diese praktiziere ein Zwangssystem, das der Wertordnung des Grundgesetzes widerspreche.”).
78. See id.; see also Robbers, supra note 2, at 62-64 (discussing the important role of “self-determination” for religious communities in Germany).
79. See Entscheidungen, supra note 13, at 2398.
well-being of their children through restrictive methods of child rearing.\textsuperscript{80} The court agreed that child abuse, if proven, would violate the third element of \textit{Rechtstreue}; but the \textit{Land}'s accusations were unproven and could only be properly decided by a court of guardianship.\textsuperscript{81}

In short, the court held that all of the \textit{Land}'s accusations were without merit and that the Witnesses satisfied both the permanency and the \textit{Rechtstreue} requirements. Surprisingly, however, the court held that the Witnesses were not entitled to public corporation status.\textsuperscript{82}

2. \textit{The meaning and purpose of “corporation status”}

Earlier in its opinion, the court observed that when a religious community obtains public corporation status, it graduates from private law to public law.\textsuperscript{83} Coming under the jurisdiction of the public law, however, does not mean that the state will impose additional burdens on the religious community. Rather, when a religious community obtains public corporation status, the state will reinforce the religious community’s individuality and independence and promote the religious community’s freedom.\textsuperscript{84} This reinforcement and promotion requires cooperation between church and state; this cooperation is the essence of the “meaning and purpose of corporation status.”\textsuperscript{85}

There are two elements of cooperation that the court believed necessary to fulfill the meaning and purpose of corporation status: (1) reciprocal respect between the church and state, and (2) \textit{Staatstreue} (loyalty to the state). Concerning the element of reciprocal respect, the court reasoned that if the

\textsuperscript{80} See id.
\textsuperscript{81} See id.
\textsuperscript{82} See id.
\textsuperscript{83} See id. at 2397 (“Durch die Verleihung des Korporationsstatus wird die rechtliche Existenz, die äußere Ordnung und Verwaltung sowie grundsätzlich das gesamte Wirken der Religionsgemeinschaft, soweit davon Rechtswirkungen im staatlichen Bereich augehen, dem öffentlichen Recht unterstellt.”).
\textsuperscript{84} See id. at 2398.
\textsuperscript{85} Id. (“Wie bereits dargelegt, stellt sich der Korporationsstatus für diejenigen Religionsgemeinschaften, die ihn nicht besitzen, als ein Kooperationsangebot des Staates dar; dabei besteht der Zweck der Kooperation in der Förderung der anerkannden Religionsgemeinschaften, weil ihr Wirken zugleich im Intresse des Staates liegt.”).
state is going to bestow certain privileges on the religious community, it can expect the religious community not to question the foundation of that state’s existence. In other words, a religious community that is at odds with the fundamentals of democracy cannot respect the state of Germany. Without this reciprocal respect, cooperation between the church and state would be impossible. While the court never did say explicitly whether the Witnesses satisfied the “reciprocal respect” element, in light of the court’s “loyalty to the state” discussion, it is doubtful the court believed that the Witnesses respected the state.

The second element of cooperation, loyalty to the state, was the deciding issue in the court’s analysis and merits a detailed review. The court began by admitting that the Witnesses were not negatively disposed towards the state—rather, in principle, they were positively disposed towards the state. But, the court was troubled by the Witnesses’s refusal to participate in government elections and their excommunication of any member who did participate.

Coming to the heart of its analysis, the court reasoned that this doctrine concerning member participation in the democratic process was in direct conflict with a fundamental democratic principle central to the constitution, namely that all acts of the state, to have force, must be validated by the will of the people. The will of the people, in turn, is conveyed to the state through the system of a representative-parliament democracy and, more specifically, through the election of

86. See id. The court reasoned:
Ebenso wie der Staat sich mit der Gewährung des Korporationsstatus nicht in die Angelegenheiten der Religionsgemeinschaften einmischt, sondern im Gegenteil deren Eigenständigkeit stützt und fördert, kann umgekehrt von der Religionsgemeinschaft, die mit Antrag ihrem nach Art. 140 GG i.v. mit Art. 137 V 2 WRV die Nähe zum Staat sucht und dessen spezifische rechtliche Gestaltungsmöglichkeiten und Machtmittel für ihre Zwecke in Anspruch nehmen will, erwartet werden, daß sie die Grundlagen der staatlichen Existenz nicht prinzipiell in Frage stellt.

Id.

87. See id.

88. See id.

89. See id.; see also text accompanying supra note 63.

90. See Entscheidungen, supra note 13, at 2598; see also infra notes 123-125 and accompanying text.
representatives to parliament. Therefore, the Witnesses' basic religious views disregarded not only the political necessity of elections but also the constitutional significance of parliamentary elections. In addition, the court reasoned that because the Witnesses continue to have, or in the future will win, influence over the behavior of German citizens, the state's executive power, because of its reliance on the will of the people, will inevitably weaken. Because the Witnesses do not recognize the aforementioned legitimate, democratic demands of the state on its citizens, the court held that the Witnesses were not loyal to the state and did not stand in a position to cooperate with the state.

In its conclusion, the court addressed one final argument: how does refusing to vote constitute disloyalty to the state when there is no law requiring citizens to vote? The court responded that even though there is no law requiring citizens to participate in elections, this did not mean that the state did not care whether its citizens participated in elections. Moreover, the court noted that the state's constitution puts the responsibility on all citizens to legitimize the government's actions through their right to vote. This responsibility is only diminished if a citizen abstains from voting as an expression of political will. The Witnesses, however, do not object to participation in voting because of the prevailing political conditions (i.e., who is running for which parties), but rather they object as a matter of principle based upon their belief.

IV. Analysis

It is the position of this Note that the German Federal Administrative Court's decision was incorrect and should be reversed by the Federal Constitutional Court for the following three reasons: (1) the court should not have applied the

91. See Entscheidungen, supra note 13, at 2398; see also infra note 134.
92. See Entscheidungen, supra note 13, at 2398.
93. See id. at 2398-99.
94. See id. at 2399.
95. See id.
96. See id.
97. See id.
98. See id.
99. See id.
“meaning and purpose of the corporation status” test; (2) even if the application of this test was correct, the court’s reasoning with respect to “accountability to the will of the people” was unconvincing; and (3) the court’s analysis is fundamentally inconsistent with ideals of religious freedom.

A. The “Meaning and Purpose of Corporation Status” Test Should Not Have Been Applied

The “meaning and purpose of corporation status” test should not have been applied for two reasons. First, the test requires the unnecessary showing of Staatstreue (loyalty to the state), and second, it sets an unreachable standard for other religious communities.

1. The “meaning and purpose of corporation status” test requires the unnecessary showing of Staatstreue (loyalty to the state)

The Federal Administrative Court noted that the “meaning and purpose of corporation status” test focused on whether the state and the religious community would be able to cooperate with each other. Furthermore, the court explained that cooperation consisted of two elements: respect and loyalty. Concerning loyalty, the more important element, the court held that the Witnesses did not bring the “lasting cooperation of essential loyalty” to the state.

However, as important as “loyalty to the state” may seem in deciding whether a religious community should receive the status of a public corporation, the court should never have reached this issue since it is not an element of the Rechtstreue requirement; the court simply failed to justify its introduction of the new Staatstreue test. As one scholar has noted, although the state may legitimately require a sort of “enhanced” Rechtstreue, it cannot force a religious community to satisfy a

100. See supra Part III.B.2.
101. See Entscheidungen, supra note 13, at 2398 (noting that cooperation, of course, is the meaning and purpose of public corporation status).
102. Id. ("Die Kl. bringt dem demokratisch verfaßten Staat nicht die für eine dauerhafte Zusammenarbeit unerläßliche Loyaltät entgegen").
Staatstreue requirement.\textsuperscript{103} The Staatstreue requirement simply has no basis in statutory law.

Although the court did not specify why it imposed the additional requirement of Staatstreue, it is apparent that the court was worried that the wrong organization may end up with too much power.\textsuperscript{104} However valid this concern may be, especially in preventing the resurgence of something akin to National Socialism, requiring Staatstreue of a religious community is not the solution. First, the Rechtstreue requirement is sufficiently strong to protect the state from abusive organizations. For example, one scholar has argued that the Witnesses’ refusal to vote, among other things, violated the Rechtstreue requirement.\textsuperscript{105} While the scholar’s conclusion that the Witnesses were not Rechtstreue relies on questionable sources,\textsuperscript{106} the article does demonstrate that the long-established Rechtstreue requirement is capable of addressing the same issues with which the court was concerned in this case. Second, although the court was justified in wanting to keep the privileges of public corporation status from the wrong religious communities, the court’s application of Staatstreue shows how the requirement can be used to discriminate against religions that are peaceful and law abiding. In the case of the Witnesses, history seems to suggest that they are not a threat

\textsuperscript{103} See id. at 11 (“Es darf die erhöhte Rechtstreue gegenüber allgemeiner Rechtstreue aber nicht unter der Hand zu einer erhöhten Staatstreue mutieren.” (General Rechtstreue can mutate into an enhanced Rechtstreue, but it can’t mutate into an enhanced Staatstreue.)); see also Jehovah’s Witnesses to Appeal to Germany’s Supreme Court, supra note 19 (“Jehovah’s Witnesses lawyer Hermann Weber argued in Thursday’s statement that Germany’s 1949 constitution did not make religious privileges conditional on loyalty to the state.”).

\textsuperscript{104} See infra note 153.

\textsuperscript{105} See Christoph Link, Zeugen Jehovas und Körperschaftsstatus [Jehovah’s Witnesses and Corporation Status], 43 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 1, 23-53 (1998). The large majority of Link’s article is spent trying to prove “erhebliche Zweifel an der Rechtstreue der Religionsgemeinschaft der Zeugen Jehovas” (considerable doubt as to the Rechtstreue of the religious community of the Jehovah’s Witnesses). Id. at 23. Whether or not Link makes his point, it would seem strange that Link would spend his entire article showing how the Witnesses were not Rechtstreue, including their refusal to vote, if he agreed with the court that it was unnecessary to consider Rechtstreue because the Witnesses failed the “meaning and purpose of corporation status” test.

\textsuperscript{106} Link relies heavily on sources that assume a negative posture toward the Witnesses (i.e., former members).
It is also important to mention that it has been argued that the meaning and purpose of the public corporation status cannot be reduced to the "[s]tate’s offer to cooperate with the religious community. Cooperation, as important as it is, is a consequence of corporation status, not the meaning and purpose of corporation status." In other words, the issues of cooperation should be worked out after public corporation status has been given, not unilaterally decided by one party before the other party has an opportunity to prove itself.

2. The "meaning and purpose of corporation status" test is unreachable by other religious communities

The Federal Administrative Court’s application of the "meaning and purpose of corporation status" establishes too high a standard for other religious communities seeking public corporation status. Most directly, given that the court’s deci
Up to now it has not been possible to install religious instruction, because there had been no official partner in Muslim groupings with whom school authorities were able to confer in adequate legal terms. This seems to be a result of the non-existence of an official structure of Islam groups which would provide for representation. Similar problems arise regarding the registration as corporations under public law.

Id. (emphasis added).

110. See John Henry Merryman et al., The Civil Law Tradition: Europe, Latin America, and East Asia 565 (1994) (table showing the structure of Germany’s court system).

111. See Wuerth, supra note 109, at 1166. Wuerth wrote:

[The court appeared to draw a clear distinction between “rights” and “privileges,” one it has rejected elsewhere, to explain why its conclusion did not violate the free exercise rights of the Jehovah’s Witnesses. This would present a classic unconstitutional conditions problem, except that it is unclear in what sense status as a corporation under public laws is really a “privilege.” Furthermore, it is unclear in what sense the conditions imposed go beyond the parameters of the subsidy itself, which, after all, has as its overarching goal the promotion of democracy.]

Id.

112. See Johan D. van der Vyver, Introduction to Legal Dimensions of Religious Human Rights: Constitutional Texts, in Religious Human Rights in Global Perspective: Legal Perspectives, supra note 4, at xi, xxx (“In Islam there is no divide between state and church, and law and religion signifies one and the same modality of life.”).

113. See Robbers, supra note 2, at 57 (Islam in Germany had, in 1987, approximately 1.65 million members, mostly foreign workers and their families, but also about 100,000 German nationals. It is however thought that there are now about
acceptance in Western Europe, let alone recognition as a public corporation in Germany—this decision may further contribute to that trend. Most generally, the denial of the Witnesses’ application based on grounds which the law had not recognized up to that point, and which the parties had not even raised, sets a dangerous precedent which makes any religious group’s appeal for public corporation status uncertain.

The Federal Administrative Court’s “meaning and purpose of corporation status” test also results in impermissible privileging of traditional, mainstream religions. Although the court used seemingly harmless terms such as “loyalty” and “cooperation,” it is evident that the court was grasping at an unusually strong definition of these terms. In the case of the Witnesses, the court would not bestow the status of a public corporation on them unless the Witnesses abandoned their long-held belief that one should abstain from voting. In the case of Islam, the court’s logic could be used to deny the Islamic community the status of a public corporation unless that community abandoned its belief that there should be no separation between church and state. In both circumstances, the court could be seen as attempting to coerce a religious community into abandoning its religious belief by withholding

2.5 million Moslems living in Germany.

114. See W.A.R. SHADDID & P.S. VAN KONINGSVELD, RELIGIOUS FREEDOM AND THE POSITION OF ISLAM IN WESTERN EUROPE 4 (1995). The authors wrote:

[A]round the beginning of the eighties . . . it was suggested that a connection existed between Islamic Fundamentalism, as it was developing in many Islamic countries, . . . and between the migrant groups in Western Europe originally coming from the Islamic world. . . . People started to question the possible impact of Islam on West-European secular democracies. . . . The ensuing discussions were usually related to such themes as the position of women, the compatibility of Islam with democracy and human rights, and the ties Muslim migrants had with their countries of origin.

Id.; see also supra note 106; infra note 145 and accompanying text.

115. See Robbers, supra note 108, at 16 (“Die Konsequenz wäre ein grundgesetzorientiertes neues Staatskirchenamt, das Institut der Staatskirche würde ersetzt durch das einer ‘Verfassungskirche.’”)

116. See Entscheidungen, supra note 13, at 2398 (“Eine solche Kooperation ist ohne ein Mindestmaß an gegenseitigem Respekt nicht vorstellbar.”) (emphasis added); see also supra Part III.B.2.

117. See SHADDID & KONINGSVELD, supra note 114 and accompanying text; see also van der Vyver, supra note 112, at xxx (“In Islam there is no divide between state and church, and law and religion signifies one and the same modality of life.”)
public corporation status. This sort of treatment by the court—and ultimately the state—is difficult to reconcile with the concept that “[s]eparation brings about emancipation. It frees the churches from state dominance.”

B. Even if the Court Was Correct in Applying the ‘Meaning and Purpose of Corporation’ Test, the Court’s Application Was Unconvincing

Even if the “meaning and purpose of corporation status” test is an apt factor in determining whether religious communities can receive public corporation status, the court’s application of the test was unconvincing.

1. Direct conflict with accountability

The Federal Administration Court reasoned that the Witnesses’ abstinence from voting fails the “meaning and purpose of corporation status” test because it contradicts the democratic principle that all acts of the state are accountable to the will of the people. In other words, the state can legitimately “demand” elections to legalize and democratize its actions and institutions. If the Witnesses are allowed to continue to exercise or win influence (i.e., by conversion) over the “good behavior of the citizens,” then the legitimate basis of the state’s “demands” will be weakened. Therefore, because the Witnesses disregard the importance of the state’s legitimate “demands” on its citizens, the court held that the Witnesses cannot obtain the status of a public corporation and be recognized as a “cooperative” partner of the state.

This analysis, however, cannot be upheld for three reasons: (1) the court based its arguments on statutes and case law that

118. Heckel, supra note 4, at 199.
119. See infra note 131 and accompanying text.
120. See infra note 152 and accompanying text.
121. See Entschiedungen, supra note 13, at 2398-99 (“Denn [die Kl.] schwächt zwangsläufig in dem Umfang, in dem [die Kl.] auf das Wohlverhalten der Bürger Einfluß nimmt oder künftig gewinnt, die Legitimationsbasis, auf die der Staat für die Ausübung der Staatsgewalt—einschließlich der Übertragung dieser Gewalt an Private—angewiesen ist.”).
122. See id. at 2399 (“Da [die Kl.] die aus dem Demokratieprinzip folgenden legitimen Ansprüche des Staats an seine Bürger nicht anerkennt, kann [die Kl.] nicht verlangen, von ihm als Körperschaft des öffentlichen Rechts und damit als sein Kooperationspartner anerkannt zu werden.”).
do not condemn the Witnesses’ abstinence from voting; (2) the court’s holding rested on the assumption that Witnesses would someday exert enough influence over the citizens of Germany to cripple the democratic electoral system; and (3) the court effectively admitted that it was denying the Witnesses public corporation status in order to curb the organization’s effect on German citizens.

a. Statutes and case law do not support the court’s arguments. To prove that the Witnesses’ prohibition against voting is an “unacceptable conflict” against the very existence of the constitution, the Federal Administrative Court relied on three articles from the German constitution: Article 20(2),123 Article 28(1),124 and Article 79(3).125 The language of these articles, however, does not support the court’s ultimate conclusion that the Witnesses are in direct conflict with democratic principles. First, although Article 20(2) explains the importance that voting and elections hold for “state authority,” the article declares that “state authority” is brought to pass by other means: “specific legislative, executive, and judicial organs.”126 Thus, interpreting Article 20(2) in a light most favorable to the court’s analysis, one could argue that the Witnesses are in partial conflict with this article.127 For example, although the Witnesses do not participate in the state’s electoral system, they do “emanate” state authority through legislative, executive and judicial organs. Indeed, as

123. See Grundgesetz [GG] art. 20(2) (F.R.G.). Article 20(2) states: “All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs.” Id.
124. See Grundgesetz [GG] art. 28(1) (F.R.G.). Article 28(1) states:

The constitutional order in the Länder must conform to the principles of republican, democratic, and social government based on the rule of law, within the meaning of this Basic Law. In each of the Länder, counties, and municipalities, the people must be represented by a body chosen in general, direct, free, equal, and secret elections.

Id.

125. See Grundgesetz [GG] art. 79(3) (F.R.G.) (“Amendments of this Basic Law affecting the division of the Federation into Länder, the participation on principle of the Länder in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible.”). 126. Id. at art. 20(2).
127. See id. Article 20(2) does not contain any language indicating that German citizens are required to vote.
the current litigation indicates, the Witnesses have no qualms about using the judicial system of the state.

Likewise, Articles 28(1) and 78(3) do not further the court's argument. Article 28(1) insists that "the people must be represented by a body."\footnote{128} Such language may intiate that if the people do not choose a representative body they are violating the constitution. But, the sentence continues by stating that the legislature should be "chosen in general, direct, free, equal, and secret elections."\footnote{129} Thus, despite the court's conclusion, the elections are to be "free" and not required. Finally, Article 79(3) does not lend support to the court's argument that the Witnesses' refusal to vote violates democratic principles because it only states that Article 20 cannot be amended by Germany's lawmakers.\footnote{130} The Witnesses' beliefs cannot be construed as an amendment to the Constitution; thus Article 79(3) does not apply.

Moreover, the case law cited by the Federal Administrative Court does not support its argument that the Witnesses' prohibition against voting is in direct conflict with the democratic principle that all acts of the state must be held accountable to the will of the people. First, the court cites a Federal Constitutional Court case, decided on June 26, 1990, to support its ruling that the acts of state authority must be held accountable to the will of the people.\footnote{131} Indeed, the case that the court cites does support this proposition, but the Federal Constitutional Court also said that, besides voting and elections, the people can also exercise "sovereignty" through the "organs" (i.e., legislative, executive and judicial functions) of the state.\footnote{132} Moreover, the case gave no indication whether an

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128. Id. at art. 28(1).
129. Id.
130. See id. at art. 79(3).
131. See Entscheidungen, supra note 13, at 2398 ("Akte der Staatgewalt sich auf den Willen des Volkes zurückführen lassen und ihm gegenüber verantwortet werden müssen (BVerfGE 83, 60 [72 f.] = NJW 1991, 159.").
132. See Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 60, 83 (F.R.G.). The court reasoned:
\begin{quote}
Art. 20 Abs. 2 Satz 2 GG . . . legt fest, daß das Volk die Staatsgewalt, deren Träger es ist, außer durch Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehen den Gewalt und der Rechtsprechung ausgeübt. Das setzt voraus, daß das Volk einen effektiven Einfluß auf die Ausübung der Staatsgewalt durch diese Organen hat. Deren Akte müssen
organization refusing to allow its members to vote stood in an unacceptable conflict with the principles of democracy.

Another case that the Federal Administrative Court relied upon was the Federal Constitutional Court’s decision on September 9, 1976. At first glance, this case does support the court’s argument that parliamentary elections are the means by which a representative democracy is sustained. Interestingly, however, the Federal Constitutional Court’s decision also addresses an issue mentioned above: the importance of “free” elections under Article 20(2). Specifically, the case states that elections only promote the democratic purpose of article 20(2) when they are “free” (i.e., free from compulsion and impermissible pressure).

Finally, the court observed that the reason the Witnesses objected to voting was because of their doctrine of “Christian neutrality in political matters.” This same doctrine, the court continued, caused the Witnesses to object to military and civil service. What the court did not say, however, is that Article 4(3) of the basic law prevents anyone from being compelled “against his conscience to render military service involving the

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135. See Grundgesetz [GG] art. 20(2) (F.R.G.). Significantly, this section of the case’s analysis mentioned nothing about the requirement of “free” elections in Article 28(1), See, e.g., supra note 124 and accompanying text.

136. See supra note 134. The court said:

Wahlen vermögen demokratische Legitimation im Sinne des Art. 20 Abs. 2 GG nur zu verleihen, wenn sie frei sind. Dies erfordert nicht nur, daß der Akt der Stimmbegabe frei von Zwang und unzulässigem Druck bleibt, wie es Art. 38 Abs. 1 GG gebietet, sondern ebenso sehr, daß die Wähler ihr Urteil in einem freien, offenen Prozeß der Meinungsbildung gewinnen und fällen können (vgl. BvVfGE 20, 56 [97]).

137. Id.

138. See id.
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use of arms.” 139 Thus, combining Article 4(3) and the court’s decision produces an odd result. On the one hand, if the very existence of Germany’s democracy were under threat by an invading force, the constitution would protect the Witnesses’ “conscientious” decision not to fight in the military. On the other hand, the Witnesses’ “conscientious” objection not to vote stands in direct conflict with democracy, even though the Witnesses support those who are elected into government positions. 140

b. Can the Witnesses potentially cripple Germany’s electoral system? Based in part on the assumption that in the future the Witnesses could cripple the democratic electoral system by converting large numbers of German citizens, 141 the Federal Administrative Court denied the Witnesses the status of a public corporation. 142 Taking an insupportable approach, the court seemed to believe that, by refusing to confer the status of a public corporation upon the Witnesses, this religious community would be unable to cripple the electoral system. 143 The fact remains, however, that the Witnesses could potentially cripple the system regardless of whether they gain the status of a public corporation. 144 Therefore, it seems odd that the Witnesses were denied public corporation status on the basis of a Witness doctrine that will continue to be taught to new German converts regardless of whether the Witnesses have public or private status.

c. Curbing the Witnesses’ growth in Germany. The court’s assumption that denying the Witnesses public corporation status will preserve the democratic electoral system only makes sense if the court is trying to stunt the Witnesses’ growth in

139. GRUNDGESETZ [GG] art. 4(3) (F.R.G.); see supra note 25 and accompanying text (emphasis added).
140. See supra note 71 and accompanying text.
141. Such an assumption is unlikely because so long as one German does not convert to the Witnesses’ beliefs, the democratic electoral system will continue to function.
142. See Entscheidungen, supra note 13, at 2398-99.
143. See id.
144. Just because the Witnesses will not be a public corporation, and enjoy all of the benefits thereof, does not mean the Witnesses will be exiled from the German society. Instead, the Witnesses will continue to function as a society under private law, converting members, distributing religious materials, and meeting together, just like they always have for the past fifty years.
Germany. Indeed, the Federal Administrative Court implied that by denying the Witnesses the status of a public corporation, the organization’s influence on the German citizenry will be curbed.145 The Court’s concern, whether valid or invalid, is an obvious violation of “[t]he German [s]tate-[c]hurch legal basis . . . structured around three basic principles: neutrality, tolerance, and parity.”146

2. Participation in elections is not mandatory, but choice to participate is required

The Federal Administration Court concluded its analysis by addressing an objection that the Witnesses raised: why was the organization’s refusal to participate in elections grounds for denying it the status of a public corporation when German citizens are not legally required to vote?147 The Witnesses’ argument has merit, but the court dismissed it by saying that even though there is no legal requirement for citizens to vote, the state has an interest in seeing that its citizens are active voters.148 Besides, the court reasoned, not voting was acceptable only when a voter objected to the political conditions (i.e., the voter didn’t like or agree with any of the candidates running for office), not when the voter objected to the very principle of voting.149

Although the state does have a strong interest in seeing that its citizens support the electoral process, the state’s power is limited to just that: an interest. There are no laws which allow the government subtly to compel its citizens to vote (e.g., by denying their religion public corporation status). To be sure, the Federal Administrative Court was quite correct that there is a distinction between an objection to the political climate and

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145. See Entscheidungen, supra note 13, at 2398-99.
146. Robbers, supra note 2, at 60.
147. See Entscheidungen, supra note 13, at 2399 (“Hiergegen kann die Kl. nicht mit Erfolg einwenden, daß in der Bundesrepublik Deutschland keine Rechtspflicht zur Beteiligung an den Parlamentswahlen besteht.”).
148. See id. (“[D]as Fehlen einer solchen Rechtspflicht besagt nicht, daß der demokratisch verfasste Staat der Beteiligung der Bürger an den Wahlen „neutral” oder indifferent gegenüber ist.”).
an objection to the principle of voting. But, the distinction, as this case demonstrates, is not critical. For example, the Witnesses could easily be seen as objecting to the “political climate” because Jehovah is not the current governor, or because Jehovah is not running for office.

C. The Federal Administrative Court’s Decision is Fundamentally Inconsistent with the Ideals of Religious Freedom

The court’s decision should be reversed because it is fundamentally inconsistent with the ideals of religious freedom in at least three ways: (1) the decision contradicts the fundamental structure of Article 4; (2) it is inconsistent with religious pluralism and respect for divergent religious beliefs; and (3) it modifies the religious freedom the drafters of the Basic Law intended to foster.

As previously mentioned, Article 4 is Germany’s freedom of religion clause. The article declares “freedom of faith, of conscience, and of creed, religious or ideological, shall be inviolable. The undisturbed practice of religion is guaranteed.” In addition, as already mentioned, Article 4 is structured around the three principles of neutrality, tolerance, and parity. Keeping these ideals of German religious freedom in mind, let us review the court’s decision. First, the court found that the Witnesses had fulfilled the permanency requirement of the constitution. The court then found that the Witnesses had fulfilled the three elements of the Rechtstreue requirement.

Finally, despite the fact that the Witnesses were positively disposed towards the Länder, the court decided that the Witnesses were not entitled to public corporation status because their refusal to vote contradicted the meaning and purpose of corporation status. It is difficult to reconcile the court’s decision with Article 4 because, on one hand, the German constitution says that one can adopt whatever religious beliefs one wants to adopt, and the state is committed to treat that belief with neutrality, tolerance, and parity; on the other hand, the court is saying that the state will not tolerate a

150. See id.
religious belief that causes its adherents not to vote and may persuade other German citizens not to vote. Therefore, either the court’s decision is at odds with the fundamental religious freedoms of Article 4, or the fundamental religious freedoms of Article 4 are severely limited.

The court’s decision also conflicts with the ideals of religious freedom because it is inconsistent with religious pluralism and respect for divergent belief systems. While it is clear that religious pluralism does exist in Germany, and there is respect for some divergent belief systems, the court’s decision is evidence that these two fundamentals of religious freedom are still not fundamental in Germany. In short, religious pluralism and respect require a society to accept and even welcome nontraditional counter-cultural religious beliefs.

The third way the court’s decision conflicts with the ideals of religious freedom in Germany is by subverting the intentions of the drafters of the Basic Law. The intention of the Basic Law drafters is recited in the *Ba-hai* case, in which the Federal Constitutional Court said that the drafters of the 1949 Basic Law did not intend to grant partial religious freedom. To the contrary, the drafters fully intended to erase the scars of National Socialism by granting religious communities full religious freedom. What the Federal Administrative Court’s decision has done, however, is grant partial religious freedom to the Witnesses. In other words, the only way the court would allow the Witnesses to obtain public corporation status is if the Witnesses abandoned one of their fundamental beliefs. Therefore, if the only way for the Witnesses to obtain public corporation status conflicts with the intention of the drafters of the Basic Law, then the court’s decision must be fundamentally inconsistent with religious freedom.

152. See generally Durham, *supra* note 11, at 13 ("[T]here must be some measure of (1) pluralism, (2) economic stability, and (3) political legitimacy within the society in question. In addition, (4) there must be some willingness on the part of differing religious groups and their adherents to live with each other.").


154. See id.
V. Conclusion

The Federal Administrative Court should have awarded the Witnesses the status of a public corporation because the Witnesses met the constitutional “permanency” and Rechtstreue requirements. Instead, the court refused to award the Witnesses the status of a public corporation because the Witnesses failed the court’s “meaning and purpose of corporation status” test. The court, however, should not have applied the “meaning and purpose of corporation status” test for the following reasons. First, the test should not have been applied because it requires the unnecessary showing of Staatstreue (loyalty to the state) and establishes too high a standard for other, non-certified religious communities. Second, even if the court was correct in applying the “meaning and purpose of corporation status” test, the court’s application was flawed and unconvincing because the court rested its arguments on statutes and case law that do not condemn the Witnesses’ prohibition on voting. Third, the court’s holding erroneously embraced the assumption that granting the Witnesses the status of a public corporation would allow them to exert enough influence over the citizens of Germany in the future to cripple the democratic electoral system. Finally, the court did not convincingly dispose of the Witnesses’ argument that the Witnesses should not be denied public corporation status for prohibiting its members from voting because the state did not legally require its citizens to vote.

In conclusion, the court’s decision violates fundamental principles of religious freedom because it contradicts the fundamental structure of Article 4, is inconsistent with religious pluralism and respect for divergent religious beliefs, and modifies the religious freedom that the drafters of the Basic Law intended to foster. In short, the Federal Constitutional Court should reverse the Federal Administrative Court’s decision, respect the Witnesses’ fundamental religious beliefs, and put Germany back on pace with the commendable record of religious freedom which it has maintained since the conclusion of World War II.

Scott Kent Brown II