

The Authority of the German Religious Constitution: Public Law, Philosophy, and Democracy

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Preliminaries

Germany's current religious constitution is primarily contained in Article 140 of the 1949 *Grundgesetz* or Basic Law, which in turn states that 'The provisions of Articles 136, 137, 138, 139, and 141 of the German Constitution of 11 August 1919 shall be an integral part of the Basic Law'.¹ Among these articles drawn from the 1919 constitution of the Weimar republic are those guaranteeing familiar rights and liberties for individuals. These include the independence of civil and political rights from religious affiliation, the enjoyment of such rights as religious privacy, access to public office independent of religious creed, and freedom from religious compulsion.² Other articles, however, specify the corporate rights and liberties of religious confessions or associations. In addition to stipulating that there shall be no state church, these articles protect the right to form religious associations and they guarantee each such association the right to 'regulate and administer its affairs independently within the limits of the law valid for all'.³ They also specify that those religious associations that have been corporate bodies under public law shall remain so, while new associations may apply for this status, which brings with it the right to levy taxes on the basis of civil taxation lists.⁴ Somewhat surprisingly from an English, French, or American perspective, the Weimar articles also stipulate that 'Associations whose purpose is the cultivation of a philosophical ideology [*Weltanschauung*] shall have the same status as religious bodies'.⁵

¹ Parliamentary Council [of the Federal Republic of Germany], *The Basic Law for the Federal Republic of Germany* (Wiesbaden: Foreign Office, 1971), p. 84.

² *Basic Law*, Weimar Art. 136 (1), (2), (3), (4).

³ *Basic Law*, Weimar Art. 137 (1), (2), (3).

⁴ *Basic Law*, Weimar Art. 137 (5), (6).

⁵ *Basic Law*, Weimar Art. 137 (7). 'Philosophical ideology' is a rather purposive translation of the Weimar text, which simply refers to associations 'die sich die gemeinschaftliche Pflege einer Weltanschauung zur Aufgabe machen' — that dedicate themselves to the common cultivation of a *Weltanschauung*; although philosophical ideologies have indeed been the object of cultivation for many such associations.

As an initial characterisation we might say that the religious constitution specified by the Basic Law is one in which a state that is ‘secular’ in the sense of remaining neutral between different confessions provides a framework for protecting the rights, liberties, and autonomy of religious associations whose status is that of public law corporations. The picture that emerges is of a bifurcated religious constitution in which the state maintains a secular and relativistic juridical framework within which multiple confessions are enabled to publicly pursue self-defined religious objectives.

In this paper I shall argue that the authority of this religious constitution is tied to its role as the instrument and effect of a particular historical political-juridical order: namely, the order that first emerged to secure the political coexistence of mutually hostile religious confessions during the sixteenth century. This order — in which secularised (or neutralised) political authorities have maintained a multi-confessional society — is striking for two things: its durability and its juridical character. The durability of this order however is not that of an unbroken cultural or national tradition, for it has never been more than a *modus vivendi* between permanently opposed religious and political factions. Moreover, the political authorities that have fitfully maintained it have themselves undergone fundamental and sometimes violent change, including changes from imperial to territorial forms of state, and from aristocratic and monarchical to republican and democratic forms of government.

Similarly, the juridical character of this order — its dependence on the institutions and language of public law (*Staatsrecht*) and public church law (*Staatskirchenrecht*) — is not due to the law’s timeless norms and its capacity to impose these on the (ostensibly) brute facticity of politics. Rather the juridified character of German politics arose from the historical peculiarities of the Holy Roman German Empire, which dictated that politics would be centrally conducted through the institutions and language of public law — in addition of course to war, diplomacy and, eventually, insurrectionary and electoral politics.⁶ Unlike England, France, and Spain, early modern Germany was not a consolidated territorial kingdom but a

⁶ Dieter Wyduckel, ‘The Imperial Constitution and the Imperial Doctrine of Public Law: Facing the Institutional Challenge of the Peace of Westphalia’, in K. Bussmann and H. Schilling (eds.), *1648: War and Peace in Europe I* (Munich: Verlagsgesellschaft 350 Jahre Westfälischer Friede, 1998), pp. 77-83; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band: Reichspublizistik und Policywissenschaft 1600-1800* (Munich: C. H. Beck, 1988), pp. 126-212.

dispersed political conglomerate — a handful of territorial states and a multitude of independent principalities, cities, and estates — that was held together by the imperial high courts (*Reichskammergericht*, *Reichshofrat*) and estate parliament (*Reichstag*).⁷ After the momentous fracturing of the imperial church at the beginning of the sixteenth century, followed by the emergence of confessionally opposed states, cities, and estates, the political survival of the empire hinged on the negotiation of a multi-confessional polity through the institutions of imperial public law. The persistence of this political-juridical order thus was conditioned above all by the enduring character of the jointly religious and political conflicts that it had evolved to manage.⁸

This specific historical character of the German religious constitution — its emergence as the instrument and effect of a political-juridical order improvised to cope with the religious fracturing of an imperial polity — presents particular difficulties for modern attempts to understand its authority. This is not least because such attempts are very often grounded in a nexus between philosophical rationality and (typically democratic) political authority that was itself posited for the purposes of particular cultural and political struggles.⁹ In his attack on the Anglican confessional state John Locke thus invoked a universal capacity for free reasoning on the basis of which individuals possessed rights against the state and a capacity to determine religious truth free of all interference by state or church.¹⁰ Closer to our present concerns, in the course of his criticisms of the Prussian religious constitution, Immanuel Kant posited the existence of ‘rational beings’ whose capacity to reconcile their conflicting choices resulted in a common will. For Kant, then, the legitimacy of political authority in general and the German religious constitution in particular was conditional on it expressing the will of citizens capable of arriving at religious truth

⁷ Robert von Friedeburg and Michael J. Seidler, ‘The Holy Roman Empire of the German Nation’, in H. A. Lloyd, G. Burgess, and S. Hodson (eds.), *European Political Thought 1450-1700: Religion, Law and Philosophy* (New Haven and London: Yale University Press, 2008), pp. 102-72; Mack Walker, *Johann Jakob Moser and the Holy Roman Empire of the German Nation* (Chapel Hill: University of North Carolina Press, 1981).

⁸ Martin Heckel, ‘*Itio in partes*: Zur Religionsverfassung des Heiligen Römischen Reiches Deutscher Nation’, in K. Schlaich (ed.), *Martin Heckel Gesammelte Schriften: Staat, Kirche, Recht, Geschichte*, vol. 2 (Tübingen: J. C. B. Mohr, 1989), pp. 636-736, at pp. 642-53.

⁹ For a recent attempt to treat the putative nexus between philosophical rationality and democratic politics as the key to the entire history of modernity, see Jonathan I Israel, *Democratic Enlightenment: Philosophy, Revolution, and Human Rights 1750-1790* (Oxford: Oxford University Press, 2011).

¹⁰ Mark Goldie, ‘John Locke and Anglican Royalism’, *Political Studies* 31 (1983), 61-85.

through individual reason, which meant that the constitutional entrenchment of inculcated ‘biblical historical’ religions was illegitimate.¹¹ More recently Kant’s philosophical architecture has been adapted and refurbished by John Rawls and Jürgen Habermas. Initially, Rawls grounded the nexus of philosophical reason and democratic politics in a conception of self-harmonising citizens whose rationality was powerful (or abstract) enough to exclude religious differences.¹² Later, following his candid acknowledgement that such rationality might itself be grounded in a quasi-religious ‘comprehensive metaphysics’, Rawls moved to a conception of ‘public reasonableness’ intended to filter-out only those religious positions that preclude reaching reasonable agreement.¹³ In doing so he moved his position closer to Habermas’s construction of agreement reached through an ‘ideal speech situation’ and democratic deliberation in a public sphere.¹⁴

Two central features of the German religious constitution make it difficult if not impossible to theorise its authority through any such nexus of philosophical reason and democratic politics. In the first place, this difficulty arises from the manner in which public law established the neutrality of the religious constitution, namely, by treating all comprehensive theological and metaphysical doctrines as the instruments of factionalised religious confessions or ‘philosophical associations’ engaged in unremitting ecclesiological and ideological combat. Public law thus sought to quarantine the religious constitution from theological and philosophical theorisation in part by treating the constitutional order as the ‘unjustifiable’ product of an array of treaties and agreements oriented to a confessional *modus vivendi*, and in part by treating theological and philosophical theories as forms of intellectual combat protected by the constitution insofar as none of them were capable of using its theoretical capture to dominate the others. There have of course been many projects to uncover the theological or philosophical underpinnings of the religious constitution, especially those launched by Kantian and left- and right-Hegelian

¹¹ Ian Hunter, ‘Kant’s Political Thought in the Prussian Enlightenment’, in E. Ellis (ed.), *Kant’s Political Theory: Interpretations and Applications* (University Park: Penn State University Press, 2012), pp. 170-207.

¹² John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), pp. 136-50, 251-57.

¹³ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. xvii-xxiii, 212-54.

¹⁴ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg (Cambridge Mass.: MIT Press, 1996), pp. 194-237.

movements in the run-up to the 1848 national assembly. From the viewpoint of *Staatskirchenrecht*, however, these projects could only be regarded as post facto intellectual actions performed on the constitution on behalf of particular cultural and political factions.¹⁵ This meant that they were to be protected in the same manner as religious associations within the relativistic secular framework of the law, but to be prevented from capturing this framework for a particular philosophical theory and faction.

Secondly, with regard to the religious constitution's insusceptibility to democratic authorisation, this is partly to do with the fact that it emerged three centuries in advance of the convening of Germany's first (partially) democratic assembly in 1848. Rather than arising from the 'people' it had been the product of an elite caste of jurists, diplomats, and statesmen, working as the officials of religiously divided imperial estates, or as the advisers of absolute monarchs. More fundamentally, though, the imperviousness of the constitution to popular-sovereignty conceptions of democracy lies in its historical task: to establish conditions of political coexistence for opposed confessional blocs. For the fundamental historical premise of the constitution was not the the uniting of rational individuals into a common will, but the presumption that the parties would remain irreconcilably opposed to each other indefinitely.¹⁶

In none of its several iterations, then, has the German religious constitution ever been informed by the idea that people are capable of reconciling their religious or philosophical differences and reaching agreement, on the basis of 'public reasonableness', for example, or dialogical principles of rationality. For this reason, far from seeking authorisation in a unified popular will or even in a workable parliamentary majority, the initial form of the constitution outlined in the Treaty of Augsburg in 1555 contained provisions designed to *preclude* majority voting on all

¹⁵ The 'philosophy-proof' character of German public law is registered in these remarks by one of its leading early nineteenth-century representatives: 'German public law is not a rational scholarly discipline but is rather a partially historical, partially positive one, arranged to fill gaps in natural, constitutional, and diplomatic law. Thus the rational forms of speculative disciplines may not be used here'. Johann Ludwig Klüber, *Öffentliches Recht des Teutschen Bundes und der Bundesstaaten*, vol. 1, 2nd ed. (Frankfurt aM., 1822), §14, p. 17.

¹⁶ For a different approach to the relations between public law and democracy — one arguing that the figure of a self-governing people shows how the sovereign can be subject to law while creating it — see Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), pp. 108-17, 221-31, 275-311

matters declared to be ‘religious’ by either of the rival blocs.¹⁷ Even after 1848, though, the irreconcilable conflicts between opposed religious and political factions would make it implausible to posit a rational common will as the normative foundation of the religious constitution; although this would not preclude democratic governments and political parties from assuming the task of *forming* a political will that would support the constitution under conditions of electoral democracy.

In what follows I shall begin by providing an historical outline of the political and juridical founding of Germany’s multi-confessional religious order in the context of religious peace-making in the sixteenth and seventeenth centuries, and of the role of public church law (*Staatskirchenrecht*) as its definitive instrument and effect. I shall then sketch-in some of the ways in which various forms of philosophy engaged with this evolving political-juridical order during the seventeenth and eighteenth centuries, before briefly discussing its incorporation in the democratic constitutions of 1849, 1919, and 1949. By way of a conclusion I will offer some indications regarding the present unfolding of this order in the juridical casuistry of the Federal Constitutional Court (the *Bundesverfassungsgericht*), the order’s current central instrument and effect.

The Historical Structure of the German Religious Order

The prototype of Germany’s double-sided religious constitution emerged with the Treaty of Augsburg in 1555. Augsburg was an agreement between the empire’s Protestant and Catholic estates — the *Corpus Evangelicorum* and *Corpus Catholicorum* — and it was intended to end the religious wars that had followed the splitting of the imperial church in the early decades of the century.¹⁸ The religious focus of the treaty was registered not just in its official title — as the Augsburg Religious Peace (*Augsburger Religionsfriede*) — but also in its central articles where the conflict between the opposed religious blocs is identified as threatening the dissolution of the empire itself.¹⁹ Ratified through the *Reichstag* and administered through the *Reichskammergericht* (Imperial Chamber Court) and the *Reichshofrat* (Imperial Aulic Court), Augsburg was an imperial public law treaty at the centre of which lay an unprecedented strategy: the extension of the purely political institution

¹⁷ Heckel, ‘*Itio in partes*’.

¹⁸ Joachim Whaley, *Germany and the Holy Roman Empire: Volume I: Maximilian I to the Peace of Westphalia, 1490-1648* (Oxford: Oxford University Press, 2012), pp. 255-336.

¹⁹ *Augsburger Religionsfriede*, §13.

of the *Landfriede* — the ‘royal peace’ previously used to settle feudal conflicts — to cover warring religious estates.²⁰ This was the first emergence of the ‘secular’ juridical framework in which the two religions were viewed relativistically — that is, independent of their theological truth-claims — as the condition of ensuring their political coexistence and with it the survival of the empire.

Despite its extraordinary cultural and political significance, the Augsburg Peace was not the brainchild of major theological or philosophical thinkers — for Augsburg there was no Aquinas or Hobbes, no Grotius or Locke. Rather it was the product of hundreds of nameless jurists, diplomats, and statesmen who negotiated a secular peace principally to ensure the survival of their own particular religion. It was grounded not in any kind of theoretical or philosophical breakthrough but in a series of improvised political and juridical measures whose cumulative effect was to transform the empire’s religious constitution.

Several of these measures stand out as particularly important for our present concerns. First, there were measures to establish parity of legal treatment and access to offices for the two confessions within the institutions of imperial public law — the *Reichskammergericht*, *Reichstag*, and (from 1559) the *Reichshofrat*. Central among these measures was the *itio in partes* (division into separate assemblies) that permitted the suspension of majority voting on religious questions, hence ensuring that the political will would be formed through horse-trading and compromise.²¹ Second, this gave rise to acceptance of the ‘permanence of heresy’ at the level of public law and diplomacy, even if heresy remained a key concept within theology and ecclesiastical law. Taken together with the third key measure — the suspension of the incendiary question of theological truth within the treaty negotiations — this produced the relativistic view of religions as a plurality of associations committed to absolute and irreconcilable religious truths.²² Fourth, this was in turn associated with

²⁰ *Augsburger Religionsfriede*, §§12-16.

²¹ Martin Heckel, ‘Parität (I)’, in K. Schlaich (ed.), *Martin Heckel, Gesammelte Schriften: Staat, Kirche, Recht, Geschichte* (Tübingen: J. C. B. Mohr, 1989-1997), pp. 106-226; Klaus Schlaich, ‘Maioritas — protestatio — itio in partes — corpus evangelicorum. Das Verfahren im Reichstag des Heilig Römischen Reichs Deutscher Nation nach der Reformation’, in M. Heckel and W. Heun (eds.), *Klaus Schlaich, Gesammelte Aufsätze: Kirche und Staat von der Reformation bis zum Grundgesetz* (Tübingen: J. C. B. Mohr, 1997), pp. 68-134.

²² Martin Heckel, ‘Religionsbann und landesherrliches Kirchenregiment’, in H.-C. Rublack (ed.), *Die lutherische Konfessionalisierung in Deutschland* (Gütersloh: Gerd Mohn, 1992), pp. 130-62.

the relegation of theological understandings of peace as *pax Christiana* (requiring papal approval), and war as ‘just war’, in favor of a secular or political understanding of peace associated with the institution of the *Landfriede*; that is, peace as a *modus vivendi* between ‘equally just’ warring parties. Finally, this set of developments was accompanied and subtended by the progressive marginalisation of theologians and theologically committed jurists in the institutions of treaty negotiation, and their replacement by public law jurists who, in their juristic persona, were the bearers of the new political-juridical understanding of religion and religious peace that had arisen within the subculture of public law.²³

Perhaps the central and crucial effect of the new arrangements is that they issued in a constitutional framework for religion that was secular in the sense of suspending religious truth, thereby establishing the polity’s neutrality in relation to a plurality of religions, while embedding political peace as a fundament of the constitutional order.²⁴ New concepts emerged within this political-juridical order — most notably of concepts of religions as legally recognised civil associations, and of religious freedom as the political maintenance of a plurality of confessions — and entered into the subculture of public law and the discipline of *Staatskirchenrecht*. It is equally clear, though, that the new order was not secular in the sense of being grounded in a rationalist worldview or secularist philosophy, since it recognised plurality of theologies and theologies viewed as permanently conflicting absolute truths. For the same reason, the new secular framework was not intended to impose a secular understanding on the confessional religions that it contained, by remodeling them as natural or civil religions, for example. Rather, it was structured in such a way as to preserve the separate religious self-understandings of the confessions themselves. This was not least in order to forestall attempts by the confessions to impose their rival theological self-understandings on each other, or to infiltrate the state with a particular confessional viewpoint, which were deep-seated and incendiary tendencies of the entire confessional period. As far as the German case is concerned, there is thus little evidence to support the widespread view that ideologies of ‘liberalism’ and

²³ Notker Hammerstein, ‘Universitäten — Territorialstaaten — Gelehrte Räte’, in R. Schnur (ed.), *Die Rolle der Juristen bei der Entstehung des modernen Staates* (Berlin: Duncker & Humblot, 1986), pp. 687-735.

²⁴ Martin Heckel, ‘Das Säkularisierungsproblem in der Entwicklung des deutschen Staatskirchenrechts’, in G. Dilcher and I. Staff (eds.), *Christentum und modernes Recht. Beiträge zum Problem der Säkularisation* (Frankfurt Main: Suhrkamp, 1984), pp. 35-95, at 50-55.

‘secularism’ were used by the ‘state’ to control religious communities by remodeling ‘subjectivity’ in accordance with these ideologies.²⁵

The dualistic religious constitution is better understood as the improvised historical product of those circumstances in which the unprecedented division of the empire into warring religious estates was addressed through the culture and institutions of public law, whose centrality was itself a purely contingent effect of the empire’s juridical-political character. These circumstances had led to a constitution in which a secular juridical framework — resulting from the pluralistic and relativising measures that established confessional parity and state neutrality — circumscribed a domain of religious associations and practices. Here the rival confessions themselves determined what was to count as religion, freedom, community, and so on, in keeping with their own theological understandings. As it turned out, this double structure would eventually pass into the modern German religious constitution, although there was no necessity that it should, and the paths of its transmission were by no means direct or unbroken.

Among the many unplanned and uncontrollable consequences of the Augsburg measures was the momentous fact that they initially led to a major strengthening and intensification of confessional religion in the German empire.²⁶ The biconfessional juridical framework established religious pluralism only at the imperial level and only for the states and estates as corporate entities. This left states and estates free to pursue radical confessionalisation within their own territories and cities, in accordance with the treaty’s *ius reformandi* — the right of religious reform granted to territorial rulers — and as encapsulated in the slogan *cuius regio eius religio*: whose the realm theirs the religion.²⁷ In its initial iteration the bifurcated structure of the

²⁵ For various iterations of this view, see Talal Asad, ‘Thinking about Religion, Belief, and Politics’, in R. Orsi (ed.), *The Cambridge Companion to Religious Studies* (Cambridge: Cambridge University Press, 2012), pp. 36-57; Saba Mahmood, ‘Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation’, *Public Culture* 18 (2006), 323-47; Elizabeth Shakman Hurd, ‘Believing in Religious Freedom’, in W. F. Sullivan, et al. (eds.), *Politics of Religious Freedom* (Chicago: University of Chicago Press, 2015), pp. 45-56; and Peter G. Danchin, ‘Religious Freedom in the Panopticon of Enlightenment Rationality’, in *Ibid.*, pp. 240-52.

²⁶ Heinz Schilling, ‘Die Konfessionalisierung im Reich: Religiöser und gesellschaftlicher Wandel in Deutschland zwischen 1555 und 1620’, *Historische Zeitschrift* 246 (1988), 1-45.

²⁷ Wolfgang Reinhard, ‘Zwang zur Konfessionalisierung? Prolegomena zu einer Theorie des konfessionellen Zeitalters’, *Zeitschrift für Historische Forschung* 10 (1983), 257-77.

imperial religious constitution thus helped to create the situation in which pluralisation of confessions at the imperial level was accompanied by the intensification of confessionalisation at the territorial level.²⁸ In a series of uncontrollable developments this led to the emergence of an array of mutually hostile confessional states whose antagonisms would eventually paralyse and then overwhelm the dispute-resolving mechanisms of the biconfessional constitutional courts, helping to catapult the empire into the catastrophe of the Thirty Years War that began in 1618.²⁹

In bringing this war to a close, the Westphalian treaties of 1648 — part international peace treaties, part imperial public law — initiated a major transformation of the German religious constitution. They did so by transferring the bifurcated constitution from the level of the empire to the internal constitutional orders of the territorial states and cities themselves. In requiring the states to give legal recognition to three public confessions — Lutheranism, Catholicism, and Calvinism — the Westphalian Treaty of Osnabrück signaled the beginning of the end of the *cuius regio* principle and opened a path that would eventually see the dissolution of the order of confessional states.³⁰ For this requirement meant that all of the territorial states had to establish a juridical framework for a plurality of confessions — the secular conception of religious freedom — while simultaneously allowing each of the rival confessions to practice their religion in accordance with its own theological self-understanding.³¹

Formal constitutional change, however, does not necessarily alter concrete political and juridical orders. Germany's most powerful confessional states — Lutheran Saxony and Catholic Bavaria and Austria — thus persisted in maintaining their religious regimes throughout the seventeenth century and well into the eighteenth, requiring adherence to the state religion as a condition of holding civil

²⁸ Martin Heckel, *Deutschland im konfessionellen Zeitalter* (Göttingen: Vandenhoeck & Ruprecht, 1983), pp. 67-79.

²⁹ Horst Rabe, 'Der Augsburger Religionsfriede und das Reichskammergericht 1555-1600', in H. Rabe, H. Molitor, and H.-C. Rublack (eds.), *Festgabe für Ernst Walter Zeeden* (Münster: Aschendorff, 1976), pp. 260-80; Whaley, *Germany and the Holy Roman Empire: Volume I*, pp. 404-27.

³⁰ Heckel, *Deutschland im konfessionellen Zeitalter*, pp. 181-209; Whaley, *Germany and the Holy Roman Empire: Volume I*, pp. 619-31.

³¹ Benjamin Straumann, 'The Peace of Westphalia as a Secular Constitution', *Constellations* 15 (2008), 173-88.

office, and persecuting their religious minorities.³² In fact during this period it was only in Brandenburg-Prussia that the deconfessionalising potential of Osnabrück began to be realised. This was not because Prussia was a more ‘enlightened’ state or one more sensitive to the ‘rule of law’ — a *Rechtsstaat* — but for a quite different kind of reason: namely, that Brandenburg-Prussia’s multi-confessional character had forestalled confessionalisation in the first place, making it more open to the pluralistic religious constitution required by the treaty.³³ After converting from Lutheranism to Calvinism at the beginning of the seventeenth century, the ruling Hohenzollern dynasty had embarked on a radical confessionalising program, only to encounter the implacable resistance of the territory’s powerful Lutheran estates, which resulted in a political-religious stalemate and the de-facto acceptance of a multi-confessional order.³⁴ Nevertheless, in fact for just these reasons, from the late-seventeenth century onwards Prussia became the forcing house for developments in the German religious constitution.

From the late-seventeenth century and throughout the eighteenth, the Hohenzollern rulers, while maintaining Calvinism as the court religion, thus enacted a raft of decrees and policy measures designed to incorporate the territory’s powerful Lutheran estates and its Calvinist and Catholic minorities within a pluralistic religious order overseen by an increasingly deconfessionalised state.³⁵ These were the historical circumstances that first permitted the bifurcated religious constitution to be installed within a territorial state. This development was manifest in the juridical reception of the Osnabrück articles within Brandenburg-Prussian public law and *Staatskirchenrecht*, and in the theoretical reception and defence of the new secularised pluralistic framework within academic natural law, especially in the work

³² Marc R. Forster, ‘Catholic Confessionalisation in Germany after 1650’, in J. M. Headley, H. J. Hillerbrand, and A. J. Papalas (eds.), *Confessionalisation in Europe, 1555-1700: Essays in Honor and Memory of Bodo Nischan* (Aldershot: Ashgate, 2004), pp. 227-41.

³³ Gerd Heinrich, ‘Religionstoleranz in Brandenburg-Preußen. Idee und Wirklichkeit’, in M. Schlenke (ed.), *Preussen, Versuch einer Bilanz. Band 2, Beiträge zu einer politischen Kultur* (Reinbeck: Rowohlt, 1981), pp. 61-88.

³⁴ See above all, Bodo Nischan, *Prince, People, and Confession: The Second Reformation in Brandenburg* (Philadelphia: University of Pennsylvania Press, 1994).

³⁵ Wolfgang Gericke, *Glaubenszeugnisse und Konfessionspolitik der Brandenburgischen Herrscher bis zur Preussischen Union 1540 bis 1815* (Bielefeld: Luther Verlag, 1977), pp. 53-98.

of Samuel Pufendorf and Christian Thomasius that would be headquartered at the university of Halle.³⁶

In addition to the piecemeal reception of the new imperial public law by its jurists, the Hohenzollern court continued to elaborate the dualistic religious constitution through a series of major decrees during the eighteenth century. This process issued in the Religious Edict of 1788 that added the Mennonites, Bohemian Brethren, and ‘Jewish nation’ to the list of tolerated confessions while cracking down on religious rationalism; and it culminated in the Prussian General Legal Code of 1794, whose religious articles declared the state’s religious neutrality and the protection of the plurality of legally recognised confessions.³⁷ In order to remind ourselves that these developments were the result of Prussia’s contingent religious and political circumstances — rather than any inevitable progress in reason, enlightenment, or the rule of law — we should take note of a significant attempt to reverse or at least divert them. During the political turbulence and contestation of the *Vormärz*, the Hohenzollerns attempted to centralise and ‘modernise’ the religious constitution through an imposed unification of Calvinism and Lutheranism into a state Protestantism.³⁸ In the event, and no less contingently, this project was stymied by refractory Lutheran estates who could now appeal to a legally entrenched religious pluralism, as we shall see below.

The German religious constitution thus arose from a series of concrete political-juridical measures — such as the *itio in partes* and the suspension of theological truth in treaty negotiations — that had been improvised by nameless jurists to preserve their own confessions under conditions of religious civil war. Emerging from circumstances in which the institutions and culture of imperial public law were adapted to cope with the fracturing of the imperial religion, the constitution began to assume its Janus-faced form: a secular and relativistic juridical framework designed

³⁶ Detlef Döring, ‘Samuel von Pufendorf’s Berufung nach Brandenburg-Preußen’, in F. Palladini and G. Hartung (eds.), *Samuel Pufendorf und die europäische Frühaufklärung. Werk und Einfluß eines deutschen Bürgers der Gelehrtenrepublik nach 300 Jahren (1694-1994)* (Berlin: Akademie Verlag, 1996), pp. 11-28; Ian Hunter, ‘Natural Law as Political Philosophy’, in D. Clark and C. Wilson (eds.), *The Oxford Handbook of Philosophy in Early Modern Europe* (Oxford: Oxford University Press, 2011), pp. 475-99, at pp. 486-96.

³⁷ For an important account of these developments, see Michael J. Sauter, *Visions of the Enlightenment: The Edict on Religion of 1788 and the Politics of the Public Sphere in Eighteenth-Century Prussia* (Leiden: Brill, 2009).

³⁸ On this episode, see Christopher Clark, ‘Confessional Policy and the Limits of State Action: Frederick William III and the Prussian Union 1817-40’, *The Historical Journal* 39 (1996), 985-1004.

to maintain a plurality of transcendent and absolute religious teachings. Despite the fact that it guaranteed freedom of religious practice for the three Westphalian religions plus four more territorially recognised religious communities, however, the religious constitution that was developing in eighteenth-century Prussia was not ‘liberal’ in the modern philosophical understanding of that term and was not democratic in any understanding. The secularised and relativistic juridical framework recognising a plurality of confessions was neither oriented to the recognition of individual rights nor grounded in the notion of a free exercise of individual reason or belief.³⁹ Religious freedom as the public-law recognition of a plurality of public confessions was the result of a series of measures designed to ensure the political coexistence of rival religious communities. This was to be achieved through their incorporation in a regime that would permit the confessions to unfold their religious self-understandings within a secular and relativistic political-juridical order, while simultaneously preventing them from imposing these self-understandings on each other, or embedding them in the juridical architecture of the state itself. German religious freedom had nothing to do with Locke or liberalism and was far more interested in protecting the public rights (and borders) of the religious confessions than the private rights of individuals.

Its historical emergence and structure has made the German religious constitution extraordinarily resistant to its theorisation by the modern human sciences. This is not least because to the extent that they operate at the nexus of a truth-oriented ideality and a determinant social materiality then, from the standpoint of German public law, the human sciences themselves fall within the sphere of relativised transcendental teachings or *Weltanschauungen*. This is what makes it difficult to argue that the secular dimension of the constitution was itself the result of some deeper theology or metaphysics; for example, a monistic or ‘univocal’ nominalist metaphysics that expelled God from nature, or a voluntaristic theology that uprooted the transcendentals from society and left it prey to secular governance.⁴⁰ On the one

³⁹ For an alternative non-historical approach, treating German religious pluralism as the result of a deep-seated ‘thirst’ for transcendent religion issuing in a ‘human right’ to religious expression, see Gerhard Robbers, ‘Religious Freedom in Germany’, *Brigham Young University Law Review* (2001), 643-68; and, more generally, Gerhard Robbers, *Religion and Law in Germany* (Dordrecht: Kluwer, 2010).

⁴⁰ As is argued more broadly about the emergence of secular society in Charles Taylor, *A Secular Age* (Cambridge MA: Harvard University Press, 2007), pp. 90-145. See also Brad

hand, this kind of account fails to comprehend that that constitution's secular framework emerged from a protracted process of pacification and institution-building that required the suspension of all theological truths: nominalist or realist, voluntarist or rationalist. On the other, it fails to observe that this framework was designed to allow the confessional teaching of all metaphysical doctrines — dualist and 'univocal', rationalist and voluntarist — including the Thomist-Aristotelian doctrine on which this modern conception of secularisation is based.

Similar remarks apply to accounts that view the political-juridical framework as a product of large-scale sociological laws or determinants. Of particular pertinence are those accounts that treat the secular character of the framework as the product of the functionalisation of religion by a 'nation state' intent on an exhaustive extension of its disciplinary power at the expense of the moral communities within it or a humanity above it.⁴¹ Here the problem is partly that this sociological theorising ignores the salient history: firstly, that the German religious constitution emerged not in nation states but in a multi-national empire; second, that the first territorial state to adopt it — Brandenburg-Prussia — was not a religiously unified nation state but a 'composite' polity whose premise was the management of permanent multi-confessional disunity.⁴² Underlying this historiographic problem though is the more deeply embedded and problematic sociological assumption that 'society' itself is capable of producing a philosophy — whether Hegelian, Marxian, Durkheimian, Kantian — capable of knowing the truth of religion, state, and law from the perspective of their higher future moral form. The historical premise of the public law religious constitution, however, is that the confessional and philosophical associations found in society are irreconcilably conflictual, which means that none of their rival

S Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Cambridge Mass: Harvard University Press, 2012), pp. 143-63, 189-224.

⁴¹ For examples, see Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003), pp. 181-201; Matthias Koenig, 'Politics and Religion in European Nation-States: Institutional Varieties and Contemporary Transformations', in B. Giesen and D. Suber (eds.), *Religion and Politics: Cultural Perspectives* (Leiden: Brill, 2005), pp. 291-316; Peter G. Danchin, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered', *Journal of Law and Religion* 23 (2007/8), 455-534, at pp. 481-89; Philip S. Gorski, 'Calvinism and State-Formation in Early Modern Europe', in G. Steinmetz (ed.), *State/Culture: State Formation After the Cultural Turn* (Ithaca NY: Cornell University Press, 1999), pp. 147-81.

⁴² On the 'composite' character of Brandenburg-Prussia, see the important revisionist study by Karin Friedrich, *Brandenburg-Prussia, 1466-1806: The Rise of a Composite State* (London: Palgrave Macmillan, 2012).

truths can serve as an effectual science of law and state without a loss of neutrality. As we shall now see, all of these problems are rooted in the historical relations between public law and philosophy.

Public Law and Philosophy

One of the most difficult things to grasp about the emergence of the German religious constitution and *Staatskirchenrecht* is the manner in which the sheer historical gravity of this new cultural body altered the intellectual orbits and trajectories of academic theology and philosophy. In the first place, by suspending the truth claims of the rival confessions — as the means of establishing their political and juridical parity — public law also adopted a neutral and relativistic view of their competing theologies and metaphysics, not least in order to prevent them infiltrating the constitution itself. In suspending and relativising theological and metaphysical doctrines, the deconfessionalised constitutional order would come to view theologies and philosophies as it did the religions from which they had emerged: namely, as engaged in permanent irreconcilable conflict in a space whose freedom had to be protected (and insulated) by a neutral legal and political frame. Second, this neutral and relativistic outlook was intersected and supported by a new kind of historical writing: the contextual-philological history of theology and philosophy that emerged during the seventeenth century.⁴³ This was a historiography that viewed theologies and philosophies as neither true nor false but as historical intellectual cultures or lifestyles, typically as pedagogical or psychagogical teachings in the service of particular religious or philosophical ‘schools’. It thereby suspended the idea that they might be revelatory of the human mind’s knowledge of itself or its relation to God or the world.

From the perspective of the subculture of public law that they helped to form, these two developments precluded the attribution of theological or philosophical

⁴³ For an introduction to the issues involved, see Donald R. Kelley, ‘History and/or Philosophy’, in J. B. Schneewind (ed.), *Teaching New Histories of Philosophy* (Princeton NJ: University Center for Human Values, 2004), pp. 345-59. For a detailed discussion of the German context, see Sicco Lehmann-Brauns, *Weisheit in der Weltgeschichte: Philosophiegeschichte zwischen Barok und Aufklärung* (Tübingen: Niemeyer, 2004). See also, Ralph Häfner, ‘Jacob Thomasius und die Geschichte der Häresien’, in F. Vollhardt (ed.), *Christian Thomasius (1655-1728): Neue Forschungen im Kontext der Frühaufklärung* (Tübingen: Max Niemeyer, 1997), pp. 141-64; and Martin Mulsow, ‘Antiquarianism and Idolatry: The *Historia* of Religions in the Seventeenth Century’, in G. Pomata and N. G. Siraisi (eds.), *Empiricism and Erudition in Early Modern Europe* (Cambridge MA: MIT Press, 2005), pp.

‘foundations’ to the religious constitution; for example, in the form of principles of justice that might have been implanted in man by divine law, or discovered by him through philosophical reason, or even foisted on him by power-hungry ideologues. These were precisely the kinds of principle that the constitutional settlement treated relativistically as permanently conflictual, and that the history of philosophy approached as factional pedagogies and psychagogies. Of course this does not mean that various theological and philosophical schools were precluded from engaging with *Staatskirchenrecht* and the religious constitution. It does mean, however, that such engagement was supervenient in the sense of taking place as an abstractional activity or discourse that was brought to bear on the public law constitution post facto, typically as a means of opening it to adjacent religious, cultural, or political worldviews.⁴⁴

From the standpoint of the history of public law, then, the philosophies that surrounded it appear as instituted intellectual cultures — arts of thinking, ‘spiritual exercises’, practices of self-cultivation — in various kinds of post hoc relation to it. When philosophies advance various ‘transcendental’ postulates — regarding the dualistic or monistic character of ‘substance’, the relation between man’s intellect and sensibility, the mind’s relation to the world, and so on — then, from the relativistic standpoint of public law, these are treated similarly to the parallel postulates found in theology; for example, theological postulates regarding divine intellection and man’s participation in it, or the relation between Christ’s divine and human natures, and so on. They are treated, that is, as the teachings of rival schools of thought and ways of life, incapable of being reconciled with each other, and functioning within forms of edification or worship internal to particular subcultures of philosophy or theology. That said, even highly abstract forms of philosophy can have real effects within public law when their forms of abstraction are used concretely to rework it for particular purposes.

The relation between a particular philosophy (or theology) and the public law religious constitution thus cannot be determined through philosophical reflection on transcendental postulates — for example, through reflection on the constitution’s

⁴⁴ On the investigation of philosophical abstraction as a concrete historical activity, see the important paper by J. G. A. Pocock, ‘The History of Political Thought: A Methodological Inquiry (1962)’, in his *Political Thought and History: Essays on Theory and Method* (Cambridge: Cambridge University Press, 2009), pp. 3-19.

postulated underlying theological or metaphysical conditions of possibility — since such reflection is regarded as internal to the rival movements or schools that the constitution is designed to maintain in a condition of relativistic pluralism. Rather than being treated as an object of transcendental reflection, then, the relation between philosophy and public law must be approached as an object of historical investigation. This object of investigation will consist of the several kinds of relation that have obtained historically between the institutional order of the public law religious constitution and the instituted practices of philosophy and theology that have supervened on this order from adjacent cultural spheres, typically those of church and university. From the wide array of such relations we have space to discuss just a handful, selected for the insight that they provide into the religious and political purposes informing various attempted philosophical and theological annexations of the public law religious constitution.

The first kind of relation is exemplified by early modern political theologians who sought to reject or suspend the secular and relativistic constitutional framework *tout court*. They pursued this objective on the basis of powerful metaphysical doctrines purporting to provide a true knowledge of man's relation to God and his world in accordance with a confessional theology. This allowed them to demonstrate the absolute truth of a particular religious confession against rival confessions and against the secularised juridical-political order itself. A typical instance of this kind of political theology or theological politics is provided by Andreas Erstenberger, a Catholic secretary to the *Reichshofrat* charged with administering the Religious Peace of Augsburg but in fact its implacable covert opponent. Erstenberger's central argument was that the 'temporal' or 'political' peace promised by Augsburg's recognition of plural religions is unacceptable, since true 'inner' peace and freedom come only from man's reconciliation with God through the true worship of him, and this is impossible if we tolerate the Protestant heretics who worship God falsely.⁴⁵ True faith and true worship are grounded in Christ's teaching as transmitted through St. Peter to the Catholic church, and in the church's natural law teaching which is responsible for mediating divine law to the civil realm where it is binding on temporal rulers.⁴⁶ The *Politicorum* of 1621, written by the Jesuit political theologian Adam

⁴⁵ Andreas Erstenberger, *De Autonomia, das ist, von Freystellung mehrelay Religion und Glauben* (Munich, 1586), bk. II, pp. 183-88.

⁴⁶ Erstenberger, *De Autonomia*, bk. II, pp. 146-55.

Contzen, provides a more thoroughgoing political mobilisation of Thomist metaphysics to these ends, elaborating a juridical hierarchy grounded in the divine law established by God's creative intellection of the forms. This divine law is accessed by Catholic theologians in the form of (Thomist) natural law, which the prince is then bound to mediate in the civil law of the republic, showing in turn the criminality of heretics and sectarians and the falsity of their claims to their own law.⁴⁷

If Contzen's political metaphysics shows how the German religious constitution appeared from the standpoint of one of the Catholic confessional states that it helped to make possible — Contzen was confessor to Elector Maximilian I of Bavaria — then the Saxon theologian Balthasar Meisner's metaphysics and natural law provides a comparable instance from the Protestant side. Together with Christoph Scheibler, Meisner sought to provide a metaphysical foundation for the Lutheran Formula of Concord — especially with regard to its account of the relation between Christ's immaterial (divine) and material (human) natures and his real presence in the Eucharistic host — and to defend it against the rival Calvinist and Catholic confessional formulas.⁴⁸ Meanwhile in his *Dissertatio de legibus* of 1616, Meisner outlined a legal hierarchy strikingly similar to Contzen's, providing an account of the manner in which divine law is acceded to via (now Protestant) natural law and thence mediated by the prince as civil law in the republic.⁴⁹ Meisner's *Dissertatio* thus provides a further example of how confessional political metaphysics permitted the biconfessional imperial constitution to be circumvented by theologians intent on defending a confessional polity.

Emerging on the other side of the Thirty Years War, and in the wake of Westphalian treaties, the second kind of philosophical engagement with the religious

⁴⁷ Adam Contzen, *Politicorum Libri Decem* (Cologne, 1621), bk. V, chs. xiv-xx, pp. 331-42. On Contzen's joint role as spiritual confessor and political adviser, see Robert Bireley, 'Hofbeichtväter und Politik im 17. Jahrhundert', in M. Sievernich (S. J.) and G. Switek (S. J.) (eds.), *Ignatianisch: Eigenart und Methode der Gesellschaft Jesu* (Freiburg: Herder, 1989), pp. 386-403.

⁴⁸ Balthasar Meisner, *Philosophia sobria*, 3 vols. (Wittenberg, 1611-23). The unsurpassed account of Meisner's metaphysics and its role in explicating the metaphysical ground of the Formula of Concord remains Walter Sparr, *Wiederkehr der Metaphysik: Die ontologische Frage in der lutherischen Theologie des frühen 17. Jahrhunderts* (Stuttgart: Calwer Verlag, 1976).

⁴⁹ Balthasar Meisner, *Dissertatio de legibus in quatuor libellos distributa* (Wittenberg, 1616). For a discussion of the *Dissertatio* as the architecture of a Christian politics, see Horst Dreitzel, 'Naturrecht als politische Philosophie', in H. Holzhey and W. Schmidt-Biggemann (eds.), *Die Philosophie des 17. Jahrhunderts, Band 4: Das heilige Römische Reich deutscher Nation, Nord- und Ostmitteleuropa* (Basel: Schwabe, 2001), pp. 836-48, at pp. 841-42.

constitution differed markedly and self-consciously from the first, especially in the deconfessionalising context of late-seventeenth century Brandenburg-Prussia. Rather than attempting to supplant the dualistic religious constitution with a confessional political metaphysics, the objective of the natural law and public law writings of Samuel Pufendorf and his follower Christian Thomasius was to deploy forms of abstraction that would lift the constitution itself into a certain kind of philosophical visibility.⁵⁰

Elaborated through explicit cultural combat with confessional political metaphysics, Pufendorf's natural law deployed a Hobbesian version of the political pact in order to eliminate divine law and its theological interpreters from the sphere of politics and law.⁵¹ At the same time, now departing from Hobbes, Pufendorf also launched a frontal assault on the unified moral anthropologies of Thomist and Christian-Platonist ethics. This was in the form of a doctrine of pluralised moral personae or *entia moralia*, 'instituted' to shape human conduct for particular spheres or purposes of life.⁵² In his influential *De habitu religionis christianae ad vitam civilem* (On the Nature of Religion in Relation to Civil Life) of 1687, Pufendorf was thus able to reshape the relations between state and church by presenting them as discrete realms inhabited by separate moral personae. The 'civil kingdom' is inhabited by rulers and subjects and is characterised by the exercise of coercive power to maintain social peace, while the 'kingdom of truth' is inhabited by religious teachers and auditors and characterised by the pursuit of salvation through relations of love and emulation.⁵³ In this way Pufendorf not only lifted the double-sided religious constitution — with its secular juridical frame and its complement of confessional religions — into philosophical visibility and academic teachability, he also attempted to provide a form of ethical justification for it via the doctrine of multiple moral personae.

⁵⁰ Hunter, 'Natural Law as Political Philosophy', pp. 486-96.

⁵¹ Fiammetta Palladini, 'Pufendorf Disciple of Hobbes: The Nature of Man and the State of Nature: The Doctrine of *socialitas*', *History of European Ideas* 34 (2008), 26-60.

⁵² For a helpful and accessible overview online, see Michael J. Seidler, 'Pufendorf's Moral and Political Philosophy,' in Edward N. Salta (ed.), the *Stanford Encyclopedia of Philosophy* (Stanford: Stanford Center for the Study of Language and Information, 2010), <<http://plato.stanford.edu/archives/win2015/entries/pufendorf-moral/>>. Accessed 9 November 2016. See also, Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge: Cambridge University Press, 2001), pp. 163-68.

⁵³ Samuel Pufendorf, *Of the Nature and Qualification of Religion in Reference to Civil Society* ed. S. Zurbuchen (Indianapolis: Liberty Fund, 2002), pp. 32-59.

Having been driven from Saxony in 1690 for his incautious attacks on Lutheran political metaphysics, and finding a welcome refuge as a founding law professor at the new Brandenburg-Prussian university of Halle, Pufendorf's follower Christian Thomasius was free to launch a frontal assault on the metaphysical and juridical underpinnings of the confessional state. He did this not least by incorporating Pufendorf's teachings into a new arts-law curriculum designed to form jurists and statesmen suited to the post-Westphalian religious constitution.⁵⁴ In addition to publishing his own exercises in Pufendorffian natural law, Thomasius used the *De habitu* as the basis for intensive lecturing on the new *Staatskirchenrecht*, and published texts on curriculum reform and the history of church law.⁵⁵ All the while he was engaged in relentless disputations in which he attacked heresy and witchcraft prosecutions, argued for the adiaphoristic character of theological doctrine and liturgy, and defended the prince's right to tolerate dissenters, including Catholics and (eventually) atheists.⁵⁶

Nonetheless, despite the fact that he has been portrayed as a founding father of 'the enlightenment', Thomasius was neither a German equivalent of Locke nor a local precursor of Kant. Rather than being grounded in a rationalist anthropology of the Lockean or Kantian kind, Thomasius's onslaught against the metaphysical and juridical infrastructure of the confessional state was based in the dualistic structure of the German religious constitution as this had been rationalised in Pufendorffian natural law and *Staatskirchenrecht*. On the one hand, this meant that toleration and religious freedom were not grounded in individual reason and rights but in the state's capacity and duty to provide a political-juridical framework for a plurality of public religions as the condition of civil peace. Toleration thus is a right and duty of the prince, not his subjects.⁵⁷ On the other hand, it meant that religious faith was acceded to through

⁵⁴ Horst Dreitzel, 'Christliche Aufklärung durch fürstlichen Absolutismus. Thomasius und die Destruktion des frühneuzeitlichen Konfessionsstaates', in F. Vollhardt (ed.), *Christian Thomasius (1655-1728). Neue Forschungen im Kontext der Frühaufklärung* (Tübingen: Niemeyer, 1997), pp. 17-50; Ian Hunter, *The Secularisation of the Confessional State: The Political Thought of Christian Thomasius* (Cambridge: Cambridge University Press, 2007), pp. 21-83.

⁵⁵ Georg Steinberg, *Christian Thomasius als Naturrechtslehrer* (Cologne: Carl Heymann, 2005).

⁵⁶ A selection of these disputations is available in Ian Hunter, Thomas Ahnert, and Frank Grunert, (ed. and trans.), *Christian Thomasius: Essays on Church, State, and Politics* (Indianapolis: Liberty Fund, 2007).

⁵⁷ See, Christian Thomasius and Enno Rudolph Brenneysen, *Das Recht evangelischer Fürsten in theologischen Streitigkeiten* (Halle: Christoph Salfeld Verlag, 1696), pp.167-71.

biblical revelation and was incapable of philosophical explication, as reflected in Thomasius's vehement opposition to all forms of philosophical theology whether scholastic, Spinozist, or Leibnizian.⁵⁸ For Thomasius religions constituted a plurality of revealed teachings, leaving them insusceptible of the kind metaphysical-philosophical explication that had permitted theological annexations of the civil order. In keeping with Brandenburg-Prussian *Religionspolitik* and the Treaty of Osnabrück, freedom of religion hinged on the state recognition of a plurality of confessional religions, each confession teaching revealed truths whose insusceptibility to philosophical explication disqualified them as foundations for civil authority. The personae of the citizen and the Christian belonged to different moral universes, and philosophical religion was the miscegenated hybrid that threatened the basis of the religious constitution itself.

The third and final kind of philosophical engagement with the public law religious constitution that we will examine was indeed marked by the onset of philosophical religions, whose first and most influential German exponent was Immanuel Kant.⁵⁹ Ignoring Pufendorf and Thomasius, Kant reached back to the pre-Westphalian Protestant metaphysics of the Meisner-Scheibler kind. He transformed this tradition, however, by transposing the metaphysical relations between God and man, immaterial and material being, into the register of the human subject where they structured the relation between intellect and sensibility.⁶⁰ This gave rise to a metaphysics of cognition in which the creative intellect finds itself realised in and

For a rare appreciation of this dimension of Thomasius's position, see Matthias J. Fritsch, *Religiöse Toleranz im Zeitalter der Aufklärung. Naturrechtliche Begründung — konfessionelle Differenzen* (Hamburg: Felix Meiner, 2004), pp. 48-65. See also, Ian Hunter, 'The Tolerationist Programmes of Thomasius and Locke', in J. Parkin and T. Stanton (eds.), *Natural Law and Toleration in the Early Enlightenment* (Oxford: Oxford University Press, 2013), pp. 107-37.

⁵⁸ Thomas Ahnert, 'Enthusiasm and Enlightenment: Faith and Philosophy in the Thought of Christian Thomasius', *Modern Intellectual History* 2 (2005), 153-77. See also, Hunter, *The Secularisation of the Confessional State*, pp. 61-83.

⁵⁹ For an interpretation of rational theologies as philosophical religions, see Carlos Fraenkel, *Philosophical Religions from Plato to Spinoza: Reason, Religion, and Autonomy* (Cambridge: Cambridge University Press, 2012).

⁶⁰ This transposition remains under-researched. For some relevant discussions, see Heinz Heimsoeth, 'Metaphysical Motives in the Development of Critical Idealism', in M. S. Gram (ed.), *Kant: Disputed Questions* (Chicago: Quadrangle Press, 1967), pp. 158-99; Heinz Heimsoeth, *The Six Great Themes of Western Metaphysics and the End of the Middle Ages*, trans. R. J. Betanzos (Detroit: Wayne State University Press, 1994); Ingeborg Heidemann, 'Person und Welt: Zur Kantinterpretation von Heinz Heimsoeth', *Kant-Studien* 48 (2009), 344-60; and Ulirch L. Lehner, *Kants Vorkehrungskonzept auf dem Hintergrund der deutschen Schulphilosophie und -theologie* (Leiden: Brill, 2007), pp. 301-77.

limited by sensory appearances, and a metaphysics of morals in which a capacity for intellectual self-governance must overcome the heteronomous desires of the sensuous inclinations. In this way, Kant reinstated a singular unifying spiritual anthropology, but now put to work in the domain of extra-ecclesial philosophical pedagogy and self-cultivation, where it provided the common basis for his political metaphysics and his religious philosophy.⁶¹

Kant's political philosophy is organised by the remarkable figure of thought whereby noumenal beings — pure intelligences existing outside space and time — in seeking to occupy the surface of the earth find that its spherical character establishes contiguity among them. This permits their choices or wills to come into conflict, thereby making the formation of a common will imperative as the condition of reconciling their choices in accordance with the 'principle of right' or justice.⁶² Abstracting completely from the historical meaning of the term, Kant then declares that 'public law' is the empirical expression of the harmonised willing of the 'rational beings' who compose the citizenry of the state.⁶³ Citizens themselves are thus direct participants in the exercise of legislative sovereignty which assumes the form of the moral self-governance of a collective rational being, there being no separation between the political personae of legislator and citizen. This permits Kant to declare that the test for the legitimacy of laws is whether 'they *could* have arisen from the united will of a whole people ...'.⁶⁴

But it is the relation between this metaphysical republicanism and Kant's religious philosophy that is particularly pertinent for our current concerns. In his *Religion within the Bounds of Bare Reason*, Kant treats the revealed truths of the confessional religions — the biblical history of God's incarnation in Christ and Christ's vicarious atonement for human sin — as the merely 'external' and 'empirical' forms through which the unrefined human intellect was first introduced to a latent metaphysical truth. This truth is that of the intellect's own capacity for moral

⁶¹ Ian Hunter, 'Kant's Political Thought in the Prussian Enlightenment', in E. Ellis (ed.), *Kant's Political Theory: Interpretations and Applications* (University Park: Penn State University Press, 2012), pp. 170-207.

⁶² Immanuel Kant, 'The Metaphysics of Morals', in M. J. Gregor (ed.), *Immanuel Kant: Practical Philosophy* (Cambridge: Cambridge University Press, 1996), pp. 355-603, at pp. 401-15.

⁶³ Kant, 'The Metaphysics of Morals', pp. 455-61.

⁶⁴ Immanuel Kant, 'On the Common Saying: That may be correct in theory, but it is of no use in practice', in *Practical Philosophy*, pp. 273-310, at pp. 296-97.

self-regeneration and moral self-governance for which the story of Christ only supplies the outer symbol.⁶⁵ The historical purgation of man's empirical imagination and sensuous inclinations that issues in his capacity for autonomous intellectual self-governance — which is the true meaning of dying to the world and being reborn in Christ — is thus on the verge of replacing the revealed empirical religions of the Christian confessions with a 'pure religion of reason' located in the individual.⁶⁶

It is striking then that Kant's metaphysical republicanism and his philosophical theology converge in the same figure: the figure of man's putative capacity for rationally self-governing willing. This figure supplies the metaphysical foundation for Kant's conception of public law and the state as the executor of the common will of a community of rational beings. (No separation between citizen and sovereign). But it simultaneously forms the basis of his conception of rational religion as the means by which individuals undergo the refinement or regeneration of their faculties that realises their latent capacity for rational self-governance and allows them to form an 'ethical community'.⁶⁷ (No separation between citizen and Christian). In other words, Kant regarded his philosophical religion as the pedagogical condition of the moral self-governance that legitimates an ideal democratic republic. For this reason his philosophy was doubly inimical to the Prussian religious constitution. On the one hand, it sought to replace the plurality of constitutionally protected confessions with a single 'religion of pure reason' while, on the other hand, it sought to transform the secular neutrality of the public law framework into the expression of a self-governing popular will that had been purified by this religion.

Neither was Kant's opposition to the religious constitution merely speculative, for he went out of his way to declare that the constitution as embodied in the Prussian Religious Edict of 1788 — the edict that had reaffirmed the freedom of the (now seven) confessional religions while banning their clergy from preaching religious rationalism in their clerical persona — was both politically illegitimate and

⁶⁵ Immanuel Kant, *Religion within the Bounds of Bare Reason*, trans. W. S. Pluhar (Indianapolis IN: Hackett, 2009), pp 6-87. For an illuminating discussion of this see Walter Sparr, 'Kant's Doctrine of Atonement as a Theory of Subjectivity', in P. J. Rossi and M. Wreen (eds.), *Kant's Philosophy of Religion Reconsidered* (Indianapolis: Indiana University Press, 1991), pp. 103-12.

⁶⁶ Kant, *Religion*, pp. 113-37.

⁶⁷ Kant, *Religion*, pp. 104-110.

philosophically false.⁶⁸ It was politically illegitimate because the people could not will a constitution that delegated the individual pursuit of spiritual regeneration and moral self-governance to an array of merely revealed ‘empirical’ religions; and it was philosophically false because history was in fact progressively realising the (Kantian) religion of pure reason through which this self-governing rational will would be formed.

As we have seen, the historical premise of the religious constitution was that religious division precluded the possibility of a unified political will, and its central strategy was the maintenance of a plurality of rival revealed confessions in perpetuity. In proposing to supplant this constitution with one based in a popular will that would be refined and unified by his own philosophical religion, Kant’s philosophy may thus be regarded as the architecture for a particular cultural-political faction or sect. This operated unofficially within the sphere of constitutional religious pluralism, but was dedicated to overturning its secular and relativistic juridical framework. This enables us to properly situate Kantian philosophy in the print war that exploded around the 1788 Edict on Religion — that is, not as a theory of politics and religion that history might prove true, but as just one of a plurality of political and religious factions that were fighting it out within the constitutional order.

Kant’s chief spear-carrier in the print war, Gottfried Hufeland, thus argued the illegitimacy of the edict on the grounds that the legal maintenance of a system of public confessions was incompatible with the individual’s free pursuit of self-perfecting religious truth, and he proposed a new religious constitution based in a myriad of congregational churches whose members would decide their theologies and elect their ministers.⁶⁹ Hufeland’s Kantian voice, though, was only one in the raucous chorus of religious rationalism, which also included the Lutheran pastor Johann Heinrich Schulz. Schulz argued that since theology and religion could not be grounded in demonstrable knowledge of God they should be banished to a purely private domain, while the state should enact a public moral philosophy grounded in a

⁶⁸ Kant, ‘On the Common Saying’, pp. 302-3; and Immanuel Kant, ‘An Answer to the Question: ‘What is Enlightenment?’’, in H. Reiss (ed.), *Kant: Political Writings* (Cambridge: Cambridge University Press, 1970), pp. 54-60.

⁶⁹ Gottlieb Hufeland, *Ueber das Recht protestantischer Fürsten unabänderliche Lehrvorschriften festzusetzen und über solchen zu halten veranlasst durch das Preußische Religionsedict vom 9. Julius 1788* (Jena, 1788).

true knowledge of human nature.⁷⁰ Overshadowing both Hufeland and Schulz was the representative of yet another kind of religious rationalism, the German Jacobin Carl Friedrich Bahrdt. For Bahrdt the illegitimacy of the edict lay in the fact that it attempted to maintain ‘superstitious’ revealed confessional religions against a true enlightened one — Unitarian, ethical, and deistic — that would form the basis of a state based on free reason and individual rights.⁷¹

The edict’s defenders were no less numerous and vocal than its critics, however, and even if their arguments had no greater philosophical validity, the making of them testified to the historical logic of the religious constitution itself. Among the edict’s chief defenders were thus the members of minority religions for whom the constitution continued to serve one of its basic functions: the juridical protection of their confession from rival religions — including philosophical ones — and from the spectre of a hostile confessional state. Norbert Reders thus defended the seventh and eighth articles of the edict — those prohibiting official clergy from preaching religious rationalism — on Catholic confessional grounds. He argued that such preaching, although carried out in the name of philosophy, was actually covert proselytism for a philosophical religion intended to undermine juridical religious pluralism.⁷² Jewish readers of pastor Schulz’s treatise also had reason to defend the edict on these grounds; for Schulz argued that a religion as riddled with superstition and priestcraft as theocratic Judaism had no place in a state founded on a true moral philosophy, which helps to explain Moses Mendelssohn’s reservations regarding the untrammelled extension of religious rationalism.⁷³ Finally, we can observe that ‘moderate’ rationalist Lutherans such as Johann Semler defended the edict in terms very close to the dualistic structure of the constitution itself. Semler thus argued that

⁷⁰ Johann Heinrich Schulz, *Erweis des himmelweiten Unterschieds der Moral von der Religion!* (Frankfurt and Leipzig, 1788).

⁷¹ Carl Friedrich Bahrdt, *Briefe eines Staatsministers über Aufklärung* (Strasbourg, 1789).

⁷² Norbert Reders, *Apologie aus katholischen Grundsätzen des siebenten und achten Paragraphes des weisen Religionsediktes König Friedrich Wilhelms von Preussen, wider das erste Berlinische Fragment über Aufklärung, and wider alle, unter dem gemisbrauchten schönen Namen der Philosophie, versteckte Deistische, and Socianische Proselytenmacher. Ein Wort zur Beherzigung aller treuen katholischen Unterthanen Seiner Königlichen Majestät von Preussen.* (Halberstadt, 1790).

⁷³ Schulz, *Erweis*, pp. 338-42. See Moses Mendelssohn, *Jerusalem, or On Religious Power and Judaism*, trans. A. Arkush (Hanover NH: University Press of New England, 1983), pp. 77-139; and for relevant commentary, David Sorkin, *The Religious Enlightenment: Protestants, Jews, and Catholics from London to Vienna* (Princeton NJ: Princeton University Press, 2008), pp. 193-205.

the edict's purpose was to make it possible for each confession to transmit its teachings and liturgy as if they were true, while simultaneously rejecting the rationalists' claims that religion could be grounded in philosophical reason or individual rights.⁷⁴

When the publication of Kant's *Religion within the Bounds of Bare Reason* in 1794 attracted a royal order, rebuking its author for abusing his role as a teacher of philosophy to the detriment of Christianity, this was not a sign of the 'end of the Enlightenment'.⁷⁵ Neither did it indicate the temporary suspension of enlightenment progress by a repressive regime that would eventually be overturned through the resumption of a true philosophical understanding of religion and politics. Rather it was the routine response of a government intent on maintaining the Prussian religious constitution — the secular and relativistic juridical ordering of a plurality of legally protected public confessions — in the face of sectarian philosophical religions that presumed to transcend the public confessions and present themselves as the true foundations of law and state. Like pre-Westphalian confessional metaphysics and post-Westphalian civil philosophy, Kantian philosophy represented not a true knowledge of the philosophical foundations of the religious constitution, but a set of abstractional operations performed on it for particular cultural and political purposes.

Philosophy and Politics

During the last two decades of the eighteenth century, and despite their programs for dismantling the Prussian religious constitution and rebuilding it on the basis of a combined religious and political rationalism, the only way in which rationalist philosophies could engage with the political and juridical order was as political-religious sects seeking to supplant it. By employing transcendental forms of

⁷⁴ Johann Salomo Semler, *Verteidigung des Königl.[iches] Ediktes vom 9. Jul. 1788 wider die freimüthigen Betrachtungen eines Ungenannten* (Halle, 1788).

⁷⁵ The portrayal of the edict as a reactionary turning against the enlightenment, and of Kant's rebuking as a symptom of this, first emerged with neo-Kantianism and found its template in Wilhelm Dilthey, 'Der Streit Kants mit der Zensur über das Recht freier Religionsforschung', *Archiv für Geschichte der Philosophie* 3 (1890), 418-50. This portrayal remains current, however, as evidenced in its retailing in Jonathan I Israel, *Democratic Enlightenment: Philosophy, Revolution, and Human Rights 1750-1790* (Oxford: Oxford University Press, 2011), pp. 855-58. This is despite the comprehensive demolition of this interpretation in Michael J. Sauter, *Visions of the Enlightenment: The Edict on Religion of 1788 and the Politics of the Public Sphere in Eighteenth-Century Prussia* (Leiden: Brill, 2009). For further discussion, see Ian Hunter, 'Kant's *Religion* and Prussian Religious Policy', *Modern Intellectual History* 2 (2005), 1-27.

abstraction — in Kant’s case derived from academic metaphysics — and by making absolute truth claims comparable with those of the religious confessions, the rationalist philosophies misunderstood the suspension of such truth claims that was embedded in the relativistic and pluralistic structure of the constitution itself. This allowed such philosophies to be treated as secular confessions that were infringing constitutional religious pluralism by claiming that both religion and state should be founded on a ‘universal’ reason that was always in fact an intellectual culture internal to a particular philosophical school or faction.

Untouched by the philosophical sects, the comprehensively rewritten Prussian legal code that was promulgated in 1794 — the *Allgemeine Preußische Landrecht* — thus contained a codification of the existing religious constitution. Anticipating the republican constitutions of 1919 and 1949, it declared that the state would authorise no religious confession and that citizens had complete freedom of worship. It further stipulated that there would be a group of confessions with the privileges of public law corporations whose ministers would possess the standing of public servants, while a second group of churches would possess the status of tolerated associations. The ordained ministers of these religious corporations, however, would be required to teach the official articles of faith that defined their confession — which might well differ from their private views — or else relinquish their posts.⁷⁶

It was not the truth, then, of the rationalist philosophies that would finally permit them to enter the political domain. Neither was this the result of a philosophical history that was progressively transforming man and society into the rational forms that would allow them to rendezvous with the metaphysical abstractions of the philosophies. What permitted this to occur was something else altogether: namely, a military and political crisis that destroyed the political and juridical structures of the German empire and suspended the Prussian constitution. This crisis began when the French revolutionary armies overran the Rhineland in 1794, leading to an extensive compensatory secularisation of ecclesiastical territories within the empire — under the terms of the *Reichsdeputationshauptschluss* (Final Recess of the Reichs Deputation) of 1803 — and culminated in Napoleon’s defeat of Prussia and

⁷⁶ *Allgemeines Landrecht für die Preußischen Staaten* (Berlin, 1794), Part II, Tit. 11, §§1-112, pp. 729-41.

dissolution of the German Empire in 1806.⁷⁷ These events created the political circumstances that allowed academic philosophies to exit their university enclave-cultures and enter the juridical and political arenas. This happened initially through their inclusion in the discursive mix that was at work adumbrating new constitutional forms to replace old imperial ones, especially in the fluid circumstances leading up to the founding of the Confederation of the Rhine in 1815 and which entailed finding a federal constitutional order for the increasingly powerful territorial states.⁷⁸ As political instability increased, however, academic philosophies such as Kantianism and Hegelianism began to be directly incorporated in the platforms of the political factions and parties that were emerging in the lead-up to the national assembly of 1848. It was not so much the idea of the French revolution that gave political wings to German idealism, then, but the entrance of Napoleon's all-conquering *Grande Armée* into Berlin in 1806.

The Napoleonic dissolution of the German empire and conquest of Prussia, followed by a military occupation that lasted until the defeat of the *Grande Armée* in 1813, created an interregnum in Prussia. On the one hand, this gave free reign to a reforming administrative elite, led by von Stein and Hardenberg. Acting as a de facto parliament, the high bureaucracy launched measures to liberalise Prussia's quasi-feudal land and labour laws — opening land ownership to peasants, abolishing guilds, and freeing urban trades and commerce — all designed to create a money economy that would finance the coming war against Napoleon. On the other hand, the social upheavals accompanying these reforms — whose unintended consequences included the creation of classes of immiserated rural small-holders and unemployed urban artisans — fed the political turbulence leading up to the 1848 'revolution'. This in turn permitted the emergence of a slew of liberal- and radical-democratic political factions proposing the complete transformation of state and society on the basis of inalienable individual rights grounded in a democratically empowered universal reason. There was no sharp division, however, between the administrative elite of the old regime and the radical reformers of the new one, since both groups belonged to

⁷⁷ Klaus Dieter Hömig, *Der Reichsdeputationshauptschluss vom 25. Februar 1803 und seine Bedeutung für Staat und Kirche* (Tübingen: J.C.B. Mohr, 1969).

⁷⁸ Michael Stolleis, *Public Law in Germany, 1800-1914* (New York: Berghahn Books, 2001), pp. 1-40.

the university-educated *Bildungsbürgertum*.⁷⁹ Finally, the enforced secularisation of all remaining religious territories as part of the land reforms meant that the religious question would provide a central and incendiary focus for the arguments over constitutional reform at the *Paulskirche* national assembly in 1848.

Almost all of the positions adopted in the 1848 debates over the religious constitution had already been occupied in the print war that had broken out over the 1788 religious edict and that had never died down. Philosophical rationalists of various kinds continued to press for supplanting the system of public confessions with various moral philosophies or philosophical religions, while the representatives of the confessions fought to maintain their religious identities and rights, and public law jurists sought to defend or modify the constitution itself. The 1848 debates, however, differed from those of the 1790s in two regards. First, and importantly, those participating in the later debates did so as the parliamentary representatives of the German states and territories, and they had been charged with the momentous task of constituting Germany as a unified polity in the wake of the dissolution of the empire. Second, the array of rationalist philosophies had been augmented by Hegelianism — in its ‘right’ and ‘left’ variants — although it is not immediately clear what degree or kind of importance should be attributed to this development.

For present concerns our interest in Hegel’s philosophy is confined to its impact on the field of religious rationalism. Hegel’s philosophical theology and ecclesiastical history differed from Kant’s in that rather than envisaging a progressive philosophical purgation of biblical Christianity and realisation of self-governing reason, Hegel elaborated a model in which a ‘world spirit’ is actualised in history through successive self-positing and self-dissolving stages.⁸⁰ In Hegel’s model, reason comes to self-consciousness not through the progressive purification of its empirical form but through a stadial process in which a self-actualising spirit materialises itself

⁷⁹ For all of this, see the classic studies by Koselleck: Reinhart Koselleck, ‘Staat und Gesellschaft im preußischen Vormärz’, in O. Büsch and W. Neugebauer (eds.), *Moderne Preußische Geschichte 1648-1947. Eine Anthologie* (Berlin: Walter de Gruyter, 1981), pp. 378-415; and Reinhart Koselleck, *Preußen zwischen Reform und Revolution. Allgemeines Landrecht, Verwaltung und soziale Bewegung von 1791 bis 1848* (Stuttgart: Klett, 1967).

⁸⁰ For a purely philosophical survey, see Paul Redding, ‘German Idealism’, in G. Klosko (ed.), *The Oxford Handbook of the History of Political Philosophy* (Oxford: Oxford University Press, 2011), pp. 348-68.

through a dialectical historical process.⁸¹ Through its self-materialisation the spirit establishes the (ascending) cultural forms of human identity — family, religion, civil society, state — but simultaneously loses consciousness of itself in these ‘alienated’ forms of its own activity, thereby setting the scene for further acts of self-positing. In treating each stage of historical self-development as entailing both the destruction of a prior self-materialisation of the world spirit and its simultaneous preservation in a new materialisation — the so-called process of *Aufhebung* — Hegel provided a philosophy of social institutions as the sublimated forms of man’s spiritual self-development, applying this to both the state and church.

Despite its esoteric core, this figure (or art) of thought generated a variety of more exoteric political and religious philosophies that fed into the debates surrounding the 1848 assembly, particularly those focused on the religious constitution. The so-called ‘right-Hegelians’ could thus follow Hegel himself in treating Christian ideals as being preserved in a sublimated form in secular social institutions, pre-eminently in the state itself. This allowed the state to be conceived in a totalising manner as the highest form of spiritual self-actualisation.⁸² They could equally follow the master in treating (Protestant) Christianity as the highest form of religion — as ‘absolute religion’ — owing to its dialectical subsumption of earlier forms of (Catholic) sacramental religion and its self-purifying disclosure of God through philosophical reason.⁸³ For their part, the ‘left-Hegelians’ — led by Ludwig Feuerbach, Arnold Ruge, and Karl Marx — maintained the model of dialectical self-development but supplanted the world spirit with anthropological or social forces as the animating principle, proposing that these forces impelled man to confront social institutions as the sublimated or alienated form of his own activity.⁸⁴ In *The Essence*

⁸¹ Georg Wilhelm Friedrich Hegel, *Lectures on the Philosophy of History*, trans. J. Sibree (London: Bohn, 1861), pp. 56-82.

⁸² Cf., ‘The state is the actuality of the ethical Idea — the ethical spirit as substantial will, *manifest* and clear to itself, which thinks and knows itself and implements what it knows in so far as it knows it’. Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), §257, p. 275.

⁸³ Cf., ‘Spirit’s knowing of itself as it is implicitly is the *being-in-and-for-self* of spirit, the consummate, the absolute religion in which it is manifest what spirit is, what God is; and this religion is the Christian religion’. Georg Wilhelm Friedrich Hegel, *Lectures on the Philosophy of Religion: One-Volume Edition, the Lectures of 1827*, trans. R. F. Brown, P. C. Hodgson, and J. M. Stewart (Los Angeles: University of California Press), p. 109.

⁸⁴ For a helpful overview of Marx’s dependence on Feuerbach and the ‘young Hegelians’ in this regard, see Gareth Stedman Jones, ‘The Young Hegelians, Marx and

of Christianity, Feuerbach thus declared that Christianity was in fact the alienated form of human nature, God and Christ being only finite externalisations in which human beings had misrecognised their own infinite thinking, willing, and feeling.⁸⁵ This was a theme on which Marx would improvise by insisting that religion was in fact the sublimated form of social forces and relations, both thinkers projecting historical change — specifically ‘secularisation’ — as desublimation or de-alienation.

Some commentators have argued that this kind of Hegelianism did indeed engage with the historical religious constitution by disclosing its (alienated) anthropological or sociological underpinnings. This kind of argument is frequently contextualised via an account of Feuerbach’s defence of religious rationalism against the ‘restorationist’ religious policies of Friedrich Wilhelm III and IV.⁸⁶ These neo-Hegelian commentaries, however, have no more historical plausibility than the parallel neo-Kantian claims regarding the intrinsic political significance of Kant’s philosophical theology. On the one hand, the notion that the confessional religions were the alienated form of human feeling or social activity was internal to the particular metaphysical doctrines and exercises — the projected cycle of alienation and desublimation — that constituted the subculture of Hegelian philosophy. It thus had no purchase on the juridical disposition of the confessions as public corporations teaching irreconcilable revealed truths, except and unless Hegelianism were itself a kind of philosophical religion in competition with the confessions, which is probably the right way to understand Feuerbach. If we were to investigate Hegelianism’s mode of political engagement during this period then we should probably be looking at its capacity to produce a kind of charismatic prophetic politics organised around the disclosure of alienation and the promise of revolutionary desublimation.

On the other hand, to characterise the religious policies pursued by the two Hohenzollern monarchs during the 1830s and 40s as ‘restorationist’ attempts to align

Engels’, in G. Stedman Jones and G. Claeys (eds.), *The Cambridge History of Nineteenth-Century Political Thought* (Cambridge: Cambridge University Press, 2011), pp. 556-600.

⁸⁵ Ludwig Feuerbach, *The Essence of Christianity*, trans. M. Evans (London: Chapman, 1854), pp. 1-31.

⁸⁶ See for example, Warren Breckman, ‘Politics, Religion, and Personhood: The Left Hegelians and the Christian German State’, in D. Moggach (ed.), *Politics, Religion, and Art: Hegelian Debates* (Evanston Ill: Northwestern University Press, 2011), pp. 96-117; and more generally Warren Breckman, *Marx, the Young Hegelians, and the Origins of Radical Social Theory* (Cambridge: Cambridge University Press, 1999). See also Todd Gooch, ‘Some Political Implications of Feuerbach’s Theory of Religion’, in Moggach (ed.), *Politics, Religion, and Art*, pp. 257-80.

‘throne and altar’ involves a significant historical misunderstanding. In attempting to unify Calvinism and Lutheranism into a kind of state Protestantism these latter-day Hohenzollerns were not in the least proposing to restore the *status quo ante* which, as we have seen, consisted in the juridical protection of a plurality of unreconciled confessions. Rather, they were planning a radical transformation of the preceding constitutional religious pluralism by attempting a ‘modernising’ political centralisation of the entire religious order.⁸⁷ Moreover, the effectual opponents of this policy were not religious rationalists like Feuerbach but the powerful Lutheran estates — anchored in the Silesian branch of the church where (Austrian Catholic) religious persecution was fresh in the memory — for whom the existing pluralistic constitution provided a significant weapon against the unifying and centralising moves.⁸⁸ The fact that this same constitution was also a bulwark against religious rationalism shows how misleading it is to construe the Hohenzollern *Religionspolitik* of this period as a restorationist assault on religious rationalism.

Kantian and Hegelian philosophies both sought to moralise the state by treating it as the form in which a self-conscious people exercised its corporate rational will, and both viewed the confessional churches as mere way-stations on the path to a rational religion. Of course their accounts of this path differed, among the options of the rational refinement of biblical Christianity into moral philosophy, the conversion of (Protestant) Christianity itself into an ‘absolute’ rational religion, or the supplanting of Christianity altogether through its desublimation into a philosophical anthropology or sociology. Yet both schools taught that a true philosophy aided by a progressive history would permit man to achieve a rational purification and unification of his will, thereby moralising that state as the democratic executor of this will.

⁸⁷ See the revealing account in Clark, ‘Confessional Policy and the Limits of State Action’.

⁸⁸ This does not mean, however, that the religious rationalists were allies in Friedrich Wilhelm III’s campaign for a unified Protestant church, as argued in Thomas Howard’s otherwise expansively informative account of these events. Unlike Breckman and Gooch, Howard argues that the Prussian government’s project for a unified state Protestantism was in fact fueled (rather than opposed) by Hegelian religious rationalism, claiming that the supra-confessional dimension of Hegelianism supported the unificationist endeavour. See, Thomas Albert Howard, *Protestant Theology and the Making of the Modern German University* (Oxford: Oxford University Press, 2006), pp. 212-15, 222-39. Without attempting to settle the matter here, it is possible to question whether Hegelian religious rationalism converged with Friedrich Wilhelm III’s unificationist project in the envisaged manner. Howard is also in danger of underestimating the persistence of state-managed confessional pluralism throughout this period.

By adopting this kind of cultural and political program, however, the two schools could increasingly only supervene on the religious constitution from the marginal position of transcendental philosophical sects. For, we can recall, the constitution's fundamental historical presuppositions were (on the one hand) that in suspending the truths of the religious confessions the state itself could not be based on any such religious or moral foundation, and (on the other) that the theological and ecclesiological differences among the confessions could never be rationally reconciled and thus were to be maintained in a condition of permanent regulated conflict. Seen from the viewpoint of the constitution and *Staatskirchenrecht*, then, the competing programs to secularise society through a rational religion or moral philosophy — while moralising the state through the execution of a democratic common will — were nothing more than a series of attempts by rival philosophical, religious, and political factions to overturn the secular framework of juridical religious pluralism, and to impose their own philosophical confession as a social ideology.

This provides the appropriate standpoint from which to view the deliberations of the *Paulskirche* national assembly in 1848 regarding the future form of the religious constitution. Given that the assembly was the first democratically elected German parliament, and was tasked with providing a constitution for a politically unified German nation, it is tempting to see it from the normative viewpoint of the major modern political philosophies. We might approach it, for example, as a mechanism for transmitting freely and rationally chosen principles of justice into public law, imbuing the latter with democratic authority and legitimacy; or as the convening of a 'public sphere' in which diverse social groups could agree on 'valid' constitutional principles by abstracting from their conflicting interests through democratic deliberation; or perhaps even as an 'agonistic' political arena in which permanently divided groups might nonetheless achieve mutual recognition and respect by using conflict to achieve political openness.

There are two key reasons, however, for refusing to see the assembly debates over the religious constitution from these normative philosophical perspectives. First, there was no philosophical truth underlying the existing religious constitution — for example, that the public confessions represented a failure to exercise individual rational autonomy, or were the alienated forms of man's inner feeling or his outer social activity — whose validity might have permitted deliberation to reach

agreement on new constitutional principles. As we have seen, the constitution and its public law exponent were not based on a true knowledge of religion of the kind claimed by philosophy and the human sciences. Rather, they operated through a relativistic acceptance of the religious self-understandings of the rival confessions themselves, an acceptance that had been historically conditioned by the suspension of religious and metaphysical truth at the level of the constitution's juridical framework.

Second, if there was no truth regarding religion about which the delegates might have agreed, then it makes little sense to view their debates as capable of refounding and legitimating the authority of the constitution on the basis of a democratic will formed through such agreement. If we examine the positions advanced in the 1848 debates over the future religious constitution then it quickly becomes clear that all of them advance truths internal to particular theological, philosophical, and political factions. This was very similar to the debates surrounding the 1788 edict, except that at the 1848 assembly these factions had achieved parliamentary representation and were in the process of being incorporated into emergent political parties. It is thus not surprising that the members of the (Catholic) Democratic faction led by Ignaz Döllinger should have presumed the truth of their confession and presented arguments designed to preserve its rights and autonomy in the future constitution. But the secularist arguments of the Feuerbachian naturalist and radical democrat Karl Vogt — who opposed religious education and infant baptism — were no less internal to a particular worldview, and hence no less incapable of forming a consensus grounded in a shared truth.⁸⁹ The same comments apply to Marx's and Engels' Feuerbachian treatment of religion as the alienated form of man's social activity, which permitted them to pour withering scorn on the assembly debates from the heights of an imagined absolute truth.

The deliberations of the assembly were indeed democratic, as they were carried out by elected representatives from all of the German states in accordance with established parliamentary procedure. Their objective though could not have been to produce a new religious constitution based on a democratic will formed through true knowledge of religion. This was in part because there was no such true knowledge,

⁸⁹ Verbatim records of the protracted arguments between these positions can be found in Franz Wigard, (ed.), *Stenographischer Bericht über die Verhandlung der deutschen constituirenden Nationalversammlung zu Frankfurt am Main*, vol. 3 (Frankfurt aM, 1848), pp. 1770 ff.

only a welter of conflicting theological, philosophical, and political theory-programs; and it was in part because *Staatskirchenrecht* had never been grounded in a true knowledge of religion but in a set of measures for permitting the rival religions to teach their several confessions as if they were true. The deliberations of the Assembly thus took the form of remorseless cultural-political combat from entrenched factional positions — with the communists already planning physical combat — accompanied by arm-twisting, deal-making, and coalition-building in pursuit of least worst outcomes. Far from being based on a common will grounded in democratic deliberation leading to ‘valid’ knowledge, the religious constitution that emerged from this process was grounded in a political will formed through protracted cultural-political combat and horse-trading. This resulted not in a ‘just’ constitution but in one that expressed a *modus vivendi* between the leading factions.

This helps to explain why Germany’s first democratic national religious constitution was a further development of the historical constitution that had begun at Augsburg, was modified at Westphalia, was further elaborated in Prussia, and had been given constitutional expression in the Prussian Legal Code of 1794. After all, the fundamental premise of this evolving constitution was a set of arrangements for securing the political coexistence of permanently conflictual confessional groups, which now included Kantians, left and right Hegelians, scientific naturalists, and so on. The central articles of the *Paulskirche* religious constitution of 1849 were thus that all Germans had complete freedom of religion and conscience (Article V, §144, 1); that crimes and misdemeanours committed in the exercise of this freedom would be punished under the law (Article V, §145, 2); that each religious society was responsible for administering its own affairs subject to general state law (Article V, §147, 1); and that no religious society would be privileged over others through the state, meaning that there would be no state church (Article V, §147, 2).⁹⁰

Its first democratic iteration thus could not have provided the German religious constitution with democratic authority or legitimacy in the sense of refounding it in a rationally-grounded popular or common will. Momentous as they were, the shifts from empire to federal state and from monarchy to parliament did not signify changes in any kind of grounding will. Rather they signified shifts in the political order or regime responsible for supplying a supportive political will for a constitution whose

⁹⁰ *Verfassung des Deutschen Reiches*, 28 March 1849. Accessed at document Archiv.de, 9 November 2016. <http://www.documentarchiv.de/nzjh/verfdr1848.htm>

actual grounding and authority lay elsewhere: namely, in the political and juridical arrangements responsible for maintaining conditions of political coexistence for permanently conflictual religious and (now) philosophical associations.

Despite a tradition of mocking commentary that began with Marx's and Engels' bombastic denunciations of the *Paulskirche* assembly as a bourgeois talking-shop, the short-lived character of the 1849 constitution was not due to the 'failure' of the delegates to reach agreement in a true knowledge of religion and politics, thence to secure its democratic empowerment through a self-conscious popular will or militant working class. We have seen that the delegates could not fail in such a world-historical task because the inexistence of any such true knowledge meant that they could not try to complete such a mission. In fact, Germany's first democratic religious constitution was short-lived for quite other kinds of reason. As a result of the fact that the territorial princes did not accept the constitutional *modus vivendi* hammered out in Frankfurt, and because the assembly did not itself possess the attributes of sovereign government required to enforce it — an army, bureaucracy, and independent finances — the *Paulskirche* coalition dissipated into defensive militias and sputtering insurrections that were easily extinguished by princely armies.⁹¹

The two subsequent democratic iterations of the religious constitution — in 1919 and 1949 — can be regarded as developments within the same broad historical context that we have sketched here. The national assembly that was convened in Weimar in 1919 — in order to ratify the Treaty of Versailles, establish parliamentary democracy, and produce a new constitution — was the product of circumstances in which the imperial government had been destroyed by military defeat abroad and by left- and right-wing insurrections at home. This assembly too should be regarded as democratic in that it consisted of elected delegates acting in accordance with parliamentary procedure. Now though the electorate was mobilised on the basis of party affiliation, by parties derived from the 1848 factions: the (Marxist) Social Democratic Party (SPD), the (Catholic) Centre Party, the (national-liberal) German Democratic Party (DDP), and the (right-wing nationalist) German National People's Party. As in 1849 the resulting religious constitution was not the product of a democratic agreement grounded in 'valid' knowledge of religion or politics but was

⁹¹ Wolfram Siemann, *The German Revolution of 1848-49*, trans. C. Banerji (New York: St Martin's Press, 1998), pp. 153-217.

determined instead through party combat and horse-trading. In fact it represented a *modus vivendi* between the Centre Party, the SPD, and the DDP, with the Centre Party seeking to defend the constitutional independence of the Catholic church and its school system against the secularising tendencies of the other parties. The result was a constitution that replaced the consitutional monarchy with a combined presidential and parliamentary federal state, abolished the *summus episcopus* status of Protestant territorial rulers, while maintaining the juridical autonomy of the churches.⁹² Once again the religious constitution that resulted from this process cannot be sourced to a democratic will but must be treated as grounded in a political regime capable of forming a political will in support of a further iteration of the juridical and political measures that secured the political coexistence of rival confessional religions and ideological movements.⁹³

In fact for our present concerns the central lesson of the short-lived Weimar regime and its constitution was just how difficult it was to maintain the juridical framework for the conditions of confessional coexistence under conditions of extreme political division. This was exacerbated when parties of the radical left and right regarded the neutrality of the framework as an obstacle to the democratic empowerment of a true philosophy or ideology that was embodied in the party itself. The destruction of the Weimar regime by this extreme political polarisation and fragmentation thus resulted in the overturning of the German religious constitution by an ideological party state, during the period of government by the National Socialist German Workers Party from 1933-1945.⁹⁴ As with the constitution more broadly, the Nazi regime did not formally suspend the religious constitution, choosing instead to ignore and violate it.⁹⁵ Such was the polyarchic and factionalised character of the

⁹² Michael Stolleis, *A History of Public Law in Germany 1914-1945*, trans. T. Dunlap (Oxford: Oxford University Press, 2004), pp. 45-60.

⁹³ The constitution could thus be defended be legal positivists (including both Schmitt and Kelsen) as a norm-generating fact immune to the change in form of government, while being repudiated by anti-positivists (especially the Hegelian natural jurist Erich Kaufmann) for its lack of grounding in the 'objective values' of the community. See Stolleis, *A History of Public Law in Germany 1914-1945*, pp. 66-70.

⁹⁴ For an eyewitness account of these developments, see Carl Schmitt, *Verfassungsrechtliche Aufsätze, aus den Jahren 1924-1954. Materialien zu einer Verfassungslehre* (Berlin: Duncker & Humblot, 1958). Schmitt focuses on the manner in which the polarisation of political parties paralysed the parliament, depriving it of the capacity to constitute a workable political will, and ultimately eroding the state's governmental capacity and ideological neutrality, particularly in relation to economic factions.

⁹⁵ Stolleis, *A History of Public Law in Germany 1914-1945*, pp. 332-43.

Nazi government, however, that it never succeeded in consolidating a new *Religionspolitik*. Instead it oscillated between attempts by Himmler's SS (paramilitary *Schutzstaffel*) to install a race-based pagan mythology as the state religion, the rabidly anti-clerical secularist plans of the SD (*Sicherheitsdienst* or security service) to abolish Christianity altogether, the efforts of other still factions to fabricate some form of state Christianity, and a de facto policy of suborning the churches through bribery and intimidation.⁹⁶ The common thread linking all of these tactics was the destruction of the constitution's neutral and relativistic framework through the reorganisation of religion in accordance with the ideology of a party-state, something that was achieved far more consistently in the Soviet Union.

The current democratic iteration of the German religious constitution, contained in the *Grundgesetz* or Basic Law of 1949, has much in common with the Weimar constitution. Not only does it incorporate the latter's key religious articles but it too was the product of a military and political crisis that destroyed the preceding regime and was designed to institute parliamentary democracy and the protection of basic rights. Rather than being the product of a national constitutional assembly, however, the Basic Law was drafted by a parliamentary council acting under conditions of military occupation. Further, although it was proclaimed on behalf of the 'people of Germany', it was in fact promulgated by the parliamentary delegates of the West German states or *Länder*, and was unable to represent the people and *Länder* then under Soviet occupation in East Germany.

While these constraints on popular representation might make it more difficult to portray the current constitution as a product of the will of the people, that is not particularly significant for our present concerns. Indeed, we have argued that none of the democratic iterations of the religious constitution can be regarded as expressions of a common rational will or popular sovereignty. We have seen rather that the agreements resulting in the drafting of the serial religious constitutions were the product of political combat and negotiation between rival political elites, factions, and parties. Usually the outcome of this negotiation was the emergence of a political order

⁹⁶ For two recent studies taking different approaches, see Wolfgang Dierker, *Himmler's Glaubenskrieger: Der Sicherheitsdienst der SS and seine Religionspolitik, 1933-1941*, 2nd ed. (Paderborn: Schöningh Verlag, 2002); and Richard Steigmann-Gall, *The Holy Reich: Nazi Conceptions of Christianity, 1919-1945* (New York: Cambridge University Press, 2003). And for an overview and assessment, see Mark Edward Ruff, 'The Nazis' Religionspolitik: An Assessment of Recent Literature', *The Catholic Historical Review* 92 (2006), 252-67.

stable enough to provide a political will supportive of the set of political and juridical arrangements that had been present in Germany — in various forms, under different circumstances — since the treaties of Augsburg and Westphalia. Perhaps it is a historical irony, then, that while the parliamentary council of 1949 was less formally democratic than the national assemblies of 1848 and 1919, the restructuring of German culture and politics brought about by military defeat and occupation in 1945 produced a political regime with a stability and durability that made it possible to reassert the religious constitutional *modus vivendi* of 1919.

Rather than being embedded in a republic, however, the constitution of 1949 provided the legal architecture for a federation of states, from which Prussia had been erased in expiation for German militarism. Further, it was executed through a powerful constitutional court, the *Bundesverfassungsgericht* —the Federal Constitutional Court — whose judgments would now determine the forms in which the religious constitution would be unfolded. Nonetheless, the historical gravity and continuity of the religious constitution is evident from the fact that the Basic Law incorporates the key articles of the Weimar religious constitution — articles 136, 137, 138, 139, and 141 — and we have seen that these articles stretch back to the constitution of 1849 and beyond that, through a series of eighteenth-century Prussian public law edicts, to the great treaties of 1648 and 1555. Despite the fact that some members of the 1949 parliamentary council heralded the Constitutional Court as the ‘guardian of the constitution’ — viewing it as exercising legal control over politics and government — it was in fact only the instrument and effect of a particular political and juridical *modus vivendi*. In this regard it was a modern equivalent of the early modern *Reichskammergericht* and *Reichshofrat* and the Weimar *Reichsgericht* and *Staatsgerichtshof*, although these had all become unworkable under conditions of political division and paralysis. Like these earlier courts, the role of the Constitutional Court is not to prescribe legal norms for politics and religion, but to apply the laws that have been generated by a political *modus vivendi*.

Concluding Casuistical Postscript

The key articles of the 1949 Basic Law reinstate the fundamentally dualistic structure of the German religious constitution. On the one hand, the content of religion and religious freedom is to be determined by the confessions themselves in accordance with their own self-understandings, and the confessions are to be

accorded the legal rights and powers of self-administration of public law corporations. On the other hand, this pluralistic religious order is to be governed by a state that embodies none of the confessional self-understandings, and that hence constitutes a secular and relativistic juridical frame oriented to maintaining the conditions of political coexistence for a plurality of rival confessions. It is central to this structure that the confessions (and ‘philosophical ideologies’) are granted the constitutional protection to unfold themselves in society — hence in the ‘public sphere’ through tax-supported religious schools, hospitals, and welfare associations — in accordance with their own religious self-understandings. At the same time, they are precluded from effectually interpreting the constitution itself in accordance with such self-understandings, or embedding them in the state, and are in this sense excluded from the ‘public sphere’. Conversely, while the constitution requires the state to hold secular and relativistic conceptions of religion and religious freedom in order to maintain the pluralistic juridical frame, it precludes the state from imposing these conceptions within the sphere of religious practice, for example, by requiring non-confessional forms of religious education, or by automatically requiring religious institutions to conform to secular social legislation.⁹⁷

It is perhaps not sufficiently appreciated that the Basic Law’s implied constitutional understanding of religious confessions is that they are divinely revealed dispensations, rather than rational religions or philosophical theologies. This is bound up with why the confessions cannot provide the normative basis of law and the state, but equally with why they cannot be supplanted by the secular understanding of religion maintained within law and state. To the extent that ‘philosophical ideologies’ are protected by being given the ‘same status as religious associations’, then it would appear that they are treated as analogous to revealed dispensations — as fundamentally conflictual and permanently irreconcilable teachings. This means that they too are precluded from providing the normative basis of the law and state as the condition of their protected exercise. The modern religious constitution is thus insusceptible to grounding in the rationality of universal subjects or citizens, whether through their role in a theatre of rational choice, or as dialogue partners in a

⁹⁷ My interpretation of the modern religious constitution in these terms draws on the important study by Martin Heckel, ‘Religionsfreiheit: Ein säkulare Verfassungsgarantie’, in K. Schlaich (ed.), *Martin Heckel, Gesammelte Schriften: Staat, Kirche, Recht, Geschichte*, vol. 4 (Tübingen: J. C. B. Mohr, 1997), pp. 647-849.

deliberative public sphere, or even as participants in an agonistic drama of reciprocal combat and recognition. The historical presupposition of the constitution is that it must secure the political coexistence of citizens whose rationality (no less than their faith) is permanently fissiparous and conflictual.

The two dimensions of the Janus-faced religious constitution are thus not reconciled in a fundamental exercise of philosophical reflection or democratic choice undertaken by universal subjects or citizens. Rather they are joined by a practice of judgment undertaken by the Constitutional Court that may be regarded as casuistical in the sense of being case-based and situationally-specific. The court's judgment is thus thoroughly conditioned by the two dimensions of the constitution itself and its underlying political *modus vivendi*. The role of the court is to continuously adjust the balance between these dimensions by determining the reciprocal limits of confessional freedom and secular governance on a case-by-case basis. We can conclude our discussion by taking brief note of some typical instances of such judgments.

A case heard in 1960 regarding the 'alienation of faith' provides significant insight into the court's understanding of the constitution and its own interpretive role.⁹⁸ This case concerned a prisoner — a radically anti-clerical former member of the SS and SD subsequently convicted as an East German spy — whose application for sentence remission had been denied on the grounds that while in prison he had been bribing other prisoners to renounce Christianity by supplying them with tobacco. The prisoner appealed this judgment to the *Bundesverfassungsgericht* on the grounds that it violated his right to religious freedom as protected by Articles 4 (1) and 5 (1) of the Basic Law, which also protect proselytism for and against particular religions. In rejecting the plaintiff's appeal the court cited the historically limited character of religious freedom under the constitution. 'The Basic Law is not intended to protect any and all kinds of free religious activity, but only those that have evolved in the course of historical development for today's civilised peoples on the basis of certain agreed basic ethical views'. In determining whether the plaintiff's actions were protected by religious freedom the court declared that this could not be based on a judgment regarding the content of belief: 'The state that is neutral regarding worldviews cannot and may not more closely determine the content of this freedom,

⁹⁸ BverfGE 12, 1.

because it may not evaluate the belief or unbelief of its citizens ...'. It could though restrain the 'misuse of this freedom' by invoking a constitutional 'value-order', specifically the value of the dignity of the person which, the court argued, was violated through the use of bribery to secure the alienation of faith.

A case decided by the Constitutional Court in 2008 exemplifies our central concerns more directly, as it pertains not just to the relation between individual and corporate religious freedom but also to the ongoing conflict between religious rationalism and confessional religion. This case arose when a Professor of Lutheran theology at the university of Göttingen, Gerd Lüdemann, publicly renounced his Christian faith during the 1980s, but not his theological post, and then published a series of sceptical articles and books. Among these was a book in which he used historical criticism to repudiate several key biblical texts — pertaining to Christ's resurrection, the Eucharist, and the last judgment — treating in them in quasi-Feuerbachian terms as anthropological 'projections' serving psychological needs.⁹⁹ The manner in which the university and the government of Lower Saxony dealt with this problem — removing the professor from his official post in the theology faculty and offering an appointment in the 'history and literature of early Christianity' in a research centre removed from the training of clergy — led to an ascending series of cases. This passed from the Administrative Court (2002), to the Superior Administrative Court (2004) and Federal Administrative Court (2005), before final decision in the *Bundesverfassungsgericht* in 2008).¹⁰⁰ The original decision was re-affirmed at each judicial level, principally on the grounds that the plaintiff's freedom of expression (Article 5) and the right to hold office independent of religious adherence (Article 33 (3)) were overridden by the faculty's own right to freedom of expression and, especially, by the church's right to self-administration and self-determination (Weimar Article 137 (3)).

The constitutional issues were perhaps captured most succinctly in the judgment of the Federal Administrative Court. As the academic branch of confessional churches, theology faculties and their staff of academic officials are required to teach a particular confessional theology as true, and to proclaim this truth to their students. The role of the state in supervising the churches and theology faculties is to maintain

⁹⁹ See, Gerd Lüdemann, *Der grosse Betrug: and was Jesus wirklich sagte und tat* (Lüneburg: Klampen, 1998).

¹⁰⁰ BverfGE 122, 89.

its neutrality by refusing to judge the theological contents of teaching, while ensuring that these institutions operate in accordance with relevant law. The court went on to characterise this dualistic state of affairs in a manner that should now be quite familiar:

Through its double-function as a state scientific institution on one side, and as a confession-bound institution of religious teaching and formation on the other side, the Göttingen theology faculty is a common concern of the state and the church. The state has the right to secure the occupational legal prerequisites of staff, while the church has the sole right to enforce its norms through the determination of doctrinal content, the selection of teaching staff, and also through the drafting and administration of approved examinations.

The court thus declared that the collision of rights in the Lüdemann case had been dealt with in a manner that both preserved the state's religious neutrality — as no judgment had been made regarding the truth or falsity of the professor's teachings and he had been maintained in academic employment — while also preserving the confession's right to self-determination, by removing the professor from his role in the teaching of confessional theology and the training of ministers. We have seen that this kind of resolution to the problem of religious rationalism had been prefigured in the Prussian government's treatment of Kant in the 1790s. More generally, the judgment is an exemplary reminder that German religious freedom consists not in individual rights grounded in reason but in the maintenance of a plurality of public confessions by a state concerned not with religious truth but religious peace.

Our final case has been selected to exemplify the casuistical — the case-based and situational — character of such judgments. This case arose in 2003 from the attempt by the state of Baden-Württemberg to dismiss an Islamic female teacher on the grounds that her wearing of a hijab while teaching in non-religious state schools contravened their religiously neutral character. In a divided opinion — five to three — the majority judges declared in favour of the plaintiff, arguing that the attempt to dismiss her infringed her right of equal access to public office (Article 33 (2)) in association with the guarantees of religious freedom (Article 4 (1), (2)).¹⁰¹ The majority acknowledged that indeed there were countervailing constitutional

¹⁰¹ BverfGE 108, 282; 2 BvR 1436/02.

considerations. These included the state's duty to provide a religiously and ideologically neutral education in its schools (Article 7 (1)), the right of parents to bring up their children in accordance with their own beliefs (Article 6 (2)), the right of schoolchildren to be free from religious indoctrination (also grounded in Article 4 (1)), and the state's overarching constitutional duty to remain religiously and ideologically neutral. While acknowledging an 'unavoidable tension' in this regard, however, the majority argued that question of whether wearing the hijab might influence children or disturb their schooling could not be determined without new statutory legislation, in the absence of which the decision to dismiss the teacher was without statutory basis.

According the minority, though, there was no need for specific legislation to restrict individual religious freedom since that freedom was already constrained by public office-holding as defined by the constitution: 'A person who wishes to become an official cannot abjure the requirement of moderation and professional neutrality, either generally or in particular instances inside or outside the service. A teacher who treats his position as a platform for display of his beliefs and uses it as a stage to develop his basic rights is acting inconsistently with these duties'. For these judges the teacher's duty of religious neutrality as an official in the state school system arises from the state's duty of neutrality. This is in turn derived from the rights of religious freedom (Article 4) read with the articles regulating the conduct of public servants (Article 33) and those declaring the independence of civil rights and duties from the exercise of religious freedom (Weimar Article 136 (1)) and prohibiting a state religion (Weimar Article 137 (1)).

In other words, the minority judges determined that the plaintiff's individual rights to religious freedom were already outweighed by the constitutional arrangements requiring public servants to subordinate their individual views to the requirements of state religious and ideological neutrality. For the majority, though, the issue was whether the wearing of the hijab undermined state neutrality and parental religious freedom as a matter of fact, the uncertainty of which could only be resolved by a new provincial statute. Neither determination hinged on a judgment regarding the truth or value of the plaintiff's religious practice, but only on whether her exercise of religious freedom was consistent with her role as an official in maintaining religious freedom understood as the secular supervision of a plurality of public confessions. That the decision could have gone either way, and that either

would have been consistent with the constitution, shows the case-based and situational character of the court's maintenance of the German religious constitution.