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Ruben Seth Fogel
New York Law School Class of 2006

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RUBEN SETH FOGEL

Headscarves in German Public Schools:
Religious Minorities are Welcome in
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ABOUT THE AUTHOR: Ruben Seth Fogel earned his J.D. from New York Law School in 2006, and his B.A. from Yeshiva College, Yeshiva University in 2003. He is currently an Associate at Sullivan & Cromwell LLP.

*Dein Christ war jüdisch,
 Dein Auto ist japanisch,
 Deine Pizza italienisch,
 Deine Demokratie griechisch,
 Dein Kaffee brasilianisch,
 Dein Urlaub türkisch,
 Deine Zahlen arabisch,
 Deine Schrift lateinisch,
 — und Dein Nachbar ist “nur” ein Ausländer?¹*

I. INTRODUCTION: WITHOUT EQUALITY, NO FREEDOM OF RELIGION

It began with an aspiring teacher who wanted nothing more than to wear a piece of cloth. It turned into a contentious legal battle and political debate that has consumed Germany over the past several years, with no end to the controversy in sight. Why? The teacher-in-training was a religious Muslim and the piece of cloth a *hijab*, an Islamic headscarf.²

The aspiring teacher’s name is Fereshta Ludin.³ Born in Afghanistan in 1972, she has lived in Germany since 1987 and became a German citizen in 1995.⁴ Attending university to become a schoolteacher, she successfully completed the last of two state examinations in 1998.⁵ The *Oberschulamts* Stuttgart [Supervisory School Authority of Stuttgart] (“SSA”),⁶ however, refused to employ Ludin in the state’s school system, concluding that Ludin “lacked personal qualifi-

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1. This popular German saying is often recited (in this or one of many similar variations) in the context of discussions about *Ausländerfeindlichkeit* (xenophobia), and the author has heard it many times in his German high and elementary schools. Its translation reads as follows:
 “Your Christ was Jewish, / your car is Japanese, / your pizza Italian, / your democracy Greek, / your coffee Brazilian, / your vacation Turkish, / your numbers Arabic, / your script Latin, / — and your neighbor ‘just’ a foreigner?”
 (Source unknown). The saying is meant to call attention to the hypocrisy of discrimination rooted in racism, anti-Semitism, or xenophobia by pointing out the contributions that foreign individuals and cultures have had — and continue to have — on German culture and everyday life.
 Unless otherwise noted, all translations are the author’s, as are all translation mistakes.
 2. While there are different forms of the *hijab* and of the Islamic headscarf in general, a result of the headscarf’s having undergone various developments throughout the history of Islam, the kind of headscarf that sparked the German headscarf debate was of the variety that covers a woman’s hair but not her face or the rest of her body as other forms of the headscarf do (such as the *burqa* or the *chador*). See generally Sabiene Enderwitz, *Geschichte des Kopftuchs im Orient: Kopftuch ist nicht gleich Kopftuch* [History of the Headscarf in the Orient: The Headscarf is not the Headscarf], QANTARA.DE: DIALOG MIT DER ISLAMISCHEN WELT [QANTARA.DE: DIALOGUE WITH THE ISLAMIC WORLD], May 4, 2004, http://www.qantara.de/webcom/show_article.php/_c-548/_nr-17/_p-1/i.html (German), http://www.qantara.de/webcom/show_article.php/_c-549/_nr-6/_p-1/i.html (English) (discussing the history of the headscarf through the ages and how it has adapted and has been adapted to the times).
 3. See, e.g., Axel Frhr. von Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665, 672 (2004).
 4. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02, A.I.1 (F.R.G.), available at http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602.html [hereinafter *Headscarf II*].
 5. *Id.*
 6. This translation for “Oberschulamts Stuttgart” is borrowed from Campenhausen, *supra* note 3, at 672.

cations”⁷ because she insisted on wearing the Islamic headscarf while teaching.⁸ After unsuccessfully lodging a complaint with the SSA, Ludin commenced a lawsuit in the *Verwaltungsgericht* [administrative trial court] of Stuttgart, alleging that the SSA’s reason for denying her employment violated her right to freedom of religion and equal treatment.⁹ Ludin did not prevail in the administrative trial court and appealed to the *Verwaltungsgerichtshof* [administrative court of appeals] of Baden-Württemberg (the *Land*¹⁰ in which Stuttgart is located).¹¹ When her appeal to the administrative court of appeals failed, Ludin sought review by the *Bundesverwaltungsgericht* [Federal Administrative Court] (“FAC”).¹² The FAC granted review but rejected Ludin’s constitutional challenge (in the “*Headscarf I*” decision).¹³

Running out of options, Ludin appealed the FAC’s decision to Germany’s highest court, the *Bundesverfassungsgericht* [Federal Constitutional Court] (“FCC”).¹⁴ On September 24, 2003, after five years of prolonged legal battle, Ludin finally prevailed. The FCC held that the SSA’s refusal to employ Ludin because she wore an Islamic headscarf violated her rights under the Basic Law and reversed the decisions of the courts below (in the “*Headscarf II*” decision).¹⁵ Ludin’s victory, however, was but a pyrrhic one: The FCC based its holding on a lack of a sufficient statutory foundation for the SSA’s denial of Ludin’s employment application,¹⁶ thereby allowing the legislature of Baden-Württemberg — and of each of the other *Länder*¹⁷ — to deny a job to a teacher who insists on donning an Islamic headscarf by simply enacting a statute that provides the foundation for such a denial.¹⁸

7. *Headscarf II*, 2 BvR 1436/02 at A.I.2.

8. *Id.*

9. *Id.* at A.I.3–6.

10. *Land* is the German word for “state.” Sixteen states make up the Federal Republic of Germany. *See infra* note 17.

11. *Headscarf II*, 2 BvR 1436/02 at A.I.5–7.

12. *Id.*

13. Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] [Federal Administrative Court] July 4, 2002, 2 C 21.01 (F.R.G.), *available at* <http://www.bverwg.de/media/archive/727.pdf> [hereinafter *Headscarf I*].

14. *Headscarf II*, 2 BvR 1436/02 at A.II.

15. *Id.* at B.III.

16. *Id.*

17. Germany is a federal republic consisting of sixteen states, or *Länder* (the plural for *Land*), which are in many respects conceptually similar to the several states that comprise the United States of America. For an overview of the Federal Republic of Germany (“F.R.G.”), its federal system, its 16 states, and more, see generally GERMAN FED. FOREIGN OFFICE, FACTS ABOUT GERMANY (2003), *available at* <http://www.tatsachen-ueber-deutschland.de>.

18. *Headscarf II*, 2 BvR 1436/02 at B.III.

Predictably, Baden-Württemberg's legislature swiftly enacted a law banning teachers from wearing headscarves in public schools.¹⁹ Meanwhile, the FAC, where Ludin's case was still pending on remand from the *Headscarf II* court, upheld Baden-Württemberg's new headscarf law (in the "*Headscarf III*" decision).²⁰ In the end, Ludin decided to forego further appellate review of the *Headscarf III* decision.²¹

In the aftermath of the *Headscarf II* decision, the legislatures of half of Germany's sixteen Länder moved quickly to enact laws banning public school teachers from wearing headscarves in school,²² and similar laws were being debated or reviewed in several more Länder.²³ In all, fewer than one third of the Länder have decided not to enact legislation to ban or otherwise regulate headscarves²⁴ — at least for the time being.²⁵

This Note contends that most, if not all, of the different laws banning Islamic headscarves from public schools are unconstitutional because they are fraught with exceptions for Christian and occidental beliefs and values and, therefore, discriminate against Muslims.²⁶ Some German Länder, in a move

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19. Gesetz zur Änderung des Schulgesetzes Baden-Württembergs [Act Amending the School Code of Baden-Württemberg], April 1, 2004, Baden Württemberg GBl. S. 178, Nr. 6 (F.R.G.), available at <http://www.uni-trier.de/~ievr/kopftuch/GesetzBadenWuerttemberg01042004.htm> (German), <http://www.uni-trier.de/~ievr/eng/kopftuch.htm> (abridged English).
 20. BVerwGE [Federal Administrative Court], June 24, 2004, 2 C 45.03 (F.R.G.), available at <http://www.bverwg.de/media/archive/2282.pdf> [hereinafter *Headscarf III*].
 21. *Muslimische Lehrerin beendet Kopftuchstreit* [Female Muslim Teacher Ends Headscarf Battle], SPIEGEL ONLINE, Oct. 8, 2004, <http://www.spiegel.de/unispiegel/studium/0,1518,322310,00.html>.
 22. In total, eight Länder have enacted such laws. See Institut für europäisches Verfassungsrecht (IEVR) [Institute for European Constitutional Law (IECL)], Arbeitsmaterialien zum Staatskirchenrecht: Kopftuchverbot für Lehrkräfte in Deutschland [Working Materials on State-Church Law: Headscarf Prohibition for Teachers in Germany], <http://www.uni-trier.de/~ievr/kopftuch/kopftuch.htm> (German), <http://www.uni-trier.de/~ievr/eng/kopftuch.htm> (abridged English) (last visited Feb. 24, 2007) (website by the University of Trier's IECL, tracking headscarf legislation in the various Länder and offering for download the texts and draft versions of enacted and proposed laws and other legislative materials) [hereinafter *Headscarf Prohibition Working Materials*].
 23. Headscarf legislation proposals have been formally submitted in three Länder. See *Headscarf Prohibition Working Materials*, *supra* note 22.
 24. Currently, five Länder are not planning to regulate the wearing of headscarves by teachers in public schools. See *id.*
 25. See *Bundesländer uneins in Debatte um Kopftuchverbot in Schulen: Unterschiedliche Positionen über Parteigrenzen hinweg* [Federal Länder Divided in Debate Over Headscarf Ban in Schools: Different Positions Across Party Lines], 123RECHT.NET, Oct. 8, 2003 (F.R.G.), <http://www.123recht.net/article.asp?a=6807> (noting that some of the Länder that do not currently plan enacting headscarf legislation (1) may nevertheless favor such legislation by the Federal government, (2) may wait to see how other Länder will react, or (3) believe that their particular law already provides sufficient statutory foundation to exclude teachers who insist on wearing headscarves in public schools).
 26. Some of the laws are phrased in such ways as to allow for the argument that certain kinds of Christian religious pieces of clothing and other symbols do not fall under the categories of religious clothing and symbols banned.

reminiscent of Orwellian doublethink, argued for the enactment of laws that prevent headscarf-wearing Muslims from teaching in public schools (and thereby *exclude* Muslim minorities on the basis of their faith) by claiming that doing so would further *integration* and the fight *against* discrimination.²⁷ This unequal treatment of different religious groups by Germany's lawmakers is all the more unfortunate because in Germany's "open-minded, modern, . . . tolerant,"²⁸ multicultural, and multi-ethnic²⁹ society, in which the right to "practice one's faith unhindered"³⁰ is guaranteed by the German Basic Law,³¹ meaningful freedom of religion for members of religious minorities is a function of equal treatment under the law.³² The German Basic Law recognizes the importance of equality,³³ repeatedly emphasizing the right to the equal protection and enjoyment of the Basic Law's rights and privileges,³⁴ including the right to freedom of relig-

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27. See, e.g., Franz Josef Jung, CDU-Fraktionsvorsitzender im Landtag Hessen [Political Faction Chairman of the Christian Democratic Union (CDU) in the State Parliament of Hessen], Rede im Landtag Hessen zum Gesetz der Sicherung der staatlichen Neutralität [Address Before the Hessen Parliament Regarding the Law for the Protection of the Neutrality of the State] 1, 4–6 (Feb. 18, 2004), *available at* http://www.franz-josef-jung.de/PDF/04_Kopftuchrede.pdf (stating that the Islamic headscarf stands for the oppression of women and is a symbol of intolerance). This "intolerance of the headscarf," he argues, "must be effectively opposed. It leads to parallel societies and hurts integration. Integration instead of division must be [the] motto." ["Der Intolleranz des Kopftuchs muss wirkungsvoll entgegengetreten werden. Sie führt zu Parallelgesellschaften und schadet der Integration. Integrieren statt Spalten muss unsere Devise sein."] According to him, wearing of the headscarf is irreconcilable with the principles of equality and non-discrimination. His arguments proved persuasive: Hessen enacted a headscarf ban eight months later. See Headscarf Prohibition Working Materials, *supra* note 22.
28. GERMAN FED. FOREIGN OFFICE, *supra* note 17, at ch. "Society."
29. See, e.g., *id.* at ch. "Society," section "Immigration and Integration" (stating that about nine percent of Germany's population is foreign).
30. See *id.* at ch. "Churches and religious communities" (follow "Society" hyperlink; then "Religion" hyperlink located in "Background" category located at the bottom of the page).
31. See *id.*
32. See, e.g., Hans Maier, Editorial, *Zwischen Kopftuch, Kippa und Kreuz* [Between Headscarf, Yarmulke, and Crucifix], RHEINISCHER MERKUR, Jan. 8, 2004, *available at* <http://www.islam-bremen.de/rheinMerkur080104.pdf> (Hans Maier, an expert on religion and former Minister of Education in Bavaria, states that "[n]othing is as sacred to a secular state as equality." ["Nichts ist einem säkularen Staat so heilig wie die Gleichheit."]); see also Jürgen Habermas, *Intolerance and Discrimination*, 1 INT'L J. CONST. L. 2, 6, 11 (2003) ("[R]eligious toleration is basic to a democratic constitutional state." And, further, "reciprocal toleration of different religious doctrines . . . is mandatory in a liberal state."). For an article discussing religious freedom and equality in Germany, and noting the need for increased integration of the Muslim minority, see Gerhard Robbers, *Religious Freedom in Germany*, 2001 BYU L. REV. 643, 656–58 (2001). For an article discussing, *inter alia*, the jurisprudence of Germany's Federal Constitutional Court on the principle of equality and differential treatment with respect to religious freedom, see Leszek Lech Garlicki, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, 2001 BYU L. REV. 467, 489–94 (2001).
33. The German Grundgesetz [Basic Law or Constitution] declares a number of basic rights, amongst them the right to equality before the law. GRUNDGESETZ [GG] [Constitution] art. 3(1) (F.R.G.).
34. The German Constitution reiterates the importance of equality when it expressly provides for freedom from discrimination on the basis of religion, among other bases, *id.* at art. 3(2), and expressly prohibits

ion.³⁵ Under the law today, however, equality is a fiction for Germany's religious Muslims.

Part II of this Note will explore the history, origins, and characteristics of Germany's Muslim population. Part II will also briefly examine the Islamic headscarf, its religious significance, and the surrounding political controversy. Part III of this Note will discuss the landmark *Headscarf I*, *II*, and *III* decisions of the FAC and the FCC (collectively, the "*Headscarf* decisions"). Further, Part III will survey the specific laws that have been enacted, proposed, or considered in response to the FCC's *Headscarf II* decision. In Part IV, this Note will demonstrate that most of the Länder's headscarf laws fail the FCC's guidelines for equal treatment of religions because they carve out *de jure* exceptions for "Christian and occidental beliefs and values." Finally, Part IV will critique some of the possible solutions to the issues raised by the *Headscarf* decisions, concluding that *all* religious clothing and symbols should be expressly and unconditionally permitted.

II. GERMANY'S MUSLIM POPULATION AND THE ISLAMIC HEADSCARF

A. *The Origins of Germany's Muslim Population*

The German headscarf debate — both legal and political — did not take place in a vacuum, but rather in a Germany that is today one of "the world's two largest recipients of immigrants,"³⁶ a Germany in which Muslims constitute the second-largest religious group,³⁷ and a Germany in which Turks make up the single largest immigrant group,³⁸ ninety-five percent of whom are Muslim.³⁹ The tensions that arise from attempts at integrating Germany's Turkish and Muslim populations — both of which are on the rise⁴⁰ — underlie and gave rise

discrimination in the *public service* on the basis of religion or worldviews, *id.* at art. 33(2)–(3). Throughout the text of the German Constitution, equality is at "center stage."

35. The Grundgesetz guarantees freedom of religion: *Id.* at art. 4(1)–(2).

36. Peter Schuck & Rainer Münz, *Introduction* to *PATHS TO INCLUSION: THE INTEGRATION OF MIGRANTS IN THE UNITED STATES AND IN GERMANY*, at vii (Peter Schuck & Rainer Münz eds., 1998). The other country is the United States. *Id.*

37. *E.g.*, Informationsplattform Religion [Information Portal for Religion], Islam, <http://www.religion-online.info/islam/islam.html> (last visited Feb. 24, 2007).

38. *See, e.g.*, Rainer Münz & Ralf Ulrich, *Changing Patterns of Immigration to Germany, 1945–1995: Ethnic Origins, Demographic Structure, Future Prospects*, in *MIGRATION PAST, MIGRATION FUTURE: GERMANY AND THE UNITED STATES* 93 (Klaus J. Bade & Myron Weiner eds., 1997) (stating that "Turkish nationals . . . are by far the largest [immigrant] group" in Germany).

39. *See, e.g.*, GERMAN FED. FOREIGN OFFICE, *supra* note 17, at ch. "Muslim communities" (stating that "[i]n Germany, there are about 3.3 million Muslims from 41 countries. [Of these,] Turkish Muslims form the largest group . . ."); John D. Snethen, Trend Paper, *The Crescent and the Union: Islam Returns to Western Europe*, 8 *IND. J. GLOBAL LEG. STUD.* 251, 260 n.58 (2000) (stating that ninety-five percent of Turks are Muslim).

40. *See infra* Part II.A.2.

to the debate over the Islamic headscarf. Of course, tensions arising because of the Islamic headscarf are not confined to Germany. Other European countries, including the United Kingdom and France, have tackled the question of how to best deal with the Islamic headscarf with respect to public institutions and civil servants (and, in the case of France, private citizens) in public institutions.⁴¹ Other countries aside, Germany's tensions are related to its Turkish — and therefore Muslim⁴² — populations. The history of Germany's Turkish population and the dynamics that brought it to Germany⁴³ demonstrate, however, that Turks and Muslims are in Germany to stay — as is the headscarf debate.

1. *What Brought Muslims to Germany — A Brief History of the Turkish Gastarbeiter*

Germany's Turkish population finds its origins in the mid-1950s, when Germany began an "organized foreign labor recruitment" effort with the German-Italian Treaty of 1955.⁴⁴ For several years, however, these *Gastarbeiter* [guest workers] did not play an important role in Germany's labor force.⁴⁵ Then, in 1961, the building of the Berlin Wall brought the availability of labor from the former East Germany to a grinding halt.⁴⁶ Not coincidentally, 1961 also marked the year that Germany signed a labor recruitment treaty with Turkey.⁴⁷ The closing of the East German/West German border that accompanied the building of the Wall constituted the watershed event that opened the floodgates to a dramatic increase in foreign labor.⁴⁸ By 1964, the one-millionth guest worker had arrived in Germany,⁴⁹ and by 1973, foreign labor employment peaked at 2.6

41. *E.g.*, *Gesetze in Europa: das islamische Kopftuch* [*Laws in Europe: The Islamic Headscarf*], DER-STANDARD.AT, Mar. 8, 2005, <http://derstandard.at/?url=?id=1976191> (Austrian online newspaper surveying the laws in various European countries). In England, it has been illegal since the early 1980s to discriminate on the basis of religion in public service and the private industry; therefore, Islamic headscarves, Sikh turbans, or other religious clothing or symbols are worn by public servants and officials, including police officers and judges on England's high court. *Id.* In France, by contrast, it has been unlawful since 1905 for public servants to wear any religious clothing or symbols while carrying out their public service functions. *Id.* Starting with the academic year 2004–2005, that law has been extended to apply to all *students* in public schools, making France one of the most restrictive countries in Europe with respect to the Islamic headscarf and other religious clothing and symbols in public schools. *Id.*

42. *See supra* notes 38–39.

43. *See infra* Part II.A.1.

44. Klaus J. Bade, *From Emigration to Immigration: The German Experience in the Nineteenth and Twentieth Centuries*, in *MIGRATION PAST, MIGRATION FUTURE*, *supra* note 38, at 23.

45. Münz & Ulrich, *supra* note 38, at 67.

46. Bade, *supra* note 44, at 23.

47. Münz & Ulrich, *supra* note 38, at 78.

48. Bade, *supra* note 44, at 23.

49. Münz & Ulrich, *supra* note 38, at 79.

million guest workers,⁵⁰ of whom Turkish *Gastarbeiter* constituted the largest group.⁵¹

These Turkish immigrants became the foundation of today's Turkish population as guest workers "gradually evolved into immigrants"⁵² and as family reunifications increased,⁵³ both made possible in significant part by eased restrictions on the renewal of guest workers' residence permits.⁵⁴ The *Anwerbestop* [labor recruitment stop] of 1973,⁵⁵ through which Germany tried to stem the tide against the rising number of foreigners, ironically strengthened the "the already growing tendency toward permanent residence."⁵⁶ Guest workers, faced with the option of indefinitely living apart from their families or returning to their home countries and thereby foregoing the chance of being readmitted to Germany, increasingly elected a third option: bringing their families to Germany.⁵⁷

By 1979, as a result of the increases in family reunifications,⁵⁸ as well as rapid population growth within the guest workers' communities,⁵⁹ the number of foreigners in Germany exceeded that at the time of the *Anwerbestop* in 1973.⁶⁰

2. Germany's Modern-Day Muslim Population

With the pathways to immigration for foreigners, and particularly Turks,⁶¹ firmly set in place in the 1960s–1970s, fertile soil was planted for the introduction and growth of a Muslim population in Germany⁶² — with dramatic results:⁶³ Between 1980 and 1999 alone, the Turkish population in Germany increased from 1.5 million to 2.1 million — a 40.4% increase.⁶⁴ As of 2004,

50. *Id.*

51. *Id.* (stating that by 1973, there were 605,000 Turkish guest workers living and working in Germany).

52. Bade, *supra* note 44, at 23.

53. Münz & Ulrich, *supra* note 38, at 82.

54. *Id.*

55. Bade, *supra* note 44, at 23.

56. *Id.*

57. *Id.*

58. *Id.*

59. Münz & Ulrich, *supra* note 38, at 67.

60. Bade, *supra* note 44, at 23.

61. See Münz & Ulrich, *supra* note 38.

62. See sources cited *supra* note 39.

63. The words Turks and Muslims are used interchangeably for the remainder of this section, as 95% of Turks in Germany are Muslim and the majority of Muslims in Germany are of Turkish descent. See sources cited *supra* note 39.

64. Ulrich Mammey & Karl Schwarz, *The Demographic Characteristics of the Immigrant Population in Germany*, in COUNCIL OF EUROPE DIRECTORATE OF SOC. AFFAIRS & HEALTH, THE DEMOGRAPHIC CHARACTERISTICS OF IMMIGRANT POPULATIONS 203 (Werner Haug, Paul Compton & Youssef Courbage eds., 2002).

Germany's total foreign population numbered 7.3 million, of which about a quarter — 1.8 million — is made up of Turkish citizens.⁶⁵ The slight decline in Turkish foreigners from 1999 to 2004, moreover, is most likely not a result of Turkish nationals leaving Germany, but because more former Turkish citizens are becoming naturalized German citizens.⁶⁶ In fact, Germany's population of Turkish origin and, therefore, of the Islamic faith, is on the rise — even as Germany's native population is decreasing by some 150,000 people annually⁶⁷ — because Turks boast the third-highest birth rates in Germany.⁶⁸ Germany's current Muslim population is 3.2 million strong.⁶⁹

As Germany's population of Turkish origin increases, so will Germany's Muslim population.⁷⁰ It is not unreasonable to expect that the importance of the Muslim population to Germany's political landscape will neither diminish nor cease to exist, and it stands to reason that neither will the debate over the Islamic headscarf or attempts to find legal and political solutions to it.

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65. FED. STATISTICAL OFFICE OF GERMANY, POPULATION BY SEX AND CITIZENSHIP (2005), <http://www.destatis.de/basis/e/bevoe/bevoetab4>.
 66. Mammy & Schwarz, *supra* note 64, at 213 (showing that from 1991 to 1999, the number of Turks becoming naturalized German citizens has increased from 3529 to more than 100,000). The authors, presumably writing before post-1999 data was available, projected further increases beginning in 2000 because of eased naturalization procedures that went into effect that year. *Id.* Moreover, under German law, the children born in Germany to Turkish nationals are automatically entitled to German citizenship (conditioned on the child's either giving up its Turkish citizenship at birth or retaining dual citizenship until its 18th birthday, at which time the child must choose which citizenship it wishes to retain). *Id.* This is not insignificant, as the current number of 1.8 million Turkish "foreigners" includes some 600,000 who were born in Germany. FED. STATISTICAL OFFICE OF GERMANY, FOREIGN POPULATION ON 31.12.2004 BY COUNTRY OF ORIGIN (2005), <http://www.destatis.de/basis/e/bevoe/bevoetab10.htm>.
 67. Mammy & Schwarz, *supra* note 64, at 239.
 68. *Id.* at 226.
 69. GERMAN FED. FOREIGN OFFICE, *supra* note 17, at ch. "Society."
 70. This prediction, of course, is limited to the increase of the Muslim population as a function of the increase of the population of Turkish origin and is based on the fact that the majority of German Muslims are of Turkish origin and the reasonable conjectures made on that basis.

B. *An Overview of the Islamic Headscarf*

The Islamic headscarf exists in a variety of forms.⁷¹ It is widely misunderstood, with a plethora of meanings and symbolisms attached to it⁷² that obscure the debate and overwhelm any but the most careful observer.

1. *The Religious Significance of the Headscarf*

A female Muslim's claim and belief that her religion commands her to wear a headscarf, though not entirely uncontroversial even within Islam, is consistent with several schools of mainstream Islamic religious thought, traditions, and practice. Generally, Muslims derive an obligation to wear some form of headscarf from the Koran.⁷³ However, there is neither agreement as to the form of headscarf that is mandated,⁷⁴ nor uniformity of opinion as to whether it is actually mandated at all.⁷⁵ Some Islamic scholars also disagree whether the religion

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71. Some of the most commonly known forms are the *hijab* and the *chador*. *E.g.*, Kopftuch, Schleier und Verhüllung [Headscarf, Veil and Veiling], <http://www.religion-online.info/islam/themen/info-kopftuch.html> (last visited Feb. 24, 2007). Another type of veil that, at least since media reports in recent years about conditions in the Taliban-controlled Afghanistan, is known to many is the *burqa*, which literally means "tent;" it is one piece of clothing that covers the entire body with only a mesh for the eyes. *Id.* (The *burqa*, however, does not feature in the German headscarf decisions or political debates.) The *hijab* is literally a scarf or throw that covers a female's hair and, sometimes, shoulders and chest but leaves her face otherwise unobstructed. *E.g.*, *id.* The *chador* is similar to the *hijab*, but it usually covers a greater portion of the female's body and conceals the wearer's face entirely except for the eyes. *E.g.*, *id.* In public discourse, both the *hijab* and *chador* are commonly referred to as a "headscarf," *e.g.*, *id.*, although it was the *hijab*, worn by Ludin, that sparked the *Headscarf* decisions.
72. *E.g.*, Kopftuch und Bekleidungsvorschriften [Headscarf and Laws Governing Clothing], <http://www.religion-online.info/islam/themen/kopftuch.html> (last visited Feb. 24, 2007) (stating that the headscarf is a symbol of female oppression for some, while an expression of individual religiosity for others). The website, a government-sponsored project of the Media and Information Service for Religious Science [*Religionswissenschaftlichen Medien- und Informationsdienst*], also provides links to other sources discussing the justifications for wearing the Islamic headscarf and points out that even within Islam those justifications do not always overlap. *Compare*, *e.g.*, Jung, *supra* note 27, at 1 (calling the Islamic headscarf a fundamentalist political symbol representing the oppression of women and lack of freedom), *with*, *e.g.*, Heide Oestreich, *Zwei Gesichter unterm Tuch [Two Faces Behind the Veil]*, QANTARA.DE: DIALOGUE WITH THE ISLAMIC WORLD, Mar. 27, 2004, http://www.qantara.de/webcom/show_article.php/_c-548/_nr-19/_p-1/i.html (discussing that to some young, modern, religious female Muslims, the headscarf signifies freedom, dignity, and identity).
73. *E.g.*, Kopftuch und Koran [Headscarf and the Koran], <http://www.religion-online.info/islam/themen/info-kopftuch-koran.html> (last visited Feb. 24, 2007) (stating that advocates of a duty to don the headscarf base such obligation on the Koran, and providing German translations of the relevant portions of the Koran: Suras 24:31, 24:60, and 33:59). For an English translation of the relevant portions of the Koran, see THE KORAN (J.M. Rodwell trans., Project Gutenberg 2002), <http://www.gutenberg.org/etext/3434>.
74. *E.g.*, Kopftuch und Koran [Headscarf and the Koran], <http://www.religion-online.info/islam/themen/info-kopftuch-koran.html> (last visited Feb. 24, 2007) ("Auch in der islamischen Welt gibt es keine Einigkeit, in welcher Form sich Frauen in der Öffentlichkeit verhüllen müssen." ["In the Islamic world, too, there is no agreement regarding the way in which females must conceal themselves."]). For an English translation of the relevant portions of the Koran, see THE KORAN, *supra* note 73.
75. *E.g.*, Aluma Dankowitz, *Inquiry and Analysis Series — No. 169: The Muslim Debate Over the French Veil Ban*, MIDDLE EAST MEDIA RESEARCH INSTITUTE ("MEMRI"), Apr. 5, 2004, <http://www.memri.org>

of Islam permits a woman to choose to not wear a headscarf, for example when living in a foreign, predominantly non-Muslim country,⁷⁶ even though those same Islamic scholars agree that wearing the headscarf is, in fact, a religious requirement.⁷⁷ Thus, despite certain discord between Islamic religious authorities, a particular female Muslim's individual belief that she must wear a headscarf is not inconsistent with mainstream Islamic religious thought, tradition, and practice.

2. *The Symbolism of the Headscarf*

Generally, most observant Muslim women who wear the headscarf reject the notion that it is a political symbol,⁷⁸ pointing instead to its religious meaning and its positive effects. Some female Muslims who, based on their religious beliefs, choose to wear a *hijab* ascribe a rather different meaning to the headscarf. They see it as liberating, allowing them to participate as emancipated and dignified members of a secular society.⁷⁹ The headscarf, they claim, affords them dignity and protects them from unwanted sexual advances.⁸⁰ To them it is a means of imposing boundaries on the surrounding, secular world in the way they believe their faith demands.⁸¹

memri.org/bin/articles.cgi?Page=archives&Area=ia&ID=IA16904 (comparing the position of the European Council for Islamic Religious Decrees and Research, headed by Sheikh Al-Qaradawi, who is "considered the spiritual leader of Islamist organizations" and who is "one of the most prominent Islamic figures in the Arabic-language media," that the headscarf is "an indisputable religious duty," with the position of various Islamic intellectuals that the headscarf is nothing more than an Islamic tradition because the Koran does not expressly identify the headscarf as a religious duty) (internal quotations and citation omitted).

76. *E.g., id.* (comparing the position of Sheikh Muhammad Sayyid Tantawi, head of the Al-Azhar University in Cairo, that "Islamic law permits Muslim women living in France to remove the veil" because of "compelling circumstances," with the position of the European Council for Islamic Religious Decrees and Research that "[t]here is not doubt that every Muslim woman who comes of age is obligated, according to Islamic law, to wear a veil.") (internal quotations and citation omitted); *see also* Jörg Lau & Toralf Staud, "Das Kopftuch ist nicht so wichtig" ["The Headscarf Is Not That Important"], DIE ZEIT, June 3, 2004 (quoting Rıdvan Çakir, Chairman of Ditib, Germany's largest Islamic organization, as saying that even though the headscarf is prescribed by religion, it is the individual's choice whether to follow the religious prescription).
77. *E.g.,* Dankowitz, *supra* note 75 (noting that Sheikh Al-Qaradawi and Sheikh Muhammad Sayyid Tantawi both agree that the headscarf is "a religious edict, not a religious symbol").
78. *See supra* note 77 and accompanying text; *see also* Sabine Schiffer, *Das Kopftuch in den Medien: Instrumentalisierter Symbolcharakter* [The Headscarf in the Media: A Symbol Which Has Been Instrumentalised], QANTARA.DE: DIALOGUE WITH THE ISLAMIC WORLD, Apr. 20, 2005, http://www.qantara.de/webcom/show_article.php/_c-548/_nr-27/_p-1/i.html (German), http://www.qantara.de/webcom/show_article.php/_c-549/_nr-17/_p-1/i.html (English).
79. *E.g.,* Oestreich, *supra* note 72; *see also* Enderwitz, *supra* note 2.
80. *E.g.,* Oestreich, *supra* note 72; *see also* Enderwitz, *supra* note 2.
81. *E.g.,* Oestreich, *supra* note 72; *see also* Enderwitz, *supra* note 2.

However, dismissing the religious or liberating meanings that observant Muslim women attach to it,⁸² opponents of the Islamic headscarf assign to it a rather different significance. To them, the headscarf is a political symbol of radical Islamic fundamentalism,⁸³ demonstrating the oppression of females,⁸⁴ an attitude of intolerance,⁸⁵ and irreconcilable opposition to Western democratic values.⁸⁶ They dismiss the claims of young Muslim women that the headscarf is a liberator as the delusional effects of extremist religious brainwashing.⁸⁷ Some warn that the Islamic headscarf is a tool of Islamic fundamentalists who plan nothing less than the violent overthrow of Western democracy.⁸⁸

Sadly, headscarf opponents generally offer little to support for their generalized characterizations of, and accusations regarding, the headscarf (even while wholeheartedly embracing other religions' clothing and symbols).⁸⁹ On the other

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82. See, e.g., Jung, *supra* note 27, at 1 (“Das islamische Kopftuch ist eben nicht nur ein Glaubenssymbol, sondern es ist auch und gerade ein politisches Symbol.” [“The Islamic headscarf is not only a symbol of faith but also, and especially, a political symbol.”]).
83. E.g., *id.* (“Es steht für den fundamentalistischen Gottesstaat, der im klaren Widerspruch zu unserer Verfassung steht.” [“It stands for the fundamentalist religious state that stands in clear contradiction to our Constitution.”]).
84. See, e.g., *id.* at 3 (“Viele vom islamischen Recht, der Scharia, geprägte Staaten bekennen sich zur Unterordnung und Unterdrückung der Frau . . . und haben dafür als äußeres Symbol [das islamische Kopftuch] gewählt.” [“Many states influenced by Islamic law, the Sharia, admit to the subjugation and oppression of women . . . and have chosen [the Islamic headscarf] as external symbol thereof.”]).
85. E.g., *id.* at 4 (referring to the “intolerance of the headscarf” [“die Intoleranz des Kopftuchs”]).
86. E.g., *id.* at 1 (“[D]as Kopftuch und die Weltanschauung, die damit verbunden ist, [stehen] nicht im Einklang mit den Grundrechten unseres freiheitlichen demokratischen Rechtsstaates.” [“The headscarf and the world view attached to it do not stand in agreement with the basic rights of our liberal, democratic, constitutional state.”]); *id.* at 4 (“[W]er glaubt . . . eine solche Art von Unterdrückung von Freiheit in Zusammenhang mit unserer Rechtsordnung, unserem Rechtsstaat und unserer Verfassung zu bringen, der irrt ganz gewaltig. [“Whoever believes that . . . such an oppression of freedom is reconcilable with our rule of law, our constitutional state, and our Constitution is entirely wrong.”]).
87. See, e.g., *id.* at 2–4 (arguing that women are subjugated in fundamentalist Islam and are under the authority of their husbands, thus — since Jung equates religious Islam with fundamentalist Islam — suggesting that they are unable to make their own decisions; also citing anecdotal stories of females who feel coerced into wearing the Islamic headscarf out of fear of reprisals).
88. E.g., *id.* at 2 (“[D]as Tragen des Kopftuchs in staatlichen Institutionen [ist] längst zum Kampfprogramm von islamistischen Kräften geworden” [“The wearing of the Islamic headscarf in public institutions has long become the combat program of Islamic powers.”]).
89. See, e.g., *id.* (rejecting the Islamic headscarf but unquestioningly embracing Christian and Jewish religious clothing, symbols, and values); *Kopftuchverbot in Bayern Verabschiedet* [Headscarf Ban Passed in Bavaria], NETZEITUNG DEUTSCHLAND, Nov. 11, 2004, <http://www.netzeitung.de/deutschland/312834.html> (describing the argument by Monika Hohlmeier, Minister of Culture of Bavaria, that non-Muslim symbols like a nun’s habit or the Jewish yarmulke are not prohibited even while the headscarf is prohibited as a ‘religious symbol’); see also Ruti Teitel, *The Veil Wars*, PROJECT SYNDICATE, <http://www.project-syndicate.org/commentary/teitel1> (last visited Feb. 24, 2007) (stating that public opinion opposing the veil is attributable “less [to] religion than [to] racist xenophobia, anti-immigrant feelings, and resistance to multiculturalism”). Teitel’s statement, although made in the context of France’s headscarf debate, is remarkably applicable to Germany’s situation. For two interesting observations that may help to partially explain the voters’ and many Germans’ xenophobic attitudes, see Bade, *supra* note 44, at

side of the debate, Pope Benedict XVI, while still Cardinal Ratzinger, so poignantly called attention to the fallacy of equating a firm commitment to faith with extremism: “Having a clear faith, based on the creed of the church, is often labeled today as fundamentalism.”⁹⁰ Clearly, however, the Islamic headscarf is more than a mere piece of clothing. It is a piece of clothing burdened with conflicting religious, social, and political meanings and symbolism that can not be reduced to superficial, general slogans in hopes of accurately conveying the depth of its meanings. And while headscarf-wearing Muslim women deny that it is a political symbol, its critics have succeeded, at the very least, in politicizing the headscarf.⁹¹ As discussed above,⁹² however, the individual decision to wear the Islamic headscarf is consistent with mainstream schools of Islamic thought and therefore constitutes a legitimate expression of a Muslim female’s adherence to the Islamic faith.⁹³

III. THE THREE HEADSCARF DECISIONS AND THE LÄNDER’S RESPONSE

The landmark *Headscarf* decisions and the laws that the Länder promulgated in response raise fundamental questions about equality and the right to religious freedom under Germany’s constitutional scheme.

A. Ludin’s Headscarf Troika

As set forth in greater detail above,⁹⁴ Fereshta Ludin challenged the policy of the School Supervisory Authority (“SSA”) of Stuttgart in Baden-Württemberg that denied her employment as a public school teacher because of her Islamic headscarf. The challenge first led to the Federal Administrative Court’s (the

24 (observing that former East Germany’s treatment of its foreign guest workers — including “state-prescribed separation” and quartering in “separate mass accommodations” — created a “social vacuum” in which a “latent xenophobia began to grow that erupted at the end of the [former German Democratic Republic’s] existence”), and Münz & Ulrich, *supra* note 38, at 73 (noting that, for decades, the German government’s official stance on immigration and integration of immigrants was that “Germany is not a country of immigration. [It] should not be a country of immigration today and must not become one in the future.” The authors explain that “[t]his official stand also reflects the view of many Germans.”). Together, these materials reasonably permit to critically question any assertion that the public’s and the legislators’ opposition to the headscarf is not, at least in part, rooted in xenophobia.

90. Cardinal Josef Ratzinger, *quoted in* Ian Fisher, *Pope Benedict XVI: The Decision*, N.Y. TIMES, Apr. 20, 2005, at A1. Then-Cardinal Ratzinger made this comment in the context of the Catholic faith; however, his observation is equally applicable to the context of the Islamic headscarf.

91. *See Female Muslim Teacher Ends Headscarf Battle*, *supra* note 21 (quoting Ludin as saying “I wear the headscarf exclusively for religious reasons and not at all for political or other reasons. Different media as well as some political circles have politicized my intent” [“Das Kopftuch trage ich ausschließlich aus religiösen und keineswegs aus politischen oder anderen Gründen. Verschiedene Medien sowie manche politischen Kreise haben meine Absicht . . . politisiert.”]).

92. *See supra* Part II.B.1.

93. The remainder of this Note is based on that understanding in defending a Muslim woman’s right (to chose) to wear a headscarf.

94. *See supra* Part I.

FAC's) *Headscarf I* decision⁹⁵ and second, to the Federal Constitutional Court's (the FCC's) *Headscarf II* decision.⁹⁶ In response to *Headscarf II*, the Länder quickly enacted the first headscarf laws, with Baden-Württemberg leading the charge.⁹⁷ Soon thereafter, the FAC upheld Baden-Württemberg's headscarf ban in its *Headscarf III* decision.⁹⁸

1. Headscarf I: *The First Decision of the Federal Administrative Court*

After Ludin failed to prevail with her complaint before the administrative trial and appellate courts in Baden-Württemberg,⁹⁹ she appealed to the FAC.¹⁰⁰ Ludin argued before the FAC that the state of Baden-Württemberg committed a wrongful administrative action when the SSA of Stuttgart denied her employment on the grounds that she lacked personal qualification because of her insistence on wearing an Islamic headscarf.¹⁰¹ More specifically, Ludin contended that the courts below erred, as a matter of law,¹⁰² when they failed to recognize that the SSA's policy violated her right to freedom of religion under Art. 4(1),¹⁰³

95. See *Headscarf I*, 2 C 21.01.

96. *Headscarf II*, 2 BvR 1436/02.

97. Act Amending the School Code of Baden-Württemberg, *supra* note 19, at 3. Baden-Württemberg was the first Land to enact a headscarf ban. See *Headscarf Prohibition Working Materials*, *supra* note 22, at 4.

98. See *Headscarf III*, 2 C 45.03 at 5.

99. For a summary of the lower court cases and citations, see *supra* Part I. For an excellent, more in-depth summary of the early procedural history of Ludin's cases, see also Campenhausen, *supra* note 3, at pt. II.A.

100. The FAC is Germany's highest court for "all matters involving the correctness of administrative decisions and administrative action including non-monetary claims against the state for wrongful administrative action." PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 6 (2004). For a general overview of the German court system, see *id.* at 6-7; DONALD P. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT* 48-55 (1976).

101. *Headscarf I*, 2 C 21.01 at 3.

102. Since this was Ludin's *review appeal* ["*Revision*"] to the high administrative court (as opposed to the *second instance appeal* ["*Berufung*"] from the trial court to the court of appeals), she could "raise only issues of law or of correct procedure." MURRAY & STÜRNER, *supra* note 100, at 17.

103. The Basic Law guarantees freedom of religion: "*Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich.*" ["Freedom of creed, of conscience, and freedom to profess a religious or non-religious faith are inviolable."] GRUNDGESETZ [GG] [Constitution] art. 4(1) (F.R.G.), translated in AXEL TSCHENTSCHER, *THE BASIC LAW (GRUNDGESETZ): THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (May 23, 1949) at 19 (2002) (throughout this Note, all translations of the Basic Law, unless otherwise noted, are Axel Tschentscher's).

Notably, under the plain language of the German Constitution, the Art. 4 right to freedom of religion is unqualified. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 444 (1989) ("[T]his particular liberty [i.e. religious freedom] is undiminished by the reservation clauses that qualify other constitutional rights."). Limitations of basic rights spring out of balancing competing and otherwise unqualified basic rights against one another. See *id.* at 503.

her right to the undisturbed practice of her religion under Art. 4(2),¹⁰⁴ her right to freedom from discrimination on the basis of religion under Art. 3(3),¹⁰⁵ and the express prohibition against discrimination on the basis of religion in public service under Art. 33(2)¹⁰⁶ of the German *Grundgesetz* [Basic Law or Constitution].

The FAC rejected Ludin's claims.¹⁰⁷ The court acknowledged that Ludin's wearing of the Islamic headscarf was entitled to the protection of the Basic Law,¹⁰⁸ and it acknowledged that those rights are absolute and unqualified unless they are outweighed by the countervailing constitutional rights of others.¹⁰⁹ However, the court reasoned, Ludin's interest in freedom of religion (and the other rights that flowed from it)¹¹⁰ must be weighed against two competing interests: (1) the interest of students' freedom of religion¹¹¹ and (2) the interest of students' parents to design their children's religious education as they desire¹¹² —

104. In addition to providing for the freedom of religion, the Basic Law expressly guarantees that one should be able to practice one's right to religious freedom without interference: "Die ungestörte Religionsausübung wird gewährleistet." ["The undisturbed practice of religion is guaranteed."] GRUNDGESETZ [GG] [Constitution] art. 4(2) (F.R.G.), *translated in* TSCHENTSCHER, *supra* note 103, at 19.

105. The Basic Law provides expressly for freedom from discrimination on the basis of religion: "Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden." ["No one may be disadvantaged or favored because of his sex, parentage, race, language, homeland and origin, his faith, or his religious or political opinions."] GRUNDGESETZ [GG] [Constitution] art. 3(3) (F.R.G.), *translated in* TSCHENTSCHER, *supra* note 103, at 18 (emphasis added).

106. Moreover, the Basic Law expressly prohibits discrimination in the *public service* on the basis of religion or worldviews:

(2) *Jeder Deutsche hat nach seiner Eignung, Befähigung und fachlichen Leistung gleichen Zugang zu jedem öffentlichen Amte.*

[2] *Every German is equally eligible for any public office according to his aptitude, qualifications, and professional achievements.*

(3) Der Genuß bürgerlicher und staatsbürgerlicher Rechte, die Zulassung zu öffentlichen Ämtern sowie die im öffentlichen Dienste erworbenen Rechte sind *unabhängig von dem religiösen Bekenntnis*. Niemandem darf aus seiner Zugehörigkeit oder Nichtzugehörigkeit zu einem Bekenntnisse oder einer Weltanschauung ein Nachteil erwachsen.

[3] Enjoyment of civil and political rights, *eligibility for public office*, and rights acquired in the public service are *independent of religious denomination*. No one may suffer any disadvantage by reason of his adherence or non-adherence to a denomination or to a philosophical persuasion.]

GRUNDGESETZ [GG] [Constitution] art. 33(2)–(3) (F.R.G.), *translated in* TSCHENTSCHER, *supra* note 103, at 34–35 (emphasis added).

107. *Headscarf I*, 2 C 21.01 at 1, 4.

108. *Id.* at 5.

109. *Id.*

110. *Id.* at 5–6 (explaining that this principle follows from the right to freedom of religion). According to the neutrality principle, the state must maintain neutrality with respect to questions of religion. *Id.* at 6 (citation omitted).

111. *Id.* at 6, 9.

112. *Id.* at 7 (explaining that this right flows from a combination of the parents' Art. 4(1) right to religious freedom, combined with their Art. 6(2) right to care for and raise their children). The relevant portion of

which interest includes the parents' right to shield their children from religious beliefs they deem wrong or harmful.¹¹³

After weighing those competing interests, the FAC held that Ludin's interest to religious freedom was outweighed by the interests to religious freedoms of the students and their parents.¹¹⁴ The court reasoned that under the neutrality principle, and particularly in light of the fact that the law requires parents to send their children to school,¹¹⁵ students have a right to be free from undue influence in their religious development that trumped Ludin's right to freely practice her religion.¹¹⁶ Younger students in particular, the court explained, can be easily influenced and have yet to learn mutual respect and tolerance for those with different beliefs.¹¹⁷ Moreover, the court rejected Ludin's argument that the neutrality principle should be relaxed in light of Germany's growing cultural, ethnic, and religious diversity in public schools.¹¹⁸ The court also rejected a case-by-case approach, explaining that even the *possibility* of any influence on the students violated those students' and their parents' constitutional rights.¹¹⁹

In sum: the FAC held that because the restrictions to Ludin's constitutional right to freedom of religion grew out of competing constitutional interests, the SSA's policy was not constitutionally infirm.¹²⁰

Art. 6(2) reads: "Pflege und Erziehung der Kinder sind das natürliche Recht der Eltern und die zuvörderst ihnen obliegende Pflicht." ["Care and upbringing of children are the natural right of the parents and primarily their duty."] GRUNDGESETZ [GG] [Constitution] art. 6(2) (F.R.G.), translated in TSCHENTSCHER, *supra* note 103, at 19.

113. *Headscarf I*, 2 C 21.01 at 7. Notably, under the Basic Law, parents are expressly given the right to decide whether or not their children should attend religion classes in school. GRUNDGESETZ [GG] [Constitution] art. 7(2) (F.R.G.), translated in TSCHENTSCHER, *supra* note 103, at 20.

114. *Headscarf I*, 2 C 21.01 at 10.

115. *Id.* at 6.

116. *Id.* at 10.

117. *Id.* at 8. In other words: because the students are not yet tolerant of other religions, teachers who belong to those other religions should be barred from openly practicing them. Apparently, religious freedom mandates no less. This reasoning is flawed because it overlooks that those children will learn tolerance and respect for other beliefs *precisely through exposure* to them. See, e.g., Oliver Gerstenberg, *Developments — Germany: Freedom Of Conscience In Public Schools*, 3 INT'L J. CONST. L. 94, 103 (2005) ("Exposure in school to religious commitment can foster an understanding of the reality of a modern multicultural society and help pupils, from an early age, to learn the importance and techniques of mutual tolerance.").

118. *Headscarf I*, 2 C 21.01 at 7.

119. *Id.*

120. *Id.* at 10.

2. Headscarf II: *The Landmark Decision of the Federal Constitutional Court*

Following her defeat in the FAC, Ludin filed a *Verfassungsbeschwerde* [constitutional complaint or constitutional appeal],¹²¹ appealing the *Headscarf I* decision to the FCC.¹²² In her constitutional complaint to the FCC, Ludin claimed that the SSA's policy and the subsequent decisions by the administrative courts, including the FAC, violated her fundamental constitutional rights, including her constitutional rights under Art. 4(1) (freedom of religion), Art. 4(2) (undisturbed practice of religion), Art. 3(3) (no discrimination on the basis of religion), and Art. 33(2) (equal access to public office free from discrimination on the basis of religion).¹²³ Moreover, Ludin also claimed violations of her constitutional rights to human dignity under Art. 1(1),¹²⁴ freedom of development of personality under Art. 2(1),¹²⁵ and, perhaps most importantly, equality before the law under Art. 3(1)¹²⁶ of the German Basic Law.¹²⁷

The FCC's second senate¹²⁸ granted Ludin review and, unlike the FAC before it, found her claims to be meritorious. In *Headscarf II*, a five to three majority of the FCC reversed the FAC's *Headscarf I* decision (and the decisions of the administrative courts below) and held unconstitutional the SSA's policy denying Ludin employment as a public school teacher because she insisted on wearing an Islamic headscarf.¹²⁹ Ludin's fundamental constitutional rights, the FCC agreed, had been violated.¹³⁰

121. For a discussion of the process of filing a constitutional appeal before the FCC, see generally MURRAY & STÜRNER, *supra* note 100, at 17. For a discussion of the formal process of litigating a constitutional claim before the FCC, see generally KOMMERS, *supra* note 100, at 175–81.

122. *Headscarf II*, 2 BvR 1436/02 at A.II.

123. *Id.*

124. “Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.” [“Human dignity is inviolable. To respect and protect it is the duty of all state authority.”] GRUNDGESETZ [GG] [Constitution] art. 1(1) (F.R.G), *translated in* TSCHENTSCHER, *supra* note 103, at 16.

125. “Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.” [“Everyone has the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or morality.”] GRUNDGESETZ [GG] [Constitution] art. 2(1) (F.R.G), *translated in* TSCHENTSCHER, *supra* note 103, at 16.

126. “Alle Menschen sind vor dem Gesetz gleich.” [“All humans are equal before the law.”] GRUNDGESETZ [GG] [Constitution] art. 3(1) (F.R.G), *translated in* TSCHENTSCHER, *supra* note 103, at 16.

127. *Headscarf II*, 2 BvR 1436/02 at pt. A.II.

128. For an explanation of the division of the FCC into two senates, their admittedly overlapping jurisdictions, and more, see PHILLIP M. BLAIR, FEDERALISM AND JUDICIAL REVIEW IN WEST GERMANY 9–13 (1981).

129. *Headscarf II*, 2 BvR 1436/02 at B.III.

130. *Id.*

Using a methodology similar to that of the FAC below, the FCC first outlined the fundamental constitutional rights and interests of Ludin,¹³¹ the constitutional principle of the neutrality of the state,¹³² the conflicting constitutional rights and interests of the parents,¹³³ and, also, the constitutional right of students to freedom of (or rather, from) religion.¹³⁴ After weighing the competing interests, the FCC decided that while a public school teacher's interests may, in theory, be subjugated to those of the parents and the students,¹³⁵ such a decision must be based on some positive legal (i.e. statutory) basis.¹³⁶ Lacking such a basis in law, the FCC reasoned, the Basic Law itself is inconclusive as to how this balancing and weighing of competing constitutional rights and interests must be resolved.¹³⁷ Moreover, the FCC held that, by itself, the public school teacher's wearing of the Islamic headscarf does not violate the principle of neutrality of the state, since a state that permits its teachers to wear Islamic headscarves does not thereby adopt the headscarf as its own.¹³⁸ Therefore, the FCC explained further, the mere potential that in-school conflicts may arise between the competing constitutional interests of the teachers, parents, and students is insufficient to resolve constitutional balancing of interests and thus did not support the SSA's policy.¹³⁹

However, Ludin's victory was incomplete because the court failed to make a general pronouncement that, as a matter of constitutional law, a public school teacher whose religious beliefs compel her to wear an Islamic headscarf is entitled to do so freely in the classroom.¹⁴⁰ Rather, the FCC avoided that ultimate question and held instead that there was no sufficient statutory basis for the SSA's policy.¹⁴¹ Specifically, it held that the SSA's policy violated Ludin's constitutional rights *precisely because* there was no law giving the SSA the legal authority to

131. *Id.* at B.II.1–4.a.

132. *Id.* at B.II.4.b.

133. *Id.*

134. *Id.*

135. *Id.* at B.III.

136. *Id.*

137. *Id.* at B.II.5.d, ¶ 2.

138. *Id.* at B.II.5.b.

139. *Id.* at B.II.5.d, ¶ 2.

140. The court's decision has led to much criticism — not only for its failure to address the fundamental question of the proper role of the Islamic headscarf in public schools, although that particular failure is the object of much scholarly criticism. *See generally* Campenhausen, *supra* note 3; Gerstenberg, *supra* note 117; Christine Langenfeld & Sarah Mohsen, *Developments — Germany: The Teacher Head Scarf Case*, 3 INT'L J. CONST. L. 86 (2005); Matthias Mahlmann, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, 4 GERMAN L.J. 1099 (2003).

141. *Headscarf II*, 2 BvR 1436/02 at B.III.

deny a job to a public school teacher on the basis that such teacher insists on wearing an Islamic headscarf (or other religious clothing or symbols).¹⁴²

At least one pair of commentators suggested that because the FCC based its decision on Art. 33(2), in combination with Arts. 4(1)–(2) and 33(3), the court “implicitly dismiss[ed] Ludin’s other complaints of violation of human dignity, personality rights and equality rights.”¹⁴³ However, while the authors make an arguably valid point with respect to the questions of human dignity and personality rights, they miss a crucially important pronouncement by the FCC on the question of equality:

This [prohibition, growing out of Arts. 33(3) and 4(1)–(2), against discrimination in the access to public service on the basis of religion] does not preclude the creation of job requirements that affect the freedom of religion of persons holding, and persons applying for, public service positions and that, therefore, make access to the public service more difficult or even impossible for religious applicants, but this [Arts. 33(3) and 4(1)–(2) prohibition] does subject [such job requirements] to the strict justification requirements that apply to restrictions of the unconditionally guaranteed freedom of religion; moreover, *the commandment of strict equal treatment of the different faiths must be adhered-to in both the justification and the practical application of such job requirements.*¹⁴⁴

By inserting this passage, the FCC requires the equal treatment of religions — in law and in practice.¹⁴⁵ This section of the *Headscarf II* decision makes one thing unmistakably clear: The Länder’s legislatures may ban Islamic headscarves, but if they do, then they must also ban other religious clothing and symbols, including Christian and Jewish ones. The Basic Law’s fundamental right to equality demands no less.

Following its decision, the FCC remanded the case to the FAC for further proceedings not inconsistent with its *Headscarf II* opinion.¹⁴⁶ Crucially impor-

142. *Id.*

143. Dagmar Schiek & Carl von Ossietzky, *Just a Piece of Cloth? German Courts and Employees with Headscarves*, 33 *INDUS. L.J.* 68, 70 (2004).

144. *Headscarf II*, 2 BvR 1436/02 at B.II.3 (“Dies schließt die Begründung von Dienstpflichten, die in die Glaubensfreiheit von Amtsinhabern und Bewerbern um öffentliche Ämter eingreifen und damit für glaubensgebundene Bewerber den Zugang zum öffentlichen Dienst erschweren oder ausschließen, nicht aus, unterwirft sie aber den strengen Rechtfertigungsanforderungen, die für Einschränkungen der vorbehaltlos gewährleisteten Glaubensfreiheit gelten; außerdem *ist das Gebot strikter Gleichbehandlung der verschiedenen Glaubensrichtungen sowohl in der Begründung als auch in der Praxis der Durchsetzung solcher Dienstpflichten zu beachten.*”) (emphasis added).

145. Notably, this passage appears in a section of the opinion in which the court lays out settled law and the legal framework for its analysis before embarking on the actual balancing of the various competing interests. This suggests that this declaration is not a matter of controversy or debate, but rather a fundamental requirement of the constitutional scheme of Germany’s Basic Law.

146. *Headscarf II*, 2 BvR 1436/02 at B.III.

tant, and perhaps prophetic, the FCC advised the FAC to also consider whatever changes of law may occur in response to the *Headscarf II* decision.¹⁴⁷

3. Headscarf III: *Baden-Württemberg's Headscarf Law and the Second Decision of the Federal Administrative Court*

Shortly after the *Headscarf II* decision, and before the FAC decided Ludin's case on remand from the FCC,¹⁴⁸ Baden-Württemberg enacted a law to regulate what religious clothing and symbols teachers in public schools may wear.¹⁴⁹ The law provides in relevant part:

Teachers at public schools . . . are not allowed to exercise political, religious, ideological or similar manifestations that may endanger or disturb the neutrality of the country towards pupils or parents or the political, religious or ideological peace of the school. Particularly illegitimate is a behaviour that can appear to pupils or parents to be a teacher[']s demonstration against human dignity, non-discrimination according to [A]rticle 3, the rights of freedom or the free and democratic order of the constitution. The exercise of the task of education according to . . . the constitution of the land of Baden-Württemberg and *the respective exhibition of Christian and occidental educational and cultural values or traditions does not contradict the duty of behaviour according to sentence 1.*¹⁵⁰

By enacting this law, Baden-Württemberg intended to prohibit public school teachers from wearing the Islamic headscarf, while retaining Christian religious clothing and symbols such as the nun's habit.¹⁵¹

On remand to the FAC, Ludin's claims did not prevail.¹⁵² The FAC noted that the FCC's holding was predicated on the lack of a sufficient statutory basis for the SSA's policy of denying a teaching position in a public school to an appli-

147. *Id.*

148. *See Headscarf III*, 2 C 45.03 at 3.

149. *See* Act Amending the School Code of Baden-Württemberg, *supra* note 19.

150. *Id.* ("Lehrkräfte an öffentlichen Schulen . . . dürfen in der Schule keine politischen, religiösen, weltanschaulichen oder ähnliche äußeren Bekundungen abgeben, die geeignet sind, die Neutralität des Landes gegenüber Schülern und Eltern oder den politischen, religiösen oder weltanschaulichen Schulfrieden zu gefährden oder zu stören. Insbesondere ist ein äußeres Verhalten unzulässig, welches bei Schülern oder Eltern den Eindruck hervorrufen kann, dass eine Lehrkraft gegen die Menschenwürde, die Gleichberechtigung der Menschen nach Artikel 3 des Grundgesetzes, die Freiheitsgrundrechte oder die freiheitlich-demokratische Grundordnung auftritt. Die Wahrnehmung des Erziehungsauftrags nach . . . der Verfassung des Landes Baden-Württemberg und *die entsprechende Darstellung christlicher und abendländischer Bildungs- und Kulturwerte oder Traditionen widerspricht nicht dem Verhaltensgebot nach Satz 1.*") (emphasis added).

151. *E.g.*, *Kopftuch-Verbot auch für Nonnen [Headscarf Ban For Nuns, Too]*, NETZEITUNG DEUTSCHLAND, Oct. 11, 2004, <http://www.netzeitung.de/deutschland/308700.html> (referring to statements made by Annette Schavan, Baden-Württemberg's Minister of Culture, demonstrating just that intent).

152. *Headscarf III*, 2 C 45.03 at 1.

cant who insists on wearing religious clothing or symbols.¹⁵³ Since Baden-Württemberg had enacted just such a law, the FAC reasoned, the SSA could now legally declare a teacher who refuses to comply with the job requirements established by that law as “unqualified” for a public school teaching position.¹⁵⁴ Baden-Württemberg’s law, the FAC explained, struck one, albeit not the only, possible balance between the competing interests of Ludin’s fundamental constitutional rights,¹⁵⁵ the fundamental constitutional rights of the students (and their parents), and the principle of neutrality.¹⁵⁶ According to the FAC, it was within the broad legislative authority of a democratically elected legislature to decide how to treat the diversity of religious beliefs¹⁵⁷ and how to resolve that tension.¹⁵⁸ Baden-Württemberg, the FAC concluded, was thus properly within its constitutional power to enact a categorical law to avoid even the *possibility* of conflicts that could arise out of the competing fundamental interests of teachers, students, and parents¹⁵⁹ and, therefore, Baden-Württemberg’s decision to not permit a case-by-case approach under the enacted law was legitimate.¹⁶⁰

The FAC also noted the FCC’s pronouncement that any law enacted in response to the *Headscarf II* decision must treat different religions with strict equality.¹⁶¹ “Exceptions for particular forms of religiously motivated clothing[,]” the FAC held, “are therefore not permissible.”¹⁶² Notwithstanding, the FAC rejected the argument that Baden-Württemberg’s exception for the “exhibition of Christian and occidental educational and cultural values or traditions”¹⁶³ violates these equal treatment principles.¹⁶⁴ The FAC reasoned that the reference to Christian and occidental values in Baden-Württemberg’s law does not create an illegal preferential treatment of the Christian confession.¹⁶⁵ Rather, the FAC reasoned, that reference to the Christian faith merely designates values that — although they developed out of a Christian-occidental tradition — are divorced from their religious meaning and now inform fundamental values of the Basic

153. *Id.* at 3.

154. *Id.* at 3–4, 10.

155. A listing of those rights is omitted to avoid unnecessary repetition. For such a listing, see *supra* Part III.A.1–2.

156. *Headscarf III*, 2 C 45.03 at 10–11.

157. *Id.* at 11.

158. *Id.* at 11–12.

159. *Id.* at 9, 12.

160. *Id.* at 9, 13.

161. *Id.* at 3.

162. *Id.* at 13 (“Ausnahmen für bestimmte Formen religiös motivierter Kleidung . . . kommen daher nicht in Betracht.”).

163. Act Amending the School Code of Baden-Württemberg, *supra* note 19.

164. *Headscarf III*, 2 C 45.03 at 13.

165. *Id.* at 14.

Law, including inviolable human dignity (Art. 1), the equality of all humans and sexes (Art. 3), and religious freedom (Art. 4).¹⁶⁶ “Further,” the FAC continued, “the phrase includes humane values such as the willingness to help others, care and general consideration for others, and solidarity with those who are weaker.”¹⁶⁷ After all, the FAC declared, the demonstration of such Christian and occidental values is not the same as the profession of an individual religious faith.¹⁶⁸ Therefore, in the opinion of the FAC, those Christian educational and cultural values are ones with which every public servant should be able to agree, irrespective of his or her religious persuasion.¹⁶⁹

“Also,” the FAC concluded, Baden-Württemberg’s law “does not excessively affect the Islamic religious community” because “the prohibition is limited to teachers in public schools,” and thus affects neither the right of students at public (or private) schools, nor the right of teachers at private schools to wear an Islamic headscarf.¹⁷⁰

B. Legislative Response to the Constitutional Court’s Decision

Even before the FAC announced its *Headscarf III* decision, most Länder’s legislatures had responded to the FCC’s *Headscarf II* opinion.¹⁷¹ In all, as of September 2006, twelve of Germany’s sixteen Länder are at some stage in the legislative process of enacting laws regulating what religious clothing and symbols teachers may or may not wear in public schools.¹⁷²

Eight Länder¹⁷³ — Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia, and Saarland — enacted laws in response to *Headscarf II*.¹⁷⁴ Three more — Brandenburg, Rhineland-Palatinate, and Schleswig-Holstein — drafted proposed laws,¹⁷⁵ of which Brandenburg’s failed to pass,¹⁷⁶ and Schleswig-Holstein’s was abandoned by the legislature.¹⁷⁷

166. *Id.*

167. *Id.* (“Weiter umfasst der Begriff humane Werte wie Hilfsbereitschaft, Sorge für und allgemeine Rücksichtnahme auf den Nächsten sowie Solidarität mit dem Schwächeren.”).

168. *Id.* at 10.

169. *Id.* at 14.

170. *Id.* at 15 (“Die islamische Glaubensgemeinschaft wird davon auch nicht betroffen, da sich das Verbot auf Lehrer im Staatsdienst beschränkt, Schülerinnen auch an öffentlichen Schulen und Lehrerinnen an Privatschulen also das Tragen eines Kopftuchs unbenommen bleibt.”).

171. See *Headscarf Prohibition Working Materials*, *supra* note 22.

172. See *id.* Notably, some Länder’s legislations apply generally to all, or most, public servants. However, this Note focuses on teachers in public schools and thus does not analyze those broader laws.

173. The translations of the Länder’s names are based on Münz & Ulrich, *supra* note 38, at 96.

174. *Headscarf Prohibition Working Materials*, *supra* note 22.

175. *Id.*

176. See *id.*

177. See *id.*

Finally, five Länder — Hamburg, Mecklenburg-Lower Pomerania, Saxony, Saxony-Anhalt, and Thuringia — decided to forego special legislation.¹⁷⁸

Many of those headscarf laws, whether enacted or still in draft form, are remarkably similar and can be summarized into one of three categories for the purpose of analysis. The first category of laws, like Baden-Württemberg's, carves out exceptions for the Christian religion and occidental traditions and values ("Category A Laws").¹⁷⁹ The large majority of headscarf laws comprise this first category.¹⁸⁰

The second category consists of headscarf laws that focus on the effect of a particular teacher's outward appearance, but do not strictly prohibit religious clothing or symbols, nor do they carve out exceptions for the Christian faith or occidental traditions and values ("Category B Laws"). Bremen's law provides in relevant part that "the outer appearance of the teaching and caring staff in school may not be such as to disturb religious and ideological feelings of pupils and parents or to carry tensions into school [that] endanger its peace through a violation of religious and ideological neutrality."¹⁸¹ Lower Saxony's law also falls into this category.¹⁸²

The third and final category consists of only one law — that of the Land Berlin ("Berlin's Law") — and takes yet another approach. Berlin's Law categorically bars all public school teachers from wearing virtually any religious clothing and symbols (the only exception being non-noticeable garments). It provides in relevant part: "Teachers . . . at public schools . . . are not allowed to wear any visible religious or ideological symbols that signal the spectator an affiliation to a specific religious or ideological community and any noticeably religious or ideologically imbued garments."¹⁸³

178. *See id.*

179. For the text of Baden-Württemberg's law, see *supra* note 150 and accompanying text.

180. This category includes, in addition to Baden-Württemberg's law, the laws of Bavaria, Brandenburg, Hesse, North Rhine-Westphalia, Rhineland-Palatinate, and Saarland. *See* Headscarf Prohibition Working Materials, *supra* note 22.

181. Gesetz zur Änderung des Bremischen Schulgesetzes [Act Amending the School Code of Bremen], June 28, 2005, Bremen GBl. S. 245, Nr. 31 (F.R.G.), *available at* <http://www.uni-trier.de/~ievr/kopftuch/GesetzBremen26082005.htm> (German), <http://www.uni-trier.de/~ievr/eng/kopftuch.htm> (abridged English) ("[D]as äußere Erscheinungsbild der Lehrkräfte und des betreuenden Personals darf in der Schule nicht dazu geeignet sein, die religiösen und weltanschaulichen Empfindungen der Schülerinnen und Schüler und der Erziehungsberechtigten zu stören oder Spannungen, die den Schulfrieden durch Verletzung der religiösen und weltanschaulichen Neutralität gefährden, in die Schule zu tragen.").

182. *See* Headscarf Prohibition Working Materials, *supra* note 22.

183. Gesetz zur Schaffung eines Gesetzes zu Artikel 29 der Verfassung von Berlin [Act for the Creation of a Law to Article 29 of the Constitution of Berlin], Jan. 27, 2005, Berlin GVBl. S. 92, Nr. 4 (F.R.G.), *available at* <http://www.uni-trier.de/~ievr/kopftuch/GesetzBerlin27012005.htm> (German), <http://www.uni-trier.de/~ievr/eng/kopftuch.htm> (abridged English) ("Lehrkräfte . . . in den öffentlichen Schulen . . . dürfen innerhalb des Dienstes keine sichtbaren religiösen oder weltanschaulichen Symbole, die für die Betrachterin oder den Betrachter eine Zugehörigkeit zu einer bestimmten Religions- oder Weltan-

Since Sachsen-Anhalt abandoned its efforts to enact a specific headscarf law, its law is not included in this categorization system.¹⁸⁴ These three categories of laws, Category A Laws, Category B Laws, and Berlin's Law, form the basis for the following analysis.

IV. THE HEADSCARF III DECISION AND THE LÄNDER'S HEADSCARF LAW'S UNCONSTITUTIONALITY DEPRIVE FEMALE MUSLIM PUBLIC SCHOOL TEACHERS OF THEIR RIGHTS TO EQUALITY AND FREEDOM OF RELIGION

In its *Headscarf III* decision, the Federal Administrative Court ("FAC") upheld Baden-Württemberg's law as being in accordance with the landmark decision of the Federal Constitutional Court ("FCC").¹⁸⁵ The FAC's decision was fundamentally flawed, however, because it failed to recognize a glaring defect in Baden-Württemberg's statutory scheme — that it, like the other Category A Laws, carves out an unconstitutional preference for the Christian religion and occidental traditions and values, thus violating the right to equality and freedom of religion of Muslim public school teachers.

A. *Why the Headscarf III Court Got It Wrong*

In *Headscarf III*, the FAC failed to apply the "principles of equality" articulated by the FCC to Baden-Württemberg's archetypal Category A Law. As explained above, the FAC reasoned that the reference to Christian and occidental beliefs and values in Baden-Württemberg's law did not violate the equality principles because it did not create an illegal preferential treatment of the Christian confession.¹⁸⁶ What the FAC failed to realize was that Baden-Württemberg's Category A Law does precisely that, i.e., it treats Muslim public school teachers who wear religious symbols and clothing differently from otherwise equally-situated Christian public school teachers who wear religious symbols and clothing.

That to do this was the express intent of the legislature of Baden-Württemberg in enacting its headscarf law became unmistakably clear in the *Headscarf III* case: The Land's attorney argued before the FAC that an Islamic headscarf falls under the law's prohibition against religious symbols but a nun's habit does not. Rather, the Land asserted, a nun's habit is not a religious symbol but, instead, constitutes "work attire" (notwithstanding German nuns' vocal protests to that characterization of their habit — clothing that, for them, is clearly an expression of their religious beliefs¹⁸⁷) and thus falls under the law's language

schauungsgemeinschaft demonstrieren, und keine auffallenden religiös oder weltanschaulich geprägten Kleidungsstücke tragen.").

184. See *Headscarf Prohibition Working Materials*, *supra* note 22.

185. *Headscarf III*, 2 C 45.03 at 1, 3–4, 10.

186. See *supra* notes 161–169 and accompanying text.

187. See, e.g., *Nonnentracht an Schulen: "Eindeutig religiös motivierte Kleidung"* [*The Nun's Habit in Schools: "Clearly a Religiously-Motivated Clothing"*], SPIEGEL ONLINE, Oct. 13, 2004, <http://>

excluding displays of Christian and occidental traditions and values from Baden-Württemberg's law's restrictions.¹⁸⁸ The FAC rejected the argument and held that all religions must be treated equally; “[e]xceptions for particular forms of religiously motivated clothing in certain regions, *as contended by the [advocate for Baden-Württemberg] during oral argument*, are therefore not permissible.”¹⁸⁹

Baden-Württemberg's intent to exclude only headscarf-wearing Muslims became even clearer, albeit only in the aftermath of *Headscarf III*, when it tried to circumvent the FAC's declaration that all — yes, *all* — religions must be treated equally under the law that the Land itself had promulgated and that no exceptions may be had for the Christian religion. Following *Headscarf III*, however, Baden-Württemberg continued to permit nuns to wear their habits while teaching in public schools, basing its defiance of the FAC's decision on the technical argument that the *Headscarf III* decision addressed only the narrow question of the Islamic headscarf under the new laws, not the question of the nun's habit under the new laws.¹⁹⁰ This action, of course, makes Baden-Württemberg's law all the more constitutionally questionable. As former FCC judge Ernst-Wolfgang Böckenförde points out, a Muslim woman who is denied a position as a public school teacher in Baden-Württemberg because she insists on wearing an Islamic headscarf could file suit, alleging that the Land's permissive policy towards nuns' habits in Baden-Württemberg's public schools constitutes unconstitutional discrimination and violates her Basic Law right to equality.¹⁹¹

Of course, the FAC did not foresee how Baden-Württemberg would respond to its decision when it ruled on Ludin's claim in the *Headscarf III* case. Nevertheless, the signs were clear: Baden-Württemberg was bent on enacting a law that would allow it to legally discriminate against the Muslim minority and, perhaps, other unpopular religious minorities in the future. Of course, what makes Baden-Württemberg's law unconstitutional under the FCC's jurisprudence is not its intent. Rather, Baden-Württemberg's law is unconstitutional because it, in fact, not merely in intent, allows the Land to discriminate against Muslim teachers who wear an Islamic headscarf by banning those teachers from

www.spiegel.de/unispiegel/studium/0,1518,322964,00.html (quoting Aloisia Höing, “the highest-ranking nun in Germany” [“die oberste Ordensschwester in Deutschland”] and chairwoman of VOD, a German nuns' association that represents some 28,000 German nuns, as saying that the habit is “a sign of religiosity and the relationship with God” [“ein Zeichen der Religiosität und der Beziehung zu Gott”]).

188. *See Nonnen an Schulen: Nicht ohne meine Kutte* [Nuns at Schools: Not Without My Habit], SPIEGEL ONLINE, Oct. 12, 2004, <http://www.spiegel.de/unispiegel/studium/0,1518,322789,00.html>.

189. *Headscarf III*, 2 C 45.03 at 13 (“Ausnahmen für bestimmte Formen religiös motivierter Kleidung in bestimmten Regionen, *wie sie der Prozessbevollmächtigte des Beklagten in der mündlichen Verhandlung in Erwägung gezogen hat*, kommen daher nicht in Betracht.”) (emphasis added).

190. *The Nun's Habit in Schools: “Clearly a Religiously-Motivated Clothing,” supra* note 187.

191. *Unterricht ohne Haube* [Class Without a Habit], SPIEGEL ONLINE, Oct. 18, 2004, <http://www.spiegel.de/spiegel/0,1518,323678,00.html>.

public schools while permitting nuns who wear their habits to continue to teach in public schools — at least until recently.¹⁹² This discriminatory function was built into Baden-Württemberg’s prototype Category A Law when that Land’s legislators excluded Christian and occidental values and traditions from regulation. Rather than upholding Baden-Württemberg’s headscarf law, therefore, the FAC should have struck it down for violating Ludin’s fundamental Basic Law rights to equality and freedom of religion.

B. *Laws Violating the Headscarf II Decision*

It follows from the above analysis that Baden-Württemberg’s law and the other Category A Laws fail to pass constitutional muster under the FCC’s *Headscarf II* decision because they, in theory and — as the example of Baden-Württemberg proves — in application, allow Länder to treat members of certain (popular) religious groups differently from otherwise similarly situated members of other (less popular) religious groups. In practical application, this means that school authorities in Länder with Category A Laws can legally ban headscarf-wearing Muslim public school teachers while continuing to allow Christian teachers (e.g., nuns) to wear religious clothing and symbols — all simply by means of the exception for “Christian and occidental beliefs and values” that is included in all Category A Laws. This, however, runs afoul of the FCC’s declaration that all religions must be treated equally — both in theory *and* in application. If, or when, a Category A Law finds its way to the FCC, the FCC should

192. After the author had graduated from law school, and while this Note was going through the editorial process of the *Law Review*, but before publication of this Note, the Stuttgart *Verwaltungsgericht* [administrative trial court] (the same court that had originally rejected Ludin’s complaint in the pre-*Headscarf II* world), held in mid-2006 that Baden-Württemberg may not ban headscarf-wearing public school teachers from Baden-Württemberg’s public schools while nuns are permitted to teach in full habits. See Dietmar Hipp, *Kopftuch-Urteil: Nonnen retten den Islam* [*Headscarf Decision: Nuns Rescue Islam*], SPIEGEL ONLINE, Jul. 8, 2006, <http://www.spiegel.de/unispiegel/schule/0,1518,425678,00.html>. In that case, a Muslim public school teacher who was asked to take off her headscarf or be barred from teaching filed a complaint, asserting that her right to equal treatment was violated. See *id.* The court agreed, reasoning that Baden-Württemberg could not, in the “practical application” of its “headscarf law,” accord certain religious persuasions preferential treatment (by choosing to not enforce the headscarf law’s restrictions against the members of that religious persuasion — in this case, Catholic nuns). See *id.* Ultimately, the court held, Baden-Württemberg had no choice but to either apply the law *equally* to *all* or to *none* of its public school teachers. See *id.* Of course, the court’s decision did not go as far as this author advocates it should have because the court failed to strike down the law itself; the court merely forced Baden-Württemberg to choose whether to tolerate headscarf-wearing Muslim public school teachers or whether to equally apply the law’s restrictions to its habit-wearing Catholic nuns who teach in public schools. See *id.* However, since forcing Catholic nuns to de-robe or forcing them to resign from school service is not a feasible political option in Baden-Württemberg, see *infra*, notes 196–199 and accompanying text, Muslim public school teachers get a reprieve — at least while there are still nuns who teach in public schools in Baden-Württemberg. See *id.*

strike it down as violating its *Headscarf II* decision because it fails to satisfy the principle of equal treatment “in law and in practice.”¹⁹³

C. Laws Passing Muster Under the Headscarf II Decision

Category B Laws and the Berlin Law, however, are a different story. In a constitutional appeal to the FCC, both Category B Laws and the Berlin Law would most likely pass muster because they treat all religions alike, at least as a matter of law.

A potential ground for a constitutional attack could be, of course, discriminatory application. If it turned out that these laws are used to prohibit only Muslim women from wearing an Islamic headscarf, but were not applied to, for example, nuns who insist on wearing their habits, then a convincing argument could be made that these laws violate those Muslim teachers’ fundamental right to equality. In fact, since these laws do not even engage in the pretense of carving our exceptions for “Christian and occidental beliefs and values,” as their Category A counterparts do, a Land pursuing such a discriminatory practice would have little legal ground on which to stand in an attempt to justify its permissive stance towards nuns (or other non-Muslims).

While such “unequal application” arguments may not be as strong as the argument against Category A Laws that carve out express exceptions for Christian and occidental beliefs and values,¹⁹⁴ it is nevertheless a potentially winning argument. It is bolstered primarily by the FCC’s holding that any laws regulating religious clothing and symbols must treat all religious faiths equally not only *de jure* but also *de facto* — in law and in practice.¹⁹⁵

D. If Banning Some Is Not An Option, What Is? — Possible Solutions

If, as argued in this Note, most of the headscarf laws (i.e., all of the Category A Laws) promulgated in response to the *Headscarf* decisions violate the German Constitution’s guarantee to equality as a matter of law, then the Länder must reconsider their regulation of the Islamic headscarf. Several possible solutions emerge to the legislatures’ dilemma as to what to do about public school teachers

193. See *supra* note 144 and accompanying text. See also *Headscarf II*, 2 BvR 1436/02 at B.II.3. Notably, the author came to this conclusion independently of Langenfeld & Mohsen, who arrive at a similar result:

[M]ost of the [Category A] laws suggest (whether explicitly or in various interpretations) that the manifestation of Christian or other traditional Western beliefs does not contravene the rule of neutrality and even that it fulfils the state’s educational mandate. It is highly doubtful that the [FCC] will find these provisions in conformity with the equality clauses of the Basic Law, given the emphasis that the Court has placed on equal treatment of religious groups by the legislature.

Langenfeld & Mohsen, *supra* note 140, at 92.

194. See *supra* Part IV.B.

195. See *supra* note 144 and accompanying text. See also *Headscarf II*, 2 BvR 1436/02 at B.II.3.

and religious clothing and symbols: ban all, ban none, permit all, or use a case-by-case approach.

1. *Ban All*

The Länder could well choose to ban *all* teachers in public schools from wearing any religious clothing or symbols.

This most restrictive approach would most certainly pass constitutional muster because it would treat all religions equally under the law.

However, such a law is unlikely to garner support in devotedly Christian Länder, such as Bavaria or Baden-Württemberg,¹⁹⁶ where politicians enacted the current headscarf laws with the express intent of banning the Islamic headscarf from public school teachers' heads while retaining crucifixes and nuns' habits in public classrooms.¹⁹⁷ This intent has been put into practice in Baden-Württemberg and continues to be practiced until recently.¹⁹⁸ In those Länder, such a wholesale ban would most likely be a political impossibility,¹⁹⁹ effectively moot-ing the constitutional legal question.

2. *Ban None*

Alternatively, Länder wishing to retain Christian religious clothing and symbols can either repeal already-enacted headscarf laws or not re-enact headscarf laws once they are found unconstitutional, as this Note contends they eventually will be. This would have the effect of de-regulating what religious clothing and symbols teachers in public schools may wear. This implied wholesale permission would constitute little more than changing the *status quo* to the *status quo ante*, i.e. the legal state that existed before the *Headscarf I* and *III* decisions and before the post-*Headscarf II* laws were enacted.

This approach, too, would pass constitutional muster because all religious clothing and symbols would be *equally* de-regulated.²⁰⁰

196. Bavaria, for example, having already failed three times (in 1986, 1995, and 1998), is once again drafting a proposal to amend Germany's (federal) civil penal law to make *mere* blasphemy — even if it does not, as the current civil penal law requires, endanger the public peace — an offense punishable by fines and a prison sentence of up to three years. *Strafe für Gotteslästerei: Bayern will Gesetz verschärfen* [Penalty for Blasphemy: Bavaria Wanting to Ratched Up Law], SPIEGEL ONLINE, Apr. 19, 2006, <http://www.spiegel.de/panorama/0,1518,411952,00.html>. This renewed momentum to tighten the civil penal law with respect to blasphemy is a response to the recent and rather irreverent MTV television series "Popetown" satirizing the Pope and the Catholic Church. *Id.*

197. See, e.g., *Headscarf Ban For Nuns, Too*, *supra* note 151 (describing that Schavan had intended that the new school law would prohibit the Islamic headscarf but would continue to permit Christian symbols).

198. See *supra* notes 190 and 192 and accompanying text.

199. See, e.g., *The Nun's Habit in Schools: "Clearly a Religiously-Motivated Clothing," supra* note 187 (quoting Aloisia Höing as saying that she can not imagine that German society would accept an all-out ban of any and all religious symbols from public schools).

200. Of course, this approach, as such, would not come before the court as an equality challenge because it would present no cause for a constitutional challenge by public school teachers. After all, if they are all equally

However, this approach may prove problematic insofar as it provides no positive, express legal protections to members of potentially unpopular religious minorities. Absent language protecting the choice of a public school teacher to wear religious clothing or symbols, a Land could conceivably use the religious clothing or symbols as a pretext to discriminate against such public school teachers but not members of other religious groups. Of course, such a Land would have to employ a different pretext from what Baden-Württemberg employed (lack of “qualification to teach” on the basis of her wearing an Islamic headscarf) in ousting Ludin from its public schools because that pretext failed for having no statutory foundation. As the FCC’s *Headscarf II* decision makes clear, a Land cannot oust a teacher without a statutory foundation. And whatever statutory pretext a Land were to create would then become subject to judicial scrutiny and would, hopefully, be recognized and struck down as such — just as Baden-Württemberg’s non-statutory pretext was, and just as the Land’s current statutory scheme should be.

3. *Permit All*

The Länder could — and should — go even further than complete deregulation. They could — and should — enact laws that expressly permit public school teachers to wear *any* religious clothing or symbols.²⁰¹ Because it would treat all religions with equal acceptance, this approach, too, would pass constitutional muster under the *Headscarf II* decision.

This approach — creating an actual, positive, unqualified legal permission for public school teachers to wear religious clothing and symbols — would, in effect, attach an irrebuttable presumption of legitimacy to the wearing of a headscarf by a female Muslim public school teacher. Moreover, this approach would put it beyond a Land’s power to regulate any individual public school teacher’s wearing of religious clothing or symbols. Unlike under the Ban None approach, a Land bent on discriminating against its unpopular religious minorities would be precluded from using religious clothing or symbols as a pretext for discrimination. In other words, a Land’s justification for ousting a teacher as unqualified cannot simply be based on the grounds that he or she is “unqualified.” Not only would doing so constitute circular reasoning (an offense against logic, if nothing else) but also a lack of statutory foundation (an offense against the German constitution, as

free to wear what they chose, then why bring suit? It would be more likely for this approach to be challenged by a public school student or the parents of a public school student claiming that the student’s or his or her parents’ constitutional rights are violated by a public school teacher’s wearing of religious clothing or symbols. For a list of the constitutional guarantees to which such a student or parent would refer in bringing such a claim, see *supra* Part III.A.1 and, in particular, notes 110–113 and the accompanying text.

201. That doing so would not necessarily run afoul of the neutrality principle has been demonstrated, ironically, by Baden-Württemberg, which allows nuns to teach in public schools while wearing their habits. See *The Nun’s Habit in Schools: “Clearly a Religiously-Motivated Clothing,” supra* note 189.

the FCC makes clear). The result would be that a Land would have to provide specific statutory criteria based upon which it determines that someone is unqualified to teach. And, if the Permit All approach were elected, that reason or criterion could not be religious clothing or symbols. Therefore, this approach is preferable to the Ban None approach. Moreover, this approach is also preferable to a case-by-case approach, as the following section discusses. For the foregoing reasons, the German Länder should enact laws granting to *all* teachers the express, unqualified permission to wear religious clothing and symbols in public schools.

4. *Why Permitting All Is Preferable to a Case-By-Case Approach*

Some Länder might propose to implement some form of a case-by-case approach in an attempt to assuage both political factions — those calling for a permissive attitude towards religious clothing and symbols and those calling for restrictive regulation.

A case-by-case approach would pass constitutional muster under the *Headscarf II* decision because, at least on its face, it treats all religions equally. However, an unqualified, permissive approach (Permit All) is preferable to a case-by-case approach for two reasons, one legal and the other political.

The first reason, a legal reason, is based on the FCC's pronouncement that any law regulating religious clothing and symbols must ensure equality of the different religious faiths both in law and in practice.²⁰² That pronouncement suggests a constitutional preference for equal treatment of religions and against discrimination on the basis of religion. Based on that principle, a probabilistic analysis demonstrates why the Permit All approach is preferable to a case-by-case approach: If we consider (1) the status of Muslims as a religious minority in Germany,²⁰³ (2) the express intent of several Länder's lawmakers to pass laws that discriminate against that Muslim minority (by prohibiting Islamic headscarves but not Christian nuns' habits and other expressions of Christian and occidental values),²⁰⁴ and (3) the pattern of actual discrimination against that Muslim minority in law, practice, or both, as established by current Category A Laws,²⁰⁵ then the likelihood that a law that permits a Land's government to

202. See *supra* note 144 and accompanying text; see also *Headscarf II*, 2 BvR 1436/02 at B.II.3.

203. See discussion of the Muslim population in Germany *supra* Part II.A.

204. See, e.g., *Headscarf Ban For Nuns, Too*, *supra* note 151 (referring to statements by Schavan demonstrating just that intent).

205. This discrimination is most dramatically exemplified by Baden-Württemberg's practice until recently — even following *Headscarf II* and *Headscarf III* — to permit nuns who are public school teachers to wear their habits while prohibiting Muslim public school teachers to wear their Islamic headscarves. See *supra* note 190 and accompanying text. This practice ended only recently, and only after a court forced the Land to choose whether to apply its law equally to *all* or equally to *none* of the public school teachers. See *supra* note 192 and accompanying text.

make discretionary decisions regarding religious clothing and symbols would be enacted and applied with the intent and effect of discriminating against the Muslim minority is significantly greater than the likelihood that a law that entirely eliminates discretion would be enacted and applied with the same discriminatory intent and effect.²⁰⁶ The Permit All approach, therefore, better satisfies the constitutional preference, as pronounced by the FCC, for the equal treatment of religions than a case-by-case approach.

The second reason, a political reason, for favoring the Permit All approach over a case-by-case approach finds its root in Germany's relatively recent history of the oppression, persecution, and mass-murder of unpopular religious and ethnic minorities during the Third Reich. Given that historical legacy, a law regulating what religious clothing and symbols public school teachers may wear should avoid even the appearance of discrimination against religious and ethnic minorities, lest Germany should suffer a loss of the goodwill it has accumulated in the world community over the past decades since WWII with respect to Germany's commitment to religious freedom and liberty. A law that permits all public school teachers, no matter their individual religions, to wear religious clothing or symbols would, by default, more effectively achieve the goal contemplated by the foregoing statement than a law affording a German Land discretionary authority to decide who gets to wear religious clothing or symbols and who does not. The constitutional relevance of this historical legacy is demonstrated by the importance that it played in shaping the principles of religious liberty espoused in the Basic Law.²⁰⁷

For these reasons, the Permit All approach is preferable to a case-by-case approach.

5. *If Case-By-Case It Must Be, Then How Ought It Be?*

Nevertheless, some Länder — faced, sooner or later, with the unconstitutionality of Category A Laws and the political opposition to both wholesale bans (Ban All) or wholesale permissions (Permit All) of teachers' wearing of religious clothing or symbols in public schools — are more than likely to consider adopting case-by-case approaches. However, as the following discussion illustrates, not all case-by-case approaches are alike. Therefore, notwithstanding the reasons that speak in favor of adopting the Permit All approach over a case-by-case approach, *if* a Land were to enact a case-by-case approach, then the constitutional prefer-

206. Put more bluntly: considering the listed three factors, the governments of the German Länder (especially Länder that have enacted Category A Laws) should not be trusted to adjudicate such case-by-case determinations fairly *unless* the group more likely to be victimized by discrimination (i.e., the Muslim religious minority) enjoys extraordinary, substantive legal protection. The presumption in favor of the Muslim minority, as proposed here, would constitute just such extraordinary, substantive legal protection.

207. KOMMERS, *supra* note 100, at 217.

ence for the equal treatment of religions would dictate that the least objectionable case-by-case approach be one that resolves borderline case in favor of teachers.

Case-by-case approaches could take the form of a restrictive case-by-case approach or a permissive case-by-case approach. Under a restrictive case-by-case approach, all religious clothing and symbols would be banned (Ban All), but the school authority (or some other qualified decision-making body) would have discretionary power to make exceptions on a case-by-case basis to allow *individual* teachers to wear *some particular* religious clothing or symbol(s). Under a permissive case-by-case approach, all religious clothing and symbols would be permitted, either impliedly (Ban None) or expressly (Permit All), but the school authority (or, again, some other qualified decision-making body) would have discretionary power to make exceptions on a case-by-case basis to prohibit *individual* teachers from wearing *some particular* religious clothing or symbol(s).

Of course, there are many permutations based on the above templates. However, a restrictive case-by-case approach would most likely fail — either for political or legal reasons. In most of the Länder, a restrictive case-by-case approach, just like the Ban All approach, would probably fail to overcome political opposition. While some legislators might try to appease political opposition to an unqualified Ban All approach by promising to use the discretionary power to make exceptions inherent in a restrictive case-by-case exclusively to the benefit of Christian teachers, and always to the detriment of Muslim teachers, such use of discretionary power would run afoul of the FCC's pronouncement that religious equality must be guaranteed in both law and *practice*.²⁰⁸ In other words, *even if* enacted, such a restrictive case-by-case approach would probably be held unconstitutional sooner or later for violating, in its application (i.e., in "practice"), the mandate for religious equality in law and practice.

Langenfeld and Mohsen, two co-commentators, have suggested a permissive case-by-case approach.²⁰⁹ Their case-by-case approach, however, adds another dimension to the discussion. They propose that borderline cases should be resolved in favor of the students,²¹⁰ which suggests a presumption in favor of the students (and their parents) and against the teacher.

However, if a Land were to elect a case-by-case approach, whether restrictive or permissive, then a borderline case should be resolved in favor of the teacher, rather than in favor of the students. As before, with respect to preferring the Permit All approach to a case-by-case approach, there are two reasons, one legal and one political, that support a presumption in favor of the teacher and his/her constitutional interests.

208. See *supra* note 144 and accompanying text; see also *Headscarf II*, 2 BvR 1436/02 at B.II.3.

209. LANGENFELD & MOHSEN, *supra* note 140, at 91 ("The decision as to whether a teacher is to be prohibited from wearing the headscarf during classes has to be taken on a case-by-case basis.").

210. *Id.* at 92 ("In borderline cases, the benefit of the doubt should be given not to the teacher but to the fundamental rights of the pupils (and their parents).").

The first reason, a legal reason, is also rooted in a probabilistic analysis of the constitutional preference,²¹¹ as indicated by the FCC, for the equal treatment of religions and against discrimination on the basis of religion.²¹² If we consider, once again, (1) the status of Muslims as a religious minority in Germany,²¹³ (2) the express intent of several Länder's lawmakers to pass laws that discriminate against that Muslim minority (by prohibiting Islamic headscarves but not Christian nuns' habits and other expressions of Christian and occidental values),²¹⁴ and (3) the pattern of actual discrimination against that Muslim minority in law, practice, or both, as established by current Category A Laws,²¹⁵ then the likelihood that a law with a presumption in favor of the students would be enacted and applied with the intent and effect of discriminating against the Muslim minority is significantly greater than the likelihood that a law with a presumption in favor of the teachers would be enacted and applied with the same discriminatory intent and effect.²¹⁶ A presumption in favor of teachers, therefore, better satisfies the FCC-pronounced constitutional mandate for the equal treatment of religions.

The second reason is rooted in the same political considerations that support favoring the Permit All approach over *any* case-by-case approach.²¹⁷ Given Germany's Third Reich history of oppressing religious minorities, and the political incentives derived therefrom, any attempt to regulate — on a case-by-case basis, no less — what religious clothing and symbols teachers in public schools may wear, should be as protective of potentially unpopular religious minorities as possible.

Therefore, if a case-by-case approach were elected, then borderline cases should be decided in favor of teachers because doing so would best balance the competing constitutional interests of teachers and students (and their parents).²¹⁸ A presumption in favor of the teacher would act as an effective safeguard against discriminatory treatment that could otherwise result from uneven application of permissive (or restrictive) case-by-case approaches that resolve borderline cases in favor of the student.

In sum, an express, unqualified permissive approach is preferable to any other approach — even a permissive case-by-case approach that resolves border-

211. *See supra* Part IV.D.4.

212. *See supra* note 144 and accompanying text; *see also* *Headscarf II*, 2 BvR 1436/02 at B.II.3.

213. *See* discussion of the Muslim population in Germany *supra* Part II.A.

214. *See, e.g.,* *Headscarf Ban For Nuns, Too*, *supra* note 151 (referring to statements by Schavan demonstrating just that intent).

215. *See supra* note 205.

216. Again, the governments of the Länder can not be trusted to fairly adjudicate such borderline cases. *See supra* note 206.

217. *See supra* Part IV.D.4.

218. As compared to a case-by-case approach that resolves borderline cases in favor of the students.

line cases in favor of teachers — because it would best guard against religious discrimination against unpopular religious minorities at the hand of the state. By denying discretionary judgment, the Permit All approach would most effectively protect against xenophobic, knee-jerk responses to Islamic headscarves and the religious clothing and symbols of other unpopular religious minorities.

V. CONCLUSION

*The [German] multicultural society has been a colossal failure.*²¹⁹

*Yes to openness and tolerance; no to Islamic head scarves.*²²⁰

The legislative, political, and judicial fight over the Islamic headscarf is far from over. Inevitably, some aspiring teacher who is a religious Muslim — and who insists on wearing her headscarf — will take up the fight where Ludin has left it. Then, if most of the headscarf-banning laws promulgated in recent years and months fail to meet constitutional muster, as this Note argues they must, the legislatures of the many Länder bent on a headscarf ban will be sent back to their drawing boards. Perhaps then they will realize, and appreciate, their dilemma more fully: Whether to ban all forms of religious symbols and all religiously inspired clothing, uniformly, with no preferential treatment for Christian and occidental beliefs and values, or whether to welcome — implicitly or expressly — all religious symbols and articles of clothing, including the Islamic headscarf, into the classroom. As a legal — and, incidentally, political — compromise, this Note proposes a law that makes expressly and unconditionally permissible *all* religious clothing and symbols.

Until then, however, the statements by Edmund Stoiber and Angela Merkel that appear at the beginning of this section prove prophetic: For Ludin, and others like her, the German multicultural society has, indeed, been a colossal failure, as, despite Germany's self-perceived openness and tolerance,²²¹ the German

219. Statement made by Angela Merkel, then-chairman of the Christian-Democratic Union (*Christlich-Demokratische Union* or "CDU") and now-Chancellor of Germany, *quoted in Integrationsdebatte: Schröder warnt vor Kampf der Kulturen [Integration debate: Schroeder warns of a battle of the cultures]*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG, Nov. 21, 2004, at 1, *available at* <http://www.faz.net> ("Die multikulturelle Gesellschaft ist grandios gescheitert."). This statement was delivered in a debate over the integration of and tolerance for ethnic and religious minority aliens, in particular Turkish and other Muslim immigrants. Merkel has since succeeded Gerhard Schröder as the Chancellor of Germany. *See, e.g.*, Reuters, *German Economy Is First and Biggest Test for Merkel*, N.Y. TIMES, Nov. 20, 2005, <http://www.nytimes.com/reuters/international/international-germany.html>.

220. Statement made by Edmund Stoiber, Prime Minister of Bavaria, *quoted in Richard Bernstein, Germany's Challenge on Muslim Integration in Europe*, INT'L HERALD TRIB., Dec. 10, 2004, at 2, *available at* 2004 WLNR 13681836. This statement was made in the same context as Angela Merkel's statement. *See supra* note 219.

221. *See* GERMAN FED. FOREIGN OFFICE, *supra* note 17, at ch. "Society" ("Open-minded, modern and tolerant — these are the hallmarks of German society at the beginning of the 21st century.").

courts and a majority of the Länder sound a resolute *Nein!* to the Islamic headscarf. Germany's religious female Muslims who want to become public school teachers thus find themselves in the unenviable position of either having to bury their professional aspirations or having to compromise and abandon their religious practices and beliefs. Meanwhile, all Ludin has to show for Germany's self-proclaimed "openness and tolerance" is some € 21,833.00 in legal and court fees.²²²

222. *Headscarf III*, BVerwGE 2 C 45.03 at 2, 15 (stating that the plaintiff is liable for the costs of the appeal).