



Economic Analysis of the Legal Regulation of Religion in the US and Germany

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In partial fulfillment of requirements for the degree
Master of Laws.

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Abstract

This thesis analyzes legal regulation of religion in the US and Germany from rational choice perspective, new institutional economics and constitutional political economy, focusing on the constitutional framework, legal status and funding of religious institutions and the establishment and free exercise jurisprudence of the US Supreme Court and German Federal Constitutional Court. It concludes that the legal regulation of religion in the US is more economically efficient in the sense that it motivates religious vitality, however, this vitality benefits mostly strict churches and sects. On the other hand, legal regulation of religion in Germany, while establishing the de facto monopoly of the traditional religions and lowering religious vitality, achieves another goal that is also economically efficient: it reduces overgrazing of moral goods and stabilizes social norms, which in turn reduces state transaction costs.

Introduction

Impetuses for studying legal regulation of religion in constitutional democracies are countless. To begin with, freedom of religion, considered by Georg Jelinek to be a primary or original fundamental right and freedom (*Urfreiheit*)¹, is granted by the majority of constitutional democracies, as well as protected by the international and European instruments for the protection of human rights².

Needless to say, this freedom is not absolute, but discounted by the requirements of non-establishment of the state church, rights of others, public morals and health, and so on. Generally, neutrality of the state with respect to religious matters is a principle aim. But what exactly constitutes this neutrality and how much of it is required or desirable is an entirely different matter. There is no unified answer, and legal systems have dealt with these problems in different ways as a result of historical experiences and myriad of other factors, not least their underlying political philosophies.

The last decade of the twentieth and the beginning of the 21st centuries witnessed the end of the staunchly anti-religious communist regimes, the widening of the EU, and the growth of traditional immigration from Africa and Asia to the European Union, United States, and Canada. “Traditional” ways of regulating religion proved themselves to be rather inadequate responses to new circumstances. Put simply, liberal constitutional democracies have found themselves in a deadlock between the constitutionally mandated values and guarantees of rights that, when interpreted broadly and in wrong hands, trumped the liberal foundations of the society that guaranteed them. The position of religion in a modern constitutional democracy became a topic of a heated debate illuminated by periodical outbursts of the “clash of civilizations - *kulturkampf*” discourse and acts, not least in response to events of the 9/11.

¹ Georg Jelinek, *Die Erklärung der Menschen- und Bürgerrechte* (Munich: Duncker & Humblot, 3 ed., 1919), in Lasia Bloß, “European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process,” *Jean Monnet Working Paper* 13/03 (2003): p. 2 and p. 10.

Religion seems to be making a big comeback to the public scene, for better or for worse. And as the lawyers and economists believe that they have something to say about everything and anything, religion is no exception. However, no two things seem more at odds than law and economics on the one hand and religion on the other hand. To some, it may sound exotic and even cynical to attempt reconciliation between these forces. However, two principal arguments can be employed to justify this. Firstly, the discussion of religious issues is plagued with every conceivable kind of value-based argument; hence the discussion is likely to perpetuate, *per definitionem*, without any solution at the horizon. Secondly, it should be clear from the start that law and economics do not analyze religious beliefs *as such* – indeed these beliefs are probably impossible to measure. They analyze religious conduct and (in this thesis) its legal regulation; hence, here we are concerned with the social costs or benefits that religiously motivated actions produce. Certain actions are socially tolerable or even desirable, while others are not; society uses legal sanctions or rewards in order to motivate desirable and suppress undesirable behavior. The effects of legal regulation are one of the perpetual themes of law and economics and from this perspective, the arguments become clearer.

In his seminal work *Economic Analysis of Law*, Richard Posner, one of the founding fathers of law and economics, has used neoclassical microeconomics and a rational choice approach to analyze a number of legal rules, including the question of legal regulation of religion under the First Amendment of the United States constitution³. The rational choice approach was used in a more extensive way by the most prominent advocates of the so-called “religious market place” theory like Laurence Iannacone, Rodney Stark and Roger Finke.

² Ibid and seq.

³ Richard A. Posner, *Economic Analysis of Law* (Aspen Law & Business, 5th edition. 1998), p. 742-745. For further discussion see Michael W. McConnell and Richard A. Posner “An Economic Approach to Issues of Religious Freedom,” 56 *U. of Chi. Law Rev.* 1, (1989); Richard A. Posner, “The Law and Economics Movement,” *American Economic Review* 77 (2), (1987):p.1-13; Eric Posner “Legal Regulation of Religion,” 2 *Legal Theory* (1996): p. 33-62; “Comment, Scylla, Charybdis and Adam Smith : An Economic Analysis of the Religion Clauses,” 39 *DePaul L. Rev.* 1235, (1990).

Alongside Posner, all three of these authors claim that the free market place of religion, when regulated only minimally, has the ultimate effect of increasing religiousness in a society. Adam Smith pointed to this more than two hundred years ago in his book *The Wealth of Nations*⁴. He claimed that monopolies in the market place of religion, such as in the case of a state-church or largely state-subsidized church, leads to the inactivity of church members and clergy, and consequently, reduces religiosity in a society. In contrast, the situation that arises when no religion has a preferential position is quite the opposite. In a free market place of religion, religious communities have to compete for believers and, as Richard Posner argues, can not afford to be stern⁵. Laurence Iannaccone takes Smith's thesis and Posner's comments one step further by means of numerous cross-country empirical studies, whose findings seem to support the conclusion that state funding for religion decreases religious vitality in the society⁶.

In addition, Iannaccone, Stark and Finke extend the scope of this hypothesis and argue for the "supply side" reinterpretation of religious activity. Supply side reinterpretation, in essence, is illustrated by the American case: the US is by far a more religiously vital country than any other when measured by church attendance, private funding of religion and so on, not because of any miraculous inclination of Americans towards embracing faith, nor attributable to historical explanations (like 'American exceptionalism,') which are unable to fully grasp and explain the phenomenon. For these authors, America's religious vitality is a result of the

⁴ Adam Smith, *The Wealth of Nations*, (London: Penguin Classics, 1999, [1776]).

⁵ Posner, *Economic Analysis of Law* (Aspen Law & Business, 5th edition., 1998), p. 744.

⁶ Laurence R. Iannaccone, "A Formal Model of Church and Sect," *American Journal of Sociology* 94(supplement), (1988): p. 241-268; "Consumption Capital and Habit Formation with an Application to Religious Participation." (Ph.D. dissertation, University of Chicago, 1984); "Religious Participation: A Human Capital Approach," *Journal for the Scientific Study of Religion* 29(3), (1990): p. 297-314.; "The Consequences of Religious Market Structure: Adam Smith and the Economics of Religion," *Rationality and Society* 3 (2), 1991: p. 156-177; "Introduction to the Economics of Religion," *Journal of Economic Literature*, vol. 36 (1998): p. 1465-1496; "Religious Markets and the Economics of Religion," *Social Compass*, vol. 39 (1992(a)): p. 123 – 131; Iannaccone, Laurence R., Roger Finke and Rodney Stark, "Deregulating Religion: The Economics of Church and State," *Economic Inquiry*, Vol. XXXV, p. 350-364, April 1997; "Rational Choice: Framework for the Social Scientific Study of Religion," (1997), available at <http://www.religionomics.com/erel/S2-Archives/Iannaccone%20-%20Framework-D.pdf> (downloaded 03.02.2007, 8:55 a.m.)

For an extensive bibliography on economics of religion see <http://www.religionomics.com/erel>.

fact that the process of founding a church in the US is simple, as well as the fact that, in contrast to the European experience, there is no significant state funding of religion. These two facts have contributed to the structure of what is now commonly known as the religious market-place, where believers shop for faith and churches offer religious beliefs as products. Currently, this theory is a major challenge to the traditional historical and sociological interpretations of religion, most prominently the ‘secularization thesis’ which claims that religion will inevitably disappear as a result of the modernization and the rise of science in the society⁷.

The free market place model of religion is, of course, but an ideal theoretical model, just like rational choice theory itself. Since religious behavior produces externalities (damage or benefits for third parties or society at large as a consequence of their actions), the state is compelled to regulate. The regulation is nevertheless restricted, given constitutional arrangements guaranteeing freedom of religion and (to varying degrees depending on the country) non-establishment of religion. The matter is further complicated by historical and social factors that do not necessarily follow efficiency principles. Furthermore, states, even those with strict separation systems, have realized that a certain degree of cooperation with religion is an unavoidable fact of everyday life. Sometimes, the cooperation is even desirable from the viewpoint of economics. As Eric Posner, Michael McConnell and Richard Posner argue, religious communities can produce certain social benefits (welfare and education, for example) with higher quality and lower transaction costs than the state itself⁸.

The rational choice approach to religious issues is certainly useful, especially in predicting the impact of regulation on religious vitality. However, several things are missing.

⁷ See, i.e., Lawrence Young, *Rational Choice Theory: summary and assessment*, (New York, Routledge, 1997); Rodney Stark and Laurence R. Iannaccone “A Supply Side Reinterpretation of the ‘Secularization’ of Europe,” *Journal for the Scientific Study of Religion*, vol. 33 (2004): pp. 230-252; Rodney Stark and Roger Finke, *Acts of Faith. Explaining the Human Side of Religion* (Berkeley: University of California Press, 2000); Rodney Stark and William S. Bainbridge, *A Theory of Religion* (New Brunswick: Rutgers University Press, 1996). For an overview of secularization thesis and a critique of rational choice approach to religion see Steve Bruce, *Choice and religion: a critique of rational choice theory*, (Oxford, England : Oxford University Press, 1999).

Richard Posner, Michael McConnell, and Eric Posner, apart from their general analysis, focus solely on the legal regulation of religion in the United States. Iannacone, Stark and Finke, on the other hand, are concerned with cross-country analysis, but factors they take into account as a proof of religiosity (i.e. church attendance) do not seem to grasp the whole picture. Effects of religiosity on collective consciousness and social norms, as well as its changes over time, are difficult to explain using solely the apparatus of rational choice.

For this reason, a rational choice approach to religion would be well advised to take into consideration arguments of the new institutional economics and constitutional political economy⁹. One of the ground breaking studies of religion in this respect (currently the only one known to me) is Ron Brinitzer's *Religion – eine institutionen-ökonomische Analyse*¹⁰. Drawing upon works of the founders of the new institutional economics like Douglas North¹¹, as well as taking into account sociological and economic theories of Niklas Luhman¹² and Friedrich von Hayek¹³, Brinitzer has managed to integrate arguments of rational choice theories of religion into the wider discussion of how religion effects social norms and institutional arrangements, claiming that, as a result of the historical presence of religion in human societies, no institutional arrangement can afford to ignore religion's presence or effects on the evolution of social norms. Nevertheless, due to the general orientation of his work, Brinitzer deals with the specific legal arrangements only in passing, without an in-depth analysis.

⁸ See supra, n. 3.

⁹ Garry Anderson and Robert D. Tollison. "Morality and Monopoly: The Constitutional Political Economy of Religious Rules", *Cato Journal*, Vol. 12 No. 2 (Fall 1992): p. 373-392. Available at www.cato.org/pubs/journal/cj12n2/cj12n2-5.pdf

¹⁰ Ron Brinitzer, *Religion – eine institutionen-ökonomische Analyse* (Egon Verlag, 2004).

¹¹ Douglas C. North, "The New Institutional Economics." *Journal of Institutional and Theoretical Economics*, Vol. 142, (1986): p. 230-237; "Transaction Costs, Institutions, and Economic History" in Furubotn, Eirik G. and Rudolf Richter (Hrsg), *The New Institutional Economics*, p. 203-213 (Tubingen, 1991); *Institutions, Institutional Change and Economic Performance* (Cambridge, 1990).

¹² Niklas Luhman, *Vertrauen – Ein Mechanismus der Reduktion sozialer Komplexität*, (Stuttgart, 3rd ed., 1989.)

¹³ Friedrich August Von Hayek, "Die Ergebnisse menschlichen Handelns, aber nicht menschlichen Entwurfs" in Hayek, *Freiburger Studien, Gessamelte Aufsätze von F. A. Von Hayek*, p. 97-107 (Tubingen, 1969).

This thesis attempts to fill these gaps by conducting economic analysis of the legal regulation of religion in the US and Germany. Both countries are developed constitutional democracies, without established state churches and with constitutional guarantees of freedom of religion. Both have been the focus of many analyses, either as a part of larger constitutional studies or single issues commentaries¹⁴. However, on many other levels, American and German attitudes towards the place of religion in the society are different, sometimes widely variant, sometimes only in slight nuances. In order to make the analysis as profound as possible and still retain focus, I have concentrated on following issues: legal status and funding of religious institutions; funding of religion in schools and funding for sectarian schools; and the establishment clause and free exercise jurisprudence of the US Supreme Court and German Federal Constitutional Court.

Naturally, the topic dictates comparative legal analysis as a baseline methodological approach. As to the economic analysis, I have used two approaches: rational choice and the new institutional economics and constitutional political economy. Two economic approaches are used in order to assess two different kind of effects that legal regulation have on religion in society. First, I examine the effects of the legal regulation on the level of religiosity in the society and the ways in which heightened levels of religiosity can contribute to general economic welfare. Secondly, I examine the effects on embeddedness and stability of social norms and general social attitude towards moral issues.

¹⁴ William A. Kaplin, *American Constitutional Law: An Overview, Analysis and Integration*, (Carolina Academic Press: Durham, North Carolina, 2004); Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Duke University Press, 2nd edition, 1997). David P. Currie, *The Constitution of the Federal Republic of Germany*, (Chicago: University of Chicago Press, 1994). Edward J. Eberle, "Free Exercise of Religion in Germany and the United States." 78 *Tulsa L. Rev* 1023, (2004), available at <http://ssrn.com/abstract=837724> (downloaded 25.03.2007, 13:45). Edward J. Eberle, "Religion and State in the Classroom: Germany and the United States." *Roger Williams University School of Law Faculty Papers*, paper 4 (2005), available at <http://lsr.nellco.org/rwu/rwufp/papers/4> (downloaded 25.03.2007, 15:20).

The social norms under consideration here should not be understood as any kind of paternalistic state-backed morality. To the contrary, I use the concept to denote the low level of intensity with which society can tolerate, discuss and live with issues that are “morally wrong” from the point of view of majority of religions. In a sense, social norms here mean social stability – competing group moral values tend to waste resources and increase state transaction costs, something that traditional law and economics only recently became concerned with¹⁵. In this work, I embrace the arguments of the new institutional economics and the constitutional political economy that stable social norms are also an economic common good that lower transaction costs and promote social net welfare.

I argue that the two systems share several differences and two important similarities. The legal status of religious institutions in the US as not-for-profit organizations funded by private sources, combined with the US Supreme Court’s staunch non-establishment and neutrality towards religion jurisprudence, acts as the deregulatory mechanism that makes religious vitality (measured mostly by church attendance) possible. However, the vitality has largely benefited strict churches and sects and damaged more liberal denominations in terms of membership and influence. As a result of this, moral issues like abortion and same-sex marriage have become very contentious in the United States, in contrast to Germany. The German system of public funding of churches and church taxes has contributed to the relative decline of religious vitality, as measured by external behavior. It is also more expensive than the United States’ system. Nevertheless, the German state receives two important benefits in return for the higher costs: there is no overgrazing of moral goods and no wasting of resources (through increased transaction costs) in attempts to resolve the competing moral claims. This is achieved via inculcation of religious beliefs as moderated cultural values and this system, I

¹⁵ See, i.e., Eric A. Posner, *Law and Social Norms* (Cambridge, Mass.: Harvard University Press, 2000).

contend, is tenable only under conditions of low religious plurality and the extensive cooperation of church and state.

From the point of view of economics, free exercise and establishment jurisprudence of the United States Supreme Court and the German Federal Constitutional Court do share, however, one important similarity. Until recently, outcomes of their free exercise cases were largely consistent with cost-benefit analysis. Nevertheless, the pressures of contemporary religious plurality motivated both courts (as exemplified by their recent decisions) to relinquish their stature of protectors of unpopular and non-traditional religious beliefs. Moreover, both courts have taken, for different reasons, a rather permissive stance towards economically efficient forms of cooperation between religious groups and state funding, German Federal Constitutional Court more so than the United States Supreme Court. Major benefactors of this attitude, in the case of the United States, are strict churches and religious communities, and it seems that this has, in many ways, upset the general equilibrium of the religious market. In addition, neither court's establishment clause jurisprudence could afford (or was willing) to ignore social norms and widespread historically settled religious beliefs, at least on a symbolic level. What differentiates the US Supreme Court from the German Federal Constitutional Court is that its decisions allowing symbolic inculcation of religion were a rather small price to be paid, relative to the effects of other non-establishment and 'moral' decisions which contributed to the rise of strict churches and sects in the US.

The first part of this study discusses economic models of religion, both from a rational choice and a new institutional economics and constitutional political economy perspective. Part two is divided into two sections. Section one analyses legal regulation of religion in the US, and section two does the same for the example of Germany. In part three, my findings are summarized and compared, and questions and issues to be tackled by future research are discussed.

1. Economic models of religion

1.1 Religious commodities and religious products

No doubt human beings have been engaging in religious practices ever since the dawn of civilization. Out of this factual statement one can easily infer the conclusion that religion always had some function in society, whether on an individual or group level. The degree of emotion with which religious disputes and wars have been (and still are) executed is further evidence of the validity of this claim.

From an economic perspective, individuals and groups engage, on the one hand, in the consumption of “religious goods” and, on the other, in the creation of “religious products.” This division is, of course, a simplified version, since the two kinds of products overlap due to the nature of religion. In other words, the producers and consumers are frequently one and the same, or their roles tend to overlap at least minimally. Many religious products cannot be consumed without the investment and effort on the consumer side, and seldom is effort invested by consumers required in order to either have the product in the first place, or improve its quality. Needless to say, costs of producing religious goods or products vary from religion to religion, depending on the nature of religious beliefs.

Religious goods and products may be intangible and tangible. For individuals, intangible goods are, for example, the feeling of self-worth resulting from upholding the tenets of their faith; the optimistic belief that their good deeds will be rewarded in the afterlife even though they are not appreciated in this life; endurance and patience in face of frustrations and injustices; and so on. Tangible benefits for individuals, however, seem to rely more on the collective production of religious goods. Membership in a community of believers makes it easier for an individual to meet like-minded persons, and to form meaningful personal and business relations without investing additional effort. In short, individual membership in group

governed by shared social norms reduces transaction costs. Hence, an individual's religious beliefs and practices within groups (assuming that they are consistent) signal to the rest of the community members that an individual shares their beliefs, which, in turn, makes it easier for them to understand and predict the behaviour of the other in different situations and in a variety of settings. And, as many religions engage in production of, for example, welfare services and low-cost education, membership in religious groups reduces the investment of time and money which individuals would incur if they tried to provide for such services either by themselves or in collaboration with individuals they do not know and with whom they do not share values, beliefs, and practices.

As for religious groups, their primary motivation for producing religious products, as in the case of every group, is self-perpetuation of existence and a large membership. However, due to their nature, religious groups have to produce both intangible and tangible goods or, in other words, they participate in both marketplace of ideas and the marketplace for goods. In this case, intangible goods would be, i.e., providing moral and spiritual support to their members in times of social and natural crisis as well as in everyday situations; promising to their members rewards or punishments in an afterlife, depending on whether members are behaving in accordance with the religious tenets; as well as promising that God or other supernatural forces will appropriately punish all those who disapprove their beliefs, whether in word or deed.

As already mentioned, on the tangible side, in order to perpetuate and justify their existence, religious groups frequently produce low-cost education and welfare services for their members in order to satisfy their mundane needs and, at the same time, maintain their allegiance. Production of both intangible and tangible goods, however, requires investment in both human and capital resources, and how religious groups deal with this problem will be further discussed below. For now, it is enough to say that a religious group looking to produce

both tangible and intangible goods face similar obstacles as any other market actors. If, for our present purposes, we define religion as a set of beliefs and practices validated by reliance on a supernatural force that rewards and punishes, the biggest problem and, at the same time, the greatest advantage of religion relative to other world views is immediately apparent. That problem, of course, is uncertainty.

As Iannaccone puts it, buying ‘religious goods’ is inherently risky, with high, but very uncertain, promised rewards¹⁶. Absence of rational evidence for religious beliefs is at simultaneously an immense setback and an immense advantage for religion. As an example of setbacks, religions always face a problem regarding how to keep their members from turning their backs on the organization due to the lack of evidence of, or responses from, “the other side”, which is why religious miracles are always welcome. However, providing meaningful explanations for irresolvable issues which Karl Jasper calls borderline situations, i.e. death, is a field in which other competitors can hardly beat religion. Furthermore, the promise of salvation in afterlife and redemption from the misery of this life can be very powerful and provide an unfailingly motivational force. To put it somewhat crudely, it is easier to pay any price and bear any burden while believing that afterlife rewards are certain, as opposed to suffering for the sake of some imagined future in which a universally free society will have abolished suffering.

From an economic point of view, three problems that all religions face are following: asymmetry of information, high opportunity costs, and high transaction costs.

Asymmetry of information is inherent to religion. To put it simply, there are no assurances and responses from “the other side.” The existence of God, heaven and hell are not certain, and it is beyond possibility of being proved or, for that case, refuted beyond reasonable doubt. Another important setback for religious individuals or groups is that their relation to God or a monopoly on places in heaven and hell is further undermined by the existence of

different religions that claim exclusive property over absolute truth, rendering uncertainty even greater and mutual toleration proportionately smaller. As in a majority of cases of bounded rationality, the individual or group will tend to develop set of practices, norms and rules that will perform a function of reducing uncertainty. One example would be customs surrounding funerals in different cultures. Many of these customs are beyond the comprehension of uninformed external observer; however they do fulfil important social functions.

Opportunity costs (costs incurred as a result of not investing resources in second-best use) may be extremely high in the case of religion, but nevertheless do tend to vary from religion to religion and over time. On the negative side, a majority of religions decree at least some kind of prohibition on activity that may be considered pleasant by average individuals, i.e., smoking or alcohol. On the positive side, religion requires its adherents to engage in practices that are frequently unpleasant, and, in the case of strict churches or sects, require even complete relinquishment of worldly pleasures in exchange for the (uncertain) rewards of the afterlife. However, higher opportunity costs may be desirable for stricter religious groups, since they act as a “screening method” which deters individual free-riders interested in ripping off the benefits of membership in a religious group without investing any effort.

Assuming for a moment an absence of definite interpretations of tenets of faith or holy scriptures that apply to religious groups, the transaction costs of practicing religion seem to be prohibitively high. An infinite number of choices face an individual when trying to decide if her acts will be in accordance with religious tenets, a confusion that renders actual decision-making and acting in accordance with religious beliefs largely inefficient. Transaction costs incurred as a price of making religious choice, foregone opportunities and asymmetry of information, as Iannacone explains, and as I shall argue below, transactional economics and new institutional economics also claim, are the main reasons why most religions are collective.

The explanation is following. In order to secure return on a highly uncertain

¹⁶ Iannacone (1997), p. 7.

investment, rational individuals face two choices: either diversify the investment portfolio, that is, invest fewer of resources in several investments with high risk, and by so doing, increasing the chance of return, *or* collectivise the production of religious products via development of institutions and groups.

A somewhat crude, but nevertheless possible example of the diversifying a religious portfolio would be a person attending church on Sunday in order to secure a place in heaven, exercising transcendental meditation in order to attain nirvana on Monday, while at the same time eating only certain foods in order to ensure moving up on the chain of being in case of reincarnation. However this may sound, it is nevertheless a rational alternative for individuals willing to pay for religious products but reluctant to extensively engage in traditional collective forms of religion. Such strategies are characteristic of New Age religions and I shall not concern myself with them in this work, since the second alternative, collectivisation of religion, is a more prevalent practice. However, in order to understand how state regulation influences religious behaviour, we first need to posit economic models of religious behaviour on an individual and collective level.

1.2 Economic models of religious behavior on individual level

1.2.1 Household Production Model

The household production model, developed by Azzi and Ehrenberg (hereafter abbreviated AE model,) despite its shortcomings, remains one of the most popular models for explaining religious behaviour on an individual and family level, but it ignores interactions and equilibrium on an aggregate level¹⁷.

The AE model is based on neo-classical economics and rational choice theory. According to Iannaccone, the AE model analyzes religious participation as a standard consumer

¹⁷ Corry Azzi and Ronald Ehrenberg. „Household Allocation of Time and Church Attendance“. *Journal of Political Economy*, Vol. 83, (1975): p. 27-56.

choice problem, relating time and money inputs required for producing religious goods, mostly afterlife salvation. Hence:

choose: *{the amounts of time and money to devote to religious versus secular activities}*

to maximize: *{the overall utility derived from secular and religious commodities}*

subject to: *{constraints on the total stock of household resources}*¹⁸

While the total utility derived from religious products (i.e. moral satisfaction) is hard to measure, total inputs, that is, money and time invested in production of religious products, can be measured, and are conditional upon the total stock of household resources. By household commodities and household resources economists mean “valued goods and services that families and individuals produce for their own consumption,¹⁹” and they may be both tangible and intangible.

One of the main contributions of the AE model is that the authors have conceptualized, very appropriately, given the subject of study, the concept of the “afterlife consumption” following a simple insight that most religions promise to their followers some form of afterlife. ‘Afterlife consumption’ and ‘afterlife benefits’ should be at least partially related to the lifetime allocation of time to religious activities. Consequently, as authors argue, “this suggest that household participation in church-related activities should be analyzed in the context of a multi-period household-allocation-of-time model which allows for ‘afterlife consumption,’ with this variable being at least partially a function of the household investments of members’ in religious activities during their lifetime.²⁰” Iannacone explains the model in a following way:

” Formally, households are assumed to maximize an intertemporal utility function which depends upon both (secular) consumption, Z_t , in each period and

¹⁸ Iannacone (1997), p. 8

¹⁹ Garry Becker, *The Economic Approach to Human Behavior*, (Chicago: University of Chicago Press, 1976), p. 89-114.

²⁰ Azzi and Ehrenberg, p. 28.

expected after lifeconsumption, A ; $U = U(Z_1, Z_2, \dots, Z_n, A)$.

Secular consumption in each period is a standard household commodity, which depends upon household inputs of time, TZ , and purchased goods, XZ . Afterlife rewards depend upon the household's entire history of religious activities, R_1, \dots, R_n , which in turn depend upon the time and purchased goods devoted to religious activities in each period. Hence,

$$\begin{aligned} Z_t &= Z(TZ_t, XZ_t) \\ R_t &= R(TR_t, XR_t) \\ A &= A(R_1, \dots, R_n).^{21} \end{aligned}$$

In addition, the authors augment this insight by adding two other possible motives for religious activity: the "consumption motive," meaning current satisfaction derived from an engagement in religious activities like church membership; and the "social pressure motive," that is, opportunities and pressures for forming useful business acquaintances for reasons of being a part of a certain church or religion, especially in cases of ethnic communities sharing common religion²².

The model can be applied not only to religious products, but also to all other intangible goods that individuals and families produce, such as relaxation, joint activities of parents and children, time spent by an individual with a partner and so on. The simplest prediction of this model is, for example, that business-oriented individuals with more money and less time are more likely to decide to pay somebody to entertain their children or to buy expensive gifts for their partners, since they attach more value to their time than money. Hence, money is an input substitute for time.

In the case of religious products, predictions of the AE model are well supported by the empirical data. As Iannacone says it, first prediction is following:

"Applied to religion, the concept of input substitution implies that people with high monetary values of time will tend to engage in money-intensive religious practices. In particular, their money contributions will be high relative to their rates of attendance and vice versa. People with low monetary values of time will adopt more time-intensive practices and contribute relatively less money²³."

²¹ Iannacone (1998), p. 1479.

²² Azzi and Ehrenberg, *supra* n.17, p. 32.

²³ Iannacone, (1997), p. 10.

The AE model of substitutes applies, as noted, to monetary church contributions. Individuals with less time and more money are more likely to contribute higher monetary amounts to churches, in contrast to lower income individuals who are more likely to engage in time consuming religious activities²⁴. Conversely, higher unemployment means decrease and consequently substitution of money-intensive religious practices for time-intensive religious practices. In practice, this would mean that stable or optimal employment/unemployment ratios in a given area will result, other things being equal, in stable relationship between money and time intensive religious practices. Consequently, as many church fundraisers knew for a long time, the effect is “skeweness” – a small number of individuals will tend to supply the highest percentage of monetary contributions to religious institutions. In the case of an individual who adheres to a church with a professionalized clergy, contributions and church donations can be analyzed in the framework of a rent-seeking theory.

1.2.2 Religious human capital model

Apart from taking the existence of religious institutions for granted, the household production model predicts individual behaviour while assuming a largely static background environment; that is, religious background, upbringing, and environment conversions are largely neglected. For this reason, the religious human capital model attempts to extend the findings of the household production model by taking into account the past experiences and present changes (endogenous or exogenous.)

The term ‘human capital’ is borrowed from labour economics and it denotes, as Iannacone says, a “person's accumulated stock of religious knowledge, skills, and sensitivities²⁵.” The model is used to predict religious behaviour over time, i. e., the influence of religious upbringing, denominational mobility, degree of religiousness depending on an individual’s age, and so on. It rests on two assumptions:

²⁴ Id., p. 11.

²⁵ Id., p. 13.

“Assumption #6: *As individuals and households produce religious commodities, they also accumulate a stock of "religious human capital" that enhances the satisfaction they derive from subsequent religious activity.*

Assumption #7: *Most religious human capital is "context specific," enhancing the real or perceived value of the particular activities, group, and religion that occasioned its accumulation.*²⁶“

Examples of religious human capital are intuitive and easy to confirm by everyday experience. An individual brought up in a religious surrounding is more likely to continue with at least some religious practices, even if only on a nominal level (that is, without being truly religious). The reason is that the religious investment in an individual, inherited either from parents or the environment, has accumulated in an individual's religious capital. That capital is more likely to be used even in a more secular form, since accumulation of new religious capital would be costly. One piece of empirical evidence for the above claim will suffice. 1974's Catholic America survey, according to Iannacone, confirms a positive correlation between childhood religious instruction and parents' church attendance on the respondents' current contributions and mass attendance²⁷.

²⁶ Id., p. 14.

²⁷ Iannacone (1990), p. 309 and Table 1, p. 304.

PARTICIPATION REGRESSIONS: 1974 CATHOLIC SURVEY

Variable	CONTRIBUTE		ATTEND		RATIO (A/C)	
	coeff†	t-stat	coeff†	t-stat	coeff†	t-stat
MARSAME	70.984***	4.60	11.836***	5.25	-0.105**	-2.64
RLGINSTR	3.313*	2.14	0.509*	2.25	-.000149	-0.04
PCHURCH	0.512	1.63	0.219***	4.80	.000909	1.19
NOINCOME	172.257***	3.58	6.199	0.88	-0.425***	-3.30
INCOME	9.025***	9.73	0.019	0.14	-0.034***	-4.53
HEDUC	4.124	1.75	0.201	0.07	-0.007	-1.35
AGE	3.702***	7.66	0.316***	4.47	-0.018*	-2.47
SEX	-0.912	-0.07	7.232***	4.13	0.103***	3.70
NONWHITE	-36.259	-1.83	-0.723	-0.25	0.252***	5.34
NKIDS	4.646	1.17	-0.020	-0.03	-0.023*	-2.38
BELIEF	35.256**	2.96	12.591***	7.23	0.039	1.40
NBHD	-25.373	-0.95	-2.725	-0.69	-0.035	-0.56
RAISECA	-5.044	-0.12	-1.068	-0.18	-0.036	-0.37
PCATH	-64.239	-1.62	-11.243**	-1.94	0.025	0.26
(CONSTANT)	-194.256	-4.02	4.122	0.58	1.276	7.64
R-squared	.39		.28		.31	
Cases	555		555		456	

* $p \leq .05$ ** $p \leq .01$ *** $p \leq .001$

†Unstandardized regression coefficients.

NOTES:

Source: N.O.R.C. American Catholic Survey, 1974.

Sample: All married respondents.

Variable definitions:

AGE = respondent's age.

ATTEND = yearly number of masses attended.

BELIEF = 9-item additive scale of respondent's strength of religious belief.

CONTRIB = yearly contributions to church (excluding Catholic school tuition and contributions).

HEDUC = years of education of family head.

INCOME = yearly income (thousands).

MARSAME = coded 1 if respondent and spouse of same religion.

NBHD = fraction of Catholic neighbors when growing up.

NKIDS = number of preschool or school-age children.

NOINCOME = dummy (1 if income not reported, 0 otherwise).

NONWHITE = dummy (1 if respondent is nonwhite, 0 otherwise).

PCATH = dummy (1 if either parent Catholic, 0 otherwise).

PCHURCH = mean of parents' yearly mass attendance.

RAISECA = dummy (1 if respondent was raised a Catholic, 0 otherwise).

RATIO = time intensity of religious participation — ATTEND/CONTRIB.

RLGINSTR = respondent's religious instruction scale score.

SEX = sex of respondent — 1 if female, 0 if male.

Similar to career choice, religious human capital is also a factor of time. It is more likely that an individual will switch religions at an early age, since gains from switching religions, just like jobs, tend to diminish over time. Adversely, even low nominal investments in religious capital over time still enlarge personal religious capital, which is why elderly persons rarely change religions. On the basis of the same survey used in above table, the following graphs were made in order to depict the relationship between the yearly attendance,

contributions and the age of respondent (Figure 1 below) and the time intensity of participation and the age of respondent (Figure 2 below) ²⁸.

Figure 1.

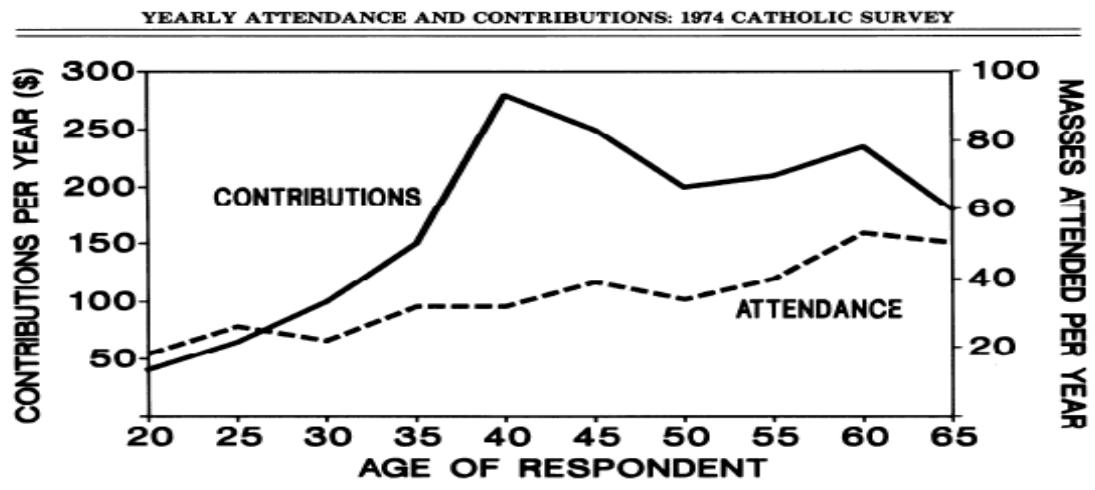
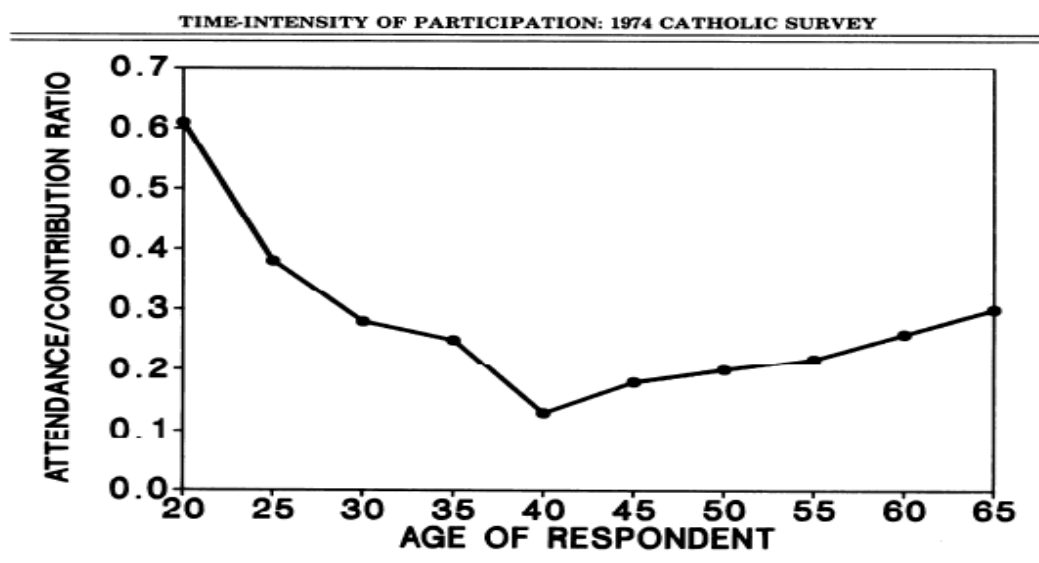


Figure 2.



Other predictions of the religious human capital model are also amply empirically supported²⁹. Put simply, investment in any entirely new capital is costly, which is why it is more likely that religious conversions will occur between similar denominations or that

²⁸ Id., Figure 2 and 3 at p.310 and 311 respectively.

²⁹ See generally id.

individuals will simply reject any religion rather than invest resources in embracing entirely new ones. Things seem to be similar in the case of interfaith marriages, since (assuming that future parents would like their children raised in a particular religion,) joint religious capital investment in children provided by parents of two different faiths tends to diminish both cumulative investment value and the amount of “religious capital shares” of each parent. This means that children will inherit less religious capital from either side and will therefore be less likely to engage in the religious practices of either of their parents³⁰.

1.3 Economic model of religious behavior on a group level: rise and behavior of religious groups and institutions

1.3.1 Rational choice models of religious institutions

The standard rational choice model of individual behaviour assumes that individuals act as rational net-benefit maximizers, evaluating costs and benefits of every action, calculated towards the achievement of the desired aim.

The rational choice approach to religion and other types of non-market behaviour follows Garry Becker's insight, developed in his book *Economic Approach to Human Behaviour* and characterized by the following words: "the combined assumptions of maximizing behaviour, market equilibrium, and stable preferences, used relentlessly and unflinchingly."³¹

For Iannacone, any rational choice approach to religion is conditional upon three assumptions:

Assumption 1: Individuals act rationally, weighing the costs and benefits of potential actions, and choosing those actions that maximize their net benefits.

Assumption 2: The ultimate preferences (or "needs") that individuals use to assess costs and benefits tend not to vary much from person to person or time to time.

Assumption 3: Social outcomes constitute the equilibria that emerge from the aggregation and interaction of individual actions.³²

³⁰ Id., p. 303 et seq.

³¹ Becker, p. 5.

³² Iannacone, (1997), p. 3.

Obviously, individual attitude towards religion is posited as a matter of choice, conditional upon subjective and objective costs and benefits individually (or collectively) evaluated in the process of choice whether to embrace any or no religion, and, assuming that the individual does embrace some religious beliefs and practices, in what way he or she will engage in the prescribed religious practices. Stability of preferences is assumed, hence, changes in religious practices are explained as responses to changes in circumstance such as incomes, prices, experiences, governmental regulation and so on³³.

Reservation toward these assumptions is necessary, however. The existence of choice is what distinguishes religion as a part of the individual life from, for example, race. Race is not a matter of individual choice, while the religion is. If an individual lives in a reasonably free society where choice of adhering to religion or its particular practices is not obstructed by legal or informal social norms, whether positive or negative, the number of choices available to an individual is proportionally greater than in societies where such choices are restricted.

Strategies available to an individual living in a society that extensively regulates religious behaviour are dependent on the degree of social regulation. A higher degree of regulation would motivate the rational individual to pay “lip service” to legal and social norms imposed upon her. In such an instance, the external observer faces a case of what Timur Kuran calls “preferences falsification,” that is, a case where outward behaviour is not the result of internalized norms³⁴. In extreme cases when, for example, excommunication from the religious institution, engaging in forbidden practices, changing religion or professing non-belief in tenets of a majority religion result in the death penalty or other severe punishments, the result is a large number of “nominal” believers, but a factually indeterminate rate of true believers. In

³³ Id.

³⁴ See Timur Kuran, *Private truths, public lies: the social consequences of preference falsification*, (Cambridge, Mass: Harvard University Press, 1995).

the long run, such systems are inefficient, since they are not stable and are always susceptible to internal schisms and disintegration, as the low level of internalisation results in a low adaptability to changed circumstances. This leads to quick disappearance of those systems whose members do not share sufficient devotion to the norms required for survival of the system. I will address this problem in more detail below, while discussing collective aspects of religion. For now, it is important to keep in mind that religious behaviour is not always a proof of internalized religious norms. Additionally, lack of religious behaviour is not a conclusive proof of absence of religious beliefs and internalized norms.

The rational choice approach applied in neoclassical economics assumes the existence of self-interested *homo oeconomicus*, and consequently rational choice is, by and large, a theory of methodological individualism. The main obstacle when applying rational choice to collective phenomena is explaining why people act in a certain way or abide by certain collective rules, when the benefits of breaking rules are greater than costs incurred in the opposite case, counted against the risk of being punished. However, some answers to the question of why people form religious groups and institutions are readily available, and are somewhat similar to those provided by the transactional and new institutional economics, discussed further below.

As noted previously, some major obstacles that all individuals engaging in religious practices face are asymmetry of information, high opportunity costs and high transaction costs. In other words, production of religious goods and consumption of religious products is plagued with the ex ante uncertainty. For this reason, as Iannacone explains, institutional and group arrangements arise in order to reduce uncertainty and ‘fraud’ in the course of buying religious products, as well as to increase the quality of products consumed or goods produced³⁵. As

³⁵ Iannacone (1997), p. 17.

Iannacone says it,: “Collective production tends to reduce the risk and raise the value associated with religious activities³⁶,”

Now, from a rational choice perspective this is certainly a consistent conclusion. It does not, however, provide an answer for questions of why and how collective forms of religious production change over time, and why certain form of institutionalization and group religiousness survive over longer periods of time - even when “conditions of uncertainty” (excluding, for now, metaphysical questions such is life after death) that have contributed to their rise have disappeared, or the religious teachings that have produced their existence become also non-existent. Take for example the enduring existence (and, indeed growth) of denominations which insist on individual interpretations of Bible and deny the need for any collective spiritual guidance provided by trained clergy.

The prediction of the rational choice mode and the cost-benefit analysis is that religious institutions will most likely be organized spontaneously, as a result of the shared benefits their members receive in return for reducing uncertainty. The cost of such organization is the problem of free-riders.

The freeloader problem arises when individuals tend to reap the benefits of collective action without investing their share of effort, in whatever form. It is characteristic for any kind of collective action, not only religious action. One solution to this problem, available to religious groups, is high opportunity cost which a religion may require from its members as an external sign of their commitment. In other words, strict prohibitions of smoking, alcohol, promiscuity, meat, coffee and so on, or requirements to wear only a certain type of clothing which is likely to attract negative social attention will screen out the free-riders. Free-riders, those attempting to engage, by definition, in an opportunistic behavior, will therefore stay

³⁶ Id.

away from the strict religious groups and will try to find more accommodating ones³⁷. Measured against the free-rider problem, the social consequences of high prohibition costs that strict churches require from their members are the following. More liberal denominations with no high opportunity costs will be more susceptible to free-riders, and will have higher rates of nominal membership (again, depending on social stratification and the amount of religious freedom in the society,) but very low rates of actual membership, as the lowering of price reduces both perceived benefits and the marginal opportunity benefits for consumers. In contrast, stricter churches will have steady rates of both nominal and actual membership, as their customers' willingness to pay is not elastic relative to prices - that is, higher prices will not drive customers to look for substitutes, as the substitutes are not readily available, or they are not perceived as valuable – if that was not so, customers would have already joined more liberal denominations.

The degree of internal cohesion among the members of strict churches will act as a catalyst for more efficient use of both human and capital resources of the group, as high cohesion will lower transaction costs for both individuals and the group as a whole, as well as allow for the more complete internalization of investment costs. In practice, this means that, over time, stricter churches have more incentive to provide higher benefits (free education, welfare, etc.) for their members in order to repay their high opportunity costs. In addition, it will be easier for them to expand the range of their services and even reach to a general public,

³⁷ I use the term 'strict churches' to denote any kind of religion that requires of its adherents to relinquish substantial number of activities that might be considered pleasant and would most likely be exercised by an average individual not holding the same beliefs. This is a negative side; on a positive (command) side, strict churches would be those that require substantial (above average) commitment of their believers, in which the adherents would most likely not engage if they would not hold the same beliefs. Except if otherwise noted in graphs and tables, I also use the term 'strict churches' to denote all religious groups, including sects, which have above mentioned traits. Therefore, in American setting, the term strict churches would be applicable to, i.e., Mormons, Jehovah's Witnesses, Pentecostals (Seventh Day Adventists, Nazarens, Assemblies of God), evangelical denominations (Southern Baptist and Missouri Synod Lutheran) and other smaller denominations with similarly strict beliefs. Churches falling outside of this model are considered to be 'liberal.' The more nuanced and detailed modeling and typology of what are strict churches can be found in the one of the foremost studies on strict churches and their growth, see Dean Kelley's *Why Conservative Churches are Growing*, (Macon, Ga. : Mercer University Press, 1986), p. 79-84. On economic restatement and application of Kelley's thesis see

since they can rely on their membership for support. To say it crudely, it is easier to get funding from the devoted than from ‘once-a-year’ members without real convictions. One can expect, then, that strict churches, should they decide to do so, will manage a disproportionate number of services such as newspapers, hospitals, shelters, TV stations and so on, relative to their membership. If they decide otherwise, they will devote available resources to providing increased benefits for their members.

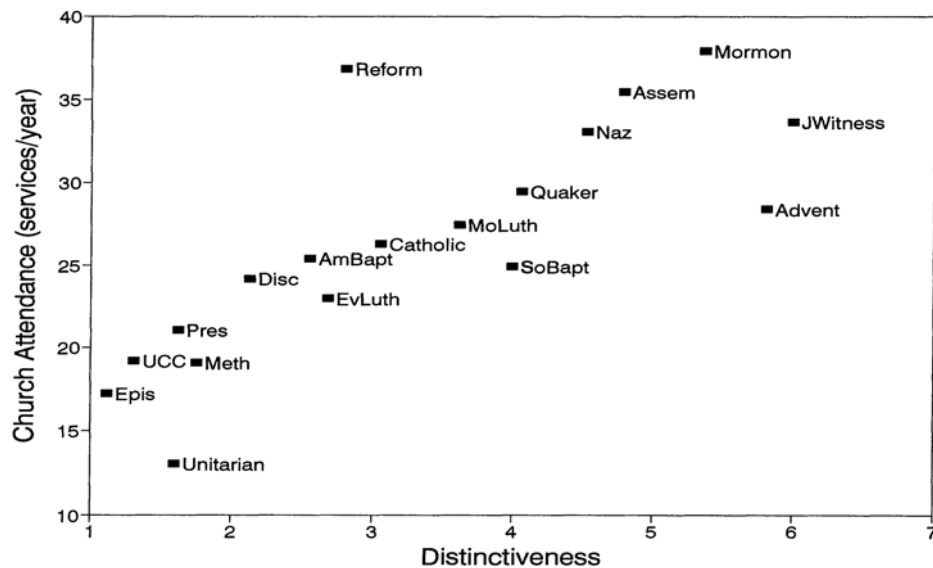
To corroborate some of these claims with evidence, it will suffice to look at a few examples. Responses to the survey question “Does the denomination emphasize maintaining a separate and distinctive life style or morality in personal and family life, in such areas as dress, diet, drinking, entertainment, uses of time, marriage, sex, child rearing and the like? Or does it affirm the current American mainline life style in these respects?”³⁸,” were sharply divided between the more liberal and the stricter denominations, as outlined in the graph below. In addition, the correlation between distinctiveness (strictness) and the rate of attendance is positive – more strictness means more attendance³⁹.

Figure 3 – Attendance versus distinctiveness

Iannacone (March, 1994). For a more detailed account on how strict churches are reducing free-riding see Iannacone (March, 1994), p. 1186 – 1189, and Iannacone (1992b).

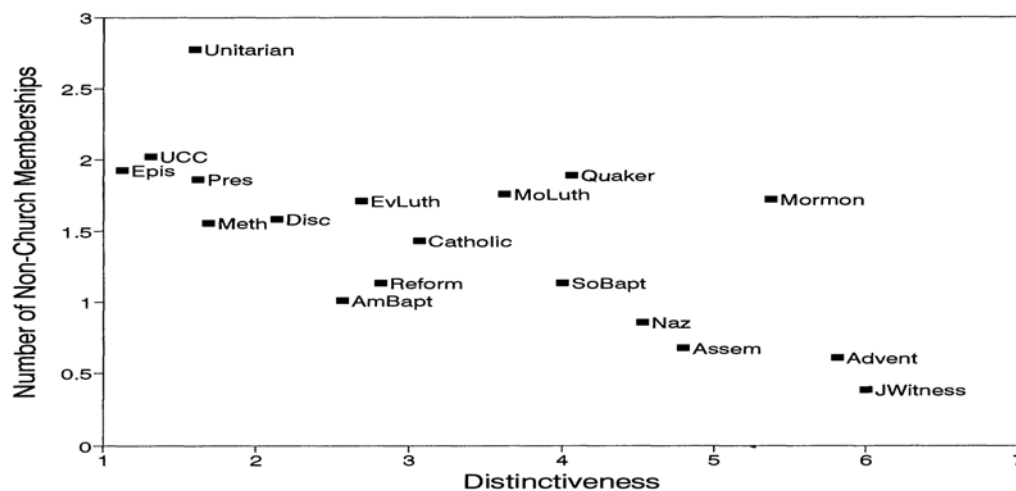
³⁸ Iannaccone, (1992b), p. 1190.

³⁹ Id., Figure 1 at p. 1191.



Similar correlations, positive or negative, exist between the strictness of the church and other activities of their members, as well as their income and church contributions. There is a strong negative correlation between the strictness of the church and the membership in non-church organizations (figure 4 below⁴⁰) and the strictness and income distribution (figure 5 below)⁴¹.

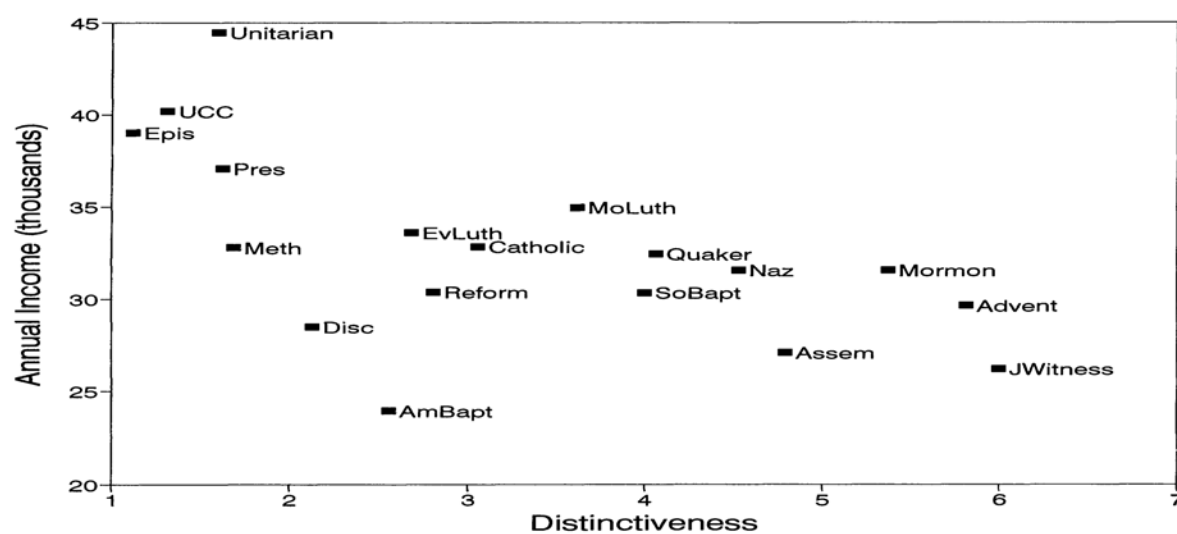
Figure 4 – Non-church membership



⁴⁰ Id., Figure 2, p. 1194.

⁴¹ Id., Figure 4 at p. 1995.

Figure 5 – Income versus strictness



Numerically, across Protestant denominations, the correlations between strictness and other activities is the following.⁴²

Table 1

⁴² Id., Table 1 at p. 1193.

PROTESTANT DENOMINATIONAL DIFFERENCES

	Liberal	Moderate	Conservative	Sects	<i>t</i> -value*
Household income (in thousands of dollars per year)	38.0 (23.2)	31.0 (20.9)	31.6 (20.7)	27.0 (20.0)	8.9
Respondent education (in years) ..	13.8 (2.92)	12.5 (2.86)	12.1 (2.84)	11.3 (3.02)	15.1
Sunday attendance (services attended per year)	20.9 (25.4)	25.2 (29.2)	31.3 (33.4)	48.5 (42.7)	13.7
Weekday attendance (% attending weekday meetings)	2.7 (16.4)	6.3 (24.3)	11.5 (31.8)	32.3 (46.8)	14.4
Church contributions (dollars per year)	584 (1,388)	473 (937)	905 (1,843)	862 (1,818)	1.8
Church contributions (% of yearly income)	1.94 (6.49)	1.94 (3.80)	2.81 (4.65)	3.16 (4.81)	2.3
Membership in church-affiliated groups (% belonging)	37.8 (48.5)	40.1 (49.0)	44.6 (49.7)	49.5 (50.1)	3.6
Secular memberships (no. of memberships)	1.90 (1.91)	1.48 (1.74)	1.27 (1.52)	.91 (1.30)	9.4
Strength of affiliation (% claiming to be "strong" members)	32.6 (46.9)	38.7 (48.7)	45.5 (49.8)	56.0 (49.7)	8.5
Biblical literalism (% believing) ..	23.2 (42.3)	40.4 (49.1)	57.8 (49.4)	68.1 (46.6)	15.7
Belief in afterlife (% believing) ...	79.5 (40.4)	85.1 (35.6)	88.9 (31.4)	87.8 (32.6)	3.5
<i>N</i> of cases	763	1,802	941	575	

SOURCE.—NORC General Social Survey, 1984–90; sample consists of nonblack, non-Catholic Christians.

NOTE.—In first four cols., nos. shown are means; nos. in parentheses are SDs. Definitions of denominational groups: liberal = Christian (Disciples of Christ), Episcopalian, Methodist, and United Church of Christ; moderate = American Baptist, Evangelical Lutheran, Presbyterian, and Reformed churches; conservative = Missouri Synod Lutheran and Southern Baptist; and sects = Assemblies of God, Church of Christ, Church of God, Jehovah's Witness, Nazarene, Seventh Day Adventist, and other fundamentalists and pentecostals.

* *t*-values are for two-tailed test comparing means for liberal and sect members.

The same correlation is found outside Protestant denominations, for example in the case of Jewish ‘denominational’ differences (reform, conservative and orthodox.)⁴³

Table 2

JEWISH DENOMINATIONAL DIFFERENCES

	Reform	Conservative	Orthodox
Individual practices:			
Attends synagogue regularly (%)	8.6	19.0	54.1
Lights candles each Friday (%)	5.4	15.3	56.8
Avoids money on Sabbath (%)	6.5	13.1	57.7
Household practices:			
Buys kosher meat (%)	3.5	20.7	68.5
Separates meat and dairy dishes (%)	3.4	18.9	66.7
Lights Hanukkah candles (%)	53.4	66.9	76.6
Has Christmas tree (%)	21.8	15.4	7.2
Networks:			
Closest friends are all Jews (%)	7.6	15.8	39.1
Lives in Jewish neighborhood (%)	6.6	11.5	36.0
Opposes marrying non-Jew (%)	1.9	9.6	47.7
Household contributions per year:			
Gives more than \$1,000 to Jewish causes (%) ..	5.4	9.44	22.5
Gives more than \$1,000 to nonJewish causes (%)	6.53	4.31	.0
Volunteer hours per week:			
Hours worked for Jewish organizations	1.08 (4.45)	2.34 (7.40)	5.62 (14.54)
Hours worked for secular organizations	4.02 (8.98)	3.62 (8.81)	2.24 (9.34)
Organizational memberships:			
Jewish (outside of synagogue)55 (1.45)	.85 (1.49)	1.46 (3.24)
Non-Jewish	1.67 (3.09)	1.45 (2.35)	.721 (1.36)
Years of education	15.8 (2.54)	15.2 (3.30)	14.8 (3.62)
Household income (in thousands of dollars)	64.7 (46.7)	55.5 (42.8)	41.7 (35.7)
<i>N</i> of cases	797	720	111

SOURCE.—1990 National Jewish Population Survey.

NOTE.—Nos. in parentheses are SDs; for each variable, the two-tailed *t*-test comparing means for Reform and Orthodox is significant at the 5% level.

⁴³ Id., Table 2 at p. 1196.

The trend of growth of strict churches and the decline in the membership traditional churches (i.e. Catholic Church and traditional Protestant denominations) is constatnt in last several decades. According to the latest data provided by Kosmin and Keysar, in a period 1990-2001 there was a five-fold increase in the number of individuals self-identified as Evangelical and “Born Again”⁴⁴. In the total population of the USA, the number of Catholics, still the largest religion in the country, has fall from 26.2% in 1990 to 24.5% 2001; number of Baptists has fall from 18.7% in 1990 to 17.2 in 2001. At a same time, membership of Pentecostals/Charismatic churches rose from 3.2% in 1990 to 3.8% in 2001⁴⁵. The only strict church that has experienced slight decline is Mormonism: the number of Mormons has fall from 1.4% in 1990 to 1.3% in 2001. Statistically, however, their membership has gone up from 2,487 thousands in 1990 to 2,787 thousands in 2001⁴⁶.

Table of gains and losses of religious groups in the period 1990-2001 reveals even more. Evangelicals and Born Again hold record gain of 42% increase in membership; Pentecostals increase in membership was 16%, Jehovah’s Witnesses 11%, Seventh Day Adventists 11% and Assemblies of God 7%. On the other hand, decrease in Catholic membership was 9%, Protestant (mainline denominations) 14% and Baptist 1%⁴⁷.

The increase in number of those self-defined as ‘No Religion’ was detrimental mostly to the Catholic Church; 28% of those identifying themselves as having no religion are former Catholics⁴⁸. Also the greatest numbers of converts are former Catholics⁴⁹. The fact, according to the current data, that the greatest ‘losers’ in the religious competition are traditional churches and religions might also explain the rise of the number of adults with no religious

⁴⁴ Barry A. Kosmin and Ariela Keysar, *Religion in a Free Market*, (Paramount Market Publishing, 2006), p. 25. On methodology used by the authors see id., p. 21 – 23.

⁴⁵ Id., p. 36, Figure 2.2.

⁴⁶ Id., and p. 26, Figure 2.1.

⁴⁷ Id., p. 59, Figure 4.2.

⁴⁸ Id., p. 60, Figure 4.3.

⁴⁹ Id., p. 61, Figure 4.5.

identification from 8% of the total population in 1990 to 14% in 2001⁵⁰. As I have argued above, since such individuals are mostly well – of and highly positioned on a social ladder (as I will document further below), they lack incentives to join other religious groups.

1.3.2 Rational Choice models of behavior of religious groups and institutions

Churches as clubs

It was already noted that religious behavior on an individual level was formalized for the first time by Azzi and Ehrenberg in their household production model. Similarly, but on a group level, the behavior of religious institutions may be formalized in accordance with the so-called club model.

The club model focuses on the on the interdependence of the utility that members of club derive from voluntary engagement in religious practices. In other words, the amount of utility that one individual derives from engaging in a religious practice depends not only on his or her own contribution, but also on the contribution of others. Hence, voluntary club models also predict that each member will have an incentive to pay close attention to behavior of other members, since any free-riding behavior will tend to reduce the utility which each individual can expect to derive from a religious practice. This confirms the prediction that it is perfectly rational for an individual with strong inclination to religion and restricted opportunities in other areas of life to participate in churches with stricter religious practices, since they tend to provide higher utility for participants, in comparison with churches that have more permissive attitudes.

The model works in congruence with the religious human capital model described above. As the utility for all members is conditional on the behavior of all others, the individuals are provided not only with internal incentives (which are already assumed to be very strong,) but also with external incentives to invest in “reputation capital.” This may explain why, among the members of strict churches, practices like gossip, which diminish

⁵⁰ Id., p. 24.

members' reputation capital, and concomitant public expressions of faith and miraculous healing are so prevalent. But these practices have a 'size problem,' too. Social screening is effective only in so far as the number of members and the territory they inhabit is small enough to allow their mutual checking and screening. This may well be the reason why certain strict churches retain attitudes of strict separation from the outside world, and do not easily accept of new members⁵¹.

Churches as firms

Another model of church behavior is based in neoclassical microeconomics. The model analyzes church behavior in religious markets assuming that churches behave just as any other profit-maximizing firm. From the point of view of this model, two sides of the equation exist, as in any other market: consumers of religious products, and producers or suppliers. Complicating factors are inherent risks connected with consumption of the religious products discussed above, and the fact that religious products frequently demand from their consumers substantial effort and so on are set aside.

According to this model, consumers of religious products act as utility-maximizers, while churches as producers and suppliers act as profit-maximizers. Interaction between the two sides constitutes the market, which is open for traditional economic analysis. As with all other profit-maximizing firms, consumer demand and the consumer confidence restrict churches. Personnel employed by the church (such as clergy) have, incentives, just as in secular firms, to increase the output of quality products with lower costs, as well as to diversify, as much as possible, the range of products in order to appeal to a diverse range of consumers. Their behavior will be similar to that of other sellers and managers, i.e., they will

⁵¹ Iannacone (1998), p. 1482. This theoretical prediction is confirmed by the data supplied by Kosmin and Keysar, noting the geographic concentration of religions across the United States, see Kosmin and Keysar, p. 105 – 137. The fact that geographic concentration is also a trait of traditional churches and not only strict ones can be easily attributed to other factors like personal and family ties, economic opportunities, racial and/or ethnic belonging and so on.

have to engage in continuous screening of the market in order to suit customers' preferences. However, the maneuvering space of firms selling religious products is restricted by the nature of the product – one cannot infinitely add new products. Claiming that monotheism, with its moral precepts, is the 'right' religion, and organizing bacchanalias for the glory of Dionysius would be a contradiction that would not likely be welcomed by the majority of consumers (pure opportunists excluded.)

Tactical indulgence of consumers' preferences is, however, possible and desirable from the viewpoint of religious firms. Take, for example, a church claiming that poverty is a way to a heavenly salvation. If the consumers are already poor, then there is a match between the factual condition of consumers and their preference and a religious product. Thus, religious beliefs available within, for instance, the interpretation of monotheistic religious scriptures, will be frequently altered in order to suit already-existing or changing consumer preferences. Given the open-ended nature of many religious texts, commands or beliefs, over time one can expect that the same group of people leading a religious firm will embrace somewhat contradictory opinions and practices, or one can otherwise predict that large religious firms will be subject to greater risk of being divided into several small firms with diversified products, attempting to capitalize on the same niche of a religious market.

However, as it was already suggested in my discussion of the club model of religious institutions, consumers are not always passive. Their individual utility is dependant both on their own investment and the investment of others. If there is a class of persons with the duty to manage a religious firm, as there is in a number of religions, a principal – agent relationship, like in other firms, is established between the church ("firm), its clergy ("managers"), and the believers who in this case become "shareholders." The principal – agent relationship, in this case, however, is not that simple nor is it a one-way street. Agents have to take into account shareholders' preferences (assuming freedom of religion, of course,) but there is also another

principal involved – the supernatural force whose commands or practices are interpreted both by principals and by agents. Agents are, then, torn between two goals that may contradict each other from time to time: on the one hand, they would like to suit consumers’ preferences, and, on the other hand, they have to be careful not to totally ruin the substance of the supernatural force’s commandments in the process, since those commands are a reason for the firm’s existence. Should the agents allow for abrogation of the commandments, the firm will collapse. Should the agent’s neglect the former, the number of shareholders will decrease.

This insight may help explain why, for example, literacy was a privilege of the clergy in the Middle Ages, and why the Catholic Church and many other organized religions frequently discouraged believers from sending their children to school, proclaiming education to be “a sin.” Widespread literacy leads to individual interpretation of religious commands and beliefs by shareholders, making things much more complicated for the clergy as agents, and, over time, leads to division and schisms within large religious firms or to a decline in membership.

The church-as-firm model, of course, assumes the existence of the religious market and the classical laws of supply and demand apply as in any other market. Competition between firms producing diversified religious products will drive towards the most efficient use of resources, and an unhindered market will lean towards steady equilibrium. As I will show below, this model is widely used in the economics of religion in order to predict the effects of monopoly and governmental regulation.

1.3.3 New institutional economics and the rise of religious institutions

Akin to neoclassical microeconomics rational choice approach, new institutional economics (hereafter NIE) explains the rise of institutions in a somewhat similar way. Factors like asymmetry of information, that is, constant decision-making under conditions of bounded rationality, high opportunity costs and high transaction costs are reasons why societies and

groups devise institutions or the rules of game. Note, however, that the NIE has one advantage in this respect in comparison with rational choice. Rational choice, as noted, is largely a theory of methodological individualism, while we may tentatively say that new institutional economics is a theory of methodological collectivism. This is not to say that the NIE fully denies or rejects assumptions of the rational choice, which it doesn't, it just means that the NIE places much more emphasis on an effect of collective rules of game (institutions), as well as their influence on societies over time relative to role of individuals.

The NIE distinguishes four levels of society, and consequently four levels of analysis. The first level is the so-called embeddedness level: it encompasses informal institutions, customs, norms and religion. Second is the level of institutional environment – these are formal rules of the game, i.e., property rules. The third level is marked by governance structures, and this is sometimes called the 'play of the game' level. Only at a final, fourth level of society, according to NIE, do we find actual resource allocation; this is where neoclassical economics steps in⁵².

One of the preeminent theorists of the NIE, Douglas North, defines institutions in the following way "... the rules of the game in a society, or more formally, (...) the humanly devised constraints that shape human interaction.⁵³". Note that the rules of game are not necessarily conducive to a solely individual benefit – it seems that it is quite the opposite. As North says, "sometimes codes of conduct [formal and informal alike – my comment] – good sportsmanship – constrain players, even though they could get away with successful violations.⁵⁴" The logic behind this is, of course, lowering transaction costs on a group level.

By introducing rules, formal or informal, members of the groups do not have to reflect on every possible course of action nor do they have to engage in costly deliberations. 'Rules of

⁵² Oliver E. Williamson, "The New Institutional Economics: Taking Stock, Looking Ahead," *Journal of Economic Literature*, Vol. XXXVIII (September 2000), p. 595-597.

⁵³ North (1990), p. 3. in Brinitzer, p. 29, fn. 88.

⁵⁴ North (1990) p. 4. in Brinitzer, p. 30, fn. 93.

thumb' provide them with a less costly way of acting. The price individuals pay for this, however, is a restricted number of choices. The equation is as follows. Individuals have to sacrifice some benefits, and, in return, they bear lessened costs of deliberation on available choices. They also get their piece of the social good to which they contribute by acting in accordance with the rules. Punishments for breaking rules, whether formal or informal, act as a pricing system, in a Hayekian sense of the word⁵⁵. It seems that changes in a system of rules, formal or informal, will depend, on the one hand, on the relationship between the costs that individuals bear and their share in social goods and, on the other hand, on the efficiency of rules. Inefficient rules that do not serve social needs will be replaced by more efficient ones, but the efficiency and the utility of a rule cannot be judged from the point of view of an external observer - otherwise we would not be able to explain the prolonged existence of seemingly inefficient rules – but from the viewpoint of the group enforcing the rules.

As Williamson puts it, on level one, “religion plays a large role,⁵⁶” and the change on this level occurs very slowly, displaying a high level of inertia. The question in need of clarification, as Douglas North says, is “what is it about informal constraints that gives them such a pervasive influence upon the long-run character of economies?⁵⁷” For the present purposes, we should note, however, that level one (customs, norms, religion etc.) has an enduring impact on the second level of society, that is, on institutions, constitution, bureaucracy, property rules, etc., but the reverse impact of the institutions on the first level is also substantial, allowing for deliberative design opportunities.

As it was already noted, in his NIE analysis of religion, Brinitzer concludes that factors like the asymmetry of information, that is, constant deciding under conditions of bounded rationality, high opportunity costs and high transaction costs are reasons why societies and

⁵⁵ Friedrich August von Hayek, “Die Ergebnisse menschlichen Handelns, aber nicht menschlichen Entwurfs” in Hayek, *Freiburger Studien, Gessamelte Aufsätze von F. A. Von Hayek*, p. 97-107. Tübingen, 1969.

⁵⁶ Williamson, p. 595-597.

⁵⁷ North in Williamson, p. 595.

groups devise institutions or the rules of game. Brinitzer argues that since religion has had an enduring impact on human societies for centuries, the amount of “social religious capital accumulated” through centuries and millennia seems to be overwhelming and hard to dispose of⁵⁸. Hence, the design of any future institutions as well as decision-making processes will have to account for that, since the large inconsistency between level one and level two of the society threatens the stability of the system.

In psychological terms, as Brinitzer claims, following North and Denzau, prolonged existence of the rules on level one is internalized via mental models, ideologies and identities that serve as tools for lowering transaction costs and reducing uncertainty, and which are spread via cultural learning. Mental models are “internal representations that individual cognitive systems create to interpret the environment.”⁵⁹ Ideologies are “the shared framework of mental models that groups of individuals possess.”⁶⁰ Both mental models and ideologies give rise to the identity of a certain group. They are economizing devices by which “individuals come to terms with their own environment and are provided with a ‘worldview’ so that a decision-making process is simplified.”⁶¹

As societies have been floating in the sea of religious symbols, practices and beliefs for centuries, the collective consciousness and (perhaps even more important) sub-consciousness has become accustomed to mechanisms of thinking and behaving in a way that was designed and changed through the evolutionary process in order to reduce transaction costs (explaining events in the world and pointing to the course of action without extensive information searching or options analysis) and produce “social goods and capital” necessary for the survival and well-being of the society. Well-being or utility has to be judged from an inside, subjective point of view. As North claims, “the ubiquitous existence of ‘beyond rationality’

⁵⁸ Brinitzer, p. 76-137.

⁵⁹ Denzau and North, p. 4.

⁶⁰ Id.

⁶¹ North (1990) in Brinitzer, p. 41, fn. 143.

beliefs in all organized belief systems suggests that it may be a superior survival trait to possess some explanations rather than no explanation for phenomena beyond our scientific reach. Such belief systems, both religious and secular, provide explanations in the face of uncertainty and ambiguity and are the source of decision making.^{62,}

The shape of institutions and decisions relies on the social consensus and the investment of level one energy into level two and, according to North, “The path-dependence of the institutional development can be derived from the way cognition and institutions in societies evolve⁶³.” The government structure has to take into account the substance of the level one – it needs to exercise governance of the social capital. From this, it does not follow, however, that level two structures can not change level one substance. What level two institutions can do is to take into account the substance of level one and change its *form* by redirecting it. Over time, different forms will adversely affect the substance and gradually change it. Provided that institutional structure and decisions were thought through, we may speak of an “institutionally controlled evolution”, which is different from the “spontaneous evolution” that occurs on the level one as a result of, basically, a fight for survival during which more efficient norms, mental models and ideologies overcome and gradually absorb and/or destroy less-efficient ones. Controlled evolution may sound like a contradiction in terms, but that need not be so – level two institutions, as argued above, are a result of conscious decisions.

For the purposes of this study, it is important to keep in mind that the state cannot afford to disregard the substance of level one norms, including religion as one the predominant example. The state may choose to distance itself from the content of these norms if there are many groups holding conflicting views under the rationale, i.e., that the distance from each and every group provides the best protection for all of them, which would be the case in the United

⁶² North (1990) in Brinitzer, p. 42, fn. 152.

⁶³ Denzau and North, p. 22.

States. Contrary to this, the government may decide to recognize the historical legacy, traditions and ideologies in the society and move to embrace level one norms or even try to bend them to a direction desirable from a governmental perspective, which would be the case in Germany. Should the government decide that the past norms are totally obsolete and that the new ones should be installed, as in the case of revolution, one can expect that new norms will have to take over the ‘energy’ of the old norms and redirect them in a desirable direction if they are to survive over a longer period of time. In this case, one could say that claims that, for example, nationalism and other –isms, are a form of political or social theology, while philosophically disputable, are nevertheless economically sound.

1.4 Regulating religion: monopoly and competition, externalities and a cost-benefit analysis

Already above, we have discussed concepts like religious goods, religious products, religious market and described some of the major traits of individual and church behavior in accordance with the neoclassical microeconomics. We have also noted the findings of the NIE regarding mental models, ideologies and identities and their adverse effect on the nature of institutions. In this part, using same analytical tools, I focus on the problems of the regulation of religion.

1.4.1 Monopoly and competition

As noted by many authors, like Posner, Iannaccone, Stark and Finke, the first economist to lay the foundations for the economic analysis of religion was Adam Smith. In his seminal work, Smith claimed that the clergy is motivated by the same self-interest as any other manager or producer, and that economic laws that are valid for market generally will be valid for religious market, too. Hence, market forces are constraining churches as any other firm and the benefits of competition and the hazards of monopoly are foreseen in the religious market.

As Smith says it:

The teachers of [religion] ..., in the same manner as other teachers, may either

depend altogether for their subsistence upon the voluntary contributions of their hearers; or they may derive it from some other fund to which the law of their country many entitle them Their exertion, their zeal and industry, are likely to be much greater in the former situation than the latter. In this respect the teachers of new religions have always had a considerable advantage in attacking those ancient and established systems of which the clergy, reposing themselves upon their benefices, had neglected to keep up the fervour of the faith and devotion in the great body of the people. ... The clergy of an established and well-endowed religion frequently become men of learning and elegance, who possess all the virtues of gentlemen, ... but they are apt gradually to lose the qualities, both good and bad, which gave them authority and influence with the inferior ranks of people. ... Such a clergy, when attacked by a set of popular and bold, though perhaps stupid and ignorant enthusiasts ... have no other resource than to call upon the magistrate to persecute, destroy, or drive out, their adversaries, as disturbers of the public peace⁶⁴.

Therefore, we can predict the consequences that monopoly and competition will have for religious vitality. Three models are possible, as Iannaccone says – a simple monopoly model, public religion; a heavily regulated religious market; or the deregulation⁶⁵.

In a simple monopoly model, predictions are same as for any other monopoly: “the monopoly church earns positive profits by limiting output levels and charging prices in excess of marginal cost... The simple monopoly model implies inefficiency and deadweight losses, as high prices lead demanders to underconsume religious commodities. The model can also be extended in the usual ways to address price discrimination, multiple outputs, and the relationship between an upstream producer, such as the Vatican, and its downstream distributors, such as monasteries and parishes.”⁶⁶

Of course, the historical example of a continuous church monopoly is the Catholic Church in the Middle Ages. Economic predictions that the absence of competition will result in an absence of faith leads to a paradoxical conclusion that the ‘Age of Faith’ was actually the age of the widespread religious apathy and irreligiousness, at least among the masses – a conclusion supported by a number of studies conducted by historians of religion like Keith

⁶⁴ Adam Smith in Iannaccone (1991), p.2.

⁶⁵ Id.

⁶⁶ Id.

Thomas, Paul Johnson, Jean Delumeau, Jane Schneider, and David Gentilcore⁶⁷. The strongest wording of this claim is pronounced by Andrew Greely:

“There is no reason to believe that the peasant masses of Europe were ever devout Christians, not in a sense that we usually mean when we use these words. There could be no deChristianization as the term is normally used because there was never any Christianization in the first place. Christian Europe never existed⁶⁸.”

It is, nevertheless, more complicated for economics to explain the endurance of this monopoly, as many factors are involved – official oppression, social ostracism and so on. The “preference falsification” argument advanced by Timur Kuran finds its plausible application here, as it seems that the appeals to religion advanced by the official medieval Catholic Church and the feudal kings and aristocracy served utilitarian purposes and the religious norms never became fully internalized on a mass scale. Iannacone, on the other hand, claims that the Catholic Church’s *internal competitiveness*, indicated by the existence of numerous partially self-governing orders (i.e., Benedictines, Franciscans and so on,) contributed to the enduring vitality of said monopoly. The outcome of this arguments is, however, somewhat similar to that of Timur Kuran’s – a lack of fully (or to a large extent) internalized norms makes a system unstable and susceptible to internal schisms.

A second model, the public regulation of religious markets, is by far the most prevalent model in Europe, and in many other countries around the world. Basic features of this model are well known. In the market, there are several ‘public religious firms’ (usually historically present religions) heavily subsidized by the state, though private funding is possible. Other religious firms (usually historically non-prevalent or non-traditional religions) are allowed, but their entrance into the market is frequently obstructed via different administrative obstacles

⁶⁷ Keith Thomas, *Religion and the Decline of Magic*, (New York: Scribner’s, 1971); Paul Johnson, *A History of Christianity*, (New York: Atheneum, 1976); Jean Delumeau, *Catholicism between Luther and Voltaire*, (New York: Harper and Row, 1977); Jane Schneider, “Spirits and the Spirit of Capitalism” in *Religious Orthodoxy and Popular Faith in European Society*, ed. by Ellen Badone, (Princeton: Princeton University Press, 1990); David Gentilcore, *Bishop to Witch*, (Manchester: Manchester University Press, 1992), as cited in Rodney Stark and Laurence R. Iannaccone, “A Supply Side Reinterpretation of the ‘Secularization’ of Europe,” *Journal for the Scientific Study of Religion*, vol. 33 (2004), p. 241.

like licensing, heavy taxation, or the denial of tax exemptions available for public religious firms. Public religious firms (whether monopolies, duopolies or oligopolies,) as well as the state itself, commodify religion, frequently by arguing that their existence is inextricably tied to public good and morals, or claiming the protection of consumers from the “unhealthy and treacherous” foreign religions.

Iannaccone claims that all such publicly regulated religious market have five traits, which he discerned as a result of a cross-country empirical study. First:

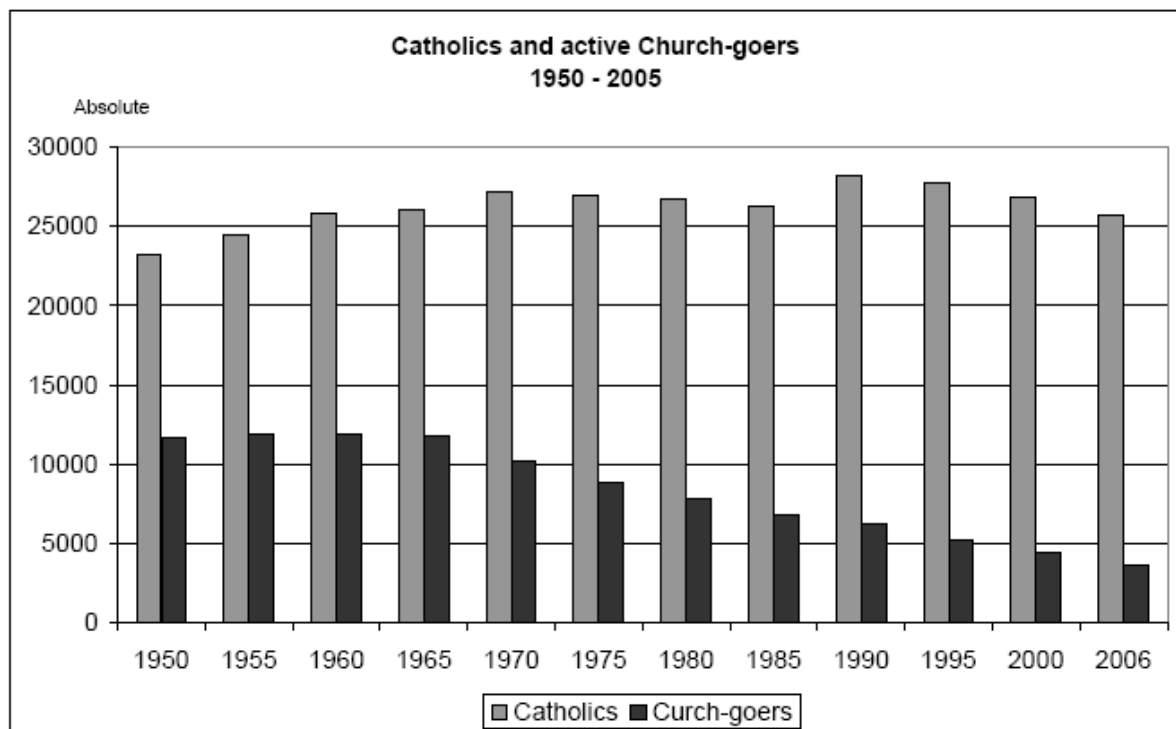
The public provision of religion will be characterized by inefficiency. Quality adjusted production costs will be higher than those of the private firms. Inefficiency can arise in numerous ways. Smith himself identified the perverse incentives faced by the clergy of an established church. In simplest terms, the providers of public religion are insulated from competitive pressures and the preferences of those they ostensibly serve. To the extent that their remuneration is fixed, they will tend to provide suboptimal effort and, hence, suboptimal quality of services. To the extent that they can increase their pay or lighten their responsibilities through lobbying their regulators, they will tend to so, thereby engaging in socially wasteful rent-seeking behaviors⁶⁹.”

Second, comparable to analysis of public versus private education, the overall consumption of religion and return on it will tend to be lower than expected as the lack of substitutes and consumer control of the product is low. Leaving aside for a moment a discussion on the effects of prolonged religious monopoly on social norms, we should point out that empirical evidence for Iannaccone’s claims that public regulation of religion leads to lower consumption of religious goods can be found in the example of the Catholic Church in Germany and church-goers counted against the overall membership in period 1950-2006⁷⁰.

⁶⁸ Andrew Greely, *The Faith We Have Lost* cited in id.

⁶⁹ Iannaccone (1991), p. 2.

⁷⁰ Data available at Deutsche Bischofskonferenz web page at <http://dbk.de/imperia/md/content/kirchlichestatistik/englisch/kath-gott-06.pdf>, (downloaded on 17.10.2007, 6:43 p.m).

Figure 4

Figures of the new Bundesländer included as from 1990.

Statistically, the numbers are following⁷¹.

Table 3

⁷¹ Data from Deutsche Bischofskonferenz, available at http://dbk.de/imperia/md/content/kirchlichestatistik/englisch/katholiken_und_gottesdienstteilnehmer-1950-2006_eng.pdf (downloaded on 17.10.2007, 6:43 p.m). Unfortunately, comparable data is not available for the Evangelical Church in Germany, though I suspect figures are similar.

Catholics and active Church-goers			
1950 – 2006			
Year	Catholics ¹⁾	Church-goers ²⁾	
		Number	per 100 Catholics
		1,000	%
2006	25,685	3,606	14.0
2005	25,870	3,688	14.3
2004	25,986	3,849	14.8
2003	26,165	3,981	15.2
2002	26,466	4,031	15.2
2001	26,656	4,248	15.9
2000	26,817	4,421	16.5
1999	27,017	4,486	16.6
1998	27,154	4,633	17.1
1997	27,383	4,823	17.6
1996	27,533	4,957	18.0
1995	27,715	5,153	18.6
1994	27,909	5,361	19.2
1993	28,003	5,404	19.3
1992	28,128	5,654	20.1
1991	28,198	5,895	20.9
1990	28,252	6,190	21.9
1989	26,746	6,092	22.8
1988	26,483	6,115	23.1
1987	26,306	6,402	24.3
1986	26,280	6,373	24.3
1985	26,308	6,800	25.8
1984	26,395	7,025	26.6
1983	26,491	7,201	27.2
1982	26,606	7,388	27.8
1981	26,707	7,547	28.3
1980	26,713	7,769	29.1
1979	26,734	7,933	29.7
1978	26,750	8,098	30.3
1977	26,808	8,535	31.8
1976	26,880	8,666	32.2
1975	27,010	8,818	32.6
1974	27,229	8,956	32.9

1973	27,407	9,239	33.7
1972	27,384	9,502	34.7
1971	27,326	9,773	35.8
1970	27,194	10,159	37.4
1969	26,977	10,697	39.7
1968	26,634	11,175	42.0
1967	26,352	11,498	43.6
1966	26,277	11,602	44.2
1965	25,998	11,725	45.1
1964	25,588	11,737	45.9
1963	26,817	11,728	43.7
1962	26,498	11,832	44.7
1961	26,218	11,993	45.7
1960	25,804	11,901	46.1
1959	25,485	11,882	46.6
1958	25,252	11,841	46.9
1957	24,982	11,855	47.5
1956	24,787	11,822	47.7
1955	24,503	11,860	48.4
1954	24,267	11,936	49.2
1953	24,076	11,915	49.5
1952	23,764	11,804	49.7
1951	23,493	11,722	49.9
1950	23,195	11,693	50.4

But, as I have argued above, the lack of norms-motivated external behavior does not necessarily mean the lack of internalized norms. In contrast to the low number of church-goers in Germany relative to the US counted against the Protestant concentration index⁷², data on personal religiousness is marked by lower percentage differences⁷³.

⁷² Iannaccone (1998), p. 1487, Figure 3.

⁷³ Stark and Iannaccone, p. 246, Table 2.

Figure 6 – Protestant Concentration v. Church Attendance Rate

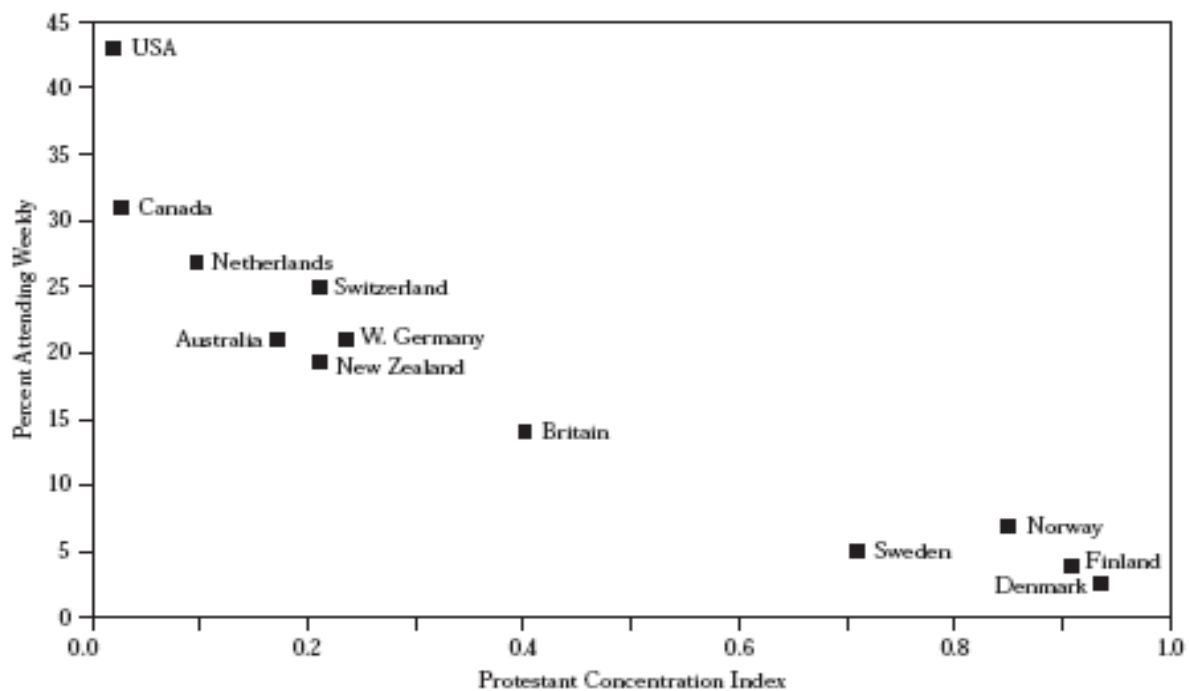


Figure 7 – Personal Religiosity, 1991

PERSONAL RELIGIOUSNESS, 1991			
	% Who Believe Bible is "Inspired by God"	% Who Believe in Life After Death	% "Not Religious"
Norway	52	60	21
West Germany	63	54	31
Netherlands	57	53	27
Great Britain	49	54	26
United States	85	78	9
Ireland	80	80	14
Poland	76	74	11

Source: International Social Survey Program, 1991, courtesy of Andrew M. Greeley.

To remain in the realm of the publicly subsidized and heavily regulated religion, we should add, as Iannaccone argues, that the ‘content’ (i.e. teachings) of such religion will be heavily influenced by the government officials looking to maximize their own utility, as they will most probably abuse their regulatory powers, similar to the behavior of regulators in the, i.e., telecommunications market. Religious clergy, in exchange for benefits, will produce

beliefs congruent with government's desires and the critic of opposition will usually be both anti-governmental and anti-cleric. Fourth, a result of the governmental regulation, the market will suffer underproduction of religious products relative to the unregulated market irrespective of consumer's desires. Finally, an insight that Iannacone proposes is very similar in consequence with the claims of the NIE, described above:

Empirical research suggests that the stultifying effects of religious regulation and monopoly will be long-lived. Even after a state church is disestablished and the religious market is legally open, it may take generations for the situation to approach that of a perfectly competitive market. As I have noted elsewhere ...people's religious choices display a great deal of inertia, due not only to the effects of indoctrination and habit formation, but also due to the nature of religious commodities. Religious commodities are typically produced in a social context and their appreciation depends on relationships with other church members, knowledge of specific rituals and practices, and familiarity with specific doctrines. The specific knowledge and relationships needed to appreciate the religion of a particular church may be viewed as a form of "religious human capital" acquired through a process of learning by doing. Hence, even when more efficient alternative religions arise, most people will wish to switch to it, since doing so renders much of their religious capital obsolete. Since most religious training is obtained directly from one's parents or one's parents' church, the tendency to remain within an inefficient church can persist over generations⁷⁴.

However, increase in religious vitality in the US relative to Europe, according to Stark and Finke, cannot be explained purely by an increase in demand, which would be the first proposition of the neoclassical economists. Given that the constitutional framework in the United States forbids the establishment of a state church, just as in many other European countries, it is hard to conceive that Americans *generally* have greater need for consuming religion than do Europeans. The answer, according to Stark and Iannacone, lies in the supply side of the equation. As American history shows, Stark and Finke argue, the explanation for the unprecedented number of denominations in the US (almost 2000, according to Iannacone) lies in two facts: very few obstacles in the process of founding of new churches (no strict licensing system) unlike in Europe, coupled with a continuous absence of any kind of state

⁷⁴ Id.

funding for religious activities, which has coerced both religious leaders and believers to engage in a kind of “religious entrepreneurship” and rely solely on their own efforts in sustaining churches and religious institutions.⁷⁵.

The arguments of Iannacone, Stark and Finke presented above are oriented towards explanations of religious vitality, not to say the tone they use frequently implies that the religious vitality and competition of churches is a value in itself. There are, however, unintended consequences of religious vitality, namely decrease of general morals in the society, as well as the ever-present danger of the *Kulturkampf*.

1.4.2 Morals as a public good or on a tragedy of common morality

As Richard Posner says,

“Adam Smith believed that, the more denominations there were and the smaller on average each was, the more effective religion would be in regulating morals, because the free-rider problem would be diminished. There is, however, a contrary argument. The more that religious denominations must compete for adherents, the easier it should be for a person of lax morals to find a forgiving denomination to join.”⁷⁶,

Posner’s claims are consistent with the findings of Iannacone, Stark and Finke, as presented above. The greater the number of denominations competing in the market, the more likely it is that denominations will have to lower their moral standards and reduce the demands they put on their adherents, if they do not want to risk a decrease in membership. As we are now considering only societies where freedom not to believe is guaranteed, the expected outcome of the decrease in moral demands that denominations put on their adherents is a general laxity of social morals that will be inversely related to the more secure economic position that adherents of a certain religion have in the society.

The logic is following: the richer the person is, underlying religiosity, as well as the availability of time that the person can invest in religious practice, might decrease given that the regular market competition demands investing more time to career competition.

⁷⁵ See generally Stark and Iannacone .

Functioning within an affluent society in which many individuals are already rich or the social venues for accumulating material wealth are widely open, churches may respond either by lowering their moral demands or demanding more money-intensive religious practices. In either case, church membership, while usually retaining nominally the same numbers of members, experiences a decline in factual membership and suffers an increase in the number of free-riders. On the other hand, the amount of money the churches receive will not necessarily become larger. Clergy and religious institutions cannot afford to have their members view them as oriented *solely* towards profit-making, as their reputational capital would decrease; such a view would hurt them, since the essence of their product is morality and their reputations count. Otherwise, consumers and future benefactors will likely turn to other moral products (i.e. humanitarian work.) This, in fact, is what happened to older and more liberal denominations in the US whose membership rose fast on the social and economic ladder.

The situation, however, is quite opposite with strict churches. As it was argued above, the strict churches, by imposing high opportunity costs, will be likely to draw fewer members but their nominal membership will be roughly equal to their factual membership. Their membership will come, in the first wave, from the economically lower classes of the society, because the strict church imposes costs that are too high for persons with better career and life opportunities.

This theoretical insight corresponds to empirical data on socioeconomic rankings across religions in the USA. Measured by the median household income in 2000, members of strict churches like Jehovah's Witnesses, Seventh Day Adventists, Pentecostals and Assemblies of God are at the very bottom or low-bottom, with only Mormons being just below the threshold for the middle class (40,000\$ in 2000 against 42,000\$ US average). However, Evangelicals and Born Again are almost at the very top with median household income of

⁷⁶ Richard Posner, *Economic Analysis of Law*, p. 744.

54,000\$ in 2000. Catholics, members of traditional Protestant denominations like Baptists and Methodists, as well as Jewish, rank highest in this ladder⁷⁷.

Figures are similar for employment ranking⁷⁸ and even more sharply divided for educational ranking, with Jehovah's Witnesses, Seventh Day Adventists, Pentecostals and Assemblies of God again at the very bottom or low-bottom and way below US average, and only Evangelicals and Born Again well above the US average. In contrast, Catholics, traditional Protestant denominations, Hindu and Jewish are well above the average⁷⁹.

However, as the strict churchgoers are devoted to *both* belief and action (they already incurred high costs for their membership in the church), they will be more likely to organize, as it was already mentioned, socially beneficial activities for their members (welfare, education, etc.) as well as to reach out to the general public. Any lack of funding they experience will be ameliorated by the resources they gain in human capital and devotion. Social outreach of the strict churches will, in the long run, prove itself to be appealing to at least some of the former liberal denominations' members and financiers, as the general level of social morality declines and the more liberal older denominations follow it by reducing their own moral standards and teachings. Henceforth, in the long run, and depending on general economic development, religious vitality, in terms of membership, favors strict churches and disfavors more liberal and older churches and denominations, as I tried to document in the preceding chapters⁸⁰.

An instructive example of how strict churches and their leadership are more likely to take advantage of the deregulation is the advent of televangelists in the USA. Ever since 1970, the 'religious media' remains firmly in their hands with, we now know, consequences for political life and the resulting ascendance of social conservatism, to the dismay of many liberal

⁷⁷ Kosmin and Keysar, p. 157, Figure 9.4.

⁷⁸ Id., p. 155, Figure 9.3.

⁷⁹ Id., p. 153, Figure 9.1.

Americans and to the detriment of membership in older, liberal denominations. The reason behind the rise of televangelists was the Communications Act of 1934 which, in effect, gave monopoly rights to Federal Communications Commission over granting broadcasting licenses. Broadcasters had to submit to FCC regulations, which required of them to devote parts of broadcasting time to ‘public service’ free of charge. FCC guidelines defining ‘public service’ stipulated religion as one of the suggested categories. In order to avoid, as Iannacone, Finke and Stark argue, high costs of producing such programs by themselves, broadcasters turned to the Federal Council of Churches, association of traditional, more liberal and wealthier Protestant denominations who divided the broadcasting time between themselves⁸¹.

The Federal Council of Churches was successful for a long time in keeping more conservative (fundamentalist and evangelical) denominations off the airwaves. In the meantime, during the 1930s and 40s, conservative denominations had no option but to buy airtime at local stations, paying with money collected through listener solicitation⁸². In 1944, conservative denominations formed National Religious Broadcasters association in order to lobby Congress, the FCC, and the National Association of Broadcasters. In 1960, as a result of lobbying efforts, the FCC changed its policy and held that it would no longer distinguish between free and paid religious programming for the purposes of satisfying ‘public service’ requirement when renewing broadcasters licenses.

As a result of this change, ‘public service’ became commercialized and the free religious broadcasts completely disappeared by the late 1980s, their place soon taken by the Fundamentalist and Pentecostal preachers like Jerry Falwell, Pat Robertson and alike, who had already built a solid economic base for investment in religious broadcasting⁸³.

⁸⁰For more detailed discussion see Laurence R. Iannacone, “Sacrifice and Stigma: Reducing Free Riding in Cults, Communes, and Other Collectives,” *Journal of Political Economy*, vol. 100 (1992), p. 271-291.

⁸¹ Iannacone, Finke and Stark (1997), p. 359. The authors argue that the Federal Council of Churches was ‘cartel-like’ association and that their behavior in the market possessed all traits usually associated with the economic behavior of cartels, see id.

⁸² Id., p. 360.

⁸³ Id.

For reasons similar to those discussed above, government decisions that might be perceived as anti-religious or “blasphemy” (such as legalizing prostitution or same-sex marriage) under conditions of religious vitality hurts liberal churches more, and increases the membership and zeal of the strict churches, including their lobbying efforts. One can expect, in the long run, that increased membership and influence of strict churches that are consistently perceiving a government (depending on number of governments moral decisions) as their adversary will try, in different ways, to gain influence on it – though, ironically, their adversary is also their best friend, allowing for the steady and growing inflow of a private funding and human capital.

An argument with logic that is similar in some respects is advanced by Anderson and Tollison, but with a different focus, namely consequences of increased religious vitality on individual and social morals. While Anderson and Tollison agree that religious vitality might as well be favoring individuals with laxer moral standards, they stop short of conclusion that it may also favor rise of strict churches. They conceive that, assuming both churchgoers and clergy are members of the Homo Oeconomicus species, religious institutions in a competitive market will have greater incentive to lower prices on consumer products (i.e, by requesting less moral and material sacrifice from believers) and religious persons will choose those religions that do not deviate significantly from their already existing preferences, formed in the general economic marketplace and a marketplace of ideas with already significantly lowered moral standards⁸⁴.

Anderson and Tollison’s argument starts from an intuitive insight into constitutional economics: not only religious vitality but also public morals and public norms are a common good that functions as a tool of reducing transaction costs by means of the individual internalization of social moral norms. Historically, they assert, religion was the main producer

⁸⁴ Garry Anderson and Robert D. Tollison, “Morality and Monopoly: The Constitutional Political Economy of Religious Rules”, *Cato Journal*, Vol.12, No. 2 (Fall 1992): p. 373-392. Available at

of both social and individual moral goods. Hence, for example, in a society with lax morals we can expect that a state will need to invest heavily in a system of, for instance, contract enforcement, since business reputation, as an external sign of adhering to internalized social norms, does not function as a sufficient deterrent for breaking norms.

In a competitive religious marketplace, according to this argument, moral goods tend to be underprovided. From the viewpoint of competing religious sects, religiosity as a form of morality – the willingness of consumers to actually pay for the religious products consumed – represents a problem of commons; there is a danger of overgrazing of common moral and religious goods. Monopoly religion, on the other hand, has a tendency to oversupply, in the short run, economically inefficient moral rules. However, in the long run, the monopoly church (or several of them in case of duopoly or oligopoly) has a longer expected time span and therefore more incentive to provide economically efficient moral rules across time – its survival and well-being depend on the well-being of the society at large. Religious sects in a competitive market, facing uncertain existence in the long run as a result of competition, do not have such an incentive as they are coerced to produce more individually appealing (usually laxer) moral rules, without taking into consideration the long term social costs and benefits. Hence, state transaction costs of enforcing rules in religiously competitive society will tend to be higher as a result of under-production of moral goods and a corresponding decrease in internalization.⁸⁵ Less morality, more lawyers.

1.4.3 Problem of the regulation of externalities and a cost-benefit analysis

Regulation of religious externalities suffers from an ambivalence problem. As many other activities, religious behavior, individual or collective, produces both positive and negative externalities, that is, it has either positive or negative effects on the environment without other persons consenting to those effects. Positive externalities usually do not pose a

www.cato.org/pubs/journal/cj12n2/cj12n2-5.pdf

⁸⁵ Id.

problem, unless there is a strict separation of church and state, as in the case of the US where the state is not always allowed to motivate or fund the production of positive externalities. Negative externalities, from an economic point of view, justify government intervention in order to reduce social damages. The special problem of negative externalities in the case of religion is the following: what is negative from the point of view of a legal system might well be a crucial part of religious activity (as the freedom of internal belief or freedom of mind is usually totally protected.) In this case, we have two competing claims, one made by legal system, and the other by religion, assuming, obviously, that the legal system guarantees religious freedom – otherwise the question will not arise. The dispute may be resolved using cost-benefit analysis. Three questions are crucial: who bears the costs of religious behavior; what kinds of benefits are involved; and what are the aggregate social consequences of allowing such behavior.

But there are limits to cost-benefit application in resolving disputes involving religion and perhaps all other moral issues. From a point of view of cost-benefit analysis, on the one hand, it would be advisable to fully oppress minority religions, as the costs of doing so is less than the cost of accommodation. Strict cost-benefit analysis, in other words, would consider establishment of majority religion or suppression of minority religions as utility – maximizing from the point of view of the majority⁸⁶.

There is, however, another special problem: situations where religion and the state compete in a production of purely secular goods, i.e., secular education. The problems cuts two ways. If the state withdraws all funding from denominational schools even though they produce education with secular-transferable skills, in the long run, aggregate social benefit will be lower since some persons will be less educated than others, and the state has vested interest in education of all its citizens in useful everyday skills, irrespective of religion. On the other hand, if the state decides to provide funding for all schools irrespective of religious affiliation

it may end up subsidizing religion –how can one determine whether the money given by the state will be used for purely secular purposes without large amounts of policing and high administrative costs?

As McConnell and Posner argue, in economic terms, the problem is one of joint costs: distinguishing the allocation of sources⁸⁷. To take again the same example, one would want to be able to decide if funding provided by the state for secular education on the premises of sectarian schools (pure religious or theological education would be excluded in this analysis) will be used exactly for those purposes without inhibiting or advancing religion (leaving the religious market undisturbed in order to achieve the outcome of perfect competition.) McConnell and Posner suggest the use of Ramsey pricing as a tool for deciding cases with allocation of costs problem under the Establishment Clause.⁸⁸ Ramsey pricing requires pricing each output inversely to the elasticity of demand for it. However, the problem is one of quantification: again, for the example of secular v. religious education and their combination, such quantification, as authors recognize, has never been attempted and it would be highly problematic.⁸⁹ Obviously, the institutional and legal structure and the values underlying it will determine government attitude towards both positive and negative externalities, as well as the methods of regulation, and we shall see below how those problems haven been tackled in the United States and Germany.

⁸⁶ McConnell and Posner, p. 5.

⁸⁷ Id., p. 23.

⁸⁸ Id., p. 23.

⁸⁹ Id., p. 22 - 24.

2. Legal regulation of religion in the United States and Germany

2.1 Regulation of religion in the United States

2.1.1 Constitutional framework

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The economical aspect of this rule is obvious: no monopoly in the market place of religion, and no taxation of religion. Hence, the First Amendment, generally speaking, functions as a deregulatory mechanism of the religious market.

The text of the Amendment is, however, open ended, and allows for many different interpretations. It does not say, for example, that there shall be no state church (though that is one meaning.) It refers to "respecting the establishment of religion." What "respecting" means can be analyzed from many different perspectives. The same is true for the free exercise clause. It was never assumed that "prohibiting the free exercise thereof" meant that the state is not allowed to regulate or prohibit any kind of religious behavior – if that was so, the state's existence would be jeopardized. Contemporary approaches to this taken by the US Supreme Court will be analyzed further below. We shall first look into the legal status of religious institutions.

2.1.2 Legal status of religious institutions

By and large, religious institutions in the US are registered as not-for-profit organizations or charities. Administrative costs for setting up such an organization, according to Edward McGlynn Gaffney, Jr., are very small⁹⁰. The major benefit enjoyed by churches, alongside other not-for-profit organizations like universities and hospitals, is eligibility for various tax exemptions. Section 501(c)(3) of the Internal Revenue Code (IRC) provides exemption from payment of federal income taxes, provided that churches satisfy two kinds of

⁹⁰ Id.

prerequisites: the organizational and the operational tests.⁹¹ The organizational test is a written document stating that the organization applying for not-for-profit status will engage only in charitable activities, and all other unrelated business activities (profit-making) will be taxed in accordance with relevant tax laws⁹². However, two kind of activities are expressly prohibited to religious institutions (1) devoting more than an insubstantial part of its activities to lobbying or attempting to influence legislation; and (2) any kind of electioneering, i.e., participating (including the publication or distribution of statements) in any political campaign on behalf of, or in opposition to, any candidate for public office⁹³. This does not mean, though, that individual clergy members cannot publicly express political views, as that would be an impediment of the freedom of speech. In addition, churches are allowed to engage in “go vote” advocacy.

The second requirement, the operational test, is more of a practical requirement, during which the state checks whether the church being set up has an internal organization (employed persons, property or leased premises, etc.) sufficient for everyday operations, so to prevent the potentially treacherous foundation of ‘paper-only’ churches. However, the state is not allowed to judge the way in which the church is organized internally, even when the internal organization contradicts federal non-discriminatory laws, as hurting church autonomy has mostly been perceived by the Courts as a breach of the free exercise clause.⁹⁴

⁹¹ Edward McGlynn Gaffney, Jr., “Religious Autonomy and the Exemption of Religious Organizations from Federal Taxation in the United States.” Paper presented on the Congress on Religious Autonomy at the University of Trier, May 27-30, 1999. Available at www.uni-trier.de/~ievr/konferenz/papers/gaffney.pdf (downloaded 22.03.2007, 9:45). On different alternatives for registering religious organizations under US law see further Gaffney ‘Regulation of Religious Bodies’, ‘Exemption of Religious Organizations from Federal Taxation’ and ‘Exemption of Religious Communities from State and Local Taxation’ in James A. Serritella et al., *Religious Organizations in the United States: A Study of Identity, Liberty, and the Law* (Carolina Academic Press, 2006), p. 405-408, p. 409 – 458 and p. 459 – 514, respectively. For the federal regulation of the taxation of churches, see generally applicable Internal Revenue Code provisions at <http://www.irs.gov/charities/churches/index.html> (last viewed 08.10.2007).

⁹²Gaffney, Jr., “Religious Autonomy and the Exemption of Religious Organizations from Federal Taxation in the United States .”, p. 29.

⁹³ Id.

⁹⁴Id., p. 32-33. See, i.e., *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). For a full list of federal tax exemptions for churches, see <http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html> (last viewed 08.10.2007).

Churches may also exempt themselves, under certain conditions, from the federal social security taxes and federal unemployment taxes.⁹⁵ Evoking religious beliefs and/or church autonomy arguments, churches and the institutions they operate (universities, hospitals and so on) may also engage in race- and gender-based discrimination, and hence are shielded from generally applicable federal anti-discriminatory laws⁹⁶.

All the privileges that churches enjoy under current laws might be reasonably construed, from an economic point of view, as an indirect subsidization of religion. Though no public funding is directly given to religious institutions, exemptions from generally applicable laws place them in an economically superior position relative to other competitors in a general market. However, within the niche of the religious market, as all players enjoy subsidies, the treatment is even. The constitutional problem of whether providing exemptions to religious institutions is, in effect, an establishment of religion was resolved in *Walz v. Tax Commission of the City of New York*⁹⁷. The Court held that the property tax exemption for churches, as long as it is available to all not-for-profit organizations and not solely religious ones, does not violate the establishment clause. Moreover, the Court found that such practice was part of the established historical legacy of the United States⁹⁸.

Similar to the rather privileged status that churches enjoy, consumers of the religious products also have privileges if they decide to donate money. All donations to not-for-profit organizations are tax deductible, and indeed the amount of money that religious institutions receive yearly is astonishing. Throughout last few decades years, charitable contributions and donations to religious organizations consistently rank as the second or third most popular method of philanthropy, and in 2004 charitable contributions to religious organizations were

⁹⁵ Gaffney, Jr, "Religious Autonomy and the Exemption of Religious Organizations from Federal Taxation in the United States, p. 32-37.

⁹⁶ *Id.*, p.45-48. See, i.e., case *Bob Jones University v. United States* 461 U.S. 574 (1983), allowing racial discrimination against African-American students on premises on church-owned university on account of religious beliefs, but upholding the IRS decision to withhold tax exemption for university on account of public policy of no-support for racial discrimination.

⁹⁷ 397 U.S. 664,(1970).

the largest single share of all contribution with more than \$88 billion dollars, with education second at \$34 billion, according to a report by the Indiana Center on Philanthropy for the Giving USA foundation⁹⁹. Bearing in mind the scarcity of public funding for their activities, it is understandable that churches have to engage in constant fund-raising activities and need to be very ‘entrepreneurially oriented’ if they hope to continue to exist and flourish. To conclude, churches have many privileges, as well as incentives to engage in religious fundraising. The risk is high, however, as the continuity of private funding is always uncertain. On the other hand, believers and non-believers alike are provided with the incentive to donate.

2.1.3 Establishment clause jurisprudence

First Amendment establishment jurisprudence of the US Supreme Court is undoubtedly confusing and hard to follow. Using any analytical tool to explain fully the winding road that establishment clause jurisprudence has traveled, especially in recent years, is likely to end in disappointment. Moreover, the caseload is burdensome and it would require a study much more voluminous than this one in order to reach at least reasonably applicable conclusions.

However, there is a more elegant way to analyze establishment clause jurisprudence, namely by focusing on tests the US Supreme Court applies in these cases. By analyzing them, one may indeed come up with a conclusion that, at least on a intuitive level, the Court is well aware of the cost-benefit analysis techniques, claims of the rational choice theory of religion, as well as the NIE (though I would not dare to say that this is an academically developed *Weltanschauung*).

According to Kaplin, the following establishment clause tests are used by the US Supreme Court: the Lemon test, the endorsement test, the coercion test, the denominational preference test, the original history test and a test of ceremonial deism¹⁰⁰.

⁹⁸ Id., p.2.

⁹⁹ As cited in Kosmin and Keysar, p. 8.

¹⁰⁰ William A. Kaplin, *American Constitutional Law: An Overview, Analysis and Integration*. (Carolina Academic Press: Durham, North Carolina, 2004), p. 395-400.

The Lemon test., developed in case *Lemon v. Kurtzman*¹⁰¹ has been the most-used establishment clause test since 1971. It provides that each government action that hopes to pass establishment clause muster must satisfy a three pronged test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances, nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion’¹⁰².”

Though the Lemon test has been interpreted differently at different times, economic analysis of its content reveals clear deregulatory logic in the following way. Secular legislative purpose and a primary effect of neither advancing or inhibiting religions mean that government can not cherry-pick to legislate issues which are of a purely religious nature, nor can it either promote (subsidize) or inhibit (impose taxes) on religion directly, intentionally, or to a large extent. We may set aside problems of generally applicable laws with secular purpose that burden religion, as that is an issue of free exercise. The third prong, an excessive entanglement, means in economic terms that not every kind of cooperation with religion is prohibited, only such cooperation that does not impose high transaction costs or high ‘shadow prices’ on non-adherents.

Endorsement, or endorsement-and-disapproval test is a derivative of Lemon test, also called ‘Lemon with a twist.’ It is used to determine whether certain governmental- or state-funded practice violates an establishment clause in a way that such “endorsement sends a message to non-adherents that they are outsiders, not full members of the political community...” while “disapproval sends the opposite message¹⁰³”. Whether a governmental practice is an endorsement or disapproval of religion is to be judged from a viewpoint of “the reasonable observer.”¹⁰⁴,

¹⁰¹ 403 U.S. 602 (1971).

¹⁰² *Lemon* at 612-613.

¹⁰³ *Lynch v. Donnelly*, 465 U.S. 668 (1984) at 687-695.

¹⁰⁴ *Id.*

In economic terms, the question that the court resolves is, again, whether there is either symbolic or material subsidization or taxation of religion, and whether the outcome should be neutral. Again, it is a deregulatory approach to the religious market, with a strict ‘hands off’ policy. However, as the standard is based on “a reasonable observer”, the outcome is also in congruence with what NIE considers evolution of the first level norms (social mores, customs, etc.) that adversely affect social perceptions (‘the reasonable observer.’) Hence, as long as a certain custom, though it has religious roots, has been practiced for a longer period of time and lost its distinct religious ‘aura’ and, therefore, has been embraced by the society via ‘cultural learning,’ that practice is immune from the First Amendment constitutional challenge. This was the outcome of the *Linch* case, as the Court upheld the inclusion of a crèche in city’s Christmas display.

The third type of establishment clause test is the coercion test, developed in *Lee v. Weisman* 505 U.S. 577 (1992.) It applies in a very limited number of cases where state-sponsored activity, regardless of whether voluntary or not, or whether one can excuse himself from the activity, may be interpreted as either psychological (i.e. peer student pressure) or physical coercion to engage in a ritual that has religious meaning. As this test is rarely used, it will suffice here to say that, from an economic point of view, it is a clear anti-monopoly measure. Similar to the effect of the coercion test is the effect of the denominational preference test in *Larson v. Valente* 456 U.S. 228 (1982). The denominational preference forbids the government to create, either in intent or in effect, a preferential status for one religion over another, unless there is a compelling government interest under the strict scrutiny standards. And in the *Larson* case, the Court found that state legislation prohibiting religious solicitation activities on the public streets targeted not members of all religions, but only members of non-traditional religions. Creating preferential treatment was clear, both in effect, and from

legislative history¹⁰⁵. In other words, ‘equal misery’ is allowed, and regulation incapacitating all religions equally (irrespective of their actual strength) is permissible.

The three tests described above act as an anti-monopoly, non-interventionist policies in respect to the religious market. Two other tests, the original history and ceremonial deism tests, are different in the sense that they are used to analyze common state-funded practices that do contain religious references (usually to God), but the Court will consider that such references do not have a tendency to establish religion in effect. These tests, then, are congruent with NIE claims of institutional inculcation of social mores and customs, even though the roots of those customs are religious. However, as the tradition of non-establishment is also part of American history, alongside diversified religious beliefs held by the majority, one might say that Lemon, coercion, and denominational preference tests are also inculcated in to the social consciousness. Two somewhat opposing traditions live side by side.

Judicial opinions explaining the roots of the original history and ceremonial deism tests manage describe this framework eloquently. In *Marsh v. Chambers*,¹⁰⁶ the Court found that the practice of having a state-employed chaplain lead prayers during the opening of the legislative sessions was established and practiced immediately after the enactment of the First Amendment and such a practice should not be deemed unconstitutional, as the Founders did not perceive it as an establishment of religion.

Justice Brennan explained this in the following way:

“We have noted that government cannot be completely prohibited from recognizing in its public actions the religious belief and practices of the American people as an aspect of our national history and culture.... While I remain uncertain about these questions, I would suggest that such practices as the designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance can be understood... as form of “ceremonial deism,” protected from the Establishment Clause

¹⁰⁵ Id., p. 398.

¹⁰⁶ 463 U.S. 783 (1983).

scrutiny chiefly because they have lost through rote repetition any significant religious content.¹⁰⁷,”

Ceremonial deism is further explained by following remarks from *Zorach v. Clauson* stating “We are religious people whose institutions presuppose a Supreme Being,¹⁰⁸” and in *School District Abington Township v. Schempp*: “...a vast portion of our people believe in and worship God...many of our legal, political and personal values derive historically from religious teachings....¹⁰⁹” The conclusion of all cited opinions is that such practices, through repetition, have lost their religious meanings and amount only to patriotic ceremonialism.

A specific problem for the Court is posed, as noted above, by the question of whether regulating government subsidies for the activities of religious organizations leads to secular outcomes. As noted above, in several areas, religion competes with government in providing purely secular services for their adherents, as well as to non-adherents. Until recently, the problem usually arose in the context of government funding for education. Again, the problem cuts two ways: if a government provides additional funding for, i.e., remedial classes for first grade students, but narrows the scope of funding only to secular schools, this is, in fact, taxation of religion by means of subsidizing competition, and the students in religious schools are being disadvantaged. On the other hand, if government provides unselective help for both religious and secular schools, this runs against establishment clause, as it is spending public money for the purpose of advancing religion (failing the second prong of the Lemon test.) In addition, as it was argued above, religious groups, by means of lowering and internalizing transaction costs, frequently provide educational services with better quality and with lower costs than the state can, and any public subsidy would provide incentives for non-adherents to attend denominational schools.

Economically, as noted above, providing the subsidies for secular parts of educational

¹⁰⁷ *Marsh* at p. 811, internal citations omitted.

¹⁰⁸ 343 U.S. 306 (1952).

¹⁰⁹ 374 U.S. 203 (1963).

program in religious schools poses a problem of joint costs – one can not really discern which part of the subsidy went purely for the secular purpose of advancing general education (which is permissible), and which part was spent on advancing religion.¹¹⁰ The administrative costs of overseeing such endeavors are overwhelming and lead to an “excessive entanglement of state and religion” (the third Lemon prong.) When economic theory with its precepts (i.e. Ramsey pricing) meets, McConnell and Posner argue,:

“constitutional theory [which] demands that the joint costs of parochial education be allocated as to ensure that tax money is not used for the religious component, it is no wonder that the decisions seem arbitrary¹¹¹ ... in favor of school lunches, state prepared standardized tests, on-premises diagnostic services, off-premises therapeutic services, and off-premises remedial education; against bus rides on field trips, maps, films, laboratory equipment and other instructional materials, teacher-prepared tests, on-premises therapeutic and remedial services, and maintenance and repair of school buildings¹¹².”

The Gordian knot still stands and its unlikely that it will be resolved in a foreseeable future.

2.1.4 Free exercise jurisprudence

The free exercise clause, generally speaking, forbids a government to impose costs on the exercise of both religious belief and practice. Burdening religious belief is virtually always unconstitutional.¹¹³ Imposing costs on religious practice is, however, an entirely different and more complicated matter. The logic behind government regulation in this case is clear: if all religious practices are to be tolerated because they are religious, it would be virtually impossible under conditions of religious vitality to sustain public order, let alone achieve any other goals, as everyone would be a law unto themselves. In other words, government claims

¹¹⁰ Richard Posner, *Economic Analysis of Law*, p. 744.

¹¹¹ McConnell and Posner, p. 20.

¹¹² List of cases is too long to be cited here, but see *id.*, p. 26, n. 48, citing John Garvey, “Another Way of Looking at School Aid,” 1985 *S. Ct. Rev.* 61. Also see Michael W. McConnell, “Political and Religious Disestablishment,” 1986 *BYU. L. Rev.* 405.

to have a compelling interest to curb certain religious practices on behalf of the majority in order to maintain a viable society, even though such practices may be economically efficient, as in the case of prohibiting polygamy (*Reynolds v. United States*¹¹⁴) and upholding Sunday closing laws against the establishment clause challenge in *McGowan v. Maryland*,¹¹⁵ even though Sunday as a day of rest was chosen for religious reasons.

Other things being equal, when governmental regulation is directed towards only a certain religion or certain religious groups, such a regulation is likely to be unconstitutional, unless the challenged law is generally applicable or neutral. This was the case in *Church of Lukumi Babalu Aye v. City of Hialeah*¹¹⁶, where the Court struck down a city ordinance prohibiting slaughtering of animals. Though the ordinance was facially neutral, the Court found that the effects of the ordinance were not neutral, since it impermissibly targeted members of Santeria religion, for whom ritual animal sacrifice is an important part of religious ritual. Hence, no taxation of specific religions is allowed, unless the burdens are shared equally by all religions, irrespective of their actual strength.

This kind of regulation allows, however, for social engineering, for the following reasons. In many cases, one can easily imagine drafting both facially and in effect generally applicable and neutral laws that would impose disproportionate costs on members of minority or non-traditional religions. In most cases, minority and non-traditional religions are not sufficiently represented in the legislative assemblies, nor do they form, by definition, a significant voting constituency. Consequently, legislators do not have many incentives to pay attention to their needs. The last resort in those cases is likely to be the Court itself, and the amount of litigation will depend on the litigation costs and the likelihood of winning cases. On

¹¹³ See, i.e., *Torcaso v. Watkins* 367 U.S. 488 (1961), where the Court found that Maryland constitutional provision requiring state officials to declare belief in God is unconstitutional since it constitutes a coercion of mind.

¹¹⁴ 98 U.S. 145 (1879).

¹¹⁵ 366 U.S. 420 (1961).

¹¹⁶ 508 U.S. 520 (1993).

an aggregate level, the majority religions and the denominations with more relaxed moral and material demands are likely to be winners under these conditions.

As a result of damage they feel was inflicted on them as a result of the generally applicable and neutral laws, strict churches with low membership, minority and non-traditional religions have two choices: opting for non-taxable substitutes and providing their adherents with greater membership benefit in order to reduce costs imposed by the legislation, which, in effect, closes them within their own communities and consequently builds virtual ghettos; *or* lobbying for legislative change by means of creating alliances with the majority religions or with influential social and political groups. The first alternative means opening large numbers of hospitals, universities and schools or providing large amounts of welfare service in order to keep the membership; or, in case that alternative is not available for any reason, making ‘unlikely friends’ – alliances of religious groups and political interests and majority religions whose beliefs are completely opposite, if not hostile to their own.

There is, however, a certain loose economic pattern in some of the most important cases where the Court granted exemption from generally applicable laws. The Court was, consistent with the cost-benefit analysis, careful to achieve at least several of the following aims. First, the exemption must not provide high incentives for others to claim adherence to religion in order to rip off benefits by means of free-riding or, alternatively, it must not provide incentive to anybody to relinquish their religious beliefs. Secondly, the costs of exemption must be to a large extent internalized by those claiming it, as no high burdens can be imposed on the rest of the society. Thirdly, on aggregate, social consequences of the exemption need to be kept reasonably low in comparison with benefits.

Cases like *Sherbert v. Verner*,¹¹⁷ *Wisconsin v. Yoder*,¹¹⁸ and *United States v. Lee*¹¹⁹ seem to embrace these standards. In *Sherbert*, the Court developed a strict scrutiny test, demanding proof that the challenged regulation was driven by the compelling government interest and that no alternative forms of regulation were available.¹²⁰ Consequently, the Court struck down a government decision to deny unemployment benefits to Ms. Sherbert as a result of her refusal to work on Saturday, her Sabbath day. Hence, Ms. Sherbert was provided with the incentive to relinquish her religious beliefs. In *Yoder*, the Court upheld exemption from compulsory school attendance for Amish children. On the other hand, in *Lee*, the Court rejected Amish employers' request for exemption from Social Security Taxes on account of their religious beliefs.

In *Sherbert* and *Yoder*, both Ms. Sherbert and the Amish parents were provided with incentives for relinquishing their religious beliefs (through work in *Sherbert*, education in *Yoder*.) Neither exemption, however, provided high incentives for joining the religion - moral and material sacrifices that both Seven Day Adventists and the Amish religion require from believers are significantly higher than the benefits gained, hence the likelihood of high numbers of persons joining each religion is small. In *Yoder*, the Court noted that the skills that Amish children learn within their communities are sufficiently useful for them to be productive members of the society. In both cases, the likelihood of grave social consequences at large is very low; it is unlikely that the majority of individuals will claim that their religion requires them not to send their children to school or not to work on Saturday, given that the incentives for doing otherwise are higher.

In *Lee*, however, the outcome is different. Social Security Taxes are one of the major sources of state funding. Allowing exception, on aggregate, could threaten to diminish state

¹¹⁷ 374 U.S. 398 (1963). For a similar and more detailed analysis of the cost-benefit as a criterion behind Courts free exercise jurisprudence, see McConnell and Posner, p.33 and seq.

¹¹⁸ 406 U.S. 205 (1972).

¹¹⁹ 455 U.S. 252 (1982).

resources significantly and would require either the state or the Court to investigate each and every religious belief in order to find out whether the religion in question is actually prohibiting payment of taxes, which would cause both high administrative costs and possibly high litigation costs, given religious pluralism. In addition, the diminishing of state resources as a result of religious exemptions would require imposing higher costs on non-exempted ones; the burdens would be disproportionate without economic justification.

The strict scrutiny standard developed in *Sherbert* in order to establish whether generally applicable law burdens free exercise was limited and almost relinquished (but not overruled,) in *Employment Division v. Smith*¹²¹ There, two members of a Native American Church were fired from their positions as counselors in drug treatment programs because of ingesting the hallucinogenic drug peyote during a religious ceremony, which is considered to be a vital part of the ritual. The Court upheld the decision, and this seems to be consistent with the economic model I have described above. Free ingestion of peyote can be a very desirable incentive for joining a religion; on aggregate, social costs of drug use are high; it is not possible to investigate which members of church are true believers without high costs; and in either case, state can not prohibit anybody from joining any religion without seriously violating the First Amendment.

The problem with *Smith* is that the Court concluded *Sherbert* strict scrutiny standard applies only in cases when laws are *not* generally applicable and neutral. In all other cases, said Justice Scalia for the Court, only rational basis standard applies. The reason for this is, according to Justice Scalia, that enforcement of law “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.”¹²² Different

¹²⁰ Kaplin, p. 402.

¹²¹ 494 U.S. 872 (1990).

¹²² *Smith* at 885.

outcomes, Justice Scalia opines, would allow for each individual to become “a law unto himself.”¹²³,

The *Smith* decision seems to close the door of the Court’s protection to non-traditional religious practices and transfers it to legislative and political process. The Court recognized that this result might “place at a relative disadvantage those religious practices that are not widely engaged in” but that is an “unavoidable consequence of the democratic government that must be preferred to a system in which each conscience is a law unto itself or in which judges weight the social importance of all laws against the centrality of all religious beliefs.”¹²⁴,

2.2 Germany: cooperationism and the de facto monopoly

2.2.1 Constitutional arrangements

Textually, German *Grundgesetz* (Basic Law – hereafter GG) is unequivocal on religious freedoms and the prohibition of establishing a state church, unlike the textually open provisions of the First Amendment. Protection of freedom of belief is extended, in comparison to the First Amendment, as Article 4 (1) GG protects not only freedom of belief, but also freedom of conscience, freedom of religion and philosophy, and the right to freely practice one’s religion without interference (Art. 4 (2) GG). However, though textually unbounded, as Eberle argues,

”...these protections may only be limited by values of a constitutional dimension, such as human dignity, the ultimate value of the German social order or the fundamental rights of other people. Such an absolute guarantee of basic rights is exceptional. Most German rights are stated with express textual reservation in keeping with the European tradition that rights are to be exercised within the parameters of a social community.”¹²⁵,

The German constitutional text and its practical application mean that an order based on it will be communitarian in essence and certainly not value free.

¹²³ Id.

¹²⁴ *Smith* at 890.

¹²⁵ Edward J. Eberle, “Free Exercise of Religion in Germany and the United States.” 78 *Tulsa L. Rev* 1023 (2004), p. 7. Available at <http://ssrn.com/abstract=837724> (downloaded 25.03.2007, 13:45).

The vast majority of schools are governed and funded by the state, nevertheless, the issue of religious education in the schools is far less contentious than in the US, as the Art. 7 (3) GG specifies that “Notwithstanding the State’s right of supervision, religious education will be given in accordance with the principles of the religious denominations.”

Prohibition of establishment of the state church and the special status of religious institutions as “corporations under public law” with guaranteed autonomy and self-governance is achieved via Article 140 GG, which incorporates into the GG the relevant articles of the Weimarer Reichsverfassung (hereafter WR) 136, 137, 138, 139 and 141¹²⁶.

Of course, these constitutional provisions favor those churches already historically present in Germany, the Catholic Church and the Evangelical Church (which shall be treated here as one church, living aside its rather peculiar organization,) and the de facto establishment is achieved via right of churches to levy taxes on their members using state machinery. In addition, the par. 5 of the Art. 137 of the WR serves as an administrative obstacle to the entrance of new religions into the religious market, since one of the requirements is that “their constitution and the number of their members offer a guarantee of permanency.” It is as if a

¹²⁶ “Article 140 GG: “The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919, are an integral part of this Basic Law.”

Article 137 WRV:

(1) There is no state church.

(2) Freedom of association is guaranteed to religious bodies. There are no restrictions as to the union of religious bodies within the territory of the Federation.

(3) Each religious body regulates and administers its affairs independently within the limits of general laws. It appoints its officials without the cooperation of the Land, or of the civil community.

(4) Religious bodies acquire legal rights in accordance with the general regulations of the civil code.

(5) Religious bodies remain corporations with public rights in so far as they have been so up to the present.

Equal rights shall be granted to other religious bodies upon application, if their constitution and the number of their members offer a guarantee of permanency.

When several such religious bodies holding public rights combine to form one union this union becomes a corporation of a similar class.

(6) Religious bodies forming corporations with public rights are entitled to levy taxes on the basis of the civil tax rolls, in accordance with the provisions of Land law.

(7) Associations adopting as their work the common encouragement of a world-philosophy shall be placed upon an equal footing with religious bodies.

(8) So far as the execution of these provisions may require further regulation, this is the duty of the Land legislature”

in Lasia Bloß, “European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process.” *Jean Monnet Working Paper* 13/03 (2003), p. 37. Available at <http://www.jeanmonnetprogram.org/papers/03/031301.html> (downloaded 24.02.2007, 16:15).

firm would be required to have consumers before ever entering the market, hence, in effect, new religious practices will emerge only if the sufficient number of domestic population embrace it. Missionaries of other religions are, in principle, allowed to spread their religious beliefs, but, as it will be shown in some detail further below, they face severe administrative obstacles and they have to compete with the de facto state-backed monopoly of established churches.

2.2.2 Corporations under public law and church taxes

Religious institutions recognized by the state as “corporations under public law” qualify for a great number of statutory privileges. Self-governance and the autonomy of churches are highly protected, and exemptions from applications of general laws (i.e. discriminatory practices on a basis of gender) are allowed.¹²⁷ Church property is tax exempt and enjoys special state protection as a part of a national heritage.¹²⁸ Religious services provided by the clergy in military and hospital settings are also guaranteed¹²⁹. Faculties of theology, though nominally part of the state public higher education system, are also exempted from a number of the federal state’s general laws on higher education, and are, in effect, almost solely run by churches without much state intrusion¹³⁰

Similar to tax exemptions in the United States, corporations under public law qualify for, as Lassia Bloss says, “various tax concessions such as relief from corporate income tax (§ 9 *Körperschaftssteuergesetz*) and inheritance and gift taxes (§ 13 (1), No 16 and 17 *Erbschaftssteuergesetz*). The purposes that qualify an organization for tax privileges are set out in detail in §§ 51-68 of the German Fiscal Code (*Abgabenordnung*, AO).¹³¹,”

One of the main sources of funding of religious institutions is church tax (*Kirchensteuer*.) It is collected using the regular state tax system. The amount of tax is

¹²⁷ Alex von Freier Campenhausen, *Staatskirchenrecht* (C.H. Beck’sche, Munchen 1996), p. 346-347.

¹²⁸ Id., p. 310-319.

¹²⁹ Id., p. 229-237.

¹³⁰ Id., p. 248-254.

approximately 8-10% of individual yearly income and roughly 3-4% of collected church taxes are withheld by the state on account of administrative costs¹³². Though the nominal membership of Catholic Church and Protestant Churches in all federal states is not equal, both biggest churches receive approximately equal sums, i.e. in 2000 each church received circa 4 thousand million EURO each¹³³ and the churches are entirely free to decide how to spend that money.

Church tax is not obligatory and as the freedom of religion is guaranteed, everybody has an opportunity of opting-out by means of so called *Kirchenaustritt*, which is a simple statement of relinquishing the status of Church member, proven by means of presenting the legally validated certificate authorized by the state authorities in charge.¹³⁴ Judged by the amount of taxes churches are collecting, and having in mind the opt-out provisions which mean that this kind of tax is not a proper tax *stricto sensu*, it seems that the substantial part of population is not resentful towards paying church tax.

According to Deutsche Bischofskonferenz, only some 30% of Catholics pay church taxes¹³⁵. As of 2006, the amount of money the Catholic Church received trough this channel between 1991 and 2006 were following¹³⁶.

Table 4

¹³¹ Bloß, p. 41.

¹³² Bloß, p. 47.

¹³³ Id. and fn. 114.

¹³⁴ Id., p. 49.

¹³⁵ See statement of Deutsche Bischofskonferenz on church taxes at http://dbk.de/zahlen_fakten/kirchensteuer/index_en.html (last viewed 11.10.2007, 7:46 p.m.).

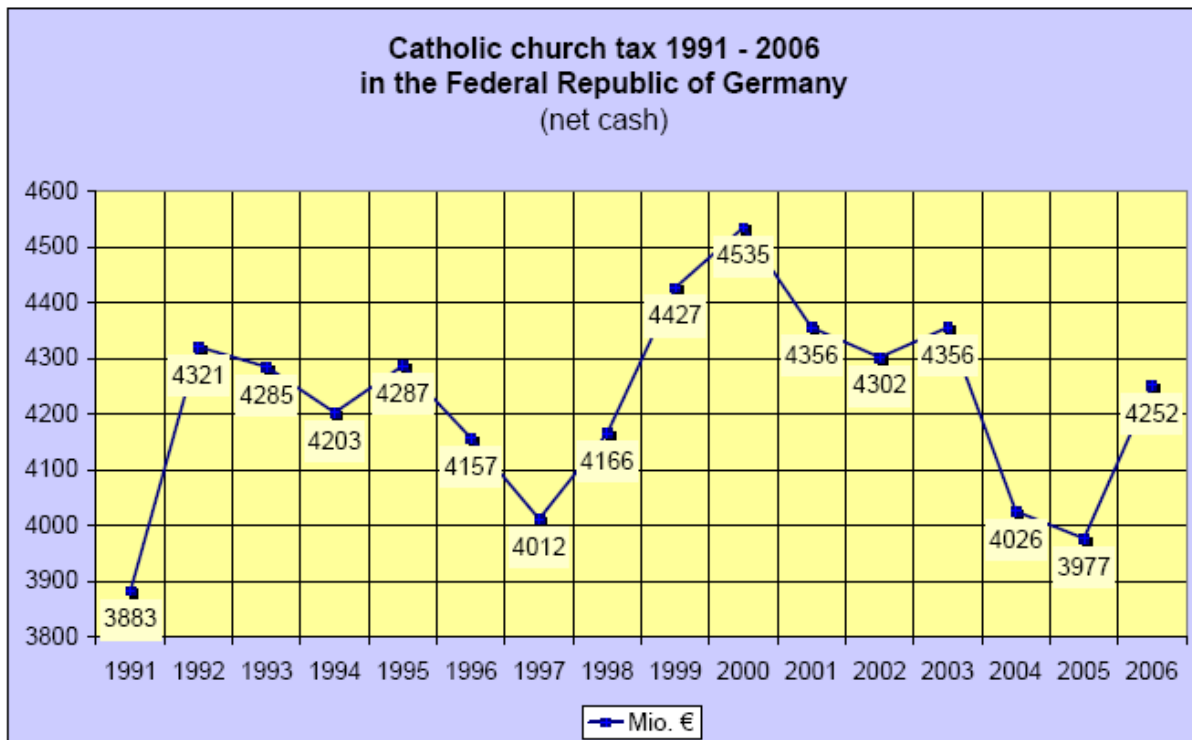
¹³⁶ See official statistics on church taxes of the Deutsche Bischofskonferenz available at http://dbk.de/imperia/md/content/kirchlichestatistik/kirchensteuer/kirchensteuer_1991_2006_engl.pdf (downloaded 12.10.2007, 11:35 a.m.).

Catholic church tax 1991 – 2006
in the Federal Republic of Germany
(net cash)

year	Catholic church tax		
	amount Mio. €	change over	
		previous year %	1991 %
1991	3,883	-	-
1992	4,321	11.3	11.3
1993	4,285	-0.8	10.4
1994	4,203	-1.9	8.3
1995	4,287	2.0	10.4
1996	4,157	-3.1	7.1
1997	4,012	-3.5	3.3
1998	4,166	3.8	7.3
1999	4,427	6.3	14.0
2000	4,535	2.5	16.8
2001	4,356	-3.9	12.2
2002	4,302	-1.2	10.8
2003	4,356	1.3	12.2
2004	4,026	-7.6	3.7
2005	3,977	-1.2	2.4
2006	4,252	6.9	9.5

Graphically, the same numbers look like this¹³⁷.

Figure 6



Figures for church taxes (first row) are similar in the case of the Evangelical Church¹³⁸.

¹³⁷ See official data on church taxes of the Deutsche Bischofskonferenz at http://dbk.de/imperia/md/content/kirchlichestatistik/kirchensteuer/diagramm_kirchensteuer1991_2006_engl.pdf (downloaded, 12.10.2007, 13:45).

¹³⁸ See official statistics of the Evangelical Church in Germany available at http://www.ekd.de/kirchensteuern_und_finanzen.pdf (downloaded on 13.10.2007, 17:23).

Figure 7

Einnahmen der Evangelischen Kirche in Deutschland und ihrer Gliedkirchen*		
Einnahmeart	Mio. EUR	Prozent
Kirchensteuer und Gemeindebeitrag	4 030	40,5
Darlehnsaufnahmen und Fördermittel für Bauunterhaltung und Investitionen; Erlöse aus Veräußerungen	1 558	15,7
Fördermittel und Zuschüsse von Dritten	1 781	17,9
Staatsleistungen	222	2,2
Entgelte für kirchliche Dienstleistungen, z.B. Elternbeiträge in Kindereinrichtungen, Schulgeld, Pflegegeld u.a.; Vermögens-einnahmen, Mieten (z.B. für Pfarrhäuser), Betriebskosten-erstattungen, Pachten, Zinserträge	2 061	20,7
Kollekten, Opfer und Spenden	298	3,0
Einnahmen insgesamt	9 950	100,0

* Erhebung 2000 aktualisiert auf 2004.

In return for the elevated status they enjoy, churches have been the most important organizers of the social welfare services in Germany, providing services ranging from preschool education and hospitals to care for disabled and elderly persons. Roughly 1/5 of the total sum collected by church taxes is spent by churches on providing welfare services; however, the state also provides substantial additional funding. Usually, churches argue that it is cheaper for the state to use already existing churches human and material resources for provision of social welfare services, than to organize everything anew¹³⁹. The data for expenditures for the Evangelical Church is as follows¹⁴⁰.

¹³⁹ Id., p. 49-50.

¹⁴⁰ See official statistics of the Evangelical Church in Germany available at http://www.ekd.de/kirchensteuern_und_finanzen.pdf (downloaded on 13.10.2007, 17:23).

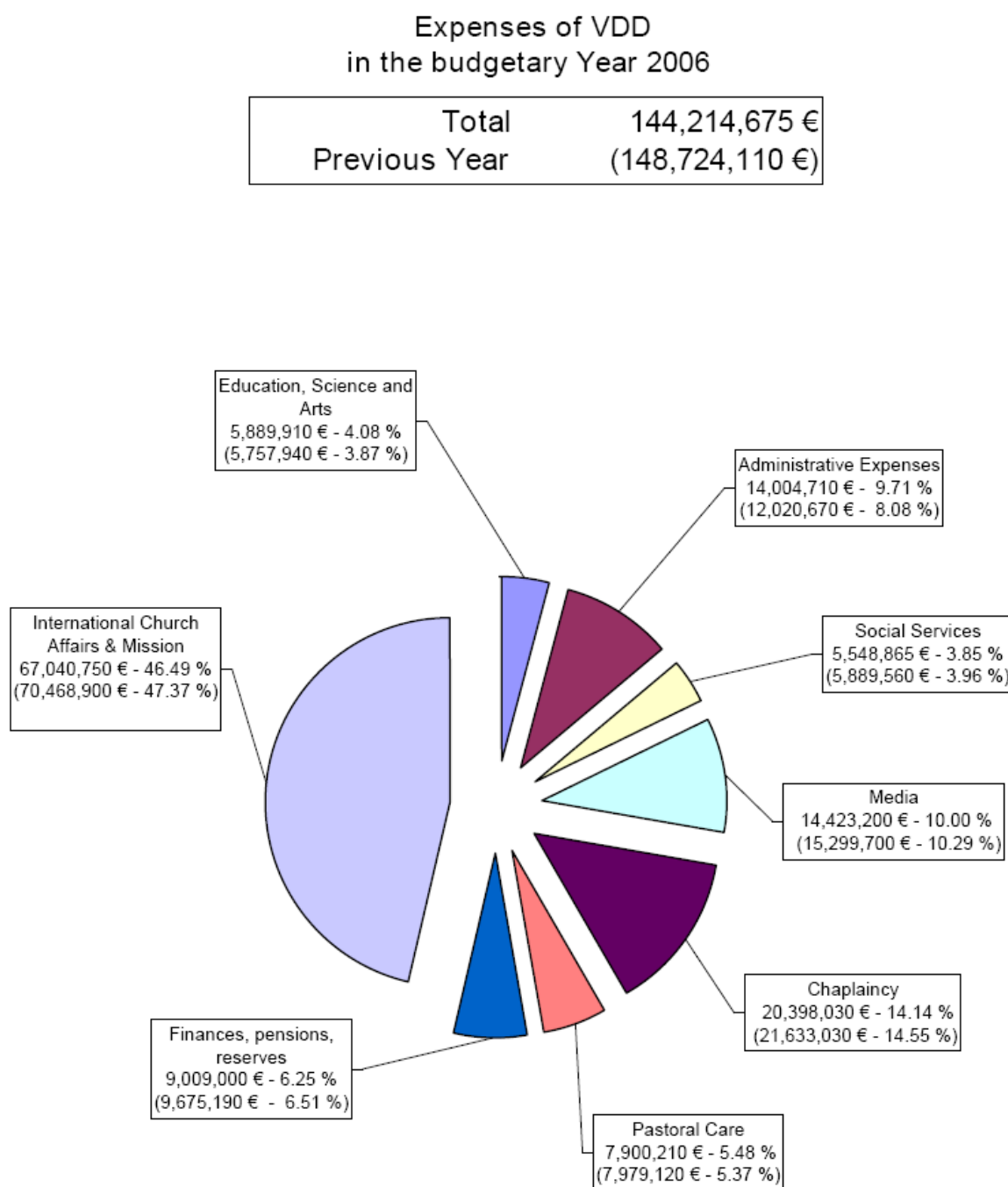
Figure 8 – Total expenditures of the Evangelical Church

Aufgaben der Evangelischen Kirche in Deutschland und ihrer Gliedkirchen und deren Kosten*		
Aufgabenbereich	Mio. EUR	Prozent
Pfarrdienst und Religionsunterricht	2 060	20,7
Allgemeine Gemeindearbeit und übergemeindliche Arbeit mit Kindern und Jugendlichen	1 208	12,1
Friedhofswesen	216	2,2
Sonstige besondere kirchliche Dienste	182	1,8
Kindertagesstätten	1 568	15,8
Diakoniestationen	213	2,1
Übrige gemeindediakonische Arbeit	564	5,7
Ökumene und Weltmission	240	2,4
Öffentlichkeitsarbeit	92	0,9
Bildungswesen und Wissenschaft	265	2,7
Leitung und Verwaltung (einschl. Synoden)	736	7,4
Vermögensverwaltung	364	3,6
Unterhaltung und Pflege kirchlicher Grundstücke und Gebäude	1 290	13,0
Sonstige Ausgaben (Vorsorgeaufwendungen, Tilgung, Zinsen, Versicherung, Haushaltsausgleich)	952	9,6
Ausgaben insgesamt	9 950	100,0

* Erhebung 2000 aktualisiert auf 2004.

Total expenditures of Catholic Church in the budgetary year 2006 are below¹⁴¹. Note that under social services heading 3,85 % (3.96% in 2005) or more than 5 million Euros was spend on social services, which is more than the Catholic Church received from church taxes in the same year (see table 4 above). However, similar to the case of the Evangelical Church (see figure 7 above), the amount the Catholic Church spends on social services is not as significant or its almost negligible compared to other church expenses (i.e. international missions), which would mean that other considerations must have played important role as a reason why the German government accepted this type of welfare system.

Figure 9 – Total expenditures of the Catholic Church



¹⁴¹ See official data on church expenditures of the Deutsche Bischofskonferenz http://dbk.de/imperia/md/content/kirchlichestatistik/kirchensteuer/engl_haushaltsausgaben2006_diagramm.pdf (downloaded 14.10.2007, 15:45).

Given the privileged status religious institutions recognized as corporations under public law enjoy, no wonder that ‘new religions’ (non-traditional ones) have applied for such status. However, they faced severe obstacles and the case of Jehovah’s Witnesses is instructive in this respect. Jehovah’s Witnesses have been fighting legal battles to attain the status of recognized religion for some 25 years. The culmination came in 2000, after the Berlin Supreme Court affirmed the administrative denial of granting the status of the corporation under public law.¹⁴² Jehovah’s Witnesses claimed they were hardly a new religion, as they have been present in Germany for almost one hundred years. Furthermore, in accordance with the Art. 140 GG and incorporated Art. 137(5) WR, they claimed the permanent membership of some 170,000 individuals. However, the Berlin Supreme Court in first instance, as well as Federal Administrative Court on appeal, denied their application claiming that granting status of corporation under public law demands loyalty to the state, which the courts found missing, as the Jehovah’s Witnesses do not participate in the political process either by voting or being voted for. Courts claims were consistent with the post-World War II German notion of strong cooperation of the church and state in a sense that church accepted its responsibility of promoting values of democracy and tolerance embraced by the state.¹⁴³ The Federal Constitutional Court, however, found a violation of the right of religious congregation in Art. 140 GG.¹⁴⁴ The Court’s ruling was careful – they held that the state cannot condition the granting of public corporate status on the basis of a failure to vote; alternative ways must be pursued to ensure loyalty to democratic order.¹⁴⁵

2.2.3 Establishment and the Free Exercise of Religion jurisprudence

The text of the GG certainly resolves many questions that have proven to be problematic in the United States, and the establishment clause jurisprudence is consequently less

¹⁴² BVerfG 2 BvR 1500/97, 19 December 2000, NJW 2001, in Bloß, p. 42.

¹⁴³ Eberle (2004), p 13 – 15.

¹⁴⁴ Bloß, p. 42-43.

¹⁴⁵ Eberle (2004), p. 10 fn. 36.

controversial than in the United States. The guiding principle for the German Constitutional Court (hereafter GCC) is a principle of neutrality.

Though the GG allows churches to levy taxes on their members using state machinery, the GCC set limits on that right. According to David Currie, churches are not allowed to levy taxes on corporations or any other associations,¹⁴⁶ against the spouses of their members,¹⁴⁷ or against individuals who have withdrawn from the congregation.¹⁴⁸

However, the majority of cases which were or would be resolved under the establishment clause in the US Supreme Court were resolved by the GCC on grounds of the free exercise of religion. This was the case in *Courtroom Crucifix* case,¹⁴⁹ as well as in *Classroom Crucifix II* case.¹⁵⁰ In *Courtroom Crucifix* case, the GCC found that a display of crucifix in the courtroom is unconstitutional, but only insofar it infringed religious freedom of the dissenting Jewish attorney. Similar was in *Crucifix II* where the Court held that the statutory display of crucifixes in public school classrooms in Bavaria is unconstitutional, again only in the face of a complaint by dissenting parents. The decision caused a public stir, and Bavaria initially vowed not to apply it. The matter was grudgingly settled only after the publication of an editorial written by GCC Justice Dieter Grimm in *Frankfurter Allgemeine Zeitung* ¹⁵¹.

The outcome of other free exercise and establishment challenges in an educational setting was, however, very different in most other cases concerning religion in school. The inculcation of religious teaching or practices in the regular curriculum was interpreted solely as recognition of the historical tradition of Christianity as one of the cornerstones of the society, and not as the establishment of the state church or infringement on the negative freedom of

¹⁴⁶ 19 BVerfGE 206 (1965).

¹⁴⁷ 19 BVerfGE 226 (1965).

¹⁴⁸ 44 BVerfGE 37 (1977).

¹⁴⁹ 35 BVerfGE 366 (1973) in Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Duke University Press, 2nd edition, 1997), p. 452-453.

¹⁵⁰ 93 BVerfGE I (1995) in Kommers, p. 472-483.

¹⁵¹ Kommers, p. 482-484.

non-believers or members of different faiths. In the *Interdenominational School Case*,¹⁵² the GCC upheld the amendments that federal land Baden-Wurtemberg made in its constitution, making Christian-denominational schools the uniform type of public schools within that federal state. The GCC claimed that the negative right of parents not to have their children subjected to any kind of religious education was trumped by the constitutional provisions that envisage state support for religious education, hence putting state and parents on equal footing when it comes to state supported school system¹⁵³. Moreover, positive rights of parents that want their children to be introduced to religious tenants were also overarching, according to the Court, as long as schools don not become missionary and zealous.

The essence of the GCC's reasoning on allowing Christian religious education in public schools, even against dissent, is extremely instructive.

“Affirming Christianity within the context of secular disciplines refers primarily to the recognition of Christianity as a formative cultural and educational factor which has developed in Western civilization...Confronting non-Christians with a view of the world in which the formative power of Christian thought is affirmed does not cause discrimination either against minorities not affiliated with Christianity or against their ideology.¹⁵⁴”

Other leading free exercise cases that deal with exemptions from generally applicable laws are the *Rummelkammer* case,¹⁵⁵ the *Blood Transfusion* case,¹⁵⁶ the *Denial of Witness Oath* case,¹⁵⁷ and the Jehovah's Witness case mentioned above.

In *Rummelkammer*, the Court upheld the right of a Roman Catholic youth organization to collect and sell recyclable goods and donate collected money collected to charities. The youth organization called upon local priests to urge their parish to donate recyclable goods, which was challenged by the commercial rag dealer who claimed that this

¹⁵² 41 BVerfGE 29 (1975) in Kommers, p. 467-470.

¹⁵³ Kommers, p. 467.

¹⁵⁴ Id., p. 470.

¹⁵⁵ 24 BVerfGE 236 (1968) in Kommers, p. 445-448. Also see Eberle (2004), p. 20.

¹⁵⁶ 32 BVerfGE 98 (1971) in Kommers, p. 449-452. In addition, see Eberle (2004), p. 28.

¹⁵⁷ 33 BVerfGE 23 (1972) in Kommers, p. 453 – 458 and Eberle (2004), p. 32 and seq.

activity was an illegal business competition. The Court, however, held that the practice of charitable giving is a vital part of religion, and furthermore claimed that the Courts intervention would be unjustified market intrusion – which is, of course, open granting of preferable market position to religious organization engaged in a practice with secular spillover effects.¹⁵⁸ In the *Denial of Witness Oath* case, the GCC protected the freedom of conscience of a religious pastor who rejected secular witness oath, claiming that his religious beliefs forbid any oaths – the outcome similar to that of the *Torcaso* case in the US¹⁵⁹.

The *Blood Transfusion* case fits into the Terry Schiavo line of cases in the US. The question in the case was the responsibility of male spouse of the married couple, who were members of the devoted Evangelical brotherhood, who did not hospitalize his wife though fully aware that she would likely die as result of blood loss suffered during the process of giving birth to their fourth child. His wife, fully consciousness, consented to his decision, consistent with their mutual religious beliefs that commanded them to place faith in God to heal her and not take any other action. Contrary to many US Supreme Court decisions, the GCC decided that the male spouse has to be excused from the general criminal laws on account of religious beliefs.¹⁶⁰

Free exercise decisions allowing exemptions from generally applicable laws as described above, however, are in line with the loose economic pattern of the US Supreme Court free exercise jurisprudence I have posited above. In all cases, the social costs of allowing free exercise of religion were virtually null – tangible and intangible burdens on society were minimal; furthermore, neither exemption provided any kind of incentive to join religion; aggregate social consequences were also next to null. All decisions were basically protection of individual conscience, which was conditional on individual complaints or claims. This claim is basically in agreement with the contention of many authors working in the area of the US –

¹⁵⁸ Eberle (2004), p. 20-24. See *Torcaso v. Watkins*, supra n. 98.

¹⁵⁹ Eberle (2004), p. 32 – 35.

German comparative constitutional law that the GCC free exercise jurisprudence is far more permissive than that of the US Supreme Court. However, the costs that GGC imposes on the society are also very low. This kind of jurisprudence has to be read, in economic analysis, within the framework of the general structure of the particular religious marketplace, either a competitive one (US) or a duopoly controlled marketplace in steady equilibrium.

The most hotly debated issue with regards to freedom of religion in Germany was a question of the positions of Islam. To date, Islam as a religion in Germany has not attained the status of the corporation under public law and the accompanying privileges. The explanation was that Islam as a religion does not have a unified structure (“church”) or a unified teaching that would allow for religious classes to be taught in schools.¹⁶¹ The cost of such an attitude was a flourishing of awkward private religious schools, with suspicious and potentially socially hostile interpretations of Islam, and so far has contributed only to, generally speaking, a widening of the already existing gulf between immigrants (mostly of Turkish descent) and the rest of the German society. This is, however, consistent with the economic prediction that governmental regulation perceived as hostile by stricter religious communities will lead to their distancing from the society, as well as motivate them to provide higher benefits for their members.

The GCC attitude towards the question of Islam was marked by its decision in the Head Scarf case.¹⁶² Fereshta Ludin, an Afghan born German citizen, was denied a teaching position in a public school, unless she removed her headscarf, which she refused to do for religious reasons. The GCC found that her constitutional complaint was founded, but nevertheless added that, since the education is constitutionally an authority of the federal states, they are free to regulate it. In effect, the GCC left the issue to the democratic process, possibly having in mind

¹⁶⁰ Id.

¹⁶¹ Bloß, p. 45.

¹⁶² Islamic Teacher’s Head Scarf, 2 BvR 1436/02 (BVerfGE Sept. 24, 2003), available at http://bverfg.de/entscheidungen/rs20030603_2bvr143602.html.

the public stir that his *Crucifix II* decision caused.¹⁶³ In this respect, the headscarf decision of the GCC is parallel to the US Supreme Court decision in *Smith*, with, however, different effects on religious equilibrium given the structure of the religious marketplaces in the two countries.

3. Summary and Conclusion

¹⁶³ Bloß , p. 45, fn. 110.

. Lower level of religiosity in Germany relative to the US should come as no surprise given legal regulation of religion in both countries. Claims of the rational choice model that the deregulation of religion and the lack of public funding for it lead to religious vitality seem to be confirmed by the empirical evidence. From the inside perspective of the legal system, as it was argued above, several factors contribute to this. First, the constitutional framing of religion in the First Amendment which, in effect, works as a rather powerful religious market deregulatory mechanism. Second, the status of religious institutions as not-for-profit organizations that do enjoy a number of tax privileges is, effectively, indirect subsidization of religion. However, in spite of these subsidies, lack of state funding for their work coerces religious institutions to take the entrepreneurial attitude towards their membership which, on the other hand, is also provided with incentives to donate money by means of tax deductions.

Nevertheless, under conditions of secularization and economic development, religious vitality in the US favors strict churches and sects more than it favors old-style liberal denominations or the Catholic Church for that matter. Two factors, one subjective and the other objective, contribute to this. On the subjective side, economic development and the higher standard, alongside the general laxation of social morals, affects the traditional denominations as it decreases their factual membership and increases free-riding, while at the same time, strict churches manage to grow as a result of their successful screening out of free-riders and their strong internal cohesion. On the other hand, strict non-establishment jurisprudence of the US Supreme Court, as well as some of its moral decisions, also contributes to the rise in membership of conservative churches and sects. This should come as no surprise, given the predictions of rational choice theorists of religion. The more positivistically oriented analysis of McConnell and Posner comes to the same conclusion:

The Establishment Clause decisions, the accommodation decisions, and the 'morality' decisions have hurt the mainline Protestant churches by undermining institutions with which they are allied and by reducing the costs of their rivals, the fundamentalist and evangelical denominations (along with Mormons, Jehovah's Witnesses, and similar

sects). The courts may therefore have played a role in the precipitous decline of the mainline Protestant churches in recent decades¹⁶⁴.

In contrast with this, the structure of the religious market in Germany, as a result of legal conditions that need to be met in order to attain the privileged status of corporation under public law, as well as the de-facto state-backed monopoly of traditional churches, leads to a decrease of religious vitality and inefficient use of religious resources. The system itself seems to be very expensive. However, all these conclusions are in line, as long as we pay attention only to factors like church attendance. But the amount of money that the German state collects yearly by means of voluntary church taxes suggests otherwise, though there is a steady decline in the amount of money churches collect, which is most likely the result of the spread of the ‘welfare state consciousness’ among the population – as the state takes over more and more social services the demand for same church-run services declines. It seems that such a system is indeed part of a tradition and, in the language of the new institutional economics, a form of cultural learning, as the above cited FCC decisions argue, which leads to the conclusion that, on average, Germans are no less devoted to their religious traditions than Americans.

The reason why Germans do not so openly practice their religion (as measured by church attendance) might be the belief that such practices are unnecessary, as the general social norms already, by large, reflect what is part of the heritage. Economically speaking, inclusion in majority preferences and the decrease in the price of their consumption reduce the utility of consumption and, consequently, the demand for it. The situation is different in cases when there is even a slight competition that threatens to change the status quo, like in the cases of Jehovah’s Witnesses and Islam. Perhaps there is a case here to argue for Kuran’s preference falsification - lack of external behavior is no proof of lack of internalized norms.

From a neo-classical economics perspective, German system is certainly inefficient. However, if one conceives social norms as a common good that decrease state transaction

¹⁶⁴ McConnell and Posner, p. 59.

costs, the perspective changes. The cooperation of state and traditional churches, on this view, might have contributed to the post – World War II German economic miracle. On a broader agenda, just as Adenauer after World War II decided to promote two different political blocs as a desirable German political landscape in contrast to the disaster of competing moral and economic claims of the different political parties during Weimar, the German state might have decided that it is more beneficial to decrease religious vitality by promoting social welfare that builds on the already existing system of church institutions, while at the same time trying to embed in citizens the teachings of democracy and tolerance via the proxy of church religious teachings.

The jurisprudence of the US Supreme Court and the German Federal Constitutional Court have several similarities with respect to religious issues. In both cases, free exercise of religion decisions are based on a model that is congruent with the cost-benefit analysis. However, in a face of increased religious plurality, both courts have relinquished their stature as protectors of minority religions and left the decision-making to their legislatures, leaving the field largely open for suppression of non-traditional and unpopular religious beliefs under the disguise of generally applicable and neutral laws.

Tests used in the establishment jurisprudence cases of the US Supreme Court, in effect, represent a deregulatory mechanism which does not permit either heavy subsidization or heavy taxation of religion. However, tests like original history and ceremonial deism do not correspond to the neo-classical economics deregulatory mechanisms, but rather to what the new institutional economics calls first level of the norms. But, the combination of these approaches has a big problem when it comes to dealing with cases in which the public subsidies benefits religion, but nevertheless increases social net benefit – an issue that is unlikely to be resolved in future.

The constitutional structure of the GG resolves many of the issues that the US Supreme Court has had to struggle with. Consequently, the Federal Constitutional Court had much less troubling and confusing jurisprudence. The protection of conscience and the general posture of neutrality towards religion, however, in the German case does not mean strict neutrality. Rather, it means that the legal system is creating conditions under which majority religious beliefs and their secularized versions are being ‘softly’ translated and embedded into citizens’ consciousness.

In the final analysis, from a neoclassical economics perspective the German system is inefficient and expensive compared to the one in the US, but it has one major advantage: it provides for stability of social norms. Whether that is a quantifiable economic good remains yet to be resolved, and in the present study it was assumed that social stability is in fact an economic good. Many other questions need to be addressed in future research on law and economics of religion. For example, this work did not apply game theory. In addition, behavioral law and economics with its emphasis on bounded rationality and bounded will power will certainly find a fruitful application when it comes to further research in the field of the legal regulation of religion. Moreover, would our analysis be different if one of the major competitors in both countries were religions outside the Christian tradition? Is there a causal connection between the concept of the United States of America as an immigrant nation and a community of values, and the strength of religious beliefs, in contrast to the relative homogeneity of the German society?

The major limit of the application of law and economics to religion is that economics is a science of means, but not of ends. But perhaps overuse of this sentence and posture in modern economics had resulted in a neglect of the original meaning of economics. Adam Smith did not only write on wealth of nations, but also on moral sentiments.

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