

**DRAFT**

For *Emory International Law Review* 25 (2011): 5-56 (with Nina-Louisa Arold)

**“Lift High the Cross”?<sup>1</sup>  
Contrasting the New European and American Cases on  
Religious Symbols on Government Property**

John Witte, Jr.<sup>2</sup> and Nina-Louisa Arold<sup>3</sup>

**I. Introduction**

A comparative anthropologist could not have asked for a better script: two high profile cases, one before the European Court of Human Rights, the other before the United States Supreme Court, each involving challenges to traditional displays of crosses on government property. The European high court struck down the cross. The American high court upheld the cross. Both cases are procedurally complicated and are factually distinguishable. But the juxtaposition of these decisions illustrates the growing contrast in European and American attitudes toward traditional religious symbols on government land, and toward religious freedom more generally. Europe, for nearly two millennia the heartland of Christianity, seems to be moving towards ever stronger policies of secularization and laïcité. America, once the champion of strict separation of church and state, seems to be moving toward an ever more generous accommodation of its religious traditions.

In *Lautsi v. Italy*,<sup>4</sup> a mother of two children who attended an Italian public school challenged an Italian tradition going back to 1924 that called for the display of a crucifix

<sup>1</sup> This is the title of a hymn, composed by George William Kitchin (1887), revised by Michael R. Newbolt, with music by Sidney R. Nicholson (1916), viewed on [www.hymnary.org](http://www.hymnary.org) (last visited Jan. 2, 2011).

<sup>2</sup> Jonas Robitscher Professor of Law, Alonzo L. McDonald Distinguished Professor, and Director of the Center for the Study of Law and Religion, Emory University.

<sup>3</sup> Associate Professor, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Associate Professor of Law, University of Lund, Sweden.

<sup>4</sup> *Lautsi v. Italy*, Eur. Ct. H.R., Appl. No. 30418/06 (Nov. 3, 2009) (referred to the Grand Chamber on 1 March 2010. The Hearing was held on 30 June 2010, and eight of ten States intervening were participating to support the Government of Italy.).

in each public school classroom. The perennial and prominent presence of these overtly Christian symbols, Ms. Lautsi argued, was contrary to the atheistic beliefs with which she wanted to raise and educate her children. She thus sought to have the crucifixes removed. She won her case in the Italian trial court. She lost before the Italian domestic courts, which declared that the cross was an integral part of Italy's history, culture, and identity, and that the cross was itself a symbol of the nation's distinct commitment to liberty, pluralism, and toleration of all peaceable faiths.<sup>5</sup> Ms. Lautsi then appealed to the European Court of Human Rights, arguing that Italy's actions violated her and her children's rights to education and to religious freedom guaranteed by the European Convention on Human Rights in Article 2 (of Protocol No. 1) and Article 9.<sup>6</sup>

On November 3, 2009, a unanimous seven-judge chamber of the European Court of Human Rights held for Ms. Lautsi. The Court found that the public display of crucifixes in public school classrooms constituted a violation both of the right of parents to educate their children in conformity with their own convictions and of the right of children to freedom of thought, conscience, and religion, which included the right to be free from coerced religious participation or observance. The Court ordered damages to Ms. Lautsi of 5,000 Euros. Italy appealed, dismayed at what it took to be an assault on its national culture and tradition. On June 30, 2010, the Grand Chamber of the European Court of Human Rights heard further arguments in the case. At least twenty European nations have publicly stated their support for Italy and joined its criticism of the European Court's first chamber decision.<sup>7</sup> The *Lautsi* case is currently under

<sup>5</sup> See Andrea Pin, Public Schools, The Italian Crucifix and the European Court of Human Rights: The Italian Separation of Church and State, 25 EMORY INT'L L. REV. \_\_ (2011).

<sup>6</sup> See *infra* note 46 and accompanying text.

<sup>7</sup> See European Center for Law & Justice, <http://www.eclj.org/Releases/Read.aspx?GUID=983c3dd3-9c17-4b70-a016-37851446ec0e&s=eur> (last visited Oct. 27, 2010) (full list of names of these twenty states).

advisement with the Grand Chamber, which has been subject to intense lobbying pressure on both sides.

In *Salazar v. Buono* (2010),<sup>8</sup> a retired national park worker challenged the display of a cross in a national park in the State of California. The Veterans of Foreign Wars (VFW), a private group, had donated and erected the cross in 1934 as a memorial to fallen American soldiers. The cross stood alone, visible on the horizon. A small sign at the base of the cross indicated that the VFW had donated it. Mr. Buono brought suit claiming that the presence of the cross on government land constituted an establishment of religion in violation of the First Amendment to the United States Constitution.<sup>9</sup> A federal district court found the cross display to be unconstitutional. Congress responded by conveying a small parcel of the federal land with and around the cross to the VFW, in exchange for a nearby private tract of land that was added to the national park. The district court declared this purported constitutional cure a “sham,” and repeated its injunction that the cross be removed.<sup>10</sup> The national park service appealed, ultimately to the Supreme Court.

A plurality of the Supreme Court ordered that the cross be retained. The decision to enjoin Congress’s land sale, Justice Kennedy wrote for the plurality, required the district court to undertake a separate constitutional inquiry whether Congress had violated the First Amendment Establishment Clause; it could not simply assume that this land sale was a “sham” designed to “evade” the first injunction.<sup>11</sup> Congress had

<sup>8</sup> *Salazar v. Buono* 130 S. Ct. 1803 (2010).

<sup>9</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion....”).

<sup>10</sup> See Adam Linkner, How *Salazar v. Buono* Synthesizes Establishment Clause Precedent into a Single Test, 25 EMORY INT’L L. REV. \_\_\_ (2011).

<sup>11</sup> *Salazar v. Buono* 130 S. Ct. 1803, 1814-1817 (2010).

tried to resolve a “dilemma” created by the district court: “It could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those [dead soldiers] the cross was seen as honoring.... Deeming neither alternative to be satisfactory,” Congress had instead sold the land and cross to a private party.<sup>12</sup> The district court now would have to judge the constitutionality of Congress’s actions on the merits. In Justice Kennedy’s view, the district court would have to take into account the reality that, while the cross was “certainly a Christian symbol,” it had been erected in the park not “to promote a Christian message” or to “set the imprimatur of the state on a particular creed. Rather those who erected the cross intended simply to honor our Nation’s fallen soldiers.”<sup>13</sup> The district court would further have to recognize that “[t]ime also has played a role” and that “the cross and the cause it commemorated had become entwined in the public consciousness” and part of “our national heritage.”<sup>14</sup>

The contrasts in these cases are as ironic as they are striking. It is no small irony that Italy, a land saturated with Christian religious symbols, must remove its crosses, while California, famous for its Hollywood-style secularism and avant-garde culture, may keep a cross in place. It is no small irony that, after so many centuries of cultural adaptation and application, a cross in Italy was still judged to be an offensive religious symbol, while in America, after a few short decades, a memorial cross was judged to be so deeply woven into American “public consciousness” and “national heritage” that it could no longer be removed. And it is no small irony that the European Court, operating without an explicit prohibition on religious establishments, struck down the cross, while the United States Supreme Court, armed with an explicit constitutional command that

<sup>12</sup> *Id.* at 1809

<sup>13</sup> *Id.* at 1816-1817.

<sup>14</sup> *Id.* at 1817.

“Congress shall make no law respecting an establishment of religion,” let the cross stand on land that Congress controlled.

What is not so ironic or surprising is that the *Lautsi* Court took this firm stand against the public display of a cross in a public school setting. Young and impressionable students, often compelled to be in school, are generally more vulnerable to religious pressure and coercion, and Western courts have thus long been jealous in protecting them in the name of religious freedom. Indeed, in six decades of cases before *Buono*, the United States Supreme Court had struck down the use of religious symbols in public schools, along with prayers, Bible reading, and religious instruction.<sup>15</sup> A number of European nations besides Italy have done the same.<sup>16</sup> This might suggest that, with *Lautsi*, European and American laws of religious freedom are actually moving closer together rather than further apart. And it might further suggest that the *Lautsi* case, despite its strong language of secularity and *laïcité*, may be restricted in its application to public schools, rather than becoming a step on the slippery slope toward the greater secularization of Europe that some critics fear. After all, despite the sweeping constitutional logic of “strict separation of church and state”<sup>17</sup> at work in many of its religion and public school cases, the United States Supreme Court has rarely used these cases as precedents to strike down overt religious expression, free exercise accommodations, and church-state cooperation in other areas of public life. Particularly in recent years, the Supreme Court, flush with neo-federalist energy, has shown ample

<sup>15</sup> See John Witte, Jr. & Joel A. Nichols, *Religion and the American Constitutional Experiment*, Chap. 8 (3d ed. 2011).

<sup>16</sup> See, e.g., *Entscheidungen des Bundesverfassungsgerichts*, [BVerfGE] [Federal Constitutional Court] May 16, 1995, 1087 *Samlichte Sammlung des Bundesverfassungsgerichts* [BvR] 91 (F.R.G.) (ruling against crucifixes in Bavarian public schools); on European education and religious liberty issues generally, see *RELIGIOUS EDUCATION IN PUBLIC SCHOOLS: A STUDY IN COMPARATIVE LAW* (José Luiz Martínez López-Muniz et al. eds., 2006).

<sup>17</sup> See John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 *J. OF CHURCH AND STATE* 15-46 (2006).

deference to the actions of state and local officials concerning religion when those actions are challenged under the First Amendment Establishment Clause.<sup>18</sup> The European Court of Human Rights might proceed similarly in limiting the reach of *Lautsi* to public schools -- particularly given its parallel doctrine to federalism of granting a “margin of appreciation”<sup>19</sup> to national traditions and practices that are challenged as violations of the religious freedom guarantees of the European Convention on Human Rights.

The aim of this mini-symposium on “Religious Symbols on Government Property” is to probe these questions at greater depth. In the balance of this Article, we situate the *Lautsi* and *Buono* cases in the existing case law of the European Court of Human Rights and the United States Supreme Court respectively. The *Lautsi* case, it turns out, is largely one of first impression: most European Court cases on religious freedom and educational rights to date have dealt with private expressions of religious dress and ornamentation in public schools and other public settings.<sup>20</sup> The *Buono* case, by contrast, is the last in a three-decade series of convoluted Supreme Court cases. It seems to signal a retreat by the Court to its original position of allowing old religious symbols to stand on public lands, even while still preventing religious symbols in public schools.<sup>21</sup>

In the two Articles that follow, two experts provide an in-depth analysis of the *Lautsi* and *Buono* cases, and the jurisprudential stakes at work in each case. Andrea

<sup>18</sup> WITTE AND NICHOLS, *supra* note 15, at \_\_-\_\_.

<sup>19</sup> See Howard C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (1996); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* 80 (2007).

<sup>20</sup> See *infra*, text at notes \_\_-\_\_.

<sup>21</sup> See *infra*, text at notes \_\_-\_\_.

Pin, a distinguished constitutional law professor at the University of Padua, has watched the *Lautsi* case emerge from the very region of Italy where he had been schooled as a child and where he now teaches as a law professor. He provides a close and revealing analysis of the constitutional history and cultural battles of Italy concerning religious freedom, the shifting relationship between the Catholic Church and the Italian state, and the unique understanding of Italian-style “*laicità*” (rather than French-style *laïcité*). He then contrasts the Italian constitutional law of religious symbolism with the emerging jurisprudence of religious freedom of the European Court of Human Rights. He regards *Lautsi* as a serious test case that marks the growing tension between Italy and Europe, between religious traditions and secular modernity, between a commodious constitutional concordance of religion and state and the emerging right of a secularist to veto these carefully calibrated national arrangements in the name of European religious freedom. In the end, he thinks *Lautsi* is wrong, and the crosses should remain.<sup>22</sup>

Adam Linkner, a bright new constitutional scholar now clerking with a distinguished federal judge, has followed the *Buono* case from the beginning. He takes note of the conflicting lower federal court treatment of the very issue on which the *Buono* plurality divided – whether a sale of government property that contains offending religious symbols is permissible under the First Amendment Establishment Clause. The real difficulty with *Buono*, he argues, is that the Supreme Court gave too little guidance to the district court on remand to determine the constitutionality of Congress’s land sale. Mr. Linkner thus cleverly distills the convoluted six decades of Supreme Court approaches to the Establishment Clause into a more workable and predictable “insider/outsider” test that he astutely discerns at work even in the multiple opinions in *Buono*. First, this test would require a court to judge whether the “predominant purpose” or intent of the government was to favor, endorse, or privilege religion. This is an “insider” inquiry that considers all the evidence of what went into the government’s decision and action respecting religion. Second, the test would require a court to judge whether an external reasonable observer would see the primary effect of the

<sup>22</sup> See supra note 5, passim.

government's action as one that endorsed religion. This is an "outsider" inquiry, one that views the result of the government's action in context and determines whether it mostly supports, favors, or privileges religion over non-religion. These are separate inquiries, Linkner insists; a government action respecting religion should be struck down if either its predominant purpose or its principal effect is to favor religion. In his view, Congress's land sale was so transparently favorable to religion that it fails the insider/outsider inquiry. In the end, he thinks *Buono* is wrong, and the cross should come down.<sup>23</sup>

Together, these two Articles illustrate some of the complexity of the legal issues surrounding the place of religious symbols on government land, and how serious scholars and judges can take opposing views and marshal reasoned arguments for each of them. It's easy to be cynical about these cases – treating them as much ado about nothing, or expensive hobbyhorses for cultural killjoys and public interest litigants to ride. But that view underestimates the extraordinary luxury we now enjoy in the West to be able to fight our cultural contests over religious symbols in our courts and academies, rather than on our streets and battlefields. In centuries past in the West, and in many regions of the world still today, disputes over religious symbols often lead to violence, sometimes to all-out warfare. For religious and cultural symbols often embrace and evoke deep personal and communal emotions. Think of what happens when someone attacks or defaces an icon, a flag, the grave of a loved one, or the memorial of a fallen hero. Far more is thus at stake in these cross cases than the fate of a couple of pieces of wood nailed together. These cases are essential forums to work through our deep cultural differences and to sort out peaceably which traditions and practices should continue and which should change.

<sup>23</sup> See supra note 10, passim.

## II. Religious Freedom and Religious Symbols in the European Convention and the European Court of Human Rights

*Lautsi* is largely a case of first impression, though it draws on several lines of cases. In this Part, we review the basic provisions on point in the European Convention on Human Rights and the procedures used by the European Court of Human Rights in adjudicating claims arising under the Convention. We review the relevant cases on freedom of thought, conscience, and religion and on the rights to education and free expression. At the end of each subpart below, we briefly sort through how these precedents can be marshaled to support both sides of the *Lautsi* case now before the Grand Chamber.

**A. Provisions and Procedures.** A major instrument of the Council of Europe, the 1950 European Convention on Human Rights (the “ECHR” or “Convention”) is binding upon all 47 of the current member states.<sup>24</sup> The European Court of Human Rights (the “Court” or “European Court”), reformed in 1998,<sup>25</sup> is the principal interpreter of the Convention. It is a daily operating and fully-functioning supervisory body, staffed with 47 judges, representing each member state, along with some 640 clerks.<sup>26</sup> The Court’s principal task is to hear cases that determine whether the member states are violating the rights guaranteed in the Convention. Since 1998, any party under the jurisdiction of a European member state has standing to claim a violation of rights under the Convention and file a claim directly with the Court. However, the Court has

<sup>24</sup> See Eur. Convention on Human Rts, Nov. 4, 1950, 213 U.N.T.S. 221 [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf) (last visited October 21, 2010).

<sup>25</sup> European Convention on Human Rights Protocol 11, Nov. 4, 1950, 213 U.N.T.S. 221 (Protocol 11 amended the European Convention on Human Rights, the changes entered into force 1 November 1998).

<sup>26</sup> See European Court of Human Rights Role of the Registry <http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/The+Registry/> (last visited October 26, 2010).

frequently stated that it is not a court of last appeal that can supplant national judicial remedies.<sup>27</sup>

Article 9 of the European Convention on Human Rights is the major provision on religious freedom. It guarantees that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The European Court has made clear that religious freedom “entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.”<sup>28</sup> It has also made clear that Article 9.2 of the ECHR is an exhaustive list of

<sup>27</sup> See NINA-LOUISA AROLD, *THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2007) (analyzing the Court's general workings and relationships with member states).

<sup>28</sup> *Grzelik v Poland*, Eur. Ct. H.R. Appl, No 7710/02 para 85 (Jun. 15, 2010).

the grounds on which any government official may impose limitations on religious freedom.<sup>29</sup>

Article 2 (Protocol 1) of the European Convention supplements the religious freedom guarantee of Article 9 in cases of education.<sup>30</sup> Article 2 provides: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” Article 14 of the Convention further prohibits discrimination on grounds of religion.<sup>31</sup> And Article 10 protects freedom of expression, which can include religious and anti-religious expression.<sup>32</sup>

<sup>29</sup> Michael O’Boyle Harris, et al., *Law of the European Convention on Human Rights* 435 ff. (2d ed. 2009); *Theory and Practice of the European Convention on Human Rights* 768 (Pieter van Dijk, et al. eds., 4th ed. 2006).

<sup>30</sup> European Convention on Human Rights Art. 2 Protocol 1, Nov. 4, 1950, 213 U.N.T.S. 221 (“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”).

<sup>31</sup> European Convention on Human Rights Art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

<sup>32</sup> European Convention on Human Rights, Art. 10.1, Nov. 4, 1950, 213 U.N.T.S. 221 (“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”).

Religious freedom cases arising under Article 9 are relatively few compared to other areas of human rights.<sup>33</sup> From 1959 to 2009, the European Court of Human Rights (and its predecessors) found a total of 30 violations of this Article, nine of them occurring in 2009 alone.<sup>34</sup> By comparison, during that same 40-year period, the Court found some 4,800 violations of Article 6 concerning the length of proceedings,<sup>35</sup> and the Court has close to 140,000 pending applications.<sup>36</sup> While religious freedom cases are small in number, violations of Article 9 are still burning issues, keeping Europe's judges busy and probably giving them headaches.

By repeatedly finding violations by individual member states, the European Court has induced changes in many domestic legal systems of member states. Those changes have prompted a growing awareness of other possible human rights claims; that fact, together with an increase in the number of member states, has resulted in a flood of applications to the Court.<sup>37</sup> To manage this swollen docket, Protocol 14 now

<sup>33</sup> See Nina-Louisa Arold, *Promoting Normative Cracks in the Surface: Strasbourg Changing Swedish Legal Culture*, in *LAW AND RELIGION IN THE 21<sup>ST</sup> CENTURY – NORDIC PERSPECTIVES* 275 (Lisbet Christoffersen, et al. eds. 2011).

<sup>34</sup> Eur. Ct. H.R., Statistics of the Court, Violation by Article and by Country 2009, [http://www.echr.coe.int/NR/rdonlyres/E8F73EC8-AF6A-4205-BAF2-F6043F67F651/0/Tableau\\_de\\_violations\\_2009\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/E8F73EC8-AF6A-4205-BAF2-F6043F67F651/0/Tableau_de_violations_2009_ENG.pdf) (last visited Oct. 21, 2010).

<sup>35</sup> *Id.* (4,800 cases concerning length of proceedings and an additional 3,207 cases concerning fair trial, hence a total of 8,007 cases under Art. 6 ECHR between 1959 and 2009.).

<sup>36</sup> See [http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending\\_applications\\_chart.pdf](http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending_applications_chart.pdf) (last visited in Oct. 2010) (139,000 pending applications in Sept. 2010).

<sup>37</sup> *But see*, Eur. Ct. H.R. 2010 Statistics, [http://www.echr.coe.int/NR/rdonlyres/8699082A-A7B9-47E2-893F-5685A72B78FB/0/Statistics\\_2010.pdf](http://www.echr.coe.int/NR/rdonlyres/8699082A-A7B9-47E2-893F-5685A72B78FB/0/Statistics_2010.pdf) (last visited Oct. 21, 2010) (the Court delivered in total between 1959 and 2009 12,198 judgments, while between January and September 2010, it produced 1442 judgments and 24,321 admissibility decisions).

gives judges the discretion to restrict themselves to cases alleging “significant” violations.<sup>38</sup> Most cases get decided by chambers of seven judges, selected from among the 47 sitting judges. These seven judges often are a balanced representation of the legal cultures represented among the 47 member states.<sup>39</sup>

Within three months of a chamber judgment any of the parties can request a referral to a Grand Chamber.<sup>40</sup> This constitutes an internal appellate review, and involves 17 judges of the European Court. This mechanism was invoked by the Italian government in *Lautsi*. While politically the banning of Christian crucifixes in Italian schools might come as a surprise, both the hybrid legal culture of the European Court of Human Rights<sup>41</sup> and the Court’s prior cases can readily support this decision, even if not ineluctably; hence the Grand Chamber review in this case. To protect national traditions, or issues of special sensitivity in national societies, the Court frequently invokes the doctrine of a “margin of appreciation.”<sup>42</sup> That doctrine recognizes that

<sup>38</sup> European Convention on Human Rights Art. 35, Protocol 14, para. 3, Jun. 1, 2010, 213 U.N.T.S. 221, [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf) (last visited Oct. 21 2010) (“The Court shall declare inadmissible any individual application .. if it considers that: ...(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”).

<sup>39</sup> See *supra* note 27 (influence of different legal traditions that the judges share on the Court).

<sup>40</sup> See European Convention on Human Rights Art. 43.1, Nov. 4, 1950, 213 U.N.T.S. 221 (“Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case.”).

<sup>41</sup> See *supra* note 27.

<sup>42</sup> The Margin of Appreciation is frequently used by the Court. See *supra* note 19 at 24ff. (extensive study of the doctrine and describes its development in two time periods, before and after 1979). The doctrines’ scope was expanded during the later years. See, e.g. *Handyside v. United*

national judges are often better placed than international judges to assess these culturally sensitive questions. Only if there is a manifest breach of the European Convention on Human Rights will the Court find a violation.

When a party claims a violation of Article 9 rights, the Court will assess: (1) whether there is interference with that right; (2) whether this interference was based on law; and (3) whether this interference was necessary in a democratic society. It is usually the third step, the balancing test by the Court, which is the focus of most cases. There the judges analyze whether the interference corresponds to a pressing social

---

Kingdom, Eur. Ct. H.R. Appl No 5493/72 (Dec. 7, 1976) (concerning obscene publications); *Hatton and Others v. United Kingdom*, Eur. Ct. H.R. Appl No 36022/97 (Jul. 8, 2003) (concerning flight noise interruptions of sleep).

need, is proportionate to the aim pursued, and is justified by relevant and sufficient reasons.

Religious beliefs and traditions can be relevant in making these decisions, even if they are not directly raised in an Article 9 case. A good example is the European Court case of *Otto-Preminger-Institut v. Austria* (1994)<sup>43</sup> regarding an act of state censorship that was challenged as a violation of Article 10 rights to free expression. The case concerned the seizure and ban of a movie ridiculing the Holy Family that was slated to be shown at an art institute in Tyrol, Austria. Using the “margin of appreciation” doctrine, the European Court judges found these state restrictions on the film to be justified. The Court determined that the national authorities of Austria were better able to discern the cultural trends and moral sensitivities of this Tyrol region of Austria. While the Court recognized that Article 10 rights encouraged a pluralism of religious and non-religious beliefs, these values had to yield in this case to the state’s concern about ideas that would strongly offend and attack the religious beliefs of a traditionally Catholic region that cherished the Holy Family. Here the “margin of appreciation” doctrine was used to defer to a national court’s protection of local Christian sensibilities and traditions. This is an important precedent for Italy in the *Lautsi* case -- though this is an Article 10 case dealing with freedom of expression, not an Article 9 case dealing with freedom of thought, conscience, and religion.

**B. Manifestations of Belief: What Gets Article 9 Protection?** The display of a belief through symbols combines concerns both about “religion” and “manifestation” of religion under Article 9. The European Court interprets “religion” broadly, but when it comes to “manifestation” not every action driven by religious belief is recognized and/or protected under Article 9. Three cases illustrate the range of treatment by the Court. In *Pretty v. United Kingdom* (2002),<sup>44</sup> the European Court held that a husband’s act of

<sup>43</sup> *Otto-Preminger-Institut v. Austria*, Eur. Ct. H.R. Appl. No. 13470/87 (Dec. 20, 1994).

<sup>44</sup> *Pretty v United Kingdom*, Eur. Ct. H.R. Appl. No. 2346/02 (Apr. 29, 2002).

assisting the suicide of his terminally-ill wife was not a religious manifestation or act protected under Article 9, even if done on grounds of humanity and dignity. The husband could not accordingly claim a religious freedom exemption from English criminal prohibitions on assisting suicide. In *Cha'are Shalom v. France* (2000),<sup>45</sup> the Court found that while Jewish ritual slaughtering in general was a religious manifestation or practice deserving presumptive protection under Article 9, a state prohibition on a certain form of ritual slaughtering, deemed cruel to animals, was justified under Article 9, especially since an alternative supply of kosher meat was available from a neighboring state. In *Kokkinakis v. Greece* (1993),<sup>46</sup> the Court found that proselytism or evangelization was a religious manifestation protected by Article 9, and that the state was not justified in imposing criminal sanctions on a peaceable proselytizer.

<sup>45</sup> *Cha'are Shalom v. France*, Eur. Ct. H.R. Appl. No. 27417/95 (Jun. 27, 2000).

<sup>46</sup> *Kokkinankis v Greece*, Eur. Ct. H.R. Appl. No. 14307/88 at para. 33 (May 25, 1993). (The *Kokkinakis* Court made clear that, while unjustified in this case, general restrictions on religious manifestations can be necessary to protect the pluralism of a society: "The fundamental nature of the rights guaranteed in Article 9 para. 1 is also reflected in the wording of the paragraph providing for limitations on them. Unlike the second paragraphs of Articles 8, 10 and 11 which cover all the rights mentioned in the first paragraphs of those Articles, that of Article 9 refers only to "freedom to manifest one's religion or belief." In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.); *Id.* at para. 31

In a subsequent case of proselytism, *Jehovah's Witnesses of Moscow and Others v. Russia* (2010),<sup>47</sup> the Court restated how vital freedom of thought, conscience, and religion is for the democratic society:

[A]s enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to “manifest [one's] religion” alone and in private or in community with others, in public and within the circle of those whose faith one shares. Since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article

<sup>47</sup> *Jehovah's Witnesses of Moscow and Others v Russia*, Eur. Ct. H.R. Appl. No. 302/02 (Jun. 2010). (currently pending for referral to the Grand Chamber.).

9 affords. The State's duty of neutrality and impartiality, as defined in the Court's case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs.<sup>48</sup>

None of these cases deals directly with whether a professed secularist has the right to be free from observing a government's display of religious symbols in a public school. But these cases do make clear that religious freedom for all – even for atheists and agnostics -- is a cherished right in a democratic society, and states must have strong and stated reasons and proportionate methods to regulate or limit this right.

**C. Religious and Non-Religious School Curricula.** Two recent school cases come closer to the issues of *Lautsi*. In *Folgerø and Others v. Norway* (2007)<sup>49</sup> and *Grzelak v. Poland* (2010),<sup>50</sup> the Court dealt with forms of religious instruction in public schools that were challenged by professed atheists and agnostics. *Folgerø* concerned Norway's new law that required all public grade school and middle school students to take a course in "Christianity, Religion and Philosophy" ("KRL" was the local acronym). The law made no exception for non-Christian students. A student, whose parents were professed atheists, objected that this curricular requirement violated the rights to education guaranteed by Article 2. The European Court agreed. It found that the state had not tailored its new law carefully enough to deal with students with different religious and non-religious sensibilities. "[N]otwithstanding the many laudable legislative purposes stated in connection with the introduction of the KRL subject in the ordinary primary and lower secondary schools, it does not appear that the respondent State took sufficient care that information and knowledge included in the curriculum be conveyed in

<sup>48</sup> *Id.* at para. 99.

<sup>49</sup> *Folgerø and Others v. Norway*. Eur. Ct. H.R. (Jun. 27, 2007).

<sup>50</sup> *Grzelak v Poland*, Eur. Ct. H.R. Appl. No. 7710/02 (Jun. 15, 2010).

an objective, critical and pluralistic manner for the purposes of Article 2 of Protocol No. 1. Accordingly, the Court finds that the refusal to grant the applicant parents full exemption from the KRL subject for their children gave rise to a violation of Article 2.”<sup>51</sup>

Three years later, in *Grzelak*, a public grade school student in Poland, with agnostic parents, was properly exempted from mandatory religion classes in accordance with *Folgerø*. But his only alternative to attending the religion classes was to spend unsupervised time in the school hallway, library, or club. His parents wanted him enrolled in an alternative course in secular ethics. The school refused to offer such a special course, on grounds of having insufficient teachers, students, and funds. The school further marked his report card with a blank for “religion/ethics,” and calculated his cumulative grade point average based on fewer credit hours. The Court found both these state actions to be in violation of both Article 9 and 14 of the Convention, for “it brings about a situation in which individuals are obliged – directly or indirectly – to reveal that they are non-believers. This is all the more important when such obligation occurs in the context of the provision of an important public service such as education.”<sup>52</sup>

The Court considers that the absence of a mark for “religion/ethics” would be understood by any reasonable person as an indication that [this student] did not follow religious education classes, which were widely available, and that he was thus likely to be regarded as a person without religious beliefs ... and distinguishes the persons concerned from those who have a mark for the subject. This finding takes on particular significance in respect of a

<sup>51</sup> *Id.*, at para. 102.

<sup>52</sup> *Id.* at para. 87.

country like Poland where the great majority of the population owe allegiance to one particular religion....

The Court finds that the absence of a mark for “religion/ethics” on the [student’s] school certificates throughout the entire period of his schooling amounted to a form of unwarranted stigmatisation.<sup>53</sup>

These cases come closer to *Lautsi* in that they deal with state impositions of religion on public school students -- directly in the case of *Folgerø*, indirectly in the case of *Grzelak*. Neither is a straightforward Article 9 case. *Folgerø* is about Article 2 rights to education free from religious influence; *Grzelak* combines Article 9 with Article 14 restrictions on religious discrimination. Nonetheless, the Court stretches far in both these cases to protect the religious freedom rights of atheistic and agnostic public school students and their parents. And it includes within the right of religious freedom (and related rights of education and non-discrimination) the right of a person to be free from state impositions of religion and even from indirect costs that come from avoiding the state’s religious offerings. *Lautsi* is still distinguishable: it is not about active curricular instruction in religion, but the passive display of a crucifix that the student will encounter in many other walks of Italian public and private life as well. But these cases are important precedents for Ms. Lautsi and her children.

**D. School Dress Codes and Headscarves.** In three other cases, the Court dealt with direct Article 9 religious freedom claims by Muslim women to wear headscarves in manifestation of their religion but contrary to public school dress codes. In each case, the Court held for the state, holding that the state’s interest in protecting the “secularity” of the school in a democratic society was a sufficient ground to justify its prohibitions on headscarves. In each case, the Court granted a “margin of appreciation”

<sup>53</sup> *Id.* at paras. 95-99 (excerpts).

to the state to decide this culturally sensitive issue of headscarf regulations in accordance with its own traditions of secularism.

In *Dahlab v Switzerland* (2001)<sup>54</sup> a state elementary school teacher, newly converted to the Islamic faith from Catholicism, was banned from wearing a headscarf when she taught her classes. The government highlighted the value of maintaining secularism in a public school that was open to young students from various traditions. Invoking the margin of appreciation doctrine, the Court found this school dress code and its application to Ms. Dahlab to be necessary and proportionate, and dismissed her claim that the state had violated her freedom of thought, conscience, and religion under Article 9. The Court stressed:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

<sup>54</sup> *Dahlab v Switzerland*, Eur. Ct. H.R., Appl. No. 42393/98 (Feb. 15, 2001).

Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.<sup>55</sup>

In *Dogru v. France* (2008),<sup>56</sup> a Muslim girl refused to follow her public school's dress code that required her to take off her headscarf during physical education classes and sports events. Dismayed by the breach of its rules and the tensions it caused among the other students, the school initiated disciplinary actions against her. When she persisted in her claim to wear her headscarf in all public settings, the school offered to teach her through a correspondence program, an option which her parents rejected. She was then expelled from the school. After losing in the French courts, she claimed violations of her Article 2 and 9 rights under the Convention. The European Court again held for the state, and again accorded France an ample "margin of appreciation" for its policy of maintaining a secular ethic in its public schools.

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, in

<sup>55</sup> *Id.* at page 13.

<sup>56</sup> *Dogru v. France*, Eur. Ct. H.R. Appl. No. 27058/05 (Dec. 4, 2008).

respect of which the approaches taken in Europe are diverse. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order.”<sup>57</sup>

In the most famous headscarf case, *Leyla Şahin v. Turkey* (2005)<sup>58</sup> an Islamic medical student at Istanbul University was forbidden to take certain courses and exams because she was wearing a headscarf contrary to state rules governing dress. The university brought disciplinary actions against her. After losing in the Turkish courts, she filed a claim before the European Court of Human Rights alleging violation of her Article 9 rights. The Court held for Turkey, and again granted a “margin of appreciation” to the Turkish constitutional and cultural ideals of gender equality and state secularism.

The principle of secularism was inspired by developments in Ottoman society in the period between the nineteenth century and the proclamation of the Republic. The idea of creating a modern public society in which equality was guaranteed to all citizens without distinction on grounds of religion, denomination or sex had already been mooted in the Ottoman debates of the nineteenth century. Significant advances in women’s rights were made during this period (equality of treatment in education, the introduction of a ban on polygamy in 1914, the transfer of jurisdiction in matrimonial cases to the secular courts that had been established in the nineteenth century).

<sup>57</sup> *Id.*, at para. 63.

<sup>58</sup> *Leyla Şahin v. Turkey*, Eur. Ct. H.R. Appl. No. 44774/98 (Nov. 10, 2005) (Note that this case was referred after the chamber delivered a judgment (finding no violation of Article 9 ECHR).

The defining feature of the Republican ideal was the presence of women in public life and their active participation in society. Consequently, the ideas that women should be freed from religious constraints and that society should be modernised had a common origin.<sup>59</sup>

The Court further noted that Turkish national law clearly bans veils and headscarves from schools and public workplaces, and these bans had been upheld many times by the Turkish Constitutional Court. The European Court then discussed the different practices of European States concerning religious symbols and headscarves in order to assess whether there was a “common European standard” on the issue that could be enforced uniformly. There was none. Only Turkey, Azerbaijan and Armenia at the time had explicit regulation concerning Islamic headscarves in a university.<sup>60</sup> France, “where secularism is regarded as one of the cornerstones of republican values,” prohibits persons from wearing headscarves, yarmulkes, and oversized crosses in its state schools.<sup>61</sup> In seven other countries, including Germany and the United Kingdom, Muslim public school and university students were allowed to wear headscarves.<sup>62</sup>

In the absence of a clear European consensus on the regulation of headscarves, the European Court was left to build on its own case law about how much religious freedom to protect and how much national regulation of religion to respect. Those precedents, the *Şahin* court concluded, called for an ample “margin of appreciation” to local practices, which the Court granted to Turkey:

<sup>59</sup> *Id.*, at paras. 33-35.

<sup>60</sup> *Id.*, at para. 55.

<sup>61</sup> *Id.*, at para. 56.

<sup>62</sup> *Id.*, at paras. 56-65.

In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected....

Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society." Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and *avoids any abuse of a dominant position*. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society. Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society."

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the *national decision-making body must be given special importance*. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially in view of the diversity of the approaches taken by national authorities on the issue. *It is not possible to discern throughout Europe a uniform conception of the significance of religion in society, and the meaning or impact of the public expression of a religious belief will differ according to time and context*. Rules in this sphere will consequently vary from one country to another according to national traditions and

the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context.<sup>63</sup>

In the “specific domestic context” of Turkey, “secularism” is “one of the fundamental principles of the Turkish state.” This principle, is “in harmony with the rule of law and respect for human rights [and] may be considered necessary to protect the democratic system in Turkey.” Religious “attitudes” and actions to the contrary “will not enjoy the protection of Article 9 of the Convention.”<sup>64</sup> Hence by a 16-1 vote, the Grand Chamber found in favour of Turkey.

Only Judge Tulkens dissented, arguing that the majority was using the “margin of appreciation” doctrine to abdicate its responsibility to protect fundamental rights. The vital issues of religious freedom at stake in this case are not merely “a local issue,” she argued, “but one of importance to all the member States. European [Court] supervision cannot, therefore, be escaped simply by invoking the margin of appreciation.”

On what grounds was the interference with the applicant’s right to freedom of religion through the ban on wearing the headscarf based? In the present case, relying exclusively on the reasons cited by the national authorities and courts, the majority put forward, in general and abstract terms, two main arguments: secularism and equality. While I fully and totally subscribe to each of these principles, I disagree with the

<sup>63</sup> *Id.*, at paras. 106-109 (emphases added).

<sup>64</sup> *Id.*, at para. 114.

manner in which they were applied here and to the way they were interpreted in relation to the practice of wearing the headscarf. In a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.<sup>65</sup>

While these three cases do not treat the government's own use of religious symbols, they are nonetheless important precedents for both sides of the *Lautsi* case. These cases can be used to support Ms. Lautsi's claim to religious freedom and non-discrimination for herself and her children. The only way they can enjoy true "equality" and "liberty" in Italy as a religious minority, the argument goes, is for the state to embrace the principle of "secularism" and to remove those symbols and end those practices that privilege and reflect the dominant Catholic faith. Particularly in the context of a state school, where children are learning the fundamentals of democracy and freedom for all, even the passive display of a symbol that is overtly Christian and perennially present in the classroom violates the mandates of secularism.

Secularism, the argument continues, is the only common feature that binds together the potpourri of European traditions – Catholic Italy and Poland, Protestant Sweden and Norway, Anglican England, Muslim Turkey, Orthodox Greece and Romania, and the large number of atheists in former Socialist countries. In accepting the European Convention on Human Rights, these countries are also accepting the principle of secularism embedded within it. The only way to ensure that each member state abides by its commitment to human rights, and to the principles of secularity and neutrality that human rights demand, is to ban religious symbols on government land, particularly in public schools – whether those symbols are put there by the state or brought there by a private party. Especially a "powerful external symbol" like the headscarf, as the *Dahlab* Court noted, can be understood as a threat to "the message

<sup>65</sup> *Id.*, dissenting opinion Tulkens, paras. 3-4.

of tolerance, respect for others, and above all, equality and non-discrimination.”<sup>66</sup> It’s best to ban all these religious symbols in public life. Combine the solicitude for the religious freedom claims of atheists and agnostics in *Folgerø* and *Grzelak* against state imposition of religion with the clarion call for state secularism in *Şahin*, *Dogru*, and *Dahlab*, the argument concludes, and Ms. Lautsi and her children should win.

The real issue, Italy’s counterargument can go, is whether the European Court is sincere about granting a “margin of appreciation” to national tribunals on “culturally sensitive” issues where no “European consensus” exists. Or is the Court simply using “the “margin of appreciation” doctrine as a pretext to establishing secularism throughout Europe, even in countries like Italy that reject it. Europe, after all, has no consensus about the mandates of secularism, and nothing in the European Convention commands secularism as a condition for respecting the human rights of all, whatever the Court’s imaginings to the contrary. Moreover, Europe has no consensus about the propriety of religious symbols on government land or in government buildings. These are highly sensitive local issues in ancient religious cultures like Italy that are gradually moving on their own terms and their own timetable toward ever greater pluralism.

Moreover, why would the European Court reject strong Article 9 claims by sincere good faith Muslims, engaged in mainstream religious practices that run contrary to new national policies of secularism, yet grant Article 9 claims of a secularist who has only recently emigrated to Italy with her children but now objects to the vestiges of ancient traditions of Christianity? Why should young students – controlled by secularist parents – get full religious freedom protection against even indirect forms of majoritarian religion, while sincere, good faith Muslim adults cannot get the religious freedom to wear unobtrusive headscarves while enjoying their rights to education? The European Court has painted itself into a secularist corner, the argument for Italy concludes, forgetting the true meaning of religious freedom.

<sup>66</sup> Dahlab ,at page 13.

**E. Freedom of Expression.** In *Otto-Preminger-Institut v. Austria*, we saw the European Court use the “margin of appreciation” doctrine to defer to Austria’s traditions of Christianity, even in the face of a strong Article 10 claim to freedom of expression to show an offensive anti-religious film.<sup>67</sup> That case used the “margin of appreciation” doctrine in a way favorable to Italy’s argument in *Lautsi*.

Another Article 10 case, *Vajnai v. Hungary* (2008),<sup>68</sup> can also be seen as helpful to Italy. A politician of a left wing party, during a public demonstration in Hungary, wore a five-pointed red star, the infamous symbol of the Communist era. He was convicted for wearing a totalitarian symbol in public. He filed a claim in the European Court, claiming a violation of his Article 10 rights to freedom of expression. The Court held for him. The Court took special note of Hungary’s history after their political transformation: “almost two decades have elapsed from Hungary’s transition to pluralism and the country has proved to be a stable democracy. It has become a Member State of the European Union, after its full integration into the value system of the Council of Europe and the Convention. Moreover, there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship. The Government has not shown the existence of such a threat prior to the enactment of the ban in question.”<sup>69</sup>

Not only was the blanket ban unjustified, it was also too broad, because it required no proof that the defendant identified with the ideas that the star represented:

The ban can encompass activities and ideas which clearly belong to those protected by Article 10, and there is no

<sup>67</sup> See *supra* note 43 and accompanying text.

<sup>68</sup> *Vajnai v Hungary*, Eur. Ct. H.R. Appl. No. 33629/06 (Jul. 8, 2008).

<sup>69</sup> *Id.*, para. 49.

satisfactory way to sever the different meanings of the incriminated symbol. Indeed, the relevant Hungarian law does not attempt to do so. Moreover, even if such distinctions had existed, uncertainties might have arisen entailing a chilling effect on freedom of expression and self-censorship.<sup>70</sup>

While the Court recognized the deep scar that Communism had left on Hungary, the judges held that there was no longer a sufficient social need to criminalize the star that symbolized the former Communist regime.

[T]he applicant's conviction for the mere fact that he had worn a red star cannot be considered to have responded to a "pressing social need." Furthermore, the measure with which his conduct was sanctioned, although relatively light, belongs to the criminal law sphere, entailing the most serious consequences. The Court does not consider that the sanction was proportionate to the legitimate aim pursued. It follows that the interference with the applicant's freedom of expression cannot be justified under Article 10 §2 of the Convention.<sup>71</sup>

While the scope and standard of Articles 9 and 10 of the Convention are certainly different, the *Vajnai* red star case has some modest bearing on the *Lautsi* case. In favor of Italy, the case recognizes that once offensive symbols in public life can lose their sting over time, and become accepted parts of a pluralistic culture that is teeming with countervailing symbols of all sorts. Only two decades after the fall of Communism,

<sup>70</sup> *Id.* at para. 54.

<sup>71</sup> *Id.* at para. 58.

the signature red star of the Communist regime was now deemed an acceptable part of public life, even if the star reminded many observers of prior oppression and political abuse, and even if the star was worn by a political official. Wearing the star may be in bad taste, but the issue for the *Vajnai* Court was whether wearing the star represented “a real and present danger” of a return to Communism, which it clearly did not. Italy can make a comparable argument respecting its crucifixes, and how passage of time has rendered them acceptable parts of a pluralistic culture. These crucifixes are not harbingers of a return to Catholic establishments, nor do they signal a “real and present danger” that the democracy of Italy is about to fall to Catholic rule. Moreover, the offenses with which the crucifixes may have been associated in prior centuries of crusades, pogroms, and inquisitions have long since ended – much longer than the offenses associated with the Communist red star, which many Hungarian citizens today can still remember. While the crucifixes may cause offense to a few members of society, like Ms. Lautsi and her children, they represent cherished cultural values to many millions of others. Ms. Lautsi’s views, in fact, cause offense to millions of members of Italian society, but those views cannot be censored for that reason alone. Freedom of expression requires that all views be heard in public life, and no one should enjoy a heckler’s veto.

The counterargument for Ms. Lautsi is that “freedom of expression” is a right that the individual can claim against the state, not that the state can claim against the individual. The further counterargument is that these crucifixes are not one of sundry symbols in public life, but are a distinctive part of the public school classroom which the state compels children to attend. And this case is about freedom of expression, not freedom of thought, conscience, and religion.

As the foregoing survey of cases illustrates, the Grand Chamber in the *Lautsi* case has a wide range of arguments at its disposal, and the eyes of the world are now upon it.

### III. Religious Freedom and Religious Symbols in the United States Supreme Court<sup>72</sup>

While the United States Supreme Court has operated continuously since 1789, its cases on religious symbols in public life and on government land have come only in the last thirty years. All these cases have arisen under the First Amendment Establishment Clause which, as we saw in the Introduction, provides that “Congress shall make no law respecting an establishment of religion.” That constitutional provision, ratified in 1791, was largely dead letter for the first 150 years of American history. Before 1947, the Supreme Court heard only two cases under the Establishment Clause, holding for the government each time.<sup>73</sup> This changed dramatically in 1947, when the Court issued the famous case of *Everson v. Board of Education*.<sup>74</sup> *Everson* for the first time applied the Establishment Clause to state and local governments, by incorporating it into the Due Process Clause of the Fourteenth Amendment. *Everson* also declared that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state’.”<sup>75</sup> This opened the floodgates of litigation; since 1947, the Supreme Court has heard nearly 70 cases arising in whole or in part under the Establishment Clause.<sup>76</sup>

<sup>72</sup> Adapted from Witte and Nichols, *supra* note 15 at chap. 10.

<sup>73</sup> *Bradfield v. Roberts* 175 U.S. 291 (1899); *Reuben Quick Bear v. Leupp* 210 U.S. 50 (1908).

<sup>74</sup> *Everson v. Board of Education*, 330 U.S. 1 (1947).

<sup>75</sup> *Id.* at 15–16.

<sup>76</sup> See list of cases in Appendix 3 in Witte and Nichols, *supra* note 15 at 305-38.

Some two-thirds of these Establishment Clause cases have concerned education – more particularly, the place of religion in public schools and the place of government in religious schools. Particularly in its religion and public school cases, the Court issued its strongest statements that the Establishment Clause called for “a high and impregnable wall of separation between church and state.” “That wall must be kept high and impregnable. We could not approve the slightest breach.”<sup>77</sup> The Court used this strict separationist logic to ban the use of religious teachers, religious officials, Bible readings, student-led prayers, moments of silence, and creationist science from the public school classroom, and to ban prayers and religious ceremonies even from occasional public school events like graduation ceremonies and football games.<sup>78</sup> In these cases, the Court also developed a three-part test to apply the First Amendment Establishment Clause. In *Lemon v. Kurtzman* (1971), the Court declared that any government action challenged under the Establishment Clause would meet constitutional muster only if it: (1) had a secular purpose; (2) had a primary effect that neither advanced nor inhibited religion; and (3) fostered no excessive entanglement between church and state officials.<sup>79</sup> This *Lemon* test, as it came to be called, was to be used not only in religion and education cases, but in all cases arising under the Establishment Clause.

Among the remaining Supreme Court Establishment Clause cases outside of education was a set of convoluted cases from 1980-2010 that raised two loaded questions: (1) what role may religious officials, ceremonies, and symbols play in public life; and (2) to what extent may government recognize, support, fund, house, or participate in these forms and forums of religious expression?

<sup>77</sup> *Everson v. Board of Education*, 330 U.S. 1 at 18 (1947).

<sup>78</sup> Cite cases *McCullum to Santa Fe*

<sup>79</sup> *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

Cases raising these questions had poured into the lower federal courts shortly after the Supreme Court issued its *Everson* case. Litigation groups like the American Civil Liberties Union, Americans United for Separation of Church and State, and the Anti-Defamation League filed many of the law suits. Their efforts were complemented, if not catalyzed, by the nation's growing countercultural movements in the 1960s (think of the hippie movement, Woodstock, the Vietnam War protests), by a growing anti-religious sentiment in the American academy in the 1970s (think of the "God is dead" movement and the Marxist critiques of religion), and by the rise of religious and cultural minorities whose views found too little place in majoritarian policies and practices. Cultural critics and constitutional litigants challenged a number of admixtures of religion and government—including the presence of religious language, art, and symbols on government stationery and seals and in public parks and government buildings; the purchase and display of religious art, music, literature, and statuary in state museums; governmental recognition of Christian Sundays and holidays; and others.

Before 1980, few of these cases made much headway in the lower federal courts. The Supreme Court repeatedly refused to hear these cases on appeal, save a small cluster of cases in 1961 challenging traditional Sabbath day laws, which got nowhere.<sup>80</sup> After 1980, however, the Court took on several cases on state-supported displays of religious symbols. These cases divided (and continue to divide) the Court deeply, yielding wildly discordant approaches to the Establishment Clause and bitter dissenting opinions from several of the Justices, notably Justices Scalia, Souter, and Stevens.

<sup>80</sup> See *McGowan v. Maryland*, 366 U.S. 420 (1961) (Upheld state law proscribing certain business and commercial activity on Sunday against establishment clause challenge); *Two Guys from Harrison Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (Sunday closing laws does not violate establishment clause); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Statute disallowing sales on Sunday does not violate free exercise rights of Jewish appellant, who is a strict Saturday Sabbatarian); *Gallagher v. Crown Kosher Super Market of Massachusetts*, 366 U.S. 617 (1961) (Sunday closing law does not violate free exercise rights of owner of kosher Jewish supermarket, Orthodox Jewish customers, or rabbis with a duty to inspect kosher markets per Jewish dietary laws).

**A. Religious Symbols in Public Schools.** The Supreme Court's first case to deal directly with the constitutionality of religious symbols on government property was *Stone v. Graham* (1980).<sup>81</sup> This was, in fact, another religion and public school case. The Court struck down a state statute that authorized the posting of a plaque bearing the Ten Commandments on the wall of each public school classroom. The plaques were donated and hung by private groups in the community. There was no public reading of the commandments nor any evident mention or endorsement of them by teachers or school officials. Each plaque also bore a small inscription that sought to immunize it from charges of religious establishment: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."<sup>82</sup>

Using the *Lemon* test, the Court struck down these displays as violations of the establishment clause. Its *per curiam* opinion held that the statute mandating the Decalogue display had no "secular legislative purpose" but was instead "plainly religious."<sup>83</sup> The Ten Commandments are sacred in Jewish and Christian circles, the Court reasoned, and they command "the religious duties of believers."<sup>84</sup> It made no constitutional difference that the Ten Commandments were passively displayed rather than formally read aloud or that they were privately donated rather than purchased with state money. The very display of the Decalogue in the public school classroom served only a religious purpose and was thus *per se* unconstitutional.<sup>85</sup>

<sup>81</sup> *Stone v. Graham*, 449 U.S. 39 at 40-41 (1980).

<sup>82</sup> *Id.* at 40.

<sup>83</sup> *Id.* at 41.

<sup>84</sup> *Id.* at 42.

<sup>85</sup> *Id.*

**B. Religious Crèches and Government Support.** The next main case dealt with the place of a government-sponsored religious symbol on private land, and here the Court upheld the display. In *Lynch v. Donnelly* (1984),<sup>86</sup> the Court addressed the constitutionality of a government display of a crèche, or manger scene. For forty years, officials in the town of Pawtucket, Rhode Island had coordinated with local merchants to put up a large Christmas display in a private park in the heart of the downtown shopping area. The display had many typical holiday decorations—stuffed animals, toys, striped poles, a Santa Claus house, a sleigh and reindeer, cardboard carolers, colored lights, a “Season’s Greetings” sign, and more. Embedded in this large display was a manger scene that depicted the Bible’s account of the birth of Christ. It included figurines of Mary, Joseph, and baby Jesus in a manger, surrounded by animals, shepherds, wise men, and angels. The crèche occupied about ten percent of the total holiday display space, and constituted fifteen percent of all the figurines. The city had purchased the crèche forty years before, and had since stored and maintained it at little cost. Local taxpayers challenged the display as a violation of the establishment clause.

The *Lynch* Court upheld the display. “There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life,” Chief Justice Burger wrote for the majority, giving an ample list of illustrations to show how crèches and other religious symbols had long been embedded in American culture and experience.<sup>87</sup> But there is another reason to uphold this display, Burger continued, now working through the three-part *Lemon* test. Crèches, while of undoubted religious significance to Christians, are merely “passive” parts of “purely

<sup>86</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984).

<sup>87</sup> *Id.* at 674

secular displays extant at Christmas,” and they have taken on secular civic purposes and become embedded in the fabric of society.<sup>88</sup> Government acknowledgments of religion—like these crèches, like legislative prayers, and like the “In God We Trust” statements on our coins—are not per se unconstitutional, Justice O’Connor added in concurrence. Instead, they serve “the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”<sup>89</sup> The primary effect of displaying the crèche as part of the broader holiday display is not to advance the Christian religion, Chief Justice Burger continued, but to “engender a friendly community spirit of good will” that “brings people into the central city, and serves commercial interests and benefits merchants.”<sup>90</sup> Governmental participation in and support of such “ceremonial deism” is not a form of excessive entanglement with religion and cannot be assessed by “mechanical logic” or “absolutist” tests of establishment.<sup>91</sup> “It is far too late in the day to impose a crabbed reading of the Establishment Clause on the country.”<sup>92</sup>

Five years later, in *Allegheny County v. ACLU* (1989),<sup>93</sup> the Court offered a much closer, if not a “crabbed,” reading of the establishment clause to outlaw another such

<sup>88</sup> *Id.* at 684.

<sup>89</sup> *Id.* at 693 (O’Connor, J., concurring).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 718.

<sup>92</sup> *Id.* at 687.

<sup>93</sup> *Allegheny County v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

public holiday display that ran six weeks from Thanksgiving into the new year. This display was in the county courthouse near the “grand staircase,” a heavily trafficked area for the many people who used the county’s offices for licensing, registration, litigation, and the like. Almost the entire display was a crèche, featuring the same biblical figurines displayed in *Lynch*. The tallest figurine was an angel holding a trumpet that bore a clearly visible sign: “*Gloria in excelsis Deo*” (“Give Glory to God in the Highest”), the Latin words of a familiar Christmas carol. The crèche had been donated by a lay Catholic group, which had put up a small sign indicating the same. The county had put around the display a small white fence, flanked by two small pine trees with red bows, and lined with red and white poinsettias. For the three weeks before Christmas, the county had invited local high school choirs to sing carols at the crèche during lunch time, dedicating the musical offerings to world peace and to missing soldiers. Local taxpayers brought suit.

The *Allegheny* Court struck down this crèche display as a violation of the Establishment Clause. Justice Blackmun wrote for the plurality, noting that this display was on a prominent piece of government land, and not in a private park (as the *Lynch* display had been). This display was almost exclusively religious in content, and not buffered by ample secular accoutrements of comparable size and genre. And this display carried a single, undiluted verbal message—enjoining viewers to give glory to God in the highest. Taken together, Justice Blackmun concluded, these factors had the fatal effect of primarily advancing or endorsing the Christian religion to the exclusion of all other forms of faith.<sup>94</sup>

<sup>94</sup> *Id.* at 601-602.

The same *Allegheny* Court, however, upheld the public display of a menorah, the eight-armed candle holder symbolizing the Jewish holiday of Hanukkah. The menorah in question was an abstract eighteen-foot design, privately owned but erected and maintained by the county. It was displayed at a lesser used entrance to the same courthouse, alongside the city's own 45-foot decorated Christmas tree, which had been labeled "A Salute to Liberty." Given its less prominent placement on government land, its abstract design, its proximity to the larger "Salute to Liberty" tree, its lack of verbal religious messages, and its use of a symbol (a menorah) that has both religious and cultural connotations, this display was constitutionally acceptable, Justice Blackmun concluded. The Court did not address the dissonance between upholding a menorah while simultaneously outlawing a crèche at the same courthouse, but seemed to suggest that each case turned on the context and the characterization of the religious symbol.<sup>95</sup>

**C. Private Displays of Religious Symbols in Public Forums.** How to characterize a religious symbol arose again six years later, in *Capitol Square v. Pinette* (1995).<sup>96</sup> For more than a century the State of Ohio had opened a ten acre square around the state capitol building for public gatherings and displays of various sorts. Parties who wished to use the square had to apply and receive a free license from the state. In December, the state invited the community to erect various unattended displays in this square. The state put up its own Christmas tree, and granted the application of a local rabbi to put up a menorah. But the state denied the application of the Ku Klux Klan to put up its signature Latin cross. The KKK appealed, charging the state with viewpoint discrimination in violation of its free speech rights. The state

<sup>95</sup> *Id.* at 620-21.

<sup>96</sup> *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995).

countered that to allow the KKK to display its cross next to the state capitol would constitute an establishment of religion.

The *Pinette* Court upheld the free speech rights of the KKK and found no establishment clause violation. “A free-speech clause without religion would be Hamlet without the prince,” Justice Scalia wrote for the plurality.<sup>97</sup> The state has created an open public forum in its capitol square, and it cannot discriminatorily exclude religious speech from this forum unless it has a compelling reason to do so. Merely seeking to avoid an establishment of religion is generally not a sufficiently compelling reason to justify religious discrimination, the Court concluded. Moreover, the Latin cross is only a private expression of religion, and no reasonable person would assume that the state had erected or condoned it—especially since the KKK would prominently label the cross as its own. And, unlike the single crèche display at the grand staircase in *Allegheny*, this display would be one of several in a public forum that is open to anyone else who wishes to apply.<sup>98</sup>

Justice Thomas concurred in the case, arguing not only that the Latin cross was a form of private expression, but that it was not even religious. For the KKK, “[t]he erection of such a cross is a political act, not a Christian one.” Its depiction is deeply offensive given the nation’s history of slavery and the KKK’s history of racism. But even offensive speech deserves free speech protection.<sup>99</sup>

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 766.

<sup>99</sup> *Id.* at 770 (Thomas, J. concurring).

**D. Decalogue Displays on Government Land.** The Court's conflicting messages and methods of dealing with public displays of religion became even more confusing after its two cases on the constitutionality of Ten Commandments displays on government land. In *McCreary County v. ACLU* (2005)<sup>100</sup> and in *Van Orden v. Perry* (2005),<sup>101</sup> announced back-to-back on the same day, two sharply divided courts struck down one Decalogue display but left another standing. In *McCreary*, Justice Souter, writing for the majority, used a strict *Lemon* analysis to strike down the display, with *Stone v. Graham* as the strongest precedent. In *Van Orden*, Chief Justice Rehnquist, writing for the plurality, ignored *Lemon* and instead used a soft history argument to uphold the display, with *Lynch v. Donnelly* as the strongest precedent. Both cases featured long and bitter dissents by Justices Scalia and Stevens and a cacophony of concurring and dissenting opinions by other Justices. The practical difference in outcome on the Court was attributable to Justice Breyer, who joined the majority in *McCreary* and joined in the decision (but not the plurality opinion) in *Van Orden*. In his concurrence in *Van Orden*, Justice Breyer described it as a "difficult borderline case" that called for "the exercise of legal judgment."<sup>102</sup>

*McCreary County v. ACLU* concerned a Kentucky county's new display of the Ten Commandments (or Decalogue) on a prominent wall in its courthouse. Initially the county ordered the Decalogue to be hung by itself. When the ACLU brought suit, the county ordered that the Decalogue be retained but that other governmental documents

<sup>100</sup> *McCreary County, KY v. American Civil Liberties Union of KY*, 544 U.S. 844 (2005).

<sup>101</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>102</sup> *Id.* at 700 (Breyer, J., concurring in the judgment).

be put around the display. The county's new order stated that "the Ten Commandments are codified in Kentucky's civil and criminal laws"; that they were put up "in remembrance and honor of Jesus Christ, the Prince of Ethics"; and that the "Founding Fathers [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."<sup>103</sup> Almost all the surrounding governmental documents chosen for the display had the religious language in them highlighted.

As the case proceeded through the courts, the county ordered yet a third display, but without repealing its prior two orders. Now the Decalogue on display was expanded to include the full verses from Exodus 20, and not just a summary as in the prior exhibits. It was flanked by nine other documents of comparable size, including the Magna Carta, the Declaration of Independence, the Bill of Rights, and the Mayflower Compact, with more neutral language in these documents highlighted. The collection as a whole was entitled "The Foundations of American Law and Government Display." Each document had a comparably-sized description of its historical and legal significance. The Ten Commandments bore this description:

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of

<sup>103</sup> McCreary County, KY v. American Civil Liberties Union of KY, 544 U.S. 844, 853 (2005).

Happiness.’ The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.<sup>104</sup>

The entire display was on the wall of a heavily-trafficked hallway in the county courthouse. The county had initiated and paid for the displays.

The *McCreary* Court struck this display down as a violation of the establishment clause. Its fatal feature, in the Court’s judgment, was that it lacked a genuine secular purpose, as both *Lemon* and *Stone* had required. The Decalogue is “a pervasively religious text” with a clear religious message, Justice Souter wrote for the majority, even if this text may have had legal or political uses in the past.<sup>105</sup> The county’s stated legislative purpose in putting up the display was to “honor Christ,” the “Prince of Ethics.” “The original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.”<sup>106</sup> That was fatal in *Stone*, and it must be fatal here.

The county’s clumsy attempts to dilute this religious message by relabeling the Decalogue as a moral code, and by displaying other political documents with their religious passages prominently highlighted, only compounded its constitutional error in

<sup>104</sup> *Id.* at 844.

<sup>105</sup> *Id.* at 870.

<sup>106</sup> *Id.* at 869.

the eyes of any “reasonable observer,” Justice Souter continued. The purported secular purposes of the county’s final display “were presented only as a litigating position”<sup>107</sup> and did little to offset the offending religious purpose that had informed the first two displays and the county’s actions throughout the lawsuit. A genuine attempt by government to cure an inadvertent unconstitutional condition could certainly pass muster under the establishment clause, the *McCreary* Court concluded, but there was no such genuine attempt here. Viewed as a whole, and over time, the county’s actions constituted an establishment of religion.<sup>108</sup>

In *Van Orden v. Perry*, issued two hours after *McCreary*, the Court took a very different approach. This case concerned a six-foot tall stone monument of the Decalogue on the state capitol grounds in Austin, Texas. The Decalogue had been privately donated forty years before by a voluntary civic group, the Fraternal Order of Eagles. It was one of 38 historical markers and monuments on a 22-acre state capitol campus. It was located near a lesser sidewalk that connected the state capitol building with the state supreme court building. *Van Orden*, a state taxpayer who had regularly used the law library the prior six years, challenged the Decalogue display as a form of religious establishment.

The *Van Orden* Court upheld the display. “Our cases, Januslike, point in two directions,” Chief Justice Rehnquist wrote candidly for the plurality. One set of cases “acknowledges the strong role played by religion and religious traditions throughout our Nation’s history.” “The other face looks toward the principle that governmental

<sup>107</sup> *Id.* at 871.

<sup>108</sup> *Id.* at 881.

intervention in religious matters can itself endanger religious freedom.”<sup>109</sup> The *Van Orden* Court followed the first line of cases, and declared the *Lemon* test “not useful”<sup>110</sup> in this case. The Decalogue is clearly a religious text with a religious message, the Court made clear. But “simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”<sup>111</sup> The Decalogue, like many other religious texts and symbols on federal, state, and local government lands, is also part of “America’s heritage”, part of the fabric of American society”<sup>112</sup> Its public display on government land democratically recognizes and represents that “religion has been closely identified with our history and government” and that America is “a religious people, whose institutions presuppose a Supreme Being.”<sup>113</sup> Moreover, this Decalogue display was privately donated. It stood unchallenged for forty years. It is a merely “passive” display that anyone can easily avoid while walking the state capitol grounds. And its message is buffered by the thirty-seven other monuments and markers on the same government land, most of which are decidedly secular. If this display is unconstitutional, Chief Justice Rehnquist wrote, then hundreds of others religious displays and maybe even the religious statutes of Moses and Mohammed on a frieze in the Supreme Court building, must come down. That surely is neither the intent nor the import of the First Amendment Establishment Clause.<sup>114</sup>

<sup>109</sup> *Van Orden v. Perry*, 545 U.S. 677, 683 (2005).

<sup>110</sup> *Id.* at 685.

<sup>111</sup> *Id.* at 690.

<sup>112</sup> *Id.* at 689.

<sup>113</sup> *Id.* at 683 n.2.

<sup>114</sup> *Id.* at 691-692.

After such a remarkably discordant pair of cases, it was surprising to most observers that the Supreme Court, in *Pleasant Grove City v. Summum* (2009),<sup>115</sup> was unanimous in upholding the constitutionality of a Ten Commandments monument on government land. The monument had been privately donated forty years earlier by the same Fraternal Order of Eagles that we saw in *Van Orden*. It was one of a dozen old signs and markers in a city park in Utah. A new religious group, called Summum, sought permission to erect in the park a monument with their Seven Principles of faith. The city refused, so Summum sued under the First Amendment. It charged the city with violating the Free Speech clause by discriminating against its Seven Principles. It also threatened to charge the city with violating the Establishment Clause by displaying the Ten Commandments alone. This left the city with a hard choice: take down the Ten Commandments or put up the Seven Principles.

The *Pleasant Grove* Court accepted neither approach, and held for the government. The Court treated the Ten Commandments monument as a form of permissible government speech. A government “is entitled to say what it wishes,” Justice Alito wrote for the Court, and it may select and reflect certain views in favor of others.<sup>116</sup> It may express its views by putting up its own tax-paid monuments or by accepting monuments donated by private parties (whose contents it need not fully endorse). In this case, city officials had earlier accepted a Ten Commandments monument on grounds that it reflected the “[a]esthetics, history, and local culture” of the city.<sup>117</sup> The Free Speech Clause does not give a private citizen a “heckler’s veto”<sup>118</sup>

<sup>115</sup> *Pleasant Grove City, UT v. Summum*, 129 S. Ct. 1125 (2009).

<sup>116</sup> *Id.* at 1127.

<sup>117</sup> *Id.* at 1128.

over that old decision by the city. Nor does it compel the city to accept every privately donated monument once it has accepted the first. Government speech is simply “not bound by the free speech clause,” the Court concluded, nor is it subject to judicial second-guessing under the First Amendment. Government officials are “accountable to the electorate” for their speech, and they will be voted out of office if their views cause offense.<sup>119</sup>

---

<sup>118</sup> *Id.* at 1131.

<sup>119</sup> *Id.*

It helped the *Pleasant Grove* Court that there were a dozen monuments in the city park, only one of which was religious in content. It also helped that the Decalogue here was a forty-year-old monument that had never been challenged before. Such facts allowed some of the justices to agree that the display did not constitute an establishment of religion. But the case turned on a characterization of the Ten Commandments monument as a form of government speech—not as a secularized icon of ceremonial deism or as a religious symbol sufficiently buffered by secular equivalents. The *Pleasant Grove* Court did not deny or dilute the religious qualities of the Ten Commandments. Instead, it left it to elected government officials to decide how to reflect and represent the views of the people, including their religious views. And it left it to the people to debate and decide whether the government’s representation of their views was adequate or outmoded. Courts could certainly step in if the government coerced citizens to accept the religious views on these symbols, or if the government’s speech violated privacy, endangered society, or violated the constitution. But a merely passive display of a generic religious symbol or text was not nearly enough to trigger federal judicial intervention.<sup>120</sup>

**E. The Cross in the National Park.** The Supreme Court did not use this government-speech logic in *Salazar v. Buono* (2010). The case, as we saw in the Introduction, concerned a challenge to a seven-foot cross on prominent display in the Mojave National Preserve in California. The cross had been donated and erected in 1934 by a private group, the Veterans of Foreign Wars (VFW), as a memorial to fallen American soldiers. The cross stood alone. A few years earlier, a Buddhist group had sought to place one of its shrines near the cross, but the government had denied their application. A former park worker now challenged its constitutionality.

<sup>120</sup> See *id.*

Observers had expected the *Buono* Court to return to *Pleasant Grove*, and decide whether this privately-donated cross in a federal park, like the privately-donated Decalogue in a city park, would be viewed as a constitutionally permissible form of government speech. Unlike *Pleasant Grove*, there were no nearby secular buffers to offset the religious message, but here the cross was a non-verbal symbol, its location was much more remote, and it had stood almost twice as long without challenge. The six fractured opinions in *Buono*, however, focused largely on *Buono*'s standing rights, the constitutionality of Congress's private land sale, and the district court's authority to enjoin it.

Writing for himself and two others, Justice Kennedy concluded that *Buono* had standing both to press his original case that challenged the constitutionality of the cross display on federal land and to press his subsequent case that challenged the federal land sale. But Kennedy was not convinced that the district court had jurisdiction to extend its original injunction against the cross to enjoin the congressional act authorizing the land sale. The decision to enjoin the land sale required a separate constitutional inquiry whether Congress had truly violated the Establishment Clause, not just a simple judgment that its act was a "sham" designed to "evade" the first injunction. The district court would now have to judge Congress's actions on the merits. In making this judgment, Kennedy continued, the district court would have to take into account the reality that while the cross was "certainly a Christian symbol," it had not been erected in the park "to promote a Christian message" or to "set the imprimatur of the state on a particular creed. Rather those who erected the cross intended simply to honor our Nation's fallen soldiers." The district court would further have to recognize that "[t]ime also has played a role" and "the cross and the cause it commemorated had become entwined in the public consciousness" and part of "our national heritage." Justice Kennedy thus reversed the order enjoining the land transfer and remanded the case to the district court to judge the constitutionality of Congress's act on the merits and in light of these factors.

Joining the plurality, Justice Alito thought the case was sufficiently developed for the Supreme Court itself to make that constitutional judgment – and in favor of the government. The cross had been privately donated to honor the nation's war dead (just like crosses in government cemeteries everywhere), it had stood without challenge for seventy years, and it was an utterly remote corner of a desert park "seen by more

rattlesnakes than humans.” Also joining the plurality, Justices Scalia and Thomas thought that *Buono* lacked standing to seek an injunction of the land sale and the district court lacked power to issue the injunction. *Buono* is asking a federal court to prevent the display of a small cross on private land, they concluded; this leaves no constitutional question to resolve.

That characterization missed the constitutional point, Justice Stevens wrote in dissent, joined by three others. The issue is whether the original display of the cross violates the Establishment Clause, and whether Congress’s actions in response to the district court order can be seen as an “evasion” -- much like the government’s actions in the *McCreary County* case, which had been judged unconstitutional. Justice Stevens concluded that both the purpose and effect of the land transfer statute was to endorse religion in violation of the establishment clause. In a separate dissent, Justice Breyer concluded that the district court did have power to enjoin the land transfer, making unnecessary any further inquiry into Establishment Clause issues.

**F. Rules of Thumb in Future Religious Symbolism Cases.** This thirty-year line of religious symbolism cases—from *Stone v. Graham* (1980) to *Buono v. Salazar* (2010) —has easily been the least steady of the Court’s Establishment Clause cases. Many of these cases turn heavily on the facts, and how these facts are characterized. Many feature widely discordant opinions, sometimes cast in rhetorically bombastic terms. The Court still seems a long way from creating a new concordance of its discordant precedents – though Mr. Linkner’s article hereafter makes a valiant effort to find coherence among the jumbled opinions. So far, there are only a few rules of thumb to guide litigants and lower courts in these matters. Four are worth mentioning here— with the caveat that while each might be useful, none is dispositive.

First, older religious displays and practices tend to fare better than newer displays, particularly if they have not faced much constitutional challenge before. Even if the original inspiration for the old display or practice was religious, its longstanding presence in public life seems to imbue it with a kind of cultural and constitutional imprimatur. In the Court’s view, it has become a part of American culture, society, and democracy—and is thus unlikely to be a fateful first step toward an establishment of religion. Sometimes the Court has implied that even if the display or practice once had

specific religious meaning, that has now been lost; it is now either merely a civic symbol devoid of religious content or a more generic symbol that evinces “ceremonial deism.” Other times the Court has worked harder to acknowledge the ongoing religious nature and content of the symbol for many citizens.

Moreover, if establishment clause litigants sit on their rights too long, those rights tend to get less deference when they are finally exercised. Older religious displays and practices were at issue in *Lynch*, *Van Orden*, *Pleasant Grove*, and *Buono*, and government won each time. Newer displays were at issue in *Stone*, *Allegheny*, and *McCreary*, and government lost each time. The law recognizes both the power and the pressure of time in other areas. For example, the power of time can be seen in historical preservation and zoning rules that “grandfather” various older (religious) uses of property that do not comport with current preferred uses. It can also be seen in private property laws of “adverse possession”: an open, continuous, and notorious use of a property eventually will vest in the user. Those legal ideas have some bearing on these religious symbolism cases, leaving older displays more secure but new displays more vulnerable. The law further recognizes the pressure of time in its rules of pleading and procedure. In order to promote finality and to prevent stale claims, legislatures set statutes of limitations on many claims. But the law itself has long done the same through the equitable doctrine of “laches,” which similarly penalizes parties for sitting too long on their rights. While the law does not set statutes of limitations on constitutional cases, and the Court has never explicitly invoked laches, the idea itself seems to influence the Court. “If a thing has been practiced for two hundred years by common consent” especially at the local level, Justice Holmes once wrote, “it will take a strong case for the Fourteenth Amendment to affect it.”<sup>121</sup>

<sup>121</sup> *Jackman v. Rosenbaum*, 260 U.S. 22, 31 (1922).

Second, it can be critical to a case how the symbol or practice is labeled or characterized. *Stone* and *McCreary* characterized the Decalogue as a religious symbol and struck it down; *Van Orden* and *Pleasant Grove* characterized it as an historical marker and let it stand. *Lynch* labeled the crèche a mere holiday display with commercial value, and let it stand; *Allegheny* labeled the crèche a depiction of the Christmas story, and struck it down. *Pinette* called the Latin cross a form of private expression protected by free speech clause; *Pleasant Grove* called the Decalogue a form of government speech immune from the Free Speech Clause. *Lynch* labeled the secular decorations around the crèche an effective buffer; *McCreary* regarded the secular documents around the Decalogue as fraudulent camouflage. For *Stone*, labeling the Decalogue as a moral code was viewed as a subterfuge belied by the very imperative tone of the Commandments. For *Allegheny*, labeling a 45-foot county Christmas tree as “A Salute to Liberty” was sufficient constitutional cover for placement of a menorah. *Allegheny* treated as constitutionally fatal two signs at the crèche bearing the imperative “Gloria in excelsis Deo” and “Donated by the Holy Name Society.” *Van Orden* thought a small sign, “Donated by the Fraternal Order of Eagles” offset any constitutional offense to a six-foot Decalogue with imperatives like “Thou shalt have no other gods before,” “Thou shalt not take the name of the Lord thy God in vain,” and “Observe the Sabbath and keep it holy.” Characterization of the symbol or practice can be key to its constitutional fate.

Third, geographical location can also be important. Government-sponsored displays on private property, as in *Lynch*, get more deference than private displays on government property, as in *Stone* and *Allegheny*. Displays in prominent places on government properties, like the grand staircase in *Allegheny* or the main hallway in the *McCreary* courthouse, are more suspect than those in less conspicuous places, like the secondary entrance in *Allegheny*, the secondary sidewalk in *van Orden*, the small city park in *Pleasant Grove*, or the remote desert of a national park in *Buono*. Location is not dispositive of the Establishment Clause question, as litigants in *Pinette* found out; there, religious activities and displays on the steps of the state capitol were upheld. But location is a factor in some cases. And location can play a key role if it strongly influences whether citizens are actually or effectively forced to observe or participate in the religious exercise. That smacks of coercion and leads the Court to find a violation of the establishment clause, as in *Stone* and in the prayer in public school cases.

A fourth factor is whether the religious symbol or practice is offset by other secular symbols or practices. Particularly when government sponsors or houses religious symbols on its property, it is best to offset these religious symbols by non-religious symbols of comparable size, weight, and genre. *McCreary* makes clear that a court can (and sometimes will) second-guess the government when the court suspects subterfuge. But lower courts have generally been sympathetic with government officials who try to balance religious and non-religious messages in their public display. In assessing the balance, they will make rough judgments whether the offsetting symbols' messages are of comparable genre; whether its religious qualities are obvious or more abstract; and whether the religious symbol is suitable or unsuitable for the government forum. For example, a Renaissance "Madonna With Child" may be fine in the foyer of the state museum but not in the entrance to the state capitol. This, like all these rules of thumb, merely reiterates that context matters.

## Conclusions

The *Lautsi* case and the *Buono* case were not inevitable in result given the shifting precedents available to the high courts of Europe and America respectively. And neither case has been finally put to rest. At the time of this writing, *Lautsi* is still before the Grand Chamber of the European Court of Human Rights, awaiting final judgment on appeal. If the Grand Chamber affirms the chamber below, it's easy to imagine a flood of new cases challenges the untold number of religious symbols in other public buildings in Western Europe. If the Grand Chamber reverses, it will be important to see how strong a role the "margin of appreciation" doctrine played in its decision.

*Buono* is back before the federal district court that now must judge the constitutionality of Congress's decision to sell the land. Since the *Buono* case was remanded, the Ninth Circuit Court of Appeals has just issued another opinion, striking down another old memorial cross that the city of San Diego sold to Congress in an effort to preserve it against an establishment clause challenge. However the *Buono* district court comes out on remand, the case will almost certainly be appealed again, given the Supreme Court's confusing precedents and logics on the constitutionality of religious symbols on government land and the uncertainty that this discordance of opinion has created for litigants and for government officials.

We end with where we ended our Introduction. While it is easy to be cynical about these religious symbolism cases, we must remember that they are essential

forums to work out peaceably our deep cultural differences and to find ways of accommodating both our traditions and the shifting needs of our modern cultures.