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***LIFT HIGH THE CROSS?*[†]:
CONTRASTING THE NEW EUROPEAN AND AMERICAN CASES ON
RELIGIOUS SYMBOLS ON GOVERNMENT PROPERTY**

John Witte, Jr.^{*}
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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 U.S. 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, as the heartland of Christianity for nearly two millennia, 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 and symbols.

In *Lautsi v. Italy*,¹ a mother of two children who attended an Italian public school challenged an Italian tradition going back to 1924 that called for the

[†] 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). *Come Brethren Follow Where Our Captain Trod*, HYMNARY.ORG, http://www.hymnary.org/text/come_christians_follow_where_our_savior (last visited Mar. 19, 2011).

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¹ *Lautsi v. Italy*, Eur. Ct. H.R. (2009) [hereinafter *Lautsi I*], http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Lautsi” in the “Case Title” box and “Italy” in the “Respondent State” box) (referred to the Grand Chamber on March 1, 2010). The hearing was held on June 30, 2010, and eight of the ten intervening states were participating to support the Italian government. *ECHR Crucifix Case: 20 European Countries Support the Crucifix*, EUR. CENTER FOR L. & JUST. (July 21, 2010), <http://www.eclj.org/Releases/Read.aspx?GUID=983c3dd3-9c17-4b70-a016-37851446ec0e&s=eur>.

display of a crucifix in each public school classroom.² The perennial and prominent presence of these overtly Christian symbols, Lautsi argued, was contrary to the atheistic beliefs with which she wanted to raise and educate her children.³ She thus sought to have the crucifixes removed.⁴ She won her case in the Italian trial court.⁵ 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.⁶ 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 Number 1) and Article 9.⁷

On November 3, 2009, a unanimous seven-judge chamber of the European Court of Human Rights held for Lautsi.⁸ 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.⁹ The Court ordered damages to Lautsi of €5000.¹⁰ Italy appealed, dismayed at what it took to be an assault on its national culture and tradition.¹¹

On June 30, 2010, the Grand Chamber of the European Court of Human Rights heard further arguments in the case.¹² At least twenty European nations publicly stated their support for Italy and joined its criticism of the European Court's first chamber decision.¹³ The *Lautsi* case was taken under advisement by the Grand Chamber, which was subject to intense lobbying pressure on both sides.

² See *Lautsi I*, *supra* note 1, paras. 1, 3, 20.

³ See *id.* para. 27.

⁴ *Id.* paras. 1, 7.

⁵ See *id.* paras. 13–15.

⁶ 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. 95, 102 (2011).

⁷ *Lautsi I*, *supra* note 1, paras. 3, 27; see *infra* notes 65–69 and accompanying text.

⁸ *Lautsi I*, *supra* note 1, para. 70.

⁹ See *id.* paras. 55–57.

¹⁰ *Id.* para. 70.

¹¹ *ECHR Crucifix Case: 20 European Countries Support the Crucifix*, *supra* note 1.

¹² *Id.*

¹³ For a full list of these twenty states, see *id.*

On March 18, 2011, just as this Article was going to final press, the Grand Chamber of the European Court of Human Rights reversed the Chamber below, and held fifteen to two in favor of Italy, halting at least for now the steady march toward increasing secularization and *laïcité*.¹⁴ While this Article retains our analysis of the original Chamber judgment against the backdrop of earlier European Court cases, we reflect on the significance of the Grand Chamber’s judgment in the Conclusion and show the growing convergence with recent U.S. Supreme Court case law.

In *Salazar v. Buono*,¹⁵ a retired national park worker challenged the display of a cross in a national park in the State of California.¹⁶ The Veterans of Foreign Wars (“VFW”), a private group, had donated and erected the cross in 1934 as a memorial to fallen American soldiers.¹⁷ The cross stood alone, visible on the horizon.¹⁸ A small sign at the base of the cross indicated that the VFW had donated it.¹⁹ 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 U.S. Constitution.²⁰ A federal district court found the cross display to be unconstitutional.²¹ 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.²² The district court declared this purported Constitutional cure a “sham,” and repeated its injunction that the cross be removed.²³ The national park service appealed, ultimately to the Supreme Court.²⁴

A plurality of the Supreme Court ordered that the cross be retained.²⁵ The decision to enjoin Congress’s land sale, Justice Kennedy wrote for the

¹⁴ See *Lautsi v. Italy*, Eur. Ct. H.R. (2011) [hereinafter *Lautsi II*], http://www.echr.coe.int/ECHR/homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Lautsi” in the “Case Title” box and “Italy” in the “Respondent State” box).

¹⁵ *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

¹⁶ *Id.* at 1812.

¹⁷ *Id.* at 1811.

¹⁸ *Id.* at 1812.

¹⁹ *Id.* The signs have since been removed and the cross currently stands unmarked.

²⁰ *Id.*; U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

²¹ *Salazar*, 130 S. Ct. at 1812.

²² *Id.* at 1813.

²³ *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1077–78 (9th Cir. 2009); see Adam Linkner, *How Salazar v. Buono Synthesizes Establishment Clause Precedent into a Single Test*, 25 EMORY INT’L L. REV. 57, 79 (2011).

²⁴ *Salazar*, 130 S. Ct. at 1814.

²⁵ *Id.* at 1821.

plurality, required the district court to undertake a separate Constitutional inquiry of 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.²⁶ Congress had 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.²⁷ The district court now would have to judge the Constitutionality of Congress’s actions on the merits.²⁸ 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.”²⁹ The district court would further have to recognize that “[t]ime also has played its role” and that “the cross and the cause it commemorated had become entwined in the public consciousness” and part of “our national heritage.”³⁰

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, was ordered to 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.³¹ And it is no small irony that the European Court, operating without an explicit prohibition on religious establishments, struck down the cross, while the U.S. Supreme Court, armed with an explicit Constitutional command that “Congress shall make no law respecting an establishment of religion,”³² let the cross stand on land that Congress controlled.

²⁶ *Id.* at 1814–21.

²⁷ *Id.* at 1809.

²⁸ *Id.* at 1820–21.

²⁹ *Id.* at 1816–17 (emphasis omitted).

³⁰ *Id.* at 1817.

³¹ *Id.*

³² U.S. CONST. amend. I.

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 zealous in protecting them in the name of religious freedom. Indeed, in six decades of cases before *Salazar*, the U.S. Supreme Court had struck down the use of religious symbols in public schools, along with prayers, Bible reading, and religious instruction.³³ A number of European nations besides Italy have done the same.³⁴ 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 state³⁵ at work in many of its religion and public school cases, the U.S. 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.³⁶ Particularly in recent years, the Supreme Court, flush with neo-federalist energy, has shown ample deference to the actions of state and local officials concerning religion when those actions are challenged under the First Amendment Establishment Clause.³⁷ 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” to national traditions and practices that are challenged as violations of the religious freedom guarantees of the European Convention on Human Rights.³⁸

³³ See JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 223–40 (3d ed. 2011).

³⁴ See, e.g., Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] May 16, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (Ger.) [hereinafter German Crucifix Case], available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=615 (translating a classroom crucifix case) (ruling against crucifixes in Bavarian public schools). See generally RELIGIOUS EDUCATION IN PUBLIC SCHOOLS: STUDY OF COMPARATIVE LAW (José Luiz Martínez López-Muniz et al. eds., 2006) (discussing European education and religious liberty issues).

³⁵ See John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. CHURCH & ST. 15, 15–46 (2006).

³⁶ *Id.*

³⁷ See WITTE & NICHOLS, *supra* note 33, at 186.

³⁸ See GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 80 (2007); HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 13 (1996).

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, the authors situate the *Lautsi* and *Salazar* cases in the existing case law of the European Court of Human Rights and the U.S. 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.³⁹ The *Salazar* case, by contrast, is the last in a three-decade series of convoluted Supreme Court cases.⁴⁰ 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.⁴¹

In the two Articles that follow, two experts provide an in-depth analysis of the *Lautsi* and *Salazar* cases and the jurisprudential stakes at work in each case. Adam Linkner, a bright new Constitutional scholar now clerking with a distinguished federal judge, has followed the *Salazar* case from the beginning. He takes note of the conflicting lower federal court treatment of the very issue on which the *Salazar* plurality divided—whether a sale of government property that contains offending religious symbols is permissible under the First Amendment Establishment Clause.⁴² The real difficulty with *Salazar*, 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.⁴³ 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 *Salazar*.⁴⁴ First, this test requires a court to judge whether the “predominant purpose” or intent of the government was to favor, endorse, or privilege religion.⁴⁵ This is an “insider” inquiry that considers all the evidence of what went into the government’s decision and action respecting religion.⁴⁶ Second, the test requires a court to judge whether an external reasonable observer would see the primary effect of the government’s action as one that

³⁹ See *infra* text accompanying notes 128–56.

⁴⁰ See *infra* text accompanying notes 387–89.

⁴¹ See *infra* text accompanying notes 411–23.

⁴² See Linkner, *supra* note 23, at 57–65.

⁴³ *Id.* at 58–59.

⁴⁴ See *id.* at 70–72.

⁴⁵ *Id.* at 59.

⁴⁶ *Id.*

endorsed religion.⁴⁷ 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.⁴⁸ 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.⁴⁹ In Linkner’s view, Congress’s land sale was so transparently favorable to religion that it fails the insider/outsider inquiry.⁵⁰ In the end, Linkner thinks *Salazar* is wrong and the cross should come down. He would likely applaud the recent case of *Trunk v. City of San Diego*, where the Ninth Circuit Court of Appeals, distinguishing *Salazar*, ordered the removal of a large cross which was privately donated to the United States nearly a century ago but now owned by the federal government—the Ninth Circuit’s concern being that, from an outsider’s perspective, the primary effect of the cross was to endorse religion.⁵¹

Andrea Pin, a distinguished Constitutional law professor at the University of Padua, has watched the *Lautsi* case emerge from the very region of Italy where Pin had been schooled as a child and where he now teaches as a law professor. Pin 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*).⁵² Pin then contrasts the Italian Constitutional law of religious symbolism with the emerging jurisprudence of religious freedom of the European Court of Human Rights.⁵³ Pin 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.⁵⁴ In the end, Pin thinks the original Chamber decision of *Lautsi* is wrong, and the crosses should remain. He thus applauds the recent Grand Chamber judgment.⁵⁵

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See id.* at 81–83.

⁵⁰ *Id.* at 92.

⁵¹ *See id. passim*; *Trunk v. City of San Diego*, 629 F.3d 1099, 1125 (9th Cir. 2011).

⁵² *See* Pin, *supra* note 6, at 110–35.

⁵³ *Id.* at 117–20.

⁵⁴ *See id.* at 141–49.

⁵⁵ *See id. passim.*

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 is 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 courts and academies, rather than on the 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.⁵⁶ 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 in which to work through our deep cultural differences and to sort out peaceably which traditions and practices should continue and which should change.

I. 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 (“ECHR” or “Convention”) is binding upon all

⁵⁶ See RENÉ GIRARD, VIOLENCE AND THE SACRED (1977); Samuel Azariah, *The Violence of Religious Intolerance*, WORLD COUNCIL OF CHURCHES, <http://www.wcc-coe.org/wcc/what/jpc/echoes/echoes-18-06.html> (last visited Apr. 2, 2011).

forty-seven of the current member states.⁵⁷ The European Court of Human Rights (“Court” or “European Court”), reformed in 1998,⁵⁸ is the principal interpreter of the Convention.⁵⁹ It is a daily operating and fully functioning supervisory body, staffed with forty-seven judges, representing each member state, along with some 640 clerks.⁶⁰ The Court’s principal task is to hear cases that determine whether the member states are violating the rights guaranteed in the Convention.⁶¹ 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.⁶² However, the Court has frequently stated that it is not a court of last appeal that can supplant national judicial remedies.⁶³

Article 9 of the European Convention on Human Rights is the major provision on religious freedom.⁶⁴ 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.⁶⁵

⁵⁷ See Convention for the Protection of Human Rights and Fundamental Freedoms art. 46, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights] (entered into force Sept. 3, 1953).

⁵⁸ See generally Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, *opened for signature* May 11, 1994, E.T.S. 155 [hereinafter Protocol 11] (entered into force Nov. 1, 1998) (amending the European Convention on Human Rights).

⁵⁹ *Id.* art. 19.

⁶⁰ See *Role of the Registry*, EUR. CT. HUM. RTS., <http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/The+Registry> (last visited Mar. 20, 2011).

⁶¹ EUROPEAN COURT OF HUMAN RIGHTS, THE COURT IN BRIEF (2010), *available at* http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf.

⁶² *Id.*

⁶³ See NINA-LOUISA AROLD, THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS 31 (2007) (analyzing the Court’s general workings and relationships with member states).

⁶⁴ European Convention on Human Rights, *supra* note 57, art. 9.

⁶⁵ *Id.* art. 9.

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.”⁶⁶ It has also made clear that Article 9(2) of the ECHR is an exhaustive list of the grounds on which any government official may impose limitations on religious freedom.⁶⁷

Article 2 of Protocol 1 to the European Convention supplements the religious freedom guarantee of Article 9 in cases of education.⁶⁸ 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.”⁶⁹ Article 14 of the Convention further prohibits discrimination on grounds of religion.⁷⁰ And Article 10 protects freedom of expression, which can include religious and anti-religious expression.⁷¹

Religious freedom cases arising under Article 9 are relatively few compared to other areas of human rights.⁷² From 1959 to 2009, the European Court of Human Rights (and its predecessors) found a total of thirty violations of this Article,⁷³ five of them occurring in 2009 alone.⁷⁴ By comparison, during

⁶⁶ *Buscarini v. San Marino*, 1999-I Eur. Ct. H.R. 605, 616.

⁶⁷ DAVID J. HARRIS, MICHAEL O’BOYLE & COLIN WARBRICK, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 435 (2d ed. 2009); *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 768 (Pieter van Dijk et al. eds., 4th ed. 2006).

⁶⁸ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, *opened for signature* Mar. 3, 1952, E.T.S. 009 [hereinafter Protocol 1] (entered into force May 18, 1954).

⁶⁹ *Id.*

⁷⁰ European Convention on Human Rights, *supra* note 57, art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

⁷¹ *Id.* art. 10(1) (“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.”).

⁷² See Nina-Louisa Arold, *Promoting Normative Cracks in the Surface: Strasbourg Changing Swedish Legal Culture*, in *LAW AND RELIGION IN THE 21ST CENTURY: NORDIC PERSPECTIVES* 275, 278 (Lisbet Christoffersen et al. eds., 2010).

⁷³ PUB. RELATIONS UNIT, EUROPEAN COURT OF HUMAN RIGHTS, 50 YEARS OF ACTIVITY: THE EUROPEAN COURT OF HUMAN RIGHTS—SOME FACTS AND FIGURES 15 (2010) [hereinafter 50 YEARS OF ACTIVITY], *available at* <http://www.echr.coe.int/NR/ronlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresENAvril2010.pdf>.

⁷⁴ PUB. RELATIONS UNIT, EUROPEAN COURT OF HUMAN RIGHTS, VIOLATION BY ARTICLE AND BY COUNTRY 2 (2009), *available at* http://www.echr.coe.int/NR/ronlyres/E8F73EC8-AF6A-4205-BAF2-F6043F67F651/0/Tableau_de_violations_2009_ENG.pdf.

that same forty-year period, the Court found some 4008 violations of Article 6 concerning the fairness and length of proceedings,⁷⁵ and the Court has close to 140,000 pending applications.⁷⁶ While religious freedom cases are small in number, violations of Article 9 are still burning issues,⁷⁷ 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.⁷⁸ To manage this swollen docket, Protocol 14 now gives judges the discretion to restrict themselves to cases alleging “significant” violations.⁷⁹ Chambers of seven judges, selected from among the forty-seven sitting judges, decide most cases.⁸⁰ These seven judges often are a balanced representation of the legal cultures represented among the forty-seven member states.⁸¹

⁷⁵ 50 YEARS OF ACTIVITY, *supra* note 73, at 15 (noting 4008 cases that concerned length of proceedings and an additional 3207 cases that concerned the right to a fair and timely trial under Article 6 of the ECHR between 1959 and 2009).

⁷⁶ See PUB. RELATIONS UNIT, EUROPEAN COURT OF HUMAN RIGHTS, PENDING APPLICATIONS ALLOCATED TO A JUDICIAL FORMATION (2010), *available at* http://www.echr.coe.int/NR/rdonlyres/99F89D38-902E-4725-9D3D-4A8BB74A7401/0/Pending_applications_chart.pdf (in December 2010, there were 139,650 pending applications).

⁷⁷ See generally Brett G. Scharffs, *Symposium Introduction: The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religions Perspectives*, 26 J.L. & RELIGION 249 (2010).

⁷⁸ *But see* PUB. RELATIONS UNIT, EUROPEAN COURT OF HUMAN RIGHTS, STATISTICS 2010 (2010), *available at* http://www.echr.coe.int/NR/rdonlyres/8699082A-A7B9-47E2-893F-5685A72B78FB/0/Statistics_2010.pdf (discussing that between 1959 and 2009, the Court delivered a total of 12,198 judgments, while between January and September 2010, it produced 1442 judgments and 24,321 admissibility decisions).

⁷⁹ European Convention on Human Rights, *supra* note 57, art. 35 (“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.”).

⁸⁰ PUB. RELATIONS UNIT, EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 6 (2010) [hereinafter THE ECHR IN 50 QUESTIONS], *available at* http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_COUL_ENG_A5_OCT2010.pdf.

⁸¹ See AROLD, *supra* note 63, at 55 (discussing the influence of different legal traditions that the judges share on the Court).

Within three months of a chamber judgment any of the parties can request a referral to a Grand Chamber.⁸² This constitutes an internal appellate review, and involves seventeen judges of the European Court.⁸³ The Italian government in *Lautsi* invoked this mechanism.⁸⁴ 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 Rights⁸⁵ 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.⁸⁶ That doctrine recognizes that national judges are often better placed than international judges to assess these culturally sensitive questions.⁸⁷ Only if there is a manifest breach of the European Convention on Human Rights will the Court find a violation.⁸⁸

When a party claims a violation of Article 9 rights to religious freedom, 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.⁸⁹ 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 need, is proportionate to the aim pursued, and is justified by relevant and sufficient reasons.⁹⁰

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*⁹¹ regarding an act of state censorship that was challenged as a violation of Article 10 rights to free

⁸² See European Convention on Human Rights, *supra* note 57, art. 43(1) ("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 be referred to the Grand Chamber.").

⁸³ THE ECHR IN 50 QUESTIONS, *supra* note 80, at 6.

⁸⁴ See *supra* text accompanying note 14.

⁸⁵ See AROLD, *supra* note 63, at 55.

⁸⁶ The margin of appreciation is frequently used by the Court. See YOUROW, *supra* note 38, at 24 (providing an extensive study of the doctrine and describing its development in two time periods: before and after 1979). The doctrine's scope was expanded during the later years. See, e.g., *Hatton v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 189 (concerning flight noise interruptions of sleep); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976) (concerning obscene publications).

⁸⁷ See YOUROW, *supra* note 38, at 13.

⁸⁸ See *id.*

⁸⁹ See *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) 6, 18 (1993).

⁹⁰ See *id.* at 20–22.

⁹¹ *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) (1994).

expression.⁹² 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.⁹³ Using the margin of appreciation doctrine, the European Court judges found these state restrictions on the film to be justified.⁹⁴ The Court determined that the national authorities of Austria were better able to discern the cultural trends and moral sensitivities of the Tyrol region of Austria.⁹⁵ While the Court recognized that Article 10 rights to freedom of expression 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.⁹⁶ Here, the margin of appreciation doctrine was used to defer to a national court’s protection of local Christian sensibilities and traditions.⁹⁷ This is an important precedent for Italy in the *Lautsi* case—though *Otto-Preminger-Institut* 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*,⁹⁸ the European Court held that a husband’s act of 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.⁹⁹ The husband could not accordingly claim a religious freedom exemption from English criminal prohibitions on assisting suicide.¹⁰⁰ In *Cha’are Shalom Ve Tzedek v. France*,¹⁰¹ 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

⁹² *Id.* at 5–6.

⁹³ *Id.* at 8–9.

⁹⁴ *Id.* at 19–21.

⁹⁵ *Id.* at 20–21.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 255.

⁹⁹ *See id.* at 281–82.

¹⁰⁰ *See id.*

¹⁰¹ *Cha’are Shalom Ve Tzedek v. France*, 2000-VII Eur. Ct. H.R. 231.

slaughtering, deemed cruel to animals, was justified under Article 9, especially since an alternative supply of kosher meat was available from a neighboring state.¹⁰² In *Kokkinakis v. Greece*,¹⁰³ 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.¹⁰⁴

In a subsequent case of proselytism, *Jehovah's Witnesses of Moscow v. Russia*,¹⁰⁵ 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

¹⁰² *Id.* at 259.

¹⁰³ *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) 6 (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 (art. 9-1) is also reflected in the wording of the paragraph providing for limitations on them. Unlike the second paragraphs of Articles 8, 10 and 11 (art. 8-2, art. 10-2, art. 11-2) which cover all the rights mentioned in the first paragraphs of those Articles (art. 8-1, art. 10-1, art. 11-1), that of Article 9 (art. 9-1) 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 18.

¹⁰⁴ *Id.*

¹⁰⁵ *Jehovah’s Witnesses of Moscow v. Russia*, Eur. Ct. H.R. (2010), http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Jehovah’s Witnesses of Moscow” in the “Case Title” box and “Russia” in the “Respondent State” box) (currently pending for referral to the Grand Chamber).

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 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.¹⁰⁶

None of these cases dealt 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 v. Norway*¹⁰⁷ and *Grzelak v. Poland*,¹⁰⁸ the Court dealt with forms of religious instruction in public schools that were challenged by professed atheists and agnostics.¹⁰⁹ *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”).¹¹⁰ The law provided no full exemption for non-Christian students.¹¹¹ A student, whose parents were professed atheists, objected that this curricular requirement violated the rights to education guaranteed by Article 2.¹¹² The European Court agreed.¹¹³ It found that the state had not tailored its new law carefully enough to deal with students with different religious and non-religious sensibilities:¹¹⁴

¹⁰⁶ *Id.* para. 99 (citations omitted).

¹⁰⁷ *Folgerø v. Norway*, Eur. Ct. H.R. (2007) [hereinafter *Folgerø*], http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Folgerø” in the “Case Title” box and “Norway” in the “Respondent State” box).

¹⁰⁸ *Grzelak v. Poland*, Eur. Ct. H.R. (2010) [hereinafter *Grzelak*], http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Grzelak” in the “Case Title” box and “Poland” in the “Respondent State” box).

¹⁰⁹ *Id.* paras. 6–25; *Folgerø*, *supra* note 107, para. 3.

¹¹⁰ *Folgerø*, *supra* note 107, para. 3.

¹¹¹ *Id.* para. 30.

¹¹² *Id.*

¹¹³ *Id.* para. 102.

¹¹⁴ *Id.*

[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 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 2.¹¹⁵

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*.¹¹⁶ But the student's only alternative to attending the religion classes was to spend unsupervised time in the school hallway, library, or club.¹¹⁷ His parents wanted him enrolled in an alternative course in secular ethics.¹¹⁸ The school refused to offer such a special course, on grounds of having insufficient teachers, students, and funds.¹¹⁹ The school further marked the student's report card with a blank for "religion/ethics," and calculated his cumulative grade point average based on fewer credit hours.¹²⁰ The Court found both these state actions to be in violation of both Article 9 and Article 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."¹²¹

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

.....

¹¹⁵ *Id.*

¹¹⁶ *Grzelak*, *supra* note 108, para. 7.

¹¹⁷ *Id.*

¹¹⁸ *Id.* paras. 7, 12.

¹¹⁹ *Id.* paras. 12, 19.

¹²⁰ *Id.* paras. 21–25.

¹²¹ *Id.* para. 87.

. . . [T]he 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 stigmatisation¹²²

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;¹²³ *Grzelak* combines Article 9 with Article 14 restrictions on religious discrimination.¹²⁴ Nonetheless, the Court stretched far in both these cases to protect the religious freedom rights of atheistic and agnostic public school students and their parents.¹²⁵ And it included 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.¹²⁶ *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.¹²⁷ But these cases are important precedents for *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.¹²⁸ 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.¹²⁹ In each case, the Court granted a margin of

¹²² *Id.* paras. 95, 99 (citation omitted).

¹²³ *Folgerø*, *supra* note 107, paras. 53–102.

¹²⁴ *Grzelak*, *supra* note 108, paras. 49–101.

¹²⁵ *See id.* paras. 84–101; *Folgerø*, *supra* note 107, paras. 85–105.

¹²⁶ *See Folgerø*, *supra* note 107, paras. 66–67; *Grzelak*, *supra* note 108, paras. 85–99.

¹²⁷ *Lautsi I*, *supra* note 1, para. 7.

¹²⁸ *Dogru v. France*, Eur. Ct. H.R. (2008) [hereinafter *Dogru*], http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Dogru” in the “Case Title” box and “France” in the “Respondent State” box); *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173; *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447.

¹²⁹ *Dogru*, *supra* note 128, paras. 75, 78; *Şahin*, 2005-XI Eur. Ct. H.R. at 205–06; *Dahlab*, 2001-V Eur. Ct. H.R. at 463–64.

appreciation to the state to decide this culturally sensitive issue of headscarf regulations in accordance with its own traditions of secularism.¹³⁰

In *Dahlab v. Switzerland*,¹³¹ a state elementary school teacher, newly converted to the Islamic faith from Catholicism, was banned from wearing a headscarf when she taught her classes.¹³² The government highlighted the value of maintaining secularism in a public school that was open to young students from various traditions.¹³³ Invoking the margin of appreciation doctrine, the Court found this school dress code and its application to Dahlab to be necessary and proportionate, and dismissed her claim that the state had violated her freedom of thought, conscience, and religion under Article 9.¹³⁴ The Court stressed

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.

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.¹³⁵

¹³⁰ *Dahlab*, 2001-V Eur. Ct. H.R. at 463; *Dogru*, *supra* note 128, para. 75; *Şahin*, 2005-XI Eur. Ct. H.R. at 208.

¹³¹ *Dahlab*, 2001-V Eur. Ct. H.R. 447.

¹³² *Id.* at 451–52.

¹³³ *Id.* at 458.

¹³⁴ *Id.* at 463.

¹³⁵ *Id.*

In *Dogru v. France*,¹³⁶ 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.¹³⁷ Dismayed by the breach of its rules and the tensions it caused among the other students, the school initiated disciplinary actions against her.¹³⁸ 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 that her parents rejected.¹³⁹ She was then expelled from the school.¹⁴⁰ After losing in the French courts, she claimed violations of her Article 2 and Article 9 rights under the Convention.¹⁴¹ 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.¹⁴²

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 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.¹⁴³

In the most famous headscarf case, *Şahin v. Turkey*,¹⁴⁴ 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.¹⁴⁵ The University brought disciplinary actions against her.¹⁴⁶ After losing in the Turkish courts, she filed a claim before the European Court of Human Rights alleging a violation of her Article 9 rights.¹⁴⁷ The Court held for Turkey, and

¹³⁶ *Dogru*, *supra* note 128.

¹³⁷ *Id.* para. 7.

¹³⁸ *Id.* para. 8.

¹³⁹ *See id.* paras. 11–12.

¹⁴⁰ *Id.* para. 8.

¹⁴¹ *Id.* paras. 1, 2, 12–46.

¹⁴² *Id.* para. 75.

¹⁴³ *Id.* para. 63 (citation omitted).

¹⁴⁴ *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173.

¹⁴⁵ *Id.* at 181.

¹⁴⁶ *Id.* at 182.

¹⁴⁷ *Id.* at 179–80, 182–83.

again granted a margin of appreciation to the Turkish constitutional and cultural ideals of gender equality and state secularism.¹⁴⁸

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).

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.¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹ There was none.¹⁵² Only Turkey, Azerbaijan, and Armenia at the time had explicit regulations concerning Islamic headscarves in a university.¹⁵³ 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.¹⁵⁴ In seven other countries, including Germany and the United Kingdom, Muslim public school and university students were allowed to wear headscarves.¹⁵⁵

¹⁴⁸ *Id.* at 180, 205–08.

¹⁴⁹ *Id.* at 185–86.

¹⁵⁰ *Id.* at 187–89.

¹⁵¹ *Id.* at 192–94.

¹⁵² *See id.*

¹⁵³ *Id.* at 192.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 192–94.

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:

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.¹⁵⁶

In the “specific domestic context” of Turkey, “secularism” is “one of the fundamental principles of the Turkish state.”¹⁵⁷ 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.”¹⁵⁸ Religious “attitudes” and actions to the contrary “will not enjoy the protection of Article 9 of the Convention.”¹⁵⁹ Hence by a sixteen to one vote, the Grand Chamber found in favor of Turkey.¹⁶⁰

Only Judge Tulkens dissented, arguing that the majority was using the margin of appreciation doctrine to abdicate its responsibility to protect fundamental rights.¹⁶¹ 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.”¹⁶²

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 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.¹⁶³

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 Lautsi’s claim to religious freedom and non-discrimination for herself and her children. The only way they can

¹⁵⁶ *Id.* at 203–04 (emphases added) (citations omitted).

¹⁵⁷ *Id.* at 204–06.

¹⁵⁸ *Id.* at 205–06.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 217.

¹⁶¹ *See id.* at 221–22 (Tulkens, J., dissenting).

¹⁶² *Id.* at 222.

¹⁶³ *Id.* at 221–22.

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, Ireland, and Poland, Protestant Sweden and Norway, Anglican England, Muslim Turkey, Orthodox Greece and Romania, and the large number of atheists in former Socialist countries.¹⁶⁴ In accepting the European Convention on Human Rights,¹⁶⁵ 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 of tolerance, respect for others, and above all, equality and non-discrimination.”¹⁶⁶ It is 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*¹⁶⁷ against state imposition of religion with the clarion call for state secularism in *Dahlab*, *Dogru*,¹⁶⁸ and *Şahin*, the argument concludes, and Lautsi and her children should win.

The real issue, Italy might counter, is whether the European Court is sincere about granting a margin of appreciation to national tribunals on culturally “sensitive” issues in which no “European consensus” exists.¹⁶⁹ 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

¹⁶⁴ See *id.* at 192–94 (majority opinion).

¹⁶⁵ *Id.* at 205–06.

¹⁶⁶ *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 463.

¹⁶⁷ See generally *Folgerø*, *supra* note 107, paras. 51–57, 86; *Grzelak*, *supra* note 108.

¹⁶⁸ See generally *Dahlab*, 2001-V Eur. Ct. H.R. 447; *Dogru*, *supra* note 128; *Şahin*, 2005-XI Eur. Ct. H.R. 173.

¹⁶⁹ See *Lautsi I*, *supra* note 1, paras. 38–41.

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,¹⁷⁰ 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 would conclude, forgetting the true meaning of religious freedom.

E. Freedom of Expression

In *Otto-Preminger-Institut v. Austria*, the European Court used 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.¹⁷¹ 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*,¹⁷² 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.¹⁷³ He was convicted for wearing a totalitarian symbol in public.¹⁷⁴ He filed a claim in the European Court, claiming a violation of his Article 10 rights to

¹⁷⁰ See *id.* para. 41.

¹⁷¹ See *supra* notes 91–97 and accompanying text.

¹⁷² *Vajnai v. Hungary*, Eur. Ct. H.R. (2008), http://www.echr.coe.int/echr/Homepage_EN (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Vajnai” in the “Case Title” box and “Hungary” in the “Respondent State” box).

¹⁷³ *Id.* para. 6.

¹⁷⁴ *Id.* paras. 7–8.

freedom of expression.¹⁷⁵ The Court held in the politician’s favor.¹⁷⁶ The Court took special note of Hungary’s history after its political transformation:

[A]lmost 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.¹⁷⁷

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 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.¹⁷⁸

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.¹⁷⁹

[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.¹⁸⁰

¹⁷⁵ *Id.* para. 3.

¹⁷⁶ *Id.* para. 58.

¹⁷⁷ *Id.* para. 49 (citation omitted).

¹⁷⁸ *Id.* para. 54.

¹⁷⁹ *Id.* para. 57.

¹⁸⁰ *Id.* para. 58.

While the scope and standard of Article 9 and Article 10 of the Convention are certainly different, the *Vajnai* 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.¹⁸¹ Only two decades after the fall of Communism, 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.¹⁸² 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.¹⁸³ 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 ended¹⁸⁴—much longer than the offenses associated with the Communist red star, which many Hungarian citizens today can still remember. While the crucifixes may offend a few members of society, like Lautsi and her children, they represent cherished cultural values to many millions of others. 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 Lautsi might be 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 might be 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. Interestingly, as we

¹⁸¹ See *id.* paras. 48–58.

¹⁸² See *id.*

¹⁸³ *Id.* para. 49.

¹⁸⁴ See Pin, *supra* note 6, at 102–04.

will note in the Conclusion, the Grand Chamber did rather little to distinguish these precedents or even to deal with them in a serious way. That will leave plenty of room for argument in subsequent European Court cases on religious symbols in public life, which will doubtlessly arise in different quarters of Europe.

II. RELIGIOUS FREEDOM AND RELIGIOUS SYMBOLS IN THE U.S. SUPREME COURT¹⁸⁵

While the U.S. Supreme Court has operated continuously since 1790,¹⁸⁶ its cases on religious symbols in public life and on government land have come only in the last thirty years.¹⁸⁷ All these cases have arisen under the First Amendment Establishment Clause which, as noted in the Introduction, provides that “Congress shall make no law respecting an establishment of religion.”¹⁸⁸ That Constitutional provision, ratified in 1791,¹⁸⁹ was largely a dead letter for the first 150 years of American history.¹⁹⁰ Before 1947, the Supreme Court heard only two cases directly under the Establishment Clause, holding for the government each time.¹⁹¹ This changed dramatically in 1947, when the Court decided the famous case of *Everson v. Board of Education*.¹⁹² *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.¹⁹³ *Everson* also declared that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state.’”¹⁹⁴ This opened the floodgates of litigation; since 1947, the Supreme Court has heard nearly seventy cases arising in whole or in part under the Establishment Clause.¹⁹⁵

Some two-thirds of these Establishment Clause cases have concerned education—more particularly, the place of religion in public schools and the

¹⁸⁵ See WITTE & NICHOLS, *supra* note 33, at 287–94.

¹⁸⁶ *Home of the Court*, SUP. CT. HIST. SOC’Y, <http://www.supremecourthistory.org/history-of-the-court/home-of-the-court> (last visited Mar. 20, 2011).

¹⁸⁷ See WITTE & NICHOLS, *supra* note 33, at 227–36.

¹⁸⁸ U.S. CONST. amend. I.

¹⁸⁹ WITTE & NICHOLS, *supra* note 33, at 89.

¹⁹⁰ See *id.* at 109–10.

¹⁹¹ *Reuben Quick Bear v. Leupp*, 210 U.S. 50, 82 (1908); *Bradfield v. Roberts*, 175 U.S. 291, 300 (1899).

¹⁹² *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

¹⁹³ *Id.* at 13–15.

¹⁹⁴ *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

¹⁹⁵ For a list of cases, see WITTE & NICHOLS, *supra* note 33, at 305–38.

place of government in religious schools.¹⁹⁶ 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 between church and state.¹⁹⁷ “That wall must be kept high and impregnable. We could not approve the slightest breach.”¹⁹⁸ 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.¹⁹⁹ In these cases, the Court also developed a three-part test to apply the First Amendment Establishment Clause.²⁰⁰ In *Lemon v. Kurtzman*,²⁰¹ 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.²⁰² 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.²⁰³

Among the remaining Supreme Court Establishment Clause cases outside of education was a set of convoluted cases from 1980 to 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?

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

¹⁹⁶ *Id.* at 223.

¹⁹⁷ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

¹⁹⁸ *Id.*

¹⁹⁹ *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Chamberlain v. Dade County*, 377 U.S. 402 (1964); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

²⁰⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ WITTE & NICHOLS, *supra* note 33, at 177–81.

lawsuits.²⁰⁴ Their efforts were complemented, if not catalyzed, by the nation’s growing countercultural movements in the 1960s (think of the hippie movement, Woodstock, and the Vietnam War protests),²⁰⁵ 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),²⁰⁶ and by the rise of religious and cultural minorities whose views found too little place in majoritarian policies and practices.²⁰⁷ 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.²⁰⁸

Before 1980, few of these cases made much headway in the lower federal courts.²⁰⁹ 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.²¹⁰ After 1980, however, the Court took on several cases on state-supported displays of religious symbols.²¹¹ 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.²¹²

²⁰⁴ *Id.* at 223.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 224.

²¹⁰ See generally *Braunfeld v. Brown*, 366 U.S. 599 (1961) (holding that a statute disallowing sales on Sunday does not violate free exercise rights of Jewish appellant, who is a strict Saturday Sabbatarian); *Gallagher v. Crown Kasher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961) (holding that a 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); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding a 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) (holding Sunday closing laws do not violate the Establishment Clause).

²¹¹ See *Salazar v. Buono*, 130 S. Ct. 1803 (2010); *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Stone v. Graham*, 449 U.S. 39 (1980).

²¹² See *Van Orden*, 545 U.S. 677; *McCreary County*, 545 U.S. 844.

A. *Religious Symbols in Public Schools*

Stone v. Graham was the Supreme Court's first case to deal directly with the Constitutionality of religious symbols on government property.²¹³ This was, in fact, another religion and public school case.²¹⁴ The *Stone* Court struck down a state statute that authorized posting a plaque bearing the Ten Commandments (or Decalogue) on the wall of each public school classroom.²¹⁵ Private groups in the community donated and hung the plaques.²¹⁶ The Commandments were not read publicly, nor did teachers or school officials mention or endorse them.²¹⁷ 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."²¹⁸

Using the *Lemon* test, the Court struck down these displays as violations of the Establishment Clause.²¹⁹ Its per curiam opinion held that the statute mandating the Decalogue display had no "secular legislative purpose" but was instead "plainly religious."²²⁰ The Ten Commandments are sacred in Jewish and Christian circles, the Court reasoned, and they command "the religious duties of believers."²²¹ 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.²²² The very display of the Decalogue in the public school classroom served only a religious purpose and was thus per se unconstitutional.²²³

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.²²⁴ In

²¹³ *Stone*, 449 U.S. at 40–41.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 41.

²¹⁷ *Id.* at 42.

²¹⁸ *Id.* at 40 (quoting KY. REV. STAT. ANN. § 158.178 (West 2010)).

²¹⁹ *Id.* at 40–41.

²²⁰ *Id.* at 41.

²²¹ *Id.* at 42.

²²² *Id.*

²²³ *Id.*

²²⁴ *Lynch v. Donnelly*, 465 U.S. 668, 668 (1984).

Lynch v. Donnelly,²²⁵ the Court addressed the Constitutionality of a government display of a crèche, or manger scene.²²⁶ For forty years, officials in the town of Pawtucket, Rhode Island coordinated with local merchants to put up a large Christmas display in a private park in the heart of the downtown shopping area.²²⁷ 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.²²⁸ Embedded in this large display was a manger scene that depicted the Bible’s account of Christ’s birth.²²⁹ It included figurines of Mary, Joseph, and baby Jesus in a manger, surrounded by animals, shepherds, wise men, and angels.²³⁰ The crèche occupied about ten percent of the total holiday display space, and constituted fifteen percent of all the figurines.²³¹ The city purchased the crèche forty years before and had since stored and maintained it at little cost.²³² Local taxpayers challenged the display as violating the Establishment Clause.²³³

The *Lynch* Court upheld the display.²³⁴ “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.²³⁵ But there is another reason to uphold this display, Burger continued, now working through the three-part *Lemon* test.²³⁶ Crèches, while of undoubted religious significance to Christians, are merely “passive” parts of “purely secular displays extant at Christmas,” and they have taken on secular civic purposes and become embedded in the fabric of society.²³⁷ Government acknowledgments of religion—like these crèches, legislative prayers, and the “In God We Trust” statements on our coins—are not per se unconstitutional, Justice O’Connor added in concurrence.²³⁸ Instead, they serve “the legitimate secular purposes of

225 *Id.*

226 *Id.* at 671–72.

227 *Id.* at 671.

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.* at 672.

235 *Id.* at 674.

236 *Id.*

237 *Id.* at 685.

238 *Id.* at 692–93 (O’Connor, J., concurring).

solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”²³⁹ 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.”²⁴⁰ Governmental participation in and support of such “ceremonial deism” is not a form of excessive entanglement with religion and cannot be assessed “mechanically” or by using “absolutist” tests of establishment.²⁴¹ “It is far too late in the day to impose a crabbed reading of the Establishment Clause on the country.”²⁴²

Five years later, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*,²⁴³ the Court offered a much closer, if not “crabbed,” reading of the Establishment Clause to outlaw another public holiday display that ran for six weeks, from Thanksgiving Day, late in November, into the new year.²⁴⁴ 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.²⁴⁵ Almost the entire display was a crèche, featuring the same biblical figurines displayed in *Lynch*.²⁴⁶ 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.²⁴⁷ A lay Catholic group donated the crèche and put up a small sign indicating the same.²⁴⁸ 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.²⁴⁹ For the three weeks before Christmas, the county had invited local high school choirs to sing carols at the crèche during lunch, dedicating the musical offerings to world peace and missing soldiers.²⁵⁰ Local taxpayers sued.²⁵¹

²³⁹ *Id.*

²⁴⁰ *Id.* at 685 (majority opinion).

²⁴¹ *Id.* at 669, 716 (quoting Arthur E. Sutherland, Book Review, 40 *IND. L.J.* 83, 86 (1964)).

²⁴² *Id.* at 687.

²⁴³ *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

²⁴⁴ *Id.* at 580.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 573.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 580.

²⁵⁰ *Id.* at 581.

The *County of Allegheny* Court struck down this crèche display as violating the Establishment Clause.²⁵² Justice Blackmun wrote for the plurality, noting that this display was on a prominent piece of government land, not in a private park like the *Lynch* display.²⁵³ This display was almost exclusively religious in content and not buffered by ample secular accoutrements of comparable size and genre.²⁵⁴ And this display carried a single, undiluted verbal message—enjoining viewers to give glory to God in the highest.²⁵⁵ 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 faiths.²⁵⁶

The same *County of Allegheny* Court, however, upheld the public display of a menorah, the eight-armed candleholder symbolizing the Jewish holiday of Hanukkah.²⁵⁷ The menorah in question was an abstract eighteen-foot design, privately owned but erected and maintained by the county.²⁵⁸ It was displayed at a lesser-used entrance to the same courthouse, alongside the city’s forty-five-foot decorated Christmas tree, which was labeled “A Salute to Liberty.”²⁵⁹ 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.²⁶⁰ 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.²⁶¹

C. *Private Displays of Religious Symbols in Public Forums*

How to characterize a religious symbol arose again six years later, in *Capitol Square Review and Advisory Board v. Pinette*.²⁶² For more than a

²⁵¹ *Id.* at 587–88.

²⁵² *Id.* at 579.

²⁵³ *Id.* at 598.

²⁵⁴ *Id.* at 598–99.

²⁵⁵ *Id.* at 600.

²⁵⁶ *Id.* at 601–02.

²⁵⁷ *Id.* at 579.

²⁵⁸ *Id.* at 587.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 613–20.

²⁶¹ *Id.* at 620–21.

²⁶² *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

century, Ohio kept open a ten-acre square around the state capitol building for public gatherings and displays of various sorts.²⁶³ Parties who wished to use the square had to apply and receive a free license from the state.²⁶⁴ In December, the state invited the community to erect various unattended displays in this square.²⁶⁵ The state put up its own Christmas tree, and granted a local rabbi's application to put up a menorah.²⁶⁶ But the state denied the Ku Klux Klan's ("KKK") application to put up its signature Latin cross.²⁶⁷ The KKK appealed, charging the state with viewpoint discrimination in violation of its free speech rights.²⁶⁸ The state countered that allowing the KKK to display its cross next to the state capitol would be establishing religion.²⁶⁹

The *Pinette* Court upheld the free speech rights of the KKK and found no Establishment Clause violation.²⁷⁰ "[A] free-speech clause without religion would be Hamlet without the prince," Justice Scalia wrote for the plurality.²⁷¹ The state 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.²⁷² The Court concluded that a general aspiration to avoid an establishment of religion was not a sufficiently compelling reason to justify religious discrimination.²⁷³ Moreover, the Latin cross was 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.²⁷⁴ And, unlike the single crèche display at the grand staircase in *County of Allegheny*, this display would be one of several in a public forum open to anyone who applies.²⁷⁵

Justice Thomas concurred, arguing not only that the Latin cross was a form of private expression, but also that it was not religious expression.²⁷⁶ For the

²⁶³ *Id.* at 757.

²⁶⁴ *Id.* at 757–58.

²⁶⁵ *Id.* at 758.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 758–59.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 753.

²⁷¹ *Id.* at 760.

²⁷² *Id.* at 753.

²⁷³ *Id.* at 764–65.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 770–71 (Thomas, J., concurring).

KKK, “[t]he erection of such a cross is a political act, not a Christian one.”²⁷⁷ Its depiction is deeply offensive given the nation’s history of slavery and the KKK’s history of racism.²⁷⁸ But even offensive speech deserves free speech protection.²⁷⁹

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. American Civil Liberties Union of Kentucky*²⁸⁰ and *Van Orden v. Perry*,²⁸¹ announced back-to-back on the same day, two sharply divided courts struck down one Decalogue display²⁸² but left another standing.²⁸³ In *McCreary County*, Justice Souter, writing for the majority, used a strict *Lemon* analysis to strike down the display, with *Stone v. Graham* as the strongest precedent.²⁸⁴ 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.²⁸⁵ Both cases featured long and bitter dissents by Justice Stevens and Justice Scalia, respectively,²⁸⁶ and cacophonies of concurring and dissenting opinions by other Justices.²⁸⁷ The practical difference in outcome on the Court was attributable to Justice Breyer, who joined the majority in *McCreary County*²⁸⁸ and joined in the decision (but not the plurality opinion) in *Van Orden*.²⁸⁹ In his concurrence in *Van Orden*, Justice Breyer described it as a “difficult borderline case” that called for “the exercise of legal judgment.”²⁹⁰

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

²⁸¹ *Van Orden v. Perry*, 545 U.S. 677 (2005).

²⁸² *McCreary County*, 545 U.S. at 858.

²⁸³ *Van Orden*, 545 U.S. at 677.

²⁸⁴ *McCreary County*, 545 U.S. at 850–81.

²⁸⁵ *Van Orden*, 545 U.S. at 681–92.

²⁸⁶ *Id.* at 692 (Scalia, J., concurring); *id.* at 737 (Stevens, Souter & Ginsburg, JJ., dissenting); *McCreary County*, 545 U.S. at 885 (Rehnquist, C.J., Scalia, Kennedy & Thomas, JJ., dissenting).

²⁸⁷ *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring); *id.* at 698 (Breyer, J., concurring in the judgment); *id.* at 737 (Stevens, Souter & Ginsburg, JJ., dissenting); *McCreary County*, 545 U.S. at 881 (O’Connor, J., concurring); *id.* at 885 (Rehnquist, C.J., Scalia, Kennedy & Thomas, JJ., dissenting).

²⁸⁸ *McCreary County*, 545 U.S. at 849.

²⁸⁹ *Van Orden*, 545 U.S. at 698–706. (Breyer, J., concurring in the judgment).

²⁹⁰ *Id.* at 678 (Breyer, J., concurring in the judgment).

McCreary County concerned a Kentucky county's new display of the Ten Commandments on a prominent courthouse wall.²⁹¹ Initially the county ordered the Decalogue to be hung by itself.²⁹² When the ACLU sued, the county ordered that the Decalogue be retained but that other governmental documents be put around the display.²⁹³ 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 Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."²⁹⁴ Almost all the surrounding governmental documents chosen for the display had the religious language in them highlighted.²⁹⁵

As the case proceeded through the courts, the county ordered a third display, without repealing its prior two orders.²⁹⁶ 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.²⁹⁷ Nine other documents of comparable size flanked it, including the Magna Carta, the Declaration of Independence, the Bill of Rights, and the Mayflower Compact, and in these documents, more neutral language was highlighted.²⁹⁸ The collection as a whole was entitled "The Foundations of American Law and Government Display."²⁹⁹ Each document had a comparably-sized description of its historical and legal significance.³⁰⁰ 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 Happiness.' The Ten Commandments provide the moral

²⁹¹ *McCreary County*, 545 U.S. at 850–81.

²⁹² *Id.* at 851–52.

²⁹³ *Id.* at 853–54.

²⁹⁴ *Id.* at 853 (quoting Defendants' Exhibit 9 in Memorandum in Support of Defendants' Motion to Dismiss at 1–3, 6, *Am. Civil Liberties Union of Ky. v. McCreary County*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (No. Civ. A. 99-507)).

²⁹⁵ *Id.* at 853–54.

²⁹⁶ *Id.* at 855–56.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 857.

²⁹⁹ *Id.* at 856.

³⁰⁰ *Id.*

background of the Declaration of Independence and the foundation of our legal tradition.³⁰¹

The entire display was on the wall of a heavily trafficked hallway in the county courthouse.³⁰² The county had initiated and paid for the displays.³⁰³

The *McCreary County* Court struck down this display as a violation of the Establishment Clause.³⁰⁴ Its fatal feature, in the Court’s judgment, was the lack of a genuine secular purpose, which both *Lemon* and *Stone* required.³⁰⁵ 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.³⁰⁶ The county’s stated legislative purpose in putting up the display was to honor “‘Christ, the Prince of Ethics.’”³⁰⁷ 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.”³⁰⁸ That was fatal in *Stone*, and it must be fatal here.³⁰⁹

The county’s clumsy attempts to dilute this religious message by relabeling the Decalogue as a moral code, and displaying other political documents with their religious passages prominently highlighted, only compounded its Constitutional error in the eyes of any “reasonable observer,” Justice Souter continued.³¹⁰ The purported secular purposes of the county’s final display “were presented only as a litigating position”³¹¹ and did little to offset the offending religious purpose that had informed the first two displays and the county’s actions throughout the lawsuit.³¹² A genuine attempt by government to cure an inadvertent unconstitutional condition could certainly pass muster

³⁰¹ *Id.* at 856 (quoting Application to Petition for Certiorari at 180a, *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005)).

³⁰² *Id.* at 864–65.

³⁰³ *Id.* at 874–75.

³⁰⁴ *Id.* at 864–75.

³⁰⁵ *Id.* at 864–65.

³⁰⁶ *Id.* at 869.

³⁰⁷ *Id.* at 870 (quoting Defendants’ Exhibit 9 in Memorandum in Support of Defendants’ Motion to Dismiss at 1–3, 6, *Am. Civil Liberties Union of Ky. v. McCreary County*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (No. Civ. A. 99-507)).

³⁰⁸ *Id.* at 869.

³⁰⁹ *Id.* at 871.

³¹⁰ *Id.* at 870.

³¹¹ *Id.* at 871.

³¹² *Id.* at 869–74.

under the Establishment Clause, the *McCreary County* Court concluded, but no such genuine attempt existed here.³¹³ Viewed as a whole, and over time, the county's actions formed an establishment of religion.³¹⁴

In *Van Orden v. Perry*, issued two hours after *McCreary County*, the Court took a very different approach.³¹⁵ This case concerned a six-foot stone monument of the Decalogue on the state capitol grounds in Austin, Texas.³¹⁶ A voluntary civic group, the Fraternal Order of Eagles, had privately donated the Decalogue forty years earlier.³¹⁷ It was one of thirty-eight historical markers and monuments on a twenty-two-acre state capitol campus.³¹⁸ It was located near a lesser sidewalk that connected the state capitol with the state Supreme Court building.³¹⁹ *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.³²⁰

The *Van Orden* Court upheld the display.³²¹ “Our cases, Januslike, point in two directions,” Chief Justice Rehnquist wrote candidly for the plurality.³²² One set of cases “looks toward the strong role played by religion and religious traditions throughout our Nation’s history.”³²³ “The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.”³²⁴ The *Van Orden* Court followed the first line of cases, and declared the *Lemon* test “not useful”³²⁵ in this case. The Decalogue is clearly a religious text with a religious message, the Court made clear.³²⁶ But “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”³²⁷ 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

³¹³ *Id.*

³¹⁴ *Id.* at 881.

³¹⁵ *See* *Van Orden v. Perry*, 545 U.S. 677, 677–92 (2005).

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* at 677.

³²¹ *Id.*

³²² *Id.* at 683.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 685–86.

³²⁶ *Id.* at 690.

³²⁷ *Id.*

of American society.³²⁸ Its public display on government land democratically recognizes and represents that ““religion has been closely identified with our history and government”” and that Americans are ““a religious people, whose institutions presuppose a Supreme Being.””³²⁹ Moreover, this Decalogue display was privately donated.³³⁰ It stood unchallenged for forty years.³³¹ It is a merely “passive” display that anyone can easily avoid while walking the state capitol grounds.³³² And its message is buffered by the thirty-seven other monuments and markers on the same government land, most of which are decidedly secular.³³³ If this display is unconstitutional, Chief Justice Rehnquist wrote, then hundreds of others religious displays and maybe even the religious statues of Moses and Mohammed on a frieze in the Supreme Court building, must come down.³³⁴ That surely is neither the intent nor the import of the First Amendment Establishment Clause.³³⁵

After such a remarkably discordant pair of cases, it was surprising to most observers that, four years later, the Supreme Court, in *Pleasant Grove City v. Summum*,³³⁶ was unanimous in upholding the Constitutionality of a Ten Commandments monument on government land.³³⁷ The same Fraternal Order of Eagles in *Van Orden* had privately donated the monument forty years earlier.³³⁸ It was one of a dozen old signs and markers in a city park in Utah.³³⁹ A new religious group, called Summum, sought permission to erect in the park a monument with their Seven Aphorisms of faith.³⁴⁰ The city refused, so Summum sued under the First Amendment.³⁴¹ It charged the city with violating the Free Speech clause by discriminating against its Seven Aphorisms.³⁴² It also threatened to charge the city with violating the

³²⁸ *Id.* at 689.

³²⁹ *Id.* at 683 (quoting *Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 212–13 (1963); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

³³⁰ *Id.* at 701.

³³¹ *Id.* at 682.

³³² *Id.*

³³³ *Id.* at 681.

³³⁴ *Id.* at 689.

³³⁵ *Id.* at 691–92.

³³⁶ *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

³³⁷ *Id.*

³³⁸ *Id.* at 1129.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

Establishment Clause by displaying the Ten Commandments alone.³⁴³ This left the city with a hard choice: take down the Ten Commandments or put up the Seven Aphorisms.³⁴⁴

The *Pleasant Grove City* Court accepted neither approach, and held for the government.³⁴⁵ The Court treated the Ten Commandments monument as a form of permissible government speech.³⁴⁶ 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.³⁴⁷ A government 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).³⁴⁸ 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.³⁴⁹ The Free Speech Clause does not give a private citizen a “‘heckler’s veto,’”³⁵⁰ 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.³⁵¹ Government speech is simply “not subject to scrutiny under the Free Speech Clause,” the Court concluded, nor to judicial second-guessing under the First Amendment.³⁵² Government officials are “‘accountable to the electorate’” for their speech, and they will be voted out of office if their views cause offense.³⁵³

It helped the *Pleasant Grove City* Court that there were a dozen monuments in the city park, only one of which was religious in content.³⁵⁴ It also helped that the Decalogue in question was a forty-year-old monument that had never been challenged before.³⁵⁵ Such facts allowed some of the Justices to agree that the display did not constitute an establishment of religion.³⁵⁶ But the case

³⁴³ *Id.*

³⁴⁴ *Id.* at 1139.

³⁴⁵ *Id.* at 1125.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 1127 (quoting *Rosenberger v. Rector*, 515 U.S. 819, 833 (1995)).

³⁴⁸ *Id.* at 1136.

³⁴⁹ *Id.* at 1128.

³⁵⁰ *Id.* at 1131 (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting)).

³⁵¹ *Id.* at 1138.

³⁵² *Id.* at 1125.

³⁵³ *Id.* at 1127 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

³⁵⁴ *Id.* at 1125.

³⁵⁵ *Id.* at 1140.

³⁵⁶ *Id.*

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.³⁵⁷ The *Pleasant Grove City* Court did not deny or dilute the religious qualities of the Ten Commandments.³⁵⁸ Instead, it left it to elected government officials to decide how to reflect and represent the views of the people, including their religious views.³⁵⁹ The Court also left it to the people to debate and decide whether the government’s representation of their views was adequate or outmoded.³⁶⁰ 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.³⁶¹ However, a merely passive display of a generic religious symbol or text was not nearly enough to trigger federal judicial intervention.³⁶²

E. *The Cross in the National Park*

The Supreme Court did not use this government-speech logic in *Salazar v. Buono*.³⁶³ The case, as discussed in the Introduction, concerned a challenge to a seven-foot cross on prominent display in the Mojave National Preserve in California.³⁶⁴ The cross had been donated and erected in 1934 by a private group, the Veterans of Foreign Wars, as a memorial to fallen American soldiers.³⁶⁵ The cross stood alone.³⁶⁶ 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.³⁶⁷ A former park worker now challenged its Constitutionality.³⁶⁸

Observers had expected the *Salazar* Court to return to *Pleasant Grove City*, 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

³⁵⁷ *Id.* at 1125.

³⁵⁸ *Id.* at 1140.

³⁵⁹ *Id.* at 1132.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 1125.

³⁶² *See id.*

³⁶³ *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

³⁶⁴ *Id.* at 1826.

³⁶⁵ *Id.* at 1807.

³⁶⁶ *Id.* at 1834.

³⁶⁷ *Buono v. Norton (Buono II)*, 371 F.3d 543, 550 (9th Cir. 2004).

³⁶⁸ *Salazar*, 130 S. Ct. at 1803.

constitutionally permissible form of government speech.³⁶⁹ Unlike *Pleasant Grove City*, 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.³⁷⁰ The six fractured opinions in *Salazar*, 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.³⁷¹

Writing for himself and two other Justices, 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.³⁷² 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.³⁷³ 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.³⁷⁴ The district court would now have to judge Congress's actions on the merits.³⁷⁵ 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."³⁷⁶ The district court would further have to recognize that "[t]ime also has played its role" and "the cross and the cause it commemorated had become entwined in the public consciousness" and part of "our national heritage."³⁷⁷ 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.³⁷⁸

³⁶⁹ See generally Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. COLLOQUY 70 (2009).

³⁷⁰ *Salazar*, 130 S. Ct. at 1803.

³⁷¹ *Id.*

³⁷² *Id.* at 1808.

³⁷³ *Id.* at 1815.

³⁷⁴ *Id.* at 1814, 1817.

³⁷⁵ *Id.* at 1815.

³⁷⁶ *Id.* at 1816–17.

³⁷⁷ *Id.* at 1817.

³⁷⁸ *Id.* at 1821.

Joining the plurality opinion, Justice Alito thought the case was sufficiently developed for the Supreme Court itself to make that Constitutional judgment—and in favor of the government.³⁷⁹ 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.”³⁸⁰ Also joining the plurality opinion, 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.³⁸¹ *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.³⁸²

That characterization missed the Constitutional point, Justice Stevens wrote in dissent, joined by three other Justices.³⁸³ 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.³⁸⁴ Justice Stevens concluded that both the purpose and effect of the land transfer statute was to endorse religion in violation of the establishment clause.³⁸⁵ 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.³⁸⁶

F. Rules of Thumb in Future Religious Symbolism Cases

This thirty-year line of religious symbolism cases—from *Stone v. Graham* to *Salazar v. Buono*³⁸⁷—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 Linkner’s article hereafter makes a valiant effort to find coherence among the

³⁷⁹ *Id.* (Alito, J., concurring).

³⁸⁰ *Id.* at 1822.

³⁸¹ *Id.* at 1824 (Scalia & Thomas, JJ., concurring).

³⁸² *Id.*

³⁸³ *Id.* at 1828 (Stevens, Ginsburg & Sotomayor, JJ., dissenting).

³⁸⁴ *Id.* at 1841.

³⁸⁵ *Id.* at 1837.

³⁸⁶ *Id.* at 1843 (Breyer, J., dissenting).

³⁸⁷ *Salazar*, 130 S. Ct. 1803; *Stone v. Graham*, 449 U.S. 39 (1980).

jumbled opinions.³⁸⁸ 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 prior Constitutional challenge. 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.³⁸⁹ Sometimes the Court has implied that even if the display or practice once had specific religious meaning, that meaning has now been lost; and the display is now either merely a civic symbol devoid of religious content or a more generic symbol that evinces “ceremonial deism.”³⁹⁰ Other times, the Court has worked harder to acknowledge the ongoing religious nature and content of the symbol for many citizens.³⁹¹

Moreover, if Establishment Clause litigants sit on their rights too long, those rights tend to receive less deference when they are finally exercised. Older religious displays and practices were at issue in *Lynch*, *Van Orden*, *Pleasant Grove City*, and *Buono*, and the government won each time.³⁹² Newer displays were at issue in *Stone*, *County of Allegheny*, and *McCreary County*, and the government lost each time.³⁹³

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.³⁹⁴ It can also be seen in private property laws of “adverse possession”: an open, continuous, and notorious use

³⁸⁸ See generally Linkner, *supra* note 23.

³⁸⁹ See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *Van Orden v. Perry*, 545 U.S. 677 (2005).

³⁹⁰ *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (quoting Arthur E. Sutherland, Book Review, 40 IND. L.J. 83, 86 (1964)).

³⁹¹ See *McCreary County v. Am. Civil Liberties Union of Ky.*, 544 U.S. 844 (2005); *Stone*, 449 U.S. at 39.

³⁹² *Pleasant Grove City*, 129 S. Ct. at 1125; *Van Orden*, 545 U.S. at 677; *Lynch*, 465 U.S. at 668; *Buono II*, 371 F.3d 543, 543 (9th Cir. 2004).

³⁹³ *McCreary County*, 544 U.S. at 844; *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 573 (1989); *Stone v. Graham*, 449 U.S. 39, 39 (1980).

³⁹⁴ MARIANNE M. JENNINGS, REAL ESTATE LAW 536 (2008).

of a property eventually will vest in the user.³⁹⁵ 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.³⁹⁶ The law has also long done the same through the equitable doctrine of laches, which similarly penalizes parties for sitting too long on their rights.³⁹⁷ 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 need a strong case for the Fourteenth Amendment to affect it.”³⁹⁸

Second, it can be critical to a case how the symbol or practice is labeled or characterized. *Stone* and *McCreary County* characterized the Decalogue as a religious symbol and struck it down;³⁹⁹ *Van Orden* and *Pleasant Grove City* characterized it as an historical marker and let it stand.⁴⁰⁰ *Lynch* labeled the crèche a mere holiday display with commercial value, and let it stand;⁴⁰¹ *County of Allegheny* labeled the crèche a depiction of the Christmas story, and struck it down.⁴⁰² *Pinette* called the Latin cross a form of private expression protected by the free speech clause;⁴⁰³ *Pleasant Grove City* called the Decalogue a form of government speech immune from the Free Speech Clause.⁴⁰⁴ *Lynch* labeled the secular decorations around the crèche an effective buffer;⁴⁰⁵ *McCreary County* regarded the secular documents around the Decalogue as fraudulent camouflage.⁴⁰⁶ For *Stone*, labeling the Decalogue as a moral code was viewed as a subterfuge belied by the very imperative tone of

³⁹⁵ *Id.* at 344.

³⁹⁶ *See, e.g.*, GA. CODE ANN. § 9-3-24 (West 2011); MASS. GEN. LAWS. ANN. ch. 260, § 2A (West 2011); N.Y. CIVIL PRACTICE LAW § 213 (McKinney 2011).

³⁹⁷ GREGORY C. SISK ET AL., LITIGATION WITH THE FEDERAL GOVERNMENT 529 (4th ed. 2006).

³⁹⁸ *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

³⁹⁹ *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 858 (2005); *Stone v. Graham*, 449 U.S. 39, 39 (1980).

⁴⁰⁰ *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1126 (2009); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

⁴⁰¹ *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984).

⁴⁰² *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 578–79 (1989).

⁴⁰³ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995).

⁴⁰⁴ *Pleasant Grove City*, 129 S. Ct. at 1126.

⁴⁰⁵ *Lynch*, 465 U.S. at 668.

⁴⁰⁶ *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 852 (2005).

the Commandments.⁴⁰⁷ For *County of Allegheny*, labeling a forty-five-foot county Christmas tree as “A Salute to Liberty” was sufficient Constitutional cover for placement of a menorah.⁴⁰⁸ *County of Allegheny* treated as constitutionally fatal two signs at the crèche bearing the imperative “*Gloria in Excelsis Deo*” and “Donated by the Holy Name Society.”⁴⁰⁹ *Van Orden* thought a small sign reading, “Presented . . . 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 me,” “Thou shalt not take the Name of the Lord thy God in vain,” and “Remember the Sabbath day, to keep it holy.”⁴¹⁰ 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*,⁴¹¹ get more deference than private displays on government property, as in *Stone* and *County of Allegheny*.⁴¹² Displays in prominent places on government properties, like the grand staircase in *County of Allegheny*⁴¹³ or the main hallway in the *McCreary County* courthouse,⁴¹⁴ are more suspect than those in less conspicuous places, like the secondary entrance in *County of Allegheny*,⁴¹⁵ the secondary sidewalk in *Van Orden*,⁴¹⁶ the small city park in *Pleasant Grove City*,⁴¹⁷ or the remote desert corner of a national park in *Buono*.⁴¹⁸ Location is not dispositive of the Establishment Clause question, as litigants in *Pinette* found out; in that case, religious activities and displays on the plaza of the state capitol were upheld.⁴¹⁹ 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

⁴⁰⁷ *Stone v. Graham*, 449 U.S. 39, 39 (1980).

⁴⁰⁸ *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 635 (1989).

⁴⁰⁹ *Id.* at 573.

⁴¹⁰ *Van Orden v. Perry*, 545 U.S. 677, 707 (2005).

⁴¹¹ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

⁴¹² *County of Allegheny*, 492 U.S. at 573; *Stone*, 449 U.S. at 39.

⁴¹³ *County of Allegheny*, 492 U.S. at 675.

⁴¹⁴ *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 852 (2005).

⁴¹⁵ *County of Allegheny*, 492 U.S. at 573.

⁴¹⁶ *Van Orden v. Perry*, 545 U.S. 677, 677 (2005).

⁴¹⁷ *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1134 (2009).

⁴¹⁸ *Buono II*, 371 F.3d 543, 549 (9th Cir. 2004).

⁴¹⁹ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995).

leads the Court to find a violation of the establishment clause, as in *Stone*⁴²⁰ and various cases on prayer in public schools.⁴²¹

A fourth factor is whether the religious symbol or practice is offset by other secular symbols or practices. Particularly when the 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 County* makes clear that a court can (and sometimes will) second guess the government when the court suspects subterfuge.⁴²² But lower courts have generally been sympathetic with government officials who try to balance religious and non-religious messages in their public display.⁴²³ 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.⁴²⁴ 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.

CONCLUSION AND POSTSCRIPT⁴²⁵

The *Salazar* case and the *Lautsi* case were not inevitable in result given the shifting precedents available to the high courts of the United States and Europe, respectively. And neither case is likely to end the perennially contested questions of the Constitutional place of religious symbols on government land.

At the time of this writing, *Salazar* is back before the federal district court that now must judge the Constitutionality of Congress’s decision to sell the land.⁴²⁶ Since the *Salazar* case was remanded, the Ninth Circuit Court of

⁴²⁰ *Stone v. Graham*, 449 U.S. 39 (1980).

⁴²¹ *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962).

⁴²² See *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

⁴²³ See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009) (involving Ten Commandments in large collection of mostly-secular outdoor art); *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 635 (1989) (involving Christmas tree among other religious and secular holiday decorations).

⁴²⁴ See *County of Allegheny*, 492 U.S. at 635.

⁴²⁵ John Witte, Jr., *Lift High the Cross? Religion in Public Spaces*, HUFFINGTON POST (Mar. 27, 2011, 9:11 PM), http://www.huffingtonpost.com/john-witte-jr/lift-high-the-cross-lauts_b_840790.html.

⁴²⁶ See *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010).

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.⁴²⁷ However the *Salazar* district court comes out on remand, the case will almost certainly be appealed again to the same Ninth Circuit court and likely to the Supreme Court as well.

Just as this Article was going to final press, the Grand Chamber of the European Court of Human Rights issued an important opinion that upheld Italy's policy of displaying crucifixes in its public school classrooms, reversing the Chamber below in a fifteen to two decision.⁴²⁸ The Grand Chamber stated clearly that the crucifix is a religious symbol, that atheism is a protected religious belief, and that public schools must be religiously neutral.⁴²⁹ But the Court held that Italy's longstanding policy of "passive displays" of a crucifix in each public school classroom was no violation of religious freedom—particularly when students of all faiths were welcome in public schools and were free to wear their own religious symbols.⁴³⁰ The Court held further that Italy's policy of displaying only the crucifix was no violation of religious neutrality, but an acceptable democratic reflection of its majoritarian Catholic culture.⁴³¹ With European nations widely divided on whether and where to display various religious symbols, the Court concluded, Italy must be granted a margin of appreciation to decide for itself how and where to maintain its Christian traditions in school.⁴³²

There is much more to be said about the Grand Chamber's judgment in *Lautsi*. But what is notable here is how closely the Grand Chamber's logic tracks that of the U.S. Supreme Court in its last three religious symbolism cases—*Van Orden*, *Pleasant Grove City*, and *Salazar*.⁴³³ While not entirely convergent in their religious symbolism cases, the American and European high courts now seem to hold six teachings in common.

First, tradition counts in these cases. In American courts, as we saw, older religious displays tend to fare better than newer displays.⁴³⁴ The longstanding customary presence of a religious symbol in public life eventually renders it

⁴²⁷ *Trunk v. San Diego*, 629 F.3d 1099, 1125 (9th Cir. 2011).

⁴²⁸ *Lautsi II*, *supra* note 14, *passim*.

⁴²⁹ *See id.* paras. 63–66.

⁴³⁰ *See id.* paras. 73–74.

⁴³¹ *See id.* paras. 67, 71.

⁴³² *Id.* para. 68.

⁴³³ *See supra* Part II.D–E.

⁴³⁴ *See supra* Part II.

not only acceptable but also indispensable to defining who we are as a people. In *Lautsi*, Judge Bonello put this argument strongly in his concurrence: “A court of human rights cannot allow itself to suffer from historical Alzheimer’s. It has no right to disregard the cultural continuum of a nation’s flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people.”⁴³⁵

Second, religious symbols often have redeeming cultural value. American courts have long recognized that a Decalogue is not only a religious commandment but also a common moral code; that a cross is not only a Christian symbol, but also a poignant memorial to military sacrifice.⁴³⁶ When passively and properly displayed, the meaning of a symbol can be left in the eye of the beholder—a sort of free market hermeneutic. The *Lautsi* court echoed this logic. While recognizing the crucifix as religious in origin, the Court accepted Italy’s argument that “the crucifix [also] symbolised the principles and values” of liberty, equality, and fraternity, which “formed the foundation of democracy” and human rights in Italy and beyond.⁴³⁷

Third, local values deserve some deference. In the United States, the doctrine of federalism requires federal courts to defer to the practices and policies of individual states, unless there are clear violations of federal constitutional rights to free exercise and no establishment of religion.⁴³⁸ The Supreme Court has used this doctrine to uphold the passive display of crosses and Decalogues on state capitol grounds.⁴³⁹ The *Lautsi* Court uses the European margin of appreciation doctrine in much the same way. Lacking European consensus on public displays of religion and finding no coerced religious practice or indoctrination in this case, the Court left Italy to decide for itself how to balance the religious symbolism of its Catholic majority and the religious freedom and education rights of its atheistic minorities.⁴⁴⁰

Fourth, religious freedom does not require the secularization of society. The U.S. Supreme Court became famous for its image of a “high and impregnable” wall of separation between church and state⁴⁴¹ that left religion hermetically sealed from political life and public institutions, and

⁴³⁵ *Lautsi II*, *supra* note 14, para. 1.1 (Bonello, J., concurring).

⁴³⁶ *See supra* Part II.

⁴³⁷ *Lautsi II*, *supra* note 14, para. 67.

⁴³⁸ *See generally* Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 CUMB. L. REV. 247 (1995) (discussing the relationship between religion and the doctrine of federalism).

⁴³⁹ *See supra* Part II.

⁴⁴⁰ *See Lautsi II*, *supra* note 14, para. 68.

⁴⁴¹ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

hermeneutically sealed from political and legal arguments. But the reality today is that the Supreme Court has abandoned much of its strict separatism and now allows religious and non-religious parties alike to engage in peaceable public activities, even in public schools.⁴⁴² The European Court of Human Rights likewise became famous for promoting French-style *laïcité* in public schools and public life, striking down Muslim headscarves and other religious symbols as contrary to the democratic “message of tolerance, respect for others and . . . equality and non-discrimination.”⁴⁴³ *Lautsi* suggests a new policy that respects the rights of private religious and secular groups alike to express their views, but allows government to reflect democratically the traditional religious views of its majority.⁴⁴⁴

Fifth, religious freedom does not give a minority a heckler’s veto over majoritarian policies. Until recently, U.S. courts allowed taxpayers to challenge any law touching religion even if it caused them no real personal injury.⁴⁴⁵ This effectively gave secularists a “veto” over sundry laws and policies on religion—however old, common, or popular those laws might be.⁴⁴⁶ The Supreme Court has now tightened its standing rules considerably, forcing parties to make many of their cases for legal reform in the legislatures and to seek individual exemptions from policies that violate their beliefs.⁴⁴⁷ *Lautsi* holds similarly. It recognizes that while the crucifix may cause offense to *Lautsi*, it represents the cherished cultural values of millions of others, who, in turn, are offended by her views.⁴⁴⁸ But personal offense cannot be a ground for censorship.⁴⁴⁹ Freedom of religion and expression requires that all views be heard in public life.⁴⁵⁰

Finally, religious symbolism cases are serious business. As we said in the Introduction, it is easy to be cynical about these cases. But the high temperature of the litigation and the close focus of the international media on these cases suggest that religious symbolism cases are themselves symbolically important for a democratic culture. These cases are essential forums to work

⁴⁴² See *supra* Part II.

⁴⁴³ *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 463.

⁴⁴⁴ See *Lautsi II*, *supra* note 14, paras. 63–77.

⁴⁴⁵ Cf. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

⁴⁴⁶ Cf. *id.* at 1131 (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting)).

⁴⁴⁷ See *id.*

⁴⁴⁸ See *Lautsi II*, *supra* note 14, paras. 63–77.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

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