

2012

Secular Crosses and the Neutrality of Secularism

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Marie E. Roper, *Secular Crosses and the Neutrality of Secularism*, 45 *Vanderbilt Law Review* 841 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol45/iss3/4>

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NOTES

Secular Crosses and the Neutrality of Secularism: Reflections on the Demands of Neutrality and its Consequences for Religious Symbols—the European Court of Human Rights in *Lautsi* and the U.S. Supreme Court in *Salazar*¹

ABSTRACT

This Note discusses analogous themes in two religious public display cases, Lautsi v. Italy, recently decided by the Grand Chamber of the European Court of Human Rights (ECHR), and Salazar v. Buono, recently handed down by the U.S. Supreme Court. Broader critiques of ECHR religious jurisprudence are addressed in the context of the interpretation and application of the principle of neutrality and the argument that secularism is not a necessary postulate of this demand. It is this theme of the relationship between neutrality and secularism

1. The title is not meant to suggest that crosses (or crucifixes) are secular or that secularism is neutral, but, instead, as this Note will emphasize, to highlight the irony in both courts' recent consideration of religious symbols. In explaining the message which the cross, and certainly a crucifix, conveys, the Apostle Paul states that the message of the gospel and the cross of Christ itself, as both a symbol and a historical event, are divisive: "For Christ did not send me to baptize but to preach the gospel, and not with words of eloquent wisdom, lest the cross of Christ be emptied of its power. For the word of the cross is folly to those who are perishing, but to us who are being saved it is the power of God." 1 *Corinthians* 1:17–18 (English Standard Version).

that is also prominent in the American discussion about the relationship between government and religion. Finally, this Note returns to Lautsi's themes as they are present in the American context to contend that applications of secularism and neutrality to the public square work against a preferable notion of constitutional pluralism that favors neither religious nor nonreligious public displays. The debate surrounding the Lautsi decision, particularly in its earlier iteration before the Grand Chamber's most recent decision, provides a valuable lens for scrutinizing U.S. neutrality. True pluralism maintains an equivocal demeanor with respect to both religious and nonreligious public displays. This Note offers the Lautsi case's context as a useful space in which to gain an outsider perspective with respect to how pluralism functions in U.S. religious display cases.

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Religious display cases before the U.S. Supreme Court and the European Court of Human Rights (ECHR) invoke theoretical ideals, applied to particular complaints about the transgression of the state's neutrality with respect to religion. Secularism, pluralism, and neutrality are most profitably understood in context. This Note seeks to explore some particular contexts in order to comment on the desirability of accepting pluralism, an inclusive ideal, as an interpretive key, rather than secularism, often discussed as if it were a neutral ideal.²

I. BACKGROUND: *LAUTSI V. ITALY* AND ANALOGOUS THEMES FROM *SALAZAR V. BUONO*

On Wednesday, June 30, 2010, the Grand Chamber of the ECHR in Strasbourg³ heard Italy's appeal of the November 3, 2009 Chamber

2. In order to explore the polarizing nature of secularism as a worldview, Os Guinness provides this definition of the process of secularization:

Properly defined, secularization is the process through which the decisive influence of religious ideas and institutions has been neutralized in successive sectors of society and culture, making religious ideas less meaningful and religious institutions more marginal. In particular, it refers to how our modern consciousness and ways of thinking are restricted to the world of the five senses.

OS GUINNESS, *THE CALL: FINDING AND FULFILLING THE CENTRAL PURPOSE OF YOUR LIFE* 148 (2d ed. 2003) (emphasis omitted). Observe that Guinness uses the term "neutralized" to mean minimized or made less potent, not as the concept of neutrality is used throughout this Note, connoting equivalent treatment without preferring one or the other—here, religious or nonreligious perspectives. Guinness's definition of the term is cited at this point not as particular authority, but as an example of how nonneutral secularism and secularization are seen from the religious perspective.

3. For an explanation of the Grand Chamber's role in ECHR adjudication, see *The Grand Chamber*, EUR. CT. HUM. RTS., <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/The+Grand+Chamber> (last visited Apr. 1, 2012). The *Lautsi* case reached the Grand Chamber on referral, and the Grand Chamber is composed of the President, Vice Presidents, section presidents, the national judge (the judge of the state against which the applicant, here, Ms. Lautsi, is complaining), and other judges

ruling in favor of the applicant in *Lautsi v. Italy*.⁴ In that opinion, the ECHR held the rights of Soile Lautsi, an Italian citizen, and the rights of her children had been violated by the presence of a crucifix in the children's classrooms at the state school they attended.⁵ Ms. Lautsi believed that the crucifixes were a religious display that violated the principle of secularism that safeguarded her own desires for her children's education.⁶ Ms. Lautsi had pursued the domestic resolution of her complaint before the Veneto Regional Administrative Court on July 23, 2002, claiming that the crucifix display violated the constitutional principles of secularism and impartiality.⁷ In 2005, her complaint was dismissed, with the Italian administrative court concluding that the crucifix was no mere religious symbol but was instead closely interwoven with Italian history, culture, and identity and with the state's secularism embodied in such core concepts as equality, liberty, and tolerance.⁸ The Italian government asserted the following additional "principles" when arguing before the ECHR in 2009: "non-violence, the equal dignity of all human beings, justice and sharing, the primacy of the individual over the group and the importance of freedom of choice, the separation of politics from religion, and love of one's neighbour extending to forgiveness of one's enemies."⁹ On February 13, 2006, the *Consiglio di Stato* (Council of State) dismissed the applicant's appeal.¹⁰ Prior to the rulings of the Regional Administrative Court and of the Council of State, Ms. Lautsi had attempted to bring her suit before the Italian Constitutional Court.¹¹ In January 2004, the administrative court granted her request to submit her case before the Constitutional Court; however, the Constitutional Court concluded that it had no jurisdiction because the provisions requiring the crucifixes to be placed in classrooms were administrative statutory regulations, and the Constitutional Court only interprets

randomly assigned, but excluding judges who heard the case previously before the Chamber, which issued the original decision appealed to the Grand Chamber. *Id.*

4. Press Release, European Court of Human Rights, Grand Chamber Hearing *Lautsi v. Italy*, Eur. Ct. H.R. Press Release 531 (June 30, 2010). For a brief introductory discussion to the ECHR, 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 Religious Perspectives*, 26 J.L. & RELIGION 249, 250-59 (2010) (highlighting the rights guaranteed by Article 9 and the way in which the Court proceeds to address complaints raised under this article).

5. Press Release, European Court of Human Rights, *supra* note 4.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Lautsi v. Italy*, 50 Eur. Ct. H.R. 42, ¶ 35 (2009).
10. Press Release, European Court of Human Rights, *supra* note 4.
11. *Lautsi*, 50 Eur. Ct. H.R. ¶¶ 6-15.

laws of the legislature.¹² After failing to achieve a satisfactory domestic result in the Italian courts, Ms. Lautsi then appealed to the ECHR, which resulted in the previously referenced 2009 ruling challenged by Italy and reversed in the Grand Chamber's final judgment in its opinion of March 18, 2011.¹³ In 2009, the ECHR held that there had been violations of the right to education, found in Article 2 of Protocol 1,¹⁴ in conjunction with the rights of freedom of thought, conscience, and religion guaranteed in Article 9 of the European Convention on Human Rights (European Convention).¹⁵ Italy, believing that its ordinances and practice of placing crucifixes in the classroom were not in violation of the European Convention, appealed the decision and, in the March 1–2, 2010 five-judge panel meeting, the Grand Chamber of the ECHR accepted the request for appeal.¹⁶ On March 10, 2011, the ECHR issued a press release stating that on March 18, 2011, the Grand Chamber would deliver its final judgment in the *Lautsi* case at a public hearing in Strasbourg.¹⁷ The Grand Chamber's decision differed from the prior ruling, concluding that there was no violation of Article 2 of Protocol No. 1 (the right to education) and no separate issue under Article 9 (the rights of freedom of thought, conscience, and religion).¹⁸

Because the 2009 ruling sparked controversy among parties to

12. See Gabriel Andreescu & Liviu Andreescu, *The European Court of Human Rights' Lautsi Decision: Context, Contents, Consequences*, J. FOR STUD. RELIGIONS & IDEOLOGIES, Summer 2010, at 48, 48–49, available at <http://jsri.ro/ojs/index.php/jsri/article/view/26/27>.

13. *Lautsi v. Italy*, 54 Eur. Ct. H.R. 3 (2011).

14. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Mar. 20, 1952, 5 C.E.T.S. 33, 34 ("Right to education: 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.").

15. Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 5 C.E.T.S. 5, 11.

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.

Id.

16. Press Release, European Court of Human Rights, *supra* note 4.

17. Press Release, European Court of Human Rights, Forthcoming Grand Chamber Judgment in the case of *Lautsi and Others v. Italy*, Eur. Ct. H.R. Press Release 200 (Mar. 10, 2011).

18. *Lautsi*, 54 Eur. Ct. H.R. ¶¶ 74–78.

the European Convention, the Court authorized third parties to present written observations and permitted eight of the ten party governments the right to intervene during the hearing.¹⁹ These intervening countries were represented by Joseph Weiler, who repeated many of his primary arguments from the hearing in a scholarly editorial.²⁰ In addition to the government interveners, the Court authorized thirty-three members of the European Parliament to jointly submit observations and allowed written comments from a variety of nongovernmental organizations (NGOs) on both sides of the case.²¹

During his oral argument before the Grand Chamber, Joseph Weiler denounced the prior ruling for its disregard of the long-established margin of appreciation doctrine²² and briefly compared various countries'—both European and non-European—responses to publicly displayed religious symbols.²³ Weiler labeled the original *Lautsi* decision an “Americanization of the European system” because of the Court’s inappropriately broad requirement that Italy, a country that does not abide by a “rigid American style separation of church and state,” remain neutral with respect to religion.²⁴ This characterization of the U.S. Constitution’s Establishment Clause as interpreted by the Supreme Court is probably more accurately a description of the jurisprudence of former Supreme Courts, particularly the Warren and Burger Courts.²⁵

In the Establishment Clause application to most instances of religious public display, there has been considerable variation in the

19. The Governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, the Russian Federation, and San Marino were authorized to submit written comments, and eight of these ten were allowed to intervene at the hearing. Press Release, European Court of Human Rights, *supra* note 4.

20. See generally Joseph Weiler, *Lautsi: Crucifix in the Classroom Redux*, 21 EUR. J. INT'L L. 1 (2010) (discussing the flaws in the November 3, 2009 ruling and the incompatibility of this ruling with both the Court’s jurisdiction and the domestic treatment of religious symbols by European states that are parties to the Convention).

21. Press Release, European Court of Human Rights, *supra* note 4.

22. See *infra* Part II.F (discussing the margin of appreciation doctrine).

23. *Grand Chamber: Lautsi v. Italy No. (30814/06)*, EUR. CT. HUM. RTS. (June 30, 2010), http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?id=20100630-1&lang=en&flow=high.

24. *Id.*

25. See Michael W. McConnell, *Religious Freedom at a Crossroads*, in THE BILL OF RIGHTS IN THE MODERN STATE 115, 116 (Geoffrey R. Stone et al. eds., 1992) (claiming that while “[t]he animating principle” of the Warren and Burger Courts “was not pluralism and diversity, but maintenance of a scrupulous secularism in all aspects of public life touched by government,” there was “reason to believe this period [was] coming to an end”). In 1992, McConnell was speculating about the direction of the Rehnquist Court; however, modern commentators have similarly noted that the current Roberts Court has likewise shown a tendency to propel the “triumph of majoritarianism when it comes to the Establishment Clause.” Erwin Chemerinsky, *The Future of the First Amendment*, 46 WILLAMETTE L. REV. 623, 641 (2010).

degree of neutrality mandated, the tests applied, and the rationales employed.²⁶ Decisions have often been closely split; in one of these, *McCreary v. ACLU*, Justice Scalia, in dissent, described the nature of American secularism quite differently from Weiler.²⁷ Recounting a conversation with a European jurist, he observed that the United States is not a strictly secular country, as distinguished from, for example, France,²⁸ and commented that the U.S. model does not demand that “[r]eligion [be] strictly excluded from the public forum.”²⁹

Weiler’s reference to the American system and his characterization of the degree to which the U.S. Constitution incorporates the principle of *laïcité* (secularism) provides a thematic link tying this current ECHR case to concepts present in the recent Supreme Court case, *Salazar v. Buono*, which also dealt with the public display of a cross.³⁰ Although the facts of *Lautsi* and *Salazar* reference public cross displays in dramatically different contexts,³¹ this Note focuses on points of comparison in their treatment of the principle of neutrality.

One example of the relevance of this prominent theme in *Lautsi* to the *Salazar* case comes from a series of questions Scalia posed during the oral argument in *Salazar*.³² The respondent Frank Buono, a former employee of the Mojave National Preserve in southeastern California, contested whether a Latin cross memorial erected in 1934 by the Veterans of Foreign Wars (VFW) as a commemoration to the dead of World War I was constitutionally displayed within the preserve on Sunrise Rock.³³ Buono claimed that the cross—a religious symbol—violates the Establishment Clause of the First Amendment.³⁴ However, during oral argument, there was a dispute concerning the symbolic nature of the cross when Scalia asked Buono’s attorney, Peter Eliasberg, whether the cross honored non-Christians who fought in the war (presumably in addition to honoring Christians).³⁵ Eliasberg stated that he did not believe the cross had

26. See *infra* Part IV (discussing American religious public display cases and analyzing the case of *Salazar v. Buono*).

27. See *McCreary v. ACLU*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting).

28. See *id.* (“That is one model of relationship between church and state—a model spread across Europe by the armies of Napoleon, and reflected in the Constitution of France, which begins ‘France is [a] . . . secular . . . Republic.’ . . . This is not, and never was, the model adopted by America.”).

29. *Id.*

30. *Salazar v. Buono*, 130 S. Ct. 1803, 1811 (2010).

31. See *infra* Parts II, IV.C (discussing *Lautsi* and *Salazar* respectively).

32. Transcript of Oral Argument at 38–39, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472).

33. *Salazar*, 130 S. Ct. at 1811–12.

34. *Id.* at 1812.

35. Transcript of Oral Argument, *supra* note 32, at 38.

such a purpose, noting that while the memorial did not state that it honored Christians exclusively, “a cross is the predominant symbol of Christianity and it signifies that Jesus is the son of God and died to redeem mankind for our sins.”³⁶ Scalia responded by saying, “It’s erected as a war memorial. I assume it is erected in honor of all of the war dead. It’s . . . the most common symbol . . . of the resting place of the dead . . .”³⁷ The Supreme Court was grappling in these moments of the oral arguments (if not in the opinion as a whole) with whether a cross, seemingly a religious symbol, actually bears more generalized cultural messages.

While Italy used a similar characterization of the crucifix as an undergirding argument in *Lautsi*, Weiler questioned whether this argument was either appropriate or necessary to Italy’s case. At the hearing, as well as in his journalistic writing, he explained how this attempt to ameliorate opponents’ concerns about the crucifix display by misconstruing the symbol is not a useful contribution to the debate about religion in the public square.³⁸ Considerable debate fuels this discussion about religion, secularism, and the demands of neutrality in the public sphere in the United States and, as can be seen from the European responses to the first *Lautsi* ruling, this conversation has its variations on the other side of ocean.³⁹

Part II of this Note briefly discusses the meaning and application of *laïcité* (secularism) in Italy, as well as the arguments set forth in *Lautsi*, the ECHR’s reasoning in the original 2009 decision, and the contentions of the opposing parties at the recent hearing. This section of the Note concludes, in agreement with the final *Lautsi* ruling, that *Lautsi* was initially wrongly decided, that the Court should have applied the margin of appreciation doctrine to the Italian context, and should have deferred, within the bounds of the European Convention, to the particular relationship to religion the internal government and courts have established. Part III of this Note addresses broader critiques of ECHR religious jurisprudence in the context of the interpretation and application of the principle of neutrality and the argument that secularism is not a necessary postulate of this demand. It is this theme of the relationship between neutrality and secularism that is also prominent in the American discussion about the relationship between government and religion. In Part IV, this Note’s focus shifts to the American context to discuss analogous cases in order to provide some points of comparison for how the U.S.

36. *Id.*

37. *Id.* at 38–39.

38. *See supra* note 20.

39. *See infra* Parts III, IV (critiquing ECHR religious jurisprudence and discussing U.S. Supreme Court interpretation of the First Amendment and American religious public display cases).

Supreme Court (standing in this Note as the ultimate American constitutional authority as juxtaposed with the ECHR, a source of “constitutional” interpretation in Europe) and the ECHR respond to principles of secularism and neutrality in the governing documents they interpret: the U.S. Constitution and the European Convention, respectively.⁴⁰ Part V returns to the relevance of *Lautsi*’s themes to the interpretation of the U.S. Constitution. This Note concludes that the Constitution should be interpreted to promote a pluralism that favors neither religious nor nonreligious public displays. Such an inclusive interpretation would eschew an unswerving secularism that cannot exemplify the much touted neutrality.

II. LAUTSI V. ITALY

A. Brief Background: The Principle of *Laïcité* (Secularism) in Italy

Following the fall of fascism and the return of democratic government in Italy, the country underwent a “[p]rocess of secularisation” that continues to impact Italian society and legislation.⁴¹ However, even though the Constitutional Court has concluded that *laicità*—equivalent to *laïcité* in the Italian context—is a constitutional principle so essential as to be immune from amendment, Italy apparently does not believe secularism is contravened by religious education, taught by Church-appointed and regulated Catholic teachers, in state schools.⁴² Even though Italy no longer claims Roman Catholicism as its state religion, the Church continues to play a vital role in Italian politics.⁴³ Additionally, political disputes often arise when the government enacts policies contrary to the teachings of the Church.⁴⁴ The public display of religious symbols, in schools as well as courtrooms and public buildings, has led to domestic lawsuits, such as that of Ms. Lautsi.⁴⁵ The Italian courts’ response to crucifixes in schools suggests potential difficulties with imposing secularism.⁴⁶

40. *Id.*

41. Giulio Ercolessi, *Italy: Born as a Secular State in the XIX Century, Back to a Clerical Future in the XXI Century?*, in SEPARATION OF CHURCH AND STATE IN EUROPE 139, 143 (Fleur de Beaufort et al., 2008).

42. *Id.* at 143–44.

43. MARIO B. MIGNONE, ITALY TODAY: FACING THE CHALLENGES OF THE NEW MILLENNIUM 268 (2008).

44. *Id.* at 268–69. For example, Mignone notes the influence of the Catholic Church on 2004 legislation which aligned with Catholic teachings in limiting the use of reproductive technology. *Id.* at 268.

45. *Id.*

46. See generally Susanna Mancini, *Taking Secularism (Not Too) Seriously: The Italian ‘Crucifix Case,’* 1 RELIGION & HUM. RTS. 179, 179–82 (2006) (describing the

B. *ECHR Chamber Ruling in Lautsi, November 3, 2009*

The original ECHR judgment in *Lautsi* is very brief.⁴⁷ Despite its brevity, however, the Court helped to shape the battle lines that formed subsequent to this landmark decision. The crucifixes that Ms. Lautsi's children encountered in their classrooms at school were technically required by Italian law, although the state had not uniformly enforced this provision.⁴⁸ The provision requiring such crosses dates back to the 1922 Ministry of Education's Circular No. 68. The crosses replaced both the images of Christ and of the King in the state schools.⁴⁹ A subsequent circular in 1926 and two Royal Decrees in 1924 and 1928 confirmed this rule, which the Italian courts have declared to remain applicable.⁵⁰ Ms. Lautsi, as the applicant in the case, argued that the Italian government was in violation of the European Convention.⁵¹ First, Ms. Lautsi did not believe that the provisions requiring crucifixes were constitutional in light of the Italian Constitution's secularism principle; however, because of the nature of these regulations, the Constitutional Court of Italy concluded it did not have jurisdiction to assess the legality of the regulations themselves.⁵² Second, she argued that the cross does carry a religious—not a merely secular—message, and by displaying the crucifixes in the classroom, the state showed preference to the Catholic Church, thus interfering with the rights to freedom of thought, conscience, and religion of Ms. Lautsi and her children, as well as her right to “bring up her children in conformity with her moral and religious convictions.”⁵³ Finally, Ms. Lautsi commented on the pressure these symbols exerted on minors against their freedom of conscience.⁵⁴ In sum, she contended that the symbols compromised the state's secularism, defined to require the state to be “neutral and keep an equal distance from all religions.”⁵⁵

Italy first responded to Ms. Lautsi's arguments by contending that this question of the crucifix's presence in the classroom was not merely legal, but that it required consideration of the meaning of the

principle of secularism and crucifix display in the Italian context prior to the ECHR ruling in Ms. Lautsi's case and discussing its examination in the Italian courts).

47. See Weiler, *supra* note 20, at 1 (“Independently of one's view of the substantive result, the decision of the Second Chamber of the ECtHR is an embarrassment. . . . All these issues are encapsulated in *Lautsi*. All are disposed of, Oracle like, in 11 impatient and apodictic paragraphs.”).

48. *Lautsi v. Italy*, 50 Eur. Ct. H.R. 42, ¶¶ 19–20 (2009).

49. *Id.*

50. *Id.*

51. *Id.* ¶¶ 27–35.

52. *Id.* ¶¶ 27–30.

53. *Id.* ¶¶ 27–35.

54. *Id.* ¶¶ 31–35.

55. *Id.*

cross itself, a meaning which Italy argued is “perfectly compatible with secularism and accessible to non-Christians and non-believers.”⁵⁶ Second, Italy argued that its reading of the symbolic nature of the cross was compatible with prior ECHR case law.⁵⁷ Third, the issue of the public display of religious symbols fell within the broad margin of appreciation, traditionally left by the Court to the rulings of domestic bodies, particularly in such spheres as education.⁵⁸ This argument dovetailed with Italy’s claim that there was “no European consensus” about the practice and concept of secularism.⁵⁹

The Court’s opinion developed principles it derived from prior cases.⁶⁰ The Court listed five principles: (1) Article 2 of Protocol 1 should be interpreted in consideration of Articles 8–10 of the Convention; (2) the right to education implies a right of parents to respect for their religious and philosophical convictions, and the state should aim for pluralism in education; (3) schools should foster an inclusive learning environment that provides students with options rather than excluding particular viewpoints; (4) the state may not indoctrinate—its curriculum should focus on being “objective, critical, and pluralistic;” and (5) in consideration of respect for parental religious convictions and of children’s own beliefs, the state has a “duty of neutrality and impartiality” that is “incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions.”⁶¹ Applying these principles, the Court concluded that the crucifix has a number of different meanings, but that the religious meaning is “predominant.”⁶² In addition, the Court thought it was correct to interpret the crucifix as a religious symbol favoring a particular religion that could be emotionally disturbing and impinge on the negative freedom from religion.⁶³ Moreover, the crucifix does not further educational pluralism and is not compatible with educational neutrality.⁶⁴ The Court therefore found that the display of crucifixes in classrooms of state schools was a violation of the previously referenced Article 9 of the Convention and Article 2 of Protocol 1.⁶⁵

56. *Id.*
57. *Id.* ¶¶ 36–41.
58. *Id.* ¶¶ 36–46.
59. *Id.* ¶¶ 36–41.
60. *Id.* ¶ 47.
61. *Id.*
62. *Id.* ¶¶ 48–54.
63. *Id.* ¶¶ 54–62.
64. *Id.*
65. *Id.*

C. ECHR Grand Chamber Hearing in Lautsi, June 30, 2010

During the summer 2010 hearing before the Grand Chamber, arguments of both parties and of third-party intervening countries continued to focus on the nature of secularism, the implications of secularism for education, and the relationship between secularism and neutrality.⁶⁶ The status of crucifixes as religious symbols continued to feature prominently in the discussion.⁶⁷ Ms. Lautsi's attorney, quoting Voltaire, attempted to describe secularism as a principle that would provide for the right of all people, including secular parents, to educate their children in accordance with their own beliefs.⁶⁸ The applicant described Article 2 of Protocol 1 as requiring education to be absent of any pressure whatsoever from the state because the state's role is to create a neutral and pluralistic atmosphere for children.⁶⁹

Additionally, in response to Italy's contention that ECHR intervention against the will of the state would violate the margin of appreciation,⁷⁰ the applicant contended that there was a European consensus on this issue.⁷¹ The applicant arrived at this consensus by narrowing the issue to crucifix display in classrooms instead of considering the broader question of whether there is uniform European practice related to religious displays in public settings.⁷² Surely, the latter consideration would have yielded the opposite conclusion, insofar as European consensus is relevant to determining whether the ECHR has interfered with domestic regulation unduly.

In keeping with the effort to narrow this issue, the applicant's attorney argued that a ruling in this case would have no effect on symbols in any other public venues, but that this case was solely about classroom displays and applied only in Italy.⁷³ This argument was particularly unusual due to the fact that the applicant and the state, as well as the prior ruling from the lower chamber, all looked to ECHR jurisprudence concerning religious symbols in other contexts in order to ascertain the appropriate treatment of this request.⁷⁴ Presumably, the Court, applicants, and parties appearing before it in

66. *Grand Chamber: Lautsi v. Italy No. (30814/06)*, *supra* note 23.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See infra* Part II.E (discussing how the margin of appreciation principle permits countries to make their own determinations about morality issues due to lack of European consensus).

71. *Grand Chamber: Lautsi v. Italy No. (30814/06)*, *supra* note 23.

72. *Id.*

73. *Id.*

74. *Lautsi v. Italy*, 50 Eur. Ct. H.R. 42, ¶¶ 36–37 (2009) (discussing numerous cases dealing with religious symbols).

the future will continue to appeal to its previous rulings and to apply the ideas and precedents they create to new contexts.

The attorneys for Italy likewise began with a discussion of secularism.⁷⁵ Italy argued that Ms. Lautsi had entirely misunderstood the nature of secularism as mandating that the state disengage completely from the realm of religion.⁷⁶ Italy firmly asserted that there was no European consensus on this issue.⁷⁷ The government was supported by eight of the ten third-party intervening countries, whose counsel the Court did not permit to address the specifics of the case but only the general principles concerned.⁷⁸ Because Weiler addressed general themes and issues, the analogy in this Note to the American context uses his perspective to consider how such ideas might be applicable to American attempts to deal with the constitutional relationship between the state and the church.

Weiler stated that the lower chamber had set forth three principles, two of which the interveners affirmed, and the third, with which the interveners strongly disagreed.⁷⁹ The agreed-upon principles were that individual freedom has both positive and negative aspects and that classroom education should be directed toward tolerance and pluralism.⁸⁰ Weiler addressed the interveners' theory on the duty of neutrality.⁸¹ Weiler characterized the core societal strife exemplified in this case as existing not between differing religious groups, but between the religious and the nonreligious.⁸² This argument, featured in the closing statements of his speech, is intriguing and serves to characterize secularism in an entirely different light.⁸³

D. Further Elaboration of Weiler's Arguments Based on the Published Text of his Oral Submission

Weiler published the text of his oral submission in the *International Journal of Constitutional Law* in an editorial.⁸⁴ Weiler described what he believes are errors with respect to the concept of neutrality in the initial *Lautsi* ruling.⁸⁵ Related to the first error, he explained that as the ECHR stands as a court which must assess the diverse nations of Europe with all of their very different versions of

75. *Grand Chamber: Lautsi v. Italy No. (30814/06)*, supra note 23.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Joseph Weiler, *State and Nation; Church, Mosque and Synagogue—The Trailer*, 8 INT'L J. CONST. L. 157, 160 (2010).

85. *Id.* at 161–65.

the relationship between the church and the state, pluralism and tolerance should be the touchstone values to which the Court's estimations should consistently return.⁸⁶ By this, he means that the Court should tolerate the various settlements that individual countries have reached on this issue—allowing more or less involvement between church and state as the individual states have negotiated it, without finding violation of the Convention's values.⁸⁷ This first error represents a balance necessary in the ECHR's decisions, but is not particularly relevant to the subsequent examination of the values of secularism, neutrality, and pluralism in the American context.⁸⁸

The second error that Weiler found in the original *Lautsi* decision is broader and particularly relevant in considering the neutrality demands of the U.S. Constitution.⁸⁹ A summary of Weiler's understanding is that neutrality does not demand secularism because secularism is itself a worldview that stands in competition with other philosophical worldviews, including those that are religiously guided.⁹⁰ The crucial application of Weiler's insight, relevant in his context and in the American one, is that secularism is not only a worldview, but that it is a worldview which is nonneutral and which, at its core, asserts a "conviction that religion only has a legitimate place in the private sphere and that there may not be any entanglement of public authority and religion."⁹¹ Weiler claimed that secularism is not a neutral position.⁹² This latter assertion is one that the United States should explore in assessing its own view of the neutrality that the Constitution demands of the state in respect to religion.⁹³ Weiler argued in the ECHR context that forbidding "any entanglement" is not a neutral, but a secular position.⁹⁴ In other words, this language, which is strikingly similar to one prominent First Amendment test for assessing whether the state has *endorsed*

86. *Id.* at 162.

87. *See id.* at 163 (claiming the Chamber's previous decision is "not an expression of the pluralism manifest by the Convention system, but an expression of the values of the laïque [or secular] State").

88. *See infra* Part II.E (discussing changes in application of the margin of appreciation principle and analyzing the influence of values like neutrality).

89. Weiler, *supra* note 84, at 163.

90. *See id.* at 164 (explaining that "[s]ecularity, *Laïcité* is not an empty category which signifies absence of faith" but instead represents to many a "rich world view").

91. *Id.* at 164.

92. *Id.*

93. *See infra* Parts IV–V (analyzing neutrality in American jurisprudence).

94. Weiler, *supra* note 84, at 164.

religion, is actually a test motivated by a secular worldview and not a test that refuses to take sides on the question of religion.⁹⁵

E. *A Narrow Critique of Lautsi: The Margin of Appreciation Doctrine*

One line of critique in response to the original ECHR decision involves the application of the margin of appreciation doctrine.⁹⁶ The ECHR originally developed this doctrine in *Handyside v. United Kingdom*.⁹⁷ In this case, the Court examined the United Kingdom's prosecution of the applicant, under the Obscene Publications Act of 1959, amended in 1964, for the publication of *The Little Red Schoolbook*.⁹⁸ The applicant claimed that his rights under Articles 9 and 10 of the European Convention had been violated.⁹⁹ In this case, the Court permitted the United Kingdom to make its own determinations about issues such as morality within its sphere due to the lack of European consensus on the issue and the need to respect the country's sovereignty when this consensus is uncertain.¹⁰⁰ This principle, the margin of appreciation doctrine, offers a partial explanation for why the parties in *Lautsi* attempted to establish whether there was a European consensus on the public display of religious symbols.¹⁰¹ Following the original ECHR judgment, parties who favored Italy summoned this doctrine to argue for greater deference to Italy to regulate its own relationship between church

95. See *infra* Part IV.B (discussing Supreme Court First Amendment cases, including the *Lemon v. Kurtzman* and *Lynch v. Donnelly* tests for endorsement).

96. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 737 (1976).

97. *Id.*

98. *Id.*

99. *Id.* at 750.

100. *Id.* The ECHR described why it would defer to countries even in the application of the international European Convention:

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. . . . [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.

Id. at 754.

101. See *supra* Part II.B–C (analyzing *Lautsi*, November 3, 2010 and *Lautsi*, June 30, 2010, and the question of European consensus).

and state.¹⁰² This principle was the cornerstone consideration in the Grand Chamber's reversal of the earlier ruling.¹⁰³

Additionally, commentators evaluating the doctrine and the Court's ruling have more broadly concluded that there are disturbing inconsistencies in the way the Court has applied this doctrine, particularly in the context of Article 9 jurisprudence.¹⁰⁴ According to Carolyn Evans's assessment of the application of this doctrine in other religious cases, "it is generally used as a rationale for deferring to State decision-making in areas of controversy and complexity."¹⁰⁵ In the context of broader ECHR jurisprudence, the original *Lautsi* decision appeared to have been a shift away from how the doctrine had been applied previously, often in favor of state deference.¹⁰⁶ One possible reason for this departure was the interpretation of neutrality in *Lautsi*, as discussed by Weiler.¹⁰⁷ In the original *Lautsi* decision, the Court only superficially nodded toward the pairing of religious pluralism with neutrality.¹⁰⁸ Malcolm Evans also viewed the original *Lautsi* decision as a shift with respect to application of neutrality—ultimately, he forecasted, the Grand Chamber's decision would be shaped by the decision of whether to follow a secularly inclined neutrality that "speaks of a paranoia about religion and its influence."¹⁰⁹

102. See, e.g., GRÉGOR PUPPINCK & KRIS J. WENBERG, EUROPEAN CTR. FOR LAW & JUSTICE, ECHR—*LAUTSI V. ITALY* (2010), available at <http://www.eclj.org/pdf/ECLJ-MEMO-LAUTSI-ITALY-ECHR-PUPPINCK.pdf> (arguing that the Court in *Lautsi* erred by failing to consider the proper margin of appreciation due Italy as a member state of the Council of Europe and as a country with unique traditions and history).

103. See *infra* Part II.F (discussing the ECHR Grand Chamber ruling in *Lautsi* of March 18, 2011).

104. See, e.g., Carolyn Evans, *Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture*, 26 J.L. & RELIGION 321, 332 ("Part of the reason for the different results between the headscarf and registration cases [two groups of religious cases on which the ECHR often rules against applicants who wish to wear headscarves but in favor of churches who complain about restrictions on their registration] was that the test of necessity (by which all restrictions on religious freedom are measured) was diluted by the margin of appreciation in the headscarf cases.").

105. *Id.*

106. See Zachary R. Calo, *Pluralism, Secularism and the European Court of Human Rights*, 26 J.L. & RELIGION 261, 265–66 (2010) (explaining that even if *Lautsi* is similar to the headscarf cases on some levels, these cases differ from other previous decisions applying the margin of appreciation).

107. See *supra* Part II.D (discussing Weiler's argument that there are errors in the concept of neutrality in the initial *Lautsi* ruling).

108. See Calo, *supra* note 106, at 266 (concluding that this application of the neutrality principle to deny religious display is dissimilar to the Court's previous fostering of religious expression in the name of pluralism).

109. Malcolm D. Evans, *From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression Before the European Court of Human Rights*, 26 J.L. & RELIGION 345, 360 (2010). Evans concludes, "Whether the Grand Chamber does reverse the Chamber's judgment may largely

F. ECHR Grand Chamber Ruling in *Lautsi*, March 18, 2011

On March 18, 2011, the Grand Chamber announced its final judgment in *Lautsi*.¹¹⁰ The Grand Chamber opted to sidestep parsing the subtleties of neutrality and secularism, deciding the case narrowly on the above-mentioned margin of appreciation doctrine, stating that: “Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions.”¹¹¹ The Grand Chamber’s long awaited decision was therefore a narrow reversal of the prior ruling—a clear resolution that defers assessment of some of the more contentious issues raised in the previous decision. Because this Note seeks points of comparison between issues before the ECHR and the Supreme Court and interpretations of broader and more complex relations, the final ruling is less relevant than the original ruling. The following critiques of ECHR religious jurisprudence continue to provide parallels to the American situation even if they did not ultimately prove decisive in the *Lautsi* case. Therefore, this Note references the more comprehensive version of the issues in the case prior to the final decision, as the margin of appreciation doctrine has no true parallel in Supreme Court jurisprudence.

III. BROADER CRITIQUES OF ECHR RELIGIOUS JURISPRUDENCE (ARTICLE 9): PRINCIPLES APPLICABLE IN THE INTERPRETATION OF THE FIRST AMENDMENT BY THE U.S. SUPREME COURT

Weiler’s focus on the values of neutrality and secularism in the *Lautsi* case fits into a broader discussion about ECHR requirements.¹¹² Commentators have offered various views about whether Article 9 neutrality involves a pluralism driven by secularism or, instead, neutrality bolstered by a more full-blooded pluralism, which, in effect, subordinates secularism to the position of one among many competing views in a pluralistic society.¹¹³ These

depend on whether it is willing to depart from the dominant emphasis in its more recent jurisprudence on State neutrality in matters of religion in general and in the educational context in particular.” *Id.* at 361.

110. *Lautsi v. Italy*, 54 Eur. Ct. H.R. 3 (2011).

111. *Id.* ¶¶ 16–18.

112. See *supra* Part II.C–D (discussing the ECHR Grand Chamber hearing in *Lautsi*, June 30, 2010, and Weiler’s oral submission to the ECHR).

113. See *infra* Part III (discussing critiques of Article 9 and ECHR religious jurisprudence).

critiques of the ECHR, often general in nature, are applicable to the *Lautsi* situation, and the demand that neutrality be secular, is, in accord with Weiler's arguments,¹¹⁴ the most problematic aspect of the original decision of the lower chamber. In the ECHR context, arguments against the lower chamber ruling could be leveled through the framework of the margin of appreciation doctrine, as it was in the ultimate Grand Chamber ruling.¹¹⁵ However, the more basic distinctions between the values of neutrality, pluralism, and secularism serve as a link to the Supreme Court's efforts to apply the neutrality mandate of the First Amendment to religious displays.

Prior to considering the nature of neutrality and pluralism, this Note considers critiques that focus on the way the ECHR defines religion itself, as these are analogously relevant in the American context. Focusing on a slightly more basic concern about ECHR understanding of religious freedom, Carolyn Evans grounded her discussion of Article 9 of the European Convention in her observation of the pervasiveness of the protection of the freedom of religion in human rights treaties.¹¹⁶ To the extent that Article 9 is based on both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as Evans contends,¹¹⁷ there is a further connection to its principles in the American context because the United States is a party to both treaties.¹¹⁸ The United States has ratified relatively few human rights instruments,¹¹⁹ so its ratification of these human rights treaties is significant. Therefore, while the United States is in no way subject to the jurisdiction of the ECHR, not being a member of its respective Convention, it has set forth its agreement with similar objectives to those embodied by Article 9 and applied in *Lautsi*. However, by discussing the public display of

114. See *supra* Part II.C (discussing the arguments of both parties before the Grand Chamber).

115. See *supra* Part II.E (discussing application of margin of appreciation in *Lautsi*).

116. Carolyn Evans, *Religious Freedom in European Human Rights Law: The Search for a Guiding Conception*, in RELIGION AND INTERNATIONAL LAW 385, 387 (Mark W. Janis & Carolyn Evans eds., 2004).

117. *Id.* at 387 ("It seems, therefore, that the idea that all people have the right to freedom of religion or belief and the freedom to manifest that religion or belief (albeit subject to limitations) has developed into an important part of the international human rights corpus.")

118. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The United States signed the ICCPR on October 5, 1977, and ratified the treaty on June 8, 1992. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

119. Even though the United States "played a leading part in the promulgation of the Universal Declaration of Human Rights and in converting the Declaration into the two principal human rights covenants [one of which is the ICCPR]," it is a party to "only a limited number of internal human rights agreements." HUMAN RIGHTS 956 (Louis Henkin et al. eds., 2d ed. 2009).

religious symbols in the United States, the Supreme Court directly interprets and applies *only* the First Amendment, which also embodies a neutrality principle.¹²⁰

Evans's concern about ECHR jurisprudence on freedom of religion additionally references another potential parallel to Supreme Court jurisprudence.¹²¹ Addressing the developing conception of the nature of religion or belief, Evans cited then-Chief Justice Burger's comment in *Wisconsin v. Yoder* that "belief and action cannot be neatly confined in logic-tight compartments."¹²² Further corroborating the parallel to Supreme Court religious display cases, at this point in the *Yoder* decision, Burger was referencing the *Lemon v. Kurtzman* decision of the previous year,¹²³ which established a significant, though much critiqued religious display test.¹²⁴

Evans argues that the very nature of the way freedom of religion is understood by the ECHR represents an outsider interpretation of the freedom as extended by the Convention.¹²⁵ She describes this tendency to interpret Article 9 with "primacy given to internal conscience" as originating in the "liberal predisposition to divide the private from the public" rather than being based in the text of Article 9.¹²⁶ The original *Lautsi* decision, decided after Evans's articulation of this flaw in the reasoning of other ECHR rulings, could be seen as an application of such assumptions as Weiler explained in his disagreement with the *Lautsi* Court's propensity to confine religion to the private sphere.¹²⁷

120. See *infra* Parts IV–V (discussing American religious display cases and American application of the principle of neutrality).

121. See Evans, *supra* note 116, at 394–95 (discussing the view that one's religious and other beliefs are inevitably intertwined).

122. *Id.* at 394–95 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972)).

123. *Yoder*, 406 U.S. at 220 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

124. See McConnell, *supra* note 25, at 140–45 (discussing then-current Rehnquist Court's "dismantling of some of *Lemon's* mistakes").

125. See Evans, *supra* note 116, at 395 ("The emphasis given in the case law to the internal as the core meaning of religion is not necessarily consonant with the way in which many religions would define themselves.")

126. *Id.* at 395. This characteristic division of the private (religious) sphere from public life captures the essence of the secularization of our society in the minds of many religious scholars. See, e.g., D.A. CARSON, CHRIST AND CULTURE REVISITED 116 (2008) ("In more popular parlance . . . all three words—'secular,' 'secularization,' and 'secularism'—have to do with the squeezing of the religious to the periphery of life. More precisely, secularization is the process that progressively removes religion from the public arena and reduces it to the private realm; secularism is the stance that endorses and promotes such a process. Religion may be ever so important to the individual, and few secular persons will object. But if religion makes any claims regarding policy in the public arena, it is viewed as a threat, and intolerant as well."); GUINNESS, *supra* note 2, at 148 (defining the terms similarly to Carson).

127. Weiler, *supra* note 84, at 164.

Susanna Mancini highlights an additional difficulty in state and court attempts to make interpretive decisions about religion—such efforts often lead to the association of a majority religion with positive political virtues and of a minority religion with negative political values.¹²⁸ She explains that her analysis is particularly relevant in the ECHR context because the Court must be ever mindful to provide a “balance between unity and diversity,” due to the “deeply divergent constitutional traditions” of the nations involved.¹²⁹ The latter observation corroborates the prior assertion that Italy should have based its argument for allowing the crucifix display on the margin of appreciation doctrine, which is often the Court’s best option for striking this essential balance.¹³⁰ The Grand Chamber decision clearly focused on this principle in issuing its judgment.¹³¹

Exemplifying the previously referenced tension between the nature of neutrality and pluralism, Zachary Calo and Mancini represent alternate positions in this debate. Calo’s discussion comments on ECHR jurisprudence as a whole, but he views the original *Lautsi* opinion as symptomatic of an unfortunate shortchanging of the value of pluralism toward which the Court ought to aim its decisions.¹³² Calo aligns with Evans and Weiler in that he articulates a concern that a step away from pluralism by the Court would be a step toward the imposition of “secular logic,” which, in his thesis, is *not neutral*.¹³³ Calo’s pluralism-as-centerpiece-value argument begins with the assertion that Article 9 itself focuses on pluralism, as the ECHR confirmed in its first religious freedom decision, *Kokkinakis v. Greece*.¹³⁴ However, pluralism is a double-jointed value, as it should be both the means by which the Court interprets Article 9 and the end at which it aims by guaranteeing

128. See Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629, 2631 (2009) (“The practical result of this attitude is that crucifixes may be displayed in the public schools because secularized Christianity represents a structural element of the western constitutional identity, while the wearing of Islamic symbols is either banned or restricted because it represents values and practices that are cast as illiberal and undemocratic.”).

129. *Id.*

130. See *supra* Part II.E–F (discussing margin of appreciation principle in *Lautsi*).

131. See *supra* Part II.F (discussing the Grand Chamber decision).

132. See, e.g., Calo, *supra* note 106, at 265–66 (describing the way the *Lautsi* decision abandons the prior efforts by the Court to endorse “religious pluralism” as “a normative good for democratic life and culture”).

133. See *id.* at 268 (expressing the thesis that, in the context of Article 9 decisions, “[w]hile no single factor can fully account for the Court’s Article 9 decisions . . . the Court’s commitment to a mode of secular logic has been particularly important in limiting its ability to render decisions consistent with the principle of normative religious pluralism”).

134. *Id.* at 261–62.

religious freedom.¹³⁵ While departing from Mancini in his conclusions, he does agree with her¹³⁶ and with Evans,¹³⁷ in the attention he draws to the uniform result in headscarf cases.¹³⁸ However, for Calo, the original *Lautsi* decision represented a potential expansion of the demise of pluralism-guided jurisprudence.¹³⁹ Calo significantly notes that the sleight of hand in the first *Lautsi* judgment, whereby the Court verbally acknowledged pluralism without applying a full-orbed version, involved the demand that pluralism be neutral.¹⁴⁰ However, even though he labels this a problem of identifying plurality with neutrality, his true critique is of the Court's version of neutrality, "not presented as the equal right to public religious expression but rather a public space free from the impositions of religion."¹⁴¹ He explains the deeply flawed end result of defining pluralism through a secularly guided structure: the application of such a principle, by definition, inevitably limits public religious expression.¹⁴²

The solution he offers allows both religious and nonreligious traditions to contribute to the articulation of human rights values, in effect providing pluralism as the engine that drives the application of Article 9, rather than secularism or secularly laden neutrality.¹⁴³ Calo clearly acknowledges that he has only dealt with one potential application of the principles he discussed—religious jurisprudence in the ECHR—and he notes but does not develop broader applicability.¹⁴⁴

135. See *id.* at 262 ("Pluralism is both the means and the end of fostering genuine religious freedom").

136. See *supra* notes 128–29 and accompanying text.

137. See Evans, *supra* note 104, at 322 (noting the disparity between the Court's tendency to rule in favor of religion in group cases, but against religion in individual cases, establishing a seeming bias against individuals with many of these up to this point being Muslim applicants, questioning headscarf restrictions).

138. Calo, *supra* note 106, at 264.

139. See *id.* at 265–66 (contrasting headscarf and *Lautsi* approach of "associat[ing] democratic pluralism with the circumscription of public religious expression" with the *Kokkinakis v. Greece* approach of "endors[ing] . . . religious pluralism as a normative good for democratic life and culture").

140. *Id.*

141. *Id.* at 266.

142. See *id.* (explaining how the Court connects "democratic pluralism with the circumscription of public religious expression").

143. See *id.* at 277 (expressing a belief that the "idea of human rights" should allow "theological rationalities" to speak into the "inheritance of the modern tradition by collapsing the distinctions between reason and faith, secular and sacred, public and private").

144. *Id.* at 278 ("While this paper has focused on the religious freedom jurisprudence of the European Court of Human Rights, it also illuminates broader challenges confronting modern legal thought. . . . This paper has thus proposed pluralization, in particular by opening the idea of human rights to theological perspectives, as one way to overcome the limitations of the secular tradition.").

Mancini's position explores the converse preference for secularism as the touchstone value: "Secularism is a crucial precondition for guaranteeing religious and cultural pluralism."¹⁴⁵ Mancini usefully explores the absurdity of Italy's attempt to argue that the crucifix is itself secular.¹⁴⁶ The lack of respect for the argument that religious symbols are really secular or bearers of secular meaning is remarkable considering the frequency with which this very argument is employed by the Supreme Court in its interpretation of constitutionally mandated neutrality as applied to religious symbols.¹⁴⁷ Mancini alludes to this irony, citing *Stone v. Graham*, as a "similar attempt to 'secularize' a religious symbol."¹⁴⁸ However, though this attempt failed in *Stone*, it resurfaced in *Salazar* and in the intervening cases that consider the public display of religious symbols.¹⁴⁹ Mancini and Calo offer contrasting alternatives—this Note argues that Calo's alternative is preferable because, by its nature, secularism is itself a system of values and incapable of serving as a neutral arbiter for the purpose of achieving true religious pluralism, either in the ECHR or Supreme Court context.

Mancini, while opting for the converse of the approach preferred here does, however, provide a final insight with which most sides of the pluralism debate must wrestle. She asks a provocative question: Are judges the proper interpreters of the nature of religious symbols and the values they evoke?¹⁵⁰ Her question at this point is one that applies to both the Supreme Court and the ECHR. Perhaps this question is even more relevant in the American context where the Supreme Court does not have a deferential option equivalent to the one used by the ECHR when it applied the margin of appreciation doctrine in the final *Lautsi* decision. The controversy sparked by the original *Lautsi* decision, before the issues were narrowed in the final

145. Mancini, *supra* note 46, at 195.

146. See *id.* at 185 (demonstrating the illogical nature of Italy's attempt to preserve the crucifixes as secular symbols by sarcastically characterizing the position: "Therefore it would be a paradox to exclude a Christian symbol from the public domain in the nature of a principle such as secularism, which is actually rooted in the Christian religion.").

147. See *infra* Part IV (discussing the Supreme Court's analysis of secular purpose arguments in religious display cases).

148. Mancini, *supra* note 46, at 188.

149. See *infra* Part IV (discussing secularization arguments in *Salazar*).

150. Mancini, *supra* note 46, at 186 (presenting the issue as "to what extent judges are legitimized to define the significance of religious symbols in order to rule on their compatibility with the values which constitute the core of a secular state"); see also Joseph Blocher, *Schrödinger's Cross: The Quantum Mechanics of the Establishment Clause*, 96 VA. L. REV. IN BRIEF 51, 55 (2010) ("What reality exists before judges render judgment? . . . These questions implicitly arise in Establishment Clause cases regarding government involvement with religious iconography. . . . But what is the status of the iconography before judges make their observation? And why should it be the judges' observation that counts?").

judgment, raised questions that the Supreme Court is unable to avoid by any applicable narrowing doctrine.

IV. AMERICAN ANALOGUES: RELIGIOUS DISPLAY IN SALAZAR AND ITS PREDECESSORS

A. *Comparison of the Texts: Article 9 of the European Convention and the First Amendment of the U.S. Constitution*

The Supreme Court's religious public display cases form an interpretive line of assessment rooted in the First Amendment decree that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁵¹ Clearly, this description of the relationship between the government and religion is far less specific than that set forth in the European Convention, which guarantees the rights of "[f]reedom of thought, conscience, and religion."¹⁵² The language in the European Convention focuses on the rights and privileges of individuals, without directly describing the relationship between the individual and the state.¹⁵³ The protections described in Article 9(1)—providing basic rights to religious belief and practice, including the right to practice in public or private¹⁵⁴—are roughly analogous to the American concept of free exercise.¹⁵⁵ Article 9(2) provides a closer parallel to the American constitutional description of the state's role in religion.¹⁵⁶ However, even Article 9(2) uses the language of "[f]reedom to manifest one's religion,"¹⁵⁷ only reaching the role of the state and its laws by confining the state's ability to regulate religious practice and belief.¹⁵⁸

The European Convention naturally does not contain language similar to that of the Establishment Clause. Article 9(2) decrees that public manifestation of religion and beliefs can be legally limited only when "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."¹⁵⁹ The text does not

151. U.S. CONST. amend. I.

152. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 15, art. 9.

153. *Id.*

154. *Id.* art. 9(1).

155. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

156. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 15, art. 9(2).

157. *Id.*

158. *Id.*

159. *Id.*

state that the member states must be neutral toward religion. The ECHR originally described how Article 9 affected Ms. Lautsi's case, immediately after explaining that this article guarantees parents and children freedom of belief or unbelief.¹⁶⁰ The Court proceeded to elaborate on the state's role in response to this freedom: "The State's *duty of neutrality and impartiality* is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions."¹⁶¹ It is precisely this statement that Weiler claimed was an incorrect gloss on Article 9,¹⁶² based on two assumptions he disputed:¹⁶³ first, that neutrality uniformly characterizes the member states' understanding of government–religion relations and,¹⁶⁴ second, the "conflation, pragmatic and conceptual, between secularism, laicity, and neutrality."¹⁶⁵ In short, Weiler believes pluralism and tolerance do not require the state to remain utterly neutral in matters of religion.¹⁶⁶

This Note does not intend to stretch the analogy between the ECHR's application of the neutrality principle and the Supreme Court's interpretation of the Establishment Clause in public religious display cases beyond reasonable bounds. European states have varying understandings of the relationship between church and state—separation is often less rigid in Europe, sometimes more rigid.¹⁶⁷ However, on this particular issue, the Supreme Court continues to wrestle with whether the Establishment Clause demands neutrality, rather than a softer, more inclusive pluralism, and if it demands neutrality, how rigidly this demand should be enforced.¹⁶⁸ The United States formally accepts language similar to the European Convention as not incompatible with its own concept of the respective spheres of the state and religion.¹⁶⁹ But the true rationale for comparing the treatment of religious public display cases between the two courts is the way in which both struggle with whether statements about pluralism, or even neutrality, can be falsely tinted by the dye of secularism to such an extent that religion,

160. *Lautsi v. Italy*, 50 Eur. Ct. H.R. 42, ¶ 47 (2009).

161. *Id.* (emphasis added).

162. Weiler, *supra* note 84, at 161.

163. *See supra* Part II.C–D (analyzing Weiler's arguments in *Lautsi*).

164. Weiler, *supra* note 84, at 161–62.

165. *Id.* at 164.

166. *Id.* at 163.

167. *See generally* SEPARATION OF CHURCH AND STATE IN EUROPE: WITH VIEWS ON SWEDEN, NORWAY, THE NETHERLANDS, BELGIUM, FRANCE, SPAIN, ITALY, SLOVENIA, AND GREECE (Fleur de Beaufort et al. eds., 2008) (discussing the different ways in which the separation of church and state has developed in various European contexts).

168. *See infra* Part IV.B (discussing the Court's arguments for plurality and neutrality and the tension between the two).

169. *See supra* Part III (discussing various responses to European religious jurisprudence).

though protected in both governing documents, is actually disadvantaged in the public sphere.

B. *Supreme Court Precedents Assessing the Constitutionality of Public Religious Displays*

Just as the *Lautsi* case, particularly in the original ruling, represents a recent struggle to consider neutrality, pluralism, and their implications in a specific application, the *Salazar* case represents a similar struggle by the Supreme Court. In the narrow context of religious displays in public schools, the Court concluded in *Stone v. Graham* that a Kentucky statute that required all public school classrooms to post a copy of the Ten Commandments, though paid for with private funds, was unconstitutional.¹⁷⁰ The Court assessed the statute's constitutionality under the three-part *Lemon* test, which requires a "secular legislative purpose," a "principal or primary effect" that "neither advances nor inhibits religion," and that the statute "not foster 'an excessive government entanglement with religion.'"¹⁷¹ In particular, the Court held that the statute did not have a secular purpose,¹⁷² and Rehnquist's dissent takes issue with the Court's haste in not analyzing whether the statute did in fact serve some additional secular purpose.¹⁷³ It is apparent from the summary disposition of this case that the Court did not believe it raised difficult constitutional questions, but it would be incorrect to assume that religious public displays in other settings have been dismissed as quickly.

The line of cases that deals more broadly with public religious displays raises questions very similar to those in *Lautsi*. The Supreme Court has wrestled with the implications of the First Amendment's joint requirements of neither favoring religion nor stifling its practice, and like the ECHR, it has often been forced to decide, as the *Lemon* test indicates, whether religious symbols have secular purposes.¹⁷⁴ The *Lemon* test is not always applied with the same rigor in Establishment Clause cases, as is clear from the Court's application to public religious displays in other contexts.¹⁷⁵ Not only is the application of the *Lemon* test now uncertain, but even the

170. 449 U.S. 39, 40 (1980).

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

172. *Id.* at 41.

173. *Id.* at 43–47 (Rehnquist, J., dissenting).

174. *Id.* at 40 (quoting *Lemon*, 403 U.S. at 612–13).

175. See CONSTITUTIONAL LAW 1319 (Kathleen M. Sullivan & Gerald Gunther eds., 17th ed. 2010) (explaining that while the *Lemon* test has not been repudiated, it has been criticized and relied upon with much less frequency in recent cases).

subsequent endorsement test, as an interpretation of the *Lemon* test, appears to be on shakier ground.¹⁷⁶

The Supreme Court's recent decision in *Salazar v. Buono* did not actually reach the issue of whether the Latin cross on Sunrise Rock in the Mojave National Preserve violated the Establishment Clause.¹⁷⁷ To address the Court's wavering response to the religious display in this case, it is necessary to consider allusions to the merits of the Establishment Clause question in the context of the Court's line of rulings about public religious displays: *Lynch v. Donnelly*,¹⁷⁸ *Allegheny v. ACLU*,¹⁷⁹ *Capital Square Review and Advisory Board v. Pinette*,¹⁸⁰ *McCreary v. ACLU*,¹⁸¹ and *Van Orden v. Perry*.¹⁸² The discussion of these cases, instead of dealing with their most prominent arguments, is an attempt to read the majority, plurality, concurring, and dissenting opinions for insights as to what the Justices think about the interpretation of religious symbols, whether neutrality (or merely plurality) is mandated by the Establishment Clause, and, if so, how this mandate influences interpretations of the symbols themselves. This wrestling to conform the religious to the strictures of absolute neutrality, or neutrality with a secular bent, ties the issues in these cases to the issues in *Lautsi*. Stanley Fish has provocatively suggested that *Salazar*, as the "latest chapter of this odd project of saving religion by emptying it of its content" forces the Court into the awkward position of "sav[ing] the symbols by leeching the life out of them."¹⁸³ Fish alludes to one of the most dangerous consequences of jurisprudence that implies secularism as a gloss on pluralistic neutrality—the state's neutrality is slanted by a bias against religion through a perverse tendency to misinterpret its symbols.¹⁸⁴ These symbols may remain only if they claim to be their own antithesis—secular.¹⁸⁵

In *Lynch*, the Court held that the display of a crèche in the City of Pawtucket's Christmas display, on public grounds and amidst other holiday decorations, was not a violation of the Establishment Clause.¹⁸⁶ The majority opinion used language that interpreted the

176. See *supra* Part IV.B (discussing application and interpretation of the *Lemon* test).

177. See *Salazar v. Buono*, 130 S. Ct. 1803, 1813 (2010) (stating that a final decision, not appealed, had already been reached on this issue by the lower court).

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

179. *Allegheny v. ACLU*, 492 U.S. 573 (1989).

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

181. *McCreary v. ACLU*, 545 U.S. 844 (2005).

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

183. Stanley Fish, *When Is a Cross a Cross?*, N.Y. TIMES (May 3, 2010, 9:00 PM), <http://opinionator.blogs.nytimes.com/2010/05/03/when-is-a-cross-a-cross>.

184. *Id.*

185. *Id.*

186. *Lynch v. Donnelly*, 465 U.S. 668, 671–72 (1984).

Establishment Clause in terms of plurality and accommodation rather than of neutrality,¹⁸⁷ calling an approach that would “invalidat[e] all governmental conduct or statutes that . . . give special recognition to religion” “absolutist.”¹⁸⁸ Even without demanding government neutrality to religion, and expressing skepticism about the rigidity of the *Lemon* test,¹⁸⁹ Justice Burger was still intent on finding a secular purpose in the crèche,¹⁹⁰ a “passive symbol.”¹⁹¹ *Lynch*, however, is perhaps more significant for Justice O’Connor’s test for evaluating whether a religious display should be considered government “endorsement.” This test provides substance for the first two *Lemon* prongs, questioning under the purpose prong, “whether the government intends to convey a message of endorsement or disapproval of religion,”¹⁹² and requiring under the effect prong that “a government practice does not have the effect of communicating a message of government endorsement or disapproval of religion.”¹⁹³

Justice Blackmun’s dissent in this case struck at the true effect of the opinion; he said that it claimed plurality, but edged toward secularly influenced neutrality by requiring secular purpose.¹⁹⁴ Admittedly, neutralizing or misusing religious symbols would not precisely qualify as showing government disapproval, which O’Connor’s twin prohibitions would vitiate against. Yet, the majority opinion seemed to be speaking about a test that would permit plurality and require a version of neutrality that would leave the crèche, but only as long as its message is not precisely and exclusively religious.¹⁹⁵ This result of requiring neutrality instead of mere plurality serves as a theme to which the Court returns at many points in the subsequent cases.¹⁹⁶ The question in these cases relates

187. *Id.* at 678 (“[I]n our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage *diversity* and *pluralism* in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.” (emphasis added)).

188. *Id.*

189. *See id.* at 679 (noting that the *Lemon* test is not sufficient to provide a simple rule for assessing all public display cases).

190. *See id.* at 680–81 (addressing the distinction between being exclusively secular and having some secular purpose, concluding that the latter is sufficient to avoid violation of the Establishment Clause).

191. *Id.* at 686.

192. *Id.* at 691 (O’Connor, J., concurring).

193. *Id.* at 692.

194. *See id.* at 727 (Blackmun, J., dissenting) (“The crèche has been relegated to the role of a neutral harbinger of the holiday season The city has its victory—but it is a Pyrrhic one indeed. . . . Surely, this is a misuse of a sacred symbol.”).

195. *See id.* at 678–80 (majority opinion) (rejecting a hard line test and emphasizing that each case will depend on context).

196. *See infra* Part IV (discussing *Allegheny*, *Capital Square Review*, *McCreary*, *Van Orden*, and ultimately, *Salazar*).

to whether the nature of the supposed neutrality actually contradicts its own mandate.¹⁹⁷

Blackmun wrote the opinion for the Court in *Allegheny*, and a majority of the Justices joined him in accepting O'Connor's endorsement test from her concurrence in *Lynch* as an appropriate interpretation of the Establishment Clause.¹⁹⁸ This case considered two different religious holiday displays, a crèche within the Allegheny County courthouse¹⁹⁹ and a display at the City-County Building, which included both a Christmas tree and Jewish Menorah.²⁰⁰ The Court held that the crèche was unconstitutional,²⁰¹ but that the joint Christmas tree and Menorah display was constitutional.²⁰²

This case is additionally pertinent to this discussion of possible interpretations of the Establishment Clause that would not demand strict neutrality because, in dissent, Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, described an alternative test.²⁰³ These Justices believed that the endorsement test is not a fair characterization of the Establishment Clause because it is not neutral in respect to religion and it expresses "an unjustified hostility toward religion."²⁰⁴ Here, the concept of neutrality is considered from religion's perspective—"neutrality" is slanted against religious messages. Establishment of religion should, under this reading of the Constitution, be defined as government coercion in support of religious ideas or exercise, by giving particular benefits to religion as opposed to irreligion, or by establishing a state church.²⁰⁵ This test would be conducive to promoting pluralism, allowing for "flexible accommodation" or "passive acknowledgement" of at least some religious symbols.²⁰⁶ This coercion or accommodation test would be tied in part to "practices that are accepted in our national heritage,"²⁰⁷ but it does not appear to unnecessarily bind religious symbols with the straitjacket of rigid government neutrality nor does it deprive them of their core emphases.

197. See *Lynch*, 465 U.S. at 680 ("In a pluralistic society a variety of motives and purposes are implicated.").

198. See *Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring))).

199. *Id.* at 579.

200. *Id.* at 584.

201. *Id.* at 612-23.

202. *Id.* at 619-20.

203. *Id.* at 655-79 (Kennedy, J., concurring in the judgment in part and dissenting in part).

204. *Id.* at 655.

205. *Id.* at 662-63.

206. *Id.*

207. *Id.*

Capital Square Review permitted a Latin cross in a public forum; this cross was not a government display, but was instead a private expressive symbol in a public forum.²⁰⁸ But, more recently in this line of cases, the Court reached seemingly opposite conclusions in *McCreary* and *Van Orden*, decided on the same day. Both cases involved displays of the Ten Commandments, which the Court had considered unconstitutional in public school classrooms in *Stone*.²⁰⁹ In *McCreary*, the Court considered several different attempts to display the Ten Commandments, culminating in the *Foundations of American Law and Government* exhibit in a county courthouse that the Court found to be an unconstitutional violation of the “neutrality principle.”²¹⁰ The dissent narrowly interpreted the Establishment Clause’s prohibitions on the government’s acknowledgment of religion, labeled the idea that “government cannot favor religion over irreligion” a “demonstrably false principle,” and disagreed with the idea that the Ten Commandments display actually violated this principle.²¹¹ Yet, despite rejecting the neutrality principle, as interpreted by the majority,²¹² the belief in a secular purpose behind the display was nevertheless central to the dissent’s conclusion.²¹³

Van Orden, *McCreary*’s foil, concluded that a different type of Ten Commandments display, on the Texas State Capitol grounds amongst other monuments, was constitutional.²¹⁴ Four Justices joined not only the result in this case, but Rehnquist’s argument, which included the following assessment of the Ten Commandments and the symbolic display at issue: “the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance.”²¹⁵ More broadly, Rehnquist described the Establishment Clause in terms that hardly even hinted at the neutrality that the Court has embraced at times: “Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”²¹⁶ He argued that there is no attempt to demand that a secular message predominate.²¹⁷ The Ten Commandments were

208. See *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (holding that the Establishment Clause is not violated by religious expression that is undertaken by a private party in a designated public forum).

209. See *infra* Part IV.B (discussing *McCreary* and *Van Orden*).

210. *McCreary v. ACLU*, 545 U.S. 844, 876 (2005).

211. *Id.* at 893 (Scalia, J., dissenting).

212. *Id.* at 876 (majority opinion).

213. See *id.* at 893 (Scalia, J., dissenting) (discussing the need for the Court to maintain the support of the people and discussing the difference between acknowledgement and establishment).

214. *Van Orden v. Perry*, 545 U.S. 677, 692 (2005).

215. *Id.* at 690.

216. *Id.*

217. *Id.*

permitted to remain, and to remain in robust possession of their true symbolic and religious message.²¹⁸ Concurring in the result, Breyer presents the alternative rationale for allowing the Ten Commandments display to remain—because they do, in fact, also contain a secular and historical message.²¹⁹ The dissent commended the plurality for the absence of any “attempt to minimize the religious significance of the Ten Commandments,”²²⁰ and set forth the neutrality principle with a similar sterling clarity, but with the opposite interpretation of the Establishment Clause as the plurality, claiming that the United States has demonstrated a “resolute commitment to neutrality with respect to religion.”²²¹

The dichotomy between the alternative interpretations of this crucial clause could hardly be further apart occupying opposing ends of the spectrum. Neither of these two sides sought to diminish the religious content of the display even though it might be condoned as an ambivalent message of national solidarity and historical significance. Both sides believe the display is religious—the plurality advocated for an Establishment Clause that accepts a plurality of messages to be publicly displayed on government property, and the dissent rejects this interpretation in favor of an Establishment Clause that remains ostensibly neutral with respect to religious messages.

C. *The Salazar Decision*

The recent decision in *Salazar v. Buono* ultimately did not require the Supreme Court to consider whether the Latin cross on Sunrise Rock violated the Establishment Clause.²²² The litigation leading up to the Court’s verdict traces a fairly complex set of appeals and statutory responses.²²³ The case before the Supreme Court posed additional questions about the plaintiff’s standing and about the government’s attempt to transfer the publicly owned plot of land on which the cross stood to the VFW, who had erected the initial cross.²²⁴ In an ironic turn of events, the cross itself mysteriously disappeared in May, ten days after the Court’s ruling.²²⁵ Lawyers on both sides of the case indicated that they believed the cross’s disappearance was related to the Court’s decision, which remanded

218. *Id.*

219. *Id.* at 701 (Breyer, J., concurring).

220. *Id.* at 716 (Stevens, J., dissenting).

221. *Id.* at 712.

222. 130 S. Ct. 1803, 1820–21 (2010).

223. *Id.* at 1808.

224. *Id.* at 1807–08.

225. Randal C. Archibold, *Cross at Center of Legal Dispute Disappears*, N.Y. TIMES, May 12, 2010, at A15.

the case to the lower court and allowed the cross to remain, at least temporarily.²²⁶ However, some commentators believed that the interesting legal issues in the case had disappeared by the time oral arguments before the Court had concluded.²²⁷ From the standpoint of clarifying Establishment Clause jurisprudence and determining whether land transfer can cure a violation, the *Salazar* decision is not satisfying. But its plurality, concurring, and dissenting opinions indicate that the Court continues to struggle with the ramifications of allowing or prohibiting public display of religious symbols, including the question of whether or not to insist that these displays offend the perennial specter of the neutrality principle.²²⁸

The Court was technically not able to decide whether the cross violated the Establishment Clause because this issue had already been resolved in the lower courts and not appealed.²²⁹ Frank Buono, respondent before the Supreme Court, a retired employee of the park who visited the preserve on a regular basis, initially filed his case claiming that the cross, a religious symbol standing on federal land, violated the Establishment Clause.²³⁰ In the first stage of the case in 2002 (*Buono I*), the district court found that cross violated the Establishment Clause by applying the reasonable observer test, concluded that the cross was a government endorsement of religion, and issued a permanent injunction forbidding the display of the cross.²³¹ The Ninth Circuit affirmed the district court's opinion (*Buono II*).²³² The government did not appeal this decision, which became final.²³³ However, prior to the Ninth Circuit's decision, Congress passed several statutes affecting the display and the land in question.²³⁴ While *Buono I* was pending before the district court, the cross and the land on which it stood were named a national war memorial in honor of World War I, reflecting the purpose of its initial

226. *Id.*

227. *See, e.g.*, Lyle Denniston, *Analysis: A Case of Disappearing Issues*, SCOTUS BLOG (Oct. 7, 2009, 1:37 PM), <http://www.scotusblog.com/2009/10/analysis-a-case-of-disappearing-issues> (noting that many of the Justices considered other factors other than the constitutionality of the cross's display the determinative factors in this case).

228. *See* discussion *infra* Part IV.C (discussing application of neutrality principle and tension between neutrality and plurality).

229. *See* *Salazar v. Buono*, 130 S. Ct. 1803, 1813 (2010) (explaining why the lower court ruling on Establishment Clause violation became final since the Government did not appeal this decision).

230. *Id.* at 1812.

231. *Id.* (citing *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1216–17 (C.D. Cal. 2002)).

232. *Id.* at 1813 (citing *Buono v. Norton (Buono II)*, 371 F.3d 543, 549–50 (9th Cir. 2004)).

233. *Id.*

234. *Id.* (citing Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. 107-117, § 8137(a), 115 Stat. 2230, 2278).

installment.²³⁵ While *Buono II* was pending before the Ninth Circuit, Congress passed a land transfer statute whereby the government exchanged the land on which the cross stood in exchange for another portion of land in the preserve, thus transferring this plot to the private ownership of the VFW.²³⁶

Next, *Buono* took his case back to the district court, this time only for the limited issue of whether the land transfer complied with the 2002 injunction; the district court concluded that it was not valid and permanently enjoined the government from implementing this statute (2005 injunction).²³⁷ The Ninth Circuit affirmed²³⁸ and denied the government's motion for rehearing en banc.²³⁹ The Supreme Court issued a divided decision and ultimately did not provide a definitive answer as to whether the land transfer would cure the constitutional problem, even though commentators had hoped the Court would cast light on this difficult problem.²⁴⁰

In comparing the issue of religious display in this case with that in *Lautsi*, the land transfer is not the relevant issue. More intriguing for present purposes was the propensity of the opinions to veer into a discussion of the merits of the status of the Sunrise Rock cross under the Establishment Clause, even though these statements are dicta with no bearing on the resolution of the case. For the purposes of analyzing the difficulties of forcing neutrality and pluralism to adhere to a secularism limitation, allusions to the future fate of the proper test for applying the Establishment Clause are relevant. First, in his *Salazar* opinion, Justice Kennedy turned to the original Establishment Clause violation, noting that the Court's current decision should not be read as affirming the lower courts' interpretation and application of the Clause to the Sunrise Rock cross, even though the Court could not legally decide an issue that had not been appealed.²⁴¹ Kennedy did not appear to interpret the Establishment Clause as requiring absolute neutrality on the part of

235. *Id.*

236. *Id.* (citing Department of Defense Appropriations Act, 2004, Pub. L. 108-87, § 1821(a), 117 Stat. 1054, 1100).

237. *Id.* at 1813-14 (citing *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005)).

238. *Id.* at 1814 (citing *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1086 (9th Cir. 2007)).

239. *Id.* (citing *Buono v. Kempthorne (Buono V)*, 527 F.3d 758, 783 (9th Cir. 2008)).

240. See, e.g., Lyle Denniston, *Analysis: Intriguing Issues About Religion*, SCOTUS BLOG (Feb. 23, 2009, 5:37 PM), <http://www.scotusblog.com/2009/02/analysis-intriguing-issues-about-religion> (discussing how the Court could end the controversy over the cross at issue in *Salazar*).

241. *Salazar*, 130 S. Ct. at 1818 ("Although, for purposes of the opinion, the propriety of the 2002 injunction may be assumed, the following discussion should not be read to suggest this Court's agreement with that judgment, some aspects of which may be questionable.").

the government with respect to religion: “The goal of avoiding governmental endorsement does *not require eradication of all religious symbols in the public realm.*”²⁴² Kennedy’s preference for accommodation of “divergent values”²⁴³ seems to conform with Weiler’s preference for demanding plurality instead of neutrality as a better framework for approaching the cross display discussion before the ECHR, a requirement more conducive to guaranteeing freedom of expression for parties of varying religious and nonreligious persuasions.²⁴⁴

Another avenue for comparing the discussion of this cross with the cross in the *Lautsi* case relates to the potential effect of provoking a negative bias toward religion by demanding neutrality. In his oral submission before the ECHR, Weiler illustrated the message of a “state-mandated naked wall” with a fictional story of two boys, one from a religious and one from a nonreligious home, who attend school under two separate scenarios—either they see a crucifix on the wall or they see a blank wall.²⁴⁵ The point of his fictional elaboration is to provide substance to the bones of the true outcome of neutrality—in reality the state’s removal of religious symbols also carries a message, one that is not ambivalent with respect to religion and nonreligion.²⁴⁶ Kennedy made a similar point in his *Salazar* plurality opinion, in reference to the government’s attempt to cure the possible violation.²⁴⁷

Perhaps Kennedy alluded to the appropriateness of finding secular meaning in religious symbols;²⁴⁸ however, the concept of accommodation is certainly present in his brief statements about analyzing this cross under the Establishment Clause.²⁴⁹ The dissent also touched on the merits of the Establishment Clause challenge, labeling Kennedy’s description of the cross’s complexity, “a revealing turn of phrase.”²⁵⁰ Without precisely taking up the neutrality demand, Justice Stevens in dissent vigorously disagreed with any attempt to permit the cross based on multifarious interpretations of

242. *Id.* (emphasis added).

243. *See id.* at 1818–19 (“The Constitution does not oblige government to avoid any public acknowledgement of religion’s role in society. . . . Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.”).

244. *See supra* Part II.C–D.

245. Weiler, *supra* note 84, at 164–65.

246. *Id.*

247. *See Salazar*, 130 S. Ct. at 1809, 1817 (“[The Government] could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those the cross was seen as honoring.”).

248. *See id.* at 1818 (noting that the cross has “complex meaning beyond the expression of religious views”).

249. *See id.* (seeming to approve of Congress’s land transfer response as one allowing for the accommodation of a religious symbol).

250. *Id.* at 1835 (Stevens, J., dissenting).

its symbolic nature.²⁵¹ Even in this case, in which the issue of an Establishment Clause violation was not actually before the Court, the subtle but important distinctions between an Establishment Clause that demands neutrality and one which allows for the subsistence of a plurality of messages—including religious messages—is apparent. Scholars believe the Court has turned a conservative corner in Establishment Clause assessment,²⁵² and this may be true, as can be seen from the retrenchment and from accompanying uncertainty as expressed by recent opinions considering religious displays. However, these cases ultimately substantiate the reality that the *Lautsi* case illustrates—the demand for neutrality in conjunction with the attempt to allow for religious symbols by focusing on their secular messages is ultimately not a solution that is actually neutral with respect to religion.

V. FURTHER DISCUSSION OF PLURALISM, NEUTRALITY, AND SECULARISM IN THE AMERICAN CONTEXT

The *Salazar* case was symptomatic of the Court's current approach to the interpretation and application of the Establishment Clause to religious display cases. Even if the Court did not reach certain substantive challenges, scholars have understood the tendencies expressed as emblematic of prominent themes in current jurisprudence, such as deference to the government and a slant toward conservative values and majoritarian religion.²⁵³ Assessments of *Salazar* in the immediate aftermath agreed that the case did not abandon the endorsement test, but viewed this decision as an indication that the test may see future alterations, including potential applications that might even allow cures as attempted by the legislation pertaining to the cross.²⁵⁴

Based on two different rationales, five of the Justices thought that the federal judge below erred in barring the congressionally

251. *Id.* at 1836 & n.8 (“The cross is not a universal symbol of sacrifice. It is the symbol of one particular sacrifice . . .”).

252. *See infra* Part V (discussing Supreme Court precedent relating to the Establishment Clause).

253. *See* Chemerinsky, *supra* note 25, at 625–42 (assessing the direction of the Roberts Court based on decisions such as *Salazar* and *Pleasant Grove v. Sumnum*, 555 U.S. 460 (2009)).

254. *See, e.g., The Supreme Court, 2009 Term—Leading Cases I: Establishment Clause: Endorsement Test*, 124 HARV. L. REV. 219, 219, 225 (2010) (noting that the majority of the Justices indicated that they would not apply the endorsement test to this case and that the “plurality and concurring opinions portend a shift toward a more formalistic endorsement test that is grounded in distinctions between public and private action”).

ordered land transfer.²⁵⁵ Some commentators, speaking less to the future of the endorsement test, have viewed *Salazar* as another case that demonstrates the lack of present clarity and the need for a more certain measuring rod for interpreting and applying the Establishment Clause.²⁵⁶ At the very least, these responses suggesting that this case is an instance of Supreme Court Establishment Clause interpretation, as well as the diversity of views expressed in this case and the line of predecessor public religious display cases, provide evidence that Weiler's statements in his oral presentation in *Lautsi*, while prescient as to the outcome of wrongly applying neutrality,²⁵⁷ were too hasty in his account of the certainty of the strictly secular requirement of the Establishment Clause.²⁵⁸

Scholars have naturally previously quibbled with the endorsement test;²⁵⁹ however, comparing *Salazar* and its predecessors with the original *Lautsi* decision sheds light on why the endorsement test in particular and secular-tending neutrality tests in general pose distinct disadvantages and actually run contrary to an open pluralism that permits both religious and nonreligious expression, even on public property. U.S. commentators have also noted such problems with a secular Establishment Clause, often as a result of tests like the endorsement test.²⁶⁰ For example, without attempting to provide an alternative solution, Ian Bartrum contends that *Salazar* raises several interesting questions, including, as previously referenced, that of the endorsement test's future.²⁶¹ But, his concerns are also similar to those of the original *Lautsi* decision's opponents—

255. Jeffrey Catalano & Bret Brintzenhofe, *Supreme Court Year in Review*, 57 FED. L. 42, 42 (2010).

256. See John P. Elwood, *What Were They Thinking*, 14 GREEN BAG 31, 42–43 (2010) (“[N]one of the opinions in the case did anything material to resolve enduring uncertainty about the role of the ‘endorsement test’ for the validity of government speech under the Establishment Clause.”).

257. Weiler, *supra* note 84, at 163.

258. *Id.* at 164–65. *Contra* Ian Bartrum, *Salazar v. Buono: Sacred Symbolism and the Secular State*, 105 NW. U. L. REV. COLLOQUY 31, 33 (2010) (founding his disagreement with the endorsement test itself on the fact that it too closely resembles the absolute secularism of some European countries, such as France: “The secular state view of disestablishment, which underlies the endorsement test, recalls the French doctrine of laïcité: the state should remain totally neutral on religious questions and should do so by setting aside all religion and religious reasoning in favor of secular rationales and policies.”).

259. See, e.g., McConnell, *supra* note 25, at 134–35 (discussing the then emerging jurisprudence of the Rehnquist Court as a counter to prior *Lemon* test—and endorsement test—influenced decisions which expressed hostility and at best, indifference toward religion); see also KENT GREENAWALT, RELIGION AND THE CONSTITUTION 87–90 (2008) (arguing from a different perspective than McConnell, cataloguing the various problems and questions related to the current endorsement test and its application).

260. Bartrum, *supra* note 258, at 41.

261. *Id.* at 31–33.

the potential for a secularly swayed neutrality test to strip religious symbols of their meaning.²⁶² Particular to the American context, he suggests that wrongly interpreting the Establishment Clause in this way is itself a significant detriment that robs the text of its true meaning and application.²⁶³ Ultimately, when a standard that might require only plurality actually requires secularism, there are two likely interpretations of this conclusion: either the Court as interpreter is actually actively working to undermine religion or the Court is simply acknowledging that when religious symbols have association with the government, over time, they become relatively meaningless.²⁶⁴ The latter concern includes the ominous potential for the government to actually commandeer religious symbols and interpret their meanings, in a seemingly unabashed governmental violation of the true separation of the state from the role and work of the church.²⁶⁵ While the first seems more insidious under a clause that appears to specifically protect religion, neither promotes the pluralism that should serve as the vital pivot point of Establishment Clause jurisprudence. Yet, even though U.S. assessments have made such observations, viewing the American jurisprudence in tandem with *Lautsi* permits a more searching examination of the absurdity of only permitting religious displays in public contexts if they also maintain secular subtexts.

In disagreement with the concerns expressed in this Note, some have suggested approaches to Establishment Clause cases that represent the epitome of preferring secularism to pluralism. These interpreters have criticized an approach that could be characterized as the pluralistic acceptance of religious along with nonreligious symbols, by claiming that such tolerance wrongly construes constitutional requirements.²⁶⁶ Amorphous as it is, the term “tolerance” has also been aligned with interpreting neutrality as a secular-focused concern.²⁶⁷ Nevertheless, Frederick Mark Gedicks chronicles the direction in which he sees the Court actually moving as

262. *Id.* He additionally believes that *Salazar* actually did address interesting issues: “[T]he case has gotten more and more interesting. . . . [M]ost members of the Court *did*—in at least some way—reach the substantive merits of the decision.” *Id.* at 31.

263. *Id.* at 34–36.

264. *Id.* at 40.

265. See Christopher Lund, *Salazar v. Buono and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY 60, 66 (2010) (“[W]hen the government puts up the cross on the theory that it means something else—or even that it just has a lot of meanings, none of which have any priority—the government threatens to commandeer (or, better yet, expropriate) the meaning of the cross.”).

266. See generally Frederick Mark Gedicks, *Undoing Neutrality? From Church-State Separation to Judeo-Christian Tolerance*, 46 WILLAMETTE L. REV. 691 (2010).

267. See generally Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23 (2010).

a progression (or digression, depending on preference) from strict separation to neutrality to, currently, more toleration of religious symbols.²⁶⁸ While he is not particularly concerned with the fate of the true meaning of religious symbols under a test that imposes a biased neutrality by requiring secular meaning, he admits that “contemporary neutralization” is a poor solution that satisfies neither the proponents nor the detractors of the public display of religious symbols.²⁶⁹ Leslie Griffin’s response to *Salazar* is basically accommodationist: religious displays should be allowed if all religions are permitted, but in agreement with this Note’s focus, she accepts that re-characterizing religious symbols as secular is not a productive or honest translation.²⁷⁰

One of the most prominent alternatives to the endorsement test is the coercion test favored by a number of the current Justices.²⁷¹ This test may not be a complete solution to Establishment Clause interpretation, but as a starting point, it at least avoids some of the problems of erroneously secularizing religious symbols in the name of neutrality. The danger remains that although the endorsement test may not be satisfactory to a number of the Justices,²⁷² future developments will result in mere case-by-case analysis, as has been true of the many preceding opinions on public religious display.²⁷³

VI. CONCLUSION

One version of pluralism that stands in accord with the concerns raised here in respect to both the *Lautsi* and *Salazar* issues defines the appropriate response to symbol interpretation in the American context as one that would “recognize that [religious symbols] are valued by many as having religious significance,” but without “demean[ing] them as . . . mere historical remnant[s] in order not to disrespect the non-belief of that growing minority without religious

268. Gedicks, *supra* note 266, at 692.

269. *Id.* at 699–702.

270. Griffin, *supra* note 267, at 64.

271. See *supra* notes 203–07 and accompanying text for a description of this test.

272. See Bartrum, *supra* note 258, at 35 (discussing Justice Kennedy’s dissatisfaction with endorsement test); Lund, *supra* note 265, at 63 (noting that with respect to at least the original incarnations of the endorsement test, there is very little agreement on the application by the current nine Justices).

273. Lund, *supra* note 265, at 60–61; see also Lisa Shaw Roy, *Salazar v. Buono: The Perils of Piecemeal Adjudication*, 105 NW. U. L. REV. COLLOQUY 72, 80–84 (noting generally that context rather than strict application of tests will probably continue to drive Establishment Clause jurisprudence). This prediction runs contra that of Chemerinsky’s prognostications about increasing, through concerningly arbitrary line drawing, formalism. See Chemerinsky, *supra* note 25, at 642.

adherence.”²⁷⁴ Michael McConnell has called the religious public display cases a treatment of “religious symbol[s]” which are “themselves the perfect symbol of the Supreme’s Court’s [hostile or indifferent] attitude toward religion.”²⁷⁵ The concerns expressed about the direction of the ECHR in the original *Lautsi* decision bleed into the Supreme Court’s interpretation of public religious freedom. In the original *Lautsi* decision, the true nature of the preservation through secularization was summarily decried as a “far-fetched argument that the cross, while religious in origins, had in context taken on additional symbolic significance which eclipsed the religious.”²⁷⁶ Instances of the public display of religious symbols extend the opportunity to foster pluralism instead of demanding governmental neutrality keyed to secularism. When neutrality is defined by the ambivalent or secular nature of the symbols themselves, the Court is positioned as religious interpreter, and when wishing to allow for religious expression, is encouraged to perform a feat of falsely ironic dexterity. An interpretation of neutrality that forces religion to receive tolerance at the expense of converting to secularism fosters pluralism no better than a requirement that the secular meet the demands of a religious measuring stick. A robust pluralism should be agnostic between the two perspectives, forcing neither to wear the other’s guise.

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274. Catherine M.A. McCauliff, *Religion and the Secular State*, 58 AM. J. COMP. L. 31, 35–36 (2010).

275. McConnell, *supra* note 25, at 127. He continues this characterization: “The Court does not object to a little religion in our public life. But the religion must be tamed, cheapened, and secularized . . . Authentic religion must be shoved to margins of public life; even there, it may be forced to submit to majoritarian regulation.” *Id.*

276. Evans, *supra* note 109, at 356.

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