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Mark L. Movsesian

St. John's University School of Law

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Crosses and Culture:

State-Sponsored Religious Displays in the US and Europe

This article compares the recent jurisprudence of the US Supreme Court and the European Court of Human Rights on the question of state-sponsored religious displays. Both tribunals insist that states have a duty of religious “neutrality,” but each defines that term differently. For the Supreme Court, neutrality means that government may not proselytize, even indirectly, or appear to favor a particular church; neutrality may even mean that government must not endorse religion generally. For the ECtHR, by contrast, neutrality means only that government must avoid active religious indoctrination; the ECtHR allows government to give “preponderant visibility” to the symbols of traditionally dominant churches. The different conceptions of neutrality reflect institutional and cultural realities. In particular, the differences reflect what sociologists of religion describe as the “American” and “European” religious models.

1. Introduction

It is, in Joseph Weiler’s words, “[t]he debate that won’t go away.”¹ In both the United States and Europe, controversies continue to erupt over the legality of state-sponsored religious displays. In April 2010, a fractured US Supreme Court decided *Salazar v. Buono*,² a case discussing the constitutionality of a Latin cross on public land, the latest in a long line of decisions addressing government’s ability to display religious symbols.³ Across the Atlantic, less than a year after *Salazar* in March 2011, the Grand Chamber of the European Court of Human Rights (ECtHR) decided *Lautsi v. Italy*,⁴ a case concerning the legality, under the European Convention on Human Rights (European Convention), of Italy’s practice of placing crucifixes in public school classrooms. National courts in Europe had been struggling with similar issues for more than a decade, and judging from the public and media attention *Lautsi* drew throughout

¹ Joseph H.H. Weiler, “State and Nation; Church, Mosque and Synagogue—the trailer” (2010) 8 ICON 157, 157.

² [2010] 130 Sct 1803.

³ In addition to *Salazar*, the cases are *McCreary County v. ACLU* [2005] 545 U.S. 844; *Van Orden v. Perry* [2005] 545 U.S. 677; *Capitol Square Rev. and Advisory Bd. v. Pinette* [1995] 515 U.S. 753; *Allegheny County v. ACLU* [1989] 492 U.S. 573; *Lynch v. Donnelly* [1984] 465 U.S. 668; *Stone v. Graham* [1980] 449 U.S. 39.

⁴ *Lautsi v. Italy* No. 30814/06, Judgment of 18 March 2011 (Grand Chamber).

Europe – not just in Italy, where opinion widely supported the crucifix – people cared deeply about the outcome.

The fact that cases like *Salazar* and *Lautsi* continue to arise reveals something important about the state of religion at the start of the twenty-first century. Long past the point when it was supposed to have disappeared as a public concern, religion remains a vital, even growing force. Governments continue to place religious symbols in courtrooms, classrooms, city halls, and parks. And citizens continue to consider such symbols worth a fight. Even in Western Europe, perhaps the most secular place on the planet, millions of people object to removing religious symbols from public places. Other millions consider such symbols an affront to pluralism and a throwback to an unenlightened time. The key point is this: both in the US and Europe, religion's continuing influence means that cases like *Salazar* and *Lautsi* will recur. Indeed, because of religious symbols' peculiar power to elicit emotional responses – alternately to inspire, comfort, or offend – we should expect such controversies to be passionate, prolonged, and persistent.

In this article, I compare the jurisprudence of the Supreme Court and the ECtHR on state-sponsored religious displays and explain how, and why, they differ. For both tribunals, the law on religious displays is a matter of themes, not rules. The main theme is neutrality. Both the Supreme Court and the ECtHR emphasize that government must remain religiously neutral in order to promote social harmony. Yet “neutrality” has different meanings for the two tribunals. For the Supreme Court, neutrality means, at a minimum, that government may not proselytize, in the sense of pressuring people to join a religion. Neutrality goes beyond that narrow conception, however. The Justices have also indicated that government may not display symbols in a way that suggests preference for a particular sect. Indeed, the Court sometimes says that government may not endorse religion even generally, though the Court's decisions do not consistently

support that view. For the ECtHR, by contrast, neutrality means only that the state must avoid proselytism, understood as active religious indoctrination – classroom catechism or prayers, for example. Giving “preponderant visibility”⁵ to the symbols of a particular sect does not qualify, to say nothing of endorsing religion generally.

The different conceptions of neutrality reflect institutional and cultural realities. Institutionally, the Supreme Court’s status as a constitutional court allows it to adopt a stricter version of neutrality than the ECtHR, which must accommodate a variety of national church-state arrangements, including establishments. Culturally, the Supreme Court’s conception of neutrality reflects what sociologists of religion refer to as the American model, which sees churches as voluntary associations that must compete in a free religious market.⁶ The American model rejects government expressions of support for particular churches as inappropriate market distortions. By contrast, the ECtHR’s thinner conception of neutrality comports with the European model, in which churches act, not as competing “firms,” but as “public utilities” that provide a kind of religious infrastructure for the nation as a whole.⁷ Although the European model rejects outright state indoctrination, it accepts symbolic endorsements of the dominant local church.

I develop these arguments in detail below. In part 2, I use *Salazar* as a vehicle for exploring the three visions of neutrality that appear in the Supreme Court’s jurisprudence: non-proselytism, non-sectarianism, and absolute neutrality. In part 3, I show how *Lautsi* reflects the ECtHR’s thinner conception of neutrality as a non-indoctrination principle. In part 4, I

⁵ *Lautsi* (n 2) [71].

⁶ Roger Finke and Rodney Starke, *The Churching of America, 1776-2005* (Rutgers 2005); John Micklethwait and Adrian Wooldridge, *God Is Back* (Penguin 2009).

⁷ Grace Davie, *The Sociology of Religion* (2007) 86.

demonstrate how the different visions of neutrality adopted by these tribunals reflect underlying institutional and cultural factors, particularly the competing “American” and “European” religious models. In part 5, I offer some brief reflections on the value of comparative studies like the one I undertake here.

2. The Supreme Court and Religious Displays

A. Salazar v. Buono

For a case that has drawn so much attention, *Salazar*'s holding is actually rather narrow. The district court in *Salazar* had determined that an eight-foot Latin cross erected as a war memorial on federal land in the Mojave Desert violated the Establishment Clause⁸ and ordered its removal. Instead, the government conveyed the land, along with the cross, to a private organization. When the district court ruled that the government had attempted to evade the injunction, the government appealed. The scope of the injunction, therefore, not the underlying constitutional issue, was the precise question before the Court, which reversed on a 5-4 vote. In the course of considering the scope of the injunction, however, both the plurality opinion and the principal dissent extensively discussed the legality of the cross itself. They disagreed both about the cross's constitutionality and the proper test for deciding the question.

Justice Kennedy's plurality opinion, which he wrote for himself and two other Justices, strongly suggested that the cross was constitutional.⁹ “Although” the cross was “certainly a Christian symbol,” the government had not been trying to ““proselytize.””¹⁰ Nor did display of

⁸ US. Const. Amend. 1 (“Congress shall make no law respecting an establishment of religion”).

⁹ Two other Justices believed that plaintiff lacked standing and voted to reverse on that basis.

¹⁰ *Salazar* (n 1) 1816.

the cross in this context indicate official approval of a specific sect.¹¹ The government had simply attempted to honor America’s war dead in a culturally familiar way:

[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor ... those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles . . . whose tragedies are compounded if the fallen are forgotten.¹²

In a concurring opinion, Justice Alito argued that removing the cross, as the district court had ordered, would have sent the message that government was not “neutral” with respect to religion, but actually “hostile ... and bent on eliminating ... any trace of our country’s religious heritage.”¹³

The principal dissent in *Salazar*, written by Justice Stevens for himself and two other Justices, scoffed at the idea that the cross was constitutional.¹⁴ The proper test was not whether government was proselytizing or even expressing a sectarian preference – although in this case, Stevens wrote, government surely had done the latter. Rather, the test was whether government had “endorsed” religion in any way.¹⁵ Here, “any reasonable observer” would understand that the display expressed favoritism not only for religion, but for Christianity in particular.¹⁶

¹¹ *ibid* 1818.

¹² *ibid* 1820

¹³ *ibid* 1823 (Alito, J., concurring in part and concurring in the judgment).

¹⁴ Justice Breyer dissented separately, arguing it was not necessary to discuss the constitutional issue.

¹⁵ *ibid* 1832 (Stevens, J., dissenting).

¹⁶ *ibid*.

“Making a plain, unadorned Latin cross a war memorial does not make the cross secular,” Stevens wrote. “It makes the war memorial sectarian.”¹⁷

B. Neutrality: Three Conceptions

Salazar reflects the unsettled quality of the Supreme Court’s religious-display jurisprudence.¹⁸ The Justices have never committed to a single test in this area. Although some scholars treat the endorsement test that Justice Stevens mentioned in *Salazar* as the operative standard,¹⁹ the Court has not always applied that test, or applied it consistently. Cases turn on broad principles and specific facts;²⁰ the jurisprudence is one of themes, not rules. One important theme is neutrality. “[O]fficial religious neutrality,” the Court has said, is a “central Establishment Clause value” that promotes “tolerance,” “liberty and social stability.”²¹ The Justices have not always agreed on what neutrality requires, however. Three conceptions appear in their decisions.

The first is neutrality as non-proselytism: government may not display symbols in a manner that pressures citizens to convert or to join a particular religion. Justice Kennedy once famously remarked that a city could not erect “a large Latin cross on the roof of city hall,” since that action would represent “an obvious effort to proselytize on behalf of a particular religion,”²² but essentially all the Justices accept this conception of neutrality.²³ One might think of the non-

¹⁷ *ibid* 1835.

¹⁸ For a helpful discussion, see Kent Greenawalt, *2 Religion and the Constitution* (Princeton 2008) 74-90.

¹⁹ Noah Feldman, *Divided by God* (Farrar, Straus and Giroux 2005) 212. Douglas Laycock writes that, notwithstanding inconsistencies and exceptions, the endorsement test embodies the Court’s “formal doctrine.” Douglas Laycock, ‘Substantive Neutrality Revisited’ (2007) 110 W. Va. L. Rev. 51, 69.

²⁰ Marc O. DeGirolami, *Tragedy and History: The Quality of Religious Liberty* (Harvard University Press forthcoming 2012).

²¹ *McCreary County* (n. 3) 860.

²² *Allegheny County* (n. 3) 661.

²³ Adam M. Samaha, ‘Endorsement Retires: From Religious Symbols to Anti-Sorting Principles’ [2005] Sup. Ct. Rev. 135, 149.

proselytism principle as a variation on the coercion test the Court has applied in other Establishment Clause contexts.²⁴ Symbols cannot directly coerce anyone, of course; one can always ignore them. But in certain contexts symbols can exert pressure to conform, and that pressure might amount to a kind of indirect coercion. A cross on city hall would not force viewers to do anything, for example, but its permanent, prominent display might unduly influence citizens' religious commitments.

The non-proselytism principle appears in *Salazar*'s plurality opinion, which asserted that the government had not been attempting to proselytize when it erected the cross as a war memorial. The principle also appears in *Stone v. Graham*,²⁵ the Court's first religious-display case, decided more than 30 years ago. In *Stone*, the Court struck down a Kentucky statute requiring public schools to post copies of the Ten Commandments in every classroom, along with small-print disclaimers referring to the Commandments' "secular" function "as the fundamental legal code of Western Civilization and the Common Law of the United States."²⁶ Notwithstanding the disclaimers, the Court worried about the effect the displays would have on impressionable children. The displays, it believed, would "induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."²⁷ To be sure, children could simply ignore the displays, but subtle pressure would remain, since students would be "confronted . . . every day," in every classroom, by an officially-sponsored religious text.²⁸

²⁴ *Lee v. Weisman* [1992] 505 US 577.

²⁵ *Stone* n 3.

²⁶ *ibid* 41.

²⁷ *ibid* 42.

²⁸ *Van Orden* (n 3) 691.

The second conception of neutrality to appear in the Court’s decisions is neutrality as non-sectarianism.²⁹ This conception bars displays that favor or appear to favor a particular sect, even if the displays avoid proselytism as such. Here, too, the Justices have been essentially unanimous, at least as a matter of principle. Justice Scalia has written that the American “constitutional tradition” forbids “sectarian” endorsements, that is, those that “specify[] details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).”³⁰ Of course, “sectarian” is a contestable term, and the Justices have disagreed whether particular displays fall within the category. Justice Scalia has argued that generally monotheistic references qualify as non-sectarian – the Ten Commandments, for example, which Christians, Jews, and Muslims all accept.³¹ Other Justices, by contrast, maintain that even generally monotheistic displays are “sectarian” in that they implicitly reject polytheistic and non-theistic traditions.³²

The cases suggest that context can give an otherwise sectarian display a neutral, cultural meaning. The *Salazar* plurality, recall, asserted that, as a war memorial, a Latin cross was not a sectarian symbol but an acceptable cultural reference evoking the memory of America’s fallen soldiers. The two crèche cases, *Lynch v. Donnelly*,³³ and *Allegheny County v. ACLU*,³⁴ provide further examples. In *Lynch*, the Court upheld the constitutionality of a crèche in a city’s annual Christmas display. Notwithstanding the crèche’s depiction of “an event that lies at the heart of

²⁹ For arguments in favor of the nonsectarianism principle, see Michael W. McConnell, ‘Religious Freedom at a Crossroads’ (1992) 59 U. Chi. L. Rev. 115, 156; Steven D. Smith, ‘Nonestablishment “Under God”? The Nonsectarian Principle’ (2005) 50 Villanova L. Rev. 1.

³⁰ *Lee* (n 24) 641.

³¹ *McCreary* (n 3) 894.

³² *Van Orden* (n 3) 719.

³³ *Lynch* (n 3).

³⁴ *Allegheny County* (n 3).

Christian faith,”³⁵ the Court maintained that the display was essentially cultural. The city was commemorating a national holiday with its traditional symbols; any sectarian meaning was “indirect, remote, and incidental.”³⁶ Justice O’Connor’s concurrence echoed this point. Christmas had its “religious aspects,” she conceded, but was also a “public holiday” with “cultural significance.”³⁷ The city had displayed the crèche alongside secular holiday symbols like reindeer and candy-striped poles,³⁸ thus ensuring that observers would understand that the city had commemorated Christmas’s cultural, rather than sectarian, importance.

Allegheny County involved two public displays, a crèche with a banner reading “‘Gloria in Excelsis Deo!’” and a composite display containing a Christmas tree, a Chanukah menorah, and a sign saluting liberty. The Court held that the first display violated the Establishment Clause but not the second. Unlike the crèche in *Lynch*, the Court explained, the crèche in *Allegheny County* stood alone; no secular images “detract[ed] from [its] religious message.”³⁹ The display thus went beyond “acknowledg[ing] Christmas as a cultural phenomenon” and endorsed the holiday’s religious content.⁴⁰ With respect to the composite display, no single analysis commanded a majority of the Court. For the two swing votes, the fact that the display contained the holiday symbols of two religions, as well as a secular salute-to-liberty sign, helped lead to the conclusion that the display was cultural rather than sectarian.⁴¹

³⁵ *Lynch* (n 3), 711 (Brennan, J., dissenting)

³⁶ *ibid* 683.

³⁷ *ibid* 691 (O’Connor, J., concurring).

³⁸ *ibid* 671.

³⁹ *Allegheny County* (n. 3) 598.

⁴⁰ *ibid* 601.

⁴¹ Ira C. Lupu and Robert W. Tuttle, ‘The Cross at College: Accommodation and Acknowledgement of Religion at Public Universities’ (2008) 16 William & Mary Bill of Rts. J 939, 991. On the importance of the multiple symbols, see *Allegheny County* (n 3) 614-16 (Blackmun, J.), 626 (O’Connor, J., concurring in part and concurring in the judgment).

The third conception of neutrality is what one might call an “absolutist” position.⁴² Not only must government avoid proselytizing or expressing preference for a particular sect; government must also refrain from displays that promote or appear to promote religion generally. As between religion and non-religion, government cannot appear to “take sides.”⁴³ The endorsement test embodies this version of neutrality. Unlike the first two conceptions, on which the Justices agree in principle, the absolutist position remains controversial on the Court and in the academy,⁴⁴ and the endorsement test faces uncertain prospects now that its chief proponent, Justice O’Connor, has retired.⁴⁵ Notably, in *Salazar*, only the dissent relied on the endorsement test,⁴⁶ the Justices in the plurality referred to it only in passing, for sake of argument.⁴⁷ The controversy arises from the fact that the test casts doubt on many traditional and widespread American practices. Public expressions of a generally religious nature abound in American life and always have. To give just two examples, the National Motto, inscribed on all US currency, is “In God We Trust,” and the Great Seal of the United States includes the eye of Providence and the words “Annuit Cœptis,” or, in the official translation, “He (God) has favored our undertakings.”⁴⁸ If one took seriously the admonition against generic religious displays, the Motto, the Seal, and other similar expressions would have to go, unless one were willing to “grandfather” them as a kind of ceremonial deism.⁴⁹

⁴² *Lynch* (n 3), 678.

⁴³ *McCreary* (n 3) 860.

⁴⁴ For a summary of criticisms of the endorsement test, see Jay D. Wexler, ‘The Endorsement Court’ (2006) 21 *Wash. U. J.L. & Pol’y* 263, 271-77. Wexler thinks many of the criticisms are overstated. *ibid.* 305.

⁴⁵ *Samaha* (n 23), 137.

⁴⁶ *Salazar* (n 2), 1832 (Stevens, J., dissenting).

⁴⁷ *ibid.* 1819 (plurality), 1824 (Alito, J.).

⁴⁸ US Dept of State, *The Great Seal of the United States* (2003) 15.

⁴⁹ Andrew Koppelman, ‘The New American Civil Religion: Lessons for Italy’ (2010) 41 *Geo. Wash. Int’l L. Rev.* 861, 864.

In sum, for the Supreme Court, neutrality means that government may not display religious symbols in a manner that proselytizes, even indirectly, or that demonstrates approval for particular sects; some cases suggest that displays may not suggest approval for religion generally, but that is more controversial. By contrast, as I explain below, the ECtHR has a much narrower conception of neutrality. For that tribunal, neutrality means only that the state may not proselytize, in the sense of engaging in active religious indoctrination. Displays of sectarian symbols, even displays that give “preponderant visibility” to the symbols of the dominant local church, are permissible.

3. The ECtHR and Religious Displays

A. Lautsi v. Italy

Lautsi's facts are well known, so I will only sketch them here.⁵⁰ Italian regulations, often characterized as fascist-era decrees but actually originating earlier, from the time of the Risorgimento, require public elementary school classrooms to display crucifixes. Soile Lautsi, the mother of two schoolchildren, challenged the regulations in the Italian administrative courts, arguing that the crucifixes violated the constitutional doctrine of *laicità*, or secularism.⁵¹ The administrative courts rejected her challenge on the somewhat dubious ground that the crucifix represented not Christianity but secularism. The lower administrative court maintained that Christianity, understood correctly, contained within itself ““those ideas of tolerance, equality and liberty which form the basis of the modern secular State, and ... the Italian State in particular.””⁵²

⁵⁰ For an interesting recent discussion of *Lautsi*, see Javier Martínez-Torrón, ‘The (Un)Protection of Individual Religious Identity in the Strasbourg Case Law’ [2012] OJLR 1, 21-22.

⁵¹ The Italian Constitutional Court declined jurisdiction, as the challenge involved administrative regulations rather than statutory provisions. Susanna Mancini ‘Taking Secularism (not too) Seriously: the Italian “Crucifix” Case’ (2006) 1 RHR 179, 183.

⁵² *Lautsi* (n 4) [15].

The crucifix thus stood for Italian constitutional values, including *laicità*. On appeal, the Consiglio di Stato affirmed. Although it avoided the lower court's more questionable forays into theology, it agreed that the crucifix represented civic values, such as tolerance and freedom of conscience, which happened to have a Christian origin.⁵³

Lautsi then sued Italy in the ECtHR, arguing that the crucifixes violated article 2 of the First Protocol to the Convention, which provides that “[i]n 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,”⁵⁴ and article 9 of the Convention, which confers the right “to freedom of thought, conscience, and religion.”⁵⁵ In a brief opinion, a chamber of the court agreed. Together, the chamber held, articles 2 and 9 imposed on states a duty of religious “neutrality and impartiality” that prohibited proselytism.⁵⁶ Public schools must not be places of “missionary activities;”⁵⁷ government must “refrain from imposing beliefs, even indirectly,” on impressionable schoolchildren.⁵⁸ Here, the chamber reasoned, the presence of crucifix could indeed create pressure for students; even though students need not take any action in response, the crucifix was a powerful, permanent symbol they could not ignore. The chamber dismissed Italy's argument that the crucifix represented “neutral,” secular values: whatever other meanings might exist, the sectarian message was obviously “predominant.”⁵⁹

⁵³ *ibid* [16].

⁵⁴ *Lautsi v. Italy* [2009], No. 30814/06 (Judgment of 3 Nov. 2009) [27].

⁵⁵ *ibid*

⁵⁶ *ibid* [47]. The ECtHR's jurisprudence refers to the duty as one of “neutrality and impartiality,” but I refer to it in the text as a duty of “neutrality,” for consistency's sake.

⁵⁷ *ibid*

⁵⁸ *ibid* [48].

⁵⁹ *ibid* [51].

The chamber's reasoning thus closely tracked the Supreme Court's analysis in *Stone*, the classroom Ten Commandments case, which also focused on the potential of passive displays to proselytize schoolchildren.⁶⁰ The chamber's decision also comported with the most famous European religious-display case before *Lautsi*, the *Classroom Crucifix II Case*,⁶¹ in which the German Federal Constitutional Court held that a similar classroom crucifix requirement violated the duty of neutrality under the German Basic Law, also because of the danger of indirect proselytism.⁶² When Italy referred the chamber's decision in *Lautsi* to the Grand Chamber, then, most observers expected that the GC, too, would hold that displaying the crucifix violated the state's duty of neutrality.

In the end, however, the GC rejected the chamber's analysis and held that displaying the crucifix did not violate Italy's duty of neutrality. The GC began by noting the "diversity of practice" in the Council of Europe regarding religious symbols in public schools:⁶³ a few states prohibited such symbols; a few, like Italy, expressly required them; and several allowed them without specific authorization.⁶⁴ National courts that had considered the legality of such symbols under domestic law had reached inconsistent results.⁶⁵ Given the diversity of practice, the GC argued, states must have a wide "margin of appreciation" in determining, with respect to public

⁶⁰ *Stone* (n 3).

⁶¹ [1995] 93 BVerfGE 1. For a translation, see Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed., 1997) 472.

⁶² For a helpful discussion of this case, see Gerhard Robbers, *Religion and Law in Germany* (Kluwer 2010) [637]-[638].

⁶³ *Lautsi* (n 4) [61]

⁶⁴ *ibid* [27].

⁶⁵ *ibid* [28]. Swiss, German, and Spanish courts had ruled against such displays, but Polish and Romanian courts had allowed them.

religious displays, how best to apply the duty of neutrality in light of local circumstances and traditions.⁶⁶ Italy, the GC believed, had not exceeded that margin.

Like the chamber, the GC understood neutrality as a non-proselytism principle. It conceived of proselytism more narrowly, however. The GC conceded that display of the crucifix gave “preponderant visibility” to the symbol of Italy’s “majority religion.” But “indoctrination,” not “preponderant visibility,” was test, and indoctrination meant something more than placing an “essentially passive” symbol on a wall.⁶⁷ The GC emphasized that teachers had no obligation to incorporate the crucifix into their class instruction; indeed, as far as the record revealed, no teacher had ever referred to the crucifix in a “proselytizing” manner.⁶⁸ Moreover, other circumstances minimized the danger of indoctrination. Italian schools allowed minority students to wear their religious attire to class and often celebrated minority religious holidays like Ramadan; schools also provided optional religious instruction for students from minority religions.⁶⁹ Finally, the GC said, Ms. Lautsi always could guide her children outside school in conformity with her own convictions.⁷⁰

The GC demurred with respect to Italy’s argument that the crucifix represented neutral, cultural values as well as sectarian ones – that Italy’s history gave the crucifix an “identity-linked” meaning that justified its display.⁷¹ Although the administrative courts had endorsed that

⁶⁶ *ibid.* [61], [70]-[76]. For criticisms of the role the “margin of appreciation” doctrine played in the GC’s decision, see Paolo Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v. Italy*’ (2011) 13 *Ecc. LJ* 287; Lorenzo Zucca, ‘*Lautsi* – A Commentary of the Grand Chamber decision’ (2011) 11 (manuscript on SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809577).

⁶⁷ *Lautsi* (n 4) [72].

⁶⁸ *ibid* [74].

⁶⁹ *ibid.* For criticism of this section of the GC’s opinion, see Claudia E. Haupt, ‘Transnational Nonestablishment’ 80 *Geo. Wash. L. Rev.* (forthcoming 2011) (SSRN manuscript at 33-34).

⁷⁰ *Lautsi* (n 4) [75].

⁷¹ *ibid* [67].

argument in *Lautsi*, Italian courts were in fact somewhat divided, and the GC did not wish to interpose itself.⁷² In other words, even assuming the crucifix was a sectarian symbol, the GC believed that Italy was acting within its margin of appreciation in continuing its traditional, pervasive classroom display – always provided Italy did not cross the line of indoctrination.⁷³

B. Neutrality as Non-Indoctrination

In defining neutrality in terms of a duty to avoid religious indoctrination, *Lautsi* follows a line of ECtHR cases, dating back to 1976, on the duty of religious neutrality in public education.⁷⁴ The GC relied on two in particular, *Folgerø v. Norway* and *Zengin v. Turkey*.⁷⁵ *Folgerø* concerned a mandatory class, “Christianity, Religion, and Philosophy,” that Norway offered in its public schools.⁷⁶ Among other things, the class attempted to impart to students “‘thorough knowledge of the Bible and Christianity in the form of cultural heritage and the Evangelical Lutheran Faith;”’ to educate students about other religions; and to “‘promote ... respect for Christian and humanist values.’”⁷⁷ The class description implied that teachers could lead students in “‘religious activities” like prayers, scripture readings, and religious plays,⁷⁸

⁷² *ibid* [68].

⁷³ As Malcolm Evans writes, under the GC’s approach, “[t]he State can be ‘neutral and impartial’ whilst ‘perpetuating’ the traditional place of religions in the public life of the country.” Malcolm D. Evans, ‘*Lautsi v. Italy: An Initial Appraisal*’ (2011) 6 Religion and Hum. Rts. 237, 243.

⁷⁴ The first case was *Kjeldsen v. Denmark* [1976]. For a helpful discussion of the duty of religious neutrality in the ECtHR, see 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* (2010-2011) 26 JLR 345.

⁷⁵ *Lautsi* (n 4) [71]-[74].

⁷⁶ *Folgerø v. Norway* No. 15472/02, Judgment of 29 June 2007) (Grand Chamber) [3]. For a recent discussion of *Folgerø*, see John Witte, Jr. & Nina-Louisa Arnold, ‘*Lift High the Cross? Contrasting the New European and American Cases on Religious Symbols on Government Property*, (2011) 25 Emory Int’l L. Rev. 5, 19-20.

⁷⁷ *Folgerø* (n 76) [23].

⁷⁸ *ibid* [94].

although parents could ask that the school excuse their children from activities the parents believed to be “the practice of another religion or adherence to another philosophy of life.”⁷⁹

The ECtHR held that the class violated the duty of neutrality. In principle, schools could offer a class in comparative religion, and the emphasis on Lutheran Christianity did not pose a difficulty, given the place of that religion in Norway’s “history and tradition.”⁸⁰ The problem arose from the requirement that the class “promote respect” for Christian values, and, especially, the possibility that teachers would conduct Christian exercises in class. These exercises could affect impressionable schoolchildren in a manner that Article 2 prohibited – that is, they could amount to indoctrination by the school.⁸¹ Although parents could request that their children be excused from religious exercises, parents might well decline to do so, since requesting an exemption might reveal “intimate aspects of [the parents’] own religious and philosophical convictions.”⁸²

Zengin also concerned instruction in comparative religion. Turkey required public school students to take classes in “religious culture and ethics.”⁸³ The classes were supposed to comply with “principles of secularism and freedom of thought, religion and conscience” and “transmit knowledge concerning all of the major religions” in a spirit of tolerance.⁸⁴ In fact, however, they actively inculcated the doctrines of Sunni Islam. For example, teachers were required to demonstrate that, “far from being a myth, Islam [was] a rational and universal religion” and to impress upon students the value of worship that showed “love, respect and

⁷⁹ibid [96].

⁸⁰ ibid [89]

⁸¹ ibid [94].

⁸² ibid [98].

⁸³*Zengin v. Turkey* No. 1448/04 (Judgment of 9 October 2007) [58].

⁸⁴ ibid.

gratitude towards Allah.”⁸⁵ Students received instruction in Sunni rites, prayers, and holidays and had to memorize chapters from the Koran.⁸⁶

A parent belonging to the Alevi faith, a branch of Islam that differs from the Sunni form, sued Turkey, arguing that the class violated his article 2 rights. The ECtHR agreed. As in *Folgerø*, the difficulty was not that public schools offered comparative religion classes or that the syllabus emphasized Sunni Islam, which was, after all, Turkey’s majority religion.⁸⁷ The problem was that schools were not teaching the classes in an objective and pluralistic way.⁸⁸ Once again, there existed a real threat of indoctrination. Teaching students that Islam is “a rational and universal religion,” and requiring them to study Islamic prayers and memorize chapters from the Koran, obviously lent itself to active proselytism. Moreover, even though Alevis made up a “very large” proportion of the Turkish population,⁸⁹ the classes conveyed little information about Alevism; this inattention showed disrespect for the religious convictions of Alevi parents like plaintiff.⁹⁰ Finally, unlike Christian and Jewish students, whose parents could request they be exempted from the classes, Alevi students were required to attend. Even with respect to Christians and Jews, the court noted, the opt-out was problematic, since, as in *Folgerø*, parents might well be reluctant to reveal their religions publicly.⁹¹

Cases like *Folgerø*, *Zengin* and of course *Lautsi* itself do not even hint at the non-sectarian or absolutist versions of neutrality that appear in the Supreme Court’s jurisprudence.

⁸⁵ *ibid* [60].

⁸⁶ *ibid* [61]-[62].

⁸⁷ *ibid* [63].

⁸⁸ *ibid* [70].

⁸⁹ *ibid* [67].

⁹⁰ *ibid* [70].

⁹¹ *ibid*. [71]-[75]. There was some debate whether Alevi students might also be exempted from the classes. *ibid*. [75].

For the ECtHR, neutrality means simply the absence of active religious indoctrination, understood as classroom religious exercises, assignments that require students to memorize religious texts, and lessons that endorse the truth of religious doctrine. As long as public schools refrain from such activities, they avoid engaging in proselytism and comply with the duty of neutrality. Once one understands this rather narrow conception of neutrality, *Lautsi*'s holding about the "essentially passive" display of crucifixes in public school classrooms – a pervasive, sectarian display if ever there was one – is completely comprehensible. The interesting question is why the ECtHR's conception of neutrality is so thin in comparison with the Supreme Court's. I turn to that question next.

4. Institutional and Cultural Realities

A. Institutional Factors

To explain the different conceptions of neutrality, one must look to institutional and cultural factors. Institutionally, the Supreme Court's position differs dramatically from the ECtHR's. The Supreme Court has formal appellate jurisdiction in a unified constitutional system. Its judgments bind lower courts, state and federal, as a matter of law. Moreover, the American Constitution contains an anti-establishment clause that applies to the states as well as the federal government.⁹² Thus, the Supreme Court can plausibly seek to fashion a uniform, comparatively rigorous national standard regarding public religious displays. This does not mean that the Court's efforts are completely consistent or successful. The fact that so many similar cases about

⁹² US. Const. Amend. 1. In *Everson v. Board of Education* [1947] 330 US 1, the Supreme Court held that the Fourteenth Amendment to the Constitution incorporates the Establishment Clause as against the states.

religious displays appear on the Court’s docket year after year, and the fact that the Court has had such difficulty reaching consensus about them, indicate the complexity of the task.

The Supreme Court is much better positioned to attempt such a task than the ECtHR, however. The ECtHR is not a constitutional court,⁹³ but a supranational tribunal without formal appellate authority over domestic courts. Over time, in a process international-law scholars have studied extensively, domestic courts in Europe have come to accept the ECtHR’s judgments and conform their jurisprudence to its interpretations of the Convention.⁹⁴ If the ECtHR were to “move[] too far out of line with a prevailing domestic democratic consensus,” however, domestic authorities, including courts, might simply decline to “follow.”⁹⁵ Moreover, the Convention does not have an anti-establishment provision, nor could it, given the variety of church-state arrangements in the Council of Europe. With regard to state-sponsored religious displays, in particular, a consensus does not exist.

An attempt to fashion a uniform, rigorous neutrality requirement thus would be neither legitimate nor feasible for the ECtHR. Given the diversity of state practice, the ECtHR can only announce a minimum standard and leave the rest to countries’ “margin of appreciation.” Consider the likely result if the ECtHR had adopted the approach of the chamber in *Lautsi* – the same approach, recall, as the American Supreme Court in *Stone* and the German Federal Constitutional Court in *Classroom Crucifix II* – and announced a more rigorous neutrality requirement forbidding display of the crucifix. The crucifix had overwhelming support in Italy;

⁹³ Dominic McGoldrick, ‘Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?’ (2011) 11 Hum Rts. L. Rev. 451, 500.

⁹⁴ Mark L. Movsesian, ‘Judging International Judgments’ (2007) 48 Virginia J. Int’l L. 65, 105.

⁹⁵ Anne-Marie Slaughter, *A New World Order* (Princeton 2005) 82.

according to some polls, 84% of Italians favored its presence in public schools.⁹⁶ Political leaders “from the President of the Republic to the Prime Minister” had vied with each other to defend it.⁹⁷ Twenty European countries, almost half the membership of the Council of Europe, had expressed public support for Italy;⁹⁸ ten had intervened at the GC in favor of Italy’s position.⁹⁹ In these circumstances, Italians would likely have seen a ruling against the crucifix as illegitimate and found a way to subvert it, whatever the GC held.¹⁰⁰

B. The American Religious Model

Institutional explanations only go so far, however. To account fully for the divergent meanings of neutrality, one must look to differences in underlying religious culture. Recent literature in the sociology of religion addresses these differences. America and Europe are complex societies, of course, and one must avoid oversimplification. Nonetheless, sociologists speak in terms of American and European religious models, and some generalizations are possible.¹⁰¹ The American model treats religion as a market. It sees churches as voluntary, private associations that compete for members, much in the way businesses compete for customers. Success depends on satisfying consumer demand; churches rise or fall based upon their ability to attract and retain adherents. As with any market, government provides public

⁹⁶ Andrea Pin, ‘Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State’ (2011) 25 *Emory Int’l L. Rev.* 97, 98.

⁹⁷ Silvio Ferrari, ‘Civil Religions: Models and Perspectives’ (2010) 41 *Geo. Wash. Int’l L. Rev.* 749, 755.

⁹⁸ European Centre for Law and Justice Press Release, ECHR Crucifix Case: 20 European countries support the Crucifix (July 21, 2010), <http://www.eclj.org/Releases/Read.aspx?GUID=983c3dd3-9c17-4b70-a016-37851446ec0e>.

⁹⁹ Eight countries – Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, and San Marino – made a joint submission. Monaco and Romania submitted their views separately. *Lautsi* (n 4) [47]-[49].

¹⁰⁰ When the German Federal Constitutional Court invalidated the Bavarian ordinance in *Classroom Crucifix II*, the Bavarian legislature soon enacted a new ordinance reinstating the crucifix requirement but providing a mechanism for parents to object if they had “‘serious and understandable reasons.’” *Robbers* (n 62) [637]. This “Bavarian solution” may “actually accentuate[] the pressure” on followers of minority faiths, since they now have “the burden to contest the display of the majority group symbol.” *Mancini* (n 51) 193.

¹⁰¹ Peter Berger, Grace Davie and Effie Fokas, *Religious America, Secular Europe?* (Ashgate 2008).

goods that make “commerce” possible, for example, infrastructure, security, and the rule of law. In fact, in the American model, government can promote religion generally as a public good, much as governments everywhere try to foster favorable business environments. But government cannot promote or protect particular churches.¹⁰² Favoritism would create perverse incentives, making beneficiaries lazy and unresponsive to the wishes of the faithful. Preferential treatment for particular churches, in other words, would distort the religious market in a way that would ultimately injure religious consumers.

The American model reflects historical and intellectual origins, what Tocqueville would have called America’s “point of departure.”¹⁰³ Most British colonies in North America had established churches, defined by law and supported by tax assessments. For example, the Church of England was established in Virginia and the other Southern colonies, as well as New York; the Congregational Church was established in New England.¹⁰⁴ But conditions made establishments difficult to maintain.¹⁰⁵ In a frontier society with a deracinated and transient population, people found it relatively easy to evade ecclesiastical discipline. One could simply relocate, as Roger Williams famously did when he ran into trouble with church authorities in Massachusetts.¹⁰⁶ The religious movements that succeeded were those that adapted to the new conditions and offered less institutionalized, more egalitarian forms of religion that depended not on ties to established bodies but voluntary commitment from the faithful. Itinerant preachers like George Whitefield, for example, whose tours of America in the 1740s drew huge crowds and

¹⁰² Robert D. Putnam and David E. Campbell, *American Grace* (Simon & Schuster 2010) 519.

¹⁰³ Alexis de Tocqueville, *Democracy in America* I:2 (Harvey C. Mansfield and Delba Winthrop trans.) (U Chicago Press 2000).

¹⁰⁴ Finke & Stark (n 6) 43.

¹⁰⁵ *ibid* 35.

¹⁰⁶ John M. Barry, *Roger Williams and the Creation of the American Soul* (Viking 2012).

sparked the First Great Awakening, succeeded precisely because they appealed to a mobile, hardscrabble population that valued straightforward, emotional preaching over intellectual sermons and church formality.¹⁰⁷

After independence, although some states continued to have established churches for a time, an opposite trend formed. The Establishment Clause prohibited establishments at the federal level, of course. Even for states that wished to maintain establishments, the task became increasingly difficult as the population spread beyond the eastern seaboard. Once again, the churches that succeeded were those that adapted to the egalitarianism of the frontier, like the Baptist and Methodist Churches, whose polities were “surprisingly democratic,” even compared with Congregationalists.¹⁰⁸ These churches drew clergy principally from the local populations they served, not from eastern seminaries, an important factor in attracting and retaining members. In Finke and Stark’s phrase, “Baptist and Methodist preachers looked like ordinary people because they were, and their sermons could convert and convince ordinary people because the message was direct and clear and the words were not read from notes.”¹⁰⁹ Revival meetings, for which Methodists, in particular, became famous, combined church services with huge picnics that “provided the ideal religious and social solution to the isolated circumstances of American farmers.”¹¹⁰ In short, Baptists and Methodists succeeded because they identified a new market and devised ways to attract and retain enthusiastic followings.

The American model did not result simply from geography, however. Ideology played a major role as well. As George Marsden writes, a “peculiar ... alliance” between evangelical

¹⁰⁷ Finke & Starke (n 6) 49-53.

¹⁰⁸ *ibid* 74.

¹⁰⁹ *ibid* 86.

¹¹⁰ *ibid* 96.

Protestantism and Enlightenment rationalism has informed American religious culture from the start.¹¹¹ Evangelical Protestantism stressed the importance of personal conversion and individual conscience. Salvation, it argued, required a genuine commitment from the believer, a voluntary, unreserved response to God’s gift. Evangelicals understood the church as an association of people who had made this commitment – the saved – not as an institution that civil authority maintained.¹¹² Indeed, they argued, civil authority inevitably corrupted the church by offering worldly inducements and encouraging people to believe they could achieve salvation through formal membership in an official body. State churches, with elaborate rituals and hierarchies, tended to substitute human tradition for the Bible, which, to the evangelical mind, was humanity’s only reliable authority. “The common person who stood by the plain, common sense meaning of the Bible,” they believed, “could confidently disregard the authority of educated clergy or prestigious churches.”¹¹³

Evangelicalism thus opposed establishment. Opposition also came from Enlightenment rationalism. Many of the founding generation – Jefferson and Franklin, for example – were Deists who had “abandoned those parts of the Christian heritage that they thought were not based on reason.”¹¹⁴ Like evangelicals, they rejected restraints on individual conscience. They did so not because they thought an unrestricted conscience would lead inevitably to Christ, but because they believed that conscience, left to itself, would inevitably conform to reason. By prescribing forms of worship and belief, and, even worse, by preserving irrational superstitions, established churches interfered with conscience and prevented reason’s ultimate triumph. Moreover,

¹¹¹ George M. Marsden, *Religion and American Culture* (Harcourt Brace Jovanovich 1990) 56.

¹¹² *ibid* 20.

¹¹³ *ibid* 59.

¹¹⁴ *ibid* 32.

rationalists associated establishments with political repression. Established churches, like the Anglican Church during the American Revolution, inevitably supported traditional authority and opposed liberty.¹¹⁵

Evangelical Protestantism and Enlightenment rationalism thus made common cause in the battle against establishment in the early Republic.¹¹⁶ Jefferson sent his famous letter extolling the separation of church and state to Baptists in Connecticut.¹¹⁷ Madison's Memorial and Remonstrance against Religious Assessments in Virginia provides another example.¹¹⁸ In 1784, Patrick Henry introduced a bill in the Virginia legislature that would have assessed a tax to supplement the salaries of Christian ministers.¹¹⁹ Opposing the bill, Madison blended evangelical and Enlightenment rhetoric. He argued on theological grounds that religion "must be left to the conviction and conscience of every man" and that Christianity did not need establishment to succeed. In fact, establishment historically had corrupted Christianity, resulting in "pride and indolence in the Clergy, ignorance and servility in the laity; in both, superstition, bigotry and persecution."¹²⁰ Madison also made a political argument: establishment corrupted civil government. "[I]n many instances," established churches "have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people."¹²¹ Establishments inevitably opposed civil equality and "just government."¹²²

¹¹⁵ *ibid* 39.

¹¹⁶ Finke & Stark (n 6) 60.

¹¹⁷ Letter to a Committee of the Danbury Baptist Association (Jan. 1, 1802).

¹¹⁸ Memorial and Remonstrance against Religious Assessments (1785).

¹¹⁹ A Bill Establishing a Provision for Teachers of the Christian Religion (1784).

¹²⁰ Memorial (n 118).

¹²¹ *ibid*.

¹²² *ibid*.

By the 1830s, establishments had ended in America.¹²³ In addition, a consensus formed that government could not act in ways that suggested preference for particular sects. As Michael McConnell explains, the idea that government must not favor one sect over another appears “repeatedly in both statements and constitutional enactments of the founding period.”¹²⁴ The nonsectarianism principle came up mainly in the context of government’s provision of material benefits to religion, but the principle covered public religious expressions as well.¹²⁵ Indeed, public religious expressions in the early Republic – Thanksgiving proclamations, congressional statements, presidential addresses – almost invariably spoke of God or Providence rather than Christ.¹²⁶ This reticence comports with the broader nonsectarianism that Tocqueville found so remarkable in American politics. Americans, he observed, believed that religion was “necessary to the maintenance of republican institutions,” but denominational differences did not overly concern them.¹²⁷ “In the United States,” he wrote, “when a political man attacks a sect, it is not a reason for the partisans even of that sect not to support him; but if he attacks all sects together, each flees him and he remains alone.”¹²⁸

To be sure, in an overwhelmingly Protestant society, listeners could easily interpret vague expressions about “God” and “Providence” as Christian references, and most Americans surely did. Most simply assumed that “nonsectarian” meant generically Protestant, which explains how so many could oppose “sectarian” influence in public education but nonetheless support classroom Bible readings that inculcated a Protestant understanding of scripture,¹²⁹ and why

¹²³ Massachusetts was the last state to end establishment, in 1833.

¹²⁴ Michael W. McConnell, ‘Free Exercise Revisionism and the Smith Decision’ (1990) 57 U. Chi. L. Rev. 1109, 1130.

¹²⁵ McConnell (n 29), 157.

¹²⁶ McCreary (n 3), 897-98 (Scalia, J., dissenting); Laura Underkuffler-Freund, ‘The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory’ (1995) 36 William & Mary L. Rev. 837, 954.

¹²⁷ *Democracy in America* (n 103) 280.

¹²⁸ *ibid.*

¹²⁹ For an excellent discussion, see Philip Hamburger, *Separation of Church and State* (Harvard 2002) 219-29.

politicians “informally continued to speak of the nation as though it were a Christian nation, or at least a biblical nation.”¹³⁰ People rarely perceive their own ironies, and Protestantism so pervaded nineteenth-century America that few apparently noticed the inconsistencies.¹³¹ Some thought nonsectarianism did not go far enough; Jefferson, for example, declined to issue Thanksgiving proclamations as president because he thought government should avoid all implication of religious belief and practice, even purely hortatory statements.¹³² But the frequent public, nonsectarian expressions in the early Republic suggest most Americans thought government could promote religion generally.

I lack space to detail how the early Republic’s understanding of church-state relations has ramified through history. The market model certainly captures the situation in America today. In Micklethwait and Wooldridge’s phrase, “[t]he American religious marketplace is almost a study in perfect competition: there are no real barriers to entry, the domestic market is big enough to support a mind-boggling variety of religious producers, and new religious entrepreneurs are always rising up to challenge incumbents.”¹³³ On the “demand side,” Americans increasingly see religion as a matter of personal choice.¹³⁴ Although most have “the same religious identity as their parents,”¹³⁵ political scientists Putnam and Campbell estimate that “at least one third” of contemporary Americans have chosen “their religion rather than simply inheriting it,” and that the percentage is increasing.¹³⁶ About 25% have “shopped around” for a new place of worship at

¹³⁰ Marsden (n 111) 43.

¹³¹ Douglas Laycock, “‘Nonpreferential’ Aid to Religion: A False Claim about Original Intent’ (1986) 27 *Wm. & Mary L. Rev.* 875, 918-19.

¹³² Underkuffler-Freund (n 126) 951-52.

¹³³ Micklethwait and Wooldridge (n 6) 174.

¹³⁴ Putnam and Campbell (n 102) 148.

¹³⁵ *ibid.* 136.

¹³⁶ *ibid.* 148.

least once, not counting those who have looked because of a move.¹³⁷ Religious “brand loyalty” is “surprisingly low.”¹³⁸

Similarly, Americans tend to see churches not as traditional institutions into which one is born but as voluntary associations of like-minded persons.¹³⁹ Thus the congregation, “an all-purpose association with members who choose it, belong to it, and make contributions to it” is the “most prevalent form” of religious association in America today.¹⁴⁰ This is not surprising with respect to Protestants, since the congregation is the quintessential Protestant polity. But non-Protestant and even non-Christian groups also adopt the form. For example, Alan Wolfe observes that American mosques operate as Protestant-style congregations. They have members who support them through voluntary contributions and who elect committees and officers to run them.¹⁴¹ They sponsor Sunday schools and social activities.¹⁴² Members expect imams to act as “professional clergy” and handle day-to-day management responsibilities.¹⁴³ None of this is typical in predominately Muslim societies, where mosques are “convenient places” to pray rather than religious organizations.¹⁴⁴ American Hindus and Buddhists similarly adopt the congregational form.¹⁴⁵

On the supply side, religious bodies compete fiercely to attract and retain adherents.¹⁴⁶ Just as Baptists and Methodists shaped their messages to appeal to the egalitarianism of the

¹³⁷ *ibid.* 168-69.

¹³⁸ *ibid.* 148.

¹³⁹ Berger et al. (n 101) 29-30.

¹⁴⁰ Putnam and Campbell (n 102) 30.

¹⁴¹ Alan Wolfe, *The Transformation of American Religion* (Free Press 2003) 228.

¹⁴² *ibid.*

¹⁴³ *ibid.* 229.

¹⁴⁴ *ibid.* 227-28.

¹⁴⁵ Putnam and Campbell (n 102) 31.

¹⁴⁶ Finke & Stark (n 6) 202.

American frontier, today's "pastorpreneurs" focus on the "total service excellence" that American consumers expect.¹⁴⁷ One of the most important phenomena in contemporary American religion is the megachurch – defined as a church with at least 3000 weekly attendees – which offers multiple worship services and opportunities for charity work, as well as amenities like banks, basketball courts, child care, coffee shops, pharmacies, even martial arts classes.¹⁴⁸ Thousands of such churches exist.¹⁴⁹ Adaptability, innovation, and niche marketing are crucial; megachurches often have services directed at specific affinity groups.¹⁵⁰ Indeed, whole denominations have sprung up to appeal to particular demographics.¹⁵¹ The variety is staggering. The *Yearbook of American and Canadian Churches* for 2011 lists roughly 200 Christian bodies alone in the United States, from the Catholic Church, with roughly 70 million members, to the Pentecostal Fire-Baptized Holiness Church, with roughly 200.¹⁵²

Finally, although Americans continue to oppose state favoritism for particular sects, they remain very comfortable with public support for religion in general. As Putnam and Campbell observe, "rather than a wedge pushing Americans apart, public expressions of religion often serve to pull them together."¹⁵³ Two hundred years after the founding, public "appeals to God at times of national unity are still de rigueur."¹⁵⁴ Only recently, for example, the House of Representatives voted, by a margin of 396 to 9, to reaffirm "In God We Trust" as the National

¹⁴⁷ Micklethwait & Wooldridge (n 6) 185.

¹⁴⁸ *ibid* 184-86.

¹⁴⁹ *ibid* 186.

¹⁵⁰ *ibid* 184-85.

¹⁵¹ *ibid* 185.

¹⁵² *Yearbook of American & Canadian Churches 2011* (Eileen W. Lindner ed. 2011) 363-73.

¹⁵³ Putnam and Campbell (n 102) 494.

¹⁵⁴ *ibid*. 518.

Motto.¹⁵⁵ Americans support such expressions because they believe, overwhelmingly, that religion plays a positive role in society. In recent surveys, large majorities even of secular Americans agreed that religion has had a good influence in American life.¹⁵⁶ Only a small segment of the most secular Americans expressed discomfort with religion's role.¹⁵⁷ Moreover, a large majority of Americans, about 80%, say they value religious diversity and think it has benefitted the country,¹⁵⁸ and almost 90% believe that followers of other religions own can go to Heaven.¹⁵⁹ Given these broadly ecumenical attitudes, it is not surprising that Americans overwhelmingly support what they conceive as inclusive, nonsectarian public expressions.

The Supreme Court's religious-display jurisprudence comports with the market model. Forbidding displays that proselytize or suggest preference for particular sects ensures that government does not interfere with the market by attempting to identify winners and losers. Nonsectarian displays that promote religion generally as a public good do not pose the same threat of market distortion, by contrast, and the Court allows them. To be sure, the endorsement test's prohibition of nonsectarian displays goes further than the market model would require. Perhaps, as others have written, this aspect of the Court's jurisprudence reflects the fact that Justices and their clerks tend to come from the more secular elements of American society and fail, in this respect, to reflect consensus American values.¹⁶⁰ In any event, as I have explained,

¹⁵⁵ David A. Farenthold, *'In God We Trust': House reaffirms national motto – yet again*, Washington Post, Nov. 2, 2011, http://www.washingtonpost.com/politics/in-god-we-trust-house-re-affirms-national-motto-yet-again/2011/11/02/gIQAiZRWfM_story.html.

¹⁵⁶ Putnam & Campbell (n 102) 497.

¹⁵⁷ *ibid* 497, 515.

¹⁵⁸ *ibid* 520.

¹⁵⁹ *ibid* 534.

¹⁶⁰ McConnell (n 29) 126.

the Justices do not rigorously or consistently apply the endorsement test and indeed may be poised to abandon it.

C. The European Religious Model

The European situation differs substantially. As in America, religion in Europe is a complicated phenomenon. Variations exist among and within nations; one must avoid accepting surface realities. Even in secular France, for example, government has more ties to religion than simplistic accounts of *laïcité* would suggest.¹⁶¹ Nonetheless, one can make some generalizations and speak meaningfully of a European religious model. That model assumes a “dominant” territorial church as “the ‘normal’ form of religious organization.”¹⁶² Where the American model treats churches (plural) as voluntary associations that compete for members, the European perceives the church (singular) as a traditional, state-supported institution whose membership comprises society as a whole.¹⁶³ One does not join a church, as in the American model; one is born into the dominant local church and remains there unless one takes steps to leave.¹⁶⁴ The church performs social functions like weddings and funerals and hosts significant national and community events. Most people will require its services at some point in their lives and simply assume it will be there for them when they need it, whether or not they are active supporters; indeed, whether or not they are practicing Christians.¹⁶⁵ As Grace Davie writes, in European societies, churches – particular churches, not religion in general, as in the American model – are “public utilities” that maintain a kind of religious infrastructure for the nation as a whole.¹⁶⁶

¹⁶¹ ‘Laïcité in Comparative Perspective’ (2010) 49 J. Catholic Legal Studies 1.

¹⁶² Berger et al. (n 101) 24; *ibid.* 98.

¹⁶³ *ibid.* 25.

¹⁶⁴ *ibid.* 24.

¹⁶⁵ Davie (n 7) 86-87.

¹⁶⁶ *ibid.* 86.

Like the American, the European model reflects historical origins. European history has ensured that national and sectarian identities intertwine in a way Americans find difficult to grasp.¹⁶⁷ For many European states, especially those that formed during the second great wave of Christianization at the start of the last millennium, conversion served as “the founding event of [the] nation.”¹⁶⁸ For example, the late French historian René Rémond writes, national consciousness in Denmark and Norway began with the baptism of Scandinavian monarchs around 1000 years ago; Hungary, Poland, and Russia similarly trace their origins as nations to royal conversions around the same time.¹⁶⁹ European nations traditionally do not identify with “Christianity in general,” however. As a consequence of centuries of inter-Christian conflict, different churches predominate in different countries.

For example, the Great Schism of 1054 split Europe into a Catholic West and an Orthodox East, a division that remains salient today, especially on the borders. In the West during the Reformation, national identities formed around Catholicism or Protestantism, and, within Protestantism, around particular forms. So, for example, Austrian and Spanish identity crystallized around loyalty to Catholicism and resistance to Protestant rebels like the Czechs, Dutch, and northern Germans; the same could be said, in reverse, for the rebels themselves.¹⁷⁰ British identity became strongly Protestant under the Tudors; within Britain, Calvinist Scotland distanced itself from Anglican England. This is not to say religious differences created national identities, only that religious differences had a very important role in the formation of national self-images across Europe. The Westphalian settlement, and, in particular, the principle of *cuius*

¹⁶⁷ *ibid* 40.

¹⁶⁸ René Rémond, *Religion and Society in Modern Europe* (Antonia Nevil trans. Blackwell 1999) 18.

¹⁶⁹ *ibid*; *ibid* 109.

¹⁷⁰ *ibid* 112-13.

regio, eius religio, strengthened the link between national identity and religion.¹⁷¹ By allowing rulers to determine the religion of their territories and excluding outside interference, the principle solidified national religious identities as of the mid-seventeenth century.

Westphalia also strengthened official ties between church and state. The state church, an official monopoly that suppressed competitors and coerced conformity by law, became the norm both in Catholic countries, like France and Spain, and Protestant countries, like Britain, the Netherlands, and Sweden.¹⁷² Indeed, state and church formed particularly strong links in Protestant polities – the Lutheran principalities of Germany, for example – where the state appointed clergy, abolished independent church courts, and generally assumed responsibility for church government.¹⁷³ In short, in Europe, the traditional form of religion was that which America rejected from the start.

Over the last two centuries, in a process too complicated to describe here, European nations have departed from the historical pattern of the confessional state, even if some, like Britain, have maintained mild establishments. The historical experience continues to resonate, however. To be sure, no European country today enforces religious conformity by law. Nowhere do civil rights depend on religious affiliation; legal equality exists everywhere and people are free to worship or not as they choose. In these important ways, religious neutrality indeed obtains in Europe. As Grace Davie observes, however, the legacy of national religious identities and state churches means that equality for faith traditions, as a cultural matter, cannot exist.¹⁷⁴

¹⁷¹ *ibid.*

¹⁷² Berger et al. (n 101) 16. See also Steven G. Calabresi, "'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' (2006) 86 B.U. L. Rev. 1335, 1407.

¹⁷³ Harold J. Berman, *Law and Revolution, II* (2003) (Harvard).

¹⁷⁴ Grace Davie, *Religion in Modern Europe* (Oxford 2000) 177.

Throughout Europe, historically dominant churches, even those churches that have been officially disestablished, continue to exert disproportionate social influence.

Italy itself provides a good example. As I have explained, the doctrine of *laicità* renders Italy a “non-confessional secular State.”¹⁷⁵ The Italian Constitution provides that “[t]he State and the Catholic Church are independent and sovereign, each within its own sphere,”¹⁷⁶ and that “religious denominations are equally free before the law.”¹⁷⁷ Yet the Catholic Church has privileges other sects lack. In Italy, bilateral agreements govern relations between the state and religious organizations, including the Catholic Church. The Concordat with the Catholic Church, however, has a higher status in Italian law than the analogous agreements, called *intese*, which the state has with non-Catholic organizations.¹⁷⁸ Some religious bodies have not been able to secure *intese* at all, making their situation even less advantageous.¹⁷⁹ Moreover, the Concordat gives the Catholic Church preferential treatment. For example, Italian public schools must offer classes in Catholicism at public expense; local bishops select the instructors.¹⁸⁰ Non-Catholic groups with *intese* can offer religious education in public schools, if students or parents request it, but these groups must pay the teachers themselves.¹⁸¹ Catholic marriages (and annulments)

¹⁷⁵ Marco Ventura, ‘The Permissible Scope of Legal Limitations on the Freedom of Religion and Belief’ (2005) 19 Emory Int’l L. Rev. 913, 918.

¹⁷⁶ Italian Const. art. 7.

¹⁷⁷ Italian Const. art. 8.

¹⁷⁸ Ventura (n 175) 919.

¹⁷⁹ *ibid* 920.

¹⁸⁰ Alessandro Ferrari & Silvio Ferrari, ‘Religion and the Secular State: The Italian Case’ in Javier Martinez-Torrón and W. Cole Durham, Jr., *Religion and the Secular State: National Reports* (ICLRS 2010) 431, 446. Classes are taught in a non-proselytizing way and students may opt out. *Ibid*.

¹⁸¹ *ibid*. 446-47; Ferrari (n 97) 754-55.

have essentially automatic civil effect; non-Catholic religious marriages do not.¹⁸² Other examples exist as well.¹⁸³

One could hardly argue for the neutrality of these preferences in an abstract sense. Given the dominant role of Catholicism in Italian society, however, one can explain them. As a state, Italy is fairly young, having come into existence only in the mid-nineteenth century. Attempts to promote a republican consciousness have not greatly succeeded. Catholicism has served as the integrating force in society, from the founding to the present. During the Risorgimento, Alessandro Ferrari writes, Catholicism “was the only cement binding the new country together: a country without a common language and without a widespread culture capable of founding civic engagement.”¹⁸⁴ Catholicism continues to provide a sense of cohesion in contemporary Italy, where roughly 90% of the population identifies as Catholic.¹⁸⁵ In fact, Catholicism provides a kind of background norm that gives content to legal doctrines like *laicità*.¹⁸⁶ In Silvio Ferrari’s phrase, Catholicism provides Italy’s “civil religion,” the set of overarching cultural values to which everyone implicitly assents.¹⁸⁷

The fact that Catholicism has a dominant place in Italian culture does not mean that Italians are markedly pious on a personal level. In fact, only about 30% of Italians attend Mass regularly.¹⁸⁸ And Italians are among the more observant people in Europe. By comparison, only

¹⁸² Ferrari and Ferrari (n 180) 444-45. There are complications unnecessary to discuss here.

¹⁸³ Ventura (n 175) 921, 925.

¹⁸⁴ Alessandro Ferrari, ‘Civil Religion in Italy: A “Mission Impossible”?’ (2010) 41 Geo. Wash. Int’l L. Rev. 839, 842.

¹⁸⁵ US Central Intelligence Agency, *The World Factbook 2009* (Washington, DC 2009), at <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html>.

¹⁸⁶ Ferrari (n 184) 850-51.

¹⁸⁷ Ferrari (n 97) 753.

¹⁸⁸ This percentage comes from recent Gallup surveys. http://www.gallup.com/poll/13117/Religion-Europe-Trust-Filling-Pews.aspx?utm_source=email-a_friend&utm_medium=email&utm_campaign=sharing&utm_content=titlelink. Ferrari and Ferrari say the number is less than 25%. Ferrari and Ferrari (n 180), 431.

five percent of French attend religious services on a weekly basis;¹⁸⁹ in Sweden, the number is more like two percent.¹⁹⁰ Taken as a whole, the percentage of Europeans who say that religion is important to them is low. “Overall, only 21 percent of Europeans say that God plays an important role in their lives, compared with 60 percent of Americans (and 90 percent in many Muslim countries).”¹⁹¹ In terms of personal commitment, Europe is indeed a rather secular place.

Paradoxically, though, this secularism at the personal level is consistent with the dominant influence of traditional churches at the collective level. Two concepts from the sociology of religion, “belonging without believing” and “vicarious religion,” help explain why.¹⁹² Even if they do not practice their religion, large numbers of Europeans continue to maintain formal affiliation with traditional churches. For example, despite the fact that Scandinavians attend church very rarely and report very low levels of personal belief, an “extraordinarily high” number have their children baptized.¹⁹³ In Germany, to give another example, the state collects a “church tax,” equal to about eight percent of the taxpayer’s income tax liability, which the state directs to the church the taxpayer designates.¹⁹⁴ All the taxpayer must do to avoid the tax, which might amount to a significant sum, is to declare that he is “religiously unaffiliated.”¹⁹⁵ Notwithstanding the low rate of religious observance in Germany –

¹⁸⁹ Micklethwait and Wooldridge (n 6), 134.

¹⁹⁰ Maarit Jäntherä-Jareborg, ‘Religion and the Secular State in Sweden’ in *Religion and the Secular State* (n 180), 669, 669.

¹⁹¹ Micklethwait and Wooldridge (n 6), 134.

¹⁹² Berger et al. (n 101), 39.

¹⁹³ *ibid* 115.

¹⁹⁴ W. Cole Durham, Jr. and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Wolters Kluwer 2010) 126.

¹⁹⁵ Berger et al. (n 101) 15.

less than 10% attend religious services weekly¹⁹⁶ – most people, at least in the west, continue to declare affiliation with their churches.¹⁹⁷ They opt to belong, even if they do not believe.

Why would people who do not believe continue to maintain an affiliation with the traditional church? Some might believe the church has an important role in educating children.¹⁹⁸ Some might value the moral cohesion the church promotes.¹⁹⁹ Some might see the church as a vehicle for preserving continuity with the nation’s past.²⁰⁰ And some might retain their affiliation simply out of inertia. The important point is this: belonging is the default position that apparently few people wish to alter, even if they no longer have a personal commitment, or only a very weak one. For a great many people, formal affiliation with the traditional church is simply part of what it means to be a member of the national community.

The second concept, “vicarious religion,” is associated principally with Grace Davie.²⁰¹ The term describes a situation in which the majority of society expects that “an active minority” will maintain the traditional church in its behalf – perform liturgies, celebrate marriages, repair sanctuaries, and so on.²⁰² The majority is not indifferent; indeed, it believes the church has an important social role.²⁰³ The majority simply expects other people, presumably at state expense, to maintain the church so that it will be available when the majority needs it. For example, Davie notes, even though Europeans do not attend church regularly, they often protest when church

¹⁹⁶ Gallup Poll, http://www.gallup.com/poll/13117/Religion-Europe-Trust-Filling-Pews.aspx?utm_source=email-a-friend&utm_medium=email&utm_campaign=sharing&utm_content=titlelink.

¹⁹⁷ Berger et al. (n 101), 15.

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*

²⁰⁰ Danièle Hervieu-Léger, *Religion as a Chain of Memory* (Simon Lee trans. Rutgers University Press 2000) 162.

²⁰¹ Davie (n 7) 127.

²⁰² *ibid.*; Berger et al. (n 101), 39-40.

²⁰³ Davie (n 174) 179.

buildings in their communities close.²⁰⁴ The buildings make up an important part of the local landscape to which people feel they have a right. Similarly, Europeans often resent being asked for entry fees at church buildings “on the grounds that such buildings, particularly those that belong to the historic churches, are ... public rather than private space, to which everyone (believer or not) should have the right of access.”²⁰⁵ The church buildings, in other words, belong to society as a whole, not “exclusively to those who use them regularly.”²⁰⁶

Funerals provide perhaps the best illustration of both “belonging without believing” and “vicarious religion.” Notwithstanding the widespread availability of secular funerals, not many Europeans choose to have them.²⁰⁷ Most Europeans would not think of anything other than a religious funeral, and they expect the church to perform this service for them when they die, whether or not they have been believers while alive. For example, when British foreign minister Robin Cook died in 2005, his funeral took place in the Church of Scotland, even though he was an avowed atheist. This was appropriate, the officiating minister explained, apparently without irony, because Cook had been a “Presbyterian atheist.”²⁰⁸ When François Mitterand, the very *laïc* French President, died in 1996, the Catholic Church gave him not one funeral Mass, but two.²⁰⁹ When a gunman massacred 93 people at a youth camp in Norway in 2011, a national memorial service took place in Oslo’s Lutheran Cathedral, attended by the royal family, the prime minister, and large numbers of Norwegians from around the country.²¹⁰

²⁰⁴ Davie (n 7) 141.

²⁰⁵ *ibid.* 142.

²⁰⁶ *ibid.*

²⁰⁷ Grace Davie, ‘Law, Sociology and Religion: An Awkward Threesome’ [2011] OJLR 1, 11-12.

²⁰⁸ Dan Barker, *The Good Atheist* 154 (Ulysses Press 2011).

²⁰⁹ Davie (n 174), 78.

²¹⁰ Steven Erlanger, “Amid Tears, Flickering Candles and Flowers, a Shaken Norway Mourns,” NY Times (24 July 2011), <http://www.nytimes.com/2011/07/25/world/europe/25oslo.html?pagewanted=all>.

The ECtHR's conception of neutrality comports with the European religious model. Acts of state indoctrination, such as holding religious exercises in public school classrooms and requiring students to memorize scriptural passages, obviously create pressure for individuals to conform to official religious orthodoxy, and the ECtHR forbids them. On the other hand, the ECtHR allows government to display symbols of the dominant local church in a manner that one can only see as an endorsement – to give such symbols “preponderant visibility,” in the ECtHR's words – even where impressionable schoolchildren are involved. In a model that assumes the existence of a historically rooted, state-supported church with which the nation strongly identifies, if principally as a cultural matter, and into which the majority of people are born and expect to die, a more rigorous definition of neutrality would be incongruous. American-style nonsectarianism would not fit, to say nothing of the endorsement test's prohibition of even generic religious references.

To be sure, some observers argue that the European model is changing. Increasingly, they say, Europe is becoming an American-style religious marketplace in which membership in a dominant local church is no longer a given.²¹¹ Unsurprisingly, the churches that do best in the “new” religious “economy” are those that adopt American ways.²¹² For example, Pentecostalism, a Protestant movement born in America in the last century, has experienced remarkable growth in Europe in the last generation.²¹³ American megachurches see Europe as mission territory; their European church “plants” evangelize in a very American fashion. For French scholar Olivier Roy, the emergence of the new religious market in Europe reflects the “deculturation” of religion

²¹¹ Micklethwait and Wooldridge (n 6), 25.

²¹² *ibid* 136.

²¹³ In France, Pentecostalism is “the fastest-growing religion,” even ahead of Islam. *ibid*.

that is occurring around the world.²¹⁴ “[T]he good old days,” he writes, “when religion was embedded in culture and culture imbued with religion,” are gone.²¹⁵ “[C]ulturally religious non-believers” in the European style “are vanishing”;²¹⁶ around the world today, religion is a function of personal seeking and self-definition, not national or cultural identity.

If European religion really is moving toward the American market model, the ECtHR may ultimately shift toward a more American understanding of neutrality as well. Reasons exist, however, to think that the historical link between religion and culture in European society will only grow stronger in coming years. As increasing numbers of Muslims immigrate to Europe, they seem to be causing resurgence in Christian identity among their neighbors. For example, in surveys, “the percentage of white Britons who call themselves ‘Christian’ (rather than ‘no religion’) is considerably higher” in “neighborhoods with high Muslim populations” than in “similar, less mixed neighborhoods, even after one reckons in income and other complicating factors.”²¹⁷ The rise in Christian identification probably does not reflect an increase in personal piety, however. Sociologist Martin Riesbrodt notes that Europeans who reengage with Christianity seek principally to revive the “‘dominant Christian culture.’”²¹⁸ “If this ‘dominant’ culture then wanted to tell them how they should spend their Sundays or how they should behave in the bedroom,” he says, they “would quickly lose their enthusiasm.”²¹⁹ Most likely, these re-

²¹⁴ Olivier Roy, *Holy Ignorance* (Columbia University Press 2010) 8.

²¹⁵ *ibid* 135.

²¹⁶ *ibid* 8.

²¹⁷ Christopher Caldwell, *Reflections on the Revolution in Europe: Immigration, Islam, and the West* (Doubleday 2009) 184.

²¹⁸ Martin Riesbrodt, *The Promise of Salvation* (Steven Rendall trans. U. Chicago Press 2010) 176.

²¹⁹ *ibid*.

Christianized Europeans are “simply professing a tribal allegiance to Team Christianity,”²²⁰ rather than choosing religion in an individualized, American way.

5. Conclusion

My purpose in this article has been comparative and critical: I have attempted to explain different legal regimes in terms of fundamental institutional and cultural commitments. Comparative work, particularly interdisciplinary comparative work, is still a bit new in law and religion scholarship. As Grace Davie recently has written, law and sociology ask different questions and rely on different methods; “conversations” between lawyers and sociologists can therefore be “difficult.”²²¹ Nonetheless, such conversations are essential.²²² For law both reflects and influences underlying social conditions. In Mary Ann Glendon’s phrase, “law, in addition to all the other things it does, tells stories about the culture that helped to shape it and which in turn it helps to shape: stories about who we are, where we came from, and where we are going.”²²³ The law on state-sponsored religious displays reveals very different understandings about the place of religion in American and European society. This article is an effort to illuminate those understandings and contribute to an emerging path in law and religion scholarship.

²²⁰ Caldwell (n 217) 184.

²²¹ Davie (n 207), 1.

²²² *ibid* 13.

²²³ Mary Ann Glendon, *Abortion and Divorce in Western Law* (Harvard 1987) 8.