Religious Symbols and the Law

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“We live by symbols”\textsuperscript{1}—don’t we? Symbols communicate ideas, promote loyalty, denote community, import values, foster virtues, advance causes, express acceptance, and convey respect. Symbols cut to the quick as words often cannot.

The potency of symbols is, much of the time, for the best. But sometimes not. “[W]hat is one man’s comfort and inspiration is another’s jest and scorn.”\textsuperscript{2} That is as true for symbols as for innumerable other ideas, values, and causes. Though symbols can build, bind, and bond, they can just as easily destroy and divide. The stronger the symbol, the greater the tension between these poles.

Nowhere is this tension more evident than with religious symbols. To some these symbols further faith, teach truth, and command respect; to others they invite dispute, signal persecution, and spur hostility. Controversy seems greatest when a religious symbol is displayed publicly—especially when government is involved. Such controversy has generated innumerable legal disputes.

The nature of some of those disputes—and how they have been addressed—warrants attention. In this Article I explore the efforts of two judicial bodies—the federal court on which I sit and the Grand Chamber of the European Court of Human Rights—to negotiate some of the challenges presented by disputes over religious symbols. I begin by surveying some major judicial decisions of the United States Court of Appeals for the Ninth Circuit—my court—involving challenges to the public display of

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  \item \textsuperscript{1} United States Circuit Judge, United States Court of Appeals for the Ninth Circuit; A.B., St. John’s University, 1957; J.D., Harvard Law School, 1963; LL.M., University of Virginia, 1992. The views expressed herein are my own and do not necessarily reflect the view of my colleagues or of the United States Court of Appeals for the Ninth Circuit. I would like to acknowledge, with thanks, the assistance of Kristen Mann and Scott Stewart, my law clerks, in preparing this article.
  \item \textsuperscript{1} John Marshall, \textit{From the Bench, February 4, 1901}, in \textit{COLLECTED LEGAL PAPERS} 266, 270 (Oliver Wendell Holmes ed., 1920).
\end{itemize}
religious symbols. I then review the Grand Chamber's recent decision in the case of *Lautsi v. Italy*, which upheld Italy's requirement that crucifixes be placed in state classrooms. I close by teasing out some trends and lessons from these cases.

I

A

In recent years, the Ninth Circuit has considered several challenges to the public display of religious symbols. Those challenges have generally involved a claim that publicly displaying such a symbol violates the Establishment Clause of the United States Constitution, the clause, of course, which provides that "Congress shall make no law respecting an establishment of religion." The meaning of the Establishment Clause has been hotly disputed since 1791. The United States Supreme Court has said that the Clause at least means that "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs." The meaning of the Establishment Clause has been hotly disputed since 1791. The United States Supreme Court has said that the Clause at least means that "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs." The Supreme Court has said, moreover, that the

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4 U.S. CONST. amend. I. Several Ninth Circuit cases have involved analogous provisions in the State of California's constitution. See, e.g., Paulson v. City of San Diego, 294 F.3d 1124, 1129 (9th Cir. 2002) (en banc); Carpenter v. City & Cnty. of San Francisco, 93 F.3d 627, 629 (9th Cir. 1996); Ellis v. City of La Mesa, 990 F.2d 1518, 1524 (9th Cir. 1993); Hewitt v. Joyner, 940 F.2d 1561, 1565 (9th Cir. 1991). I focus here on Establishment Clause cases and address these cases only so far as they bear on Establishment Clause cases.


6 Id. at 593 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985)) (internal quotation marks omitted).
“touchstone” of the Establishment Clause is the requirement of "governmental neutrality between religion and religion, and between religion and nonreligion."\(^7\)

Our Supreme Court has developed a variety of tests to apply the Clause to concrete disputes. Two tests are particularly important in disputes over public displays of religious symbols. The first stems from the decision in *Lemon v. Kurtzman*.\(^8\) Under the *Lemon* test, to survive an Establishment Clause challenge a government action or policy at issue (1) must have a secular purpose, (2) cannot have the principal effect of advancing religion, and (3) cannot cause "excessive government entanglement with religion."\(^9\) The second and third prongs have at times been taken to ask, together, "whether the challenged governmental practice has the effect of endorsing religion."\(^10\) The *Lemon* test has been applied to a broad array of Establishment Clause challenges, some involving the public display of religious symbols. The Supreme Court has recently developed a second test specifically for Establishment Clause challenges to religious monuments and displays.\(^11\) I discuss this test a little later.\(^12\)

**B**

It is in the shadow of *Lemon* that my court has decided many of its cases involving religious displays. One example is one of my own cases, *Kreisner v. City of San Diego*,\(^13\) which held that the City of San Diego did not violate the Establishment Clause by permitting a private group to erect a religious display in a public park during the Christmas season.\(^14\)

The display in *Kreisner* consisted of eight scenes from the New Testament situated in a small, open-air amphitheater that itself sat in a public park.\(^15\) Each scene contained "life-size

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\(^8\) 403 U.S. 602 (1971).

\(^9\) Id. at 612–13.

\(^10\) Trunk v. City of San Diego, 629 F.3d 1099, 1106 (9th Cir. 2011) (internal quotation marks omitted), *cert. denied*, 132 S. Ct. 2535 (2012).


\(^12\) See infra Part I.C.

\(^13\) 1 F.3d 775 (9th Cir. 1993).

\(^14\) Id. at 789.

\(^15\) Id. at 777.
statuary depicting a biblical scene from the life of Christ, a painted backdrop, and a descriptive sign." 16 "Each scene [was] housed in a palm-covered booth ten feet high and fourteen feet wide." 17 Seven of the scenes included gospel passages. 18 The display was accompanied by a disclaimer sign stating that the display was "privately sponsored and not allied with the City." 19 The sponsor did not pay a fee to use the amphitheater, but did reimburse the city for the estimated cost of electricity that the display consumed. 20

Howard Kreisner, a park user, sued to prevent the city from allowing the sponsor to erect the display on public property. Kreisner contended that the city's decision to permit the display in the park violated the Establishment Clause. 21 After finding that the city "followed a first-come, first-served policy" in issuing permits for park use, the district court ruled that permitting the display on public property did not violate the Establishment Clause. 22

Applying the Lemon test, we affirmed. At Lemon's first prong, our court concluded that the city's decision to permit the display was supported by a legitimate and sincere secular purpose: promoting free expression. 23 The court next ruled that the display did not have the primary effect of advancing religion because the display was private speech in a traditional public forum that was removed from the seat of government. 24 Finally, the court concluded that the aid the city provided—which consisted only of allowing the sponsor to use the amphitheater and covering any electricity use above the flat-fee reimbursement paid by the sponsor—was "indirect and de minimis," and thus did not appreciably entangle the city with religion. 25

Even when my court has not expressly applied the Lemon test, its religious display cases have sought to follow Lemon's general teaching that government should be neutral between

16 Id.
17 Id.
18 Id.
19 Id. at 778.
20 Id.
21 Id.
22 Id. at 779.
23 Id. at 782.
24 Id.
25 Id. at 789.
religions. This guiding theme was evident in the court's decision in *American Jewish Congress v. City of Beverly Hills.* There, a group of plaintiffs challenged the City of Beverly Hills's decision to permit a private group—Chabad—to "erect a 27-foot menorah in a public park near city hall during the holiday season." The city had a general rule forbidding the erection of large unattended displays on public property, but had granted an exception to allow Chabad to erect its display. The district court held that the city could allow the display to stand if, among other conditions, a Christmas tree of similar size was placed nearby and a disclaimer sign was viewable from both directions of the nearby public street.

The Ninth Circuit reversed that decision. The court emphasized that the City had vested "standardless discretion in its officials to grant exceptions" to the general prohibition on large unattended displays on public property. Although the city could constitutionally ban all unattended private displays in its parks, the court explained, in this case it had granted an exception to one group, based on no clear standard. Such a policy "allows for arbitrary application" and "leaves open the possibility of improper discrimination by the City." "Permitting the erection of Chabad's menorah pursuant to this policy," the court held, "violates the Establishment Clause."

After *American Jewish Congress*, my court decided several cases involving Latin crosses, again emphasizing themes of neutrality and non-endorsement. In *Separation of Church & State Committee v. City of Eugene* ("SCSC"), for example, we held that the City of Eugene, Oregon, violated the Establishment Clause by owning and displaying a fifty-one-foot concrete Latin cross in a public park. In reaching that conclusion, the court emphasized that "[t]he maintenance of the cross in a public park by the City of Eugene may reasonably be perceived as providing

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26 90 F.3d 379 (9th Cir. 1996) (en banc).
27 Id. at 380.
28 Id. at 381.
29 Id.
30 Id. at 386.
31 Id. at 383.
32 Id. at 384.
33 Id. at 385.
34 Id. at 386.
35 93 F.3d 617, 618–20 (9th Cir. 1996) (per curiam).
official approval of one religious faith over others." Such governmental endorsement of Christianity," the court held, violates the Establishment Clause. I filed an opinion concurring in the result. But, I did this "because I believe[d] the court owe[d] the City of Eugene a better explanation of why" the cross at issue was being "condemned." I also wrote "to emphasize that the court applie[d] the wrong legal standard" even though "it reache[d] the judgment compelled by current Supreme Court jurisprudence." I began by explaining that the Establishment Clause "was intended to serve a relatively limited purpose"—mainly "to prevent Congress from establishing a national religion" and more generally "to prohibit Congress from legislating on the subject of religion, thereby leaving church-state relations to the individual states." Establishment Clause case law, however, "br[oke] with the original understanding of the Clause" in the middle of the twentieth century. The focus of that jurisprudence then became the maintenance of a "wall of separation" between religion and the government—whether at the national or state level. This wall-of-separation-driven jurisprudence, I explained, culminated in the Lemon v. Kurtzman decision. I then canvassed the criticism that Lemon had endured since the Court adopted it. Despite that criticism, I acknowledged that the Supreme Court had not abandoned Lemon and had regularly applied the test or had carefully applied a variation of it—such as the so-called "endorsement" test. I argued that this case required such a careful endorsement analysis. The majority, I explained, erred in reaching its holding "solely on the naked assertion that a 'Latin cross is a symbol of Christianity.' In cases involving a religious display

36 Id. at 619.  
37 Id. at 619–20.  
38 See id. at 620 (O'Scannlain, J., concurring).  
39 Id.  
40 Id.  
41 Id. at 620–21.  
42 Id. at 622.  
43 Id.  
44 Id.  
45 Id.  
46 Id. at 622–23.  
47 See id. at 624.  
48 Id. 
on government property, I explained, applicable Supreme Court law required us to pay close attention to “the context in which the religious symbol[] is displayed”—for example, whether a religious symbol “was displayed along with other secular . . . decorations” or instead stands alone.49

Finally, I explained that this test “compels the conclusion that the City’s display of the cross is unconstitutional.”50 Although “the cross has a secular purpose”—it had been designated a war memorial in 1970—“observers might reasonably perceive the City’s display of such a religious symbol on public property as government endorsement of the Christian faith.”51 Moreover, “the City’s use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans.”52 This conclusion was unfortunate—and was well at odds with the original meaning of the Establishment Clause—but under Supreme Court case law “the cross violate[d] the Establishment Clause merely because someone could reasonably perceive the cross as the City’s endorsement of the Christian faith.”53 Although the Supreme Court’s Establishment Clause case law had “not always [been] clear, consistent or coherent,” I believed that it required the result reached by the panel majority.54

A second notable Latin cross case is Buono v. Norton.55 The cross in Buono was displayed on federally-owned land in the Mojave National Preserve.56 Finding that the case was “squarely controlled” by SCSC, the court ruled that the cross violated the Establishment Clause and affirmed the district court’s injunction barring the government from permitting the display of the cross.57 In reaching its conclusion, the Ninth Circuit emphasized the context of the display. The court observed that the cross sat on publicly-owned land, religious services had been held at the cross since at least 1935, the cross site had not been opened to other permanent displays, no other displays were in the area,

49 Id. at 624–25.
50 Id. at 626.
51 Id.
52 Id.
53 Id.
54 Id. at 627.
55 371 F.3d 543 (9th Cir. 2004).
56 Id. at 544.
57 Id. at 548, 550.
and a third-party’s request to erect a Buddhist display near the cross had been denied. Although the cross was only “five to eight feet tall” and in a more remote location than the one in SCSC, the court ruled that “[t]hese distinctions are of no moment.” To begin with, the cross at issue in Buono was “bolted to a rock outcropping [that rose] fifteen to twenty feet above grade and [could be seen from] vehicles on the adjacent road from a hundred yards away.” And although the cross was in a remote location, that was immaterial, the court ruled, because the cross sat on public park land. Moreover, the court observed, a reasonable observer would know that the government had “denied similar access for expression by an adherent of the . . . Buddhist faith.” The critical point, in the end, was that the cross improperly “project[ed] a message of government endorsement to a reasonable observer.”

C

After our decisions in Kreisner, American Jewish Congress, SCSC, and Buono, the Supreme Court developed a different Establishment Clause test for at least some cases involving

58 Id. at 548–49.
59 Id. at 549.
60 Id.
61 Id.
62 Id. at 550.
63 Id. at 549. Controversy over the cross continued. While the Buono v. Norton appeal was pending, Congress passed a statute directing the Secretary of the Interior to transfer the federal government’s interest in the land on which the cross was located. When the government began moving forward with the transfer, Buono moved the district court to enforce its injunction—which by then had been affirmed by the Ninth Circuit. The district court ruled that the transfer scheme did not comply with its injunction and was an improper attempt to keep the cross in place. The district court therefore enjoined the government from implementing the land-transfer statute. The Ninth Circuit affirmed. Buono v. Kempthorne, 502 F.3d 1069, 1071 (9th Cir. 2007), rev’d sub nom. Salazar v. Buono, 130 S. Ct. 1802 (2010). In a splintered decision, a plurality of the Supreme Court ruled that the district court did not properly consider whether the land-transfer statute—among other circumstances—obviated the need for an injunction against the federal government. The Court remanded to allow the district court to conduct a proper inquiry into whether injunctive relief was still needed. See Salazar v. Buono, 130 S. Ct. 1803, 1821 (2010). In 2012, the parties settled the dispute. The district court then vacated its injunction and dismissed the case. See Order Approving Settlement Agreement and Vacating Injunction at 2, Buono v. Salazar, No. 5:01-CV-00216-RT (C.D. Cal. Apr. 23, 2012).
religion displays. In Van Orden v. Perry, the Supreme Court ruled on an Establishment Clause challenge to a Ten Commandments monument on the grounds of the Texas State Capitol. Believing that the Lemon test was "not useful in dealing with the sort of passive monument" before it, a four-Justice plurality focused on "the nature of the monument and . . . our Nation's history" to conclude that the display did not violate the Establishment Clause. The plurality emphasized the role of God and the Ten Commandments in the nation's founding and history, the monument's passive use, and its historical meaning.

Justice Breyer provided the fifth vote in Van Orden. He thought it to be a "difficult" case that must be decided by "the exercise of legal judgment" rather than by a "test-related substitute" for such judgment. Such judgment should, he explained, be exercised based upon a fact-intensive assessment of whether the display of the monument keeps faith with the purposes of the Establishment Clause. Justice Breyer contended that this type of case must be decided by flexibly considering many factors—not only the Lemon prongs—including the monument's purpose, how viewers perceive the monument, the extent to which the monument's physical setting suggests religious meaning, and the monument's history. He concluded that the display of the commandments should not be ruled unconstitutional because such a ruling could "lead the law to exhibit a hostility toward religion." That result, he said, could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."

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64 545 U.S. 677 (2005).
65 Id. at 681.
66 Id. at 686 (plurality opinion).
67 Id. at 686–87, 689–90.
68 Id. at 698 (Breyer, J., concurring).
69 Id. at 700.
70 Id.
71 Id. at 701–03.
72 Id. at 704.
73 Id.
My court's most recent foray into the constitutionality of religious symbols followed Van Orden. Trunk v. City of San Diego involved a challenge to a forty-three foot tall Latin cross and veterans' memorial atop Mount Soledad—an 822-foot hill—in La Jolla, California.74

The case had an extensive history. A Latin cross has been atop Mount Soledad since 1913.75 After an earlier cross blew down in 1952, the current cross was erected in 1954 and was dedicated as a memorial to American service members and as a tribute to God's "promise to man of everlasting life."76 The cross is "twenty-nine feet high and twelve feet across[,] stands atop a fourteen foot high base," and is visible for miles and from the nearby interstate freeway.77 The cross had been raised by the Mount Soledad Memorial Association, a civic association that also contributed to its maintenance. Some public funds had also been expended on the cross.78

Although the cross long stood on Mount Soledad by itself, in the late 1990s the war memorial became more extensive, with the cross as the centerpiece.79 The memorial included some 2,100 black stone plaques honoring veterans, platoons, and groups of soldiers; twenty-three bollards—posts—honoring community and veterans' organizations; and an American flag that flies from a large flagpole.80 "Until the events leading up to this suit, the Memorial stood on land belonging to the City."81

For two decades, beginning in the early 1990s, the memorial was the subject of litigation.82 Relevant here, in 2006, Congress passed a law to seize the Mount Soledad land "in order to preserve a historically significant war memorial . . . as a national

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74 629 F.3d 1099, 1101 (9th Cir. 2011), cert. denied, 132 S. Ct. 2535 (2012).
75 Id. at 1102.
76 Id. at 1101.
77 Id. at 1103.
78 Id.
79 Id.
80 Id.
81 Id.
82 Id.
memorial honoring veterans of the United States Armed Forces. Congress’s action spurred two lawsuits challenging the government’s acquisition of the memorial. Those suits culminated in the most recent Ninth Circuit decision in the dispute. In 2008, the district court held that Congress had acted with a secular purpose in acquiring the memorial and that the memorial did not advance religion. It therefore ruled that the City had not violated the Establishment Clause by permitting the display of the Mount Soledad cross.

The Ninth Circuit reversed that decision. The court panel agreed with the district court that Congress acted with a predominantly secular purpose when it acquired the memorial. But the court concluded that the memorial’s primary effect is religious. In reaching that conclusion, the court analyzed the “meaning or meanings of the Latin cross at the Memorial’s center, the Memorial’s history, its secularizing elements, its physical setting, and the way the Memorial is used.”

The court first explained that the Latin cross is an exclusively, or at least iconic, Christian symbol. The court then decided that a reasonable observer would view a memorial cross as sectarian. In reaching that determination, the court emphasized record evidence showing that the Latin cross is not commonly used as a war memorial and that the cross “remains a Christian symbol, not a military symbol.”

Moving to the memorial’s history, its secularizing elements, and how it has been used, the majority emphasized that the memorial had long consisted only of the cross, that the memorial had long been recognized and promoted for its religious nature rather than as a memorial, and that the memorial’s use for

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83 Id. at 1104 (citations omitted).
84 Id. at 1105.
85 Id.
86 Id.
87 Id. at 1125.
88 Id. at 1108.
89 Id. at 1110.
90 Id.
91 Id. at 1111 (internal quotation marks omitted).
92 Id. at 1112.
93 See id. at 1112–16.
secular and veteran-recognizing events has been spotty.\textsuperscript{94} The court added that the memorial’s use for religious purposes had been contentious, and the community in which the cross is located has a history of anti-Semitism “that reinforces the Memorial’s sectarian effect.”\textsuperscript{95} In short, the court explained, “a reasonable observer viewing the Memorial would be confronted with an initial dedication for religious purposes, its long history of religious use, widespread public recognition of the Cross as a Christian symbol, and the history of religious discrimination in La Jolla.”\textsuperscript{96} “These factors,” the court concluded, “cast a long shadow of sectarianism over the Memorial that has not been overcome by the fact that it is also dedicated to fallen soldiers, or by its comparatively short history of secular events.”\textsuperscript{97}

As to the memorial’s physical setting, the court noted that the cross is the memorial’s primary feature, “with the secular elements subordinated to it.”\textsuperscript{98}

Overall, the court concluded that “[b]y claiming to honor all service members with a symbol that is intrinsically connected to a particular religion,” the government was sending a message of exclusion to non-adherents.\textsuperscript{99} The court therefore held that the memorial, “presently configured and as a whole, primarily conveys a message of government endorsement of religion that violates the Establishment Clause.”\textsuperscript{100} The Ninth Circuit remanded the case to the district court to fashion an appropriate remedy.\textsuperscript{101}

\textsuperscript{94} Id. at 1118–19.
\textsuperscript{95} Id. at 1121–22.
\textsuperscript{96} Id. at 1122.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 1123.
\textsuperscript{99} Id. at 1125.
\textsuperscript{100} Id.
\textsuperscript{101} Id. After the Conference, the Supreme Court denied petitions for certiorari in the case. See Mount Soledad Mem’l Ass’n v. Trunk, 132 S. Ct. 2535, 2535 (2012). In a statement regarding that denial, Justice Alito observed that the Supreme Court’s Establishment Clause jurisprudence “is undoubtedly in need of clarity.” Id. But because the case had not reached a final judgment—and because it remained unclear what action the district court would order the federal government to take—he believed that Supreme Court review would be premature. Id. at 2536.
As we move across the Atlantic, we see a somewhat different view on the challenges presented by the public display of religious symbols.

A

In 2002, Soile Lautsi brought suit in Italian administrative court on behalf of herself and her children against the Italian Government, which required that crucifixes be displayed in state school classrooms. Lautsi, who is not Christian and who believes in secularism, alleged that this requirement violates the Italian constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"). Specifically, she alleged that the presence of crucifixes in state school classrooms interfered with her ability to raise her children in accordance with her religious and philosophical beliefs.

Italy’s administrative court upheld the requirement to display crucifixes in state schools. It reasoned that, although the crucifix is a Christian religious symbol, it has significant historical and cultural meaning. It is also, the administrative court concluded, a “symbol of a value system underpinning the Italian Constitution” and was compatible with the principle of secularism.

The Consiglio di Stato—Supreme Administrative Court—affirmed the administrative court’s judgment. In doing so, the court confirmed that displaying a crucifix is consistent with

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103 Id. ¶ 12.
104 Id. ¶ 41.
105 Id. ¶ 15.
106 Id.
107 Id.
108 Id. ¶ 16.
secularism, in part because the symbol is "capable of expressing, symbolically of course, but appropriately, the religious origin of those values . . . which characterise Italian civilisation."¹⁰⁹

Lautsi then brought her case before the European Court of Human Rights ("ECHR"), alleging violations of three provisions of the Convention: Article 2 of Protocol No. 1, Article 9, and Article 14.¹¹⁰ These provisions protect the right to education, the freedom of religion, and the right to be free from discrimination on the basis of religion. Article 2 of Protocol No. 1 states:

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 religions and philosophical convictions.¹¹¹

Article 9 provides:

(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.¹¹²

(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.¹¹³

And Article 14 says that "[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as . . . religion."¹¹⁴

¹⁰⁹ Id.
¹¹⁰ Id. ¶ 29, 79.
¹¹¹ Id. ¶ 29 (quoting Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, opened for signature Mar. 20, 1952 (Council of Europe) (entered into force May 18, 1952)).
¹¹² Id. (quoting Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, opened for signature Nov. 5, 1950, 213 U.N.T.S. 222 (Council of Europe) (entered into force Sept. 3, 1953)).
¹¹³ Id. (quoting Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, opened for signature Nov. 5, 1950, 213 U.N.T.S. 222 (Council of Europe) (entered into force Sept. 3, 1953)).
¹¹⁴ Id. ¶ 79.
A seven-judge Chamber held that Article 2 of Protocol No. 1 and Article 9 of the Convention had been violated.\textsuperscript{115} The Chamber emphasized that the State was obliged not to impose its beliefs on its citizens, particularly in sensitive places such as schools.\textsuperscript{116} The Chamber concluded that the crucifix was a religious symbol that might disturb non-Christians and that placing it in classrooms would inhibit parents’ ability to educate their children in accordance with their own beliefs. Thus, a crucifix requirement was “incompatible with the State’s duty to respect neutrality.”\textsuperscript{117}

The Italian government requested a referral to a Grand Chamber, which accepted the case.\textsuperscript{118} In front of the Grand Chamber, the government argued that the Chamber had confused neutrality with secularism, effectively requiring the State to favor an “antireligious” approach.\textsuperscript{119} The government further emphasized that the crucifix was a passive symbol that did not affect the content of students’ lessons and did not impede parents’ ability to raise their children as desired.\textsuperscript{120} The government urged the court to leave to the State the balancing of interests between national traditions and popular feelings.\textsuperscript{121}

Lautsi countered that the crucifix requirement was an inappropriate expression by the State of a preference for a particular religion in a place where views are developed and formed.\textsuperscript{122} She argued that because of the sensitive nature of schools, the State must provide a neutral space where all views are recognized and can be freely expressed.\textsuperscript{123} This is particularly important, she argued, where there was a need to protect minority viewpoints.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{115} Id. ¶ 30.
\item \textsuperscript{116} Id. ¶¶ 30–31.
\item \textsuperscript{118} Id. ¶ 5.
\item \textsuperscript{119} Id. ¶ 35.
\item \textsuperscript{120} Id. ¶ 36.
\item \textsuperscript{121} Id. ¶ 37.
\item \textsuperscript{122} Id. ¶ 41.
\item \textsuperscript{123} Id. ¶ 43.
\item \textsuperscript{124} Id. ¶ 45.
\end{itemize}
The Grand Chamber first set forth the principles governing its decision. Under Article 2 of Protocol No. 1 a State must “respect . . . the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” To “respect” in this context means more than to “‘acknowledge’ or ‘take into account’ . . . it implies some positive obligation on the part of the State.” The court stressed, however, that states have wide latitude in determining how to comply with the Convention. The Convention does not, for example, give parents the prerogative to require particular teaching; curricular decisions are within the State’s purview. And the Convention does not prevent the State from providing religious and philosophical lessons. What the Convention does require is that information be conveyed in an objective, pluralistic manner in an “atmosphere free of any proselytism.”

With these principles in mind, the Grand Chamber turned to the question whether the Convention permits the display of crucifixes in state classrooms. The Grand Chamber agreed with the original Chamber’s decision that the crucifix is predominantly a religious symbol. But the Grand Chamber did not find this fact to command the conclusion drawn by the Chamber, because there was no evidence that the presence of the crucifix had an influence on students. While acknowledging that Lautsi or her children might take a crucifix as showing disrespect for their beliefs, the Grand Chamber concluded that subjective perception of disrespect was not enough to establish a violation of Article 2. Similarly, the Grand Chamber recognized the wide margin of appreciation granted to states in matters of historical tradition and cultural development, but

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125 Id. ¶ 59, 61.
126 Id. ¶ 61.
127 Id.
128 Id. ¶ 62.
129 Id.
130 Id. ¶ 66.
131 Id.
132 Id.
133 This doctrine recognizes that, where national tradition or sensitive cultural issues are at stake, states are in the best position to address these issues in light of their legal and cultural circumstances. They are thus granted a “margin of appreciation” to do so within which the court will defer to their determinations.
concluded that states could not evade the Convention’s requirements by reference to such interests. The question before the court was whether Italy’s crucifix requirement exceeded the discretion afforded to states and entered the realm of indoctrination.

The court concluded, by a fifteen to two vote, that the State had not exceeded this boundary. The court was persuaded by the lack of European consensus on whether it was proper to display religious symbols on State property. The court further found that because the crucifix is a passive symbol, its presence is unlikely to violate the principle of neutrality, particularly where it is not associated with “compulsory teaching about Christianity” and where the State opens the school environment to other religions. Indeed, Lautsi did not even allege that the crucifix encouraged or was associated with proselytizing.

Taken together, the circumstances demonstrated that Italian authorities had acted within the margin of appreciation afforded to states and had not violated Lautsi’s Article 2 of Protocol No. 1 right to ensure teaching in conformity with her own convictions.

Lautsi generated several separate opinions. Judge Bonello’s strongly worded concurring opinion contended that the ECHR generally lacks the competence to address sensitive domestic disagreements. In his view, “[a] court of human rights cannot allow itself to suffer from historical Alzheimer’s. It has no right to disregard the cultural continuum of a nation’s flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people.” He characterized Lautsi’s claims as an invitation to the court to “bankrupt centuries of European tradition” and to “veto overnight what has survived

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134 Lautsi, No. 30814/06, ¶ 68.
135 Id. ¶ 69–70.
136 Id. ¶ 76–77.
137 See id. ¶ 70.
138 Id. ¶ 72, 74 (noting that many State schools celebrated the end of Ramadan, that students were allowed to wear Islamic headscarves and other non-Christian symbols, and that alternative arrangements could be made for non-majority religious education).
139 Id. ¶ 74.
140 Id. ¶ 76–77.
141 Id. at 38 (Bonello, J., concurring).
142 Id.
countless generations.”¹⁴³ In Judge Bonello’s view, “secularism, pluralism, the separation of Church and State, religious neutrality, [and] religious tolerance” are not protected by the Convention.¹⁴⁴ All that is protected is the freedom of religion and conscience, he argued, and the court lacks the authority to “bully” States into secularism or religious neutrality.¹⁴⁵ Judge Bonello further reasoned that requiring the removal of crucifixes would be an “act of intolerance” that would impose the views of the parents of one student over the philosophy of the other twenty-nine pupils in the class.¹⁴⁶

Judge Power’s concurrence reiterated that the Convention does not compel secularism.¹⁴⁷ Judge Power emphasized that “[t]he test of a violation . . . is not ‘offence’ but ‘coercion’” and that a passive religious symbol, though it may carry meaning, “does not compel or coerce an individual to do or to refrain from doing anything.”¹⁴⁸

Only two of the seventeen judges dissented.¹⁴⁹ Written by Judge Malinverni and joined by Judge Kalaydjieva, the dissent argued that the majority exaggerated the lack of consensus on the propriety of displaying religious symbols.¹⁵⁰ In the dissent’s view, because only a few states provide for the display of religious symbols in state schools and most states leave the matter unregulated, the court could not draw conclusions about consensus among the member states.¹⁵¹ The dissent would also have taken a narrower view of the margin of appreciation afforded to states when the Convention imposes an obligation on them.¹⁵² The dissent would have required not only the school curriculum but also the school environment to observe the “strictest denominational neutrality.”¹⁵³ Because the State has

¹⁴³ Id.
¹⁴⁴ Id. at 39–40.
¹⁴⁵ Id. at 40
¹⁴⁶ Id. at 41 (emphasis added).
¹⁴⁷ Id. at 44–45 (Power, J., concurring).
¹⁴⁸ Id. at 45.
¹⁴⁹ See id. at 31.
¹⁵⁰ See id. at 47 (Malinverni, J., dissenting).
¹⁵¹ Id.
¹⁵² Id.
¹⁵³ Id. at 51.
failed to observe such neutrality, the dissent would have ruled that the Italian government had violated Article 2 of Protocol No. 1 and Article 9.154

Reaction to the Lautsi case has been mixed. The initial 2009 Chamber decision was viewed as consistent with a trend in the court's jurisprudence toward secularization.155 Recognizing the difficulty of balancing individuals' religious freedom with states' need to regulate religious expression to preserve stability, some believed that the ECHR was endorsing a ban on religious symbols in public life.156 It would now appear, however, that the ECHR is more concerned with ensuring stability than in promoting an individual's right to religious freedom.157 Furthermore, the Chamber's apparent view that religious liberty is protected only by eradicating religious symbols and expression from public life was greeted with skepticism and outrage in countries like Italy that believe public life is enriched by religious culture.158

154 Id.
156 See, e.g., Witte, supra note 155, at 25–27.
158 See, e.g., Andrea Pin, Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State, 25 EMORY INT'L L. REV. 95, 97–100 (2011).
III

As is likely obvious already, it is difficult to see any clear trends from the developing case law. Cases involving religious symbols are always sensitive and often important and, in the ECHR and the United States, judges appear to struggle in every case to strike the right balance between weighty and longstanding—but often competing—interests. Though synthesizing all of the cases into a coherent whole may be impossible, I draw what lessons and thoughts I can as we continue to try to determine the appropriate role of religion in public life.

To begin with, I must observe that if modern Establishment Clause case law followed the original understanding, Supreme Court and Ninth Circuit decisions would be far more open to the public display of religious symbols. As I have explained elsewhere, “the Establishment Clause was intended to serve a relatively limited purpose.”\footnote{159} The Clause “was not intended to erect a ‘wall of separation’ between church and state.”\footnote{160} Such an approach “was unknown and, indeed, unthinkable at the time of the framing.”\footnote{161} The Establishment Clause was adopted at a time when “accommodation of religion was not only permitted but encouraged,” when state—as opposed to federal—religious establishments persisted, and when the national government itself regularly encouraged and promoted religion.\footnote{162} Had this approach not given way in the last sixty-five years or so, our jurisprudence would be far more accommodating to religion—and far more like that endorsed in Lautsi.

Yet, interestingly, there are signs that Europe, too, is moving away from the original understanding of the protections for religion that are embedded in the Convention. For example, many argued that the Chamber's judgment, by requiring state neutrality, ran contrary to the text of the Convention, which, unlike the United States Constitution, does not have an Establishment Clause or otherwise refer to state neutrality.\footnote{163} The Convention was not meant to impose uniform requirements

\footnote{159} Separation of Church & State Comm. v. City of Eugene, 93 F.3d 617, 620 (9th Cir. 1996) (O'Scannlain, J., concurring).

\footnote{160} Id. at 621.

\footnote{161} Id. at 620.

\footnote{162} Id. at 621–22.

\footnote{163} See, e.g., Pin, supra note 157, at 637–38.
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for protecting religious freedoms, some argue, and had the Chamber's judgment been allowed to stand, it would have had consequences for not only Italy but for the constitutional traditions of many of the countries that subscribed to the Convention.164

At the same time, I counsel caution on drawing too close a connection between the United States' cases and the decision in Lautsi. Europe and America have different religious traditions, and it would be hard, this late in the day, to describe the two as so alike. A notable distinction is that established religions persist in Europe. When a European state is charged with promoting an established religion, one would expect rulings such as that in Lautsi that accommodate official religious expression. Note, in this connection, the different texts that we are interpreting. The United States Constitution prohibits Congress from making any law "respecting an establishment of religion."165 But the ECHR contains no such prohibition and, indeed, the Catholic heritage appears to enjoy a privileged position in Italy.166 We therefore begin from quite different places.

As a result, we have very different views on government neutrality regarding religion. As mentioned above, the United States Supreme Court has emphasized that the "touchstone" of the Establishment Clause is the requirement of "governmental neutrality between religion and religion, and between religion and nonreligion."167 By contrast, the Grand Chamber proclaimed in Lautsi that a state's obligation to "respect the right of parents to ensure the education and teaching of their children in conformity with their own religious and philosophical convictions" required more than mere acknowledgement—it required a "positive obligation on the part of the State."168

164 See id. at 640.
165 U.S. CONST. amend. I.
166 See Alessandro Ferrari & Silvio Ferrari, Religion and the Secular State: The Italian Case, INT'L CENTER FOR LAW AND RELIGIOUS STUD. (2010), http://www.iclrs.org/content/blurb/files/Italy.pdf.
At the very least, we can say that the struggle to define the role of religion and religious symbols in public life is far from complete. The cases I have covered show that, although we may live in an increasingly secularized society, we remain aware that religion is central to our identities and development. We also see such historically important issues treated—at least some of the time—with the sensitivity they deserve.

Cf., e.g., Diarmuid F. O'Scannlain, Catholic Lawyers in an Age of Secularism, 43 CATH. LAW. 1, 1 (2004) (discussing how to be a "good Catholic and a good lawyer at the same time").