Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols

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Essay

CROSS, CRUCIFIX, CULTURE:
AN APPROPRIATE APPROACH TO THE CONSTITUTIONAL MEANING OF
CONFESSIONAL SYMBOLS

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Abstract

In the United States and Europe the constitutionality of
government displays of confessional symbols depends on whether
the symbols also have nonconfessional secular meaning (in the
U.S.) or whether the confessional meaning is somehow absent (in
Europe). Yet both the United States Supreme Court (USSCt) and the
European Court of Human Rights (ECtHR) lack a workable
approach to determining whether secular meaning is present or confessional meaning absent.

The problem is that the government can nearly always articulate a possible secular meaning for the confessional symbols that it uses, or argue that the confessional meaning is passive and ineffective. What matters, however, is not the possibility that secular meaning is present or confessional meaning absent, but whether this presence or absence is historically and culturally authentic. Courts largely ignore this, routinely appealing to history and culture to justify government use of confessional symbols without undertaking a serious investigation of either history or culture.

Drawing on the work of C.S. Peirce, we propose that courts ask three successive questions in religious symbol cases:

1. Is the ordinary meaning of the symbol confessional or otherwise religious?
2. Does the immediate context in which the symbol is displayed suggest a possible historical, cultural, or other secular meaning?
3. Is this alternate secular meaning authentically present and genuinely recognized in the history and culture of the place where the symbol is displayed?

We illustrate this approach with Salazar v. Buono, in which the USSCt upheld government display of a Christian cross, and Lautsi & Others v. Italy, in which the ECtHR deferred to Italian court decisions upholding government display of a Catholic crucifix. While the USSCt in Buono and the Italian courts in Lautsi imagine conceivable nonconfessional meanings for the confessional symbol at issue, neither meaning can be found in American or Italian history or culture. In Lautsi, therefore, the ECtHR ends up deferring to an Italian “tradition” that doesn’t exist.

Judicial denial of obvious confessional meaning and invention of substitute secular meanings for confessional symbols betrays a cultural schizophrenia: Majoritarian religions rail against the secularization of culture and its subversion of belief, yet they insist that their confessional symbols remain at home in this culture. But confessional symbols no longer fit in mainstream culture as confessional—hence the characterization of their meanings as secular or passive, even and especially by the majoritarian religions that use them. Ironically, judicial secularization or minimization of the meaning of these symbols to
validate their use by government is likely to accelerate and entrench the very secularization that such religions deplore.
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INTRODUCTION: DIMENSIONS OF RELIGIOUS SYMBOLIC MEANING

Under the constitutional norms of both the United States and Europe the critical inquiry when government displays a religious symbol is what the symbol means. Symbolic meaning that coerces or endorses religion violates the U.S. Establishment Clause,1 while meaning that threatens religious pluralism or minority religious liberty violates the European Convention on Human Rights (the “Convention”).2


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

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

Id.; id., prot. no. 1, art. 2 (Coun. Eur. - Paris March 20, 1952).

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.

Id.

The European Convention, of course, contains no anti-establishment clause, but numerous scholars have observed that ECtHR decisions and other sources of law in the EU have been steadily converging on such a norm. See, e.g., Claudia E. Haupt, Transnational Nonestablishment, 80 Geo. Wash. L. Rev. 991 (2012) [hereinafter Haupt, Transnational Nonestablishment] (arguing that
In the United States and Europe, the legality of government display of a religious symbol depends on whether the symbol possesses nonconfessional significance or, at least, lacks meaningful confessional significance. Yet both the United States Supreme Court (USSCt) and the European Court of Human Rights (ECtHR) lack a workable approach to the crucial determination whether the required secular meaning is actually present or the prohibited confessional meaning is really absent.

Two recent religious symbol cases illustrate the doctrinal the problem. In *Salazar v. Buono*, a plurality of the USSCt rested its decision on the purportedly secular meaning of a large white Latin cross at a World War I veterans memorial located in the midst of a vast tract of federal park land. The plurality denied that the cross symbolized only Christianity and the Christian resurrection, insisting that it additionally memorialized the sacrifices of U.S. military veterans.

In *Lautsi and Others v. Italy*, Italian courts found that
crucifixes posted in public school classrooms signified the Christian roots of liberal democracy rather than Roman Catholicism; a Grand Chamber of the ECtHR then held under the margin-of-appreciation doctrine that this practice did not violate the Convention or threaten related principles of religious pluralism or minority religious liberty because the crucifix is a mere passive symbol that exerts no effect on non-Catholic students in the absence of other evidence of religious coercion.6


6 Lautsi & Others, at 29 ¶¶ 70, 72 (internal cross-reference deleted).
For a pointed critique of the position that religious symbols are “passive” signs that exert no material effect on unbelievers or adherents to other religions, see Claudia Haupt, Active Symbols, 55 B.C. L. REV. (forthcoming 2014) [hereinafter Haupt, Active Symbols] (“Characterizing religious symbols as passive is descriptively inaccurate, doctrinally incoherent, and analytically unsound”) [Oct. 5, 2013 Draft, at 3].

The “margin of appreciation” doctrine permits the ECtHR “to assume, on certain issues, an attitude of deference with respect to decisions of [contracting] States that apparently impact rights guaranteed” by the Convention. Pasquale Annicchino, Tra Marginie di Apprezzamento e Neutralità: Il Caso «Lautsi» e I Nuovi Equilibri della Tutela Europea della Libertà Religiosa, in DIRITTO E RELIGIONE IN EUROPA 179, 181 (Bologna, Italy: Il Mulino, Roberto Mazzola ed. 2012) (authors’ translation). The ECtHR generally uses the doctrine to avoid making a definitive rule with respect to questions that are particularly complicated or controversial or as to which the contracting states have not reached consensus. Id. at 182. For a general introduction, see G. LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Oxford: Oxford University Press, 2007).

In applying the margin-of-appreciation doctrine, the ECtHR accepted Italy’s self-serving representation that its public schools are models of religious pluralism, neutrality, and minority liberty. Lautsi & Others at 30 ¶ 74 (internal citation omitted). Commentators from Italy and elsewhere have criticized this credulous account of the treatment of religious minorities (and especially Muslims) in Italian public schools. See, e.g. Allison Mawhinney, Crucifixes, Classrooms and Children: A Semiotic Cocktail, in THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 93, 109-10 (Leiden, The Netherlands: Martinus Nijhoff, 2012) [hereinafter THE LAUTSI PAPERS]. But see S. Ferrari, supra note 2, at 21-22 (“Today, not only Christmas but also the end of Ramadan and other religious
The plurality opinion in Buono and the opinions of the Italian courts in Lautsi depend on whether the confessional symbol in each case actually had the nonconfessional meaning and effect asserted for it, while the Grand Chamber’s opinion depends on the absence of any religious symbolic meaning at all. No court, however, made a persuasive case for the presence or absence of the meaning and effect on which everything seemed to depend.\(^7\) The Buono plurality’s contention that the veterans memorial cross signified also secular honor of military sacrifice is the classic \textit{ipse dixit}.\(^8\) The Italian courts did little better, baldly asserting a secular cultural-historical meaning that supposedly crowded out the ordinary Roman Catholic meaning of the classroom crucifix. The ECtHR, meanwhile, simply proclaimed that a classroom crucifix projects no confessional influence at all despite its status as the quintessential symbol of Italy’s majority Catholic faith.\(^9\) Lacking in the USSCt and the Italian court cases was any serious investigation of whether the supposedly “historical-cultural” meanings and effects attributed to cross and crucifix are real or imagined—that is, present and recognizable in American and Italian history and culture, or simply made-up to justify government use of the symbols. In both cases the courts appeal to history and culture, yet their historical and cultural findings are mere assertions or

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\(^7\) See Thomas C. Berg, \textit{Can State-Sponsored Religious Symbols Promote Religious Liberty?}, 52 J. CATH. LEGAL STUDS. 23, 43 (2013) (“[T]he Italian courts offered a selective and contestable interpretation of Christianity that, they said, served as the ground for religious freedom and laicità); S. Ferrari, supra note 2, at 16 (“[T]he Italian courts’ insistence on the exclusively cultural significance of the classroom crucifix is the most unsatisfactory element of their reasoning on the question.”).

\(^8\) It is sometimes argued that the purely religious or confessional meaning or effect of a symbol need not invalidate its use by government. See, e.g., McCreary Cty v. ACLU, 545 U.S. 844, 893 (2005). (Scalia, J., dissenting) (arguing that Establishment Clause permits government endorsement of monotheism and disregard of polytheists and unbelievers); \textit{cf.} ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (Cambridge, Mass.: Harvard University Press, 2013); (same with respect to “religion in general” when articulated at a “high level of abstraction”). Because we take as a premise that the U.S. and European law requires that religious symbols be understood to have secular or (at least) nonconfessional meaning and effect when displayed by government, \textit{see supra} notes 1-8 & accompanying text, we do not address these arguments.

\(^9\) \textit{Lautsi & Others}, at 29 ¶ 72.
speculations, as if “history” and “culture” are properly invented in chambers.

Academic literature reflects the same problem. Commentary on government use of religious symbols is legion, much of it prompted by Buono and Lautsi themselves. Like the USSCt and


Italian courts, however, commentators generally assume the presence of permissible historical-cultural meanings or the absence of prohibited confessional ones without seriously investigating either history or culture. The doctrinal results are predictable:


See, e.g., CARDIA, supra note 11, at 112-22 (characterizing classroom display of crucifix as secular signifier of roots of Italian culture based on quotations from selected Italian liberals); Bartrum, supra note 11, at 1661-64 (speculating that Buono plurality might have properly concluded that cross had lost confessional meaning through display at military monuments and cemeteries); Lorie G. Beaman, Battles over Symbols: The “Religion” of the Minority versus the “Culture” of the Majority, 28 J.L. & RELIG. 67 (2013) (assuming nonexistence of “culture” used to justify government display of majoritarian symbols); Bradley, supra note 10, at 2262 (suggesting without demonstrating that cross possesses “some meaning for everyone as an example or illustration of certain universal values,” like “love,” “sacrifice,” and perhaps “redemption”); Allison Mawhiney, Crucifixes, Classrooms, and Children: A Semiotic Cocktail, in THE LAUTSI PAPERS, supra note 6, at 93 (asserting that Italy’s invocation of “historical-cultural” meaning for crucifix cynically deployed Catholicism to define Italian identity); J.H.H. Weiler, Freedom of Religion and Freedom from Religion: The European Model, 65 MAINE L. REV. 759 (2013) (asserting that crosses and crucifixes are symbols of national identity); Witte & Arnold, supra note 11, at 30, 52-53 (reading cases as permitting government display of confessional symbols because they have historical and cultural meaning, despite failure of cases to investigate history or culture); see also Lautsi & Others, at 38-43 (Bonello, J., concurring) (asserting that crucifix is customary secular symbol of Italian “cultural personality”).

Among the few exceptions are C. Lupu & Robert W. Tuttle, The Cross at College: Accommodation of Religion at Public Universities, 16 WM. & MARY BILL RTS. J. 939 (2008) (detailing history of Wren cross displayed within chapel at state-owned College of William & Mary as basis for conclusion that display violated Establishment Clause); B. Jessie Hill, Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time, DUKE L.J. (2009) [hereinafter Hill, Ceremonial Deism] (arguing that before a facially religious text may be constitutionally used by government, it should be proved to have lost its confessional force by a specific demonstration of history).

Finally, a few commentators have suggested the relevance of historical or cultural analysis without specifying its analytical significance. See, e.g. Linkner, supra note 11, at 75-78 (suggesting history as a supplement to the endorsement test); Mark L. Movesesian, Crosses and Culture: State-Sponsored
Thinly sourced and ultimately unpersuasive judgments about purportedly present nonconfessional meanings (or supposedly absent confessional ones) that underwrite the validity of government displays of confessional symbols.

We propose that when the meaning of a confessional religious symbol is at constitutional issue, courts should ask three successive questions:

(1) Is the ordinary meaning of the symbol confessional or otherwise religious?\(^{13}\)

(2) If so, does the immediate context in which the symbol is displayed suggest an alternate secular meaning for the confessional symbol?\(^{14}\)

(3) If so, is this alternate secular meaning authentically present and genuinely recognized in the history and culture in which the confessional symbol is displayed?\(^{15}\)

In short, we are proposing a consistent procedure for determining the meaning of religious symbols, based upon their ordinary meaning, their immediate context, and the culture and history of the country in which they are displayed.

*Buono* and *Lautsi* exemplify the problems that arise from failure to carefully and systematically explore these dimensions of religious symbolic meaning,\(^{16}\) and illustrate deeper trends of secularization and acculturation highlighted by the historical-cultural dimension.\(^{17}\) We close with the suggestion that attempts by traditionally dominant religions to defend government use of their confessional symbols by manufacturing “secular” meanings or denying obvious confessional ones only undermines authentic religious belief and hastens the social irrelevance such religions.\(^{18}\)

I. Three Modes of Symbolic Meaning

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\(^{13}\) See infra Part I-A.

\(^{14}\) See infra Part I-B.

\(^{15}\) See infra Part I-C.

\(^{16}\) See infra Part II.

\(^{17}\) See infra Part III.

\(^{18}\) See infra Conclusion.
American pragmatist Charles Sanders Peirce provided a useful vocabulary for the dimensions of symbolic meaning. Peirce maintained that a sign “conveys to the mind an idea about a thing,” in three ways. Likenesses or “icons” imitate the things they represent, like a photograph, an architectural plan, or certain Egyptian hieroglyphics. “Indications” or “indices” are linked to some thing or effect in the world, like a street sign to the street it marks, smoke with fire, or a greeting with the person to whom it is directed. Finally, “general signs,” “tokens,” or “symbols”—Peirce used all three terms interchangeably—possess a significance acquired by custom, usage, or convention, like a police officer’s badge (signifying civil authority), a theatre ticket (signifying right of entrance), or a warning bell or buzzer (signifying danger).

Most signs combine iconic, indicational, and conventional meaning. For example, the traditional Christmas nativity or crèche iconically replicates the New Testament accounts of Jesus’s birth, it is indexed to an event that Christians believe took place in literal history, and it is conventionally associated in the West

The nativity scene . . . necessarily depicts the first of the two miracles at the heart of Christianity. The nativity scene depicts the incarnation of God in human form—or as much Christian literature refers to it, the Incarnation with a capital I. Without the Incarnation, the nativity scene becomes either a meaningless arrangement of figures engaged in some unidentifiable activity (which no one believes), or it becomes a depiction...
with the Christmas holiday celebrating the birth of the Christian Messiah and the related hope of salvation through him.25

Peirce’s semiotics of icon, index, and token suggest three inquiries necessary to ascertain the constitutionally relevant meaning of confessional symbols displayed by government: the sign’s ordinary confessional meaning, based on its similarity to the idea or thing it signifies; the sign’s alternate meaning, based on whether the specific context in which the sign is displayed might conceivable displace its confessional meaning with a secular alternative; and the alternate meaning’s historical-cultural fit, based whether it is authentically present and genuinely recognized in the history and culture of the place where it is displayed.

A. Ordinary Confessional Meaning

“Ordinary meaning,” as we employ it, is rooted in the notion of “literal,” “semantic,” or “linguistic” meaning—that is, the meaning of a text based on the rules of the language in which it is written.26 Consider the sentence, “This chair is broken.” By the rules of English spelling and grammar, the combination of letters and words signifies (i) an object on which people sit, generally having a seat, a back, and four legs, that is (ii) deficient—missing a leg, or otherwise unstable, or having a seat worn through or a missing back. This is the literal, semantic, or linguistic meaning of the sentence.

The “ordinary” meaning of a symbol is analogous to semantic meaning, constituting the object or idea that the symbol superficially signifies according to the communicative rules of the culture in which it is displayed, without attending to contextual details or deploying a very thick cultural knowledge. To return to the Christian nativity, in the West it ordinarily signifies the birth of

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25 See, e.g., Laycock, Religious Displays, supra note 10, at 1212-14.
the son of God to save the world from death and sin. Strictly speaking, this meaning exceeds the purely semantic or iconic: It literally depicts a group of adults in ancient garb kneeling before a baby and a couple who appear to be its parents, in a stable filled with barnyard animals. One needs a cursory knowledge of Western culture—an awareness of the Gospel accounts of Jesus’s birth—to understand it as a common representation of that birth.

Similarly, a Latin cross merely imitates the most common form of execution among the ancient Romans, and crucifixes only depict a man nailed to such a cross. For anyone with a faint acquaintance with Western culture, however, these signs are instantly recognizable as symbols of Christianity—the Roman cross on which Jesus was crucified—and Catholicism and Eastern Orthodoxy—Jesus nailed and dying on that very cross. We refer to these as the “ordinary” meanings of the cross and crucifix.27

Nonlinguistic confessional symbols are the quintessential Peircean icon.28 Every religious sign displayed by the government has an ordinary confessional meaning—a predominant iconic meaning rooted in its similarity to a religious belief that has cultural salience.

B. Alternate Secular Meaning

Peirce maintained that a correlative relationship exists between the indicational meaning of a sign and its object in the world.29 Certainly the physical context in which a confessional sign is displayed will affect the meaning of the sign, sometimes to the point of apparently displacing its ordinary confessional meaning with another, secular meaning.

Consider, again, “This chair is broken.”30 It could constitute a warning, if directed at someone about to sit on it: “This chair is broken,” don’t sit on it! But at a garage sale it could instead be an explanation: “This chair is broken,” I don’t want to buy it. Or an accusation, from someone who has fallen from it: “This chair is broken,” you should have told me! Although the linguistic meaning of the sentence remains the same in each example, its performative

27 See infra Parts II-A-1 & II-B-1.
29 See supra notes 19-23 & accompanying text.
30 The following performative examples are drawn from CULLER, supra note 26, at 113.
meaning changes according to the context in which it uttered. As these examples illustrate, the performative meaning of a sign depends on the context in which the semantic meaning of the sign is deployed.

The meaning of confessional signs likewise depends on the physical context in which they are displayed. Given the ordinary meaning of the Christian nativity as a sign of Jesus’s miraculous birth, its placement on the lawn of a Protestant church identifies a place of Christian worship. But a nativity displayed by itself in the lobby of a courthouse might additionally imply Christian bias in the administration of justice. And yet, the identical nativity in a commercial shopping district surrounded by secular signs and symbols may find its ordinary Christian significance diluted or entirely absent, displaced by another, secular meaning according to which the nativity is simply a marker of the “winter holiday season” celebrated by Christians, some non-Christians, and most unbelievers.

31 See Roland Barthes, Elements of Semiology 42 (New York: Hill and Wang & Noonday, Annette Lavers & Colin Smith trans. 1967) (“The union of signifier and signified . . . does not exhaust the semantic act, for the sign derives its value also from its surroundings.”).

The relationship between an indicational sign and its object approximates the “performatory effect” of spoken language. See J.L. Austin, How To Do Things With Words (Cambridge, Mass.: Harvard University Press, 2nd ed. 1975). Most utterances do not passively reflect or describe the world, but also actively “do” something in it. See Austin, supra note 31, at 94. For example, when uttered by a cleric of government official, “I now pronounce you husband and wife” effects a legally binding marriage. Austin, supra note 31, at 5.

Although Austin restricted his analysis of performatives to the spoken word, others have applied it to signs. See, e.g., Stéphane Beaulac, The Power of Language in the Making of International Law (Leiden, The Netherlands: Brill, 2004); Nelson Goodman, Languages of Art: An Approach to a Theory of Symbols (Indianapolis, Ind.: Bobbs-Merrill, 1968); Hill, Religious Symbolism, supra note 10, at 545.

32 Hill, Ceremonial Deism, supra note 12, at 36; e.g., Brett Scharffs, The Role of Judges in Determining the Meaning of Religious Symbols, in The Lautsi Papers, supra note 11, at 35, 41 (Flag-burning means something different when conducted by “Palestinian protesters in the West Bank” or “a large crowd on the Mall” than by “American Legionnaires or the Boy Scouts.”).

33 See, e.g., City & Cty. of Allegheny v. ACLU, 492 U.S. 573 (1989); S. Ferrari, supra note 2, at 19.

The significance of a religious sign displayed by the government is not necessarily its ordinary confessional meaning. That meaning is shaped, diluted, and sometimes wholly displaced by the physical context in which the sign is displayed.

C. Historical-Cultural Presence

Signs have no “inherent” meaning—that is, there is no natural or necessary relationship between a sign and the idea or object it signifies. As Ferdinand de Saussure put it, the “bond between the signifier and the signified is arbitrary.”35 “Arbitrary,” however, does not mean “random” or “unconstrained,” as if one might attribute any meaning whatever to a sign; to the contrary, the only way that language and other signs can function is through conventional rules governing meaning.36 “Arbitrary” intends, rather, that the meaning of a sign is not rooted in the sign’s physical characteristics or otherwise latent within it, but is rather a function of its relations with other signs in the cultures that use them.37

“Culture” consists of the “symbolic systems, imaginative representations and institutions specific to a society” that legitimate its “political and social order.”38 The signs and symbols that constitute a culture are generally used in regular and conventional ways.39 Roland Barthes metaphorically described this regularity as “contractual,”40 like the pseudo-historical “social contract.”41 Of course, the cultural contribution to a sign’s meaning is a legacy that

36 CULLER, supra note 26, at 114-15; TERRY EAGLETON, LITERARY THEORY 97 (Minneapolis: University of Minnesota Press, 1983); see also RONALD DWORKIN, LAW’S EMPIRE 31 (Cambridge, Mass.: Harvard University Press, 1986) (“We follow shared rules, they say, in using any word: these rules set out criteria that supply the word’s meaning.”).
37 See EAGLETON, supra note 36, at 97.
38 OLIVIER ROY, HOLY IGNORANCE 26, 109 (New York: Columbia University Press, 2010); see also JAMES DAVISON HUNTER, TO CHANGE THE WORLD 32, 35 (Oxford: Oxford University Press, 2010) (“Culture is, first and foremost, a normative order by which we comprehend others, the larger world, and ourselves and through which we individually and collectively order our experience. [Particularly in the cultural meaning imputed to such things, culture can be understood as symbolic capital.”) (emphasis in original).
40 See BARTHES, supra note 31, at 51.
41 “Signs and Symbols,” supra note 28, at 440.
precedes any particular use of the sign; the relation of sign and signifier is thus arbitrary in principle (ex ante) but not in practice (ex post).42

Religion is freighted with culture—and vice versa. Each has grown out of and informed the other. Religion, in other words, is “inculturated”—accessed by and through the history and culture of its adherents, at the same time that it is “of” that history and culture, “an integral part” of it. 43 Being Catholic, for example, has traditionally been an important part of being Irish—Catholicism informs what it means to be Irish—but at the same time Catholicism has been accessed through Irish history and culture—what it means to be a Irish has also informed what it means to be Catholic.

Given the intimacy of religion, history, and culture, it is possible—indeed, likely—that a society may so commonly and widely deploy a confessional sign that it seems to lose its confessional character. Such a sign might come to be used not only by adherents to the religion it originally and ordinarily signified, but also by members of other faiths and by unbelievers. 44 Christmas trees and crosses on national flags are examples of signs whose ordinary meaning has “crossed over” from the confessional to the secular. 45

II. CROSS AND CRUCIFIX

A. Salazar v. Buono

Buono began as a challenge to a 10-foot high white Latin cross displayed as a memorial to World War I veterans on federal park land in California’s Mojave desert.46 The lower federal courts initially held that display of the cross violated the Establishment Clause as an endorsement of Christianity,47 a ruling the federal government declined to appeal to the USSCt. 48 To forestall

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43 ROY, supra note 38, at 26; see Ravitch, supra note 10, at 1020-21.
44 Cf. Zarrow, supra note 10, at 513 (“Neutralité among religious would be assured if a member of a minority religion would view the symbol displayed as secular or nondenominational.”).
45 See 2 GREENAWALT, supra note 10, at 69-70.
46 212 F.Supp.2d at 12-04-05.
47 212 F.Supp. 2d at 1217, aff’d, 371 F.3d at 549-50.
48 130 S.Ct. at 1813.
permanent removal, Congress declared the cross a National Memorial, prohibited the use of federal funds to remove it, and transferred the few square yards on which it stood to the nongovernmental American Legion.49 The original plaintiff then obtained an order that these congressional actions violated the Establishment Clause.50 This time, the government appealed to the USSCt, and a plurality found the lower courts insufficiently attentive to the possibility that the cross was a secular sign of military honor and sacrifice that did not endorse Christianity, and thus would be fully consistent with the Establishment Clause.51 It vacated the injunction and remanded the case for consideration of this possibility.52

1. Ordinary Meaning of the Cross

In the West a Latin cross, without more, is overwhelmingly likely to be understood as the sign of Christianity and Christian belief, since for Christians the cross has been the virtually exclusive emblem in Jesus’s resurrection and his related victory over death and sin for nearly two thousand years.53

A common contemporary rendering is the Latin cross,

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49 364 F.Supp.2d at 1177, 1181-82, aff’d 527 F.3d at 771.
50 364 F.Supp.2d at 1182, aff’d 527 F.3d at 768, 782-83.
51 130 S.Ct. at 1814-21.
52 Id. Justice Alito concurred on the Establishment Clause point, but thought remand unnecessary, 130 S.Ct. at 1821-24 (concurring in part and concurring in the judgment). Justices Scalia and Thomas would have dismissed for plaintiff/appellee’s lack of Article III standing, because the cross became private property after the transfer statute. 130 S.Ct. at 1824-28 (concurring in the judgment).

Justices Stevens, Ginsburg and Sotomayor would have affirmed that the transfer statute violated the Establishment Clause. 130 S.Ct. at 1828-42 (dissenting opinion). Finally, Justice Breyer found the case controlled by general equitable principles and thus would have dismissed for lack of a substantial federal question. 130 S.Ct. at 1842-45 (dissenting opinion).

depicting a horizontal line most of the way up a vertical line ("†"), and believed to resemble the cross on which the Romans crucified Jesus. 54 Another rendering is the Greek cross composed of horizontal and vertical lines intersecting at their respective midpoints ("+"), used predominantly by the Eastern Orthodox Christian churches. Both versions are ubiquitous symbols of Christianity and Christian belief, appearing on altars, gravestones, clerical vestments, and military battle flags and banners (as in the Crusades); in sculpture, painting, cemeteries, and architecture (especially in connection with churches); and as personal jewelry and emblems of clerical office.55

The cross is so closely linked to Christianity that its Christian meaning generally displaces all others.56 The various courts in Buono were simply stating the semantically obvious in finding that the Latin cross is “certainly a Christian symbol,” “the preeminent symbol of Christianity,” “exclusively a Christian symbol,” and “not a symbol of any other religion.”57

2. Alternate Secular Meaning at Veterans Memorial

Given the ordinary Christian meaning of the cross, its display by government seems to align the government with Christianity. But this effect may be displaced by another, depending on the particular context in which the cross is displayed.

For example, crosses were once widely found on signs identifying hospitals, pharmacies, and first-aid stations—this practice remains common in Europe and the United States.58 The placement of the cross where healthcare services are available displaces its ordinary Christian meaning with a secular meaning—a

56 BOMBERGER, supra note 53, at 37 (The cross “must, like the atonement completed upon it, be regarded as the most peculiar property of Christianity”); Lund, supra note 11, at 1391, (“[T]he cross’s religious meaning is primary. The cross is the central symbol of the central event of Christian theology.”).
57 212 F.Supp.2d at 1205, aff’d, 527 F.3d at 768-69, rev’d & remanded, 130 S.Ct. at 1816.
58 Italian pharmacies, for example, are commonly marked with a lighted green Greek cross, while Greek crosses on a blue background are displayed on U.S. interstate highways to signal that a hospital is near an exit.
place where one might receive medical care.\textsuperscript{59}

Similarly, crosses are sometimes a component of the corporate logos of entities associated with healthcare services, such as Blue Cross/Blue Shield, an international association of health insurance companies, and the International Red Cross. The distinctive branding effect of such logos differentiates their crosses from the Christian cross: Both Blue Cross/Blue Shield and the International Red Cross use the Greek cross in addition to (obviously) coloring the cross in blue and red, respectively.\textsuperscript{60} The Greek cross is also generally used in the United States and Europe as a traffic sign, displayed on a yellow or other distinctively colored background to mark an approaching intersection.

A secular use of the Latin cross has also emerged in popular culture. Actors, singers, members of rock bands, media figures, and ordinary people often wear Latin crosses as jewelry.\textsuperscript{61} While many wear it as an emblem of personal Christian faith, others who wear it are often widely known to have rejected Christianity, or wear it in situations that apparently contradict Christian beliefs.\textsuperscript{62}

In each of these situations, the ordinary Christian meaning of the cross is successfully displaced by other, secular meanings made clear by the precise physical context in which the cross is displayed.

The \textit{Buono} plurality likewise portrayed the effect of displaying the cross at a veterans memorial as having displaced its ordinary Christian meaning, thus avoiding the unconstitutional Christian endorsement that would otherwise seem to follow from its display by the government. The Court maintained that the cross communicates a secular meaning of memory and honor, at least when displayed at a war memorial or veterans cemetery:

Although certainly a Christian symbol, the cross was not

\textsuperscript{59} One can argue, of course, that even this context bears the trace of less pluralist eras of Western history during which Christian clerics and missionaries were virtually the only trained providers of health care.

\textsuperscript{60} See BlueCross BlueShield Association, \url{http://www.bcbs.com/}; International Federation of Red Cross & Red Crescent Societies, \url{http://www.ifrc.org/}. As its official name suggests, “red cross” was not secular enough for Muslim societies.

\textsuperscript{61} See Scharffs, \textit{supra} note 32, at 43-44.

\textsuperscript{62} Madonna’s use of cross imagery in the video rendition of her hit, “Like a Prayer,” for example, was deemed blasphemous by many Christians. See \url{<http://en.wikipedia.org/wiki/Like_a_Prayer_(song)>>} (“Reception and protests”). Additionally, we are reliably informed by Professor Gedicks’s daughter that a recent contestant on a well-known American dating reality show rarely appeared without her Latin-cross pendant even though her behavior seemed rather consistently unChristian.
employed on Sunrise Rock to promote a Christian message. Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.\(^63\)

As confirmation of this meaning, the plurality pointed to the vast number of crosses marking graves of fallen American servicemen in battlefield cemeteries.\(^64\)

In short, the plurality concluded that the government’s display of a cross at a veteran’s memorial does *not* align the government with Christianity or coerce or encourage Christian belief, but “simply” honors and remembers the sacrifice of American soldiers fallen in defense of the United States.

This alternate, purportedly secular meaning of the cross raises at least two questions: (a) Is it *independent of* or *parasitic upon* its ordinary Christian meaning? And (b) would its removal dishonor *all* veterans?

a. *Separability*

The plurality ignores whether its proposed secular meaning can be present in the absence of the Christian meaning—whether the cross can “simply” convey the secular message of memory and honor of wartime veterans, without necessarily and simultaneously signifying Christianity and the Christian resurrection? If it cannot, then the alternate secular meaning is not independent of the ordinary Christian meaning, and thus not really secular.

The supposed secular meaning of the cross no doubt arose from the proliferation of crosses marking the battlefield graves of a military that until the early twentieth century had been overwhelmingly Christian. But this proposed meaning depends on the cross’s ordinary confessional meaning, and thus is not “secular” at all. As Professor Laycock has observed,

The cross honors Christian soldiers because it symbolizes

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\(^63\) 130 S.Ct. at 1816-17; *see also* id. at 1817-18 (suggesting that the cross “has complex meaning beyond the expression of religious views”); *id.* at 1820 (concluding that the cross “is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient strivings help secure an honored place in history for this Nation.”).

\(^64\) 130 S.Ct. at 1820.
the promise that they will rise from the dead and live forever. To say that the cross honors the Christian dead is not to identify a secular meaning of the cross; it is merely to identify a common application of the religious meaning of the cross. [T]he Christian cross has no meaning not derived from its primary religious meaning.65

The plurality’s proposed meaning is exposed as Christian in another way. Why choose the cross to honor all World War I veterans, when any number of unambiguously secular symbols would just as powerfully commemorate their sacrifices? None of the Capitol Mall war memorials and monuments, for example, seems to contain a Christian or even a religious symbol.66 Congress’s choice of an ordinarily Christian symbol, rather than an unambiguously and independently secular one, suggests that that the purpose and effect of displaying a Latin cross at the memorial were precisely to align the government with Christianity.67

65 Laycock, supra note 10, at 1239; see also id. at 1240 (“The cross’s power as a symbol, and the story it symbolizes, are entirely dependent on the divinity of Jesus. [...] Unthinking Christians may intend a cross to honor all the war dead, but that does not create any sensible theory by which the cross actually honors nonChristians.”).


67 Bartrum, supra note 11, at 1661 (“The plurality fails to explain why, if the cross’s religious meaning is not central to its symbolism—the easiest solution would not be to replace it with a nonreligious memorial. [I]t seems disingenuous to deny that the symbol’s deep religious significance adds something essential to the mix.”); see City & Cty. of Allegheny v. ACLU, 492 U.S. 573, 618 (1989) (opinion of Blackmun, J.) (“Where the government’s secular message can be conveyed by two symbols, only one of which carries religious meaning, an observer reasonably might infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith.”); School Dist. v. Schmepp, 374 U.S. 295 (1963) (Brennan, J., concurring) (“[W]hat our decisions under the Establishment Clause have forbidden, [is] use [of] essentially religious means to serve governmental ends, where secular means would suffice.”); e.g., Board of Educ. Of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 689, 707-08 (1994) (invalidating special public school district for disabled school children drawn to coincide with boundaries of Ultra-Orthodox Jewish community because, inter alia, less religious-conscious means of accommodating community’s beliefs were available).
Because the plurality’s proposed secular meaning of the Sunrise cross cannot be separated from its ordinary Christian meaning—indeed, is actually dependent upon it—it is not actually secular, and thus cannot save the cross from invalidation under the Establishment Clause.

b. Disrespect.

Though it ignored the performative effect of the government’s displaying the cross, the plurality expressed deep concern about the potential performative effect of its removal, opining that this would dishonor and disrespect the fallen veterans whose sacrifice the cross was supposed to memorialize.68 But dishonor entails the mistaken assumption that the cross honors all veterans, whereas it really honors only Christians. Of course, neither Christian veterans nor those of any other religious group are entitled to the military’s exclusive adoption of the sign of their faith, and thus neither Christians nor any other group can reasonably claim disrespect when such a sign is removed.69

3. The Latin Cross in American History and Culture

The plurality maintains that whatever may have been its ordinary meaning when the cross was first erected, by the time Congress enacted its memorial designation that meaning had evolved into a secular commemoration of military sacrifice.70

Culture is not static, and neither are its symbols. It is certainly conceivable that the meaning of an unambiguously confessional symbol might evolve into something predominantly secular, like a Christmas tree. Of pagan origin signifying renewal, Christmas trees were adopted by early Christians as emblems of the

68 130 S.Ct. at 1817.
69 Cf. Allegheny, 492 U.S. at 601, 612 (“[P]rohibiting the display of a crèche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause prohibits. [S]ome Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire . . . .”).
70 130 S.Ct. 1817 (finding that over the decades of its existence the cross and its commemorative purpose “had become entwined in the public consciousness,” making it “reasonable to interpret the congressional designation as giving recognition to the historical meaning that the cross had attained”).
hope of everlasting life associated Jesus’s birth, only to have more recently reverted to something resembling their pagan origins—largely secular signs of the holiday season, their pervasive, inoffensive secularity confirmed by ubiquitous commercial exploitation.71

The Latin cross has not undergone this sort of semiotic evolution, even when displayed at a veterans memorial or cemetery. As Justice Alito conceded, the “thousands of small crosses” marking battlefield graves of fallen soldiers are interspersed with hundreds of Stars of David marking the battlefield graves of fallen Jewish soldiers.72 Indeed, the U.S. military now allows a choice of grave markers from among scores of Christian, nonChristian, and nonreligious symbols.73 If the cross were really a secular symbol of memory and sacrifice, if it did nothing more than honor fallen veterans, it alone should suffice to mark and honor the graves of all fallen servicemen.74

It is not hard to imagine that a Jewish veteran or his or her family might feel troubled rather than honored by a Christian cross. In fact, one of the original Buono plaintiffs, a decorated Jewish war veteran, alleged that as “a sectarian Christian symbol,” the cross “is not meaningful to him.” 75 It is equally understandible that

72 130 S.Ct. at 1823 (Alito, J., concurring in part and concurring in the judgment) (“In American military cemeteries overseas, the graves of soldiers who perished in the First World War were marked with either a white cross or a white Star of David. More than 3,500 Jewish soldiers gave their lives for the United States in World War I.”)
73 See http://www.cem.va.gov/cem/docs/emblems.pdf. Some of these markers are also illustrated in LESLIE GRIFFIN, LAW AND RELIGION 422 (New York: Thomson Reuters/Foundation, 2nd ed. 2010).
74 Cf. Utah Highway Patrol Ass’n v. Am. Atheists, Inc., 637 F.3d 1095, 1112 & n.2 (10th Cir. 2010) (noting that state would not have permitted the family of a fallen officer to choose a symbol other than a Latin cross to memorialize a trooper, presumably because the state maintained in litigation that the cross is a purely secular symbol of honor and memory), cert. denied, 132 S. Ct. 12 (2011).
75 212 F.Supp. at 1209. This plaintiff dropped out of the litigation because of questions about his Article III standing, but the issue resurfaced at oral argument before the USSCt.

Justice Alito noted that it would have been appropriate for Congress to have added the Star of David and other religious symbols to the monument. But he lamely excused its failure to do so by speculating that this would not have satisfied the cross’s opponents.130 S.Ct. at 1823 (Alito, J., concurring in part and concurring in the judgment). Of course, whether the addition of other
unbelievers and most other believers outside of the American Christian mainstream might not perceive a meaning in the cross that includes them. Christians were a key element in two of the sustained religious persecutions in U.S. history, those of Mormons during the late 19th century and Jehovah’s Witnesses during the early 20th. Both faiths have forcefully rejected the cross as a confessional symbol. Association of the cross with Christian persecution and discrimination is embedded in Jewish and (especially) Muslim culture; they, too, have rejected it as a confessional symbol. Unbelievers, meanwhile, remain politically

confessional symbols would have satisfied the plaintiffs is beside the point; the ordinary Christian meaning of the cross does not vanish because a plaintiff acts unreasonably in settlement negotiations.

76 See Viladesau, Beauty of the Cross, supra note 53, at 8 (“As a symbol of salvation, the cross has not lost its offensive character to those outside the Christian tradition,” such as South Asians, Sunni Muslims, Jews, and unbelievers).


78 For Mormons, see Michael G. Reed, Banishing the Cross: The Emergence of a Mormon Taboo 33-85 passim, 113-20 (Independence, Mo.: John Whitmer, 2012); e.g., Gordon B. Hinckley, The Symbol of Our Faith, The Ensign (Apr. 2005), at 3 (“[F]or us, the cross is the symbol of the dying Christ, while our message is a declaration of the Living Christ.”). In the 1960s, the LDS church obtained approval of a distinctively Mormon military grave marker so that the burial sites of LDS servicemen and -women would not be marked by a cross. Reed, supra, at 121-22.


Jehovah’s Witnesses also have their own distinctive military grave marker which lacks a cross.


80 E.g., William K. Emerson, Encyclopedia of United States Army: Insignia and Uniforms 268 (recounting how during World War II, Army-commissioned Jewish chaplains insisted on a different insignia than the
and culturally marginalized in the U.S., and of course have no use for the cross.\textsuperscript{81}

The ordinary meaning of the Latin cross might conceivably have evolved over the centuries, from an exclusively Christian symbol of the resurrection to a largely secular sign of something else, like the Christmas tree. If this were true, however, one would expect to find confirming evidence in American culture—that is, uses of the cross to depict memory and honor for the military sacrifices of nonChristians and nonbelievers personally, as well as collectively by institutions which nonChristians and unbelievers control or in which they have substantial influence, just as many unbelievers and some nonChristians put up Christmas trees every December.

There is no cultural evidence, however, that the Latin cross has been embraced by American unbelievers or nonChristian believers as a religiously neutral signifier of military honor and sacrifice—or, indeed, of anything other than Christianity.\textsuperscript{82} The record in \textit{Buono} itself confirms this, showing that the cross at the World War I memorial was a regular site for Easter sunrise services, but not for celebrations by nonChristians or unbelievers or for secular ceremonies on Veterans Day, Memorial Day, or other secular holidays with military significance.\textsuperscript{83} As plaintiff’s counsel pointed out at oral argument, there are no crosses in Jewish cemeteries.\textsuperscript{84} Congressional designation of the cross as a veterans cross that had theretofore identified all Army chaplains, because they considered the cross offensive when worn by rabbis; \textit{REED}, supra note 78, at 89, 91-92 (recounting opposition of Salt Lake City rabbis to cross memorial proposed in early 20\textsuperscript{th} century); \textit{supra} note 75 \& accompanying text (opposition of Jewish war veteran to Sunrise Cross).


\textsuperscript{82} For example, every authorized military marker for a mainstream Christian faith includes a cross, while of the 29 markers authorized for unbelievers, nonChristians, or Christians outside the orthodox mainstream, only one includes a cross. See <\texttt{http://www.cem.va.gov/cem/docs/emblems.pdf}>; \textit{GRiffin}, \textit{supra} note 73, at 422. \textit{See also} Lupu & Tuttle, \textit{supra} note 12, at 976 (arguing that permanent display of cross on altar or pulpit of university chapel open to use by all faiths “cannot readily be harmonized with nonChristian use of the space”).

\textsuperscript{83}See 130 S.Ct. at 1838 n.9 (Stevens, J., dissenting) (analyzing and summarizing record to show incorrectness of plurality’s unsupported assertion that secular memorial ceremonies were regularly held at the cross).

\textsuperscript{84} Counsel, who is apparently Jewish, made the statement in response to Justice Scalia’s expression of outrage that one might think the cross did not honor Jewish veterans: “The cross is the most common symbol of the resting place of
memorial did not make the cross secular, it made the memorial Christian.\footnote{See 130 S.Ct. at 1839 (Stevens, J., dissenting).}

**B. Lautsi & Others v. Italy**

*Lautsi* began with two Italian parents who asked that crucifixes displayed in classrooms of the middle school where their two sons attended be removed.\footnote{Sentenza N. 56/04, Ric. No. 2007/02 (Trib. Ammin. Reg. Veneto – Sez. I Nov. 13, 2003), at 2.} School and regional administrators not only rejected their request, but also issued a circular to public school principals expressly recommending the crucifix’s classroom display.\footnote{Sentenza N. 56/04, at 5 ¶ 2.3.1.} The boys’ mother then filed suit in the Tribunale Administrative Regionale Veneto, the Italian administrative court in the Veneto Region having original jurisdiction, asking that the administrators’ decision be annulled as a violation of the fundamental Italian principle of *laicità*.\footnote{Sentenza N. 56/04, at 2-3.}

Difficult to translate—it literally means “laic-ness” or “laicity”—Italian *laicità* is usually defined as “inclusive” state religious neutrality or government “equidistance” with respect to all forms of belief and unbelief.\footnote{See Marco Ventura, *Italy*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: RELIGION 17, ¶ 74 at 50 (Alphen aan den Rijn, The Netherlands: Wolters Kluwer, Rik Torfs ed. 2013) (defining *laicità* as a “[s]upreme principle of Italian constitutional law . . . implying the equidistance and neutrality of the State towards all religious denominations,” and derivable from constitutional principles of “equality, non-discrimination on grounds of religion, and independence of the State from the Catholic Church”); e.g., Sentenza N. 1110/2005, Ric. No. 2007/02 (Trib. Ammin. Reg. Veneto – Sez. III Mar. 17, 2005), at 23 ¶ 7.1 (defining *lacità* as the “a-confessionality” of the state) (authors’ translation) Sentenza N. 203, ¶ 4 (Corte Cost. Dec 14, 1989) (“The principle of *laicità* . . . implies not an indifference of the State with respect to religions but a guarantee of the State for the safeguarding of religious liberty in a regime of confessional and cultural pluralism.”) (authors’ translation), Lautsi – English Translations, supra note 5, at 9, 10.} It is distinct from “secularism,” which Italians associate with French *laïcité* and (somewhat inaccurately) American church-state jurisprudence.\footnote{See LORENZO ZUCCA, A SECULAR EUROPE 101 (Oxford: Oxford University Press, 2012) (“[S]ecularism must be sharply separated from neutrality. Neutrality is the common denominator between the different conceptions of secularism.”) (authors’ translation).} The term

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\footnote{See 130 S.Ct. at 1839 (Stevens, J., dissenting).}
does not appear in the Italian Constitution; it emerged in the wake of
the 1984 Villa Madam Accords between Italy and the Holy See,
which transformed Italy from a confessional to a secular state but
expressly recognized Catholicism as part of Italy’s “historical
heritage.”

Laicità is now well-established as a fundamental (albeit
nontextual) Italian constitutional norm limiting government
action.

Specifically at issue in Lautsi were two fascist-era royal
decrees previously held valid and enforceable in contemporary
republican Italy. One, issued in 1924, requires that every middle
school “have the national flag” and every classroom, “the symbol of
the Crucifix.” The other, issued in 1928, lists required furnishings
for various public school classrooms, including a crucifix for each
elementary school classroom.

Finding that the plaintiff’s case for the constitutional
invalidity of the decrees was “not manifestly unfounded,” the
Tribunale referred the case in accordance with Italian procedure to
the Corte Costituzionale, the appellate court in Italy charged with
ruling on the constitutionality of statutes and laws. The Corte,
however, held that it lacked jurisdiction to determine the
constitutionality of administrative (as opposed to legislative)
actions, and remanded the case back to the Tribunale.

On remand, the Tribunale upheld classroom crucifix
displays, finding that the practice conformed to laicità because the
.crucifix merely signifies (i) the Christian origins of secular values
recited in the Italian Constitution, and (ii) the Catholic roots of

is inclusive, secularism is exclusive. The Italian government is firmly committed
to neutrality, but not to secularism. In fact neutrality means that the state should
refrain from promoting secularism which amounts to a form of proselytism.”).

See Pin, supra note 11, at 120-27. Professor Pin argues that initially laicità was
characterized by a “strong connection and collaboration” between church and
state which supported state display of Catholic symbols, and only later evolved
into a mandate of “some” church/state separation. See id. at 134-35.

Sentenza N. 203, ¶¶ 4 & 9.


Art. 118, cap. XII, r.d. n. 965/24 (Apr. 30, 1924) [hereinafter 1924 Decree]
(authors’ translation).

Art. 119, tab. C, r.d. n. 1297 (Apr. 26, 1928) [hereinafter 1928 Decree].

Sentenza n. 56/04, at 13-15 ¶¶ 5.3 & 6 (authors’ translation).


note 5, at 12-14.
Italian history and culture.\textsuperscript{99} The \textit{Consiglio di Stato} affirmed, relying only on the \textit{Tribunale}’s first rationale.\textsuperscript{100} On plaintiff’s appeal to the ECtHR, that court’s seven-judge Second Section unanimously reversed, finding that the predominantly Catholic meaning of the crucifix infringed student and parental rights to freedom from Catholicism and upset religious pluralism in the classroom by suggesting that “the State takes the side of Catholicism,”\textsuperscript{101} in violation of the European Convention of Human Rights.\textsuperscript{102} The Second Section decision, in turn, was reversed by a 17-judge Grand Chamber of the ECtHR,\textsuperscript{103} which found that perpetuating a tradition of displaying crucifixes in classrooms as “passive” symbols of culture and religious freedom was within the “margin of appreciation” granted to Convention signatories to adapt its principles to their particular national circumstances.\textsuperscript{104}

1. The Ordinary Meaning of the Crucifix

In contrast to the unadorned Latin cross, the crucifix depicts Jesus nailed to the cross. It emerged as a Christian symbol in the 4\textsuperscript{th} or early 5\textsuperscript{th} century.\textsuperscript{105} Early crucifixes generally showed a fully-clothed and triumphal Jesus “alive and reigning” on the cross.\textsuperscript{106} It was not until the early Middle Ages that Christ was shown dead on the cross,\textsuperscript{107} and not until the late Middle Ages did crucifixes generally depict a realistically crucified Jesus—almost naked and bloodily nailed to the cross, with bowed head and eyes


\textsuperscript{101} \textit{Lautsi}, at 12-13 ¶¶ 51-55.

\textsuperscript{102} \textit{See EUROPEAN CONVENTION ON HUMAN RIGHTS}, supra note 2, art. 9; \textit{id.}, prot. no. 1, art. 2., (Coun. Eur. - Rome Nov. 4, 1950), \url{http://www.hri.org/docs/ECHR50.html#P1}.

\textsuperscript{103} “Grand Chamber” review of a Chamber decision of the ECtHR is analogous to en banc review of a panel decision in the U.S. Courts of Appeals. For a description of ECtHR procedures relating to section panel and grand chamber proceedings, see \textit{Witte & Arnold, supra} note 11, at 15-16.

\textsuperscript{104} \textit{Lautsi & Others}, at 27-31 ¶¶ 63-77.

\textsuperscript{105} \textit{Bomberger, supra} note 53, at 38; \textit{Pocknee, supra} note 53, at 38-39; “Archaeology of the Cross and Crucifix,” \textit{supra} note 54, at 17-19.


\textsuperscript{107} \textit{Harrries, supra} note 53, at 28-30 (mid-7\textsuperscript{th} century); \textit{Viladesau, Beauty of the Cross, supra} note 53/106, at 48 (mid-9\textsuperscript{th} century).
closed in mortal suffering and death. The crucifix is closely associated with the Roman Catholic Church, though it is also used by Eastern Orthodox Christianity. Reformation Protestants (especially Calvinists) rejected it as an aspect of the Catholic veneration of icons, but its use persisted among Anglicans, Lutherans, and Methodists into the 17th century. Since the 19th century its use has been almost entirely confined to Catholicism and Eastern Orthodoxy, and it is widely understood as the quintessential Roman Catholic sign.

The ECtHR Grand Chamber barely admitted the ordinary Catholic meaning of the crucifix. It laconically described the crucifix as “above all a religious symbol” which “undoubtedly refers to Christianity.” The Consiglio di Stato did little better, conceding that “the crucifix is properly and exclusively a ‘religious symbol,’ insofar as it seeks to encourage a bond of reverence towards the founder of the Christian religion,” but only in a “place of worship,” foreshadowing the ECtHR’s use of performative effect to empty the crucifix of any confessional meaning at all. The

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111 Lautsi & Others, at 27-28 ¶ 66.
Tribunale evaded the problem entirely by flatly equating the Catholic crucifix with the Christian cross. 113

One must consult lower court decisions that were vacated or overruled for a detailed account of the crucifix’s ordinary Catholic meaning. The Tribunale that first referred the action to the Corte Costituzionale had no trouble conceding that the crucifix is obviously and ordinarily understood throughout Italy as the quintessential sign of Catholicism and Catholic belief, observing that its classroom display “honors an unambiguous confessional meaning, perceived as such by the largest part of those associated with the school . . . .”114 Likewise, the Second Section of the ECtHR found that the crucifix’s Catholic meaning predominated over all others,115 and expressed its skepticism that “display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion of Italy)” would serve the religious educational pluralism and liberal-democratic values guaranteed by the Convention.116

There is little doubt that in Italy the crucifix, without more, is ordinarily understood as the sign of the Catholic Church and Catholic belief.

2. Alternate Secular Meaning in Public School Classroom

Given the Catholic ordinary meaning of the crucifix, its display by government seems to align it with Roman Catholicism. As with the Latin cross, this expected effect might be displaced by another which renders the crucifix secular or otherwise appropriate when placed in the requisite physical context.

The controlling opinions in Lautsi present a semiotic regression on this point, in which a detailed account of the crucifix’s purportedly secular performative effect is successively diluted until it drops out of the case entirely. The Tribunale gave a rich (if controversial) account of the crucifix’s purported secular effects, concluding that it signified the Christian foundation of secular Italian culture and universal human rights.117 On appeal, the

infra Part II-B-2.

113 Sentenza n. 1110/2005, at 13-14 (authors’ translation), Lautsi – English Translations, supra note 5, at 4-5.
115 Lautsi, at 12 ¶¶ 51, 53 (citation omitted).
116 Lautsi, at 13 ¶ 56.
117 See infra Part II-B-2-a.
Consiglio agreed in part, holding that classroom crucifixes communicated the Catholic origins of secular human liberty. Finally, the Grand Chamber of the ECtHR found the crucifix’s ordinary Catholic meaning wholly displaced without identifying any alternate secular meaning, holding that the crucifix is an “essentially passive” symbol that does not religiously influence school children in the absence of affirmative efforts by the school to coerce Catholic practice or belief.

a. Secular Liberty & Secular History

The Tribunale began by observing that “in the public schools in which children are necessarily introduced to the values of liberty, democracy, and the laicità of the State, it is not legal to impose any type of religious belief . . .”, and emphasizing the powerful obligation of religious impartiality that laicità imposes on the state.

Laicità’s constitutional premises of state theological equidistance and nonconfessionalism imposed on the Tribunale the difficult task of delivering a plausible account of the crucifix as a secular rather than (merely) Catholic symbol. It began by emphasizing that the crucifix is “also an historical-cultural symbol, and thus endowed with a value of identity in reference to [the Italian] people.” But neither historical analysis nor even the constitutional value of laicità, observed the Tribunale, can change an Italian past saturated with Christianity. An understanding of the crucifix as a mere symbol of Italian history and culture, it concluded, would be sufficient to dismiss the plaintiff’s action, because a sign that “summarizes relevant aspects of our society, of our humanistic culture as well as our popular conscience, would not damage in any way the laicità of the State or the objectives of public school instruction and thus the sphere of liberty of every citizen.”

118 See infra Part II-B-2-b.
119 See infra Part II-B-2-c.
121 Sentenza n. 1110/2005, at 24-25, 26 ¶¶ 7.2, 7.4, Lautsi – English Translations, supra note 5, at 9, 10.
124 Sentenza n. 1110/2005, at 29 ¶ 8.3 (authors’ translation), Lautsi – English
The problem, admitted the Tribunale, is that the crucifix cannot plausibly be viewed as merely an historical-cultural symbol, but must also satisfy laicità as the confessional symbol it is ordinarily understood to be.\textsuperscript{125} Having candidly confessed the semiotic difficulty of separating the crucifix’s ordinary confessional from its purportedly secular meaning—something the Buono plurality failed to do—the Tribunale then (rather less candidly) pulled a rhetorical “bait and switch”: Having to this point discussed the meaning of the “crucifix,” the court inexplicably changed to a discussion of the meaning of the “cross,” as if one were indistinct from the other.\textsuperscript{126}

The switch to cross from crucifix made it easier to conform its use by government with laicità. The unadorned cross is “understood as the symbol of Christianity, not simply that of Catholicism, and thus also captures beyond Catholicism itself the values of the other Christian confessions present” in Italy,\textsuperscript{127} a claim that could not have been made for the crucifix. But even granting the ecumenical character of the cross, it does not reach nonChristian confessions, is not ordinarily secular, and is not very relevant to any secular meaning of the crucifix.

Having equated crucifix with cross, the court initiated a detailed explication of Christianity as the root of human virtue and, in particular, those virtues grounding universal human rights.\textsuperscript{128} The words “crucifix” and “cross” both appear in this lengthy passage, but the court uses “cross” whenever it emphasizes the

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\textsuperscript{125} Sentenza n. 1110/2005, at 29-30 ¶ 9.1, Lautsi – English Translations, supra note 5, at 12.

\textsuperscript{126} The court relied on the fact that individual schools had sometimes displayed unadorned crosses in response to the fascist-era decrees requiring display of the crucifix. Sentenza n. 1110/2005, at 13-14 ¶ 4.1-4.2, Lautsi – English Translations, supra note 5, at 4-5. As another fascist-era decree made clear, however, the substitution of cross for crucifix was not a general dispensation, but a specific concession to the Waldensians (Valdesi), a small pre-Reformation Christian sect which rejected the crucifix and in the 1920s was almost entirely concentrated in Sicily and the French-Italian Alps. See Sentenza n. 1110/2005, Ric. N. 2007./02 (Trib. Ammin. Reg. Veneto – Sez. III Mar. 17, 2005) (citing Circolare n. 8823 (Ministero Pubb. Instru. 1923)), Lautsi – English Translations, supra note 5, at 5.

\textsuperscript{127} Sentenza n. 1110/2005, at 30 ¶ 9.2 (“[L]iberté, égalité, fraternité,’ constitutes a motto easily shared by a Christian, albeit with obvious emphasis on the third term.”) (authors’ translation), Lautsi – English Translations, supra note 5, at 12.

purportedly open and inclusive character of Christianity.\textsuperscript{129} The point was to establish that the cross and the crucifix symbolize Christian charity and care for the other, values that also ground the post-confessional Italian republic:

Christianity, . . . with its strong accent on the precept of love for one’s neighbor and even more with the explicit predominance of charity in in one’s faith, contains in essence those ideas of tolerance, equality, and liberty that are at the base of the modern secular state, and the Italian state in particular.

Looking beyond the superficial, one discerns a line of thought that gathers in itself the Christian revolution of two thousand years ago, the affirmation in Europe of habeas corpus, the very cardinal elements of Enlightenment (even though historically posed in lively contrast with religion), that is, the liberty and dignity of man, the declaration of the rights of man, and ultimately the very laicità of the modern state; all of these historical phenomena are in a significant way—though certainly not exclusively—in the Christian conception of the world.\textsuperscript{130}

The court even went so far as to positively associate Christianity with the motto of the profoundly anti-clerical French revolution.\textsuperscript{131}

From this premise, the Court concludes that laicità is so well established as a constitutional principle that there is little danger in the court’s entertaining a “new and contemporary” secular meaning for the cross, notwithstanding its ordinary Christian one.\textsuperscript{132} It then takes this new secular meaning of the Christian cross and imputes it to the Catholic crucifix: As both

the symbol of a particular historical and cultural national identity and “the expression of secular principles of the community . . . the crucifix can be legitimately placed in the classrooms of public schools, in that it not only doesn’t clash


\textsuperscript{132} Sentenza n. 1110/2005, at 41-42 ¶ 15.2 (authors’ translation), \textit{Lautsi – English Translations, supra} note 5, at 17.
Thus, the Tribunale concluded: “The crucifix is the symbol of our history and our culture and, as a consequence, of our identity . . . and also of the laicità of the State.”\textsuperscript{134}

The Tribunale decision is an unsubtle sleight-of-hand. It dubiously asserted an identity of meaning between the Christian cross and the Catholic crucifix. It then identified Christian values symbolized by the cross, and asserted (again dubiously) that these also form the exclusive basis of Italian constitutional and fundamental secular human rights.\textsuperscript{135} Concluding that government display of the cross does not violate laicità, it simply substituted Catholic crucifix for Christian cross to hold that display of the crucifix conforms to laicità as well, notwithstanding its ordinary Catholic meaning.

b. Secular Liberty

On appeal from the Tribunale, the Consiglio di Stato reasoned that while the crucifix was undoubtedly a religious symbol when displayed in a place of worship, it might also communicate secular values when displayed in a nonreligious venue like a public school:

[F]or believers and nonbelievers the [crucifix’s] display will be justified and will assume a nondiscriminatory meaning under its religious profile, if it is able to represent and to precisely recall in an immediately perceptible and intuitive form . . . relevant civic values, and to call particular attention to those values that suggest and inspire our constitutional order, the base of our shared civil life. In this sense the crucifix can develop, even in a “secular” context different

\textsuperscript{133} \textit{Sentenza n. 1110/2005}, at 42 ¶ 16.2 (authors’ translation) (emphasis added), \textit{Lausti – English Translations, supra} note 5, at18.

\textsuperscript{134} \textit{Id.} at 38 ¶ 12.4 (authors’ translation) (emphasis added), \textit{Lausti – English Translations, supra} note 5, at 15.

\textsuperscript{135} As Professor Mancini has pointed out, many of the personal rights and liberties listed in the Italian Constitution were supported by the secular left, which obviously did not ground its support in the supposed origins of such rights in Christian or Catholic theology. Indeed, this line of reasoning seems to presuppose that there can be no ethic of human rights outside of Christianity or Catholicism. See Mancini, supra note 2, at 187.
from the religious context that is its natural home, a highly educational symbolic function, regardless of the religion professed by the pupils.\textsuperscript{136}

In other words, the performative effect of displaying the crucifix in a public school classroom displaces its ordinary Catholic meaning with an alternative secular one, namely,

the religious origin of the values of tolerance, mutual respect, regard for the individual, the affirmation of his or her rights and regard for his or her liberty, freedom of conscience against authority, human solidarity, prohibition of every discrimination, all of which characterize the Italian civic order.\textsuperscript{137}

How and why the crucifix does this is left unexplained, though the Consiglio is obviously indebted to the Tribunale’s comparable analysis. The Consiglio suggests that there is no other symbol “in Italian culture . . . better suited” to encapsulate these secular values “than the crucifix,”\textsuperscript{138} and then defers to the Veneto Ministry’s judgment that the crucifix is the most effective means of teaching Italian civic virtue.\textsuperscript{139}

This argument implicitly concedes that the ordinary Catholic meaning of the crucifix is out of place in a public school. Accordingly, its display there must signify something else, something nonconfessional—like Italian constitutional and civic values—as if it were inconceivable that Italian public school authorities might violate the religious impartiality demanded by laicità by posting an obviously confessional symbol. In the view of the Consiglio, display of the crucifix in a public school necessarily displaces its ordinary Catholic meaning with the alternate, secular meaning of Italian civic unity, though it leaves unexplained why this must be the case.

c. (Almost) No Effect

\textsuperscript{136} Sentenza n. 556/06, at 16 (authors’ translation), \textit{Lautsi – English Translations}, supra note 5, at 22.
\textsuperscript{137} Sentenza n. 556/06, at 16 (authors’ translation), \textit{Lautsi – English Translations}, supra note 5, at 22.
\textsuperscript{138} Sentenza n. 556/06, at 17 (authors’ translation), \textit{Lautsi – English Translations}, supra note 5, at 23.
\textsuperscript{139} Sentenza n. 556/06, at 18 (authors’ translation), \textit{Lautsi – English Translations}, supra note 5, at 23.
The Grand Chamber of the ECtHR largely adopted the position of the Italian government that the “mere presence” of a “passive symbol” like the crucifix could not violate the Convention without of proof that children were coerced or pressured or the teaching atmosphere otherwise lacked the religious impartiality. Unlike the Italian government, however, which attributed various secular meanings to the crucifix, the ECtHR decided the case without adopting any alternate meaning at all in place of the majoritarian Catholic significance it grudgingly admitted at the outset. Conceding that classroom posting of crucifixes “confer[s] on [Italy]’s majority religion preponderant visibility in the school environment,” the ECtHR nevertheless agreed with the government that as “an essentially passive symbol” the crucifix “cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities,” especially given lack of “compulsory teaching about Christianity” or other evidence that “the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.”

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140 Italy’s submission on this point was based on a study prepared by Professor Carlo Cardia, who later published it as a monograph. See CARDIA, supra note 11. Cardia is professor of ecclesiastical and canon law at the University of Rome “La Sapienza,” and a prominent figure in Italian academics and legal practice relating to law and religion. He was retained by the Italian Chamber of Deputies in connection with the lengthy negotiations between the Italian government and the Holy See that yielded the Villa Madama Accords that formally altered Italy from a Catholic confessional to a religiously impartial state. See generally infra notes 221-23 & accompanying text.

141 See, e.g., CARDIA, supra note 11, at **.

142 Lautsi & Others, at 27-28 ¶ 66.

143 Lautsi & Others, at 29 ¶ 72.

**Error! Main Document Only.** Based on a review of U.S. Establishment Clause decisions, Claudia Haupt has cogently argued that government display of visual religious symbols is no less problematic than its use of religious texts, and that finding a religious symbol constitutionally acceptable because it is “merely passive” overlooks that the government’s display of such symbols often violates the Establishment Clause by coercing viewers to violate their personal beliefs or by communicating strong government endorsement of religion. See generally Haupt, Active Symbols, supra note 6.

144 Lautsi & Others, at 30 ¶74 (emphasis added); see also id. (“In addition, the applicants did not assert that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytizing tendency, or claim that the [applicant children] had ever experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions.”).
The ECtHR reasoned that the physical context of the public school classroom in which the crucifix is displayed neutralized its ordinary Catholic meaning even in the absence of an alternate secular meaning. Its decision constitutes an implicit judgment that the purportedly open, religiously neutral, and plural environment of Italian public schools diluted the ordinary Catholic meaning it would otherwise communicate to the point that it was apparently undetectable.

This contrasts with the ECtHR’s Second Section opinion, which held that the Convention requires government “to refrain from imposing beliefs, even indirectly, in places where persons are dependent on [government] or in places where they are particularly vulnerable,” such as elementary and middle schools.145 It seems a matter of common sense that “in countries where the great majority of the population owe allegiance to one particular religion the manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practice that religion or those who adhere to another religion.”146 The record showed that “it is impossible not to notice crucifixes in the classrooms,” and that the Italian government considers them “an integral part of the school environment.”147 The Section therefore concluded that the ordinary Catholic meaning of the crucifix served to align the government with Catholicism:

The presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion. What may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religions or those who profess no religion. That risk is particularly strong among pupils belonging to religious minorities. Negative freedom of religion is not restricted to the absence of religious services or religious education. It extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism. That negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of

145 *Lautsi*, at 11 ¶ 49.
146 *Lautsi*, at 12 ¶ 50 (internal citation omitted).
147 *Lautsi*, at **¶ **.
sacrifice.\textsuperscript{148}

By contrast, the Grand Chamber gave outsized importance to the margin of appreciation. Deferring to the Italian government by use of this doctrine theoretically implies that there is a national accepted secular understanding of the crucifix rooted in Italian history and culture. As we shall see, however, there is no authentic Italian narrative in which the crucifix functions as a secular historical-cultural symbol embraced by unbelievers and non-Catholics.\textsuperscript{149}

In sum, the Grand Chamber opinion simply and implausibly denies that display of the crucifix has any meaning or effect at all, its being just a “passive” symbol.

3. The Crucifix in Italian History and Culture

Like Buono, Lautsi involves assertions about Italian history and culture that underwrite the defense of the classroom crucifix displays: The ordinary Catholic meaning of the crucifix is displaced by alternate secular meanings (as the Italian courts held) or is displaced by the secular classroom context even if no alternate secular meaning takes its place (as held by the ECtHR Grand Chamber). Accordingly, one should be able to look for confirming evidence in Italian history and culture of the proposed alternative secular meanings and effects of the crucifix (or the absence of confessional meaning and effect).

Italy has experienced wide swings and violent alterations in its forms of government and their relationship to the Papacy and the Church since just the mid-19th century. This complex history can only be sketched here. We emphasize as well that our purpose is not to make normative judgments, but rather to test whether the claimed secular meanings and effects (or absent confessional meaning and effect) cohere with Italian history and culture.

a. Papal Absolutism

From the 8th through most of the 19th century, with some interruption, a strategic swath of central Italy was ruled by the Pope as an absolute temporal monarch.\textsuperscript{150} Beyond these Papal or

\begin{footnotesize}
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\item \textsuperscript{148} Lautsi, at 12-13 ¶ 55.
\item \textsuperscript{149} See infra Parts II-B-3 & III.
\item \textsuperscript{150} See RÉMY BRAGUE, THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN
\end{itemize}
\end{footnotesize}
Pontifical States, the Pope sought to impose his will on the feudal kingdoms of Europe even in what today we would call “secular” matters, claiming the power to depose kings and emperors by his power of excommunication.

The Latin cross was a sign of the temporal and spiritual power of the Church throughout Europe. In the Papal States, the crucifix was ubiquitous in government venues and many commercial and private ones.

b. Opposition to Constitutional Government

Most of the Papal States fell to the armies of the Italian unification movement in 1861, which then proclaimed the Kingdom of Italy, a liberal, anti-clerical, constitutional monarchy governing most of the Italian peninsula. Rome and its environs remained under papal control until 1870, when the new monarchy occupied and annexed Rome and confined the Pope to the tiny enclave of Vatican City, opening a schism with the Church that lasted nearly 60 years.

The practical independence and political freedom of action afforded the Papacy by the Papal States vanished with its loss of

151 No meaningful distinction between “religious” and “secular” existed during the Middle Ages and the medieval and early modern periods; the Church and the State each exercised power in both realms. See, e.g., BRAGUE, supra note 150, at 136; Richard Schragger & Micah Schwartzmann, Against Religious Institutionalism 11 (Sept. 2012), http://ssrn.com/abstract=2152060.

152 See, e.g., BERMAN, supra note 150, at 87, 94-98; Schragger & Schwartzman, supra note 151, at 12.


154 See HEARDER, supra note 150, at 187-97, 202-03.

Rome and the rest of the States. The Church’s consequent exclusion from governing power in any part of Italy also undermined its ability to govern the practice of Catholicism in its historical, cultural, and geographical homeland.

The annexation of Rome in 1870 unified Italy politically but not socially or culturally. Outside of the Papal States, the Italian peninsula had consisted for centuries of shifting and diverse kingdoms, duchies, republics, city-states, and enclaves periodically occupied or controlled by foreign powers. In short, the people of the new Italian state had little in common other than Roman Catholicism.

Pope Pius IX, however, moved quickly to prevent Catholicism from being used to unify the peoples of Italy. Aiming at the restoration of the Papal States (especially Rome) and deeply suspicious of liberal, constitutional, and other modernist values, he issued the *non expedit*, which declared it “not expedient” for Catholics to participate in the political life of the new state by voting, holding office, participating in its functions, or otherwise recognizing its legitimacy. Enforced by the Pope’s power of

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156 See ROMANO, supra note 155, at 30; Ventura, supra note 89, ¶ 3, at 24.
157 See ROMANO, supra note 155, at 46.
159 See *e.g.*, BARZINI, supra note 150, at 352ff. (maps showing the multitude of shifting civil-political jurisdictions on the peninsula between 1500 and 1810); HEARDER, supra note 150, at 42, 86, 137, 156, 159, 195 (same between 600 and 1870).
160 Pius IX is reported to have exclaimed, “Rome is mine!,” whenever the Kingdom of Italy was mentioned in his presence. BOSWORTH, MUSSOLINI’S ITALY, supra note 155, at 258.
162 HEARDER, supra note 150, at 203; ROMANO, supra note 155, at 17; see also Ventura, supra note 89 ¶ 36, at 34 (“Pius IX rejected any compromise implying the end of the temporal power of the Holy See and the recognition of the Kingdom of Italy.”).
excommunication, the non expedit was a powerful obstacle to effective government in the early years of the monarchy, especially in the South, splitting the Kingdom into pro- and anti-Catholic factions and foreclosing any possibility that Catholicism might act as a unifying national force.

Nevertheless, the new Kingdom of Italy succeeded in introducing substantial religious liberty and in liberalizing the law of church and state, despite its formally confessional character and the determined opposition of the Church. Its policy was captured in Camillo Cavour’s phrase, “A free Church in a free State.” These were accompanied, however, by widespread suppression of Catholic orders and institutions and expropriation of their property. Speaking of the Kingdom of Italy after unification, Professor Ventura observes that “liberalism was its political source of inspiration, secularized (often anti-clerical) bourgeois society was its social reference, and policies limiting the influence of the Catholic Church and expanding the powers of the State in areas traditionally reserved to the Church were its natural inclination.”

c. Alignment with Fascism

Benito Mussolini established a Fascist dictatorship in the early 1920s, though he retained the monarchy as part of the formal constitutional apparatus. Italian Fascism was profoundly anti-clerical and had even less use for Catholicism than its predecessor liberal regime. Having come to power by a threatened coup, however, Mussolini’s government had a

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163 ROMANO, supra note 155, at 21-22; Ventura, supra note 89, ¶ 36, at 34-35.
164 See BOSWORTH, MUSSOLINI’S ITALY, supra note 155, at 15; see also BARZINI, supra note 150, at 335 (“The Kingdom was undermined by the alliance of the popular classes with the Church, the incredulity of the majority of its citizens, and the national character.”).
165 See A. Ferrari, Civil Religion in Italy, supra note 158, at 843; Pin, supra note 11, at 111 n.103; Ventura, supra note 89, ¶¶ 39, 42, at 36, 37.
166 See ROMANO, supra note 155, at 73.
167 See Ventura, supra note 89, ¶¶44, at 30.
168 Ventura, supra note 89, ¶ 36, at 34.
169 BOSWORTH, MUSSOLINI’S ITALY, supra note 155, at 180-83; HEARDER, supra note 150, at 225-29.
170 BOSWORTH, MUSSOLINI’S ITALY, supra note 155, at 176, 257, 259; Ventura, supra note 89, ¶ 47, at 39. There was, however, a significant Catholic presence in Italian Fascism from the beginning. See ROMANO, supra note 155, at 47.
171 Italy officially entered the Fascist era on October 30, 1922, when King Victor Emmanuelle III was intimidated into asking Mussolini to form a government after
legitimacy problem, which he proposed to solve by courting the support of the Church.\textsuperscript{172} The Fascist government began to rebuild the Church/State relationship that had fractured with unification and the annexation of Rome,\textsuperscript{173} including unilateral issuance of the crucifix decrees at issue in \textit{Lautsi},\textsuperscript{174} and otherwise signaled that it was open to reconciling the Italian state with the Church. The Pope, for his part, had still not fully accepted the new Italian state,\textsuperscript{175} but by then had also decided that liberalism, socialism, and communism were bigger threats than Fascism.\textsuperscript{176}

Negotiations eventually yielded the “Lateran Pacts,” a “treaty” between the Kingdom of Italy and the Church named for the Vatican palace in which they were executed. They expressly provided for recognition of the Papacy as a tiny but sovereign entity demarcated by the borders of Vatican City, and formally declared Roman Catholicism the sole state religion of Italy, with accompanying powers and privileges including tax exemption and compulsory teaching of Catholicism in public schools.\textsuperscript{177} The Church also received an enormous sum as reparations for its loss of Rome and the Papal States, as well as continuing financial support for its “social welfare” ministries. In return, the Church officially recognized the Kingdom of Italy and thus, by unmistakable implication, the legitimacy of Mussolini’s dictatorial government.\textsuperscript{178}

the latter’s “March on Rome” with 40,000 armed Fascist militia. \textsc{Bosworth}, \textit{Mussolini’s Italy}, supra note 155, at 181-82.
\textsuperscript{172} \textsc{Bosworth}, \textit{Mussolini’s Italy}, supra note 155, at 176; see \textsc{Romano}, supra note 155, at 70 (Mussolini was a “Catholic of convenience,” protecting the Church for the “value added’ it conferred on his politics in Italy and the world.”) (authors’ translation).
\textsuperscript{173} \textsc{See A. Ferrari, \textit{La libertà religiosa}, supra note 161, at 33-34; Ventura, supra note 89, ¶ 47, at 39-40.}
\textsuperscript{174} \textsc{See A. Ferrari, \textit{La libertà religiosa}, supra note 161, at 33-40; supra notes 155-64 & accompanying text.}
\textsuperscript{175} \textsc{See Romano, supra note 155, at 49.}
\textsuperscript{176} \textsc{Bosworth}, \textit{Mussolini’s Italy}, supra note 155, at 259, 374; \textsc{Romano, supra note 155, at 33, 37-38, 68; Ventura, supra note 89, ¶ 51, at 41 (“[F]ascists and most Catholics shar[ed] the same loathing not just for socialism and communism, but also for the enlightenment, democracy and liberalism, all deemed foreign ideas not belonging to the Italian Catholic tradition. The Fascist cult for order and discipline, authority and hierarchy, also did not displease a Church still obdurately opposed to pluralism, democracy, and civil liberties.”).}
\textsuperscript{177} \textsc{Hearder, supra note 150, at 230; Romano, supra note 155, at 74.}
\textsuperscript{178} \textsc{Bosworth}, \textit{Mussolini’s Italy}, supra note 155, at 257; \textsc{Hearder, supra note 150, at 230; Romano, supra note 155, at 74-75.}
Mussolini and the Church both got what they wanted. Italy’s treaty with the Church legitimized Mussolini and Fascism at home and abroad and enabled consolidation of their already considerable power. For the Church, the Lateran Pacts undid the liberal reforms protecting institutional and individual religious liberty, reconfessionalizing Italy as an exclusively Catholic state and subjecting non-Catholic religions to discriminatory burdens, while also initiating a de facto alliance with Fascism that lasted from 1929 through at least the fall of Mussolini’s first government in 1943. There is little doubt that Pope Pius XI (1922-39) welcomed Fascism as an ally in the Church’s fight against democracy, liberalism, pluralism, socialism, and communism.

179 See A. Ferrari, La libertà religiosa, supra note 161, at 29; Romano, supra note 155, at 145.
180 Bosworth, Mussolini’s Italy, supra note 155, at 238-39.
181 A. Ferrari, La libertà religiosa, supra note 161, at 29-32.
182 See, e.g., Bosworth, Mussolini’s Italy, supra note 155, at 231 (concluding that the Pacts marked “the embrace of Fascist totalitarianism by the public forms of Catholicism,” and characterizing the church’s relation to the Fascist regime as a kind of “wedlock” or “cohabitation”); id. at 238 (describing Mussolini’s brother’s “highest delight” at the thought of an Italian people who could now reconcile their everyday inspiration from Catholicism with their nation state. [The papal paper, L’Osservatore Romano, applauded a pact whereby ‘Italy has been given back to God and god to Italy.’ The Jesuit journal, Civiltà Cattolica, in March 1929 agreed that Fascism incarnated ‘the restoration of a Christian society.’”); id. at 257 (Pius XI disclosing to Mussolini that he prayed morning and night to the latter’s guardian angel); Romano, supra note 155, at 75 (“And perhaps what was needed was a man like the one Providence sent our way; a man who without the preoccupations of liberal-minded men for whom all those laws, may we say, and all those regulations were as much fetishes and, precisely as fetishes, the more intangible and venerated, the more ugly and deformed.”)(quoting Pius XI’s description of Mussolini) (authors’ translation); see also Bosworth, Mussolini’s Italy, supra note 155, at 238 (noting that for a time in Pius “favoured something which he called ‘Catholic totalitarianism’”).

The post-Lateran era is replete with examples of endorsements of and expressions of sympathy for Fascism by lower-ranking Catholic clerics. Romano, supra note 155, at 72; e.g., Bosworth, Mussolini’s Italy, supra note 155, at 239, 259, 489; Romano, supra note 155, at 84-85.
183 Bosworth, Mussolini’s Italy, supra note 155, at 258.

Mussolini and Pius XI accepted that the church and state shared enough in their views of the social and gender order at home and in regard to Malta, the USSR and a number of other issues abroad for accommodation to remain the best policy. Fascism, the Pope said, stood for “order, authority, and discipline”; none of them contrary to Catholic way of thinking.
The relationship between Fascism and the Church deepened with the election of Pius XI’s successor, Pius XII (1939-58). Pius XII not only shared his predecessor’s view of Fascism as a bulwark against contemporary political and social movements opposed by the Church,\(^{184}\) he was more cautious about criticizing the regime and less reticent about cooperating with it.\(^{185}\) Pius XII’s family, additionally, had close ties to the Bank of Rome, which was a crucial source of Fascist financing.\(^{186}\)

As we discuss in more detail below,\(^{187}\) Pius XII is a figure of great controversy. Professor Bosworth’s measured assessment of his attitudes observes that there has been an absurd and lengthy debate whether or not Pius XII was “Hitler’s pope,” a warrior who de facto served the German side of the conflict. Of course he did not. The Church authorities judged Nazism before and after 1939 an ungodly movement. It is fairer, however, to see Pius and the hierarchy over whom he presided as fellow travelers or

\(^{184}\) See Bosworth, Mussolini’s Italy, supra note 155, at 348.

\(^{185}\) See Bosworth, Mussolini’s Italy, supra note 155, at 237, 348.

\(^{186}\) See infra Part II-B-3-d.

\(^{187}\) See supra note 155, at 237, 348.
outright sympathizers with Mussolini and Fascism. In what they perceived as this wicked world, the Vatican liked most of what they saw in Fascism and . . . preferred it probably to liberal democracy and certainly to socialism and communism. All in all, the Church’s wartime stance towards the dictatorship was not very different from that prevailing among [Italian] businessmen and landowners, who thought that Fascism, despite its eccentricities, was fine for them until it became obvious that it was going to lose its battles on every front.188

d. Fascist-Era Anti-Semitism

It is not true, as Italians sometimes suggest,189 that anti-Semitism was largely unknown in pre-war Italy.190 Hostility to Jews is deeply rooted in Italian and Catholic history (as in other religions and elsewhere in the West).191 Jews in the Papal States were subjected to the Inquisition, and humiliations and disabilities imposed on them as late as the 19th century bore a disquieting resemblance to those instituted by the Nazis in advance of the Holocaust.192 For centuries the Church had taught that the burdens borne by Jews in Europe were the natural and deserved consequence of their having rejected the true Savior and his New Testament.193

By the pre-war era, Catholic teaching distinguished acceptable “discrimination” against Jews from their unacceptable “persecution.” The Church condemned anti-Jewish violence, but generally supported discriminatory legislation that sought to restrict Jewish influence on Catholic society, at least in Italy.194 Having

188 BOSWORTH, MUSSOLINI’S ITALY, supra note 155, at 490.
189 See, e.g., BARZINI, supra note 150, at 315.
190 See BOSWORTH, MUSSOLINI’S ITALY, supra note 155, at 417; ROMANO, supra note 155, at 87.
191 See, e.g., VILADESCU, BEAUTY OF THE CROSS, supra note 53, at 108, 167 (detailing anti-Semitism in Catholic theology and art during the Middle Ages); VILADESCU, TRIUMPH OF THE CROSS, supra note 108, at 97, 99, 146-47, 150 (same in Catholic and Protestant theology, art, and theatre during the late medieval and early modern eras).
192 For example, in 1516 Roman Jews were ordered by the Papacy to wear a blue hat or scarf marking them as nonChristians, and were confined to a walled ghetto with guarded gates. These restrictions were enforced until Rome was annexed Rome in 1870. See, e.g., CORRADO AUGIAS, THE SECRETS OF ROME 352-56, 359-62 (New York: Rizzoli, A. Lawrence Jenkins trans. 2007).
193 See, e.g., ROMANO, supra note 155, at 87; VENTRESCA, supra note 185, at 9.
194 ROMANO, supra note 155, at 87; SUSAN ZUCOTTI, UNDER HIS VERY
rejected the Christian revelation, Jews were viewed as a continuing threat to properly constituted Christian societies, and thus could be treated as second-class citizens. Pre-war popes also reflexively associated Jews with communism, liberalism, modernism, socialism, and other enemies of the late 19th and early 20th century Church.

Catholic teaching, however, understood Judaism as a religion and a culture, not as a supposed race. The Church viewed Jews who converted to Catholicism as no longer Jewish, and it consistently protested Fascist application of restrictive Jewish racial laws against Catholic converts. Fascist-era efforts to intervene on behalf of all Jews, however, were rare. For example, the Church never generally condemned Mussolini’s 1938 anti-Jewish racial laws, except as they affected Jewish converts to Catholicism and Jews married to Catholics. Discrimination against observant Jews resonated with the Church’s belief that the practice of Judaism subverted the Christian message and justified measures to reduce Jewish influence.

Whether the Fascist-era Popes—Pius XI and especially Pius XII—were unacceptably passive in the face of the Holocaust is a


195 ROMANO, supra note 155, at 86-87

196 See A. FERRARI, LA LIBERTÀ RELIGIOSA, supra note 161, at 35; BOSWORTH, MUSSOLINI’S ITALY, supra note 155, at 258, 262, 374, 415; ROMANO, supra note 155, 86-87. Because unification eliminated ghettoization of Italian Jews and introduced religious equality, papal anti-Semitism often overlapped with the papal hostility to the Kingdom of Italy. See VENTRESCA, supra note 185, at 176; ZUCOTTI, supra note 194, at 10, 15.

197 ZUCOTTI, supra note 194, at 15, 22.

198 RONALD J. RYCHLAK, RIGHTEOUS GENTILES: HOW PIUS XII AND THE CATHOLIC CHURCH SAVED HALF A MILLION JEWS FROM THE NAZIS 86-87 (Dallas, Tex.: Spence, 2005); ZUCOTTI, supra note 194, at 50-51.

199 See infra note 203 & accompanying text.

200 See Ventura, supra note 89, ¶ 61, at 44. In fairness, the 1938 laws provoked little popular opposition among lay Italians. BOSWORTH, MUSSOLINI’S ITALY, supra note 155, at 42.

201 See ZUCOTTI, supra note 194, at [33].

The terrible truth is that [Pius XI and Pius XII] were not opposed to moderate measures separating Jews from Christian society. That attitude continued throughout the war and complicated every decision. With each week and month that passed it became more awkward and difficult to oppose measures that should have been denounced from the onset.

Id.
matter of enormous factual and ethical controversy. Their defenders argue that they acted courageously, doing the maximum that could have been done given the dire circumstances of the Church.\footnote{Professor Rychlak argues that Pius XI and Pius XII both issued encyclicals and statements criticizing Fascism and Nazism and otherwise condemned anti-Semitism. See, e.g., RYCHLAK, supra note 198, at 23-41 passim, 91-93, 97, 112-19, 124-28, 155; accord VENTRESCA, supra note 185, at 174 (observing that Pius XII’s 1942 Christmas address “alluded in general terms to those who ‘solely because of their nation or their race, have been condemned to death or progressive extinction’”). Once the war started, the Vatican as a sovereign country was obliged to maintain its neutrality by both international law and the threat of invasion, with the attendant threat of arrest of the Pope himself. See ROMANO, supra note 155, at 91-92; RYCHLAK, supra note 198, at 17-18, 123-24, 133-36; VENTRESCA, supra note 185, at 166-67; ZUCOTTI, supra note 194, at 206-07, 220, 315-16. Short of actual invasion, Fascists or Nazis could have easily laid siege to the Vatican, cutting off food, fuel, power, and most contact with the outside world. Cf. ROMANO, supra note 155, at 88 (describing the threatening and isolated circumstances of Pius XII during the Fascist era, especially after the German occupation in 1943).} Papal detractors, on the other hand, contend that defenses of the Fascist-era Popes are myths built on repetition and exaggeration encouraged by the Church.\footnote{Pius XI’s encyclicals, for example, did not condemn Fascism or Nazism as such or for their persecution of Jews, but only for their offenses against the Church. See LONG, supra note 183, at 213; VENTRESCA, supra note 185, at 117, 126-27, 177. As we indicated above, neither pope was fundamentally opposed to discriminatory measures designed to safeguard Christian society against disproportionate Jewish influence, see supra notes 194-96 & accompanying text, and they and other Church leaders welcomed Fascism as an ally against the Church’s many 20th century enemies, see supra notes 183-88 & accompanying text. No written evidence or first-hand account has ever emerged of a general directive by Pius XII that Vatican officials and Catholic orders and clerics assist Jewish fugitives during the Fascist era, even in Italy or strongly Catholic countries where the Church enjoyed grassroots influence.. See, e.g., VENTRESCA, supra}
We cannot resolve these controversies here. However, whatever Pius XI and XII, the Vatican, and the Church may or may not, see, e.g., ZUCOTTI, supra note 194, at 201 (noting that of the 1,272 Catholic orders and institutions and additional “hundreds of parish churches” operating in Rome during the German occupation, only 155 are claimed by the Vatican to have sheltered Jews); see also VENTRESCA, supra note 185, at 230 (same regarding 180 Catholic institutions). Many Italian clerics embraced even the extreme measures imposed during the German occupation, ROMANO, supra note 155, at 93-95; ZUCOTTI, supra note 194, at 258, 268-73, and the Vatican itself was conflicted about its own sheltering of Jews and the appropriateness of such aid by other Italian clerics, see ZUCOTTI, supra note 194, at 45-46, 206-10, 192, 195, 219-31, 256-58, 281-85. Interventions by Pius XII and other Vatican officials, it is argued, were cautious, vague, polite, and few, usually put forward on behalf of Jewish converts to Catholicism and Jews married to Catholics, and rarely decisive in the actual rescue of Jews. See, e.g., VENTRESCA, supra note 185, at 147, 177-80, 189; ZUCOTTI, supra note 194, at 3, 50-51, 64-69, 78, 101-46 passim, 218-19, 272-73, 292. Professor Zucotti praises the Vatican for eventual efforts late in the war on behalf of Jews facing deportation from Italian occupation zones in Croatia and southeastern France, and from Hungary, ZUCOTTI, supra note 194, at 125-26, 129-31, 293-94.

Finally, however one presents the numbers, by the end of the war Italian Jews had been reduced to substantially less than half of their prewar population by immigration, “defensive” conversion to Catholicism, and deportation to death camps. See LONG, supra note 183, at 283.

204 Professor Ventura offers this nuanced assessment of Papal and Church conduct with respect to Italian Jews during the war:

From 1938 to 1945, Italian racial laws under the alliance between Italian fascism and German Nazis exerted a heavy toll on Italian Jewish communities, in particular in Rome. The debate is still open on the responsibilities of individual Catholics and of the Catholic Church as a whole. While experts have exposed the heavy involvement of Italian Catholics in the anti-Jewish persecution, the dominant narrative in the media is that the diplomatic wariness of the Holy See was inevitable, and that eventually Catholic institutions proved friendly to the Jewish people.

Ventura, supra note 89, ¶ 19, at 28; see also id., ¶ 61, at 44 (“Confronted with anti-Semitism leading to deportations to concentration camps and to the holocaust, Catholics split: some of them did their best to protect threatened Jewish people, but many others concurred in the persecutions through omission or connivance.”).
not have done for Jews during the Fascist era, it cannot be gainsaid that their greatest focus was on protecting Catholic interests—aligning the Church with Fascist Italy to obtain recognition of its temporal sovereignty, reconfessionalize Italy, and obtain reparations for loss of the Papal States; negotiating a concordat with the Nazi regime to protect the Church’s members and interests in Germany; tailoring its pronouncements and actions during the war to safeguard Vatican neutrality and forestall occupation or siege; and intervening mostly on behalf of Jewish converts and Jews in mixed marriages rather than for Jews in general.\(^{205}\) When these interests conflicted with the protection of Jews, even Italian Jews, the popes, the Vatican, and the Church usually favored their own interests over those of the Jews, though some Italian and Vatican clerics individually (and heroically) chose differently.\(^{206}\) This prioritization of the Church’s interests and constituencies when confronted with Fascism and Nazism undercuts the claim that the crucifix as quintessential sign of Catholicism is sensibly viewed as a mere secular symbol of Italian history and culture or the constitutional protection of all Italians.\(^{207}\)

\(\text{e. Catholic Confessional Republic}\)

Post-war Italy chose liberal democracy in a 1946

\(^{205}\) See Zucotti, supra note 194, at 323 (describing Vatican officials’ “narrow focus on their own Catholic constituency” during the Fascist era, and their view that the Vatican was obliged to “concentrate its resources and energies on the Catholic faithful, so threatened by the modern world”); Ventesca, supra note 185, at 177, 178 (Pius XII “shared the conventional view that Jewish questions were not the primary concern of the church. [As secretary of state], the future Pius XII did not believe he had the authority, or the responsibility, to defend the civil rights of German Jews as vigorously as he defended German Catholics.”); Ventura, supra note 89, ¶ 61, at 44 n.86 (noting historian Giovanni Miccoli’s conclusion that during the Fascist era neither the Catholic Church nor Christian churches generally viewed protecting Jews, even from deportation and extermination, as a pressing concern).

\(^{206}\) This is one of Zucotti’s primary claims. See, e.g., Zucotti, supra note 194, at 48-54, 69, 87-89, 189-92, 199-204, 218-20, 235-37, 244-45, 252-53, 257-61; accord Ventesca, supra note 185, at 78-86, 92, 99-103, 146-47, 189-92, 221.

\(^{207}\) See, e.g., Zucotti, supra note 194, at 69 (Until the papacy of John XXIII, “it was not considered self-evident that the Catholic Church should champion the rights of those outside its fold.”) (internal quotation marks deleted); see also Calo, supra note 161, at 3-4 (noting Church’s transformation since mid-19th century from staunch opponent to powerful defender of liberal-democratic rights and values).
referendum, but Pius XII and the Church proved to be insurmountable obstacles to implementation of Italy’s liberal-democratic Constitution. Jews, Protestants, and every other non-Catholic religion, along with a secular left of social democrats, socialists, and communists, endorsed a nonconfessional state with individual and institutional religious equality, as was indeed provided by the text of the proposed Constitution. This would have necessitated repudiation or substantial amendment of the Fascist-era Lateran Pacts, which privileged the Church and severely constrained the religious liberty of non-Catholic individuals and institutions.

Non-Catholic endorsement of religious equality drew a rebuke from Pius XII, who publically accused Jews and Protestants of conspiring with leftist unbelievers to deprive the Church of its rightful, preeminent place in Italy, and invoked the traditional teaching that constitutional protection was appropriate only for religious truth, meaning the Church and its teaching.

Pius thus insisted on constitutionalization of the Pacts without alteration, despite their flat contradiction of religious liberty and equality guarantees in the proposed Constitution. As Professor Alessandro Ferrari has observed, the Church again, as it did in first negotiating the Pacts, placed protection of its own confessional interests over general provisions that would have equally protected the religious liberty of all.

The secular left eventually compromised by agreeing to include the Pacts in the Constitution, on the understanding that the Church and the new Italian republic would renegotiate their

208 Ventura, supra note 89, ¶ 64, at 45.
209 See Pin, supra note 11, at 114. Ventura, supra note 89, ¶ 65, at 45.
210 E.g., A. Ferrari, La libertà religiosa, supra note 161 at 44; Long, supra note 183, at 236, 288-89, 293-98.
212 Long, supra note 183, at 215-16; 236; see also Ventura, supra note 89, ¶ 66, at 46.

[The] Constitution [of 1948] was not the Constitution of a Catholic State. This could not be the Catholic State of the Ancien Regime tradition, nor of the age of liberalism; nor of course could it be a Catholic State in the Fascist sense. Catholic Italy was still there, socially and politically, and to some extent legally, but Italy was now framed with a Constitution based on pluralism, freedom, and equality.

Id.

211 A. Ferrari, Civil Religion in Italy, supra note 158, at 848.
provisions to bring them into harmony with the Constitution.  

This not only left the Church entrenched in its traditional position of power and privilege, it also left intact the odious Fascist-era requirement that non-Catholic religions obtain express state permission before they could legally operate in Italy as religions.

During what has become known as the “First Republic,” the Church strongly influenced Italian politics and government through its ally, the Christian Democratic Party or “DC.” Although not a confessional party, the DC was subject to Papal influence, as evidenced by its formation of early coalition governments with post-war monarchists and fascists to avoid sharing power with the Church’s enemies on the secular left, its post-war policy of channeling national tax dollars to the reconstruction of Catholic cathedrals destroyed in the war, but not synagogues or Protestant churches, and its determined opposition to liberal reforms opposed by the Church, such as civil divorce and abortion (legalized over papal and DC opposition only in the early 1970s and late 1980s, respectively).

The renegotiation of the Lateran Pacts was not concluded until the Villa Madama Accords in 1984—almost 40 years after ratification of the liberal-democratic Constitution and 20 years after the Second Vatican Council belatedly endorsed freedom of religious belief and worship as fundamental personal and group rights.

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214 A. FERRARI, LA LIBERTÀ RELIGIOSA, supra note 161, at 44, 45; LONG, supra note 183, at 318-19; see Ventura, supra note 89, ¶ 66, at 46.
215 A. FERRARI, LA LIBERTÀ RELIGIOSA, supra note 161, at 57.
216 A. FERRARI, LA LIBERTÀ RELIGIOSA, supra note 161, at 54; LONG, supra note 183, at 281-82; Pin, supra note 11, at 119.
217 A. FERRARI, LA LIBERTÀ RELIGIOSA, supra note 161, at 44; A. Ferrari, supra note 158, at 845; Pin, supra note 11, at 137; Ventura, supra note 89, ¶ 67, at 46.
218 VENTRESCA, supra note 185, at 238, 245-49; see FRANCESCO BARBAGALLO, L’ITALIA REPUBBLICANA 15 (Rome: Carocci, 2009) (observing that even in the late 1940s the Church remained aligned with the “authoritarianism of the right and struggled to adjust to political democracy”) (authors’ translation); LONG, supra note 158, at 224 (observing that the Church was fervently condemning liberalism as late as 1946); VENTRESCA, supra note 185, at 243-45 (recounting Pius’s sympathy for Italian monarchists and his hostility to the left, including authorization of excommunication for any Catholic member of the Italian Communist Party).

The DC often resisted papal overtures, making clear that it was a “center-left” party “open to the right.” See, e.g., VENTRESCA, supra note 185, at 238, 245.
219 LONG, supra note 183, at 293.
220 A. FERRARI, LA LIBERTÀ RELIGIOSA, supra note 161, at 59, 60-61.
221 Ventura, supra note 89, ¶ 69, at 48.
The Accords eliminated the Church’s status as the state church of Italy, along with some of its related privileges, though they permit Catholic teaching in public schools for students who desire it, and expressly note that Catholicism is part of the “historical legacy” of the Italian people. Only after Villa Madama did Italy ratify long-negotiated agreements that legally recognized Jewish and Protestant communities. Similar agreements with less familiar groups such as the Jehovah’s Witnesses and The Church of Jesus Christ of Latter-day Saints had to await the fall of the DC in 1992.

f. Universal Protector of Human Rights

After the deconfessionalization of Italy and the demise of the DC, the Church struggled to find a new political identity. Building on the postwar myth that the Church had saved Italy from totalitarian disasters on the right and the left, on Vatican II’s recognition of universal religious liberty, and finally on Villa Madama’s express recognition of Catholicism as an Italian historical-cultural legacy, the Church reconceptualized itself as a universal “human-dignity umbrella” which sheltered all people in the exercise of the freedom of religion and belief, regardless of the character of that belief or, indeed, unbelief. This enabled a presentation of the Church as the guardian and protector of human rights for all Italians and, indeed, all of humankind. This reasoning is evident in the Italian court opinions in Lautsi which contend that the crucifix is a secular signifier of liberal-democratic values and the historic relationship of the Italian people with Christianity.
Within the last two centuries, therefore, the Church whose beliefs are ordinarily signified by the crucifix has

(a) Ruled central Italy as an absolute monarch;

(b) Bitterly fought the unification and modernization of Italy under a liberal constitutional monarchy;

(c) Successfully overturned religious egalitarian reforms and restored Catholicism as the privileged state religion by aligning itself with Fascism through the Lateran Pacts;

(d) Officially navigated the shoals of the Fascist era by prioritizing Catholic interests over those of Italian and other European Jews, though some of its clerics individually chose to protect and rescue Jews from Fascist and Nazi threats;

(e) Blocked the establishment of a religiously impartial liberal-democratic state for almost 40 years after the fall of Fascism, contrary to express constitutional guarantees and the unanimous opposition of non-Catholics and the secular left; and finally,

(f) Only in the last generation has fashioned an identity as protector of religious liberty and other human rights for all Italians and all people.

It seems unlikely that Church teachings and practices of barely 30 years duration have displaced centuries in which the Church subordinated unbelievers and non-Catholics to its own priorities and interests. But if the relatively brief periods in which the Church has recognized personal religious freedom (about a half century) and renounced its claims to preeminent status as the state

229 Cf. Beamon, supra note 10, at 96 (noting the dubious historical assumption that all Italians—not just Italian Catholics—have experienced Catholicism as an unqualified good that has not infringed religious or other freedoms); A. Ferrari, Civil Religion in Italy, supra note 158, at 841 (suggesting that rather than a unifying civil religion Italy has had “a church-religion, aiming to establish a ‘protected democracy’ . . . subordinated to the objectives and non-negotiable values of a single church”).
religion of Italy (about a quarter century) have indeed served to displace the ordinary Catholic meaning of the crucifix, one would find confirmation in contemporary Italian culture. One would see non-Catholic and unbelieving Italians, as well as human rights and other secular activist groups, using the crucifix as a secular sign of freedom of religion, laicita’s guarantee of state religious even-handedness, and secular human rights for all humankind.

Unsurprisingly, non-Catholic and unbelieving use of the crucifix is unknown in contemporary Italian culture. Neither Jews nor Protestants nor Muslims, nor secular human rights organizations, nor anyone other than the Church and its practicing Italian members uses the crucifix as a secular symbol. Even some practicing Catholics are skeptical.230 Italian cultural usage—or, rather, lack thereof—confirms that the crucifix has not acquired any secular meaning that is independent of its ordinary Catholic confessional meaning.

III. CROSS, CRUCIFIX, AND CULTURATION

The decisions in Buono and Lautsi each rest on two premises. First, they expressly acknowledge that the cross and the crucifix each ordinarily have confessional meaning.231 And second, they implicitly assume that the State’s adopting or endorsing this religious or confessional meaning would be unconstitutional, as is evident from Buono’s assertion of an extraordinary secular meaning for the cross when displayed at veterans memorials,232 the Italian courts’ assertion of extraordinary meanings for the crucifix when displayed in public school classrooms,233 and Lautsi’s extraordinary assertion that the crucifix has no confessional meaning or effect at all in an Italian public school.234 These premises are evident in each decision’s assertion of an extraordinary meaning for each symbol: honor and memory of all military dead, in case of Buono and the cross, and the Christian-Catholic roots of universal human rights and Italian culture (to which the ECtHR deferred under the margin of appreciation doctrine), in case of Lautsi and the crucifix. These alternate secular meanings are not obvious from their ordinary confessional counterparts, and seem to

230 See, e.g., A. Ferrari, Civil Religion in Italy, supra note 158, at 841.
231 See supra Parts II-A-1 & -B-1.
233 See supra Parts II-B-2-a & -b.
234 See supra Part II-B-2-c.
be at odds with them since they subvert or deny the symbol’s theological significance. Of course, if the confessional meanings were not constitutionally problematic, there would have been no need to substitute the less obvious secular meanings adopted by the USSCt and the Italian courts, or to deny confessional meaning altogether, as did the ECtHR.

Buono and Lautsi defend the alternate secular meanings for the cross and the crucifix in two ways. First, they de-emphasize the ordinary religious or confessional meaning of the symbols; because such meanings undermine the plausibility of any alternate secular meaning, a court that intends to uphold the symbol gains nothing by emphasizing its confessional content. And second, they erase the effect of the cross and the crucifix. Buono does this by suggesting that there is no Establishment Clause harm—that is, no legally cognizable “endorsement” effect—if the symbol conveys a secular message.235 Lautsi accomplishes the same thing more directly, emphasizing the crucifix’s “passivity” and the lack of any evidence that non-Catholic children were treated badly or differently in Italian classrooms where the crucifix is displayed.236

But merely positing a possible secular meaning for a confessional symbol is hardly decisive of the constitutional question: The government can nearly always articulate a possible secular meaning for the ordinarily confessional symbols that it uses. What matters is not the possibility of an alternate secular meaning, but its actual existence—not whether a secular meaning is imaginable, but whether it is present and recognizable in the history and culture of the society in which it is displayed.237 The meaning of a sign is in principle indeterminate, but it does not follow, as judges sometimes suppose, 238 that a sign can mean anything.239 The meaning of a sign is specified by its overall context—not just the immediate context in which it is displayed (a veterans memorial, a public school classroom),240 but also the history and culture of the place where it is displayed (the United States, Italy).241

As we have seen, the purported secular meanings asserted

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236 See supra Part II-B-2-c.
237 See supra Part I-C.
239 See supra text accompanying notes 43-45
241 See supra Parts II-A-3 & -B-3.
for the cross and the crucifix are culturally inauthentic. The cultural histories to which the courts appeal in their respective efforts to prove these secular meanings obscure a predominant confessional meaning, and one cannot find unbelievers or minority believers in either the United States or Italy who themselves use these symbols in a manner that would confirm the secular meanings that courts have projected onto them. 242

The cross may be a commonly displayed cultural symbol in the U.S., and the crucifix such a symbol in Italy, but it does not follow that they are secular symbols. Rather, they are remnants of a once-predominant Christian culture (Protestant in the U.S., Catholic in Italy) that no longer exists as it once did. As sociological data makes clear, both cross and crucifix have become “deculturated,” alienated from the culture where they once enjoyed a natural and privileged place. As Professor Beaman has pointed out, deculturation explains the ironic self-presentation of these traditionally dominant religions as embattled cultural minorities. 243

In short, neither cross nor crucifix is any longer culturally at home as a confessional symbol. The United States is no longer a predominantly Protestant culture, and is fading as a seriously Christian one. For example, the newly elected president of the Southern Baptist Convention’s Ethics and Religious Liberty Commission, Russell Moore, has declared that evangelicals “are no longer the moral majority,” but a “prophetic minority.” 244 Self-declared Protestants now constitute a bare majority of U.S. adults, 245 and Christianity (especially evangelical Protestantism) has ceased to be a major American cultural influence. 246 NonChristians, unaffiliated believers, and unbelievers now

242 See supra Parts II-A-3 & B-3.
243 Beaman, supra note 10, at 90.
244 Naomi Schaefer Riley, Russell Moore: From Moral Majority to “Prophetic Minority”, WALL ST. J., Aug. 16, 2013; see also id. (“Mr. Moore is among the leaders of a new generation who think that evangelicals need to recognize that their values no longer define mainstream American culture the way they did 50 or even 20 years ago,” and who believe “that Christians must return to the days when they were a moral example and vanguard—defenders of belief in a larger unbelieving culture.”).
245 PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY, REPORT 1 (RELIGIOUS AFFILIATION) - SUMMARY OF KEY FINDINGS 5 (June 2008) [hereinafter RELIGIOUS AFFILIATION SURVEY FINDINGS], http://religions.pewforum.org/pdf/report-religious-landscape-study-key-findings.pdf. For the full report, see http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.
246 See HUNTER, supra note 38, at 79-92.
constitute over a fifth of the population,\textsuperscript{247} and have more than doubled in the just the last two decades. The trend is starker among young people: Only four in ten young adults ages 18 to 29 self-identify as Protestant, and one in four is either an unbeliever or unaffiliated with a religion.\textsuperscript{248} Perhaps most telling, large majorities of Americans do not believe that their religion is the only way to heaven, or that there is significant conflict between belief and contemporary secular society.\textsuperscript{249}

Though Italy is among the more religious of the EU countries,\textsuperscript{250} its culture is also secularizing, as evidenced by large and growing gaps between Italian practice and Catholic teachings. Rates of Catholic baptisms, first communion, confirmation, and marriages have shown substantial declines in just the last 15 years.\textsuperscript{251} These data on so-called Catholic “rites of passage” are far more telling than more frequent cited figures about attendance at mass (which, in any event, has also dropped precipitously over the last generation). Another clear indicator is the radically new understandings of “family” in Italian society: The data point to

the emergence of a new family model in Italy, which is completely opposite to the one promoted by the Catholic Church. There are increasing numbers of couples without children, single parents, and divorced parents who remarry or choose to cohabit. Family formation is changing and

\textsuperscript{247} Religious Affiliation Survey Findings, supra note 245, at 5 (summing percentages for “Other Religions” (4.7%) & “Unaffiliated” (16.1%)).
\textsuperscript{248} Religious Affiliation Survey Findings, supra note 245, at 7.
\textsuperscript{251} Silvia Sansonetti, Social Indicators of Secularization in Italy, in Secularism, supra note 250, at 137, 137-39 (Hartford, Conn.: Institute for the Study of Secularism in Society and Culture, Barry A. Kosmin & Ariela Keysar eds. 2009).
following the pattern of other advanced Western countries.

An overwhelming majority of Italian Catholics opposes Church intervention in Italian politics, and the result of most referenda relating to practices opposed by the Church has been rejection of the Catholic position.

In short, “a process of secularization is taking place in Italy that is slow, but continuous. The process of transformation is oriented towards a more flexible attitude in applying the Catholic precepts and sometimes a growing disinterest towards these precepts by the Italian people.”

Both the United States and Italy are confronted with increasing secularization and growing demands from believers, unbelievers, faith communities, and other groups that government take into account specific aspects of their belief or unbelief when it acts—especially when it adopts or displays symbols. A paradox is evident: On the one hand, there is a growing national “identitarian” narrative, focused on a presupposed confessional identity or affiliation of the people with “Judeo-Christianity” in the U.S. and Roman Catholicism in Italy, while on the other, statistical data confirm the steady secularizing of individual behavior and the widening gulf between these these purported identifications and popular culture. The triumphant “return of religion” has not in reality been confirmed by empirical data on religious practice and belief.

As Professor Roy has shown, “religion” is now less a faith than a cultural phenomenon. We see this in both Buono and Lautsi. The confessional elements of both cross and crucifix are losing their cultural salience—it can no longer be assumed, in other words, that the confessional referent of each sign is widely accepted and approved by Americans and Italians. As a consequence, the government could not defend its use of cross or crucifix on the basis of its confessional meaning. Defenses of each symbol sought instead to “re-acculturate” it, by turning it into a secular symbol which is at home in the secularizing cultures of the U.S. and Italy.

252 S. Sansonetti, supra note 251, at 140. See also R. Cartocci, Geografia dell’Italia Cattolica (Bologna, Italy: Il Mulino, 2011).
253 Kosmin, supra note 250, at 35.
254 See Sansonetti, supra note 251, at 140.
255 Sansonetti, supra note 251, at 149.
256 See Part I-C.
The importance of careful cultural analysis is well illustrated by Professor Weiler’s argument before the E CtHR’s Grand Chamber on behalf of eight intervening countries in Lautsi & Others.257 Widely credited with persuading the Grand Chamber to overturn the prior Second Section decision invalidating classroom display of the crucifix.258 Like the Italian lower courts, Weiler spent most of his argument talking about religious symbols other than the crucifix. He noted the wide range of practices with respect to government use of religious language and symbols in Europe—established churches, constitutional invocations of the Trinity, crosses on national flags—the last especially powerful because national flags are simultaneously object and source of nationhood.259 He argued for a kind of group pluralism—a plurality of responses among nations, thus inviting the Court’s application of the margin of appreciation doctrine,260 and ignoring the powerful constitutional convergence trends documented by Professors Annichino, Ferrari, and Haupt, among others.261

Within the “non-làïque” states he represented (which notably did not include a single predominantly Protestant nation), Weiler argued, “the continued entanglement of religious symbols in its public square and by the State is accepted by the secular population as a part of national identity and as an act of tolerance towards their co-nationals,” this latter presumably a reference to those practicing the historically dominant Roman Catholicism or Christian Orthodoxy in such countries.262 There is no doubt that crosses on national flags have authentic—and by now close to exclusive—nonconfessional, secular meaning. Unbelieving and non-Christian Norwegians and Finns and English who trek to the World Cup or the Olympics seem not to have any qualms about waving the symbol of their country—cross and all—in support of national teams and athletes. Like the Christmas tree, crosses on

259 Weiler, supra note 257, at ¶ 12, 13
260 Weiler, supra note 257, at ¶ 15.
261 See, e.g., Annichino, supra note 6, at 182-83; Silvio Ferrari, The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law, in THE LAUTSI PAPERS, supra note 11, at 14, 29 [hereinafter S. Ferrari]; Haupt, Transnational Establishment, supra note 2.
262 Weiler, supra note 257, at ¶ 15.
national flags are symbols whose ordinary confessional meaning has long since been displaced by an alternate secular one, easily confirmed by this ubiquitous use by unbelievers and non-Christians.

But has the crucifix achieved this status? Weiler didn’t say, and offered no evidence that it has. He argued that the “message of tolerance towards the Other” properly written into the European Convention “should not be translated into a message of intolerance towards one’s own identity,” suggesting that removing crucifixes from public school classrooms would have precisely that effect for Italians. But this begged the question before the court: Of whose identity did he speak? Which Italians? Baptist, Buddhist, Jehovah’s Witness, Jewish, Mormon, Muslim, and other non-Catholic and unbelieving Italians, of whom there are ever increasing numbers? Unless there is an alternate nonconfessional meaning for the crucifix that is authentically present and genuinely recognized in Italian culture, the “lost identity” of which Weiler so passionately spoke is not that of the Italian people, but only that of Italian Catholics and their Church.

In a narrow sense Weiler’s efforts in Lautsi and similar arguments in Buono were successful: The memorial cross was allowed to stay (for the present) in Buono, as was the classroom crucifix in Lautsi, so “religion” lives on for another day in the public square. But there is no actual U.S. culture, no real society, in which the cross possesses the secular meanings attributed to cross by the USSCt. Nor is there any actual Italian culture, or real society, in which classroom display of the crucifix reflects the open and welcoming nonconfessional “tradition” of which the Italian courts spoke and to which the Grand Chamber deferred under the margin of appreciation.

263 Weiler, supra note 257, at ¶ 16 (emphasis added).
264 Weiler invoked the time-worn argument that absence of government-displayed symbols equates to government endorsement of unbelief, using a homely analogy of “Marco,” whose atheist/agnostic family intentionally lacks a crucifix, and “Leonardo,” whose believing Catholic family cannot imagine their home without one. Weiler thus encouraged the ECHR to conclude that Marco and Leonardo would both understand their public school to have endorsed atheism if it lacked crucifix. Weiler, supra note 257, at ¶¶ 25-27

The Italian state, of course, is not a private actor whose influence is confined to a single household like Weiler’s fictional families; the Italian state acts for all its citizens, as must all liberal democratic states. See S. Ferrari, supra note 261, at 29; Haupt, Transnational Nonestablishment, supra note 2, at 1028-29. Weiler, again, does not explain how a state’s use of a confessional symbol that lacks an alternate, nonconfessional meaning in Italian history and culture can represent dissident Catholic, non-Catholic, and unbelieving Italians.
Similar arguments can be made against the position taken by Professor Cardia, who served as a consultant to the Italian government in preparing the Italian government’s submission to the Grand Chamber. 265 Like the Italian courts, Cardia dubiously concludes (commenting on the Second Section decision), “[T]he symbol of the cross”—as in the Italian courts the crucifix itself seems to disappear—“does not belong to one church or another: It belongs to Christianity, to the faith of each of us, even to the heart of one who, lacking other faiths, recognizes its universal meaning.”266

A pretense of “reacculturation” is at work here, a shallow trivialization and stereotyping of formerly powerful religious narratives symbolized by the cross and the crucifix, effected by attributing nonconfessional meaning to obviously confessional symbols and embedding that meaning in a nonexistent, imaginary “culture” so as to create the illusion of acculturation.

Part of the impulse to this “synthetic” re-acculturation is understandably strategic: By attributing secular meaning to religious symbols, confessional groups and their advocates show courts how to defend government use of these symbols, and thus also to preserve an apparent union of religion and national culture. 267 These efforts also betray a kind of cultural schizophrenia: Many believers—and especially the leaders of conservative Christian confessions—rail against the secularization of culture and its subversion of belief, yet they insist that their symbols and the confessional beliefs they signify are still at home in this ever more secular and unbelieving culture. But these symbols continue to fit, if at all, only as something other than the confessional symbols they are—hence the redefinition of such symbols as secular even and especially by the religions that use them and with which they have traditionally been associated.

Most ironic is the likelihood that judicial re-definition of religious symbols as secular will actually accelerate and entrench the secularization that traditionally dominant religions deplore.268

265 See supra notes 140-41 & accompanying text.
266 CARDIA, supra note 11, at 137 (authors’ translation).
267 Bartrum, supra note 11, at 1662-63.
268 See Scharffs, supra note 32, at 58; e.g., Berg, supra note 2, at 42-43 (“An obvious distortion or dilution of religion occurs if courts validate religious symbolic displays on the ground . . . that the displays have no religious meaning or serve merely a historical or ceremonial function.”); S. Ferrari, supra note 2, at 16-17 (“[A] cultural defense of the crucifix implicitly devalues its religious significance and, indirectly, endorses the principle that a symbol can be displayed in a public institution only if the symbol has no religious character.”); cf. Hill,
As Professor Roy has concluded, the challenge is not a “clash between different cultures, it is a separation of culture and religion.”

CONCLUSION: ACCULTURATION OR WITNESS?

James Davison Hunter has argued that

[the goal for Christians . . . is not and never has been to 
“take back the culture” or to “take over the culture” or to 
“win the culture wars” or to “save Western civilization.”
Ours is now, emphatically, a post-Christian culture, and the 
community of Christian believers are now, more than ever—spiritually speaking—exiles in a land of exile. 
Christians, as with the Israelites in Jeremiah’s account, must 
come to terms with this exile.]

The temptation to dominate and politicize culture, Hunter continues, transforms “Christian public witness into the opposite of the witness Christianity is supposed to offer.” Creating disingenuous accounts of imaginary history and inventing secular meanings that have no cultural existence do not serve as Christian witness, but as ironic and cynical manipulation.

Professor Berg has concluded that if allowing the state to define the meaning of religious symbols will inevitably end in their secularization, “then the only way for the state to acknowledge its limits is by remaining silent and leaving statements about transcendent reality to the initiative of private individuals and groups in civil society.” We agree, and believe this would be a salutary development for religion as well as government. Religion’s conceding and cooperating with government in the desacralizing of

_Ceremonial Deism, supra_ note 12, at 48-49 (“The act of describing a reality may instead have a tendency to create and enforce that reality, [a] danger particularly acute when the describing is done in the name of the state.”).

ROY, supra note 38, at 115.

HUNTER, supra note 38, at 280; accord Riley, supra note 244 (noting a “new generation” of evangelical leaders “who think that evangelicals need to recognize that their values no longer define mainstream American culture the way they did 50 or even 20 years ago,” and who believe “that Christians must return to the days when they were a moral example and vanguard—defenders of belief in a larger unbelieving culture”).

_Id._

Berg, supra note 2, at 47.
sacred symbols will only dilute the authentic testimony of religions and believers who are already estranged from Western culture. In this respect, Buono and Lautsi were anything but good news for belief.