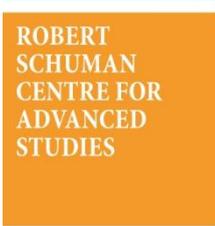




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RELIGIOWEST

Cross, crucifix, culture: an approach to the  
constitutional meaning of confessional symbols

Frederick Mark Gedicks and Pasquale Annicchino



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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 or whether, at least, the confessional meaning is somehow absent. 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 conceivably absent. What matters, however, is not the possibility that secular meaning is present or confessional meaning absent, but whether 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 one.

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 a nonexistent Italian “tradition.”

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 their redefinition as secular, even and especially by the majoritarian religions that use them. Ironically, judicial secularization of these symbols to validate their use by government is likely to accelerate and entrench the very secularization that such religions deplore.

This Essay includes as appendices English translations of the two Italian administrative court decisions, which had not previously been translated from the original Italian.

## **Keywords**

Acculturation, Buono, cross, crucifix, culture, Establishment Clause, European Court of Human Rights, inculturation, interpretation, Italy, laicità, Lautsi, semiotics, meaning, religious neutrality, religious symbols, Salazar, secularism



## 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,<sup>1</sup> while meaning that threatens religious pluralism or minority religious liberty violates the European Convention on Human Rights (the “Convention”).<sup>2</sup>

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 really absent.

Two recent religious symbol cases illustrate the doctrinal the problem. In *Salazar v. Buono*,<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> U.S. CONST., amend. I, cl. 1 (“Congress shall pass no law respecting an establishment of religion . . . .”); e.g., *McCreary City v. ACLU*, 545 U.S. 844 (2005) (display of Ten Commandment in county courthouse motivated by government desire to endorse Christianity); *Lee v. Weisman*, 505 U.S. 577 (1992) (government-sponsored graduation prayer psychologically coerced students and their families) to participate in a religious ceremony; *City & Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (display of Christmas nativity in county courthouse constituted endorsement of Christianity); *Stone v. Graham*, 449 U.S. 39 (1980) (display of Ten Commandments in public school might coerce Christian belief in impressionable schoolchildren).

<sup>2</sup> See EUROPEAN CONVENTION ON HUMAN RIGHTS art. 9 (Coun. Eur. – Rome Nov. 4, 1950), <http://www.hri.org/docs/ECHR50.html#P1>.

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.*; see Claudia E. Haupt, *Transnational Nonestablishment*, 80 Geo. Wash. L. Rev. 991 (2012) (arguing that the ECtHR and other sources of EU law have combined to create an emerging European principle of nonestablishment); Susanna Mancini, *Taking Secularism (not too) seriously: the Italian “crucifix case”*, 1 RELIG. & HUM. RTS. 179, 180 (2006) (arguing that “a secular state is the pre-condition for any functional religious accommodation and for the protection of minority religions and convictions.”).

<sup>3</sup> *Buono v. Norton*, 212 F.Supp.2d 202 (C.D.Cal. 2002), *aff’d*, 371 F.3d 543 (9<sup>th</sup> Cir. 2004), *on motion to enforce judg.*, 364 F.Supp.2d 1175 (C.D.Cal. 2005), *aff’d sub nom.* *Buono v. Kempthorne*, 502 F.3d 1069 (9<sup>th</sup> Cir.), *amended & superseded on denial of reh. en banc*, 527 F.3d 758 (9<sup>th</sup> Cir. 2008), *rev’d and remanded sub nom.* *Salazar v. Buono*, 130 S.Ct. 1803 (2010).

<sup>4</sup> 130 S.Ct. at 1820 (plurality opinion of Kennedy, J., joined by Roberts, C.J., & in pertinent part by Alito, J.); see also *Buono v. Kempthorne*, 527 F.3d 758, 765 (9<sup>th</sup> Cir. 2008) (O’Scannlain, J., dissenting from denial of reh. en banc) (“While the cross at Sunrise Rock takes the form of an ordinarily religious symbol, it serves the secular purpose of memorializing fallen soldiers. [T]he lack of any challenge to the Sunrise Rock memorial for *seven decades* surely demonstrates that the public understands and accepts its secular commemorative purpose.”) (emphasis in original).

In *Lautsi and Others v. Italy*,<sup>5</sup> Italian courts found that crucifixes posted in public school classrooms signified the Christian roots of human rights and liberal democracy rather than merely 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.<sup>6</sup>

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.<sup>7</sup> The *Buono* plurality's contention that the veterans memorial cross signified also *secular* honor of military sacrifice is the classic *ipse dixit*.<sup>8</sup> The Italian courts did little better, baldly asserting a secular cultural-historical 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.<sup>9</sup> Lacking in the USSCt and the Italian court cases was any serious investigation of whether the supposedly "historical-cultural" meaning and effect 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 speculations, as if "history" and "culture" may simply be invented in chambers.

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<sup>5</sup> Sentenza N. 56/04, Ric. No. 2007/02 (Trib. Ammin. Reg. Veneto – Sez. I Nov. 13, 2003), *referral remanded for lack of juris.*, Ordinanza N. 389 (Corte Cost. Dec. 13, 2004), *on remand*, Sentenza N. 1110/2005, Ric. N. 2007/02 (Trib. Ammin. Reg. Veneto – Sez. III Mar. 17, 2005), *aff'd*, Decisione N. 556/06, N. 7314/2005 Reg. Dec. (Cons. Stato Jan. 13, 2006), *rev'd in part sub nom. Lautsi v. Italy*, App. No. 30814/06 (E.Ct.H.R. – 2<sup>nd</sup> Sect. Nov. 3, 2009) (7-0 dec.) [hereinafter *Lautsi*], *rev'd sub. nom. Lautsi & Others v. Italy*, App. No. 30814/06 (E.Ct.H.R. – Grand Chamber Mar. 18, 2011) (15-2 dec.) [hereinafter *Lautsi & Others*].

<sup>6</sup> *Lautsi & Others*, at 29 ¶¶ 70, 72 (internal cross-reference deleted).

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 Margine 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*].

<sup>7</sup> 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); 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 either to have nonconfessional meaning and effect, or at least to lack confessional meaning and effect, when displayed by government, see *supra* notes 1-8 & accompanying text, we do not address these arguments.

<sup>8</sup> BLACK'S LAW DICTIONARY (9<sup>th</sup> ed. 2009) ("something asserted but not proved").

<sup>9</sup> *Lautsi & Others*, at 29 ¶ 72.

Academic literature reflects the same problem. Commentary on government use of religious symbols is legion,<sup>10</sup> much of it prompted by *Buono* and *Lautsi* themselves.<sup>11</sup> Like the USSCt and Italian courts, however, commentators make assertions about historical-cultural meanings without seriously investigating either history or culture.<sup>12</sup> The doctrinal results are predictable: Thinly sourced

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<sup>10</sup> See, e.g., 2 Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* 69-86 (Princeton, N.J.: Princeton University Press, 2008); Frederick Mark Gedicks, *The Rhetoric of Church and State* 65-80 (Durham, N.C.: Duke University Press, 1995); Koppelman, *supra* note 7, at 73-76; Lorie G. Beaman, *Battles over Symbols: The "Religion" of the Minority versus the "Culture" of the Majority*, 28 J.L. & Relig. 67 (2013); Gerard V. Bradley, *The Wren Cross Controversy: Religion and the Public University*, 49 Wm. & Mary L. Rev. 2217 (2008); Caroline Corbin, *Nonbelievers and Government Speech*, 97 Iowa L. Rev. 347 (2012); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 Mich. L. Rev. 491 (2005) [hereinafter Hill, *Religious Symbolism*]; RonNell Andersen Jones, *Pick Your Poison: Private Speech, Government Speech, and the Special Problem of Religious Displays*, 2010 B.Y.U. L. Rev. 2045 (2010); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 Case Wes. Res. L. Rev. 1211 (2011); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. Cal. L. Rev. 495 (1986); Frank S. Ravitch, *Religious Objects As Legal Subjects*, 40 Wake Forest L. Rev. 1011 (2005); Joshua D. Zarrow, Note, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 Am. U. L. Rev. 477(1986). See also Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 Wm. & Mary L. Rev. 2261 (2004).

<sup>11</sup> See, e.g., CARLO CARDIA, *IDENTITÀ RELIGIOSA E CULTURALE EUROPEA: LA QUESTIONE DEL CROCIFISSO* (Turin: Umberto Allemandi, 2010); KOPPELMAN, *supra* note 7, at 75-76; Ian Bartrum, *Salazar v. Buono: Sacred Symbolism and the Secular State*, 104 Nw. U.L. Rev. 1653 (2010); Giuseppe Casuscelli, *Il crocifisso nelle scuole: neutralità dello Stato e «regola della precauzione»*, OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE (July 2005), www.olir.it; Jlia Pasquali Cerioli, *Laicità dello stato ed esposizione del crocifisso: brevi note sul (difficile) rapporto tra la presenza del simbolo religioso nelle strutture pubbliche e il principio di separazione degli ordini*, OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE (July 2005), www.olir.it; Adam Linkner, *How Salazar v. Buono Synthesizes the Supreme Court's Establishment Clause Precedent into a Single Test*, 25 EMORY INT'L L. REV. 57 (2011); Christopher C. Lund, *Salazar v. Buono and the Future of the Establishment Clause*, 105 Nw. U.L. REV. 1387 (2011); Mancini, *supra* note 2; Andrea Pin, *Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State*, 25 EMORY INT'L L. REV. 95 (2011); Mary Elizabeth Roper, Note, *Secular Crosses and the Neutrality of Secularism: Reflections on the Demands of Neutrality and its Consequences for Religious Symbols—the European Court of Human Rights in Lautsi and the U.S. Supreme Court in Salazar*, 45 VAND. J. TRANSNAT'L L. 841 (2012); Vincenzo Turchi, *La pronuncia della Grande Chambre della Corte di Strasburgo sul caso Lautsi C. Italia: post nubile Phoebus*, STATO, CHIESE E PLURALISMO CONFESSIONALE (Oct. 2011), www.statoeheise.it; J.H.H. Weiler, *Freedom of Religion and Freedom from Religion: The European Model*, 65 MAINE L. REV. 759 (2013); John Witte, Jr. & Nina-Louisa Arnold, *Lift High the Cross: Contrasting the New European and American Cases on Religious Symbols on Government Property*, 25 EMORY INT'L L. REV. 5 (2011).

Two important collections of commentary on *Lautsi* are THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 35 (Leiden, The Netherlands: Martinus Nijhoff, Joren Tempermann ed. 2012), and Symposium, *State-Sponsored Religious Displays in the U.S. and Europe*, 51 J. CATH. LEGAL STUDIES (forthcoming 2013).

<sup>12</sup> 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); Beaman, *supra* note 10 (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 Mawhinney, *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-

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?<sup>13</sup>
- 2) If so, does the immediate context in which the symbol is displayed suggest an alternate secular meaning for the confessional symbol?<sup>14</sup>
- 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?<sup>15</sup>

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

### I. Three Modes of Symbolic Meaning

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,”<sup>19</sup> in three ways. Likenesses or “icons” imitate the things they represent, like a photograph, an architectural plan, or certain Egyptian hieroglyphics.<sup>20</sup> “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.<sup>21</sup> Finally, “general signs,” “tokens,” or “symbols”—Peirce used all three terms interchangeably—possess a significance acquired by custom, usage, or convention, like a police

(Contd.)

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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 Religious Displays in the US and Europe*, 1 OXFORD J.L. & RELIG. 338 (2012) (arguing that differing U.S. and European doctrines for confessional symbols reflect different cultural conceptions about the social purpose of religion).

<sup>13</sup> See *infra* Part I-A.

<sup>14</sup> See *infra* Part I-B.

<sup>15</sup> See *infra* Part I-C.

<sup>16</sup> See *infra* Part II.

<sup>17</sup> See *infra* Part III.

<sup>18</sup> See *infra* Conclusion.

<sup>19</sup> 2 CHARLES SANDERS PEIRCE, *THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS (1893-1915)* 5 (Bloomington: Indiana University Press, Nathan Houser, et.al. ed. 1998); accord 1 CHARLES SANDERS PEIRCE, *THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS (1867-1893)* 225 (Bloomington: Indiana University Press, Nathan Houser, et.al. ed. 1992) (“A sign is in a conjoint relation to the thing denoted and to the mind.”).

<sup>20</sup> 2 PEIRCE, *supra* note 19, at 5-6, 7; accord 1 PEIRCE, *supra* note 19, at 226 (“Icons are so completely substituted for their objects as hardly to be distinguished from them.”); 2 *id.* at 307 (“An icon . . . possesses the quality signified.”).

<sup>21</sup> 2 PEIRCE, *supra* note 19, at 5.

officer's badge (signifying civil authority), a theatre ticket (signifying right of entrance), or a warning bell or buzzer (signifying danger).<sup>22</sup>

Most signs combine iconic, indicational, and conventional meaning.<sup>23</sup> 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,<sup>24</sup> and it is conventionally associated in the West with the Christmas holiday celebrating the birth of the Christian Messiah and the related hope in salvation through him.<sup>25</sup>

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 conceivably 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.<sup>26</sup> 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 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 hay and barnyard animals. One needs a cursory

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<sup>22</sup> 2 PEIRCE, *supra* note 19, at 5; accord 1 PEIRCE, *supra* note 19, at 225-26 (A token "is related to its object only in consequence of a mental association, and depends upon a habit. Such signs . . . are, for the most part, conventional or arbitrary."); 2 PEIRCE, *supra* note 19, at 9 (A symbol is "a conventional sign, or one depending upon habit . . .").

<sup>23</sup> See 2 PEIRCE, *supra* note 19, at 10.

<sup>24</sup> See, e.g., Laycock, *supra* note 10, at 1213.

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. [W]ithout 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 of false worship--a depiction that would horrify its sponsors. If you think about it even a little bit seriously, the nativity scene can only represent the Christian belief in the Incarnation.

*Id.*; see also *id.* at 1214 ("[I]t seems rather odd to describe a miraculous event as merely historical. But of course Christians who fully believe in the miracle believe that it actually happened and that it happened in historic time. So from a Christian perspective, the event is historical as well as miraculous.").

*Id.*

<sup>25</sup> See, e.g., Laycock, *Religious Displays*, *supra* note 10, at 1212-14.

<sup>26</sup> See JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 110-11 (Ithaca, N.Y.: Cornell University Press, 1982).

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.<sup>27</sup>

Nonlinguistic confessional symbols are the quintessential Peircean icon.<sup>28</sup> 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.<sup>29</sup> 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.”<sup>30</sup> 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 meaning changes according to the context in which it uttered.<sup>31</sup> As these examples illustrate, the meaning of a sign depends on the context in which the semantic meaning of the sign is deployed.<sup>32</sup>

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

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<sup>27</sup> See *infra* Parts II-A-1 & II-B-1.

<sup>28</sup> See “Signs and Symbols,” in 7 *ENCYCLOPEDIA OF PHILOSOPHY* 437, 441 (New York: MacMillan & Free Press, Paul Edwards ed. 1967).

<sup>29</sup> See *supra* notes 19-23 & accompanying text.

<sup>30</sup> The following are examples of “performative” meaning drawn from CULLER, *supra* note 26, at 113. See also *infra* note 31.

<sup>31</sup> See ROLAND BARTHES, *ELEMENTS OF SEMIOLOGY* 42 (New York: Hill and Wang & Noonday, Annette Lavers & Colin Smith trans. 1967) (“[T]he 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 “performative effect” of spoken language. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (Cambridge, Mass.: Harvard University Press, 2<sup>nd</sup> 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 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.

<sup>32</sup> 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.”).

displayed by itself in the lobby of a courthouse might additionally imply Christian bias in the administration of justice.<sup>33</sup> 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 nonChristians, and most unbelievers.<sup>34</sup>

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.”<sup>35</sup> “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.<sup>36</sup> “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.<sup>37</sup>

“Culture” consists of the “symbolic systems, imaginative representations and institutions specific to a society” that legitimate its “political and social order.”<sup>38</sup> The signs and symbols that constitute a culture are generally used in regular and conventional ways.<sup>39</sup> Roland Barthes metaphorically described this regularity as “contractual,”<sup>40</sup> like the pseudo-historical “social contract.”<sup>41</sup> Of course, the cultural contribution to a sign’s meaning is a legacy that 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*).<sup>42</sup>

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.<sup>43</sup> Being

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<sup>33</sup> See, e.g. *City & Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

<sup>34</sup> See, e.g., *Lynch v. Donnelly*, 465 U.S. 68 (1984). This holding of *Lynch* has been widely criticized. See, e.g., Norman Dorsen & Charles Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837, 857; Frederick Mark Gedicks, *Lynch and the Lunacy of Secularized Religion*, 12 NEV. L.J. 640, 642-43 (2012); Laycock, *supra* note 10, at 1213-14.

<sup>35</sup> FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 67 (London: Peter Owen, Charles Bally & Albert Sechehaye rev. ed. Wade Baskin trans. 1974).

<sup>36</sup> 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.”).

<sup>37</sup> See EAGLETON, *supra* note 36, at 97.

<sup>38</sup> 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. [P]articularly in the cultural meaning imputed to such things, culture can be understood as *symbolic capital*.”) (emphasis in original).

<sup>39</sup> See Jack Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1135-36 (1990).

<sup>40</sup> See BARTHES, *supra* note 31, at 51.

<sup>41</sup> “Signs and Symbols,” *supra* note 28, at 440.

<sup>42</sup> BARTHES, *supra* note 31, at 51; MAURICE MERLEAU-PONTY, *SIGNS* 39-44 (Evanston, Ill.: Northwestern University Press, Richard C. McCleary trans. 1964).

<sup>43</sup> ROY, *supra* note 38, at 26; see Ravitch, *supra* note 10, at 1020-21.

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.<sup>44</sup> Christmas trees and crosses on national flags are examples of signs whose ordinary meaning has “crossed over” from the confessional to the secular.<sup>45</sup>

## 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.<sup>46</sup> The lower federal courts initially held that display of the cross violated the Establishment Clause as an endorsement of Christianity,<sup>47</sup> a ruling the federal government declined to appeal to the USSCt.<sup>48</sup> To forestall 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.<sup>49</sup> The original plaintiff then obtained an order that these congressional actions violated the Establishment Clause.<sup>50</sup> 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 was fully consistent with the Establishment Clause.<sup>51</sup> It vacated the injunction and remanded the case for consideration of this possibility.<sup>52</sup>

#### 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

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<sup>44</sup> Cf. Zarrow, *supra* note 10, at 513 (“Neutrality among religious would be assured if a member of a minority religion would view the symbol displayed as secular or nondenominational.”).

<sup>45</sup> See 2 GREENAWALT, *supra* note 10, at 69-70.

<sup>46</sup> 212 F.Supp.2d at 12-04-05.

<sup>47</sup> 212 F.Supp. 2d at 1217, *aff’d*, 371 F.3d at 549-50.

<sup>48</sup> 130 S.Ct. at 1813.

<sup>49</sup> 364 F.Supp.2d at 1177, 1181-82, *aff’d*, 527 F.3d at 771.

<sup>50</sup> 364 F.Supp.2d at 1182, *aff’d* 527 F.3d at 768, 782-83.

<sup>51</sup> 130 S.Ct. at 1814-21.

<sup>52</sup> *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 1848-42 (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).

emblem in Jesus's resurrection and his related victory over death and sin for nearly two thousand years.<sup>53</sup>

A common contemporary rendering is the Latin cross, depicting a horizontal line most of the way up a vertical line (“†”), and believed to resemble the cross on which the Romans crucified Jesus.<sup>54</sup> 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.<sup>55</sup>

The cross is so closely linked to Christianity that its Christian meaning generally displaces all others.<sup>56</sup> 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.”<sup>57</sup>

## 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.<sup>58</sup> The placement of the cross where healthcare services are available displaces its ordinary Christian meaning with a secular meaning—a place where one might receive medical care.<sup>59</sup>

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,

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<sup>53</sup> See II J.H.A. BOMBERGER, *THE PROTESTANT THEOLOGICAL & ECCLESIASTICAL ENCYCLOPEDIA* 37 (Phil.: Lindsay & Blakiston, 1860); RICHARD HARRIES, *THE PASSION IN ART 1* (Hants, UK: Ashgate, 2004); CYRIL E. POCKNEE, *CROSS AND CRUCIFIX IN CHRISTIAN WORSHIP AND DEVOTION* 33 (London: A.R. Mowbray, 1962); RICHARD VILADESAU, *THE BEAUTY OF THE CROSS: THE PASSION OF CHRIST IN THEOLOGY AND THE ARTS, FROM THE CATACOMBS TO THE EVE OF THE RENAISSANCE* 7 (Oxford: Oxford University Press, 2006) [hereinafter VILADESAU, *BEAUTY OF THE CROSS*]; e.g., HARRIES, *supra* note 53, at xi (“[I]n the earliest Christian art . . . the Cross and the Resurrection are seen in a unified manner as two aspects of one triumph.”).

<sup>54</sup> BOMBERGER, *supra* note 53, at 37; “Archaeology of the Cross and Crucifix,” in *CATHOLIC ENCYCLOPEDIA* (1909), <http://www.newadvent.org/cathen/04517a.html>, at 8-9.

<sup>55</sup> POCKNEE, *supra* note 53, at 69-77; “Archaeology of the Cross and Crucifix,” *supra* note 54, at 13-14.

<sup>56</sup> 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.”).

<sup>57</sup> 212 F.Supp.2d at 1205, *aff’d*, 527 F.3d at 768-69, *rev’d & remanded*, 130 S.Ct. at 1816.

<sup>58</sup> 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.

<sup>59</sup> 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.

respectively.<sup>60</sup> 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 warn of 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.<sup>61</sup> 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.<sup>62</sup>

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 *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 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.<sup>63</sup>

As confirmation of this meaning, the plurality pointed to the vast number of crosses marking graves of fallen American servicemen in battlefield cemeteries.<sup>64</sup>

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 instead *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 really secular, and thus not an alternative to the ordinary Christian meaning.

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

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<sup>60</sup> See BlueCross BlueShield Association, <http://www.bcbs.com/>; International Federation of Red Cross & Red Crescent Societies, <http://www.ifrc.org/>. As its official name suggests, "red cross" was not secular enough for Muslim societies.

<sup>61</sup> See Scharffs, *supra* note 32, at 43-44.

<sup>62</sup> For example, Madonna's use of cross imagery in the video rendition of her hit, "Like a Prayer," was deemed blasphemous by many Christians. See <[http://en.wikipedia.org/wiki/Like\\_a\\_Prayer\\_\(song\)](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.

<sup>63</sup> 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.").

<sup>64</sup> 130 S.Ct. at 1820.

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 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.<sup>65</sup>

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.<sup>66</sup> Congress's choice of an ordinarily Christian symbol, rather than an unambiguously and independently secular one, suggests that the purpose and effect of displaying a Latin cross at the memorial were precisely to align the government with Christianity.<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup>

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<sup>65</sup> 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.").

<sup>66</sup> *See* links to photographs and descriptions under "Landmarks, museums and other features" at <[http://en.wikipedia.org/wiki/National\\_Mall](http://en.wikipedia.org/wiki/National_Mall)>. Arlington National Cemetery contains the "Argonne Cross," erected in the early 1920s to mark the section of the cemetery where World War I veterans were interred and named for the Argonne Unit of the American Women's Legion.  
<<http://www.arlingtoncemetery.mil/visitorinformation/MonumentMemorials/ArgonneCross.aspx>>.

<sup>67</sup> 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. 6897, 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).

<sup>68</sup> 130 S.Ct. at 1817.

<sup>69</sup> *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 . . .").

### 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.<sup>70</sup>

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 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.<sup>71</sup>

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.<sup>72</sup> Indeed, the U.S. military now allows a choice of grave markers from among scores of Christian, nonChristian, and nonreligious symbols.<sup>73</sup> 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.<sup>74</sup>

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.”<sup>75</sup> It is equally understandable that unbelievers and most other believers outside of the American Christian mainstream might not perceive a meaning in the cross that includes them.<sup>76</sup> Christians were a key element in two of the sustained religious persecutions in U.S. history, those of Mormons during the late 19<sup>th</sup> century and Jehovah's Witnesses during the early 20<sup>th</sup>.<sup>77</sup> Both faiths have forcefully rejected

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<sup>70</sup> 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”).

<sup>71</sup> See generally *Allegheny*, 492 U.S. at 616; “Christmas tree,” in *ENCYCLOPEDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/115737/Christmas-tree>.

<sup>72</sup> 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 th[e] 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.”)

<sup>73</sup> 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, 2<sup>nd</sup> ed. 2010).

<sup>74</sup> Cf. *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 637 F.3d 1095, 1112 & n.2 (10<sup>th</sup> 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).

<sup>75</sup> 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 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.

<sup>76</sup> 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).

<sup>77</sup> See, e.g., SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 75-83, 228-33 (Chapel Hill, N.C.: University of North Carolina Press, 2002); THE

the cross as a confessional symbol.<sup>78</sup> Association of the cross with Christian persecution and discrimination is embedded in Jewish and (especially) Muslim culture;<sup>79</sup> they, too, have rejected it as a confessional symbol.<sup>80</sup> Unbelievers, meanwhile, remain politically and culturally marginalized in the U.S., and of course have no use for the cross.<sup>81</sup>

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.<sup>82</sup> The record in *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.<sup>83</sup> As plaintiff’s counsel pointed out at oral argument, there are no crosses in Jewish cemeteries.<sup>84</sup> Congressional designation of the cross as a veterans memorial did not make the cross secular, it made the memorial Christian.<sup>85</sup>

(Contd.) \_\_\_\_\_

PERSECUTION OF JEHOVAH’S WITNESSES: THE RECORD OF VIOLENCE AGAINST A RELIGIOUS ORGANIZATION UNPARALLELED IN AMERICA SINCE THE ATTACKS ON THE MORMONS (New York: American Civil Liberties Union, Jan. 1941).

<sup>78</sup> 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.

For Jehovah’s Witnesses see “Why True Christians Do Not Use the Cross in Worship,”

<http://www.jw.org/en/publications/books/bible-teach/why-true-christians-do-not-use-the-cross-in-worship/>; Leolaia, Jehovah’s Witnesses and the Cross, Jehovah’s Witness Discussion Forum (1990), <http://www.aggelia.be/jwcross.pdf>. Jehovah’s Witnesses also have their own distinctive military grave marker which lacks a cross.

<sup>79</sup> See, e.g., T. Jeremy Gunn, *Islam, Europe, and Emerging Legal Issues*, in ISLAM, EUROPE, AND EMERGING LEGAL ISSUES 111, 112 (Cole Durham, et. al. eds. 2012); see also KAREN ARMSTRONG, HOLY WAR: THE CRUSADES AND THEIR IMPACT ON ODAY’S WORLD xvii (New York: Anchor, 2<sup>nd</sup> ed. 2001); cf. *Awad v. Ziriax*, 670 F.3d 1111 (10<sup>th</sup> Cir. 2012) (striking down state constitutional amendment approved with strong conservative Christian support that singled out Sharia law for special disabilities).

<sup>80</sup> 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 cross that had theretofore identified all Army chaplains, because they considered the cross offensive when worn by rabbis); REED, *supra* note 78, at 89, 91-92 (recounting opposition of Salt Lake City rabbis to cross memorial proposed in early 20<sup>th</sup> century); *supra* note 75 & accompanying text (opposition of Jewish war veteran to Sunrise Cross).

<sup>81</sup> See, e.g., Corbin, *supra* note 10, at 357-75; Jennifer Groesbeck, Note, *No Freedom from Religion: The Marginalization of Atheists in American Society, Politics, and Law*, 1 MARGINS 569 (2001).

<sup>82</sup> 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 <<http://www.cem.va.gov/cem/docs/emblems.pdf>>; GRIFFIN *supra* note 73, at 422. See also Lupu & Tuttle, *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”).

<sup>83</sup> 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).

<sup>84</sup> 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

## 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.<sup>86</sup> School and regional administrators not only rejected their request, but followed with a circular to public school principals expressly recommending the crucifix's classroom display.<sup>87</sup> 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*.<sup>88</sup>

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.<sup>89</sup> It is distinct from “secularism,” which Italians associate with French *laïcité* and (somewhat inaccurately) American separationism.<sup>90</sup> The term 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.”<sup>91</sup> *Laicità* is now well-established as a fundamental (albeit nontextual) Italian constitutional norm limiting government action.<sup>92</sup>

Specifically at issue were two fascist-era royal decrees previously held valid and enforceable in contemporary republican Italy.<sup>93</sup> One, issued in 1924, requires that every middle school “have the national flag” and every classroom, “the symbol of the Crucifix.”<sup>94</sup> The other, issued in 1928, lists required furnishings for various public school classrooms, including a crucifix for each elementary school classroom.<sup>95</sup>

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*

(*Contd.*) \_\_\_\_\_

Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.” Tr. Oral Arg., at 38-39, *Buono*, 130 S.Ct. 1803 (2010) (No. 08-472).

<sup>85</sup> See 130 S.Ct. at 1839 (Stevens, J., dissenting).

<sup>86</sup> *Sentenza N. 56/04*, Ric. No. 2007/02 (Trib. Ammin. Reg. Veneto – Sez. I Nov. 13, 2003), at 2.

<sup>87</sup> *Sentenza N. 56/04*, at 5 ¶ 2.3.1.

<sup>88</sup> *Sentenza N. 56/04*, at 2-3.

<sup>89</sup> 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 *laicità* 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).

<sup>90</sup> See LORENZO ZUCCA, A SECULAR EUROPE 101 (Oxford: Oxford University Press, 2012) (“[S]ecularism must be sharply separated from neutrality. Neutrality 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.”).

<sup>91</sup> 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.

<sup>92</sup> *Sentenza N. 203*, ¶¶ 4 & 9.

<sup>93</sup> See *Sentenza N. 63/88* (Cons. Stato – Sez. II Apr. 27, 1988).

<sup>94</sup> Art. 118, cap. XII, r.d. n. 965/24 (Apr. 30, 1924) [hereinafter 1924 Decree] (authors' translation).

<sup>95</sup> Art. 119, tab. C, r.d. n. 1297 (Apr. 26, 1928) [hereinafter 1928 Decree].

*Costituzionale*, the appellate court in Italy charged with ruling on the constitutionality of statutes and laws.<sup>96</sup> 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*.<sup>97</sup>

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,<sup>98</sup> and (ii) the Catholic roots of Italian history and culture.<sup>99</sup> The *Consiglio di Stato* affirmed, relying only on the *Tribunale*'s first rationale.<sup>100</sup> 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,"<sup>101</sup> in violation of the European Convention of Human Rights.<sup>102</sup> The Second Section decision, in turn, was reversed by a 17-judge Grand Chamber of the ECtHR,<sup>103</sup> which found that perpetuating a tradition of displaying crucifixes in classrooms as secular "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.<sup>104</sup>

### 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<sup>th</sup> or early 5<sup>th</sup> century.<sup>105</sup> Early crucifixes generally showed a fully-clothed and triumphal Jesus "alive and reigning" on the cross.<sup>106</sup> It was not until the Middle Ages that Christ was shown dead on the cross,<sup>107</sup> 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 closed in mortal suffering and death.<sup>108</sup>

The crucifix is closely associated with the Catholic Church, though it is also used by Eastern Orthodox Christianity. Reformation Protestants (especially Calvinists) rejected it as an aspect of the

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<sup>96</sup> *Sentenza n. 56/04*, at 13-15 ¶¶ 5.3 & 6 (authors' translation).

<sup>97</sup> *Ordinanza n. 389* (Corte Cost. Dec. 13, 2004) (authors' translation).

<sup>98</sup> *Sentenza N. 1110/2005*, Ric. No. 2007/02 (Trib. Ammin. Reg. Veneto – Sez. III Mar. 17, 2005), at 31-35 ¶¶ 11.1-11.9.

<sup>99</sup> *E.g.*, *Sentenza N. 1110/2005*, at 28-29, ¶¶ 8.1-8.3.

<sup>100</sup> *Decisione N. 7314 Reg. Ric. N. 556/06* (Cons. Stato Feb. 13, 2006), at 16.

<sup>101</sup> *Lautsi*, at 12-13 ¶¶ 51-55.

<sup>102</sup> See EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 2, art. 9; *id.*, prot. no. 1, art. 2., (Coun. Eur. - Rome Nov. 4, 1950), <http://www.hri.org/docs/ECHR50.html#P1>.

<sup>103</sup> For a description of ECtHR procedures relating to section panel and grand chamber proceedings, see Witte & Arnold, *supra* note 11, at 15-16.

<sup>104</sup> *Lautsi & Others*, at 27-31 ¶¶ 63-77.

<sup>105</sup> BOMBERGER, *supra* note 53, at 38; POCKNEE, *supra* note 53, at 38-39; "Archaeology of the Cross and Crucifix," *supra* note 54, at 17-19.

<sup>106</sup> BOMBERGER, *supra* note 53, at 39; HARRIES, *supra* note 53, at 10-11, 18-19; see RICHARD VILADESAU, THE BEAUTY OF THE CROSS 62-69 (Oxford: Oxford University Press, 2006) [hereinafter VILADESAU, BEAUTY OF THE CROSS].

<sup>107</sup> HARRIES, *supra* note 53, at 28-30 (mid-7<sup>th</sup> century); VILADESAU, BEAUTY OF THE CROSS, *supra* note 53/106, at 48 (mid-9<sup>th</sup> century).

<sup>108</sup> BOMBERGER, *supra* note 53, at 39; HARRIES, *supra* note 53, at 48, 65-66; POCKNEE, *supra* note 53, at 48, 63, 65, 66; "Archaeology of the Cross and Crucifix," *supra* note 54, at 20-21; VILADESAU, BEAUTY OF THE CROSS, *supra* note 53/106, at 155-58; *e.g.*, RICHARD VILADESAU, THE TRIUMPH OF THE CROSS: THE PASSION OF CHRIST IN THEOLOGY AND THE ARTS, FROM THE RENAISSANCE TO THE COUNTER-REFORMATION 12-13 (Oxford: Oxford University Press, 2008) [hereinafter VILADESAU, TRIUMPH OF THE CROSS] (discussing Fra Angelico's "St. Dominic in Adoration before the Crucifix" (ca. 1440-45)).

Catholic veneration of icons, but its use persisted among Anglicans, Lutherans, and Methodists into the 17<sup>th</sup> century.<sup>109</sup> Since the 19<sup>th</sup> century its use has been almost entirely confined to Catholicism and Eastern Orthodoxy, and it is widely understood as the quintessential Roman Catholic sign.<sup>110</sup>

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.”<sup>111</sup> 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.<sup>112</sup> The *Tribunale* evaded the problem entirely by flatly equating the Catholic crucifix with the Christian cross.<sup>113</sup>

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 . . . .”<sup>114</sup> Likewise, the Second Section of the ECtHR found that the crucifix’s Catholic meaning predominated over all others,<sup>115</sup> 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.<sup>116</sup>

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 ordinary Catholic 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

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<sup>109</sup> BOMBERGER, *supra* note 53, at 38; POCKNEE, *supra* note 53, at 76-77, VILADESAU, TRIUMPH OF THE CROSS, *supra* note 108, at 128-33.

<sup>110</sup> See, e.g., J. HOPPENOT, LE CRUCIFIX 6 (Paris: Desclée, De Brouwer, 5<sup>th</sup> ed. 1905).

The crucifix is the epitome of Catholic dogma: the person of him who suffers on it, the only *Son* of God the *Father*, conceived in Mary’s womb by power of the *Holy Spirit*, reminds us of the two great mysteries of the Trinity and the Incarnation. [] The crucifix is the memorial to Christian morality. Pagan morality said, “Let us eat and drink, for tomorrow we die.” Against these facile principles, the cross tells you, “You are of Christ, crucify your flesh with its vices and sins.

*Id.* (authors’ translation) (emphasis in original); see also Gunn, *supra* note 79, at 112 (“The Catholic Church . . . places the crucifix at the focal point of its churches. The sacred Mass, which employs crucifixes as part of the ceremony, commemorates the crucifixion of Christ”).

<sup>111</sup> *Lautsi & Others*, at 27-28 ¶ 66.

<sup>112</sup> Decisione N. 556/06, N. 7314/2005 Reg. Dec. (Cons. Stato Jan. 13, 2006), at 15 (authors’ translation); see *infra* Part II-B-2.

<sup>113</sup> Sentenza n. 1110/2005, at 13-14 (authors’ translation).

<sup>114</sup> Sentenza n. 56/04, Ric. No. 2007/02 (Trib. Ammin. Reg. Veneto – Sez. I Nov. 13, 2003), at 12 (authors’ translation).

<sup>115</sup> *Lautsi*, at 12 ¶¶51, 53 (citation omitted).

<sup>116</sup> *Lautsi*, at 13 ¶ 56.

out of the case entirely. The *Tribunale* gave a rich (and controversial) account of the crucifix's purported secular meanings, concluding that it signified the Christian foundation of secular Italian culture and universal human rights.<sup>117</sup> On appeal, the *Consiglio* agreed in part, holding that classroom crucifixes communicated the Catholic origins of secular human liberty.<sup>118</sup> 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.<sup>119</sup>

#### *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 . . .,"<sup>120</sup> and emphasizing the powerful obligation of religious impartiality that *laicità* imposes on the state.<sup>121</sup>

*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."<sup>122</sup> Neither historical analysis nor even the constitutional value of *laicità*, observed the *Tribunale*, can change an Italian past saturated with Christianity.<sup>123</sup> 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.<sup>124</sup>

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.<sup>125</sup> 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.<sup>126</sup>

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<sup>117</sup> See *infra* Part II-B-2-a.

<sup>118</sup> See *infra* Part II-B-2-b.

<sup>119</sup> See *infra* Part II-B-2-c.

<sup>120</sup> *Sentenza n. 1110/2005*, at 24 ¶ 7.1 (authors' translation).

<sup>121</sup> *Sentenza n. 1110/2005*, at 24-25, 26 ¶¶ 7.2, 7.4.

<sup>122</sup> *Sentenza n. 1110/2005*, at 28 ¶ 8.1 (authors' translation) (emphasis in original).

<sup>123</sup> *Sentenza n. 1110/2005*, at 28 ¶ 8.1.

<sup>124</sup> *Sentenza n. 1110/2005*, at 29 ¶ 8.3 (authors' translation).

<sup>125</sup> *Sentenza n. 1110/2005*, at 29-30 ¶ 9.1.

<sup>126</sup> 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. 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 rejects the crucifix and in the 1920s was almost entirely concentrated in rural Sicily and remote areas of 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 Pubbl. Instru. 1923)).

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,<sup>127</sup> a claim that could not have been made for the crucifix. But even granting the ecumenical character of the *cross*, it does not reach non-Christian confessions or unbelievers, is not ordinarily secular, and is not 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.<sup>128</sup> The words “crucifix” and “cross” both appear in this lengthy passage, but the court uses “cross” whenever it emphasizes the purportedly open and inclusive character of Christianity.<sup>129</sup> 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 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.<sup>130</sup>

The court even went so far as to associate Christianity with the motto of the profoundly anti-clerical French revolution.<sup>131</sup>

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.<sup>132</sup> 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 with but indeed affirms and confirms the principle of the *laicità* of the republican State.<sup>133</sup>

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.”<sup>134</sup>

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

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<sup>127</sup> *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).

<sup>128</sup> *Sentenza n. 1110/2005*, at 31-42 ¶¶ 11.1-15.2.

<sup>129</sup> *Sentenza n. 1110/2005*, at 31-42 ¶¶ 11.1-15.2.

<sup>130</sup> See, e.g., *Sentenza n. 1110/2005*, at 31-32 ¶ 11.1 (authors’ translation) (emphasis added).

<sup>131</sup> See, e.g., *Sentenza n. 1110/2005* at 32 ¶ 11.2.

<sup>132</sup> *Sentenza n. 1110/2005*, at 41-42 ¶ 15.2 (authors’ translation).

<sup>133</sup> *Sentenza n. 1110/2005*, at 42 ¶ 16.2 (authors’ translation).

<sup>134</sup> *Id.* at 38 ¶ 12.4 (authors’ translation) (emphasis added).

constitutional and fundamental secular human rights.<sup>135</sup> 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 from the religious context that is its natural home, a highly educational symbolic function, regardless of the religion professed by the pupils.<sup>136</sup>

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.<sup>137</sup>

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,”<sup>138</sup> and then defers to the Veneto Ministry's judgment that the crucifix is the most effective means of teaching Italian civic virtue.<sup>139</sup>

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*, that display of the crucifix occurs 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*

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 proof that children were coerced or pressured or the teaching atmosphere otherwise lacked the

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<sup>135</sup> 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.

<sup>136</sup> *Sentenza n. 556/06*, at 16 (authors' translation).

<sup>137</sup> *Sentenza n. 556/06*, at 16 (authors' translation).

<sup>138</sup> *Sentenza n. 556/06*, at 17 (authors' translation).

<sup>139</sup> *Sentenza n. 556/06*, at 18 (authors' translation).

religious impartiality.<sup>140</sup> Unlike the Italian government, however, which attributed various secular meanings to the crucifix,<sup>141</sup> 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.<sup>142</sup> 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,”<sup>143</sup> 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.”<sup>144</sup>

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.<sup>145</sup> 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.”<sup>146</sup> 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.”<sup>147</sup> 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

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<sup>140</sup> 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.

<sup>141</sup> See, e.g., CARDIA, *supra* note 11, at 112.

<sup>142</sup> *Lautsi & Others*, at 27-28 ¶ 66.

<sup>143</sup> *Lautsi & Others*, at 29 ¶ 72.

<sup>144</sup> *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.”).

<sup>145</sup> *Lautsi*, at 11 ¶ 49.

<sup>146</sup> *Lautsi*, at 12 ¶ 50 (internal citation omitted).

<sup>147</sup> *Lautsi*, at 54.

from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice.<sup>148</sup>

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 nationally 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.<sup>149</sup>

In sum, the Grand Chamber opinion simply 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, at least, 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-19<sup>th</sup> 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 its failure to project confessional meaning and effect) cohere with Italian history and culture.

#### *a. Papal Absolutism*

From the 8<sup>th</sup> through most of the 19<sup>th</sup> century, with some interruption, a strategic swath of central Italy was ruled by the Pope as an absolute temporal monarch.<sup>150</sup> Beyond these Papal or Pontifical States, the Pope sought to impose his will on the feudal kingdoms of Europe even in what today we would call “secular” matters,<sup>151</sup> claiming the power to depose kings and emperors by his power of excommunication.<sup>152</sup>

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<sup>148</sup> *Lautsi*, at 12-13 ¶ 55.

<sup>149</sup> *See infra* Parts II-B-3 & III.

<sup>150</sup> *See* RÉMY BRAGUE, *THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN IDEA* 130-40 (Chicago: University of Chicago Press, Lydia G. Cochran trans. 2007); HARRY HEARDER, *ITALY: A SHORT HISTORY* 43-59 (Cambridge: Cambridge University Press, Jonathan Morris rev. & updated ed. 2001).

Though formally absolute, the power of the Papacy over the States was often compromised by that of the Holy Roman Emperor and other feudal rulers, as well as the local nobility and a generally endemic corruption. *See* LUIGI BARZINI, *THE ITALIANS* 162, 302-05 (New York: Atheneum, 1977); HAROLD BERMAN, *LAW AND REVOLUTION* 90-91 (Cambridge, Mass.: Harvard University Press, 1983). As Galileo discovered, however, papal power was real enough to impose the Inquisition in the Papal States and the rest of Italy. *See* BARZINI, *supra*, at 314.

<sup>151</sup> 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 Schwartzman, *Against Religious Institutionalism* 11 (Sept. 2012), <http://ssrn.com/abstract=2152060>.

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

The Latin cross was a sign of the temporal and spiritual power of the Church throughout Europe.<sup>153</sup> In the Papal States, the crucifix was ubiquitous in government venues and many commercial and private ones.

*b. Opposition to Liberal 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.<sup>154</sup> Rome and its environs remained under papal control until 1870, when the new monarchy occupied and annexed Rome, confining the Pope to the tiny enclave of Vatican City and opening a schism with the Church that lasted nearly 60 years.<sup>155</sup>

The practical independence and political freedom of action afforded the Papacy by the Papal States vanished with its loss of Rome and the rest of the States.<sup>156</sup> 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.<sup>157</sup>

The annexation of Rome in 1870 unified Italy politically but not socially or culturally.<sup>158</sup> Outside of the Papal States, the Italian had consisted for centuries of shifting and diverse kingdoms, duchies, republics, city-states, and enclaves periodically occupied or controlled by foreign powers.<sup>159</sup> 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),<sup>160</sup> and deeply suspicious of liberal, constitutional, and other modernist values,<sup>161</sup> 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.<sup>162</sup> Enforced by the Pope's power of excommunication,<sup>163</sup> 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

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<sup>153</sup> See, e.g., “Papal States”, [http://en.wikipedia.org/wiki/Papal\\_States](http://en.wikipedia.org/wiki/Papal_States) (displaying the Papal States' coat of arms).

<sup>154</sup> See HEARDER, *supra* note 150, at 187-97, 202-03.

<sup>155</sup> See R.J.B. BOSWORTH, *MUSSOLINI'S ITALY*, 236 (London: Arnold, 2002); HEARDER, *supra* note 150, at 187-97, 203-04; SERGIO ROMANO, *LIBERA CHIESA, LIBERO STATO?* 15 (Milan: TEA, 2005).

<sup>156</sup> See ROMANO, *supra* note 155, at 30; Ventura, *supra* note 89, ¶ 3, at 24.

<sup>157</sup> See ROMANO, *supra* note 155, at 46.

<sup>158</sup> Alessandro Ferrari, *Civil Religion in Italy: A “Mission Impossible”?*, 41 *GEO. WASH. INT'L L. REV.* 839, 841-42 (2010) [hereinafter A. Ferrari, *Civil Religion in Italy*]; see HEARDER, *supra* note 150, at 165.

<sup>159</sup> See e.g., BARZINI, *supra* note 150, at 352ff. (maps showing the multitude of sifting 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).

<sup>160</sup> 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.

<sup>161</sup> See, e.g., BARBAGALLO, *infra* note 218, at 15. In 1864, Pius published the controversial *Syllabus* listing the many “grave errors” of modernism, including legalization of divorce, abolition of temporal papal authority, state recognition of religions other than Catholicism, elimination of Catholicism as the only state religion, freedom of religious exercise for non-Catholics, separation of church and state, freedom of thought and opinion, and the idea of progress. See ALESSANDRO FERRARI, *LA LIBERTÀ RELIGIOSA IN ITALIA: UN PERCORSO INCOMPIUTO* 17 (Torino: Carocci, 2012) [hereinafter A. FERRARI, *LA LIBERTÀ RELIGIOSA*]; Zachary R. Calo, *Catholicism, Liberalism, and Human Rights*, *J. CHRISTIAN LEG. THEORY* (forthcoming), <http://ssrn.com/abstract=1920857>, at 8.

<sup>162</sup> 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.”).

<sup>163</sup> ROMANO, *supra* note 155, at 21-22; Ventura, *supra* note 89, ¶ 36, at 34-35..

pro- and anti-Catholic factions and foreclosing any possibility that Catholicism might act as a unifying national force.<sup>164</sup>

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.<sup>165</sup> Its policy was captured in Camillo Cavour's phrase, "A free Church in a free State."<sup>166</sup> These were accompanied, however, by widespread suppression of Catholic orders and institutions and expropriation of their property.<sup>167</sup> 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."<sup>168</sup>

### *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.<sup>169</sup> Italian Fascism was profoundly anti-clerical and had even less use for Catholicism than its predecessor liberal regime.<sup>170</sup> Having come to power by a threatened coup,<sup>171</sup> however, Mussolini's government had a legitimacy problem, which he proposed to solve by courting the support of the Church.<sup>172</sup> The Fascist government began to rebuild the Church/State relationship that had fractured with unification and the annexation of Rome.<sup>173</sup> It unilaterally issued the crucifix decrees at issue in *Lautsi*,<sup>174</sup> 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,<sup>175</sup> but by then had also decided that liberalism, socialism, and communism were bigger threats than Fascism.<sup>176</sup>

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<sup>164</sup> 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.").

<sup>165</sup> 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.

<sup>166</sup> See ROMANO, *supra* note 155, at 73.

<sup>167</sup> See Ventura, *supra* note 89, ¶44, at 30.

<sup>168</sup> Ventura, *supra* note 89 ¶ 36, at 34.

<sup>169</sup> BOSWORTH, MUSSOLINI'S ITALY, *supra* note 155, at 180-83; HEARDER, *supra* note 150, at 225-29.

<sup>170</sup> 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.

<sup>171</sup> 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 the latter's "March on Rome" with 40,000 armed Fascist militia. BOSWORTH, MUSSOLINI'S ITALY, *supra* note 155, at 181-82.

<sup>172</sup> BOSWORTH, MUSSOLINI'S ITALY, *supra* note 155, at 176; see 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).

<sup>173</sup> See A. FERRARI, LA LIBERTÀ RELIGIOSA, *supra* note 161, at 33-34; Ventura, *supra* note 89, ¶ 47, at 39-40.

<sup>174</sup> See A. FERRARI, LA LIBERTÀ RELIGIOSA, *supra* note 161, at 33-40; *supra* notes 155-64 & accompanying text.

<sup>175</sup> See ROMANO, *supra* note 155, at 49.

<sup>176</sup> BOSWORTH, MUSSOLINI'S ITALY, *supra* note 155, at 259, 374; 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.

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.<sup>177</sup> 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.<sup>178</sup>

Mussolini and the Church both got what they wanted.<sup>179</sup> Italy’s treaty with the Church legitimized Mussolini and Fascism at home and abroad and enabled consolidation of their already considerable power.<sup>180</sup> 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.<sup>181</sup> The Pacts also initiated a *de facto* alliance with Fascism that lasted from 1929 through at least the fall of Mussolini’s first government in 1943.<sup>182</sup> 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.<sup>183</sup>

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 the Church’s contemporary political and social enemies,<sup>184</sup> he was more cautious

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<sup>177</sup> HEARDER, *supra* note 150, at 230; ROMANO, *supra* note 155, at 74 .

<sup>178</sup> BOSWORTH, MUSSOLINI’S ITALY, *supra* note 155, at 257; HEARDER, *supra* note 150, at 230; ROMANO, *supra* note 155, at 74-75.

<sup>179</sup> See A. FERRARI, LA LIBERTÀ RELIGIOSA, *supra* note 161, at 29; ROMANO, *supra* note 155, at 145.

<sup>180</sup> BOSWORTH, MUSSOLINI’S ITALY, *supra* note 155, at 238-39.

<sup>181</sup> A. FERRARI, LA LIBERTÀ RELIGIOSA, *supra* note 161, at 29-32.

<sup>182</sup> 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.

<sup>183</sup> 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.

*Id.*

Mussolini and the Church nevertheless had plenty of disagreements, and Pius XI issued encyclicals against Fascist and Nazi excesses. See Gianni LONG, ALLE ORIGINI DEL PLURALISMO CONFESIONALE: IL DIBATTITO SULLA LIBERTÀ RELIGIOSA NELL’ETÀ DELLA COSTITUENTE 212-13 (Bologna: Il Mulino, 1990).

<sup>184</sup> See BOSWORTH, MUSSOLINI’S ITALY, *supra* note 155, at 348.

about criticizing the regime and less reticent about cooperating with it.<sup>185</sup> Pius XII's family, additionally, had close ties to the Bank of Rome, which was a crucial source of Fascist financing.<sup>186</sup>

As we discuss in more detail below,<sup>187</sup> 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 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.<sup>188</sup>

#### *d. Fascist-Era Anti-Semitism*

It is not true, as Italians sometimes suggest,<sup>189</sup> that anti-Semitism was largely unknown in pre-war Italy.<sup>190</sup> Hostility to Jews is deeply rooted in Italian and Catholic history (as in other religions and elsewhere in the West).<sup>191</sup> Jews in the Papal States were subjected to the Inquisition, and humiliations and disabilities imposed on them as late as the 19<sup>th</sup> century bore a disquieting resemblance to those instituted by the Nazis in advance of the Holocaust.<sup>192</sup> 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.<sup>193</sup>

By the pre-war era, Catholic teaching distinguished acceptable "discrimination" against Jews from their unacceptable "persecution." The Church condemned anti-Jewish violence, but generally

(Contd.) \_\_\_\_\_

[T]he elevation of Pius XII was welcomed among the Fascist leadership, as it should have been, given the new Pope's family background in Italian high finance, fervent anti-communism and preference for Fascism over other modern ideologies which kept in thrall a sinful mankind. Despite further jars with Mussolini, in his occupation of the papal chair Pius XII heralded no rupture in the cohabitation between Church and State in Fascist Italy.

*Id.*

<sup>185</sup> ROBERT A. VENTRESCA, *SOLDIER OF CHRIST: THE LIFE OF POPE PIUS XII* 66, 90, 95, 131, 150-53 (Cambridge, Mass.: Harvard University Press, 2013) (concluding that as Vatican Secretary of State, Cardinal Pacelli had moderated strident criticisms of Fascism and Nazism that Pius XI had been inclined to issue, and continued this tendency when he was elevated as Pope Pius XII); *see also id.* at 142-43 (observing that members of Mussolini's government were pleased with Pacelli's election as pope because they expected him to act more favorably to Fascism than had Pius XI, based on Pacelli's sympathy for Franco and the Falangists, "his constructive working relationship with Fascist Italy, and his continued pursuit of better relations with Hitler's regime").

<sup>186</sup> BOSWORTH, *MUSSOLINI'S ITALY*, *supra* note 155, at 237, 348.

<sup>187</sup> *See infra* Part II-B-3-d.

<sup>188</sup> BOSWORTH, *MUSSOLINI'S ITALY*, *supra* note 155, at 490.

<sup>189</sup> *See, e.g.*, BARZINI, *supra* note 150, at 315.

<sup>190</sup> *See* BOSWORTH, *MUSSOLINI'S ITALY*, *supra* note 155, at 417; ROMANO, *supra* note 155, at 87.

<sup>191</sup> *See, e.g.*, VILADESAU, *BEAUTY OF THE CROSS*, *supra* note 53, at 108, 167 (detailing anti-Semitism in Catholic theology and art during the Middle Ages); VILADESAU, *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).

<sup>192</sup> 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 in 1870. *See, e.g.*, CORRADO AUGIAS, *THE SECRETS OF ROME* 352-56, 359-62 (New York: Rizzoli, A. Lawrence Jenkins trans. 2007).

<sup>193</sup> *See, e.g.*, ROMANO, *supra* note 155, at 87 ; VENTRESCA, *supra* note 185, at 9.

supported discriminatory legislation that sought to restrict Jewish influence on Catholic society, at least in Italy.<sup>194</sup> Having 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.<sup>195</sup> Pre-war popes also reflexively associated Jews with communism, liberalism, modernism, socialism, and other enemies of the late 19<sup>th</sup> and early 20<sup>th</sup> century Church.<sup>196</sup>

Catholic teaching, however, understood Judaism as a religion and a culture, not as a supposed race.<sup>197</sup> 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.<sup>198</sup> Fascist-era efforts to intervene on behalf of all Jews, however, were rare.<sup>199</sup> 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.<sup>200</sup> Discrimination against observant Jews resonated with the Church's belief that the practice of Judaism subverted of the Christian message and justified measures to reduce Jewish influence.<sup>201</sup>

Whether the Fascist-era Popes—Pius XI and especially Pius XII—were unacceptably passive in the face of the Holocaust is a 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.<sup>202</sup> 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.<sup>203</sup>

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<sup>194</sup> ROMANO, *supra* note 155, at 87; SUSAN ZUCOTTI, UNDER HIS VERY WINDOWS: THE VATICAN AND THE HOLOCAUST IN ITALY 56 (New Haven, Conn.: Yale University Press, 2002).

<sup>195</sup> ROMANO, *supra* note 155, at 86-87

<sup>196</sup> 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.

<sup>197</sup> ZUCOTTI, *supra* note 194, at 15, 22.

<sup>198</sup> 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.

<sup>199</sup> See *infra* note 203 & accompanying text.

<sup>200</sup> 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.

<sup>201</sup> 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.*

<sup>202</sup> 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"). Professor Ventresca emphasizes elsewhere, however, that Pius XII avoided explicit condemnations of Nazi persecution of Jews. See, e.g., VENTRESCA, *supra* note 185, at 177.

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 and occupation by the Italian army and the German occupiers, 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. Professor Ventresca, however, questions that any plan of occupation and arrest ever existed, though Pius XII and Vatican officials took the possibility seriously. VENTRESCA, *supra* note 185, at 193-94. 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).

We cannot resolve these controversies here.<sup>204</sup> However, whatever Pius XI and XII, the Vatican, and the Church may or may not have done for Jews during the Fascist era, it cannot be gainsaid that

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It is undeniable, finally, that thousands of courageous Catholic clerics in Italy—including the cardinal archbishops of Genoa, Florence, Milan, and Turin, and some Vatican clerics (perhaps including Pius himself)—ran great risks to hide and protect thousands of Jews from arrest, internment, and deportation under the German occupation; some paid with their lives. *See, e.g.,* RYCHLAK, *supra* note 198, at 18, 101, 105; ZUCOTTI, *supra* note 194, at 87-88, 189-92, 199, 202-06, 212-13, 233-64 *passim*. These efforts, it is suggested, were directed behind the scenes by Pius XII because he could not openly challenge the Fascists or the Nazis. *See, e.g.,* RYCHLAK, *supra* note 198, at 7, 101-02, 130-33, 138, 255; *see also* VENTRESCA, *supra* note 185, at 299, 307. While Jews undeniably fared poorly in Fascist and German-occupied Italy, it is suggested that an apparently greater percentage survived there than anywhere else in Europe: Of an estimated 40,000 to 45,000 Jews residing in pre-war Italy, 7,500 to 8,000 were killed in Italy or deported to death camps in Germany and Poland, from which between 500 and 1,000 returned. *See* BOSWORTH, MUSSOLINI'S ITALY, *supra* note 155, at 472; LONG, *supra* note 183, at 283. The proportion of Italian Jews who perished—substantially less than 20% of the pre-war population—is claimed to have been lower than in any other part of Germany or German-allied or -occupied Europe.

<sup>203</sup> Pius XI's encyclicals, for example, did not condemn Fascism or Nazism as such, but only for their offenses against the Church. *See* LONG, *supra* note 183, at 213; VENTRESCA, *supra* note 185, at 117, 126-27. As we indicated above, neither pope was fundamentally opposed to discriminatory measures designed to safeguard Christian society against what they viewed as 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 20<sup>th</sup> 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 at any time during the Fascist era, even in Italy or strongly Catholic countries where the Church enjoyed grassroots influence; It is argued that this suggests that no such directive was ever issued. *See, e.g.,* VENTRESCA, *supra* note 185, at 308; ZUCOTTI, *supra* note 194, at 101, 114-15, 192, 180, 236, 238, 243, 245, 253, 258-59, 263-64, 281. *Contra* RYCHLAK, *supra* note 198, at 207-25 (maintaining that direct evidence of general papal orders to protect Jews has been overlooked or ignored). No general public condemnation of Fascist or Nazi anti-Semitism was issued even after the possibility of Axis occupation or siege was eliminated by the Allied liberation of Rome (June 4, 1944) or, indeed, the end of the war itself (May 6, 1945). VENTRESCA, *supra* note 185, at 177, 219, 229, 310; ZUCOTTI, *supra* note 194, at 283. *Contra* RYCHLAK, *supra* note 198, at 141.

While many clerics courageously hid and protected Jews during the German occupation, *see supra* note 202, most did 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* RYCHLAK, *supra* note 198, at 101 (noting that 150 Church buildings in Rome sheltered Jews and other victims of the German occupation); VENTRESCA, *supra* note 185, at 230 (same regarding 180 Catholic institutions). Many Italian clerics embraced even the extreme anti-Semitic 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 generally cautious, vague, polite, and amazingly few; they were usually put forward only on behalf of Jewish converts to Catholicism and Jews married to Catholics, rather than for all Jews, and were 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 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, while Professor Rychlak maintains that such papal interventions were common and effective throughout Europe during the war, *see* RYCHLAK, *supra* note 198, at 207-25.

Finally, however one presents the numbers, by the end of the war Italian Jews had been reduced to 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 (reporting that approximately one-third of Jews in pre-war Italy immigrated or converted to Catholicism to avoid racial restrictions, internment, execution, or deportation; 7,500 were executed or deported to death camps, of whom 610 survived, leaving about 20,000 Jews in post-war Italy out of a pre-war population of 40,000 to 45,000).

<sup>204</sup> 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

their greatest focus was on protecting Catholic interests—aligning the Church with Fascist Italy to obtain recognition of its temporal sovereignty, reconsecrate 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.<sup>205</sup> 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.<sup>206</sup> 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.<sup>207</sup>

*e. Catholic Confessional Republic*

Post-war Italy chose liberal democracy in a 1946 referendum,<sup>208</sup> 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 the 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.<sup>209</sup> 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.<sup>210</sup>

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, invoking the traditional teaching that constitutional protection was appropriate only for religious *truth*, meaning only for the Church and its teachings.<sup>211</sup>

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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.”).

<sup>205</sup> 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”); VENTRESCA, *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).

<sup>206</sup> 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* VENTRESCA, *supra* note 185, at 78-86, 92, 99-103, 146-47, 189-92, 221.

<sup>207</sup> *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-19<sup>th</sup> century from staunch opponent to powerful defender of liberal-democratic rights and values).

<sup>208</sup> Ventura, *supra* note 89, ¶ 64, at 45.

<sup>209</sup> *See* Pin, *supra* note 11, at 114. Ventura, *supra* note 89, ¶ 65, at 45.

<sup>210</sup> *E.g.*, A. FERRARI, LA LIBERTÀ RELIGIOSA, *supra* note 161 at 44; LONG, *supra* note 183, at 236, 288-89, 293-98.

<sup>211</sup> LONG, *supra* note 183, at 214, 217-20.

Pius thus insisted on constitutionalization of the Pacts without alteration, despite their flat contradiction of religious liberty and equality guarantees in the proposed Constitution.<sup>212</sup> 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.<sup>213</sup>

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 provisions in due course to bring them into harmony with the Constitution.<sup>214</sup> This not only left the Church entrenched in its traditional position of power and privilege,<sup>215</sup> 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.<sup>216</sup>

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.”<sup>217</sup> 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 liberal, social democratic, and communist enemies,<sup>218</sup> 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,<sup>219</sup> 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).<sup>220</sup>

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.<sup>221</sup> The Accords eliminated the Church’s status as the state church of Italy,

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<sup>212</sup> 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.*

<sup>213</sup> A. Ferrari, *Civil Religion in Italy*, *supra* note 158, at 848.

<sup>214</sup> 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.

<sup>215</sup> A. FERRARI, *LA LIBERTÀ RELIGIOSA*, *supra* note 161, at 57.

<sup>216</sup> A. FERRARI, *LA LIBERTÀ RELIGIOSA*, *supra* note 161, at 54; LONG, *supra* note 183, at 281-82; Pin, *supra* note 11, at 119.

<sup>217</sup> 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.

<sup>218</sup> 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.

<sup>219</sup> LONG, *supra* note 183, at 293.

<sup>220</sup> A. FERRARI, *LA LIBERTÀ RELIGIOSA*, *supra* note 161, at 59, 60-61.

<sup>221</sup> Ventura, *supra* note 89, ¶ 69, at 48.

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.<sup>222</sup> Only after Villa Madama did Italy ratify long-negotiated agreements that legally recognized Jewish and Protestant communities.<sup>223</sup> Similar agreements with less familiar groups such as the Jehovah’s Witnesses and The Church of Jesus Christ of Latter-day Saints (Mormons) 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,<sup>224</sup> on Vatican II’s recognition of universal religious liberty,<sup>225</sup> and finally on Villa Madama’s express recognition of Catholicism as an Italian historical-cultural legacy,<sup>226</sup> 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.<sup>227</sup> 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.<sup>228</sup>

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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 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) Fashioned only in the last generation 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

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Italian courts had begun to undermine the Lateran Pacts in the 1970s. See Ventura, *supra* note 89, ¶ 69, at 47. An increasingly liberal electorate foreshadowed that change was inevitable. *Id.*, at 48.

<sup>222</sup> Pin, *supra* note 11, at 118; Ventura, *supra* note 89, ¶71, at 49.

<sup>223</sup> Ventura, *supra* note 89, ¶71, at 49.

<sup>224</sup> See A. Ferrari, *Civil Religion in Italy*, *supra* note 158, at 847-48.

<sup>225</sup> See Calo, *supra* note 161, at 21-24. John Paul II, the pope who oversaw the deconfessionalization of Italy under the Villa Madama Accords, was also the pope who made human rights a central concern of the Church. *Id.* at 24.

<sup>226</sup> See, e.g., A. Ferrari, *Civil Religion in Italy*, *supra* note 158, at 851; Pin, *supra* note 11, at 121.

<sup>227</sup> See Calo, *supra* note 161, at 3,4.

<sup>228</sup> See *supra* Parts II-B-2-a & -b.

interests.<sup>229</sup> 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 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, *laicità*'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.<sup>230</sup> 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.<sup>231</sup> 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,<sup>232</sup> the Italian courts' assertion of extraordinary meanings for the crucifix when displayed in public school classrooms,<sup>233</sup> and *Lautsi*'s remarkable assertion that the crucifix has no confessional meaning or effect at all in an Italian public school.<sup>234</sup> 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), in case of *Lautsi* and the crucifix. These alternate secular meanings are not obvious from their ordinary confessional counterparts, and actually seem to 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 deemphasize 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.<sup>235</sup> *Lautsi* accomplishes the same thing more directly, emphasizing the crucifix's “passivity” and the lack

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<sup>229</sup> 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”).

<sup>230</sup> See, e.g., A. Ferrari, *Civil Religion in Italy*, *supra* note 158, at 841.

<sup>231</sup> See *supra* Parts II-A-1 & -B-1.

<sup>232</sup> See *supra* Part II-A-2.

<sup>233</sup> See *supra* Parts II-B-2-a & -b.

<sup>234</sup> See *supra* Part II-B-2-c.

<sup>235</sup> See *supra* Part II-A-2.

of any evidence that non-Catholic children were treated badly or differently in Italian classrooms where the crucifix is displayed.<sup>236</sup>

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.<sup>237</sup> The meaning of a sign is in principle indeterminate, but it does not follow, as judges sometimes suppose,<sup>238</sup> that a sign can mean anything.<sup>239</sup> 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),<sup>240</sup> but also the history and culture of the place where it is displayed (the United States, Italy).<sup>241</sup>

As we have seen, the purported secular meanings asserted 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.<sup>242</sup>

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 Christian culture (Protestant in the U.S., Catholic in Italy) that in practice 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 traditional majoritarian religions as embattled cultural minorities.<sup>243</sup>

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. Self-declared Protestants now constitute a bare majority of U.S. adults,<sup>244</sup> and Christianity (especially evangelical Protestantism) has ceased to be a major American cultural influence.<sup>245</sup> NonChristians, unaffiliated believers, and unbelievers now constitute over a fifth of the population,<sup>246</sup> 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

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<sup>236</sup> See *supra* Part II-B-2-c.

<sup>237</sup> See *supra* Part I-C.

<sup>238</sup> See, e.g., *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 474-76 (2009) (plurality opinion by Alito, J.) (arguing the impossibility of determining a city monument’s meaning).

<sup>239</sup> See *supra* text accompanying notes 43-45

<sup>240</sup> See *supra* Parts II-A-2 & -B-2.

<sup>241</sup> See *supra* Parts II-A-3 & -B-3.

<sup>242</sup> See *supra* Parts II-A-3 & B-3.

<sup>243</sup> Beaman, *supra* note 10, at 90.

<sup>244</sup> 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>.

<sup>245</sup> See HUNTER, *supra* note 38, at 79-92.

<sup>246</sup> RELIGIOUS AFFILIATION SURVEY FINDINGS, *supra* note 245, at 5 (summing percentages for “Other Religions” (4.7%) & “Unaffiliated” (16.1%)).

unbeliever or unaffiliated with a religion.<sup>247</sup> 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 society.<sup>248</sup>

Though Italy is among the more religious of the EU countries,<sup>249</sup> 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.<sup>250</sup> These data on so-called Catholic “rites of passage” are far more telling than those on 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 following the pattern of other advanced Western countries.<sup>251</sup>

An overwhelming majority of Italian Catholics opposes Church intervention in Italian politics,<sup>252</sup> and the result of most referenda relating to practices opposed by the Church has been rejection of the Catholic position.<sup>253</sup>

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.”<sup>254</sup>

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, while on the other, statistical data confirm the steady secularizing of individual behavior and the widening gulf between religion 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.<sup>255</sup> We see this in both *Buono* and *Lautsi*. The confessional elements of both cross and crucifix are losing their

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<sup>247</sup> RELIGIOUS AFFILIATION SURVEY FINDINGS, *supra* note 245, at 7.

<sup>248</sup> PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY, REPORT 2 (RELIGIOUS BELIEFS & PRACTICES/SOCIAL AND POLITICAL VIEWS) - SUMMARY OF KEY FINDINGS 5 (June 2008, <http://religions.pewforum.org/pdf/report2religious-landscape-study-key-findings.pdf>); *accord* ROBERT D. PUTNAM & DAVID CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 80-133 (New York: Simon & Schuster, 2010) (arguing that the dramatic increase in disaffiliation and unbelief in young adults is a reaction to conservative Christian political activism in the 1980s and 1990s). For the full Pew report, see <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>.

<sup>249</sup> See, e.g., Barry Kosmin, *France, Italy and Spain: Political Secularism and Public Opinion*, in SECULARISM, WOMEN & THE STATE: THE MEDITERRANEAN WORLD IN THE 21<sup>ST</sup> CENTURY 29 (Hartford, Conn.: Institute for the Study of Secularism in Society and Culture, Barry A. Komlin & Ariela Keysar eds. 2009) [hereinafter SECULARISM]

<sup>250</sup> 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. Komlin & Ariela Keysar eds. 2009).

<sup>251</sup> S. Sansonetti, *supra* note 251, at 140. See also R. CARTOCCI, GEOGRAFIA DELL’ITALIA CATTOLICA (Bologna, Italy: Il Mulino, 2011).

<sup>252</sup> Kosmin, *supra* note 250, at 35.

<sup>253</sup> See Sansonetti, *supra* note 251, at 140.

<sup>254</sup> Sansonetti, *supra* note 251, at 149.

cultural salience—it can no longer be assumed, in other words, that the confessional referent of each sign is uniformly or even 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.

The importance of careful cultural analysis is well illustrated by Professor Weiler’s argument before the ECtHR’s Grand Chamber on behalf of eight intervening countries in *Lautsi & Others*,<sup>256</sup> widely credited with persuading the Grand Chamber to overturn the prior Second Section decision invalidating classroom display of the crucifix.<sup>257</sup> 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.<sup>258</sup> 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,<sup>259</sup> and ignoring the powerful constitutional convergence trends documented by Professors Annicchino, Ferrari, and Haupt, among others.<sup>260</sup>

Within each “non-laïque” state 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.<sup>261</sup> 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 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 doesn’t say, and offers no evidence that it has. He argues 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.<sup>262</sup> But 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

(Contd.) \_\_\_\_\_

<sup>255</sup> See Part I-C.

<sup>256</sup> See Joseph Weiler, “Oral Submission on Behalf of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Russia, and San Marino (June 30, 2012), <http://icon.oxfordjournals.org/content/8/2/157.full>.

<sup>257</sup> See, e.g., Pierre-Henri Prétot, *The Lautsi Decision as Seen from (Christian) Europe*, 65 *MAINE L. REV.* 783 (2013).

<sup>258</sup> Weiler, *supra* note 257, at ¶¶ 12, 13

<sup>259</sup> Weiler, *supra* note 257, at ¶ 15.

<sup>260</sup> See, e.g., Annicchino, *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, *supra* note 2.

<sup>261</sup> Weiler, *supra* note 257, at ¶ 15.

<sup>262</sup> Weiler, *supra* note 257, at ¶ 16 (emphasis added).

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 that of Italian Catholics and their Church.<sup>263</sup>

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 it 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.

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.<sup>264</sup> 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* seems to disappear in Weiler’s argument—“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.”<sup>265</sup>

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.<sup>266</sup> But 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.<sup>267</sup> As

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<sup>263</sup> 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 ECtHR 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. 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.

<sup>264</sup> See *supra* notes 140-41 & accompanying text.

<sup>265</sup> CARDIA, *supra* note 11, at 137 (authors’ translation).

<sup>266</sup> Bartrum, *supra* note 11, at 1662-63.

<sup>267</sup> See Scharffs, *supra* note 32, at 58; cf. Hill, *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.”).

Professor Roy has concluded, the challenge is not a “clash between different cultures, it is a separation of culture and religion.”<sup>268</sup>

### **Conclusion: Acculturation or Witness?**

James Davison Hunter has argued that

[t]he 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.<sup>269</sup>

The temptation to dominate and politicize culture, Hunter continues, transforms “Christian public witness into the opposite of the witness Christianity is supposed to offer.”<sup>270</sup>

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. Conceding and cooperating with government in the desacralizing of 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* are anything but good news for belief.

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<sup>268</sup> ROY, *supra* note 38, at 115.

<sup>269</sup> HUNTER, *supra* note 38, at 280.

<sup>270</sup> *Id.*

**Appendices: English Translations of Italian Administrative Trial and Appellate Court Decisions  
in Lautsi**

**I. Appendix I: Sentenza N. 1110/2005, Ric. N. 2007/02 (Tribunale Amministrativo  
Regionale Veneto - Sezione III Mar. 17, 2005)\***

**REPUBLIC OF ITALY  
IN THE NAME OF THE ITALIAN PEOPLE**

The *Tribunale Amministrativo Regionale per il Veneto*,<sup>271</sup> Third Panel . . . has pronounced the following

**JUDGMENT**

on complaint n. 2007/02, brought by Soile Tuulikki Lautsi, for herself and as parent of minor children Dataico Albertin e Sami Albertin . . . ,

against

the Ministry of Instruction, Universities, and Research, in the person of the minister *pro tempore* . . . ,  
with the intervention as interested opposing parties

of the *Associazione "Forum"* . . . ;

and of Mr. Paolo Bonato for himself and as parent of minor child Laura Bonato, and of Mr. Linicio Bano, in his capacity as president of the *A.GE.* (Italian Parents Association) of Padova . . . ;

for reversal

of the decision handed down on 27 May 2002 by the *Consiglio di Istituto* of the *Istituto Comprensivo "Vittorino da Feltre"* of Abano Terme (Padova)—memorandum n. 5—to the extent that it decided to leave religious symbols displayed in the educational environment.

. . .

[C]onsidered in fact and law as follows:

**FACTS**

Massimo Albertin and Soile Tuulikki Lautsi, the latter born in the city of Sipoo, Finland, are the parents of Dataico and Sami Albertin, born in 1988 and 1990, respectively, and enrolled in 2002 in the Third and First Classes, respectively, of the *istituto comprensivo statale "Vittorino da Feltre"* of Abano Terme (Padova).

On April 22, 2002, in the course of a meeting of the *consiglio d'istituto*—as can be read in the minutes of the meeting—the same Massimo Albertin, “in reference to the display of religious symbols” within the school, proposed their removal; after a thorough discussion, the decision was deferred to the meeting of May 27, when a resolution proposing “to leave religious symbols displayed” was put to a vote and approved.

Soile Tuulikki Lautsi, for herself and as parent exercising custodial authority over her minor sons, has challenged this determination with the complaint under examination . . . .

The complaint criticizes the challenged resolution, first of all, for violating the principles of impartiality and of the *laicità* of the State, and particularly the latter, as a supreme principle of the constitutional order, having absolute priority and fundamental character, inferable together from art. 3

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\* Translated by Frederick Mark Gedicks, Guy Anderson Chair & Professor of Law, Brigham Young University Law School, Provo, Utah & Dr. Pasquale Annicchino, Research Fellow, Robert Schumann Centre for Advanced Studies, European University Institute, Florence, Italy.

All footnotes have been added by the translators. Italics, asterisks, and typeface for English words mirror those in the original opinion.

<sup>271</sup> The “Administrative Tribunal for the Veneto Region.”

of the Constitution, which guarantees the equality of all citizens, and by the succeeding art. 19, which recognizes complete liberty to profess ones own religious faith, including even the profession of atheism or of agnosticism: A principle confirmed by art. 9 of the European Convention on Human rights, made effective in Italy with the law of 4 August 1955, n. 848, which recognizes the liberty to manifest “one’s own religion or creed.”

The aforementioned principle of *laicità*, contines the plaintiff, would preclude display of the crucifix and of other religious symbols in school classrooms, claimed to be in violation of the “parity that must be guaranteed to all religions and all beliefs, even those not religious.”: The challenged resolution of the *Consiglio* of the school “Vittorino da Feltre” would constitute an “open and clear violation of the aforementioned fundamental principles of out legal order.”

Additionally, continues Ms. Lautsi, the same resolution would also be an illegitimate abuse of discretion by reason of its contradictory logic.

One can presume, from what is written in the minutes of the meeting in which the provision was approved, that one of the members of the body had expressed a desire that “this problem might incentivize greater education about religious integration and respect for liberty of ideas and thought of all”: but, according to Ms. Lautsi, one cannot affirm this and at the same time deny it, “by deciding that in the school there must be present the religious symbol belonging, however, to a single determined religious confession.”

...

[The court then summarizes the defenses of the Ministry, noting that it contests the merits of the complaint and also raises procedural and jurisdictional objections by both parties, including the purported failure of the plaintiff to notify other parents and students in the school as interested opposing parties who might want to maintain display of the crucifix, the administrative law judge’s lack of jurisdiction over a matter involving personal constitutional rights, and the failure of the plaintiff to specifically reference the two regulations issued in 1924 and 1928 that actually control the case. It also noted the plaintiff’s objection to the interventions of *Associazione Forum*, Mr. Bonato, and *A.GE*.

The court then related the *Tribunale*’s previous referral of the case to the *Corte Costituzionale*, because it appeared to raise *prima facie* a question of constitutionality, and that court’s remanding of the case back to the *Tribunale* for lack of jurisdiction, explaining that the corte’s jurisdiction extends only to legislative acts, and not to administrative acts.]

...

As far as the merits are concerned, [the intervening parties] observe that the crucifix represents a symbol of Christian civilization and culture as a universal value, independent of a specific religious confession ; in any event, this would be a matter of a nondiscriminatory sign.

...

As far as the merits are concerned, the complaining parties, also making use of the defense memoranda of the State Attorney’s Office filed in the constitutional office, relate how regulatory norms on the display of the crucifix, insofar as they are connected with Article 1 of the *Statuto Albertino*,<sup>272</sup> have been at least implicitly abrogated by law n. 121 of 1985 containing modifications to the Concordat and of the succeeding norms that guarantee liberty of conscience.<sup>273</sup> If the *TAR* were to consider the cited regulations as still enforceable, in her view they would in any event have to be

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<sup>272</sup> The *Statuto Albertino* was adopted as the constitution of the Kingdom of Savoy under King Albert in 1849, and later as the Constitution of the unified Kingdom of Italy in 1861. Among other things, it provided that the “Catholic, Apostolic, Roman Church” shall be the “sole religion of the State.”

<sup>273</sup> The “Concordat” refers to the treaty between Italy and the Church executed in 1929.

disallowed, insofar as they conflict with the constitutional principles of the nonconfessionalism of the state and of the liberty of conscience.

After a full and through discussion held in the course of oral arguemnt on 17 March 2005, the case was prepared for decision.

## LAW

[The court held that the *Associazione Forum* was not a proper intervening party, but that Mr. Bonato and the *A.GE.* were. It rejected all of the State's procedural and jurisdictional objections.]

...

4.1. Preliminarily, this tribunal considers – with respect to the purpose of the present judgment and of an overall evaluation of the question – the cross and the crucifix to be equivalent symbols, as previously indicated in the decree of this *TAR* n. 56 of 2004 and also previously before by the *Consiglio di Stato* in advisory opinion n. 63 of 1988, even if it certainly did not ignore the differences between the two signs. In this respect, it must be remembered that the approach of the various Christian confessions with respect to the representation of Christ are very different; it is enough to think of the noted and varying positions on this point of the Catholic Church, of the Reformed and Orthodox churches, of the Waldensian [*Valdese*], Anglican, Old Order [*Vetero*] Catholic, Hussite, Copt, and Armenian churches.

One must, however, be aware that in the prolonged praxis applying the regulation, as will be seen below, though it mentions only the crucifix, individual public schools often displayed a simple cross. Given that even in administrative law, it is conceivable that a custom could form as a source of unwritten law, a consistent behavior, repeated and constant for a certain number of years, is sufficient to complete the formation of an interpretive custom as part of the regulation.

4.2. Additionally, the crucifix has always been held as a sign seen in a less absolute manner, insofar as it is considered fungible with other images of equivalent significance, in fact, circular n. 8823 of 1923 of the Ministry of Public Instruction, admittedly in the context of a normative context also relating only to the crucifix, permitted (apparently to accommodate requests of the Waldensians) admitted the possibility that an image of Christ in another posture, for example, a scene showing Jesus with little children, could be substituted for the crucifix.

In substance, acknowledging the customary (and thus also interpretive) application of the legal norms on the display of this symbol in the schools, the two objects – cross and crucifix – can be considered fully present within and interchangeable with each other.

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5.1. As far as concerns the reconstruction of the regulatory foundation of the challenged provision, it remains only to recall the repeated decree of this *TAR* n. 56 of 2004, which related how display of the crucifix in school classrooms is expressly prescribed by two legal norms, art. 118 of r.d. [royal decree] 30 April 1924, n. 965 [hereinafter the “1924 decree”], containing direction on the internal order of institutes of middle school instruction, and art. 119 of r.d. 26 April 1928, n. 1297 [hereinafter the “1928 decree”] (and in particular in Table C attached to it), relating to institutes of elementary school instruction, norms that are historically connected to Article 140 r. d. n. 4336 of 1860, containing the implemented regulation of the well-known *Casati* law (l. n. 3725 of 1859), that included precisely the crucifix among the furnishings of school classrooms, later confirmed by regulation r. d. 6 February 1908 n. 150 (attachment D relating to article 112). The two cited royal decrees of 1924 and 1928 although dating back to the *Statuto* are still be in force, as confirmed by opinion 27 April 1988 n. 63/1988, delivered by the Second Panel of the *Consiglio di Stato* and, although not expressly referenced in the act challenged here, established its legitimacy.

5.2. In truth, continues order n. 56 of 2004, it is first of all recognized that the provisions referenced by the protesting Administration constitute as such a pertinent and adequate positive legal foundation

for the challenged provision, even though limited to a particular religious symbol, the crucifix, that is in any event the only one to which the complaint refers explicitly and with reasonable certainty, and to which the challenged provision refers. The cited [1928 decree] – included in Section XII entitled “School Rooms and Furnishings” – provides that every institute of middle school instruction “shall have the national flag; every classroom, the image of the crucifix and the portrait of the King”; the [1928 decree], in its turn, establishes that the various furnishings of school classrooms are listed in Table C, attached to the same regulation: and such listing includes the crucifix for each elementary school class.

Such provisions having predated the Treaty and the Concordat between the Holy See and Italy – which was put into execution with the law of 27 May 1929, n. 810 – do not appear to be inconsistent with the provisions contained in the acts of the Lateran Pacts, in which nothing was established relative to the display of the crucifix in the schools or in any other public office; additionally, as the *Consiglio di Stato* relates in opinion n. 63/1988, the modifications brought to the Concordat with the [Villa Madama] Accords, and made effective with the law of 25 March 1985, n. 121, “not contemplating themselves in any way the material which we are discussing, so they cannot influence or condition the enforceability of the regulations relating to the original Concordat,” lacking the presuppositions of Article 15 of the norms of general law.

In particular, continues the same opinion, neither a relationship of incompatibility of superseded norms nor the configuration of a new organization of the entire subject matter appears possible, their being already regulated by “preceding norms”: therefore, in conclusion, since the provisions under discussion “do not conform to the teaching of the Catholic religion nor do they constitute implementation of tasks assumed by the state under the Concordat, it must be held that these are even now legitimate.”

5.3. The regulatory nature of the two cited regulations is deducible, first of all from specific provisions that qualify them as such (for example article 144 of [the 1924 decree], and the same heading of the [1928 decree]); one may add that their respective preambles reference acts of an indisputably legislative character – the *testo unico* of the laws on elementary school instruction, approved with the r. d. of 5 February 1928 n. 577, on the one hand, and the r.d. of 6 May 1923, n. 1054, providing the directions for middle school instruction, on the other – which these decrees are dedicated to putting into detailed effect.

5.4. For completeness, we related that in their turn, the cited laws were actually made effective in the formulation found at d. lgs. 16 April 1994, n. 297, through which was approved the *testo unico* of the legislative provisions in force in matters of instruction, relative to schools of every level and grade.

In truth, the fact that according to the [1924 and 1928 decrees] (and in particular Table C attached thereto) the crucifix constitutes a school furnishing, is recalled by article 159, subsection I, of d. lgs. 297/94, corresponding to article 55 of the r.d. of 5 February 1928, n. 577, which provides that it falls to the municipality to provide, among other things, “the funds necessary for the acquisition, the maintenance, and the refurbishing of teaching materials of *scholastic furnishings* comprised of the cabinets and shelving for school libraries, gym equipment, enrollment and printing supplies necessary for all elementary schools”; for the middle schools, then, article 190 of the cited d. lgs. 297/94, corresponding to article 103 of the r. d. of 6 May 1923, n. 1054, equally provides that the municipalities are obligated to furnish, beyond sufficient space, the furnishings, water, telephone, lighting, heating, and so on.

There is, then, another provision, contained in the same d. lgs. 297/94 that must be considered, namely article 676, entitled “Abrogation norm,” which provides that “the provisions inserted in the present *testo unico* are in force in its resulting formulation; those not inserted remain dormant with the exception of those provisions contrary to or incompatible with the *testo unico* itself, which are abrogated.”

In truth, the norms contained in the [1924 and 1928 decrees] do not at all conflict with the *testo unico* and remained therefore fully enforceable by the same article 676.

5.5. It serves then to consider that the nature of the regime that governed the Country during the era in which the cited regulations were issued and put into use,<sup>274</sup> cannot at all entail their abrogation, both because this is an irrelevant legal consideration, as well as because, as noted, the norms assume a their own [*proprio*] meaning independent of the intentions of those who issued them. Additionally, as mentioned above, the norms governing display of the crucifix in school classrooms date back to 1859, when, among other things, there existed an historical context of vivid opposition between the Papacy and the unified State and, in any event, well before being instituted by the dictatorship. Evidently, display of the Christian symbol was considered at the time, along with display of the portrait of the King and of the flag, as a call to unifying values of the nation.

Finally, the display of the crucifix in the schools has endured for such a long time, even after the fall of Fascism, that it is spoken of as a custom in the legal sense of the term.

5.6. What we have been discussing, moreover, permits rejection of the thesis, argued on the part of the plaintiff in incorporated memoranda and sometimes referenced in jurisprudence and doctrine, according to which the two cited regulations (the [1924 and 1928 decrees]), insofar as they are strictly related to the *Statuto Albertino* and to its provision that Catholicism is the religion of the State (article 1), would be abrogated by the republican Constitution or, at least, by the modification made to the Concordat by the Accord, ratified and made effective with the law of 25 March 1985 n. 121, that expressly expelled from the legal system the very concept of a religion of the State.

First of all, the thesis relates that, not being a matter of express abrogation, it could be one of implied abrogation, from article 15 of the *preleggi*, which must be deduced from direct logical incompatibility, or else from the impossibility that the new norm and the old norm could coexist with respect to same object because of the absolute contradiction of the two provisions (*Consiglio di Stato*, Panel IV, 5 June 1995, n. 538). Nonetheless, this assumption implies the direct derivation of the regulation on display of the crucifix from article 1 of the *Statuto Albertino*, and thus its evident incompatibility both with the Constitution and with the modification of the Concordat of 1985; the thesis considers it demonstrated *a p priori*, however, that which constitutes instead the object of the present controversy—that is, the possible incompatibility of display of the crucifix in school classrooms with the actual constitutional arrangement.

In truth, as already explicated above, the cited regulations have as a foundation the laws on public instruction and do not imply at all a direct application of the *Statuto Albertino*, which at the most can constitute only the reason for display of the crucifix but which do not impose it and certainly do not imply it as a logical consequence. In substance, the abrogation thesis, though striking, ignores the normative and historical picture and even more, takes for granted a single meaning of the symbol of the cross in the school context that is instead doubtful and controversial. Furthermore, it would be contradictory to simultaneously negate the direct derivation of the cited regulations from laws that regulate the equipment of the schools, concerning the same subject matter as the *Corte Costituzionale* established in the cited order of inadmissibility n. 389 of 2004, and at the same time place these regulations in direct correlation with article 1 of the *Statuto Albertino*, a norm with the force of ordinary law having a completely different object and goal.

5.7. For completeness, it must be observed that it has also been held that the two regulations of 1924 and 1928 did not provide the obligation to display the crucifix, but only the obligation of school administration to acquire it as part of the school equipment; the display would become in this manner optional and the choice in that regard would be transferred to each individual school, according to the will of the majority of the competent governing body.

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<sup>274</sup> This is an oblique reference to the fact that the 1924 and 1928 decrees were issued under Mussolini's Fascist dictatorship.

This thesis does not appear tenable, first of all because of textual evidence, consisting of the [1924 decree] – including chapter XII entitled “Of the Rooms and Furnishings of the Schools” – which provides that every institute of middle school instruction “shall have the national flag; every classroom the image of the Crucifix and the portrait of the King”; the [1928 decree] in its turn establishes that the furnishings of the various scholastic classes are listed in Table C attached to the same regulation: and such listing includes the crucifix for each elementary school class.

The two cited norms, logically interpreted, make the display of the crucifix obligatory, also because it would not make any sense to equip the schools with an object lacking practical utility and a purely symbolic use without its display, say, if it were placed in a drawer. Finally, insofar as leaving the choice to each school, apart from the fact that the given legal norm does not permit it, it appears doubtful that in this subject matter, which involves individual liberties, it is up to majorities to decide.

5.8. Another suggested thesis draws the legitimacy of the crucifix in school classrooms directly from article 7 of the Constitution that distinguishes the Catholic Church (the only one mentioned in the Charter) from the other religions, recognizing the Concordat regime and considering the Church an ally of the state under international law. It follows easily from this proposition that on the one hand, neither the crucifix, nor for more important reasons the cross, can today be identified only with the Catholic religion, and on the other hand, that the Lateran Pacts and the peculiar position of the Catholic Church in our legal order do not at all undermine – as will be seen in the following subsection 7.2. – the supreme principle of the *laicità* of the state and of the equality of the various religious confessions.

5.9. In conclusion on this point, the court in its turn must recognize that the two acts in question have not been abrogated, neither expressly nor implicitly, by successive norms of a constitutional, legislative, or regulatory character. The [1924 and 1928 decrees] constitute, therefore, enforceable regulatory sources of law, as also asserted by the cited order of the *Corte Costituzionale* n. 389 of 2004.

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6.1. The crucifix, as appears evident, cannot be considered simply as a furnishing, but is a symbol, an object that calls to mind diverse meanings with respect to its material attributes similar to a flag, a scepter, or a wedding ring.

The question shifts therefore to what is to be the meaning or the meanings that this particular symbol evokes, to confirm, in the light of enforceable norms that are principally of constitutional character, if these are or are not compatible with its display in a public school. As is well known, the language of symbols constitutes a communicative system characterized by a high degree of vagueness and, at the same time, by the strong “emotional weight” of the indicated sign, for which both the preunderstanding of the interpreter as well as the contextualization of the examined symbol assume a relevant role.

It is conceded that a symbol, especially the cross, assumes by its nature a polysemous content, even in a single historical moment, besides undergoing changes both in the course of time as well in relation to the context in which it is displayed. For example, the cross that stood out on the shields of the Templars presented a semantic meaning altogether different from the cross inserted into the logo of the French Gaullist party or that displayed on the hats of Red Cross workers.

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7.1. This court does not believe that it can be doubted that the constitutional value to which the cross refers is the *laicità* of the state, clearly sanctioned by the republican Constitution. *Laicità* or nonconfessionalism does not at all mean opposition to religion or religiosity, but more simply that the democratic state recognizes an independent value to the religious sphere as extraneous to the state’s power of decision; in substance, the State is proclaimed neutral with respect to the diverse religions to which the citizen may freely belong, or even not belong because of atheist convictions or simple

indifference with respect to the fact of religion. “Secular state” means, therefore, the recognition of an autonomous sphere in religious matters left to the free determination of the individual; it means also in our legal order the regulation of certain conditions of rapport with some specified religions (recognized to the extent that they are not placed in opposition to fundamental values of the republic) and, through the special Concordat regime, with the Catholic Church. “Secular state” means as well, as a logical corollary, that in the public school in which young people must be developed in accordance with values of liberty, democracy, and the *laicità* of the state, it is not legal to impose any type of religious creed and where, to the contrary, an education imprinted with maximal liberty and reciprocal respect in such matters is appropriate.

7.2. In truth, as well explained in the cite order n. 56/04 of this TAR, the *laicità* of the Italian state constitutes, according to the judge of the laws,<sup>275</sup> a supreme principle, emerging from articles 2, 3, 7, 8, 19, and 20 of the Constitution and, therefore, “one of the contours of the form of the State delineated by the constitutional Charter of the republic,” (*see Corte Costituzionale*, 12 April 1989, n. 203), and in which “faiths, cultures, and diverse traditions are to live together in equality of liberty” (*Corte Costituzionale*, 18 October 1995, n. 004). As an effect of the principle of *laicità* (successively affirmed by the Corte Costituzionale with the judgments nn. 259/90, 195/93 and 329/97), and, more specifically, of the equality of all citizens without distinction of religion (article 3 of the Constitution) and of the equal liberty before the law of all religious confessions (article 8 of the Constitution), “the attitude of the state cannot be other than one of equidistance and impartiality” towards each faith, “without giving any relevance to whether this or that religious confession has a large or a small number of adherents (judgment nn. 925 of 1988, 440 of 1995 and 329 of 1997)” (*see Corte Costituzionale*, 20 November 2000, n. 508). In such a context, believers and unbelievers are found “exactly on the same plane with respect to a prescribed intervention on the part of the state with respect to practices having religious meaning: it is excluded in any event—by reason of a religion’s belonging to a dimension that is not that of the state and of its legal order, which possesses only the task of guaranteeing conditions that favor expansion of the liberty of all and in this area, religious liberty.” (*Corte Costituzionale*, 8 October 1996, n. 334); while “different and differentiating legislative valuations and approvals” among the diverse faiths, with different degrees of protection, would infringe upon the equal dignity of the person and would be posed “in contradiction to the constitutional principle of the *laicità* or non-confessionalism of the State” (*Corte Costituzionale*, 14 November 1997, n. 329). It is, finally, relevant that the numerous pronouncements of the *Corte Costituzionale* on this matter, if from one standpoint have concerned questions in which a specific prescription or normative imposition was discussed, nevertheless from the other they have affirmed a cardinal principle, that of the *laicità* of the State, that transcends individual legal events.

7.3. For completeness, we recall also article 9 of the European Convention for the Protection of Human Rights and Fundamental Liberties, signed on November 4, 1950 and ratified with the law of 4 August 1955 n. 848, which sets forth the inviolable right to “liberty of thought, conscience and religion.”

In the view of this Court, this international norm—as with others of analogous tenor, such as the Convention of the Rights of the Child signed at New York on November 20, 1989 and ratified with the law of 27 May 1991 n. 176—does not add or take away anything from what is already clearly established by our Constitution with regard to the non-confessionalism of the State, but constitutes a mere confirmation of it.

7.4. The *laicità* of the State, deriving directly from principles of equality and of liberty, constitutes not just a principle of the Italian legal order but also one in all western democratic systems; it is interesting to observe how the numerous jurisdictional pronouncements in various countries concerned with the legitimacy of the display of religious symbols in public spaces and in the schools, even in the

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<sup>275</sup> A reference to the *Corte Costituzionale*.

diversity of normative and social contexts, have always strongly affirmed the priority of the principle of the *laicità* of the State or of neutrality with respect to all religious faiths and atheist convictions, and this is true despite the most widely varying outcomes of the given judgments.

The supreme principle of the non-confessionalism of the state has been considered in truth as a constant reference in the judgment of the Bundesverfassungsgericht of 16 May 1995, in that of the Constitutional Court of the Bavarian State of 1 August 1997, in the judgment of the Federal Tribunal of Switzerland of 26 September 1990, of the Supreme Tribunal of Spain of 12 June 1990, but also in numerous pronouncements of courts in the United States, even though pertaining to symbols different from the cross.

7.5. The reference to jurisdictional decisions assumed in different legal orders compels the conclusion that the principle of the *laicità* of the State is by now part of the European legal heritage and of western democracies, but implies also that from its application in specific cases it is possible to draw diverse conclusions about the legality of the display of religious symbols in public places.

7.6. It is added that other concepts, even reference in foreign pronouncements and collected in doctrine that has drawn wide comment, instead do not appear usable in the present controversy: for example the possibility of recalling the concept of positive (*attiva*) *laicità*, contrasted with a so-called passive *laicità*, appears doubtful, because this distinction appears difficult to set up in our constitutional order, which next to religious liberty permits also the Concordant regime. In the same way, the concept of the active symbol distinct from that of the passive symbol referenced in some judgments of the United States of America does not appear usable, also because the distinction appears based more on the attitude of the observer, determinable only with difficulty, than on the nature of the symbol itself.

Finally, it is impossible to import into our system the concept of French *laïcité*, strictly bound to the specific history of that Country and based not just on the neutrality of the State, but upon its precise choice of values.

7.7. It serves only to add, for completion, that this being a matter of applying a principle of liberty, the criterion of the opinion of the majority or of a minority or of an individual cannot be permitted (the sole exception in Europe concerns the Austrian law of 1949, confirmed by the Concordat of 1962, that permits display of the cross in schools according to the will of the majority of the students). In this question what one observes is the eventually observable harm [*vulnus*] to the legal sphere even by a single subject; in truth, the same *Corte Costituzionale*, changing one of its precedents [*orientamento*] that relied on the common feeling of the majority, held that in such matters the number of adherents large or small to this or that religious confession does not possess any relevance (judgments already cited nn. 925 of 1988, 440 of 1995, 329 of 1997 and 508 of 2000).

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8.1. That admitted, it is observed first of all how the crucifix constitutes **also** an historical-cultural symbol, and consequently is endowed with an identity-value in reference to our people; even without quoting the well noted and authoritative assertion according to which “we cannot not call ourselves Christians,”<sup>276</sup> the crucifix undoubtedly represents in this way the historical path and cultural characteristic of our Country and in general of all of Europe, and constitutes an effective synthesis of them. Only with difficulty can one deny that our tortured history is saturated—for good or ill—with Christianity. Neither transforming historical analyses, nor the same indisputable *laicità* of the State can modify the past. Even if we are called to live together with our tradition in a manner certainly not

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<sup>276</sup> This refers to the title of a famous essay by Benedetto Croce, the author of *History as the Story of Liberty* (1938) and an anti-clerical and anti-Fascist Italian philosopher who emerged as a national figure of considerable moral stature in the post-war period. See Benedetto Croce, *Perchè non possiamo non dirci Cristiani*, LA CRITICA (Nov. 1942).

passive, but dialectical, by considering it always open and in evolution, the past certainly cannot be eliminated with an act of sovereign will or through a judgment.

8.2. For completion we add that the cited law n. 121 of 1985, a source of law famously reinforced as compared to ordinary law, containing the “ratification and execution of the Accord with additional protocols signed at Rome on February 18, 1984, that effected modifications to the Lateran Concordant of 11 February 1929, between the Republic of Italy and the Holy See,” as well as article 9 of that same Accord, expressly recognize that Christian principles “are part of the historical heritage of the Italian people,” with an affirmation of general application content and not solely applicable in the context of the teaching of the Catholic religion in the schools.

8.3. In truth, if we wanted and were able to consider the crucifix solely as a cultural-historic symbol, it would be easy to resolve the legal question that occupies us by arriving at a rejection of the complaint, insofar as everything points to a sign that in some way encapsulates relevant aspects of our civilization, of our humanistic culture as well as our popular conscience, not damaging in any way the *laicità* of the State and the educational goal of the public school.

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One cannot hide here—both because of the plural meaning that this symbol contains, and because of an elementary respect for the truth—that the crucifix, today, cannot be considered a mere historical and cultural symbol, not even in the school context, but it must be evaluated **also** as a religious symbol.

However, just as it would be reductive and simplistic—also to a certain extent—to consider the cross as a mere historical and cultural sign, it would also be reductive to automatically and uncritically correlate the qualification of that symbol as religious with the prohibition on displaying it in a public school, at least without first developing its particular bearing on the legally and constitutionally guaranteed concept of *laicità* that it is intended to preserve and defend.

9.2 In this respect it should be highlighted how the cross has to be understood as a symbol of Christianity, not just simply one of Catholicism, and thus also collects in itself, beyond Catholicism itself, the values of the other Christian faiths present in our Country, from the Waldenses [*Valdesi*] to those originating in the Reformation, from the Orthodox to those of more recent migration. The reference to religious confessions different from Catholicism, at this time the majority confession of our Country, is not casual, insofar as within some of these, especially the Waldensian confession, affirmation of the concept of the *laicità* of the State anticipated by decades the republican Constitution.

9.3. In substance, the cross is a symbol in which can be identified numerous (even if probably not all) religious confessions that take inspiration from the figure of Christ and that, in a certain way, thereby also constitute the sign of their common denominator; consequently, one can and must reject that the crucifix has to be understood according to the peculiarities of only a single one of the various Christian confessions, even that of Catholicism.

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10.1. The cross thus represents the distinctive sign of the Christian confessions: Now, given that it would be naïve and inexact to consider all religions equal or similar in their essential core, or even simply indifferent with respect to the secular State (it is enough to consider the problematic relations among several States and the Islamic religion, whose representatives often contest precisely the secularism [*laicità*] of the State), it is necessary to examine how Christianity is placed with respect to certain legal values protected by the republican Constitution, to evaluate the compatibility of positioning a Christian symbol in a public school.

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11.1. At this point, even being aware of setting ourselves on a treacherous and impassable path, one cannot do less than relate how Christianity and also its elder brother, Judaism—at least from Moses on and surely in Talmudic interpretation—placed tolerance of the other and defense of human dignity at the center of their faith.

In particular, then, Christianity—also by reference to the noted and oft-misunderstood, “Render unto Cesar that which is Cesar’s, and to . . .”—with its strong accent on the precept of love for one’s neighbor and even more the explicit prevalence give to the charity in the same faith, contains in a nutshell those ideas of tolerance, equality and liberty that are at the base of the modern secular State and that of Italy in particular.

11.2. Turning now beyond the surface, one discerns a line of thought that connects the Christian revolution of two thousand years ago, the affirmation in Europe of “*habeas corpus*,” the same cardinal elements of Enlightenment (even if historically it is posed in lively contrast to religion), that is, the liberty and human dignity of each person, the Declaration of Human Rights, and finally, the same secularism [*laicità*] of the modern State; all of these historical phenomena are in a significant way founded—even if certainly not in an exclusive way—on the Christian conception of the world. It has been perceptively observed that the well-known phrase, “*liberté, égalité, fraternité*” constitutes a motte easily adopted by a Christian, although with obvious emphasis on the third term.

In substance, it does not appear rash to affirm that, through the tortured and broken path of European history, the secularism [*laicità*] of the modern Stato has hardly been obtained except (and certainly no only) by more or less conscious reference to the founding values of Christianity; this explains why many judges of Christian faith in both Europe and Italy have been among the foremost proponents of the secularism [*laicità*] of the State.

11.3. In truth, in drafting of the republican Constitution and in fixing the principle of the *laicità* of the State, the cultural element of Christian inspiration has played a decisive part, as the work of the *Costituente*<sup>277</sup> demonstrates beyond a shadow of a doubt. In the sweep of history, right and proper credit must be given to a learned Servite monk,<sup>278</sup> working centuries earlier in the Republic of Venice who, anticipating our times, delineated in a difficult era the principles of reciprocal liberty in the two spheres of government and religion, and thus contextually proclaimed the secularism [*laicità*] of the State and the autonomy of religion.

It is thus agreed that the secular juxtaposition of State and Church, now finally obtained, contains a principle common and beneficial to both, the secularism [*laicità*] of the State, an expression in a particular sector of the precept of tolerance contained in the *kerygma* of the Christian faith.

Libera Chiesa in libero Stato<sup>279</sup> has today become a legally shared and protected value, even if the difficult path walked to establish it among the range of legal norms was different in the varying nations of Europe. As specifically regards Italy, the affirmation of the independence and sovereignty of the State and the churches, each in its proper order, was established for the Catholic Church in article 7 of the Constitution (reproduced, in a passage quite similar, by the conciliare constitution *Gaudium et spes*, at n. 76), and for other confessions by the succeeding article 8.

11.5. The bond between Christianity and liberty implicates an historical consequence that is not immediately perceptible, like an underground river only recently explored precisely because it is underground for most of its course, also because in the tormented affair of States and churches in

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<sup>277</sup> The *Costituente* was the constitutional assembly in which representatives from all of Italy convened in 1946 to draft the post-war republican Constitution that was ratified in 1947.

<sup>278</sup> Along with the Augustinians, the Carmelites, the Dominicans, and the Franciscans, the Servites constituted one of the five “mendicant” orders of Roman Catholicism dedicated to preaching the Gospel and serving the poor.

<sup>279</sup> This was the expression used by Camillo Cavour, the first prime minister of Italy, to capture the relationship between Church and State desired by the Kingdom of Italy in the wake of unification.

Europe the numerous attempts of churches to interfere in questions of state and vice versa are easily recognized, so that rather frequently well-known Christian ideals have been abandoned because of reasons of power and in the end violent opposition between governments and religious authorities.

11.6. However, considered in perspective, the central core and constant of Christian faith, notwithstanding the Inquisition, anti-Semitism, and the Crusades, one can easily discern the principle of human dignity, of tolerance, of evern religious liberty and thus in the final analysis the foundation of the same *laicità* of the State.

11.7. Knowing how to focus on history, as if on a mountain rather than confined to the valley, one discerns a perceptible affinity (not identity) between the “essential core” of Christianity which, privileging charity over every other aspect, including faith, places the accent on acceptance of the other, and the “essential core” of the republican Constitution, which consists in the legal endorsement, through solidarity, of the liberty of everyone and thus in the legal guarantee of respect for the other. The synthesis endures even though surrounding these two cores, both focused on human dignity, there are at times highly encrusted sedimentations, so much so as often to hide them—this holds expecially for Christianity.

11.8. In truth, if we may be permitted the expression, the consonance between the two harmonious spheres does not concern secondary aspects at all, but the respective fulcra of each of the Christian religion and the State. For Christianity, in fact, the method—that is, charity—prevails over premises—that is, faith—and over goals—that is, hope--, which constitute a constant among religions. At the same time, in mature democracies, the democratic method prevails over goals, by definition ever-changing, and over premises, by now part of the heritage of those belonging to the social contract.

11.9. One can therefore argue that, in actual social reality, the crucifix must be considered not just as a symbol of historical-cultural evolution, and thus of the identity of our people, but as the symbol moreover of a system of values of liberty, equality, human dignity, and religious tolerance, and thus also of the *laicità* of the State, principles that give life to our constitutional Charter.

In other words, the constitutional principles of liberty have many roots, and one of these is undoubtedly Christianity, in its very essence. It would be, therefore, subtly paradoxical to exclude a Christian sign from a public structure in the name of a *laicità* that surely has that precisel Christian religion as one of its distant sources.

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12.1 This Court certainly does not ignore how in the past other values have been attributed to the symbol of the crucifix, such as, at the time of the *Statuto Albertino*, the crucifix as the sign of Catholicism understood as the religion of the State, utilized, therefore, to Christianize a power and consolidate an authority.

We are also aware that even today the symbol of the cross can yield diverse interpretations: First of all, a strictly religious one, whether referring to Christianity in general or to Catholicism in particular. We are also aware that some students attending public school could freely and legitimately attribute to the cross meanings still more diverse, such as the crucifix as as sign of unacceptable preference given to one religion over the others, or of a blow [*vulnus*] to individual liberty and thus precisely to the *laicità* of the State, or of a reference to the limit of cesaropapism or of the Inquisition, even as a gratuitous remnant of the catechism implicitly supplied to nonbelievers in a location not suitable for subliminal propaganda in favor of Christian confessions: these are all matters of quite respectable opinion, but at bottom not relevant to the case under examination.

12.2. In fact, in evaluating the question without falling into subjectivism, which in constast to individual liberty is not legally or constitutionally guaranteed, (and thus not permitting that a solipsistic intepretation come to be—to use a customary expression in administrative law—

“otherwise” protected, one must necessarily be aware also of the reality in which we work, of the light of the actual constitutional order and of living law.

In other words, it is needful to refer oneself to the well-known facts underlying the case which, in the particular case under examination, also concern some indisputable social aspects, one of which relates, first of all, to the minority position assumed in our secularized society by citizens who adhere to various religious faiths in a nonsuperficial or skin-deep manner (and especially by Christians), which renders plausible and easy the reading of a symbol like the cross, displayed in a school context, as a cultural and also a religious sign, but interpreted in the limited and unrestrictive sense indicated above.

In truth, recent sociological analyses at the European and Italian level show an evident disassociation between the practice of faith, by now a minority activity, and adherence to the secularized values of Christianity, which appear instead as a widely diffused legacy. One academic, endowed with an ironic sense of paradox and spirit of observation, has defined the Europe of today as a continuing pagan flight from religious superstitions.

12.3. Correlatively, by virtue of the same *laicità* of the State, one must reiterate the necessity of public instruction, including the so-called civic education, which references not just history but also democratic and secular values of the enforceable and living constitution. The d.PR. n. 104 of 1985, containing scholastic programs, expressly reproduces the entire article 3 of the Constitution and immediately adds the following concerning religion: The state school does not have its own creed to preach nor an agnosticism to privilege. It recognizes the value of religious reality as an historical given, culturally and morally personified in the social reality of which the child has experience and, as such, the school makes the value of this reality an object of attention in the entirety of its educational activity, having regard for the religious experience that the child lives in his or her own family environment and in such a way as to mature feelings and behaviors of respect of the diverse positions in matters of religion and to oppose every form of discrimination.

12.4. In substance, in the actual moment, the crucifix in class presents a formative meaning and can and must be understood, both as the symbol of our history and culture and consequently of our very identity, and as a symbol of the principles of liberty, equality, and tolerance, and finally of the very *laicità* of the State, foundations of our life together and by now assimilated to the legal, social, and cultural legacy of Italy.

12.5. The sign of the cross, therefore, is to be considered—in its display in schools—**also** as a religious symbol of Christianity, certainly not understood its totality and thus with all of its implications and superstructures, but in the measure in which its founding meanings of acceptance and respect for one’s neighbor—that constitute as seen the foundation and keystone of Christianity—have been transfused into the principles of the *laicità* of the State, thus visibly protecting from an educational perspective the sharing of certain fundamental principles of the Republic with the heritage of Christianity.

12.6. It should also be clearly stressed that the symbol of the crucifix, so understood, assumes today, with the reference to values of tolerance, a particular meaning in the consideration that the Italian public school is actually attended by numerous foreign students, to whom it is quite important to transmit those principles of openness to diversity and rejection of all fundamentalisms—be they religious or secular—that pervade our legal order. We live in a tumultuous moment of encounter with other cultures and, to avoid its transformation into violent confrontation, it is indispensable to reaffirm symbolically our identity, all the more so since that identity is itself characterized by values of respect for the dignity of each human being and of universal solidarity.

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13.1. For mere scruple of completeness, it must be added the examination of the symbol of the cross of the cross effected on the basis of the well known and accepted theory of semiotic science, according

to which it is indispensable to examine the elements that a sign excludes rather than those it includes in order to discern the significance of the naturally polyvalent symbol, leads to the same result as that outlined above.

13.2. To be sure, religious symbols in general implicate a logical mechanism of exclusion; in fact, the point of departure for each religious faith is precisely the belief in a superior being by which adherents or the faithful find themselves by definition and conviction in the right. Consequently and inevitably, the attitude of one who believes with respect to one who doesn't, who thus is implicitly opposed to the supreme being, is one of exclusion.

The distinction towards the infidel is not expressed by proper name or group, but even in the name of name of the omnipotent, who constitutes an exceptional collective spiritual force for believers, but also a formidable danger, because it expresses the profound root of every religious fundamentalism. In determined historical circumstances, therefore, it becomes possible to instrumentalize religion, to the point of violence and war conducted in the name of the creator, as was taught to us by the paradoxical motto of the Nazi police, "Gott mit uns," and the same tragic chronicle of the years at the beginning of this century.

13.3. The logical mechanism of exclusion of the infidel is inserted in every religious creed, even if its followers are not aware of it—with the sole exception, however, of Christianity, already well understood (which obviously had not always happened in the past nor happens today, not even in the works of those proclaiming themselves Christians), which considers this same faith in the omnipotent secondary before charity, that is, with respect to one's neighbor. It follows from this that rejection of the nonbeliever on the part of a Christian implicates the radical negation of this very Christianity, substantial and gratuitous denunciation, which doesn't apply to other religious faiths, for which it can constitute at the most the violation of an important precept.

13.4. The symbol of Christianity—the cross—cannot, therefore, exclude anyone without negating itself; to the contrary, it constitutes, in a certain sense, the universal sign of acceptance and of respect for every human being as such, independently of any of his or her beliefs, religious or not.

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14.1. It serves only to add that the cross in class, properly understood, does not depend on the free convictions of anyone, does not exclude anyone and obviously does not impose or prescribe anything on or to anyone, but solely implicates, in the context of educational goals and the arrangements of the public school, a reflection—necessarily guided by the teachers—on Italian history and on the shared values of our society as legally reflected in the Constitution, among which in primary place is the *laicità* of the State.

14.2. To hazard a comparison, no one can dispute the symbolic sense, inclusive and assertive—*mutatis mutandis*—of the verse of the Koran singing the praises of the divine mercy prominently displayed on the campus of the University of Tunis—attended also by Christians, Jews, the religious indifferent, and atheists—or of the Muslim crescent that stands out on the flag of even secular Turkey.

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15.1 Remaining within the ambit of the analogy just cited, the sign of the cross that stands out on the flags of some European Countries, such as Finland, Sweden, Denmark, and Iceland, has its historical origins also in Christianity (principally in the Lutheran confession and, in case of Finland, also in Christian Orthodoxy), but it has lost through time every connotation referencing the strict bond that at one time existed between those States and religious faith, to assume the meaning of a symbol of nations that have become profoundly secular, without at all disavowing their Christian history, but on the contrary preserving in it certain universal values.

15.2. In other words, a Finnish citizen of Baha'i faith or an atheist or a person simply religiously indifferent, certainly cannot feel offended in his or her sphere of liberty by the presence in public

schools of the national symbol of the Country, even if it contains a cross. In the same way, in the actual cultural context of Europe, a Greek, Maltese, Swiss, English, or Slovak citizen can easily and reasonably distinguish in the cross that stands out on the flag, beyond a reference to his or her own history and identity, also a reference to the values of secular democracy.

Returning to Italy, this is not about maintaining coats of arms or banners of local entities that explicitly reference Christian symbology, such as the official flag of the Veneto Region, posted in numerous public offices in its territory with apparently disturbing anyone.

The crucifix constitutes surely a different symbol than a flag, and besides, in Italy the cultural evolution did not otherwise reach the same level as the Nordic Countries or—more correctly and for evident historical reasons—it lacks the full awareness of it, but in any event the *laicità* of the State and the principal constitutional provisions of liberty appear universally accepted in such a manner as to permit a new and updated consideration of the symbol of the cross.

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16.1. Summarizing and concluding, the crucifix understood as the symbol of a particular history, culture and national identity—an element immediately perceptible—in addition to the expression of certain secular principles of the community—which requires instead a reasonable interpretive effort—can be legitimately displayed in the classrooms of the public school, in so far as it does not contrast with but indeed affirms and confirms the principle of the *laicità* of the republican State.

16.2. For all the reasons indicated above the complaint is dismissed, even if the partial novelty of the question and the shared values of liberty invoked by the plaintiff induce the Court to divide the expenses of judgment among the parties.

**P.Q.M.**<sup>280</sup>

The *Tribunale Amministrative Regionale* for Veneto, third panel, rejects every contrary point and exception, definitively pronouncing on the complaint *premissa*, exempting from the judgment the *Associazione Forum* but not the *A.GE.* (Italian Parents Association) of Padova,

**dismissed.**

Expenses compensated.

It is ordered that the present judgment be followed by the administrative Authority.

So decided in Venice, in the *Camera di Consiglio*, this day 17 March 2005.

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<sup>280</sup> The traditional Italian conclusion to an opinion, an abbreviation of *per questi motivi*, or “for these reasons.”

**II. Appendix II: Decision No. 7314, Reg. Ric. No. 556/06 (Consiglio di Stato Feb. 13, 2006)\***

**REPUBLIC OF ITALY  
IN THE NAME OF THE ITALIAN PEOPLE**

The *Consiglio di Stato* in its reviewing capacity [*sede giurisdizionale*] (Sixth Panel) has pronounced the following

**DECISION**

...

[The *Consiglio di Stato* first stated and summarized the parties, facts, and issues on appeal, and then ruled on the procedural and jurisdictional objections raised below. The *Consiglio* affirmed the holdings of the *Tribunale Amministrativo Regional – Veneto*,<sup>281</sup> the court below, that the notice given to the other parties of Ms. Lautsi’s complaint was adequate, that the administrative law judge had competent jurisdiction, and that Ms. Lautsi adequately identified the regulations that she is challenging. It reversed, however, the *Tribunale*’s holding that the *Associazione Forum*, Mr. Bonato, and the Italian Parents Association of Padova (*A.Ge.*) could not intervene in the case, concluding instead that each was a proper opposing interested party that had properly intervened. The *Consiglio* then took up the merits of Ms. Lautsi’s appeal.]

...

**LAW**

1.- The judgment deals with the legitimacy of the deliberation of the *Consiglio di Istituto*<sup>282</sup> of the state middle school “Vittorino da Feltre” of Abano Terme, during which the request of the plaintiff to remove the crucifix from public school classrooms was rejected. The *TAR Veneto*, with the previously indicated order, rejected the complaint, declaring it without merit . . . .

...

3.- Passing to the merits, the complaint is without merit.

The appellant first of all reiterates the importance, disregarded by the *TAR*,<sup>283</sup> of the implicit abrogation of the norm of article 118, r.d. 1924 no. 965 (it being unnecessary to speak of article 119 of r.d.no. 1297/1928 insofar as it refers to elementary schools while the minor children attend middle school), its not having been “reproduced” by the *Testo Unico*<sup>284</sup> of 1994 which codified the entire subject matter and otherwise abandoned at least the principle of confessionalism, set forth by article 1 of the *Statuto Albertino*<sup>285</sup> that represents its foundation, in that this statutory norm was not

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\* Translated by Frederick Mark Gedicks, Guy Anderson Chair & Professor of Law, Brigham Young University Law School, Provo, Utah & Dr. Pasquale Annicchino, Research Fellow, Robert Schumann Centre for Advanced Studies, European University Institute, Florence, Italy.

All footnotes have been added by the translators. Italics, asterisks, and typeface for English words mirror those in the original opinion.

<sup>281</sup> The “Administrative Tribunal for the Veneto Region.”

<sup>282</sup> The governing council of the middle school where the plaintiff’s children attended, consisting of parent, teacher, and employee representatives and constituted by law.

<sup>283</sup> The conventional abbreviation for *Tribunale Amministrativo Regionale*.

<sup>284</sup> The *Testo Unico*—literally, the “Unified Text”—is the compilation by the Italian government of the various laws enacted by the Chamber of Deputies, roughly analogous to the United States Code, and sometimes abbreviated, “*T.U.*”

<sup>285</sup> The *Statuto Albertino* was adopted as the constitution of the Kingdom of Savoy under King Albert in 1849, and later as the Constitution of the unified Kingdom of Italy in 1861. Among other things, it provided that the “Catholic, Apostolic, Roman Church” shall be the “sole religion of the State.”

incorporated by the law no. 121/1985 putting into effect the Accord of Villa Madama, in contrast to what happened with the law 801 of 1929 putting into effect the Lateran Treaty.

As far as the first consideration of the appellant with reference to what has been established by the *Corte Costituzionale* on the controlling character of the norm of article 118 r.d. 1924 no. 965, that, as such, it cannot be considered to have been codified by the *Testo Unico* 1994 (notwithstanding that if such were the case the *Corte* would not have been able to abstain from adjudicating its legitimacy), nor can it be held to have been abrogated (and the same *Corte* in its order did not ever place in discussion its enforceability).

In relation to the second consideration, it does not appear correct to place the principle of the confessionalism of the State as the foundation of the regulation in question (so that the elimination of one would be also the elimination of the reason for being of the other). It is well understood, in fact, that in 1924 when the norm was promulgated as enforceable in Italy, the *Statuto Albertino* whose article 1 proclaimed the Catholic, Apostolic, and Roman religion as “the only religion of the State” (the other religions being tolerated to the extent they conformed to the law); but it is otherwise true that such norm did not minimally hinder the Legislature, in the course of the decades, from adopting in multiple sectors of the life of the State a norm contrary to the interests of the Catholic confession, nor, in the opinion of some authors, even those well qualified, from including the Catholic church among unlawful associations.

The problem of the enforceability of article 118 r.d. 1924 no. 965 cannot, however, be adequately resolved by the lack of mention in the Villa Madama Accords of a principle (that of the confessionalism of the state), required in the Lateran Treaty of 1929 (that is to say, five years after the promulgation of the norm itself), but is dealt with by means of the verification of the compatibility of however so much of it is consistent with the principles today inspired by the constitutional order of the State, and in particular with the principle of *laicità*, invoked by the appellant herself. In that regard, the *Corte Costituzionale* has many times recognized in *laicità* a supreme principle of our constitutional order, sufficient to resolve any questions of constitutional legitimacy (for example, among many pronouncements, those regarding norms on mandatory attendance at religious [Catholic] teaching in the public schools, or on the jurisdictional competence for cases concerning the validity of marriage entered into under canon law and transcribed in the registers of the civil state). It has to do with a principle not proclaimed explicitly by our fundamental Charter; a principle that is rich with ideological resonance and a controversial history, that assumes, however, legal relevance by being derivable from the fundamental norms of our order. In reality, the *Corte* derives it specifically from articles 2, 3, 7, 8, 19, and 20 of the Constitution.

The principle utilizes a linguistic symbol (“*laicità*”) that indicates in abbreviated form meaningful profiles of what is vested in the aforementioned norms, whose contents identify the conditions of use according to which *laicità* is understood and used. On the other hand, without the identification of such specific conditions of use, the principle of “*laicità*” would remain confined to ideological disputes and would be used only with difficulty in juridical situations.

In this situation the conditions of use are certainly determined by reference to the cultural tradition, to the living customs, of each people, insofar, however, as such tradition and such customs are poured into the juridical order. And this varies from nation to nation. So there is no doubt that in one way the principle of the English order is understood and used as secular, although strictly connected to the Anglican church, which is permitted to issue secular legislative norms relating to internal affairs of the church itself (a relatively recent example is given by the law on ordination of women as priests); in another way in the French order, for which *laïcité*, constitutionally enacted (article 2 Constitution of 1958), represents an end that the state can pursue, and in fact has pursued, even to the extent of disrespecting the organizational autonomy of denominations (*lois Combis*) and the individual freedom of expression of one’s religious faith (laws on the wearing of religious symbols); and in yet another way the federal order of the United States of America, in which the indeed rigorous separation

between the State and religious denominations, imposed by the First Amendment to the federal Constitution, does not prevent a diffuse piety in civil society inspired by the religious traditions of the pilgrim Fathers that can be seen in multiple forms, even institutionally, by an explicit attestation of religious faith inscribed on religious coins and money (in God we trust), to the large provision of tax exemptions granted to economic donations given to confessional organizations and their welfare, social, and educational activities, in the horizon of privatized liberalism typical of American society); in another way, finally, in the Italian order, in which that linguistic symbol serves to indicate reciprocal autonomy between the temporal and spiritual orders, and consequently prohibits the State from entering into the internal affairs of religious denominations (arts. 7 and 8 of the Constitution); protected by fundamental personal rights (art. 2), independent of what is provided by the religion to which one belongs; equal legal protection among all citizens, it being irrelevant for such purpose their unusual religious faith (art. 3); respect of the liberty of denominations to organize themselves autonomously according to their own rules, so long as these do not violate the Italian juridical order (art 8, 2<sup>nd</sup> [co.]), and for all, and not just for citizens, protection of the liberty in religious matters—that is, to believe or not to believe, to manifest in public or private their faith, to exercise its rites of worship (art. 19); the prohibition, finally, of discriminating against denominational entities on the basis of their religion and with the purpose of discriminating against religion or sect (art.20). From the Italian constitutional norms recalled by the *Corte* for delinating the *laicità* proper to the State can be deduced, additionally, a favorable attitude in interactions with religious phenomena and with the faiths it propounds, the Constitution having set relevant limits to the free explication of the legislative activity of the state in the matter of relations with religious confessions; an activity that is able to be practiced ordinarily only in agreement with the both the religion of the majority as well as the other religious confessions (art. 7, 2<sup>nd</sup> [co.], and art. 8, 3<sup>rd</sup> [co.]).

From this it is inferred that *laicità*, although it presupposes and requires everywhere the distinction between the temporal dimension and the spiritual dimension and between the orders and the societies to which such dimensions properly belong [*sono proprie*], is not realized in terms consistent in time and uniform in different countries, but indeed within a self-same civilization. It is *relative* to the specific institutional organization of each State, and therefore essentially *historical*, bound as it is to the development of this organization (for example, *laicità* in Italy must be understood with reference to the *Stato risorgimentale*,<sup>286</sup> where, notwithstanding the principle of the confessionalism of the State, proclaimed by the fundamental *Statuto [Albertino]* of the Kingdom, restricting discriminations were permitted on ecclesiastical [*i.e.*, Catholic] entities,<sup>287</sup> and with reference to the contemporary State, risen from the republican Constitution and by now no longer confessional, in which those discriminations could not take place.

Which, then, of the legal systems recalled here, or of still others not considered here, is to be the best answer to the abstract idea of *laicità*—which in the end will coincide with that which each finds most consonant with his or her ideological assumptions—is an old question; a question that, however, is left to doctrinal disputes.

In this jurisdictional seat, for the problem raised before us of the legitimacy of displaying the crucifix in public school classrooms, decided by competent authorities in execution of the regulations, is a matter of concretely and more simply verifying if such display is in violation of the substance of the fundamental norms of our constitutional order, that gives form and substance to the principle of

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<sup>286</sup> The *Risorgimento* refers to the period, beginning in the 17<sup>th</sup> century, during which a consciousness and desire for national unity arose among Italians, culminating in unification of the Italian people as the Kingdom of Italy during 1861-70.

<sup>287</sup> This refers to the confiscation of most of the property of the Catholic Church by the Kingdom of Italy following unification.

“*laicità*” that today characterizes the Italian State, and to which the supreme judge of the laws<sup>288</sup> has many times made reference.

It is evident that the crucifix is itself a symbol that can assume diverse meanings and serve diverse purposes; first of all, because of the location where it is displayed.

In a place of worship the crucifix is properly and exclusively a “religious symbol,” insofar as it seeks to encourage a reverent adherence [*adesione*] towards the founder of the Christian religion.

In a nonreligious place, such as the school, dedicated to the education of youth, the crucifix will still be able to perform for believers its announcement of religious values, but for believers and unbelievers its display will be justified and will assume a nondiscriminatory meaning under its religious contours, if it is able to represent and to bring to mind relevant civil values in an immediately perceptible and intuitive synthetic form (as is the case with every symbol), and particularly those values that suggest and inspire our constitutional order, the foundation of shared civic life. In this sense, the crucifix will be able to develop, even in a “secular” sense [*orizzonte*] different from the religious sense that is natural to it [*che gli è proprio*], a highly educational symbolic function, irrespective of the religion professed by the students.

Now it is evident that in Italy, the crucifix can express, precisely from a symbolic point of view but also in an adequate way, the religious origin of the values of tolerance, of reciprocal respect, of the value of the person, of his or her rights, of concern for his or her liberty, of the autonomy of individual moral conscience with respect to government authority, of human solidarity, of denial of every discrimination, that connote Italian civilization.

These values, which are themselves saturated with traditions, a way of life, the culture of the Italian people, suggest and emerge from the fundamental norms of our constitutional Charter, found among the “fundamental principles” and Part I of the Constitution and, specifically, from those called to mind by the *Corte Costituzionale*, delineating the *laicità* proper to the Italian State.

The reference, by means of the crucifix, to the religious origins of these values and of their full and radical consonance with Christian teachings, serve therefore to place in evidence their transcendent foundation, without placing in question, indeed by reiterating, the autonomy (not the counterposition, leading to an ideological interpretation of *laicità* that is not found in the text of our fundamental Charter) of the temporal order with respect to the the spiritual order, and without diminishing their specific “*laicità*,” consistent with the cultural context properly made and manifested by the fundamental legal order of the Italian State. These values, however, will have to be lived in civil society in an autonomous way (in reality, not contradictory) with respect to religious society, so that they can be “secularly” ratified by all, independent of membership in the religion that has inspired and preached them.

As with every symbol, diverse and contrasting meanings also can be imposed upon or attributed to the crucifix, or one can deny its symbolic value in order to transform it into a decoration that can at the most exhibit artistic value. One cannot, however, think of the crucifix exhibited in school classrooms as a decoration, an object of décor, nor even as an object of worship; one must rather think of it as a symbol suitable for expressing the elevated foundation of the civic values referenced above, which are them the values that delineate *laicità* in the actual legal order of the State.

In the Italian cultural context, it appears difficult to find another symbol, in truth, that lends itself to doing this better than the crucifix; and the appellant moreover desires (and claims a right to) a *blank wall* [*parete bianco*], as the only kind that would appear to be particularly consonant with the value of the *laicità* of the State.

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<sup>288</sup> The “supreme judge of the laws” is an Italian legal euphemism for the *Corte Costituzionale*, similar to the common American phrase, “high court” often used in reference to the USSCt.

The decision of the educational authorities, in enforcing the regulation, to exhibit the crucifix in school classrooms, does not appear blameworthy in reference to the principle of *laicità* appropriate to the Italian State.

The pretext that the State abstains from presenting or preaching in a place of education, by means of a symbol (the crucifix) considered suitable to the purpose, undoubtedly secular values (even if of religious origin), which pervade Italian society and that connote its fundamental Charter, can (if ever) be argued in jurisdictions (political, cultural) judged more appropriate, but not in the judicial arena.

In this jurisdiction, therefore, one cannot accept the request of the appellant that the State and its organs abstain from relying upon the educational instrument considered most effective for expressing the values on which the State itself is founded and that characterize it, set forth and expressed in the constitutional Charter, when recourse to such instruments does not only not undermine any of the principles established by that same Constitution or other norms of its legal order, but aims to affirm them in a way that underscores their high significance.

In conclusion, the principal appeal is rejected, the incidental appeals of the *Associazioni Forum* and *A.GE.* are affirmed to the extent to which they claim the right of intervention in the case.

The expenses and attorneys fees can be awarded.

**P.Q.M.**<sup>289</sup>

The *Consiglio di Stato* . . . orders that the present decision be followed by the administrative Authority.

So decided in Rome, 13 January 2006, by the *Consiglio di Stato* in its reviewing capacity [*sede giurisdizionale*] (Sixth Panel) in the *Camera di Consiglio* . . . .

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<sup>289</sup> The traditional Italian conclusion to an opinion, an abbreviation of *per questi motivi*, or “for these reasons.”

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