

*LAUSTI AND SALAZAR: ARE RELIGIOUS SYMBOLS LEGITIMATE
IN THE PUBLIC SQUARE?*

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I. INTRODUCTION

In two recent cases, the United States Supreme Court and the European Court of Human Rights (ECtHR) were asked to determine whether religious symbols (specifically crosses and crucifixes) could be placed on public property.¹ This was not a simple task however, as the crosses at issue in the case served both religious and secular purposes. In addition to being crosses, they were also war memorials and symbols of a nation's heritage.² Therefore, the courts were forced to address a question of which interpretation of the symbols to use, the secular one or the religious one. Supporters of the symbols argued that they were memorials erected in memory of fallen soldiers and national symbols.³ Opponents contended that the crosses were religious symbols and, as such, did not have a place in a secular world.

Both cases involved crosses placed in highly visible locations and both courts rendered controversial decisions that elicited strong responses from each side.⁴ In the European case, *Lautsi v. Italy*, religious supporters in Italy, the Catholic Church, a number of other institutions from around the world, and some secular supporters spoke vehemently in favor of the cross.⁵ An equally large number of groups, from as many varied locations, opposed it.⁶ In the United States case, *Salazar v. Buono*, the cross at issue caused such controversy that it was stolen after the Supreme Court issued its decision.⁷ Because of these strong emotions, both courts had to decide between two

¹ *Lautsi v. Italy*, App. No. 30814/06 (2011) [hereinafter *Lautsi II*]; *Salazar v. Buono*, 130 S. Ct. 1803, 1811 (U.S. 2010).

² See Peter Petkoff, *Religious Symbols Between Forum Internum and Forum Externum*, in *LAW AND RELIGION IN THE 21ST CENTURY* 297 (Silvio Ferrari & Rinaldo Cristofori eds., 2010) for further discussion on symbols.

³ *Lautsi II*, *supra* note 1, ¶ 15.

⁴ *Lautsi v Italy – A Lost Opportunity*, EUR. HUMANIST FED'N (July 1, 2010), <http://humanistfederation.eu/lautsi-v-italy-a-lost-opportunity/> [hereinafter *A Lost Opportunity*]; Stijn Smet, *Lautsi v. Italy: The Argument from Neutrality*, STRASBOURG OBSERVER (Mar. 22, 2011), <http://strasbourgoobservers.com/2011/03/22/lautsi-v-italy-the-argument-from-neutrality/>. The Pope also issued a formal condemnation of the initial *Lautsi* decision. Anna Arco & Cindy Wooden, *Vatican Hails Ruling on Crucifixes: European Court of Human Rights Issues 'Landmark' Decision in Defence of Religious Freedom*, CATH. HERALD (Mar. 25, 2011), <http://www.exacteditions.com/exact/browse/397/440/8537/3/1>.

⁵ According to the CIA World Factbook, Italy is almost 90% Roman Catholic with small communities of Protestant, Jewish, and Muslim faiths. *Italy*, C.I.A. WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html> (last updated Oct. 4, 2012) [hereinafter *Italy – Factbook*]. For a further discussion on those who supported Italy's position please see *infra* Part II.A, discussing the response to the European Court of Human Rights' first *Lautsi* decision.

⁶ See *A Lost Opportunity*, *supra* note 4 for an example of this reaction.

⁷ Lauri Lebo, *Mojave Desert Cross is Stolen*, RELIGION DISPATCHES (May 11, 2010), http://www.religiondispatches.org/dispatches/laurilebo/2562/mojave_desert_cross_is_stolen.

unpleasant options. If the court required that the symbols be removed it would displease those who advocated for religious symbols in the public square. However, allowing the symbols to stay would displease those who advocated strict separation of church and state. The courts could have determined that the crosses should be removed from public property because of their relatively undisputed religious connotation as a well-recognized symbol of the Christian faith.⁸ However, if the U.S. Supreme Court had made this decision, a war memorial would have to be torn down.⁹ In the European Union, a similar decision would have meant requiring a predominantly Catholic nation to take down crucifixes in a number of institutions.¹⁰ Furthermore, the success of a decision requiring removal of crosses in the European Union was uncertain because the ECtHR has a relatively small amount of influence over the states of the European Union.¹¹

Alternatively, the courts could have allowed the crosses to remain where they were. However, this would implicitly recognize as acceptable religious symbols erected on public property. This outcome was unlikely in the United States because of strong notions of strict separation of church and state, and it would be unusual for the ECtHR given its past case history prohibiting religious symbols on public property.¹²

The ECtHR in *Lautsi*, eventually chose to allow crucifixes to remain displayed in public schoolrooms by accepting the secular purpose: a symbol of national heritage.¹³ The issue in the United States in *Salazar* was more procedurally complicated than the direct constitutionality of crosses. The actual issue in the case was whether a land transfer act Congress used to cure an Establishment Clause violation was constitutional.¹⁴ Congress attempted to remedy the constitutional violations connected with a cross placed on public property by transferring the land from public to private property. While the Supreme Court did not rule explicitly on the constitutionality of the cross, its decision did lay out theories of interpretation for religious symbols with secular meanings, including addressing the constitutionality of

⁸ See RENÉ GUÉNON, *THE SYMBOLISM OF THE CROSS* (James R. Wetmore ed. Angus Macnab trans. 2004) (discussing the symbolism of the cross).

⁹ Will Rosenzweig & Daniel Shatz, *Salazar v. Buono*, LEGAL INFO. INST., <http://www.law.cornell.edu/supct/cert/08-472> (last visited Jan. 11, 2012).

¹⁰ See *Italy – Factbook*, *supra* note 5 (describing religious demographics of Italy).

¹¹ As will be discussed later, the ECtHR has no formal ability to enforce its actions in EU states and instead depends on the good will of the nations for implementation. Some states, like England, have provisions that explicitly enforce the decisions of the court. John Hedigan, *The European Court of Human Rights: Yesterday, Today and Tomorrow*, 12 GERMAN L.J. 1716, 1729 (2011).

¹² See *infra* Part II.

¹³ *Lautsi II*, *supra* note 1, ¶ 80.

¹⁴ *Salazar v. Buono*, 130 S. Ct. 1803 (U.S. 2010).

the cross itself.¹⁵ The language in the Court's decision may point to a more accommodating test for religious symbols.¹⁶

Both of the decisions, the ECHR's explicit acceptance of a crucifix in a public school and the Supreme Court's possible acceptance of a more accommodating test, suggest that both courts are moving in similar directions. Furthermore, the direction they choose will have substantial consequences for future decisions. While the beliefs of those who supported the cross and crucifix, including fears that courts would mandate the removal of all religious symbols from the public sphere, have been assuaged for the moment, many remain concerned for the future of religious symbols.¹⁷ Equally vehement are those who argue that the current position of the ECtHR (and perhaps that of the Supreme Court) infringes on individuals who believe that the presence of the crosses violates their right to live a life free from religious influence.¹⁸ Thus, it appears likely that litigation on this issue will continue.¹⁹ For now, incorporating a principle of accommodation may be the clearest and best option for future cases. It would afford protection for religious symbols while leaving open the possibility of rigorous review when indoctrination or oppression is a concern.

It is not the purpose of this Note to offer a normative opinion on either of the decisions. Rather, this Note seeks to perform an analysis of the two cases and explain some striking similarities in the positions taken by the two courts. Two courts, with different cases and with different historical backgrounds and nationalities, appear ready to use or encourage tests that would allow greater presence of religious symbols in the public square so long as they do not invoke oppression or indoctrination. In this manner, both of the court decisions indicate judicial openness to a principle of accommodation. It is this, the parallel movement of the two courts reflecting a more nuanced perspective of the place of these symbols in the public sphere, that is the subject of this Note.

¹⁵ *Id.* at 1835–36.

¹⁶ *See infra* Part II.B (discussing *Salazar v. Buono*).

¹⁷ For example, in response to the lower European Court of Human Rights decision, Joseph Weiler, in *Crucifix in the Classroom Redux*, 21 *EUR. J. INT'L L.* 1, 5 (2010), articulated the issue by saying that: "Is one to revoke from the public space one's symbols as if 'contaminated' by their religious content? Change the British National Anthem? Amend the first phrase of the German Constitution?"

¹⁸ Gabriel Andreescu & Liviu Andreescu, *The European Court of Human Rights' Lautsi Decision: Context, Contents, Consequences*, 9 *J. STUDY RELIGIONS & IDEOLOGIES* 47, 67 (2010). "A lay public sphere is the only solution to ensuring genuine equality between members of majority and minority churches, agnostics, atheists, or non-theists. In the long term, this is the only way to eliminate religious (and anti-religious) tensions." *Id.*

¹⁹ *See, e.g., Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (U.S. 2011) (exemplifying a more recent case dealing with a cross placed near a public highway).

To make this assertion first requires acknowledgment of the differences between the ECtHR and the U.S. Supreme Court. The ECtHR does not operate under a charter that specifically restricts the interaction between church and state.²⁰ The U.S. Constitution, on the contrary, does include restrictions on the government's involvement with religion.²¹ The different national structures that formed the respective courts are also important because they effectuated significant differences between the functions of the courts. For example, the European Union is more loosely unified than the United States and is an organization of states with unique histories, diverse citizenship and legal requirements, as well as different forms of government.²² Thus, a complete comparison would be inappropriate. Yet, even with these differences, these two courts have indicated preferences for remarkably similar decisions. Finally, note that the cases presented are not identical. *Lautsi* addressed crucifixes placed in public schoolrooms.²³ Therefore, concerns with indoctrination were far more prevalent than in *Salazar*, where the cross at issue was a memorial placed in a public park.²⁴ Each of these will be extensively discussed in the next section.

It is clear that singular single, concise answer to the questions before these courts may not be forthcoming.²⁵ Concepts of religious liberty, particularly the symbols that proponents of each side believe they have the right to display or avoid, are by their nature divisive.²⁶ However, a proper consideration of the decisions rendered is necessary before either side may press their case.

Part II will give an outline of both *Lautsi v. Italy* and *Salazar v. Buono* and will explain some of the relevant case law and tests used to reach each of these decisions. Part III will discuss the similarities between the tests used by the U.S. Supreme Court and by the ECtHR. Part IV will provide a conclusion and briefly discuss the future of these tests.

²⁰ John Witte, Jr. & Nina-Louisa Arold, *Lift High the Cross?: Contrasting the New European and American Cases on Religious Symbols on Government Property*, 25 EMORY INT'L L. REV. 5, 8 (2011); U.S. CONST. amend. I (laying out the Establishment Clause, which specifically prohibits the government from making a "law respecting an establishment of religion").

²¹ U.S. CONST. amend I.

²² Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 YALE J. INT'L L. 331, 343 (2007); Andrew Ashworth, *Self-Incrimination in European Human Rights Law — A Pregnant Pragmatism?*, 30 CARDOZO L. REV. 751 (2008).

²³ *Lautsi II*, *supra* note 1.

²⁴ *Salazar v. Buono*, 130 S. Ct. 1803 (U.S. 2010).

²⁵ Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1707 (2006).

²⁶ See sources cited *supra* notes 4, 6.

II. THE PATH OF THE CROSSES

By the time *Lautsi v. Italy* and *Salazar v. Buono* reached the ECtHR and the Supreme Court respectively, they had developed complicated factual backgrounds and extensive lower court decisions. The decisions of the lower courts are available in the records of those courts. Therefore this Note will spend a substantial amount of time discussing the final decision in *Lautsi* and focus less on the early case law.²⁷

Salazar v. Buono will not be discussed as extensively, though this Note will give a brief background and history of the case. The decision is slightly older than *Lautsi* and has been well covered in numerous articles that more completely and clearly elucidate that case and its background.²⁸

A. *Lautsi v. Italy*

The controversy that initiated the *Lautsi* case was a parental disagreement with the state-mandated display of crucifixes in Italian public schools. In Italy, a country with a long history and relationship with the Catholic Church, crucifixes had been a part of schools for decades. Indeed, crosses have been displayed in Italian schoolrooms by governmental fiat for over a hundred years.²⁹ During that time, governing bodies in Italy, including those prior to Italy's unification and the Italian state itself, issued a number of administrative decrees, regulations, and treaties either requiring or encouraging crucifix displays. One of the earliest was a royal decree by the Kingdom of Piedmont-Sardinia in 1860.³⁰ This decree required that "each school must without fail be equipped . . . with a crucifix."³¹ This regulation was also incorporated into the Constitution of Italy in 1861.³² In November of 1922, a Ministry of Education circular, Circular no. 68, "order[ed] all

²⁷ See Malcolm D. Evans, *From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression Before the European Court of Human Rights*, 26 J.L. & RELIGION 345 (2010–2011) for a full discussion on early case law regarding religious symbols in public places.

²⁸ See, e.g., Mary Jean Dolan, *Salazar v. Buono: The Cross Between Endorsement and History*, 105 NW. U. L. REV. COLLOQUY 42, 43 (2010); Angela C. Carmella, *Symbolic Religious Expression on Public Property: Implications for the Integrity of Religious Associations*, 38 FLA. ST. U. L. REV. 481 (2011); Marci A. Hamilton, *The Endorsement Factor*, 43 ARIZ. ST. L.J. 349 (2011).

²⁹ R.D. n. 4336/1860 (It.), art. 140 (Royal Decree of the Kingdom of Piedmont-Sardinia) [hereinafter Royal Decree].

³⁰ *Id.*

³¹ *Lautsi II*, *supra* note 1, ¶ 17 (quoting Regio Decreto, *supra* note 29).

³² Costituzione [Cost.] (It.).

municipal administrative authorities in the Kingdom to restore to those schools which lack them, the . . . sacred symbol[] of faith.”³³

The country’s close ties to the Vatican further influenced the decision to place crucifixes in schools.³⁴ In 1929, Italy and the Vatican signed the Lateran Pacts which, among other treaty provisions, confirmed Catholicism as Italy’s official religion.³⁵ In 1984 the pacts were amended,³⁶ formally revoking Catholicism as Italy’s religion in favor of a secular Italian state.³⁷ Regardless of these developments however, many schools in Italy continued displaying the crucifixes.³⁸

These laws and ordinances, requiring crucifixes in classrooms, remained relatively undisturbed until 2002 (although they were not always enforced). In that year, Ms. Lautsi, a woman who wanted her sons to have a secular education, initiated a case bringing her concerns about the display of the crucifixes to her local school board.³⁹ Her sons had attended the *Istituto comprensivo statale Vittorino da Feltre*, a state run school in which a cross was displayed.⁴⁰ At a meeting of the school’s governors, Ms. Lautsi and her husband requested that the governors consider removing the cross from the wall so that it did not affect her sons’ education.⁴¹ The governors refused Ms. Lautsi’s request.⁴²

A month later, in July of 2002, Ms. Lautsi filed suit in the Veneto Administrative Court alleging the crucifixes violated Articles 3 and 19 of the Italian Constitution.⁴³ While the *Lautsi* trial was ongoing, the Minister of

³³ *Lautsi II*, *supra* note 1, ¶ 19.

³⁴ *Id.* ¶ 20.

³⁵ *Id.* Article 1 of the Conciliation Treaty states: “Italy recognizes and reaffirms the principle established in the First Article of the Italian Constitution dated March 4 1848, according to which the Roman Catholic Apostolic religion is the only State religion.” *Id.*

³⁶ *Id.* ¶ 21.

³⁷ *Id.* ¶¶ 21–22. Italy adopted its republican constitution in 1948, Article 7 of which explicitly acknowledges “the State and the Catholic Church are independent and sovereign, each in its own sphere.” Art. 7 Costituzione [Cost.] (It.).

³⁸ *Id.* *Lautsi II*, *supra* note 1, ¶¶ 21–24 (providing examples of cases in which schools continued to display crucifixes).

³⁹ *Id.* ¶ 11.

⁴⁰ *Id.* ¶ 10.

⁴¹ *Id.* ¶ 11.

⁴² *Lautsi v. Italy*, App. No. 30814/06, ¶ 8 Eur. Ct. H.R. (2009) [hereinafter *Lautsi I*] (“On 27 May 2002 the school’s governors decided to leave the crucifixes in its classrooms.”).

⁴³ *Lautsi II*, *supra* note 1, ¶ 8; *see also* Costituzione [Const.] (It.):

All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

Education, Universities, and Research published Directive no. 2666 requiring all Italian public schools have crucifixes displayed in their classrooms.⁴⁴

Before coming to a decision, the Administrative Court, which had initially been granted jurisdiction, determined that the case was better suited for the Constitutional Court of Italy and chose not to rule on the merits of the case.⁴⁵ The Constitutional Court, however, also determined that it would be inappropriate for it to issue a ruling because the laws governing the display of the crucifixes were statutory and therefore the case did not pose a constitutional question.⁴⁶ In 2004, the Constitutional Court referred the case back to the Administrative Court.⁴⁷

Finally, in March 2005, the Administrative Court issued a ruling on the merits of Ms. Lautsi's case.⁴⁸ The court determined that the crucifixes did not violate any of Ms. Lautsi's rights, or the rights of her children, under the laws of Italy.⁴⁹ In explanation of its decision, the court stated that while

the principle of the secular nature of the State [was] now part of the legal heritage of Europe and the western democracies . . . the presence of crucifixes in State-school classrooms, regard being had to the meaning it should be understood to convey, did not offend against that principle.⁵⁰

Ms. Lautsi then brought her case to the ECtHR according to the procedure set forth in Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.⁵¹ The case was given to one

This was characterized by the ECtHR as the "principle of equality." *Lautsi II*, *supra* note 1, ¶ 12. Article 19 of the Italian Constitution reads: "Anyone is entitled to freely profess their religious belief in any form, individually, or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality." Art. 19 Costituzione [Cost.] (It.). This was referred to by the court as "religious freedom." *Lautsi II*, *supra* note 1, ¶ 12.

⁴⁴ *Lautsi II*, *supra* note 1, ¶ 24 (indicating a general acceptance by the Italian political system of the crucifixes).

⁴⁵ The justice system in Italy divides its cases into administrative, ordinary, and constitutional courts. For a full explanation of the system, see *The Italian Judicial System*, <http://ulr.unidroit.org/mm/TheItalianJudicialSystem.pdf> (last viewed Sept. 22, 2011).

⁴⁶ *Lautsi I*, *supra* note 42, ¶ 12 ("In decision no. 389 of 15 December 2004 the Constitutional Court ruled that it did not have jurisdiction, seeing that the provisions complained of were not provisions of statute law but were contained in regulations, which did not have legal force.").

⁴⁷ *Lautsi II*, *supra* note 1, ¶ 14.

⁴⁸ *Id.* ¶ 15.

⁴⁹ *Lautsi I*, *supra* note 42, ¶ 13 (holding that the crucifix "was both the symbol of Italian history and culture . . . and the symbol of the principles of equality, freedom and tolerance of the state's secular basis").

⁵⁰ *Lautsi II*, *supra* note 1, ¶ 14 (2011) (internal citations omitted).

⁵¹ The Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 34,

section of the court for initial determination. There, Lautsi alleged that the crucifixes violated Article 2 of Protocol No. 1 and Article 9 of the European Convention of Human Rights.⁵² She asserted that displaying the sign of the cross in the state-school attended by her sons constituted interference incompatible with her (Ms. Lautsi's) right to ensure that they receive education and teaching in conformity with her religious and philosophical convictions. Furthermore, Ms. Lautsi asserted that displaying the sign of the cross also infringed on her freedom of belief and religion.⁵³

Ms. Lautsi's argument was, essentially, that Italy was interfering with her ability to raise her children with a secular ideology.

Furthermore, Ms. Lautsi claimed that,

the provisions concerned were the legacy of a religious conception of the State which in present-day Italy was now in conflict with the State's duty of secularism, and infringed the rights protected by the Convention. There was a 'religious question' in Italy, since by requiring the crucifix to be displayed in classrooms the State was granting the Catholic Church a privileged position which amounted to State interference with the right to freedom of thought, conscience and religion of the applicant and her children and the applicant's right to bring up her children in conformity with her

Mar. 20, 1952, 213 U.N.T.S. 222 [hereinafter HR Convention] (regulating individual applications to the ECtHR). Because the ECtHR's jurisdiction is limited to hearing cases only when the remedies and procedures in the home state [Italy], have been exhausted, Ms. Lautsi had been previously unable to present her case to the Court. *European Court of Human Rights: The ECHR in 50 Questions*, PUBLIC RELATIONS UNIT OF THE EUROPEAN COURT OF HUMAN RIGHTS 7, http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CB BB781F42C8/0/FAQ_ENG_A4.pdf (last visited July 2, 2013).

⁵² *Lautsi II*, *supra* note 1, ¶ 27; HR Convention, *supra* note 51. Article 2 of Protocol No. 1 provides "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.* art. 2.

Article 9 reads

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. art. 9.

⁵³ *Lautsi II*, *supra* note 1, ¶ 41.

moral and religious convictions, and a form of discrimination against non-Catholics.⁵⁴

It was the Lautsis' assertion that the crucifix's religious connotation was so dominant that a student could only understand its presence to be a state endorsement of religion.⁵⁵ If this were true, this would be in conflict with Italy's secular constitution and its obligations under the European Convention on Human Rights.⁵⁶ Finally, Ms. Lautsi also argued that Italy was favoring one religion (Catholicism or Christianity) over others.⁵⁷ She asserted that Italy was indicating an adherence to a "particular religious belief," rather than treating each religion equally.⁵⁸ Ms. Lautsi claimed that, "[t]he concept of secularism required the State to be neutral and keep an equal distance from all religions, as it should not be perceived as being closer to some citizens than to others."⁵⁹

The Italian government, however, argued that the crucifixes' connotation was not limited solely to its religious meaning,⁶⁰ but included an "ethical meaning which could be understood and appreciated regardless of one's adherence to the religious or historical tradition, as it evoked principles that could be shared outside Christian faith."⁶¹ Concerned that this argument would be unacceptable to the Court, the Italian government argued in the alternative that the cross has no religious meaning at all.⁶² Instead Italy asserted that "the message of the cross . . . could be read independently of its religious dimension and was composed of a set of principles and values forming the foundations of [Italy's democracy]."⁶³

The lower section of the ECtHR ruled in favor of the Lautsis.⁶⁴ In its decision, the Chamber highlighted several issues. First, the Chamber was concerned that the display of the crucifixes could be misinterpreted by students indicating a state associated with a particular religion. The Chamber saw this as problematic because "[w]hat may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religions or those who profess no religion."⁶⁵ Second, the Chamber noted

⁵⁴ *Lautsi I*, *supra* note 42, ¶ 30.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* ¶ 32.

⁶⁰ *Id.* ¶¶ 34–36.

⁶¹ *Id.* ¶ 35.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* ¶ 55.

that Ms. Lautsi's ability to raise her children was hindered when the state engaged in behavior that favored one religion over others.⁶⁶ The Chamber explained that this hindrance occurred when few other religious symbols were displayed in schools.⁶⁷ Under this theory, children could not reasonably expect to feel that all religions were equal. The Chamber also required that Italy make restitution to the Lautsis as required under the Human Rights Convention for hindering their rights.⁶⁸

This decision led to an outcry in Italy and Europe.⁶⁹ A number of prominent Italian legislators stated that they would not change Italian laws placing crucifixes in schoolrooms.⁷⁰ However, it also led to great praise from those who wished for a more secular Europe.⁷¹ Unsurprisingly, given the tremendous outcry, the Grand Chamber swiftly granted Italy's appeal of the *Lautsi* case.⁷²

The Grand Chamber of the ECtHR, the final decision making body of the Court, decided the case on March 18, 2011.⁷³ The arguments presented to the Court at oral argument and in brief remained fairly similar to those in the earlier *Lautsi* case. However, this time, numerous governments and organizations were given leave to intervene and express an opinion. The governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, and the Republic of San Marino, as well as a number of legislators from the European Council and several independent organizations, intervened on behalf of both Ms. Lautsi and Italy.⁷⁴ The case and its final outcome were closely watched.

After deliberation, the Court ruled in Italy's favor.⁷⁵ The Court based its decision on the concept of the margin of appreciation.⁷⁶ This doctrine holds

⁶⁶ *Id.* ¶ 47(b) (stating: "It is on to the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching.").

⁶⁷ *Id.* ¶ 43.

⁶⁸ *Id.* ¶¶ 67-70.

⁶⁹ *Lautsi v Italy: Crucifixes in the Classroom and 'Dialogue' with Strasbourg (Italian style)*, EDU. L. BLOG (Mar. 29, 2011, 4:18 PM), <http://www.education11kbw.com/?p=263>.

⁷⁰ Andreescu & Andreescu, *supra* note 18.

⁷¹ Grégor Puppinc, *Lautsi v. Italy: The Leading Case on Majority Religions in European Secular States*, PRESENTATION PREPARED FOR THE 2010 ANNUAL INTERNATIONAL LAW AND RELIGION SYMPOSIUM 1 (2010).

⁷² *Lautsi II*, *supra* note 1.

⁷³ *Id.*

⁷⁴ *Id.* ¶ 8 (intervening groups include the Greek Helsinki Monitor, Associazione nazionale del libero pensiero, European Centre for Law and Justice, Eurojuris, International Commission of Jurists, Interights and Human Rights Watch, Zentralkomitee der deutschen katholiken, Semaines sociales de France, Associazioni cristiane lavoratori italiani, and thirty-three members of the European Parliament).

⁷⁵ *Id.* ¶ 66 (stating there was no evidence that "the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that

that “the Contracting States [of the European Convention on Human Rights] enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.”⁷⁷ The doctrine grants to the courts and to the contracting states of the European Union a great deal of flexibility in determining their states’ laws in relation to the various conventions.⁷⁸ While the doctrine does not allow for a direct violation of the Convention, it does allow states to incorporate their national heritages and norms in conforming with the Conventions.⁷⁹

In reaching their decision, the Grand Chamber understood that the states of the European Union have an obligation to protect the rights of parents and students in public schooling.⁸⁰ The Court noted that:

the decision whether crucifixes should be present in State-school classrooms forms part of the functions assumed by the respondent State in relation to education and teaching and, accordingly, falls within the scope of the second sentence of Article 2 of Protocol No. 1. That makes it an area in which the State’s obligation to respect the right of parents to ensure the education and teaching of their children in conformity with their own religious and philosophical convictions comes into play.⁸¹

However, the Court also determined that none of these rights held by the Lautsis had been violated by Italy’s policy supporting crucifixes.⁸² Instead, the Court decided that because the crucifixes were not used for educational purposes or even discussed, Ms. Lautsi’s rights were not infringed; meaning that the mere display of the crucifixes did not in fact keep her from raising her children in a secular manner.⁸³ The Grand Chamber also determined that the policy Italy had pursued did not indicate a particular preference for any one religion, as no child was prohibited from expressing a different religious

it does or does not have an effect on young persons whose convictions are still in the process of being formed”).

⁷⁶ *Id.* ¶ 68.

⁷⁷ *Id.* ¶ 61.

⁷⁸ See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907, 908 (2005) (asserting that the margin of appreciation doctrine has been classified as “non-intrusive”).

⁷⁹ *Id.*

⁸⁰ *Lautsi II*, *supra* note 1, ¶ 14.

⁸¹ *Id.* ¶ 65.

⁸² *Id.*

⁸³ *Id.* ¶ 66.

preference.⁸⁴ Therefore, because Italy did not prohibit any other religious faiths from being freely practiced in their schools, no person could reasonably decide that Italy had indoctrinated its students or chosen one religion over another.⁸⁵

Forming the boundary of the Grand Chamber's decision were a number of other decisions addressing the ability of a member state, like Italy, to regulate religion and religious expression within its borders. Some cases dealt with questions of religious garb or education in schools, while others dealt with the use of religion in holding public office.⁸⁶ Other cases went so far as to address religion in television.⁸⁷ Many of these decisions appear contradictory, but were relevant to the ECtHR's decision in *Lautsi*.

One case that became relevant to the *Lautsi* issue was *Sahin v. Turkey*.⁸⁸ This case, decided in 2004, dealt with a prohibition of Islamic headscarves in Turkey.⁸⁹ A medical student studying at a university was denied admission to classes because she wore a headscarf in violation of Turkey's secular regulations banning the wearing of religious regalia.⁹⁰ Turkey had not required the universities to enforce a preexisting headscarf restriction in classes, and Sahin had worn the headscarf to class in the past.⁹¹ Turkey, however, changed its policy and, after advertising the change to students, formally banned all religious garb, turning away any who came to class

⁸⁴ *Id.* ¶ 74. The Court noted that according to the indications provided by the Government, Italy opens up the school environment in parallel to other religions. The government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were 'often celebrated' in schools; and optional religious education could be organized in schools for 'all recognized religious creeds' . . . Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.

Id.

⁸⁵ *Id.* ¶ 66 (noting that because Islamic students were able to wear their headscarves and pray, and because Jewish students were able to observe Hanukkah, the crucifixes were not enough to violate the European Convention). This distinction became key to the decision and is a distinguishing factor between *Lautsi* and many of the cases discussed in this Note.

⁸⁶ *Sahin v. Turkey*, App. No. 44774/98 Eur. Ct. H.R. (2005); *Grzelak v. Poland*, App. No. 7710/02 Eur. Ct. H.R. (2010); *Folgreo and Others v. Norway*, App. No. 1572/02 Eur. Ct. H.R. (2007).

⁸⁷ *Otto Preminger Institut v. Austria*, Eur. Ct. H.R. (ser. A), App. No. 13470/87 (1994).

⁸⁸ *Sahin v. Turkey*, App. No. 44774/98 Eur. Ct. H.R. (2005).

⁸⁹ *Id.* ¶ 3.

⁹⁰ *Id.* ¶ 16.

⁹¹ *Id.* ¶ 17.

dressed in the banned attire.⁹² When Sahin tried to enter her classroom, she was refused admittance.⁹³ Sahin claimed that this refusal violated her rights under the Human Rights Convention and, after a thorough review in Turkey, appealed the law to the ECtHR.⁹⁴

The ECtHR determined that Turkey's law did not violate the Convention's requirements.⁹⁵ The court explained that while "having regard to the Contracting States' margin of appreciation in this [religious regulation] sphere, the court finds that the interference in issue was justified in principle and proportionate to the aim pursued."⁹⁶

Another relevant case was *Otto Preminger Institut v. Austria*, in which the ECtHR allowed Austria to regulate and ban a movie that depicted the Holy Family in an inappropriate manner.⁹⁷ In another case, *Kokkinakis v. Greece*, the ECtHR concluded that a Greek law outlawing proselytism was legal under Article 9 of the Convention.⁹⁸ Furthermore, in *Grzelak v. Poland* and *Folgero v. Norway* (both cases mentioned by the ECtHR in the *Lautsi* decision), the court dealt with various regulations requiring students to receive religious education while they were in schools.⁹⁹ During these cases "the court dealt with forms of religious instruction in public schools that were challenged by professed atheists and agnostics It found that the state had not tailored its new law carefully enough to deal with students with different religious and non-religious sensibilities."¹⁰⁰ Therefore, in reaching each decision the Court was aware of and considered the different facts and contexts of each case, as well as the various nations and nationalities involved.

1. Using the Margin of Appreciation

The margin of appreciation was crucial to the Grand Chamber's decision in *Lautsi*. Without its use, it is unlikely that the court would have ruled in Italy's favor. As mentioned before, the margin of appreciation is a doctrine the court uses to allow the states of the European Union greater flexibility in charting the course of individual social issues.¹⁰¹

⁹² *Id.* ¶ 16.

⁹³ *Id.* ¶ 17.

⁹⁴ *Id.* ¶¶ 70, 18–20.

⁹⁵ *Id.* ¶ 162.

⁹⁶ *Id.* ¶ 122.

⁹⁷ *Otto Preminger Institut v. Austria*, Eur. Ct. H.R. (ser. A), App. No. 13470/87 (1994).

⁹⁸ *Kokkinakis v. Greece*, App. No. 14307/88 Eur. Ct. H.R. (1993).

⁹⁹ *Grzelak v. Poland*, App. No. 7710/02 Eur. Ct. H.R. (2010); *Folgero and Others v. Norway*, App. No. 1572/02 Eur. Ct. H.R. (2007).

¹⁰⁰ Witte & Arold, *supra* note 20, at 19.

¹⁰¹ See Shany, *supra* note 78; HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION

Generally, if the ECtHR determines that an action taken by a state violates the European Convention on Human Rights, the action is determined to fall outside of the state's authority.¹⁰² When this occurs, the margin of appreciation cannot protect the state's actions and the law or decision is likely to fall as a violation of the Convention.¹⁰³ However, when an action the state has taken merely suggests a violation of the Convention, but may not rise to an actual breach, the doctrine may be used by the court to uphold the State's action if it comports with the state's ethics and norms.¹⁰⁴ When this occurs, the state is generally allowed greater latitude in determining how to handle controversial issues.¹⁰⁵

The use of this doctrine is highly fact specific and greatly influenced by the culture of the appealing state, and its use can result in seemingly inconsistent decisions.¹⁰⁶ For example, in the *Sahin* case the ECtHR determined that it was acceptable for Turkey to prohibit the wearing of religious garb in universities. However, in *Lautsi*, the ECtHR allowed crucifixes to remain in the classrooms.¹⁰⁷ Though these cases may appear inconsistent due to the nature of the challenges, within the confines of the doctrine of margin of appreciation they are not so untenable.

The key difference between the two cases is an all or nothing concept.¹⁰⁸ For example, if Turkey proscribes all religious garb rather than targeting any group specifically, this is likely to be considered an equal, if burdensome, restriction. The Turkish law may suggest violations of the Convention's protection of religious participation as it does affect religious practice, but does not, at least as the ECtHR has interpreted the Convention, violate it. However, if some groups were allowed to wear their religious garb and other groups were targeted and prohibited from wearing religious clothing, the validity of the law would be far more suspect. As applied to the case at issue, the crucifix law fell within the doctrine of the margin of appreciation,

DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 13 (1996) (discussing the application of the margin of appreciation).

¹⁰² See generally *Sahin v. Turkey*, App. No. 44774/98 Eur. Ct. H.R. (2005) (discussing the general application of the test).

¹⁰³ Shany, *supra* note 78, at 910.

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 119 (2004–2005).

¹⁰⁶ Shany, *supra* note 78, at 910.

¹⁰⁷ *Sahin*, App. No. 44774/98.

¹⁰⁸ This line of reasoning can also be found in cases like *ABC v. Ireland* where the Court determined that a state could proscribe abortion entirely, but, if the state allowed abortion in even extremely limited circumstances it, needed to ensure that abortion was available if the circumstances could be proven. *A, B, and C v. Ireland*, App. No. 25579/05 Eur. Ct. H.R. (2010).

because Italy allowed some crucifixes to be displayed but did not prohibit the display of other religious symbols.¹⁰⁹

B. *Salazar v. Buono*

Salazar v. Buono is a case that arose because of a cross placed at a national park as a war memorial to those who died in World War I by the Veterans of Foreign Wars (VFW).¹¹⁰ The cross, an eight foot tall structure made of metal tubes, was placed on top of Sunrise Rock in the Mojave National Preserve in San Bernardino County, California.¹¹¹ The VFW placed the cross on Bureau of Land Management property in 1934, “along with a plaque memorializing the ‘Dead of All Wars’; though the plaque later disappeared.”¹¹²

The cross remained in its place, undisturbed, for over sixty years. Not only was it a war memorial, but Easter Sunday services were also celebrated at the site of the cross.¹¹³ However, the situation changed when, in 1999, the U.S. Park Service refused to allow a group to build a Buddhist stupa near the site of the cross on public property.¹¹⁴ The Park Service decided instead to remove the cross to avoid Establishment Clause concerns.¹¹⁵ Congress refused to appropriate the money that would have allowed the Park Service to remove the cross and “then designated it a national memorial to veterans of World War I; and, for good measure, prohibited the use of federal money to ‘dismantle’ a [] World War I memorial[].”¹¹⁶

However, a Park Service administrator brought a claim alleging that when a cross was placed on public property and the same public property was “not open to groups or individuals [wishing] to erect other freestanding, permanent displays,” there was a violation of the Establishment Clause.¹¹⁷ The Ninth Circuit agreed with the administrator and the case was not appealed to the Supreme Court.¹¹⁸

However, instead of removing the cross, Congress initiated a land transfer moving the cross from public property to private property.¹¹⁹ This was

¹⁰⁹ *Lautsi II*, *supra* note 1.

¹¹⁰ *Salazar v. Buono*, 130 S. Ct. 1803 (U.S. 2010).

¹¹¹ Ian Bartrum, *Salazar v. Buono: Sacred Symbolism and the Secular State*, 105 Nw. U. L. REV. COLLOQUY 31, 31–32 (2010).

¹¹² *Id.*

¹¹³ *Salazar*, 130 S. Ct. at 1812.

¹¹⁴ Bartrum, *supra* note 111, at 31–32.

¹¹⁵ *Id.* (discussing the history of the case’s early foundation).

¹¹⁶ *Id.*

¹¹⁷ Brief for the Petitioners at 5, *Salazar v. Buono*, 130 S. Ct. 1803 (U.S. 2010) (No. 08-472), 2009 WL 1526915; *see also* *Buono v. Norton*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002).

¹¹⁸ *Buono v. Norton*, 371 F.3d 543, 546, 550 (9th Cir. 2004).

¹¹⁹ *Id.* at 545.

facilitated by an order from Congress to the Secretary of the Interior demanding an exchange of the parcel of land on which the cross was placed for another similarly situated parcel of private property.¹²⁰ Congress's orders also required "the proviso that the property would revert to the government if the [land was not] . . . 'maintained as a war memorial.'"¹²¹ By taking this action Congress hoped to make the case moot as the cross would no longer be on public property and would theoretically be outside the realm of Establishment Clause rules.¹²² However, this action itself implicated constitutional concerns since it was an action taken by Congress to protect a religious symbol. It was this, the constitutionality of the land transfer, that was appealed and reached the U.S. Supreme Court.¹²³

The decision of the Supreme Court was fractured. There were three concurrences and two dissents, in addition to the Court's opinion.¹²⁴ The fact that the actual case the Court decided did not deal directly with the constitutionality of the cross was the root cause of the Court's splintered decisions.¹²⁵ Thus it was, and is, difficult to draw a clear conclusion from the Court's decision.

Indeed, the Court did not offer a decision on whether or not the land transfer cured the Establishment Clause violations found by the Ninth Circuit.¹²⁶ Instead, the Court determined that the issue of the land transfer should be remanded to the lower court to issue a ruling before any further determination was made.¹²⁷

This decision was, however, quickly rendered moot. The cross, which had been covered by a box during the course of the Court's decision-making process, was stolen.¹²⁸ Although a temporary cross was erected in its place, that cross was removed by the Park Service.¹²⁹ Currently, the case is still winding its way through the court system. In this, the ultimate fate for the cross on Sunrise Rock remains as mysterious as its actual whereabouts.

¹²⁰ *Id.*

¹²¹ Bartrum, *supra* note 111, at 32; Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121, 117 Stat. 1054 (2003).

¹²² Bartrum, *supra* note 111, at 32-33.

¹²³ Salazar v. Buono, 130 S. Ct. 1803 (U.S. 2010).

¹²⁴ *Id.*

¹²⁵ Dolan, *supra* note 28, at 43.

¹²⁶ Salazar, 130 S. Ct. at 1808.

¹²⁷ *Id.* at 1809.

¹²⁸ Dolan, *supra* note 28, at 43-44.

¹²⁹ *Id.* at 44; Stanley Fish, *When is a Cross a Cross?*, N.Y. TIMES OPINION PAGES (May 3, 2010, 9:00 PM), <http://opinionator.blogs.nytimes.com/2010/05/03/when-is-a-cross-a-cross/>.

1. *The Reasonable Observer*

A number of cases shed light on the Court's Establishment Clause decision-making, although it would be difficult to clearly elucidate them all in this Note.¹³⁰ However, the tests used to determine if a display of a religious symbol on public property violates the Establishment Clause are important to the discussion in this Note. Thus, we will focus on the reasonable observer test.¹³¹

Generally, the test, part of the hybrid Lemon/endorsement test requires that "a court . . . consider[] whether a reasonable observer, aware of the history and context of the community and forum in which the religious display appears, would understand it [the cross] to endorse religion or one religion over another."¹³² While the history and context surrounding the display of a religious symbol are relevant, it is unclear exactly how much a "reasonable observer" is expected to know or indeed who the "reasonable observer" is expected to be.¹³³ The Court and the ECtHR both appeared ready to evaluate their respective tests of religious symbols in public spaces.

III. ACCOMMODATION AS THE DECIDING PRINCIPLE

A. *A Dual Movement to Accommodation?*

A consistent criticism of the first *Lautsi* decision was that the ECtHR appeared to assert a preference for symbols segregated from their religious background over those symbols whose religious theme could not be so removed.¹³⁴ For example, Italy argued in the first *Lautsi* case that the crucifix no longer had a religious meaning of any merit.¹³⁵ In *Salazar*, the

¹³⁰ See, e.g., LEONARD WILLIAMS LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1994) (discussing the relevant tests).

¹³¹ *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring) (establishing the reasonable observer test).

¹³² 16A AM. JUR. 2D *Constitutional Law* § 452.

¹³³ Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL'Y 417, 452-52 (2006). The application of this test has been criticized in the court. See *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 901 (2005) (noting Justice Scalia's argument that "the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion") (emphasis in original); see also David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 584 (2002) (arguing that "the test provides few clear guidelines, and appears to turn on judges' inevitably subjective assessments of a hypothetical reasonable observer's perceptions about the cultural significance of state practices").

¹³⁴ *Lautsi I*, *supra* note 42, ¶ 35.

¹³⁵ *Id.*

Supreme Court likewise appeared wary of a war memorial in the form of a cross, seeming more comfortable with war memorials that did not have a secondary religious meaning.¹³⁶

However, the recent decision by the ECtHR's Grand Chamber in *Lautsi v. Italy* and the Supreme Court's decision in *Salazar v. Buono* may suggest that the respective courts have become more favorable to a line of reasoning that incorporates and accepts both the religious meaning of a symbol and its secular purpose. For example, the *Lautsi* decision utilized the concept of margin of appreciation in order to grant the state of Italy greater freedom in determining a use of religious symbols in the public square. It can further be argued that in the most recent *Salazar* case, the U.S. Supreme Court indicated preference for a test that would allow religious symbols to remain on state property. These tests would be more accommodating of the symbols' purpose, both religious and secular.¹³⁷ It is this, the parallel movement of the two courts, reflecting a more nuanced perspective of the place of these symbols in the public sphere, that is of most interest.

Lautsi necessitated the need to balance the ideals of the majority, those who prefer the use of religious symbols in Italy, against the needs of the minority, those who prefer that crosses be absent from public spaces.¹³⁸ This concern with balance reflected the ECtHR's awareness that the complete removal of crucifixes from Italy would be a more difficult course of action than it would have been in a country with a lesser level of religious affiliation.¹³⁹

Furthermore, the Grand Chamber was likely cognizant of the danger of affiliating too closely with one side of the argument. The Chamber did not wish to render a decision that would result in the removal of crucifixes because a group of individuals found their presence offensive.¹⁴⁰ Nor does it appear from the text that the Grand Chamber wished to encourage the states to practice religious indoctrination in public schools.¹⁴¹ To make a decision without sacrificing either of these two competing interests, the court engaged in a factual determination balancing these two concerns of indoctrination and majoritarian preferences.

¹³⁶ *Salazar v. Buono*, 130 S. Ct. 1803, 1808 (U.S. 2010).

¹³⁷ Dolan, *supra* note 28, at 41–45.

¹³⁸ Joseph Weiler's Testimony before the European Court of Human Rights, dotSUB, July 28, 2010, available at <http://dotsub.com/view/65bc5332-aa10-4b8c-bc50-d051e8f4fcc7>.

¹³⁹ See, e.g., Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 CARDOZO L. REV. 2669, 2670 (2009); Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L L. 663, 701–03 (2011) (discussing France's relationship with religion).

¹⁴⁰ *Lautsi II*, *supra* note 1, ¶ 66.

¹⁴¹ *Id.* ¶ 71. This is also the root issue behind a number of cases in schools regarding religious education.

First, the ECtHR dealt with the concern of indoctrination.¹⁴² The ECtHR explained that the simple presence of a religious symbol that “undoubtedly refers to Christianity . . . is not in itself sufficient . . . to denote a process of indoctrination on the respondent State’s part and establish a breach of the requirements of Article 2 of Protocol No. 1.”¹⁴³ In this statement, the court indicated that the presence of religious symbols alone do not violate the Convention simply because the symbols were placed publicly.¹⁴⁴ Furthermore, because Italy had mandated the crosses’ placement, the ECtHR’s decision also implicitly suggested that a government’s overt support of a religious symbol, even when the state’s constitution mandated a secular government, did not constitute indoctrination.¹⁴⁵ Instead, the court required that there be some other factor to render symbol’s existence in the public square so egregious that the symbol could not remain where it was without violating the Convention’s protection of freedom of religion.¹⁴⁶

To support this, the ECtHR explained its decisions in the *Folgero* and *Zengin* cases.¹⁴⁷ At issue in these cases were religious education classes in public schools.¹⁴⁸ The ECtHR evaluated the totality of the circumstances and held that the teaching of religion was not so egregious that it fell outside the realm of the margin of appreciation.¹⁴⁹ Members of minority religions brought both the cases, objecting to the presence of religious education that they alleged focused too heavily on the majority religion in Turkey and Norway, the nations in question.¹⁵⁰

Zengrin was highly relevant to *Lautsi*. In *Zengrin*, the ECtHR determined that religious education classes could focus more heavily on the majority religion of the state (Turkey) simply because the religion which was being given preferential treatment was the “majority religion practiced in Turkey.”¹⁵¹ Thus, the Court relied on *Folgero* and *Zengrin* when it decided

¹⁴² *Id.* ¶¶ 69–71.

¹⁴³ *Id.* ¶ 71.

¹⁴⁴ *See, e.g.*, *Danchin*, *supra* note 139, at 721–23 (comparing Judge Bonello’s and Judge Power’s concurring opinions).

¹⁴⁵ Art. 7 Costituzione [Cost.] (It.) (requiring that the Catholic Church and Italian government be independent).

¹⁴⁶ An example of a situation that would rise to the level the court required would be requiring people to swear on the bible or otherwise invoke religious persons in order to serve as a member of a parliament or governing body. *Buscarini and Others v. San Marino*, App. No. 24645/94, Eur. Ct. H.R. (1999).

¹⁴⁷ *Folgero and Others v. Norway*, App. No. 15472/02 Eur. Ct. H.R. (2007); *Hasan and Eylem Zengin v. Turkey*, App. No. 1448/04 Eur. Ct. H.R. Former (2007).

¹⁴⁸ *See sources cited supra* note 147.

¹⁴⁹ *Lautsi II*, *supra* note 1, ¶ 71.

¹⁵⁰ *Folgero*, App. No. 15472/02 (2007); *Zengin*, App. No. 1448/04 (2007).

¹⁵¹ *Lautsi II*, *supra* note 1, ¶ 71 (discussing the Court’s previous decisions in *Folgero* and *Zengrin*).

that majoritarian preferences could be considered.¹⁵² Additionally, to address the concerns of indoctrination on the part of the state, the ECtHR relied on evidence that Italian schools freely encouraged the practice of other religions.¹⁵³

The ECtHR also addressed concerns of indoctrination by deciding that the crucifix was a “passive symbol.”¹⁵⁴ The court noted that the crucifixes in schools were not addressed, gestured at, or remarked upon while studying or teaching students in class.¹⁵⁵ Thus, the ECtHR felt that the crucifixes were unlikely to have the same effect on a student as, say, a teacher wearing a headscarf in a classroom.¹⁵⁶ By including this analysis, the ECtHR distinguished the *Lautsi* case from the headscarf cases discussed earlier.¹⁵⁷

Finally, the ECtHR determined that Ms. Lautsi’s individual perception of the crucifix was not enough to prove a violation of the Convention.¹⁵⁸ This final assertion allows the *Lautsi* decision to be reconciled with the U.S. Supreme Court’s decision in *Salazar v. Buono* because it changed the focus of interpretation for cases of religious symbols. Now, both courts look ready to examine their interpretations more narrowly.

By allowing the crucifixes to remain, the Grand Chamber prevented Ms. Lautsi from asserting that her individual perception of a symbol could itself prove a violation of the European Convention on Human Rights. It also soothed concerns that every religious symbol could be deemed a violation of the convention because one person found it objectionable.¹⁵⁹ However, in making this determination, the court accepted, and has been criticized for adopting, a majoritarian perspective towards questions of religion.¹⁶⁰

By taking this route, the ECtHR was able to accommodate the vastly different ideologies and perspectives towards religion existent in modern Europe. In heavily emphasizing the concern of indoctrination, the court left open the possibility that, in other cases where there are more egregious circumstances, the court might make a different decision. In those cases, it appears likely that the court will scrutinize the situation more carefully and may not apply the margin of appreciation.

¹⁵² *Id.*

¹⁵³ *Id.* ¶ 74.

¹⁵⁴ *Id.* ¶ 72.

¹⁵⁵ *See id.* (discussing the passive nature of crucifixes).

¹⁵⁶ *Id.* ¶ 74; *see also* Dahlab v. Switzerland, App. No. 42393/98, Eur. Ct. H.R. (2001).

¹⁵⁷ *Lautsi II*, *supra* note 1, ¶ 73.

¹⁵⁸ *Id.* ¶ 66.

¹⁵⁹ *See* Weiler, *supra* note 17, at 4 (noting the different approaches to religion).

¹⁶⁰ Andrea Pin, *Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State*, 25 EMORY INT’L L. REV. 95, 97–98 (2011).

Politically, the Grand Chamber's decision was reasonable.¹⁶¹ It protected the ECtHR from the wrath of many organizations that viewed the decision of the lower chamber as a violation of religious freedoms. By focusing on indoctrination, as well as classifying the crucifix as a passive symbol and a representation of the Italian State, the ECtHR was able to distinguish *Lautsi* from prior decisions. Thus, the court could reasonably uphold both the Italian crucifixes and the Turkish ban on religious dress in universities.¹⁶²

The doctrine, by refusing to allow a single subjective interpretation of a symbol to determine its validity in the public square, is similar to the concept of a "reasonable observer."¹⁶³ This is because both methods require highly factual observations of the circumstances and do not bow to subjective interpretations of a symbol.¹⁶⁴ Yet the ECtHR, by applying the margin of appreciation doctrine, goes slightly beyond the "reasonable observer" test.¹⁶⁵ The ECtHR, for better or for worse, may accommodate the majority religious perspectives of the various nations under its jurisdiction, while not completely abdicating its responsibility to protect minority religions from indoctrination. In this manner, the ECtHR was able to deal with the question of religious symbols which hold alternate non-religious meanings.

There is some evidence the U.S. Supreme Court, like the ECtHR in *Lautsi*, is moving towards a test that would allow a greater accommodation of religious symbols.¹⁶⁶ After the 2010 decision in *Salazar v. Buono*, some have argued in favor of new theories of interpretation regarding religious symbols placed on public property.¹⁶⁷ These newly argued theories focus less on the traditional two pronged endorsement tests used in past cases.¹⁶⁸ One of these alternative tests may arguably expand the reasonable observer test. The other argues that religious symbols, which do not have a strongly indoctrinating or highly offensive character, should be acceptable within the public sphere normatively. Both of these tests bear striking resemblances to some of the abovementioned theories relied upon in *Lautsi v. Italy*.

The first theory can be interpreted as a reimagining of the reasonable observer test. It requires what has been categorized as an "extraordinarily

¹⁶¹ See Witte & Arnold, *supra* note 20, at 16 (suggesting that the ECtHR's motivation was highly political).

¹⁶² *Lautsi II*, *supra* note 1.

¹⁶³ *Id.* ¶ 66.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Dolan, *supra* note 27, at 58.

¹⁶⁷ See generally Lisa Shaw Roy, *Salazar v. Buono: The Perils of Piecemeal Adjudication*, 105 NW. U. L. REV. COLLOQUY 72 (2010).

¹⁶⁸ *McCreary v. Amer. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005); Roy, *supra* note 167, at 80–82.

reasonable observer.”¹⁶⁹ This test would operate within the traditional sphere of the endorsement test, but would require an observer that has a unique understanding of the circumstances related to the religious symbol.¹⁷⁰ For example, in *Salazar* the observer would be considered aware of the fact that the VFW placed the cross on the land and that Congress had deemed the cross a memorial for World War I veterans.¹⁷¹ Thus, it would not be enough that the observer only understood the religious connotation of the cross.¹⁷² The hypothetical observer necessary to the test would also have to understand that the cross served the purpose of a memorial.¹⁷³ Furthermore, the observer would have to be able to rationally consider and balance the religious symbolism of cross with its secular purpose, and then determine if the symbol constituted a government endorsement of religion.¹⁷⁴

The second theory that has been espoused is that of accommodation.¹⁷⁵ This theory holds that “[t]he Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society[,] . . . [r]ather, it leaves room to accommodate divergent values within a constitutionally permissible framework.”¹⁷⁶

It has been argued that this second theory is the predominate preference of the Court held by Justices Kennedy, Alito, Scalia, Thomas and Breyer.¹⁷⁷ Breyer’s rationale is that “cultural strife may be avoided when the Court’s Establishment Clause jurisprudence does not demand removal of every longstanding religious symbol from the public square.”¹⁷⁸ According to Lisa

¹⁶⁹ Dolan, *supra* note 28, at 48; *see also* Roy, *supra* note 167, at 80–87; Douglas G. Smith, *The Constitutionality of Religious Symbolism after McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93, 106 (2007) (outlining the reasonable observer test in various cases before criticizing it); *Am. Civil Liberties Union of Ky. v. Mercer Cnty.*, 432 F.3d 624, 638–39 (6th Cir. 2005) (noting that “fortunately, the reasonable person is not a hyper-sensitive plaintiff”).

¹⁷⁰ Dolan, *supra* note 28, at 48; Adam Linkner, *How Salazar v. Buono Synthesizes the Supreme Court’s Establishment Clause Precedent into A Single Text*, 25 EMORY INT’L L. REV. 57, 66 (2011) (suggesting the observer must appreciate the moral dilemma Congress faced between honoring the memorial and respecting the Establishment Clause).

¹⁷¹ Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 722 (2001) (explaining Justice O’Connor’s opinion in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995)).

¹⁷² *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010) (“[A] Latin cross is not merely a reaffirmation of Christian beliefs . . . [but] a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.”).

¹⁷³ Dolan, *supra* note 28, at 49.

¹⁷⁴ *Id.*

¹⁷⁵ Roy, *supra* note 167, at 80.

¹⁷⁶ *Salazar v. Buono*, 130 S. Ct. 1803, 1819 (U.S. 2010).

¹⁷⁷ Roy, *supra* note 167, at 81–82.

¹⁷⁸ *Id.*; *see, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 703–04 (2005) (Breyer, J., concurring) (explaining that removing longstanding displays of the Ten Commandments throughout the U.S. would “create the very kind of religiously based divisiveness that the Establishment

Shaw Roy, it seems unlikely that the Court still views religious symbols or monuments as outsiders.¹⁷⁹ For example, she asserts that

Alito stated that a monument ‘may be intended to be interpreted, and may in fact be interpreted by different observers in a variety of ways.’ Particularly in the context of symbols and displays, without a reasonable observer who can discern a message of exclusion the endorsement test loses much of its content.¹⁸⁰

In other words, because the endorsement test is dependent on a reasonable observer, which may not exist, it is not always the best test to use when evaluating religious symbols.

The use of an accommodation approach has not been universally accepted and is complicated by the fact that *Salazar* does not explicitly rule on the constitutionality of the cross.¹⁸¹ However, if the Court does truly move in this direction and is dedicated to this path, it may offer a possibility, much like that sought in *Lautsi*, to preserve religious symbols in the public square without violating individual rights. Some have criticized the accommodation approach as disingenuously “dereligionizing” sectarian symbols,¹⁸² but that perspective is too simplistic.¹⁸³ Like the application of the margin of appreciation doctrine, the accommodation doctrine “does not demand a choice between two undesirable extremes—on the one hand, an obsessive focus on religion to the exclusion of important historical and cultural realities; and on the other, an implausible denial of a symbol’s religious character.”¹⁸⁴

In sum, both the ECtHR in *Lautsi* and the Supreme Court in *Salazar*, may be ready to espouse a doctrine of accommodation. In applying this doctrine, the courts will make highly fact-specific decisions that evaluate the totality of the circumstances in which the religious symbols exist. Yet, within that context, the courts will also leave open the possibility that further cases can be brought when there are examples of severe indoctrination or suppression of individual rights. Finally, by applying this test, the courts reaffirm that it is difficult, if not impossible, to remove the religious connotation of a cross. Thus, the courts may accept that regardless of religious connotation, there are

Clause seeks to avoid”).

¹⁷⁹ Roy, *supra* note 167, at 81–82.

¹⁸⁰ *Id.* at 81.

¹⁸¹ *Id.* at 81–84.

¹⁸² Fish, *supra* note 129.

¹⁸³ Roy, *supra* note 167, at 83.

¹⁸⁴ *Id.*

some circumstances in which crosses will not violate religious freedom clauses simply because they are located on public ground.

In the end, these two cases, though both factually and procedurally complex, represent a similarity of thought and ideology in two different courts halfway across the globe. This similarity could signal a trend that, should it continue, points toward a global application of the accommodation doctrine.

IV. CONCLUSION

Even with the extensive review and discussion that the decisions of *Lautsi* and *Salazar* have wrought in their respective jurisdictions, it is unclear how they will ultimately affect jurisprudence in either the European Union or the United States. The ECtHR has been criticized for offering a politically expedient decision in the Grand Chamber's ruling on *Lautsi* rather than a legally sound point.¹⁸⁵ If this is the predominant interpretation that is eventually attached to *Lautsi*, then there is little need to evaluate the Court's approach to symbols as an espousal of an accommodation principle. However, to assert that *Lautsi* was simply a political decision without evaluating its merits and its historical foundations would be unfair to the complexity of the issue. On the other hand, the argument that the U.S. Supreme Court does not yet espouse a theory of accommodation is more than fair.¹⁸⁶ Due to the procedural complications of the *Salazar* case itself, it is hard to declare anything definitive.

The Supreme Court recently denied certiorari to a case, *American Atheists v. Duncan* in which the Tenth Circuit determined that crosses placed on the side of a highway as commemorative markers for dead policemen were unconstitutional.¹⁸⁷ This case would have been an ideal test to determine whether the Court had truly moved towards a more accommodating test of religious symbols. It is possible that, by refusing certiorari, the Court intended to disprove this notion and signal instead a reaffirmation of the more doctrinally rigorous reasonable observer/endorsement tests.¹⁸⁸ Yet, it is hard to ignore the language that the Justices used as they debated the constitutionality of the land transfer of the cross in the desert.

¹⁸⁵ See, e.g., Smet, *supra* note 4.

¹⁸⁶ Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 4.

¹⁸⁷ *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 12 (2011).

¹⁸⁸ It is noteworthy that the decision in *Salazar v. Buono* included an example in which it said that the court would not find an Establishment Clause violation for crosses placed on the side of the highway in remembrance of policemen who died in the line of duty. *Salazar v. Buono*, 130 S. Ct. 1303, 1818 (2010).

The logic in the decision offered by the Grand Chamber in *Lautsi v. Italy* and by the various Justices in *Salazar v. Buono* is remarkably similar. In both cases the courts were faced with a highly controversial decision about a religious symbol placed in a public space open to many observers. That both courts appear ready to espouse a doctrine that would allow religious symbols to remain on public property may point towards the chosen path for each of these courts.

Because of their role as final arbiter of disputes between governments and their people, the Supreme Court and the ECtHR will have to chart a course that protects individual rights without trampling on collective cultural and religious identities. For now incorporating a principle of accommodation may be the best option, as it would afford protection for religious symbols while leaving open the possibility of rigorous review when indoctrination or oppression are concerns.

For the European Union, the beginnings of the course of accommodation appear through the fact-sensitive evaluation which duly considers concerns about indoctrination and intimidation. By choosing this course, the ECtHR allowed the countries of the European Union to display religious symbols so long as the same states did not restrict the rights of other people to practice their religion or lack of religion. In addition, through the use of the margin of appreciation doctrine, the court allowed individual countries to chart their own paths.

The course for the Supreme Court and the establishment jurisprudence remains less clear.¹⁸⁹ The rules and tests used for purported violations of the Establishment Clause remain convoluted and unsure, applied differently by numerous courts.¹⁹⁰ Regardless, it appears there is the possibility that the Court, like the ECtHR, will move towards a more accommodating test when questioning religious symbols. This new test would recognize the religious nature of these symbols but would not sacrifice their other meanings to the religious connotation.

Finally, if this is the course that the courts choose to take, there will be substantial consequences for future challenges to crosses placed on public property. In the European Union, it appears that challengers will not only need to show that the cross is capable of substantial indoctrination but that the individual challenger's interpretation of the cross will not be sufficient to sustain a challenge. This showing will have to be accomplished within the context of a highly fact-specific case in which every relevant factor is taken into account when considering possible indoctrination. This test will be fairly similar in the United States if the Supreme Court applies the

¹⁸⁹ For further consideration of long term consequences, see Bartrum, *supra* note 111.

¹⁹⁰ *Id.*

accommodation principle that this Note anticipates. In the United States, if the Court chooses to utilize the hyper reasonable observer principle, a challenger will have to show that a person viewing the cross, who has every ounce of the relevant information, could not see the cross's existence as anything other than an endorsement of religion. Thus, both courts appear ready to use a similar principle to determine the cross's validity. The fact that these questions have arisen for both courts is not surprising. What is interesting is that both courts appear willing to address the question in similar ways through a concept of accommodation.