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# CAN STATE-SPONSORED RELIGIOUS SYMBOLS PROMOTE RELIGIOUS LIBERTY?

THOMAS C. BERG<sup>†</sup>

The title of this conference panel raises the question, “Cultural or Religious? Understanding Symbols in Public Places.” I will make some remarks about that issue, but I would like primarily to frame a different question: “Can public, that is state-sponsored, religious symbols promote religious liberty?”

Let me explain the question. I followed from afar the litigation in *Lautsi v. Italy*<sup>1</sup> over the display of crucifixes in Italian state schools. I also have spent a number of years studying the United States Supreme Court’s erratic efforts to distinguish between permissible and impermissible government religious symbols and statements. In *Lautsi*, of course, the Grand Chamber of the European Court of Human Rights upheld the Italian schools’ display of crucifixes. Somewhat differently, our Supreme Court has upheld state-sponsored displays of symbols such as crèches or menorahs and of religious texts such as the Ten Commandments, but only outside the school setting, and only if they are accompanied by other elements giving the overall display a secular message.<sup>2</sup> In both instances, the high courts in question found that the displays did not interfere with religious liberty.

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<sup>1</sup> *Lautsi v. Italy*, No. 30814/06 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

<sup>2</sup> *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 857, 881 (2005) (invalidating Decalogue display tainted by earlier display of Decalogue standing alone); *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (approving Decalogue display with other historic/civic monuments); *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 621 (1989) (approving menorah with Christmas tree but invalidating standalone crèche); *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (approving crèche with secular Christmas symbols); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (invalidating posting of Decalogue in public school classrooms).

But I believe that if such displays are to be justified in public argument, they need a stronger defense than merely that they can co-exist with religious liberty. After all, they can have negative effects: They can coerce or at least alienate people who do not share the favored religion, especially children in a schoolroom, and they can create social conflict over which religion(s) receive the state's acknowledgment. In that light, the justification for them would be much stronger if they do not merely coexist with religious liberty but can actually promote it. That affirmative case may not be required as a matter of positive law. To me, the Grand Chamber seems correct in concluding that, given the variety of church-state arrangements among European nations, Europe's human-rights tradition does not have a sufficient consensus to prohibit state-sponsored religious displays. But the affirmative case for such displays is needed, I think, if they are to be defended as a matter of state policy.

In this Article, therefore, I examine the question and offer some ways in which state-sponsored religious symbols can actually support a vigorous conception of religious liberty. I then acknowledge some of the problems with such official displays and briefly suggest ways in which the vigorous conception of religious liberty can be recognized and promoted without them.

## I. HOW OFFICIAL SYMBOLS MIGHT SUPPORT RELIGIOUS LIBERTY

I begin my Article with two texts, one European and one American. The European text is from an earlier ruling in *Lautsi*: the 2006 opinion of Italy's Consiglio di Stato, or Supreme Administrative Court. In holding the crucifix displays permissible, that court said:

[I]n Italy the crucifix is capable of expressing, symbolically of course, but appropriately, the religious origin of those values—tolerance, mutual respect, valorisation of the person, affirmation of one's rights, consideration for one's freedom, the autonomy of one's moral conscience vis-à-vis authority, human solidarity and the refusal of any form of discrimination—which characterise Italian civilisation. . . . The reference, via the crucifix, to the religious origin of these values and their full and complete correspondence with Christian teachings accordingly makes plain the transcendent sources of the values concerned, without calling into question, rather indeed confirming the autonomy of the temporal power vis-à-vis the spiritual power

(but not their opposition, implicit in an ideological interpretation of secularism which has no equivalent in the Constitution) . . . .<sup>3</sup>

The American text comes from fifty years earlier: A statement by a committee of the U.S. Congress explaining why that legislature had added the phrase “under God” to the official text of the Pledge of Allegiance to the American flag. From the Pledge’s creation in 1892, public schoolchildren and other Americans recited it to declare allegiance to the flag “and to the Republic for which it stands one Nation indivisible, with Liberty and Justice for all.”<sup>4</sup> But in 1954, at the height of the Cold War and in response to advocacy by President Eisenhower and several prominent clergymen, Congress amended the text to read “one Nation under God, indivisible.”<sup>5</sup> The relevant congressional committee report explained the change on the ground, among others, that it would more clearly state the foundation of American liberties:

At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. [O]ur American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. . . . [The inclusion of “under God” in the Pledge] would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.<sup>6</sup>

These two texts have obvious differences. One is European, the other American; one concerns a symbol specifically of Christianity, the other a more generic piece of religious language; and one appeared recently while the other dates back to the less religiously pluralistic America of the Cold War. But the two texts share a thesis, broadly speaking. They claim that certain

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<sup>3</sup> See *Lautsi*, No. 30814/06, ¶ 16, at 8–9 (quoting Consiglio di Stato).

<sup>4</sup> *The Pledge of Allegiance and Our Flag of the United States: Their History and Meaning*, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA, <http://www.wvsc.uscourts.gov/outreach/Pledge.htm> (last visited Sept. 10, 2013).

<sup>5</sup> Pledge of Allegiance, Pub. L. No. 396, 56 Stat. 380 (1954).

<sup>6</sup> H.R. REP. NO. 83-1693, at 1–2 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2340.

religious expression by the government, including display of religious symbols, is not merely tolerably consistent with religious liberty, but can actually support it, along with other human rights. This Article will explore that thesis in greater detail, including both the arguments for it and the shortcomings in it.

The two texts share another feature: Neither was adopted by the relevant court of last resort as the basis for justifying the official religious expression in question. The Italian tribunal's defense of Christianity as a key ground of religious freedom—indeed, as a key ground of the “autonomy of the temporal state,” or Italian *laicità*—was, as I understand, “quite a surprising” twist to most observers.<sup>7</sup> Before the Italian opinion, and again when the case reached the European Court, defenders of the crucifix, including the Italian government, emphasized its cultural and historical, rather than its specifically religious, features.<sup>8</sup> Ultimately the Grand Chamber, while acknowledging that the crucifix had religious meaning and still permitting its display, did not affirmatively claim that such displays could support religious freedom. It merely held that they could coexist with religious freedom, enough to fall within the margin of appreciation for European member states.<sup>9</sup>

As for “under God” in the Pledge of Allegiance, the U.S. Supreme Court dodged the question of its constitutionality on a procedural ground.<sup>10</sup> But the Justices who have signaled their approval of the phrase have not argued that it makes any contribution to religious freedom. Instead they have argued that such references simply “recogni[ze] . . . our Nation's religious history and character”;<sup>11</sup> or that they serve the ceremonial purposes “of solemnizing public occasions [and] expressing

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<sup>7</sup> 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, 103 (2011).

<sup>8</sup> *Id.* at 102–03.

<sup>9</sup> *Lautsi v. Italy*, No. 30814/06, ¶¶ 68, 69 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

<sup>10</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16–17 (2004) (parent who challenged recitation of Pledge in his daughter's classroom lacked standing to sue because he did not have legal custody over her).

<sup>11</sup> *Id.* at 30 (Rehnquist, J., concurring).

confidence in the future”;<sup>12</sup> or, in Justice Brennan’s view, that the words “have lost through rote repetition any significant religious content.”<sup>13</sup>

These defenses by American Justices, at least, range from uninspiring at best to offensive at worst. Justice Brennan’s defense is most disturbing, suggesting that a symbol is only permitted because the government’s use of it has stripped it of its religious meaning. In an article a few years ago, I wrote that “[i]f ‘under God’ should be upheld, there needs to be a better rationale for doing so, one that does not kill the patient in order to save it.”<sup>14</sup> I still believe that.

So is there something more to be said for the official display of religious symbols? In what way—if any—could religious expression by the government, including expression through symbolic displays, actually promote religious liberty? My two texts present arguments that it could. Let me return to these texts, which have typically been ignored if not maligned, and explore what they have to offer.

#### A. *The Transcendent Status and Source of Rights*

First, both texts suggest that religious liberty, like other human rights, is more secure if it stems from a transcendent source or authority. Thus the Consiglio di Stato says that the crucifix display—which symbolizes that values such as toleration and respect for conscience have religious origins and a “full and complete correspondence with Christian teachings”—thereby “makes plain the transcendent sources of th[ose] values.”<sup>15</sup>

The American congressional report lays out this argument explicitly. It says that the inclusion of “under God,” by assigning the state a secondary status, communicates “the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil

<sup>12</sup> *Id.* at 36 (O’Connor, J., concurring) (internal quotation marks omitted).

<sup>13</sup> *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

<sup>14</sup> Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 48–49 (2003). As I note shortly, the Ninth Circuit has adopted a different rationale from these Justices—one very much like the “limited government” argument I explore here. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010). But no Supreme Court Justice has endorsed it.

<sup>15</sup> *Lautsi v. Italy*, No. 30814/06, ¶ 16, at 9 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040> (quoting Consiglio di Stato).

authority may usurp.”<sup>16</sup> The passage, of course, echoes the Declaration of Independence’s natural rights theory and its assertion of “self-evident” truths: “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights” including “Life, Liberty and the pursuit of Happiness.”<sup>17</sup> Thus “under God” in the Pledge may communicate the ideas “that government is a limited institution” and “that the rights of persons—the ‘liberty and justice’ guaranteed to all—are inalienable, stemming from a source higher than the nation or any other human authority.”<sup>18</sup> The Court of the Appeals for the Ninth Circuit recently adopted this rationale, referring to the 1954 congressional committee report, in upholding the Pledge’s text against an Establishment Clause challenge. The appellate panel said:

The words ‘under God’ were added as a description of ‘one Nation’ primarily to reinforce the idea that our nation is founded upon the concept of a limited government, in stark contrast to the unlimited power exercised by communist forms of government. In adding the words ‘under God’ to the Pledge, Congress reinforced the belief that our nation was one of individual liberties granted to the people directly by a higher power.

....

In the context of the Pledge, the phrase ‘one Nation under God’ constitutes a powerful admission by the government of its own limitations.<sup>19</sup>

The Ninth Circuit panel held that under this “limited government” argument, the Pledge satisfied the Establishment Clause because its:

purpose and effect . . . are that of a predominantly patriotic, not a religious, exercise. The phrase ‘under God’ is a recognition of our Founder’s political philosophy that a power greater than the

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<sup>16</sup> H.R. REP. NO. 83-1693, at 1–2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

<sup>17</sup> *See The Declaration of Independence*, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA, <http://www.wvwd.uscourts.gov/outreach/Declaration.htm> (last visited Sept. 10, 2013).

<sup>18</sup> Berg, *supra* note 14, at 52.

<sup>19</sup> *Newdow*, 597 F.3d at 1032, 1036.

government gives the people their inalienable rights. Thus, the Pledge is an endorsement of our form of government, not of religion or any particular sect.<sup>20</sup>

Recently some scholars have argued why it could matter greatly that human rights stem from a God-given dignity. In a short paper, Jeremy Waldron examines a passage from the Israeli Supreme Court's 2005 opinion on the question whether the Israeli government could make preventive strikes aimed at killing members of terrorist organizations in the West Bank and Gaza Strip.<sup>21</sup> The passage, from the majority opinion by Justice Aharon Barak, stated: "Needless to say, unlawful combatants are not beyond the law. They are not 'outlaws.' *God created them as well in his image*; their human dignity as well is to be honored; they as well enjoy and are entitled to protection . . . by customary international law."<sup>22</sup> Waldron argues that the assertion that the terrorist is "created in the image of God" adds a crucial "objective" ground to the claim that he has dignity:

It presents itself as grounded ontologically, not in what we happen to care about or in what we happen to have committed ourselves to, but in facts about what humans are actually like, or—more accurately, what they have been made by the Creator to be like . . . and to command by virtue of the fact of that likeness treatment as something sacred and inviolable. We are not just clever animals, and the evil-doers among us are not just good animals gone bad: [O]ur dignity is associated with a specifically high rank in creation accorded to us by our creator and reflecting our likeness to Him.<sup>23</sup>

Waldron continues:

[The] foundational work that *imago dei* does for dignity is, in my opinion, indispensable for generating [and adhering to] the sort of strong moral constraint . . . that we need to override what would otherwise seem like sensible and compelling strategies for dealing with outsiders, with our enemies, with terrorists, with those who can be categorized as 'the worst of the worst.'

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<sup>20</sup> *Id.* at 1037.

<sup>21</sup> Jeremy Waldron, *The War on Terror and the Image of God*, in LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES 556, 556 (2010).

<sup>22</sup> *Id.* at 557 (emphasis added) (quoting HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2005] (Isr.)).

<sup>23</sup> *Id.* at 560.



... [Such constraints must come from] something that goes beyond our attitudes, even beyond 'our' morality, something commanded from the depths of the pre-political and pre-social foundation of the being of those we are tempted to treat [degradingly].<sup>24</sup>

Michael Perry has similarly argued that the idea of universal rights rests in the sacredness of all persons: the fact that "the Other (the outsider, the stranger, the alien), too, no less than oneself and the members of one's family or of one's tribe or nation or race or religion, is a 'child' of God—God the creator and sustainer of the universe."<sup>25</sup> Perry, too, doubts that secular rationales will be adequate to ground human rights solidly in the face of pressures to subordinate some persons to the needs—sometimes the most pressing needs—of the state or some group within it. He argues that it is too contingent to try to base human dignity on the awe we feel for the human creature, as Ronald Dworkin tries to do, or on enlightened self-interest.<sup>26</sup> These grounds will prove inadequate if a person or group is too despised or despicable to trigger any sense of awe or too powerless ever to threaten any retaliation or costs for harm.<sup>27</sup>

I will not try here to assess, let alone resolve, the long-running debate whether human rights norms ultimately require a theological grounding. It is enough for my purpose to posit that such a grounding—a transcendent source, higher than any human authority or imperative—can strengthen the commitment to human rights. A transcendent source means that the rights apply to everyone, even those who seem most alien, and that society must take the utmost care when it treads close to these rights. Government may want to express this vision of rights and try to solidify it in the people's minds through statements, including symbolic displays. "Passive" displays, as the *Lautsi* decision calls them, can express this vision without directly pressuring people to believe or affirm it, which would itself violate their freedom of belief.

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<sup>24</sup> *Id.* at 560–61.

<sup>25</sup> MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 17 (1998).

<sup>26</sup> *Id.* at 27–29 (discussing and criticizing RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 82–83 (1993)).

<sup>27</sup> *Id.* at 33–34.

I should, however, pause to register a caveat about *Lautsi's* conclusion that students are not pressured or influenced when the religious symbols are on schoolroom walls.<sup>28</sup> The U.S. Supreme Court, at least, has concluded otherwise: It has repeatedly enforced our no-establishment rule vigorously concerning classroom practices, on the premise that students are "impressionable" and that in the classroom, "[t]he State exerts great authority and coercive power."<sup>29</sup> A conclusion of non-coercion would be much more convincing were the symbols placed in a room where students did not see them every hour of the school day.

Concepts of transcendent rights and limited government may play crucial roles not just generally for human rights, but especially for religious liberty. I will focus on the American tradition. James Madison's Memorial and Remonstrance Against Religious Assessments was perhaps the greatest statement of our founding era against government interference in religion, and it begins by asserting that

[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe.<sup>30</sup>

Likewise, the landmark Virginia Statute for Religious Liberty, written by Thomas Jefferson, grounds religious freedom in the premise that "Almighty God hath created the mind free" and that "all attempts to influence it by temporal punishments or burdens . . . are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either."<sup>31</sup>

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<sup>28</sup> *Lautsi v. Italy*, No. 30814/06, ¶ 66 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040> (finding "no evidence before the Court" of such an effect and concluding "it cannot reasonably be asserted").

<sup>29</sup> *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); see also *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (finding that "indirect coercive pressure upon religious minorities" from classroom prayers, even with formal opt-out process, "is plain").

<sup>30</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, in RONALD B. FLOWERS, *THAT GODLESS COURT?: SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS* 187, 187 (2d ed. 2005).

<sup>31</sup> Thomas Jefferson, *An Act for Establishing Religious Freedom*, in FLOWERS, *supra* note 30, at 193, 193.

Such passages reflect what Professor Steven Smith has called the “religious justification” for religious freedom.<sup>32</sup> In this account, religious duties and callings are of fundamental value because they relate to an authority above temporal rulers; but the state cannot enforce the religious duties it believes valid or prohibit those it believes invalid, because the duties and callings are only valuable if they are followed voluntarily.<sup>33</sup> America, like Europe, has seen a lively debate about whether such religious arguments are legally admissible today to support a distinctive right of religious freedom; whether other arguments can generate such a distinctive right; and indeed whether religious freedom should exist as a distinctive right or simply as an instance of general freedoms of belief, expression, and association. In that debate, Smith and others have argued that the religious justification is necessary to ground a vigorous right of religious freedom.<sup>34</sup> Smith explores several common secular justifications for religious freedom—respecting personal autonomy, preventing civil strife, avoiding alienation of some citizens—and concludes they are inadequate for the task because religion does not present significantly greater problems than other beliefs on those measures.<sup>35</sup> Only a religious perspective, Smith says, can explain why religious freedom is a distinctive right: It does so by explaining why religious duties and callings are distinctively important, but must be freely chosen.<sup>36</sup> The state acts cautiously in religious matters—it does not impose a religious view on anyone, and it makes room for citizens to practice their religious beliefs as much as possible—precisely because it has a religious sense of the sacredness of these questions and the limits of its own authority.<sup>37</sup>

I think that freedom of religion can be justified based on other rationales, but I do think it is weakened by the loss of the religious rationale. Let me illustrate this with a tale of two U.S. Supreme Court decisions, separated by a century. In 1990, the

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<sup>32</sup> Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153–54 (1991).

<sup>33</sup> *Id.* at 154–55.

<sup>34</sup> See generally JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 112–22 (2000); Michael S. Paulsen, *The Priority of God (A Theory of Religious Liberty)*, 39 PEPP. L. REV. 1159 (2013).

<sup>35</sup> Smith, *supra* note 32, at 196, 202, 207, 210, 218.

<sup>36</sup> *Id.* at 155–56.

<sup>37</sup> *Id.* at 155.

Court ruled in *Employment Division v. Smith*, the “peyote case,” that the Free Exercise Clause did not protect religious conduct from generally applicable laws, no matter the magnitude of the restriction on religion or the weakness of the state’s interest.<sup>38</sup> This significantly shrunk the scope of constitutional protection for religious freedom that had existed since 1963.<sup>39</sup> As Steven Smith has shown, the Court’s move can be attributed to an unwillingness to consider the religious justification for religious freedom. When a religious believer makes a claim for protection against generally applicable secular laws, she typically calls on the state to recognize the priority, or at least the importance, of religious duties. The believer asserts that she faces a conflict between two authorities, God and the state, and that the state should allow her to follow the religious duty unless it would endanger important social interests. But the opinion in the peyote case denigrated the free exercise claimant as simply seeking “to become a law unto himself”<sup>40</sup>—when in fact, as Professor Smith observes, “the whole point of the claim is that the believer is bound by a heteronomous obligation imposed by a higher authority.”<sup>41</sup> And “[i]f there is no higher authority—or at least none that the state is permitted to recognize—then regardless of how the claimant characterizes his belief, the source of the obligation invoked by the believer can only be the individual himself.”<sup>42</sup> Once the religious-freedom claim is reduced to an individual’s asserted right to ignore “generally applicable laws” simply because of his or her subjective belief, the claim, unsurprisingly, fails.<sup>43</sup>

Contrast *Smith* with the Supreme Court’s 1892 decision in *Holy Trinity Church v. United States*, in which the Justices refused to apply United States immigration law to prohibit an Anglican church in New York City from calling an English citizen

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<sup>38</sup> 494 U.S. 872, 906–07 (1990).

<sup>39</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963). Both cases recognized constitutionally mandated exemptions from laws substantially burdening religious freedom unless the state could show a compelling interest.

<sup>40</sup> *Emp’t Div.*, 494 U.S. at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

<sup>41</sup> *Smith*, *supra* note 32, at 236.

<sup>42</sup> *Id.* at 237.

<sup>43</sup> *Id.* at 234, 236–37.

as its rector.<sup>44</sup> The Court's opinion is famous—infamous among civil-rights proponents—because it baldly stated that “this is a Christian nation.”<sup>45</sup> Today conservative Christians sometimes quote that phrase as a reason for the government to disfavor or impose on non-Christian faiths. But the Court in 1892 used the phrase entirely differently. After listing in six full pages the “mass of organic utterances”—colonial and state constitutions, court rulings, and so forth—“that this is a Christian nation,” the Court concluded that “[i]n the face of all these,” it could not be believed that Congress intended to prohibit “a church of this country [from] contract[ing] for the services of a Christian minister residing in another nation.”<sup>46</sup> But the ruling was not limited to Christian churches: The Court said that “no purpose of action against *religion* can be imputed to any legislation, state or national, because this is a religious people.”<sup>47</sup> And posing a series of hypothetical questions, it said that if a congressman had explicitly proposed prohibiting contracts various Christian denominations made with foreign clergy, “*or any Jewish synagogue with some eminent rabbi,*” it would not “have received a minute of approving thought or a single vote.”<sup>48</sup>

In the view of the Court in *Holy Trinity Church*, the Christian foundations of the nation generated a respect for freedom of religious practice that extended to other faiths as well, even in the face of a secular law that otherwise would clearly apply. The result contrasts with the peyote decision. And it should counsel caution to anyone who assumes that a religious grounding for laws would deny freedom to those of other faiths. On the contrary, it is plausible that a government willing to recognize religion in its own expression is more likely to respect citizens' varying senses of calling to a higher power—even senses that differ from the majority's—than is a studiously secular government.

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<sup>44</sup> 143 U.S. 457, 458–59 (1892).

<sup>45</sup> *Id.* at 471.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 465 (emphasis added).

<sup>48</sup> *Id.* at 472 (emphasis added).

### B. *Religious Liberty in Public Settings*

Second, official religious expression may bolster religious freedom by affirming, if only symbolically, that religious beliefs are relevant to public life: that the public square is not naked of religion, and that religious arguments are part of the pattern of debate in a pluralistic society. In the words of the *Consiglio di Stato*, “the autonomy of the temporal . . . [and] spiritual power[s]” does not equate with an “interpretation of secularism” that renders spiritual matters irrelevant to the temporal sphere.<sup>49</sup> Religious identity is important enough to individuals and organizations, this view implies, that the freedom to pursue it extends to all aspects of life, not merely to private, insular activities, or in other words, those activities that do not touch others. This is an important matter. Some of today’s major disputes over religious freedom involve whether religious believers can pursue their beliefs in settings that are not purely private but that also do not make the believers arms of the state.

Consider the European debate over the non-face-covering headscarf. As a general matter, nations that rest religious freedom on a highly secular rationale have been unsympathetic to the basic claims of citizens to manifest their belief in state schools in a non-coercive manner. It is questionable enough to forbid a teacher to wear the headscarf in the classroom—as Switzerland and some German regions have done<sup>50</sup>—but at least that prohibition rests on a colorable concern that teachers might influence students subtly or overtly. It is a giant further step against religious freedom to prohibit students, as France and Turkey have done, from wearing the scarf or indeed any conspicuous religious symbol or dress.<sup>51</sup> The concept of the

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<sup>49</sup> See *Lautsi v. Italy*, No. 30814/06, ¶ 16, at 9 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

<sup>50</sup> See, e.g., *Dahlab v. Switzerland*, No. 42393/98, at 13 (Eur. Ct. H.R. Feb. 15, 2001), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643> (upholding Swiss law); *Germany: Headscarf Bans Violate Rights*, HUMAN RIGHTS WATCH (Feb. 26, 2009), available at <http://www.hrw.org/news/2009/02/26/germany-headscarf-bans-violate-rights> (“Half of Germany’s 16 states . . . have laws prohibiting public school teachers (and other civil servants in several states) from wearing the headscarf at work.”).

<sup>51</sup> Admittedly, even *laïcité* does not forbid all manifestation of religion in public; “the principle is primarily aimed at the state and its institutions.” Gerhard van der Schyff & Adriaan Overbeeke, *Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans*, 7 EUR.

highly secular state contributes to such bans.<sup>52</sup> If secularization of public activities constitutes the dominant value, with no qualification, it will constrict the freedom of individuals to manifest their faith in such settings.

By contrast, French Catholic schools permit the wearing of the headscarf, leading many French Muslims to turn to the Catholic system. "It's ironic," one Muslim leader is quoted as saying, "but today the Catholic Church is more tolerant of—and knowledgeable about—Islam than the French state."<sup>53</sup> Likewise, America's understanding of religious freedom, because it is less secularist than France's, would almost certainly forbid public schools from singling out peaceful student religious expression for prohibition.<sup>54</sup> And Italy, which displays the crucifix in classrooms, also, as the *Lautsi* decision describes, "opens up the school environment in parallel to other religions" by allowing students to wear Islamic headscarves or other religious apparel, by making "alternative arrangements" for students whose "non-majority religious practices" conflict with school schedules, and by permitting "optional religious education" to be organized in schools for "all recognised religious creeds."<sup>55</sup>

The freedom to practice religion beyond insular, private settings has also been implicated in the American debate over whether religious charities may be compelled to pay for contraception and sterilization in their employees' insurance plans under the 2010 healthcare reform law.<sup>56</sup> The Obama

CONST. L. REV. 424, 430 (2011). But state institutions, especially state schools, can structure much of an individual's life.

<sup>52</sup> This is not to deny that other factors have played a role. For comprehensive discussion, see generally JOHN R. BOWEN, *WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE* (2008). See also Robert A. Kahn, *The Headscarf as Threat: A Comparison of German and U.S. Legal Discourses*, 40 VAND. J. TRANSNAT'L L. 417, 418–19 (2007).

<sup>53</sup> Katrin Bennhold, *Spurning Secularism, Many French Muslims Find Haven in Catholic Schools*, N.Y. TIMES, Sept. 30, 2008, at A6.

<sup>54</sup> See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that elementary school's act of singling out religious club for exclusion from after-hours use of classrooms violated First Amendment); Steve Barnes, *Oklahoma: School District Settles Suit Over Muslim Head Scarf*, N.Y. TIMES, May 20, 2004, at A20 (describing school district's retreat from banning headscarf worn by female Muslim student).

<sup>55</sup> *Lautsi v. Italy*, No. 30814/06, ¶ 74, at 30 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

<sup>56</sup> News Release, U.S. Dep't. of Health & Human Serv., *Affordable Care Act Ensures Women Receive Preventive Serv. at No Additional Cost*, (Aug. 1, 2011), available at <http://www.hhs.gov/news/press/2011pres/08/20110801b.html>.

administration offered a strikingly narrow exemption for religious organizations with objections to supporting these procedures and medicines. To be protected, a religious organization not only had to limit employment primarily to members of its own faith, but also had to limit its service primarily to its own members *and* had to have the primary purpose of inculcating religious values, that is preaching or proselytizing, rather than simply serving people.<sup>57</sup> The administration has recently broadened the exemption by providing an accommodation for most religious schools, social services, and hospitals, under which the costs of coverage will be borne by the insurance company.<sup>58</sup> This has satisfied some objectors but left many others unsatisfied.

The initial exemption covered few organizations other than houses of worship: It left vast numbers of religious charities unprotected, despite their deep religious motivation, simply because they choose to serve people outside their own religious body's membership. In the heated public debate over the mandate, a reproductive rights organization dismissed such charities as "so-called 'religious'" organizations; the *New York Times* called them "nonreligious arms" of the Church.<sup>59</sup> The controversy has implicated many issues, but one of them is whether a religious organization's right to follow its tenets should disappear as soon as it enters the realm of providing services to those outside its religious community. In other words, does our conception of religious freedom treat action in civil society as near the periphery of religious practice or as within its core?

If religion legitimately has public, social relevance, then citizens should remain free to manifest their religious identity when they attend state institutions, and religious organizations should remain free to conform to their moral identity when they

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<sup>57</sup> 45 C.F.R. § 147.130(a)(1)(iv)(B) (2011).

<sup>58</sup> See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873–78 (July 2, 2013) [hereinafter Final Rules] (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R. pts. 147, 156), available at <https://webapps.dol.gov/federalregister/PdfDisplay.aspx?DocId=26927>; Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (proposed Feb. 6, 2013) [hereinafter Proposed Rules].

<sup>59</sup> EMILY's List, *Urgent: Stop the Attacks on Birth Control*, CARE2.COM, <http://www.thepetitionsite.com/takeaction/124/733/626/> (last visited Oct. 7, 2013); Editorial, *The Freedom to Choose Birth Control*, N.Y. TIMES, Feb. 11, 2012, at A20.



provide services to others outside their faith. But if religion should be a “private,” insular matter, then religious freedom should be narrower and these claims probably should fail. The Obama Administration’s most recent proposal purports to accommodate religiously affiliated service organizations by putting the financial and other burden of coverage entirely on the insurance company, through a separate policy with the employee—a gambit which may succeed in insulating the objecting employer from involvement.<sup>60</sup> At least, however, the proposal now extends fuller protection to some schools and social services—those that are part of, or an “integrated auxiliary” of, a church or association of churches—and removes the especially objectionable language excluding organizations because they reach non-adherents or because they provide services to people rather than preach or proselytize.<sup>61</sup> The latest proposal certainly does not solve all the problems. But here is an optimistic reading: In the United States, even an administration drawing much of its support from the secular left recognizes that religious liberty protection should extend to religiously affiliated service organizations, not just to houses of worship. America is in the middle of a struggle over whether the freedom to act on religious belief should be confined to the most insular settings or should extend to the provision of services in the broader society. But so far neither side in that struggle has prevailed.

Religious displays in state settings have a symbolic bearing on this debate about the scope of religious freedom. Such displays are one way of communicating the public relevance of religion and by extension the right of all believers, including religious minorities, to exercise their faith in public settings. Thus there is logic and principle at work, not merely pragmatism, when a nation like Italy displays the crucifix in state schools while broadly accommodating the needs of Muslims and other minority faiths in those very same schools.

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<sup>60</sup> See Final Rules, 78 Fed. Reg. at 39,873–78. For an example of immediate critical reaction, see Press Release, The Becket Fund for Religious Liberty, Final HHS Rule Fails To Protect Constitutional Rights of Millions of Americans (June 28, 2013), available at <http://www.becketfund.org/becket-welcomes-opportunity-to-study-final-rule-on-hhs-mandate/> and Press Release, The Becket Fund for Religious Liberty, Still Unacceptable and Unconstitutional (Feb. 1, 2013), available at <http://www.becketfund.org/hhsannouncement1/>.

<sup>61</sup> Final Rules, 78 Fed. Reg. at 39,874; Proposed Rules, 78 Fed. Reg. at 8461.

### C. *Resonance with Societal Values*

The arguments so far, of course, do not show that official acknowledgments of religion ensure strong religious freedom. Plenty of governments, historical and current, that have explicitly acknowledged religion or a particular faith have also constrained or suppressed dissenting views. Many Muslim-majority states severely limit non-Muslim practices; the Greek and Russian governments have prohibited even peaceful religious proselytizing in the name of protecting the Orthodox faith of citizens.<sup>62</sup> My point is only that official religious symbols can reflect and reinforce an attitude sympathetic to religious freedom.

More importantly, in some nations, religious principles provide the only viable pathway to vigorous religious freedom, because only that pathway resonates with the population's traditions or current values. In most Muslim-majority nations, constitutions will reflect an Islamic foundation; instituting vigorous religious freedom requires developing and solidifying an Islamic theory supporting that freedom.<sup>63</sup> In the United States, where fifty percent of the population say religion is very important to them and more than ninety percent believe in God or a universal spirit,<sup>64</sup> religious principles will likely remain important in justifying religious freedom but not necessarily dominant. Although much of Western Europe has low rates of religious identification, the fact that ninety-four percent of

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<sup>62</sup> Laurie Goodstein, *Church Battle Over Mandate Was at Ready*, N.Y. TIMES, Feb. 10, 2012, at A1 (observing that the Greek and Russian Orthodox Churches have joined the American Bishops in calling out their governments for "declar[ing] a war on religion").

<sup>63</sup> See Noah Feldman, *A New Democracy, Enshrined in Faith*, N.Y. TIMES, Nov. 13, 2003, at A31 ("It would be [] futile for the United States to unilaterally impose secularization in Afghanistan and Iraq. For a constitution to function, it must represent the will of its citizens. Nothing could delegitimize a constitution more quickly than America setting down secularist red lines in a well-meaning show of neo-imperialism. Rather, our goal must be to persuade a majority of the world's 1.2 billion Muslims that Islam and democracy are perfectly compatible.").

<sup>64</sup> PEW GLOBAL ATTITUDES PROJECT, PEW RESEARCH CENTER, THE AMERICAN-WESTERN EUROPEAN VALUES GAP 8 (2011), available at <http://www.pewglobal.org/files/2011/11/Pew-Global-Attitudes-Values-Report-FINAL-November-17-2011-10AM-EST1.pdf>; Frank Newport, *More Than 9 in 10 Americans Continue To Believe in God*, GALLUP POLL (June 3, 2011), <http://www.gallup.com/poll/147887/Americans-Continue-Believe-God.aspx>.

Italians still believe in God or some sort of spirit or life force—versus only fifty-four percent of the French<sup>65</sup>—may explain why support for crucifixes in Italian schools was so high.

Suppose we grant that state-sponsored religious symbols can send messages that support a vigorous right of religious liberty for all: the transcendent source of the right, and its relevance in public as well as private settings. If so, then what is the answer to this panel's question: Are these messages of state-sponsored religious symbols cultural or religious? As both *Lautsi* and United States Supreme Court opinions recognize, such displays can communicate religious, cultural, or historical messages, or combinations of them, depending on the context.<sup>66</sup> The messages I have been discussing, I think, are both theological and civil-cultural. They are certainly civil in that they deal with the civil implications of religion rather than with purely doctrinal or liturgical questions. At the same time, the messages are theological in that they assert that religious freedom and other human rights have a foundation in objective truths about the human person and the world: They are not simply constructs of a particular society or culture, or as some philosophers have put it, "the way we do things around here."<sup>67</sup> And yet the messages from public religious symbols still have a cultural and historical component, in that they do not necessarily assert that Christianity or theism offer the only way to defend the transcendence and importance of religious freedom. They only imply that Christianity or religion does support and strengthen

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<sup>65</sup> EUROBAROMETER 73.1, EUROPEAN COMMISSION, BIOTECHNOLOGY (Oct. 2010) available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_341\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_341_en.pdf). In a survey of European attitudes on values and biotechnology, 74 percent of Italians said they believed specifically in God, versus 27 percent of French; and 40 percent of French were atheists, the highest figure for any European nation. *Id.*

<sup>66</sup> *Lautsi v. Italy*, No. 30814/06, ¶ 16, at 8–9 (Eur. Ct. H.R. Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>; *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring) ("In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law . . .).")

<sup>67</sup> See, e.g., MICHAEL BACON & RICHARD RORTY: PRAGMATISM AND POLITICAL LIBERALISM 38 (2007); Jeremy Waldron, *Particular Values and Critical Morality*, 77 CAL. L. REV. 561, 583 (1989) (referring to "the' particular morality of this country or the way 'we' do things around here").

religious freedom and that it has been particularly influential in this culture. But that leaves open the possibility of other cultures taking other routes.

Thus, in theory, official religious symbols can promote vigorous religious freedom for all faiths, by suggesting that there are matters and callings higher than government's authority, and also that these matters are not purely private and insular but have some relevance to public life. If religious symbols can reinforce these notions, then government has reasons to display them, when the constitutional or human rights tradition of the relevant nation or group of nations provides room for such official religious expressions. The broad European approach to church and state does leave such room. As the Grand Chamber of the European Court stated in *Lautsi*, "the fact that there is no European consensus on the question of the presence of religious symbols in State schools" supports finding the decision to be within the margin of appreciation for member states.<sup>68</sup> Indeed, as Professor Joseph Weiler observed in his argument to the Grand Chamber, leaving room for governments to incorporate official religious expressions—as long as they still protect dissenters' freedom of belief and practice—can actually promote religious freedom around the world by "[demonstrating] to countries which believe that democracy would require them to shed their religious identity that this is not the case."<sup>69</sup>

If government is going to display religious symbols, it should make this "religious freedom" rationale for them clear. Because such symbols are subject to many interpretations, it is important that the government explain that their display is meant not to disrespect other faiths or nonbelievers, but rather to symbolize (a) that freedoms have a transcendent grounding and (b) that religious freedom does not rest on a secularism that confines religion to private, insular contexts.

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<sup>68</sup> *Lautsi*, No. 30814/06, ¶ 70.

<sup>69</sup> Joseph Weiler, *Oral Submission by Professor Joseph Weiler Before the Grand Chamber of the European Court of Human Rights*, ILSUSSIDIARIO, para. 19, (June 30, 2010), <http://www.ilsussidiario.net/News/Politics-Society/2010/7/1/EXCLUSIVE-Oral-Submission-by-Professor-Joseph-Weiler-before-the-Grand-Chamber-of-the-European-Court-of-Human-Rights/96909/>.

## II. PROBLEMS AND POSSIBLE SOLUTIONS

In theory, official religious symbols can support vigorous religious freedom for all as just described. But in practice, they may fail to serve these goals or do so at too great a cost. This section considers two objections: First, that state-chosen symbols dilute or distort religious meaning; and second, that they exclude people outside the chosen faith(s). These are essentially the classic objections that are raised against a state-established church, or against a civil religion, even when the state in question gives freedom to other faiths. This section examines these problems and suggests that, even granting that official religious symbols can serve valuable goals, those goals may and often should be achieved by other means.

### A. *Diluting, Distorting, or Corrupting Religious Meaning*

One classic objection to a state-established church or civil religion is that such arrangements involve the government pronouncing on matters of religious doctrine. Even if such pronouncements do not restrict anyone's religious practice, they can create social division and distort or dilute the meaning of religious doctrine compared with what the religious communities in question believe. The United States in particular has traditionally been concerned that explicit government pronouncements will corrupt or harm even the religion that the government seeks to help. The tradition dates back to Roger Williams and to the Baptist dissenters of the eighteenth and early nineteenth centuries who gave crucial impetus to disestablishment in the American states.<sup>70</sup> It is impossible to imagine a modern American court engaging in anything close to the detailed interpretation of Christianity that the Italian courts offered in *Lautsi*.

An obvious distortion or dilution of religion occurs if courts validate religious symbolic displays on the ground—adopted by some U.S. Supreme Court Justices—that the displays have no religious meaning or serve merely a historical or ceremonial

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<sup>70</sup> See, e.g., Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1524–25 (2004).

function.<sup>71</sup> But the European Court did not say that in *Lautsi*, and the Italian courts clearly recognized the religious meaning of the crucifix.

The more troubling fact in *Lautsi* is that the Italian courts offered a selective and contestable interpretation of Christianity that, they said, served as the ground for religious freedom and *laicità*. For example, the initial court, the Administrative Tribunal, asserted that despite the history of “‘the Inquisition, Antisemitism, and the crusades, one can easily find the principle[s] of human dignity, tolerance, and freedom—including religious freedom—that are part of the same fabric of the State’s *laicità*.’”<sup>72</sup> The tribunal opined that alone among the world’s religions, Christianity “properly understood” cannot exclude any nonbelievers, because “[i]n Christianity even the faith in an omniscient god is secondary in relation to charity, meaning respect for one’s fellow human beings.”<sup>73</sup> The tribunal not only transposed the order of the two great commandments: loving God (biblically “the greatest and the first commandment”) and loving neighbor.<sup>74</sup> In addition, by arguably “underestim[ing] some painful episodes of the [Christian] past,” the tribunal may have provoked unnecessary irritation and division.<sup>75</sup> Government pronouncements on religious disputes are prone to do just that.

However, the problem with this objection is that it may prove too much: Any government expression of religious content could be seen by someone as a mistake or distortion. Taken to its logical conclusion, the principle of “no pronouncements on religious disputes” means the government cannot display any religious symbols anywhere or engage in any kind of religious expression. Even the U.S. Supreme Court, for all its stated emphasis on government religious neutrality, has not gone that far. Rather, the Court has claimed both to forbid pronouncements on religious disputes and to allow some government religious expression—and it has never offered a coherent resolution of those two conflicting norms.

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<sup>71</sup> See *supra* notes 12–13 and accompanying text.

<sup>72</sup> Pin, *supra* note 7, at 104.

<sup>73</sup> *Lautsi*, No. 30814/06, ¶ 15, at 7 (citations omitted).

<sup>74</sup> *Matthew* 22:37–39 (New Amer. Bible) (“You shall love the Lord, your God, with all your heart, and with all your soul, and with all your mind. This is the greatest and the first commandment. The second is like it: You shall love your neighbor as yourself.” (citations omitted)).

<sup>75</sup> Pin, *supra* note 7, at 104.

Any nation that states a commitment to religious neutrality—which includes Italy as well as the United States—faces a problem reconciling that commitment with longstanding traditions of government religious expression. But the problem seems to me more acute in the United States, which has an explicit non-establishment provision and where the Supreme Court has committed itself so strenuously to neutrality, than in Europe. If disestablishment is not a fundamental principle—and throughout much of Europe it is not—then there is more room to read neutrality in a flexible rather than absolute sense. Under the flexible approach, government may express religious messages, and therefore shape religious ideas, as long as it recognizes equal, substantial religious freedom for people of all views on religion.

### *B. The Problem of Excluding Others*

A more serious problem with official sponsorship of religious symbols is that, even if it does not directly undercut anyone's religious freedom, it may alienate citizens who do not belong to the favored faith. Even if such a symbol supports the importance of religious freedom for all faiths, the fact that the symbol belongs to only one faith may also communicate a message of favoritism that creates social division.<sup>76</sup> Even the Italian Administrative Tribunal recognized that “[t]he logical mechanism of exclusion of the unbeliever is inherent in any religious conviction, even if those concerned are not aware of it,”<sup>77</sup> and it gave no good reason for refusing to apply this insight to Christianity as well. In this final section, therefore, I consider whether and how to take steps to reduce this exclusion while retaining and serving the important principles that religious symbols, in theory, can promote: the transcendent source of religious freedom and its relevance in public and not merely private, insular settings.

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<sup>76</sup> See Alessandro Ferrari, *Civil Religion in Italy: A “Mission Impossible”?*, 41 GEO. WASH. INT’L L. REV. 839, 853 (2010) (“The logical consequence of [the Italian courts’] rationale [in *Lautsi*] is an interpretation of Italian religious freedom based on the idea of a privileged treatment of religious convictions over non-religious ones . . . and based on a clear superiority of the Catholic Church. In the crucifix controversies, the judges completely ignore the first paragraph of Article 8, which foresees equal freedom for all cults.” (citation omitted)).

<sup>77</sup> *Lautsi*, No. 30814/06, ¶ 15, at 7.

## 1. Excluding Other Faiths

If an official display reflects one faith, as do the crucifixes in Italian schools, one might expand the display to encompass a wide range of faiths. There are two strategies for accomplishing this. One, prevalent in America, is to promote a so-called non-sectarian or common faith. Much religious expression by American governments has very general religious content that aims to include the large majority of religious beliefs and believers by abstracting away from differences among them. “Under God” in the Pledge of Allegiance constitutes a classic example, aimed at encompassing Protestants, Catholics, and Jews, the three groups thought to define America’s religious diversity in the 1950s.<sup>78</sup> Other examples include generalized prayers to God in open legislative or court sessions and displays of the Ten Commandments on government property.<sup>79</sup> The defense of such practices, in the words of Justice Scalia, is that they “are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.”<sup>80</sup> I suspect that this approach has weaker historical roots and less appeal in Europe than America. It also may fail to satisfy not just the non-religious citizen, but the highly particularistic religious believer who objects to the reduction of her faith to a least common denominator.

The other option is to display the different symbols of multiple faiths. This avoids the problems of reductionism and abstraction, but it may raise practical problems in ensuring that all relevant faiths are included. More importantly, it does not remedy the potential alienation or exclusion of persons who do not adhere to any religion.

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<sup>78</sup> See, e.g., WILL HERBERG, *PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* 87–90 (1955) (describing the “common faith” of 1950s America).

<sup>79</sup> See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983) (upholding practice of non-sectarian legislative prayers).

<sup>80</sup> *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).



## 2. Excluding Nonbelievers

Even granting that officially endorsed religious symbols can support a wholesome attitude toward religious liberty, they also can have a direct, immediate negative effect on nonbelievers. Symbols might communicate messages supporting toleration for atheists and skeptics, but they might communicate messages of disfavor or exclusion. And whatever direct effect they have on the freedom of individuals, they can cause resentment and social conflict. Therefore the government may be wise to forego displaying such symbols unless the potential benefits in religious freedom are quite certain and cannot be achieved by other means.

In fact, displays of religious symbols can undercut vigorous protection of the right to practice religion, by undercutting arguments for reciprocity in protection of rights. Strong protection of free exercise, encompassing exemptions from generally applicable secular laws, creates costs to other social goals and can be expected to trigger resistance, increasingly so as a society becomes more secular. In those circumstances, freedom of religious practice may not succeed unless its defenders can make arguments from reciprocity. In other words, only if proponents of religious practice give significant weight to nonbelievers' interests, and relinquish whatever benefits a state-sponsored symbol provides, can they successfully claim significant weight also for the freedom to engage in religious practice. Put conversely, in positive terms: If nonbelievers' interests receive sufficient weight to eliminate even state displays that do not directly coerce them, then freedom of religious practice also deserves sufficient weight to justify incurring significant social costs to protect it.

### C. *Religious Freedom in Public Settings, Without State-Sponsored Displays*

In short, the key is that the state somehow acknowledge its limits and respect the right of people to practice their religious beliefs in civil society, not just insular private settings. Official religious symbols might support such respect, but they might also interfere with it. If official religious symbols are eliminated or forbidden, it should be because they create such interference, not because they violate the norm of a strictly secular public sphere.

Moreover, if religious symbols are eliminated, it is then important to make clear that this does not constitute an endorsement of secularism, particularly in education. Here are two ways of doing so.

### 1. Teaching About the Relevance of Religion

Although the religious rationales for religious freedom and other human rights are undoubtedly important, government has means to expose students to these rationales without official displays of religious symbols. A school can teach about the religious rationales by presenting them in an objective rather than a devotional manner. It can teach children that historically, and for many citizens today, religious freedom and other rights have rested on belief in God—which is different from teaching children that they should believe in God. A non-devotional but fair presentation of religious propositions may inform students far more than any displays can. As Professor Weiler pointed out in his argument to the Grand Chamber, “a crucifix on the wall, might be perceived as coercive. . . . [I]t depends on the curriculum to contextualize and teach the children in the Italian class tolerance and pluralism.”<sup>81</sup> Done properly, such teaching does not violate anyone’s freedom to practice religion or educate his children in conformity with his beliefs. To paraphrase *Lautsi*, such teaching does not have a “proselytizing tendency,” nor is it “intolerant of pupils who believe[] in other religions, [who are] non-believers or who [hold] non-religious philosophical convictions.”<sup>82</sup>

### 2. Freedom of Individuals

The display of religious symbols may be a way for the state to acknowledge limits on its power and the possibility of a transcendent reality. But in choosing the symbols, the state may inevitably end up defining and confining that transcendent reality rather than simply acknowledging it. If this effect is inevitable, then the only way for the state to acknowledge its limits is by remaining silent and leaving statements about transcendent reality to the initiative of private individuals and groups in civil society. If the state can only acknowledge a higher

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<sup>81</sup> Weiler, *supra* note 69.

<sup>82</sup> *Lautsi*, No. 30814/06, ¶ 74.

reality by acknowledging the various higher commitments of its various citizens, that fact implies that the state should accommodate conscientious religious practice in cases of conflict with the law, unless there is a strong reason for refusing the accommodation. As Professor Michael McConnell has written, recognition of such accommodations “makes an important statement about the limited nature of governmental authority. While the government is powerless and incompetent to determine what particular conception of the divine is authoritative,” the right to religious freedom implies “that [government’s] claims on the loyalty and obedience of the citizens is partial and instrumental,” leaving room for “the commands of God, as heard and understood in the individual conscience.”<sup>83</sup>

State-sponsored religious displays can communicate these important messages of limited government and transcendent freedoms, including a religious freedom that is relevant to public life and not confined to private, insular settings. Still, the official symbols also come with costs, and government is often well advised not to display them. But the crucial thing is to cultivate the spirit I have described of limited government, transcendent rights, and meaningful religious freedom.

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<sup>83</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1516 (1990).