

# The Nanovic Institute Lecture Papers

A. James McAdams, Series Editor

## Lecture Paper 14

*The European Court versus the Crucifix:  
A Panel Discussion*



# **The European Court versus the Crucifix: A Panel Discussion**

Paolo Carozza, Professor of Law

Richard W. Garnett, Associate Dean and Professor of Law

Donald P. Kommers, Joseph and Elizabeth Robbie Professor  
of Political Science and Professor of Law Emeritus

The Nanovic Institute for European Studies



Copyright 2010 by the University of Notre Dame.  
Published by the Nanovic Institute for European Studies,  
University of Notre Dame, Notre Dame, Indiana.

This lecture is published with the permission of the authors and  
is intended for educational use only.

Cover images provided by [Istockphotos.com](http://Istockphotos.com).

## Contents

### *The European Court versus the Crucifix: A Panel Discussion*

<i>Introduction</i> .....	1
<i>Anthony Monta, Assistant Director Nanovic Institute for European Studies</i>	
<i>Section I</i> .....	2
<i>Paolo Carozza, Professor of Law University of Notre Dame</i>	
<i>Section II</i> .....	5
<i>Donald P. Kommers, Joseph and Elizabeth Robbie Professor of Political Science and Professor of Law Emeritus University of Notre Dame</i>	
<i>Section III</i> .....	10
<i>Richard W. Garnett, Associate Dean and Professor of Law University of Notre Dame</i>	
<i>Section IV</i> .....	14
<i>Paolo Carozza, Professor of Law University of Notre Dame</i>	
<i>Questions &amp; Responses</i> .....	17
<i>Panelists</i> .....	23
<i>Index of Nanovic Institute Lecture Papers</i> .....	24



## Introduction

*Anthony Monta, Assistant Director  
Nanovic Institute for European Studies*

Good afternoon. I'm pleased to see so many of you here. The topic of discussion today is *Lautsi v. Italy*, a case brought before the European Court of Human Rights to address the display of crucifixes in Italian state schools under the 1950 *European Convention of Human Rights*. The court recently decided the case in Ms. Lautsi's favor, holding that the display of the cross breached her freedom of conviction and religion as protected by Article 9 of the *Convention*. The court awarded her 5,000 euros.

*Lautsi* raises important questions about the relationship between secularity and religious liberty and also helps us to understand some of the legal processes and cultural dynamics of Europe. At Notre Dame, we want not only to draw attention to such controversies but to examine them, reflect on their wider implications, and if necessary consider possible courses of action. Here today are three outstanding scholars who can help us do that.

Paolo Carozza is an expert in comparative and international law. He is currently a member of the Commission on Human Rights and served as its president from 2008-09. He lectures frequently on legal subjects in Italian universities. Donald Kommers is an expert in comparative constitutional law. He joined the faculty of Law at Notre Dame in 1975 and became its second director of the Center for Civil and Human Rights. Professor Kommers has also been a chaired professor here in Political Science since 1992. Finally we have Richard Garnett, who has long-standing interests in church-state relations and religious liberty. He graduated in 1995 from the Yale Law School, where he served as senior editor of the law journal and the *Journal of Law and the Humanities*. After graduation, Professor Garnett clerked for Chief Justice Arnold for the Eighth Circuit of the U.S. Court of Appeals and then for Chief Justice William Rehnquist of the U.S. Supreme Court.

Professor Carozza will put the case in the context of Italian constitutional litigation and the procedures of the European Court of Human Rights. Professor Kommers will then put the case in a wider European context by describing the fate of similar cases in Germany and its different jurisdictional posture. Professor Garnett will then address how such cases are handled in the United States. At the end, Professor Carozza will conclude the opening remarks and open the discussion to questions from the audience.

## Section I

*Paolo Carozza, Professor of Law  
University of Notre Dame*

This case, *Lautsi v. Italy*, began in 2002 when the parents of the two children involved in the case, who live in a small town in the Veneto region, went to their school and asked for the crucifixes, which were present in all the classrooms, to be removed in deference to the beliefs that they had and wanted to impart to their children. As a legal matter, the crucifixes were there by virtue of an administrative order in Italy that actually goes back all the way to the early 1920s. As a sociological fact, however, it's interesting to note that there is in fact a pretty significant variation of practice around Italy regarding crucifixes in the classroom, despite that formal law. In many localities the crucifixes are still on the walls and in a lot of them they're not. In particular, crucifixes are present in a lot of the older schools, simply because they've been there, and so they stay there. In some schools the religious symbols are actually built *into* the structures of the buildings. The schools are buildings that had some religious character historically so they're still there. In the newer schools, however, there's more variation. Many of the towns don't put crucifixes in the schools or haven't for decades. But in this case the crucifix was there, so the father, who was quite a committed and vocal atheist, objected. The local equivalent of the school board considered the request and eventually refused it. So the parents took the case to the Italian administrative courts, because the origin is an administrative order not a statute. Again, that has procedural significance for those of you present who are lawyers or aspiring lawyers.

It wasn't the first time that a case like this has gone to the courts. There had been other cases in other areas of Italy coming up through the administrative courts in recent years, and in fact the debate itself, independent of the courts in Italy, goes back decades. There has been a very robust public discussion about the appropriateness of this, which has been increasingly played out in the courts. In a different court, for example, just a few years ago, the court ruled that it was in fact against the Italian constitution to display the crucifix. In this particular case, instead, the administrative courts decided the opposite, that it was not unconstitutional to do so. So given in part this divergence of opinion, when the parents appealed this decision at the administrative level denying their request, the case went up to the Council of State, which in the Italian legal system is the highest court for administrative or public law matters. It is separate from and parallel to the Constitutional Court, but it

does have the capacity to rule on constitutional questions within the context of administrative law. The Council of State ruled in 2006 that it was not contrary to the Constitution to keep the crucifix in the classroom. The court's reason was primarily that the crucifix had acquired an extensive traditional, historical, and cultural meaning deeply rooted in Italian national identity, and the court even went on to say that within the context of Italian tradition and culture, the crucifix is a symbol of important secularized values of tolerance, freedom, and equality. Finally, the court noted that the presence of the crucifix is not coercive to those students who have no faith or a different faith than the one being represented within the context of the religious dimensions of the symbol.

Along the way, the administrative court had asked the Constitutional Court if it would also rule on the question. The Italian Constitutional Court dismissed the constitutional challenge and let the administrative ruling stand, but did so primarily on procedural grounds and not by engaging the substantive question. For that reason, then, the Lautsis, having exhausted their possibility for redress in the Italian judicial system, went to a regional European Court of Human Rights in Strasbourg. (This by the way is *not* an EU court --it is a Court of the Council of Europe, which is a different organization, and it is primarily defined by the cornerstone treaty that created it, the European Convention on Human Rights.) So the Strasbourg court was deciding whether there has been a violation of the European Convention on Human Rights by Italy.

The applicants argued that the crucifix on the wall was a violation of both Article 9 of the Convention, which guarantees freedom of thought, conscience and religion, and also Article 2 of the first Protocol of the Convention, which guarantees the right to education and says in particular, "The State shall respect the right of parents to ensure that such education and teaching is in conformity with their own religious and philosophical convictions." I think that the latter provision might actually cut both ways, in favor as well as against the keeping of crucifixes in the classrooms, but it didn't in this case. So the Italian government, not surprisingly given what I've told you about the way that the Council of State had ruled on it at the domestic level, primarily advanced an argument emphasizing that although the cross obviously has some religious significance to it, it is in the school primarily as a secularized symbol of certain public values. It is an argument familiar to those of you who have studied, for example, the U.S. constitutional jurisprudence on, say, nativity scenes in public places. The European court didn't accept it, however.

It ruled unanimously, all seven of the judges (one of whom was Italian), that the presence of the crucifix in school classrooms does violate the Convention. They said that the state is held to religious neutrality and that they don't see how the crucifix can contribute to educational pluralism. Their final conclusion was that "The court considers that the mandatory display of a symbol of a faith in exercising a public function relative to specific situations supported by government control, particularly in classrooms, restricts the right of parents to educate their children according to their beliefs and the right of school children to believe or not to believe, and is a violation of freedom of religion as well as the right to education." They ordered damages in the amount of 5,000 euros, which is typical of the Court's remedies.

Since then, the controversy has only intensified. The Italian government has appealed the case to what is called the Grand Chamber of the Court, which has not yet decided whether in fact it will take it up. It's rather like certiorari—a discretionary form of appellate review. Polling within Italy suggests that as much as 85% of the Italian population objects to the decision of the Strasbourg court, and very interestingly the political opposition to the decision within Italy has crossed in an almost unprecedented way the typical partisan political rivalries. Individuals on both the left and the right, secular liberals and Catholics, are objecting to the decision. Here's where the fact that I mentioned about some schools having the crucifixes and others, especially the new ones, not having them, is again relevant. The objection has been so widespread and pervasive that even in some of those schools that didn't have crucifixes, and even in regions that are dominated by traditionally leftist governments like the Veneto, some schools have gone and put crucifixes on the walls where they weren't there before! That's how strong the objection is. So the ECHR decision is potentially going to raise some very interesting questions about compliance and about the social legitimacy of European supranational adjudication.

The decision has provoked reactions within the European Union as well, even though it's not a European Union court. There was a very intense debate on the floor of the European Parliament in December when a variety of parliamentarians tried to introduce a resolution condemning the European Court of Human Rights decision. The resolution got tabled by a very slim majority. But that meant that almost half of the parliamentarians wanted the EU to take a position against the ECHR decision.

So that is a very compressed summary of the background of the case. I'll come back and say a few words about what I think of the substance of the court's decision, but first I'll turn the floor over to Professor Kommers.

## **Section II**

*Donald P. Kommers, Joseph and Elizabeth Robbie Professor  
of Political Science and Professor of Law Emeritus  
University of Notre Dame*

Good Afternoon. Given my work in the vineyard of German and comparative constitutional law, I've been asked to discuss the classroom crucifix decision handed down by Germany's Federal Constitutional Court in 1995, a case comparable to the Italian decision of the European Court of Human Rights. Germany's Constitutional Court struck down as unconstitutional a Bavarian regulation that required the display of the crucifix in all elementary school classrooms. The case remains one of the most controversial in the German Court's 59-year-old history.

Let me begin by saying that Germany's Constitutional Court is one of the world's great constitutional tribunals. And as I've said on many occasions, this tribunal and the Basic Law – Germany's constitution – have actually displaced the American Supreme Court and the U.S. Constitution as the leading models of constitutional governance around the world. The reputation of this court is one reason its crucifix judgment is worthy of being compared to the decision of Italy's Council of State and its reversal by the European Court of Human Rights. You may find that the German decision as I describe it below tends to reinforce the ruling of the Human Rights Court, but you may also conclude from my brief discussion of related German decisions that the European Court's ruling is flawed in fundamental respects. These related decisions give us a different perspective on the nature of religious liberty, a perspective that may be instructive for other advanced constitutional democracies. The German Court generally takes a more flexible or sympathetic stance toward religious symbolism than the Human Rights Court, although the crucifix decision itself triggered massive protest marches through the streets of Munich and many other cities and towns in Bavaria.

To differentiate Germany's crucifix case from the Italian and European judgments, I should like initially to discuss the broader context in which the German case was decided. Several points need to be made. First, a word

about jurisdictional posture. The Italian judgement was an administrative court decision upheld on appeal by the Council of State. It was the Council's decision that the European Court reversed as a violation of the religious liberty provisions of the Convention on Human Rights. In Germany, by contrast, individual citizens have the right to file a constitutional complaint before the Federal Constitutional Court to challenge a regulation or judicial decision allegedly in violation of one or more of their rights under the Basic Law. That is what happened here. Bavaria's Higher Administrative Court had upheld a local regulation requiring the display of the cross in all elementary school classrooms. Constitutional complaints were filed against this ruling by the complaining parents and their three minor-age children required to attend one of these schools.

Second, the complaining parents and children adhered to a school of thought known as anthroposophy, a humanistic view of life based on the naturalistic teachings of Rudolf Steiner. The Bavarian regulation, which required that "in every classroom a cross shall be affixed," nevertheless obliged teachers and pupils "to respect the religious feelings of all." In addition, the regulation recognized "parental rights in the religious upbringing of their children." School officials sought to accommodate the complaining parents and their children by removing the large crucifix positioned above the blackboard in front of the class and replacing it with a small cross, absent the body of Christ, over the doorway to the classrooms attended by their children. The parents initially accepted this compromise but school officials failed consistently to follow this policy with respect to each of their three children, whereupon the complainants challenged the very presence of the cross in classrooms as a violation of their philosophy of life.

Third, the crucifix case brought into play three articles of the Basic Law, two of which differ significantly from the religion clauses of the European Human Rights Convention. The first of these provisions, and the one most like the text of the European Convention, declares that freedom of faith and religion are inviolable. It also guarantees the freedom to profess a creed or other belief, religious or non-religious. A second article includes a paragraph bestowing on parents the "natural right" to rear and educate their children. Finally, and importantly, a third article of the Basic Law places the entire educational system under the supervision of the state. But one of its clauses also declares that religious instruction shall form a normal part of the school curriculum, although it goes on explicitly to recognize the right of parents to determine whether their children are to receive religious instruction in the schools.

Under this provision, religious instruction is given in accord with the tenets of the relevant religious denomination. Participation is voluntary; children may be excused from these otherwise compulsory classes if the parents so wish.

A fourth background point is simply to note that in Germany all schools, confessional and secular, are under the supervision of the state. But most public schools in Bavaria and elsewhere are Christian-oriented interdenominational schools. The crucifix case involved such a school. In short, there is no high wall of separation between church and state in Germany, as there is in the United States, particularly with respect to religious practices and symbols on school property. In two major school cases decided in the 1970s, however, the Federal Constitutional Court upheld the recitation of voluntary prayer in the schools and the Christian interdenominational character of the public schools, respectively. The Supreme Court of the United States would have nullified both practices.

Finally, it is important to underscore the dual character of basic rights in Germany. German constitutionalism distinguishes between the negative and positive character of all guaranteed rights. Under the Basic Law as interpreted by the Constitutional Court, persons have negative as well as positive rights to religious liberty. As the Court put it in the interdenominational school case, freedom of faith and freedom to profess a belief “covers not just the inner freedom to believe or not to believe, but also the outer freedom to manifest, profess, and disseminate that faith in public.” The distinction between negative and positive liberty in this context has to be considered in tandem with what the Germans refer to as the objective value system of the Basic Law, a concept of “objectivity” that rings strange to American ears. In Germany’s constitutional jurisprudence, every negative or subjective right is connected to or reinforced by an objective value inherent in the same fundamental right. As in the United States, the negative right protects persons against any state interference with the public expression or practice of religion. The corresponding objective value, on the other hand, imposes on the state a positive duty or obligation to ensure that society is structured in such a way as to support and facilitate the expression or practice of one’s religious belief. This is the meaning of religious liberty in Germany. The purpose of the Basic Law’s provisions is not only to protect the individual against invasion of his or her religious liberty but to provide a social and legal context that encourages and facilitates the exercise of religious freedom.

In the two constitutional decisions I just mentioned – the cases upholding, respectively, voluntary classroom prayer and the general Christian value system in all public schools – the Court ruled that the positive right to religious freedom trumped the negative right against state interference with the right. The interference, the Court suggested, did not rise to the level of religious coercion or discrimination. It was insufficient to negate these practices or values, first because the prayer was voluntary and the school context one that did not embarrass or coerce dissenting students and, second, because the Christian orientation of the schools was rooted in general or nondenominational Christian values that have influenced the development of western civilization. In the course of its opinion, the Court made clear that public schools may not be transformed into missionary schools nor may they “claim exclusive truth for Christian articles of faith.” What is constitutionally required, declared the Court, is “tolerance for persons holding other [religious or ideological] views.”

Among German constitutional lawyers, it was widely thought that the Federal Constitutional Court would similarly uphold the display of the cross, the anticipated argument being that dissenting students were not really burdened by its mere display in a setting where it could easily be ignored, if noticed at all, and rarely if ever called attention to by teachers. Here, however, the eight-judge panel of the Constitutional Court declared that the negative right to religious freedom trumped the equivalent positive right. The Court held that the cross symbolizes a specific religious faith – namely, “the salvation of man from original sin brought through Christ’s sacrificial death” – and that it privileges this faith, effectively encouraging students to venerate it. Because the cross symbolizes the essential core of the Christian faith, continued the Court, its display in Bavarian public school classrooms violates the religious liberty and parental rights provisions of the Basic Law. The Court held that the state must remain neutral in matters of faith and not “endanger the religious peace of society.” The justices in the majority had no problem with the display of crosses or crucifixes in public places generally or even in public buildings where it could not be argued that the religious beliefs of observers or passers-by were being threatened in any decisive way. In school classrooms, however, under Germany’s system of compulsory education, the situation was different because students were effectively coerced, as the Court put it, into “learning under the cross.”

Three of the Court’s eight judges dissented. They advanced two arguments. The first was based on Germany’s federal system of government. The dissenters

maintained that the establishment of the education system and its practices were exclusively reserved to the individual states under the Basic Law and that the Court was overstepping its authority by interfering with a state's governance of its own schools. The second argument focused on the cross as a general cultural symbol rather than a vehicle of religious teaching. According to the dissenters, the cross was not to be understood in a confessional sense but rather as a symbol of western Christendom and the underlying values of German and European culture. The dissenting justices also pointed out that the state was observing the benign neutrality in religious matters expected and required of the Basic Law. They maintained that any rejection of the cross would generate indifference to religion and thus undermine the constitutionally guaranteed positive right to religious liberty.

As noted at the outset of my remarks, the crucifix case caused a political explosion in Germany, in part because some constitutional commentators thought the Court was banning the display of the cross or crucifix in all elementary school classrooms. In partial defiance of this interpretation, Bavaria passed a new law providing that any student or parent who objects to the display of the crucifix has the right to have it removed from the particular classroom involved, but not from classrooms generally. As for the majority of justices in the crucifix case, they were taken by surprise at the intensity of the public reaction to their decision, so much so that the Court later released a public statement accepting the Bavarian compromise. The cross could continue constitutionally to be displayed but if any parent objected the cross or crucifix would have to be removed from the classrooms attended by the dissenting students.

A final thought: Some American constitutional scholars who commented on the German case have described it as a move in the direction of American religious liberty jurisprudence. Some compared it to *Engel v. Vitale*, the decision that struck New York's requirement that a prayer be recited in classrooms before each school day. Nothing could be further from the truth. First, the prescribed New York *nondenominational* prayer struck in *Vitale* seems entirely consistent with the Constitutional Court's decisions in the interdenominational school and school prayer cases. Second, the crucifix case is full of statements about the beneficial role of religious values and the positive right to religious liberty that one would seldom read in a majority opinion of the contemporary American Supreme Court. What is more, and apart from the special symbolism of the crucifix, ordinary symbols and practices associated more generally with the culture and politics of Christendom find official

acceptance in German classrooms, especially in Bavaria, an overwhelmingly Catholic state. It will be interesting to see whether Germany's constitutional law of religious liberty will have any influence at all on the European Court if the Italian case makes its way to the European Court's Grand Chamber.

### **Section III**

*Richard W. Garnett, Associate Dean and Professor of Law  
University of Notre Dame*

There are two different but related questions that are on the table in the Strasbourg court decision and in similar American decisions. The first is, "what is the place of religion in the public life of a contemporary democracy?" This is, of course, an important and interesting question. The second question, which is sometimes neglected, is, "what is the appropriate role of courts in supervising the decisions that political communities make about how to strike the right balance when it comes to the role of religion in the public square?"

With these two questions in mind, I am going to say a few things about how cases involving public displays of religious symbols are handled in the American context. It seems to me that the Strasbourg court took—for better or worse—a very American approach to the controversy. It is fair to say that, in the United States, this would have been an easy case. In fact, our Supreme Court probably would have decided this case by a 9-0 vote. That is, if our Court had reviewed a law requiring the display of a crucifix in a public school, I believe that every Justice now sitting on the Court would have voted to invalidate it on First Amendment grounds. Why is this true? Let me try to explain.

Back up for a second. These "public religious symbols" cases tend to fall in two different categories: "symbols in public schools" and "symbols in places besides public schools." The latter category includes disputes about Ten Commandments displays in parks, prayers before legislative sessions, menorah and Christmas tree displays in the town square, religious imagery on government seals, and so on. The former category includes cases that arise in the special context of public schools. For many reasons, and for a long time now, American courts have been particularly concerned with religious expression and symbols in public elementary and secondary schools. In my view, the Strasbourg court's decision reflects a similar concern about the

special context of public schools. We should ask, then, “what is it about public schools that makes us think they require special treatment?”

Before engaging this question, though, it makes sense to say a bit about the latter, “every other place” category. For most of our history, questions about religious displays by government entities would not have been constitutional questions. At least, they would not have been constitutional questions that were decided by courts. Instead, these questions would have been decided through politics. Yes, the First Amendment’s “Establishment Clause” has been a part of our Constitution for more than two hundred years, but for most of that time it was not thought that the Clause had much to say in debates about “religion in the public square.” Today, of course, these issues are thoroughly constitutionalized and “judicialized.” Still, and notwithstanding the many times the Court has weighed in, there are few clear, hard-and-fast rules. Usually, the judicial answer to almost any public-religious-display question is “it depends.” This was particularly true during the long tenure on the Court of Justice Sandra Day O’Connor, who held and cast the “swing vote” in many of these cases.

“It depends.” Well, it depends on *what*? It depends, in part, on the nature of the symbol: Are we talking about a menorah, a crèche, a Christmas tree, a crucifix, a cross, or something else? It depends on the relevant history of the item in question: Has it been there a long time, is it relatively new, does it have artistic significance, or is it a pawn in a larger political fight? It depends on aesthetics and context: Is the symbol prominently displayed or is it out-of-the-way? And then, in the end, it depends on whether, considering all these various factors together, the Court thinks (and for a long time that meant “Justice O’Connor thinks”) that the government is sending a message of “endorsement” with respect to religion. The assumption is that the government communicates a message through the symbols it displays. So, what message is it communicating? If the message is a non-sectarian acknowledgment of our religious traditions, or a thoughtful appreciation of our religious diversity, then it is probably going to be fine. But if the message being sent is that religious believers are special “insiders” in the political community, or that religious non-believers are “outsiders”—if it is that religion is relevant to one’s status in the political community—then the courts (during the last forty years) have tended to find an unconstitutional endorsement or establishment of religion.

It is easier to state the no-endorsement rule than to apply it. Some cases are easy. No Court is ever going to require Los Angeles or Sacramento or Corpus Christi to change its name. No Court is ever going to tell the president that he or she cannot say “God bless America.” No Court is ever going to ban Nativity stamps at Christmas, and the Supreme Court is never going to say to itself, “we have to blow the Ten Commandments off the marble frieze in our courtroom.” These cases, again, are easy. Now, are they easy because the no-endorsement rule is a clear and principled one that, when applied, yields clear and principled results? No. These cases are easy because the Supreme Court is politically sensitive enough to foresee, and avoid, the blowback that would result if it were to say, “Los Angeles, change your name.”

Some cases are trickier. May a Nativity scene be displayed by the government along with a menorah or do we have to draw the line at a Christmas tree? We do not require Los Angeles to change its name, but there have been cases where efforts have been made to require cities to change their official seals. With respect to a town like Las Cruces, New Mexico, there are those who might say, “look, the name is what it is, but the town should at least have to stop putting crosses on its official documents.” And while it is true that no one is going to tell President Obama he cannot say “God bless America,” there is often litigation about whether legislative sessions can open with prayers that invoke Jesus Christ.

At the end of the day, I think that most jurists are sensible enough to realize that ours has been and remains a society that is comfortable with mild, non-sectarian forms of “public religion”, and that they should not overreach. At the same time, most are also sensitive to the fact that America has become more diverse and pluralistic in terms of religious commitments, and believe that judges have a role to play in protecting the feelings of religious minorities. If we err in one direction, we give a heckler’s veto to people who simply don’t like any religious imagery. If we err in the other direction, we fall into unattractive and unthinking deference to majorities.

Now, what about the special case of schools? In many ways, the history of America’s church-state debates is the history of our experiment with public schools. Especially during the last half-century or so, courts have often insisted that public schools are a special environment because of the vulnerability and sensitivity of children. They have emphasized the special role that public schools supposedly play in inculcating democratic values, toleration, appreciation of diversity, and so on. And they have worried about

the ability of governments to handle religious symbols or religious expression sensibly. After all, many committed religious believers agree with the Supreme Court's decisions keeping government prayer out of schools because they do not think the government is likely to be very good at crafting the prayers that are going to be recited.

So, what kinds of cases, in particular, tend to arise in the public-schools context? In the United States, there have not been so many cases about the crucifix, but that is because ours is—or, at least, has been—a Protestant and not a Catholic country and culture. We've had disputes about the Ten Commandments on the walls of public schools and, in a nutshell, they come down. We've had decisions about government-sponsored prayer in schools and, in a nutshell, these prayers are stopped. So-called “moments of silence” are sometimes permissible, and sometimes not. The Pledge of Allegiance continues to present vexed questions. My prediction is that the Supreme Court is never going to say that voluntary recitals of the Pledge of Allegiance in public schools are impermissible. Again, this is not because the clear application of a clear rule yields this result. It is because of political realities, not doctrinal clarity or consistency.

Most of the cases today about religion in American public schools are not about government expression of religion (crosses on the wall, school prayer, etc.). Instead, they are about *private* religious expression and activity in public schools. In these cases, a pattern—a compromise—has emerged: We say that the public schools are officially secular in their curricula, imagery, and symbolism. At the same time, we say that we will not discriminate against or exclude private expressions by students and even by teachers. If a public school permits 20 different after-school clubs to meet in the gym, then the Bible Club gets to meet in the gym after school too. If a teacher says, “Alright kids, do a book report on your favorite hero,” and the kid says, “Mine is St. Francis,” the teacher may not fail him for that.

Let me close with three points before I turn it back to Professor Carozza. First, it is worth emphasizing that in the Italian and also in the Bavarian context courts are dealing with a longer history, and also with a history that has a much clearer connection to a particular religious history and tradition than ours. American history is God-soaked and we remain more religious than many of our fellow western democracies. However, we don't have a tradition of one particular, established faith. Instead, ours has been a pan-Protestant civil religion. We have never had an established church, but we have had

an unofficially established, generic, “nice” Protestantism. Some have quipped that if we actually had an established church it would be “whatever—but not Catholic.” This does explain a lot of our history.

Another interesting point about the Strasbourg case is the extent to which the court emphasized parents’ rights. The problem, the court thought, with the crucifix is that it interfered with the parents’ right to inculcate and form their children’s spirituality as they saw fit. In America, there are decisions that purport to hold that parents enjoy the liberty to control and direct the upbringing of their children. I believe that this liberty reflects an important moral principle and right. However, our Court has been reluctant to rely on it in cases like this, and has instead stuck to asking, “is this an establishment of religion?” The justices seem not to want to get into debates about parents’ right to educate their children, because they are afraid that doing so would open the floodgates for parents to object to many aspects of public schools’ curricula.

Third, there is in the Strasbourg decision an allusion to the idea of a “margin of appreciation.” The idea, as I understand it, is that one can firmly embrace constitutional norms and commitments and at the same time recognize that they might play out in different ways in different communities. In the United States, we have not taken very seriously this idea of a margin of appreciation when it comes to the Establishment Clause. Instead, the Supreme Court’s view has been, “[i]f the First Amendment requires x or prohibits x, it does so across the board, whether you’re talking about Provo or Manhattan.” Some scholars have suggested that this might be an ahistorical way of understanding what the Establishment Clause was meant to do, and it also might be bad politics, in the sense that it might well be wise to permit local communities a little more self-definition, in terms of how they express themselves through symbols. True, there is a danger that permitting local variation could create hard cases, but the possibility is still worth exploring.

## **Section IV**

*Paolo Carozza, Professor of Law  
University of Notre Dame*

I think the European Court of Human Rights decision is embarrassingly weak. Obviously there are really difficult and really important questions about

religious freedom and religious identity at stake. There is a very difficult, fine, and debatable line between the way religion ties up with the community's identity and where it crosses into some forms of coercion, and that boundary does need to be explored. There are also important questions about the meaning of "neutrality" in this context: what does neutrality mean in a world where there are multiple religious groups within a single democratic polity? Or even more, what does neutrality mean in the context of a society where the principal cleavages typically are not among different religious groups, but mostly between those who have religious viewpoints (of whatever kind) and those have none? That fact makes the neutrality of a blank wall very different from the neutrality of all the different religious symbols in the park at the end of December.

Coming back to the Strasbourg case, then, the point is this: you have heard much more detailed, elaborate, and sophisticated analysis of all those questions in ten-minute thumbnail sketches from these two professors than you will find anywhere in the twelve paragraphs of substantive reasoning of the European Court of Human Rights. Twelve paragraphs for all of these complex questions. In those twelve paragraphs you will find no discussion of any of the jurisprudence of any of the constitutional courts of Europe, nor any discussion of any of the doctrinal history, analysis, or reasoning of the very long and distinguished tradition of European academic legal writing about the question of religion in the public square. Not a word. So, the European Court of Human Rights acts in this case as if it were an oracle, rather than being engaged in an important public dialogue. That's the first point.

The second point is this, and it's related to the first point. The fact that all those things are absent means that what's also absent is the entirety of the rich heritage of constitutional pluralism that exists and has historically existed within the European political and social space. Not all of the countries are France and Turkey. France and Turkey have very distinctive, very particular, very historically rooted, and very extreme forms of secularism with regard to public space. But look at all the other traditions of Europe. There are the Italian one that we are talking about now, and the German one that we just heard about. There are established churches still in Norway, Sweden, and the U.K. There is the historic Greek association with the Orthodox Church. There is the invocation of the Holy Trinity in the preamble of the Constitution of Ireland. Do they have to change their constitution now? And you can go on and on through all of them. You would never know, from the Strasbourg decision, that there is not, in fact, a one-size-fits-all model of

European church-state relations and that the French-Turkish model not the only European tradition of reconciling secularity and the public square.

And therefore, the third and final point is that by ignoring that rich constitutional diversity within the European space and not taking it seriously, the Strasbourg court is in fact betraying what has been probably the best and most important aspect of supranational constitutionalism in Europe. What Europe has given to the world and what is essential that Europe continues to give to the world is an experiment in trying to synthesize transnational cooperation, harmony, unity, and togetherness, with a continued appreciation of and preservation of the legitimate and rich distinctiveness of all the different peoples of Europe. The world depends on the success of that experiment, which the Strasbourg court is betraying.

## Questions & Responses

*What are some of the practical or pragmatic consequences of this decision in terms of the European community laws? What is this going to cause as a result of this decision? Are there implications in terms of trade or sanctions of any sort, or is it mostly a symbolic kind of thing?*

(Carozza) I think there are two large sets of implications here for the future. One is that this controversy might very well mark the beginning of a serious new discussion about the meaning of religious freedom in Europe, which hasn't really existed for decades. But the other set of implications is about the role and authority of supranational institutions. By signing the treaty Italy has agreed to abide by the decisions of the European Court of Human Rights. So it's a binding judgment, for which they're legally liable, assuming the decision gets confirmed by the Grand Chamber. And there are enforcement mechanisms through the Council of Europe's Committee of Ministers. Ultimately if Italy were to refuse to comply, in theory it could get kicked out of the Council of Europe. If they're kicked out, or if they choose to withdraw over the conflict, technically they can't be a member of the European Union any more, either, because they're linked. A state has to be a party to the European Convention of Human Rights to be a member of the European Union. So, if you follow that chain it could have really severe implications. I don't think it would ever get to that point, but I think it's very possible that the conflict could result in a certain supranational constitutional crisis, given the degree of resistance that we're seeing to the decision. Now, that resistance has happened before, in other cases involving other countries over other issues. So it's hard to know at what point such a conflict might provoke a change in the system and how long the community as a whole can just slog forward with one state thumbing its nose at the Strasbourg court over an issue like this. But there's no question in my mind that the question of the authority of international institutions will be in play in the follow-up to this case.

*Is this an isolated case? The European Court as an oracle? And the European Court not respecting pluralism as you say? Is this a trend?*

*I have a question regarding what I experienced when I was in school in Germany. The percentage of Muslims in Germany, for example, is growing more and more. At the moment there are areas of Germany where 25% of students are Muslim. By focusing on the controversy of the crucifix up and down, how does this decision influence the*

*inculcation of Muslim students who as well have a right to express their faith in a German public school but where only 5% about attend private school organization in Germany, 95% go to public schools where they do have religious education of every kind. How does the Strasbourg decision influence this integration between Muslim children and Christian because the Christian background is there but is changing dramatically.*

*Paolo, I think the point you got most excited about, the critique about the lack of sophistication of the arguments, that could be said for a lot of supranational tribunals. I'm also wondering whether the lack of sophisticated arguments reflects the lack of sophistication of the briefing of the issues by the different parties. I haven't seen those, but I've seen some of the Italian ministers come out and say their argument was that the crucifix is not a religious symbol, it's a symbol of national unity and tolerance. That doesn't seem very sophisticated to me. It didn't pass the giggle test, at least in my mind. For education ministers to defend that position didn't sound like the arguments were very sophisticated. I'm wondering if you'd seen the briefs.*

*I just want to piggyback on the question about Islamic integration and what sort of emerging Catholic church position is on this. One of the interesting things about the Italian case is that you said there had been more secular liberals that have been recognizing that there's sort of a basic law that's undergirded by some sort of religious tradition, Catholic tradition, so long as it's some sort of traditional public expression of religion as a Catholic that's okay, but they've been using that position to say that that's one of the reasons why Islamic integration is much more difficult because as long as it's Catholic public expression of religion and not Islamic public expression of religion, that's going to be okay. Whereas the church seems to be using these decisions to say, you know this is precedent for a right for all public religious expression, especially the case in Switzerland over the minarets. The church came out very strongly for that, so they've been allowing crucifixes in schools, allowing minarets, this is a fundamental right of all religions.*

(Kommers) With respect to the Muslim problem, I might mention that there is a big difference between constitutional litigation in Germany and the United States with respect to religion in the public schools. I noted earlier that the German Constitution makes religion an ordinary part of the elementary school curriculum. The difference between the two countries is that constitutional cases in the U.S. are usually brought to take religion *out* of the schools, whereas in Germany the typical case takes the form of a claim, usually by a minority religion, to add its religious teaching to the ordinary school curriculum. And interestingly enough, several German states have begun to incorporate Muslim religious classes in the public schools along with Catholic, Protestant, and Jewish classes, all on a voluntary basis of course.

Paolo has rightly pointed out the great variety of religious traditions and practices in Europe, many of which the Strasbourg Court appears to have ignored. Apart from Germany's crucifix case, one may legitimately wonder whether Germany's tradition of positive religious freedom is in jeopardy as a result of the European Court's Italian decision. Will that decision now be invoked to challenge Germany's own constitutional tradition of positive religious liberty? Will that decision lead to a constitutional assault before the European Court on the Basic Law's provision that makes religion a normal part of the school curriculum? Is this the beginning of a movement to impose on the Member States of the Council of Europe an American-style separation of church and state? Any such assault would clearly be resisted by Germany's Federal Constitutional Court which on several occasions has ruled that it will enforce the European Court's human rights jurisprudence only to the extent that it does not impinge upon fundamental rights guaranteed by the Basic Law. From what I gather, the emphasis in the European decision is exclusively on negative religious liberty rights. One would hope that if the case is referred to the Grand Chamber of the Human Rights Court, alternative traditions of positivity and accommodation would be respected and defended to the extent that they do not result in any serious invasion of negative constitutional rights.

With regard to the negative right I'd simply make this last point: There seems to be nothing in the Italian case, or for that matter in the German cases I've mentioned, that indicates that children are being pressured or coerced in any way to venerate the cross. The mere display of the cross, with no commentary by the state or teachers on what it means, hardly constitutes pressure of any kind, psychological or otherwise. Of course, this argument would not prevail in the United States Supreme Court, which has ruled that all religious symbols must be removed from public school classrooms. As I've already noted, and my colleagues seem to be in agreement, it would be unfortunate if American separationist jurisprudence were to be imposed on European countries such as Germany, Italy, and other nations which hold to what might be called an accommodationist theory of church-state relations. For its part, as I've already indicated, Germany's Federal Constitutional Court has long made clear that German schools must not become missionary schools. In Germany's constitutional jurisprudence, all religious traditions and non-religious value systems are entitled to equal respect under law. What is constitutionally required in Germany on the part of the state is a posture of neutrality toward these traditions or value systems. So long as the state does not affirmatively discriminate against religious minorities and so long as public school students are not really burdened by the display of the cross,

and so long as the schools are open to a diversity of faith traditions and secular world views, the principle of neutrality has been satisfied. And in countries such as Germany and Italy, where Christian values and traditions overwhelmingly predominate, minority religious faiths are expected to tolerate the presence of symbols associated with the former so long as their own views and traditions are respected. From a separationist American perspective, the European Court's Italian decision makes a lot of sense, but from a European perspective, the decision undermines – and even ignores – the large measure of appreciation that the Human Rights Court has traditionally extended to member states in establishing their own policies in the sensitive fields of religion and morality.

(Garnett) As you pointed out, the Church's position with respect to this case has not been to say "the crucifix should be permitted to remain because it's ours, we like it, and we are the Church", but instead to situate this case in the context of a broader argument about religious freedom. Some might find this surprising, but I do not. In recent years, the Pope has emphasized the fact that religious freedom is grounded in the dignity of the human person. And so, all people—Catholics, Muslims, Protestants, nonbelievers—have a dignity-based right to seek the transcendent, to seek the truth and cling to it when it is found. Perhaps a silver lining to this ruling, then, is that it will call attention to the fact that the Church's concern for religious liberty is not a parochial one. Instead, it reflects a broader claim about, and commitment to, human dignity.

(Carozza) Let me start with the last point just to build on it and on the responses to the questions about, for example, how this affects the integration of Muslim communities in ever-growing numbers into Italy, Germany, and throughout the rest of western Europe in particular. By criticizing the European Court of Human Rights decision, I do not in any way want to imply that I think the current Italian settlement on this question is necessarily a good one. I don't really know. It might not be. And it might not be in particular because an increasingly important fact on the ground is that there are difficult questions of how to address the growing importance of religious pluralism within Europe that have to be faced by European societies, faced together and individually. I do not deny that at all. But it's interesting to me that, for example, the union of Islamic communities in Italy came out strongly in favor of the Italian law and against the European Court of Human Rights decision. Why? Because they also see that, for all of the difficulties of religious pluralism, today the most important cultural fact is the difficult

relationship between religion and secularism, not among the religious groups. And that builds on Professor Garnett's point about how the Catholic church also is in a completely different place over these questions than it would have been prior to *Dignitatis Humanae* and the trajectory of the last fifty years and more.

So what is the European Court of Human Rights supposed to do in that context? Well, one of the things it could do is engage in discussion. Is the fact that they don't a fault of the parties? In part. I mean, I agree with you that the Italian government's arguments in this case were terrible. They were completely disingenuous from my point of view, and not a serious defense of what was going on. But on the other hand, it's not like that was the only resource they had. We've got constitutional courts and constitutional traditions from 47 different countries, members of the Council of Europe, that the Strasbourg court could have engaged. Many of the judges who decided this case are former constitutional court justices from their countries. They know this law. They know that it's there. There is no reason why they are limited to the argument that the Italian government presented.

The legitimacy of the European Court's decisions historically in these controversial areas, in the areas where there really are difficult normative questions, has depended in large part on it being careful, opening constitutional dialogues, and recognizing that there's a genuine public argument that has to be made with reasonableness, with a give and take, that the ECHR is a participant in this dialogue and not a single dictator over these complex and dynamic areas of public life. That's what it really takes for the Court to make a positive contribution. It involves addressing such issues on a systemic, institutional, and political level, not simply at the level of formal legal doctrine.

Finally, turning to the last point—is this an isolated case or is this a trend? I hate to say it, but in my view it's a trend. In fact, it's the convergence of two trends. Several scholars of European constitutionalism started to sound warning bells about it, at least five years ago. One of the two trends is the disappearance of the margin of appreciation that Professor Garnett was talking about. Since the great expansion of the Council of Europe into central and eastern Europe and even into Asia, the scope of the margin of appreciation has decidedly and notably declined. It's less and less of a factor. In other words, the Court has been less and less willing to tolerate diversity among the member states of the Council of Europe. And that converges, unfortunately, with a very different

trend towards endorsing a French and Turkish model of secularism as the only legitimate model of the relationship between church and state. This is something that started in the Turkish case, the Turkish political cases where we saw the Court endorsing a very radical form of secularism. Most people said at the time, and the Court tried to pretend, that that was just because Turkey is unique. You can read that in two ways. You can read it as saying that we're really all Islamophobes, which is a plausible reading of it, but you can read it also as saying Turkey has problems with religion that the rest of Europe doesn't have, so we'll just let the Turkish model persist for Turkey. The problem is that that doctrine produced in the Turkish cases has not been limited to the Turkish reality; it has now made its way into all sorts of other contexts, into decisions restricting what can be taught in religious education in Norwegian schools, decisions regarding restrictions in religious symbols in people's dress, now the latest restrictions on the crucifix in schools, restrictions on the hiring and tenuring of professors in Catholic universities. You see the trend in all sorts of ways there. Maybe the scariest part of the non-reasoning of the Court is that in this decision they don't cite any of those precedents.

**Paolo Carozza** (Professor of Law) is the former President of the Inter-American Commission on Human Rights, which is responsible for the promotion and protection of human rights in the Western hemisphere. He also is active in the Center for Civil and Human Rights and serves as director of its doctor of jurisprudence program in international human rights law. A faculty fellow of Notre Dame's Nanovic Institute for European Studies, Kellogg Institute for International Studies, and Kroc Institute for International Peace Studies, Carozza has served as a Fulbright lecturer at the University of Milan and taught at several other universities in Europe and Latin America.

**Richard W. Garnett** (Associate Dean and Professor of Law) received his B.A. in philosophy summa cum laude from Duke University in 1990, and his J.D. from Yale Law School in 1995. He served as senior editor of the Yale Law Journal and as editor of the Yale Journal of Law & the Humanities. After graduation, he clerked for Chief Judge Richard S. Arnold of the United States Court of Appeals for the Eighth Circuit, and then for Chief Justice William H. Rehnquist. He practiced law for two years at the Washington, D.C., law firm of Miller, Cassidy, Larroca & Lewin, specializing in criminal-defense, religious-liberty, and education-reform matters.

**Donald P. Kommers** (Joseph and Elizabeth Robbie Professor of Political Science and Professor of Law Emeritus) earned his B.A. in philosophy and English literature from the Catholic University of America and his advanced degrees (M.A. and Ph.D.) in political science from the University of Wisconsin-Madison, where he also studied law. In 1998, he received an honorary doctor of laws degree from Germany's Heidelberg University. He has been a resident scholar in Germany's Federal Constitutional Court, a Max Planck Society Fellow in the Max Planck Institute of International and Comparative Public Law in Heidelberg, and a Fulbright Lecturer at the University of Tokyo. His other honors include the Berlin Prize and Germany's Alexander von Humboldt Prize for senior U.S. scholars. Most recently, on November 8, 2010, he was a recipient of the Distinguished Service Cross of the Federal Republic of Germany.

- Paper 1 *Language Wars: Language Policies and Globalization* by Louis-Jean Calvert (2005).
- Paper 2 *Challenges Facing American and European Catholic Universities: A View from the Vatican* by Archbishop J. Michael Miller, C.S.B. (2006).
- Paper 3 *Pope Benedict XVI's Remarks About Islam: Five Perspectives from the University of Notre Dame* by R. Scott Appleby, Brad S. Gregory, Paul V. Kollman, C.S.C., A. Rashied Omar, and W. David Solomon (2006).
- Paper 4 *Neighbors? Jews and Catholics in Post-Shoah Poland and The Theological and Pastoral Reception of Nostra Aetate in Poland* by Archbishop H.E. Mons. Józef Życiński (2006).
- Paper 5 *The Future of Economic and Political Relations Between the European Union and the United States* by Ambassador John Bruton (2007).
- Paper 6 *The Vatican Museums: The Holy See's Portal to the World* by Dr. Francesco Buranelli (2007).
- Paper 7 *The Carbon Footprint of Modern Corporation: A European Perspective* by Dr. Gordon L. Clark (2007).
- Paper 8 *Catholicism and Islam: Points of Convergence and Divergence, Encounter and Cooperation* by Archbishop Celestino Migliore (2007).
- Paper 9 *The God of Europe: Christian Roots and the Future of Europe* by Mario Mauro (2009).
- Paper 10 *Catholicism and Secularism in Contemporary Europe* by Archbishop Angelo Amato, S.D.B. (2009).

- Paper 11 *The Role of Trans-Atlantic Relations in World Governance* by Guido Lenzi (2009).
- Paper 12 *The Culture of the Enemy: A Critique of Huntington from Freud and Nietzsche* by Marc Crépon (2009).
- Paper 13 *The Fall of the Wall and Its Implications Twenty Years Later* by Horst M. Teltschik with an Interview by Ambassador J.D. Bindenagel (2010).
- Paper 14 *The European Court versus the Crucifix: A Panel Discussion* by Paolo Carozza, Richard W. Garnett, and Donald P. Kommers (2010).