*Politics and Religion*, **8** (2015), 565–587

doi:10.1017/S1755048315000279 1755-0483/15

# *Lautsi vs. Italy*: Questioning the Majoritarian Premise

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**Abstract:** in 2011, the European Court of Human Rights (ECHR) published its seminal decision in the *Lautsi vs. Italy* case, arguing that the requirement in Italian law that all public schools will display crucifixes in each classroom does not violate the European Convention on Human Rights. This decision gave rise to a storm of reactions. The goal of this article is to argue, that the ECHR used "majoritarianism" in an under-theorized way and/or unattractive way, and that this usage of the concept can be identified in other cases as well (see the highly controversial *Dahlab vs. Swiss*, ECHR). Demonstrating the procedural, monopoly based and circularity problems within the ECHR decision point to potential ways to criticize the court decision, without taking sides in the heated and highly divisive debate between so called "neutrality supporters" and (roughly) "endorsed church — majoritarian supporters," sides of the debate surrounding "Lautsi."

## 1. INTRODUCTION

In 2011, the Grand Chamber (GC) of the European Court of Human Rights (ECHR) published its decision in the *Lautsi vs. Italy* case in which it was decided that the Italian law that requires the display of crucifixes in each classroom of public schools does not violate the European Convention on Human Rights.

This decision attracted the attention of several scholars and fueled a debate focused on two main issues: first, whether state neutrality in religious issues ought to be preferred to the current arrangement which, according to the court and various commentators, faithfully represents the religious and cultural preferences of the Christian majority in Italy (Mancini 2010; Pierik 2012), and second, the function of courts such as

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the ECHR relative to the majority in Italy's presumed right to shape the religion-state relations according to its preferences (Piret 2012; Weiler 2013; Zucca 2013). These are obviously important and fascinating debates with "camps,' both in this particular case and in the general literature examining both issues, which are both well-defined and well developed.[1] This article aims to contribute to, and offer a comment on, the debate regarding *Lautsi*, and hopefully the larger theoretical conversation, from a different perspective. The court's decision (both concurring and dissenting opinions) and many commentators on both sides of the debate surrounding *Lautsi* accept the premise that the essential problem brought about by *Lautsi* is majoritarianism vs. neutrality, and following, the place of courts in such scenarios. However, the majoritarian assumption, on which this entire debate is built, lacks a proper analysis, thus it is unclear that such majoritarian assumptions should be accepted at all *to begin with*. The purpose of this article is to offer a close look at the majoritarian assumptions, resulting in the conclusion that they ought to be rejected or at least significantly qualified. It would be argued here, that the conditions that lead to majority decisions are not necessarily proper, that is because they may well be made under conditions in which unfair limitations shape the decision itself. In such cases, the supposed majoritarian claim should be flatly rejected. This is exactly the situation in *Lautsi*. Following, it would be argued here that a rejection of the majoritarian claim in the *Lautsi* decision is justified, and that such a rejection ought to lead to the following conclusions: first, that the GC decision in the *Lautsi* case should have included a much more careful examination of the majoritarian argument. Such an examination might have led the GC to reach a different decision. Second, that this examination of the majoritarian argument does not require the controversial adoption of a neutrality framework to religion-state relations. Last, that the un-critical conceptual usage by the GC of the majoritarian claim is shared by other problematic decisions of the ECHR, using the majoritarian assumption to justify troubling decisions, and it therefore deserves serious attention.

This article will be constructed as follows: section two lays the theoretical ground-work regarding majoritarianism required for the following sections, and explains the significance of the *Lautsi* case. Section three succinctly presents the details of the case. Section four presents the first challenge to the majoritarian premise: that of preference adaptions (or "sour grapes"). Section five presents the second challenge to the majoritarian premise: that of the problematic monopoly status of the Education + Crucifixes situation and the difficulty of discovering

https://doi.org/10.1017/S1755048315000279 Published online by Cambridge University Press

preferences (of both parents and children) under such a scenario. Section six examines the consequences that follow if the majoritarian portrayal of the case is indeed false, and examines further interpretations and possible justifications for the majoritarian position at the *Lautsi* decision.

## 2. LAYING THE GROUND-WORK: THEORETICAL PREMISES REGARDING *MAJORITARIANISM*; THE SIGNIFICANCE OF THE *LAUTSI* CASE

The majoritarian assumption shared by almost all those interested in the *Lautsi* decision (including the GC judges), accepts that a majority of Italians support the mandatory placement of crucifixes, and that such preferences ought to be accepted as is. This basic intuition about what the majority "really wants," never questioned in the court's decision, is arguably exactly what ought to be questioned.[2] In order to avoid linguistic confusion, let us name the argument that majorities should be allowed to shape (in this case) religion-state relations according to their preferences, the *majoritarian stance* (see also, Dworkin 1996, 15–17; 2011, 383), the basic notion that there is an actual majority that holds the particular view described by this majoritarian stance, and that this majority's preferences should be formed in a proper fashion (i.e., were not manipulated, coerced or otherwise illegitimately influenced), the *majoritarian premise*. A fundamental argument of the current article is that the majoritarian stance has to rely on a well-executed majoritarian premise. The majoritarian stance makes no sense if there is no way to know what are the preferences of the majority (see Section five), or if the preferences were formed under certain constraints (see section four). This point seems almost self-evident, but further exploration of it is found in section five.

This article questions the use of the *majoritarian premise* in the *Lautsi* case and, only in a derivate manner, argues against the *majoritarian stance*. Nevertheless, the majoritarian stance heavily relies on the majoritarian premise, and the derivative character of this criticism should not be taken to mean "peripheral" or "secondary."

Note that no position needs to be taken, at this stage, either for or against the majoritarian stance in cases in which the majoritarian premise meets proper standards. All that is needed here is to accept that *if* the majoritarian stance is to have initial credibility, then it has to rely on the majoritarian premise (as will be argued in section five below). This does not mean that this initial credibility should lead to any *further*

https://doi.org/10.1017/S1755048315000279 Published online by Cambridge University Press

adoption of this stance over principles such as liberal neutrality or the harm principle as organizing principles for a given society.

Moving forward, the following four comments explain the special importance of the *Lautsi* decision and the significance of the debate surrounding it, pointing to, in other words, the ways in which this decision elucidates several central issues in both religion-state relations and in the conceptual usage of majoritarianism, the importance of which is not limited to church and state scholarship. First, as the prestigious ECHR accepted the mandatory placement of Crucifixes as a legitimate policy, and the Italian policy was widely supported by European states and commentators, criticism of the court's decision is a challenge not only of *a decision*, it is a critique of an entire approach toward issues of religion and state legitimated by one of the most important courts in the world. Second, while several important examinations of the *Lautsi* decision were published since the decision was made, the major focus of these examinations were whether the decision violates state neutrality and, in turn, whether this means that Italy violated its obligation to treat all its citizens with equal concern and respect (Pierik 2012; Marshall 2013). This article does not challenge these examinations directly, though it does engage them somewhat as they accept that the *Lautsi* decision should be viewed as a conflict between majoritarianism and state neutrality. This article points to a different analysis of the *Lautsi* case. Third, the problematic usage of the concept of majoritarianism by the GC in the *Lautsi* case is not sui generis, and an examination of this conceptual matter is by no means limited to the *Lautsi* affair. Last, The focus on the majoritarian premise has one additional distinctive attribute: it's importance can be agreed upon by both sides of the debate surrounding the *Lautsi* case, regardless of any commentator's position in the controversy.

## 3. *LAUTSI VS. ITALY*: THE DETAILS OF THE CASE AND THE MAJORITARIAN ASSUMPTIONS

The case started with a request by Mrs. Soile Lautsi for the removal of the crucifixes in the public school (in the region of Veneto, Italy) in which her two sons studied. When the School Council decided not to comply, Mrs. Lautsi appealed to several Italian courts. After passing several initial considerations (at different courts that will not enter this succinct description), her application was rejected and she turned to the ECHR. In November 2009, a Chamber of the Second Section of the Court declared that there

had been a violation of the European Convention on Human Rights (30814/06). The Chamber that considered the case decided that Italy was in violation of Article 9 of the European Convention (freedom of thought, conscience, and religion) and Article 2 of the first Protocol to the Convention (the right to education). The chamber reasoned that, among the plurality of meanings the crucifix might have, the religious meaning was predominant (para. 53–56). The Chamber argued that the "negative" freedom of religion (i.e., the right not to be exposed to religious indoctrination) indicates more than the absence of religious services or religious education and extends to practices and symbols. It added that the right of children — not to be exposed to such symbolism — deserved special protection in cases where the state expresses a belief and dissenters were unable to extract themselves except by making disproportionate efforts and sacrifices (para. 55, the Chamber pointing here to the costs of private education). The court also argued that the mandatory display of crucifixes restricts the right of parents to educate their children according to their convictions, and thus the practice is incompatible with state neutrality (para. 57).

In response, the Italian government (January 2010) lodged an appeal to the Grand Chamber of the ECHR with the support of several European countries. The decision of the GC, delivered in March 2011, overturned the ruling of the lower Chamber with a vote of 15 to 2 (30814/06). It granted that the mandatory placement of crucifixes does not violate the European Convention. The court agreed that the school environment is indeed inseparable from the material being taught and, therefore, merits the court's attention (para. 64), particularly within the scope of Article 2 of protocol 1 of the Convention (right to education). Furthermore, the court agreed that the crucifix is, above anything else, a religious symbol (para. 66). However, the court did not find that the mandatory placement of crucifixes violates the Convention and argued, instead, that it falls within the so-called "margin of appreciation," which roughly means the range of possibilities that constitute a legitimate interpretation of the European Convention on Human Rights, of each contracting state (para. 68). The court viewed the crucifix as a passive symbol (para. 72), dissimilar to active indoctrination, and thus compatible with a pluralist and tolerant environment as maintained by Italian public schools in their teaching methods and general environment (para. 74).

Note that the court acknowledges that placing a crucifix in each classroom does create inequality for students of different (or no) denominations, and the decision relies on some argument that justifies the

creation of this inequality (the characterization of the "passive" nature of the crucifix and the GC's insistence that "there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions" (para. 74) both attempt to excuse and diminish the severity of this governmentally created inequality, but they cannot serve as principled and a-priori justifications for the creation of this inequality). Two of the concurring opinions are especially clear in describing how such a justification expresses the majoritarian premise and leads to the majoritarian stance. First, that of Judges Rozakis and Vajic: "The main issue to be resolved in this case is the effect of the application of the proportionality… between, on the one hand, the right of parents to ensure their children's education and teaching in conformity with their own religious and philosophical convictions, and, on the other hand, the right or interest of at least a very large segment of society to display religious symbols as a manifestation of religion or belief" (para. 34). Second, comments made by Judge Bonello: "This Court ought to be ever cautious in taking liberties with other peoples' liberties, including the liberty of cherishing their own cultural imprinting" (para. 39); and, more explicitly, Bonello again: "The parents of one pupil want that to be 'non-crucifix' schooling, and the parents of the other twenty-nine, exercising their equally fundamental freedom of decision, want that schooling to be 'crucifix' schooling."

The following examination focuses only on the majoritarian premise, and not on other issues, such as Bonello's awkward use of the term "liberty." It is clear that the court's support of the majoritarian stance is grounded in the judges' belief that the majoritarian premise was valid in this case — that a large majority of parents and Italians as a whole support the mandatory placements of crucifixes in classrooms, and that the judges implicitly accepted that such preferences ought to be accepted as is (regardless of the way they were formed; a "lower-bar" majoritarian premise is perhaps an adequate concept here), and therefore that such preferences ought to direct public policy. Prof. Weiler, an important commentator and participant in the proceedings, argued against Lautsi's request in a similar fashion: "But surely Freedom *from* Religion is not absolute, and its vindication has to be so balanced, and the principle collective good against which it should be balanced would, in my view, be the aforementioned collective freedom of a self-understanding, self-definition and determination of the collective self as having some measure of religious reference" (Weiler 2011, 582). When Weiler uses the term "collective good" in this context, it surely means that a substantial majority of the relevant population views the placement of crucifixes as a good, and that this

aggregated preference ought to be accepted, as is, as decisive in shaping public policy. So a "lower-bar" majoritarian premise is used by more than just the judges of the GC (see also, Pin 2011).

One final observation on the court's decision — regarding its odd wording — is important here. Judge Bonello adds the following remarks to his decision: "On a human rights court falls the function of protecting fundamental rights, but never ignoring that customs are not passing whims. *They evolve* over time, harden over history into cultural cement. *They become* defining, all-important badges of identity for nations, tribes, religions, individuals" (para. 38, italics added). This is an odd way to describe the process of nation building in a legal context — it seems that, at least from Bonello's perspective, national customs almost have a life of their own ("they evolve," "they become") and are active agents in history. This is the essentialist element of nationalism that has been thoroughly criticized from various angles such as, notably, the modernist school headed by Gellner (1983), and by meticulous descriptions of the rise of the modern state (Scott 1998; Weber 1976), both demonstrating how national customs and national identity are created and enforced rather than independently evolve.[3] This is important not as a means to criticize Judge Bonello's outdated view of national identity, but to point to a more realistic view of the sources of the majoritarian premise, as an active process of creation and enforcement of norms, rather than a natural process leading to a certain set of dispositions.

The GC's main decision body itself is formulated with slightly more accuracy: "The Government, for their part, explained that the presence of crucifixes in State-school classrooms, being the result of Italy's historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it *important to perpetuate*" (para. 67, italics added). The important words here are "important to perpetuate," which indicate that the court understands such norms are delivered from one generation to the next through a process of selection and enforcement, and thus implicitly rejects its own "reflection" image that treats national customs and norms like an already existing "essence" that ought to be respected by the state's education system (although, arguably, the process described occasionally returns to the passive tense, hinting at an essentialist notion of national identity).[4] Beyond signifying internal tensions within the GC's decision, this "cultivating" understanding exemplifies the tension between different potential justifications of the majoritarian claim as a whole, as follows.

https://doi.org/10.1017/S1755048315000279 Published online by Cambridge University Press

If displaying a crucifix is an existing tradition, than it falls under the "reflection" understanding of the policy that sees the practice as merely reflecting existing Italian culture. The "reflection view" will be disputed in this article, in Sections four and five, via monopoly problems and preference adaptations problems. If, on the other hand, this policy aims to cultivate a certain predisposition toward Italian tradition and Christianity, than it completely changes the majoritarian stance: rather than reflecting the wishes of a majority (or a given "majoritarian premise"), the stance seeks *to create* a majority according to a particular ethical or religious view. But a "creation of a majority" understanding of the majoritarian approach is in tension with other parts of the GC's decision and probably incompatible with significant parts of the European heritage of religious toleration itself. As argued, for example, by Pierre Bayle (echoing the famous words of P. della Mirandola himself, 1486, 1998: 4–5) pointing to the positive results of religious factions' inability to recruit the state to their needs: each denomination must compete with others by demonstrating its virtues, rather than by recruiting the coercive apparatus of the state. (Bayle 2005, 199–200).

Some will conclude that the wording, chosen by the GC, implying the "creation of a majority" is a simple mistake, as even if an essentialist view of national identity is outdated, such an argument will suggest — at least the essentialist view is compatible with the majoritarian premise. Nevertheless, from a scholarly perspective, the "creation of a majority" wording has the benefit of revealing the difficulties faced by the GC, elucidating its attempt to maneuver between "reflection" and "cultivating or creation."

This ends our succinct survey of the *Lautsi* decision. We turn now to analyze the decision in light of preference adaption issues.

## 4. PREFERENCE ADAPTION AND THE *LAUTSI* DECISION

The *Lautsi* decision relies on the crucial belief of the GC that the mandatory placement of crucifixes in public schools should be classified as a permissible decision to be reached by the majority of parents, children, and Italians generally. This majoritarian claim, crucial to the decision of the court, must be subjected to careful examination. Assuming that the court's description and representation of the wish of a majority of Italians is reliable, the normative strength of preferences stemming from a system in which crucifixes are mandatorily placed in all public

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schools deserves a measure of scrutiny. To put the point made by the GC succinctly, if 29 students in every class of 30 wish to have the crucifix placed in their class (as Judge Bonello writes), the majoritarian premise is supposedly satisfied and supports the majoritarian stance. The process that creates these wants does not enter into these majoritarian considerations, according to the GC, even though young children are especially vulnerable to processes in which they adjust their preferences to fit their possibilities (Feinberg 1992, 76–97). It is hardly surprising, therefore, that a mandatory placement of crucifixes in the children's environment leads to a preference of having them. But why should preferences formed in this way guide the ECHR in cases such as the *Lautsi* decision? This will be the focus of the current section. The next section will challenge the validity of the majoritarian premise due to difficulties of determining preference under conditions of monopoly.

Let us begin with a brief description of the preference adaption process according to Jon Elster's famous description of the phenomenon. Elster argues that want or preference satisfaction should not be considered as a part, or a criterion, of justice at least in cases where such preferences are attributable to constraints on available options and adaptations made to suit such available options. If some conditions that give rise to certain adaptations in wants are suspect, want satisfaction should not be a part of a theory of justice (Elster 1983, 109–140).

In the *Lautsi* case, the mandatory placement of crucifixes restricts one option: that of not having crucifixes in classrooms. As the custom has been in place in Italy for a long time (starting in 1860), it may have given rise to a preference adaption of both children in public schools and their parents who studied in the same environment. Now, a typical preference adapting result of eliminating the choice not to have crucifixes in classrooms can take one or both of the following forms: first, it can downgrade the importance of not having crucifixes in classrooms or, second, it could detract from the significance of having them in classrooms. Examples of both tactics can be found in the opinions of the courts. Attempts to downgrade the significance of having crucifixes in classrooms can be found in some courts' odd attempts, in the various *Lautsi* decisions, to argue that the crucifix represents various values aside from its Christian symbolism (see the skeptical discussion of this option by Evans 2011, 356), or in efforts to stress the difference between passive and active religious education. The downgrading of the importance of *not* having crucifixes is also evident in the distinction between passive and active religious education, as well as arguments

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against the adequacy of the separation between church and state in Europe (an argument repeated by Weiler 2010, 2; see also, Langlaude 2013, 9–11).

Now, the analysis of preference adaptations, and the argument that wants such formed should not guide governmental or courts' decisions, face two potential challenges that merit a succinct discussion. First, preference adaption, a perfectly fair observer might argue, can be used to object to many decisions reached within a "thick" (*a la* Geertz 1973) cultural context. As such, it seems to be an easy weapon to use against many different decisions, and as such of little value. However, the noted critique of the second *Lautsi* decision and the legal situation that follows (legitimating the placement of crucifixes in every classroom in every public school), is a very specific application of the "sour grape" scenario. Given that the situation does not allow any exit option or any accommodating arrangement for non-believers or religious minorities, and that the noted arrangement applies to children at school age, it arguably justifies the non-trivial or non-facile application of the preference adaption objection to the formation of the noted majority. While there are indeed examples of bad faith, or at least, impossible to refute rejections of decisions one happens to dislike as supposedly stemming from a preference constraining and hence preference adapting scenarios, it does not mean that there are no actual cases. The argument presented is that the GC decision and the "no exit" legal arrangement that the GC gave legitimacy to are indeed such a case.

Second, a well-known challenge stemming from the fear, articulated by I. Berlin, that theories attempting to second guess "real" preferences of individuals over the preferences that they currently have often served as a useful excuse for illiberal governments to coerce their citizens into a supposedly preferred policy (Berlin 1969). Any analysis of preference adaptation in the *Lautsi* case attempts to second guess the preferences of Italian parents and children (as described by the judges, see the next section). In what way can the current analysis prove any better than other divided-self theories, the judges' assessment of the wishes of Italians included? There is an evident answer to this question: the judges' analyses derived from their account of children and Italian parents preferences *only* one policy — that of a mandatory placement of crucifixes — that the analysis of preferences adaptations crucially does *not* follow. If a policy based on preference adaption analysis were adopted, it would lead to a pluralist scenario of allowing some schools the option to operate without the crucifix (i.e., establishing an "exit" option). There is no doubt that Berlin's warning

regarding the dangers of any divided-self approach needs to be heeded, but it seems best to focus on the judges' decision (aiming to narrow the number of options available to the students at Italian schools to just one) rather than on the analysis aiming to open up more options to the Italian students (compare, Williams 1985, 43).[5]

To conclude this section, the argument presented is that the majoritarian premise was not properly satisfied as the process leading to the formation of the noted majority was tainted and that it leads to a problematic, constraining, policy. We now turn to the second critique that considers the difficulties monopolies create for preference guessing or estimating.

## 5. MONOPOLIES AND PREFERENCES, THE *LAUTSI* DECISION

The previous section attempted to criticize the *Lautsi* decision following the notion that preferences formed under restrictive conditions tend to adapt to those constraints. In the *Lautsi* case, this means that the requirement to display crucifixes creates the preference for crucifixes in each classroom. This critique assumes, following the way the GC formulated its decision, that Italian students and their parents (and the Italian population at large) prefer having crucifixes in their schools. This section questions this premise: how could the court know that this is the preference of the relevant agents? The obvious answer is that the court assumes that if a majority of people in a country adhere to religion X, and the political leadership vocally supports arrangement Y (the mandatory placement of crucifixes), then it can conclude safely that the majoritarian premise is a truism that does not require any supporting evidence.[6] This section argues that this "leap" is anything but obvious.

The placement of Crucifixes in public schools, as it is mandatory, can be treated as a monopoly with legal barriers of entrance (as no public school is allowed to function without them).[7] Though the option of private schools exists, the cost of utilizing such options involves, as the Chamber decision indicated, "disproportionate efforts and acts of sacrifice" (para. 55) from parents and cannot be seen as a reasonable substitute. If there is only one viable provider of service for the majority of citizens, how can the service provider or an external observer know the true preferences of those who depend upon the service? Unlike companies in the private market that may not care about this question as their motivation is profit maximization, the *Lautsi* decision used the majoritarian stance

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as its central justification. In fact, the idea that the court's decision merely reflects the majoritarian premise is arguably crucial to its decision. Accurate knowledge regarding preferences in situations in which such preferences are not revealed through actual choices poses a problem that is familiar to social scientists and (especially) economists. The various attempts to discover such preferences, and the difficulty of measuring unrevealed preferences, have been eloquently criticized by James M. Buchanan: "Economists … have generally assumed omniscience in the observer, although the assumption is rarely made explicit … the economist can unambiguously distinguish an increase in welfare independent of individual behavior because he can accurately predict what the individual would, in fact, "choose" if confronted with the alternatives under consideration. This omniscience assumption seems wholly unacceptable. Utility is measurable … only to the individual decision-maker. It is a *subjectively* quantifiable magnitude. While the economist may be able to make certain presumptions about "utility" on the basis of observed facts about behavior, he must remain fundamentally ignorant concerning the actual ranking of alternatives until and unless that ranking is revealed by the overt action of the individual in choosing (Buchanan 1959, 126).[8] Even if we stop short of Buchanan's epistemological pessimism, there are formidable problems for anyone who wishes to justify a certain policy based on presumed want satisfaction without access to revealed preferences. This point is especially relevant in controversial cases such as the placing of crucifixes in schools that serve a large and diverse population. Want satisfaction, even apart from the critiques of moral realists like Scanlon who completely reject want satisfaction as a criterion of justice (Scanlon 1975), encounters formidable problems. Contemporary scholarship certainly must consider the ways in which such preferences are actually formed (Richardson 2002, this also attempts to answer to preference adaption problems). The obvious first step is to allow preferences to be revealed — whether education + crucifixes is actually what is preferred by children and parents.[9]

If we suppose that an exit option[10] is established, i.e., that certain classes (let us say) without crucifixes will be created within public schools, and children and parents will be allowed to choose, what happens then? Here we need to progress carefully. If a sufficient number of students and parents choose education without displayed crucifixes, such an alternative needs to be continually presented. Continued use of this alternative could then amend, or even falsify the majoritarian premise adopted by the GC.

If a sufficient percentage of students and parents do not choose "education without crucifixes," there are still several noteworthy advantages of having an exit option, as an exit option has merit beyond its function as a "preference revealing mechanism." First, an exit option is an important part of any liberal democratic approach to religion and state relations as it protects the autonomy of children and parents (Scanlon 1986; Feinberg 1992). Second, such an exit option bears important egalitarian implications. If the only exit option is private education and higher tuition costs, then parents and children who lack financial means would face a significant impediment not shared by all if they wish to choose education without the presence of a crucifix (Warren 2011). Third, such an exit option would increase institutional responsiveness to actual or potential dissatisfaction with the presence of a crucifix (Finke and Stark 2003). Fourth, an exit option is a crucial step from recognizing fallibility to religious toleration. If there is any doubt whether the GC was wrong to accept the majoritarian premise, the logical step is to allow an exit option and to find out.

Moving forward, it is important to note that establishing an exit option does not create a scenario in which no religious symbolism is allowed in public schools. This point is important for two reasons. First, the supporters of the mandatory placement of the crucifix, who were horrified by the advance of what they consider intolerant secularism (Weiler 2010, 4), can keep religious symbolism in some classrooms. As such, the noted proposal cannot be labeled, as some other critical responses of the GC decision were as bearing, or related to "encroaching secularism." At no point the proposal of establishing "exit options" is aimed at removing all crucifixes.[11] Second, such an exit option will not ban religious symbolism worn by individuals (as distinct from the religious symbolism of artifacts such as crucifixes). The Chamber's description of the applicant (*Lautsi*) position (para. 33), is relevant to this point: "As to whether a teacher would be free to display other religious symbols, the answer would be negative, since there were no provisions permitting that practice." The applicant's view raises severe difficulties as it moves from defending the rights of parents and children to choose not to be exposed to religious symbols, to forbidding religious symbolism all together; furthermore, the petition would shift from artifacts placed on walls to religious attire wore by believers. Indeed, if an objection to the public placing of crucifixes leads automatically to a ban on wearing of religious garments by teachers as, for example, in the case of Dahlab v. Switzerland (ECHR 42393/98), than it becomes much more controversial. Fortunately, such a linkage of

positions is not necessary, contrary to what the applicant seems to argue. There are two reasons these positions are not linked. First, at no point does arguing against the majoritarian premise mean that the placement of crucifixes all together should be banned. Rather, it aims to establish an exit option in public schools that would allow better verification of the majoritarian premise and which holds fundamental importance within a liberal democratic framework. Second, there are important differences between religious garments and religious artifacts put on a wall as the individuals wearing religious garments have religious freedoms that artifacts do not have. As the critique of the majoritarian premise does not entail the position that religious symbolism, including wearing religious garments, is problematic (rather, that having a system that does not allow an exit option is problematic), there is no need to delve further into the importance of such distinctions.

We conclude our discussion of the importance of establishing an exit option by pointing to the way in which a famous point made by John Locke in his *A Letter Concerning Toleration* (2010, 1689) assists us in exposing a significant gap between Italy's position and the GC justification for this decision, as follows. We can wonder what value there is in having a crucifix on a classroom wall given that at least some of the students do not want it there. Locke argued that religious coercion is irrational as coercion cannot produce true belief which is the outcome of an internal, private process. Locke's point is reflected in the way the GC insisted on the importance of the tolerant environment in Italian schools, and the lack of intention to proselytize or indoctrinate students (paras. 72, 74). Now, Locke's argument is disputed as the creation of a certain environment can, statistically speaking, contribute to the development of religious faith (Waldron 1988). However, such an "environmental" argument conflicts with the self-limiting fashion in which the GC justified its own decision. The GC insisted that the placement of the crucifix is, first, a reflection of a pre-existing Italian predisposition and, second, that it is a passive symbol that does not aim (or can) to indoctrinate. The *former* point is disputed by the mere existence of the *Lautsi* petition, and by the arguments from preference adaption and monopoly, examined in this article. The *latter* will face the following objection: one cannot hold *both* that Locke's argument fails because creating a certain environment leads to the growth of certain beliefs (and this is what the government would be forced to argue, otherwise, what purpose does the crucifix fulfil?) *and* that crucifixes are displayed with education purposes that have no important religious or indoctrinatory influence on students as a

passive symbol (as the GC would have to argue). To put this complex point in a simple way: Locke's argument brings to the fore a gross, unpleasant, mismatch between the policy as devised by the Italian government, and the GC defense of this policy.

The obvious solution to this quagmire is to establish an exit option of education without the crucifix. Whether a sufficient percentage of students actually choose this exit option, at least initially, is beside the point.

## 6. IS THE MAJORITARIAN PREMISE *SINE QUA NON* TO THE MAJORITARIAN STANCE AND THE *LAUTSI* DECISION?

So far, this article has assumed that a properly executed majoritarian premise is needed to justify the majoritarian stance. This reading is consistent with the ways in which the GC justified its decision. However, perhaps this is the wrong assumption. Perhaps the court can adopt the majoritarian stance without relying on the majoritarian premise *if* it is possible to separate the two. As a review, the *majoritarian stance* is the notion that majorities should be allowed to (in this particular case) shape religion-state relations according to their preferences; the *majoritarian premise* is the notion that there is a majority that actually holds the position described by the majoritarian stance and uses it, in the *Lautsi* case, to demand the placement of crucifixes in all public schools, and that such preferences were reached in a proper way (i.e., were not manipulated, coerced or otherwise illegitimately influenced). If the arguments of sections three and four are at all plausible, the validity of the majoritarian premise ought to be viewed skeptically. If this is the case it seems that the majoritarian stance cannot be adopted — at least without serious revisions. The reason is simple: if the majoritarian stance holds that a *majority* ought to be allowed (in the *Lautsi* case) to shape the religion-state relations according to its preferences, then if there are reasons to doubt the normative status of such preferences given the problems of preference adaptions (and the epistemic problems of preference revealing under monopoly conditions), it would force the majoritarian stance to face the objection that a legitimate majority position does not exist. The *Lautsi* decision, as given by the GC, seems objectionable therefore because it uncritically relied on the majoritarian premise in precisely this way.

Now, there is always the option to change the majoritarian stance from one that reflects the wishes of a given majority, to one that educates or shapes a given majority. In the *Lautsi* case, such a modified view

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would argue that it is social good to place crucifixes in all public schools. Prof. Weiler, in his speech before the GC, mentioned one such reason to deem this good: that the creation of cohesive demos requires religious symbolism. This shift could save the majoritarian stance, as it would not rely on the majoritarian premise, but with two costs. First, as described in section two, this interpretation of the majoritarian stance differs significantly from the way in which the GC actually justified its decision. The GC insisted that its acceptance of the mandatory placement of crucifixes assumes a general environment of toleration and religious pluralism in schools and that the diversity among Italian students is a welcome fact rather than a regrettable social phenomenon. Furthermore, the GC emphasized the passive nature of the crucifix and argued that it does not actually and directly advance one denomination. Such an argumentation makes the GC's decision incompatible with the amended view of the majoritarian stance.

Second, it also merits mention that, aside from the GC's decision which is incompatible with the amended majoritarian stance, the GC itself does not function in a normative limbo. It is certainly constrained by the European Convention on Human Rights and the amended majoritarian stance involves normative views that are incompatible with the Convention (for example, Article 2 of the first protocol that protects the rights of parents to ensure non-coercion in education of religious beliefs *vis-à-vis* their children). These normative views are also incompatible with the views of major political philosophers, such as John Rawls and Amartya Sen, who accept reasonable pluralism of conceptions of the good as a stable fact of social lives and searched for a theory of justice starting from such diversity as a constant fact, and would object to any attempt to move from such heterogeneity to social homogeneity (Rawls 1993, 28; Sen 2009, 11–12).

A defender of the Italian government's approach can legitimately argue that there are other arguments that may support the policy of mandatory placement of crucifixes. It is possible that the court could be forced to reach the same decision, but only based on different reasoning. One potentially powerful reason, which was pointed to in the deliberations, is the rights of states who function under the European convention. The argument, in short, is that the crucifix issue is a topic that is unsuitable for a court such as the ECHR: the correct interpretation of national identity and national symbols is a matter for sociologists, philosophers, and politicians within a given country, not for judges (see, for example, the GC's decision, para, 56 (in the section detailing third party submissions, for example , by members of the European parliament), and para. 61).

There are several possible answers to this rejoinder. First, appeals to states' rights and the argument from judicial non-intervention in topics of philosophical/national identity rings hollow when the law in question forces one understanding of national identity, in this case as applied to education, and does not leave any space for plurality of arrangements in schools. Second, the court did not take the path of non-intervention; rather, it based its decision on the majoritarian premise and stance (primarily) and other arguments (such as the "passivity" of the Crucifix, see para. 72 of the GC's decision). There is little sense in arguing about a path that the court did not take. Third, a non-interventionist view would probably entail that the ECHR accept a ban of religious symbolism in other cases, a stand that would likely be rejected by those arguing against the Chamber's view of *Lautsi*. Non-intervention is a general approach that is not necessarily pro-symbolism. Fourth, and perhaps obviously, a convincing argument can hardly be made, in this case, due to states' rights and the subject matter's unsuitability for judicial decision making. The reason is simple: the argument from the "right' interpretation to the Crucifix (as reached by each state) seems to implicitly assume a valid majoritarian premise yet again and thus remains vulnerable to the objections raised in Sections 3 and 4. Last, such a non-interventionist retreat by the court would mean leaving the children of minority groups to the vagaries of presumed majorities in member states — not a very attractive position."

Moving forward, one last line of defense, for an advocate of the position of the Italian government, might be as follows; one might argue that the 'test' offered here for meeting the majoritarian premise is set too high. A different, "lower-bar" for meeting the majoritarian requirement is simply to point to a given government's approach to a given subject (compare, Waldron 2006, 1347). There are four reasons why this approach cannot be applied to the *Lautsi* case and other, similarly controversial, cases. First, the majoritarian stance played a crucial part in the Italian government's justification of its position and the way that the GC's decision was constructed. Paragraph 40 of the GC's decision describes the government's official position: "… the Government emphasized the need to take into account the right of parents who wanted crucifixes to be kept in classrooms. That was the wish of the majority in Italy and was also the wish *democratically expressed* in the present case by almost all the members of the school's governing body. Removing crucifixes from classrooms in such circumstances would amount to 'abuse of a minority position' and would be in contradiction with the State's duty to help individuals

satisfy their religious needs" (italics added, see also para. 1.5 for Judge Bonello's concurring opinion). If this is the way both the government of Italy and the court's decision choose to present the case, an interpretation that deviates from this understanding of majoritarianism would not do justice to the details of the case.

Second, even a "lower-bar" majoritarian premise can legitimate a court decision *only* if the democratic procedures leading to the forming of a given majority meet reasonable standards. Once such standards are met, the well-known conflict between procedural (i.e., majoritarian) democracy and substantive considerations of neutrality within democratic theory begins (Brettschneider 2007). However, in the *Lautsi* case, there are reasons to doubt the existence and/or the legitimacy of the majoritarian premise (and thus the majoritarian stance), i.e., the monopoly and sour grapes problems noted above — that are pertinent even in a "lower-bar" majoritarian context. These are especially important following the way in which the GC stated its position and the importance of the decision itself.[12]

Third, the *Lautsi* decision involves a potential violation of democratic governments' obligation to treat their citizens with equal concern and respect. Even the GC implicitly acknowledged this point with the simple admissions that the crucifix is a religious symbol and that the student body in Italian schools is religiously diverse. The potential to violate these students' rights means that this is not a trivial decision on the part of a court such as the ECHR. Therefore, ignoring procedural aspects of majority formation would seem highly inadequate.

Fourth, if the majoritarian argument simply legitimates whatever a given government declares, regardless of any critical examination of procedural aspects, then it is puzzling that anyone would find this principle attractive. Among the many critiques of the majoritarian position understood in this way, the following two mentioned by Dworkin deserve our attention.

Dworkin, in a short yet important discussion in his celebrated *Justice for Hedgehogs*, raises two objections to the majoritarian stance. First, the majoritarian stance is but a technicality. It aims to serve the protection and advancement of what Dworkin calls the partnership model of democracy, i.e., a situation in which the "… members accept that in politics they must act with equal respect and concern for all other partners" (384). It is those core values that count; the majoritarian technique is but a tool, an instrument that should be discarded once it ceases to advance the partnership model. *Second*, the majoritarian technique has no value without a prior definition of the contours of the community (386).

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Perhaps there are ways in which the GC's decision can be rendered compatible with Dworkin's two points, implausible as that might be. Nevertheless, Dworkin's objection to the majoritarian principle is especially plausible against a 'lower-bar' majoritarian principle which would allow the government to present any non-egalitarian policy as the wish of the people. Apart for some rare and very orthodox Schumpeter style democrats (2003, 1943), this view would present an archetype of what Dworkin's objection is meant to forestall.

## 7. CONCLUSION

The GC's decision in the *Lautsi* affair received a critical response from many observers. However, explaining why is not a trivial project, especially without assuming in advance that democratic governments are obligated to adopt the neutrality model in religion-state relations — the disputed point in *Lautsi*. One way to avoid such a controversial step, suggested here, is to skeptically examine the way the concept of "majoritarianism" was used by the GC. This examination raised a dual objection to this concept as used by the GC and the government of Italy as they attempted to represent the Italian people: first, that under conditions of monopoly it is unclear what level of support a mandate — such as the placing of crucifixes — actually has. Second, that insufficient attention was given to the way in which the alleged preference supporting the crucifixes rule developed in the first place. As the GC insisted on majoritarianism as a crucial justification for its decision, the present method of rejecting the decision forces those emphatic to this decision, at the very least, to rework the argumentation offered by the court without the majoritarian "weapon" at their disposal. This view does not rely on a previous commitment to a Rawlsian view of the importance of state neutrality, a position that would be rejected by those empathetic to the *Lautsi* decision.

Two final comments follow. First, the majoritarian maneuver offered by the government of Italy and the GC is not unique to the *Lautsi* decision. Thus this skepticism towards the usages of the majoritarian premise might be a useful mechanism in other contexts. The decision of the ECHR in *Dahlab v. Swiss*[13] is especially worrisome in this context, both as it aims to serve the wishes of the alleged majority and because it is arguably incompatible with *Lautsi*. The "lower-bar" majoritarian principle offers an easy explanation: in both cases a member of an unpopular minority found its interests neglected, as Schumpeter, the most famous supporter of a

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minimalist, "lower-bar" majoritarian version of democracy, predicted would happen (1943; 2003, 271–272).

Second, the argument that the majoritarian premise is invalid, if correct, does not end the conversation regarding the *Lautsi* decision. Nevertheless, it does arguably achieve one goal; if the majoritarian stance cannot justify the GC's decision, then the conversation regarding an adequate solution to this case is reopened, even for those who reject the neutrality position. Indeed, the importance of the permanent diversity of ethical and religious views in modern societies, and how such a plurality ought to affect the usage of religious symbols, will surface as a central issue. One possible solution, loyal to the tradition of Pierre Bayle (one of the most famous *European* advocates of religious toleration), would be to create an egalitarian space in which the state is not biased towards one given denomination and to signal to all its citizens that they have equal standing, regardless of their religious and ethical views. In this arrangement, the different denominations and cultural traditions would compete by displaying wisdom, toleration, and virtue rather than by the decree of the state (Bayle 2005, 199–200).

## NOTES

1. The literature concerning judicial review is extensive, some examples include: Waldron 2006; Harel and Eylon 2006; Brettschneider 2007, chap. 7. The literature on neutrality, secularism, and religion in the public sphere is also extremely wide, see Taylor 1998; Bhargava 1998; Nussbaum 2008, 224–232 for succinct discussions.

2. Note that such a majoritarian view differs from general descriptive reports on the percentage of practicing Catholics in Italian society, such as various reports on the declining popularity of Catholicism in Italian society. Ferrari and Ferrari (2010). Private religiosity obviously does not entail being supportive of a given, particular state-religion arrangement.

3. Note, that even the "perennial school" in the study of nationalism has a robust view of the role of the state in maintaining and shaping national culture (which, in our case is intertwined with religion), see Smith 1995; Gat 2013, 248.

4. Prof. Weiler, in his address in front of the GC, indeed indicated the importance of creating a demos and social cohesion through public educational institutions that display the crucifix; that is, a rejection of the "reflection" view of national identity. See his address on Youtube, at 6.31, http://www.youtube.com/watch?v=ioyIyxM-gnM (Accessed on February 28, 2014).

5. We can't enter the complex debate of what an autonomous preference would look like (or what social and political structure would give rise to such a legitimate preference); here we can only note the tainted situation in the *Lautsi* background conditions. See: Sunstein 1991; Rostbøll 2005; Richardson 2000.

6. Such an argument overlooks the fact that actual adherence to Christian practices is a minority practice in Italy, see Ferrari and Ferrari 2010.

7. This economic language has long been applied to the study of religion (Gill 2008, chap. 2).

8. The literature on revealing preferences under monopoly conditions and the institutional background influence on personal choices is complex, but does not undermine the point made above regarding the tainting influence monopolies have on preferences; see Thelen 2009.

9. A formal exit option will not cancel, or 'neutralize' the rich cultural background of Italy, upon its obvious Christian heritage and character. And as such, there is no "perfect," "neutral" or completely "naked" location from which to make decisions (in our context) vis-à-vis the proper relations between

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religion and state. However, the current argument does not pretend that there is such a location but this does not mean that an intervention by the state will not further influence the cultural environment by using its coercive apparatus, much beyond any societal background conditions. As was pointed out in the examination of Judge Bonello's decision above, the place of the state and its legal framework is crucial here. There are several aspects to why this is the case: without state intervention, there will be an exit option; furthermore, Europe is culturally in a process of rapid change, as the referendum in Swiss regarding the Minarets demonstrates. Without state intervention, such changes would certainly affect the cultural background and might affect opinions regarding the noted exit option and the general arrangement legitimated by the GC *Lautsi* decision. Put succinctly, state intervention is crucial in creating and maintaining the given cultural conditions in existence in Italy, and an observer should be careful not to assume that such surroundings would remain as are without such an intervention (on the Minarets in Swiss, see Miller 2014, on the importance of state intervention regarding culture and nationality see Smith 1995).

10. The framework of "exit" to be described here was chosen following its centrality in liberal and democratic theory; however, the ECHR could have taken it via the framework of accommodation of religious and conscience based exemptions, as it did, for example, in *Eweida v. the U.K.* (36516/10), in which it ruled for a Christian employee in its dispute *vis-à-vis* BA over the wearing of a cross necklace.

11. The general literature regarding religious toleration is involved in a complex debate regarding the differences, similarities and (perhaps) equivalence between religious education and secular-liberal one (Macedo 1995; Stolzenberg 1993). There are various interesting arguments on both sides, and while arguably the liberal "side" has, on balance, some compelling arguments demonstrating why a liberal "open" education, while not "neutral" allows more options than a religious one, this debate does not have a direct bearing on the current essay that aims to argue for an exit option, not the total removal of religious symbolism.

12. This point can be presented in a slightly different way: several prominent authors have argued that democratic governments should not simply aggregate pre-existing preferences — as the crucial step of deliberation is missing — which simply has to exist in order to reach the formulation of more knowledgeable, informed decisions. But deliberation requires, arguably, a certain legal and institutional reality. The situation in Italy, in which the law bans an option one side to the deliberation desires and forces one option as a part of public education, would be a violation of the institutionalized aspect of deliberation (see Vermeule 2007, 179–180.).

13. The court upheld the government's presumed right to require a teacher, who had recently converted to Islam, to remove her headscarf.

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