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-ARTICLE-

THE COMING DEMISE OF THE CRUCIFIX

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I. INTRODUCTION

In April, 2010, a Latin cross—a pair of bars with the vertical longer than the horizontal—was found by the Supreme Court to have lost its Christian significance because it served as a war memorial. Logically speaking, a crucifix—a cross with a representation of Jesus' body on it—could also be viewed in this secular fashion. This outcome is not certain because the Justices who saw the Latin cross in non-religious terms were Catholic, and Catholics tend to use the crucifix rather than a plain cross as their central religious symbol. But in the end, it probably will not matter, and a crucifix will be welcomed onto public land if it is described as a war memorial.

Some will applaud this outcome as a welcome acceptance of religion in public life. But that acceptance comes with a heavy cost. When religious symbols take on secular meanings, they lose their distinctive force. People of faith who pushed to have the cross accepted as a war memorial made the same mistake that was made when crèches, menorahs, and Santa Claus began cavorting on courthouse lawns, and when the Ten Commandments became a blank slate rather than a biblical text. They were promoting a bleached faith² in which real religion is the loser.

The Supreme Court, in its 2010 decision in *Salazar v. Buono*,³ reversed a lower court decision requiring that a Latin cross erected as a war memorial on public land in a California desert be taken down.⁴ The case was complex because it involved a transfer of the land to

² See generally STEVEN GOLDBERG, BLEACHED FAITH: THE TRAGIC COST WHEN RELIGION IS FORCED INTO THE PUBLIC SQUARE (Stanford Univ. Press 2008).

³ *Salazar v. Buono*, 130 S. Ct. 1803, 1811 (2010).

⁴ *Id.* at 1811-12.

private hands so that the cross could remain, as well as a variety of other procedural issues.⁵ Four Justices dissented on the ground that the lower court had correctly found an Establishment Clause violation.⁶ Justices Scalia and Thomas voted to reverse the lower court on standing grounds.⁷

The important opinions for the future were written by Justices Kennedy and Alito. Kennedy's opinion, joined by Chief Justice Roberts and Justice Alito, and Justice Alito's separate opinion, each set forth a justification for viewing the cross in the desert as a secular symbol. Given the significant likelihood that Justices Scalia and Thomas agree with this reasoning on the merits,⁸ the Kennedy and Alito opinions point the way toward the future. And it is an unsettling future indeed.

II. LEARNED HAND AND THE LATIN CROSS

When Christians insist on a secular meaning for the cross they should not be surprised when the religious symbolism of the cross begins to fade. No one understood this better than Learned Hand, who, in 1921, ruled that Bayer had lost its trademark on the word "Aspirin"

⁵ *Id.* at 1811, 1815-16. "Here, the District Court did not engage in the appropriate inquiry. The land-transfer statute was a substantial change in circumstances bearing on the propriety of the requested relief. The court, however, did not acknowledge the statute's significance." *Id.* at 1816.

⁶ *Id.* at 1828. (Stevens, J., dissenting) (Breyer, J., dissenting).

⁷ *Id.* at 1824. (Scalia, J., concurring).

⁸ Justice Scalia joined Justice Kennedy's pivotal Establishment Clause opinion in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Thomas supports an even narrower view of the Establishment Clause. *See Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Thomas, J., concurring).

for sales to the public.⁹ Bayer's problem was that it had not defended its trademark;¹⁰ Christian groups go even farther when they affirmatively contribute to the demise of their symbol.

Bayer tried to stop United Drug Company from selling acetyl salicylic acid under the name "Aspirin," on which Bayer held the trademark. But Judge Hand found that Bayer had allowed consumers to believe that "Aspirin" simply stood for a chemical formula that any company might sell. To buyers, "Aspirin" meant nothing more than "an ingredient in a general compound, to which faith and science might impart therapeutic virtue."¹¹

Here it is faith more than science that imparts the virtue, but the result is the same. For well more than a thousand years, the Latin cross has been a vital symbol of the Christian faith. The United States Supreme Court is well aware of this obvious fact. As Justice Kennedy wrote in 1989, the "Latin cross" is the symbol of "a particular religion,"¹² a sentiment echoed by other modern Justices who have described the Latin cross as "an especially potent sectarian symbol"¹³ and as "the principal symbol of Christianity around the world."¹⁴

But in *Salazar*, the cross was described as something else altogether. The proponents of the cross, and the Justices who

⁹ Bayer Co. Inc. v. United Drug Co., 272 F. 505, 512 (S.D.N.Y. 1921).

¹⁰ *Id.*

¹¹ *Id.* at 510. For other comparisons between trademark law and constitutional law, see generally Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS L. REV. 385 (2009).

¹² *Allegheny*, 492 U.S. at 661.

¹³ Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 776 (O'Connor, J., concurring in part and concurring in judgment).

¹⁴ *Id.* at 792 (Souter, J., concurring in part and concurring in judgment).

supported them, argued that a lone cross in the desert should be seen as a war memorial rather than as a religious symbol.¹⁵

This was not a new issue when the Supreme Court took up *Salazar*. Lower federal courts had long confronted Establishment Clause challenges to crosses on public land that were said to be secular because they were war memorials. The majority of those courts, including the lower court in *Salazar*, had rejected those arguments finding that the cross was the quintessential Christian symbol that could not be readily transformed into something secular.¹⁶

But symbols do not have meanings that are fixed forever. Context, history, and ideological goals enable viewers to change how a symbol is understood.¹⁷ And Supreme Court decisions can play a major role in shaping the meaning of our symbols.

Accordingly, in this case, the Justices had a choice. They confronted in *Salazar* a lone cross in a remote location on public land in the Mojave Desert. The cross, put up by private citizens who were members of the Veterans of Foreign Wars, was said to honor American soldiers who died in World War I.¹⁸ Yet, it certainly was possible to read this cross as a religious symbol. This monument to World War I veterans was erected in 1934, fifteen years after that war

¹⁵ *Salazar*, 130 S.Ct at 1820. “Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.” *Id.*

¹⁶ See generally Jason Marques, *To Bear a Cross: The Establishment Clause, Historic Preservation, and Eminent Domain Intersect at the Mt. Soledad Veterans Memorial*, 59 FLA. L. REV. 829 (2007). For the lower court decisions in *Salazar*, see *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004).

¹⁷ Cf. ROLAND BARTHES, MYTHOLOGIES 120 (Annette Lavers trans., Farrar, Strauss & Giroux) (1972) (“[T]here is no fixity in mythical concepts: they can come into being, alter, disintegrate, disappear completely. And it is precisely because they are historical that history can very easily suppress them.”).

¹⁸ *Salazar*, 130 S.Ct at 1811.

ended.¹⁹ Beginning in 1935, it had been the site of Easter Sunrise services, but never of Armistice Day or Veterans Day events.²⁰ The cross supposedly memorialized all of the Americans who died in World War I, but that group included many Jewish soldiers, a point forcefully made by attorney Peter Eliasberg in oral argument in *Salazar*: “I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.”²¹

Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, reached across the ocean to urge us to view this cross in secular terms, writing “a Latin cross is not merely a reaffirmation of Christian beliefs . . . Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles”²²

Justice Alito wrote a separate opinion emphasizing that while “[t]he cross is of course the preeminent symbol of Christianity,” here it has a different meaning.²³ He began by reiterating Kennedy’s image of “white crosses, row on row, that marked the final resting places” of Americans who died overseas in World War I.²⁴ But, he also stressed that one of the men who erected the cross was “John Riley Bembry, a miner who had served as a medic and had thus presumably witnessed the carnage of the war firsthand. It is said that Mr. Bembry was not a particularly religious man, but he nevertheless agreed to look after the

¹⁹ *Id.*.

²⁰ *Id.* at 1838, n.9 (Stevens, J., dissenting).

²¹ *Salazar v. Buono*, No. 08-472, Tr. of Oral Arg. 39, lines 8 – 10 (Oct. 7, 2009); available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-472.pdf.

²² *Salazar*, 130 S. Ct. at 1820..

²³ *Id.* at 1822 (Alito, J., concurring in part and concurring in the judgment).

²⁴ *Id.*

cross”²⁵ Perhaps sensing that the practice of mass wartime graves in Europe did not readily translate to a single cross put on government land in the United States more than a decade after the war ended, Alito invoked the biography of Bembry, a non-religious veteran.

The decision to understand a cross as a non-denominational war memorial does not come without cost. Look closely at Justice Kennedy’s statement: the cross is not “merely” about Christ; it evokes “far more” than Christianity.²⁶ Imagine discussing the cross in those terms with devout Christians outside of the context of this case. Learned Hand wrote that Bayer “can scarcely claim to have been ignorant of the fact” that the meaning of “Aspirin” had not been protected when its product was sold.²⁷ Christians who applaud treating the Latin cross as a non-denominational symbol can scarcely claim to be ignorant of where this is headed.

III. JUSTICE BLACKMUN’S MENORAH

The reason they cannot be ignorant of where this is headed is that we have been down this road before.²⁸ In 1984, the Supreme Court allowed the display of a crèche on public land because it was surrounded by a Santa Claus house, reindeer, candy-striped-poles, a Christmas tree, and other items including a talking wishing well.²⁹ Commentators and lower courts were incredulous, with one judge saying the Court was “requiring scrutiny more commonly associated

²⁵ *Id.* at 1821.

²⁶ *Id.* at 1820.

²⁷ *Bayer*, 272 F. at 512.

²⁸ GOLDBERG, *supra* note 2, at 66-93.

²⁹ *Lynch v. Donnelly*, 465 U.S. 668, 671, 687, 695 (1984).

with interior decorators than with the judiciary.”³⁰ The loss of religious meaning in the display was obvious.

Then, matters took a turn for the worse. In 1989, the Supreme Court struck down a crèche surrounded by flowers on courthouse steps, while upholding the display on public land of a Chanukah menorah next to a Christmas tree and a sign saluting liberty.³¹

This time, the menorah got the worst of it. Justice Blackmun, who was not Jewish, wrote the controlling opinion. He noted the religious meaning of the menorah as a symbol of the Jewish holiday Chanukah, but argued that the menorah has other meanings as well since Chanukah has a “political or national, as well as a religious, dimension: it tells of national heroism in addition to divine intervention. Also, Chanukah, like Christmas, is a winter holiday”³² While observing that “[a]n 18-foot dreidel would look out of place and might be interpreted by some as mocking the celebration of Chanukah,”³³ Blackmun concluded, “[i]t does not demean Jewish faith or the religious significance of the menorah to say that the menorah in *this* context represents the holiday of Chanukah as a whole (with religious and secular aspects).”³⁴

Chanukah, which in fact celebrates efforts by Jews to avoid assimilation by Greek culture, has now been wholly assimilated.³⁵ The

³⁰ American Jewish Congress v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

³¹ County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 578 (1989).

³² *Id.* at 585.

³³ *Id.* at 618.

³⁴ *Id.* n.68.

³⁵ GOLDBERG, *supra* note 27, at 83. Indeed, the nine-branched Chanukah menorah is much more ubiquitous than the ancient seven-branched menorah, a far more important symbol of Judaism. *Id.* at 83-86.

fault does not lie with Justice Blackmun; it is highly observant Jews who have pushed to have menorahs on public land.³⁶ They presumably believe, as do the Christians who continue to fight for crèches surrounded by cartoon figures, that they are pulling a fast one on society: they are sneaking religion onto public land. But they are mistaken.

A similar fight has been going on for years over the posting of the Ten Commandments in public buildings.³⁷ Oddly edited, poorly translated versions of the Commandments have been cropping up with increasing frequency since the rise of the “Hang Ten” movement in 2000 and the political popularity of Alabama’s Judge Roy Moore, who, in 2001, installed a 5,280 pound granite version of the Commandments in his courthouse. The relevant legal framework is provided by several Supreme Court decisions on Commandments displays, which reach conflicting results, always by a five to four vote. At present, a lower court unlucky enough to get one of these cases looks at factors such as what, if anything, surrounds the Commandments (Judge Moore included the National Anthem, *inter alia*), and whether the Commandments have been ignored by passersby (if they have, they are more likely to be held constitutional).³⁸

³⁶ See, e.g., Rivka Chaya Berman, *Allegheny v. ACLU: Good for Chanukah*, CHABAD LUBAVITCH HEADQUARTERS NEWS, Dec. 10, 2009, available at <http://lubavitch.com/news/article/2027834/Allegheny-vs-ACLU-Et-Al-Good-for-Chanukah.html> (last visited June 9, 2010).

³⁷ GOLDBERG, *supra* note 27 at 7-38.

³⁸ For an impressive, thoughtful Court of Appeals decision in this difficult area, see *Green v. Haskell County Bd. of Comm’rs*, 568 F.3d 784, 789 (10th Cir. 2009), *cert. denied*, 2010 U.S. Lexis 2057 (2010).

This is not just silly. It reduces a vital biblical text, which appears in different form in Exodus and Deuteronomy, to an empty symbol. Certainly, those who push to make the sacred into the political have not focused on the substance of the Commandments. They overlook, for example, the statement in the Commandments that “I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.”³⁹ Even the relatively uncontroversial dictates are ignored. Sabbath observance, for example, the subject treated at greatest length in the Commandments, has diminished in recent decades.⁴⁰ The one thing we can say with confidence about the Ten Commandments today is that people would rather display them than obey them.

It is tempting to believe that these decisions, and the bleached faith that they encourage, are an artifact of the Supreme Court’s use of the endorsement test to sort out Establishment Clause cases involving passive displays. Under that test, a religious display is unconstitutional if it causes a reasonable observer to believe that the government endorses religion by sending “a message to non-adherents that they are outsiders, not full members of the political community.”⁴¹ This approach places a premium on putting a variety of symbols or plaques around a religious icon so that an observer will interpret the display as endorsing something other than religion, such as freedom or diversity or respect for the war dead.

³⁹ *Exodus* 20:5.

⁴⁰ TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE, 48-49 (2002).

⁴¹ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

The endorsement test is closely associated with former Justice O'Connor, and it is quite possible that it does not command a majority on the current Supreme Court. Indeed, with the replacement of Justice O'Connor by Justice Alito, it is possible that five Justices – Roberts, Scalia, Kennedy, Thomas and Alito – would now adopt the rival coercion test.

In theory, the coercion test would allow frankly religious, even sectarian, displays on public land. Justice Kennedy, the primary proponent of this test, has written that while the government “may not coerce anyone to support or participate in any religion or its exercise,” passive religious displays on public property pose no such problem: “Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.”⁴²

But it turns out that the coercion test, at least outside of the context of seasonal displays, requires the very same sort of case-by-case analysis of religious content as the endorsement test, and thus puts the same pressure on those who want to post religious displays to water those displays down. This was clear, albeit somewhat hidden, from the beginning. In the very case where Kennedy told passersby to just ignore a Christmas display, he wrote that the result might be different “in an extreme case,” such as “the permanent erection of a large Latin cross on the roof of city hall,” because such an “obtrusive year-round religious display would place the government’s weight

⁴² *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 659, 661, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

behind an obvious effort to proselytize on behalf of a particular religion.”⁴³

Salazar, of course, involved a permanent display of a Latin cross on federal land. The five Justices who might support making coercion the relevant legal test made up the only five votes for upholding the cross. While Justices Scalia and Thomas concurred in the judgment on standing grounds, Kennedy, writing for Roberts and Alito, did not suggest that passersby could “turn their backs.” Instead, he engaged in the sort of opinion that could have come from Justice O’Connor in the heyday of the endorsement test. He noted that the cross could not be seen from the nearest highway, that it once (but not now) was accompanied by wooden signs identifying it as a war memorial, and, most importantly, as we noted before, he wrote that given the use of “small crosses in foreign fields marking the graves of Americans who fell in battles,” this cross “evokes far more than religion.”⁴⁴

When a central religious symbol, such as the Latin cross, is described in this fashion in a Supreme Court opinion, the cost to real faith can be as great as if it were surrounded by a Santa Claus and his reindeer. Perhaps using a cross as a war memorial seems less dangerous than surrounding it with symbols of other faiths. But even if the “cross as war memorial” retains a vaguely religious meaning, that is hardly good news for Christianity. As Carl Esbeck said about *Salazar*:

They’ve taken a symbol of the church and turned it into civil religion. This can be bad for

⁴³ *Id.* at 661.

⁴⁴ *Salazar*, 130 S.Ct. at 1820.

evangelicals because when people look at a nativity scene or a Roman cross, we want people to think of the God of the Bible. If these too become simply civil religion to Americans, it makes the task of evangelism harder for Christians.⁴⁵

In other words, when you tell people that a cross is a war memorial, they just might start to believe you. The cross now joins the crèche, the menorah, and the Ten Commandments as an increasingly watered-down symbol of an increasingly politicized faith. As we have noted, no symbol has a meaning that is fixed forever, separate from historical context. The question is not whether it is possible for a religious symbol to lose its distinctive meaning, but whether this is desirable. Those pushing religion into the public square fail to realize that in our increasingly secular, commercial culture, when a cross starts to be treated like a Christmas tree, it may end up losing its importance .

IV. THE CATHOLICS AND THE CRUCIFIX

One possible reading of *Salazar* begins by noting that the Justices – Kennedy, Roberts, and Alito – who joined the opinion which saw the cross in the desert as non-religious, are all Catholic.⁴⁶

⁴⁵ Cathy Lynn Grossman, *Supreme Court's New Hymn: The Old Rugged War Memorial*, USA TODAY, Apr. 29, 2010, <http://content.usatoday.com/communities/Religion/post/2010/04/cross-christianity-supreme-court/1>.

⁴⁶ Elesha Coffman, *6 Catholics, 3 Jews*, CHRISTIANITY TODAY, May 11, 2010, <http://www.christianitytoday.com/ct/2010/mayweb-only/29-22.0.html?start=1>. Justice Sotomayor joined Justice Stevens' dissent in *Salazar*, an opinion that saw the Latin cross in the desert as religious. In another setting, Justice Thomas described a Latin cross erected by the KKK as a political rather than religious symbol. See

This may be relevant because the cross in question was Latin : it consisted of two bars, a vertical one and a shorter, horizontal one without the figure of Jesus . The Latin cross, in other words, is an empty cross. By contrast, a crucifix is a three-dimensional cross with a representation of Jesus' body on it.

While the empty cross and the crucifix are both important symbols for Christians, the empty cross is more closely identified with Protestants while the crucifix is more closely identified with Catholics.⁴⁷ The Protestant perspective is that while the empty cross does not deny Christ's suffering it focuses more on His resurrection. The Catholic point of view is that the crucifix emphasizes Christ's suffering which gives meaning to His resurrection. These differences among Christians are less sharp than they once were, but they still exist. For example, Boston College recently decided to emphasize its Catholic heritage by hanging crucifixes in every classroom.⁴⁸

It may be that these three Catholic Justices found it easier to interpret the empty Latin cross in the desert as non-religious because it was not a powerful religious symbol for them. This possibility is reinforced by the fact that it was the sole Protestant on the Court, Justice Stevens, who wrote the principle dissent in *Salazar*,

Capitol Square Review Bd. v. Pinette, 505 U.S. 753, 770 (1995) (Thomas, J., dissenting).

⁴⁷ See, e.g., Linda Negro, *Cross Purposes: Christians View Symbol Differently*, PLAIN DEALER, Nov. 25, 1995, at 6E; Nancy Haught, *Protestants Drawn to "Passion" Despite Its Catholic Perspective*, THE OREGONIAN, Feb. 22, 2004, at L01; Susan Hogan, *Cross Purpose: Christians Rejoice, Disagree: Emphasis on Crucifixion vs. Resurrection Part of Spirited Debate on Symbol of Faith*, DALLAS MORNING NEWS, Apr. 13, 2001, at 1A.

⁴⁸ Posting of Alison Go, THE PAPER TRAIL, <http://www.usnews.com/education/blogs/paper-trail/2009/02/17/boston-college-hangs-crucifixes-in-all-classrooms> (February 17, 2009).

emphasizing that “[t]he cross is not a universal symbol of sacrifice. It is the symbol of one particular sacrifice, and that sacrifice carries deeply significant meaning for those who adhere to the Christian faith.”⁴⁹ In fact, in an earlier case, Stevens alluded to the varying perspectives of Christians concerning the cross when he wrote, “The Latin cross is identifiable as a symbol of a particular religion, that of Christianity; and, further, as a symbol of particular denominations within Christianity.”⁵⁰ Stevens is surely correct. Consider, for example, the Church of Jesus Christ of Latter Day Saints, often called the Mormon Church, which uses no cross at all as a symbol of its Christian faith.⁵¹

So, were Kennedy, Roberts, and Alito seeing something less religiously vital when they saw the Latin cross? Would this case have been different if the cross in the desert were a crucifix instead? It seems plausible that the rhetoric might have been different. It is hard to imagine that many Catholics would write or join an opinion that said the crucifix is “not merely a reaffirmation of Christian belief . . .” or that the crucifix “evokes far more than religion.”⁵²

But while the language might have varied, I am convinced that the result would have been the same. The powerful belief that religion benefits if its symbols make it into the public square, regardless of

⁴⁹ *Salazar*, 130 S. Ct. at 1836, n.8 (Stevens, J., dissenting). On Justice Stevens’ Protestant faith, see Adam Liptak, *Stevens: The Only Protestant on the Supreme Court*, THE NEW YORK TIMES, Apr. 11, 2010, <http://www.nytimes.com/2010/04/11/weekinreview/11liptak.html>.

⁵⁰ *Pinette*, 515 U.S. at 798, n.3 (Stevens, J., dissenting).

⁵¹ Gospel Library, Support Materials, The Church of Jesus Christ of Latter-Day Saints, Cross, http://www.lds.org/ldsorg/v/index.jsp?vgnextoid=ed462ce2b446c010VgnVCM1000004d82620aRCRD&locale=0&sourceId=c51f991a83d20110VgnVCM100000176f620a___&hideNav=1.

⁵² *Salazar*, 130 S. Ct. at 1820.

cost, would cover the crucifix as readily as the Latin cross and the crèche. I fear that many Catholics would push for crucifixes in the public square as war memorials if they believed that approach would succeed in court. And I believe that under current case law, judges and Justices, regardless of their religion, would be likely to uphold such displays. In other words, it is not the religion of the parties or of the Justices that matters. It is the attitude toward religion itself that makes the difference.

There is some history here that may be illuminating. In 1955 a branch of the Knights of Columbus, a Roman Catholic fraternal organization, placed an eighteen-foot high crucifix, which included a six-foot tall terra cotta figure of Jesus, in a public park in North Township, Indiana.⁵³ The display was described as a war memorial and included a plaque on its base reading, “For God and Country. Dedicated to the memory of men and women whose love for this nation enabled them to make the supreme sacrifice of life itself in its defense.”⁵⁴ At the dedication of the memorial, the featured speaker, a local attorney, praised veterans and noted “Christ brought us brotherhood and that is why I am happy to be here today.”⁵⁵

Years later a challenge was filed in court, and, in 1993, the Seventh Circuit found a violation of the Establishment Clause. The decision worked its way through the Supreme Court precedents involving crèches and menorahs before striking down this crucifix on public land. The judges were strengthened in their result by Seventh Circuit precedent, which said that the Latin cross was “an

⁵³ *Gonzales v. N. Twp.*, 4 F.3d 1412, 1414 (7th Cir. 1993).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1415.

unmistakable symbol of Christianity as practiced in this country today.”⁵⁶ If that was true of the Latin cross, it was even more obviously true of the crucifix. Indeed the court said, “we are masters of the obvious, and we know that the crucifix is a Christian symbol.”⁵⁷ As to the plaque denominating the crucifix as a war memorial, the court noted that it was initially obscured by shrubbery and then was removed.⁵⁸

The Seventh Circuit’s North Township decision is in question today. The Circuit’s assumption in 1993 that a Latin cross is unmistakably religious seems quaint after *Salazar*. A court today might be troubled by the explicitly religious statements of the speaker at the dedication ceremony in Indiana. But the speaker was an attorney, not a clergyman, and he might be seen today as being like John Riley Bembry, a “not particularly religious man.” Moreover, the Knights of Columbus, the group that put up the North Township crucifix, is known for its dedication to war memorials.⁵⁹ And while the North Township crucifix was visible to far more people than the Latin cross in the desert, that it is prominently displayed should certainly not count against a war memorial.

Other considerations point to the same result. *Salazar* would lead modern supporters of a crucifix as a war memorial to cite European examples, such as the crucifix—which serves as a World War I memorial in Dachet, UK—since it was European examples that

⁵⁶ *Id.* at 1418.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1414.

⁵⁹ *Gonzales*, 4 F.3d. at 1414 (noting that the North Township crucifix was one of several erected by the Knights of Columbus).

were so central to Justices Kennedy and Alito.⁶⁰ And surely a crucifix can be readily seen as a symbol of the suffering of those who fought. Finally, the North Township court was concerned that a plaque explaining that the crucifix was a war memorial was not attached, but the equally missing plaque in *Salazar* made absolutely no difference to the Justices in that case. In fact, the Justices were affirmatively dismissive of what the plaque in the desert actually said before it disappeared. While the Justices repeatedly describe the Latin cross as a World War I memorial, the plaque that was put up more than a decade after that war ended simply said, “The Cross, Erected in Memory of the Dead of all Wars,” and “Erected 1934 by Members of Veterans of Foreign [sic] Wars, Death Valley post 2884.”⁶¹ So the North Township plaque, which commemorated the dead in all wars, was indistinguishable from that in *Salazar*.

The bottom line is clear. A crucifix as a war memorial in a public park has a very good chance of being upheld in court. And the lesson is equally clear. People of faith should resist the temptation to erect that crucifix lest another sacred symbol be bleached of its distinctive religious meaning.

⁶⁰ Janet Kennish, Datchett Village History, War Memorials, <http://www.datchethistory.org.uk/> (follow “War Memorials” hyperlink) (last visited June 11, 2010).

⁶¹ *Salazar*, 130 S. Ct. at 1812.