No Bueno, Buono: An Essay on Salazar v. Buono and Establishment Clause Remedies

David B. Owens, Stanford University
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By David B. Owens*

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ABSTRACT

Atop Sunrise Rock in the Mojave Desert sat a Latin Cross. The only problem, for some, was that this land happened to be owned by the federal government. After contentious litigation, the cross was deemed a violation of the Establishment Clause, and the district court issued an injunction forbidding the cross to remain. That judgment became final and unreviewable, but the district court's subsequent remedial action—declaring invalid Congress' attempt to sell only a small "donut" of land around the cross—was not. Congress' interesting end-around spawned further litigation and an order by the district court modifying the injunction despite the fact that the land was now technically "private." After the Ninth Circuit Court of Appeals affirmed the decision, the Supreme Court intervened and, in Salazar v. Buono, held that the district court erred by declaring the land-transfer invalid.

This Essay critically analyzes Buono and argues that the plurality failed to appreciate the remedial significance of the challenge to the land transfer. The plurality, it seems, attempts to re-litigate the Establishment Clause violation, though res judicata stood as a formal procedural barrier to making that determination. In so doing, I argue, the Court put form over substance by remanding the case, and ignored the "essential command" of the Establishment Clause—government neutrality. To make my case, I draw on political theory to clarify the concept of neutrality, and propose a novel way of thinking about Establishment Clause remedies by drawing on decisions considering the extent of Congress' Section 5 Enforcement Power under the Fourteenth Amendment. I conclude by trying to blur the sharp distinction the plurality draws—and accepts—between public and private space. Buono is a significant case, but not because it adds to or clarifies the classically confusing Establishment Clause jurisprudence (it doesn't). Instead, Buono is significant because, practically speaking, it reminds us of the how important remedial efficacy is when attempting vindicate fundamental rights.

* Law Clerk, Diane P. Wood (7th Cir.); J.D. & M.A. (Philosophy) Stanford University, 2010. Thanks to Josh Cohen for patience, helpful discussions, and inspiration.
“The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.” —Cummings v. Missouri

INTRODUCTION

A primary purpose of the Establishment Clause, we frequently hear, is to limit conflicts in political life. In many ways it certainly has. For instance, unlike debates over whether Congress may or should establish an official national language, there is universal agreement that Congress could not declare a national religion. Yet, controversies around the Establishment Clause, which draw on deep disagreements pervasive in our pluralist society, seem to be more present than ever, and have long created political battles. When the Supreme Court declared school prayer unconstitutional, people were up in arms. Other times, political battles—for better or worse—continue because the Supreme Court refuses to weigh-in.

In addition to controversies in political life, the Court itself has been famously vexed about how to conceptualize the Establishment Clause, and the underlying right it protects. Some argue that the Establishment clause merely prohibits overt coercion, while others—the
“nonpreferentialists”—maintain a narrow view of the Establishment Clause as merely composing some type of antidiscrimination or equal treatment rationale when it comes to things like Government partial-subsidies of parochial schools or the ability to put up monuments in public places. Then, there is Justice O’Connor’s “endorsement” approach, which has been the recent front-runner in thinking about the Clause.

The Court’s jurisprudential inconsistency is compounded by the fact that its approach differs by three contexts of Establishment Clause issues: (1) the distribution of money, (2) the content of classroom education, and (3) display of religious symbols in public places (or on public things). Disputes around the distribution of money often surface when state and local governments’ spend taxpayer money on educating students at parochial schools, while classroom content disputes frequently involve textbook disputes—whether teaching “intelligent design” is unconstitutional—school prayer, and issues related to students reciting “under God” in the Pledge of Allegiance. By contrast, symbols deal with public monuments and currency (“In God we Trust?”), commandments (on government property?), crèches, and crosses. The division of these three groups is important not just for the way the establishment prohibition plays out in each context, but also because the remedial questions, while often similar, can be quite different as well.

The remedial question, then, further complicates an already complex and inconsistent Establishment Clause doctrine. But, unlike defining the substantive right, the remedial question has received far less attention. “[I]n contrast to the . . . assessment of the prohibition itself, the analysis of remedies is an ad hoc and often superficial exercise with little doctrinal grounding—in keeping with the unfortunate treatment of remedies generally as ‘the poor cousin’ of

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9 Pleasant Gove v. Summum, 555 U.S. ___, 129 S. Ct. 1125 (2009), is a good recent example of some of the complex First Amendment issues local governments face. See also Bernadette Melyer, Summum and the Establishment Clause, 104 N.W. UNIV. L. REV. COLLOQUIY 95 (2009). For a discussion, and rejection of, the nonpreferential view see generally LEVY, supra note 2, at Ch. 4.
12 See Newdow v. Lefevre, 598 F.3d 638 (9th Cir. 2010) (no Establishment Clause violation for “In God we Trust” on federal money); Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) (same).
14 The three groups are general, and not hermetically sealed, meaning there are occasionally areas of significant overlap in thinking about the rights violation and its remedy. In particular, the types of claims asserted and remedies sought in Pledge of Allegiance cases, strikes me lingering closer to the symbolic context than some of the particular disputes raised in other areas. For a recent example, see Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007 (9th Cir. 2010). Judge Reinhardt’s dissent, presented like an ambitions law review article on the history of the Pledge, is particularly noteworthy and informative. See also KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION, at 69-74 (2006) (providing background on issues related to religious symbols outside of Supreme Court decisions).
15 This trend is not confined to Establishment Clause remedies, but has occurred in a broad range of litigation contexts. See generally Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 COLUM. L. REV. 857 (1999).
This approach—focusing heavily on the right, treating it as superior to the remedy—has been termed “rights essentialism.” Such a view construes rights and remedies as if they were unrelated and, as a consequence, fails to see the significance that the remedy plays in determining the value of the underlying right. By contrast, the “remedial equilibration” thesis argues that the best way to understand the value of a right is by looking to it remedy, i.e., by what courts will actually do when a claim is brought alleging a violation.

This backdrop is what makes Salazar v. Buono, such an interesting case. The remedial issue was, finally, thrust into the limelight. There, the Court was formally barred, by res judicata, from addressing the issue of whether the challenged display—a cross in the midst of a huge federally-owned preserve in the Mojave Desert of Southern California—violated the Establishment Clause. The Ninth Circuit affirmed the District Court, which held the cross’s continued perch was unconstitutional, and, as a remedy, issued a permanent injunction that forbade the Government “from permitting the display of the Latin Cross in the area of Sunrise Rock in the Mojave National Preserve.” Following the 2002 injunction, in 2004 Congress transferred the land containing the cross, creating a small donut of “private” land surrounded by the public preserve, and, when Buono challenged the transfer, the District Court sought continued enforcement of the injunction by blocking the transfer. Accordingly, when Buono arrived at the Supreme Court, the only issue presented was whether the District Court’s subsequent move—about the remedy alone—would stand.

Led by Justice Kennedy, a plurality of the Court reversed the District Court’s denial of the land transfer, as conducting the wrong inquiry, remanding the case in light of this determination. Justice Kennedy explained that the “District Court should have evaluated Buono’s modification request in light of the objectives of the 2002 injunction,” and relied heavily on the fact that the cross stood on formally private, not federal land. Justice Alito would have decided the issue then and there: the formal land transfer resolved the Establishment Clause issue. With Justice Thomas, Justice Scalia argued that Buono did not even have standing to challenge the land-transfer—a position that drew no other votes—because he was not seeking vindication of

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17 Levinson, supra note 15.
19 See Levinson supra note 15, at 858 (“Rights are dependent on remedies not just for their application to the real world, but for their scope, shape and very existence.”). The remedial equilibration thesis follows from the Legal Realist tradition. See, e.g., Karl N. Llewellyn, The Bramble Bush 83-84 (1951) (“Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do.”).
21 See Black’s Law Dictionary (8th ed. 2004) (“An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit. • The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.”); Buono, Slip Op. at 9 (“At that point, the judgment became res judicata to the parties and those in privity with the, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.”)
22 Buono, Slip Op., at 4
23 Id. at 16
24 See id. (Alito, J., concurring in part and in the judgment), Slip op. at 1 (“The factual record has been sufficiently developed to permit resolution of these questions, and I would therefore decide them and hold that the statute may be implemented.”).
his original remedy but, rather, an extension of it.25 Rounding out the plurality, the Chief Justice, who completely joined Justice Kennedy’s opinion, wrote separately to invoke *Cummings* (where this Essay began). He noted that, at oral argument, Buono’s lawyer apparently said it would be permissible for the government to tear down the cross, sell the land, then allow a private party to resurrect it, and concluded that the “Constitution deals with substance, not shadows.”26

Here, I will argue, is the grave irony of *Buono*: the plurality rests the impetus for its decision on “shadows,” not substance. Instead, and to re-quote the epigraph, the District Court, “intended that the rights of the citizen should be secure against deprivation . . . by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.”27 From the remedial equilibration perspective, the District Court did the right thing: it eschewed an overly formal public-private distinction and, instead, looked to the substance of the transaction: a mere change in the title of “visually indistinguishable” land, following the pronouncement of an Establishment Clause violation designed to keep the symbol intact.28

This Essay critically analyzes the *Buono* plurality’s disposition of the case, from the perspective of remedial enforcement. This analysis overlaps, in part, with some of the arguments made in the dissents, which both better treat this case as one about the linkage between right and remedy—indeed, Justice Breyer claimed that the “legal principles that answer the question presented are found not in the Constitution but in cases that concern the law of injunctions”—but, my concern is different in two ways.29 First, I am not strictly worried about the doctrinal implications of *Buono*; my point here is not to crunch cases. Second, I want to use the case as the vehicle for raising two related, more theoretical, issues I think motivate the plurality: (a) hostility to the District Court’s original (and procedurally barred) Establishment Clause violation, that causes the plurality to miss the district court’s remedial insight, and (b) a form-over-substance approach to the public-private distinction in this remedial context that has the potential to undermine substantive establishment values.

To make my case, Part I briefly describes Establishment Clause basics from the rights side, and gives the backdrop for the dispute in *Buono*. Part II analyzes Justice Kennedy’s decision for the plurality, and, by way of drawing out important issues related Establishment Clause remedies, theorizes the notion of notion of neutrality, and proposes a novel way of thinking about remedial enforcement in this context. Part III draws upon case law in other areas to demonstrate how problematic the *Buono* plurality’s strong adherence to the public-private distinction is for both the Establishment Clause and, most significantly the continued availability of remedies for symbolic establishment.

I. THE SET UP

A. Legal Landscape

25 See *id.* (Scalia, J., concurring in the judgment), Slip op at 1 (“In my view we need not—indeed, cannot—decide the merits of the parties’ dispute, because Frank Buono lacks Article III standing to pursue the relief he seeks.”).

26 See *id.* (Roberts, C.J., concurring (quoting *Cummings v. Missouri*, 4 Wall. 277, 325 (1867). *But see Buono*, Slip Op. at 10 n.3 (Stevens, J., dissenting) (noting that the portion of the transcript to which Justice Roberts referred dealt with a hypothetical where counsel assumed that the government would not retain a reversionary interest or have a designation as a national memorial).

27 *Cummings*, 4 Wall at 325.


299 *Buono*, (Breyer, J., dissenting), Slip Op. at 3.
Nearly any discussion of the conditions for finding an Establishment Clause violation begins with *Lemon v. Kurtzman*, which set out a three prong test for determining whether a government action violated the Establishment Clause. But after significant criticism of *Lemon*, in her *Lynch v. Donnolley* concurrence Justice O’Connor proposed a reformulation that views endorsement as the touchstone of Establishment Clause inquiry. The endorsement approach derives from the principle that the “Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.” She focused on two methods of demonstrating how religion might be relevant to an individual’s standing: (1) by excessive entanglement that might interfere with independence or, (2) endorsement of disapproval of religion. “Endorsement sends a message to nonadherents that they are political outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.” Notably, Justice O’Connor’s approach requires endorsement be assessed from the perspective of an objective, “reasonable observer,” who is “deemed more informed than the casual passerby,” which is a “legal question to be answered on the judicial interpretation of social facts.”

Then, in *Allegheny v. American Civil Liberties Union*, a majority of the Court adopted O’Connor’s test, but Justice Kennedy penned a bitter dissent. Kennedy’s argued that the Establishment Clause was primarily about (both direct and indirect) coercion, but also sharply criticized the endorsement test as inconsistent with prior precedent, extreme in that it would require abandoning nearly all public Thanksgiving and Christmas celebrations, and claimed the “reasonable observer” standard was both wrong and unmanageable.

But, despite all this criticism, Justice O’Connor’s parry remains insightful for theorizing the Establishment Clause. In *Allegheny*, she echoed her terms from *Lynch*, and added that, “as a theoretical matter, the endorsement test captures the essential command of the Establishment Clause.” She continued:

> Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse

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30 403 U.S. 602 (1971) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”).

31 *See*, e.g., Steven G. Gey, *Religious coercion and the Establishment Clause*, 1994 U. ILL. REV. 463, 468-69 (1994) (“[The *Lemon* test] is possibly the most maligned constitutional standard the court has ever produced.”).

32 465 U.S. 668, 687 (O’Connor, J., concurring).

33 *Id.* at 690.

34 *Id.*


38 *Allegheny*, 492 U.S. at 686 (Kennedy, J., dissenting).

39 *See* *id.* (“If there be such a person as the ‘reasonable observer,’ I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least-favored faiths so as to avoid any possible risk of offending members of minority religions.’’); *id.* at 687 (“Even if the majority is quite right about the history of the menorah, it hardly follows that this same history informed the observers”).

40 *Lynch*, 465 at 627 (emphasis added).
the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.

An Establishment Clause standard that prohibits only “coercive” practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.41

I quote this language in full because it demonstrates the underlying theory behind the violation to be prevented, which can tell us some things about an appropriate remedy. First, remedies that do not actually cure the endorsement or disapproval of a particular violation will not work. Part of the problem, and this is especially true of symbols, is how religious messages establish the priority of some to the exclusion of others. This why damages remedies are rarely given for Establishment Clause violations— they are both hard to quantify, and, more fundamentally, they cannot not fully redress the wrong because the message of disapproval continues by the symbol’s continued existence. Second, as Justice Kennedy seemed to acknowledge in a different context, coercion alone is too cramped a vision of establishment to respect the fact of pluralism.42 Indeed, a curious statement in his Allegheny dissent is hard to square completely on coercion grounds.43 Courts, when evaluating these remedies, need to be mindful of the “subtle ways” government might seek to use their superior resources and power to continue violating the constitution, despite a court’s determination.44

Finally, returning to the insight from Cummings, we should look to the “essential command” of the Establishment Clause—even if disputed—because it will help us ask whether that command has been followed when we consider how it has been remedied. If, as some would have it, coercion is the command, then our remedial apparatus for symbolic establishment might not even exist. If, however, the establishment clause embraces a broader exclusion against endorsement, with a basis in neutrality, and most fundamentally, the equal liberty of those in our diverse society, a commitment to more aggressive, and potentially creative, remedies will be required to vindicate the Clause.45 Crucially, Cummings tells us, we cannot let mere shadows and manipulation guide us, but must remain committed to vindicating substance over form.

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41 Id. at 627-28.


43 Allegheny County, 492 U.S. at 661 (Kennedy, J., dissenting) (“But coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is per se suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.” (emphasis added)). Of course, just displaying a cross cannot be “coercion,” in the sense typically used. Justice Kennedy must be either (1), expanding, in a way inconsistent with Lee, a hard-to-define version of “indirect” or “psychological” coercion that, apparently, occasionally addresses silent symbols, or (2), which seems more intuitive, not actually think that the establishment clause is limited to coercion—whether described as direct or indirect. Put differently, this statement means that Justice Kennedy likely acknowledges that coercion is a sufficient but not necessary condition for unconstitutionality.

44 I assume here that the local government will typically resist significant curtailment of practices that are Establishment violations because they usually have the approval a majority of individuals in the community, which elect them.

Before moving to Buono, two five-four decisions from the 2005 term deserve mention. Decided the same day, one held a Ten Commandments posting unconstitutional, while the other permitted a Ten Commandments monument. First, in McCreary County v. ACLU of Kentucky, Justice Souter’s opinion for the Court applied the Lemon test, but focused primarily on neutrality. Two Kentucky counties put up gold-framed copies of the Ten Commandments in their courthouses, followed by resolutions of support by politicians. Then, after litigation began the counties added Magna Carta, the Declaration of Independence, the Bill of Rights, etc. to argue that the displays were historical, not religious. In my mind McCreary was an easy case—the legislative history revealed a thinly-veiled attempt to disguise an overtly religious purpose. In Van Orden v. Perry, a harder case, the Court held that a 6-foot statute inscribed with the Ten Commandments, one of 17 monuments in the park surrounding the Texas Capitol, was constitutional. The wild-card switch, though, was not Justice O’Connor, but Justice Breyer, who called the case “borderline,” eschewed any formal test, and, instead, relied upon sound “legal judgment.” Through an intensely contextual approach involving a variety of factors like historical experience and physical proximity in relation to other monuments, Breyer concluded that that capitol display was constitutional. After Van Orden, it is unclear whether the “endorsement” test endures, courts should look to Justice Breyer’s contextual approach, or if Justice Kennedy’s view will now set the standard.

B. The Buono Back-story

Atop “Sunrise Rock,” in the federally-owned Mojave Desert Preserve, which encompasses 1.6 million acres, or 2,500 square miles, of territory sits a five-foot Latin cross. “Just over 90 percent of the land in the Preserve is federally owned, with the rest owned either by the State of California or private parties.” The Cross, is visible from the nearest road from roughly 100 yards away, and was donated in 1934 by the Veterans of Foreign Wars (VFW) some 60 years before Congress created the Preserve, and since 1935 has been an off-and-on Easter gathering place. But, the National Park Service (NPS) has not opened any area of the Sunrise rock to individuals to erect any other displays, religious or otherwise, and there are no other displays or monuments in the area.

In 1999, NPS received a letter from an individual who identified himself as “Sherpa San Harold Horpa,” who was a long-time acquaintance of Fank Buono, a park employee from 1972 to 1997 and regular park visitor. Horpa, also a retired NPS employee, requested permission to

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47 545 U.S. 844 (2005)
48 See id. at 851-60 (describing the factual background and blatant religious references of some public officials).
49 Van Orden, 545 U.S. at 700 (Breyer, J. concurring in judgment) (“If the relation between government is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment.”); id. at 699 (noting that “the Court has found no single mechanical formula that can accurately draw the constitutional line in every case”). Cf. KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION 1 (2006) (“Sound constitutional approaches to the religion clauses cannot be reduced to a single formula or set of formulas, although we can identify major considerations that should guide legislators and judges.”).
50 See id. at 701-05 (looking to factors).
erect a ‘stupa’—a dome-shaped Buddhist shrine—near Sunshine Rock and the cross.54 Instead of granting the request, and after a letter from the ACLU, NPS conducted an historical review of the cross, deemed it unworthy of designation in the National Register of Historic Places, and by early 2000 announced plans to remove the cross. But, in December of 2000, Congress passed an appropriations bill preventing any federal funding from being used to remove the cross, thereby preventing NPS from doing so.55 Then, after Buono filed suit and his motion for summary judgment was pending, Congress designated the cross and area around Sunrise rock as “a national memorial commemorating United States Participation in World War I and honoring the American veterans of that war.”56

Despite the Congressional action, in 2002, the District Court ruled in favor of Buono, and issued a judgment that “Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.”57 But, again, Congress passed an appropriations bill prohibiting federal funds from being used to remove the cross. Then, the Ninth Circuit affirmed, but stayed the injunction to the extent it required removal, and instead permitted the Government to cover the cross, which they did first with a tarp and later with a plywood box.58 Thereafter, Congress passed a statute directing that the land surrounding the Cross be transferred to the VFW, but included a reversionary clause requiring the VFW to maintain the property as a memorial, along with other continued federal controls.59 Despite the permanent injunction, the Government did not appeal the Ninth Circuit’s affirmation. Accordingly, that judgment—that the cross violated the Establishment Clause and the proper remedy was a permanent injunction preventing the Government from “permitting the display of the Latin Cross”—became final, and unreviewable.60

Accordingly, when Congress, again through an appropriations bill, sold the land to the VFW in 2004, Buono challenged that transfer as a sham transaction and method for avoiding the District Court’s (now final) permanent injunction.61 The District Court considered case law indicating that such transfers are usually permissible unless “unusual circumstances” taint the transaction, and, upon finding several irregularities—like the method of transfer, the Government’s continued interest in the land, and the fact that it remained visually indistinguishable from the surrounding private land—turned to the remedial question.62 Deeming the transfer an “an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunset Rock,”63 Notable for present purposes is that the district court framed the issue in the case as one of remedial enforcement alone and, therefore, had no occasion to address whether the transfer itself was a separate Establishment violation.64 Given this framing the issue at the Supreme Court was narrow: “whether the District

54 Id. at 1206.
55 Id. at 1206-07.
59 See Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008) (describing significant continuing government oversight and control over the cross and preserve property).
60 See Slip Op. at 9 (“The Government therefore does not—and could not—ask this Court to reconsider the propriety of the 2002 injunction or the District Court’s reasons for granting it.”).
62 Id. at 1178-82.
63 Id. at 1182.
64 Id. at 1182 n.8.
Court properly enjoined the Government from implementing the land-transfer statute.  

With that in mind, consider Figure 1, which gives a snapshot of Buono in comparison to Van Orden and MCcreary.  

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II. REACHING FOR THE RIGHT: KENNEDY AND THE IMPORTANCE OF NEUTRALITY

A. Reaching for the Right

Justice Kennedy’s main worry in Buono was not about the law of remedies or effectuating the District Court’s injunction. Instead, as he tees up the issue: “The District Court did not consider whether the statute, in isolation, would have violated the Establishment Clause, and it did not forbid the land transfer as an independent constitutional violation. Rather, the court enjoined compliance with the statute on the premise that the relief was necessary to protect the rights Buono had secured through the 2002 injunction.” Note what Justice Kennedy does here:

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66 Adopted from Kidd-Miller, supra note 46. In addition to adding a Buono column, the enforcement mechanism row is new, and may provide another way of distinguishing Van Orden and Buono. Permanent injunctions are significant and though the Ninth Circuit clarified that the injunction did not require removal per se, such relief does significantly limit the freedom of government actors. See DAN B. DOBBS, THE LAW OF REMEDIES 108-110 (1973) (standards for injunctive relief); MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL REMEDIES 169-60, 184-87 (2002) (discussing prospective relief and distinguishing it from damages).
he turns a question about the propriety of an injunction (a remedial question) into one about the right, and shifts the focus from vindicating 2002 injunction, to justifying the 2004 land transfer; shifts from a effectuating a governmental loss, which cannot be undone, to the opportunity for seeing government, and a dominant religion, win. In so doing, he creates space for more rights construction and, it seems, room to advance his opposition to the District Court’s unreviewable determination.68

But, as he does it, Justice Kennedy’s reasoning, at times, lacks internal consistency. Kennedy, again, starts by framing the issue as “whether the District Court properly enjoined the Government from implementing the land-transfer statute.”69 From there, he briefly considers the law of equity, but selectively draws quotations that emphasize injunctive relief as an “extraordinary remedy,” and the importance of responding to “changed circumstances.”70 We should keep in mind, though, that in the context of symbolic government speech, injunctive relief is the rule, not the exception.71 On Kennedy’s account, the District Court erred by failing to “acknowledge the statutes’ significance,” because it (apparently wrongly) “examined the events that led to the statute’s enactment and found an intent to prevent removal of the cross.”72 In other words, the District Court erred by considering the reasons motivating the land-transfer statute’s passage. What’s the problem with that?

The error, Justice Kennedy tells us, was that the District Court took “insufficient account of the context in which the statute was enacted and the reasons for its passage.”73 What!? So, the district court was wrong to consider the reasons the statute was passed because it was supposed to consider the reasons the statute was passed. Of course, that’s not what Justice Kennedy means, and the rest of the pertinent paragraph demonstrates his sleight-of-hand. Instead of looking at the land-transfer statute, which was passed in response to the District’s Court finding an Establishment Clause and subsequently issuing an injunction,74 Justice Kennedy wants us to look at the reasons the cross was built and concludes the paragraph by positing that “those who erected the cross intended simply to honor our Nation’s fallen soldiers.”75 That may be true, and is laudable, but that intention does not pertain to the 2002 injunction, which was supposed to be our focus. By shifting from a determination of whether the land-transfer statute altered the propriety of the ongoing injunctive relief to the history of the cross, our emphasis is no longer on purposes of the 2002 remedy, but, instead, provides Kennedy space to undermine the underlying finding of unconstitutionality by bootstrapping it to a separate Establishment Clause rights determination.

Next, we finally get a positive statement of what the District Court should have done: “evaluated Buono’s modification request in light of the objectives of the 2002 injunction.” What are those? “The injunction was issued to address the impression conveyed by the cross on

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68 See Slip Op. at 14. (“Although for purposes of the opinion, the propriety of the 2002 injunction may be assumed, the following discussion should not be read to suggest this Court’s agreement with a judgment, some aspects of which may be questionable.”). Two things strike me here: First, given the doctrine of finality and res judicata, the court must, not may assume that the “propriety” of the injunction, and second, this is a statement made only in criticism, not just raising the logical possibility of “questionable” aspects of the underlying finding.

69 Id. at 9-10.

70 Id. 10-11.

71 See Budd, supra note 16, at 213.

72 Id. at 11 (emphasis added).

73 Id.

74 Kennedy acknowledges this point. See id. at 4-5 (discussing Congressional action prior to and during various stages of the litigation).

75 Id. at 11.
federal, not private, land. Even if its purpose were characterized more generally as avoiding the perception of governmental endorsement, that purpose would favor—or at least not oppose—ownership of the cross by a private party rather than by the Government.”76 From there, Kennedy commands the district court to consider the “reasonable observer” standard as applied to the Cross following the transfer.

Four things seem curious here. First, and though the analytical framework is correct—we should be looking at the objectives of the 2002 injunction—Kennedy assumes that the objectives have been already been altered by the land transfer when it is the very land transfer that is being challenged as a sham.77 The inquiry, for the district court, was not whether, assuming the transfer is appropriate, what is the Establishment Clause problem but, instead, a facial challenge to the transfer itself as a method for skirting the objectives of the injunction.78

Second, as he notes in Buono, Kennedy strongly criticized the “reasonable observer” methodology in his Allegheny dissent.79 Also, given the unsettled nature of the law following Van Orden, Kennedy’s requirement that the District Court use this particular test, seems insufficiently deferential to that court’s authority, and the Supreme Court’s typical deference, for determining how to modify a final judgment.80 Again, as Justice Breyer was at pains to remind us, this inquiry only matters if the focus is on an Establishment Clause violation, not on whether this was an appropriate way of modifying an injunction.81

Third, Kennedy gets into this hole by implying that the District Court needed to utilize the same Lemon prong/test in analyzing land transfer as it did when granting the initial injunction.82 The initial injunction was based upon the perceived endorsement of a reasonable believer, but the District Court rejected the land transfer based upon a finding of religious purpose. Why should this matter? On one hand, Justice Kennedy’s analysis has some intuitive appeal. If the constitutional violation was sending the wrong message, and Congress does something to change the message shouldn’t we inquire as to whether they have actually succeeded? That’s what the Government claimed it was doing.83 In most cases, this means looking at whether the monument has been taken down, signs or disclaimers provided or, on a non neutral basis, permitting other groups to donate their own monuments in the state-created “public fora.”84 But, the question of the transfers independent validity is analytically prior to its substance and, at any rate, shouldn’t an illicit purpose trump general endorsement concerns

76 Id. at 16.
77 See Buono v. Norton, 364 F. Supp. 2d 1175, 1178 (C.D. Cal. 2005) (“Plaintiff contends that the land transfer directed by Section 8121 is a sham by Defendants to preserve the Latin cross in the Preserve.”).
78 On this point, see Buono, (Stevens, J., dissenting), Slip Op. at 7 (“In evaluating a claim that the Government would impermissibly ‘permit’ the cross’ display by effecting a transfer, a court cannot start from a baseline in which the cross has already been transferred.” (emphasis in original)).
79 Id., Kennedy Op., at 16.
80 See id. Stevens Op., at 3-5 (describing deference to district court’s determinations about the continued propriety of ordered relief and how “changed circumstances” affect such a determination).
81 Id., Breyer Op., at 4-6.
82 Id. Kennedy Op., at 15. (“Given the sole reliance on perception as a basis for the 2002 injunction, one would expect that any relief grounded on that decree would have rested on the same basis. But the District Court enjoined the land transfer on an entirely different basis: its suspicion of an illicit governmental purpose.”).
83 See Buono v. Norton, 364 F. Supp. 2d 1175, 1178 (C.D. Cal. 2005) (“Defendants contend that the transfer of the land on which the cross stands to private ownership will remedy the Establishment Clause violation.”).
84 See, e.g., Pleasant Gove v. Summum, 555 U.S. 129 S. Ct. 1125 (2009); Capitol Square Review Board v. Pinette, 515 U.S. 753 (1995) (free speech compels city to permit the Ku Klux Klan to erect a large Latin cross on a public square near the state capitol, and no Establishment Clause violation for permitting the cross into the park with equal access by other groups).
either way? Should endorsement violations be resolvable by methods that are adopted because they serve the purpose of advancing religion? Purposive violations are generally thought to be more constitutionally suspect than so-called “benign” classifications.\(^85\) And, even on Kennedy’s apparent preference for an “indirect coercion” test, wouldn’t he admit that an action taken with the explicit purpose of promoting religion through government is unconstitutional?\(^86\)

Fourth, Justice Kennedy remands the case and asks the district court to determine “the land-transfer statute’s bearing on this dispute,” in light of the fact that the cross is now on private, not federal, land.\(^87\) This is the first problem again, though Kennedy is certainly right about a key remedial equilibration insight: if circumstances change that make the ordered relief inappropriate or anachronistic, then the injunction should be altered.\(^88\) But, the way he applies that insight misses the point of Buono’s challenge. His argument is that the transfer itself, which could potentially change the circumstances and require a new endorsement inquiry is itself invalid, because it is a pretext for formally circumventing the injunction. Paraphrasing Justice Stevens, the baseline for remedial analysis cannot be the presumption that the challenged action has already occurred.\(^89\)

**B. Toleration and Neutrality**

Justice Kennedy’s comments with respect to the district court’s determination of purpose raise important questions regarding neutrality. If, as the logic of his opinion would permit, government actors can cure symbolic endorsements of religion in ways that have the purpose of promoting religion, a core meaning of the Establishment Clause is lost. But part of Kennedy’s concern is certainly valid: avoiding hostility towards religion.\(^90\) Accordingly, Justice Kennedy is right that the Establishment Clause “leaves room to accommodate divergent values” and “does not require eradication of all religious symbols in the public realm.”\(^91\) The vexing problem is how to both accommodate those with religious views but not exclude minorities or outsiders.

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85 Consider, for example, Equal Protection violations. The court permits significant amounts of governmental programming that results will have a racially disparate impact, see Washington v. Davis, 426 U.S. 229 (1976), but once a discriminatory purpose is found, the court is quick to intervene. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). Closer to home, consider Stone v. Graham, 449 U.S. 39 (1980), which held unconstitutional a Kentucky law that required posting the Ten Commandments in public schools, though they were purchased with private funds because the law’s “avowed purpose” was to promote religion. Cf. Levy, supra note 2, at 129 (complaining, rather cynically, that “tests have little to do with decisions; the use of a test lends the appearance of objectivity to a judicial opinion, but no evidence show that a test influences a member of the Court to reach a decision that he would have not reached without that test. And, Justices using the same test often arrive at contradictory results.”).

86 Consider on this point, the fact that Justice Kennedy joined Justice Stevens opinion for the court in Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000). There, the Court held that a student-led practice of having a “brief invocation and/or message [to] solemnize the event” at football games was an unconstitutional. Justice Stevens concluded that “the specific purpose of the policy was to presser a popular ‘state-sponsored religious practice,’ that ‘invites and encourages religious messages.’ Id. at 305.


88 See id. at 14. Justice Stevens admits this, too. See Slip Op. at 6-7. This, in a way, is also the entire point of Justice Breyer’s dissent. Cf. McCreary County, 545 U.S. at 874 (“It is enough to say here that district courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions.”).

89 See Buono, Stevens Slip Op. at 7.


What we want, I will argue, is neutrality. The neutrality norm is not without its critics, and some have attacked it on manageability and theoretical grounds. But there is a reason that the Court—since its first encounter in *Everson*—and commentators repeatedly return to neutrality. Neutrality describes a basic articulation of the “essential command” of the Establishment Clause. Brian Barry’s definition is insightful: “Neutrality is . . . a coherent notion that defines the terms of equal treatment for different religions. It is compatible with neutrality, however, that religions should be publicly recognized: the only constraint is, again, that they should be treated equally.” With this in mind, the problem with putting a cross atop city hall is not, as Justice Kennedy has suggested, that it is coercive, rather, it is problematic in light of the fact that expresses a preference for one religion, which undermines the state’s role as a neutral institution created by a pluralistic people to protect and respect their liberty as a community of equals.

Neutrality moves us beyond formalistic notions of separation, and helps us see the remedial justification for the District Court’s modification of its 2002 injunction. Missing from the Supreme Court’s opinion is the fact that Horpa requested to build a Buddhist stupa in the park, and that denial is what triggered series of events leading to this litigation. Public places may certainly be in a bind when private parties want to build religious monuments in the public forum, but accepting any monument with religious roots will, and should, raise establishment concerns and have us consider whether the government entity is being more neutral than bias.

Drawing on Ronald Dworkin, we can think about pursuing neutrality in terms of what type of country we have. Dworkin starts with the premise that we “all agree . . . our government must be tolerant of all peaceful religious faiths and also of people of no faith.” But, we have a choice as to where this value of toleration derives from. Are we a “religious nation” that tolerates nonbelievers, or, in light of our fundamental commitment to equal liberty, are we a committed to “thoroughly secular government . . . A religious nation that tolerates nonbelief? Or a secular nation that tolerates religion?” Related to establishment, the tolerant religious vision might accept that we cannot adopt a national religion of a particular sect—though it might be open to the notion of civil religion—and will only limit its support of religion when it is necessary to protect the freedom of dissenters and nonbelievers. By contrast, a tolerant secular society cannot

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94 *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (requiring neutrality under the Establishment Clause); see Smith, *supra* note 93, at 313-16 (describing the “allure of neutrality” and citing significant scholarship emphasizing neutrality, esp. n. 184).

95 *BARRY, supra* note 2, at 26 (2001).

96 *Allegheny County*, 492 U.S. at 661 (Kennedy, J., dissenting).

97 See Beschle, *supra* note 92, at 174 (“Neutrality connotes a lack of favor or disfavor, but it does not connote total noninvolvement as does separation. A judge or an umpire is neutral as between the participants, but he does not separate himself from them.”).

98 *See Melyer, supra* note 9.

99 *RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?* 56 (2006).

100 *Id.* at 58; cf. *JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT*, at Book IV Ch.8 (Cranston ed., 1968) (1762) (describing civil religion and noting that “it is very important to the state that each citizen should have a religion which makes him love his duty, but the dogmas of that religion are of interest neither to the state or its members”).
make religion or atheism illegal because “it is collectively neutral on the subject of whether there is a god or gods or which religion is best, if any is.”102 For symbolic issues, in the secular society Christmas trees would not, of course, be outlawed but they would not be installed or permitted on public property, either.

These two conceptual models help illustrate, I think, why the concept of neutrality is important for thinking about endorsement. Clearly, we do not have a tolerant religious state. But, the American experience is more complicated, and is less fully-secular, than the “thoroughly secular” model. We have important references to religion in a variety of places, many of which do not necessarily violate the “collective neutrality” we now strive for, but we have, and should embrace, a commitment to equal liberty that implicates the very heart of these issues.103 The big problem, of course, is history. Our nation has changed and continues to do so, which means we have to reconcile history, which is always imperfect, with our (again, contested) normative ends. Surely, neutrality is violated when we are overly hostile religion, 104 and the thoroughly secular model works imperfectly because its extent of religious exclusion is too strong.105 But, sectarian monuments will often offend neutrality in the opposite direction.

In addition to its conflict with our historical arrangement, the absolutely secular state is normatively undesirable because its attempt at the complete privatization of religion “fails to accommodate all those whose beliefs include the notion that religion ought to have public expression.”106 Neutrality does not require—or permit—absolute exclusion. That said, part of the difference between the models is about baseline and which tendency best suits our collective trajectory. Especially in the establishment clause context, where it is often those in the political majority who are benefited or have their views expressed through the government symbol, in close cases, the tie-breaker should go toward promoting neutrality, even if that means removing more monuments than we retain, especially when newly adopted.107 Of course, this may create political conflict, but, as we have seen, this may be inevitable and, more importantly for present

102 DWORKIN, supra note 99, at 58.
103 For more on the “equal liberty” view, see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION CH. 2 (2007); see also id. at Ch. 4 (applying equal liberty to symbols under the Establishment Clause and endorsing something akin to Justice O’Connor’s view from Lynch). Dworkin’s view also relies on a concept of equal liberty, and all seem to have antecedents in Rawls. See DWORKIN, supra note 99, at 9-21 (describing equal dignity and personal responsibility (liberty) as fundamental principles); JOHN RAWLS, A THEORY OF JUSTICE 52-56 (2d rev. ed. 1999) (summarizing his two principles of justice).
104 Cf. Buono, (Alito, J., concurring in part and in the judgment), Slip Op. at 4 (“The demolition of this venerable if unsophisticated monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all pubic places and symbols any trace of our country’s religious heritage.”).
105 Cf. McCrery County v. ACLU of Kentucky, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (describing France as a secular republic where religion “is to be strictly excluded from the public forum. This was not, and never was, the model adopted by America. . .”); Lynch v. Donnelly, 465 U.S. 668, 674 (1984) (“There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”).
106 BARRY, supra note 2, at 25-26.
107 Newly adopted sectarian monuments have, with some exceptions, been adopted to promote religion, and in response to political majorities wanting to inject religion into government institutions. These political battles are, in some sense, about what the Establishment Clause should mean, but, too often, reject the notion of neutrality, and as a consequence should be prohibited. See, e.g., McCrery County 545 U.S. 844 (discussing neutrality and religious purposes); Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Al. 2002) (part of campaign promise to install Ten Commandments memorial, political official later basically begs to be held in contempt of court, all based on well-stated religious purpose).
purposes, the potential for conflict is just a reminder that due care need be taken when thinking about the remedy.\textsuperscript{108} That it should simultaneously cure the violation—end the endorsement and lack of neutrality—but do so in a way that does not insist upon absolute exclusion.\textsuperscript{109}

The foregoing, then, helps us conceptualize the remedial inquiry. In the Fourteenth Amendment context, courts apply significant tools for assessing the fit between a state interest and the means used to achieve it. In \textit{City of Boerne v. Flores}, the Court announced a “congruence and proportionality” standard for addressing Congressional exercises of their Section Five enforcement power.\textsuperscript{110} The decision draws on the intuition that Congress cannot be expected to identify precisely the scope of the constitutional prohibition, so its remedial power can exceed that by some margin so long as congruent and proportional to the actual constitutional prohibition. Now, think about the congruence standard in terms of establishment remedies. Assume again that a court, like Congress, cannot always, despite attentiveness to context, precisely find “Platonic Neutrality,” though we all agree that such a result is desirable. So, when confronted with challenges, courts have three basic options: (1) over-enforce the constitutional prohibition in a way congruent and proportional to the violation; (2) perfectly mirror our ideal norm of Platonic Neutrality; or (3) under-enforce the constitutional guarantee, and permit unlawful establishment. We, of course, want (2), but suppose we cannot have it. We are then forced to make a tradeoff—permit unconstitutional endorsement in favor of dominant religious groups versus over-exclude some religious displays in public places for the sake of neutrality.

Figure 2 gives a picture of these tradeoffs, and the final row paints the continuum of actual remedies a court might order to redress an Establishment Clause violation. Of note, and what makes the inquiry difficult, is that there are no one-remedy-fits-all solutions. As courts and commentators have stressed, context matters for finding a violation, but even more significantly context matters for finding the right remedy.

<table>
<thead>
<tr>
<th>Model</th>
<th>Constitutional Worry</th>
<th>Remedial Tendency</th>
<th>Remedial Choice</th>
<th>Relationship between State-Type, the Constitution, and Neutrality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Secular State</td>
<td>Hostility (disapproval/discrimination)</td>
<td>Over-enforcement</td>
<td>\textit{Required Dismantling}</td>
<td>Establishment (endorsement/favoritism/coercion)</td>
</tr>
<tr>
<td>Religious State</td>
<td>Congruence/Proportionality</td>
<td>\textbf{(2)} Platonic Neutrality</td>
<td>Permanent/temporary injunctions; Removal; Increased inclusion; declaratory judgment; land-transfer (?)</td>
<td>Under-enforcement</td>
</tr>
<tr>
<td>Unconstitutional establishment (lawlessness)</td>
<td>\textbf{(3)}</td>
<td></td>
<td></td>
<td>None, Damages</td>
</tr>
</tbody>
</table>

In the Establishment Clause context, as in other areas of constitutional law, we should probably be more worried about under, rather than over enforcement for several reasons. First, it gets back to what type of state we have, one that is more secular than religious. Under-enforcement of the Establishment Clause tends us towards a religious state, away from the

\textsuperscript{108} See Van Orden v. Perry, 545 U.S. 677, 704 (Breyer, J., concurring in judgment) (discussing the “religiously based divisiveness the Establishment Clause seeks to avoid”); \textit{Buono}, Alito Op. at 4 (positing that demolition of the cross would have been interpreted as a government “bent on eliminating from all places and symbols any trace of our country’s religious heritage.”). \textit{But see id.} Stevens Op. at 22 n. 11 (responding to Alito and arguing that it “does not follow that the government can decline to cure an Establishment Clause violation in order to avoid offense”).

\textsuperscript{109} See \textit{id.} Stevens Op. at 22 n. 11 (“The proper remedy, like the determination of the violation itself is necessarily context specific.”); Alito Op. at 4-5 (discussing alternatives).

\textsuperscript{110} 521 U.S. 507 (1997).
(mediated) secular nation we have. If the tradeoff is between permitting government lawlessness (establishment) and congruent and proportional “over-enforcement,” then the tie ought to go to the enforcing the constitutional prohibition. Second, the political realities of the Establishment Clause challenges mean minority religions are likely to suffer the greatest harm, judges are less likely to strike down decisions that will cause significant political rancor, and erring on the side of under-enforcement inevitably means increasing the already present right-remedy gap in constitutional adjudication. Third, as Joshua Cohen argues, permitting exclusion via endorsement of religion has the effect of disenfranchising outsiders from the political process in ways that are unique to religion. Finally, the Establishment Clause is buttressed against the Free Exercise clause, which serves to promote and ensure inclusion in the public fora by even the most under-represented groups. So, if there is a worry about hostility to religion, followers have an additional constitutional guarantee at their back, while nonbelievers, seeking state-neutrality, do not.

Coming back to Buono, suppose that the initial 2002 permanent injunction is a category (1) remedy. Another fact without much significance to the plurality—but important for the actual conflict on the ground—is that the Ninth Circuit stayed the permanent injunction to the extent it required dismantling the cross itself. Was the remedy so overreaching that it was incongruent or out of proportion to the violation? No. And, with the Ninth Circuit’s clarification, Congress was free to choose other options, so long as they served the purposes of the injunction. The problem with the option they chose, though, was that, if effective, the remedy would for all practical purposes become category (3) underenforcement; especially given the “unusual circumstances” surrounding the transfer and the fact that, on the ground, literally nothing would have changed. With this in mind, consider, again, the decision to declare the land-transfer invalid. That determination is certainly congruent with the initial injunction and, notably, does not foreclose Congress from satisfying the injunction through other means. In other words, even if not a category (2) perfect fix, it is on the way to (1), and a promotion of neutrality (remember, again, this all started when NPS refused to allow a stupa, but let the cross stand). Realizing that, at the end of the day, nothing would be practically changed in terms of how the monument looked or

111 For an interesting argument related to social problems given the fact of underenforcement in constitutional law see LAWRENCE SAGER, JUSTICE IN PLAINCLOTHES CH. 6-7 (2006).
112 This is basically an extension of the idea that where there’s a right, there should be a remedy, which, given the constitutional prohibition, a fundamental concept in American law. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.” (quoting BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23 (1783) (internal quotation marks omitted)).
was perceived, the district court denied the Government’s attempt to skirt the injunction by relying heavily on the formal status—public or private—of the land. The Government did, however, convince the Buono plurality that the land’s formal status was nearly-dispositive.

III. FORM OVER SUBSTANCE: ALITO, SCALIA AND PUBLIC-PRIVATE FORMALISM

This Part analyzes the opinions of Justice Alito and Justice Scalia, which both, I will argue, put form over substance and rely too heavily on a formalistic public-private distinction. Start with Justice Alito. He begins by describing the Sunrise Rock monument and admits that, in this area, “boundaries between Government and private land are often not marked,” and that the “cross is of course the preeminent symbol of Christianity, and Easter services have long been held on Sunrise Rock,” but reminds us that the original reason for the placement of the cross was to commemorate WWI veterans.119 Worried about hostility against religion, Justice Alito viewed the land transfer as “an alternative approach that was designed to eliminate any perception of religious sponsor ship stemming from the location of the cross on federally owned land, while at the same time avoiding disturbing symbolism associated with the destruction of the historic monument.”120

Thus, Alito construes the aims of the injunction narrowly: “simply that the government could not allow the cross to remain on federal land.”121 This was all set up for Justice Scalia’s strident application of the public-private distinction, and his attendant narrow construction of the 2002 injunction. He argued that the “only reasonable reading of the original injunction, in context, is that it proscribed the cross’s display on federal land. Buono’s alleged injuries arose from the cross’s presence on public property.”122 This certainly is not how the district court “reasonably” read its injunction, but nevertheless, from this premise, Scalia concludes that Buono does not even have standing to challenge the land transfer because it has nothing to do with enforcing the 2002 injunction.123 Though it certainly has remedial implications (Scalia’s Article III standing doctrine often results in aggrieved plaintiffs having no remedy despite a strong constitutional claim), I want to focus on the public-private distinction motivating the plurality, and, as Justice Stevens did, consider only: “whether the shift form public to private ownership of the land sufficiently distanced the Government of the Cross.”124

The plurality answered unequivocally: Yes! So, “[w]hen the government completely ends its ownership and control over a display, what was government speech becomes private speech.”125 The mere transfer of a title somehow “transforms” the unconstitutional endorsement into private speech. But, other courts addressing precisely this situation have been more careful

119 Id. Opinion of Alito, J., at 2-3 (concurring in part and concurring in the judgment).
120 Id. at 5.
121 Id. at 6.
123 Buono, Scalia Op. at 3-6 (“A plaintiff cannot sidestep Article III’s requirements by combining a request for injunctive relief for which he has standing with a request for injunctive relief for which he lacks standing. And for the same reason, a plaintiff cannot ask a court to expand an existing injunction unless he has standing to seek the additional relief.”).
to see the potential for pretextual manipulation, and the plurality balks at factors suggesting pretext here. For me, and other commentators that have considered this issue, these factors make the transfer suspect and plainly unconstitutional.

My primary interest, though, is to demonstrate that the plurality’s relentless adherence to the public-private distinction encourages constitutional violations and undercuts potential remedies. For a time, it seemed the public-private distinction was doomed, and it was a matter of “legal sophistication to understand the arbitrariness of the division of law into public and private realms.” But, despite its apparent resurgence, we should be mindful of the constitutionally important reasons for being more functional than formal in this context. Recently, the Court blurred the distinction, and rightly so. In Santa Fe Independent School District v. Doe, the Court—with Justice Kennedy in the majority—considered the constitutionality of student-led invocations/messages before football games, where the student body would each year vote on whether to have a speaker. The program replaced the designation of a “chaplain” who would provide “prayer at football games.” In holding the new program an unconstitutional establishment, it did not matter that the speech was student-led or actually took place by formally private actors (the students). Instead, because it took place at a school-function the private speech became public. Santa Fe is, of course, in many ways distinguishable from Buono, but, for present purposes, it is significant because the Court was willing to look beyond the pretextual alteration of the program—changing the student’s title from chaplain to speaker and from prayer to message—and deemed formally “private” actions sufficient to trigger establishment worries.

Moving outside of establishment doctrine, consider Marsh v. Alabama where, in an opinion by Justice Black, the Court held that a privately-owned town was nonetheless required to abide by the First Amendment, and struck the criminal penalties applied to Jehovah’s Witnesses who had been using the sidewalk for religious proselitization. Like the Sunrise Rock cross, in Marsh the court addressed a situation where the “public” and “private” were visually indistinguishable. Justice Black noted that the “town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title belongs to a private corporation.” Similarly, in Buono there is nothing to distinguish the formally public preserve from the the “little donut hole of [private] land with a cross” on it.

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126 See, e.g., Freedom From Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000) (Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion. We are aware, however, that adherence to a formalistic standard invites manipulation. To avoid such manipulation we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased.”); Mercier v. Fraternal Order of Eagles, 395 F.3d 693 (7th Cir. 2005); Jonathan R. Slabaugh, Note, Selling the Government Property Beneath A Religious Monument that Violates the Establishment Clause: Constitutional Remedy or Infringement, 29 ST. LOUIS U. PUBL. L. REV. 301 (2009).
128 See generally Budd, supra note 16; City of Marshfield, 203 F.3d at 491; Buono v. Kempthorne, 527 F.3d 758, 768 (9th Cir. 2008).
132 Id. at 503 (emphasis added).
133 Buono v. Kempthorne, 527 F.3d 758, 768 (9th Cir. 2008).
Marsh rested heavily on the performance of a “public function” in holding the corporate town obliged by the First Amendment’s expression components, and in Buono we have stronger reasons to find such an ongoing function. Not only does the monument’s location and lack of visible distinguishing cues make it functionally public—like Marsh we don’t expect travelers to read the title to discern the formal status of a piece of land—we have additional, and formally recognizable, reasons for finding that the 2004 land-transfer from public to private practice would not be curative. As Justice Black noted, “[o]wnership does not always mean absolute dominion,” and in Buono we have legally binding restrictions that give the Federal Government a continuing interest in the “dominion” of the land, and, in particular, the cross. First, the “five-foot-tall cross” has been declared a “national memorial commemorating United States participation in World War I and honoring the American veterans of that war.” As Justice Stevens notes, this transforms the cross from a “local artifact” to an object with a “formal national status of the highest order.” Indeed, such a designation, as a general matter, also binds what can be done to the property—the cross could not be taken down by VFW even if they wanted to. Second, the land-transfer statute contained a reversionary interest clause, stating that the land would revert to the federal government should the memorial fall into disrepair. The problem though is that, unlike any other war memorial, the cross constitutes the entire display, making this reversionary interest one designed to keep the cross up, and its unconstitutional symbolism in tact.

The plurality, however, attempts to interpret these two formal measures as evidence of Congressional secular intent—again, not the issue before the court. But, more importantly for the remedial question at hand, these actions mean continued federal “dominion” over the property, which further blurs the public-private distinction upon which the plurality so heavily relies. Again, the Court has, in context after context, traditionally been responsive to, rather than defiant of, the real-world fact that formal ownership as either “public” or “private” does not, and ought not, end our inquiry as to whether Constitutional rights require protecting or, where violated, deserve a remedy.

To get at the issue from the other side, consider Oregon v. City of Rajneeshpuram, where a federal district court granted declaratory judgment to the state of Oregon when it refused to grant municipal status on the City of Rajneeshpuram. The “City” was a nearly 64,000 arce parcel of land, called “Rancho Rajneesh,” and wholly owned by a “Rajneesh Foundation International” (RFI), was organized to advance the teachings of the Bhagawan Shree Rajneesh—whose followers “assert that he is an enlightened religious master.” Through a series of

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137 See Brentwood Acad. v. TN Sec. School Athl. Assn., 531 U.S. 288 (2001). This is not to say there has been consensus on how to treat the court’s designation of for a under the First Amendment, only that, in the past the Court has realized that title ownership is not, by itself, dispositive. See International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (holding that privately owned airport could maintain regulations on speech, though plurality disagreed and was worried as to how permit speech in places of public accommodation); Cf. New Jersy Coalition Against War in the Middle East v. J.M.B Realty Corp, 128 N.J. 326 (1994) (requiring that private shopping malls permit leafleting on political issues). But see Loyd Corp. v. Tanner, 407 U.S. 551 (1972) (no general right to free speech in privately-owned shopping center).
139 Id. Indeed, Rajneesh had quite a devout following of 7,000, who were later subject to raids and arrests when government officials attempted to break up the commune. See generally James T. Richardson, State and Federal
complex arrangements involving RFI, the Rajneesh Investment Corporation, the formal religious organization, and rules of their commune, the Rancho was a “city” technically owned by private parties. But, as the court noted, “the sovereign power exercised by the City is subject to the actual, direct control of an organized religion and its leaders.” Applying the entanglement prong of Lemon the court upheld the state’s denial of a municipal charter. Relevant for Buono, though, is how the court treated the claim that the formally “private” ownership of the City was sufficient to relive the state of its obligations to avoid an Establishment Clause violation. Instead, seeing the obvious end-around of merely “privatizing” what would otherwise be clear violation, the Court looked to the functional differences between the Rancho and typical public cities and prevented the Charter.

The lesson from Marsh and Rajneeshpurim is that a strict adherence to the public-private distinction does not do well for the adjudication of constitutional rights. The pairing of these cases, which I consider both rightly decided, demonstrates that a too rigid view of privatization can also hurt religion. In Marsh, the group would not have been able to do what their fundamental beliefs taught them to do, and, in contrast, privatization could not be used to force the state of Oregon to permit the Rancho to be considered an official municipality and carry with it the full coercive power of the state that such a designation would permit. Deciding these cases, however, required looking beyond mere form, to substance, which is what seems absent in the Buono plurality.

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All that said, Justice Alito’s opinion does provide us with some remedial insight. Alito notes that there might have been other ways than selling the land or dismantling the cross that would remedy the ongoing endorsement of Christianity by, for example, broadening the religious symbols to be representative of those who served in WWI. While we do not agree on the propriety of Congress’s alternative action, he reminds us that not all injunctions are created equal, and that challengers to alleged endorsements—for the sake seeking neutrality, not hostility—should be creative in conceiving ways of remedying the troubles of establishment. I have suggested we favor “congruence and proportionality” over underenforcement, and that there are strong reasons why that approach favors neutrality, which should be viewed as an “essential command” of the Establishment Clause. That said, this standard should be one with teeth that encourages remedial creativity, tends away from an “automatic dismantling” approach, but does, when the case is close, limits more symbols than it permits.

We should, finally, remember how we got into this mess in the first place. The government permitted a prominent religious symbol to be erected on public land without any

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Cooperation in Regulating New Religions: Oregon versus the Bhagwan Rajneesh, in Regulating Religion: Case Studies from Around the Globe 477-90 (James T. Richardson ed. 2004). After the break-up Bhagwan fled to India and now, under the name Osho, is apparently making a comeback with a new “meditation resort,” and a series of highly successful books that are part self-help, part spiritualism. See www.osho.com; OSHO, FROM SEX TO SUPERCONSCIOUSNESS (2002) (on file with author).

140 Id. at 31.

141 See id. at 34 (noting that “there is a difference between the effect on and benefit to religion of the provision of ordinary municipal services to a city of private landowners of one religion and to the City of Rajneeshpuram, where the land is communally owned and controlled by religious organizations. The provision of services by a municipal government in a city whose residents are private landowners of one religious faith has the direct and primary effect of aiding the individual landowners and residents living in the city. The effect on the religion of those private landowners is remote, indirect, and incidental. In contrast . . . ”).

142 Cf. BARRY, supra note 2, at 26 (discussing consequences of privatization).

143 Buono, Alito Slip Op. at 4-5.
limitation or designation of that symbol that might serve a purpose beyond religious promotion. The Establishment Clause is meant to serve as an *ex ante* deterrent to such unmediated or care-free acceptance of religious symbols onto government property. But, to do so, and overcome the significant political obstacles to such a position, state actors must think that there is a real chance such action will be challenged, *and* that they will have to do something about it. Rather than wait for *ex post* litigation, many establishment issues can be more easily resolved without involving the court’s in the first place. The problem with *Buono*, though, is that it weakens this deterrent effect by resort to formalistic distinctions, which encourages remedial evasion over actually addressing the problem.

**CONCLUSION**

We can conclude where we began; with *Cummings* and the Chief Justice’s reminder that the Constitution deals with “substance,” not “shadows.” Given what we have seen, his concurrence and the plurality violates the principle it purports to advance. *Buono*, to some, might have been a dud because it failed to address what the post-O’Connor court thinks about the Establishment Clause right. But, perhaps we can learn more about the real value of that right—despite any quibbling over which test to apply—by looking at the way the Court conceives of how to enforce the constitutional prohibition. Unfortunately, the outlook is not encouraging. The plurality technically left open the possibility of the district court again finding the land-transfer unconstitutional by applying the “reasonable observer” test to the situation now formally private. But, this result means brushing aside the remedial enforcement claim in order to give the Government (and potentially the high court) another bite at the substantive apple. As things proceed, we now have reason, again, to question whether Justice Kennedy really meant what he said in *Lee v. Weisman*: “Law reaches past formalism.”