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Selling Land and Religion

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Selling Land and Religion

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ABSTRACT

Thousands of religious monuments have been donated to cities and towns. Fearing an Establishment Clause violation, some governmental bodies have privatized religious objects and the land beneath them by selling or transferring the objects and land to private parties. Drawing from Establishment Clause jurisprudence involving religious displays, this Article utilizes the *Lemon* and endorsement tests as analytical tools for resolving the constitutionality of land dispositions involving religious displays.

The government purpose for disposing of the religious object and surrounding land have been premised on preserving the religious object as a memorial or commemoration of secular events, avoiding a show of disrespect to religion that might result from the object's removal, and curing Establishment Clause violations. After examining these purported legislative purposes, this Article argues that the government lacks a predominately secular purpose for disposing public land and in doing so, the government endorses religion by taking extraordinary measures to preserve religious symbols when alternatives exist. Additionally, some land dispositions have included reversionary clauses and restrictive covenants that administratively entangle government with religion, which cannot be mitigated by disclaimers and fencing. The potential for political divisiveness further exacerbates government entanglement. Finally, coupled with the

government speech doctrine as interpreted in *Pleasant Grove v. Summum*, allowing the government to privatize land on which religious objects rest would permit the government to evade the Free Speech and Establishment Clauses' protection. Thus, this Article concludes that the soundest method of complying with the Establishment Clause is to simply remove the religious monuments and objects—without resorting to divestiture of public land.

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INTRODUCTION

Local, state, and federal governments now have greater freedom to accept religious monuments, symbols, and objects donated to them for display in public spaces without violating the Free Speech Clause. In *Pleasant Grove City v. Summum*, the city displayed a donated monument of the Ten Commandments in its public park while rejecting a monument of the Seven Aphorisms donated by Summum, a religious organization.¹ The Supreme Court characterized the display of monuments in public spaces as government speech, which allows the government to select the message it wants to express.² In applying the government speech doctrine, the Court upheld the city's actions against a Free

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¹ *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009).

² *See id.* at 464-65.

Speech Clause challenge because the Free Speech Clause implicates government regulation of private speech, not government speech.³

Now that the city has embraced the Ten Commandments monument as its own speech, the next question arises whether the city violated the Establishment Clause in displaying a religiously significant monument. The Court, however, did not address the constitutionality of the city's actions under the Establishment Clause because *Summum* did not raise that issue.⁴ In anticipation, Justice Scalia reassured the city that its victory would not “propel[] it from the Free Speech Clause frying pan into the Establishment Clause fire.”⁵

Fearing an Establishment Clause violation, some governmental bodies, however, have sold religious monuments, objects, and symbols⁶ and the land under them to private parties when confronted with an Establishment Clause challenge.⁷ Other governmental parties have exchanged or transferred the land beneath the religious

³ *See id.*

⁴ *See id.* at 482 (Scalia, J., concurring).

⁵ *Id.* at 482-83.

⁶ This article uses the term “object” and “symbol” interchangeably to refer generally to permanent structures, like monuments, as opposed to temporary holiday displays.

⁷ *See, e.g.,* *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005)(rehearing en banc denied 2005 U.S. App. LEXIS 3480 (2005)); *Chambers v. City of Frederick*, 373 F. Supp. 2d 567 (D. Md. 2005); *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000); *Kassandra J. Slaven, Comment, A Cross-examination of the Establishment Clause and Boise's Table Rock Cross*, 45 IDAHO L. REV. 651, 652-56 (2009) (discussing the sale of a sixty foot cross erected on Table Rock in Boise).

objects to private parties. Such was the case of *Salazar v. Buono*, where the federal government transferred public land in a national park on which a Latin cross was erected in exchange for land from a private party.⁸ Whether the land transfer successfully extricated the federal government from an Establishment Clause violation remained unanswered by the entire Court.⁹

This Article explores whether the transfers or sales of religious objects and the land underlying them to private hands would save the government from the Establishment Clause fire.¹⁰ It argues that under all proposed standards used in religious display cases, government disposition of religious objects and the public land beneath them violates the Establishment Clause.

To determine the constitutional sufficiency of land dispositions, this Article examines a broad array of factors involved in the transactions. Some transactions have included restrictive covenants requiring that the religious object be maintained.¹¹ Others have sold or transferred the religious object and its underlying land to the original donor

⁸ *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (plurality opinion).

⁹ The Court was presented with a narrow issue about whether the lower court's injunction was proper. *Id.* at 1815-16.

¹⁰ The cases involving disposition of religious objects result from either a government assumption that the object itself will be found to violate the Establishment Clause or a judicial determination that such an object on government land does indeed violate the Establishment Clause. This Article proceeds on the assumption that continued display of the object on public land violates the Establishment Clause; thus, the purpose of this Article is to explore whether privatizing the land and religious object can sufficiently end Establishment Clause violations.

¹¹ *See, e.g., Buono v. Kempthorne*, 527 F.3d 758, 771 (9th Cir. 2008); Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121(a)-(e), 117 Stat. 1100 (2003), codified at 16 U.S.C. § 410aaa-56.

without soliciting bids from other buyers,¹² or without considering the highest bid.¹³ And in some circumstances, the religious object's original installation¹⁴ or the land transactions have occurred in violation of existing law.¹⁵ Part I describes the circumstances in which governments have employed land sale, land transfer, and eminent domain to resolve Establishment Clause violations. The purpose of this Part is to provide a context for the evaluation of these remedies under the Establishment Clause standards discussed in Parts II, III, and IV.

As a result of the Court's "unwilling[ness] to be confined to any single test or criterion,"¹⁶ there is no consistent approach in the Court's Establishment Clause jurisprudence.¹⁷ Consequently, this Article examines the

¹² See *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000); *Trunk v. City of San Diego*, 629 F.3d 1099, 1103 (9th Cir. 2011); *Buono v. Kempthorne*, 527 F.3d 758, 771(9th Cir. 2008).

¹³ See *Chambers v. City of Frederick*, 373 F. Supp. 2d 567, 571 (D. Md. 2005).

¹⁴ See, e.g., *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008), *rev'd and remanded*, *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

¹⁵ See, e.g., *Chambers v. City of Frederick*, 373 F. Supp. 2d 567, 571 (D. Md. 2005).

¹⁶ *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

¹⁷ See *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting from denial of cert.) (describing Establishment Clause jurisprudence as being "in shambles"); *Lee v. Weisman*, 505 U.S. 577, 619 (1992) ("Our precedents may not always have drawn perfectly straight lines."); *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1010 (W.D. Wis. 2004)("[T]he Court has struggled to set forth a consistent framework for addressing questions under the establishment clause, as even the Court itself has recognized."); Andrew Koppelman, *Law and Cultural Conflict: No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI-KENT L. REV. 729, 729 (2003) [hereinafter Koppelman, *Religious Orthodoxy*] ("The Court has left a

constitutionality of such land transfers and sales under a number of competing Establishment Clause standards and theories. Because religious display cases are the most analogous to land disposition cases involving religious symbols, Part II provides a brief discussion of Establishment Clause standards used in religious display cases: the *Lemon* test, endorsement test, and *Van Orden v. Perry* “legal judgment” approach. This part concludes that the legal judgment approach fostered by Justice Breyer closely resembles the purpose and effect prongs of the *Lemon*/endorsement tests. Therefore, this Article proceeds by adopting the *Lemon* and endorsement tests as viable standards in light of *Van Orden*.

In Parts III and IV, this Article analyzes the validity of these land transactions under *Lemon* and endorsement tests, utilizing the construct of the reasonable observer who is aware of the history of the religious object and land disposition.¹⁸ Part III specifically considers the governmental purpose for the land disposition in determining the existence

constitutional muddle with a series of unsatisfactory and unclear standards and outcomes.”); Steven Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 464 (1994) (“In recent years, there has been no fewer than ten different Establishment Clause standards that have commanded the allegiance of one or more Justice on the Court. The situation was made worse by the fact that some Justices have supported more than one standard and some Justices have interpreted the same standards differently than other Justices.”); William P. Marshall, *We Know It When We See It: The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 497 (1986) (“The Court itself has acknowledged its own ‘considerable internal inconsistency,’ candidly admitting that it has ‘sacrifice[d] clarity and predictability for flexibility,’ and commentators have found the area hopelessly confused.”).

¹⁸ *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005).

of a secular interest: providing memorials, avoiding a show of disrespect to religion, and avoiding Establishment Clause violations. This Part argues that the purported government purposes are secondary to a religious interest because the government can achieve its objectives without resorting to land disposition.

Part IV explores the effect that land disposition has on the reasonable observer. In Part IV, this Article argues that privatizing religious symbols and their surrounding land has the effect of advancing religion by securing the retention of religious objects through private land ownership. Further, restrictive covenants that require the private owner to maintain the symbol and reversionary clauses that allow the government to reclaim the land perpetuate state action and excessively entangle the government with religion. This Article concludes that governmental bodies cannot avoid the Establishment Clause fire by any means other than removing the religious object.

I. THE LAY OF THE LAND

A. Land Sales

1. The Statue of Christ in Marshfield

In recent years, there has been a trend to resort to land sale, eminent domain, and land transfer to resolve Establishment Clause violations.¹⁹ In *Freedom from*

¹⁹ See *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011) (holding federal exercise of eminent domain to seize land on which a cross was erected violated Establishment Clause); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005) (upholding sale of land beneath Ten Commandments monument against Establishment Clause challenge); *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000) (holding sale of Christ statue and land

Religion Foundation, Inc. v. City of Marshfield, a city sold a statue of Christ and the surrounding land in response to an Establishment Clause claim challenging the city's display of the statue.²⁰ Although the bid met state requirements for public land sales²¹ and reflected fair market value,²² the city did not solicit any other bids²³ and included in the sale a requirement that the land to be used for public park purposes.²⁴ After the sale, the statue continued to rest in the public park, visible to drivers on a state highway entering the city.²⁵ When the city sold the property, the city discontinued

beneath it to private owner did not violate Establishment Clause but visual conditions of park caused continuing perception of government endorsement); *Chambers v. City of Frederick*, 373 F. Supp. 2d 567 (D. Maryland 2005) (validating land sale to Fraternal Order of Eagles, which had originally donated the Ten Commandments monument); *Sumnum v. Duchesne City*, 340 F. Supp. 2d 1223 (D. Utah 2004) (upholding land sale to family that originally donated the Ten Commandments monument); *Kong v. City and County of San Francisco*, 18 Fed. Appx. 616 (9th Cir. 2001) (unpublished opinion) (upholding city's auction of land beneath a cross as a resolution for Establishment Clause challenge); *Slaven, supra* note 7, at 652-56 (2009) (discussing the sale of land under an illuminated, sixty foot cross erected on Table Rock in Boise).

²⁰ *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000). In 1959, the city accepted a white marble statue of Christ with his arms open in prayer, standing on a sphere. The base of the statue bears an inscription in twelve-inch block letters: "Christ Guide Us on Our Way." *Id.* at 489. A photograph of the statue is available at <http://www.flickr.com/photos/32441465@N00/172129898>, last visited March 1, 2012.

²¹ *Marshfield*, 203 F.3d at 490.

²² *Id.* at 492.

²³ *Id.*

²⁴ *Id.* at 490.

²⁵ *Marshfield*, 203 F.3d at 489. For a map of the location of the statue, see *id.* at 500, Fig. C.

provision of electrical services to the park and erected a sign disclaiming the religious message of the statue.²⁶

Subsequently, the sale was challenged as a sham to evade the Establishment Clause.²⁷ Upon review, the Seventh Circuit applied a presumption that “[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion”²⁸ and evaluated the “substance of the transaction” and “its form.”²⁹ Because the restrictive covenant did not violate state laws, the Seventh Circuit concluded there lacked any “extraordinary circumstances” that would warrant voiding the sale.³⁰ Although the court upheld the sale, the court recognized the obvious religious message of the statue of Christ and found the government lacked a secular purpose for the statue.³¹

The court concluded that the sale did not change the nature of the park, which retained its public forum character even under private ownership.³² The court considered the historical use of the property as a public forum, its dedication for public purposes, and the location of the statue in relation to the park and its visibility to the public.³³ The property had been used as a public park and public forum, and the restrictive covenant requiring the continued public use reinforced the property’s public forum status despite the

²⁶ *Id.* at 490.

²⁷ *Id.*

²⁸ *Id.* at 491.

²⁹ *Id.*

³⁰ *Id.* at 493.

³¹ *Id.*

³² *Marshfield*, 203 F.3d at 494.

³³ *Id.*

sale.³⁴ The statue's location and its lack of physical partition, coupled with the previously discussed factors, magnified the perception that the statue rested on public property.³⁵ The disclaimer posted by the city did not mitigate this perception.³⁶ The court concluded, thusly, that a reasonable person would interpret the circumstances to convey governmental endorsement of a religious message.³⁷

The Seventh Circuit, however, signaled that the perception of continued government endorsement could be removed with the construction of a fence or wall to separate the private property on which the statue now rests from the city's property.³⁸ On remand, the district court ordered a four-foot high fence be erected around the monument.³⁹

2. The Ten Commandments Monument in Mercier

Similarly, in *Mercier v. Fraternal Order of Eagles*, the city disposed of its land through a sale to cure an Establishment Clause challenge about a monument of the Ten Commandments.⁴⁰ which had rested on a public park for almost forty years. The city had dedicated the monument to

³⁴ *Id.*

³⁵ *Id.* at 494-95.

³⁶ *Id.* at 495.

³⁷ *Id.*

³⁸ *Id.* at 497.

³⁹ *Freedom From Religion Found., Inc. v. City of Marshfield*, 2000 WL 767376, at*1 (W.D. Wis. 2000).

⁴⁰ *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005). The granite monument consisted of an inscription of the Ten Commandments, an eagle grasping the American flag, and the "all-seeing eye." *Id.* at 694-95. For additional description and history of the monument, see *Books v. City of Elkhart*, 235 F.3d 292, 294-96 (7th Cir. 2000). For photographs of the monument and a map of the park, see *Mercier*, 395 F.3d at 708-11.

commemorate the volunteer efforts of high school students during a flood,⁴¹ and since, the monument has rested in a public park for almost forty years.⁴²

Twenty years after its installation, the monument sparked controversy and litigation ensued over whether the monument's presence violated the Establishment Clause.⁴³ In an effort to remedy any Establishment Clause violations, three organizations made offers to the city: 1) the local Eagles chapter, which had originally donated the monument, offered to take back the monument and place it in a location visible to the public; 2) an Episcopal church offered to move the monument; and 3) the Freedom From Religion Foundation offered to move the monument to another location.⁴⁴ Rather than accepting the offers to move the

⁴¹ *Id.* at 696.

⁴² *Mercier*, 395 F.3d at 694. Approximately 5,500 stone monuments of the Ten Commandments were dispersed throughout the United States as part of a promotion of the movie "The Ten Commandments." *Chambers v. City of Frederick*, 373 F. Supp. 2d 567, 569 (D. Md. 2005). Many cities displayed the Ten Commandments monoliths in public parks and/or near government buildings. *Summum v. Duchesne City*, 340 F. Supp. 2d 1223, 1226 (D. Utah 2004). For a sampling of the litigation that has ensued over monuments depicting the Ten Commandments, see *infra* note 117; see also *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008); *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion); *Am. Civil Liberties Union Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Ind. Civ. Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000); *Freedom From Religion Found, Inc. v. Zielke*, 845 F.2d 1463 (7th Cir. 1998); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973); *Red River Freethinkers v. City of Fargo*, 749 F. Supp. 2d 940 (D.N.D. 2010).

⁴³ *See id.*

⁴⁴ *Id.*

monument, the city decided to sell the monument and a parcel of land on which the monument rested to the local Eagles chapter.⁴⁵ No other bids were sought, and the city sold the land for fair market value.⁴⁶

Subsequently, litigation arose, challenging the sale as violating the Establishment Clause by favoring the monument's religious message.⁴⁷ On review, the Seventh Circuit upheld the land sale.⁴⁸ The court was persuaded by a number of factors: the city had a historical reason for retaining the monument; it was practical to sell the land to the Eagles due to the chapter's headquarters being located close to the monument; the land was not located near the seat of government; the monument was not located in a prominent part of the park; and the city and Eagles erected fencing and signs disclaiming government sponsorship.⁴⁹ The court determined that the city had a secular purpose for accepting the monument to commemorate the flood volunteers and selling the parcel of land to avoid violating the Establishment Clause.⁵⁰ Additionally, the court held that the city did not have the primary or principal effect of advancing religion through the sale.⁵¹ The court concluded that a reasonable observer familiar with the history of the monument would understand the city's motivation for keeping the monument in the park and the practical solution

⁴⁵ *Id.*

⁴⁶ *Id.* at 697.

⁴⁷ *Id.* at 702.

⁴⁸ *Id.* at 705.

⁴⁹ *Id.* at 703-704.

⁵⁰ *Id.* at 704-705.

⁵¹ *Id.* at 705.

of selling the monument to the Eagles, whose headquarters was conveniently located across from the park.⁵²

3. The Ten Commandments Monument in Frederick

In addition to *Mercier*, in *Chambers v. City of Frederick*, the city received an identical monument of the Ten Commandments from the local Eagles chapter and similarly relied on selling public land to remedy its Establishment Clause challenge.⁵³ When litigation over the monument commenced, the Eagles offered to purchase all or part of the Memorial Ground on which the monument rested.⁵⁴ At least eight other organizations informed the city of their interest to purchase the parcel of land.⁵⁵ The city selected a buyer based on the bidder's ability to pay the fair market value of the land, willingness to comply with the covenants, and ability to maintain the property.⁵⁶ The city sold the parcel to the Eagles but retained ownership of another nearby memorial monument.⁵⁷

Despite the city's failure to comply with standards regulating the sale of city property and that the Eagles' bid was lower than other bidders, the district court found there was no "unusual circumstances surrounding the sale of the parcel of land so as to indicate an endorsement of religion."⁵⁸

⁵² *Id.* 705.

⁵³ *Chambers v. City of Frederick*, 373 F. Supp. 2d 567, 570 (D. Md. 2005).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 570-71.

⁵⁷ *Id.* at 571.

⁵⁸ *Id.* at 572 (quoting *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702 (7th Cir. 2005)).

Notwithstanding the first half of the monument's religious references,⁵⁹ the court accepted the city's assertion that the monument had a secular purpose "to remind citizens not to bear false witness, to deal fairly and not covet other's property, and to make the park into a haven of tranquility."⁶⁰ Consequently, the court upheld the sale.⁶¹

B. Eminent Domain: The Cross on Mount Soledad

Another method of land disposition used in response to Establishment Clause concerns is the exercise of eminent domain. In *Trunk v. City of San Diego*, governmental bodies relied on both land sales and eminent domain to resolve

⁵⁹ The Ten Commandments inscription stated:

I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother, that thy days may be long
upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbor.

Thou shalt not covet thy neighbor's house.

Thou shalt not covet thy neighbor's wife, nor his manservant,
nor his maidservant, nor his cattle, nor anything that is thy
neighbor's.

Books v. City of Elkhart, 235 F.3d 292, 296 (7th Cir. 2000).

⁶⁰ *Chambers*, 373 F. Supp. at 573.

⁶¹ *Id.*

litigation that arose over a Latin cross⁶² on top of Mount Soledad.⁶³ The cross stood forty-three feet high,⁶⁴ spanned twelve feet across, and weighed twenty-four tons,⁶⁵ looming over thousands of drivers who use the Interstate 5 and see it from miles away.⁶⁶ In response to challenges over the cross, the city twice attempted to sell the cross and underlying land to a private group, but both sales were invalidated.⁶⁷ The court invalidated the first land sale because the city's failure to solicit other bids showed a preference for Christianity and a desire to preserve the cross.⁶⁸ The second sale failed

⁶² A Latin cross consists of a short horizontal bar joined at the center by a longer vertical bar. *Salazar v. Buono*, 130 S. Ct. 1803, 1811-12 (2010) (plurality opinion).

⁶³ *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011). Many cities have accepted donations of crosses permanently erected on public land. *See, e.g.*, *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996); *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 1007 (1976).

In addition to these cases, there are other instances of cross displays on public land that have not been litigated. *See Slaven, supra* note 7, at 652-56 (describing a two-ton, sixty-foot cross that was erected on Table Rock in Boise in 1956 and later sold, along with the land beneath it, to the Boise Jaycees for \$100 upon impending litigation).

⁶⁴ *Murphy v. Bilbray*, 782 F. Supp. 1420, 1422 (S.D. Cal. 1991).

⁶⁵ *Trunk*, 629 F.3d at 1103. For photographs of the cross and the site, see *id.* at Appendix A; <http://www.yelp.com/biz/mount-soledad-veterans-memorial-la-jolla>, last visited March 2, 2012.

⁶⁶ *Trunk*, 629 F.3d at 1103.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1103. The proposition stated:

Shall the removal from dedicated park status of that portion of Mt. Soledad Natural Park necessary to maintain the property as an *historic war memorial*, and the transfer of the same parcel by The City of San Diego to a private non-profit corporation for not less than fair market value be ratified?

because it was structured to give an advantage to bidders who desired to preserve the cross.⁶⁹

Consequently, in 2004 the city proposed moving the cross to a church, but the proposal did not receive sufficient voter approval for a third sale.⁷⁰ This failed initiative spurred Congress to pass a bill in 2005 to accept the cross as a donation and designate it as a national veterans' memorial.⁷¹ After the ballot initiative received the required voter approval, another court enjoined the donation.⁷²

As a result, Congress intervened again in 2006.⁷³ This time, Congress seized the memorial through eminent domain⁷⁴ "in order to preserve a historically significant war memorial, designated the Mt. Soledad Veterans memorial in San Diego, California, as a national memorial honoring veterans of the United States Armed Forces."⁷⁵ Although the cross stood without any physical designation as a war memorial until 1998,⁷⁶ Congress declared that site had served as a memorial for over fifty-two years.⁷⁷ Also, the act required the Department of Defense "to manage the property

Paulson v. City of San Diego, 294 F.3d 1124 (9th Cir. 2002) (emphasis added).

⁶⁹ *Id.* at 1103.

⁷⁰ *Id.* at 1103-04.

⁷¹ *Id.* at 1104.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Pub. L. 109-272, HR 5683, § 2(a) (2006).

⁷⁶ *Trunk*, 629 F.3d at 1103.

⁷⁷ Pub. L. 109-272, HR 5683, § 1(1) (2006).

and enter a memorandum of understanding with the Association⁷⁸ for the Memorial's 'continued maintenance.'"⁷⁹

Following Congress's exercise of eminent domain, litigation arose that challenged the federal government's seizure as violating California's and the United States Constitution.⁸⁰ On appeal, relying on legislative statements and the text of the act, the Ninth Circuit held that Congress had a secular purpose in acquiring the memorial.⁸¹ Nonetheless, the Ninth Circuit, after considering the context of the memorial, its history, uses, and the dominance of the cross, held that the memorial conveyed a message of government endorsement of religion.⁸²

Trunk presents a unique case where two levels of government were involved in preservation efforts of a religious symbol,⁸³ and where the methods pursued included privatizing the land⁸⁴ and later retaining the land's public character.⁸⁵ In light of the unprecedented, persistent congressional involvement in maintaining a religious symbol, it is a curiosity that Congress thought conveyance or outright seizure of a sectarian symbol and its land from one level of government to another would extinguish an Establishment Clause challenge. After all, it was government ownership of the sectarian symbol and

⁷⁸ The Association refers to the Mount Soledad Memorial Association, a civic organization that installed the cross. *Trunk*, 629 F.3d at 1103.

⁷⁹ *Trunk*, 629 F.3d at 1105 (quoting 152 Cong. Rec. H5422, § 2(c)).

⁸⁰ *Id.* at 1105-109.

⁸¹ *Id.* at 1108.

⁸² *Id.* at 1125.

⁸³ *Trunk*, 629 F.3d at 1103-04.

⁸⁴ *See id.* at 1103.

⁸⁵ *See id.* at 1104.

underlying land that sparked the controversy in the first place.

C. Land Transfer: The Cross on Sunrise Rock, Mojave National Preserve

A final method of addressing Establishment Clause challenges involves land transfers, which was implemented in *Salazar v. Buono*.⁸⁶ In *Buono*, a Latin cross was erected in the Mojave National Preserve, composed of 1.6 million acres in southeastern California.⁸⁷ The Veterans of Foreign Wars installed the cross on top of Sunrise Rock, along with wooden signs stating “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.”⁸⁸ The original cross, as well as subsequent replacements, were installed without permission⁸⁹ in contravention of park regulations.⁹⁰ In its most recent form, the cross stands alone without any signs.⁹¹ The cross, standing less than eight feet high,⁹² is visible 100 yards away from a road passing through the preserve.⁹³

⁸⁶ *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

⁸⁷ *Id.* at 1811.

⁸⁸ *Buono*, 130 S. Ct. at 1812.

⁸⁹ *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008), *rev'd and remanded*, *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

⁹⁰ *See* 36 C.F.R. § 2.62(a) (prohibiting unauthorized “installation of a monument, memorial, tablet, structure, or other commemorative” object).

⁹¹ *Id.* at 1812.

⁹² *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002)

⁹³ *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008).

In 1999, the National Park Service received a request to erect a Buddhist stupa⁹⁴ on the outcropping near the cross.⁹⁵ The Park Service denied the request, warning that “[a]ny attempt to erect a stupa will be in violation of Federal Law⁹⁶ and [be] subject [] to citation and/or arrest.”⁹⁷ The National Park Service acknowledged that “[c]urrently there is a cross on [a] rock outcrop located on National Park Service land” and committed, in writing, its “intent to have the cross removed.”⁹⁸

Before undertaking the cross’s removal, the National Park Service investigated the cross’s and memorial site’s possible inclusion in the National Register of Historic Places but concluded they were ineligible.⁹⁹ In 2000, Congress responded to the National Park Service’s anticipated removal of the cross by passing a law that prohibited the use of federal funds to remove the cross.¹⁰⁰ In 2001, Buono, a former National Park Service employee, challenged the retention of the cross.¹⁰¹ In January 2002, during the pendency of the

⁹⁴ A stupa is Buddhist shrine shaped like a dome. *Id.*

⁹⁵ *Id.* at 769.

⁹⁶ See 36 C.F.R. § 2.62(a) (“The installation of a monument, memorial, tablet, structure, or other commemorative installation in a park area without the authorization of the Director is prohibited.”).

⁹⁷ *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008). See Consolidated Appropriations Act, 2001, Pub. L. No. 106-554 § 133, 114 Stat. 2763A-230 (2000).

¹⁰¹ *Buono v. Norton*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002) (*Buono I*). As a result of four different cases, *Buono’s* procedural history is complex. *Buono I* and *Buono II* centered on the constitutionality of the cross. The district court invalidated the display (*Buono I*), affirmed by the Ninth Circuit (*Buono II*). *Buono III* and *Buono IV* addressed the remedy; the district court (*Buono III*) and the Ninth Circuit (*Buono IV*) concluded

district court case, Congress designated the cross as a national memorial and required the Secretary of the Interior to use federal funds to “acquire a replica of the original memorial plaque and cross placed at the national World War I memorial.”¹⁰²

In July 2002, the district court found the cross violated the Establishment Clause and permanently enjoined the display of the cross.¹⁰³ Three months after the district court’s injunction, Congress passed another bill prohibiting use of federal funds “to dismantle national memorials commemorating United States participation in World War I.”¹⁰⁴ During the appeal of the case, in September 2003, Congress passed a bill authorizing an exchange of the public land beneath the cross at Sunrise Rock for private land from Henry Sandoz, who had erected the current cross.¹⁰⁵ This legislation required the recipient owner Veterans of Foreign Wars to maintain the property as a memorial, upon which failure to do so would result in the property reverting to the United States.¹⁰⁶

When the case reached the Supreme Court, the Court’s decision was limited to resolving, as Justice Breyer viewed it,

that Congress’s land transfer failed to cure the Establishment Clause violation.

¹⁰² *Buono v. Kempthorne*, 527 F.3d 758, 770 (9th Cir. 2008). *See* Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-117 § 8137, 115 Stat. 2230, 2278-79 (2002), codified at 16 U.S.C. § 410aaa-56.

¹⁰³ *Buono v. Kempthorne*, 527 F.3d 758, 770 (9th Cir. 2008).

¹⁰⁴ *Id.* at 771. *See* Pub. L. No. 107-248 § 8065(b), 116 Stat. 1551 (2006).

¹⁰⁵ *Buono v. Kempthorne*, 527 F.3d 758, 771 (9th Cir. 2008). *See* Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121(a)-(e), 117 Stat. 1100 (2003), codified at 16 U.S.C. § 410aaa-56.

¹⁰⁶ *Id.*

“the very technical boring issue”¹⁰⁷ of whether the district court’s injunction against implementation of the land exchange statute was proper.¹⁰⁸ Because the government did not appeal the ruling that the cross had the primary effect of advancing religion,¹⁰⁹ res judicata prevented the Court’s review of the underlying conclusion that the cross violated the Establishment Clause.¹¹⁰

Although there were six separate opinions, only three of the opinions directly addressed the merits.¹¹¹ Justice Kennedy, joined by the Chief Justice, and in part by Justice Alito, was sensitive to the government’s dilemma between violating the injunction by maintaining the cross or showing disrespect for veterans by removing it, and accorded legislative deference to the land transfer.¹¹² While the plurality intimated that the land disposition adequately settled Establishment Clause concerns,¹¹³ it ultimately remanded the case for the district court to determine if knowledge of Congress’s “policy of accommodation” manifested by the land transfer would affect a reasonable observer’s perception.¹¹⁴ Justice Alito, in his separate concurrence, was convinced that the government properly resolved Establishment Clause claims through the land

¹⁰⁷ Transcript of Oral Argument at 9, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472).

¹⁰⁸ *Salazar v. Buono*, 130 S. Ct. 1803, 1815-16 (2010) (plurality opinion).

¹⁰⁹ *Id.* at 1812-13.

¹¹⁰ *Id.* at 1815.

¹¹¹ *See id.* at 1811, 1816-21 (Justice Kennedy’s plurality opinion); *id.* at 1821-24 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1831-45 (Stevens, J., dissenting).

¹¹² *See id.* at 1817 (plurality opinion).

¹¹³ *See id.* at 1816-20 (plurality opinion).

¹¹⁴ *See id.* at 1819-20 (plurality opinion).

transfer.¹¹⁵ The dissent, however, was skeptical of the government's motive and argued that the land transfer was an inadequate Establishment Clause remedy.¹¹⁶

II. STANDARDS FOR RELIGIOUS DISPLAYS

Establishment Clause jurisprudence has often been described as “muddled” because there is no one prevailing standard and the Court's inquiry relies heavily on context.¹¹⁷

¹¹⁵ See *id.* at 1821 (Alito, J., concurring in part and concurring in the judgment).

¹¹⁶ See *id.* at 1830-31 (Stevens, J., dissenting).

¹¹⁷ See *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in judgment) (stating that Establishment Clause analysis “must take account of context and consequences”); *Santa Fe School Dist. v. Doe*, 530 U.S. 290, 315 (2000) (“Every government practice must be judged in its unique circumstances”); *Lee v. Weismann*, 505 U.S. 577, 597 (1992) (“Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one”); *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburg Chapter*, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring) (“To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice”); *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1018 (W.D. Wis. 2004) (“Establishment clause cases are notoriously context sensitive.”).

For example, the ambiguity in Establishment Clause jurisprudence and reliance on context has led to conflicting results regarding the Ten Commandments monument donated by the Fraternal Order of the Eagles to various cities, even though the monuments are identical. See Susanna Dokupil, *“Thou Shall Not Bear False Witness”: “Sham” Secular Purposes in Ten Commandments Displays*, 28 HARV. J. L. & PUB. POL'Y 609, 640 (2005). See also *Green v. Haskell County Bd. of Comm'rs.*, 568 F.3d 784 (10th Cir. 2009) (rejecting a presumption of unconstitutionality of Ten Commandments monument, but concluding that the monument had an effect of government endorsement, without directly addressing whether government had a secular purpose); *Card v. City of Everett*, 520

F.3d 1009 (9th Cir. 2008) (concluding city had secular purpose in displaying Ten Commandments monument and no violation of Establishment Clause); *Am. Civil Liberties Union Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (upholding Ten Commandments monument as not contravening the Establishment Clause); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (affirming district court's finding that Ten Commandments monument display advanced a religious purpose); *Summum v. City of Ogden*, 297 F.3d 995, 1000 (10th Cir. 2002) (“[T]he fact that *Anderson* considered an identical Ten Commandments Monument is not necessarily controlling. . . . Nor, particularly in light of *Allegheny's* fact-intensive inquiry, does the fact that Salt Lake City's Ten Commandments Monument [in *Anderson*] did not have an improper effect establish that the City of Ogden's Monument was not likely to have such an improper effect.”); *Ind. Civil Liberties Union v. O'Bannon*, 259 F. 3d 766 (7th Cir. 2001) (invalidating display of Ten Commandments monument because of religious purpose and having effect of conveying a religious message); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (concluding that Ten Commandments was displayed for a religious purpose and that displayed advanced religion); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973) (accepting the Ten Commandments display for the secular purpose of conveying the foundation of United States and Utah laws and concluding no Establishment Clause violation); *American Civil Liberties Union v. Bd. of Comm'rs*, 444 F. Supp. 2d 805 (N.D. Ohio 2006) (finding secular purpose and no governmental endorsement of religion); *Twombly v. City of Fargo*, 388 F. Supp. 2d 983 (D.N.D. 2005) (finding secular purpose in display of Ten Commandments monument); *Chambers v. City of Frederick*, 373 F. Supp. 2d 567 (D. Md. 2005) (finding secular purpose and no impermissible advancement of religion in Ten Commandments display); *Summum v. Duchesne City*, 340 F. Supp. 2d 1223, 1226 (D. Utah 2004) (“The outcome of these Establishment Clause challenges varies from court to court and circuit to circuit.”); *Kimberly v. Lawrence County*, 119 F. Supp. 2d 856 (S.D. Ind. 2000) (invalidating Ten Commandments display as violation of Establishment Clause); *Russelburg v. Gibson County*, 2005 WL 2175527 (unpublished opinion) (upholding Ten Commandments display in light of *Van Orden*); *Christian v. Grand Junction*, 2001 WL 34047958 (unpublished opinion) (upholding Ten Commandments display); *State v. Freedom From*

The Establishment Clause cases involving religious displays lend the most analogous comparisons to land disposition cases because the land dispositions often involve religious displays. In the context of religious display cases, the Court has applied three tests: *Lemon* test, endorsement test, and “legal judgment.”

A. *Lemon* Test

At the heart of the tests relied upon by the Court in religious display cases are the questions of governmental purpose and effect of governmental action. In *Lemon v. Kurtzman*, this inquiry was encompassed in a three-part test: “First, the statute must have a secular legislative purpose;¹¹⁸ 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.’”¹¹⁹ Although the *Lemon* test has its critics¹²⁰ and has at times been completely disregarded¹²¹ or regarded merely as a “helpful signpost,”¹²² it has not been overruled.¹²³

Religion Found., Inc., 898 P.2d 1013 (Colo. 1995) (upholding Ten Commandments display).

¹¹⁸ For an excellent discussion of secular purpose, see Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002) [hereinafter Koppelman, *Secular Purpose*] (clarifying the meaning of secular purpose and responding to objections raised against the secular purpose requirement).

¹¹⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

¹²⁰ See *Allegheny*, 492 U.S. at 655-56 (Kennedy, J., dissenting) (providing cases in which criticisms of the *Lemon* test have surfaced).

¹²¹ Justice Thomas has catalogued the Court’s treatment of the *Lemon* test:

Some of our cases have simply ignored the *Lemon* or *Lemon*/ endorsement formulations. See, e.g., *Zelman v.*

B. Endorsement Test

Later, Justice O'Connor refashioned the *Lemon* test into the endorsement test. The endorsement test inquires whether

Simmons–Harris, 536 U.S. 639, 122 S. Ct. 2460, 153 L. Ed.2d 604 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed.2d 151 (2001); *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed.2d 1019 (1983). Other decisions have indicated that the *Lemon* /endorsement test is useful, but not binding. *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S. Ct. 1355, 79 L. Ed.2d 604 (1984) (despite *Lemon* 's usefulness, we are “unwillin[g] to be confined to any single test or criterion in this sensitive area”); *Hunt v. McNair*, 413 U.S. 734, 741, 93 S. Ct. 2868, 37 L.Ed.2d 923 (1973) (*Lemon* provides “no more than helpful signposts”). Most recently, in *Van Orden*, 545 U.S. 677, 125 S. Ct. 2854, a majority of the Court declined to apply the *Lemon* /endorsement test in upholding a Ten Commandments monument located on the grounds of a state capitol. Yet, in another case decided the same day, *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 859–866, 125 S. Ct. 2722, 162 L. Ed.2d 729 (2005), the Court selected the *Lemon* /endorsement test with nary a word of explanation and then declared a display of the Ten Commandments in a courthouse to be unconstitutional. See also *Van Orden, supra*, at 692, 125 S. Ct. 2854 (Scalia, J., concurring) (“I join the opinion of THE CHIEF JUSTICE because I think it accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence we currently apply some of the time”).

Utah Highway Patrol Ass’n v. Am. Atheists, Inc., 132 S. Ct. 12 (2011) (Thomas, J., dissenting from denial of cert.).

¹²² *Lynch v. Donnelly*, 465 U.S. 668, 689 n.1 (1984) (O'Connor, J., concurring).

¹²³ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 n.7. (1993).

the government acts in a manner that endorses or disapproves of religion.¹²⁴ Under this test, a government act violates the Establishment Clause if the government’s “actual purpose is to endorse or disapprove of religion[,] . . . [or] irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”¹²⁵

The endorsement test is concerned about the perception of government endorsement as seen by a reasonable observer¹²⁶ who is “more informed than the casual passerby.”¹²⁷ The test does not focus on “the perceptions of particular individuals or saving isolated nonadherents from discomfort of viewing symbols of faith to which they do not subscribe.”¹²⁸ Additionally, by not focusing on “the actual perception of individual observers, who naturally have differing degrees of knowledge,” the endorsement test, as Justice O’Connor argued, “creates a more collective standard to gauge the objective meaning of the government’s statement in the community.”¹²⁹ Justice O’Connor’s reasonable person is derived from tort law and embodies a person “who is not to be identified with any ordinary individual, who might occasionally do unreasonable things, but is rather a personification of a community ideal of reasonable behavior, determined by the collective social

¹²⁴ *Id.* at 688.

¹²⁵ *Id.* at 690.

¹²⁶ *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (O’Connor, J., concurring).

¹²⁷ *Id.* at 779.

¹²⁸ *Id.*

¹²⁹ *Id.* (internal quotations omitted).

judgment.”¹³⁰ The endorsement inquiry does not ask “whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think the State endorses religion.”¹³¹

¹³⁰ *Id.* (internal quotations omitted) (original alteration marks omitted).

¹³¹ *Id.* at 780 (emphasis original) (original alteration marks omitted).

Evaluating the effect of the government’s action from the reasonable observer’s perspective has prompted much criticism. Scholars have noted that the reasonable observer standard has led to inconsistent rulings in the lower courts. *See, e.g.*, Jesse Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 513 (2002) (discussing the manipulability of the reasonable observer construct and that the outcome of cases depend upon the characteristics attributed to the reasonable observer). Professor Steven Smith has pointed out that “invoking a fictional observer as the arbiter of meaning merely turns disputes about ‘what the law means’ into more byzantine disputes about just what sort of character the fictional observer is, or about what this fictional character would perceive.” Steven Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 561 (2001).

For example, it is unclear if the reasonable observer is a member of the mainstream religion or minority religion or atheist. The reasonable observer’s religious affiliation may change the analysis of the effect of the government’s actions. “If this individual is a member of the religious (or political mainstream), there is too great a risk that the perspective ‘will be inadequately sensitive to the impact of government action on religious minorities, there in effect basing the protection on religious minorities on the judgment of the religious majority that is accused of infringing the majority’s religious autonomy.” Choper, *supra* note 131, at 511 (quoting, Note, *Developments in the Law: Religion and the State: Accommodation of Religion in Public Institutions*, 100 HARV. L. REV. 1606, 1648 (1987)).

Additionally, Justice Stevens has criticized the reasonable person as conceptualized by Justice O’Connor:

Some have interpreted the endorsement test as a separate or alternative test to the *Lemon* test, while others have understood it as part of the *Lemon* test.¹³² For practical ease, this Article applies the endorsement test in conjunction with the *Lemon* test.

C. “Legal Judgment” Approach

[H]er reasonable person is a legal fiction, a personification of a community ideal of reasonable behavior determined by the collective social judgment. The ideal human Justice O'Connor describes knows and understands much more than meets the eye. Her “reasonable person” comes off as a well-schooled jurist, a being finer than the tort-law model. With respect, I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context. It strips of constitutional protection every reasonable person whose knowledge happens to fall below some “ideal” standard.

515 U.S. at 800 n. 5 (Stevens, J., dissenting) (internal quotation and citation omitted). “Instead of protecting only the ‘ideal’ observer,” Justice Stevens advocates “extend[ing] protection to the universe of reasonable persons and ask[ing] whether some viewers of the religious display would be likely to perceive a government endorsement.” *Id.*

¹³² Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the Marsh Wild Card*, 40 IND. L. REV. 529, 556 (2007). *See also*, *Trunk v. City of San Diego*, 629 F.3d 1099, 1106 (9th Cir. 2010) (“In recent years, the Supreme Court essentially has collapsed [*Lemon*’s] last two prongs to ask ‘whether the challenged governmental practice has the effect of endorsing religion.’”); *Mellen v. Bunting*, 327 F.3d 355, 370-71 (4th Cir. 2003) (“treating the endorsement test as a refinement of the second *Lemon* prong”); *Adland v. Russ*, 307 F.3d 471, 479 (6th Cir. 2002) (same); LESLIE C. GRIFFIN, *LAW AND RELIGION: CASES AND MATERIALS* 62 (2d ed. 2010) (introducing “the endorsement and coercion tests as alternatives to *Lemon*”).

Another approach to resolving cases involving religious symbolism evolved in *Van Orden v. Perry*, where the Court reviewed the constitutionality of a monument of the Ten Commandments displayed on a state capitol's public grounds.¹³³ Adding to the confused state of Establishment Clause jurisprudence, the plurality believed the *Lemon* test was "not useful" in this particular circumstance.¹³⁴ The plurality, in addition to Justice Breyer's fifth vote, held that the monument did not violate the Establishment Clause.¹³⁵

Justice Breyer's concurrence, which was controlling,¹³⁶ shed little light on the proper approach courts should use for reviewing religious symbolism cases. In his concurrence, Justice Breyer tried to distance himself from the *Lemon*/endorsement tests by "rely[ing] less upon a literal application of any particular test"¹³⁷ and espousing "exercise of legal judgment."¹³⁸ His "legal judgment" approach included "reflect[ing] and remain[ing] faithful to the underlying purposes of the Clauses, and . . . tak[ing] into account . . . context and consequences measured in light of those purposes."¹³⁹

¹³³ *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion).

¹³⁴ *Id.* at 686.

¹³⁵ *Id.* at 691-92.

¹³⁶ Justice Breyer's opinion was the controlling opinion as it was the narrowest. For a discussion about the narrowest grounds doctrine used for determining binding precedent in plurality opinions, see *Marks v. United States*, 430 U.S. 188, 193 (1977); W. Jesse Weins, Note, *A Problematic Plurality Decision: Why the Supreme Court Should Leave Marks over Van Orden v. Perry*, 85 NEB. L. REV. 830 (2007).

¹³⁷ *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment).

¹³⁸ *Id.* at 700.

¹³⁹ *Id.*

D. Which Test is Controlling?

The *Lemon*/endorsement tests remain viable standards for evaluating religious display cases. Although *Van Orden* declined to apply these tests, *McCreary County v. American Civil Liberties Union of Kentucky*, which was decided on the same day, not only embraced the three-factor *Lemon* test¹⁴⁰ but also reinvigorated it with a more demanding standard of review.¹⁴¹ Recently, the *Buono* plurality relied on the endorsement test, as evidence by its urging the district court to consider the reasonable observer's perception in light of Congress's accommodation policy.¹⁴² In that case, Justice Kennedy specifically "require[d] the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surround the symbol and its placement."¹⁴³

¹⁴⁰ *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859 (2005) (citing *Lemon v. Kurtzman*); *see also* *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting from denial of cert.) (In "*McCreary County v. American Civil Liberties Union of Ky.*, the Court selected the *Lemon*/endorsement test.") (citations omitted).

¹⁴¹ *See* Edith Brown Clement, *Public Displays of Affection . . . for God: Religious Monuments after McCreary and Van Orden*, 32 HARV. J.L. & PUB. POL'Y 231, 235-36 (2009) (discussing *McCreary's* shift of *Lemon's* purpose prong from "the search for a genuine, secular motivation to the hunt for a predominantly religious purpose") (citing *McCreary County v. ACLU*, 545 U.S. 844, 902 (2005) (Scalia, J., dissenting)); Vincent Phillip Munoz, *Thou Shall Not Post the Ten Commandments: McCreary, Van Orden, and the Future of Religious Display Cases*, 10 TEX. REV. L. & POL. 357, 390-91 (2006).

¹⁴² *Buono*, 130 S. Ct. at 1819.

¹⁴³ *Id.* It is possible that Justice Kennedy alluded to the reasonable observer because of the district court's adoption of this construct but he did not depart from or criticize the lower court's reliance on the reasonable observer construct.

Even after *Van Orden*, most appellate courts continue to apply *Lemon's* three-prong test.¹⁴⁴ Among the sixteen religious display cases decided by the federal courts of appeals post *Van Orden*,¹⁴⁵ “only two have expressly declined to apply *Lemon*, and both did so on extremely narrow grounds.”¹⁴⁶

Perhaps courts continue to rely on the *Lemon*/endorsement tests after *Van Orden* because *Van*

¹⁴⁴ See Clement, *supra* note 141, at 246 (discussing the effect of *McCreary* and *Van Orden* on the lower courts).

¹⁴⁵ See *Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011); *Johnson v. Poway Unified School Dist.*, 658 F.3d 954 (9th Cir. 2011); *Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010); *American Civil Liberties Union of Ky. v. Grayson County, Ky.*, 591 F.3d 837 (6th Cir. 2010); *Cooper v. U.S. Postal Service*, 577 F.3d 479 (2d Cir. 2009); *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009); 541 F.3d 1017 (10th Cir. 2008); *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008); *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007); *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036 (9th Cir. 2007); *Staley v. Harris County*, 461 F.3d 504 (5th Cir. 2006), *abrogated*, 485 F.3d 305 (5th Cir. 2007) (en banc); *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320 (11th Cir. 2006); *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006); *Am. Civil Liberties Union of Ky. v. Mercer County*, 432 F.3d 624 (6th Cir. 2005); *Am. Civil Liberties Union Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc); *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005); *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005).

¹⁴⁶ *Id.* at 247. See, e.g., *O'Connor v. Washburn University*, 416 F.3d 1216 (10th Cir. 2005) (explaining that it will “apply the *Lemon* test as modified by [the] endorsement test, while remaining mindful . . . of legal judgment”); *Am. Civil Liberties Union of Ky. v. Mercer County*, 432 F.3d 624, 635-36 (6th Cir. 2005) (following *Lemon* because it had not been explicitly overruled in *Van Orden*); see also Douglas G. Smith, *The Constitutionality of Religious Symbolism after McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93 (2007) (surveying federal circuit court responses to *Van Orden* and *McCreary* in religious symbolism cases).

Orden's own analysis resembles the inquiry encompassed in these tests.¹⁴⁷ Despite the professed resistance to following *Lemon*, Justice Breyer's *Van Orden* analysis, in practical effect, shows consideration of the purpose and effect factors found in the *Lemon*/endorsement tests.¹⁴⁸ First, Justice Breyer's evaluation of context and history¹⁴⁹ is akin to the *Lemon*/endorsement tests' effects prong, which also takes into account history and context. His conclusion that the monument's display on public land was constitutional rested on the context—the physical setting of the monument—and the history of the display.¹⁵⁰ The monument's existence in a park with sixteen other monuments and twenty-one historical markers negated any implication of religious activity.¹⁵¹ Justice Breyer found it significant that the display existed for forty years without being challenged.¹⁵² Second, his determination that the monument conveys a religious and secular moral message¹⁵³ suggests a secular purpose for the display and thereby, corresponds to the purpose prong of the *Lemon*/endorsement tests. Therefore, because a majority

¹⁴⁷ See B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 502 (2005) (pointing out that Justice Breyer used “an analysis that is functionally equivalent to the endorsement inquiry.”)

¹⁴⁸ *Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2010) (“Notably, this inquiry does not dispense with the *Lemon* factors, but rather retains them as ‘useful guideposts.’”).

¹⁴⁹ See *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring in the judgment).

¹⁵⁰ *Id.* at 701-03.

¹⁵¹ *Id.* at 702.

¹⁵² *Id.* at 702-03.

¹⁵³ See *id.* at 701-03 (referring to the “Commandments’ role in shaping civic morality as part of [the Fraternal Order of the Eagles’] effort to combat juvenile delinquency”).

of courts have relied on the *Lemon*/endorsement tests after *Van Orden* and *Van Orden* does not significantly depart from them, this Article focuses on these tests in determining the constitutionality of land dispositions involving religious symbols.

III. GOVERNMENT PURPOSE

A. Method of Determining Legislative Purpose

Both the *Lemon* and endorsement tests require inquiry into legislative purpose to determine if government actions comport with the Establishment Clause.¹⁵⁴ *McCreary County v. American Civil Liberties Union of Kentucky* discussed the means of ascertaining legislative purpose.¹⁵⁵ Legislative purpose is discernable from “readily discoverable fact, without any judicial psychoanalysis of the drafter’s heart of hearts.”¹⁵⁶ These facts are evaluated through the perspective of an objective observer who considers the “text, legislative history, and implementation of the statute, or comparable official act.”¹⁵⁷ Not only is the objective observer familiar with the government’s past actions but also “competent to learn what history has to show.”¹⁵⁸ The Court has considered textual changes between prior and

¹⁵⁴ For a critique of the motivational approach in religion cases, see John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205, 1313-27 (1970).

¹⁵⁵ *McCreary*, 545 U.S. at 862.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 866.

subsequent legislation,¹⁵⁹ public comments made by the bill's sponsor,¹⁶⁰ and the government action itself¹⁶¹ to arrive at a commonsense conclusion about the government's purpose.¹⁶²

Although the Court generally accords deference to the stated legislative purpose, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."¹⁶³ In *Stone v. Graham*, the Court found a religious objective in legislation requiring the posting of the Ten Commandments in schools.¹⁶⁴ The Ten Commandments poster contained a statement that the district court later found to be self-serving:¹⁶⁵ "The secular application of the Ten Commandments is clearly seen in its adoption of the fundamental legal code of Western Civilization and the common law of the United States."¹⁶⁶ Despite the government's avowed secular purpose for posting the Ten Commandments to illustrate their legal influence, the sacred nature of the Ten Commandments led the Court to conclude the "pre-eminent purpose" for the government's action was

¹⁵⁹ See *Wallace v. Jaffree*, 472 U.S. 38, 58-60 (1985) (inferring purpose from textual changes in school prayer statute).

¹⁶⁰ *Edwards v. Aguillard*, 482 U.S. 578, 586-88 (1987)(interpreting statutory text and public comment to conclude an illegitimate purpose for a statute requiring instruction in creationism to accompany evolution teaching).

¹⁶¹ See *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963) (finding religious purpose in requiring Bible study in public schools); *Stone v. Graham*, 449 U.S. 42 (1980) (per curiam) (concluding no secular purpose in requiring post of the Ten Commandments on school walls).

¹⁶² *McCreary*, 545 U.S. at 862.

¹⁶³ *Id.* at 864.

¹⁶⁴ *Stone v. Graham*, 449 U.S. 39, 42 (1981) (per curiam).

¹⁶⁵ *Id.* at 41.

¹⁶⁶ *Id.* at 40 n.1.

“plainly religious.”¹⁶⁷ Also, in *School District of Abington Township v. Schempp*, the professed secular purpose of providing education in music and literature did not alter the Court’s conclusion that there was a religious objective behind laws requiring recitations of the Lord’s Prayer and Biblical readings.¹⁶⁸

Additionally, in *Edwards v. Aguillard*, the Court rejected¹⁶⁹ the government’s purported secular purpose behind a law prohibiting the teaching of evolution unless accompanied with instruction on creation science.¹⁷⁰ The government claimed that the law promoted academic freedom and provided a more comprehensive curriculum.¹⁷¹ The Court, however, found no merit in these arguments.¹⁷² While acknowledging the deference accorded to the government’s stated secular purpose, the Court insisted that the government’s articulation of “such purpose be sincere and not a sham.”¹⁷³ The Court concluded that the government’s purpose was to advance a religious viewpoint¹⁷⁴ because if the government had been truly interested in providing comprehensive education, the government would have permitted instructions in all theories of human origins, without making the teaching of one theory contingent upon teaching another.¹⁷⁵

¹⁶⁷ *Id.* at 41.

¹⁶⁸ *Schempp*, 374 U.S. at 273.

¹⁶⁹ *Edwards v. Aguillard*, 107 U.S. 578, 585-93 (1986).

¹⁷⁰ *Id.* at 582.

¹⁷¹ *Edwards v. Aguillard*, 107 U.S. 578, 586 (1986).

¹⁷² *Id.* at 586.

¹⁷³ *Id.* at 586-87.

¹⁷⁴ *Id.* at 598. *See also*, *Trunk v. City of San Diego*, 629 F.3d 1099, 1112 (9th Cir. 2011).

¹⁷⁵ *Edwards*, 107 U.S. at 588-89.

The Court was equally unconvinced by the government's purported secular purpose that changed each time the counties changed their Ten Commandments display in *McCreary*.¹⁷⁶ The counties in *McCreary*, claiming an educational purpose,¹⁷⁷ initially posted the Ten Commandments in high traffic areas where the display would be visible to visitors seeking government services.¹⁷⁸ After litigation over the Ten Commandments display began, the counties attempted to correct the display by adding eight other religiously themed documents and secular documents with excerpts highlighting a religious reference, such as "endowed by their Creator," "In God We Trust," and "the Bible is the best gift God has ever given to man."¹⁷⁹ Later, the counties changed the display a third time by adding copies of the Magna Carta, Declaration of Independence, Bills of Rights, Star Spangled Banner's lyrics, Mayflower Compact, Kentucky's Constitution's Preamble, and a picture of Lady Justice.¹⁸⁰ The counties tried to recharacterize the display by adding a title, "The Foundations of American law and Government Display," and offering a new proffered secular purpose—educating citizens about the influence of the Ten Commandments on the development of American law and government.¹⁸¹ Notwithstanding the purported secular purpose, the Court construed the counties' actions as "reaching for any way to keep the religious documents on the walls of the courthouse"¹⁸² and concluded that the

¹⁷⁶ *McCreary*, 545 U.S. at 869-73.

¹⁷⁷ *Id.* at 854.

¹⁷⁸ *Id.* at 851-52.

¹⁷⁹ *Id.* at 853-54.

¹⁸⁰ *McCreary*, 545 U.S. at 856.

¹⁸¹ *Id.* at 856-57.

¹⁸² *Id.* at 873.

government acted with a predominately religious objective.¹⁸³

These cases demonstrate that where the government's secular purpose is a sham or secondary to a religious purpose, the Court has not hesitated to find an illegal government purpose even after giving legislative deference its due consideration. Therefore, courts should not allow legislative deference to impede their discerning review of the proffered legislative purpose for land dispositions.¹⁸⁴

B. Purpose of Land Disposition

1. Maintaining memorials and commemorative objects

One secular purpose being asserted as a basis for selling religious objects and the land underneath them to private parties is the preservation of memorials or commemorative objects. It is argued that religious objects serve a secular purpose by memorializing or commemorating important events and the object and land beneath must be transferred or sold in order to preserve them from Establishment Clause challenges.¹⁸⁵

¹⁸³ *Id.* at 881.

¹⁸⁴ See *Buono*, 130 S. Ct. at 1840 (Stevens, J., dissenting) (“Furthermore, in the Establishment Clause context, we do not accord any special deference to the legislature on account of its generic advantages as a policy making body, and the purpose test is not ‘satisfied so long as *any* secular purpose for the government action is apparent.”) (quoting *McCreary*, 545 U.S. at 865 n. 13).

¹⁸⁵ Providing a war memorial has frequently been advanced as a justification for permanent displays of religious objects, particularly crosses. See *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996); *Gonzales v. N. Twp.*, 4 F.3d 1412, 1414 (7th Cir. 1993); *Jewish War Veterans of the United States v. United States*, 695

The purported purpose of using symbols to memorialize or commemorate events poses a general problem in that the symbol being used is not uniquely connected to the secular purpose being advanced. In the specific case of a cross, it is problematic to use a cross as a memorial because “the cross is ‘not a *generic* symbol of death.’”¹⁸⁶ Despite Justice Alito’s invoking the imagery of “white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that [Great War] conflict,”¹⁸⁷ historians have found that the cross¹⁸⁸ is not generally used to memorialize veterans in the United States.¹⁸⁹ Moreover, one single cross does not honor individual veterans—individual crosses for individual soldiers honor the individual’s faith.¹⁹⁰ The crosses among the fields of poppies, alluded to by Justice Alito, were used as *individual* grave makers, instead of as a “universal monument to the war dead.”¹⁹¹ The poppy, as depicted in the

F. Supp. 3, 5 (D.C. 1988); Greater Houston Chapter of Am. Civil Liberties Union v. Eckels, 589 F. Supp. 222 (S.D. Tex. 1984).

¹⁸⁶ *Trunk*, 629 F.3d at 1112.

¹⁸⁷ *Salazar v. Buono*, 130 S. Ct. 1803, 1822 (2010) (Alito, J., concurring in part and concurring in judgment).

¹⁸⁸ *Trunk*, 629 F.3d at 1112. Similarly, the Star of David is not a prevalent symbol for remembering the dead. Greater Houston Chapter of Am. Civil Liberties Union v. Eckels, 589 F. Supp. 222, 227 (S.D. Tex. 1984).

¹⁸⁹ Currently, there are forty-one emblems representing a range of faiths that can be carved into individual headstones at Arlington National Cemetery, including ones for atheists and Wiccans. See http://www.arlingtoncemetery.mil/funeral_information/authorized_emblems.html, last visited July 16, 2011. Displaying a cross on an individual headstone is not problematic because it is private speech, elected by the individual.

¹⁹⁰ *Buono*, 130 S. Ct. at 1836 n.8 (Stevens, J., dissenting).

¹⁹¹ *Trunk*, 629 F.3d at 1113.

famous poem “In Flanders Field,”¹⁹² not the cross, became the *universal* symbol for the foreign wars.¹⁹³

Like the cross, the Ten Commandments have been advanced as a commemoration of civic responsibility¹⁹⁴ and similarly lack a connection with this purported secular purpose. In *Mercier*, for example, the Ten Commandments monument and the land underlying it was sold to preserve the monument as a commemoration of volunteerism. But there is neither a “rational connection” between the Ten Commandments and the volunteer efforts of high school

¹⁹² I thank Professor Bruce Ledewitz for reminding me of the Great War poem, which reads as follows:

In Flanders fields the poppies blow
Between the crosses, row on row,
That mark our place; and in the sky
The larks, still bravely singing, fly
Scarce heard amid the guns below.

We are the Dead. Short days ago
We lived, felt dawn, saw sunset glow,
Loved and were loved, and now we lie
In Flanders fields.

Take up our quarrel with the foe:
To you from failing hands we throw
The torch; be yours to hold it high.
If ye break faith with us who die
We shall not sleep, though poppies grow
In Flanders fields.

John McCrae, *In Flanders Fields and Other Poems* (1915).

¹⁹³ *Trunk*, 629 F.3d at 1113.

¹⁹⁴ See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 704-05 (7th Cir. 2005).

students who filled sandbags¹⁹⁵ nor to the original purpose of the monument. The monument was originally conceived to combat juvenile delinquency and as a commercial venture by Cecile B. DeMille to promote his movie “The Ten Commandments.”¹⁹⁶ Moreover, because approximately 5,500 copies of the Ten Commandments monuments were distributed to various cities throughout the country,¹⁹⁷ there is no special connection between the monument and the identity of any particular city. Also, the city’s legislative purpose in preserving the Ten Commandments monument is suspect because the monument was accepted long before the flood happened.¹⁹⁸ “Thus, at most, the dedication was an afterthought. There is no evidence to suggest that the City would have declined to install the monument if the volunteers had not worked as tirelessly as they did.”¹⁹⁹

Religious symbols inadequately serve as a memorial or commemoration of secular events because not only do they lack universality as a symbol for the purported purpose but also have potential to exclude others. Displays like the cross or Ten Commandments, in addition to having religious significance, express a sectarian preference. First, courts have acknowledged the Ten Commandments as being primarily religious. Even in *Van Orden*, in which the Ten

¹⁹⁵ *Mercier v. La Crosse*, 305 F. Supp. 2d 999, 1008 (W.D. Wis. 2004), *rev’d* *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 704-05 (7th Cir. 2005).

¹⁹⁶ *Books v. City of Elkhart*, 235 F.3d 292, 294-95 (7th Cir. 2000).

¹⁹⁷ *Chambers v. City of Frederick*, 373 F. Supp. 2d 567, 569 (D. Md. 2005).

¹⁹⁸ *See id.* at 1008.

¹⁹⁹ *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1008 (W.D. Wis. 2004). *See also* *Books*, 235 F.3d at 302 (rejecting “avowed secular purpose of recognizing historical and cultural significance of the Ten Commandments, issued on the eve of litigation”).

Commandments display was upheld, the plurality conceded that “[o]f course, the Ten Commandments are religious—they were so viewed at their inception and so remain.”²⁰⁰ Justice Kennedy, who provided the fifth vote in *Van Orden*, agreed that “the Commandments’ text undeniably has religiousness, invoking, indeed emphasizing, the Deity.”²⁰¹ Second, the Ten Commandments favor Judaism, Christianity,²⁰² and Islam,²⁰³ for which the Ten Commandments is a sacred text.²⁰⁴ Third, choosing one version of the Ten Commandment or of a cross necessarily implicates religious endorsement because it represents approval of one sect over another.²⁰⁵ For example, in *Glassroth v. Moore*, Chief Justice Moore of the Alabama Supreme Court erected a monument of the Ten Commandments in the rotunda of the Alabama State Judicial Building.²⁰⁶ The Ten Commandments displayed by Chief Justice Moore was a Christian version, which in some

²⁰⁰ *Van Orden*, 545 U.S. 677, 690 (2005) (plurality opinion).

²⁰¹ *Id.* at 700-01 (Breyer, J., concurring in the judgment).

²⁰² See Douglas Laycock, *Government-sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE. W. RES. L. REV. 1211, 1219 (2011) (explaining that the Ten Commandments monument “explicitly presents the Commandments as Christians and Jews have always understood them—as the direct Word of God”).

²⁰³ See *McCreary County v. Amer. Civil Liberties Union of Ky.*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting) (pointing out that Islam accepts the Ten Commandments).

²⁰⁴ See *Van Orden v. Perry*, 545 U.S. 677, 716 (2005) (Stevens, J., dissenting).

²⁰⁵ See *Glassroth v. Moore*, 335 F.3d 1282, 1299 (11th Cir. 2003) (“[C]hoosing which version of the Ten Commandments to display can have religious endorsement implications under the *Establishment Clause*.”).

²⁰⁶ *Id.* at 1284.

parts contradicts the Hebrew version.²⁰⁷ Similarly, the Latin cross, described as “one of the most sacred of religious symbols,”²⁰⁸ “an especially potent sectarian symbol,”²⁰⁹ “the principal symbol of Christianity around the world,”²¹⁰ and “a symbol of a particular religion, that of Christianity,”²¹¹ and a

²⁰⁷ *Id.* at 1299.

²⁰⁸ *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 771 (1995) (Thomas, J., concurring).

²⁰⁹ *Id.* at 776 (O'Connor, J., concurring in part and concurring in judgment).

²¹⁰ *Id.* at 792 (Souter, J., concurring in part and concurring in judgment).

²¹¹ *Id.* at 792 (Stevens, J., dissenting). *See also* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (“[T]he church speaks through the cross.”); *Gonzales v. N. Twp.*, 4 F.3d 1412, 1417 (7th Cir. 1993) (“But we are masters of the obvious, and we know that the crucifix is a Christian symbol. We reached a similar conclusion about the Latin cross, acknowledging that it is ‘an unmistakable symbol of Christianity as practiced in this country today.’”); *Harris v. City of Zion*, 927 F.2d 1401, 1403 (7th Cir.1991) (“There also can be no doubt that a Latin cross is the principal and unmistakable symbol of Christianity as practiced in this country today.”); *Am. Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) (“The Latin cross] is, indeed, the principal symbol of Christianity as practiced in this country today.”); *Am. Civil Liberties Union of Ga. v. Rabun*, 698 F.2d 1098, 1103 (11th Cir. 1982)(“[T]he Latin cross is a universally recognized symbol of Christianity.”); *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065, 1069 (M.D. Fla.1989) (“The Latin cross is unmistakably a universal symbol of Christianity.”); *Hewitt v. Joyner*, 705 F. Supp. 1443, 1449 (C.D. Cal. 1989), *rev'd*, 940 F.2d 1561 (9th Cir.1991) (“[T]he Latin cross [] epitomize[s] Christian faith. In fact, the Latin cross is the pre-eminent symbol of many Christian religions and clearly represents the key Christian concept of the Crucifixion and Resurrection of Christ.”); *Jewish War Veterans of the United States v. United States*, 695 F. Supp. 3, 13 (D. Col. 1988) (“[T]he Latin cross . . . is a readily identifiable symbol of Christianity.”); *Greater Houston Chapter of the Am. Civil Liberties Union v. Eckels*, 589 F. Supp. 222, 234 (S.D. Tex.1984) (“That the cross . . . [is] the primary symbol[] for

“symbol of particular denominations within Christianity,”²¹² not only excludes non-Christians, but also other sects within Christianity²¹³ that do not recognize the cross as their religious symbol.²¹⁴

The litigation of the Jewish War Veterans is an example of how the cross fails to represent all war veterans

Christianity . . . is beyond question.”), appeal dismissed, 755 F.2d 426 (5th Cir.1985), reh'g en banc denied, 763 F.2d 180 (5th Cir.1985), cert. denied, 474 U.S. 980 (1985).

²¹² Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 792 (1995) (Stevens, J., dissenting).

²¹³ See *id.* at 798, n.3 (Stevens, J., dissenting) (“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.”).

Professor Steven Goldberg provides an explanation for how some of the Justices came to view the Latin cross as nonreligious: An unadorned cross may not be seen as religious symbol to the Catholic Justices because Catholics generally associate the crucifix as their religious symbol, rather than a plain cross. See Steven Goldberg, *The Coming Demise of the Crucifix*, 12 RUTGERS J. L. & RELIGION 277, 278 (2011).

Empirical research reveals that in “religious freedom decisions, the single most prominent, salient, and consistent influence on judicial decision making was religion—in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.” Gregory C. Sisk, et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L. J. 491, 614 (2004). See also Scott C. Idleman, *The Concealment of Religious Values in Judicial Decisionmaking*, 91 VA. L. REV. 515, 521-23 (2005) (showing the effect of judicial religious affiliations on religion case and other cases such as gay rights, obscenity, the death penalty, and gender discrimination).

²¹⁴ Terry Schroder, *Myths and Realities: Gravestones and Markers are Not in Danger*, ACLU statement, July 26, 2006 (“Even within the Christian faith, many sects do not recognize the Latin cross as their preferred religious symbol.”), available at <http://www.aclu.org/religion-belief/myths-and-realities-gravestones-and-markers-are-not-danger>, last visited Oct. 8, 2011.

and how it can be perceived to dishonor the veterans whose faiths are not represented.²¹⁵ In *Trunk*, after the federal government seized the memorial through eminent domain, the Jewish War veterans, “the oldest active national veterans’ service in America,” challenged the cross display.²¹⁶ One veteran expressed: “I don’t know if it is a Christian monument, but it does not speak for me. I was under Hitler and in a concentration camp and a cross does not represent me. The Cross does not represent all veterans and I do not know how they can say it represents all veterans. I do not think a cross can represent Jewish veterans.”²¹⁷

While maintaining a memorial is a legitimate secular interest, maintaining a memorial through the use of a religious symbol is not. Any purported secular purpose for the religious object, like a cross memorializing self-sacrifice, cannot be divorced from the object’s religious meaning.²¹⁸ For example, the cross symbolizes the death of Jesus Christ,²¹⁹ and any secondary meaning for the cross is derivative of cross’s original symbolism.²²⁰ In *Buono*, Justice Kennedy makes a contrary argument by suggesting that the meaning of the cross is changed when Congress adopts it as

²¹⁵ See *Trunk*, 629 F.3d at 1105.

²¹⁶ *Id.* at 1105.

²¹⁷ *Id.* at 1125.

²¹⁸ See *Libin v. Town of Greenwich*, 625 F. Supp. 393, 399 (D. Conn. 1985) (“[T]he cross is primarily a religious symbol. Any secondary meaning as a symbol of peace appears to be derived from the teachings of Christ as set forth in the tenets of the Christian religions to which the cross is sacred.”)

²¹⁹ See *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1161 (10th Cir. 2010) (describing the cross as a “Christian symbol of death”).

²²⁰ Laycock, *supra* note 202, at 1238-39 (arguing that the “secondary meanings would make no sense without the primary meaning”).

a memorial.²²¹ This is a perplexing argument because it implies that the message or meaning of an object that has stood for seventy years is changed by sudden legislative acts. Since 1935, the cross has inspired Easter Sunrise services but never Armistice Day or Veterans Day services until the litigation commenced.²²²

Likewise, Congress cannot erase the cross's primary meaning or the history of religious activities that have taken place in *Trunk*. The cross in *Trunk* was dedicated on Easter Sunday in a Christian religious ceremony²²³ "as a reminder of God's promise to man of everlasting life and of those persons who gave their lives for our freedom."²²⁴ Mount Soledad was selected because it was "worthy to be a setting for the symbol of Christianity." Only in the late 1980s, in response to controversy over the cross, were a plaque and other displays that honor individual veterans²²⁵ added to signify the site as a war memorial. Visitors have held annual Easter services at the site during much of the cross's history, but Veterans' memorial services at the site began only in the late 1990s.²²⁶

²²¹ See Christopher Lund, Salazar v. Buono *and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY 60, 69 (2010).

²²² Salazar v. Buono, 130 S. Ct. 1803, 1828 n.9 (2010) (Stevens, J., dissenting).

²²³ Murphy v. Bilbray, 782 F. Supp. 1420, 1424 (S.D. Cal. 1991). See *Trunk*, 629 F.3d at 1103 (describing the addition of other objects in the 1990s that created a more extensive war memorial, which now includes six walls around the base of the cross, 2,100 plaques, twenty-three bollards (posts), brick paving stones honoring veterans, and an American flag).

²²⁴ *Trunk*, 629 F.3d at 1099.

²²⁵ *Id.* at 1103.

²²⁶ *Id.* at 1099.

Similarly, the secular purposes asserted for the Ten Commandments,²²⁷ whether based on its supposed historic value or influence as a moral code, cannot exist without reliance on its primary religious meaning. “To say that Commandments are ‘historical’ is to repeat the fallacy of *Lynch v. Donnelly*. A miracle—God’s appearance on a mountaintop to carve laws in stone—is ‘historical’ only if it really happened. Whether it really happened is a matter of faith.”²²⁸

Finally, “[i]t borders on the preposterous to argue that the government can avoid an establishment clause violation by ‘dedicating’ a religious object to a nonreligious group.” If this argument were true, governmental bodies could erect unlimited permanent religious symbols and maybe even churches on any public property as long as it could dedicate them to secular groups.²²⁹

In sum, the use of religious symbols for a memorial is unnecessary. As history has shown, a memorial can easily be provided without the government “embedding its actions in any particular religious narrative.”²³⁰ In fact, many memorials, such as the Viet Nam War Memorial, honor the fallen service members without use of religious symbols.²³¹

²²⁷ Some theologians believe that the Ten Commandments cannot operate as a secular text because the Commandments “teach us how to worship God, not how to build democracy.” GRIFFIN, *supra* note 132, at 455 (quoting theologians Stanley M. Hauerwas and William H. Willimon).

²²⁸ Laycock, *supra* note 202, at 1220.

²²⁹ *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1008 (W.D. Wis. 2004), *rev’d*, *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 704-05 (7th Cir. 2005).

²³⁰ Andrew Koppelman, *Religious Orthodoxy*, *supra* note 17, at 738.

²³¹ *See Greater Houston Chapter of the American Civil Liberties Union v. Eckels*, 589 F. Supp. 222, 234 (S.D. Tex. 1984).

As the Ninth Circuit pointed out, “there are countless ways that we can and should honor [veterans], but without the imprimatur of state-endorsed religion.”²³²

2. Avoiding showing disrespect to religion

Another possible secular purpose used to justify sales and transfers of religious objects and land under them is that removing a monument or symbol would risk showing disrespect toward religion.²³³ The argument concludes that because removing a religious object will show hostility toward religion, the best recourse is to transfer or sell the religious object and the land beneath it.

²³² *Trunk v. San Diego*, 629 F.3d 1099, 1102 (9th Cir. 2011).

²³³ *See Salazar v. Buono*, 130 S. Ct. 1803, 1823 (Alito, J., concurring in part and concurring in the judgment) (“[T]his removal would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor. 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”); *see also id.* at 1817 (plurality opinion) (“The 2002 injunction thus presented the Government with a dilemma. It could not . . . remove the cross without conveying disrespect for those the cross was seen as honoring.”).

Ironically, after the Court’s decision in *Buono*, the cross was stolen by a veteran who explained in an anonymous letter that he removed it to defend the Constitution. *See* Caroline Black, *Mojave Cross Honoring U.S. War Dead Stolen in Middle of the Night*, CBSNEWS.COM (May 12, 2010), http://www.cbsnews.com/8301-504083_162-20004719-504083.html). The cross was anonymously replaced within a week, but then promptly removed by the National Park Service because the installation was illegal. *See Replica Cross Mysteriously Appears in Mojave: Authorities Call it Illegal and Remove it from Federal Preserve*, MSNBC.COM (May 20, 2010), <http://www.msnbc.msn.com/id/37261550>).

First, the government's concern for the appearance of disrespect that might result from the object's removal underscores the object's religious significance. Disrespect would be perceived, if at all, only by those who hold religious reverence for the object. The concern over causing disrespect, thereby, undermines the government's purported secular interest in disposing of public land. Even if a religious object can have dual religious and secular meanings, as Justice Breyer believes in *Van Orden*,²³⁴ the concern for causing religious disrespect brings religion to the forefront of the government's actions and would render any purported secular purpose secondary to a religious purpose.

Second, if the government were concerned about the appearance of governmental disrespect for religion when the object is removed by government hands, it could simply sell the object—not the land—and allow private hands to remove it. Under new ownership, the appearance of governmental disrespect is dissipated because presumably the public possesses a common understanding of private ownership and that private owners may do what they wish with the property. For example, in the *Mercier* case, removal of the Ten Commandments monument would not have risked showing disrespect toward religion because an Episcopal church, as well as the original donor the Eagles, had even offered to move the monument to another location visible to the public.²³⁵ Since the Eagles headquarters was located directly across from the park,²³⁶ removing the monument to the Eagles property would not have diminished the visibility of

²³⁴ See *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment) (discussing the display's dual meanings).

²³⁵ *Mercier*, 395 F.3d 693, 696 (2005).

²³⁶ *Id.* at 695.

the monument. Rather than accepting these offers that would have easily resolved any Establishment Clause violation, the city resorted to changing the character of public land through privatization to keep the monument in its original location, leading one judge to conclude that the city “show[ed] a stubborn refusal to separate itself from the display of a purely religious monument.”²³⁷ The city’s rejection of all three offers²³⁸ undermines the city’s need to sell the monument and land beneath it to avoid the appearance of being disrespectful toward religion.

Further, the government’s justification premised on showing respect for religion seems disingenuous not only because there is a readily available alternative, but also because its own actions taken to retain religious objects may appear disrespectful to other religions. One way the government shows disrespect to religion is by denying other religious groups access to erect symbols of their faith.²³⁹ In *Buono*, the government denied a request to build a Buddhist stupa near the cross²⁴⁰ but made “Herculean” efforts to save the cross from being removed.²⁴¹ The federal government went to great lengths to preserve the cross by passing four successive acts, some of which were passed within months of the district court’s decisions.²⁴² The government’s rejection of the stupa causes as much disrespect toward religion as the

²³⁷ *Id.* at 706 (Bauer, J., dissenting).

²³⁸ *Id.* at 696.

²³⁹ I am not arguing that allowing other groups to install religious symbols would mitigate the Establishment Clause violation, but merely that rejecting other religious symbols would open the government to greater Establishment Clause problems when it insists on selling the religious object and land underlying it.

²⁴⁰ *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008).

²⁴¹ *Buono v. Norton*, 364 F. Supp. 2d 1175, 1181-81 (C.D. Cal. 2005).

²⁴² *See Buono v. Kempthorne*, 527 F.3d 758, 769-771 (9th Cir. 2008).

cross's removal. Granted, it will be more obvious when a religious object resting on public land is removed than when the government silently denies a request to erect a new religious object. But an unsuccessful donor will feel the sting of a perceived religious rebuff when the religious object is not erected as much as a successful donor when the object is removed.

Governmental efforts to preserve a religious symbol on public land are not only disrespectful to nonadherents but also to devote believers. Government support through secularization of religious objects may harm religion by "diminish[ing] respect for religion"²⁴³ because the government must disclaim or disassociate the religious significance of the object in order to assert a secular purpose for the object.²⁴⁴ "It is one of the ironies of the sequence of

²⁴³ Koppelman, *Religious Orthodoxy*, *supra* note 17, at 735.

²⁴⁴ Professor William Marshall explains:

[T]he possibility that government practices may through time become "secularized" further compounds the issue. Many persons who would question the result in *Lynch*, for example, have apparently accepted the national celebration of Christmas as permissible. For them, apparently, Christmas is primarily a secular event while the nativity scene is primarily religious. But who decides what is secular and what is religious? Strong Christians are likely to view the holiday as having religious content equally as strong as, if not stronger than, a crèche. To them description of the holiday as a folk event is certainly as demeaning of their religious principles as a similar depiction is of the crèche. Similarly, Christmas is not a secular occurrence to many non-Christians, and public celebration of the holiday is as offensive and alienating as the display of a crèche. Perhaps a greater segment of the population might find the crèche to be more religious than the holiday; but even so, should the

cases dealing with religious symbols on public land that those who argue for their lawful presence must first deny them the significance that provokes the desire to put them there in the first place.”²⁴⁵ As Professor Steven Goldberg observes, “[p]eople 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 faith in which real religion is the loser.”²⁴⁶

The opposition to secularizing religious symbols and the resulting harm are evident in a number of cases. In *Lynch*, because the crèche is part of religious worship, an ordained minister “expressed dismay that the City had demeaned this Christian religious symbol by setting it in the

majority rule? In any event, how should the threshold of “secularization” be determined? Whose perspective (and perception) should govern?

Marshall, *supra* note 17, at 534-35.

²⁴⁵ Stanley Fish, *When is a Cross a Cross?*, N.Y. TIMES OPINIONATOR, May 3, 2010, available at <http://opinionator.blog.nytimes.com/2010/05/03/when-is-a-cross-a-cross>); see also Ian Bartrum, Salazar v. Buono, *Sacred Symbolism and the Secular State*, 104 NW. U. L. REV. 1653, 1662 (2010); Goldberg, *supra* note 213 (arguing that the secularization of religious symbols damages their religious significance).

²⁴⁶ Goldberg, *supra* note 213, at 278. See also *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 812 n.19 (1995) (Stevens, J., dissenting) (“There is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful.”).

midst of other, non-religious symbols.”²⁴⁷ In *Glassroth v. Moore*, when a request was made to place a monument displaying a historic speech near the Ten Commandments monument, Chief Justice Moore insisted that no other monument share the same space because he believed that “the placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument.”²⁴⁸ In *Greater Houston Chapter of the American Civil Liberties Union v. Eckels*, the Star of David that was used to memorialize veterans was equally offensive to adherents.²⁴⁹ For one rabbi, the Star of David evoked memories of the Holocaust and Nazi denigration of Jews.²⁵⁰ One reverend objected to the Star of David and crosses as memorials because they “‘water down’ or adulterate the very precise religions of Christianity and Judaism.”²⁵¹

This discussion is not meant to suggest that government objectives should yield to a heckler’s veto or a “tyranny of the squeamish”²⁵² created by thin-skinned individuals. To the contrary, religious disparagement caused by the secularization of religious objects is felt by the very community that the government intended to avoid offending. Moreover, the perception of religious disrespect is not the result of an obscure or unconventional interpretation

²⁴⁷ *Donnelly v. Lynch*, 525 F. Supp. 1150, 1159-60 (D.R.I. 1981), *aff’d*, 691 F.2d 1029 (1st Cir. 1982), *rev’d*, 465 U.S. 668 (1984).

²⁴⁸ *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003).

²⁴⁹ *Greater Houston Chapter of the Am. Civil Liberties Union v. Eckels*, 589 F. Supp. 222, 226 (S.D. Tex. 1984).

²⁵⁰ *Id.* at 226.

²⁵¹ *Id.* at 227.

²⁵² CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 127 (Harvard University Press 2007).

of the religious symbol's meaning. Rather, it results from the understanding of "competent practitioner[s] in the relevant community"²⁵³ who are familiar with the social meaning of the religious symbol. The government, therefore, should be cognizant of the unintended consequences that undermine the very objective it seeks to achieve.

Thus, if the disrespect to religion is a consideration, then any perceived disrespect resulting from removal of religious objects must be balanced against the disrespect that would occur through the maintenance of religious objects. Because there is equal risk of offending religious adherents by removing the religious symbol as well as retaining it, and greater risk of offending nonadherents by retaining the object, if showing religious disrespect were a factor, it should tilt in favor of removing the object. The appearance of disrespect to religion can easily be mitigated by allowing private parties to remove the object,²⁵⁴ whereas the disrespect occurring from secularization of religious objects can be prevented only by the avoidance of installing religious objects.

Some, however, may criticize this suggested approach as being unnecessarily secular. It has been argued that when the government acts in a secular manner without regard for the role of religion in society, the government is preferring nonreligion over religion,²⁵⁵ harbors a "latent hostility"²⁵⁶ or

²⁵³ *Id.* at 127.

²⁵⁴ See *Summum v. City of Duchesne*, 340 F. Supp. 2d 1223, 1229 (D. Utah 2004) (discussing the sole discretion of new property owners to do as they desire with the monument).

²⁵⁵ In *Lynch*, the mayor stated, "The people absolutely resent somebody trying to impose another kind of religion on them I think the denigration, trying to eliminate these kind of things, is a step towards establishing another religion, non-religion that it may be." *Donnelly v.*

“callous indifference toward religious faith,”²⁵⁷ favors “nontheistic religion/faith,”²⁵⁸ or promotes “a religion of secularism.”²⁵⁹

But these types of arguments misunderstand the Establishment Clause. A “religion of secularism,” as defined by the Court, entails “affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’”²⁶⁰ When the government declines association with religious monuments, it is not preferring those who believe in no religion. It is merely being silent on the matter of religion. “A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism

Lynch, 525 F. Supp. 1150, 1162 (D.R.I. 1981), *aff’d*, 691 F.2d 1029 (1st Cir. 1982), *rev’d*, 465 U.S. 668 (1984).

²⁵⁶ *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in judgment in part, dissenting in part).

²⁵⁷ *Id.* at 664.

²⁵⁸ *McGinley v. Houston*, 362 F.3d 1328, 1329-30 (11th Cir. 2004). Similarly, Professors Christopher Eisgruber and Lawrence Sager point out the following:

[T]here is an opprobrious dimension to the Court’s judgment. But that is just the function of constitutional disputes, and persons on the wrong side may understand themselves to have been criticized by an official organ of the state. The social meaning of the court’s decision does not on this account include the message anyone is less than a full member of the relevant community.

EISGRUBER & SAGER, *supra* note 252, at 129-30.

²⁵⁹ *See Abington School Dist. v. Schempp*, 374 U.S. 226, 225 (1963)(rejecting such arguments that prohibiting Bible readings at school would promote “a religion of secularism”).

²⁶⁰ *Schempp*, 374 U.S. at 225 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

nor religion as its official creed.”²⁶¹ Affirmative beliefs like Humanism and atheism require positive assertions and cannot be advanced merely by governmental restraint in the realm of religion.²⁶² Preferring nonreligion would require an affirmative act, such as allowing a display that states that there is no God or Supreme Being. To interpret government silence and inaction as a type of government preference for nonreligion would turn the Establishment Clause on its head. Or to put it another way, “[i]f ‘non-religion’ is, in fact, religion, then every government action is an establishment.”²⁶³ Furthermore, this interpretation would make it impossible to correct Establishment Clause violations “because every time a violation is found and cured by the removal of the statue or practice that cure itself would violate the Establishment Clause by leaving behind empty space.”²⁶⁴

3. Avoiding Establishment Clause violation

A final secular purpose being advanced to justify selling religious objects and the public land they rest on is the avoidance of Establishment Clause violations. Governmental compliance with the constitution is unquestionably a legitimate purpose, but this defense suffers from the same problem as using a religious symbol for a memorial or commemoration. Both defenses ignore alternative measures of achieving the purported secular purpose.

²⁶¹ *Allegheny*, 492 U.S. at 610.

²⁶² *Eckels*, 589 F. Supp. at 228. Humanism rejects beliefs in God and cherishes the power of humans. *Id.* at 230. Humanism is promoted through the symbol known as the Happy Humanist. *Id.* at 231.

²⁶³ Marshall, *supra* note 17, at 542.

²⁶⁴ *McGinley v. Houston*, 362 F.3d 1328, 1332 (11th Cir. 2004).

In *Larkin v. Grendel's Den*, the Court found the existence of alternative secular measures important in evaluating legislative purpose.²⁶⁵ In *Larkin*, a state statute allowed schools and churches to object to the issuance of

²⁶⁵ *Larkin v. Grendel's Den*, 459 U.S. 116, 117 (1982). See also *Capitol Square Advisory and Review Bd. v. Pinette*, 515 U.S. 753, 793 (1995) (Souter, J., concurring in part and concurring in judgment) (reasoning that the government “was required to find its most narrowly drawn alternative” when confronted with an Establishment Clause concern arising out of Klu Klux Klan’s application to erect a cross in a public square); *Lemon v. Kurtzman*, 403 U.S. 602, 659 (1971) (Brennan, J., concurring) (“I conclude that, in using sectarian institutions to further goals in secular education, the three statutes do violence to the principle that ‘government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.’”); *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 680 (1970) (Brennan, J., concurring) (“What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.”); *School Dist. of Abington, Twp. v. Schempp*, 374 U.S. 203, 264-65, 279-80 (1963) (Brennan, J., concurring) (“[T]he government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.”); *McGowan v. Maryland*, 366 U.S. 420, 466-67 (1961) (Frankfurter, J., separate opinion) (“[I]f a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand.”); Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. Am. Civil Liberties Union of Ky. and Van Orden v. Perry*, 4 FIRST AMEND. L. REV. 139, 173-74 (2006). But see, *Allegheny*, 492 U.S. at 636 (O’Connor, J., concurring) (rejecting “less religious alternative” analysis).

liquor licenses²⁶⁶ in order to “protect[] spiritual, cultural, and educational centers from the ‘hurly-burly’ associated with liquor outlets.”²⁶⁷ While the Court recognized the validity of this secular purpose, the Court pointed out that the government’s purpose could have been achieved by other means, such as completely banning liquor establishments near churches and schools, or providing applicants with a hearing when objections are made.²⁶⁸ As the law existed, it allowed churches veto power over liquor licenses because it failed to provide a standard for determining acceptable reasons,²⁶⁹ and consequently, it was invalid under the Establishment Clause.

Similarly, just as the government can protect churches from the “hurly-burly” of liquor establishments without giving them veto power over liquor licenses, the government can comply with the strictures of the Establishment Clause without resorting to divesting the public of land beneath the religious object. The most obvious solution to remedy Establishment Clause violations is simply to remove the religious objects from public land, not to devise complex land sales or transfers to change the character of the land from public to private land. It is incumbent upon the government to use “reasonable alternatives that are less religious in nature” to avoid an

²⁶⁶ *Larkin v. Grendel’s Den*, 459 U.S. 116, 117 (1982).

²⁶⁷ *Id.* at 123.

²⁶⁸ *Id.* at 123-24. *Compare*, *Gallagher v. Crown Kasher Super Market of Mass., Inc.*, 366 U.S. 617, 630 (1961) (rejecting appellant’s request to invalidate Sunday closure laws on basis that the government has alternative means to achieve secular purpose).

²⁶⁹ *Larkin*, 459 U.S. at 125.

Establishment Clause violation.²⁷⁰ Removing the religious object poses no risk of conveying a religious message. On the other hand, government sales or transfers of the land underlying the religious objects risks perpetuating the Establishment Clause violation because of the extreme measures the government takes to save the religious symbol. Although use of alternative measures is not an independent test of the Establishment Clause,²⁷¹ a government's rejection of less religious alternatives sheds light on the government's avowed secular purpose and is relevant to whether the sale has the effect of endorsing religion.²⁷² When the government has two options to avoid Establishment Clause violations, one being the removal of the religious object and the other being to transfer or sell the land beneath it, a reasonable observer

²⁷⁰ *Allegheny*, 492 U.S. at 618 (Blackmun, J.). Justice Blackmun viewed that where the government has two symbols to convey its secular message, only one of which has religious significance, the government's selection of the one that has religious meaning conveys to a reasonable observer that the government intended to advance religious faith. *Id.* *But see id.* at 636 (O'Connor, J., concurring in part, and concurring in judgment); *Marshfield*, 203 F.3d at 497 (suggesting in dictum that "that this perceived endorsement of religion can be alleviated without recourse to removal of the statue from Fund-owned property").

²⁷¹ *See Lynch*, 465 U.S. at 681 n. 7.

²⁷² *See Gonzales v. N. Twp.*, 4 F.3d 1412, 1423 (7th Cir. 1993); *Rabun*, 698 F.2d at 1111 ("[A] government may not 'employ religious means to reach a secular goal unless secular means are wholly unavailing.'") (quoting *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)); *Jewish War Veterans*, 695 F. Supp. at 14 ("While federal courts for the most part have stopped short of holding the use of religious tools where secular ones will do unconstitutional per se, it seems fair to say that the needless use of means that are inherently religious makes a message of endorsement likely if not unavoidable."); *Eckels*, 589 F. Supp. at 234 ("[T]he use of religious means to achieve secular goals where nonreligious means will suffice is forbidden."). *See also supra* note 265.

could infer that the government intended to promote religious faith when it decides to dispose of public land.

Finally, if merely articulating avoidance of an Establishment Clause violation were sufficient to uphold land sales or transfers, it would render the Establishment Clause a nullity through circumvention.²⁷³ In *Mercier*, the Seventh Circuit repudiated that it was “endorsing a non-remedial initiative designed to sell off patches of government land to various religious denominations as a means of circumventing the Establishment Clause. [It] therefore reject[ed] the idea that the sale was a violation of the Establishment Clause simply because the City had other options.”²⁷⁴ But indeed, when a government is allowed to sell or transfer land while other options exist, it has provided the means to circumvent the Establishment Clause.

The government speech doctrine, as interpreted by *Pleasant Grove v. Summum*, provides the vehicle for circumvention. The government could engage in viewpoint discrimination by selectively accepting permanent monuments and objects for its public spaces while rejecting others. Then the government could shield itself from a Free Speech Clause violation by invoking the government speech doctrine.²⁷⁵ After accepting the religious object, the government could keep the religious monument as long as possible on public land until objections against the display

²⁷³ See *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000) (“[A]lthough this court will defer to a municipality’s sincere articulation of a religious symbol’s secular purpose, we shall not accept a stated purpose that merely seeks to avoid a potential *Establishment Clause* violation.”) (internal quotation marks omitted).

²⁷⁴ *Mercier v. Fraternal Order of Eagles*, 395 F.3d 695, 702 (7th Cir. 2005).

²⁷⁵ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2010).

reach the courts. Once a legal challenge is filed, then the government could retain the object in the very spot by merely transferring the property. There is nothing to keep the government from repeating these actions for each religious object it wants permanently erected on public land.

Summum v. Duchesne City serves as one example of when a land sale can be used to circumvent the Establishment Clause. In this case, the city accepted for placement in its public park the donation of a stone monolith depicting the Ten Commandments.²⁷⁶ Threatened by litigation, the city transferred the monument and the land underlying it to the Duchesne City Lion's Club.²⁷⁷ The only form of consideration for the land and monument was "the Lion's Club previous, current and future services to the community."²⁷⁸ Three weeks later, Summum requested a similar plot of land to place a monument of the Seven Aphorisms next to the Ten Commandments monolith.²⁷⁹ The city denied the request, unequivocally informing Summum that it would not be allowed to erect its own monument until it donated equivalent time and service to the community as the Lion's Club and the family that donated the monument.²⁸⁰ Subsequently, Summum filed a lawsuit alleging violations of its Free Speech rights.²⁸¹ During the litigation, the city nullified the land transfer to the Lion's

²⁷⁶ *Summum v. Duchesne City*, 340 F. Supp. 2d 1223, 1223-24 (D. Utah 2004), *rev'd*, 482 F.3d 1263 (10th Cir. 2007), *vacated*, 555 U.S. 1210 (2009).

²⁷⁷ *Id.* at 1224.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

Club²⁸² and passed ordinances authorizing the city to sell a parcel of land in the park on which the monument rested to the family that originally donated the monument and to permanently close the park for future private displays.²⁸³ The land was sold for fair market value, and after the sale, the private owner erected a fence and a sign.²⁸⁴ The district court upheld the sale as an “adequate” solution for the city to disassociate itself from the monument.²⁸⁵

As *Summum v. Duchesne City* illustrates, allowing the government to sell the land beneath a religious object affords the government to make an end-run around constitutional mandates. The city exercised preferential treatment by allowing the Ten Commandments monument but rejecting the Seven Aphorisms monument, and then ensuring the continued display of the preferred religious monument through the land sale, and ensuring that no other group be afforded equal access by closing the public park entirely to private displays.

Like in *Duchesne City*, the potential to circumvent the Establishment Clause also exists in *Buono*. In *Buono*, an individual had requested requested permission to erect a Buddhist stupa beside the cross.²⁸⁶ Because the request was denied on grounds of violating the Establishment Clause, the stupa was never installed.²⁸⁷ If the government now, after transferring land to the cross’s donor, is permitted to deny a subsequent request for land transfer by the individual interested in erecting a stupa, the government would be

²⁸² *Id.*

²⁸³ *Id.* at 1225.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 1229.

²⁸⁶ *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008).

²⁸⁷ *Id.*

permitted to disregard the strictures of the Establishment Clause.

The government might respond that subsequent land transfers are unnecessary because there are no other religious objects on the contested public property. But this response is unsatisfactory considering that the government prevented other religious objects to be installed, which consequently provides the justification to deny other requests for land. In *Buono*, had the government permitted the stupa, equality principles would require a transfer of the land underlying the stupa. In this regard, the government can circumvent the Establishment Clause by endorsing religion through the first land transfer and expressing a preference for one religious sect over another if it denies subsequent land transfers to other religious groups like in *Duchesne City*.

One might defend the actions in *Duchesne City* or *Buono* on the basis that the government may preserve existing religious symbols as memorials while rejecting additional symbolic memorials.²⁸⁸ Although a first-installed, first-preserve rule could at first blush appear reasonable, such a rule, however, would in effect advance religious preferences. The most historically entrenched permanent symbols have been pervasively Christian.²⁸⁹ “The displays almost always represent objects of dominant, or at least less marginalized,

²⁸⁸ See Clement, *supra* note 141, at 254 (pointing out that there are “many secular reasons why Congress may have had in seeking to preserve the decades-old private war memorial, while at the same time not objecting to the park Service’s determination that new memorials on the same site were inappropriate.”)

²⁸⁹ See, e.g., *infra* note 117 and accompanying text, and *supra* note 63. One rare case involved a Buddhist bell. See *Brooks v. City of Oak Ridge*, 222 F.3d 259 (6th Cir. 2000).

religious groups, and thus the failure to find such displays unconstitutional in many circumstances amount to de facto establishment of majority religious preferences.”²⁹⁰ Thus, allowing a first-installed, first preserve rule would perpetuate the preference shown for the majoritarian religion.

V. EFFECT OF LAND DISPOSITION

Even if there is a secular purpose, land dispositions may be invalid if they have an impermissible effect. Both the *Lemon* and endorsement tests consider the effect of government actions: whether the government “conveys a message of endorsement or disapproval”²⁹¹ or is excessively entangled with religion.²⁹² The history and ubiquity of the practice, context and physical setting of the display, and procedural irregularity are relevant in evaluating government effect. The entanglement inquiry is concerned with administrative entanglement and political divisiveness.

A. History and ubiquity

“History and ubiquity” are among the factors the Court has considered when evaluating the effect of government actions in Establishment Clause cases.²⁹³ The “history and ubiquity” of the practice provides the reasonable

²⁹⁰ Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1061(2005).

²⁹¹ *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984).

²⁹² *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

²⁹³ *Allegheny*, 492 U.S. at 630. *See also* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 778 (1995) (O’Connor, J., concurring in part and concurring in judgment) (inquiring into the “history and administration” of a government practice to determine endorsement).

observer context to assess whether the action conveys a message that the government is approving or disapproving of religion.²⁹⁴ The question, as Justice O'Connor framed it, is whether a reasonable observer would view longstanding practices as endorsing religion if they were undertaken for a secular purpose and their religious relevance has dissipated with time.²⁹⁵

Courts have relied on the longevity of a religious symbol to emphasize its historical significance in order to argue that the object has become an accepted part of the community.²⁹⁶ In *Van Orden*, for example, the plurality emphasized that the Ten Commandments monument had existed for forty years without expressed controversy to bolster its constitutionality.²⁹⁷ This rationale was espoused by Justice Breyer in *Van Orden* when he explained that “[i]t was particularly important that the Texas display stood uncontested for forty years. That fact indicated, as a practical matter of degree, that (unlike the Kentucky display [in

²⁹⁴ *Allegheny*, 492 U.S. at 630. See also *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring in part and concurring in judgment).

²⁹⁵ *Allegheny*, 492 U.S. at 631.

²⁹⁶ See, e.g., *Trunk v. City of San Diego*, 660 F.3d 1091 (9th Cir. 2011) (explaining “whether the government has violated the Establishment Clause by erecting or maintaining a religious symbol on public grounds depends on: (1) the government's use of the religious symbol; (2) the context in which that symbol appears; and (3) the history of the symbol while under government control, including how long it has stood unchallenged”) (Bea, J., dissenting from denial of rehearing en banc).

²⁹⁷ See *Van Orden v. Perry*, 545 U.S. 677, 682 (2005) (plurality opinion). Justice Breyer stated, “I am not aware of any evidence suggesting that [the absence of prior litigation] was due to a climate of intimidation.” *Id.* at 702 (Breyer, J., concurring in the judgment). The court in *Mercier* made a similar conclusion. See *Mercier*, 395 F.3d at 694.

McCreary] the Texas display was unlikely to prove socially divisive.”²⁹⁸

This line of argument has been carried over to land disposition to contend that land disposition does not convey a message of government endorsement because the religious symbol’s longevity demonstrates that its religious message has dissipated. In *Buono*, the nearly seven decades that the cross has stood persuaded the plurality of its “historical meaning”: “Time has also played its role. The cross has stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then the cross and the cause it commemorated had become entwined in the public consciousness.”²⁹⁹

²⁹⁸ STEPHEN BREYER, ACTIVE LIBERTY—INTERPRETING OUR DEMOCRATIC CONSTITUTION 124 (2005).

²⁹⁹ *Buono*, 130 S. Ct. at 1817 (plurality opinion). Although the plurality in *Buono* invoked the history of the cross as a justification for its preservation, the plurality failed to reconcile its supposed historical significance with the fact that the cross did not qualify as a National Historic Landmark. *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008) (*Buono* IV). The cross had been replaced throughout the years, and the plaque no longer accompanied it. *Id.*

Also, interestingly, the government sought to cloak the cross with the prestige and protection bestowed to a National Historic Landmark, although it had previously determined granting such designations to religious properties would offend the Establishment Clause. In 1995, the Department of Justice advised the Department of the Interior about the constitutionality of providing historic preservation grants to religious properties. The DOJ concluded that “*direct award of historic preservation grants to churches and other pervasively sectarian institutions violates the Establishment Clause of the Constitution.*” Office of Legal Counsel, U.S. Dep’t of Justice, Memorandum Opinion for the Solicitor, Dep’t of the Interior: Constitutionality of Awarding Historic Preservation Grants to Religious Properties (1995), available at <http://www.justice.gov/olc/doi.24.htm> (last visited September 25, 2011). In 2003, the DOJ reversed its policy. Memorandum from M. Edward

This line of argument is problematic because it “smacks of bootstrapping.”³⁰⁰ It is equivalent to arguing “the longer the violation, the less violative it becomes. The longer a [religious object] is displayed . . . , the more the effect is to memorialize rather than sermonize.”³⁰¹ Although in *Marsh v. Chambers*, the Court permitted legislative prayers because of their “unique history,”³⁰² the Court has narrowly applied *Marsh* by emphasizing that “*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today.”³⁰³ Such a reading of *Marsh*, as the Court explained, “would gut the core of the Establishment Clause.”³⁰⁴

The interpretation that the unchallenged practice signifies community support, however, fails to consider the

Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to John Leshy, Solicitor, U.S. Department of the Interior, *Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties such as the Old North Church*, (Apr. 30, 2003), available at <http://www.usdoj.gov/olc/OldNorthChurch.htm> (last visited September 25, 2011). See also Christen Sproule, *Federal Funding for the Preservation of Religious Historic Places: Old North Church and the New Establishment Clause*, 3 GEO. J.L. & PUB. POL’Y 151, 171-73 (2005) (discussing the shift in DOJ policy).

³⁰⁰ *Marshfield*, 203 F.3d at 495; *Trunk*, 629 F.3d at 1122 (quoting *Gonzales*, 4 F.3d at 1422).

³⁰¹ *Trunk*, 629 F.3d at 1122 (quoting *Gonzales v. N. Twp.*, 4 F.3d 1412, 1422 (7th Cir. 1993)). See also *Van Orden v. Perry*, 545 U.S. 677, 746 (2005) (Souter, J., dissenting).

³⁰² *Marsh v. Chambers*, 463 U.S. 783, 791 (1983).

³⁰³ *Allegheny*, 492 U.S. at 603. See also EISGRUBER & SAGER, *supra* note 252, at 138 (arguing that in some contexts, “tradition and historical pedigree will not save sectarian symbols”).

³⁰⁴ *Id.*

possibility that the longevity of the practice or silence of religious minorities represents “something quite different from disinterest.”³⁰⁵ Professor Douglas Laycock explains, “It is far more plausible to infer that those who knew and might have complained saw little hope of success in filing a lawsuit [Additionally,] it is far more plausible to infer that anyone who knew about the display, objected to it, and thought he could win a lawsuit might have been intimidated, or at least might have thought it was just not worth the cost in hassle and social disapproval to pursue a lawsuit that would produce intense political resistance and no monetary recovery.”³⁰⁶ As Justice Souter pointed out in *Van Orden*, “[s]uing a State over religion puts nothing in a plaintiff’s pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent. I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause.”³⁰⁷

Trunk demonstrates that the lack of litigation does not equate to the religious object’s acceptance. In *Trunk*, the Ninth Circuit explained that there was a history of anti-Semitism particularly in the housing market in La Jolla, where the cross was erected.³⁰⁸ Within a decade of Jews and other minorities having access to the housing market in La Jolla, challenges concerning the constitutionality of the cross began to surface.³⁰⁹ These events suggest that the

³⁰⁵ *Murphy v. Paulson*, 782 F. Supp. 1420, 1433 (S.D. Cal. 1991).

³⁰⁶ Laycock, *supra* note 202, at 1224.

³⁰⁷ *Van Orden v. Perry*, 545 U.S. 677, 747 (2005) (Souter, J., dissenting).

³⁰⁸ *Trunk*, 629 F.3d at 1121; *Gonzales*, 4 F. 3d at 1422.

³⁰⁹ *Trunk*, 629 F.3d at 1122.

discrimination in La Jolla “may have stifled complaints about the Memorial early in its lifetime.”³¹⁰

A reasonable observer who possesses historical knowledge could perceive the government’s efforts in *Trunk* and *Buono* as endorsing or advancing religion. As the Court stated, “reasonable observers have reasonable memories, and [] precedents sensibly forbid an observer ‘to turn a blind eye to the context in which [the] policy arose.’”³¹¹ The reasonable observer would know that the site in *Trunk* was not originally a war memorial and did not acquire physical elements to indicate it was a memorial until late 1989.³¹² The observer would be aware that the site was chosen because the association believed it to be “a fitting place on which to erect an emblem of faith” and erected the cross as a tribute to God.³¹³ Even when the cross was dedicated as a war memorial in 1954, it was simultaneously dedicated to Jesus Christ.³¹⁴ After the dedication, the site had been the setting for Easter Service and other religious ceremonies.³¹⁵ Most of the secular events taking place at the site only occurred after legal challenges were initiated in 1996.³¹⁶ Additionally, “[g]iven that the Cross was constructed in La Jolla with a distinctively religious purpose, by La Jolla residents, during the height of this discriminatory period, we cannot ignore that such discrimination is part of the Memorial’s history and context

³¹⁰ *Id.*

³¹¹ *McCreary*, 545 U.S. at 865 (alteration original) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

³¹² *See Trunk*, 629 F.3d at 1119.

³¹³ *Id.* at 1118.

³¹⁴ *Id.* at 1119.

³¹⁵ *Id.* at 1119.

³¹⁶ *Id.* at 1119.

and informs the reasonable observer's views."³¹⁷ The reasonable observer would also be aware that the site in *Buono* had been used for Easter Sunrise services since 1935, but no annual Armistice Day or Veterans Day services were held until controversy over the cross arose.³¹⁸

Thus, the longevity of a religious symbol is an unreliable indicator of historical significance and should not mitigate the object's religious significance.³¹⁹ On the contrary, the longer a religious object has been in place the more it solidifies the object's religious message and its sectarian prominence or dominance. Arguments relying on an object's longevity fail to recognize that time may in fact be the religious object's failing.

B. Context and Physical Setting

The context and physical setting of the religious object is another factor relevant to considering the effect of land sales and transfers. Context was significant in *Lynch*, where Justice O'Connor found no effect of governmental endorsement.³²⁰ In *Lynch*, Justice O'Connor first applied her endorsement test to review the constitutionality of a city's inclusion of the crèche in a display among "a Santa Clause house, reindeer pulling Santa's sleigh, candy-striped poles, Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear."³²¹

³¹⁷ *Id.* at 1121, n.21.

³¹⁸ *Salazar v. Buono*, 130 S. Ct. 1803, 1828 n.9 (2010) (Stevens, J., dissenting).

³¹⁹ *See Ellis v. City of La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993).

³²⁰ *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

³²¹ *Id.* at 691.

Justice O'Connor viewed that the government's purpose of including the crèche among its display was to celebrate the winter holiday, not to promote religion.³²² Although displaying the crèche among secular objects did not neutralize the religious symbolism of the crèche, such a varied display negated any message of government endorsement of religion.³²³ Similarly, in *Allegheny*, Justice O'Connor concluded that the menorah did not convey a message of endorsement of religion because it was displayed next to a Christmas tree and a message saluting liberty.³²⁴

In *Capitol Square Advisory and Review Board v. Pinette*, Justice O'Connor applied the perception of a reasonable person to determine if a cross erected by the Klu Klux Klan in a public square, accompanied by a sign disclaiming government sponsorship, would convey a message of endorsement. Justice O'Connor attributed to the reasonable person knowledge that cross is a religious symbol and that the square is a public park located near the seat of government.³²⁵ Her reasonable person also knew that the public square had been used in the past by private speakers³²⁶ and understood the difference between speech supported by the government and speech permitted by the government as a result of opening the space to private speakers.³²⁷ Justice O'Connor concluded that the reasonable person would not interpret the Klan's cross as a religious endorsement because the reasonable observer would also read and understand the

³²² *Id.*

³²³ *Id.*

³²⁴ *Allegheny*, 492 U.S. at 635.

³²⁵ *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring).

³²⁶ *Id.* at 781.

³²⁷ *Id.* at 782.

Klan's disclaimer.³²⁸ In contrast, notwithstanding the disclaimer in *Allegheny*, displaying the crèche "in the main and most beautiful part of the building that is the seat of county government" sent an "unmistakable message that [the government] supports and promotes the Christian praise to God that is the crèche's religious message."

Similar to the crèche in *Allegheny*, the physical settings of the displays in *Trunk* and *Buono* are likely to convey to a reasonable observer a message of government endorsement. Although the displays rest on private land after the divestiture, the continued display of the religious object in prominent places may perpetuate the aura of government endorsement. The Seventh Circuit recognized, at least implicitly, by pointing out that the monument was not located in a "particularly privileged location in the aesthetic scheme of the Park" that the location of a monument would impact the Establishment Clause analysis when considering the sale of the land underneath the monument.³²⁹ The Ten Commandments monument in *Mercier* was illuminated by a spot light affixed to a rooftop³³⁰; the crosses in *Trunk* and *Buono* were erected in a place of prominence, highlighting the religious message of the Latin crosses. In *Trunk*, the sheer size of the cross, weighing twenty-four tons and standing forty-three feet tall, dominates its surrounding³³¹ and towers over thousands of drivers while perched on top of a hill. The religious message of the cross, unlike the crèche in *Lynch*, is not negated by its

³²⁸ *Id.*

³²⁹ *Mercier*, 395 F.3d 693, 696 (2005).

³³⁰ *Id.* at 695.

³³¹ *Trunk*, 629 F.3d at 1123.

surrounding secular objects.³³² While the cross is visible for miles from different perspectives,³³³ the secular message conveyed by the inscriptions on the plaques would not be visible except to an observer standing near them. “In fact, the Cross is the only element of the memorial that can be seen from anywhere except the site of the Memorial itself—including from Interstate 15, which is much farther from Mount Soledad than Interstate 5.”³³⁴

In *Buono*, there are no other displays to neutralize the religious significance of the cross, if that were possible. There had been at one time a sign stating that the cross was intended to commemorate war veterans, but it is no longer there.³³⁵ Although Congress appropriated funds for the installment of a plaque,³³⁶ the plaque is unlikely to neutralize the effect of the cross. Because the cross in *Buono*, too, stands in an elevated position on top of Sunrise Rock, visible from a distance,³³⁷ an observer would not be able to read the secular message of a plaque from afar.

Even if equally prominent secular objects were added, their addition would not cure the Establishment Clause

³³² Some scholars argue that the religious significance of “intrinsically sectarian symbols, such as the cross or Star of David” cannot be muted by including other secular objects. See, e.g., Jordan C. Budd, *Cross Purposes: Remediating the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 222 (2004).

³³³ *Trunk*, 629 F.3d at 1123.

³³⁴ *Id.* at 1123.

³³⁵ *Buono*, 130 S. Ct. at 1812.

³³⁶ *Buono v. Kempthorne*, 527 F.3d 758, 770 (9th Cir. 2008). See Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-117 § 8137, 115 Stat. 2230, 2278-79 (2002), codified at 16 U.S.C. § 410aaa-56.

³³⁷ *Buono v. Kempthorne*, 527 F.3d 753, 769 (9th Cir. 2008).

problem. In *McCreary*, the county attempted to avoid Establishment Clause violations by surrounding the Ten Commandments poster with secular, historical documents.³³⁸ The Court, however, was unpersuaded, believing the county's attempts to be a ruse to mask the county's religious message.³³⁹ Similarly, neither the secular objects like the bollards, plaques, and pavers later added to the site³⁴⁰ in *Trunk*, nor the belated secular events, like the Veterans' Day ceremonies³⁴¹ can diffuse the religious meaning of the cross or the religious activities that occurred at the site since the cross's installation.³⁴² In *Lynch* and *Allegheny*, the Court did not hold the creche's and menorah's, respectively, religious message was muted by the inclusion of other objects.³⁴³ "The idea that sacred objects can be robbed of their sacred meaning by placement in a boarder display is not keeping with the general understanding of the nature of religious objects and symbols."³⁴⁴

Finally, erecting fences and signs disclaiming government ownership after the land has been conveyed to private owners is an inadequate solution "when the problem is not limited to potential confusion regarding the source of the speech."³⁴⁵ In *County of Allegheny v. American Civil Liberties Union*, the Court considered the constitutionality of the crèche and menorah in the context of their surroundings

³³⁸ See *McCreary*, 545 U.S. at 856-57.

³³⁹ See *id.* at 873, 881.

³⁴⁰ See *Trunk*, 629 F.3d at 1103.

³⁴¹ See *id.* at 1099.

³⁴² See *id.*

³⁴³ See Ravitch, *supra* note 290, at 1059; EISGRUBER & SAGER, *supra* note 252, at 134.

³⁴⁴ *Id.* at 1059-60.

³⁴⁵ *Mercier*, 305 F. Supp. 2d at 1012.

and the effect the posted signs had on government endorsement.³⁴⁶ The Court held that the crèche display was unconstitutional despite the fact that city posted a sign next to the crèche explaining a Roman Catholic organization's ownership of the display.³⁴⁷ Rather than finding that the sign mitigated an appearance of government endorsement, the Court concluded that the sign signified the government's endorsement of the organization's religious message.³⁴⁸ On the other hand, the city's sign saluting liberty next to the menorah and Christmas tree conveyed cultural diversity during the holiday, rather than a religious endorsement.³⁴⁹

In circumstances where the land being transferred to private ownership is surrounded by vast public land, it is unlikely that the reasonable observer understands the significance of signs and fencing around the property. For example, as the district court pointed out in *Buono*, because the cross is visible by visitors traveling in cars as far as 100 yards away, drivers are unlikely to "quickly recognize"³⁵⁰ that the one acre "donut hole of land"³⁵¹ that the cross sits on as private property when it is surrounded by 1.6 million acres of public land. In the more extreme case of *Trunk*, there is even a greater likelihood that the reasonable observe will perceive the massive cross as government endorsement. No sign can

³⁴⁶ *Allegheny*, 492 U.S. 573 (1989).

³⁴⁷ *Id.* at 600. The crèche display included a sign stating "This Display Donated by the Holy Name Society." *Id.* at 580.

³⁴⁸ *Id.* at 600.

³⁴⁹ *Id.* at 619. The sign next to the forty-five foot Christmas tree that was placed outside next to the eighteen foot menorah stated: "During this holiday season, the city of Pittsburgh salutes liberty. Let festive lights remind us that were are the keepers of the flame of liberty and our legacy of freedom." *Id.* at 582.

³⁵⁰ *Buono v. Norton*, 364 F. Supp. 2d 1175, 1181 n.7 (C.D. Cal. 2005).

³⁵¹ *Buono v. Kempthorne*, 527 F.3d 758, 768 (9th Cir. 2008).

disclaim government ownership in this instance since the federal government actually owns the seized cross and its surrounding property.

C. Deviation in Procedures and Illegality

Whether there are any deviations from government procedures or regulations for divesting public land via a sale or transfer should also impact the reasonable observer's perception of the transaction's effect. Several cases involve regulatory deviations and congressional anomalies. In *Chambers*, the city did not follow procedures for selling public land and accepted a lower bid.³⁵² In *Mercier*,³⁵³ *Buono*,³⁵⁴ and *Marshfield*,³⁵⁵ the land dispositions occurred without solicitation of other bids.

A reasonable observer would interpret the divestiture of public land to a predetermined recipient without seeking other bids or in lieu of a higher bidder as endorsement of religion. Rather than endorsing religion directly by displaying the religious monument on public land, the government is endorsing religion by giving a private group "preferential access" to display its religious message on property that is surrounded by government-owned land.³⁵⁶ In essence the government is selling a platform to a religious group that it knows will continue the religious message of

³⁵² *Chambers v. City of Frederick*, 373 F. Supp. 2d 567, 572 (D. Md. 2005). In *Chambers*, the district court failed to question the city's noncompliance with requirements for selling public land. *Id.* at 572.

³⁵³ *Mercier*, 395 F.3d at 697.

³⁵⁴ *Buono v. Norton*, 364 F. Supp. 2d 1175, 1180 (C.D. Cal. 2005).

³⁵⁵ *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000).

³⁵⁶ *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1003 (W.D. Wis. 2004), *rev'd*, *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 704-05 (7th Cir. 2005).

the object.³⁵⁷ As the *Capitol Square Advisory and Board v. Pinette* plurality stated, “Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause.”³⁵⁸ A reasonable observer would see no meaningful distinction between a government’s display of a religious object and its authorization of one private owner’s permanent religious display resting in the same location, surrounded by government land.³⁵⁹

In addition to failing to seek other bids, the land exchange in *Buono* occurred outside of established procedure governing the National Park Service.³⁶⁰ The plurality in *Buono* embraced the cross’s history³⁶¹ but ignored that the original cross and subsequent replacements have existed illegally because they were installed without authorization.³⁶² The National Park Service acknowledged this illegality in a letter responding to a request to erect a stupa³⁶³ and again when the cross was stolen and later replaced.³⁶⁴ The National Park Service removed the

³⁵⁷ *See id.* at 1012.

³⁵⁸ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion).

³⁵⁹ *Mercier*, 305 F. Supp. 2d at 1003.

³⁶⁰ Motion to enforce, or in the alternative, modify permanent injunction, United States District Court for the Central District of California, Eastern Division, Frank Buono v. Norton, at 11 (citing 16 U.S.C. § 4601-22(b); 16 U.S.C. § 410aa-56.)

³⁶¹ *See Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) (plurality opinion); *see also id.* at 1822-23 (Alito, J., concurring in part and concurring in judgment).

³⁶² *See Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008).

³⁶³ *See id.*

³⁶⁴ *Replica Cross Mysteriously Appears in Mojave: Authorities Call it Illegal and Remove it from Federal Preserve*, MSNBC.COM (February 10, 2011), <http://www.msnbc.msn.com/id/37261550>; *Park Service Removes*

replacement cross because it, too, was installed without permission.³⁶⁵

Also, although Congress passed four successive acts relating to the cross and received the benefit of the plurality's legislative deference,³⁶⁶ the acts' history is devoid of the customary debate attendant to legislative acts. There is no legislative history to show congressional deliberation, particularly regarding the national cross designation³⁶⁷ or land transfer.³⁶⁸ Given that in each of the successive act pertaining to the cross, the relevant provision dealing with the cross was "buried in a defense appropriations bill,"³⁶⁹ it is

Mojave Cross Replica, CBN.com (February 10, 2011), <http://www.cbn.com/cbnnews/us/2010/May/Stolen-Mojave-Desert-Cross-Returned/>; Liberty Institute, Put the Cross Back!, <http://www.putthecrossback.com/>).

³⁶⁵ *See id.*

³⁶⁶ *See Buono*, 130 S. Ct. at 1817 (plurality opinion).

³⁶⁷ *Buono*, 130 S. Ct. at 1835 (Stevens, J., dissenting).

³⁶⁸ *Id.* at 1840 (Stevens, J., dissenting) (pointing out that there are "no factual findings, reasoning, or long history of 'careful legislative adjustments' [and] Congress did not devote 'years of careful study' to § 8121, nor did it develop a record of any kind, much less an exhaustive one") (internal citations omitted).

³⁶⁹ *Id.* (citing *Buono III*, 364 F. Supp.2d at 1181). The prohibition against expending federal funds to remove the cross consisted of three lines within an act spanning 712 pages, *see Consolidated Appropriations Act, 2001*, Pub. L. 106-554, § 133, 114 Stat. 2763A-230; the cross's designation appeared in a few lines in the 126 page act, *see Department of Defense Appropriations Act, 2002*; the second prohibition against expenditure of federal funds for the cross's removal appeared in two lines of the act consisting of fifty-eight pages, *see Department of Defense Appropriations Act, 2003*; and the provision transferring the land consisted of one paragraph within fifty-six pages of the act, *see Department of Defense Appropriations Act, 2004*, Pub. L. 108-87, § 8121(a), 117 Stat. 1100.

easy to see how those provisions could be “tucked silently into an appropriations bill”³⁷⁰ without much notice.

A reasonable observer who is aware of the government’s noncompliance with its own laws or customary procedures will likely perceive such maneuvers as government endorsement of religion. Moreover, deviations in procedure to effectuate land dispositions can convey a sectarian preference. A reasonable observer would see the “herculean”³⁷¹ efforts to save a majoritarian religious symbol as additional government support of majority religions over minority religions.³⁷² “If anything, the sale . . . exacerbates the violation because it communicates to nonadherents that not only is the city willing to display a Judeo-Christian symbol on public property, but it is also willing to carve up a public park to insure that the symbol does not have to be moved or share its space with displays expressing other viewpoints.”³⁷³ The disposition “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”³⁷⁴

D. Excessive Government Entanglement

³⁷⁰ *Buono*, 130 S. Ct. at 1840 (Stevens, J., dissenting).

³⁷¹ *Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (2005).

³⁷² *See Budd*, *supra* note 332, at 224 (espousing that “accommodations in the remedial context thus should be permitted only if they afford endorsed religious speech no expressive advantage vis a vis competing private view points. To otherwise permit government to project its perceived favoritism into the sphere of private expression will perpetuate rather than dissipate apparent endorsement in the view of a skeptical observer.”).

³⁷³ *Mercier*, 305 F. Supp. 2d at 1013, 1020.

³⁷⁴ *Lynch v. Donnelly*, 465 U.S. 688, 688 (1984) (O’Connor, J., concurring).

Government entanglement, whether evaluated as an individual test in *Lemon* or collapsed into the endorsement test's effect prong,³⁷⁵ is another consideration for determining the constitutionality of land sales and transfers involving religious objects. To determine whether the government act implicates excessive government entanglement, the Court has "examine[d] the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."³⁷⁶ The Court has invalidated laws that administratively entangle the government by requiring a "comprehensive, discriminating, and continuing state surveillance"³⁷⁷ and expressed concerns about laws that engender political divisiveness.³⁷⁸

1. Restrictive covenants

Few would disagree that a government's explicit mandate to retain a religious object on the land it conveyed to a private owner would excessively entangle the government in religion. The more contentious issue is whether a restrictive covenant that requires maintenance of a memorial necessarily mandates retention of the religious object itself. Resolving this issue depends on statutory construction and common sense.

³⁷⁵ Even when government entanglement was "first explicitly articulated in *Walz v. Tax Commission* , . . . it could easily have been construed as simply a pragmatic rephrasing of the 'primary effect' test." Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—a Ten Year Assessment*, 27 UCLA L. REV. 1195, 1199 (1980).

³⁷⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

³⁷⁷ *Id.* at 619.

³⁷⁸ *Id.* at 622-24.

In *Buono*, a reasonable observer can view the land transfer and legislative acts as a means to preserve the cross. The land transfer act requires that the new owner maintain the property as “a war memorial.”³⁷⁹ Despite the government’s argument that the act is ambiguous as to whether the cross needed not be part of the required memorial,³⁸⁰ it is logical to read the transfer act as requiring maintenance of the cross because Congress had specifically designated the cross as a memorial³⁸¹ and required funds to install a replica of the plaque.³⁸² Also, when Congress, on the heels of the district court’s injunction, passed the act forbidding the use of federal funds to “dismantle national memorials commemorating United States participation in World War I,”³⁸³ there is no ambiguity that Congress intended “memorial” to mean the cross. It is strange to suggest that the word “memorial”—the meaning of which was clear in the two prior acts—should suddenly become ambiguous in the land transfer act. Moreover, there has been no subsequent act to supersede the designation of the cross as a National Memorial.³⁸⁴ Because statutory

³⁷⁹ Department of Defense Appropriations Act, 2004 Pub. L. No. 108-87, § 8121(e), 117 Stat. 1054, 1100 (2003).

³⁸⁰ See Brief for the Petitioners at 32, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472), 2009 WL 1526915.

³⁸¹ The memorial was previously officially designated as the “White Cross World War I Memorial.” 16 U.S.C. § 431 (2006).

³⁸² See Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States, 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278-79 (2002).

³⁸³ See *Buono v. Kempthorne*, 527 F.3d 758, 771 (9th Cir. 2008); Pub. L. No. 107-248 § 8065(b), 116 Stat. 1551 (2006).

³⁸⁴ See Mary Jean Dolan, *Salazar v. Buono: The Cross Between Endorsement and History*, 105 NW. U. L. REV. COLLOQUY 42, 51 (2010)

construction requires that two acts be read in conjunction unless they conflict, the land transfer act's reference to a war memorial would logically mean the cross. "[An] accepted rule of construction is that ambiguities in a newly enacted statute are to be resolved in such a fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws."³⁸⁵ Finally, it often takes a congressional act to abolish a National Memorial,³⁸⁶ and because no subsequent act has changed the cross's designation as a memorial, the cross is still the "memorial" referred to in the land transfer act.

An argument that a restrictive covenant requiring a memorial's maintenance does not include the religious object itself is disingenuous. In most instances, the religious object and land underlying it are sold, without seeking other bidders or without accepting higher bids, to the object's original donor or to someone who expressed an interest in maintaining the religious object. The city sold the Ten Commandments monument and land beneath to the local Eagles chapter that had originally donated the monument³⁸⁷ without soliciting other bids in *Mercier*³⁸⁸ and despite receiving higher bids in *Chambers*.³⁸⁹ In *Buono*, without soliciting other bids, the federal government transferred the cross and its surrounding land to the Veterans of Foreign

("[A]bolishing National Memorial status frequently has entailed specific congressional action.").

³⁸⁵ ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 16 (Princeton University Press 1997).

³⁸⁶ *Id.* at 51 n. 59.

³⁸⁷ *See Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (2005); *Chambers v. City of Frederick*, 373 F. Supp. 2d 567, 571 (D. Md. 2005).

³⁸⁸ *Mercier*, 395 F.3d at 697.

³⁸⁹ *Chambers*, 373 F. Supp. at 572.

Wars, which had initially erected the cross, and exchanged land with Mr. Sandoz, the individual who erected the cross in its current form.³⁹⁰ In *Marshfield*, also without soliciting bids,³⁹¹ the city sold the Christ statue and land beneath it to the Henry Prashak Memorial Fund, Inc.,³⁹² established in honor of the person who donated the picnic tables and grills for a comfort station around the statue.³⁹³ Similarly, in *Duchesne City*, the city sold land along with the monument of the Ten Commandments to the family that had donated the monument.³⁹⁴

Selling the religious object to its donor most likely ensures that the object will be maintained because the donor attached significance to the object in donating it in the first place. In *Mercier*, the practicality of the sale to the Eagles, the donor, only mattered if the government were interested in the monument being maintained. The location of the Eagles chapter made it convenient for the maintenance of the monument, and thereby, making the sale “practical” in the court’s eyes.³⁹⁵ It was no surprise that the Eagles kept the monument in its original location.³⁹⁶

Even if a restrictive covenant does not explicitly require the retention of the religious object, the inclusion of a covenant requiring any maintenance of the property is

³⁹⁰ *Buono v. Norton*, 364 F. Supp. 2d 1175, 1180 (C.D. Cal. 2005).

³⁹¹ *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000).

³⁹² *Id.* at 489.

³⁹³ *Id.* at 490.

³⁹⁴ *Sumnum v. Duchesne City*, 340 F. Supp. 2d 1223 (D. Utah 2004).

³⁹⁵ *See Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (2005).

³⁹⁶ *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1014 (W.D. Wis. 2004) (“Every La Crosse citizen recognizes the sale to the Order [of the Eagles] was about preserving the monument’s religious message in the park.”).

likely to suggest to a buyer that the government intends for the status quo to be maintained. A requirement to maintain any memorial, even if not the religious object, structures an incentive for the new owner to maintain the current religious object, rather than expend funds to dismantle the current memorial and erect a new one in its place. In *Paulson v. City of San Diego*, the Ninth Circuit invalidated a prior sale of a cross because the city's consideration of the bid price and financial capability to maintain the "historic war memorial" gave an unfair advantage to those seeking to promote the city's sectarian message.³⁹⁷ The Ninth Circuit explained:

Suppose that two similarly situated bidders-Bidder # 1 and Bidder # 2-each had the minimum acceptable amount of \$35,000 to bid on the project, and Bidder # 1 proposed to retain the cross, while Bidder # 2 proposed to construct a secular memorial. The structure of the sale ensured that Bidder # 1 would be awarded the land. Bidder # 1 could bid the full \$35,000 and still demonstrate the financial capability to maintain a historic war memorial because the City would subsidize the cost of Bidder # 1's proposed memorial by conveying the cross. Bidder # 2 could not compete successfully with Bidder # 1: If Bidder # 2 matched Bidder # 1's bid, then Bidder # 2 could not demonstrate the financial capability to maintain a historic war memorial, because all of Bidder # 2's resources would have been dedicated to the bid price, and none would have been reserved to fund removal of the cross and construction of a new memorial. Alternatively, Bidder # 2 could reserve the money needed to remove the cross and construct the new memorial. But that option would

³⁹⁷ *Paulson v. City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002).

eliminate Bidder # 2 from the process, because Bidder # 2's bid in that instance would fall below the minimum acceptable bid.³⁹⁸

Paulson demonstrates that when a governmental body conditions the sale of land and religious object on a particular use, bidders who are interested in preserving the religious objects are given “gratis” the means to continue the government’s sectarian message.³⁹⁹

Assuming arguendo that a restrictive covenant cannot be interpreted to require retention of the religious object, a restrictive covenant that generally requires a particular use for the conveyed land would still entangle the government. The Court has warned about “programs, whose very nature is apt to entangle the state in details of administration.”⁴⁰⁰ In *Lemon*, the Court invalidated state aid to parochial schools because the program entailed “continuing state surveillance” to ensure compliance.⁴⁰¹ Although the inspection in *Lemon* related more specifically to religious content,⁴⁰² covenants that mandate the maintenance of religious objects or memorial, or that mandate public access be made available for a space necessitate the government to monitor compliance with the covenants, which continue state action in perpetuity.

2. Reversionary interests

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Lemon*, 403 U.S. at 615 (quoting *Walz v. Tax Com.*, 397 U.S. 664, 695 (1970) (Harlan, J., separate opinion)).

⁴⁰¹ *Id.* at 619.

⁴⁰² *Id.* at 620.

When the government retains a reversionary interest in the land, it further perpetuates state action because the land on which the religious monument or memorial rest may revert back to the government's ownership. Not only must the government monitor the new owner's compliance with the restrictive covenant, but it also must act to enforce the covenant when the new owner fails to meet its obligation. A reversionary interest in the land undermines the government's disassociation from the religious monument, which purportedly motivated the land sale in the first place.

Imposing a requirement on the private owner to maintain the property for a particular use would allow the government to retain "complete and present control."⁴⁰³ For example, in *Hampton v. City of Jacksonville*, a city sold golf courses that were previously segregated to private owners for fair market value.⁴⁰⁴ Although there was no evidence of bad faith,⁴⁰⁵ the court, nonetheless, found that state action continued because the city included a reversionary clause in the sale, which provided that the property would revert to the city if the property were used for any purpose other than a golf course.⁴⁰⁶ Courts, like *Hampton*, have viewed such schemes involving reversionary clauses as being no different from a long term lease that permits the government to cancel if the owner fails to carry out the purpose.⁴⁰⁷

Additionally, entanglement may result from the government retaining an easement onto a parcel. In *Buono*, the government appears to have retained an easement via Pub. L. No. 108-87, § 8121(a)-(f) and Pub. L. No. 107-117, §

⁴⁰³ *Hampton v. City of Jacksonville*, 304 F.2d 320, 323 (5th Cir. 1962).

⁴⁰⁴ *Id.* at 321.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 322.

⁴⁰⁷ *Id.* at 322-23.

8137.⁴⁰⁸ Section 8121 provides that “[n]otwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under section 8137.”⁴⁰⁹ The Secretary, pursuant to section 8137, must “use no more than \$10,000 of funds available for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial . . . and to install the plaque in a suitable location on the grounds of the memorial.”⁴¹⁰ The government, thereby, at least has retained an easement to allow it to install a plaque, which evinces the government’s failure to sever its association with this religious symbol.

3. Political divisiveness

Apart from the restrictive covenants and reversionary interests, a land disposition without these clauses could still excessively entangle the government because of political divisiveness. As early as *Everson v. Board of Education*, the Court has recognized the divisive effect of religion in the public sphere.⁴¹¹ Justice Jackson articulated “that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made

⁴⁰⁸ Motion to enforce, or in the alternative, modify permanent injunction, filed by plaintiff, Frank Buono v. Gale Norton, United States District Court for the Central District of California, Eastern Division, at 12.

⁴⁰⁹ Pub. L. 108-87, § 8121(a)-(f), 117 Stat. 1054, 1100 (2003).

⁴¹⁰ Pub. L. 107-117 § 8137 (2002), 115 Stat. 2230, 2278-79 (2002).

⁴¹¹ See *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 26-27 (1947) (reviewing the constitutionality of township’s reimbursement for transportation of children to parochial schools).

public business. . . . It was intended not only to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life. . . ."⁴¹² In *Lemon*, the Court considered the potential for political divisiveness⁴¹³ as part of its entanglement analysis: "A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs."⁴¹⁴ The *Lemon* Court assumed that the issue of state assistance would prompt substantial political activity in a community where there was high enrollment in church-related schools.⁴¹⁵

⁴¹² *Id.* at 26-27.

⁴¹³ For a discussion about the origins of the political divisiveness argument, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1681-83 (2006).

⁴¹⁴ *Lemon*, at 622. See also *Aguilar v. Felton*, 473 U.S. 402, 417 (1975), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997), (Powell, J., concurring) (discussing that the "potential for such divisiveness" provided "a strong additional reason" to invalidate the government's programs); *Wolman v. Walter*, 433 U.S. 229, 259 (1977) (Marshall, J., concurring in part and dissenting in part)(expressing concern for the "dangers of 'political divisiveness on religious lines'"); Cmte. for Public Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 798 (1973) (warning that competition among religious groups to "gain and maintain the support of government" may "occasion[] considerable civil strife"); *Walz v. Tax Com.*, 397 U.S. 664, 694 (1970) (Harlan, J., separate opinion)("[W]hat is at stake as a matter of policy (in Establishment Clause cases) is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.").

⁴¹⁵ *Lemon*, 403 U.S. at 622. It has been argued that Justice Burger failed to buttress the political divisiveness test in *Lemon* with any historical support. See Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L. J. 205, 214 (1981). But other scholars, though skeptical about the entanglement test, have acknowledged that "the 'excessive entanglement' conception has long

Some Justices have suggested that the entanglement prong should be confined to administrative entanglement⁴¹⁶ but yet have acknowledged that the “[p]olitical divisiveness is

been recognized as one of the core strengths of our democratic society. Madison recognized the theoretical necessity of confining religion and civil government to their own respective spheres; de Tocqueville observed the salutary consequences of adherence to that standard.” Ripple, *supra* note 375, at 1238. Likewise, Professor Richard Garnett traced the foundations for the political divisiveness test to Madison, who warned “‘intermedd[ing] with Religion’ by government can only ‘destroy . . . moderation and harmony’ and is an ‘enemy of the public quiet.’” Garnett, *supra* note 413, at 1681 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785)).

⁴¹⁶ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002) (rejecting “the invisible specters of ‘divisiveness’ and ‘religious strife’”); *Agostini v. Felton*, 521 U.S. 203, 233-34 (1997) (concluding that divisiveness alone was insufficient to create entanglement); *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O’Connor, J., concurring) (stating that political divisiveness “should not be an independent test of constitutionality.”) For other criticisms of political divisiveness as a consideration in determining Establishment Clause violations, see Clement, *supra* note 141, at 245; Gaffney, *supra* note 460 (arguing that the political divisiveness test lacks historical support and promotes bad public policy and bad theology); Garnett, *supra* note 413 at 1670 concluding that although political divisiveness concerns are “real and reasonable does not mean that they can or should supply the enforceable content of the First Amendment’s prohibition on establishment of religion”); Ripple, *supra* note 375, at 1217 (arguing that the entanglement standard is vulnerable to judicial subjectivity).

For scholarship supporting political divisiveness as a factor in Establishment Clause evaluations, see Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the Lemon Entanglements Prong*, 7 FIRST AMEND. L. REV. 253 (2009) (utilizing political theory, social science, and history to argue in defense of the political divisiveness factor); David R. Scheidemantle, Note, *Political Entanglement as an Independent Test of Constitutionality under the Establishment Clause*, 52 FORDHAM L. REV. 1209 (1986).

admittedly an evil addressed by the Establishment Clause.”⁴¹⁷ Despite the urgings to eliminate political divisiveness as a factor, the support for political divisiveness test can be found in a number of circumstances⁴¹⁸ beyond its origins in parochial-aid cases. In *Lee v. Weisman*, the Court invalidated nonsectarian school prayers at a graduation.⁴¹⁹ Although Justice Kennedy grounded his opinion on the dangers of coercion, political divisiveness appeared to underlie his discussion of a pluralistic society.⁴²⁰ Also expressed in *Weisman*, Justice Blackmun feared that “mixing of government and religion can be a threat to free government, even if no one is forced to participate” and explained that “[o]nly ‘anguish, hardship and bitter strife’ result ‘when zealous religious groups struggl[e] with one another to obtain the government’s stamp of approval.’”⁴²¹

Similarly, political divisiveness is relevant to religious display cases. In *McCreary*, Justice Souter, writing for the majority, was concerned about the “civic divisiveness that follows when the Government weighs in on one side of the religious debate.”⁴²² In *Van Orden*, Justice Breyer, in his controlling concurring opinion, focused on the Establishment Clause’s “basic purpose[]” of “avoid[ing] that divisiveness based on upon religion that promotes social

⁴¹⁷ *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O’Connor, J., concurring). See also Garnett, *supra* note 413, at 1700 (pointing out that Justice O’Connor’s endorsement test is similar to the political divisiveness consideration).

⁴¹⁸ See Garnett, *supra* note 413, at 1700.

⁴¹⁹ *Lee v. Weisman*, 505 U.S. 577 (1992).

⁴²⁰ See Garnett, *supra* note 413, at 1701.

⁴²¹ *Weisman*, 505 U.S. at 606-07 (Blackmun, J., concurring) (second alteration original).

⁴²² *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 876 (2005).

conflict, sapping the strength of government and religion alike.”⁴²³ In that same case, Justice Stevens provided even greater support for examining political divisiveness in Establishment Clause cases by referring to the “Government’s *obligation* to avoid divisiveness and exclusion in the religious sphere.”⁴²⁴ Most recently, the *Buono* plurality implicitly acknowledged political divisiveness as a consideration when it cited to Justice Breyer’s concurrence in *Van Orden*, which expressed fear that removing the Ten Commandments monument could “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”⁴²⁵

Although the *Van Orden* and *Buono* pluralities employed the political divisiveness argument to justify retaining the religious symbol, they nonetheless relied on political divisiveness as a consideration. And as Dean Erwin Chemerinsky points out, “accepting Breyer’s goal of preventing divisiveness should lead to a robust application of the Establishment Clause—the opposite of his conclusion in *Van Orden*.”⁴²⁶

Because “political division along religious lines was one of the principal evils against which the *First Amendment* was intended to protect,”⁴²⁷ the concern about political divisiveness should be relevant to land disposition cases. The

⁴²³ *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

⁴²⁴ *Id.* at 2875 (Stevens, J., dissenting) (emphasis added).

⁴²⁵ *Buono*, 130 S. Ct. 1803, 1817 (2010) (plurality opinion) (citing *Van Orden v. Perry*, 545 U.S. 677, 702-03 (2005) (Breyer, J., concurring in judgment)).

⁴²⁶ Erwin Chemerinsky, *Why Justice Breyer was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL OF RTS. J. 1, 4 (2005).

⁴²⁷ *Lemon*, 403 U.S. at 622.

issue of school aid for church-related schools may be more divisive and likely to draw greater political activity because of the financial stakes involved.⁴²⁸ There are many who would directly benefit from school aid whose voice would add to the political division, along with the many who would oppose their tax dollars being spent on school aid. In the case of land transfers or sale, the financial stakes are low as tax money is generally not being spent in the transaction.⁴²⁹

On the other hand, the absence of economical stakes may not alleviate the concern over political divisiveness. “The argument for government agnosticism is that, unlike government endorsement of any particular religious proposition, it is not in principle impossible for everyone to

⁴²⁸ See *Everson v. Board of Educ.*, 330 U.S. 1, 53-54 (1947) (Rutledge, J., dissenting):

Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit other, there another. That is precisely the history of societies which have had an established religion and dissident groups It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. . . . The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefits, or all will embroil the state in their dissensions

⁴²⁹ In *Buono*, however, Congress authorized as much as \$10,000 tax dollars in appropriations for a replica of the cross and plaque. See Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-117 § 8137, 115 Stat. 2278-79 (2002), codified at 16 U.S.C. § 410aaa-56; *Buono v. Kempthorne*, 527 F.3d 758, 770 (9th Cir. 2008).

agree to it.”⁴³⁰ Government display of religious objects and the sale of land that perpetuate the object’s presence are a source of tremendous divisiveness. As Justice Brennan warned, “the Court should not blind itself to the fact that because communities differ in religious composition, the controversy over whether local governments may adopt religious symbols will continue to fester.”⁴³¹ The dissent in *Lynch* pointed out that although there was no apparent civil strife prior to the suit challenging the government’s display of the crèche, it later “unleashed powerful emotional reactions which divided the City along religious lines.”⁴³² The

⁴³⁰ Koppelman, *Secular Purpose*, *supra* note 118, at 110.

⁴³¹ *Lynch v. Donnelly*, 465 U.S. 668, 702 (1984) (Brennan, J., dissenting).

⁴³² *Id.* at 702. Most of the letters reviewed by the district court reflected a sentiment that the ACLU was engaging in “petty” behavior by initiating a law suit over a central Christian symbol rather than having the plaintiff who was offended by the crèche avoid the park where the crèche was displayed. The majority of the letters expressed outrage and indignation with the “minority’s” interference with the “majority’s” choice regarding of objects to display. *Id.*

Ten local clergypersons issued the following statement in response to the mayor statements denouncing the legal challenge of the creche:

We clergy of several religious traditions wish to express a pastoral concern growing out of the controversy surrounding the display of a nativity scene with city funds in Pawtucket. Our concerns are several noted below. While the festivities, lights and generation of good will in this season have roots in both religion and secular tradition, the creche is a specifically religious symbol. Our country, while deeply influenced by the Judeo-Christian heritage, is not itself Judeo-Christian but is pluralistic, consisting of many rich religious traditions and recognizing the value of all. Government in our country, wisely recognizing the diversity of these traditions, was set up to steer clear of embracing any

cross in *Trunk* “has long since become a flashpoint of secular and religious divisiveness,”⁴³³ engendering twenty years of litigation. Similarly, in *Jewish War Veterans of the United States v. United States*, “emotions were running high,” provoking over 3,200 letters about the cross⁴³⁴ and “ignit[ing] a fuse among local residents” who used their political strength to persuade their senator to act.⁴³⁵ In other cities, the battle over religious symbols aroused as many as 10,000 people to march in the streets.⁴³⁶ As was seen in *Buono*, the

while protecting the religious freedom of all. We as pastors have a responsibility to educate our people in the history of religious strife and the futility of imposing religious beliefs on the human conscience. The specifically religious observance of this holiday period belongs in our homes and in our churches and synagogues. Although there are public recognitions of this glad season, they should be confined to those symbols and traditions which are not identified with any one group. We call upon our public officials not to exploit the strong sentiments associated with religious festivals and divide majority from minority. Rather, we hope they will rise to a statesperson-like position and avoid the insensitivity of foisting upon others any specific religious traditions. In this way, the true joy of the season can be appreciated by and made meaningful to the widest diversity of people.

Donnelly v. Lynch, 525 F. Supp. 1150, 1160 n.17 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984).

⁴³³ *Trunk*, 629 F.3d at 1122. *See also* *Gonzales v. N. Twp. of Lake County*, 4 F.3d 1412, 1415 (7th Cir. 1993) (discussing objections made by groups of crucifix because “the religious symbol which was erected with the intention of uniting [the] community in reality has proved divisive both between and within religious groups”).

⁴³⁴ *Jewish War Veterans of the United States v. United States*, 695 F. Supp. 3, 6 (D. D.C. 1988).

⁴³⁵ *Id.*

⁴³⁶ *Slaven*, *supra* note 7, at 652.

issue of preserving a religious symbol prompted immediate political activity, extending beyond the community to as far as to Congress. Congress reacted to the litigation over the Latin cross by declaring it a memorial,⁴³⁷ twice prohibiting public funds to be used for its removal to forestall compliance with the district court injunction,⁴³⁸ appropriating \$10,000 for a replica plaque,⁴³⁹ and passing the land exchange act.⁴⁴⁰

Perhaps the divisiveness of government religious endorsement is best explained by the ACLU's observation:

Of all the issues the ACLU takes on—reproductive rights, discrimination, jail and prison conditions, abuse of kids in public schools, police brutality, to name a few—by far the most volatile issue is that of school prayer. Aside from our efforts to abolish

⁴³⁷ *Buono v. Kempthorne*, 527 F.3d 758, 770 (9th Cir. 2008). See Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-117 § 410aaa-56.

⁴³⁸ *Buono v. Kempthorne*, 527 F.3d 758, 769, 771 (9th Cir. 2008). See Consolidated Appropriations Act, 2001, Pub. L. No. 106-554 § 133, 114 Stat. 2763A-230 (2000); Pub. L. No. 107-248 § 8065(b), 116 Stat. 1551 (2006).

⁴³⁹ *Buono v. Kempthorne*, 527 F.3d 758, 770 (9th Cir. 2008). See Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-117 § 410aaa-56.

⁴⁴⁰ *Buono v. Kempthorne*, 527 F.3d 758, 771 (9th Cir. 2008). See Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121(a)-(e), 117 Stat. 1100 (2003), codified at 16 U.S.C. § 410aaa-56.

the death penalty, it is the only issue that elicits death threats.⁴⁴¹

In *Santa Fe Independent School District v. Doe*, for example, although the court tried to protect anonymous plaintiffs from harassment, once their identity was discovered, the plaintiffs received death threats and their dog was killed.⁴⁴² In another case, plaintiffs challenging religious meetings in the public schools suffered harassment and the destruction of their home.⁴⁴³ Even children have been subjects of threats.⁴⁴⁴ One newspaper reported that State Representative Peter G. Palumbo attacked a teenage girl who challenged a school prayer poster, denouncing her as “an evil little thing” on a popular radio show.⁴⁴⁵ As a result of the threats she received, the teenager was able to attend school only under police escort.⁴⁴⁶ In another school prayer case, a child had to be relocated to another school.⁴⁴⁷

Thus, political divisiveness, whether as a result of religion in the schools or in the parks, is a genuine concern both to

⁴⁴¹ *Weisman*, 505 U.S. at 607, n.10 (Blackmun, J., concurring) (quoting, Parish, *Graduation Prayer Violates the Bill of Rights*, 4 UTAH BAR. J. 19 (June/July 1991)).

⁴⁴² Laycock, *supra* note 202, at 1224.

⁴⁴³ *See id.* (citing *Bell v. Little Axe Independent Sch. dist. No. 70*, 766 F.2d 1391, 1397 (10th Cir. 1985)).

⁴⁴⁴ *See* Abby Goodnough, *Lawsuit Against a Religious Poster in a Public School Roils a Catholic City*, NY TIMES, Jan. 27, 2012, at A-11 to A-12. I thank Professor Enrique Guerra Pujol for alerting me to this case.

⁴⁴⁵ *See id.* at A11.

⁴⁴⁶ *See id.*

⁴⁴⁷ Laura S. Underkuffler, *Through a Glass Darkly: Van Orden, McCreary, and the Dangers of Transparency in Establishment Clause Jurisprudence*, 5 FIRST AMEND. L. REV. 59, 79 (2006) (citing Neela Banerjee, *Families Challenging Religious Influence in Delaware Schools*, NY TIMES, Jul. 29, 2006, at A10).

the safety of religious nonadherents and of our government. As the *Lemon* Court reminds us, “[w]e have an expanding array of vexing issues, local and national, domestic and international to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government.”⁴⁴⁸

The concern over political divisiveness, however, is not to insinuate that voter apathy is ideal. It is feared that allowing judges to invalidate laws on the basis of political divisiveness would hamper voter participation in the political process.⁴⁴⁹ The value of the political divisiveness test, however, rests on its protection of religious minorities and the political process by serving as a “‘warning signal’ of other pitfalls under the ‘purpose’ or ‘effect’ standards.”⁴⁵⁰ “The very purpose of a Bill of Rights was to withdraw certain subjects from vicissitudes of political controversy, to place them beyond the reach of majorities and officials. . . . [Such] fundamental rights may not be submitted to vote; they depend on the outcomes of no elections.”⁴⁵¹

⁴⁴⁸ *Lemon*, 403 U.S. at 623.

⁴⁴⁹ See Gaffney, *supra* note 460, at 232.

⁴⁵⁰ Ripple, *supra* note 375, at 1203 (quoting Cmte. for Public Educ. v. Nyquist, 413 U.S. 825 (1973), *Lemon v. Kurtzman*, 403 U.S. 602, 624-25 (1971)).

⁴⁵¹ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

CONCLUSION

The Establishment Clause should not be nullified by “evasive schemes . . . whether attempted ‘ingeniously or ingenuously.’”⁴⁵² Land sales and transfers and exercise of eminent domain are ingenious ploys used to avoid removing religious symbols from public land. A review of the government’s purported secular purposes has revealed that they are a sham for preserving the government’s religious message. Governmental bodies have justified land dispositions as a basis for preserving a memorial or commemoration of secular events and ideals, but these religious objects hold no unique connection to the event they are intended to memorialize and risk perpetuating sectarian preferences. Memorials can be provided and compliance with the Establishment Clause can be achieved without the infusion of religion. Additionally, a concern that removing the religious object shows disrespect to religion neglects to take into account the disrespect felt by religious adherents over the secularization of their revered symbols. Even if all religious adherents would be offended by the object’s removal, “it does not follow that the government can decline to cure an Establishment Clause violation in order to avoid [religious] offense.”⁴⁵³ Therefore, the government lacks a predominantly secular interest in privatizing religious symbols and their surrounding land, which alone is enough to invalidate the government’s actions under the *Lemon* and endorsement tests.

⁴⁵² *Cooper v. Aaron*, 358 U.S. 1,17 (1958).

⁴⁵³ *Buono*, 130 S. Ct. at 1839 (2010) (Stevens, J., dissenting).

Also, a reasonable observer will view privatization of public land in lieu of removing the religious object as government endorsement of religion. The Herculean efforts exerted by the government and the history of religious activities that have occurred at the religious symbol's site contribute to the perception of government endorsement that cannot be mitigated by fencing and disclaimers. The perception of endorsement is further magnified by restrictive covenants that require maintenance of the symbol and reversionary clauses that entangle the government in religion. Finally, coupled with the government speech doctrine, privatization of religious symbols and their surrounding land will enable the government to circumvent the Free Speech Clause and Establishment Clause. Thus, the best course of action that comports with the Constitution is the obvious—removal of the religious symbol from public land.