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Salazar v. Buono: Sacred Symbolism and the Secular State

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SALAZAR V. BUONO: SACRED SYMBOLISM AND THE SECULAR STATE

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After oral argument, *Salazar v. Buono* looked like it might be a dud. As Adam Liptak observed in the *New York Times*, the Justices spent most of their energy pressing then-Solicitor General Elena Kagan and her opponent, Peter Eliasberg of the ACLU, on the case's tangled procedural history, and "only Justice Antonin Scalia appeared inclined to reach the Establishment Clause question" that gave rise to the legal controversy.[1] But, in the intervening months, the case has gotten more and more interesting. First, most members of the Court *did*—in at least some way—reach the substantive merits in the decision; ironically, only Justices Scalia and Clarence Thomas would have disposed of the case on standing grounds. And second, in a twist no one saw coming, the Latin cross at the heart of the dispute disappeared just a few days after the Court announced its decision.[2] As a result, a case that seemed doomed to founder on its awkward procedural posture has, at least fleetingly, brought the Establishment Clause back into the national spotlight. Given the complexity of the procedural questions, however, it is probably worthwhile to revisit the case's history before moving on to the more intriguing substantive questions the Court's opinions present.

The controversy centers on an eight-foot-tall cross, made of metal tubing and painted white, perched atop a rocky outcropping called Sunrise Rock, in the heart of the Mojave Desert National Preserve. The Veterans of Foreign Wars first put up a wooden cross at the site—on what was then Bureau of Land Management property—in 1934, along with a plaque memorializing the "Dead of All Wars"; though the plaque has since disappeared, and the cross has been replaced several times.[3] For being "in the middle of nowhere," as Chief Justice John Roberts put it, the cross has been the focus of surprising attention over the last ten years.[4] The trouble started in 1999, when the National Park Service denied a local man's request to build a Buddhist stupa at the site and announced its decision to take the cross down instead.[5] Apparently shocked by this development, Congress promptly denied the Park Service any appropriation to remove the cross; then designated it a national memorial to veterans of World War I; and, for good measure, prohibited the use of federal money to "dismantle" any World War I memorials.[6]

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* Assistant Professor of Law, Drake Law School. Thanks to the other participants in this colloquy for their insightful comments and suggestions. Thanks also to the editors of the Colloquy for their hard work, and to my students for their inspiration and creativity.

[1] Adam Liptak, *Religion Largely Absent in Argument About Cross*, NYTIMES.COM, Oct. 7, 2009, http://www.nytimes.com/2009/10/08/us/08scotus.html (link).

[2] Randal C. Archibold, *Cross at Center of Legal Dispute Disappears*, NYTIMES.COM, May 11, 2010, http://www.nytimes.com/2010/05/12/us/12cross.html (link).

[3] Buono v. Norton, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002)

[4] Transcript of Oral Argument at 54, Salazar v. Buono, 130 S. Ct. 1803 (2010) (No. 08-472). (link)

[5] *Buono*, 212 F. Supp. 2d at 1205–06.

[6] *See* Buono, 212 F. Supp. 2d at 1206–07; Consolidated Appropriation Act, 2001, Pub. L. No. 106-554 § 133, 114 Stat. 2763A-230 (2001) (link); Department of Defense and Emergency Supplemental

In the meantime, Frank Buono, a former Park Service administrator, brought suit in federal district court, alleging that the presence of the cross on government property "not open to groups or individuals [wishing] to erect other freestanding, permanent displays" violated the Establishment Clause.[7] The court agreed, concluding that, "the presence of the cross on federal land conveys a message of endorsement of religion," and permanently enjoined the government from allowing its display.[8] While the government's appeal was pending, the Park Service hid the cross under a plywood box,[9] and Congress directed the Secretary of the Interior to convey the disputed acre of land (now a National Memorial) to the VFW in exchange for a similar parcel elsewhere in the Mojave Preserve—with the proviso that the property would revert to the government if it was no longer "maintained as a war memorial."[10] The Ninth Circuit agreed with the District Court's Establishment Clause analysis, though it expressly reserved judgment on whether the proposed land exchange might solve the constitutional problem.[11]

The government chose not to appeal the Ninth Circuit's decision, and that judgment—including its confirmation of Buono's standing to sue—became final. Buono, however, took preemptive action by asking the District Court to enforce or modify the existing injunction so as to prevent the Secretary of the Interior from following through with the land swap.[12] The District Court agreed with Buono's contention that the Secretary's exchange scheme was essentially a sham: "In light of [its unusual] history . . . the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation."[13] Accordingly, the court permanently enjoined the exchange as "an unlawful attempt to evade" its earlier injunction,[14] which the Ninth Circuit subsequently affirmed.[15] It was at this point that the Supreme Court finally got involved.[16]

The upshot of this tortured procedural odyssey—particularly the government's decision not to appeal the original injunction—is that the case presented the Court with

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Appropriations for Recover from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117 § 8137(a), 115 Stat. 2278 (2002) (link); Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248 § 8065(b), 116 Stat. 1551 (2003) (link).

[7] Brief for the Petitioners at 5, Salazar v. Buono, 130 S. Ct. 1803 (2010) (No. 08-472), 2009 WL 1526915 [hereinafter Pet. Brief]; *see* Buono, 212 F. Supp. 2d at 1207.

[8] *See Buono*, 212 F. Supp. 2d at 1217.

[9] Pet. Brief at 5.

[10] Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121, 117 Stat. 1100 (2004) (link).

[11] Buono v. Norton, 371 F.3d 543, 546, 550 (9th Cir. 2004) (link).

[12] Pet. Brief, *supra* note7, at 7. Buono v. Norton, 364 F. Supp. 2d 1175, 1176–77 (C.D. Cal. 2005) (link).

[13] Buono 364 F. Supp. 2d At 1182 .

[14] *Id*. At 1182 n.8.

[15] Buono v. Kempthorne, 502 F.3d 1069, 1085 (9th Cir. 2007). A request for rehearing was denied after a slight modifiction to the 2007 opinion to highlight the importance of a fact-based analysis for the endorsement test. Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2007).

[16] Salazar v. Buono, 129 S. Ct 1313 (2009) (Mem.) (link).

two fairly narrow questions: (1) whether the District Court's 2005 order enjoining the land exchange was, in essence, a new proceeding, such that the government might renew its challenge to Buono's standing; and (2) whether the District Court had mistakenly concluded that the land swap would not remedy the Establishment Clause violation. Only Justices Scalia and Thomas answered the first question affirmatively,[17] while two others—Justice Samuel Alito and Chief Justice Roberts—joined in Justice Anthony Kennedy's conclusion that the District Court had erred on the merits.[18] The remaining four Justices answered no to both questions.[19]

Although the procedural issues are certainly interesting in their own right, I want to explore several of the substantive implications of the Court's decision. The opinions give rise to two particularly interesting questions—one doctrinal, the other more prudential and structural. Doctrinally, as *Salazar* is the first Establishment Clause case decided since Justice Sandra Day O'Connor's retirement, it offers the first actual glimpse into the future of her pet "endorsement" test—and its future seems, to me, to be in some doubt. Second, Justice Kennedy's lengthy discussion of the secular purposes behind the government's efforts to preserve the cross memorial raises—for me, at least—troubling questions about the Court's increasing desire to strip sacred symbols of their religious meaning and significance. If this is in fact happening, I suggest it is evidence that we have lost sight of one of the fundamental purposes of religious disestablishment—protecting religion from the state's destructive power. But I begin with the doctrinal question.

THE FUTURE OF THE ENDORSEMENT TEST

The District Court, the Ninth Circuit, and three of the Supreme Court dissenters evaluated Buono's challenge within the doctrinal framework of the so-called "endorsement test," which asks whether a reasonable observer would perceive that the state has "endorsed" religion.[20] This test has evolved over the last three decades (with Justice O'Connor's careful nurturing) into the Court's principal means of assessing whether a religious display on public land has the "primary effect" of advancing religion, per the second prong of the *Lemon* test.[21] O'Connor's efforts to refine *Lemon* began in

[17] *Salazar*, 130 S.Ct 1803, 1825–27 (Scalia, J., concurring).
[18] *Id.* at 1821 (Roberts, C.J. concurring; Alito, J., concurring).
[19] *Id.* at 1842-43 (Breyer, J. dissenting); *see id*. at 1841 (Stevens, J. dissenting).
[20] Buono v. Norton, 371 F.3d at 548–49; Buono v. Norton, 212 F. Supp. 2d at 1215–16; *Salazar*, 130 S.Ct 1832 (Stevens, J., dissenting).
[21] *Lemon* famously formulated a three-part Establishment Clause test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (link). For a thoughtful account of this doctrine's evolution in various contexts, see Mary Jean Dolan, *Government Identity Speech and Religion: The Endorsement Test After* Summum, 19 WM. & MARY BILL RTS. J. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1548761 (link).

1984 with her concurrence in *Lynch v. Donnelly*, a case that challenged a Christmas display in a public park in Pawtucket, Rhode Island.[22] The majority upheld the display under the *Lemon* test, and O'Connor concurred in the judgment, writing separately "to suggest a clarification of our Establishment Clause doctrine."[23] In her view, the establishment touchstone, at least in the context of religious displays, is whether the government's actions amount to an endorsement of religion.[24] Thus, she suggested that *Lemon*'s first two prongs are best understood as an effort to determine whether the government *intends* such an endorsement, and whether the government activity in fact *conveys* such an endorsement.[25] The third prong, addressing the potential of an "excessive entanglement" between church and state, is less relevant in the context of a religious display.[26]

Over the next few years, O'Connor's endorsement test gained support in the lower federal courts, and in 1989 she managed to get the support of a majority of her colleagues, at least regarding the proper application of *Lemon*'s second prong.[27] In *Allegheny County v. ACLU*, the Court again addressed several religious holiday displays on public property; this time, in Pittsburgh.[28] Using O'Connor's approach, the majority evaluated the likelihood that a reasonable observer might perceive government endorsement of religion and, based on the specific symbolism and context, invalidated a crèche in the central stair of the city courthouse.[29] At the same time, it allowed the display of a Christmas tree and a Menorah in a public park.[30] But just as notable as the majority's acceptance of the endorsement test was Justice Kennedy's impassioned dissent, in which he both decried O'Connor's framework as "flawed in its fundamentals and unworkable in practice,"[31] and went to great lengths to demonstrate the "hostility" her test expresses towards our national religious heritage.[32]

In truth, it is the "flawed in its fundamentals" criticism that lies at the heart of Kennedy's disagreement with O'Connor.[33] At root, Kennedy—like several prominent scholars[34]—views the Establishment Clause as complementing the Free Exercise Clause

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[22] 465 U.S. 668 (1984) (link).
[23] *Id.* at 687 (O'Connor, J., concurring).
[24] *Id*. at 690.
[25] *Id*.
[26] *See id.* at 689.
[27] Cnty. of Allegheny v. ACLU, 492 U.S 573, 595–96 (1989) (link).
[28] *Id*. at 587–88.
[29] *Id.* at 598–602. The Court had already suggested that O'Connor's test seemed to ask the right questions just a year after *Lynch*, in *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985) (link).
[30] *Allegheny*, 492 U.S. at 618–20.
[31] *Id.* at 669 (Kennedy, J., dissenting).
[32] *Id.* at 655, 670–79.
[33] The "unworkable in practice" criticism centers on the problem of assessing what a "reasonable observer" might perceive. This inquiry, however, seems no more difficult than that into the "psychology" of coercion that Kennedy suggests. Lee v. Weisman, 505 U.S. 577, 593–94 (1992) (link).
[34] *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351 (2002) (locating the "liberty of conscience" at the Establishment Clause's theoretical heart) (link);

in protecting individual religious "duty" from state intrusion; not, as the endorsement test seems to suggest, as the guarantor of a "secular state." The "religious duty" conception of disestablishment sees a First Amendment violation only when the government forces citizens to choose between their obligations to the state and their obligations to God. To put it more bluntly, democratic government should not require a choice between jail and eternal damnation.[35] In this conception, an established church is simply an especially virulent species of this tyranny. The "secular state" view of disestablishment, which underlies the endorsement test, recalls the French doctrine of *laicité*: the state should remain totally neutral on religious questions and should do so by setting aside all religion and religious reasoning in favor of secular rationales and policies.

Although the different approaches may seem a little like splitting theoretical hairs, the divergence of these first principles can, and sometimes does, lead to dramatically different results in particular cases. Those who support the "duty" conception often see efforts to ensure a secular state as "hostile" towards religion, while "secular state" adherents worry that the state's imprimatur on particular religious symbolism or speech makes unrepresented groups feel excluded from their own government. The doctrinal result of all this is, for Kennedy, that *coercion* against duty, not government *endorsement*, represents the true establishment evil. For Kennedy, this coercion might be direct or indirect—it may result from psychological kinds of pressure, as well as the threat of force—but it has nothing to do with endorsement, unless that endorsement rises to the level of coercion.[36]

Kennedy's view of coercion was, for a time, the only one—and the only alternative to O'Connor's endorsement test.[37] *Lee v. Weisman* changed all that, when Kennedy wrote for a majority that struck down a nonsectarian benediction at a middle school graduation.[38] Despite O'Connor's protestations in concurrence, Kennedy did not employ the endorsement test, but rather concluded that the benediction presented "a particular

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Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 958–59 (1989) (arguing that disestablishment originally required institutional separation rather than state secularism).

[35] For an excellent exploration of this view, see MICHAEL SANDEL, DEMOCRACY AND DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 65–67 (1996) (link); and *accord* Feldman, *supra* note 34, at 350-–353.

[36] *Allegheny*, 492 U.S. at 660–62 (Kennedy, J., dissenting).

[37] In her contribution to this symposium, Professor Dolan characterizes the split in religious symbolism doctrine as one between "endorsement" and "history." Mary Jean Dolan, *Salazar v. Buono: The Cross Between Endorsement and History*, NW. U. L. REV. COLLOQUY (forthcoming 2010). She is, of course, correct to note these two positions in recent cases, but I would suggest that "history" arguments actually occur within the larger framework of the endorsement test: History advocates are simply trying to show that the symbolism has a secular purpose, and thus is not an endorsement of religion. I contend that—if they had the votes—Justices Kennedy, Thomas, and Scalia would toss out the endorsement framework altogether and focus instead on coercion. This, I think, is this ideological divide that is really at stake after O'Connor's departure.

[38] 505 U.S. 577, 586–87 (1992).

risk of indirect coercion."[39] This result drew a vigorous dissent from Scalia, who, along with Chief Justice William Rehnquist and Justices Byron White and Thomas, agreed that coercion is the relevant question, but rejected the "boundless, and boundlessly manipulable, test of *psychological* coercion" that Kennedy described.[40] Rather, for Scalia, the only kind of coercion that gives rise to an establishment concern is direct—that accomplished by "*force of law and threat of penalty*."[41] And so, after *Lee*, the Court had articulated three distinct establishment tests applicable in the religious speech context: O'Connor's "endorsement" test, Kennedy's "indirect coercion" test, and Scalia's "direct coercion" test.

For the most part, O'Connor's approach has maintained the support of a tenuous majority since 1992,[42] but with her retirement in 2006, it was unclear whether the test would long survive. Indeed, *Salazar* was the first true religious display case since her departure, and so it presented an opportunity to assess the future of the endorsement test with a quick (and concededly crude) count of heads. Both Justices Ruth Bader Ginsburg and Sonia Sotomayor joined Justice John Paul Stevens's dissent, which expressly relied on the endorsement test and upheld the Ninth Circuit's application of the same.[43] In *Salazar*, Justice Stephen Breyer wrote a separate dissent in which he declined to reach the Establishment Clause question—arguing that the Ninth Circuit's unappealed 2004 decision settled the issue—and would instead have upheld the 2005 order as a valid exercise of the District Court's discretionary enforcement of its own injunction.[44] In the past, however, Breyer has largely stood behind O'Connor's framework—though he has, on occasion, given it his own spin.[45] Therefore, I think it is safe to count at least four votes in favor of the endorsement test. It is probably equally safe, however, to count at least three votes—Kennedy, Scalia, and Thomas—in staunch opposition, as the opinions in *Salazar* hardly suggest that the "coercion" coalition has had any change of heart since *Lee*.

This leaves only the recent Bush appointees, Roberts and Alito, to consider. It is difficult to draw any meaningful conclusions from Roberts's short (and, frankly, strange)

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[39] *Id*. at 592.
[40] *Id*. at 632 (Scalia, J., dissenting) (emphasis added).
[41] *Id*. at 640 (emphasis in original).
[42] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 690–92 (2005) (plurality) (evaluating whether a religious symbol has a purely "religious purpose"); *id.* at 699–701 (Breyer, J. concurring) (applying a form of the endorsement test); *id.* at 715–22 (Stevens, J., dissenting) (same); *id.* at 737–43 (Souter, J., dissenting) (same) (link).
[43] Salazar v. Buono, 130 S. Ct. 1803, 1832 (2010) (Stevens, J., dissenting).
[44] *Id*. at 1842–43 (Breyer, J., dissenting).
[45] *See* Van Orden v. Perry, 545 U.S. 677, 699–701 (2005) (Breyer, J. concurring) (link). In *Van Orden*, Justice Breyer accepts the fundamentals of the endorsement approach, but he opines that "no exact formula can dictate a resolution in such fact-intensive cases." *Id*. at 700. Instead, Breyer engages in an analysis of the combined "religious" and "secular moral" messages that such longstanding monuments may express. *Id*. at 701. Indeed, Breyer's approach here is very similar to that which Kennedy takes in *Salazar*.

concurrence in *Salazar*.[46] The Chief Justice is a passionate and adroit doctrinalist, however, and the fact that he was not much concerned with the precise nature of the government's effort to preserve the cross suggests that he may put little stock in the nuances of the endorsement approach.[47] Justice Alito's concurrence provides a little more insight into his views, but again, it is no smoking gun. The only direct clue he offered is an enigmatic bit of speculation "Assuming that it is appropriate to apply the so-called 'endorsement test,' this test would not be violated by the land exchange."[48] This is hardly a statement of unconditional support, though the remainder of his opinion—which would have overturned the District Court's order without remand—indicates that he might be sympathetic to the kinds of concerns that underlie the endorsement analysis. He gives significant weight to factual matters such as the monument's original purpose, the number of people likely to see it, and Congress's intentions in undertaking the land swap.[49] All of this suggests that Alito may be willing to work within the endorsement framework. But he did vote to uphold the cross display, which is suggests that, at the very least, his ideas about what constitutes "endorsement" may be very different than were O'Connor's. Thus, even if the endorsement test survives in name, it may end up being something closer to Kennedy's indirect coercion test in application.

This last thought raises the question, though: what's in a name? After all, it might not matter whether we call the test "endorsement" or "indirect coercion" if the analysis often produces the same outcome. But I think there is a real and important distinction, which I hinted at above. The doctrinal test the Court adopts necessarily reflects its conception of exactly what the Establishment Clause guarantees: Is it the promise of a "secular" state, as a prohibition on government endorsement would suggest? Or does it protect against a particularly problematic species of Free Exercise intrusion; the likelihood that an established church will cause the state to coerce us against conscience? And over the last 30 years or so, the tension and competition between these different, underlying principles has resulted in a number of subtle doctrinal compromises that are potentially destructive of our most fundamental disestablishment goals. Indeed, *Salazar* presents a disquieting example of this phenomenon, as we see Kennedy—basically a believer in the "duty" conception of disestablishment—try to squeeze the Latin cross through the endorsement test by suggesting that it has lost its religious import and become a secular monument.[50]

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[46] *Salazar*, 130 S. Ct. at 1821 (Roberts, C.J., concurring). I say the Chief Justice's concurrence is strange because he is prepared to decide the case based solely on the respondent's questionable concession at oral argument suggesting that there would be no Establishment problem if the government took the cross down, transferred the land, and the private party then put a new cross up. Not only is this a dubious concession, but it also fails to address the primary endorsement issue in the case, which is the extent of the government's efforts to preserve the cross.

[47] *Id*.

[48] *Id*. at 1824 (Alito, J., concurring).

[49] *Id*. at 1821–23.

[50] It may seem incongruous that Kennedy would operate within the endorsement test here, which he has roundly rejected in the past. But, to be fair, Kennedy was essentially saddled with this approach given *Salazar's* procedural history. He could only answer the narrow question of whether the District Court had

This argumentative approach presents some very real theoretical problems, which the next Section explores in a little more detail.

THE SACRED AND THE SECULAR

Justice Kennedy's plurality opinion in *Salazar* highlights a troubling question about the state's role in both assessing and shaping the public meaning of religious symbols; one which emerges, I suggest, from the same fundamental disagreement over the meaning of disestablishment. For Kennedy, given *Salazar*'s procedural posture, the only issue before the Court was whether the District Court "engage[d] in the appropriate inquiry" before enjoining the land exchange as an effort to evade its earlier judgment.[51] Where the lower court went wrong, he wrote, was in its failing adequately to consider the secular purpose behind the cross's original placement, the secular meaning it has come to have for many local people over the last 75 years, and the "dilemma" Congress faced in its efforts to cure the establishment violation without "conveying disrespect for those the cross was seen as honoring."[52] Ultimately, Kennedy claims that the District Court did not fully appreciate that this particular cross is a symbol "that has complex meaning beyond the expression of religious views."[53] While all this may be true, it fails to explain why—if the cross's religious meaning is not central to its symbolism—the easiest solution would not be to replace it with a non-religious memorial. Despite Kennedy's protestations about the monument's lengthy history, over which period "the cross and the cause it commemorated [became] entwined in the public consciousness,"[54] it seems disingenuous (some might say sacrilegious) to deny that the symbol's deep religious significance adds something essential to the mix.

But maybe not. Maybe Kennedy is right when he claims that "a Latin cross is not merely a reaffirmation of Christian beliefs [but] a symbol often used to honor and respect those whose heroic acts, noble contributions and patient striving help secure an honored place in history for this Nation and its people."[55] But if that is true, if the cross has somehow lost much of its most central and profound meaning by virtue of its association with the state and its objectives, then I fear we have a real disestablishment problem on our hands. Stanley Fish captured this growing concern in a recent *New York Times*

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enforced its own injunction (which was based on an endorsement analysis) correctly. I suspect that if the substantive question were squarely presented, he might happily have applied the indirect coercion test and avoided any discussion whatsoever of secular purpose or meaning. This circumstance is one of the consequences of piecemeal adjudication that Professor Roy rightly laments in her contribution to this symposium. Lisa Shaw Roy, *Salazar v. Buono: The Perils of Piecemeal Adjudication*, NW. U. L. REV. COLLOQUY (forthcoming 2010).

[51] *Salazar*, 130 S. Ct. at 1815–16.

[52] *Id*. at 1817.

[53] *Id*. at 1818.

[54] *Id.* at 1817.

[55] *Id.* at 1820. I cannot help noting that here Kennedy tellingly, though perhaps unintentionally, minimizes the importance of Christian beliefs with an ill-placed "merely".

editorial: "It is one of the ironies of the sequence of 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."[56] Indeed, in this particular oral argument a "visibly angry" Justice Scalia scolded Peter Eliasberg for suggesting that the Latin cross is, in fact, a Christian symbol.[57] It is this last absurdity that highlights what is most disturbing about the current doctrinal trend. In truth, it is hard to blame the advocates for their efforts to empty symbols like the cross of their religious content; they simply tailor their arguments to the Court's doctrinal landscape. And in recent years the Court has been a willing co-conspirator, if not the instigator, in a troubling effort to see the sacred as secular.[58]

This suggests two equally problematic possibilities: (1) the Court itself is actively working to diminish the religious meanings of sacred symbolism; or (2) the Court is willing to accept and sanction the idea that long association with government can wash away a religious symbol's central significance. If either (or both) of these propositions is true, then I fear that we have been poor stewards of the disestablishment promise. Most, if not all, establishment scholars recognize that one of the clause's central theoretical purposes is to protect religion from the corruptive power of the state.[59] This strand of disestablishment theory, often called the "evangelical" strand, has long been associated with Roger Williams's efforts to wall off the "garden" of the church from the "wilderness" of the state.[60] And if Kennedy is correct about the "secularizing" power an association with state objectives can have on sacred symbols, then it seems that

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[56] Stanley Fish, "When is a Cross a Cross?" N.Y. TIMES OPINIONATOR (May 3, 2010), http://opinionator.blogs.nytimes.com/2010/05/03/when-is-a-cross-a-cross (link).

[57] Liptak, *supra* note 1; *accord.* Oral Arguments, *supra* note 4, at 39 (calling the thought that the cross honors only Christian dead "an outrageous conclusion").

[58] *See, e.g.,* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

[59] Feldman, *supra* note 34 at 349–51; *see* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part 1: The Religious Liberty Guarantee*, 80 HARV. L. REV.1381, 1386–90 (1967) (summarizing scholarly strands).

[60] *See, e.g.*, MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965) (arguing for a renewed emphasis on the "evangelical" thesis). The famous passage from Roger Williams is as follows:

> [W]hen [the Christians] have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wilderness of the world, God hath ever broke down the wall it[]self[], removed the Candlestick, etc., and made His Garden a Wilderness[], as at this day. And that therefore if he will ever please to restore his garden and Paradi[s]e again, it must of necessit[y] be walled in peculiarly unto himself[] from the world, and that all that shall be saved out of the world are to be transplanted out of the Wilderness of the world . . . .

Roger Williams, "Mr. Cotton's Letter Lately Printed, Examined and Answered" (1644) *reprinted in* 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 108 (Russell & Russell, Inc. 1963). In his contribution to this symposium, Professor Lund points out that James Madison was also concerned with the danger to religion that too close an association with the state presents. Christopher Lund, *Salazar v. Buono and the Future of the Establishment Clause*, NW. U. L. REV. COLLOQUY (forthcoming 2010).

Williams's garden is in real danger of being overrun. This is, in fact, the very danger that Mark DeWolfe Howe warned of in his prescient book, now more than forty years old, on the modern elevation of the "rationalistic" conception of disestablishment.[61] Indeed, if all Kennedy says is true, Frank Buono need not waste any more energy trying to get the cross off Sunrise Rock; the government has done it for him. Thus, however exciting *Salazar* may seem to religious enthusiasts as a short-term win, one cannot help but suspect that, in the long run, these same people may come to believe that victory came at too steep a price.[62]

CONCLUSION

For a case that seemed destined to disappoint, *Salazar v. Buono* ended up providing Establishment Clause observers with some surprising late-term fireworks. Not only did the Justices, by and large, reach and comment on the substantive constitutional question, but they did so in ways that highlight interesting and problematic questions about the Court's past and future treatment of religious symbolism on public land. On the one hand, the various opinions seem to suggest that the endorsement test, at least as we have known it, faces an uncertain future. On the other hand, Justice Kennedy's plurality opinion implicitly bows to the secular purpose and meaning inquiries at that test's heart, but argues that the District Court failed to give adequate consideration to the complex interests the cross on Sunrise Rock has come to represent. It is no mystery why Kennedy and others feel compelled to treat the cross and other religious symbols on public land as "predominantly secular";[63] they are reacting to a doctrinal culture they see dismantling valued pieces of our cultural heritage in its vigilance to insulate the state from the threatening influence of religion. But this current tactic—the effort to downplay religious meanings in order to minimize the threat—is counterproductive; indeed, it seems far more hostile to religion than the endorsement doctrine to which Kennedy has so vehemently objected. Better, one would think, to protest forthrightly the doctrine of the secular state than to play along in ways that threaten to abandon the "other" disestablishment goal: protecting the sanctity and vitality of the American religious garden from the wilderness of the bureaucratic state.

But I am trying hard here not to take a side in this fight. I want to suggest only that *Salazar* sets the important doctrinal and structural issues in bold relief, and asks very old questions in slightly new ways. In so doing, it illustrates some interesting connections between divergent first principles and our modern doctrinal battles—and highlights at least one potential long-term consequence of the coercion coalition's current

[61] HOWE, *supra* note 60, at 10–11 (lamenting the Court's efforts to prove that "the only theory of separation known in American constitutional history is the Jeffersonian or rationalistic").
[62] For an interesting early perspective on this issue, *see* Rod Dreher, *Commentary: The Cross Without Christ*, BELIEFNET (May 5. 2010), http://blog.beliefnet.com/roddreher/2010/05/the-cross-without-christ.html (link).
[63] The phrase is from taken from Justice Breyer's concurrence in *Van Orden*. 545 U.S. at 702 (Breyer, J., concurring).

argumentative approach. While the opinions in *Salazar* do not provide any clear or definitive answers, they at least set the stage for a potentially new, post-O'Connor era of Establishment Clause jurisprudence. And it will be quite interesting indeed to see what this era brings for American religious and political life.