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(Dis)owning Religious Speech

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(DIS)OWNING RELIGIOUS SPEECH

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ABSTRACT

To claims of a right to equal citizenship, one of the primary responses has long been to assert the right of private property. It is therefore somewhat troubling that, in two recent cases involving public displays of religious symbolism, the Supreme Court embraced property law and rhetoric when faced with the claims of minority religious speakers for inclusion and equality.

The first, Pleasant Grove City v. Summum, is a free speech case in which the defendant evaded a finding that it was discriminating against the plaintiff’s religious speech by claiming a government speech defense. In the process, it claimed as its own speech a facially religious monument of the Ten Commandments. The second, Salazar v. Buono, which dealt with an Establishment Clause challenge to a Latin cross in the middle of the Mojave Desert National Preserve, was resolved primarily on the basis of the literal ownership of the religious speech at issue in the case. What both cases have in common is a claim, on one side, that the government has improperly and unconstitutionally excluded one religious group, both literally and metaphorically, and a response, on the other side, that is formulated in the language of ownership, property, and sovereignty.

This Article explores the possible causes and implications of the Court’s recent embrace of property concepts and property rhetoric. It argues that the Court has turned to the language and even the law of property partly as a way of avoiding knotty First Amendment questions. But the rhetoric of property functions on another level, as well. Property rhetoric legitimates and naturalizes the acts of exclusion and subordination inherent in the Court’s decisions. It also gives the appearance of a concrete stake held by some in the religious majority—and a material loss that is incurred—when dominant religious symbols are removed. Ultimately, this article concludes that, for all their flaws, the endorsement test and public forum doctrine, which the Court appears to have temporarily marginalized, are superior approaches to the problem of public displays of religious symbolism.
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INTRODUCTION

To claims of a right to equal citizenship, one of the primary responses has long been to assert the right of private property. One need only think of *Dred Scott v. Sandford*,\(^1\) for example, or the sit-ins of the civil rights movement to see the pull exerted by property rhetoric and principles on those who would resist the demands of inclusion and equality.\(^2\) The latest iteration of this dynamic, opposing property to equality, has taken shape in the Supreme Court’s recent jurisprudence concerning the constitutionality of governmental choices with respect to the display of religious symbolism.

The permissibility of religious symbolism in public places has been a significant concern of Establishment Clause jurisprudence for the past 30 years, since the Supreme Court first held that a law requiring the display of the Ten Commandments in public schools was unconstitutional in 1981.\(^3\) Beginning with *Lynch v. Donnelly*\(^4\) in 1984, the Supreme Court decided a series of cases in which it struggled to clarify the doctrine and the nature of the right at stake, including *County of Allegheny v. ACLU* in 1989,\(^5\) *Capitol Square Review & Advisory Board v. Pinette* in 1995,\(^6\) and the companion cases *Van Orden v. Perry*\(^7\) and *McCreary County v. ACLU*\(^8\) in 2005. Though the doctrinal framework shifted somewhat, the primary question

\(^{1}\) 60 U.S. 393 (1856).
\(^{2}\) Free association is another right that is often opposed to equality claims. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 175-77 (1976) (rejecting the claim of parents that the integration of schools violates their right to freedom of association).
\(^{3}\) The first Supreme Court case dealing with public displays of religious symbolism was *Stone v. Graham*, 449 U.S. 39 (1980), which held unconstitutional the display of the Ten Commandments in public schools. However, *Stone* was a brief per curiam opinion utilizing no discernable doctrinal test.
\(^{5}\) 492 U.S. 573 (1989).
\(^{7}\) 545 U.S. 677 (2005).
\(^{8}\) 545 U.S. 844 (2005).
that the Court struggled to answer in those cases consistently concerned the social meaning of the display at issue, with a specific focus on whether that display had the purpose or effect of conveying a message to nonadherents that they were outsiders to the political community. In addition, and relatedly, the Court has issued a series of holdings in recent years asserting the rights of religious speakers of all kinds to be included in various speech fora alongside other speakers, religious or secular. To do otherwise, the Court has made clear, would constitute viewpoint discrimination that is inconsistent with the Free Speech Clause.

In two recent cases, however, the Court made a surprising turn toward the language of property. The first of the recent cases, Pleasant Grove City v. Summum, is a free speech case in which the defendant evaded a finding that it was discriminating against the plaintiff’s religious speech by claiming a government speech defense. In the process, it claimed as its own speech a facially religious monument of the Ten Commandments. The second case, Salazar v. Buono, which dealt with an Establishment Clause challenge to a Latin cross in the middle of the Mojave Desert National Preserve, is unusual for its central focus on the literal ownership of the religious speech at issue in the case. What both cases have in common (other than that the plaintiffs did not prevail) is a claim, on one side, that the government has improperly and unconstitutionally excluded one religious group, both literally and metaphorically, and a response, on the other side, that is formulated in the language of ownership, property, and sovereignty, rather than of social meaning.

This article explores the possible causes and implications of the Court’s recent embrace of property concepts and property rhetoric. This article is, therefore, in part a reflection on the two most recent Supreme Court cases dealing with public displays of religious symbolism and an inquiry into the possible consequences of the rhetorical and doctrinal structure of those cases for the future of the Establishment Clause in this area. It is also a contribution to the substantial scholarship on the

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9 See, e.g., Lynch, 465 U.S. at 688 (O'Connor, J., concurring); infra at __.
12 130 S. Ct. 1803 (2010).
13 Although this article observes a shift in the Supreme Court’s focus in the recent religious symbolism cases, it also notes that property has long been implicated in this jurisprudence and indeed, inextricable from it. See infra __. Never before has it played such a prominent role in the decisional framework or the rhetoric of the symbolism cases, however.
relationship between constitutional rights and property law—a body of scholarship that has, however, paid scant attention to the connection between property and religious display cases, as well as to the implications of importing property rhetoric into this domain of constitutional law. More broadly, this article is also an attempt to examine, through the lens of the Supreme Court’s rhetoric, the intense emotional investment that both sides seem to have in the precise issue of the constitutionality of symbolic religious expression in the (literal or metaphorical) public square. I argue that the Court has turned to the language and even the law of property partly as a way of avoiding the knotty questions raised by Establishment Clause doctrine’s focus on social meaning and as a means of escaping the doctrinal corner in which it has painted itself by opening the public square to some, but not all, religious speech. I further argue that the rhetoric of property functions on another level, as well. Property rhetoric legitimizes and naturalizes the act of exclusion inherent in the Court’s decisions. It also gives the illusion of a concrete stake held by some religious majority—a material loss that is incurred when dominant religious symbols are removed. In doing so, this article proceeds from the intuitive view that the passion expressed by individuals both in favor of and against such religious expression requires some explanation, given the apparently low material stakes and the concurrent difficulty that both sides have in articulating any precise benefit or harm.\footnote{See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS LIBERTY AND THE CONSTITUTION 156-58 (2007) (discussing the “extreme passions these cases provoke”).}

Of course, property has actually been implicated in the Supreme Court’s jurisprudence of religious symbolism all along, and is intertwined with the protection of many other constitutional rights as well.\footnote{See Timothy Zick, Property and/as Constitutional Settlement, 104 NW. U. L. REV. 1361, 1361 (2010) (“Certain constitutional right are intricately bound up with, and in some cases critically dependent upon, access to and enjoyment of public properties.”) Louis Seidman has thoughtfully examined the ways in which free speech rights and property rights are deeply intertwined, arguing that the strength of speech rights is directly proportional to the strength of economic rights. Louis Michael Seidman, The Dale Problem: Property and Speech Under the Regulatory State, 75 U. CHI. L. REV. 1541 (2008).} Thus, for example, “anti-establishment principles require that officials operate and maintain public places in a manner that is not perceived as endorsing, through symbolic displays or otherwise, particular religious sects or sectarianism.”\footnote{Id. at 1362.} Indeed, First Amendment scholars have long recognized the connection between property and speech. Ever since the rise of so-called “public forum doctrine,” according to which the government’s power to regulate speech...
depends on the nature of the forum in which the speech takes place, this connection has been made explicit, leading to a rich body of scholarship on the intersection of speech and property rights. Most of this scholarship has focused on the concept of property in forum analysis, however; neither the borrowing of property implicit in the government speech doctrine nor the use of property law in Establishment Clause disputes have garnered as much attention. Indeed, the turn to property in cases involving religious symbolism seems to be a relatively new phenomenon, but one worthy of attention.

Part I of this article describes the Court’s decisions in Summum and Buono and briefly sketches the background of religious symbolism case law against which those cases were decided. That Part thus traces a shift to a “property paradigm” in the Court’s treatment of religious symbolism. Part II considers possible doctrinal and pragmatic reasons for the shift. Part III then elaborates some of the troubling consequences of the focus on ownership of

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17 It appears that Professor Harry Kalven, Jr. introduced the concept of the “public forum” in First Amendment doctrine in his classic article The Concept of the Public Forum: Cox v. Louisiana, 1965 SUP. CT. REV. 1 (1965). Written in the midst of the civil rights movement, Professor Kalven’s article meditates upon the relationship between the state’s property interest in public property and the public’s free speech rights, arguing that “in an open democratic society the streets, the parks, and other public places are...a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.” Id. at 12. Kalven thus famously spoke of a sort of “First Amendment easement” on public property possessed by citizens. Id. at 13. More recently, Professor Timothy Zick has produced a deep and nuanced of scholarship examining the relationship among property, space, and constitutional rights – especially free speech rights. See, e.g., Zick, Property and/as Constitutional Settlement, supra note __ (criticizing the use of private property principles to avoid constitutional issues in resolving cases in the equality, religion, and speech contexts); Timothy Zick, Space, Place, and Speech: The Expressive Topography, 74 GEO. WASH. L. REV. 439, 441-43 (2006) (introducing the concept of “expressive place,” which is distinct from, and richer than, the concept of “place as res or property”); Timothy Zick, Property, Place, and Public Discourse, 21 WASH. U. J.L. & PUB. POL’Y 173, 178 (2006) (arguing that “the ‘forum’ concept, which is rooted in principles of public property, should be replaced by a distinct conception of “place”). Like Professor Zick, Professor Calvin Massey has written critically of courts’ inclination to place free speech problems in a property framework. Calvin Massey, Public Fora, Neutral Governments, and the Prism of Property, 50 HASTINGS L.J. 309 (1999). And Professor Joseph Blocher has thoughtfully examined the expressive dimensions of property and property rights, with particular reference to the concept of government speech. Joseph Blocher, Government Property and Government Speech, 52 WM. & MARY L. REV. 1413 (2011).

18 But see Zick, supra note 15, at 1384-1400 [Property and/as Constitutional Settlement] (discussing ownership of religious symbols); Blocher, supra note 17, at (discussing government speech); see also Nelson Tebbe, Privatizing and Publicizing Speech, 104 NW. U. L. REV. COLLOQUY 70 (2009).
speech rather than on the meaning of the speech. This article argues that the paradigm of property is an uncomfortable one to import into the First Amendment domain, since property centers around, justifies, and naturalizes inequality and exclusion – values that are inherently antithetical to Establishment Clause and Free Speech Clause values. Ultimately, this article concludes that, for all their flaws, the endorsement test and public forum doctrine, which the Court appears to have temporarily marginalized, are superior approaches to the problem of public displays of religious symbolism. Finally, in concluding, Part IV returns to the explanatory project of this article, with some tentative meditations on the deeper cause and meaning of the shift to ownership discourse within Establishment Clause doctrine, viewed in the broader context of the U.S. culture wars and the passionate response to this particular issue that those culture wars entail.

I. FROM SOCIAL MEANING TO PROPERTY

Although the Supreme Court had long stated that its primary concern with respect to public displays of religious symbolism was whether the display conveyed a message of endorsement of religion, Summum and Buono, the two most recent Supreme Court cases dealing with religious symbolism, appeared to marginalize the endorsement test and its focus on social meaning. Instead, those two cases adopted what might be called a “property framework” for analysis. In both cases, the Court’s analysis and result turned primarily on issues of ownership and attribution of the displays’ messages, rather than on the meaning of the messages themselves. In Pleasant Grove City v. Summum, the Supreme Court rejected the free speech claim of a religious group seeking to have its permanent monument displayed alongside the Ten Commandments and various more obviously secular items in a publicly owned park known as Pioneer Park.19 The Court held that the monuments in the park, while uniformly donated by private parties, were government speech and therefore immune to claims of discriminatory treatment from a free speech perspective.20 In Salazar v. Buono, a National Park Service employee challenged the presence on federal land of a Latin cross, which served as a memorial to the soldiers who had died in World War I.21 Although there was no majority opinion in that case, the Court held against the cross’s challenger, with a plurality opining that federal legislation transferring ownership of the cross to a private party, passed after the district court found an Establishment Clause violation, had the potential to alleviate a previously-adjudicated

19 Summum, 129 S. Ct. at 1129-30.
20 Id. at 1134.
21 Buono, 130 S. Ct. at 1807.
constitutional violation.\(^{22}\)

In some ways, these cases are quite distinct and may even be considered mirror images of one another.\(^ {23}\) In *Summum*, which did not directly deal with an Establishment Clause challenge,\(^ {24}\) the Government claimed the purportedly religious speech as its own and thereby deflected any argument that it had behaved in a discriminatory manner with respect to the variety of speakers seeking to have their symbols displayed in the park. In *Buono*, by contrast, the Government’s strategy was to disown the allegedly religious speech by transferring title to a private party, thereby deflecting the claim that the Government had endorsed the religious message of the Latin cross.

Yet, the two cases have a number of things in common as well. First, of course, the challengers lost in both cases. And, in holding for the governmental entity seeking to exclude a private religious speaker in both instances, the Court embraced the language of property, focusing on ownership and control of the challenged speech. In both cases, the Court ultimately resolved the controversy against the plaintiffs by placing the religious speech into a framework in which the speaker has the virtually unlimited right to exclude any kind of speech for any kind of reason and is not subject to requirements of neutrality. In other words, the Court found in both cases that the ownership of the religious speech – private ownership in one case and government ownership in the other – rendered the Government immune from claims of religious discrimination.

A. The Social Meaning Framework from *Lynch v. Donnelly* to *Van Orden v. Perry*

In order to make sense of the position that *Summum* and *Buono* occupy within the line of Supreme Court cases dealing with the constitutionality of

\(^{22}\) *Id.* at 1810.

\(^{23}\) Cf. *Tebbe*, *supra* note 18, at 71 ("One of these cases, then, asks whether government can avoid a constitutional difficulty by publicizing private sectarian speech, while the other asks whether government can evade a different constitutional problem by privatizing such expression.").

\(^{24}\) Although the Supreme Court alluded to the Establishment Clause implications of its holding, the plaintiffs had not raised a federal Establishment Clause claim, choosing instead to rely solely on the Free Speech Clause. As Bernadette Meyler explains, *Summum* initially raised a claim under the Utah Constitution’s anti-establishment provisions but did not pursue that claim in the litigation, and it was deemed waived by the Tenth Circuit. Bernadette Meyler, *Summum and the Establishment Clause*, 104 NW. U. L. REV. COLLOQUIY 95, 98-99 (2009). *Summum* subsequently amended its complaint to include an Establishment Clause claim, which was dismissed by the district court. *Summum v. Pleasant Grove City*, No. 2:05CV638, 2010 WL 2330336 (D. Utah June 3, 2010).
public displays of religious symbolism, it is necessary to review briefly the cases that went before them. Although the Supreme Court’s Establishment Clause jurisprudence concerning religious symbolism is famously messy and widely criticized, some general principles can be derived from it. Above all, the focus of the analysis has been on what might be called the “social meaning” of a given display and on the question whether that display conveyed a message of endorsement of a particular religion, or of religion in general, thereby suggesting that nonadherents are social and political outsiders. This analysis is embodied in the so-called “endorsement test,” and it is – for the time being, at least – the predominant approach to evaluating the constitutionality of religious symbolism displays. Even when the Court has declined to apply the endorsement test in a given religious symbolism case, however, the majority of the Justices still sought to resolve the central question that the endorsement test also seeks to address – namely, the social meaning of the display to a reasonable observer, viewed in its physical, temporal, and historical context.

The social meaning framework first arose in Justice O’Connor’s Lynch v. Donnelly concurrence, in which she formulated the endorsement test. Though she ultimately agreed with the majority’s decision to uphold the display of a nativity scene in a privately-owned park at Christmastime, she famously asserted that the proper inquiry in such cases is whether, by symbolically endorsing religion, the challenged governmental action “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.” The newly-minted endorsement test then garnered the support of a majority of Justices, though in a set of badly fractured decisions, in County of Allegheny v.}

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25 See, e.g., Shari Seidman Diamond & Andrew Koppelman, Measured Endorsement, 60 MD. L. REV. 713, 719-20 (2001); Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test, 86 MICH. L. REV. 266, 276-301 (1987); William P. Marshall, “We Know It When We See It”: The Supreme Court and Establishment, 59 S. CAL. L. REV. 495, 536-37 (1986); I have been critical of it myself. B. Jessie Hill, Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test, 104 MICH. L. REV. 491 (2005). I argue that the endorsement test in its current application reflects certain difficulties that are inherent to any inquiry into social meaning but that the test ultimately asks the right questions. Id. at 493-95.


27 See 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 88 (2008) (noting that a majority of the Justices “has treated the [endorsement] inquiry as central only in the public display cases”).

ACLU. That case involved a challenge to two different displays – a crèche and a menorah – both of which were owned by private groups and situated on government property. The Court upheld the menorah display but found the crèche unconstitutional, with members of the concurrence and dissents reaching different conclusions but agreeing on the applicability of the endorsement test.

Though the endorsement test appeared to provide some structure for the constitutional inquiry when religious displays were at issue, it did not take long for cracks to appear in its already-wobbly façade. The endorsement test failed to carry the day in two companion cases decided in 2005, dealing with challenges to displays of the Ten Commandments on government-owned property. In McCreary County v. ACLU, the Court declared the displays, which had been erected by the local government inside county courthouses, unconstitutional as motivated by a religious purpose. In so doing, the Court applied the alternative Establishment Clause test set forth in Lemon v. Kurtzman.

In looking to Lemon, the Court chose an alternative test, but one affiliated with the endorsement test. Moreover, the Court showed itself still to be concerned with the social meaning of the display. Invoking the language of the endorsement test, the Court noted that “[t]he reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments’ religious message” when they mounted their initial Ten Commandments displays, and, given the counties’ continuing religious purpose, declined to find that this fact had been changed by the subsequent displays. Finally, in Van Orden, the Court considered the constitutionality of a Ten Commandments display, which had been donated forty years earlier by a private entity, on the Texas statehouse grounds. Although there was no majority rationale for upholding the display, a majority of the Justices applied the endorsement test.
test, or its substantial equivalent, in determining that the overall meaning of the Ten Commandments display was secular rather than religious.\textsuperscript{38}

Thus, although the Justices have regularly divided over both the result and the precise doctrinal test for evaluating the constitutionality of religious symbolism, one relatively constant principle has been that a majority of Justices have focused on the social meaning of the display, as perceived by the so-called “reasonable observer.” In some instances the religious symbol was privately owned and in some instances it was government-owned, but the ownership of, or control over, the symbol itself never appeared to make any difference to the Court’s analysis. As described above, the displays in Allegheny were privately-owned but placed in publicly-owned spaces. In Van Orden, the challenged display had been donated to the government by a private group and placed in a publicly-owned park. Though the provenance of the displays in McCreary is unclear,\textsuperscript{39} at the time of the lawsuits they were controlled by the government and placed in public buildings. Finally, the display in Lynch was owned by the government, but placed in a privately-owned park.\textsuperscript{40}

cases should come out the same way, though they didn’t agree on how. Only Justice Breyer saw a difference between the two cases, and he therefore cast the swing vote. GREENAWALT, supra note 27, at 86. His opinion, joined by no one, also provides the relevant rationale for the case, as it provides the narrowest ground supporting the decision. See also, e.g., Paul E. McGreal, Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions, 40 ARIZ. ST. L.J. 585, 619 n.156 (2008).

\textsuperscript{38} Hill, supra note 25, [MLR] at 502 (stating that Justice Breyer “analyzed the display in light of the physical and historical context in order to determine whether a religious or secular message was conveyed—an analysis that is functionally equivalent to the endorsement inquiry”); McGreal, supra note 37, at 619 n.156 (noting that four Justices in dissent applied the endorsement test). Justice Breyer did not claim to be applying any particular test but rather to be using “legal judgment”; in addition to the contextual factors, the divisiveness that would be caused by tearing down the monument, as opposed to the relative lack of divisiveness that the monument had caused during the forty years it had stood there, seemed to play an important role for Justice Breyer.


\textsuperscript{40} Lynch v. Donnelly, 465 U.S. 668, 671 (1984) (“Each year, in cooperation with the downtown retail merchants’ association, the City of Pawtucket, Rhode Island, erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district.”).
The Supreme Court addressed the issue of ownership in the context of the endorsement test for the first time in Capitol Square Review and Advisory Board v. Pinette. In that case, the Supreme Court dealt with a claim by the Ku Klux Klan that the City of Columbus, Ohio had discriminated against it, thereby violating the Free Speech Clause of the First Amendment, by refusing to allow it to place a large Latin cross in Capitol Square, a public plaza situated near the seat of government. The city had claimed it was not discriminating against the Klan’s message but rather had declined the symbol for fear of violating the Establishment Clause. The question before the Court was therefore whether “a State violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government.”

Justice Scalia, representing a plurality composed of himself, Chief Justice Rehnquist, and Justices Kennedy and Thomas, favored a per-se rule that private religious speech in a true and properly administered public forum cannot violate the Establishment Clause. He thus dismissed concerns about “mistaken” perceptions of endorsement by observers seeing an unattended cross in such close proximity to the seat of government. Instead, Justice Scalia’s opinion came close to the ownership-based approach to be adopted in Summum and Buono, as he focused primarily on the nature of the forum and the access to it, as well as the public or private nature of the speech rather than on the message conveyed:

We find it peculiar to say that government “promotes” or “favors” a religious display by giving it the same access to a public forum that all other displays enjoy.… Where we have tested for endorsement of religion, the subject of the test was either expression by the government itself or else government action alleged to discriminate in favor of private religious expression or activity. The test petitioners propose, which would attribute to a neutrally behaving government private religious expression, has no antecedent in our jurisprudence, and would better be called a “transferred endorsement”

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42 Id. at 759-60.
43 Id. at 757.
44 Id. at 770.
45 Id. at 766, 770.
Yet Justice Scalia’s approach did not win out. Justice O’Connor’s concurrence, joined by Justices Souter and Breyer, persisted in applying an endorsement analysis. While noting that it was unlikely that private religious speech in a true public forum could be perceived as an endorsement of religion, Justice O’Connor’s opinion declined the invitation to adopt a per se rule and maintained a focus on the message actually conveyed to the reasonable observer by the display, given its overall context. Even when private speech in a public forum is involved, Justice O’Connor argued, an endorsement effect may still arise in some circumstances, “whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others.” Finally, Justices Stevens and Ginsburg dissented on the grounds that the cross’s location, lack of a disclaimer attributing its message to a private group, and proximity to key government buildings conveyed a message of religious endorsement, notwithstanding the nature of the Capitol Square forum.

Thus, although the result in Capitol Square might suggest that issues of ownership and the private or public nature of the speech were central to the Establishment Clause analysis, in fact a majority of the Justices still perceived the fundamental question to be whether the privately-owned cross, situated in a public forum, conveyed a message of endorsement of religion in light of its physical setting, proximity to the seat of government, and lack of disclaimer and accompanying secular symbolism. Capitol Square may be viewed as a transitional case that foreshadows the decisions and the paradigm shift in Summum and Buono, but one that nonetheless remains firmly planted in the social meaning framework.

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46 Id. at 763-64 (internal citations omitted).
47 Id. at 777 (O’Connor, J., concurring).
48 Justice O’Connor suggested that, because the “reasonable observer” is presumed to be aware that the forum is a traditional public forum, open to all comers, he or she would not perceive an endorsement of religion in the City’s decision to allow the Klan to use the space on the same terms as all other groups. Id. at 775-76, 780-81.
49 Id. at 778. Though Justice O’Connor did not give any examples of what she meant when she suggested that an inference of endorsement could still arise in a true public forum, one might imagine a case in which, for example, a religious group operating in a public forum includes the city seal on its religious symbols, thereby suggesting an official imprimatur.
50 Id. at 800-02 (Stevens, J., dissenting); id. at 817-18 (Ginsburg, J., dissenting). Justice Souter also concurred, suggesting that a proper disclaimer might help to alleviate any perception of endorsement, though he agreed with Justice O’Connor that no Establishment Clause problem presented itself in this case.
B. **PLEASANT GROVE CITY v. SUMMUM, SALAZAR v. BUONO, AND THE TURN TO PROPERTY**

The decisive shift toward the property framework began with *Summum*. Although the Court’s unanimous holding – that the religious group Summum did not have a Free Speech right to install its monument among other permanent monuments in a city-owned park – likely surprised no one, the Court’s rationale appeared less foreordained. Somewhat controversially and one might even say implausibly, the Court held that the privately donated monuments in the public park constituted government speech, therefore rendering the City doctrinally immune from claims of viewpoint discrimination in its selection of monuments. 

*Summum* was a lawsuit brought by a small religious group of the same name, seeking to place a permanent stone monument in a public park (Pioneer Park) in Pleasant Grove City, Utah. As in *Van Orden*, the park already contained a Ten Commandments monument donated decades earlier by the Fraternal Order of Eagles, along with a number of permanent secular monuments. The Summum group wished to add its “Seven Aphorisms of Summum,” which were roughly its equivalent of the Ten Commandments, to be “similar in size and nature to the Ten Commandments monument.”

When the City refused the donation, the group asserted a violation of its free speech rights, claiming that the City had engaged in viewpoint discrimination by refusing to permit the group’s expression in a public forum. In response, the City maintained that the monuments in the park were its own speech—“government speech”—and therefore immune to such claims. Though the Summum group had achieved an initial victory in the Tenth Circuit, ultimately the Supreme Court sided with the defendant City, embracing as well its government speech rationale.

The label of government speech serves as a defense to a free speech claim. If the government is expressing its own message rather than

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52 *Summum*, 129 S. Ct. at 1129.

53 *Summum*, 129 S. Ct. at 1129.


55 *Summum*, 129 S. Ct. at 1130.

56 *Summum*, 129 S. Ct. at 1131.

57 See, e.g., Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment*
providing a platform or forum for private speech, the doctrine holds, then it has leeway to exclude or discriminate against private messages in any way it sees fit. Thus, the government assumes the role of a private speaker and is therefore free from the constraints against content- and viewpoint-based discrimination that apply when it acts as regulator.  

No government could do its job, after all, without being able to express its views on matters like foreign policy or public health, without having to provide a platform for opposing views at every turn. The government may, and indeed must, exercise dominion and control over its own message. Of course, the fact that government speech is immune from claims of viewpoint discrimination does not mean that it is protected from claims that it violates other constitutional prohibitions — such as the Establishment Clause.  

The Establishment Clause was not, however, directly relevant in the Summum case because the plaintiff did not raise it.

In holding that the monuments in the park were government speech, the Court in Summum adopted an analytic framework centered on concepts of sovereignty, ownership, and property. Indeed, government speech doctrine itself tends to place the government in the position of private party — that is, of employer, market participant, and exerciser of private law rights to control and exclude others. For example, the government speech cases describe the government as “raising [its] voice in the ‘marketplace of ideas.” Following this paradigm, Justice Alito’s majority opinion repeatedly refers to the city as a “property owner” and notes that it “took ownership” of the other monuments in the park. Moreover, the Court expressly linked the city’s ownership of the monument not so much to

\[\text{Clause, 85 TUL. L. REV. 571, 573 (2011) (“If the speech is government speech...the Free Speech Clause does not apply.”).}\]

\[\text{58 Haupt, supra note 57, at 577; Joseph Blocher, Property and Speech in Summum, 104 NW. U. L. REV. COLLOQUIY 83, 89, 92 (2009) (“[W]hen the government speaks..., it has a near-absolute right to control its message.”).}\]

\[\text{59 See, e.g., Andy G. Ollree, Identifying Government Speech, 42 CONN. L. REV. 365, 365 (2009) (“The U.S. Supreme Court has interpreted the Speech Clause of the First Amendment to mean that when the government distributes money or other resources to private speakers, it generally may not discriminate among speakers based on viewpoint. The government is, however, allowed to express its own viewpoint, even if it enlists the aid of private parties to get the message out, as long as the communication does not violate some separate legal restriction, such as the Establishment Clause.”).}\]

\[\text{60 See supra note 24.}\]

\[\text{61 Johanns v. Livestock Marketing Ass’n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting). Of course, the “marketplace of ideas” is a familiar trope, but as Joseph Blocher notes, that the language of a speech market nonetheless implies concepts of privatization and rivalrousness. Blocher, supra note 58 [Property and Speech in Summum], at 91.}\]

\[\text{62 See, e.g., Summum, 129 S. Ct. at 1133 (three times in one paragraph, though the Court is using the term in the abstract, it also clearly refers to the city in this case).}\]

\[\text{63 Id. at 1134.}\]
expression of a message – an aspect of the government speech in that case which the majority chose to downplay, by questioning the determinacy of such messages with almost postmodern zeal64 – but rather by connecting ownership of the monument to the city’s very identity.65 “[T]he City took ownership of [the Ten Commandments] monument and put it on permanent display in a park that it owns and manages and that is linked to the City’s identity. All rights previously possessed by the monument’s donor have been relinquished,” Justice Alito’s opinion explains.66 In transforming the central controversy in the case from a free speech issue into, essentially, a property issue, the Court was able to short-circuit the free speech claim.67 Having determined that the speech belonged to the government, the Court had automatically resolved the free speech issue.

Some of the Justices recognized that the category of government speech – with the proprietary and exclusionary dimensions that it implies – is a poor fit with the type of expressive activity involved in the Summum case.68 At oral argument, Justice Souter preferred to characterize the speech as “a mixture,”69 and his discomfort carried over to his concurrence, in which he urged his fellow Justices to “go slow” in defining the contours of government speech.70 Indeed, both Justices Stevens and Souter expressed some unease with the absolute nature of the government-speech label, as they tried to avoid marginalizing concepts such as endorsement, context, and the viewpoint of the reasonable observer – that is, the concepts with which the endorsement test is primarily concerned. Justice Stevens went so far as to assert that “the reasons justifying the city’s refusal [of the monument] would have been equally valid if its acceptance of the monument, instead of being characterized as ‘government speech,’ had merely been deemed an implicit endorsement of the donor’s message.”71 Likewise, Justice Souter suggested that “[t]o avoid relying on a per se rule

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64 Id. at 1135-36.
66 Summum, 129 S. Ct. at 1134.
67 See Tebbe, supra note 18, at 79 (describing Summum as a case in which the government “successfully insulated itself from a constitutional challenge through actions involving a property transfer”).
68 See also Blocher, supra note 58 [Property and Speech in Summum], at 92.
69 Summum oral argument transcript at 10.
70 Summum, 129 S. Ct. at 1141 (Souter, J., concurring).
71 Id. at 1138-39 (Stevens, J., concurring).
to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land."\(^{72}\) Those concurring opinions, while supporting the result in this case, nonetheless demonstrate a discomfort with the categorical and absolutist property-based approach that the majority’s rhetoric suggested.

The Court’s property focus continued in its next religious symbolism case—this time, a seemingly more straightforward Establishment Clause challenge. The procedural history of Buono is rather byzantine, however, and this fact may account to some degree for the strange configuration of the Justices’ fractured opinions in that case. Buono was an Establishment Clause claim brought by a retired National Park Service employee Frank Buono to a Latin cross that was initially erected by private individuals acting unofficially and without permission at Sunrise Rock in the Mojave National Preserve.\(^{73}\) Buono brought his challenge after another individual sought to have a Buddhist shrine placed on the same site but was denied permission by the Government.\(^{74}\) Buono’s claim was initially successful on summary judgment in 2002 before the U.S. District Court for the Central District of California, resulting in an injunction requiring the cross to be dismantled.\(^{75}\) During the pendency of that litigation and prior to the Ninth Circuit’s affirmance of the district court’s decision, however, Congress had intervened in various ways with the ostensible purpose of keeping the cross from being dismantled: first, by passing two separate appropriations provisions that forbade the expenditure of public funds for the removal of the cross; second, by designating the cross a national memorial; and third, by passing a statute transferring the land to the Veterans of Foreign Wars in exchange for another privately-owned parcel of land elsewhere in the National Preserve.\(^{76}\) Despite the land transfer, the Government retained a measure of control over the land, in that it would revert back to Government ownership if it ceased being maintained as a war memorial.\(^{77}\)

The Government did not petition for certiorari after the Ninth Circuit also decided in Buono’s favor. In the course of affirming, however, the

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\(^{72}\) Id. at 1142 (Souter, J., concurring). Justice Souter also noted that “[t]his reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases.” Id.


\(^{74}\) Buono v. Kempthorne, 527 F.3d 758, 769 (9th Cir. 2008) (opinion of McKeown, J., on denial of rehearing en banc).

\(^{75}\) Buono, 130 S. Ct. at 1812. The Ninth Circuit stayed the requirement of dismantling the cross, however, and allowed the Government to cover it instead.

\(^{76}\) Buono, 130 S. Ct. at 1813.

\(^{77}\) Id.
Ninth Circuit had not addressed the relevance, if any, of the congressional land transfer statute on the Establishment Clause holding.\(^78\) Thus, Buono returned to the district court and sought to prevent the land transfer by asking the district court either to hold that the transfer violated the 2002 injunction or to modify that injunction to forbid the transfer.\(^79\) The district court did the former, and the Ninth Circuit affirmed again.\(^80\) The Government then successfully sought certiorari.

Thus, by the time the case was before the U.S. Supreme Court, a variety of issues, most of them not directly related to the First Amendment, vied for the Justices’ attention—including Buono’s standing to maintain the action; the scope and meaning of the 2002 injunction; the nature of the property right that the Government had transferred and of the reversionary interest that it retained; and the res judicata effect, if any, of the unappealed and therefore undisturbed Ninth Circuit decision holding that the cross conveyed a message of religious endorsement. It is perhaps no surprise, then, that the Court’s opinion was badly fractured and barely addressed the underlying question whether Government’s action violated the Establishment Clause. Nonetheless, the Justices’ reframing of the question at issue in the case bears more elaboration.

The controversy before the district court on remand from the Ninth Circuit, after the land transfer statute had passed, seemed to center around the relatively straightforward question whether the proposed transfer was a sham, intended to avoid the force of the initial injunction, or instead was a valid remedy for the Establishment Clause violation.\(^81\) Applying a series of factors based on other lower courts’ encounters with this precise issue, the appellate court held that the circumstances of the particular sale at issue in Buono indicated that it was an attempt to evade the court’s ruling and therefore that the transfer should be blocked.\(^82\)

The Supreme Court plurality’s understanding of the problem before it was entirely different, however.\(^83\) Instead of ruling on the validity of the

\(^{78}\) Id.

\(^{79}\) Id. at 1813-14.

\(^{80}\) Id. at 1814.

\(^{81}\) Buono III, 364 F. Supp. 2d 1175, 1178 (C.D. Cal. 2005).

\(^{82}\) Buono III at 1179-82; see Mercier v. Fraternal Order of Eagles, 395 F.3d 693 (7th Cir. 2005); Paulson v. City of San Diego, 294 F.3d 1124 (9th Cir. 2002); Freedom from Religion Foundation v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000); see also generally Paul Forster, Note, Separating Church and State: Transfers of Government Land as Cures for Establishment Clause Violations, 85 CHI.-KENT L. REV. 401 (2010).

\(^{83}\) The plurality opinion was written by Kennedy, joined by Chief Justice Roberts, and joined in part by Justice Alito (who agreed with the entire opinion except the decision to remand).
land transfer, it assumed the transfer as a sort of *fait accompli* and then instructed the lower court to decide whether the fact of the symbol’s presence on private property affected the Establishment Clause analysis.\(^8^4\) To this inquiry, it appeared, the plurality expected the answer to be “yes.” In other words, the plurality treated the ownership or attribution of the symbol as the decisive factor in the case; rather than asking whether the Government’s actions, taken as a whole, should be understood as an endorsement of religion in violation of the First Amendment, the plurality focused only on the ownership of the symbol. “The injunction was issued to address the impression conveyed by the cross on federal, not private, land,” Justice Kennedy’s opinion explained.\(^8^5\) It then cited *Summum* for the notion that “persons who observe donated monuments routinely – and reasonably – interpret them as conveying some message on the property owner’s behalf.”\(^8^6\) Thus, the Court remanded to the district court to reconsider its decision “in light of the change in law and circumstances effected by the land-transfer statute,” and even questioned whether on remand the “reasonable observer” standard embodied in the endorsement test remained the proper one for analyzing the constitutionality of “objects on private land.”\(^8^7\)

Justice Scalia, who concurred in the judgment but felt that the case should have been decided on standing grounds instead, nonetheless also focused on the ownership of the cross, rather than on its meaning. He opined that the Government could not be enjoined from “permitting” the display of the cross unless the Government owned the property on which it stood: “Barring the Government from ‘permitting’ the cross’s display at a particular location makes sense only if the Government owns the location. As the proprietor, it can remove the cross that private parties have erected and deny permission to erect another. But if the land is privately owned, the Government can prevent the cross’s display only by making it *illegal*.”\(^8^8\) According to Justice Scalia, Buono’s complaint was that that “the manner of abandoning public ownership and the nature of the new private ownership violate the Establishment Clause.”\(^8^9\) As such, Buono could not show that he was injured by the Government’s land transfer, since had not shown that he was harmed or “offended” by the existence of the cross on private, rather than public, land.\(^9^0\)

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\(^8^4\) *Buono*, 130 S. Ct. at 1820.
\(^8^5\) *Id.* at 1819.
\(^8^6\) *Id.*
\(^8^7\) *Id.*
\(^8^8\) *Id.* at 1825 (Scalia, J., concurring).
\(^8^9\) *Id.* at 1827.
\(^9^0\) *Id.* at 1826-27.
For at least a majority of the Justices, then, the most important fact in the case was the private rather than public ownership of the land on which the cross stood. Both Justice Kennedy’s plurality opinion (joined by Chief Justice Roberts and in substantial part by Justice Alito) and Justice Scalia’s concurrence (joined by Justice Thomas), thus evidence an overriding concern with questions of ownership rather than with questions of meaning. This shift in focus, and its concomitant marginalization of the endorsement approach, was troubling to Justice Stevens, who authored the principal dissent in the case.  

For Justice Stevens, the issue before the Supreme Court was essentially the same as the question that was at issue throughout the litigation: whether the Government’s actions— including the action of attempting to transfer the one-acre plot of land to a private party— resulted in an impermissible endorsement of religion. “In evaluating a claim that the Government would impermissibly ‘permit’ the cross’ display by effecting a transfer,” Justice Stevens therefore explained, “a court cannot start from a baseline in which the cross has already been transferred.”  

In other words, the Court should not focus on the fact of the public or private ownership as the central fact in the case, and then reason outwards from the fact of that ownership. Rather, it should have considered whether the transfer would cure or continue the already-adjudicated Establishment Clause violation.  

Although Justice Stevens’ dissent did discuss the cross’s ownership, along with the indicia of the Government’s continuing control over the cross despite its transfer, he considered those facts only insofar as they were relevant to an understanding of the social meaning of the Government’s actions. Thus, he argued that once the cross had been designated a national memorial, “changing the identity of the owner of the underlying land could no longer change the public or private character of the cross. The Government has expressly adopted the cross as its own.”  

And of course, what the Government has adopted is a religious message: “We have recognized the significance of the Latin cross as a sectarian symbol, and no participant in this litigation denies that the cross bears that social meaning. Making a plain, unadorned Latin cross a war memorial does not make the

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91 Id. at 1828-42 (Stevens, J., dissenting) (joined by Justices Ginsburg and Sotomayor). Justice Breyer dissented separately on the ground that the case involved no substantial constitutional issues but rather resolved around the simple question whether the district court had the power to interpret its own injunction as it did and to enforce that injunction as it saw fit – a question of the law of remedies. Id. at 1842-44. According to Justice Breyer, that question clearly should have been answered in the affirmative. Id. at 1845.

92 Id. at 1831.

93 Id. at 1837.

94 Id. at 1834.
cross secular. It makes the war memorial sectarian.” Justice Stevens distinguished *Pinette* on the ground that the government action in that case, unlike in *Buono*, showed no favoritism toward religion. Because the contemplated private ownership of the patch of land in the national preserve was not a dispositive fact for Justice Stevens, he could ultimately conclude that “[c]hanging the ownership status of the underlying land … would not change the fact that the cross conveys a message of government endorsement of religion.”

C. **SUMMUM AND BUONO COMPARED**

*Summum* and *Buono* are distinct cases, dealing with distinct doctrinal issues. *Summum*, of course, was a free speech challenge, while *Buono* was an Establishment Clause case. As such, the principal question in *Summum* was whether the city park was a speech forum—and if so, what kind of forum—or whether it constituted government speech immune to Free Speech Clause attack. In *Buono*, by contrast, the issue was whether the cross display in the Mojave National Park impermissibly endorsed religion, in violation of the Establishment Clause.

But in several very important ways, *Summum* and *Buono* are closely related. At base, both cases were born of an act of exclusion. In *Summum*, the challenge arose from the city’s exclusion of the Seven Aphorisms monument from its park, and in *Buono*, the government’s refusal to permit a Buddhist shrine to be erected at Sunrise Rock initially set in motion the litigation that ensued. Though one case was styled as a free speech case and the other as an Establishment Clause case, both were concerned with the government’s ability to exclude some religious speech and to adopt other religious speech as its own. In addition, in both cases, the underlying First Amendment issues were resolved by reference to property and ownership, both literal and metaphorical, of symbolic speech. In *Buono*, the actual ownership of the plot of land on which the cross stood was viewed by the plurality as central to the case, and possibly dispositive of the Establishment Clause claim. In *Summum*, the city’s proprietary relationship to the Ten Commandments monument and other monuments in Pioneer Park was also seen as directing the outcome of the case. In both literally and symbolically “owning” that speech, the city was given the right to exclude Summum’s desired message from a public place. The central place that ownership occupies in these two cases is reflected, moreover, in the cases’ rhetoric, referring to the government with the privatizing term “property owner,” for

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95 Id. at 1835.
96 Id. at 1836.
97 Id. at 1837.
example.

Finally, although in one case the Court was setting aside questions about endorsement and in the other it was setting aside questions about viewpoint discrimination, in both cases it used formalistic, conceptual reasoning to do so. In turning speech into a form of property and casting the government in the role of private property owner, the Court gave the government absolute power to control the constitutionality of its actions, merely by engaging in particular property transactions. 98

II. DOCTRINAL DEAD ENDS AND COUNTING HEADS: SOME POSSIBLE EXPLANATIONS FOR SUMMUM AND BUONO

Each of the cases just discussed is somewhat idiosyncratic—Buono because of its convoluted history of property transactions and Summum because of its free speech posture that hints at but expressly disclaims an Establishment Clause claim. Despite their uniqueness, however, both the “government speech” category embraced in Summum and the property transfer remedy sanctioned in Buono are likely to have lives that extend beyond those individual cases. Indeed, one might even see the Supreme Court’s subsequent decision in Christian Legal Society v. Martinez, 99 in which it rejected a religious student group’s claims for inclusion among a public law school’s official sanctioned student organizations, as being influenced by the Court’s approach in Summum and Buono. In that case, the Court applied public forum doctrine to sideline the Christian Legal Society’s free speech and free association claims. 100 As I have argued elsewhere, the Court’s use of property concepts—particularly in its unprecedented application of forum doctrine to the CLS’s claim that the law school’s actions burdened its freedom of association—was anything but inevitable, and it functioned to conceal or subsume difficult questions about the meanings of pluralism and equality by appearing to resolve the case on cut-and-dried private law concepts. 101

The primary focus of this article is therefore on the troubling implications of importing property rhetoric into the case law dealing with

98 Cf. Timothy Zick, supra note 15, [Property As/and Constitutional Settlement] at 1396 (discussing several Establishment Clause cases involving settlement of constitutional issues through property disposition and reading the Buono plurality as giving “strong hints … that at least three justices are inclined to treat property dispositions deferentially, even in a case bearing some unusual indicia of favoritism toward a religious symbol”).

99 130 S. Ct. 2971 (2010).

100 CLS, 130 S. Ct. at 2994.

religious symbolism. It is nonetheless helpful, in considering the future implications of *Summum* and *Buono*, to understand the possible reasons why the cases were decided as they were.

Perhaps the first and most obvious explanation for the configuration of the Supreme Court’s most recent religious symbolism cases is the retirement of Justice O’Connor in 2006. Justice O’Connor was the creator and most fervent supporter of the endorsement test. Although O’Connor’s test managed to command a majority in the key religious symbolism cases, as the above discussion demonstrates, the majorities were fragile and fragmented, often composed of a mere five Justices, some of whom were writing in dissent. In the wake of O’Connor’s departure, the death of the endorsement test has been widely, if prematurely, pronounced by commentators. Justice O’Connor was, of course, replaced by Justice Alito, who wrote the majority opinion in *Summum* and who joined Justice Kennedy’s plurality opinion in *Buono* almost in its entirety. Thus, one might argue, the only thing that changed in any meaningful way between *Van Orden* and *Summum* was the Court personnel—but it was a change that, unsurprisingly, turned out to have significant implications for the ways in which Establishment Clause challenges would subsequently be decided. The dissents in *Buono* and concurrences in *Summum*, composed of those Justices who were formerly part of the majority applying the endorsement analysis in religious symbolism cases, of course persisted in focusing on questions of social meaning and the viewpoint of the reasonable observer rather than the property law paradigm that the government put forward.

At the same time, it is somewhat surprising that the Court did not wholeheartedly adopt a coercion standard in *Buono*. As many commentators have observed, there are likely five votes for adopting Justice Kennedy’s preferred, and more stringent, standard, according to which a government action does not violate the Establishment Clause unless it constitutes


104 See, e.g., Chemerinsky, supra note 103, at 663-66 (predicting that Justice O’Connor’s replacement by Justice Alito was likely to make a difference in Establishment Clause cases); cf. Lisa Shaw Roy, *Pleasant Grove City v. Summum: Monuments, Messages, and the Next Establishment Clause*, 104 NW. U. L. REV. COLLOQUIY 280, 289 (2010) (“Nor should it be lost on the reader that the author of the majority opinion in *Summum*, Justice Alito, assumed Justice O’Connor’s seat on the Court, which has both symbolic and practical implications.”).
(physical or psychological) coercion or proselytizing.\textsuperscript{105} That standard probably would have resulted in Buono being decided the same way, but it would have kept the focus of the Court’s inquiry on social meaning – requiring the Court to ask whether the cross’s message was coercive or proselytizing – rather than on property and ownership.\textsuperscript{106}

A second pragmatic explanation would be the rather peculiar factual backdrops of both cases. The oddity of Summum lay in the religious sect’s request to be included in a public park not on a transient basis by means of an ephemeral speech or temporary holiday display, for example, but by being allowed to erect a large, permanent monument. The sheer practicalities of the situation—the unsavory possibility, if Summum’s request were granted, of opening up a public park to physical overcrowding by a cacophony of monuments—seemed to dictate the result in that case. One might then speculate that the Court reached whatever doctrinal lengths were necessary in order to avoid this bizarre and counterintuitive result.\textsuperscript{107}

And as noted above, the fact that the case arose as a Free Speech Clause challenge rather than in the usual Establishment Clause posture certainly accounted for the Court’s decision not to discuss questions of endorsement and social meaning in any direct way. Likewise, Buono was characterized by a complex and distracting factual and procedural history that both provided a number of bases on which the case could be decided and made the determination of social meaning complex, to say the least. For this reason, a number of commentators predicted that the Supreme Court would decide the Buono case without seriously addressing the underlying Establishment Clause merits, which is exactly what it did.\textsuperscript{108}

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\textsuperscript{105} See sources cited supra note 103.
\textsuperscript{107} See Adam Liptak, supra note 51 (noting that at oral argument “the justices were finding it hard to identify a principle that would compel the city to accept the Summum monument without creating havoc in public parks around the nation” and describing such questions asked by the Justices as “‘You have a Statue of Liberty….Do we have to have a statue of despotism? Or do we have to put any president who wants to be on Mount Rushmore?’” (quoting Chief Justice Roberts).
\textsuperscript{108} The Buono plurality did not directly decide what implications the land transfer would have for the Establishment Clause claim but rather remanded to the lower court for further proceedings. Justice Scalia felt that the case should have been decided on standing grounds, and Justice Breyer would have decided it as a matter of the law of remedies, not as a matter of constitutional law.
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Finally, *Summum* and *Buono* can be seen as the end result of a doctrinal mess thirty years in the making. Ever since the Court first permitted religious speech in the public square, beginning with *Lynch v. Donnelly*’s sanctioning of a crèche display at Christmastime, it seemed virtually inevitable that more and more religious voices would seek entry to that privileged space, until there was simply no more room. Once the Establishment Clause was understood to not to banish religious speech but simply to mandate equal treatment among religious speakers, one might argue, the flood of claims for equal treatment was inevitable.109 Thus, for example, in the years after the Supreme Court’s decision in *Lynch*, the Chabad-Lubavitch movement sought repeatedly to place menorah displays in prominent public places in various cities during the winter holiday season. A number of these displays were the subject of litigation; the most famous was the menorah in *County of Allegheny*, but several cases also involved Free Speech Clause challenges to the exclusion of menorahs from prominent public places.110 The Summum religion, too, fought and won on free speech grounds some cases involving access to public fora.111

*Summum* thus represents a very concrete example of the crowding of the public sphere with religious voices demanding official recognition. But even in a less literally crowded public space, there are surely limits to the amount and types of religious speech a government may be willing and able to include. There are only so many temporary holiday displays that can

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109 “If there is room at the public forum for the Good News Club, there must also be room for Summum.” Ian Bartrum, *Pleasant Grove City v. Summum: Losing the Battle to Win the War*, 95 VA. L. REV. IN BRIEF 43, 46 (2009).

110 *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); see also, e.g., *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 430 (6th Cir. 2004) (holding that Chabad had a likelihood of success on the merits of its claim that its exclusion from a public square during the winter holiday season violated its free speech rights); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1385 (11th Cir. 1993) (holding that Chabad had a free speech right to maintain a menorah display in the state capitol during the holiday season). But see *Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109, 110-12 (2d Cir. 1991) (upholding City of Burlington’s denial of a permit to displaying Chabad’s menorah in a city park, reasoning that the display would violate the Establishment Clause); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347-48 (7th Cir. 1990) (upholding the exclusion of Chabad’s menorah from O’Hare airport as reasonable time, place, or manner restriction, despite the presence of city-owned Christmas trees).

111 See, e.g., *Summum v. Callaghan*, 130 F.3d 906, 919-20 (10th Cir. 1997) (holding that Summum had stated a claim for denial of its free speech rights by being denied permission to erect its monolith on the county courthouse lawn alongside the Ten Commandments); *Summum v. City of Ogden*, 297 F.3d 995, 1011-12 (10th Cir. 2002) (holding that the City of Ogden, Utah “cannot display the Ten Commandments while declining to display the [Summum] Seven Principles Monument” consistent with the Free Speech Clause).
fit around the state capitol and only so many days on which a legislative prayer may be offered. As such, the Court would have to re-introduce some boundaries, either by means of the government speech doctrine, which would allow the government to re-possess the public space and thereby prevent it from being overcrowded with too many speakers, or by privatizing the property at issue, thereby cutting off the governmental connection to the alleged discrimination among speakers. In either case, a solution had to be found to allow some form of discrimination among, and exclusion of, religious voices, since including every religious speaker is simply impossible as a practical matter.

At the same time, as some commentators have observed, the government’s ownership of religious speech creates a new problem to be solved – the appearance that the government is endorsing that religious speech whenever it takes ownership of it.112 For this reason, it perhaps made sense for the Court to marginalize the endorsement test. In Summum, the Court suggested that there was a difference between government speech and government endorsement of speech, by allowing that the government could be speaking through its monuments without speaking the actual words contained on the monuments. And in Buono, the Court allowed the government to avoid the implications of its ownership of a Latin cross by alienating that property. Property law presented a way out of the doctrinal mess the Court itself had created.

There are thus a number of pragmatic reasons that may explain why the Summum and Buono cases were decided as they were, making them unsurprising if ill-fitting additions to the sequence of religious symbolism cases in the Supreme Court. Even if predictable, however, the turn that the Court has taken in its rhetoric and reasoning has some potentially disturbing implications. The following section demonstrates that the property rhetoric of Summum and Buono is a particularly inappropriate overlay to Establishment Clause doctrine.

III. PROBLEMS WITH THE PROPERTY PARADIGM

This Part presents a critique of the Court’s decision to embrace property law and language in Summum and Buono. I acknowledge the fact that, to some degree, the concepts of property and ownership are always involved when a legal challenge is presented to a message attributed to the government. Therefore, in Part III.A., I examine the relationship among the concepts of endorsement, attribution, and ownership. I conclude that,

112 Meyler, supra note 24; Bartrum, supra note 109.
although all of those concepts are related, and inevitably involved in any evaluation of the constitutionality of speech that is attributed to the government, endorsement and ownership are ultimately distinct. The government need not apply property rhetoric whenever it discusses a symbol’s attribution to a government body. Then, in Part III.B., I consider in detail the reasons why it is unwise for the Court to adopt property rhetoric and principles in the religious symbolism context. I argue that property law’s visible appeal as a neutral, clear, formalistic approach to deciding difficult constitutional cases actually has very little to recommend it. Worse, property introduces into the doctrine an exclusion and subordination of minority religious speakers by the government, acting on behalf of the majority, that is treated as both natural and inevitable. In addition, the government’s expressive possession of Christian religious symbols acts to construct the community as an openly Christian one, in which non-Christians and nonadherents are, at worst, unwelcome outsiders and, at best, tolerated guests.

A. Endorsement, Attribution, and Ownership

The very concept of attribution, which itself is central to both the endorsement analysis and the government speech defense, incorporates a notion of ownership—or at a minimum, of control. A party cannot endorse a message without somehow claiming it as its own, usually by means of exercising some measure of ownership or control over the message. Whether one is attempting to discern endorsement or ownership, the issue appears to turn on one’s relationship to a symbolic object. The concepts are therefore closely affiliated. Indeed, although this article argues that the Supreme Court’s turn to property in its religious symbolism cases is a relatively new phenomenon, it is also possible that the Court did not discuss the ownership of the symbolic speech in any meaningful way in older cases like *Lynch, Allegheny, Van Orden, or McCreary* because the symbol’s ownership—its attribution to the government—simply was not contested in those cases. This section therefore explores in greater depth the relationship of ownership to the concept of endorsement. Ultimately, while property rights and questions of ownership are inextricably linked with free speech concerns as well as Establishment Clause concerns pertaining to religious speech, ownership and endorsement are distinct concepts. Indeed, the Court explicitly recognized the difference in *Summum*.

In applying the endorsement test to determine the constitutionality of a religious display, a court is required, implicitly, to make two determinations: first, whether the display’s message endorses religion; and second, whether that message of religious endorsement can be attributed to
the government. In early cases like *Lynch* and *Allegheny*, the focus was primarily on the first question. The Court never stopped, for example, to question whether the crèche display in *Lynch* was attributable to the government of Pawtucket, Rhode Island, although it technically stood in a private park. As one commentator has pointed out, the city owned the display itself and took responsibility for erecting and removing the display, thus exercising “effective control” over the display’s message. Indeed, the Court “has long resisted bright-line rules that would limit [the endorsement test’s] contextual analysis only to those messages that are government owned or controlled.” Thus, the Court has also clung to the endorsement test when a privately owned symbol stood on government property and when a publicly owned and erected display occupied private property.

In more recent years, however, the second question—the problem of attribution—has garnered significant scholarly attention, particularly in light of the rise of the government speech doctrine. In the wake of percolating lower-court debates over the constitutionality of specialty license plate schemes as well as of the *Summum* case, much of this scholarship has focused on determining when the government should be able to claim speech as its own, thereby insulating that speech from challenge under the First Amendment’s free speech protections. Secondarily, scholars have considered when the government must take responsibility for speech, thus opening itself to Establishment Clause challenges. Scholars such as Claudia Haupt, Helen Norton, and Andy Olree have proposed tests for identifying speech as governmental. Relatedly, Professor Caroline Mala Corbin has argued that courts should recognize a distinct category of “mixed speech,” which has elements of both private and governmental control. Professor Corbin suggests that claims of viewpoint

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114 Haupt, supra note 57, at 606.

115 Haupt, supra note 57, at 606-07.


119 Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and*
discrimination with respect to mixed speech should invoke intermediate scrutiny; she also implies that such speech would be attributable to the government for Establishment Clause purposes. In the analyses of these commentators, as well as of lower courts that have struggled to find a systematic approach to determining responsibility for speech, actual ownership of either the symbols or the property on which they stand is often a factor, but not a dispositive one. Ownership and attribution, in other words, are not necessarily identical.

Recent work by Professor Abner Greene, moreover, demonstrates that the relationship between a government “speaker” and a particular message may take a wide variety of forms. For example, sometimes the government provides “platforms” for private speech with which it does not necessarily wish to associate itself, but for which it appears to retain some responsibility. An example might be a specialty license plate program, or an adopt-a-highway program. In those instances, Professor Greene has argued that the government should have discretion to decline a platform for certain kinds of speech, such as speech that is hateful or vulgar; yet, the fact “[t]hat the state may be selectively advancing a contested view of the good does not entail that it is adopting the speech as its own, nor that it is correct to attribute the speech to the state.”

This scholarship highlights the fact that the relationship between speech and a governmental or private “speaker” is not always a straightforward one, determined with simple reference to ownership of the locus or apparatus of speech. To borrow from the terminology of philosophy of language, endorsement is but one of many “speech acts” that a speaker

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120 Corbin, supra note 119, at 675-80 (advocating for intermediate scrutiny); id. at 689-91 (stating that government may discriminate against mixed religious speech in order to avoid Establishment Clause problems).

121 For Claudia Haupt, ownership of the property may play a role in determining the entity to which a reasonable observer would attribute a religious message, she specifically eschews such “categorical” approaches in favor of an examination of “effective control.” Haupt, supra note 57, at 593-97. Helen Norton treats the public or private ownership of the property on which the speech occurs as a relevant “cue” to the proper attribution. Norton, supra note 118, at 608. Andy Olree uses the ownership or control of the “medium or format” of the speech as one of three questions to ask in attributing speech. Olree, supra note 118, at 411. Professor Olree also notes that most lower courts have followed a four-pronged test for determining whether speech is governmental or private, and that actual ownership of the speech does not carry independent weight. Id. at 386, 398 (citing ... [cases]).

122 Abner S. Greene, Speech Platforms, 60 Case W. Res. L. Rev. ___ (forthcoming); see also Abner S. Greene, (Mis)attribution, 87 DENV. U. L. REV. 833 (2010).

123 In other work, I have used philosophy of language to illuminate problems associated with religious speech and the endorsement test. B. Jessie Hill, Putting Religious Symbolism in Context, supra note 25; B. Jessie Hill, Of Christmas Trees and Corpus
may perform. It is one of many possible relationships between the speaker and the symbolic object. Depending on the context, the speech act may, instead, be one of referring to or commemorating a historical event; of acknowledging or giving thanks for a contribution; or even of “quoting” a private speaker’s speech by bracketing or distancing the message itself in favor of inclusion based on some other principle – such as when a government entity opens a library, operates a public forum for free speech, or selects works of art for a publicly-owned museum. The nature of the speech act depends on the context of the speech, which may consist of a large – even limitless – number of factors.

For this reason, though property ownership is inextricably interwoven with the problem of attribution and of the social meaning of a display, it is not identical to, nor coextensive with, either meaning or attribution.

Indeed, in Summum, Justice Alito examined the relationship between attribution and ownership at some length. He began by noting that the government’s ownership of the park and acceptance of the privately donated monuments therein tended to indicate that the monuments were the government’s own speech: “It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.” As such, in general, monuments, whether commissioned by the government or simply accepted by it when offered, “have the effect of conveying a government message, and they thus constitute government speech.”

In reaching this conclusion, however, Justice Alito was undoubtedly

\textit{Christi, supra note 106.}

\footnote{124}{An example might be a monument that recognizes the role of a particular religious or missionary group in a city's founding.}

\footnote{125}{Cf. Norton, supra note 118 (discussing acknowledgement of a private entity’s contribution as expressive behavior).}

\footnote{126}{Cf. Summum, 129 S. Ct. at 1136 n.5 (“Museums display works of art that express many different sentiments, and the significance of a donated work of art to its creator or donor may differ markedly from a museum’s reasons for accepting and displaying the work. For example, a painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same ‘message.’”).}

\footnote{127}{Hill, \textit{Putting Religious Symbolism, supra note 25.} Professor Greene also refers to “local” or “background” understandings. Greene, \textit{Speech Platforms, supra note 122, at 4 (“local understandings”); Greene, Misattribution supra note 122, at 851 (“background understandings”).}

\footnote{128}{Summum, 129 S. Ct. at 1133.}

\footnote{129}{Summum, 129 S. Ct. at 1134.}
aware of the path he had to negotiate between the Scylla of Summum’s free speech claim and the Charybdis of a potential, future Establishment Clause claim. If the Ten Commandments and other monuments in the public park were not government speech, then the park was a public forum for private speech, and the city had discriminated against Summum by rejecting its contribution. But if the Ten Commandments were government speech, then the city was vulnerable to an Establishment Clause claim that it had openly endorsed the religious speech contained therein. Thus, he carefully explained how government speech that is facially religious could nonetheless fail to be religious speech that is endorsed by the government. First, he pointed out that monuments can convey more than one message, and that the meaning of a monument can change over time. Additionally, and crucially, he described the act of possessing and placing the monument on city property as, itself, an expressive act—one that, presumably, expresses a relationship between the government speaker and the speech. He thus recognized that, while the Ten Commandments monument contains facially religious language, the speech act that results from the particular situation is not necessarily one of endorsement of the monument’s religious message. Instead, the actual message or effect is dependent on various features of the physical, temporal, and social context—including the nature of the space in which the monument is placed and the other items surrounding it. Though he did not make his understanding of the

130 Cf. Lisa Shaw Roy, Pleasant Grove City v. Summum: Monuments, Messages, and the Next Establishment Clause, supra note 104, at 280 (“If Pleasant Grove argued too vigorously the theory that the existing Ten Commandments monument constitutes the city’s own message, then it risked violating the Establishment Clause in a follow-up lawsuit based on the same facts. If, on the other hand, Pleasant Grove attributed the monument’s message to its 1971 donor, then the city would be hard-pressed to explain why Pioneer Park was not, as Summum claimed, a public forum that must be potentially open to all monuments without discrimination based on content or viewpoint.” (footnote omitted)).

131 Summum, 129 S. Ct. at 1135-36.

132 Summum, 129 S. Ct. at 1136 (“By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument’s donor or creator.”); cf. Joseph Blocher, Government Property and Government Speech, 52 WM. & MARY L. REV. 1413, 1438 (2011) (observing, by analogy to the law of expressive association, that “the inclusion or exclusion of a person or thing can itself be an expressive act”); see generally Randall P. Bezanson, Speaking Through Others’ Voices: Authorship, Originality, and Free Speech, 38 WAKE FOREST L. REV. 983 (2003) (discussing “speech selection judgments” as expressive acts).

133 Summum, 129 S. Ct. at 1136. Justice Alito’s view is clearly influenced by the mode of analysis employed by the Court in other cases involving religious symbols, such as Lynch v. Donnelly. I have examined the idea of endorsement as a speech act and the importance of context in determining the message, or effect, of religious displays. Hill, supra note ___ [MLR 2005].
government’s message explicit, Justice Alito seemed to suggest that while the message on the Ten Commandments monument itself was explicitly religious (exhorting the reader to, for example, keep holy the Sabbath), the message conveyed by the city’s placement of the Ten Commandments in Pioneer Park, along with “an historic granary, a wishing well, the City’s first fire station, [and] a September 11 monument”\textsuperscript{134} was more incoherent—perhaps something like, “These are things that are important to the citizens of Pleasant Grove.”\textsuperscript{135} Whether that message should be constitutionally problematic when it includes the Ten Commandments is at least arguable. Justice Alito makes it clear, however, that the city has not automatically endorsed the content of the Ten Commandments monument by accepting ownership of it.

Nonetheless, the Court’s opinion at times suggests that not just the entire Pioneer Park display, but in fact each monument in it, is government speech. It asserts, for example, that “the City’s intends \textit{the monument} to speak on its behalf,” and that “[t]he \textit{monuments} that are accepted … constitute government speech.”\textsuperscript{136} The Court equivocates somewhat on this point, however, later asserting that “the \textit{City’s decision} to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech.”\textsuperscript{137} The opinion is decidedly indecisive as to what, exactly, constitutes the speech. Still, the overwhelmingly clear message is this: ownership of speech is distinct from endorsement of speech. Government speech, in \textit{Summum}, is not so much speech attributable to or endorsed by the government, but rather speech that is, in an almost literal sense, owned by the government. By taking ownership of the speech in Pioneer Park, while still distancing itself from its message, Pleasant Grove City obtained the right to exclude other voices, without necessitating any judicial inquiry into whether the exclusion was impermissibly discriminatory.

\textit{B. A Critique of the Property Framework}

So far, this article has illustrated the way in which the Court has

\textsuperscript{134} \textit{Summum}, 129 S. Ct. at 1129.

\textsuperscript{135} \textit{Summum}, 129 S. Ct. at 1133-34 (discussing how the park conveys an image of the City). Mary Jean Dolan refers to such speech as “identity speech” and argues that such speech describing a municipality’s identity should be considered to violate the Establishment Clause when it is religious in content, at least in the absence of any disclaimer. Dolan, \textit{Government Identity Speech, supra} note 65, at 63-67.

\textsuperscript{136} \textit{Summum}, 129 S. Ct. at 1134 (emphasis added).

\textsuperscript{137} \textit{Summum}, 129 S. Ct. 1125 at 1138.
turned to property concepts in dealing with the thorny First Amendment questions raised by public displays of religious symbolism. As illustrated above, there was nothing inevitable about the Court’s choice of framework—it could have considered *Summum* within a viewpoint discrimination paradigm, or it could have adopted a government speech rationale that rendered the inclusion of the Ten Commandments constitutionally problematic. And it could have treated *Buono* under the endorsement test, by asking whether the social meaning of the Government’s actions, including the land transfer, constituted an endorsement of Christianity and a message of exclusion to nonadherents. Instead, the Court turned to property, both as a legal solution and as a rhetorical framework. The literal ownership of the land and symbols at issue were treated as dispositive factors, whether the ownership was governmental or private. In addition, the language of property permeates both opinions.

This section argues that the concept of property is a poor fit with the Supreme Court’s existing Establishment Clause and free speech doctrines—particularly the ideals of equality, inclusion, and nondiscrimination that they embody. Indeed, by shifting the focus in its religious symbolism cases from social meaning and viewpoint discrimination to ownership of speech, the Court not only minimizes the importance of those concepts but also introduces into the case law a perspective that is diametrically opposed to them.

My criticisms of the property paradigm are as follows. First, although property law appears to provide a convenient and noncontroversial set of neutral principles for deciding difficult controversial cases, that neutrality is largely illusory. The Court’s use of property law and property-based reasoning, while formalistic and arguable even simplistic, merely masks enormous complexity rather than resolving it. In addition, both the law and the language of property are dominated by concepts such as exclusion, absolutism, inequality, and hierarchy. Rather than enforcing true

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138 The Court can be considered to have engaged in a form of “constitutional borrowing,” as defined by Professors Nelson Tebbe and Robert Tsai (unless property law is considered an area of non-constitutional doctrine). See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 Mich. L. Rev. 459, 461 (2010) (defining constitutional borrowing as “the practice of importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends”). Professors Tebbe and Tsai cautiously endorse the practice, but they warn that borrowing can be unwise, for example, if it results in combining together incompatible ideas, is disingenuously selective, or if it corrupts the doctrine so as to make it unworkable or unstable. *Id.* at 469-71, 482-84. Arguably, many or all of those problems are present in the Court’s borrowing of property concepts in the free speech and Establishment Clause domains.
neutrality, the property paradigm helps to reinforce a particular political identity that excludes religious outsiders by both centralizing and naturalizing the exclusion that lies at the heart of the concept of property. Consequently, I argue that the Court should, in the future, avoid the easy device of property law and rhetoric and instead confront the substantive First Amendment issues raised by the presence of religious displays in public places. Given that both Summum and Buono are unlikely to wield direct precedential force in future religious symbolism disputes, it is still possible for the Court to return to its earlier approach.

1. Property and Neutral Principles

Property law must have seemed to the Justices like a desirable way to way to resolve the complex issues in Summum and Buono. Rather than requiring messy inquiry into the heavily context-dependent concept of social meaning or the unruly analysis of whether viewpoint discrimination has occurred in a government-sponsored forum, ownership and property appear to present neat and formalistic categories. If the speech is government speech, then the government has the right to exclude any other speakers, for any reason whatsoever. If the land on which the cross monument stands is owned by a private party, not the Government, it raises no Establishment Clause concerns. End of story.

Indeed, the turn to property law may even recall the Supreme Court’s earlier embrace of “neutral principles” in the context of a church property dispute, in the 1979 case of Jones v. Wolf. In that case, the Court was confronted with difficult Establishment Clause and free exercise issues raised by a dispute over who owned church property after a schism in a local church. The Court purported to avoid all of those issues, however, by allowing the

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139 See Hill, supra note 25 (MLR) (discussing the difficulties that inhere in any analysis of social meaning, deriving from the centrality of context to social meaning).

140 See, e.g., Steven G. Gey, Reopening the Public Forum—From Sidewalks to Cyberspace, 58 OHIO ST. L.J. 1535, 1555 (1998) (“The post-Perry public forum doctrine may not be the most fractured area in modern constitutional law, but it comes close. ”); Note, Strict Scrutiny in the Middle Forum, 122 HARV. L. REV. 2140, 2141 (2009) (“[I]n recent years, forum analysis has become a muddled area of First Amendment jurisprudence.”).

141 It is not difficult, moreover, to see the attraction of the “private law model” for a Court such as the Roberts Court, which seems to sympathize greatly with the traditional model of adjudication and valorization of the private law world. See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1288 (1976) (describing the affiliation between the private law model of litigation and traditionally conservative political attitudes).


143 Jones, 443 U.S. at 597.
state courts to take apply “neutral principles of law,” apparently defined as “objective, well-established concepts of trust and property law familiar to lawyers and judges.” Applying those neutral principles, the Court held, “promise[d] to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.”

Similarly, in *Adderly v. Florida*, the Court purported to apply straightforward trespass principles to hold that the First Amendment did not grant a right to engage in a civil rights protest on the grounds of a municipal jail: “Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute,” the Court explained. “The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”

This neutrality is more problematic than it appears, however. As the dissent in *Jones* indicates, the turn to purportedly neutral property principles often suppresses or assumes away the underlying constitutional questions. Similarly, the dissent in *Adderly* complained of the “violence” done to free speech principles when a case about the right to protest was “turned into a trespass action.” The formalistic language of the Court’s property analysis conceals difficult balancing questions that do not lend themselves to categorical, formalistic analysis. Property rights simply are not as categorical as they appear, especially when public property is involved. Moreover, as discussed below, property law and property rhetoric is charged with concepts of exclusion, inequality, and hierarchy.

Relatedly the rhetoric of property tends toward a certain absolute quality. Although property rights, like every other right, may at some point be limited or even sacrificed when necessary for the public good, the language of property and ownership often ignores those limits. In illustrating this point, commentators often quote Blackstone’s famous (if not necessarily accurate) description of property as “that sole and despotic dominion which one man claims and exercises over the external things of

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144 Id. at 602-03.
145 Id. at 604.
147 Id. at 47.
148 Id.
149 Jones, 443 U.S. at 614-16 (Powell, J., dissenting) (criticizing the majority for leaving unresolved the “basic question” of “which faction should have control of the local church” and “afford[ing] no guidance as to the constitutional limitations” on the use of neutral principles such as restrictive evidentiary rules).
150 Adderly, 385 U.S. at 52.
151 See infra Parts III.B.2-3.
152 I have made some of these arguments, in much briefer form, with respect to the use of forum doctrine in *CLS v. Martinez*. Hill, supra note 101, (DJCLPP) at 53-56.
the world, in total exclusion of the right of any other individual in the universe.”

Ownership is a concept that is almost always configured not just as dominion and control but as complete dominion and control. Consider, for example, the following language from Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati, the City of Cincinnati had justified its exclusion of a privately-owned menorah from a holiday display on the city’s central public square by claiming that the speech taking place in the square during the holiday season was government speech. The City passed an ordinance declaring:

The City has an inherent right to control its property, which includes a right to close a previously open forum. During times of exclusive use by the City of Cincinnati, the City will bear the ultimate responsibility for the content of the display or event. No other party, other than the City of Cincinnati, may make decisions with regard to any aspect of the event and/or display. No private participation with regard to any aspect of the event and/or display will be permitted at this time. However, the City may accept donations or funds from other entities for the event and/or display which is the subject of exclusive use. As a result of its sole responsibility, ownership, management and control by the City of Cincinnati during times of exclusive use, it is recognized the City is engaging in government speech.

The invocation of government speech, which implies the government’s ownership of speech, thus seems to have produced a sort of totalizing language, associating the City’s ownership of a public place with absolute dominion over the speech within it.

This categorical view of property rights, which makes cases like Summum and Buono suddenly appear to be clear and easy, turning on questions of ownership and nothing else, is thoroughly inaccurate, however. At a minimum, when public property is involved, the case is considerably more complicated. There is a long tradition of case law suggesting that the

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154 363 F.3d 427 (6th Cir. 2004).

155 Id. at 431 (quoting Cincinnati Municipal Code § 713-1).
government does not possess an absolute right to exclude speakers from its property, merely by virtue of its ownership of that property. Indeed, the Supreme Court famously stated in *Hague v. CIO*,\(^\text{156}\) “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”\(^\text{157}\)

In so holding, the Court rejected the government’s position, drawn from the older First Amendment case *Davis v. Massachusetts*,\(^\text{158}\) which opined instead, in the language of absolute property rights, that public property “was absolutely under the control of the legislature,” and therefore that individuals had no right to use it “except in such mode and subject to such regulations as the legislature, in its wisdom, may have deemed proper to prescribe.”\(^\text{159}\)

Of course, there are other ways in which the law limits the government’s power to exclude even in its role as property owner: nonpublic forums, for example, are subject to rules against viewpoint discrimination.\(^\text{160}\) The desegregation of public places limited the rights of governmental property owners in the interest of equality.\(^\text{161}\) For this reason, Professor Timothy Zick has argued, drawing on the language of *Hague*, that government property must be held in a sort of metaphorical public trust, “for the benefit of the public,” such that “public officials must comply with public duties of fair dealing, preservation, and fulfillment of constitutional covenants.”\(^\text{162}\) Likewise, Professor Harry Kalven, Jr., has spoken of a “First Amendment easement” to use the public streets for expressive purposes.\(^\text{163}\)

And indeed, even private property rights may be limited in the interest of constitutional values. Civil rights laws requiring equal access to privately-owned accommodations limit private property rights in the

\(^{156}\) 307 U.S. 496 (1939).

\(^{157}\) Id. at 515.

\(^{158}\) 167 U.S. 43 (1897).

\(^{159}\) Id. at 46–47 (quoted in *Hague*, 307 U.S. at 514).

\(^{160}\) Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995) (noting that a governmental entity, “like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated,” but it may not “exercise viewpoint discrimination, even when the limited public forum is one of its own creation”).


interest of equality. Moreover, although the First Amendment does not generally require private property owners to permit private speech on their land, the Supreme Court has upheld the power of a state supreme court to do just that. In his concurrence in that case, Pruneyard Shopping Center v. Robins, Justice Marshall rejected an “overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment guarantee of freedom of speech,” pointing out that common-law rights are of course subject to legislative revision.

Indeed, as Professor Zick has demonstrated, the Court has often shown a willingness to look beyond formal indicia of ownership when considering the impact of property dispositions on constitutional rights claims. He surveys a series of cases, involving equal protection, free speech, and the Establishment Clause, in which the Court has looked behind a property transfer to consider its effects on constitutional liberties.

Similarly, in Marsh v. Alabama, the Court refused to find that a corporation’s ownership of a “company town” meant that Jehovah’s Witnesses had no First Amendment right to solicit there, stating, “We do not agree that the corporation’s property interests settle the question.” Thus, the crux of the issue is, and has always been, not whether property law governs, but what substantive principles govern the limitations on the property owner’s rights. Indeed, Blackstone notwithstanding, the Court even went so far as to affirm that “[o]wnership does not always mean absolute dominion.”

Far from resolving everything, in other words, the purportedly neutral principles of property law in fact resolve very little. But the reality of the limited nature of property rights seem to prove no match for the totalizing power of property rhetoric.

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164 See, e.g., Title II of the Civil Rights Act of 1964, 42 U.S.C. s. 2000a, et seq. Of course, the Civil Rights Act is a statutory enactment, passed pursuant to Congress’s commerce power, not a constitutional rule or an enactment pursuant to the Fourteenth Amendment. It therefore does not illustrate directly the use of constitutional laws to limit property rights, but it does illustrate the non-absolute quality of property rights.


166 Id. at 91-93.


169 Marsh v. Alabama, 326 U.S. 501, 505 (1946). See also id. at 504-05 (noting that “an ordinance completely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the municipality holds legal title to them”);

170 Id. at 506.

171 Related to this tendency toward absoluteness, perhaps, is the intense and emotional power that property rhetoric exerts on the American imagination. See generally Fagundes, supra note __. Property possesses a certain “mythic quality.” Jennifer Nedelsky, American
2. Property, Exclusion, and Inequality

Exclusion is at the heart of property. Although every law student learns that “property,” far from being a concrete thing or even a unified concept, is actually a “bundle of rights,” many property theorists continue to assert that the right to exclude others is the most essential, fundamental, and widely shared of the possible assortment of property. 172 Indeed, as the preceding discussion has demonstrated, the exercise of property rights in both cases – taking metaphorical ownership of the monuments’ speech in Summum and transferring literal ownership of the cross to a private party in Buono – resulted in the exclusion of particular undesired speakers or all other potential undesired speakers. The litigation, in both cases, was born of an act of governmental exclusion of a religious minority speaker, and that exclusion was upheld as valid in each case. 173

In addition, the concept of property is intimately associated with hierarchy and inequality. An illustration of this point may be derived, for example, from the feudal origins of the modern private property regime. In feudal times, all property was owned by the sovereign, and thus all interests in property derived from the sovereign. 174 One’s ownership of an interest in property therefore signified one’s relationship to the sovereign—in short,
one’s social and political status. This association between property and status was magnified, moreover, by the fact that an ownership interest in property generally meant a right to the income derived from the labor of others who, by their lesser wealth and lower social status, were required to work on the land. Even today, one might argue, as has Professor Morris Cohen, that dominion over things (in the form of property) also entails power over other human beings, because property law allows us to exclude others from the things that they need, compelling them to provide their labor in order to obtain those necessities. Thus, property’s origin is in part, as a signifier of hierarchy and one’s place within it.

Of course, in some ways, in America, property came to represent just the opposite of what it represented in the feudal system. Professor Joseph Singer has argued, for example, that property law is the “infrastructure of democracy”, that property, regulation, and equal opportunity are of one piece. Others have pointed to the fact that property rights and civil liberties, rather than existing in irresolvable tension, were understood by the Founders as inextricably intertwined. Still, there remains an association between property and inequality. At the same time that the Founders appreciated the relationship between property and liberty, they worried that too much equality—too much democratic rule—would undermine property rights. According to Professor Jennifer Nedelsky, for example, the Founders themselves saw property both as central to their conception of democracy and as a reflection of natural inequalities. Since “an unequal distribution of property was the inevitable result of men’s freedom to use their ‘different and unequal faculties of acquiring property,’” the property of the minority would always need to be protected from the majority that lacked it; individual property rights therefore had to be

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175 See PENNER, supra note 172, at 213-15.
176 See PENNER, supra note 172, at 213-15.
177 Cohen, supra note 172, at 12. Yet, Cohen continues, “[t]he character of property as sovereign power compelling service and obedience may be obscured for us in a commercial economy by the fiction of the so-called labor contract as a free bargain and by the frequency with which service is rendered indirectly through a money payment.” Id.
179 Joseph William Singer, Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity, 86 IND. L.J. 763, 778 (2011) (“Property exists only if we have property law, and law exists only if we have government to issue regulations. One cannot be for property and against government.”).
181 McDONALD, supra note 174, at 157.
balanced with democratic rule in the form of a constitutional democracy. Property was understood as embodying a natural and inevitable hierarchy. Indeed, Professor Joan Williams has documented the continuing influence, exerted in part through the canonical cases of property law, of the view that property derives from individuals’ own hard work and merit; as such it “sets ... off limits” any question about the unequal distribution of property rights today, suggesting that such inequality is a natural effect of property’s origins in “human hunger and human sweat.”

This naturalization of inequality risks reinforcing existing inequalities by making them invisible. And by presenting apparently neutral principles for judicial decisionmaking in the form of protecting of pre-existing ownership rights according to well-established legal regimes, property law arguably both reinforces the underlying economic inequalities and makes those inequalities seem like a mere preexisting fact, a natural state of affairs in which the law has played no role.

But what does all this have to do with the religious symbolism cases? The Court was not faced, in those cases, with questions about the limits of private property rights or the justness of the current distribution of property in society. Nonetheless, the formalizing and naturalizing rhetoric of property, which encourages the reader to focus not on the underlying constitutional values but rather on legal entitlements to land and objects, is troublesome in the context of First Amendment doctrine. The property framework embraced in *Summum* and *Buono*, and the absolute control and right to exclude that it implies, conflict profoundly with the core ideals of equality and inclusion the endorsement test.

As Christopher Eisgruber and Lawrence Sager have pointed out, the endorsement test appears to be concerned primarily with equality, with “equal liberty” of conscience, and with avoiding the disparagement of

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182 Nedelsky, *supra* note 171, at 244 (quoting Madison, *The Federalist*, No. 10, at 58 (Jacob E. Cooke ed. 1961)).

183 Neil Hertz has discussed a similar concept of property in connection with the French Revolution—and particularly the views of those who were troubled by it. He identifies an appreciation of property as “a natural sign of legitimate inequalities” in the likes of Edmund Burke and Alexis de Tocqueville. Neil Hertz, *Medusa’s Head: Male Hysteria under Political Pressure*, REPRESENTATIONS 27, 38 (Fall 1983).

184 Williams, *supra* note 153, at 287-89. Williams attributes this view of property, in part, to John Locke, of course.

185 Cf. Nedelsky, *supra* note 171, at 261-62. Writing in a different context, Patricia Williams has powerfully demonstrated—through narratives such as the story of her exclusion from a retail store based on her race—“how the rhetoric of increased privatization, in response to racial issues, functions as the rationalizing agent of public unaccountability and, ultimately, irresponsibility.” PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 47 (1991).
religious outsiders in society. The concept of equality is closely tied to the concept of inclusiveness, particularly with respect to religious outsiders. Thus, other First Amendment scholars have also highlighted the connection among the endorsement test, inclusion, and equality. In an early meditation on the endorsement test, Neal Feigenson argued that the test “prohibits government from using religion to affect its citizens' participation in the political community” with the goal of ensuring equality. “After all, the purpose served by ensuring such specific civil rights as the right to vote, speak freely, hold office, or serve on juries is to guarantee to each citizen an equal opportunity to wield lawfully the power of persuasion and thus to help shape political decisions. Equal participation is the ultimate value.” Similarly, Lisa Shaw Roy has noted that the Court’s Establishment Clause jurisprudence pertaining to religious displays “is largely about protecting the feelings of the nonadherent from a public manifestation that may confer outsider status.” And Martha Nussbaum has recently, and influentially, adopted a theory of religious freedom and nonestablishment grounded in equality and equal respect.

The power of property to naturalize inequalities plays a role in both Summum and Buono. By appearing to appeal to neutral principles of property law, both cases resulted in governmental acts of exclusion. In Summum, the exclusion of Summum’s message was literal. Once the speech in Pioneer Park was characterized as belonging to the city, the reasons for Summum’s exclusion seemed irrelevant; the City could obviously construct its message—that is, use its property—however it wished. The inclusion of the Ten Commandments in that identity message, moreover, did not appear to strike the majority as problematic.

In Buono, both the literal exclusion of all other speakers – including the Buddhists who wished to erect a shrine at the site of the cross and the

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186 *Eisgruber & Sager*, supra note 14, at 123-27.
188 Id.
191 I have argued elsewhere that the invocation and re-invocation of religious phrases in secular contexts, in the form of ceremonial deism, also often tends to conceal the context of inequality and strife that gave rise to it – thus both “drawing upon and covering over” the religious force of the language. Hill, *Ceremonial Deism*, supra note 106. A similar dynamic appears to be at work in Summum and Buono.
symbolic exclusion of nonadherents in the form of the cross’s message—were at the same time reinforced by the use of the property framework. Of course a private party could not be forced to allow a Buddhist shrine on its land, property law tells us. The literal exclusion thus seems a matter of common sense. The symbolic exclusion of non-Christians from the war memorial—and its invisibility—is perhaps best exemplified by Justice Scalia’s exchange with plaintiff’s counsel over the sectarian nature of the Mojave Desert cross to this dynamic of naturalized inequality or hierarchy. The exchange proceeded as follows:

JUSTICE SCALIA: [The cross is] erected as a war memorial. I assume it is erected in honor of all of the war dead. It’s the -- the cross is the -- is the most common symbol of -- of -- of the resting place of the dead, and it doesn’t seem to me -- what would you have them erect? A cross -- some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?

MR. ELIASBERG: Well, Justice Scalia, if I may go to your first point. The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.

The blindness reflected in Justice Scalia’s remark—his inability to see the sectarian nature of the cross as a symbol of the dead—may well be due to personal experience, upbringing, or biases. But it also seems to reflect a viewpoint that resounds deeply with the rhetoric of property and its tendency to treat social structures as inevitable, and to treat hierarchies as natural. The cross’s meaning as a war memorial is itself, metaphorically, the property of the Christian majority.192 The majority “owns” the meaning of the memorial. Any claim for inclusion or equal regard is almost illegible in this context, in which the cross is private property, to be exchanged at will, rather than a symbol whose meaning must be evaluated according to First Amendment constraints. Indeed, the cross—the propertization of the memorial and its message—cast nonadherents to Christianity, if not as

192 In using the term “Christian majority,” I recognize that the religious landscape in the United States is extremely complicated and that no single religious denomination constitutes a majority. However, Christians in general are still the majority in America. See generally ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES US AND UNITES US (2010).
unwelcome intruders, then as “guests” in another’s home or ceremony, to adopt Alan Brownstein’s elegant metaphor. To place non-Christian veterans and visitors to the national memorial in that role, whether because of the Government’s ownership of the symbol or a private party’s ownership, is to grant them the social status of an outsider.

The Court’s ultimate disposition of Buono – its privatizing of the cross and concomitant assumption that the property transaction would answer the Establishment Clause question – allowed the Court to decline to grapple with the very real challenge presented to Justice Scalia’s viewpoint by plaintiff’s counsel’s remark. But perhaps more importantly, it erased the very question that the Court was supposed to answer — whether the cross impermissibly cast non-Christians as outsiders — by treating that outsider status as a natural and inevitable function of the pre-existing property entitlements, both legal and metaphorical.

Of course, the Christian majority’s “ownership” of the war memorial and its meaning is metaphorical. I use this metaphorical language to demonstrate the rhetorical impact of property and to suggest that the Court’s turn to property is driven by a particular way of viewing the challenges presented by public displays of religious symbolism. The point, here, is to show how the Court’s use of property, both as a legal device and as a rhetorical tool, both reflects its viewpoint and potentially


If I attend a religious ceremony, such as a wedding, at the invitation of a friend of another faith, I am not going to feel offended at the prayers that are offered at this ceremony. I may not be able to participate in some of these expressive activities, but that is hardly the basis for offense. I am a guest, after all, a conceded outsider and visitor to the religious ceremony of another faith.

…. Public school graduations are very different. My children are not guests at their own graduation.

Id. Similarly, one might point out that non-Christian citizens and veterans are not guests in the National Park or at National Memorials. I am grateful to Alan Brownstein for drawing my attention to this article.

194 Several commentators have discussed the force and importance of metaphor in law, but a consideration of their work is beyond the scope of this Article. See, e.g., Michael Boudin, Antitrust Doctrine and the Sway of Metaphor, 75 Geo. L.J. 395 (1986) (describing the power of metaphor as a “concealed form of argument by analogy,” and as “intimately connected to the growth of language and thought, … a means of discovering new insights in law, as elsewhere”); Dan Hunter, Cyberspace As Place and the Tragedy of the Digital Anticommons, 91 Cal. L. Rev. 439 (2003) (drawing on cognitive science to examine the use of property metaphors with respect to regulation of cyberspace).
shakes our understandings as well.\footnote{See Williams, supra note 153, at 279 (describing law as “‘constitutive rhetoric’ dedicated to the ‘art of constituting culture and community’” (quoting James Boyd White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life, 52 U. Chi. L. Rev. 684, 688, 692 (1985))).}

3. Property, Identity, and Expression

Finally, as discussed above, scholars have noted the expressive nature of property.\footnote{E.g., Blocher, supra note 17; Dolan, supra note 65.} Justice Alito, too, highlighted the ability of monuments to “speak for” a city.\footnote{Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1133 (2009).} In addition, monuments not only speak for the government—they purport to represent something about the government’s identity. In this way, the concepts of property, attribution, and identity are intimately related in the expressive function of both the symbol itself and the government’s ownership and placement of it.

Professor Carol Rose, in examining the concept of possession in relation to property, has spoken of possession as a form of communication. Using the example of adverse possession, Professor Rose notes that it is not so much actual control but a “declaration of one’s intent to appropriate” that is key to indicating possession for the purposes of triggering that doctrine.\footnote{Carol Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 77 (1985).} “Possession as the basis of property ownership, then, seems to amount to something like yelling loudly enough to all who may be interested,” she concludes.\footnote{Id. at 81.} “The first to say, ‘This is mine,’ in a way that the public understands, gets the prize, and the law will help him keep it against someone else who says, ‘No, it is mine.’”\footnote{Id.} Similarly, the government’s possession of a religious symbol, and its treatment of that symbol as property, seems to say that the symbol “belongs to” our polity and is intimately connected with it. It is an act of defining a political community through its possession of the symbol.\footnote{Relatedly, Professor Timothy Zick has expressed concern about the way in which Summum, and its use of private property analogies, undermines free speech and public forum concepts by treating a public park both as a locus for, and as a form of, expression of a government message, rather than as a space for expression of the public’s messages in the form of a diversity of private voices. Timothy Zick, Summum, the Vocality of Public Places, and the Public Forum, 2010 B.Y.U. L. REV. 2203.}

The government’s ownership and control of the symbol as property is itself a speech act that both describes and constructs a particular reality—a reality in which the community at issue is designated a Christian community.\footnote{In an earlier article, I discussed at length the power of religious speech acts both to}
and self-defining nature of this exercise in possession. The more the
government announces its exclusion of those who do not “belong,” the
more it is entitled to do so—that is, the less likely it is that the forum at
issue will be found to be a public forum subject to constraints on viewpoint
discrimination. The longer and the more notorious the exclusion, too, the
more likely that religious symbols challenged under the Establishment
Clause, too, will be found to have acquired a sort of immunity by “adverse
possession.” An example of this sort of “adverse possession” arises in the
case of the Ten Commandments monument in Van Orden v. Perry, which,
Justice Breyer noted, had gone unchallenged for forty years and was
therefore unlikely to be divisive:

If these factors [such as the physical setting of
the display and the circumstances of its donation]
provide a strong, but not conclusive, indication that
the Commandments’ text on this monument
conveys a predominantly secular message, a further
factor is determinative here. As far as I can tell, 40
years passed in which the presence of this
monument, legally speaking went unchallenged…. Those 40 years suggest that the public visiting the
capitol grounds has considered the religious aspect
of the tablets’ message as part of what is a broader
moral and historical message reflective of a cultural
heritage.203

By virtue of a sort of adverse possession, this language implies, the Ten
Commandments have become a part of our culture, losing their quality as a
religious symbol affiliated only with certain religious belief systems. Like
many instances of so-called “ceremonial deism,” including the words
“under God” in the Pledge of Allegiance and the words “In God We
Trust” on our coins, Justice Breyer’s language and logic imply, such symbols are
unchallengeable because our culture has come to possess them in this
manner.204

Finally, and relatedly, the shift to a property paradigm for deciding
religious symbolism cases also shifts control over the meaning of the
government’s actions from the hypothetical “reasonable observer” back to
the government. Although some have argued that the endorsement test’s

\[\text{RAW TEXT ELSEWHERE}\]

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204 See generally Hill, Ceremonial Deism, supra note 106.
“reasonable observer” embodies the viewpoint of the “reasonable nonadherent,” and others have criticized the test for failing to do so. The endorsement test clearly does not allow the government to definitively establish the meaning of its own message. In disjunctively providing that a governmental act is forbidden if it has the purpose or effect of sending an alienating message to religious outsiders, the endorsement test instead explicitly recognizes that the government may send a message that is other than what it intended, but that the unintended message may still cause constitutional injury. The property paradigm, by contrast, allows the government to short-circuit the endorsement inquiry, rendering the perspective of the viewer irrelevant. Although the endorsement test may have a tendency toward indeterminacy or even, as I have argued, a majoritarian bias, the property paradigm eliminates consideration of the religious outsider altogether.

C. A Return to First Amendment Principles

Given this critique of the property framework in religious symbolism cases, the solution to the problems it poses should be fairly obvious. The Court should abandon its foray into property as a device for avoiding or simplifying difficult First Amendment questions and return to the doctrine it had been developing. This approach would do greater justice to the principles of equality and inclusiveness that underlie the doctrine. There is no doubt, of course, that both the endorsement test and the public forum doctrine could stand some refinement—their fundamental assumptions, however, are sound. Both are based on the principle of guaranteeing equal voice and equal status among all speakers and listeners, religious and nonreligious.

Moreover, though there is reason to fear that the Court’s property paradigm might continue to exert influence in future cases, there is also reason to believe that this is not an inevitable outcome. Both Summum and Buono were characterized by certain idiosyncrasies that would allow the Court to avoid their full impact in the future. In Buono, the complex history of procedural maneuvering and Congressionally-authorized property transactions make the case somewhat sui generis. Moreover, the Court

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205 See, e.g., Roy, supra note 189, at 17.
207 Hill, supra note 25.
208 See supra note 25, 140 (noting commentators’ criticisms of the endorsement test and public forum doctrine).
neither decided the Establishment Clause question nor officially abandoned the endorsement test; as such, it may well be able to return to the endorsement test in a future case raising the issue of a religious symbol on technically private, but ostensibly public, land. Likewise, *Summum* was an odd sort of public forum challenge. It is hard to imagine that a holding in favor of the plaintiff—essentially, a holding that a public park must be open to anyone who wants to place a permanent monument there—would stick for very long. But the Court can limit the potential damage from *Summum* by cabining its holding to its context of permanent, privately donated monuments in a public park, and resisting the temptation to allow the government speech doctrine to expand beyond its original borders.

Given the Court’s relatively sophisticated approach to problems of meaning, attribution, and identity in *Summum*, moreover, it should not be difficult for the Court to recognize, as well, that rhetoric functions in a constitutive way. The Supreme Court’s speech, in particular, possesses the power to construct reality and to define our political community. Caution is warranted, therefore, before it assumes the language of property, with overtones of hierarchy, exclusion, and formalism, for dealing with the problem of public displays of religious symbolism.

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209 See *Salazar v. Buono*, 130 S. Ct. 1803, 1819-21 (2010) (remanding to the district court for an inquiry into whether the reasonable observer would find an endorsement of religion in the cross’s presence on private land). Although Buono is unusual in its procedural posture, it is not entirely unusual for governmental entities to seek to avoid Establishment Clause claims by manipulating the ownership of the symbol or the land on which it sits. See generally Forster, supra note 82.

210 See, e.g., Zick, supra note 201[BYU], at 2204 (“Insofar as the result is concerned, the decision in *Summum* is facially unassailable. Just imagine the chaos that would ensue if governments were required to accept either all privately donated monuments or none at all.”).

211 See Zick, supra note 201[BYU], at 2223-28 (expressing concern that *Summum* will encourage expansion of the government speech doctrine); see also Helen Norton, *Imaginary Threats to Government’s Expressive Interests*, 61 CASE W. RES. L. REV. 1265, 1269-74 (2011) (documenting expansive uses of the government speech doctrine in the lower courts).

212 Williams, supra note 153, at 279.

213 See, e.g., Hill, supra note 106 [DLJ], at 756-57 (discussing how the Court’s authority enables it to speak authoritatively and thereby to construct the reality it seeks to describe; and how the Court’s observations about history often “become solidified in law and cited as precedent”).
IV. CONCLUSION: REFLECTIONS ON SUMMUM AND BUONO IN THE CONTEXT OF THE CULTURE WARS

This concluding provides some brief reflections on how one might understand, in the broader context of the culture wars, the shift to property law and rhetoric in the Supreme Court’s religious symbolism jurisprudence. The property paradigm may be understood both as a way of harnessing the power of property in articulating the harm perceived by certain members of society when the public square is stripped of religious symbolism and as a way of re-inscribing a societal power structure that may have been threatened, in one domain, by the rise of the endorsement test.

First, the use of the property framework may be understood as an attempt by the conservative wing of the Court to find a powerful way of articulating the nature of the injury suffered by those who would keep their religious symbols in a privileged place. As Eisgruber and Sager have eloquently explained, passions are intense both for and against the removal of religious symbolism in public places.214 Yet, it is difficult to explain precisely why individuals in both sides are so invested in the controversy—and, particularly, why the absence of religious symbolism is considered by some to be a form of disparagement equivalent to that experienced by religious outsiders confronted with symbols of the majority religion.215 By placing an overlay of property rhetoric on the religious speech at issue, those who would preserve the right of the government to place certain symbols of its choosing in the public square, the conservative Justices call forth all of the emotional power that property itself evokes in the American imagination. As Jennifer Nedelsky explains the appeal of property as a concept, “[p]roperty was ‘something’ which was important, which required and was entitled to protection, which could be threatened and whose destruction or violation would cause far-reaching damage.”216 In other words, casting religious symbolism in terms of property rhetoric gives concrete shape to the injury that is felt by some members of society when their religious symbols are removed. The loss of the symbols is a loss of status, of one’s standing within the social hierarchy—just as a loss of one’s property in feudal times would accompany a loss of social or political status and of one’s particular relationship to the sovereign. Viewed as such, removal of religious symbols from the public square is a kind of “taking” of the Christian majority’s heretofore privileged status.

214 EISGRUBER & SAGER, supra note 14, at 128-30.
216 Nedelsky, supra note 171, at 252 n.19. Indeed, Nedelsky adds, “It is as though property rights have remained infused with a natural-rights quality long after natural-rights theories were no longer accepted.” Id.
Additionally, the turn to property talk may be a response to a perceived imbalance of power in this particular legal domain that had taken hold during the time that Justice O’Connor’s endorsement test held sway. The tendency of property to present the pre-existing social order as natural and foreordained must be appealing to those Justices who felt that the “outsider” perspective of the nonadherent had come to dominate Establishment Clause jurisprudence in this area.\textsuperscript{217} The language of property is a response to the rise of the reasonable observer, a reassertion of the government’s power, on behalf of the majority, to control the meaning of its symbols.

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The Supreme Court appears to have turned to property law and property rhetoric as a way of simplifying or avoiding difficult First Amendment questions involving public displays of religious symbolism. This turn to property is troubling, however. The property paradigm valorizes and naturalizes the acts of exclusion and discrimination in the course of expressing a message of religious identity. Both the endorsement test and public forum principles, marginalized in Summum and Buono, require reform but not interment; they are certainly preferable to the current alternative.

\footnote{\textit{Cf.} Meyler, \textit{supra} note __, at 108 (noting that, to the extent the historicity of monuments becomes a reason for maintaining them, this rationale favors mainstream and longstanding religious traditions over newer ones).}