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A CROSS IN THE ROAD: *SALAZAR V. BUONO* AND THE CIRCUIT DIVIDE ON THE ESTABLISHMENT CLAUSE REMEDIAL QUESTION

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Somewhere within 1.6 million acres of sand dunes and Joshua trees, among the abandoned mines and the deserted homesteads, lies a rocky slope like any other barren slope in the Mojave National Preserve.[1] This particular slope, however, has become the unlikely setting for a Supreme Court showdown.[2] It is now the center of a legal firestorm of constitutional proportions because of a simple white cross, originally erected as a memorial to the fallen veterans of World War I.[3] Over seventy years later, the cross still stands, even as similar crosses on other public lands have been removed for violating the Establishment Clause of the First Amendment to the United States Constitution.[4] The cross remains, despite the United States Court of Appeals

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1. *See* Mojave National Preserve, http://www.nps.gov/moja/index.htm (last visited Mar. 27, 2009).

2. *See, e.g.*, David Ziemer, *Establishment Clause Conflict Case: Cross Case Will Likely Face U.S. Supreme Court Review*, WIS. L. J., Sept. 17, 2007, *available at* http://www.wislawjournal.com/print.cfm?recID=68694 (stating the case is "a strong candidate for review in the U.S. Supreme Court"); Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2007_09_02-2007_09_08.shtml#1189200966 (Sept. 7, 2007, 17:36) ("I just read the Ninth Circuit's decision from yesterday in *Buono v. Kempthorne*, and it strikes me as having a good chance of going up to the Supreme Court."); *see also* The9thCircuitWatch.com, http://the9thcircuitwatch.com/bl/comments.php?id=24_0_1_0_C (May 22, 2008, 15:35) ("Undoubtedly the government will seek review in the Supreme Court and the Ninth Circuit will add another reversal to their voluminous record."). The United States filed a petition for writ of certiorari on October 10, 2008. *See* Petition for Writ of Certiorari, Kempthorne v. Buono, No. 08-472 (Oct. 10, 2008). Certiorari was granted on February 23, 2009. Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

3. ERIC CHARLES NYSTROM, FROM NEGLECTED SPACE TO PROTECTED PLACE: AN ADMINISTRATIVE HISTORY OF MOJAVE NATIONAL PRESERVE, ch. 6, at 6 (2003), *available at* http://www.nps.gov/archive/moja/adminhist/adhi.htm. The most recent incarnation of the cross consists of "eight feet of iron pipe welded to bolts sunk in holes drilled into the granite rock." *Id.*

4. *See, e.g.*, Mendelson v. City of St. Cloud, 719 F. Supp. 1065, 1069, 1071 (M.D. Fla. 1989) (holding that a cross placed on a water tower was done so in violation of the Establishment Clause); *see also* Separation of Church and State Comm. v. City of Eugene (*SCSC*), 93 F.3d 617, 618, 620 (9th Cir. 1996). Decided a decade before *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir.

for the Ninth Circuit's finding that its location violates the Establishment Clause,[5] because one more wrinkle in Establishment Clause jurisprudence needs to be ironed out among the circuit courts.[6] This cross, all alone in the middle of the California desert, represents a novel issue in American constitutional law: whether the government can effectively remedy an Establishment Clause violation by transferring the offending land to a private party.[7]

The First Amendment's Establishment Clause prohibits Congress from making any law concerning the establishment of a religion.[8] Since its adoption in 1791, the Clause has been interpreted and reinterpreted to gradually narrow the scope of permissible government involvement in religion.[9] The robust attention the Establishment Clause has received in the courts, however, has failed to leave a clear blueprint of what constitutes an Establishment Clause violation.[10] Not surprisingly, courts have been inconsistent about the next step—how the government can cure an Establishment Clause violation once it has occurred.[11] Here, the lonely cross atop the isolated rocky slope in the Mojave Desert plays a significant role.

2008), *SCSC* was a Ninth Circuit case in which the court held that the city of Eugene, Oregon violated the Establishment Clause by maintaining a Latin cross as a war memorial. *SCSC*, 93 F.3d at 620. The cross at issue in *SCSC* was eventually moved to private property on the campus of the Eugene Bible College, but only after police negotiators ended a three-hour siege initiated by an armed supporter of the cross. *See* Dana Tims, *Workers Remove Cross from Atop Eugene's Skinner Butte*, THE OREGONIAN (Portland, Or.), June 13, 1997, at A1.

5. Buono v. Norton (*Buono II*), 371 F.3d 543, 550 (9th Cir. 2004).

6. See discussion *infra* Part I.B.

7. See discussion *infra* Parts II–III.

8. U.S. CONST. amend. I. The Establishment Clause is paired with the Free Exercise Clause, which prohibits Congress from restricting the free exercise of religion. *Id.*

9. *See* Stuart Buck, *The Nineteenth-Century Understanding of the Establishment Clause*, 6 TEX. REV. L. & POL. 399, 400 (2002) (explaining that the Supreme Court's Establishment Clause jurisprudence has "radical[ly] depart[ed]" from the original text to "the current doctrinal model [that] sets up a heckler's veto, allowing federal courts to intervene whenever some citizen is displeased over even the slightest governmental benefit, accommodation, or approval for religion").

10. *See* Patrick M. Garry, *A Congressional Attempt to Alleviate the Uncertainty of the Court's Establishment Clause Jurisprudence: The Public Expression of Religion Act*, 37 CUMB. L. REV. 1, 2 (2006–2007) ("[T]he courts have not only used an array of different constitutional tests for determining Establishment Clause violations, but have applied those tests in confusing and inconsistent ways."). Professor Garry argues that the non-uniform application of the Establishment Clause has caused public officials to reject religious speech on public property altogether. *Id.* at 3. As a result, Garry suggests that it has had a "chilling effect on the First Amendment's freedoms of speech and religion." *Id.* at 5.

11. *See* Christopher Lauderman, Note, *Building a Fence of Separation: The Constitutional Validity of Land Transfers in Escaping from Establishment Clause Violations*, 65 WASH. & LEE L. REV. 1193, 1197–99 (2008) (summarizing the circuit split and noting it includes a split among the branches of government as well). *Compare* Buono v. Kempthorne (*Buono V*), 527 F.3d 758, 783 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) ("Nor does the proposed land exchange . . . end the improper government

The story of the "Sunrise Rock" cross[12] begins with a grizzled old prospector who lived in a shack "built out of wooden planks and corrugated aluminum."[13] In 1934, he and fellow members of the local Veterans of Foreign Wars (VFW) chapter erected a steel pipe cross to serve as a memorial to war veterans.[14] For decades, the cross went relatively unnoticed.[15] Not until 1994, when Congress declared the area to be a national preserve, under the management of the National Park Service (NPS), did the status quo change.[16] Shortly thereafter, a former NPS employee, backed by the American Civil Liberties Union (ACLU), sued to challenge the constitutionality of the cross.[17] After the District Court for the Central District of California enjoined the government from displaying the monument, the Ninth Circuit affirmed, ruling that the cross was an unconstitutional government endorsement of religion.[18] When Congress tried to remedy the violation by selling the land on which the cross sat, the Ninth Circuit enjoined the government from making the transfer.[19]

Half a continent away, the United States Court of Appeals for the Seventh Circuit had already reached a different conclusion on the same question of law.[20] In a pair of cases, it had allowed a municipality to remedy an Establishment Clause violation by selling to a private entity the land on which the religious display sat.[21] Like the Sunrise Rock cross, the two religious displays at issue stood uncontested for decades.[22] Legal challenges came only after the Freedom from Religion Foundation requested that the municipalities

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action. Such a transfer cannot be validly executed without running afoul of the injunction."), *with* Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 705 (7th Cir. 2005) ("This sale [of public land] has clearly not pleased everyone, and it likely did not entirely please anyone. It was, however, constitutionally appropriate.").

12. The site is known as "Sunrise Rock" because it has long been used by locals for annual Easter sunrise services. NYSTROM, *supra* note 3, ch. 6, at 6.

13. Richard Lake, *That Old Rugged Cross*, LAS VEGAS REV.-J., Dec. 15, 2002, at 1B.

14. *See* Richard Lake, *Mojave Desert Cross Focus of Church-State Fight*, PRESS-TELEGRAM (Long Beach, Ca.), Dec. 25, 2002, at A7; Lake, *supra* note 13.

15. Occasionally, vandals or the weather would destroy the cross, but the cross was always repaired or replaced. *See* Lake, *supra* note 13.

16. *See* California Desert Protection Act of 1994, Pub. L. No. 103-433, § 502, 108 Stat. 71, 4490 (codified at 16 U.S.C. § 410aaa-42 (2000)). This Act created the Mojave National Preserve and transferred the land, which was already federal property, from the Bureau of Land Management to the National Park Service. *Id.* §§ 502–03.

17. *See* Opposition Brief of Appellees at 4, Buono v. Norton, 371 F.3d 543 (9th Cir. 2003) (No. 03-55032); NYSTROM, *supra* note 3, ch. 6, at 6–7.

18. *See* Buono v. Norton (*Buono II*), 371 F.3d 543, 545, 550 (9th Cir. 2004).

19. *See* Buono v. Kempthorne (*Buono IV*), 502 F.3d 1069, 1086 (9th Cir. 2007), *amended by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3242 (U.S. Feb. 23, 2009) (No. 08-472).

20. *See* Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 705 (7th Cir. 2005); Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000).

21. *Mercier*, 395 F.3d at 705; *Marshfield*, 203 F.3d at 493.

22. *Mercier*, 395 F.3d at 696; *see Marshfield*, 203 F.3d at 489.

remove the displays from public property.[23] Rather than removing the displays, however, the municipalities sold the land to private parties.[24] In the ensuing litigation, the Seventh Circuit determined that the sale of land effectively remedied the Establishment Clause violation absent "unusual circumstances" and allowed the sales to proceed.[25]

The divergent holdings of the Ninth and Seventh Circuits call attention to the different doctrines used by the courts in their respective analyses. Some methods of analysis, such as the *Lemon* test, the endorsement test, and the reasonable observer standard, are commonplace in Establishment Clause jurisprudence.[26] Other methods of analysis, including the "unusual circumstances" doctrine employed by the Seventh Circuit, are not as oft-used.[27] Additional doctrines, namely the public function doctrine and the notion of deference to government actions, are more common to other areas of jurisprudence.[28] The interplay of these doctrines, their varying uses, and their misuses helps to shed light on exactly how the circuits split.[29]

This Comment examines and analyzes the split between the Ninth and Seventh Circuits. Part I.A. reviews the Supreme Court's current Establishment Clause jurisprudence, starting with its modern origins in *Lemon v. Kurtzman* and continuing to its recent disjointed application. Part I.B. then addresses the inconsistent Establishment Clause remedial analysis that flows from the Court's cacophonous broader jurisprudence. It does so by examining the substantive issues surrounding the split between *Salazar v. Buono* from the Ninth Circuit and *Freedom from Religion Foundation, Inc. v. City of Marshfield* and *Mercier v. Fraternal Order of Eagles* in the Seventh Circuit. Next, Part II employs the issues to critique the weaknesses of the Ninth Circuit's holding in light of the Seventh Circuit's strengths. Here, this Comment focuses on the scope of the "unusual circumstances" doctrine, the Supreme Court's public function jurisprudence, the notion of deference to governments, and the reasonable observer standard. Finally, Part III examines other remedial options, and then concludes by encouraging the Court to bring clarity, flexibility, and fairness to its ever-evolving Establishment Clause jurisprudence by adopting a presumption of effectiveness to remedial land transfers.

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23. *Mercier*, 395 F.3d at 696; *Marshfield*, 203 F.3d at 489.

24. *Mercier*, 395 F.3d at 697; *Marshfield*, 203 F.3d at 490.

25. *Mercier*, 395 F.3d at 700–01; *Marshfield*, 203 F.3d at 491.

26. *See* discussion *infra* Part I.A.1.

27. *See Marshfield*, 203 F.3d at 491 (adopting the "unusual circumstances" doctrine).

28. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (explaining the notion of deference to government actions); Evans v. Newton, 382 U.S. 296, 301 (1966) (finding a public function in the maintenance of a private park).

29. *See* discussion *infra* Part II.

I. THE SUPREME COURT'S ESTABLISHMENT CLAUSE: A DISJOINTED DOCTRINE

A. The Development of Establishment Clause Jurisprudence

For over two hundred years, the First Amendment to the United States Constitution has commanded that "Congress shall make no law respecting an establishment of religion."[30] Despite its longevity, perhaps no other area of American law has had as much inconsistency and dissonance as Establishment Clause jurisprudence.[31] Prior to the mid-twentieth century, an Establishment Clause violation involved only those characteristics that were part of the Anglicanism rejected by the founders.[32] These characteristics were: "(1) institutional mingling between government and religion, (2) direct government support for a particular religion, (3) special privileges for a particular religion, or (4) coercion of religious belief, including the punishment of non-adherents."[33] In the last half century, however, and indeed since 1971, the Supreme Court's jurisprudence in this area has departed from this simple standard to become increasingly complex and disjointed.[34]

1. The Lemon *Test and its Progeny*

In deciding *Lemon v. Kurtzman* in 1971, the Supreme Court adopted a new three-part test for Establishment Clause violations.[35] Under this test, there is no violation if the government action (1) has a secular legislative purpose, (2) does not have the primary effect of advancing or inhibiting religion, and (3)

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30. U.S. CONST. amend. I. The First Amendment became effective on December 15, 1791 with its ratification by the state of Virginia. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 72 (2000). James Madison, the principle architect of the Bill of Rights, declared that, "he apprehended the meaning of [the First Amendment] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 ANNALS OF CONG. 730 (1789). Scholars have recognized Madison's statement as the authority on the meaning of the First Amendment. *See, e.g.*, Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 937 (1986) (asserting that "Madison's statements on the floor of Congress are of the greatest weight" in interpreting the First Amendment).

31. *See* Buck, *supra* note 9, at 410–11; Jason Marques, Note, *To Bear a Cross: The Establishment Clause, Historic Preservation, and Eminent Domain Intersect at the Mt. Soledad Veterans Memorial*, 59 FLA. L. REV. 829, 843–44 (2007).

32. Buck, *supra* note 9, at 400.

33. *Id.*

34. Arguably, this fractured treatment of the Establishment Clause originated with the Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947). *See* Marques, *supra* note 31, at 843–44. In that case, the Court invoked Thomas Jefferson's notion of a "separation between church and State" in reviewing a New Jersey law that allowed the state to reimburse parents for transportation to parochial schools. *Everson*, 330 U.S. at 16–18. Interestingly, many historians and commentators have suggested that the Court in *Everson* misapplied Jefferson's metaphor. *See* PATRICK M. GARRY, WRESTLING WITH GOD: THE COURT'S TORTUOUS TREATMENT OF RELIGION 48–52 (2006).

35. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

does not foster an excessive entanglement with religion.[36] Since then, however, the *Lemon* test has inspired little affection and even less confidence.[37] The Court's attempts at improving upon *Lemon* have left the Establishment Clause with almost as many interpretations as there are Supreme Court justices.[38] Although *Lemon* has never been explicitly overruled,[39] the Court has come to accept Justice O'Connor's "endorsement test" as the preferred Establishment Clause test.[40] This test requires the Court to determine

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36. *Id.*

37. *See* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 468–69. Professor Gey argues:

> The almost uniform use of *Lemon* gives a misleading appearance of coherence and consistency in the application of this standard. In reality, the Court's application of *Lemon* has been erratic, contradictory, and arguably irrational. Although measuring such things scientifically is impossible, the three-part test for compliance with the Establishment Clause announced in *Lemon v. Kurtzman* is probably the most maligned constitutional standard the Court has ever produced.

Id. at 468 (footnote omitted). Another commentator has declared the test to be "so unsatisfactory that hardly anyone, either on the Court or in academia, supports it." Buck, *supra* note 9, at 410. Justice Scalia has also voiced his displeasure with *Lemon*'s continued use, calling it a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ." Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

38. For instance, Justice O'Connor attempted to improve on *Lemon* by "[f]ocusing on institutional entanglement and on endorsement or disapproval of religion." Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring). Chief Justice Rehnquist read the Court's precedents to suggest a neutrality approach toward the Establishment Clause that

> make[s] clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

Zelman v. Simmons-Harris, 536 U.S. 639, 647, 652, 662–63 (2002) (holding that a school voucher program in which eighty-two percent of the participating schools had a religious affiliation and ninety-six percent of participating students attended a religiously affiliated school did not violate the Establishment Clause). Contrarily, Justice Kennedy proclaimed a different approach to the Establishment Clause, one that protected "th[e] sphere of inviolable conscience and belief." Lee v. Weisman, 505 U.S. 577, 592, 599 (1992) (holding that an invocation and benediction during a public school's graduation ceremony violated the Establishment Clause). As a result of these differing interpretations, the Court came to some seemingly contradictory conclusions, such as allowing a crèche in a municipal shopping district, but disallowing a crèche in a municipal courthouse. *Compare Lynch*, 465 U.S. at 687, *with* County of Allegheny v. ACLU, 492 U.S. 573, 601–02 (1989).

39. One commentator theorizes that "the Court continues to apply the [*Lemon*] test, presumably because no one has been able to conceive of a better alternative that could command five votes." Buck, *supra* note 9, at 410.

40. *See Allegheny*, 492 U.S. at 597 (applying the endorsement test to determine that the display of a crèche in a county courthouse violates the Establishment Clause); *see also* GARRY, *supra* note 34, at 57 ("[The endorsement] test has become the Supreme Court's preeminent means for analyzing the constitutionality of religious symbols and expression on public property . . . ."). Justice Kennedy, however, refused to accept the endorsement test, calling it "flawed in its

only whether the challenged government action "has the effect of endorsing [or disapproving] religious beliefs."[41] Although seen as an improvement on *Lemon*, the endorsement test suffers from the same ailments that plagued the *Lemon* test.[42] Two 2005 cases, both decided the same day, presented the Court with a unique opportunity to refine and clarify its Establishment Clause jurisprudence.[43]

2. Van Orden v. Perry

The Supreme Court heard arguments in *Van Orden v. Perry* to determine whether the Establishment Clause prohibited "the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds."[44] In a plurality opinion, Chief Justice Rehnquist took note of the Court's varied use of the *Lemon* test in Establishment Clause cases.[45] Yet he declined to make a conclusive determination on the fate of the *Lemon* test and instead focused on the nature of the monument in a historical context.[46] After providing a brief history of the role of religion in American life, the Chief Justice went on to emphasize the Ten Commandments' legal and historical

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fundamentals and unworkable in practice." *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in part and dissenting in part). He criticized the test for its inconsistency and labeled it a "jurisprudence of minutiae" that would prove difficult to apply. *Id.* at 674–75. He noted that the test itself, by employing a reasonable observer to determine whether a religious message is unconstitutional, necessarily delved too far into religion. *Id.* at 677. As he explained,

> the very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to this type of [religious] inquiry. If there be such a person as the "reasonable observer," I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents.

Id.

41. *Allegheny*, 492 U.S. at 597 (majority opinion); *see also Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

42. *See* Garry, *supra* note 10, at 9 (noting that the endorsement test is "fraught with uncertainty"); *see also* GARRY, *supra* note 34, at 59 (explaining that the endorsement test's inherent subjectivity in "call[ing] for judges to speculate about the impressions that unknown people may have received from various religious speech or symbols" prevents the test from achieving any degree of certainty).

43. *See* Marques, *supra* note 31, at 849–50.

44. Van Orden v. Perry, 545 U.S. 677, 681 (2005). The grounds of the Texas State Capitol contained numerous monuments celebrating the Texan identity, including the six-foot tall monolith at issue. *Id.* In addition to the Ten Commandments, the monolith displayed an eagle grasping an American flag, two Stars of David, an eye inside of a pyramid, and the Greek letters Chi and Rho. *Id.*

45. *Id.* at 685–86 (citing various cases in which the Court applied *Lemon*, did not apply *Lemon*, used *Lemon*'s factors only as "helpful signposts," and applied *Lemon* only after finding a violation under another Establishment Clause test).

46. *Id.* at 686. The Chief Justice proclaimed that the *Lemon* test was not useful for the "sort of passive monument" that Texas had erected on its state capitol grounds. *Id.*

significance.[47] The Chief Justice concluded that the display, as a passive historical monument, was constitutional because its setting and location conveyed an overall secular meaning.[48] In so holding, however, the Court missed a valuable opportunity to elucidate its Establishment Clause jurisprudence, a fact further illuminated by the contemporaneous holding in *McCreary County v. ACLU*.[49]

3. McCreary County v. ACLU

In *McCreary County v. ACLU*, the Supreme Court was again presented with the question of whether the Establishment Clause prohibited the display of the Ten Commandments, this time in courthouses in two Kentucky counties.[50] Justice Souter, writing for the majority, held fast to the *Lemon* test.[51] He interpreted the *Lemon* test's purpose prong to require a genuine purpose that is "not a sham, and not merely secondary to a religious objective."[52] In reviewing the counties' ever-shifting proffered purposes for the displays,[53] the Court concluded that the counties failed to meet this standard.[54] Accordingly, the Court found a violation of the Establishment Clause and enjoined the display of the Ten Commandments.[55]

Presented with an opportunity to unify its approach to the Establishment Clause, the contrasting holdings in *Van Orden* and *McCreary County* only

47. *Id.* at 689–90.

48. *Id.* at 691–92 ("The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.").

49. 545 U.S. 844 (2005).

50. *Id.* at 850. McCreary and Pulaski Counties had displayed large, gold-framed copies of the King James Version of the Ten Commandments. *Id.* at 851. In response to the ACLU's lawsuit, the counties added eight other documents to the display, including the Preamble to the Kentucky Constitution, the national motto of "In God We Trust," and the Mayflower Compact. *Id.* at 853–54. After the district court issued a preliminary injunction against the displays, the counties posted a new display in each courthouse consisting of nine framed documents and entitled "The Foundations of American Law and Government Display." *Id.* at 854–56.

51. *Id.* at 861 ("[T]he Counties ask us to abandon *Lemon*'s purpose test, or at least to truncate any enquiry into purpose here. . . . The assertions are as seismic as they are unconvincing.").

52. *Id.* at 864.

53. *See id.* at 852–53, 856–57. The counties' proffered reason for the first two versions was to display the "precedent legal code upon which the civil and criminal codes of . . . Kentucky [were] founded." *Id.* at 853 (omission in original). The counties argued the third version was meant "to demonstrate that the Ten Commandments were part of the foundation of American law and Government" and to educate the counties' citizens as to "some of the documents that played a significant role in the foundation of our system of law and government." *Id.* at 856–57.

54. *Id.* at 870 ("[T]he Counties make no attempt to defend their undeniable objective, but instead hopefully describe version two [of the display] as 'dead and buried.'" (citation omitted)).

55. *Id.* at 881.

further highlight the discord in the Court's jurisprudence.[56] Although originally intended to prohibit a narrow class of improper government interaction with religion, by the turn of the millennium Establishment Clause jurisprudence had grown to prohibit almost all government action involving religion.[57] In the process, the Establishment Clause had developed an eclectic and unpredictable reputation.[58]

B. The Circuit Divide on the Establishment Clause Remedial Analysis

In line with the Supreme Court's inconsistent Establishment Clause jurisprudence, lower courts have had difficulty in articulating consistent remedies for Establishment Clause violations.[59] The most common remedy for a violation involving a religious display is a court-ordered removal of the display from public property.[60] Removal, however, has not been the only remedy.[61] Increasingly, governments are transferring land to private parties as

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56. *See* Christopher B. Harwood, *Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of* Van Orden v. Perry *and* McCreary County v. ACLU, 71 MO. L. REV. 317, 337–38 (2006) (discussing competing principles employed by the Court in deciding these cases). The plurality in *Van Orden* utilized the accommodation principle, under which government policies acknowledging or supporting religion in society are compatible with the Establishment Clause. *Id.* at 341–42. The competing principle, asserted by the majority in *McCreary County*, was the neutrality principle, under which the government "must not favor one religion over another, religion over secularism, or secularism over religion." *Id.* at 338.

57. *See* William Perry Pendley, *The Establishment Clause and the Closure of "Sacred" Public and Private Lands*, 83 DENV. U. L. REV. 1023, 1026–27 (2006) ("Since 1971 . . . the U.S. Supreme Court has defined expansively what governmental activities violate the Establishment Clause; the short answer . . . is that nearly any government involvement with religion is unconstitutional." (footnote omitted)); *see also* Buck, *supra* note 9, at 400 (arguing that the recent Establishment Clause jurisprudence reveals "a radical departure from the constitutional text ratified in 1791").

58. *See* Van Orden v. Perry, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) (observing that "'flexibility' of [the] Court's Establishment Clause precedent leaves it incapable of consistent application"); County of Allegheny v. ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (regretting that the Court has not developed clear guidelines for Establishment Clause actions to replace the Court's case-specific inquiries).

59. *See* Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 215 (2004) (asserting that courts have applied "a patchwork of ad hoc and often irreconcilable dispositions" to remedial inquiries of Establishment Clause violations). One commentator has even suggested that the Supreme Court's Establishment Clause jurisprudence has made remedial efforts almost impossible. Garry, *supra* note 10, at 15.

60. *See* Budd, *supra* note 59, at 227. Budd notes that although the removal unquestionably separates the government from improper speech, the remedial analysis must still examine the neutrality of the removal. *Id.* at 232.

61. *See, e.g.*, ACLU v. City of Plattsmouth, 186 F. Supp. 2d 1024, 1036 (D. Neb. 2002), *rev'd en banc*, 419 F.3d 772 (8th Cir. 2005) (allowing a monument of the Ten Commandments to remain on public property if it is moved to a different location). One court has even deemed restitution to be an effective remedy to an Establishment Clause violation. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 941 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007). Although the restitution was overturned on appeal, at least one other court has agreed that restitution may be a valid

a means of avoiding an Establishment Clause violation while still preserving a religious display.[62] Yet, as the sale of public land becomes a more popular remedy, it remains infused with the same dissonance that plagues current Establishment Clause jurisprudence.[63] The circuits have come to differing conclusions on whether a transfer of land to a private entity is an effective remedy. On one side, the Ninth Circuit has held such a transfer to be ineffective in remedying the violation.[64] On the other side, the Seventh Circuit has held that a transfer of land can cure the government's Establishment Clause violation.[65]

1. The Ninth Circuit: The Transfer of Land as an Ineffective Remedy

a. A Private Tribute to Fallen Heroes

In 1934, J. Riley Bembry and several fellow members of the Death Valley chapter of the VFW erected a small cross atop federally-owned Sunrise Rock as a war memorial.[66] For more than forty years, Bembry tended to the cross.[67] When he became too old to continue his stewardship, his friend, Henry

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remedy to an Establishment Clause violation. David T. Raimer, Note, *Damages and Damocles: The Propriety of Recoupment Orders as Remedies for Violations of the Establishment Clause*, 83 NOTRE DAME L. REV. 1385, 1385–86 & n.6 (2008) (indicating that a Seventh Circuit decision, Laskowski v. Spellings, 443 F.3d 930 (7th Cir. 2006), *vacated and remanded sub nom. by* Univ. of Notre Dame v. Laskowski, 127. S. Ct. 3051 (2007), suggested that restitution might be a viable remedy under the Establishment Clause).

62. *See, e.g.*, Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 702 (7th Cir. 2005) (explaining that, in the face of a lawsuit seeking removal of a display of the Ten Commandments, the Mercier City Council chose to sell the land on which the display sat); Paulson v. City of San Diego, 294 F.3d 1124, 1126 (9th Cir. 2002) (en banc), *dismissed as moot sub nom.* San Diegans for the Mt. Soledad Nat'l War Mem'l v. City of San Diego, 475 F.3d 1047 (9th Cir. 2007) ("To remedy the constitutional violation and to comply with the injunction, the City decided to sell the land under the cross to a private organization."); Chambers v. City of Frederick, 373 F. Supp. 2d 567, 570 (D. Md. 2005) (explaining that the city of Frederick, Maryland sought to sell land containing a donated Ten Commandments monument to avoid a potential Establishment Clause violation). Not surprisingly, commentators have been split on the remedial effectiveness of a land transfer. *Compare* Budd, *supra* note 59, at 239–40, 246 (arguing a transfer of land is only effective if it physically separates the government from the religious display and is carried out in a religiously neutral manner), *with* Lauderman, *supra* note 11, at 1230–31 (arguing that a land transfer is remedially effective if it satisfies a five-prong test that incorporates the circumstances of the transaction, the purpose behind the transfer, and its effects on private speech rights). For a critique of both views, see discussion *infra* Part III.B.

63. *See* discussion *infra* Part II.

64. Buono v. Norton (*Buono II*), 371 F.3d 543, 546 (9th Cir. 2004) ("[T]he presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause.").

65. *See Mercier*, 395 F.3d at 705–06.

66. *See* Lake, *supra* note 14; Lake, *supra* note 13; *see also* NYSTROM, *supra* note 3, ch. 6, at 6.

67. Lake, *supra* note 13.

Sandoz, took over the duties.[68] Around 1998, after vandals destroyed a previous incarnation of the cross, Sandoz wielded together two eight-inch pieces of steel to form a cross, painted it white, and bolted it into the rock.[69]

Over the years, area residents came to revere the cross atop Sunrise Rock.[70] However, controversy arose in 1999 when an individual petitioned the NPS to build a dome-shaped Buddhist shrine known as a "stupa" near the site of the cross.[71] The NPS responded by letter, rejecting the petition as required by agency regulations,[72] and stating that it also intended to remove the cross.[73] The legal battle erupted in October 1999 when the ACLU of Southern California, tipped off by former NPS employee Frank Buono, threatened legal action if the cross was not removed.[74] After a three-month investigation into the cross's legality and upon further deliberation, the NPS ultimately decided to remove the cross.[75]

b. If at First You Don't Succeed, Try, Try Again: The Injunction and Congressional Intervention

As area residents became aware of the NPS decision, their local congressman, Representative Jerry Lewis, became involved.[76] Over the next two years, Congress included three provisions concerning the cross in a series of appropriations bills.[77] Congressional action continued even as the District

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68. *Id.*

69. Buono v. Kempthorne (*Buono IV*), 502 F.3d 1069, 1072 (9th Cir. 2007), *amended by*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472); *see also* NYSTROM, *supra* note 3, ch. 6, at 6.

70. *See* Julie Cart, *Lawmaker Seeks Land Swap to Let Mojave Cross Stand*, L.A. TIMES, Oct. 18, 2002, at B6; Lake, *supra* note 14; Lake, *supra* note 13. In time, the cross became more than just a war memorial to area residents who began gathering regularly at the site for Easter Sunrise services around 1984. *Buono IV*, 502 F.3d at 1072.

71. Buono v. Norton (*Buono I*), 212 F. Supp. 2d 1202, 1205–06 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004); NYSTROM, *supra* note 3, ch. 6, at 6.

72. *See* 36 C.F.R. § 2.62(a) (2008) ("The installation of a monument, memorial, tablet, structure, or other commemorative installation in a park area without the authorization of the Director is prohibited.").

73. *Buono I*, 212 F. Supp. 2d at 1206.

74. *Id.* Buono served as Assistant Superintendent of the Mojave National Preserve in 1994 and 1995. *Id.* at 1207. He alerted the ACLU to the existence of the cross in 1999, after he left the NPS. NYSTROM, *supra* note 3, ch. 6, at 6–7.

75. *Buono I*, 212 F. Supp. 2d at 1206; NYSTROM, *supra* note 3, ch. 6, at 6–7. The NPS evaluated the cross's commemorative significance and determined it did not merit inclusion in the National Register of Historic Places. *Buono I*, 212 F. Supp. 2d at 1206.

76. *See Buono I*, 212 F. Supp. 2d at 1206; NYSTROM, *supra* note 3, ch. 6, at 7.

77. *See* Department of Defense Appropriations Act of 2003, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1551 (2002) (codified at 16 U.S.C. § 431 (Supp. V 2005)); Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act of 2002, Pub. L. No. 107-117, § 8137, 115 Stat. 2230, 2278–79; Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, app. D, § 133, 114 Stat. 2763A-171, 2763A-230 (2000).

Court for the Central District of California granted summary judgment to Buono and the ACLU in July 2002 (*Buono I*).[78] Undeterred, in September 2003, Congress included yet another provision regarding the cross in an appropriations bill.[79] In exchange for private property owned by Henry Sandoz, section 8121 of this bill conveyed

> to the Veterans Home of California—Barstow, Veterans of Foreign Wars Post #385E . . . , all right, title, and interest of the United States in and to a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by section 8137 of the Department of Defense Appropriations Act, 2002 (Public Law 107-117; 115 Stat. 2278)) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.[80]

The statute provided Congress with a reversionary interest in the property[81] and directed the Secretary of the Interior to maintain the cross as a national memorial.[82]

Nine months later, the Ninth Circuit issued its first opinion in the case, *Buono v. Norton* (*Buono II*).[83] Judge Kozinski, writing for a three-judge panel, affirmed the district court's injunction.[84] Mirroring the district court's rationale, the panel dismissed the government's claim that Buono lacked standing[85] and discounted the government's attempts to distinguish the case from controlling precedent.[86] Unconvinced and further noting the multiple

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78. *See Buono I*, 212 F. Supp. 2d at 1217. The district court applied *Lemon* and invoked Justice O'Connor's endorsement standard to ask whether the cross had the effect of endorsing or disapproving religion. *Id.* at 1214–15. The court found *Separation of Church and State Committee v. City of Eugene* (*SCSC*), 93 F.3d 617 (9th Cir. 1996), to be "materially indistinguishable" from *Buono*, and noted that "it was 'simple' and 'straightforward' that the presence of the cross had a primary effect that advanced religion, and thus was unconstitutional." *Buono I*, 212 F. Supp. 2d at 1215 (quoting *SCSC*, 93 F.3d at 620).

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

80. *Id.* § 8121(a), 117 Stat. at 1100. As consideration, Sandoz agreed to convey about five acres of his property within the Preserve's boundaries. *Id.* § 8121(b), (c), 117 Stat. at 1100.

81. *Id.* § 8121(e), 117 Stat. at 1100. The interest would mature if the Secretary of the Interior determined the property was no longer being used as a war memorial. *Id.*

82. *Id.* § 8121(a), 117 Stat. at 1100.

83. Buono v. Norton (*Buono II*), 371 F.3d 543 (9th Cir. 2004). The court heard arguments in August 2003, one month before Congress passed the land transfer. *Id.* The court declined, however, to accept the government's contention that the case was now moot due to the transfer. *Id.* at 545.

84. *Id.* at 550.

85. *Id.* at 547–48 (explaining that an inability to "freely use" public land is a sufficient injury-in-fact to confer standing).

86. *Id.* at 549. The government attempted to distinguish *Buono II* from *SCSC*; however, the court determined:

> These distinctions are of no moment . . . . [The particulars of the cross] make[] it no less likely that the Sunrise Rock cross will project a message of government

congressional actions to maintain the cross, the court held that a reasonable observer could conclude the government endorsed the cross, and its presumably non-secular message.[87]

c. "Another Day" Arrives: The Ninth Circuit Decides Whether the Sunrise Rock Transfer Violates the Establishment Clause

Despite the Ninth Circuit's holding, the NPS initiated the land transfer.[88] Buono then moved to enforce the district court's injunction or, in the alternative, to modify the injunction to prohibit the land transfer.[89] The district court, in *Buono v. Norton* (*Buono III*), enjoined the government from proceeding with the land transfer.[90] The government appealed and on September 6, 2007, the Ninth Circuit issued its second opinion, *Buono v. Kempthorne* (*Buono IV*).[91] While the court's first opinion, *Buono II*, addressed whether the Sunrise Rock cross itself violated the Establishment Clause,[92] the issue in *Buono IV* was whether the land transfer violated the injunction and, in turn, the Establishment Clause.[93] The court held that it did.[94] Employing the same rationale as the district court, the Ninth Circuit examined three aspects of the land exchange: the government's oversight over the land following the transfer,[95] the method for effectuating the transfer,[96] and the history leading up to the transfer.[97]

> endorsement to a reasonable observer . . . . Nor does the remote location of Sunrise Rock make a difference . . . . What is significant is that the Sunrise Rock cross, like the *SCSC* cross, sits on public park land.

Id.

87. *Id.* at 550.

88. *See* Buono v. Kempthorne (*Buono IV*), 502 F.3d 1069, 1076 (9th Cir. 2007), *amended by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

89. Buono v. Norton (*Buono III*), 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005), *aff'd sub nom.* Buono v. Kempthorne, 502 F.3d 1069, 1076 (9th Cir. 2007), *amended by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

90. *Id.* at 1182.

91. *Buono IV*, 502 F.3d 1069.

92. *See Buono II*, 371 F.3d at 544–45.

93. *See Buono IV*, 502 F.3d at 1071. The court noted that it had the opportunity to make this determination in *Buono II*, but it "left for another day the question of 'whether a transfer completed under section 8121 would pass constitutional muster.'" *Id.* at 1082 (quoting *Buono II*, 371 F.3d at 546).

94. *Id.* at 1086 ("The district court did not abuse its discretion in enjoining the government from proceeding with the land exchange . . . and ordering the government to otherwise comply with its prior injunction that it not permit the display of the Sunrise Rock cross in the Preserve." (citation omitted)).

95. *Id.* at 1082–84.

96. *Id.* at 1084–85.

97. *Id.* at 1085.

i. Government Control over the Cross Property

The Ninth Circuit first examined whether the district court abused its discretion in concluding that the government would still exercise considerable control over the cross after the transfer.[98] The court read several NPS authorizing statutes as a whole to determine that the "government retain[ed] various rights of control over the cross and the property."[99] The court concurred with the district court that the law establishing the cross as a national memorial reserved management responsibilities to the NPS and, therefore, gave the government an easement or a license over the property.[100] Most importantly, however, the court put significant weight on the inclusion of the government's reversionary interest in the property.[101] This reversionary interest, the court emphasized, "result[ed] in ongoing government control over the subject property, even after the transfer."[102]

ii. Method of the Land Exchange

Next, the Ninth Circuit turned to the method by which the property was transferred.[103] The court noted that the normal NPS procedures authorized the Secretary of the Interior to exchange federal land for non-federal land,[104] and that these procedures allowed for a public hearing and required an open-bidding process.[105] The transfer of the Sunrise Rock cross, according to the court, deviated from these accepted standards.[106] Congress, the court said, had acted outside of the normal procedures for disposing of federal property and, as such, had demonstrated an "unusual involvement" in the transaction.[107]

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98. *Id.* at 1082–84.

99. *Id.* at 1083; *see also* 16 U.S.C. § 1 (2000) (empowering the NPS to regulate and promote "national parks, monuments, and reservations"); *id.* § 2 (granting the NPS with powers of "supervision, management, and control" over national parks and monuments); *id.* § 3 (authorizing the Secretary of the Interior to make "rules and regulations . . . for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service").

100. *Buono IV*, 502 F.3d at 1083 ("Such an easement or license reflects ongoing control over the property requiring compliance with constitutional requirements . . . .").

101. *Id.* The court dismissed the government's contentions that reversionary interests are standard clauses in government contracts and that the court must await exercise of the interest before ruling on its application. *Id.* at 1084.

102. *Id.* at 1083–84.

103. *Id.* at 1084.

104. *Id.* (citing 16 U.S.C. § 460*l*-22(b)).

105. *Id.* (citing 16 U.S.C. § 460*l*-22(a), (b)).

106. *Id.* ("In this case, however, the decision to exchange the land was made by Congress and authorized by a provision buried in an appropriations bill. The government did not hold a hearing before enacting such exchange. Nor did the government open bidding to the general public." (citation omitted)). The court rejected the government's argument that the VFW was the logical purchaser because it had originally erected the cross. *Id.* at 1084–85.

107. *Id.* at 1085.

iii. History of Congressional Involvement

Lastly, the Ninth Circuit examined the history of the government's efforts to maintain the cross atop Sunrise Rock.[108] The court delineated the actions taken by Congress regarding the cross and held that these actions led "to the undeniable conclusion that the government's purpose in this case is to evade the injunction and keep the cross in place."[109] Agreeing with the district court, the Ninth Circuit said the government "engaged in 'herculean efforts' to preserve the cross atop Sunrise Rock," yet despite these efforts, the transfer failed to cure the Establishment Clause violation.[110]

d. The Amended Opinion and the Dissent from the Denial of Rehearing En Banc

In May 2008, the Ninth Circuit issued an amended opinion in *Buono v. Kempthorne* (*Buono V*), as well as a dissent from the court's denial of a rehearing en banc.[111] The amendment made only one change to the opinion, modifying a footnote concerning the Seventh Circuit's approach to remedying an Establishment Clause violation by transferring land to a private party.[112] The amended footnote clarified the Ninth Circuit's stance:

> The Seventh Circuit stated that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion. We are aware, however, that adherence to a formalistic standard invites manipulation. To avoid such manipulation, we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased." Read as a whole, the Seventh Circuit position looks at the issue on a transaction-by-transaction basis. We agree with this approach. However, to the extent that *Marshfield* can be read to adopt a presumption of the effectiveness of a land sale to end a constitutional violation, we decline to adopt such a presumption. The Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry in this area.[113]

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108. *Id.*

109. *Id.*

110. *Id.*

111. Buono v. Kempthorne (*Buono V*), 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

112. *Id.* at 759.

113. *Id.* at 779 n.13 (citation omitted) (quoting Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000)). In contrast, the original footnote read:

> Although the Seventh Circuit adopted a presumption that "a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion" in the absence of "unusual circumstances," we decline to adopt such presumption. The

Five judges dissented from the court's denial of a rehearing en banc.[114] The dissent, authored by Judge O'Scannlain, harshly critiqued the majority for "contraven[ing] governing Supreme Court precedent, creat[ing] a split with the Seventh Circuit on multiple issues, and invit[ing] courts to encroach upon private citizens' rights under both the speech and religion clauses of the First Amendment."[115] It asserted that the majority misapplied the Seventh Circuit's "unusual circumstances" exception to create a test that went well beyond Supreme Court precedent.[116] This new test, the dissent argued, enjoined a private religious symbol simply because of the government's prior conduct, despite the absence of any evidence of intimate government involvement with the property.[117] The dissent further criticized the majority for flouting public policy[118] and misconstruing the merits of the case.[119] In its conclusion, the dissent admitted that it sympathized with the majority's "frustration that a court can lose control of its injunction by the enjoined party's unanticipated abdication of ownership . . . ."[120] However, the dissent recognized that "such a risk is inherent in our trade, and for good reason."[121]

Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry in this area.

Buono IV, 502 F.3d at 1082 n.13 (citation omitted) (quoting *Marshfield*, 203 F.3d at 491).

114. *See Buono V*, 527 F.3d at 760.

115. *Id.* (O'Scannlain, J., dissenting from the denial of rehearing en banc).

116. *Id.* at 762. The dissent argued that the Seventh Circuit's "unusual circumstances" analysis "merely incorporated well-established Supreme Court precedent concerning when state action may be imputed to private parties despite the transfer of once-public land: a continuation of state action may be found when the government remain[s] intimately involved in exclusively public functions . . . ." *Id.* (internal quotation marks omitted) (alteration in original) (quoting *Marshfield*, 203 F.3d at 492). Under this approach, the dissent asserted, the only relevant issue is whether there is actual state control, not the government's intent or method in effectuating the transfer. *Id.*

117. *Id.* at 762–63. The appropriate remedy, according to the dissent, was to enjoin the government's improper conduct rather than encroach upon a private party's rights. *Id.* at 764.

118. *Id.* at 765 ("By altogether ignoring the dispositive considerations in *Van Orden*, the *Buono IV* opinion vitiates the Supreme Court's caution against applying the endorsement test in a manner that has 'radical implications for our public policy.'" (quoting Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 768 (1995))).

119. *Id.* at 765–67. The dissent criticized the majority's reliance on statutes as evidence of government control, arguing the "trivial, fleeting duties" authorized by the statutes did not sufficiently constitute intimate involvement. *Id.* at 766. It also debated the majority's decision to require a congressional land transfer to adhere to an agency's procedural rules. *Id.* at 766–67. Finally, it questioned the majority's logic in faulting the government for attempting to cure the violation. *Id.* at 767.

120. *Id.* at 768.

121. *Id.*

2. The Seventh Circuit: The Transfer of Land as an Effective Cure

a. Freedom from Religion Foundation, Inc. v. City of Marshfield

The Seventh Circuit first heard arguments in *Freedom from Religion Foundation, Inc. v. City of Marshfield* in October 1999.[122] This case centered on a fifteen-foot marble statue of Jesus Christ that the city of Marshfield received as a gift in 1959 from the John Eisen Assembly, Fourth Degree Knights of Columbus.[123] In 1964, a member of the Knights of Columbus, Henry Praschak, offered to construct signs, picnic tables, and outdoor grills for the site; the city responded by agreeing to establish a public park at the site, complete with electrical service and support infrastructure.[124] Thirty-nine years after the statue was erected, in 1998, Clarence Reinders, a local businessman and member of the Freedom from Religion Foundation (FFRF), asked the city to move the statue onto private property.[125] When the city did not respond to his request, Reinders and the FFRF filed suit seeking declaratory and injunctive relief.[126]

In wake of the suit, the city posted disclaimers near the statue, reading "[t]he location of this statue . . . does not reflect an endorsement of a religious sect or belief by the city of Marshfield."[127] The city also agreed to sell 0.15 acres of park land on which the statue stood to the Henry Praschak Memorial Fund.[128] Litigation continued, however, and after the parties stipulated that the city did not provide maintenance or electrical service to the parcel, the district court granted the city's motion for summary judgment.[129]

Reinders and FFRF appealed, arguing that the land sale was a sham transaction designed to circumvent the Establishment Clause.[130] The city, on the other hand, asserted that it was a valid transaction and any religious expression on the property belonged to the Fund, not the city.[131] Judge Kanne, writing for the Seventh Circuit panel, agreed with the city, focusing on the

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122. Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000).

123. *Id.* at 489. The statue was fifteen feet tall and depicted Christ with his "arms open in prayer, standing atop a large sphere, which in turn rests atop a base bearing the inscription in twelve-inch block letters, 'Christ Guide Us On Our Way.'" *Id.* The statue, placed on undeveloped property owned by the city, faced the main thoroughfare into the city. *Id.*

124. *Id.*

125. *Id.* Reinders alleged that the statue caused him to avoid the park and to take alternate routes of transportation when coming into the city. *Id.*

126. *Id.*

127. *Id.* (omission in original).

128. *Id.* at 490. After the sale, which met all Wisconsin state statutory requirements, the city separated the electrical service for the statue from the lighting service that illuminated the park. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

distinction between private speech and public speech.[132] Recognizing this difference, the court stated, "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion."[133] The court reviewed the circumstances surrounding the transfer and concluded that the "sale validly extinguished any government endorsement of religion."[134]

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132. *Id.* The court noted "there is 'a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Id.* (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)).

133. *Id.* In articulating this presumption, the court noted the line of "public function" cases of the Supreme Court in which a public motive was imputed to a private party only where "a set of unusual facts and circumstances demonstrated that the government remained intimately involved in exclusively public functions that had been delegated to private organizations . . . ." *Id.* at 491–92. These "public function" cases originated with *Terry v. Adams*, a civil rights case in which the Court held that an election was an exclusive government function such that a private political association's exclusion of African-Americans in its primary elections amounted to a state violation of the Fifteenth Amendment. *See* Terry v. Adams, 345 U.S. 461, 469 (1953) ("The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice . . . ."). In a similar case, *Marsh v. Alabama*, the Court held that a town owned by a private company could not prohibit the distribution of religious literature because its governance and enforcement powers amounted to state action. Marsh v. Alabama, 326 U.S. 501, 509 (1946). The Court in *Evans v. Newton* explained its rationale in these opinions, stating,

> [c]onduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action . . . . Thus we held . . . that the exercise of constitutionally protected rights on the public streets of a company town could not be denied by the owner . . . . We have also held that where a State delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

Evans v. Newton, 382 U.S. 296, 299 (1966) (citations omitted) (holding that a tract of land deeded to the City of Macon, Georgia for use as a private park only by white residents constituted a public institution subject to the Fourteenth Amendment). *But see* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 151–53 (1978) (holding that a warehouseman's proposed private sale of goods entrusted to him under state statute did not rise to the level of state action for class action litigation).

134. *Marshfield*, 203 F.3d at 492. In evaluating the circumstances of the sale, the court considered the Wisconsin law governing municipal land sales, the price paid for the parcel, the responsibility for utilities to the parcel, and the restrictive covenant in the deed. *Id.* at 492–93. It concluded, "we find no extraordinary circumstances that justify disregarding the sale for the purposes of endorsing religion, and we find that the City did not engage in governmental action endorsing religion by selling the property at issue to a religious organization." *Id.* at 493. The court did, however, go on to examine whether the Establishment Clause violation continued despite the land transfer. *Id.* Noting the obvious non-secular message of the statue and the park's status as a traditional public forum, the court concluded,

> the City has granted the Fund preferential access to a public forum, which violates the Establishment Clause . . . . [T]he proximity of the statue to City property and the lack

b. Mercier v. Fraternal Order of Eagles

Five years after *Marshfield*, the Seventh Circuit decided *Mercier v. Fraternal Order of Eagles*.[135] *Mercier* concerned a granite monument inscribed with the Ten Commandments that was erected by the local chapter of the Fraternal Order of Eagles in a La Crosse, Wisconsin public park.[136] Erected in June 1965, the monument was dedicated to the efforts of several hundred high-school students who had helped battle severe flooding the previous April.[137] For the next several decades, the Eagles maintained the monument and illuminated it at night with a light attached to the roof of their headquarters.[138]

The first challenge to the monument came in 1985 when a resident asked the La Crosse Common Council to remove the monument, a request that the Council denied.[139] In 2001, the FFRF asked the Council to remove the monument from the park and, again, the Council denied the request.[140] Recognizing the potential for a lawsuit, however, the Council reached an agreement with the Eagles whereby the city would sell them the twenty-foot by twenty-two-foot parcel of park land on which the monument stood.[141] The sale was finalized in August 2002, and two fences were erected and signage was placed indicating the Eagles' ownership of the property.[142] During the pendency of the sale, the FFRF filed a lawsuit challenging the display of the monument.[143] In February 2004, the district court granted summary judgment

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of visual definition between City and Fund property creates a perception of improper endorsement of religion by the City and constitutes a violation of the Establishment Clause.

Id. at 494, 496. On remand, the Seventh Circuit directed the district court to work with the parties to remedy the violation by distinguishing between City and Fund property. *Id.* at 497.

135. 395 F.3d 693 (7th Cir. 2005).

136. *Id.* at 694. The monument also included an eagle grasping the American flag and the "all-seeing eye" associated with the dollar bill. *Id.* at 694–95. The monument was located in a park adjacent to the Eagles' La Crosse headquarters, in the northeastern corner of the park, directly across from the headquarters. *Id.* at 695.

137. *Id.* at 696. During the monument's dedication ceremony, special attention was paid to the students' efforts. *Id.*

138. *Id.*

139. *Id.* A lawsuit was subsequently filed but the case was dismissed in 1987 for lack of standing. *Id.*

140. *Id.*

141. *Id.* Prior to the sale, the city adopted a resolution explaining that the monument was given to the city to honor the students' efforts during the flood. *Id.* In authorizing the sale in July 2002, the City Council again expressly reaffirmed the monument's purpose. *Id.* at 697.

142. *Id.* at 697. The Eagles first erected a four-foot high steel fence, and then the City erected a second four-foot high wrought-iron fence immediately outside the Eagles' fence. *Id.* Both the Eagles and the city placed permanent signs indicating the land was private property. *Id.* at 697–98.

143. *Id.* at 696–97. "The district court later denied the individual plaintiffs' motion to proceed anonymously" and twenty additional named parties were added. *Id.* The plaintiffs all

for the FFRF, finding that the display of the monument constituted an Establishment Clause violation and that the sale of the land was unconstitutional.[144] The city and the Eagles appealed.[145]

On appeal, Judge Manion, writing for the Seventh Circuit panel, acknowledged that the presence of the monument from 1965 to 2002 may have violated the Establishment Clause, but it restricted its analysis to whether the sale by the city was an independent violation.[146] The court began with a detailed analysis of *Marshfield*, highlighting its "unusual circumstances" rationale.[147] Applying this precedent, the Seventh Circuit accused the district court of narrowly reading the holding in *Marshfield*[148] to foreclose the possibility of a sale as an effective remedy.[149] The court noted that *Marshfield* offered an alternative to the removal of an offending display: a sale that did not involve "unusual circumstances."[150] The court examined the particular circumstances of the transaction at issue to conclude that the "sale clearly [met] the standards set out in *Marshfield*."[151] Even assuming that *Marshfield* was not controlling precedent, the court concluded that the sale satisfied the *Lemon* test.[152] As such, the court concluded the sale of the parcel was a

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alleged that as residents of La Crosse, they avoided the park because of the monument, or that they became emotionally disturbed when traveling near the park. *Id.* at 697.

144. *See* Mercier v. City of La Crosse, 305 F. Supp. 2d 999, 1005–10, 1019 (W.D. Wis. 2004), *rev'd and remanded sub nom.* Mercier v. Fraternal Order of Eagles, 395 F.3d 693 (7th Cir. 2005). The district court held that the only remedy was to return the land to the city and require the city to remove the monument from the park. *Id.* at 1019–20.

145. *Mercier*, 395 F.3d at 698.

146. *Id.* at 699 (assuming that the monument was an Establishment Clause violation in order to reach the issue of whether the land transfer itself violated the Clause).

147. *Id.* at 700.

148. *Id.* at 701 ("The Appellees [and the district court], however, misread *Marshfield*. *Marshfield* considered not just whether the restrictive covenant was constitutional, but also whether the sale itself was a sham and constituted an endorsement of religion by the City . . . .").

149. *Id.* ("Thus, although *Marshfield* focused on the original placement of the statue and whether the sale rectified the Establishment Clause violation, that case also made clear that the sale of the parcel was permissible under the Establishment Clause."). The court continued, stating, "[r]emoval is always an option, but as *Marshfield* holds, it is not a necessary solution to a First Amendment challenge." *Id.* at 702.

150. *Id.*

151. *Id.* at 704. Specifically, the court focused on the sale's compliance with Wisconsin state law, the fact that the Eagles paid fair market value for the land, the Eagles' assumption of the traditional roles of ownership of the monument, and the secular history behind the monument. *Id.* at 702–03. The court determined that the location of the monument was not "a setting where the presence of government [was] pervasive and inescapable." *Id.* at 703 (citing Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 126 (7th Cir. 1987)). It concluded that the extensive efforts at distinguishing between the public park and the private parcel showcased the city's good faith attempt to dissuade any perception of religious endorsement. *Id.* at 703–04.

152. *Id.* at 704. In its *Lemon* analysis, the court deferred to the city's stated secular purpose. *See id.* This deference was based on the Supreme Court's endorsement of this notion of deference to a government's proffered purpose. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably

"constitutionally appropriate" means of curing the city's Establishment Clause violation.[153]

II. REJECTING *BUONO*: HOW THE SEVENTH CIRCUIT'S APPROACH DEMONSTRATES THE NINTH CIRCUIT'S ERRORS

The disagreement between the Ninth Circuit and the Seventh Circuit should come as no surprise given the Supreme Court's "schizophrenic" interpretation of the First Amendment's Establishment Clause.[154] Beginning with *Lemon*[155] and moving forward through *Van Orden*[156] and *McCreary County*,[157] the Court has yet to articulate a clear, bright-line rule for what constitutes an unconstitutional endorsement of religion. Instead, the best the Court has offered is a case-by-case determination that leaves it to individual courts to determine whether a violation has occurred.[158] Once a court has determined that a violation has occurred, it is saddled with a similar problem in analyzing whether a sale of the land cures the violation.[159] As *Buono*, *Marshfield*, and *Mercier* demonstrate, courts are examining similar facts under the same law and are arriving at widely contrasting conclusions.[160]

In the *Buono* line of cases, the Ninth Circuit shoehorned Supreme Court precedent into an untenable position in order to support its conclusions.[161] The court did so in four ways. First, and most glaringly, the court widened the scope of the Seventh Circuit's "unusual circumstances" doctrine to encompass almost any government action, even government action *divesting* itself of the

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religious policy, the government's characterization is, of course, entitled to some deference."). In the same vein, the Supreme Court has established a notion of deference to the constitutionality of congressional actions. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). In *DeBartolo Corp.*, the Court noted the long history of this deference, under which "the Court will construe the statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Id.* The Seventh and Ninth Circuits have adopted this presumption as well. *See* Jideonwo v. INS, 224 F.3d 692, 700 n.7 (7th Cir. 2000); Confederated Tribes of Siletz Indians of Or. v. United States, 110 F.3d 688, 693 (9th Cir. 1997).

153. *Mercier*, 395 F.3d at 705. A short dissent following the opinion cited no points of law but criticized the majority for allowing the monument to remain despite the city's "stubborn refusal" to separate itself from the religious display. *Id.* at 706 (Bauer, J., dissenting).

154. *See* Garry, *supra* note 10, at 7 (noting the Establishment Clause's doctrinal inconsistency has been labeled as a "sort of jurisprudential schizophrenia" (quoting Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 717 (9th Cir. 1999), *withdrawn and reh'g granted*, 192 F.3d 1208 (9th Cir. 1999)).

155. Lemon v. Kurtzman, 403 U.S. 602 (1971).

156. Van Orden v. Perry, 545 U.S. 677 (2005).

157. McCreary County v. ACLU, 545 U.S. 844 (2005).

158. *See* discussion *supra* Part I.A.

159. *See* discussion *supra* Part I.B.

160. *See infra* notes 172–75 and accompanying text.

161. *See* discussion *infra* Parts II.A–D.

religious message.[162] Second, the court misconstrued and misapplied the Supreme Court's "public function" rationale to impute state action onto a private party that was not intimately involved in an exclusively public function.[163] Third, the court ignored the presumption of constitutionality owed to congressional statutes and instead assumed a malicious intent inherent in Congress's actions.[164] Finally, the court incorrectly employed the "reasonable person" standard by partially blinding the reasonable observer to several significant facts.[165] The Seventh Circuit, conversely, properly considered and appropriately applied Supreme Court precedent to adopt a pragmatic approach.[166] In examining the Ninth Circuit's holding through the prism of the Seventh Circuit, the errors of *Buono* become clear.

A. The Scope of "Unusual Circumstances"

In 2000, the Seventh Circuit in *Marshfield* announced that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion."[167] Five years later, the court reinforced this presumption in *Mercier*.[168] The *Mercier* court articulated three such "unusual circumstances":

> a sale that did not comply with applicable state law governing the sale of land by a municipality; a sale to a straw purchaser that left the City with continuing power to exercise the duties of ownership; [and] a sale well below fair market value resulting in a gift to a religious organization.[169]

Although the court indicated that this list was not exhaustive, the list suggests that a certain degree of bad faith must be present in all unusual circumstances.[170] Assuming this suggestion is accurate, for a court to find the

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162. *See* discussion *infra* Part II.A.

163. *See* discussion *infra* Part II.B.

164. *See* discussion *infra* Part II.C.

165. *See* discussion *infra* Part II.D.

166. *See* Buono v. Kempthorne (*Buono V*), 527 F.3d 758, 761–64 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (O'Scannlain, J., dissenting from the denial of rehearing en banc).

167. Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000) (concluding there were no unusual circumstances in the sale of a parcel of a public park containing a statue of Jesus Christ). Although the Ninth Circuit refused to adopt this presumption, at least one other federal court has. *See* Chambers v. City of Frederick, 373 F. Supp. 2d 567, 572 (D. Md. 2005).

168. Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 702 (7th Cir. 2005) ("The sale, however, must still satisfy the requirement of *Marshfield*, namely, there must be no unusual circumstances surrounding the sale of the parcel of land so as to indicate an endorsement of religion.").

169. *Id.* (citations omitted).

170. *See Marshfield*, 203 F.3d at 491 (suggesting that courts must look to whether the "typical sort of improprieties" that could be involved in a land transfer exist in a particular case).

existence of unusual circumstances in a land transfer, it must find that the government was engaging in some sort of deception, fraud, conspiracy, or scheme.[171] Neither the court in *Marshfield* nor the court in *Mercier* found sufficient evidence of bad faith to conclude that unusual circumstances existed in the respective land transfers.[172]

The *Buono* court, however, did find unusual circumstances to exist in the transfer of the Sunrise Rock cross to the VFW,[173] and it did so by applying roughly the same factors as those articulated in *Mercier*[174] to similar facts.[175] The different conclusions can be explained by the *Buono* court's refusal to adopt the Seventh Circuit's presumption that a sale of real property effectively remedies an Establishment Clause violation.[176] In denying the land transfer presumptive validity, the Ninth Circuit necessarily began its analysis with a suspicious eye toward Congress's actions.[177] As the court examined the actions of Congress in preserving the cross, this suspicion allowed it to expand the scope of "unusual circumstances" to include almost any governmental

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171. *See, e.g.*, *id.* at 492 (noting that a "continuing and excessive involvement between the government and private citizens" can exist through various "improprieties" such as a legally improper sale, a sale below market-rate, the purchase through a "straw purchaser" under which the city retains actual control, or a "sham arrangement," all of which suggest bad faith on the part of the government).

172. *See Mercier*, 395 F.3d at 704 ("[T]his sale clearly meets the standards set out in *Marshfield*."); *Marshfield*, 203 F.3d at 493 ("[W]e find no extraordinary circumstances that justify disregarding the sale for the purpose of endorsing religion . . . .").

173. Buono v. Kempthorne (*Buono IV*), 502 F.3d 1069, 1085 (9th Cir. 2007), *amended by*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (concluding the government engaged in "herculean efforts" to preserve the Sunrise Rock cross).

174. *See id.* at 1082. The court examined "(1) the government's continuing oversight and rights in the site containing the cross after the proposed land exchange; (2) the method for effectuating the land exchange; and (3) the history of the government's efforts to preserve the cross." *Id.* The only significant difference between these factors and the *Mercier* factors is that *Buono*'s factors included the history of governmental efforts to preserve the cross. *See supra* text accompanying note 169 for a discussion of the factors considered in *Mercier*.

175. The only two pertinent facts differentiating *Buono* from *Mercier* and *Marshfield* were the religious symbol at issue and the government entity seeking to transfer the offending land. *Compare Buono IV*, 502 F.3d at 1071 (noting that Congress sought to transfer property containing Latin Cross), *with Mercier*, 395 F.3d at 694 (describing a municipal government's efforts to transfer property containing Ten Commandments), *and Marshfield*, 203 F.3d at 489–90 (involving a municipal government that sought to transfer property containing statue of Jesus Christ).

176. *See* Buono v. Kempthorne (*Buono V*), 527 F.3d 758, 779, n.13 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472); *Buono IV*, 502 F.3d at 1082 n.13.

177. For instance, this predisposition is evident in the Ninth Circuit's opinion where the court addresses whether the government retained control over the cross by immediately discounting the validity of the transfer. *See Buono IV*, 502 F.3d at 1082 ("Although Congress sought to transfer the property to the VFW, a private entity, the various statutes . . . evince continuing government control.").

action concerning the cross.[178] Thus, a standard reverter clause in the contract was read as evidence that "the government's ongoing control over the property" will cause "the parties [to] conduct themselves in the shadow of that control."[179] Congress's decision to bypass NPS administrative procedures and conduct the land transfer itself was seen as "evidence that the government is seeking to circumvent the injunction."[180] Finally, and most curiously, Congress's multiple attempts to find an effective remedy for the Establishment Clause violation were taken by the court to mean "that the government's purpose . . . [was] to evade the injunction and keep the cross in place."[181]

In misapplying the Seventh Circuit's rationale, the Ninth Circuit improperly expanded the scope of "unusual circumstances." The court, armed with a built-in suspicion of congressional action, broadened "unusual circumstances" to include both the usual—a standard reverter clause, and the circumstantial—congressional remedial efforts.[182] This expansion effectively prohibits any affirmative government action in remedying an Establishment Clause violation. It restricts the remedial avenues open to the government, leaving removal as the only available option and forcing the government down a path of hostility toward religion.[183] The Ninth Circuit thus created a strict "separation of Church and State" stance, a position from which the Supreme Court has regressed over the last half-century.[184]

B. The Supreme Court's Public Function Jurisprudence

In footnote thirteen of *Buono IV* and *Buono V*, the Ninth Circuit cited the Supreme Court's public function doctrine as evidence that a transfer of public property to a private party does not presumptively cure a constitutional

178. *See Buono V*, 527 F.3d at 762 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (arguing that the *Buono IV* holding "creat[ed] an 'unusual circumstances' test that extend[ed] well beyond the limited circumstances in which state action persists").

179. *Buono IV*, 502 F.3d at 1084.

180. *Id.* at 1085.

181. *Id.*

182. *Id.* at 1082, 1084–85.

183. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (accusing the Court of "reflect[ing] an unjustified hostility toward religion" by holding that a display of a crèche in a county courthouse had the principal effect of advancing religion, and therefore, violated the Establishment Clause).

184. *See, e.g.*, DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 103–04 (2002) (noting that, in practice, the Court has "implemented a less restrictive line of demarcation between church and state"); *see also* Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (asserting the wall of separation metaphor "has proved all but useless as a guide to sound constitutional adjudication").

violation.[185] The court, however, misconstrued this precedent.[186] In *Evans v. Newton*, a public function case cited by the Ninth Circuit in *Bouno IV* and *Buono V*'s footnote 13,[187] the Supreme Court held that trustees of a private park could not enforce racially discriminatory provisions in a deed because the circumstances showed that the government was intimately entangled in the park's operation.[188] From other similar cases during the same period, the Supreme Court developed a public function jurisprudence that "found a continuation of state action when a set of unusual facts and circumstances demonstrated that the government remained *intimately* involved in *exclusively* public functions that had been delegated to private organizations."[189] However, these cases are relevant only where there exists "continuing and excessive involvement between the government and private citizens."[190] Excessive entanglement between the state and the private party is thus a prerequisite that must be satisfied before a court can examine whether a state's action can be imputed to a private entity.[191]

In *Buono*, the Ninth Circuit did not acknowledge this threshold question. Instead, it circuitously employed the public function cases to suggest that a land transfer did not presumptively cure a constitutional violation.[192] The court used these cases—cases in which there *were* unusual circumstances that evinced state control—to reject a presumption that a land transfer is an effective remedy *absent* unusual circumstances.[193] The court made this blanket assertion without ever considering the close relationship needed to impute state action to the private party or addressing the unique factors present in the public

185. *See* Buono v. Kempthorne (*Buono V*), 527 F.3d 758, 779, n.13 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472); *Buono IV*, 502 F.3d at 1082 n.13.

186. *See Buono V*, 527 F.3d at 762 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

187. *Buono IV*, 502 F.3d at 1082 n.13.

188. Evans v. Newton, 382 U.S. 296, 301 (1966).

189. Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 492 (7th Cir. 2000) (citing Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946)) (emphasis added).

190. *Id.*

191. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158–60 (1978) (reviewing the rights and remedies of commercial transactions and holding that the state had not delegated an exclusive function to the private party); *Evans*, 382 U.S. at 301–02 (examining the relationship between a city and a private park, including its maintenance by the city and its tax exemption status, to conclude that "the predominant character and purpose of [the] park are municipal"); *Terry*, 345 U.S. at 469 (concluding that state-sponsored elections had become no more than "perfunctory ratifiers" of a discriminatory private election).

192. *See* Buono v. Kempthorne (*Buono V*), 527 F.3d 758, 779, n.13 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472); *Buono IV*, 502 F.3d at 1082 n.13.

193. *See Buono V*, 527 F.3d at 779 n.13; *Buono IV*, 502 F.3d at 1082 n.13.

function cases that are not necessarily present in every case.[194] In blindly employing the public function doctrine to discredit the Seventh Circuit's presumption, the Ninth Circuit plainly misconstrued the doctrine.

Moreover, the Ninth Circuit misapplied the Supreme Court's doctrine to the facts of the case. Under a public function analysis, the government must remain "*intimately* involved in *exclusively public* functions."[195] In *Buono*, however, little evidence existed to indicate that the government would remain intimately involved with the cross after the transfer.[196] Although the court argued the reversionary interest and the other statutes demonstrated governmental control,[197] it failed to show the sort of day-to-day control that would establish *intimate* involvement.[198] The court also did not address how the maintenance of a cross was an exclusively public function.[199] The cross, like many other private parcels, was located on a very small swath of private property within a very large national preserve.[200] It certainly cannot be suggested that there is an exclusively public function in the maintenance of Sunrise Rock but not in the maintenance of a parcel containing a ranch, home, or other private property. In selectively employing the public function doctrine as such, the Ninth Circuit clearly misapplied Supreme Court precedent.[201]

C. Deference to Governmental Actions

Closely tied to the "unusual circumstances" precedent and the public function doctrine is judicial deference to the validity of governmental actions. The Supreme Court has advised that in statutory construction, courts should avoid unnecessary unconstitutional conclusions because "Congress, like this

194. *See Buono V*, 527 F.3d at 779 n.13; *Buono IV*, 502 F.3d at 1082 n.13.

195. *See* Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 492 (7th Cir. 2000) (emphasis added).

196. *See Buono V*, 527 F.3d at 763 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (asserting that absent from the *Buono* majority opinion "is *any* evidence that the government has maintained or will maintain or support the Sunrise Rock cross after the land transfer")

197. *See supra* notes 101–04 and accompanying text.

198. *See, e.g.*, Evans v. Newton, 382 U.S. 296, 301 (1966) (holding that unusual circumstances existed in a private park that was such an "integral part" of the city that the city regularly "swept, manicured, watered, patrolled, and maintained" the park).

199. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159 (1978) (explaining that the dominant feature of the public function doctrine is the exclusivity of the function). In *Flagg Brothers*, the Court reasoned that while the elections in *Terry* and the streets in *Marsh* had exclusivity evincing continuing government control, the sale in *Flagg Brothers* did not. *Id.* at 158–60.

200. *See* Petition for Writ of Certiorari at 27–28, Kempthorne v. Buono, No. 08-472 (U.S. Oct. 10, 2008) (asserting "in the American West, it is not unusual for private land to be intermingled with public land").

201. *See Buono V*, 527 F.3d at 763 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (criticizing the *Buono IV* opinion for flouting the "fundamental principle of judicial restraint" by invalidating the land transfer without finding that the government would remain intimately involved in maintaining the cross after the land transfer).

Court, is bound by and swears an oath to uphold the Constitution."[202] Thus, courts should "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."[203] This rationale requires courts to first make an effort to find a reasonable and constitutional purpose in a congressional statute before imputing a malicious motive.[204]

Both the Seventh Circuit and the Ninth Circuit have previously recognized this notion of congressional deference.[205] The Seventh Circuit followed this precedent.[206] In *Buono*, however, the Ninth Circuit ignored it.[207] The Ninth Circuit read the congressional statutes regarding the cross as demonstrative of a congressional desire to violate the Constitution.[208] This reading squarely contradicted the court's own precedent and, more importantly, Supreme Court precedent.[209] Further, in its opinion, the court never seriously considered any legitimate purposes behind Congress's actions, and instead baselessly concluded that the "government's purpose [was] . . . to evade the injunction and keep the cross in place."[210] Rather than look at the fact of the sale itself, which would have *divested* the government of any direct involvement with the cross, the court looked past it, straining for hints of an improper congressional intent in making the sale.[211] By so doing, the Ninth Circuit not only failed to

202. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

203. *Id.*

204. *See Buono V*, 527 F.3d at 763 (O'Scannlain, J., dissenting from the denial of rehearing en banc) ("[T]he deference owed to Congress forecloses us from striking down legislation based upon a presumption that the government will violate the Constitution in the future.").

205. *See* Jiḍeonwo v. INS, 224 F.3d 692, 700 n.7 (7th Cir. 2000) ("[W]e are mindful of our obligation to presume that Congress intended to act consistent with the dictates of the Constitution."); Confederated Tribes of Siletz Indians of Or. v. United States, 110 F.3d 688, 693 (9th Cir. 1997) ("When reviewing congressional enactments . . . for constitutional infirmities, we give 'great weight to the decision of Congress.'" (internal citation omitted)).

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

207. *See Buono V*, 527 F.3d at 763 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

208. *See* Buono v. Kempthorne (*Buono IV*), 502 F.3d 1069, 1082 (9th Cir. 2007), *amended by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) ("[T]he various statutes, when read as a package, evince continuing government control.").

209. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *Confederated Tribes of Siletz Indians*, 110 F.3d at 693.

210. *Buono IV*, 502 F.3d at 1085. *But see Mercier*, 395 F.3d at 705 (finding a secular motive, namely, to avoid the appearance of endorsing a religious message, in the municipal government's decision to sell land on which sat a monument of the Ten Commandments).

211. *See Buono IV*, 502 F.3d at 1085 (citing congressional action regarding the cross to support a conclusion that Congress sought to continue an improper endorsement of religion). *But see Mercier*, 395 F.3d at 705 (noting that the sale of land containing a religious display is itself a secular motive).

apply the requisite deference due congressional statutes, but actually adopted a presumption *against* validity.

D. The Reasonable Observer Standard

Lastly, the Ninth Circuit improperly employed the "reasonable observer" standard utilized by the Supreme Court in an endorsement analysis.[212] This test, articulated by Justice O'Connor in her elaboration on a plurality opinion, requires that "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears."[213] In *Buono IV*, the court employed this standard by hypothesizing:

> [A] reasonable observer aware of the history of the cross would know of the government's attempts to preserve it and the denial of access to other religious symbols. Even a less informed reasonable observer would perceive governmental endorsement of the message, given that "[n]ational parklands and preserves embody the notion of government ownership."[214]

Starting from this inquiry, the court easily concluded that the land transfer would not prevent a reasonable observer from believing the government endorsed the religious message.[215] However, the court here did not give the reasonable observer all of the facts.[216] It made the observer aware of the government's "attempts to preserve [the cross] and the denial of access to other religious symbols,"[217] but it did not enlighten the observer as to the complete seventy-year history of the cross, its dedication as a war memorial, or the many congressional efforts to preserve it *as a war memorial*.[218] Thus, by partially blinding the observer as to the totality of the facts, the court was able to easily conclude that a reasonable observer would perceive governmental

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212. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 778–79 (1995) (O'Connor, J., concurring in part and concurring in judgment) (discussing the knowledge that a court should attribute to a "reasonable observer [who] evaluates whether a challenged governmental practice conveys a message of endorsement of religion").

213. *Id.* at 780.

214. *Buono IV*, 502 F.3d at 1086 (internal citation omitted).

215. *Id.* The court held that "[n]othing in the present posture of the case alters" the fact the sale will not minimize the governmental endorsement of religion. *Id.*

216. *See, e.g.*, *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in judgment) (critiquing Justice Steven's dissent for adopting a reasonable observer standard that is nothing more than a poorly informed "casual passerby"). Justice O'Connor put forth a reasonable observer that she equated to the "reasonable person" in tort law, in which the determination is not on the perspective of any particular individual but rather on a community-based "reasonable" individual. *Id.* at 779–80.

217. *Buono IV*, 502 F.3d at 1086.

218. *See* NYSTROM, *supra* note 3, ch. 6, at 6–8 (outlining the history of the Sunrise Rock cross).

endorsement.[219] Perhaps if the Ninth Circuit had lifted the veil and provided the reasonable observer with all the facts, the reasonable observer would have concluded otherwise.

In viewing *Buono* through the prism of the Seventh Circuit's jurisprudence, the errors of the Ninth Circuit are brought to light. The Seventh Circuit's presumption that a land transfer is an effective remedy to an Establishment Clause violation easily trumps the Ninth Circuit's holding because it is a more established and more balanced approach. The Ninth Circuit, on the other hand, twisted existing precedent and strained Supreme Court doctrine to reject the Seventh Circuit's presumption. It handcuffed government actors and limited their options in solving complicated jurisprudential and social problems.

III. REMEDYING THE CIRCUIT SPLIT BY ADOPTING THE SEVENTH CIRCUIT'S APPROACH

The Supreme Court's Establishment Clause jurisprudence is broken. The Court knows it.[220] Commentators know it.[221] This jurisprudence is so difficult in practice that the Court issued two opinions on the same day applying two different rationales to arrive at two contrasting holdings.[222] Such uneven treatment has left lower courts with little guidance in deciding Establishment clause cases.[223] It leaves the courts with even less guidance in providing

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219. *Buono IV*, 502 F.3d at 1086. In this respect, the Ninth Circuit adopted the reasonable observer standard presented by Justice Stevens in *Pinette*, in which a court must determine whether *any* observer of the religious display would likely perceive a governmental endorsement. *See Pinette*, 515 U.S. at 800 n.5 (Stevens, J., dissenting).

220. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) ("[T]he incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application.").

221. *See* WITTE, *supra* note 30, at 3 (arguing the recent trend in Establishment Clause jurisprudence has "bred not only frustration about the vast inconsistencies of the American experiment but doubts about its very efficacy"); Buck, *supra* note 9, at 415–16 (listing criticisms of the Court's Establishment Clause jurisprudence); Marques, *supra* note 31, at 843–44 (noting the jurisprudence's unpredictability, inconsistency, complexity, and frustration).

222. *Compare Van Orden*, 545 U.S. at 691–92 (holding that a monument of the Ten Commandments placed on the state capitol grounds did not violate the Establishment Clause), *with* McCreary County v. ACLU, 545 U.S. 844, 881 (2005) (holding that the posting of the Ten Commandments within the county courthouse violated the Establishment Clause).

223. *See* Card v. City of Everett, 520 F.3d 1009, 1016 (9th Cir. 2008). The court noted that in the wake of *Van Orden* and *McCreary County*, courts have described the current state of Establishment Clause jurisprudence as "purgatory" and "Limbo . . . ." *Id.* In a concurrence in *Card*, Circuit Judge Fernandez likewise lamented that "[t]he still stalking *Lemon* test and the other tests and factors, which have floated to the top of this chaotic ocean from time to time in order to answer specific questions, are so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable." *Id.* at 1023–24 (Fernandez, J., concurring) (footnote omitted).

appropriate remedies for Establishment Clause violations.[224] After over thirty years of inconsistency, the Supreme Court now has the opportunity to clarify its case law for both Establishment Clause violations and remedial measures. The time is ripe for the Court to establish a clear and consistent jurisprudence. *Salazar v. Buono* offers just that opportunity.[225]

A. Why This Circuit Split Matters to the Supreme Court

As the judicial landscape stands now, the very same display may be constitutional in Wisconsin but unconstitutional in California.[226] For similarly situated litigants in these courts, the outcome of their cases rests not so much on the merits of their cases, but rather, on the location of the courthouses. Not only does such a discrepancy prevent uniformity within the federal court system, it also treats citizens of one state differently from citizens of another. This disparity is especially troubling given that an Establishment Clause claim usually involves a state or municipal governmental defendant.[227] As such, a citizen's ability to seek redress from his local government is as varied as the locale's climate or geography, even though redress is sought under the very same constitutional guarantee. This inconsistent treatment has affected a broad cross-section of society.[228] Undoubtedly, such a wide-spread pockmarked treatment of the Constitution is hardly the national legal environment envisioned by the Founders or desired by the Supreme Court.[229] The Court,

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224. *See* Budd, *supra* note 59, at 212 (explaining that the remedial analysis for an Establishment Clause violation is "an ad hoc and often superficial exercise with little doctrinal grounding").

225. The government filed a petition for writ of certiorari on October 10, 2008. *See* Petition for Writ of Certiorari, Kempthorne v. Buono, No. 08-472 (October 10, 2008). It was granted on February 23, 2009. Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

226. *Compare* Buono v. Kempthorne (*Buono V*), 527 F.3d 758, 783 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472), *with* Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 705 (7th Cir. 2005).

227. *See* Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 673 (2003). Since 1947, the Supreme Court has decided over sixty Establishment Clause cases, of which a "vast majority" have been challenging state activities. *Id.* By way of comparison, only several Establishment Clause cases have been brought against the federal government. *Id.* at 673 n.20.

228. *See* Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (explaining the Court's Establishment Clause jurisprudence "leaves courts, governments, and believers and non-believers alike confused").

229. Perhaps enticing for the Court, *Buono* presents a unique opportunity to revisit and finally settle its Establishment Clause jurisprudence. Over three years have passed since the Court decided *Van Orden* and *McCreary County*. Enough time has passed for the Court to recognize that those two cases have done little to advance Establishment Clause jurisprudence. If anything, they have added discord to dissonance such that courts are straining to fashion an underlying holding from the two contrasting opinions. *See, e.g.*, Douglas G. Smith, *The Constitutionality of Religious Symbolism After* McCreary *and* Van Orden, 12 TEX. REV. L. & POL. 93, 106–07 (2007). Without a clear path, courts are left with *Lemon*, which is outdated and not widely accepted on the Court, and Justice O'Connor's endorsement test, which appears to be

newly constituted, is well positioned for a reorientation of its Establishment Clause jurisprudence back toward clarity and accommodation.[230]

B. What the Supreme Court Should Do

To date, the Court has yet to address explicitly the scope of permissible remedies of Establishment Clause violations. As shown, this silence has caused inconsistency and confusion in the courtroom, forcing courts to adopt ad hoc and overly fact-sensitive approaches to remedial questions.[231] A better approach is desperately needed, and a few suggestions have been offered to fill this void.

One commentator has posited a somewhat rigid test for the remedial effectiveness of a land transfer.[232] This proposal would require a remedial land transfer to adhere to twin principles of substantial physical separation and strict religious neutrality.[233] In other words, it would tether its analysis to Justice O'Connor's endorsement standard,[234] requiring substantial separation between religion and the state, or a reasonable appearance thereof.[235] In this manner, however, the proposal treads dangerously close to exhibiting hostility toward religion.[236] At the very least, the proposal limits remedial options only to secular avenues because its requirement of strict neutrality prohibits any religious involvement in fashioning a remedy.[237] For these reasons, the Court would be wise to look elsewhere.

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heading toward a similar fate. *See* Marques, *supra* note 31, at 848 (implying that *Van Orden* and *McCreary County* knocked the endorsement test from its pedestal as the preeminent Establishment Clause test); discussion, *supra* Part I.B.1.

230. *See* Marques, *supra* note 31, at 853 (hypothesizing that "recent changes in Supreme Court membership could herald a return to clarity"). Although it is unclear how Chief Justice Roberts and Justice Alito will affect the Court's Establishment Clause approach, many commentators believe the Court's two newest members will be sympathetic to religion and religious groups. *See* Harwood, *supra* note 56, at 348–49; Marques, *supra* note 31, at 853–54.

231. *See supra* note 59 and accompanying text.

232. *See* Budd, *supra* note 59, at 234–56.

233. *Id.* at 220.

234. *See id.* at 257.

235. *See id.* at 239–46 (asserting that physical separation requires both evident and substantial separation).

236. *See supra* notes 183–84 and accompanying text.

237. *See* Budd, *supra* note 59, at 246 (asserting that "a remedial sale must accomplish that objective through means that are strictly neutral with respect to the religious expression at issue"). Because every Establishment Clause violation necessarily involves some degree of religion, the only effective "neutral" remedy under this proposal would be one in which the religious component is removed, leaving the secular options as the only viable remedies. *See McCreary County v. ACLU*, 545 U.S. 844, 889–93 (2005) (Scalia, J., dissenting) (critiquing the majority opinion's use of the neutrality principle and stating "[i]f religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all").

A better approach, as advocated by one commentator, advances a five-pronged test to examine an Establishment Clause remedy.[238] Splicing the Seventh Circuit's reasoning with previous Supreme Court rationale,[239] the end result is a well-intentioned and seemingly effective mechanism. In application, however, the modifications may prove unnecessary. Any thorough judicial inquiry into a remedial land transfer should examine the substance and the form of the transaction, as well as its purpose and consequences. Yet this five-prong proposal limits a court's analysis to five specifically delineated criteria, and in so doing, risks diminishing judicial diligence for the sake of judicial clarity. In this way, it sacrifices a comprehensive remedial inquiry in favor of a cookie-cutter analysis. Although such uniformity is a worthy goal, in the context of a remedial land transfer inquiry, this proposal gives up too much in return for far too little.

Instead, the Supreme Court should adopt the position that a transfer of property is a presumptively effective remedy to an Establishment Clause violation. The Court's jurisprudence would benefit from this presumption in three ways: (1) it would adhere to the original intent of the Establishment Clause and remain faithful to the current direction of the law; (2) it would allow municipalities and local governments the flexibility to remedy Establishment Clause violations with creative solutions, and not tie them down with take-it-or-leave-it choices; and (3) it would respect the Free Exercise, Free Speech, and property rights of private parties that acquire the land through valid means.

1. Original Intent and Current Direction of the Law

The Establishment Clause, as proposed by the First Congress back in 1789, only prohibited a state's establishment of a religion or an excessive involvement in religion.[240] As was understood at the time, and as has been pointed out in several Supreme Court opinions, religion had a significant place in the then-existing American society.[241] It was not until the last half of the

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238. *See* Lauderman, *supra* note 11, at 1230–31. This proposal adopts three of the Seventh Circuit's suggested "unusual circumstances"—the substance and form of the transaction, the transfer's compliance with state laws, and the transfer's appraisal at fair market value—as the test's first three prongs. *Id.* (citing Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 492 (7th Cir. 2000)). The fourth prong of the analysis is a limited inquiry into the stated purposes of the transaction, and, as the fifth prong, a review of the private speech rights affected by the transaction. *Id.*

239. *See id.*

240. *See* GARRY, *supra* note 34, at 94 (explaining the Eighteenth Century understanding of the establishment of religion). Examples of the establishment of religion during the founding era included efforts to interfere with church affairs and efforts to provide preferential treatment to certain sects. Buck, *supra* note 9, at 402, 404–05.

241. *See generally* GARRY, *supra* note 34, at 87–94. Professor Garry details the relationship between religion and government in the United States, starting with the nation's settlement as a refuge for those seeking religious freedom. *Id.* at 87. Early governments readily accepted the

twentieth century that the role of religion in society came into question.[242] Even today, though, as religion has been mostly removed from the public sphere, remnants of its past role still remain.[243] Some members of the Court have appeared willing to work from this base toward a more conciliatory view of religion, one in which government and religion can coexist through accommodation.[244]

Adopting the Seventh Circuit's holding would allow the Court to accommodate a religious display in a manner consistent with the original intent of the Establishment Clause as described by James Madison.[245] Absent any unusual circumstances, a land transfer would necessarily divest the government of any religious endorsement while also preserving the private religious display. In this way, a transfer would be a device for the government to yield back to the community a religious display that members of the community had erected and maintained, and in which they still had an interest.[246] Such a land transfer would represent a compromise between secularism and religion, through which a long-standing religious display could remain by severing the governmental ties to its religious message. Thus, it would present a more workable balance in American society between

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role of religion in society by donating land for churches, outlawing blasphemy and sacrilege, and funding chaplains to offer daily prayers. *Id.* at 91–92. In fact, shortly after Congress proposed the Establishment Clause, it also urged President George Washington to proclaim a national day of public thanksgiving and prayer. Buck, *supra* note 9, at 408. The Supreme Court has variously discussed this issue. *See* McCreary County v. ACLU, 545 U.S. 844, 886–87 (2005) (Scalia, J., dissenting) (outlining the early relationship between government and religion to conclude: "[t]hose who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality"); Marsh v. Chambers, 463 U.S. 783, 786 (1983) (stating that some religious acts, such as beginning a legislative session with prayer, are "deeply embedded in the history and tradition of this country").

242. *See* GARRY, *supra* note 34, at 105–06.

243. *See* GARRY, *supra* note 34, at 104–05 (noting "[m]any signs of America's historical religious identity survive today," including witnesses in court swearing on the Bible, Supreme Court and congressional sessions beginning with religious references, and the Pledge of Allegiance's appeal to "one nation under God").

244. *See* Harwood, *supra* note 56, at 340–42. Harwood suggests that Justices Kennedy, Scalia, and Thomas adhere to the accommodation principle, as shown by their plurality in *Van Orden*. *Id.* at 341–42. He suggests that the appointments of Chief Justice Roberts and Justice Alito will further strengthen the accommodation tendencies of the Court, giving it a five-justice majority. *Id.* at 350.

245. *See* discussion *supra* note 30.

246. For instance, in *Buono*, the proposed land transfer would have yielded the land on which the Sunrise Cross sits to the VFW, which had originally erected the cross in 1934. Buono v. Kempthorne (*Buono IV*), 502 F.3d 1069, 1074 (9th Cir. 2007), *amended by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472). Likewise, the transfer in *Mercier* yielded the land on which the Ten Commandments monument sat to the Fraternal Order of Eagles, which had originally installed the monument in 1964. Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 694–97 (7th Cir. 2005).

government and religion, a goal toward which the Supreme Court has been struggling unsuccessfully for over two centuries.[247]

2. Flexibility to Local Governments

Adopting the Seventh Circuit's holding would also provide local governments with important flexibility with which to address major policy issues. For municipalities today, the complexities of governance are increasing as Americans become more religiously and culturally diverse.[248] This trend is perhaps most volatile with issues of religious policy.[249] As *Buono*, *Mercier*, and *Marshfield* demonstrate, questions of religious displays can generate a tremendous amount of emotion on both sides.[250] The government, as both the arbiter of the dispute and as a main participant, is stuck in a difficult predicament in choosing between the religious and the secular.[251] Especially under a current jurisprudence that sacrifices clarity in favor of dissonance, a government can never have complete faith in the effectiveness of a particular remedy.[252] Often, the only option open to the government is a yes-or-no, take-it-or-leave-it approach to the religious display.[253] The government is thus

247. Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (noting that "this Court's precedent permits even the slightest public recognition of religion to constitute an establishment of religion").

248. *See* Joseph P. Viteritti, *Reading* Zelman*: The Triumph of Pluralism, and Its Effects on Liberty, Equality, and Choice*, 75 S. CAL. L. REV. 1105, 1170–71 (2003) (noting the tension between liberty and equality in public education as a result of increased secularism and pluralism in America).

249. *See* Rosen, *supra* note 227, at 675 (suggesting that the relationship between religion and the government has risen to become "political and cultural wars" regarding the scope of Judeo-Christian values in public life (internal quotation marks omitted)).

250. *See, e.g.*, Lake, *supra* note 13 (reporting that Buono claimed that the presence of the cross offended him because he viewed it as an endorsement of religion by the government). Local residents, however, vigorously supported the cross and resisted efforts to remove it. As Henry Sandoz, the current caretaker of the cross, explained, "We didn't just tell them no. We said, 'Hell no.'" *Id.* (internal quotation marks omitted).

251. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 767–68 (1995) (plurality opinion) (explaining that when a government's endorsement is imputed to a private party via the "transferred endorsement" principle, "[p]olicymakers would find themselves in a vise between the Establishment Clause," which may forbid a certain religious display, "and the Free Speech and Free Exercise Clauses, which may protect it"). At least one commentator has posited that judicial deference to state decision-making would reduce the scope of litigation over public religious displays by making the political process the ultimate arbiter. *See* Smith, *supra* note 229, at 133–34. Smith also notes that since *McCreary County* and *Van Orden* lower courts appear to be adopting such a deferential position in Establishment Clause cases. *Id.* at 133.

252. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 870–73 (2005) (rejecting attempts by the county governments to remedy Establishment Clause violations by proffering new purposes and adding additional "foundational" documents).

253. *See* Budd, *supra* note 59, at 223 (arguing that the only viable remedy for an intrinsically religious display "is to physically separate government from the unconstitutional display"). Budd notes that physical separation may be achieved by removing the display or privatizing the land on which the display sits. *Id.* He argues that a sale of land necessarily requires a stricter scrutiny

forced into a Sophie's Choice situation in which, quite simply, it cannot win. If it retains the display, the government runs the risk of facing a lawsuit. If it removes the display, it faces a backlash from the community entity that erected and maintained the display.[254]

The Seventh Circuit's position, however, allows the government the flexibility to both preserve the display and avoid the constitutional violation. A presumption of effectiveness absent unusual circumstances allows the government to remedy a violation by selling the land as easily as it would by removing the display. It incorporates a principle of deference that rightly passes the decision-making authority from the courts to the political process. At the very least, it calms an overly-sensitive judicial inquiry into the validity of the land transfer. It thus affords the government a degree of latitude within which to develop solutions that cure an Establishment Clause violation without forcing the display to be removed. This flexibility permits the government—whether local, state, or federal—to adopt a remedial approach that best comports with its unique history, traditions, public opinion, and way of life.[255] In short, this approach recognizes that in the realm of remedial Establishment Clause analyses, one size does not always fit all.

3. Respect for the Rights of Private Party Purchasers

Finally, the position of the Seventh Circuit suitably appreciates the rights of a private party in contracting for the land containing the religious speech. Various Supreme Court justices have recognized a fundamental difference between government-sponsored speech endorsing religion and private speech espousing religion.[256] They have opined that the Free Exercise and Free Speech Clauses protect a private endorsement of religion, whether or not the private speech may be mistaken for government speech.[257] Thus, the salient factor, at least with respect to whether a religious display may be remedied, is

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and more thorough analysis because "the remedy is potentially a mere recharacterization of title with little or no substantive effect on the perception of government endorsement." *See id.* at 233. His remedial analysis, however, presupposes the use of the endorsement standard. *Id.* at 215–16, 233. This test, however, may not be received favorably by the current Supreme Court. *See supra* note 230 and accompanying text.

254. *See supra* note 250.

255. *Cf.* Rosen, *supra* note 227, at 695, 701 (arguing for an approach known as "sizing," whereby constitutional constraints would apply differently to different levels of government).

256. *See Pinette*, 515 U.S. at 765–66 (plurality opinion) (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)).

257. *See id.* at 766 ("Petitioners assert . . . the distinction [between private speech and government speech] disappears whenever private speech can be mistaken for government speech. That proposition cannot be accepted, at least where, as here, the government has not fostered or encouraged the mistake.").

the actual ownership of the parcel in question.[258] A land transfer, once it divests the government's control from the parcel, transforms the religious message into purely private speech.[259] Once the land is privately owned, the proper analysis must shift from the Establishment Clause to the Free Speech and Free Exercise Clauses. The Seventh Circuit's position understands this shift, and it correctly protects the rights of the private party.[260] Its presumption of effectiveness errs on the side of the private religious expression by imputing a public character to a private party only with a showing of unusual circumstances.[261] The burden, therefore, is on the party challenging the display to show the private speech is actually governmentally endorsed. Moreover, in adopting its presumption, the Seventh Circuit demonstrated an appreciation for the rights a private party has in his property.[262] It permits the purchaser to accept only the rights and obligations he expected to receive when he contracted for the property. His purchase, absent unusual circumstances, is not tainted by any government endorsement that may have occurred prior to his ownership. The presumption secures the party's expectation interest in utilizing his property according to his wishes.

For the reasons explained, the Supreme Court should adopt the Seventh Circuit's presumption that the transfer of land is an effective remedy to an Establishment Clause violation. Of course, the party challenging the transfer may rebut the presumption, but only with a demonstration of unusual circumstances does the presumption break down. The Seventh Circuit's position advances the original intent of the Establishment Clause, grants greater flexibility to governments, and protects the rights of private purchasers. Most importantly, by adopting the position of the Seventh Circuit, the Supreme Court could advance its Establishment Clause jurisprudence toward clarity and common sense. After two hundred years of inconsistency, this advancement is sorely needed.

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258. *See* Freedom from Religion Found. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000) ("Because of the difference in the way we treat private speech and public speech, the determination of whom we should impute speech onto is critical.").

259. *See Pinette*, 515 U.S. at 767 (plurality opinion) (noting that the Establishment Clause was never intended to impede purely private religious speech).

260. *See Marshfield*, 203 F.3d at 497 ("[E]ither the Fund, a private land owner, must be estopped from exercising its right to free exercise and freedom of speech on its own property, or some way must be found to differentiate between property owned by the Fund and property owned by the City. The latter—not the former—is the appropriate solution."); *see also* Buono v. Kempthorne (*Buono V*), 527 F.3d 758, 762 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (O'Scannlain, J., dissenting from the denial of rehearing en banc) ("The Seventh Circuit properly applied the principle that once publicly-owned land is transferred to a private party, government action ceases, and the Establishment Clause violation necessarily goes with it.").

261. *See Marshfield*, 203 F.3d at 491, 495.

262. *See Buono V*, 527 F.3d at 764 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (explaining that "the Seventh Circuit correctly held that a private party's rights may not be brushed aside to remedy the government's violative conduct").

IV. CONCLUSION

Over the last two-hundred-plus years, the Establishment Clause has grown from a superfluous afterthought to a disjointed and dissonant doctrine. Today, its fractured jurisprudence lends little assistance to courts in determining whether there is an Establishment Clause violation, and, if so, how to effectively remedy it. This discord is highlighted by three cases in two circuits, *Salazar v. Buono* from the Ninth Circuit and *Freedom from Religion Foundation, Inc. v. City of Marshfield* and *Mercier v. Fraternal Order of Eagles* in the Seventh Circuit. These cases have come to different conclusions on the same question: whether a transfer of public land to a private party is an effective remedy to an Establishment Clause violation. The Ninth Circuit held that such a transfer is not an effective remedy; the Seventh Circuit held that it is. In comparing the two rationales, the Seventh Circuit's case law helps to elucidate how the Ninth Circuit misapplies Supreme Court doctrine and ignores precedent. The Seventh Circuit, by contrast, adopts an approach that remains faithful to the original intent of the Establishment Clause, provides greater flexibility for remedial decisions, and protects the rights of private parties. As the Supreme Court moves forward, it would be well advised to adopt the Seventh Circuit's reasoning and hold that a transfer of public property to a private party is a presumptively effective remedy to an Establishment Clause violation.