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## Building a Fence of Separation: The Constitutional Validity of Land Transfers in Escaping from Establishment Clause Violations

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# Building a Fence of Separation: The Constitutional Validity of Land Transfers in Escaping from Establishment Clause Violations

Christopher Lauderman\*

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"[R]eligious service is usually performed on Sundays at the Treasury office and at the Capitol. I went both forenoon and afternoon to the Treasury."<sup>1</sup>

### *I. Introduction*

A Latin cross stands in the Mojave National Preserve.<sup>2</sup> This nondescript, five-foot white cross represents more than just an Easter gathering place, a memorial for World War I veterans, and an endorsement of the Christian faith by the federal government.<sup>3</sup> This cross, in the middle of a California desert, is representative of a showdown that will undoubtedly occur across the country. Standing in the desert for over seventy years, this cross brings to the forefront a battle between those trying to protect pieces of Christian history and war memorials from destruction and those trying to rid the country of symbols they find offensive and repulsive even to look at from a distance.<sup>4</sup> A circuit split developed in the fall of 2007 on whether the government can cure an Establishment Clause violation by transferring the monument and the land to a private individual or group, usually the group that erected the monument decades beforehand.<sup>5</sup> This is a battle the Veterans of Foreign Wars (VFW)

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1. 1 MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848 265 (Charles Francis Adams ed., 1874) (1803) (recording his church attendance at the Christian service held inside the United States Capitol Building attended regularly by President Thomas Jefferson).

2. See *Buono v. Kempthorne*, 502 F.3d 1069, 1071 (9th Cir. 2007), *amended and superseded and reh'g denied* by *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (pointing out the location of the cross on the top of Sunrise Rock).

3. See *id.* at 1072 (discussing what the cross represents, what the cross has been used for, the cross's history, and the dimensions of the cross—a Latin cross has two arms at right angles to one another).

4. See *id.* (stating that the Veterans of Foreign Wars placed the Latin cross as a memorial in 1934); see also *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 489 (7th Cir. 2000) (stating that the person challenging the presence of the statue changed his travel routes to avoid driving by the statue).

5. See *Buono v. Kempthorne*, 527 F.3d 758, 759 (9th Cir. 2008) (declaring that the

most likely never could have imagined when they erected the first cross atop Sunrise Rock. The importance of the battle, however, cannot be understated. It will not only determine the destiny of memorials and monuments depicting or taking the form of religious symbols, but it will also impact the future law of government reaction to private free speech.

Following the adverse ruling in *Buono v. Kempthorne*,<sup>6</sup> the government filed a brief for rehearing with the Ninth Circuit, arguing the three-judge panel committed five main errors: (1) neglecting to recognize that the Establishment Clause does not require hostility toward religion; (2) failing to acknowledge that legislative expressions of a secular purpose are entitled to deference; (3) rejecting the Seventh Circuit's conclusion that a land transfer is a cure; (4) failing to avoid constitutional infirmity in interpretation where possible to do so; and (5) refusing to admit that transferring the land to the logical purchaser is permissible and sensible.<sup>7</sup> This Note explores each of these points in depth through the context of the land transfer situation of the Ten Commandments cases of 2005 and disputes that the cross in *Buono* is actually an Establishment Clause violation. Additionally, this Note examines the public function aspect addressed by the plaintiffs in these cases and referenced by each of the courts, and it addresses the speech aspects as well as the federal government split.

In Part II, this Note begins by summarizing the current state of Establishment Clause jurisprudence. Providing background in the Establishment Clause, Part III then discusses the split among the federal branches of government. The Part first examines the Ninth Circuit case of the Sunrise Rock cross and how the circuit split developed. Next, the Note moves into the Seventh Circuit cases allowing transfer of land to cure an Establishment Clause violation and the rationale behind the holdings. Laying the foundation for the circuit split, Part IV of the Note explores the Ten Commandments cases of 2005 and argues that the Latin cross in the Mojave Preserve is not an Establishment Clause violation. From there, the Note predicts what path the Court will take if it analyzes the cross as an Establishment Clause violation. To do this, Part IV investigates similar cases

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Ninth Circuit refuses to follow any possible presumption set forth by the Seventh Circuit 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").

6. *Buono v. Kempthorne*, 502 F.3d 1069, 1086 (9th Cir. 2007), *amended and superseded and reh'g denied* by *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (holding that the district court did not abuse its discretion by enjoining the land transfer and ordering that the cross be removed).

7. Petition for Rehearing of Defendants-Appellants at i, *Buono v. Kempthorne*, No. 05-55852 (9th Cir. Nov. 20, 2007), *reh'g denied*, 527 F.3d 758 (9th Cir. 2008).

the Supreme Court has examined over the course of the nation's history dealing with sham transactions, continuing involvement and reversionary interests, and addresses possible objections to whether true separation can ever be achieved. After this discussion, the Note delves into why the Supreme Court, if certiorari is granted, will ultimately conclude that the Seventh Circuit came to the correct result—by examining past Establishment Clause jurisprudence, looking at the nation's history and tradition, and exploring the consequences on speech of adopting the Ninth Circuit's rationale. However, because of criticisms of the Seventh Circuit's approach, the Note concludes by recommending that the Supreme Court adopt a new test, created by using elements of the Seventh Circuit decision as the first three prongs of the test and adding two additional prongs adopted from Supreme Court First Amendment jurisprudence.

## II. *The Establishment Clause*

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion."<sup>8</sup> The Supreme Court, however, has struggled to interpret the Establishment Clause and has not settled on a single formula to draw a constitutional line between what is and is not permissible under the clause.<sup>9</sup> Since 1947, when the Supreme Court decided that the Clause means there should be an absolute separation between the church and the state,<sup>10</sup> the jurisprudence has not been predictable. Current

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8. U.S. CONST. amend. I.

9. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("Establishment Clause jurisprudence is in hopeless disarray.").

10. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (using President Jefferson's language to suggest that the phrase "a wall of separation between Church and State" means more than just the principle that the United States will not have an official state religion and outlaw all other religious faiths). The court stated:

The "establishment of religion clause" means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from [sic] they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

*Id.*

Establishment Clause jurisprudence points in two directions.<sup>11</sup> On the one hand, the cases look to the powerful impact religion and religious traditions have had on America throughout its history.<sup>12</sup> On the other hand, the case law examines the principle that when government becomes entangled in religion, religious freedom may become endangered.<sup>13</sup> Despite these somewhat contradictory objectives in applying Establishment Clause analysis, over the last fifty years the Court consistently has held that the Constitution does not require a hostile relationship between religion and the government.<sup>14</sup> The Clause does not mean that the government should pursue striking down everything religious in nature.<sup>15</sup>

In 1971, the Supreme Court devised the three-prong *Lemon* test to guide Establishment Clause analyses.<sup>16</sup> The *Lemon* test states: "First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"<sup>17</sup> Over the past quarter century, however, the Court has backed away from applying the *Lemon* test.<sup>18</sup> The one consistent pattern in Establishment Clause jurisprudence is that the Supreme Court recognizes that these cases are very fact-intensive and even the slightest variation alters the analysis.<sup>19</sup> The Ten Commandments cases

11. See *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (calling the Supreme Court jurisprudence "Januslike," after Janus, the two-faced Roman god).

12. See *id.* (discussing writings evidencing that the Founding Fathers believed wholeheartedly in a God and that the unalienable rights of man came from Him); see also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . .").

13. See *Van Orden*, 545 U.S. at 683 (providing the other "face" that the Supreme Court must protect in ruling on such cases).

14. See *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952) (discussing that the United States is a nation of religious people, whose institutions presuppose a Supreme Being). While the court acknowledged the importance of a disentangled Church and State, it refused to read into the Bill of Rights a philosophy of hostility toward religion. *Id.* at 315.

15. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (issuing a caution that fostering hostility toward religion could undermine the neutrality required by the Establishment Clause).

16. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (laying out a three-part test to analyze the Establishment Clause).

17. *Id.*

18. See *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (showing that many recent cases have not applied the *Lemon* Test).

19. See *Buono v. Kempthorne*, 502 F.3d 1069, 1082 n.13 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (explaining that fact-specific inquiries must take place).

of 2005, *Van Orden v. Perry*<sup>20</sup> and *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*,<sup>21</sup> illustrate this reality as the Court declared one monument on capitol grounds not to be an Establishment Clause violation while declaring the posting of the Ten Commandments in a county courthouse to be an Establishment Clause violation.<sup>22</sup>

### III. Federal Government Split

The Ninth Circuit decision in *Buono* not only creates a split between two circuit courts but also constructs a split among the three federal branches of government.<sup>23</sup> *Buono* pits the Ninth Circuit against the two elected branches of the federal government, which both agree with the Seventh Circuit's approach.<sup>24</sup> In 2002, after litigation commenced, Congress declared the Mojave Preserve cross a national World War I memorial and authorized the Secretary of the Interior to acquire a replica of the original plaque and cross and to install the replica on the grounds of the memorial.<sup>25</sup> According to the Ninth Circuit, as a national war memorial, the National Park Service became charged with the supervision, management, and control of the monument.<sup>26</sup> In 2003, Congress passed another bill that included the land exchange agreement at issue.<sup>27</sup>

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20. See *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (holding that the Establishment Clause allows a monument containing the Ten Commandments on the Texas State Capitol grounds).

21. See *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 881 (2005) (finding that the display of the Ten Commandments in a courthouse violated the Establishment Clause).

22. Compare *Van Orden*, 545 U.S. at 692 (holding that the Texas display of the Eagle's Ten Commandments monument on the capitol grounds did not violate the Establishment Clause), with *McCreary County*, 545 U.S. at 881 (upholding a permanent injunction ordering the posting of Ten Commandments on courthouse wall to be taken down).

23. See *Buono*, 502 F.3d at 1085 (describing the government's "herculean efforts" to leave the Latin cross intact).

24. See *id.* (explaining that Congress's goal was to maintain the cross); see also Randal C. Archibold, *Bush Signs Law to Save War Memorial Cross*, N.Y. TIMES, Aug. 15, 2006, at A14 (explaining President Bush's reasoning for signing the law to take city land by eminent domain in hopes of preserving a Latin cross war memorial in San Diego).

25. See *Buono v. Kempthorne*, 502 F.3d 1069, 1074 (9th Cir. 2007), *amended and superseded and reh'g denied by Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (reprinting the bill Congress passed granting the Secretary of the Interior \$10,000 for this purpose).

26. See *id.* at 1073-74 (discussing the cross's designation as a national memorial); see also 16 U.S.C. §§ 2, 431 (2000) (creating duties of regulating and promoting national parks, monuments, and reservations).

27. See *Buono*, 502 F.3d at 1074; see also 16 U.S.C. § 410aaa-56 (2000 & Supp. 2007)

Similarly, the Executive Branch began to work as feverishly as the Legislative Branch to save Latin Cross war memorials.<sup>28</sup> In August 2006, President Bush signed legislation transferring a Latin Cross war memorial from the city of San Diego to the federal government.<sup>29</sup> While the Supreme Court has yet to address the question of whether a Latin Cross war memorial constitutes an Establishment Clause violation, the Ninth Circuit, in 1993, declared that the San Diego cross violated the California Constitution.<sup>30</sup> Both Congress and President Bush believed that transferring the land from the San Diego local government to the federal government would stall an order requiring the cross to be taken down as litigation in federal court commenced.<sup>31</sup> In *Buono*, the Ninth Circuit veered from the policy of the other two federal branches and held that the cross must be removed.<sup>32</sup>

#### A. The Ninth Circuit—*Buono v. Kempthorne*

Sunrise Rock, a rock outcropping in the 1.6 million acre Mojave National Preserve, is home to a five-foot tall cross.<sup>33</sup> The controversy over the war memorial began in 1999 when an individual made a request to the National Park Service (NPS) to build a Buddhist shrine, called a stupa, on a rock outcropping in the preserve near the cross.<sup>34</sup> After declining the individual's request, the NPS examined the history of the cross and decided to take it down, given that the cross had been deconstructed and replaced several times with a

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(allowing Henry Sandoz to convey to the Secretary a five acre parcel of land in the preserve in exchange for the Sunrise Rock outcropping with the cross).

28. See Archibold, *supra* note 24, at A14 (calling President Bush's actions in using eminent domain in this matter "unusual").

29. See *id.* (stating that Bush signed the legislation in the Oval Office surrounded by cross supporters).

30. See *Ellis v. City of Le Mesa*, 990 F.2d 1518, 1528 (9th Cir. 1993) (holding that the war memorial violates the "No Preference Clause" of the California Constitution and the designation of the cross as a war memorial does not remedy the violation). However, the court failed to comment on whether such war memorials violate the First Amendment of the United States Constitution. *Id.*

31. See Archibold, *supra* note 24, at A14 (trying to explain why President Bush would use the federal eminent domain powers to transfer land from a city government to the federal government).

32. See *Buono v. Kempthorne*, 502 F.3d 1069, 1086 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (upholding the district court's order that the cross be removed).

33. See *id.* at 1072 (illustrating that the preserve covers 2,500 square miles of predominately federally owned land).

34. See *id.* (stating that a request was made by a Buddhist to build a "stupa"—a dome-shaped Buddhist shrine).



new version and that people gathered there every Easter for religious purposes.<sup>35</sup> This NPS action prompted Congress to pass a law in December 2000 that no government money could be used to take down the cross.<sup>36</sup> In 2001, Frank Buono, a former employee at the Mojave National Preserve, represented by the American Civil Liberties Union (ACLU), brought suit to enjoin the government from displaying the cross.<sup>37</sup>

A federal district court concluded that the cross was an Establishment Clause violation and entered a permanent injunction ordering the cross to be removed.<sup>38</sup> In response to this order, while the case was on appeal, in January 2002, Congress passed a statute making the Sunrise Rock cross a national memorial, officially designating the cross the "White Cross World War I Memorial."<sup>39</sup> In October 2002, Congress passed yet another bill including a provision disallowing the use of federal funds "to dismantle national memorials commemorating United States [sic] participation in World War I."<sup>40</sup>

The government argued that the cross does not constitute a violation of the Establishment Clause of the First Amendment to the United States Constitution but rather a war memorial honoring the veterans of World War I.<sup>41</sup> The Ninth Circuit previously rejected that argument and held that the presence of the cross alone, in the preserve, violated the Establishment Clause.<sup>42</sup> Vehicles traveling on a road 100 yards away can see the cross, and there is currently no sign or fence to inform travelers that the cross is a war memorial.<sup>43</sup> The federal

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35. See *id.* at 1072–73 (discussing NPS's denial of the request to build the Buddhist shrine).

36. *Id.* at 1073; see also Pub. L. No. 106-554 § 133, 114 Stat. 2763A-230 (2000) (showing the first piece of legislation enacted by Congress aimed at saving the cross from being taken down by the Ninth Circuit).

37. *Buono*, 502 F.3d at 1073.

38. See *id.* (describing the first action taken by the courts with respect to the cross).

39. *Id.* at 1073–74; see also 16 U.S.C. § 431 (2000 & Supp. 2007) (giving the details for the defense appropriations bill that included the designation).

40. *Buono v. Kempthorne*, 502 F.3d 1069, 1073 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008); see also Pub. L. No. 107-248 § 8065(b), 116 Stat. 1551 (2002) (providing the bill that disallowed federal funds to remove the cross).

41. See *Buono*, 502 F.3d at 1073 (reviewing the defense appropriations bill that made the Latin cross a national memorial).

42. See *id.* at 1075 (discussing the Ninth Circuit's previous opinions of the cross being a violation of the Establishment Clause).

43. See *id.* at 1072 (discussing the cross's locations and setting, and indicating that those traveling on a nearby road can see the cross from a distance).

government owns ninety percent of the preserve with the remaining land owned by private individuals and the State of California.<sup>44</sup>

In September 2003, in response to the Ninth Circuit, Congress passed a final law allowing the transfer of land to a private group in exchange for land elsewhere in the preserve, thus creating a donut shaped hole in the preserve.<sup>45</sup> Nine months later, the Ninth Circuit declared that the Mojave Preserve Latin cross, regardless of its war memorial status, clearly represents government endorsement of a particular religion.<sup>46</sup> Nonetheless, the government continued to pursue transferring the land. On September 6, 2007, the Ninth Circuit held that the transfer of the land violated the previously issued injunction to remove the cross.<sup>47</sup> In 2008, the Ninth Circuit expressly stated that an Establishment Clause violation cannot be cured presumptively by a transfer of land from the government to a private party.<sup>48</sup>

### *B. Seventh Circuit*

#### *1. Freedom from Religion Foundation, Inc. v. City of Marshfield*

In contrast to the Ninth Circuit, the Seventh Circuit devised a drastically different approach to dealing with land transfers in Establishment Clause cases.<sup>49</sup> In 1959, the Knights of Columbus donated a fifteen-foot marble statue of Jesus Christ, displayed with His arms open in prayer, to the city of Marshfield.<sup>50</sup> The city allowed the Knights to place the statue on a piece of

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44. *See id.* (describing that private individuals own 86,000 acres of land in the preserve and that California owns 43,000 acres of land in the preserve, leaving ninety percent of the land owned by the federal government).

45. *See id.* at 1086 (describing the parcel of land that the law carved out of the preserve as a "donut hole"); *see also* 16 U.S.C. § 410aaa-56 (Supp. 2007) (allowing Henry Sandoz to convey to the Secretary a five acre parcel of land in the preserve in exchange for the Sunrise Rock outcropping with the cross).

46. *See* *Buono v. Kempthorne*, 502 F.3d 1069, 1075 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (stating that, despite the federal government's efforts to keep it on the outcropping, the cross still must come down).

47. *See id.* at 1086 (holding that the district court did not abuse its discretion by enjoining the land transfer and ordering the cross be removed).

48. *See* *Buono v. Kempthorne*, 527 F.3d 758, 759 (9th Cir. 2008) (declining to adopt a presumption of the effectiveness of a land sale to end a constitutional violation).

49. *See id.* (refusing to read *Marshfield* as adopting a presumption of the effectiveness of a land sale to end a constitutional violation).

50. *See* *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 489 (7th Cir. 2000) (describing the statue and explaining that the city accepted the gift from the John

undeveloped public land.<sup>51</sup> The statue stands on a large sphere, which rests on a base that is inscribed with the phrase, "Christ Guide Us On Our Way."<sup>52</sup> An individual member of the Knights of Columbus, Henry Praschak, added improvements to the city land including picnic tables and outdoor grills.<sup>53</sup> In response, the city decided to convert the land into a public park, thereby providing electricity and maintenance to the grounds.<sup>54</sup> This newly created public park bordered one of the major roads leading into the city of Marshfield.<sup>55</sup> In 1998, thirty-nine years after the acceptance of the statue, Clarence Reinders, a city resident, protested the city's ownership of such an offensive statue.<sup>56</sup> The fifteen-foot likeness of Jesus Christ offended Reinders so greatly that he decided he had no choice but to find new routes for traveling into and out of the city.<sup>57</sup> Reinders filed a lawsuit when the city refused to move the statue out of the park and onto a private piece of land.<sup>58</sup>

In response, a group of Marshfield residents formed the Henry Praschak Memorial Fund, Inc. (HPMF) and offered to buy the statue and the surrounding land from the city.<sup>59</sup> The city agreed, and the HPMF bought the land for \$21,560, or \$3.30 a square foot, the highest amount of money per square foot for which the city had ever sold property.<sup>60</sup> In addition, to further separate the city involvement from the HPMF, after the sale of the land, the city no longer maintained the 0.15 acres surrounding the statue and no longer provided electricity to illuminate the statue of Jesus Christ.<sup>61</sup> Neither the HPMF nor the

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Eisen Assembly, Fourth Degree Knights of Columbus).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *See id.* (illustrating that State Highway 13, also known as Roddis Avenue, is the main thoroughfare into Marshfield from the south, and the statue is visible to those traveling on the road).

56. *See id.* (reviewing Reinders's claim that he avoids visiting the park because of the statue).

57. *See id.* (describing the consequences of Reinders's revulsion to the statue and the inconvenience the statue put on him).

58. *See id.* (providing the timeline of events). In March 1998, the Freedom from Religion Foundation asked that the statue be moved out of the park. *Id.* After the city refused to act, the suit was filed on April 15, 1998. *Id.*

59. *See id.* at 489–90 (pointing out that the private organization consisted of local citizens who wanted to preserve the statue).

60. *See id.* at 490 (giving the price paid by the private group for the land and noting that the bid process on the land met all Wisconsin statutory requirements for the sale of government owned land).

61. *See id.* (illustrating the distance that the private organization attempted to place

city erected anything to acknowledge the boundary line between the private and public property.<sup>62</sup>

The *Marshfield* court held that, "absent unusual circumstances," a sale of real property makes available an effective channel for the government to free itself of a religious monument and avoid endorsing a specific religion.<sup>63</sup> Specifically, the court gave three types of unusual circumstances as examples.<sup>64</sup> First, a court should not rubber stamp sham transactions that employ a straw purchaser,<sup>65</sup> thus, a court must look to the substance of the transaction as well as its form to determine whether the government actually disentangled itself from the improper endorsement.<sup>66</sup> Only if a court finds "continuing and excessive involvement between the government and private citizens" should the court consider the land transaction invalid.<sup>67</sup> Second, a sale must comply with state laws governing the sale of government land.<sup>68</sup> Third, a sale of property significantly below fair market value would imply that the land is a gift to the purchasing organization.<sup>69</sup> Applying this analysis to the facts, the *Marshfield* court found the city's lack of maintenance as determinative.<sup>70</sup> In addition, the local government sold the land properly, and the purchaser was not a mere straw for the government.<sup>71</sup> Importantly, the court held that a land transfer is not a per se remedy of an Establishment Clause violation.<sup>72</sup> The private buyer

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between the private land and the public park).

62. *See id.* at 494–95 (enlightening the reader as to the major flaw with the transfer of land from Marshfield to the Fund).

63. *See id.* at 491 ("Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion.").

64. *See id.* at 492 (discussing the typical sort of improprieties that might cause a court to disregard a land transfer).

65. *See id.* (recognizing the importance that there was no indication that the city used the Fund merely as a straw purchaser).

66. *See id.* ("[W]e look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased.").

67. *See id.* (discussing when a land arrangement does not pass constitutional muster).

68. *See id.* (finding no impropriety in the city's transfer to the Fund because the sale of the property complied with the applicable Wisconsin property laws).

69. *See id.* (comparing when a land transfer is a purchase as opposed to a gift from the government to the religious group).

70. *See id.* (explaining the first reason that the land transfer in the case is not a sham transaction).

71. *See id.* (discussing what a straw purchaser is and why the Fund is instead a legitimate purchaser of the land).

72. *See id.* at 496 (establishing that the holding of the case does not apply to every land transfer as a presumptive cure of an Establishment Clause violation).

must differentiate the private land from the other land in the public park.<sup>73</sup> Without this distinction, the local government in effect gives a sectarian message preferential access to a public forum, which is forbidden under Establishment Clause jurisprudence.<sup>74</sup> The court recommended that a permanent gated wall or fence with a "clearly visible" disclaimer be built to remedy the confusion over who specifically owns what land.<sup>75</sup> On remand, the district court approved a plan to build a ten-foot masonry wall around the private land with a sign in ten-inch block letters reading "Private Park" and four-inch block letters underneath reading: "This property is not owned or maintained by the City of Marshfield, nor does the City endorse the religious expression thereon."<sup>76</sup>

## 2. *Mercier v. Fraternal Order of Eagles*

Five years after *Marshfield*, the Seventh Circuit again faced a very similar situation with the same oppositional group—the Freedom From Religion Foundation, Inc.<sup>77</sup> In 1964, the city of La Crosse, Wisconsin approved the installation of a Fraternal Order of the Eagles Ten Commandments monument in a one and one-half acre public park.<sup>78</sup> In addition to the inscription of the Ten Commandments, the monument also contains an eagle with an American flag and an all-seeing eye, as is printed on the one dollar bill.<sup>79</sup> While a walker or jogger on one of the park's sidewalks would notice the monument, none would see the actual inscription on the monument.<sup>80</sup> Importantly, the monument is not located in the center of the park or another location that could

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73. See *id.* (emphasizing the importance that a reasonable observer would not believe that the city owns the land with the statue).

74. See *id.* (stating that the private land is still technically a traditional public forum and no barrier of any kind presents the appearance of government favoritism toward one religious group to express a message).

75. See *id.* at 497 (setting forth a standard for building fences and creating signs to ensure a reasonable observer would know that the land is no longer property of the local government but instead a private, religious group).

76. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 701 (7th Cir. 2005) (providing the exact wording of the new Marshfield signs approved on remand).

77. See *id.* at 701 n.1 (noting that the Freedom From Religion Foundation, Inc., which brought suit in *Mercier*, was a plaintiff in *Marshfield*).

78. *Id.* at 694–95.

79. *Id.*

80. See *id.* at 695 (noting that the writing on the monument is so small, a passerby would have to come close and make an effort to read the inscription).

be considered prominent.<sup>81</sup> In addition, the Eagles maintain and illuminate the monument at their own expense.<sup>82</sup> Between the approval and dedication of the monument, the Mississippi River flooded and threatened the city of La Crosse.<sup>83</sup> Appreciating the efforts of a group of students who fought the flood, the Eagles dedicated the monument to "those young people who helped during this spring's flood."<sup>84</sup> No one complained about the monument until 1985, when Phyllis Grams, a resident of La Crosse, joined forces with the Freedom From Religion Foundation, Inc. and asked the city to remove the monument.<sup>85</sup> The city refused, and the Freedom From Religion Foundation filed a lawsuit, which the district court dismissed for lack of standing.<sup>86</sup> In 2001, the Freedom From Religion Foundation again asked the city to take down the monument and filed the present suit after the city again vowed not to remove the monument.<sup>87</sup> The Freedom From Religion Foundation then recruited twenty plaintiffs that claimed that they avoided the park because they became emotionally disturbed and distressed when they saw the monument.<sup>88</sup>

In response to the suit brought by the Freedom From Religion Foundation, in 2002, the city sold the monument and the land it sits on to the Eagles.<sup>89</sup> The Eagles paid \$2,640, or \$6.00 a square foot, which the city assessor described as fair market value.<sup>90</sup> The Eagles then constructed a four-foot high steel fence around its land.<sup>91</sup> They also placed permanent signs on each side of the property reading: "This is the property of La Crosse Eagles Aerie 1254

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81. *Id.*

82. *Id.* at 696.

83. *Id.*

84. *Id.*

85. *See id.* (showing that the Freedom From Religion Foundation first attempted to remove the monument from the city park two decades after it was originally placed by the Eagles).

86. *See id.* (explaining why the first lawsuit, filed sixteen years earlier, failed to produce a result in the courts).

87. *Id.*

88. *See id.* at 697 (describing the dissatisfaction the Freedom from Religion Foundation expressed over the land transfer).

89. *See id.* at 696 (reviewing the record showing that after an April 2002 resolution declaring that the monument did not violate the Constitution and that the city council would do whatever necessary to keep the monument in its current location, the council decided to sell the land to the Eagles on June 20, 2002).

90. *See id.* at 697 (showing that the city council sold the land to the Eagles for an appropriate amount, avoiding a sham).

91. *See id.* (pointing out that on its own initiative, the Eagles constructed a fence, as recommended by the *Marshfield* court).

Dedicated to the volunteers who helped save the city of La Crosse during the 1965 flood."<sup>92</sup> The city then constructed a wrought-iron fence, four-feet high and placed metal signs on the fence reading: "PRIVATE PARK. THIS PROPERTY IS NOT OWNED OR MAINTAINED BY THE CITY OF LA CROSSE, NOR DOES THE CITY ENDORSE THE RELIGIOUS EXPRESSION THEREON."<sup>93</sup>

Applying *Marshfield*, the Seventh Circuit concluded that no "unusual circumstances surrounding the sale of the parcel of land so as to indicate endorsement of religion" existed.<sup>94</sup> Specifically, the monument's location played a key role in this decision.<sup>95</sup> The court noted that the public park housing the monument is neither in a government building nor near the grounds of a government building.<sup>96</sup> Residents, therefore, do not walk by the monument while conducting government business such as paying a traffic ticket, meeting with government officials, or applying for a marriage license.<sup>97</sup> The court also said the location within the park is important.<sup>98</sup> The monument does not stand in the center or in another prominent location.<sup>99</sup> By selling the land to the Eagles, the city did not deny access to the park to any citizen or visitor to the park.<sup>100</sup> The land sale did not affect park use by visitors.<sup>101</sup> Additionally, a municipality only offering the land to one purchaser and not putting the land up for public sale does not create an unusual circumstance invalidating the land transaction.<sup>102</sup> The court ultimately held that by selling the land to a private group, in this case the Eagles, "the city exercised an option that served a secular

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92. *Id.*

93. *Id.* at 698.

94. *See id.* at 702 (applying the *Marshfield* three-part test and finding that it was a legitimate sale of government land).

95. *See id.* at 703 (determining that location is an important factor for determining the appropriateness of a sale to cure a constitutional violation).

96. *See id.* (stating that the difference between selling a piece of a park and selling a piece of a capitol building is determinative).

97. *Id.*

98. *See id.* (describing that a monument that is the centerpiece of the park is different from a monument that lies in the outskirts of the park).

99. *See id.* ("It is not . . . set at the heart of the Park or in a particularly prominent location where the sale would eviscerate the design or plan of the Park's layout.").

100. *See id.* at 703 (discussing that despite the transfer of land, the park is still open to the public and use is not disrupted).

101. *See id.* (justifying the sale of land to the "logical purchaser" rather than putting the monument on the real estate market).

102. *See id.* (providing that the failure to solicit alternate bids does not invalidate a land transfer).

purpose" and did not violate the Establishment Clause.<sup>103</sup> With six signs and two fences, the court concluded that no reasonable person would confuse the monument with city property.<sup>104</sup> The court noted that removal is always an available option but that the holding from *Marshfield* ensured that it is not the necessary solution to an Establishment Clause challenge.<sup>105</sup> It also explained that there are situations where a government sale of land would not be proper.<sup>106</sup> The court imagined a situation where the government decides on its own initiative "to sell off patches of government land to various religious denominations as a means of circumventing the Establishment Clause."<sup>107</sup> In contrast to the imagined scenario, the court in *Mercier* drew a distinction.<sup>108</sup> It faced a situation of removing a monument that had stood on government property for almost forty years, and the litigation to remove it prompted the sale.<sup>109</sup>

#### IV. Discussion

Through a discussion of the Ten Commandments cases of 2005, this Note finds that the cross in *Buono* was not an Establishment Clause violation. The courts, however, in *Buono*, *Marshfield*, and *Mercier* all treated the statue or monument as a violation of the Establishment Clause. Because the parties in *Buono* did not litigate that issue below, the Supreme Court will not address this question if *Buono* goes to the Court.

Given that the parties treat the White Cross War Memorial as a violation, the Court should nonetheless find that the land transfer was valid and that the cross can continue to stand. The government can use prior Supreme Court jurisprudence to rebut four main objections to real separation: (1) the reversionary interest; (2) the "Herculean Efforts;" (3) the history; and (4) the

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103. See *id.* at 705 (finding that a secular purpose is a requirement for a particular Establishment Clause violation test discussed later in this Note).

104. See *id.* at 703–04 (stating that a reasonable person could not reasonably think that the city owns the fenced-in land).

105. See *id.* at 702 (explaining that the city could have removed the statue but does not have to in order to remedy an Establishment Clause violation).

106. See *id.* (reiterating the proposition stated in *Marshfield* that the sale of land does not presumptively cure an Establishment Clause violation).

107. See *id.* (answering the objection that this particular remedy would allow the government to sell every piece of land to religious groups).

108. See *id.* at 703 (recounting the importance of the history and tradition of the monument and what it means to the residents of La Crosse).

109. *Id.* at 702.



appearance. The Public Function Doctrine and principles of free speech and democracy provide the Court with more support for allowing the transfer. Finally, this Note recommends a new test that courts should use in situations such as this.

### *A. The Ten Commandments Comparison*

On the grounds of the Texas State Capitol, surrounded by sixteen monuments and twenty-one historical markers commemorating the people, ideals, and events that compose Texan identity, stands an Eagles Ten Commandments monument.<sup>110</sup> The monument sits between the capitol building and the Texas Supreme Court building.<sup>111</sup> Thomas Van Orden, a resident of Austin and former licensed attorney, frequently passed the monument on his way to the law library in the Supreme Court building.<sup>112</sup> Forty years after the installation of the monument, Van Orden sued to dismantle the monument.<sup>113</sup>

Chief Justice Rehnquist, writing for a plurality, decided that using the *Lemon* test was not helpful in this situation.<sup>114</sup> Chief Justice Rehnquist focused the plurality's analysis on the nature of the monument and America's history.<sup>115</sup> The Court pointed out the "unbroken history" by all three branches of government acknowledging the position of religion in American life since the signing of the Constitution.<sup>116</sup> The Chief Justice did not dispute the undeniably religious meaning of the Ten Commandments, but recognized that the monument carried significant historical meaning as well.<sup>117</sup> Importantly, the Court recognized that the executive and legislative branches have acknowledged the historical role of the Ten Commandments.<sup>118</sup> Chief Justice

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110. Van Orden v. Perry, 545 U.S. 677, 681 (2005).

111. *Id.*

112. *Id.* at 682.

113. *Id.*

114. See *id.* at 686 (ignoring, for the time, the fate of the *Lemon* test, and deciding it is not useful in dealing with a passive monument).

115. See *id.* ("[O]ur analysis is driven both by the nature of the monument and by our Nation's history.").

116. See *id.* at 686–88 (citing examples such as Congressional resolutions asking George Washington to issue a religious Thanksgiving Day Proclamation, the text of one of George Washington's Thanksgiving Day proclamations, and court cases demonstrating the role of God in America's heritage).

117. See *id.* at 690 (describing the religious history of the Ten Commandments and the secular history of Moses as a lawgiver).

118. See *id.* (providing President Harry S. Truman's papers and Congressional resolutions

Rehnquist concluded his analysis by stating that simply displaying religious content or advancing a message consistent with a religious doctrine does not violate the Establishment Clause, but he noted that there are limits to the presentation of religious messages.<sup>119</sup>

Justice Breyer, the swing vote in the Ten Commandments 5-4 decisions, concurred in *Van Orden*, stating that the Establishment Clause does not force the government to purge all religion from the public sphere.<sup>120</sup> According to Justice Breyer, to determine the message the text conveys, a court first must examine how the text is used.<sup>121</sup> The Texas monument has both a secular and religious message, but the circumstances surrounding the monument's placement and setting suggest the state intended the secular message to predominate.<sup>122</sup> The forty years that the monument sat undisturbed suggest more strongly than any formulaic test that few individuals are likely to have understood the monument as amounting to government favor of a particular religion in a detrimental way.<sup>123</sup> In addition, the forty years imply that visitors to the capitol grounds see the religious message of the monument as part of a broader moral and historical message that reflects the country's heritage.<sup>124</sup> Justice Breyer stated that removing the Ten Commandments display based primarily on the religious nature of the text on the tablets would demonstrate a hostility toward religion that the Establishment Clause does not embrace.<sup>125</sup>

Nonetheless, in *McCreary County*, Justice Breyer flipped and signed onto Justice Souter's differing majority opinion.<sup>126</sup> *McCreary County* involved two

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from 1997 as examples).

119. See *id.* (backing up this conclusion with several Supreme Court cases from the twentieth century).

120. See *id.* at 699 (Breyer, J., concurring) ("Such absolutism is not only inconsistent with our national traditions, . . . but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.").

121. See *id.* at 701 (Breyer, J., concurring) (prescribing inquiry into the use of the text and consideration of the context of the monument).

122. See *id.* (Breyer, J., concurring) (discussing the Eagles' goal of placing the monument as a way to shape civic morality and to combat juvenile delinquency).

123. See *id.* at 702 (Breyer, J., concurring) (weighing history and tradition against a formulaic test and determining that the history and tradition of the monument is far more instructive).

124. See *id.* at 703 (Breyer, J., concurring) (contemplating why the monument existed for over four decades with no complaints from the public).

125. See *id.* at 704 (Breyer, J., concurring) (advancing the notion that the religious appearance of the monument does not matter because destruction of a monument for religious reasons is hostile toward religion).

126. See *id.* at 703 (Breyer, J., concurring) (distinguishing *McCreary County* from *Van Orden*).

Kentucky counties that posted the Ten Commandments on the walls of their courthouses.<sup>127</sup> Unlike the monument in Texas, the Commandments came under attack shortly after posting.<sup>128</sup> Justice Souter first held that a determination of the Kentucky counties' purpose was a sound basis for ruling on the Establishment Clause complaints.<sup>129</sup> Using *Lemon* to guide the analysis, Justice Souter wrote that the original text of the Ten Commandments viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.<sup>130</sup> The Court also pointed out that the postings stood alone on the wall and not as part of a larger theme.<sup>131</sup>

Justice Breyer accounted for his difference of opinion in *McCreary County* by noting that the postings in the courthouses had short, yet stormy, histories.<sup>132</sup> In *McCreary*, Justice Breyer believed that those who mounted the Commandments had substantially religious objectives and that the officials wanted the people viewing the Commandments to take away a religious message, not a secular message of history and tradition of American culture.<sup>133</sup> The Court found that the county governments installed the postings for purely religious reasons, thus creating a distinction from the passive monument in *Van Orden*.<sup>134</sup> The counties, according to the Court, wanted to "emphasize and celebrate" the religious message expressed by the Ten Commandments.<sup>135</sup> Reading *Van Orden* and *McCreary County* together, Justice Breyer seems to

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127. See *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 850 (2005) (giving case history of county executives posting the Ten Commandments).

128. See *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring) (comparing the short and stormy nature of the Kentucky postings to the long, historical tradition of the Texas monument).

129. See *McCreary County*, 545 U.S. at 861 (emphasizing that purpose is an indispensable part of statutory interpretation that appellate courts use every day).

130. See *id.* at 869 (concluding that when the government makes an effort to post the Ten Commandments in public view, surrounded by nothing else, a religious object is instantly recognizable); see also *Van Orden*, 545 U.S. at 686 (explaining that sometimes *Lemon* will not be applied, including in cases like *Van Orden*, where a passive monument is involved).

131. See *McCreary County*, 545 U.S. at 869 (noting the importance of the display's solitary nature).

132. See *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring) (discussing the tumultuous history of the Kentucky postings in *McCreary*).

133. See *id.* (Breyer, J., concurring) (bringing up the likely religious objectives of the executives of the Kentucky counties).

134. See *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 869 (2005) (creating an important distinction between the monument in *Van Orden* and the postings in the present case).

135. See *id.* (discussing what the reasonable observer would conclude from viewing the display set up by the Kentucky counties).

suggest the dispositive factors are the monument's history and whether the monument's objective is purely religious.<sup>136</sup>

### B. Choosing Van Orden or McCreary County

The parties in the lower courts did not argue the issue of whether *Buono* is more like *Van Orden* or *McCreary County*, but this issue may prove to be important in future memorial or VFW cross cases before a court. To answer that question, a court must look to the history of the cross.<sup>137</sup> The VFW erected the first cross seventy-four years ago in 1934.<sup>138</sup> The veterans stated the purpose of the cross was to memorialize the soldiers who died in World War I.<sup>139</sup> The original wooden signs stating the monument's purpose no longer stand, and the cross has been replaced several times, most recently, ten years ago.<sup>140</sup> The cross is also a gathering spot for Easter religious services, which have been conducted as early as 1935 and regularly since 1984.<sup>141</sup>

Despite the Latin cross being the universally recognized symbol of Christianity, the Supreme Court should analyze the case under *Van Orden* rather than *McCreary County*. Justice Breyer's concurrence in *Van Orden* provides guidance. First, the Latin cross conveys both a religious and a secular message.<sup>142</sup> Second, the history of this cross monument is not short and stormy, but rather long and undisturbed.<sup>143</sup>

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136. See *Van Orden v. Perry* 545 U.S. 677, 703 (2005) (Breyer, J., concurring) ("This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.").

137. See *id.* at 701 (Breyer, J., concurring) (stating that when there is a borderline case, the court must examine the context of the display).

138. *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008).

139. *Id.*

140. *Id.*

141. *Id.*

142. See Eric Charles Nystrom, *From Neglected Space to Protected Place: An Administrative History of Mojave National Preserve*, <http://www.nps.gov/archive/moja/adminhist/adhi6.htm> (last visited Jan. 20, 2008) (on file with the Washington and Lee Law Review) ("To local residents, the cross was a religious symbol, and a patriotic tribute to America's veterans. It also served as a source of local identity, giving residents a focal point around which to gather and to rally. . . . [L]ocal residents argued to keep the cross intact.").

143. Cf. *Van Orden v. Perry* 545 U.S. 677, 701–03 (2005) (Breyer, J., concurring) (discussing the long history of the Ten Commandments monument and how that contrasts to a short-lived monument).

After determining to use *Van Orden*, the Court must then plunge into the analysis. The Court faces the challenge of a Latin cross on government property in a preserve.<sup>144</sup> Such crosses are common war grave markers and memorials, but at the same time, the cross is undoubtedly a religious symbol.<sup>145</sup> The cross, therefore, has religious meaning, but also carries an undeniable historical meaning. The *Buono* court twice stated that a cross war memorial may be seen as remembering veterans of only the Christian religion.<sup>146</sup> The VFW surely would dispute this statement by the Ninth Circuit. When those veterans first placed the cross on the outcropping over seven decades ago, they did not state and put on the plaque that the monument was in memory of dead Christian soldiers, but instead, the plaque read "erected in Memory of the Dead of All Wars."<sup>147</sup> It is pure speculation for either side in this dispute to surmise the VFW's state of mind. Like the placement of the *Van Orden* monument on the Texas Capitol grounds, the middle of a desert preserve is a passive place when compared to, say, the classrooms of public schools.

Also important to the *Van Orden* analysis is that the two elected branches of government, the executive and legislative, acknowledge the historical role of the Latin cross.<sup>148</sup> A large difference between *Van Orden* and *Buono* is that the cross is not part of a larger grouping of historical and cultural monuments. The Supreme Court, however, using the analysis from *Van Orden*, would likely overlook the cross's vacant surroundings because of the important secular meaning that the cross conveys and the more than seven decades that the cross stood undisturbed and unchallenged at the top of the outcropping in the Mojave Preserve. For these reasons, the Supreme Court should not find an Establishment Clause violation in *Buono* or with any similar Latin cross war memorial. However, because the Establishment Clause issue was never raised in *Buono*, and assuming that the Latin cross war memorial violates the

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144. See *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (stating that the cross is located in a 1.6 million acre preserve).

145. See *id.* (describing the Latin cross as the undisputed preeminent symbol of the Christian religion and that it cannot be confused with a symbol of another religion).

146. See *Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005) (viewing the cross as a memorial for Christian soldiers only).

147. See *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (providing the inscription of the original signs placed by the VFW: "The Cross, Erected in Memory of the Dead of All Wars").

148. See *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (giving examples of the importance of the Decalogue to the other two Federal branches of government and their outward expression of its importance to American culture).

Establishment Clause, if the Supreme Court decides to hear *Buono*, the Court will logically take up the question of how the government, finding itself engaged in an Establishment Clause violation, can cure such a violation. Is removal necessary, or will transfer to private ownership be sufficient?

Four issues will confront the Court in determining whether the transfer effectively cured the perceived endorsement. First, does the reversionary clause in the land transfer prevent a finding of transfer of true ownership? Second, do the strenuous efforts exerted by Congress to keep the memorial standing create unusual circumstances? Third, can the White Cross War Memorial escape its history? Fourth, does the cross shape of the memorial in itself create an insurmountable problem? While recognizing that segregation is a different situation, the Court can delve into past segregation cases for guidance in exploring the process of escaping constitutional violations. Additionally, the Court should examine the speech implications of both the Seventh and Ninth Circuit approaches and deal with the significance of the conflict between the federal branches of government here.

### C. Objections to Real Separation

#### 1. The Reversionary Interest

At first glance, the government appears to have an uphill battle in proving real separation because the government retained a reversionary interest in the property in the event that the property is no longer used as a war memorial.<sup>149</sup> Prior public function jurisprudence cautions against such an action as it may be interpreted as a sham transaction.<sup>150</sup> Cases mentioned by the Ninth Circuit such as *Hampton v. Jacksonville*<sup>151</sup> and *First Unitarian Church of Salt Lake v. Salt*

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149. See 16 U.S.C. § 410aaa-56 (2000 & Supp. 2007) (noting the reversionary clause). The clause states:

REVERSIONARY CLAUSE.—The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war. If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.

*Id.*

150. See *Hampton v. Jacksonville*, 304 F.2d 320, 322 (5th Cir. 1962) (raising the possibility that reversionary clauses provide a way for the city to maintain control over a property, while giving the impression that the land no longer belongs to the government).

151. See *id.* at 323 (deciding that a reversionary clause vests complete present control to the government).

*Lake City Corp.*<sup>152</sup> provide that a reversionary clause in the transfer creates state action.<sup>153</sup> In *Hampton*, the city of Jacksonville sold a municipal golf course to a private group to maintain segregation policies and placed a reversionary interest in the deed very similar to the one in *Buono*.<sup>154</sup> Forty years later, in *First Unitarian Church*, the Tenth Circuit held that where the government sells a portion of land to a private religious group and maintains a pedestrian easement, the First Amendment applies on that easement.<sup>155</sup> These cases, however, can be distinguished from the land transfer question. The Tenth Circuit explained this distinction when it revisited the reversionary issue in 2005 with *Utah Gospel Mission v. Salt Lake City Corp.*<sup>156</sup> There, the city sold an easement to a private church, but it maintained a right of re-entry if the private religious group did not maintain the property as a landscaped space.<sup>157</sup> The Tenth Circuit distinguished *Hampton* and other cases from the same era involving a government reversionary interest, stating that the government in *Hampton* remained inextricably intertwined with the ongoing operations of the private entity and the property served the same primary function as before the sale.<sup>158</sup>

While the primary function of the war memorial in *Buono* will be the same as it was under government ownership, the reverter does not give the

152. See *First Unitarian Church of Salt Lake v. Salt Lake City Corp.*, 308 F.3d 1114, 1131 (10th Cir. 2002) (concluding that a government easement is a public forum).

153. See *id.* at 1122 (deciding that the First Amendment free speech clause applies even on private land when the government holds an easement on the land).

154. See *Hampton*, 304 F.2d at 320 (discussing the fact that the city was forced to desegregate its public golf courses).

155. See *First Unitarian Church*, 308 F.3d at 1122 (providing that the First Amendment applies on private land because of an easement).

156. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1257 (10th Cir. 2005) (deciding that the government, even though it held a reversionary interest, was not inextricably intertwined with the property). The court stated:

As noted, the property in this case serves a very different primary function than when under City ownership, and the right of reverter does not require that the Plaza be used only for a particular purpose, grant the public a right of access, give the City the right to control expressive activities on the Plaza, or prohibit the LDS Church from erecting fences or closing the Plaza altogether. The right of reverter merely acts to preserve the property as a landscaped space, maintain the view corridor, and allow for public utility easements. To the extent that these subsidiary functions are encouraged, the City is not inextricably intertwined with the ongoing operations of the LDS Church or the Plaza.

*Id.*

157. See *id.* (explaining the reversionary interest held by the government and the terms by which the land becomes government property again).

158. See *id.* (distinguishing the reverter cases of the segregation era).

government the right to remain inextricably intertwined with the memorial.<sup>159</sup> No statute gives the National Park Service authority to trespass on private land to maintain the cross once the transfer is complete.<sup>160</sup> The Ninth Circuit clearly misread the statutes. There is no provision in the United States Code that authorizes the government to enter private land.<sup>161</sup> Further, there is nothing to maintain. The cross is made of two pipes, and it sits on a rock.<sup>162</sup> There is no grass to mow, sidewalks to sweep, or facilities to keep clean.<sup>163</sup> The National Park Service never "maintained" the cross at all until the government placed a cardboard box over the cross.<sup>164</sup>

The reversionary clause gives the land back to the government if the land ceases to be a national war memorial.<sup>165</sup> The veterans could decide to take the cross down tomorrow and replace it with a nonsectarian-shaped memorial and the land would not revert back to the government. As long as *any* war memorial is standing and the veterans own the property, the government is not telling the veterans what ideas they must express on their property. This transfer allows a long-standing war memorial to remain, but if for some reason the veterans do not want to leave the memorial standing, the land goes back to the government at the Secretary of the Interior's discretion.<sup>166</sup>

## 2. The "Herculean Efforts": Purpose versus Motive

The California federal district court in *Buono* considered the government's efforts to save the cross "herculean."<sup>167</sup> These "herculean efforts" included

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159. See 16 U.S.C. § 410aaa-56 (2000 & Supp. 2007) (lacking any provision for government maintenance of the memorial).

160. See *id.* §§ 1, 2, 431 (2000) (giving the National Park Service authority to maintain national memorials but never mentioning the right to trespass onto private land to maintain a memorial that had been sold to a private party).

161. See *id.* (giving nothing to support what the Ninth Circuit states using 16 U.S.C. §§ 1, 2, 431 (2000)).

162. See Nystrom, *supra* note 142 (describing the current cross's material as two pieces of iron pipe welded together).

163. Telephone Interview with Dennis Schramm, Superintendent, Mojave National Preserve, in Barstow, Cal. (Feb. 27, 2008).

164. *Id.*

165. See 16 U.S.C. § 410aaa-56 (2000 & Supp. 2007) (providing that if the land is no longer being used as a national war memorial by the VFW, the land will revert back to the government).

166. See *id.* (providing that this all happens at the discretion of the Secretary of the Interior).

167. See *Buono v. Norton*, 364 F. Supp. 2d 1175, 1181-82 (C.D. Cal. 2005) (emphasizing the magnitude of the government's involvement).



designating the cross a national war memorial, preventing the use of federal money to dismantle any World War I memorial, authorizing the Secretary of the Interior to take funds and install a replica plaque of the original, and transferring the land to the VFW.<sup>168</sup> Whether these acts by Congress and the President should be considered unusual circumstances making it impossible to disentangle the government from the property or regular acts taken to comply with the Constitution, presents a challenging question for the Court.

The Supreme Court can move in one of two directions. The Court could follow the district court's opinion and decide that such efforts by the government cannot possibly lead to a clean break from endorsement of a religion.<sup>169</sup> On the other hand, the Court could follow the Seventh Circuit's approach and decide that the government is honestly trying to disentangle itself from the situation while preserving the history and tradition of the monument.<sup>170</sup> Even if Congress's intent in undertaking what the Ninth Circuit termed "herculean efforts" was religiously motivated, prior Supreme Court case law points to the conclusion that this fact will not weigh into the Court's analysis.<sup>171</sup>

While an unconstitutional *motive* of Congress is not a factor to be considered by the Supreme Court, the Court should consider whether Congress actually has a legitimate *purpose*.<sup>172</sup> The distinction between motive and purpose is important and not just semantics.<sup>173</sup> In order for legislative action to

168. See *id.* (describing what makes the governmental actions "herculean" in nature).

169. See *id.* (invalidating the land transfer as a violation of the injunction issued by the courts to remove the cross from the outcropping).

170. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005) (allowing the city to transfer the land to the Eagles).

171. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (providing that a court should give deference to the legislature when it characterizes its actions as having a secular purpose); see also *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (stating that there is a presumption that government officials will abide by the Constitution and clear evidence is needed to overcome it); *Petition for Rehearing of Defendants-Appellants at 2*, *Buono v. Kempthorne*, No. 05-55852 (9th Cir. Nov. 20, 2007) (showing that the panel decision is at odds with prior case law).

172. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) ("Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act . . . what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.").

173. As the government argues, *Board of Education v. Mergens*, 496 U.S. 226 (1990) is especially relevant because it dealt with the Establishment Clause. *Petition for Rehearing of Defendants-Appellants at 10*, *Buono v. Kempthorne*, No. 05-55852 (9th Cir. Nov. 20, 2007). In *Mergens*, Justice O'Connor wrote that denying a Christian club permission to meet at a public high school after school hours violated the Equal Access Act. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990); see also 20 U.S.C. § 4071 (2008) (making it unlawful for schools to deny

survive Establishment Clause scrutiny, it must have a valid secular purpose.<sup>174</sup> In *United States v. O'Brien*,<sup>175</sup> the Court refused to accept the proposition that illegal motivation leads to a finding of unconstitutional behavior.<sup>176</sup> Rather, the question of *purpose* involves the specific object of the legislation—what is the legislation trying to accomplish?<sup>177</sup> The answer to that question is usually either stated in the law itself or is apparent from the law's very provisions.<sup>178</sup> In *Buono*, Congress's stated purpose was to allay an Establishment Clause violation and to perpetuate a war memorial, both of which aims are secular in nature.<sup>179</sup>

The lesson from the case is that motivation does not matter if the government behaves in a proper manner. Similarly in *Buono*, the government transferred the land to get out of an Establishment Clause violation.<sup>180</sup> It is pure conjecture that the motivation of Congress was unconstitutional, but even if the motivation of Congress was to maintain and preserve a Christian symbol, what matters is the legislation's effect, not its motivation. The land transfer was legal, and assuming a fence gets built around the monument, the government does not force someone to look at the cross any longer as he walks through the desert preserve.

The Ninth Circuit's problem with the "herculean efforts" was that those actions, in the court's opinion, reaffirmed its belief that Congress was passing

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an open forum to a religious group). The Act provided equal access to secular and religious speech, therefore the act's purpose was not to endorse or disfavor religion. *Mergens*, 496 U.S. at 248. The *Mergens* Court also cites *Edwards v. Aguillard*, 482 U.S. 578 (1987), for the proposition that the court is deferential to a legislatively articulated secular purpose and *Mueller v. Allen*, 463 U.S. 388 (1983), as further support that the court is reluctant to ascribe unconstitutional motives to the states when a secular purpose can be discerned from the face of the statute. *Mergens*, 496 U.S. at 248–49.

174. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (stating that there may be more than one purpose for the statute, but there must be a valid secular legislative purpose).

175. *United States v. O'Brien*, 391 U.S. 367, 372 (1968) (holding that the statute forbidding the burning of draft cards is constitutional).

176. See *id.* at 382–83 (reviewing well-established jurisprudence that illicit motive on the part of the legislature does not defeat an otherwise constitutional statute).

177. See *id.* (focusing analysis of *purpose* on the specific object of the legislation in question).

178. See *Mueller v. Allen*, 463 U.S. 388, 394–95 (1983) ("This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute.").

179. Cf. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005) (emphasizing the "obvious" secular motive of selling land to avoid a constitutional problem).

180. See *Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005) (rejecting the government's position that the land transfer is valid because the government is seeking to escape a constitutional violation).

the laws in order to save a religious symbol for religious reasons.<sup>181</sup> This is an incorrect analysis for two reasons. First, the government tried to disentangle itself from the situation, and second, the result and the legitimate stated purpose matter, not the believed motivation. The land transfer resulted in private ownership of the land with the cross.<sup>182</sup> Without the fence around the cross, however, there is still arguably an endorsement problem.<sup>183</sup> Nonetheless, whatever Congress's intentions in passing all of the legislation, a constitutional result occurred.

In *Buono*, the stated *purpose* of Congress for the land transfer was to cure an Establishment Clause violation, while Congress's *motive* with the extensive legislation may have been to keep in place a religious symbol on government land. As a starting point, courts owe deference to the government's characterization of its purpose.<sup>184</sup> In addition, the government correctly argues that the Supreme Court has mandated that reviewing courts should read statutes to avoid constitutional infirmity.<sup>185</sup> The Seventh Circuit explicitly stated that a reviewing court in this situation is concerned with the purpose for the sale of the monument rather than its purpose at installation.<sup>186</sup> The purpose for which the monument has remained in the preserve for over seventy years is important in understanding why the government would want to keep it in its current location.<sup>187</sup> Like the Ten Commandments monument in *Mercier*, the cross in *Buono* has developed substantial local meaning.<sup>188</sup> At every stage in the government's strenuous efforts, the government remembered this point and

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181. See *id.* at 1182 (stating that the only way to view the government's efforts is as trying to maintain a religious symbol without curing the Establishment Clause violation).

182. See *Buono v. Kempthorne*, 502 F.3d 1069, 1075 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (providing the text of the land transfer between the private party and the government).

183. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000) (setting forth a standard for building fences and creating signs to ensure a reasonable observer would know that the land is no longer property of the local government, but instead a private, religious group).

184. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (providing that a stated secular purpose is entitled to deference).

185. See *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (stating that reviewing courts should read statutes as favorable toward the Constitution); *Petition for Rehearing of Defendants-Appellants at 2, Buono v. Kempthorne*, No. 05-55852 (9th Cir. Nov. 20, 2007) (arguing that statutes should be read to avoid constitutional infirmity).

186. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 704 (7th Cir. 2005) (focusing its attention on the purpose behind the sale).

187. See *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring) (noting the importance of the length of time a monument has stood undisturbed).

188. See *Nystrom*, *supra* note 142 (giving a history of how the people of the area are not bothered by the cross and have incorporated the monument into their local heritage).

made repeated statements that it was preserving a World War I memorial.<sup>189</sup> In addition, there was an "undeniably appropriate secular purpose of ensuring the presence of a war memorial on the site" as recognized by the Ninth Circuit.<sup>190</sup> Clear evidence must be shown on the part of Buono and the ACLU to overcome the presumption that government officials will uphold the Constitution.<sup>191</sup> Here, no such showing has been made.

### 3. *The History: Can the Monument Truly Escape Its Past?*

A third objection to real separation is whether the cross can overcome its past. In *McCreary County*, Justice Souter observed that "reasonable observers have reasonable memories" and that observers do not ignore the context of a monument.<sup>192</sup> Justice Scalia in dissent noted what he believes to be an inconsistency in the majority opinion—the majority's reliance on the monument erector's purpose rather than on the display itself.<sup>193</sup> The Court ends up with identical displays being treated differently.<sup>194</sup> Displays erected in silence are permissible, while the Court treats those erected after discussion and debate as unconstitutional.<sup>195</sup> The *McCreary County* majority disregarded Justice Scalia's criticism and stated that whether the display was motivated by sectarianism or lacked such intent is an important distinction.<sup>196</sup> In *Santa Fe*

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189. See *Buono v. Kempthorne*, 502 F.3d 1069, 1073–74 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (describing the government's efforts to memorialize the cross).

190. See *Paulson v. City of San Diego*, 294 F.3d 1124, 1132 (9th Cir. 2002) (en banc) (stating that San Diego's efforts to sell a cross war memorial served a secular purpose).

191. See *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (acknowledging that Congress, like the Court, has sworn to uphold the Constitution and that presumption will not be overcome without clear evidence to the contrary); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (assuming that Congress does not intend to infringe constitutionally granted and protected liberties); Petition for Rehearing of Defendants-Appellants at 9–10, *Buono v. Kempthorne*, No. 05-55852 (9th Cir. Nov. 20, 2007) (arguing that government officials have a duty to uphold the Constitution).

192. See *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (observing that the reasonable person has certain memories that he will not disassociate with a certain place).

193. See *id.* at 907 (Scalia, J., dissenting) (addressing that the objective observer will see the illogicality of the court's inconsistency in practice).

194. See *id.* at 907–08 (Scalia, J., dissenting) (comparing displays across the country similar to the display in *McCreary County* that are constitutional because the government's purpose, unlike that of *McCreary County, Kentucky*, was not "tainted with any prior history").

195. See *id.* (Scalia, J., dissenting) (reviewing the "absurdity" of the majority opinion).

196. See *id.* at 866 n.14 (responding to Justice Scalia's criticism by saying that he does not

*Independent School District v. Doe*,<sup>197</sup> a school district had student-led prayer before football games.<sup>198</sup> This practice was challenged in District Court as a violation of the Establishment Clause.<sup>199</sup> In response, the school district adopted a plan where the students would vote on whether a prayer would be said at football games.<sup>200</sup> If the students decided to have prayer by majority vote, the students would then select a member of the student body to give the invocation at the football game.<sup>201</sup> Justice Stevens, writing for the majority, stated that by viewing the evolution of the former prayers to the new practice of electing whether or not to pray and taking the history of the prayer into account, it was evident that the school district wanted to maintain the traditional invocation.<sup>202</sup> The Court held the school district's action to be in violation of the Establishment Clause.<sup>203</sup> Finally, in *Evans v. Newton*,<sup>204</sup> a public function case later discussed, the Court concluded that transferring an entire public park to private trustees would not pass constitutional muster.<sup>205</sup> A reasonable observer would associate the park with the city and the image of the two together is inseparable.<sup>206</sup>

The question becomes, is the history of the cross such that it cannot be viewed in any other way than as a religious object? Is it so deeply rooted in Christianity that a reasonable observer could not see the secular purpose? The answer is no. Both Ten Commandments cases lead to that conclusion. First in

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give the reasonable observer enough credit).

197. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 n.23 (2000) ("[W]e now hold only that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause.").

198. See *id.* at 294 (providing history that before 1995, the elected student council chaplain led prayer before every football game over the public speaker system).

199. *Id.*

200. See *id.* at 297 (discussing the alternative plan).

201. See *id.* (explaining how the two elections operated).

202. See *id.* at 309 ("The conclusion that the District viewed the October policy . . . as a continuation of the previous policies is . . . illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy.").

203. See *id.* at 317 n.23 (declaring that the revised practice is state-sponsored religion).

204. *Evans v. Newton*, 382 U.S. 296, 301 (1966) ("We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.").

205. See *id.* at 302 ("[W]e cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment.").

206. See *id.* at 301 (emphasizing the integral role of the park in the community as a public gathering place and the role the city has in watering, manicuring, patrolling, sweeping, and maintaining the grounds of the park).

*McCreary County*, in describing the majority's opinion, Justice Scalia says that "[d]isplays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional."<sup>207</sup> The White Cross War Memorial has been standing in the same location for seventy years.<sup>208</sup> The VFW placed it there to be a war memorial and no one objected for many years.<sup>209</sup> During that long time period, the cross came to develop a secular purpose.<sup>210</sup> The VFW was clear in its purpose in laying the monument: It is a memorial to the dead of all foreign wars.<sup>211</sup> The *McCreary County* majority noted that "it will matter to objective observers whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose."<sup>212</sup> The VFW did not place the cross with some sectarian motivation to force religion on observers, as the court implied was the case in *McCreary County*.<sup>213</sup> Looking at Justice Breyer's concurrence in *Van Orden* only reaffirms this reading of the Ten Commandments cases.<sup>214</sup> Seventy years of undisturbed history matters,<sup>215</sup> but history can, as in *Santa Fe*, sometimes cut against a finding of real separation and the curing of a constitutional infirmity.<sup>216</sup> A major difference between the scenario in *Santa Fe* and a land transfer is the fact that absolutely nothing changed in *Santa Fe* to the

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207. See *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 907–08 (2005) (Scalia, J., dissenting) (encapsulating the majority opinion's reasoning on why *McCreary County* and *Van Orden* are different).

208. See *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (stating that the original cross was laid in 1934).

209. See *id.* (citing the original plaque that provided the purpose for the cross being placed on top of the outcropping).

210. See *Nystrom*, *supra* note 142 (discussing how the community viewed the cross as a secular war memorial in addition to a religious symbol).

211. See *Buono*, 502 F.3d at 1072 (reviewing the VFW's dedication of the cross from 1934).

212. See *McCreary County*, 545 U.S. at 866 n.14 (describing why history does make a difference to the reasonable person).

213. See *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring) (describing the likely religious objectives of the executives of the Kentucky counties).

214. See *id.* at 703 (Breyer, J., concurring) (comparing the short and stormy nature of the Kentucky postings to the long, historical tradition of the Texas monument).

215. Cf. *id.* at 702 (Breyer, J., concurring) (weighing the history and tradition against a formulaic test and determining that the history and tradition of the monument is far more instructive).

216. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (holding that the alternative plan developed by the school district was still an establishment of religion, in part because the district could not escape its history).

perspective of the reasonable observer.<sup>217</sup> A person going to the football games and unfamiliar with the litigation would have no idea that anything had changed.<sup>218</sup> A land transfer done properly, on the other hand, will mark off the land well enough that a reasonable observer will have no doubts that there has in fact been a change and that the government is no longer endorsing religion.<sup>219</sup>

#### 4. *The Appearance*

The District Court for the Central District of California believed that the appearance of the cross alone was enough to doubt its status as a war memorial.<sup>220</sup> In the court's opinion, a sectarian war memorial was really a memorial only to the soldiers of the particular faith who relate to the symbol.<sup>221</sup> The government has a strong argument, supported by other judges who also disagree with the Ninth Circuit, that religious symbols, including Latin crosses, can serve secular government purposes.<sup>222</sup> The veterans who placed the memorial dedicated it not just to the Christian dead but to all the dead soldiers of foreign wars.<sup>223</sup> The organization that paid for the material and maintained it for decades decided to use a sectarian symbol.<sup>224</sup> Whether it is the erector's

217. *See id.* (surmising that the new prayer policy was just a continuation of a popular practice that violated the Constitution).

218. *See id.* (noting that there is no real difference between the pre-1995 policy and the alternative policy).

219. *See Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005) (concluding that a land transfer meeting the Seventh Circuit requirements overcomes any doubts a reasonable observer may have as to who owns the land).

220. *See Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005) (discussing the inherently religious message of a sectarian war memorial).

221. *See id.* (explaining that the appearance cannot be overcome).

222. *See Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) (O'Scannlain, J., concurring) (arguing that a cross war memorial serves a secular purpose); *see also Briggs v. Mississippi*, 331 F.3d 499, 505–06 (5th Cir. 2003) (finding that including a cross on a state flag serves the purpose element of the *Lemon* test); *Friedman v. Bd. of County Comm'rs*, 781 F.2d 777, 789 n.2 (10th Cir. 1985) (allowing a cross to remain in a city's seal); *Am. Atheists v. Duncan*, 528 F. Supp. 2d 1245, 1253 (D. Utah 2007) (finding that roadside crosses to mark the death of state troopers are secular); *Petition for Rehearing of Defendants-Appellants at 8, Buono v. Kempthorne*, No. 05-55852 (9th Cir. Nov. 20, 2007) (providing examples of cross war memorials with a secular government purpose).

223. *Buono v. Kempthorne*, 502 F.3d 1069, 1072, (9th Cir. 2007) *amended and superseded and reh'g denied by Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008).

224. *See id.* (observing that the most recent cross was constructed by Henry Sandoz, the man who participated in the land transfer).

purpose or the display itself that matters is a policy question that the Supreme Court may or may not choose to address, but in *McCreary County*, the Court said that the purpose of erection rather than the display itself is what matters.<sup>225</sup>

#### *D. Insights from the Public Function Doctrine*

While different from *Buono* in many respects, the public function cases highlight an issue and provide a glimpse of how the Supreme Court handled this issue with a similar progression: (1) government violates the Constitution; (2) government seeks to get out from under constitutional violation; (3) government transfers public land to private parties to escape violation. In the mid-twentieth century, the Supreme Court heard a series of state action cases dealing with private groups performing municipal activities and running elections.<sup>226</sup> The basic holdings of these cases were that when private individuals or groups are endowed by the state with government-like powers, these individuals become instrumentalities of the state and are subject to the state's constitutional limitations.<sup>227</sup> The Supreme Court case most similar to *Buono* is *Evans v. Newton*.<sup>228</sup> In that case, the mayor and city council of Macon, Georgia were devised a piece of land to create a park for white

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225. See *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (Scalia, J., dissenting) (comparing similar displays across the country that are constitutional because the government's purpose, unlike that of *McCreary County*, was not "tainted with any prior history").

226. See *Evans v. Newton* 382 U.S. 296, 299 (1966) (stating that when private groups or individuals get government-like powers, they become liable for Fourteenth Amendment violations as a state actor).

227. In order to exclude black Americans from participating in elections, the Texas Democrat Party held a pre-primary under the label of the Jaybird Party. *Terry v. Adams*, 345 U.S. 461, 462–63 (1953). In *Terry v. Adams*, the Jaybirds claimed that they were exempt from the provisions of the Fifteenth Amendment because they were a private, self-governing, voluntary club. *Id.* at 463. The Jaybird primary became the only effective part of the elective process, thereby excluding blacks from participating in meaningful elections. *Id.* at 469. The Supreme Court held that primary elections could not be taken private. *Id.* In 1981, the Supreme Court in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), decided a public function case dealing with hiring decisions made by a private school receiving public funds. *Id.* at 832. A school director fired a teacher who spoke out against a policy decision. *Id.* at 834. Each year, the government provided at least ninety percent of the school's funds. *Id.* at 832. Chief Justice Burger, writing for the court, held that the funds contributed by the state for students to attend the private school did not mean that hiring decisions constituted state action. *Id.* at 843. The relationship between the school and its teachers is not changed because the State pays tuition for the majority of the school's students. *Id.* at 841.

228. See *Evans*, 382 U.S. at 301 (explaining that the city of Macon attempted to transfer a well-established city park into private hands).



residents in 1911.<sup>229</sup> Recognizing violations of the Constitution, the city opened the park to all people.<sup>230</sup> In response, some people attempted to remove the city as trustee and appoint new, private trustees, creating a private park for whites only.<sup>231</sup> The Supreme Court held that where the tradition of municipal control had become firmly established, the mere substitution of trustees did not transfer the park from the public to the private.<sup>232</sup> The Court analogized the park's role in the community to a fire department or police department.<sup>233</sup> The park was municipal in nature, open to every white person without a selective element.<sup>234</sup>

The public function cases provide the current Supreme Court Justices with a frame of reference to examine the land transfer question. While not directly on point with the Establishment Clause controversy at hand, the current Court can draw a parallel between the public function cases, where a traditional government function was placed into private parties' hands, and the land transfer question, where the government is exchanging or selling government property to private parties.

In *Buono*, the Ninth Circuit correctly noted that the public function cases do not establish that a transfer of land from the government to a private individual presumptively cures a constitutional violation.<sup>235</sup> The Ninth Circuit, however, overlooked two aspects when commenting on the public function cases. First, just because the transfer is not a presumptive cure, does not mean that transfers, such as the one in *Buono*, are invalid and not curative of the constitutional violation facing the municipality. Second, the public function cases can be distinguished in three ways from the land transfer question.

To find whether the sale of land from the state to the private party terminated state involvement without creating a sham, a court must look to a number of factors and come to a conclusion based on the totality of the facts in

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229. *Id.* at 297.

230. *Id.*

231. *See id.* (showcasing the strong feelings of those advocating for a continued segregated park environment).

232. *See id.* at 301 (noting that the park is an integral part of the city and the momentum it gained from this status cannot be undone by a transfer).

233. *See id.* (concluding that the nature of the park itself makes a difference in the analysis of the case).

234. *See id.* at 301 (showing that the only admission requirement into the park was race, therefore, it was nonselective).

235. *See Buono v. Kempthorne*, 502 F.3d 1069, 1082 n.13 (9th Cir. 2007), *amended and superseded and reh'g denied by Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (reviewing the public function cases to state that a transfer does not presumptively fix an Establishment Clause violation).

the record.<sup>236</sup> The Seventh Circuit examined three specific factors when it conducted its review of the record in *Marshfield*.<sup>237</sup> First, a court needs to look at the fair market value of the land in question.<sup>238</sup> A court must analyze the sale of land worth \$3,000 at a price of \$1 to a private group differently from the sale of such land at a fair \$3,000 price.<sup>239</sup> In the first case, the sale is not a true purchase, but a gift from the government. While in the second case, a valid sale of land occurs.<sup>240</sup> Second, a court must look to the maintenance and upkeep of the property after the exchange has taken place.<sup>241</sup> When a local government continues to provide utilities and maintenance to the transferred land, it creates the outward appearance that the government is still actually in control of the land and endorsing the religion expressed on the private land.<sup>242</sup> Third, the court must look to factors to determine whether the transaction is a sham where the city, seeking to rid itself of an Establishment Clause violation, transfers the land but really continues to own it or carry responsibility for maintaining it behind the scene.<sup>243</sup>

Three factors distinguish the land exchange question from the public function cases: (1) the government remained intimately involved in exclusive government functions in the public function cases;<sup>244</sup> (2) the government in the public function cases engaged in elaborate shams to avoid complying with the Constitution;<sup>245</sup> and (3) the public function cases only remain relevant to the

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236. See *Evans v. Newton*, 382 U.S. 296, 300 (1966) (discussing the need to sift facts and weigh circumstances).

237. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000) (presenting three "typical improprieties" for consideration).

238. See *id.* (discussing the importance that the private group paid a fair market price for the land).

239. See *id.* (relating that \$1 would be considered a gift if the land is worth \$3,000).

240. See *id.* (stating that a sub-market rate sale price is a gift from the government to a religious organization).

241. See *id.* (advancing the idea that maintaining the property after transfer signifies intention of continuing ownership).

242. See *id.* (comparing *Evans v. Newton*, where the city still provided utilities and services to the private park, with *Marshfield*, where the city ceased providing electrical service to the property and stopped maintaining the area).

243. See *id.* (noting that Reinders and Freedom from Religion based their entire argument on the restrictive covenant, which limited the use of the land to public park purposes, but did not void the land transfer).

244. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 n.7 (1982) (distinguishing *Evans* as a case where the government really provided all of the public services and disguised itself in the acts of private individuals).

245. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000) (contrasting the facts of the case with *Evans*, where the government set up a straw purchaser and continued to act as if nothing had changed).

land transfer question if there is continuing and excessive involvement in the new private land by the government.<sup>246</sup> In the public function cases, when ownership transferred, nothing in the nature or character of the park or elections changed—the government participated in every aspect of decision-making and control.

The land transfer in *Buono* can be distinguished from *Evans* in that it is not a sham transaction because the whole preserve was not transferred to a private group.<sup>247</sup> A valid land exchange occurred, giving the VFW, the group that originally placed the cross atop the rock outcropping, ownership of the Latin cross.<sup>248</sup> The Ninth Circuit stated that the NPS remains responsible for the cross because the NPS "is responsible for the supervision, management, and control" of national memorials.<sup>249</sup> Assuming for the moment that the Ninth Circuit is correct on this point, this control exercised by the NPS is different from the control in *Evans*, where the city continued to maintain the entire segregated "private" park, and from the control in *Terry v. Adams*,<sup>250</sup> where the state rubber-stamped the election results of a party that excluded blacks. According to the Ninth Circuit, the NPS maintains national memorials, whether publicly or privately owned.<sup>251</sup> From this assumption, the federal government still plays a role with the now private land after the transfer. If this is in fact true, given the typical and routine nature of this governmental involvement, the Supreme Court probably would not give much weight to the continuing maintenance of the memorial by the NPS. There are two reasons why this does not present a problem for the government. First, the cross requires little to no maintenance. Even when the government owned the property the cross sits on, it did not maintain it.<sup>252</sup> Second, the Ninth Circuit misread the statutes. The government not only lacks a mandate but also lacks a right to enter onto the

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246. See *id.* (stating that public function remains a relevant topic if there is continuing and excessive involvement between the government and private individuals).

247. See *Buono v. Kempthorne*, 502 F.3d 1069, 1074 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (noting that the exchange was one acre with the cross for five acres of land located elsewhere within the Preserve).

248. See *id.* at 1075 (listing the consideration received by the government from the Veterans in exchange for the land with the cross).

249. See *id.* at 1082–83 (objecting to private control because the National Park Service is statutorily charged with this duty).

250. *Terry v. Adams*, 345 U.S. 461, 470 (1953) (holding that the Jaybird-Democratic election machinery denied minorities the right to vote).

251. See *Buono*, 502 F.3d at 1074 (providing that the "supervision, management, and control" of national memorials rests with the National Park Service (citing 16 U.S.C. §§ 2, 431 (2000))).

252. *Supra* notes 163–64 and accompanying text.

now-private property.<sup>253</sup> Further, the Supreme Court has noted that *Evans* is limited to the unique facts of the case.<sup>254</sup>

### *E. Suppressing Private Speech*

Prior Supreme Court jurisprudence is not the only factor that will influence the Court's decision. The central question before the Court is a question of remedies, but the case also has significant implications for the First Amendment Free Speech Clause.<sup>255</sup> In order for the Court to analyze the speech implications, it must first decide not only whether the speech that the government seeks to regulate is public or private, but also whether the forum where the speech is occurring is public or private.<sup>256</sup>

The Mojave Preserve is a federal preserve.<sup>257</sup> If the Court chooses to analyze the preserve like a park, it will acknowledge that the Mojave Preserve is a traditional government forum.<sup>258</sup> The Supreme Court has refused to answer whether private property can be a public forum,<sup>259</sup> but the Seventh Circuit looked to three factors to answer this question. A court first looks to the historical association of the property with a public forum.<sup>260</sup> Second, a court sees if the property has been dedicated to public use.<sup>261</sup> Third, a court examines the physical location of the private property in relation to the rest of the park.<sup>262</sup> In *Buono*, up until the transfer occurred, the VFW property was

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253. See 16 U.S.C. §§ 1, 2, 431 (2000) (providing no manner in which to go onto a private party's land to maintain the monuments).

254. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 n.8 (1978) (limiting *Evans* to the unique facts involved).

255. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000) (describing the dramatic difference between government speech endorsing religion and private speech endorsing religion).

256. See *id.* at 494 (stating that unless the sale of a section of the public land to a private group changes the nature of the land, the court applies traditional public forum analysis to the property).

257. *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded and reh'g denied by Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008).

258. See *Marshfield*, 203 F.3d at 494 (stating that a park is a traditional public forum).

259. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 742 (1996) (declining to address the question of to what extent private property may be denoted as a public forum).

260. *Marshfield*, 203 F.3d at 494.

261. *Id.*

262. *Id.*

part of the national preserve.<sup>263</sup> The VFW's property is indistinguishable from the rest of the preserve.<sup>264</sup> The VFW did not create any boundaries to inform the reasonable observer that the VFW property is not owned by the government.<sup>265</sup> Unlike the *Marshfield* case, *Buono*'s reversionary clause does not contain a restrictive covenant that the private property must be used for public use.<sup>266</sup>

The result is private religious speech at a traditional public forum.<sup>267</sup> Under *Capitol Square Review & Advisory Board v. Pinette*,<sup>268</sup> the Supreme Court provided analysis for when the government may inadvertently endorse religion when private religious expression occurs in a traditional public forum.<sup>269</sup> Under *Capitol Square*, the Court found a violation of the Establishment Clause either when the speaker is not a purely private person or the forum is not open equally.<sup>270</sup> Examining the facts and circumstances of *Buono* under the endorsement test, a court must ask whether a reasonable person would perceive the existence of the memorial to promote or disfavor religion or a particular religious belief.<sup>271</sup> A reasonable observer would see that no barrier exists and believe that the federal government is endorsing one religion over others because the cross stands by itself and not in a grouping.<sup>272</sup> Had the transfer occurred and signs and a barrier been put up to distinguish the

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263. See *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (discussing the history of the cross).

264. See *id.* (explaining the position of the cross in the preserve).

265. See *id.* at 1086 (noting that a reasonable observer would perceive government endorsement of religion).

266. See *id.* at 1075 (citing the reversionary clause).

267. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 495 (7th Cir. 2000) (acknowledging that the analysis is convoluted, but nonetheless, the situation involves a case of private religious speech at a traditional public forum).

268. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (holding that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms").

269. See *id.* at 760 (discussing the facts of the case where a private group expressed a religious message on government property).

270. See *id.* (stating when and where religious speech cannot violate the Establishment Clause).

271. See *id.* at 778 (O'Connor, J., concurring) (stating that the endorsement test is appropriate for reaching a result).

272. Cf. *Marshfield*, 203 F.3d at 497 (noting the problem of being unable to distinguish private property from the rest of the government land).

memorial from the rest of the traditional public forum, that would have ended the Establishment Clause problems.<sup>273</sup>

In a *Buono*-type situation, the government must cure the perception that it has endorsed the speech of the private property.<sup>274</sup> This leaves the courts with two options: First, estop the private land owner from exercising freedom of speech and free exercise on its own property, or second, find a way to differentiate the public property from the private property.<sup>275</sup> The latter approach is the better approach.<sup>276</sup> Once the private group constructs a fence with signs surrounding it, a reasonable observer should no longer have doubts over who owns the property.<sup>277</sup> Assuming that a fence is built around the Latin cross like the fences constructed in *Marshfield* and *Mercier*, there is no elaborate ruse on the part of the government to have any person believe that the federal government endorses the religion represented by the cross on the outcropping or that the government owns that land. With the fence and the signs posted on the fence, it could not be made any clearer to a reasonable person that the government does not own the land.<sup>278</sup> As the cross currently stands, however, without a fence differentiating it from the rest of the preserve, a reasonable person would most likely think that the cross is owned by the federal government and that the government is endorsing a particular religion.

#### *F. Elected Branches of Government*

The other factor outside of judicial precedent for the court to take into consideration is the split among the federal branches of government. If the Supreme Court decides to affirm the Ninth Circuit decision and say that land transfers do not cure Establishment Clause violations, it will create a split

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273. *See id.* (advocating that the perceived endorsement of religion can be cured without removing the cross).

274. *See id.* (reviewing that, because the government may not find private religious speech inappropriate solely on its content, the only redressable harm that the government has to fix is the perception that it has endorsed speech).

275. *See id.* (giving the government two choices in remedying the problem of perceived endorsement and suggesting that one is better than the other).

276. *Id.*

277. *See id.* (doubting that a reasonable person would confuse speech endorsed by the City with speech made on well-demarcated private property).

278. *See Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005) (providing that after noting the government's extensive efforts, *Marshfield* precedent, and all the steps taken to do the land transfer properly, no reasonable observer could doubt the government's noninvolvement).

between the elected branches of government and the appointed branch of government.<sup>279</sup>

The Supreme Court has made clear on more than one occasion that it is the province of the judiciary to interpret the law and no other branch can propose an alternative explanation.<sup>280</sup> The courts do need to protect the integrity of the Constitution, but on a policy issue as widely controversial as this matter, to go against the two branches of government directly elected by and representing the people is not ideal. Reasonable minds could differ on this issue.<sup>281</sup> The Ninth Circuit took a hard line approach, going against the will of the people.<sup>282</sup> The Seventh Circuit, on the other hand, created a compromise that preserves the history of the monuments without sacrificing constitutional principles.<sup>283</sup> The Seventh Circuit acknowledged that what it was doing, by forcing barriers to be erected, did not please everyone and did not likely please anyone, but it was "constitutionally appropriate."<sup>284</sup> The *Mercier* court allowed a long standing monument to remain and stated that if the local citizenry at some point in the future wanted to remove the statue to make room for another purpose, they should turn to the political process rather than the legal process.<sup>285</sup>

### G. The New Test

While the Seventh Circuit "unusual circumstances" approach for testing the validity of land transfers functions well, it leaves some unanswered questions. The Supreme Court should adopt the three examples of unusual circumstances devised by the Seventh Circuit as the first three prongs of the

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279. See *Buono v. Kempthorne*, 502 F.3d 1069, 1082 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (discussing congressional action aimed at transferring the land).

280. See *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809) (stating that if the state legislatures annul the judgments of the federal courts, the Constitution becomes a solemn mockery).

281. See, e.g., *Buono v. Kempthorne*, 527 F.3d 758, 759 (9th Cir. 2008) (declining to read the Seventh Circuit's opinion as adopting a presumptive cure).

282. See *Buono*, 502 F.3d at 1082, *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (showing that Congress, the elected branch of government, differs from the Ninth Circuit on the appropriate remedy).

283. See *Mercier*, 395 F.3d at 705 (discussing how the sale achieved the practical goal of extricating the city from the endorsement while preserving the monument in its present location).

284. See *id.* (reiterating that neither side is completely happy with the result).

285. *Id.*

test, but add two additional prongs from its own precedent in Establishment Clause cases. The first of the new prongs responds to the need for distinguishing the legitimate legislative purposes from unconstitutional motivations, which the Court has continually pointed to as a crucial distinction.<sup>286</sup> The second new prong aims to protect the free speech interest of a private party land owner. At the same time, the free speech interest must be balanced against the perception of government endorsement of religion. The new, combined test consists of the following five elements: (1) a court must look to the substance of the transaction as well as its form to find out if the government "has actually disentangled itself" from the improper endorsement, because a court will not rubber stamp sham transactions using a straw purchaser;<sup>287</sup> (2) a transfer must comply with state laws governing the transfer of government land;<sup>288</sup> (3) a transfer of property must not be significantly below fair market value as the sale would imply that the land is a gift to the purchasing organization;<sup>289</sup> (4) a reviewing court may not question the motives of the legislative body that approves the transaction, but may review the stated purpose to determine constitutionality; and (5) a court should consider the First Amendment speech rights of the party being suppressed and the perception of government endorsing this speech.

#### *H. The New Test in Application*

The new test devised in the previous section takes principles from the Seventh Circuit and Supreme Court cases discussed earlier in this Note and combines them into a single test that helps to answer some questions the previous approach left unanswered. Taking the new test and applying it to the facts of *Buono* provides an answer. The discussion section advanced the argument that the government disentangled itself from improper endorsement.<sup>290</sup> Additionally, the sale complied with laws regarding the

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286. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) ("[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.").

287. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000) (discussing that only if a court finds "continuing and excessive involvement between the government and private citizens" should the court consider the land transaction invalid).

288. See *id.* (finding that these private groups must comply with state property laws to avoid a sham transaction).

289. See *id.* (comparing when a land transfer is a purchase as opposed to a gift from the government to the religious group).

290. See *supra* Part IV (discussing the government's efforts to transfer the land around the cross); see also 16 U.S.C. § 410aaa-56 (2000 & Supp. 2007) (including nothing to allow the



transfer of land and was transferred in a fair exchange.<sup>291</sup> The government had a secular legislative purpose in transferring the land.<sup>292</sup> Lastly, however, while the VFW's free speech rights should not be estopped, there is currently no distinctive separation between the government land and the VFW's land.<sup>293</sup> Therefore, the White Cross Memorial fails the test. This could quickly be remedied, just as the statue of Jesus was remedied in *Marshfield*.<sup>294</sup>

To experiment with the new test, imagine some slight twists on the facts of *Buono*. First, assume that a local religious organization placed a similar cross in a park, with the blessing of the city council, in order for residents to observe the cross and be reminded of the sacrifice their God made for them. In this hypothetical, even satisfying the first three prongs and the last prong, there would still be a problem because the legislative purpose lacked a secular purpose. Thus, according to current Establishment Clause jurisprudence, the cross should not have been erected in the first place. The legislators explicitly made known the religious purpose of the cross. If the local government seeks a land transfer to this religious group, it is not seeking to transfer an object with a dual secular and religious meaning. The object also has not become a symbol of the community that could carry any message other than its religious meaning.

Now, assume that a town with a high Jewish population decides to honor *all* the dead of the wars in Afghanistan and Iraq. The only veterans group in the town has a Jewish affiliation. They ask the veterans group if they would like to install a memorial to honor the dead of those wars. The group, without running the design by the city, places a Star of David war memorial in the local park. The group makes clear in its dedication and on a plaque that the memorial is to honor *all* of the dead soldiers who fought in Iraq and Afghanistan. Over the next few years, the memorial takes on great significance to the town as Jewish and non-Jewish soldiers from the community have died in

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government to come onto the Veteran's property once the land is transferred).

291. See 16 U.S.C. § 410aaa-56 (2000 & Supp. 2007) (allowing Henry Sandoz to convey to the Secretary a five acre parcel of land in the preserve in exchange for the Sunrise Rock outcropping with the cross).

292. See *Paulson v. City of San Diego*, 294 F.3d 1124, 1132 (9th Cir. 2002) (en banc) (stating that San Diego's efforts to sell a forty-five-foot-high cross war memorial served a secular purpose); see also Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004) (acknowledging that Congress, like the Court, has sworn to uphold the Constitution and that presumption will not be overcome without clear evidence to the contrary).

293. See *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (noting that there is no sign to tell observers that the land is not owned by the government).

294. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 701 (7th Cir. 2005) (explaining the proposed remedy ordered by the court on remand, including a wall and signs to surround the monument).

the war. A few years later, a Christian businessman and an agnostic teacher team up to remove the memorial as a violation of the Establishment Clause. Given the relatively short history of the monument, the town may have a hard time claiming it is not a violation of the Establishment Clause. Assume that the monument is declared to be an Establishment Clause violation and that, after such declaration, the city seeks to transfer the memorial to the local veterans group and the group places a fence and signs around the memorial. Unlike the first hypothetical, the government never announced a purpose for a religious monument. The monument has taken up a dual religious and secular meaning for the community. The government sought the transfer to escape a violation of the Constitution and maintain a symbol of the community. At no point did any legislator state that the monument had anything but a secular purpose.

### V. Conclusion

Imagine living in an America where all signs of Christianity are not only ripped out of the public square, but also forbidden on private property. It is a scenario the Founding Fathers who wrote and approved the Establishment Clause, yet attended church services in the United States Capitol and the Treasury Building, could have never imagined.<sup>295</sup> The Supreme Court, when taking on this land transfer question, should adopt a modified version of the Seventh Circuit's approach in *Marshfield* and *Mercier*. First, the history and tradition of the monument with its dual religious and secular purposes should be an important factor for allowing the cross to stay in its present location.<sup>296</sup> Imagine Greece tearing down the Parthenon or the United Kingdom destroying Stonehenge because of the monument's religious nature—such actions would be unthinkable. Second, the government can overcome the objections to whether or not real separation can be achieved. The reversionary interest in the property does not force the VFW to maintain a Latin cross on the property forever,<sup>297</sup> and the government's strenuous efforts to achieve the land transfer

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295. See MARGARET BAYARD SMITH, *THE FIRST FORTY YEARS OF WASHINGTON SOCIETY, PORTRAYED BY THE FAMILY LETTERS OF MRS. SAMUEL HARRISON SMITH (MARGARET BAYARD) FROM THE COLLECTION OF HER GRANDSON, J. HENLEY SMITH* 13 (Gaillard Hunt ed., 1906) (commenting on President Thomas Jefferson's regular attendance at the church services held each Sunday in the United States Capitol Building).

296. See *Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring) (weighing the history and tradition against a formulaic test and determining that the history and tradition of the monument is far more instructive).

297. See 16 U.S.C. § 410aaa-56 (2000 & Supp. 2007) (requiring that the land be used as a World War I memorial).

worked a secular purpose in attempting to escape an Establishment Clause violation.<sup>298</sup> Further, the cross in *Buono*, like the Ten Commandments monument in *Van Orden*, can escape its past.<sup>299</sup> The initial cross was constructed seven decades prior to any challenges, and during that time the cross picked up a dual secular meaning for observers as a World War I memorial.<sup>300</sup> As to the final objection of the appearance, courts have recognized that the appearance of the cross itself can serve a secular purpose.<sup>301</sup> Third, public function, raised by the defendants in *Marshfield*, *Mercier*, and *Buono* is dissimilar to what is going on in the land transfer cases because there is no elaborate sham by the government.<sup>302</sup> The White Cross Memorial land is actually being turned over to the private party, and the government is not secretly running the land behind the scenes.<sup>303</sup> Fourth, the government should not suppress religious speech on private property. Given the option to tear down a monument or to erect a barrier, the latter should be chosen every time.<sup>304</sup> The ACLU, given its asserted mission of protecting all First Amendment rights, should not be advocating for such a result.<sup>305</sup> The consequences of such a precedent could be drastic. Finally, the Ninth Circuit is in direct opposition to not only another circuit, but the branches popularly elected by the

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298. See *Paulson v. City of San Diego*, 294 F.3d 1124, 1132 (9th Cir. 2002) (en banc) (stating that San Diego's efforts to sell a forty-five-foot-high cross war memorial served a secular purpose); see also *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (acknowledging that Congress, like the Court, has sworn to uphold the Constitution and that presumption will not be overcome without clear evidence to the contrary).

299. See *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring) (stating the short and stormy nature of the Kentucky postings compared to the long, historical tradition of the Texas monument).

300. See *Nystrom*, *supra* note 142 (describing the dual meaning that the cross represents to the local residents).

301. See *supra* note 222 and accompanying text (providing three specific examples of other courts finding a Latin cross to have a secular meaning).

302. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000) (contrasting the facts of the case with *Evans*, where the government set up a straw purchaser and continued to act as if nothing had changed).

303. Cf. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 n.7 (1982) (distinguishing *Evans* as a case where the government really provided all of the public services and disguised itself in the acts of private individuals).

304. See *Marshfield*, 203 F.3d at 497 (observing the two options presented to the government and stating that "[t]he latter—not the former—is the appropriate solution").

305. See Am. Civil Liberties Union: About Us, <http://www.aclu.org/about/index.html> (last visited on Jan. 20, 2008) (on file with the Washington and Lee Law Review) ("The mission of the ACLU is to preserve all of these protections and guarantees: Your First Amendment Rights—freedom of speech, association and assembly; freedom of the press, and freedom of religion . . .").

people.<sup>306</sup> While the will of the people should not dictate what the Constitution means, it can be persuasive.<sup>307</sup>

The Seventh Circuit's strong, functioning line of jurisprudence is ready for an adaptation by the Supreme Court. In addition to the three examples of "unusual circumstances" laid out by the Seventh Circuit, this Note proposes that two additional prongs, derived from First Amendment jurisprudence, should be added by the Court. First, sham transactions using a straw purchaser are not to be permitted. A reviewing court should look to the substance of the transaction as well as its form to find out if the government "has actually disentangled itself" from improper endorsement.<sup>308</sup> Only if a court finds "continuing and excessive involvement between the government and private citizens" should the court consider the land transaction invalid.<sup>309</sup> Second, a sale must comply with state law for the sale of government land.<sup>310</sup> Third, the government must not sell the property significantly below fair market value as that would imply that the land is a gift to the religious organization.<sup>311</sup> Fourth, the reviewing court must examine the stated intent of the government actors and not a potential motive. Finally, the speech implications must weigh into the decision of the court. The adoption of this five-part test would present a livable compromise to end a bitter fight. On one hand, a symbol which is despised by a group may be shielded from public view. On the other hand, the monument that not only represents a period of American history, but also means a great deal to the local community and America's servicemen and women who have fought and given their lives to make this lawsuit possible, can continue to stand as it has for the last seventy years. As the Seventh Circuit wisely stated in 2000, selling the land and building a fence around monuments does not make either party happy, but it does provide a constitutional solution.<sup>312</sup>

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306. See *Buono v. Kempthorne*, 502 F.3d 1069, 1082 (9th Cir. 2007), *amended and superseded and reh'g denied by* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (discussing congressional action aimed at transferring the land).

307. See *Mapp v. Ohio*, 367 U.S. 643, 653–54 (1961) (holding that the exclusionary rule is applicable to the states through the Fourteenth Amendment partly because of the rule's growing acceptance by the states); see also *United States v. Watson*, 423 U.S. 411, 423 (1976) (considering the judgment of Congress in determining whether an arrest was reasonable).

308. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000) (addressing these typical improprieties to determine whether an "unusual circumstance" is present that would make the land transfer inappropriate).

309. See *id.* (discussing when a land arrangement does not pass constitutional muster).

310. See *id.* (finding that these private groups must comply with state property laws to avoid a sham transaction).

311. See *id.* (comparing when a land transfer is a purchase as opposed to a gift from the government to the religious group).

312. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005) (predicting the reaction to the court's decision).

