FROM SUBSTANCE TO SHADOWS: AN ESSAY ON *SALAZAR V. BUONO* AND ESTABLISHMENT CLAUSE REMEDIES

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ABSTRACT

Most disputes about the Establishment Clause center on its substantive meaning; whether, for example, a state subsidy promotes religion, the phrase "In God We Trust" can appear on currency, or a display of the Ten Commandments is unconstitutional. Often overlooked and lurking behind these substantive disputes is a question about what remedies are available when an Establishment Clause violation is found. Typically, an injunction prohibiting the subsidy, practice, or display is the choice. In Salazar v. Buono, *however, the Supreme Court was confronted with an unusual case for two reasons. First, the doctrine of* res judicata *formally barred the Court from reaching the substantive finding that a Latin cross on federal property violated the Establishment Clause. Second, because the district court had declared invalid a federal statute transfering the land to a private party, and—unable to address the substantive ruling—the Court was forced to address the law of remedies in an*

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atypical posture. Reversing the lower courts, in Buono *a plurality of the Court held that the district court erred when it invalidated the land transfer. This Essay critically analyzes* Buono *and argues that the plurality failed to appreciate the remedial significance of the challenge to the land transfer. The plurality, it seems, attempted to re-litigate the substantive Establishment Clause violation despite the* res judicata *bar. In so doing, I argue, the Court put form over substance and ignored the essential command of the Establishment Clause—government neutrality. To make my case, I draw on political theory to clarify the concept of neutrality, and propose a novel way of thinking about Establishment Clause remedies by drawing on decisions considering the extent of Congress's Section 5 Enforcement Power under the Fourteenth Amendment. I conclude by trying to blur the sharp distinction the plurality draws between public and private space.* Buono *is a significant case, but not because it contributes to or clarifies the law regarding the Establishment Clause. Instead,* Buono *is significant because it demonstrates how important remedial flexibility is to ensuring rights, while at the same time exemplifying the perils of remedial formalism.*

"The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." —Cummings v. Missouri[1]

I. INTRODUCTION

A primary purpose of the Establishment Clause is to limit conflicts in political life.[2] In many ways it certainly has. For instance, unlike debates over whether Congress may or should establish an official national language, there is universal agreement that Congress cannot declare a national religion.[3] Yet,

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[1] Cummings v. Missouri, 71 U.S. 277, 325 (1866).

[2] *See, e.g.*, LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE ix (1986) ("Given the extraordinary religious diversity of our nation, the establishment clause functions to depoliticize religion; it thereby helps to defuse a potentially explosive situation."); BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 24-25 (2001) (discussing how efforts to privatize religion were designed to reduce political conflicts).

[3] *Compare, e.g.*, Peter Applebome, *Small New York Town Makes English the Law*, N.Y. TIMES, May 13, 2010, at A22 (describing a small rural town that adopted English as its official language on the premise that "'[f]or too long, the federal government has shirked its duty by not passing English as the official language of the United States'") (quoting Roger Meyer, a Town Council member), with KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 573 (3d ed. 2007) ("Clearly, it would violate the Establishment

controversies around the Establishment Clause have long been significant in social life, and are now arguably more present than ever.[4] Naturally, these political controversies also manifest themselves in the law, where the Supreme Court has been famously vexed over how to conceptualize the right the Establishment Clause protects.[5] Some argue that only coercion is prohibited,[6] while others—the "nonpreferentialists"—maintain the view that the Clause permits significant state intertwinement with religious speech, so long as groups are not discriminated against in obtaining any benefit from government agencies.[7] Then there's the *Lemon* test, which has been the long-criticized leading formulation of thinking about the Establishment Clause.[8] Finally, Justice O'Connor's "endorsement" approach, which refines the *Lemon* analysis, has been the recent front-runner in thinking about establishment in the context of religious displays on public property.[9]

In sharp contrast, very little energy or attention is focused on what the appropriate remedy should be for an Establishment Clause violation. Unlike the we-

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Clause for government to place a Latin cross on the dome of the state capitol. . . The Establishment clause, as a minimum, prohibits theocracy.").

[4] Recent controversies include a cross being erected at the Ground Zero Memorial and Museum, public officials announcing statewide prayer events, and Congress requiring the president to set a national day of prayer. *See* Freedom From Religion Found., Inc. v. Obama, 641 F.3d 803 (7th Cir. 2011) (dismissing challenge to the National Day of Prayer statute); Manny Fernandez, *Judge Dismisses Atheists' Suit Against Texas Governor's Prayer Rally*, N.Y. TIMES, July 28, 2011; Elissa Gootman, *Atheists Sue to Block Display of Cross-Shaped Beam in 9/11 Museum*, N.Y. TIMES, July 28, 2011, at A20.

[5] *See, e.g.*, Murray v. City of Austin, 947 F.2d 147, 163 (5th Cir. 1991) (Goldberg, J., dissenting) (noting that "confusion . . . reigns" in applying the "matrix" of legal tests that comprise Establishment Clause doctrine); *see generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 12.2.1 (3d ed. 2006) (describing competing theories of the Establishment Clause).

[6] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (advocating a coercion test); County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting) (arguing primarily along the lines of coercion, but occasionally employing nonpreferentialist rhetoric).

[7] *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), is a good recent example of some of the intertwinement issues faced by local governments. *See also* Bernadette Meyler, Summum *and the Establishment Clause*, 104 NW. UNIV. L. REV. COLLOQUY 95 (2009). For a discussion of the nonpreferential view, see LEVY, *supra* note 2, at Ch. 4.

[8] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); *see* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. REV. 463, 468 (1994) ("[The *Lemon* test] is possibly the most maligned constitutional standard the court has ever produced."); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) (criticizing *Lemon*).

[9] *See* County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (adopting Justice O'Connor's approach); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

ll-developed approaches to the substance of establishment, "the analysis of remedies is an *ad hoc* and often superficial exercise with little doctrinal grounding."[10] This approach—focusing heavily on substantive rights and treating them as superior to, and independent from, their "lowly" remedies—has been termed "rights essentialism."[11] Such a view construes rights and remedies as if they were unrelated and, as a consequence, fails to see the significance that the remedy plays in determining the value of the underlying right.[12] By contrast, the "remedial equilibration" thesis argues that the only way to understand the value of a right is by looking to its remedy, *i.e.*, by looking at what courts actually *do* when a right has been violated.[13] If a right is violated and there is no remedy that right—despite any lofty language that might be employed to describe it—is actually meaningless. For this reason, rights and remedies are "functionally inseparable."[14] Thus, from the perspective of remedial equilibration (and to paraphrase the language of *Cummings*), in order for the Constitution to deal in "substance," remedies cannot be left in the "shadows." More specifically, to ensure that the First Amendment's prohibition on establishment is secure, the enforcement of that right must be flexible enough to enable courts to prevent efforts to undercut the right "however disguised."[15]

Through the lens of *Salazar v. Buono*, this essay aims to begin filling the analytical gap for establishment remedies in the context of symbolic expression on public monuments and displays.[16] *Buono* dealt with the somewhat infamous cross atop Sunrise Rock in the federally-owned Mojave Desert Preserve. On establishment grounds, the district court entered judgment for plaintiff Frank Buono and declared the cross unconstitutional. For remedy, the district court issued an injunction prohibiting the government "from permitting the display of

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[10] Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 212-13 (2004) (quoting Tracy A. Thomas, *Congress's Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 679-80 (2001)).

[11] *See generally* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

[12] *See id.* at 861-72; David B. Owens, *Fourth Amendment Remedial Equilibration: A Comment on* Herring v. United States *and* Pearson v. Callahan, 62 STAN. L. REV. 563, 567-69 (2010).

[13] See KARL N. LLEWELLYN, THE BRAMBLE BUSH 83-84 (1951) ("Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do."); Levinson, *supra* note 11, at 858 ("Rights are dependent on remedies not just for their application to the real world, but for their scope, shape and very existence.").

[14] Levinson, *supra* note 11, at 858.

[15] Cummings v. Missouri, 71 U.S. 277, 325 (1866).

[16] Salazar v. Buono, 130 S. Ct. 1803 (2010). Establishment problems come in a variety of contexts, *e.g.*, whether money provided to religious groups is unconstitutional, whether religion is being taught or ignored by schools, and whether certain government displays (like crèches and crosses) are sufficiently religious to offend the Constitution. Remedial questions will differ by context and this Essay focuses exclusively on religious symbols.

the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[17] The court of appeals affirmed, but the government decided not to ask the Supreme Court to hear the case. As such, that judgment became final and unreviewable. At the time, the finality of that judgment was of no concern—the government chose not to petition the Court because it thought it didn't need to. Instead, and in the meantime, Congress transferred a small patch of land surrounding the cross to a private group. This transfer, the government assumed, put the cross on private land and thereby beyond the ambit of the Establishment Clause. Undeterred, Buono went back to court and asked the district court to enjoin the land-transfer on the basis that it would undermine the original injunction. The district court agreed, struck the land transfer, and was again affirmed on appeal. This time, the government turned to the high Court, which took the case. Given this posture, when *Buono* reached the Supreme Court, the law of remedies for Establishment Clause violations was finally thrust into the limelight; *res judicata* barred the Court from considering the initial judgment, and the only issue formally on the table was whether the district court's *subsequent* move—enforcing its injunction—should stand.[18]

Through Justice Kennedy, a plurality of the Court reversed and explained that the district court "should have evaluated Buono's modification request in light of the objectives of the 2002 injunction."[19] Relying heavily on the fact that the cross now stood on formally private land, the plurality remanded the case for "revaluation."[20] Justice Alito, however, would have decided the issue then and there: the land transfer resolved the Establishment Clause violation.[21] Justice Scalia, with Justice Thomas in agreement, argued that Buono did not even have standing to challenge the land transfer because he was seeking an extension beyond, not a vindication of, the original injunction.[22] Rounding out the plurality, the Chief Justice, who completely joined Justice Kennedy's opinion, wrote separately to invoke *Cummings*. He noted that at oral argument Buono's lawyer apparently said it would be permissible for the government to tear down the cross, sell the land, and then allow a private party to resurrect it. Because, in the words of *Cummings*, the "'Constitution deals with substance, not shadows,'" the Chief Justice thought the land transfer should stand.[23] The

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[17] *Buono*, 130 S. Ct. at 1812 (internal quotation marks and citation omitted).

[18] *See* BLACK'S LAW DICTIONARY 1425-26 (9th ed. 2009) ("An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions, and that could have been—but was not—raised in the first suit."); *Buono*, 130 S. Ct. at 1815.

[19] *Buono,* 130 S. Ct. at 1819.

[20] *Id.*

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

[22] *See id.* at 1824 (Scalia, J., concurring in the judgment) ("In my view we need not—indeed, cannot—decide the merits of the parties' dispute, because Frank Buono lacks Article III standing to pursue the relief he seeks.").

[23] *Id.* at 1821 (Roberts, C.J., concurring) (quoting Cummings v. Missouri, 71 U.S. 277,

decision was five-to-four; Justice Stevens penned the principle dissent in which Justices Ginsburg and Sotomayor joined, and Justice Breyer dissented alone.

The irony of *Buono*, I will argue, is that the plurality rests the impetus for its decision on shadows, not substance. As *Cummings* commands, the district court's declaration that the land-transfer statute could not stand was meant to prevent indirect, unlawful establishment achieved through "disguise."[24] From the remedial equilibration perspective, the district court did the right thing: it eschewed an overly formal view of the public-private distinction, and looked instead to the *substance* of the land transfer statute.[25] The land-transfer, as we shall see, was not the typical sale of property from a government entity to a private party—it was calculated to keep the cross up through a formal title transfer without anything changing on the ground.[26] For miles, the land surrounding the cross remains government land, and no passerby would have known that the sliver of land containing the cross belonged to a private party.

From the perspective of remedial enforcement, this essay offers a broader view of how to think about remedies in the context of religious displays in public places. Given my focus, there is some overlap between the analysis here and parts of the dissenting opinions, which focused heavily on the fact that *Buono* should have questions less about the meaning of the Constitution and more about how violations should be fixed. Justice Breyer, for example, noted that the "legal principles that answer the question presented are found not in the Constitution but in cases that concern the law of injunctions."[27] Yet, my focus is different in at least two ways. First, I am not strictly worried about the doctrinal implications of *Buono*, and I do not grapple with the various cases that consider whether other land-transfers are consistent with the Establishment Clause.[28] Second, I want to use *Buono* as the vehicle for raising two related, more theoretical issues that I think motivate the plurality: (1) hostility towards the district court's original finding of an Establishment Clause violation, and (2) a form-over-substance approach to the public-private distinction.

Part I of this Essay briefly describes Establishment Clause basics from the rights side, and gives the backdrop for the dispute in *Buono*. Part II analyzes Justice Kennedy's decision for the plurality, and, by way of drawing out important issues related to Establishment Clause remedies, theorizes the notion of neutrality. I then propose a novel way of thinking about evaluating remedies by drawing analogies to rights enforcement under Section 5 of the Fourteenth Amendment. Part III contrasts *Buono* with other areas where the public-private

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325 (1866)). *But see Buono*, 130 S. Ct. at 1833 n.3 (Stevens, J., dissenting) (noting that the portion of the transcript to which Justice Roberts referred dealt with a hypothetical situation that was distinct from *Buono* itself).

[24] *Cummings*, 71 U.S. at 278.

[25] *See* Buono v. Norton, 364 F. Supp. 2d 1175 (C.D. Cal. 2005) ("*Norton III*").

[26] *See* Buono v. Kempthorne, 527 F.3d 758, 760-61 (9th Cir. 2008).

[27] *Buono*, 130 S. Ct. at 1843 (Breyer, J., dissenting).

[28] *See, e.g.*, *infra* at n.129.

distinction is relevant, which demonstrates the problematic nature of the plurality's unusually strong—and inflexible—adherence to the public-private distinction.

II. THE SET-UP

A. *The Unsettled Legal Theory of Establishment*

Nearly any discussion of tests for finding Establishment Clause violations begins with *Lemon v. Kurtzman*, which created a three-part test for determining whether a government action violated the Establishment Clause.[29] Following significant criticism of *Lemon*, Justice O'Connor proposed a reformulation of the establishment inquiry while concurring in *Lynch v. Donnelley*.[30] The touchstone of the establishment prohibition, Justice O'Connor argued, is whether government has endorsed religion, which she derives from the proposition that the "Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[31] Justice O'Connor focused on two methods of demonstrating how religion might be relevant to an individual's standing in the community: (1) excessive entanglement that might interfere with independence, and (2) endorsement or disapproval of religion. For my purposes, the real player here is the second method: "Endorsement sends a message to nonadherents that that they are political outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[32] Notably, Justice O'Connor's approach requires that endorsement be assessed from the perspective of an objective "reasonable observer," who is "deemed more informed than the casual passerby."[33] As in other areas of the law, the reasonableness standard is not based upon data from average citizens (say, by making the issue a question for the jury). Instead, determining how a reasonable person would view a display or monument is a "legal question to be answered on the judicial interpretation of social facts."[34]

In *Allegheny v. American Civil Liberties Union*, a majority of the Court

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[29] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) ("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.").

[30] Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

[31] *Id.* at 687.

[32] *Id.* at 688.

[33] Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779 (1995). (O'Connor, J., concurring).

[34] *Lynch*, 465 U.S. at 694.

adopted O'Connor's test, but Justice Kennedy penned a bitter dissent.[35] Justice Kennedy argued that the Establishment Clause is primarily about coercion (in both direct and indirect forms), and sharply criticized the endorsement test. To Kennedy, focusing on endorsement is inconsistent with prior precedent; extreme, in that it would require abandoning nearly all public Thanksgiving and Christmas celebrations; and, would be difficult to apply because the "reasonable observer" standard is both wrong and unmanageable.[36] Despite this criticism, and my own concerns about making the reasonable observer inquiry judge-centered, Justice O'Connor's view remains insightful for theorizing the Establishment Clause. In *Allegheny*, Justice O'Connor built on her foundation in *Lynch* and added that, "as a theoretical matter, the endorsement test captures the *essential command* of the Establishment Clause."[37] Such a command derives from the fact that:

> [O]ur citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be *neutral* in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.
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> An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.[38]

Justice O'Connor's rationale for looking to endorsement provides an underlying theory behind the violation to be prevented, which can tell us some things about an appropriate remedy.

Three remedial insights are worth noting. First, remedies that do not actually *cure* the endorsement or disapproval of a particular religion—those that fail to account for the numerous subtle ways government can show favoritism—are inadequate. Part of the problem, and this is especially true of symbols and displays, is that religious messages establish the priority of one group to the exclusion of another. For this reason, courts rarely give money damages for establishment violations. In addition to being hard to quantify here, money damages are inadequate because they fail to address the fact that the message of disapproval continues when the symbol remains. Put differently, money dam-

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[35] County of Allegheny v. ACLU, 492 U.S. 573 (1989); *Lynch,* 465 U.S. at 686 (Kennedy, J., dissenting).

[36] *See Lynch*, 465 U.S. at 677.

[37] *Allegheny*, 492 U.S. at 627 (emphasis added).

[38] *Id.* at 627-28.

ages suffer an inherent inadequacy because they are retrospective and meant to repair a harm that has already occurred.[39] Injunctive relief, however, is prospective and stops the harm occurring now, and prevents ongoing or future harm through a court's coercive power (and most notably the contempt sanction).[40]

Second, as Justice Kennedy seemed to acknowledge in *Lee v. Weisman*—an establishment case addressing religious prayer at school events—coercion is too cramped a vision of establishment to respect the fact that we live in a pluralistic society.[41] In the school prayer case, Justice Kennedy moved to a type of indirect, "psychological" coercion as the basis for deeming a prayer unconstitutional. That is much harder to do when considering a religious display. This is why, perhaps, Justice Kennedy's *Allegheny* dissent struggles with inherent limits of a coercion-based conception of establishment: "Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, . . . but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."[42] Looking to whether government has "put its weight behind" an effort to proselytize begins to look something like Justice O'Connor's endorsement approach—both aim to end the state's *imprimatur* on religious speech.

Finally, and returning to the insight from *Cummings*, we should look to the "essential command" of the Establishment Clause as endorsement because it can help us determine whether a violation has been remedied. If coercion is the command, as some would have it, then our remedial apparatus for symbolic establishment might not even exist—that's why Justice Kennedy needed to avoid taking such a line in *Allegheny*. If, however, the Establishment Clause embraces a broader prohibition on endorsement—with a basis in neutrality and the equal liberty of those in our plural society—then a commitment to more aggressive and potentially creative remedies will be required to vindicate the Clause.[43] Crucially, *Cummings* teaches that we cannot let mere shadows—indirect methods of avoiding a direct prohibition—end the enquiry; to exist, robust rights require a commitment to vindicating substance over form. That lesson applies equally, if not more compellingly, when our focus is the remedy for a proven violation.

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[39] *See* DAN. B. DOBBS, THE LAW OF REMEDIES 3-4 (2d ed. 1973).

[40] *See id.* at 6-8.

[41] Lee v. Weisman, 505 U.S. 577 (1992) (Kennedy, J.) (applying the "psychological coercion" analysis for a school graduation ceremony invocation).

[42] *Allegheny*, 492 U.S. at 661 (Kennedy, J., dissenting).

[43] For more on "equal liberty" as a basis for religious freedom, see generally CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

Before moving to *Buono*, two five-four decisions deserve mention. Decided the same day, one held a Ten Commandments display unconstitutional, while the other found a similar display lawful.[44] First, in *McCreary County v. ACLU of Kentucky*, the Court, with Justice Souter writing for the majority, focused on neutrality, applied the *Lemon* test, and deemed a Ten Commandments display an establishment violation.[45] The displays in *McCreary* were gold-framed and located in two rural Kentucky courthouses. Following the posting of the Commandments in 1999, local politicians passed religiously infused resolutions of support for their new monuments. After litigation began, officials posted the Magna Carta, the Declaration of Independence, the Bill of Rights, and other documents near the Ten Commandments in support of their argument that the displays were meant to be historical and not religious. *McCreary* was an easy case; the legislative history revealed a thinly-veiled attempt to disguise an overtly religious purpose.[46] In *Van Orden v. Perry*, a more difficult case, the Court held that a six-foot statue inscribed with the Ten Commandments erected in 1961, which was one of seventeen monuments in a park surrounding the Texas Capitol, was constitutional. In somewhat of a surprise, given the composition of the Court, Justice Breyer was the single vote of difference between the two cases. In his concurrence in the judgment, Justice Breyer labeled the case "borderline" and eschewed any formal test for finding an establishment violation; instead, sound "legal judgment" was the basis for his conclusion.[47] Through an intensely contextual approach involving a variety of factors like historical experience and physical proximity in relation to other monuments, Justice Breyer concluded that that capitol display was constitutional.[48] After *Van Orden* and *McCreary* it is unclear whether courts should look to Justice O'Connor's "endorsement" test, *Lemon*'s three factors, Justice Breyer's contextual approach, or if Justice Kennedy's view will soon set the standard.[49]

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[44] For a brief, but informative analysis of both, see Allison Kidd-Miller, *The Supreme Court's 'Out with the New, in with the Old' Approach to Religious Displays*, 52 OCT. FED. LAW 18 (2005).

[45] McCreary County v. ACLU, 545 U.S. 844 (2005).

[46] *See id.* at 851-60 (describing the factual background and blatant religious references of some public officials).

[47] *See* Van Orden v. Perry, 545 U.S. 677, 700 (Breyer, J., concurring in judgment) ("If the relation between government is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment."); *cf.* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 1 (2006) ("Sound constitutional approaches to the religion clauses cannot be reduced to a single formula or set of formulas, although we can identify major considerations that should guide legislators and judges.").

[48] *See Van Orden*, 545 U.S. at 701-05.

[49] The Supreme Court recently passed on its most recent opportunity to consider McCreary County's new Ten Commandment displays, which were also deemed violations of the

B. *Frank Buono and The Cross*

Sitting atop "Sunrise Rock" in the federally-owned Mojave Desert Preserve sat a five-foot Latin cross.[50] Located in Southern California, the Mojave Preserve is expansive—1.6 million acres, or 2,500 square miles, of territory—but the cross was visible from the nearest road, roughly 100 yards away. Originally, the cross went up in 1934, and was donated by the Veterans of Foreign Wars ("VFW") sixty years before Congress created the Preserve. Since 1935, Sunrise Rock has been an off-and-on gathering place for the Easter holiday. But, the National Park Service has not opened any other area of Sunrise Rock to allow individuals to erect additional displays, and there are no other displays or monuments in the area.[51]

In 1999, the Park Service received a letter from a retired park employee who now identifies as "Sherpa San Harold Horpa." Horpa's letter asked for permission to erect a "stupa"—a dome-shaped Buddhist shrine—near Sunrise Rock and the cross.[52] Following a letter from the ACLU urging the Park Service to grant Horpa's request, the Service decided instead to conduct a historical review of the cross. Because the history of the cross, in the Park Service's estimation, made it unworthy of designation in the National Register of Historic Places, they announced plans to remove the cross. Saying "no" to the stupa and saying "yes" to removing the cross would, from the Service's perspective, facilitate avoidance of thorny Establishment Clause issues. But, not so fast. In December of 2000, Congress passed an appropriations bill preventing any federal funding from being used to remove the cross, which effectively prohibited Service employees from taking down the cross.[53] In 2001 in light of the appropriations bill, Frank Buono, a former park employee and frequent park visitor, filed a lawsuit against the Secretary of the Interior, the Regional Director of the Service, and the Superintendent of the Preserve seeking to have the cross removed.[54] Before the district court entered its final judgment, Congress designated the cross and the area around Sunrise Rock "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war."[55]

Establishment Clause. *See* ACLU v. McCreary County, 607 F.3d 439 (6th Cir. 2010) (*en banc*), *cert. denied* 131. S. Ct. 1474 (2011).

[50] Buono v. Norton, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002) ("*Norton I*"). The past-tense is appropriate here not because of any legal judgment, but because two weeks after the *Buono* plurality remanded the case, the cross was stolen. *See* David Kelly, *Mojave Cross is Missing; Theft Occurred Soon After Supreme Court Ruled in Its Favor*, L.A. TIMES, May 12, 2010, at A1.

[51] *Norton I*, 212 F. Supp. 2d 1205.

[52] *Id.* at 1206.

[53] *Id.* at 1206-07.

[54] *Id.* at 1204.

[55] Dep't of Defense Appropriations Act, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2278 (2002).

Despite Congress's action, in 2002 the district court ruled in favor of Buono, and issued a judgment providing that the defendants were "permanently restrained and enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[56] Nonetheless, Congress again passed an appropriations bill prohibiting government funds from being used to remove the cross.[57] On appeal, the Ninth Circuit Court of Appeals affirmed on the merits in full.[58] Nestled in a footnote, however, was a slight remedial alteration. The appellate court stayed the injunction to the extent that it required *removal* of the cross, but "did not stay alternative methods of compliance with, or additional obligations imposed by, the district court's order."[59] In the short term, the government covered the cross with a tarp and later a plywood box.[60] Thereafter, Congress passed a land-transfer statute giving the cross and a small patch of surrounding land to the VFW.[61] In the words of the court of appeals, the land transfer "would leave a little donut hole of land with a cross in the midst of a vast federal preserve."[62] In addition, the land transfer came with strings attached that, taken together, "evince continuing governmental control" over the cross.[63] These encumbrances are numerous: a designation of the cross as a national memorial commemorating " 'the United States participation in World War I and honoring the American veterans of that war' "; the Park Service retains overall management supervision and control of national memorials; the Secretary of the Interior retained duties to maintain the cross and install a plaque up to the tune of $10,000; and, the transfer was conditioned upon the VFW maintaining the land as a war memorial subject to a right of reversion triggered if the land was no longer maintained as a war memorial.[64] In light of the statute, the government did not appeal the Ninth Circuit's judgment. Accordingly, the judgment—that the cross violated the Establishment Clause and that the proper remedy was a permanent injunction preventing the government from "permitting the display of"—became final and unreviewable.[65]

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[56] Buono v. Norton, 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005) (internal quotation marks deleted) ("*Norton III*").

[57] Department of Defense Appropriations Act, Pub. L. 107-248, § 8065(b), 116 Stat. 1551 (2003).

[58] Buono v. Norton, 371 F.3d 543 (7th Cir. 2004) (Kozinski, J.) ("*Norton II*").

[59] *Id.* at 545 n.1.

[60] *See Norton III*, 364 F. Supp.2d at 1177.

[61] *Id.*

[62] Buono v. Kempthorne, 502 F.3d 1069, 1071 (7th Cir. 2007).

[63] *Id.* at 1073-74

[64] *Id.* at 1082-83 (9th Cir. 2008) (quoting Pub. L. No. 108-87, § 8121(a)-(f), 117 Stat. 1054, 1100 (2003)).

[65] *See* Salazar v. Buono, 130 S. Ct. at 1814 (2010) ("The Government therefore does not—and could not—ask this Court to reconsider the propriety of the 2002 injunction or the District Court's reasons for granting it.").

Accordingly, when Congress sold the land to the VFW in 2004 through an appropriations bill, Buono challenged that transfer as a sham transaction to avoid the district court's permanent injunction.[66] The district court considered case law (mostly from the Seventh Circuit) indicating that such transfers are usually permissible, unless "unusual circumstances" taint the transaction.[67] Upon finding several irregularities, including the method of transfer, the government's continued interest in the land, and the fact that the "private" land remained visually indistinguishable from the surrounding land, the court turned to the remedial question.[68] To the district court, it was clear that the land transfer was an unlawful "attempt by the government to evade the permanent injunction enjoining the display of the Latin cross atop Sunset Rock," which led the court to deem the transfer invalid.[69] The court of appeals reached the same conclusion.[70]

The procedural posture, therefore, narrowed the issue before the Supreme Court to "whether the District Court properly enjoined the government from implementing the land-transfer statute."[71] Even in this narrow posture, the Court reversed.

III. JUSTICE KENNEDY, INJUNCTIVE RELIEF, AND THE GOAL OF NEUTRALITY

A. *Reaching for the Right*

In finding that the district court erred, Justice Kennedy's opinion for the plurality demonstrates the ease at which remedial questions can be turned into arguments about rights. Put narrowly, as Justice Kennedy explained, the district court "did not consider whether the statute in isolation would have violated the Establishment Clause, and it did not forbid the land transfer as an independent constitutional violation. Rather, the court enjoined compliance with the statute on the premise that the relief was necessary to protect the rights Buono had secured through the 2002 injunction."[72] Note what Justice Kennedy does here—he rebukes the court for engaging in a bit of "constitutional avoidance" by addressing only the remedial question without considering the thorny rights-side issue. As reframed, turning a question about the propriety of an injunction (a remedial question, and the question presented) into one about whether there was an additional *rights* violation (by passing the land transfer statute), Justice Kennedy shifts the issue presented from whether the 2004 injunction was properly vindicated into whether the land transfer was justified on its own footing.

Justice Kennedy's move has three consequences worth noting here. First, it

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[66] *Norton III*, 364 F. Supp. 2d at 1177.

[67] *Id.* at 1178-79.

[68] *Id.* at 1178-82.

[69] *Id.* at 1182.

[70] *Kempthorne*, 502 F.3d at 1081-86.

[71] Salazar v. Buono, 130 S. Ct. 1803, 1815-16 (2010).

[72] *Buono*, 130 S. Ct. at 1816.

demonstrates how remedial equilibration—which sees the link between rights and remedies rather than attempting to keep them separate—makes discussing remedies in isolation difficult. Instead, even when discussing the remedy alone, there is a temptation to be drawn back into rights construction, and a strong belief on the rights side is likely manifest itself in how robust one thinks a remedy should be. In practice, had the district court addressed whether the land transfer itself was an additional Establishment Clause violation, it would have been forced to contend, again, with *Lynch, Lemon*, *McCreary*, and *Perry*, *i.e.*, reconsider the substantive right question. That, of course, would have provided the Supreme Court with a basis for doing so as well, and afforded the Court its own end-around the barrier *res judicata* imposed in *Buono*.

Second, asking the district court to evaluate the land transfer independently demonstrates the difficulty of disentangling the right from remedy when dealing with a permanent injunction. In other words, linking the right and remedy was, in some ways, unavoidable. The law concerning injunctive relief, the main remedy for symbolic displays, tees up the problem of disentangling the rights question from the remedial one by setting them on a collision course. To justify a preliminary injunction, "the plaintiffs must show that they are likely to succeed on the merits, that they are likely to suffer irreparable harm without the injunction, that the harm they would suffer is greater than the harm that the preliminary injunction would inflict on the defendants, and that the injunction is in the public interest."[73] The same basic standards apply, but are slightly altered for permanent injunctions. Most important here, as a general matter, there is an inverse relationship between the likelihood of success on the merits (which requires looking to the substantive law) on one hand, and the showing of irreparable harm (which looks to the urgency of the facts on the ground).[74] For example, to get an *ex parte* temporary restraining order, one's showing of immediate harm must be high, while their showing on the likelihood of success on the merits can be much lower. At the other end, however, a permanent injunction is justified even when the extent of irreparable harm is low; other remedies (usually, money damages) need only be inadequate. At the same time, a permanent injunction can only be ordered after actual success on the merits. The permanent injunction, therefore, further eviscerates the line between right and remedy. In some instances, it will be near-impossible to separate them, which explains why so few cases deal with the issues separately; the remedy is often easily assumed. In *McCreary*, for example, no one doubted that deeming the Ten Commandments unconstitutional meant one thing: they must be removed. That was the case even though, at the time, only a preliminary injunction had been ordered. In short, given that injunctions are the *sine qua*

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[73] Judge v. Quinn, 612 F.3d 537, 546 (7th Cir. 2010).

[74] *See* FED. R. CIV. P. 65 (setting out standards for injunctions and restraining orders); DAN B. DOBBS, THE LAW OF REMEDIES 108-10 (1973) (describing standards for injunctive relief).

non of remedying an unconstitutional religious display, disentangling the right and its remedy are especially difficult in this context.[75]

Third, shifting from the scope of the injunction to whether the land transfer itself was an establishment violation re-directs the power in the case. We move from vindicating a plaintiff's win, to determining—as if no prior establishment violation had been found—if Congress (a majoritarian institution) acted lawfully. This spells trouble for a plaintiff seeking to enforce an injunction against a land-transfer. The Establishment Clause works to limit religious majorities from dominating the public sphere by using government as a means of promoting, or securing advantages for, their religion. That means that courts must focus on the "little guy" to make sure his religious beliefs are not being trampled, or that majorities are not preferred. Only political majorities are likely—at any level—to garner enough support to have a city, county, state, or even Congress pass a law with the express purpose of rectifying what that majority considers an erroneous decision to classify a display as an establishment violation.

With these consequences in mind, we can return to Justice Kennedy's opinion. Now, with the proper focus, the issue in the case is "whether the District Court properly enjoined the Government from implementing the land transfer statute."[76] To answer that question, Justice Kennedy reasoned, we need to keep in mind the fact that an injunction is an "extraordinary remedy" and district courts must be careful to respond to "changed circumstances" when considering whether to modify an order requiring an injunction.[77] But, as Justice Breyer pointed out, the changed circumstances worry seems odd here because that doctrine typically applies when a party subject to an injunction requests a modification, which the government did not do.[78] More important, Justice Breyer explained, the sort of changed circumstances presented by the land transfer require invocation of the principle at work in *Cummings*: courts do not "permit defendants to evade responsibility for violating an injunction, by doing through subterfuge a thing which is not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing."[79]

On Justice Kennedy's account, however, the district court erred by failing to "acknowledge the statutes' significance," because it wrongly "examined the events that led to the *statute's* enactment and found an *intent* to prevent removal of the cross."[80] In other words, the district court erred by considering the reasons motivating the land-transfer statute's passage. On its own, this state-

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[75] *See* Budd, *supra* note 10, at 213.

[76] *Buono*, 130 S. Ct. 1803, 1815-16 (2010).

[77] *Id.* at 1816.

[78] *Id.* at 1845 (Breyer, J., dissenting).

[79] *Id.* at 1844 (internal quotation marks and citation omitted).

[80] *Id.* (emphasis added).

ment is odd because in ferreting out a discriminatory purpose or pretext courts frequently look for any invidious intent lurking behind a formally neutral decision.[81] Just a few paragraphs later, however, the tension inherent in this argument is made clear. According to Justice Kennedy, the district court erred because it took an "insufficient account of the context in which the statute was enacted and the *reasons* for its passage."[82] That can't be right. If not, the district court was wrong to examine the "events that led to the statute's enactment" and Congressional "intent" in passing the statute, because it failed to account for the "reasons for its passage." This creates an internally contradictory syllogism: the district court erred by ignoring congressional intent because it relied too heavily on congressional intent.

The truth (and way out of this circle), as far as I can tell, is that Justice Kennedy really means that the district court was supposed to look not at the reasons the statute was passed but, instead, at the reasons the cross was erected in the first place.[83] Those who built the cross "intended simply to honor our Nation's fallen soldiers."[84] This conclusion directly conflicts with the district court's unreviewable finding that the cross violates the Establishment Clause, and that a "reasonable observer" would view the cross as an endorsement or religion; nothing in the statute changed that. Essentially, and even before the case could return following remand, Justice Kennedy re-litigated the issue that *res judicata* took off the table. In addition, while the initial cross-builder's intention might be laudable, it does not pertain to the 2002 injunction or to the land transfer statue passed in its aftermath, which is what Justice Kennedy had just finished claiming were supposed to be our focus. In short, by shifting from a determination of whether the land transfer statute undermined a permanent injunction to a determination of whether the history of the cross was secular, the emphasis of the case is no longer the remedial question, but on a separate Establishment Clause merits determination. Note, finally, that this move requires a tight interweaving between remedy and right. If they were completely distinct, as the Court has recently suggested, such a move would be more difficult and, sometimes, impossible.[85] The request for injunctive relief in any context, and especially where the probability of money damages is low, demon-

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[81] *See, e.g.*, Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) (opinion by Justice Kennedy holding that the ordinance unfairly targeted religious group, which was revealed through legislative history demonstrating an invidious purpose); Batson v. Kentucky, 476 U.S. 79 (1986) (requiring district courts to weigh race-neutral reasons for striking jurors to determine if they are credible or instead a pretext for discrimination).

[82] *Buono*, 130 S. Ct. at 1808 (emphasis added).

[83] The plurality acknowledges this point. *See id.* at 1812-13 (discussing Congressional action prior to and during various stages of the litigation).

[84] *Id.* at 1816.

[85] *See* Davis v. United States, 131 S. Ct. 2419, 2431 (2001) ("Remedy is a separate, analytically distinct issue.").

strates that viewing rights and remedies as completely separable is, in most instances, simply fiction.

B. *The "Objectives" of the Injunction*

Finally, we turn to the injunction itself. Here, the district court should have "evaluated Buono's modification request in light of the objectives of the 2002 injunction," but the district court seems not to have done so. Enjoining the land transfer statute furthered the aim of the 2002 injunction's requirement that the government not display a cross atop Sunrise Rock. In an odd move (or at least one implying that the district court judge was operating with false consciousness), the plurality redefines the district court's own intention. The "injunction purportedly aimed at addressing the impression conveyed by the cross on *federal*, not *private*, land. Even if the purpose of the injunction were characterized more generally as avoiding the perception of governmental endorsement, that purpose would favor—or at least not oppose—ownership of the cross by a private party rather than by the Government."[86] The plurality then requires the district court to consider the "reasonable observer" standard as applied to the cross following the transfer.[87]

Three things seem curious here. First, though the analytical framework is correct—the district court (we were just told) should be looking at the objectives of the 2002 injunction—Justice Kennedy assumes that the controversy has already been resolved by taking the *ex post* view that the land transfer has already occurred. Justice Scalia makes the same assumption later on. However, requiring a court to assume the effect of a transfer that is itself being challenged puts the cart before the horse, and misses the real point of the case: was the land-transfer a sham transaction pursued by Congress to further its goal of keeping the cross displayed even though that would be ongoing Establishment Clause violation?[88]

Second, even though Justice Kennedy strongly criticizes the "reasonable observer" methodology in his *Allegheny* dissent, he endorses it here.[89] Perhaps the fact implicit in that dissent—coercion is insufficient a test for these types of cases—has prevailed. Either way, Justice Kennedy's requirement that the district court use this particular test is odd not just because of his criticism, but

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[86] *Id.* at 1819.

[87] *Id.*

[88] *See* Buono v. Norton, 364 F. Supp. 2d 1175, 1178 (C.D. Cal. 2005) ("*Norton II*") ("Plaintiff contends that the land transfer directed by Section 8121 is a sham by Defendants to preserve the Latin cross in the Preserve."). Making the same criticism, see *Salazar v. Buono*, 130 S. Ct. 803, 1831 (2010) (Stevens, J., dissenting) ("In evaluating a claim that the Government would impermissibly 'permit the cross' display by effecting a transfer, a court cannot start from a baseline in which the cross has *already* been transferred.") (emphasis in original).

[89] *See Buono*, 130 S. Ct. at 1819.

because of what—at least from my vantage point—a reasonable observer would conclude if they knew about the facts leading up to the land transfer. A reasonable observer would almost certainly witness Congress's attempt to displaying a cross in defiance of a district court's order and view the transfer as a method of doing so that would not, even from a visual standpoint, actually change anything on the ground. The real problem, as Justice Breyer points out, is that the "reasonable observer" inquiry throws us back into the substantive rights side of the case, and does not solve the remedial one at all.[90] If the district court concludes, for example, that the land transfer itself was not an establishment violation, is it prohibited from striking the transfer because it would undermine its prior injunction preventing the cross from being displayed on Sunrise Rock? Would finding the transfer lawful necessarily mean that the underlying display stopped being unlawful? More generally, does a lawful act taken in the wake of a finding of unlawfulness cure the antecedent violation? In principle, the answer must be no. In *McCreary*, for example, putting up the Declaration of Independence in the courthouse (which certainly is no establishment violation), did nothing to cure the unlawful establishment; the Ten Commandments remained, and their purpose remained unchanged.

Third, the plurality's requirement that the district court look to the "reasonable observer" test raises important issues about how to cure a found violation. In most instances, we assume the monument comes down. How to remedy a violation does pose a conceptual difficulty: how can a government actor change the message of a display in response to an injunction that does not require dismantling that display? Perhaps the government might open the space for many speakers. And, if Congress through the land transfer was merely attempting to change the message sent by the cross on Sunrise Rock, we should inquire whether Congress succeeded. The government argued that such a message-change had occurred here, or at least that was its goal.[91] The multi-factored tests now percolating in the courts of appeals (which the district court applied here) provide some answers. But, in some cases, this inquiry might be irrelevant. Here, for example, the district court rejected the land transfer based on a finding of religious purpose.[92] In such a case, even if the message may have arguably changed, the pretextual motivation taints the process and should lead to an establishment violation. That rationale drove the holding of *McCreary*, and it makes sense. An unconstitutional purpose should trump general endorsement concerns. By analogy, we might think of the "endorsement" and "reason-

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[90] *Id.* at 1844-45 (Breyer, J., dissenting).

[91] *See* Buono v. Norton, 364 F. Supp. 2d 1175, 1178 (C.D. Cal. 2005) ("Defendants contend that the transfer of the land on which the cross stands to private ownership will remedy the Establishment Clause violation.").

[92] *Buono*, 130 S. Ct. at 1819 ("Given the sole reliance on perception as a basis for the 2002 injunction, one would expect that any relief grounded on that decree would have rested on the same basis. But, the District Court enjoined the land transfer on an entirely different basis: its suspicion of an illicit governmental purpose.").

able observer" questions as one of disparate impact—if you send a particular message or have a certain effect, regardless of intent, there is a violation. Purposeful violations of the law, however, negate the need to turn to disparate impact because they are more constitutionally suspect than actions (or displays) that are arguably benign.[93] In this sense we do not need to inquire whether a display itself expresses endorsement or disapproval to the somewhat-informed passerby because we already know that this unlawful end was the goal.

C. *Searching for Neutrality*

Justice Kennedy's treatment of the "purpose" of the land transfer raises important questions regarding neutrality. If, as the logic of his opinion would permit, government actors can cure symbolic endorsements of religion in ways that have the purpose of promoting religion, a core meaning of the Establishment Clause is lost. But part of Justice Kennedy's concern is avoiding hostility towards religion, which is certainly valid.[94] And, Justice Kennedy is right that the Establishment Clause "leaves room to accommodate divergent values" and "does not require eradication of all religious symbols in the public realm."[95] The vexing problem is how to accommodate those with religious views without excluding minorities or outsiders while simultaneously avoiding government endorsement of religion in a manner that does not thereby exclude religious adherents from involvement in public life.

Briefly stepping onto the rights side of the remedial inquiry, the conceptual tool for resolving this problem, I will argue, should be neutrality.[96] The neutrality norm is not without its critics, and some have attacked it on manageability and theoretical grounds.[97] But there are reasons why the Court and commen-

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[93] Consider, for example, Equal Protection violations. The court permits significant amounts of governmental programming where the results will have racially disparate impacts, see *Washington v. Davis*, 426 U.S. 229 (1976), but once a discriminatory purpose is found, the court is quick to intervene. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). Closer to home, consider *Stone v. Graham*, 449 U.S. 39 (1980), which held unconstitutional a Kentucky law that required public schools to post the Ten Commandments, though they were purchased with private funds because the law's "avowed purpose" was to promote religion.

[94] *See generally* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 114 (1992).

[95] *Buono*, 130 S. Ct at 1818-19.

[96] *See, e.g.*, Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1986); William P. Marshall, *"We Know it When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

[97] For critical commentary, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987).

tators repeatedly return to neutrality.[98] In Justice O'Connor's words, neutrality describes a basic articulation of the "essential command" of the Establishment Clause because it avoids sending the message that "nonadherents . . . are outsiders or less than full members of the political community."[99] This version of establishment also gets to the injury that the Establishment Clause prevents the harm that comes from political exclusion when government rejects your religion by endorsing another. Avoiding that harm, as Justice O'Connor notes, requires adequately protecting religious liberty, while respecting the religious diversity of our pluralistic society.[100] With this in mind, the problem with putting a cross atop city hall is not, as Justice Kennedy admits, that doing so is coercive.[101] Rather, a cross on city hall should be deemed unlawful because it expresses a preference for one religion over others (or none at all), which undermines the state's role as a neutral institution created by a pluralistic people to protect and respect liberty as a community of equals. Neutrality, therefore, helps us move beyond formalistic notions of separation, refocuses the establishment inquiry on the constitutional injury meant to be avoided. In addition, as we shall see, neutrality demonstrates the remedial equilibration insight by guiding our assessment of the interaction between remedial enforcement, constitutional harm, and substantive rights construction.

To help draw out the middle-path neutrality implies consider Ronald Dworkin's distinction between a religious nation that tolerates nonbelief and a secular nation that tolerates religion.[102] Neither, as their labels indicate, is neutral. But, starting from the noncontroversial premise that we "all agree . . . our government must be tolerant of all peaceful religious faiths and also of people of no faith," Dworkin argues we have a choice about which type of society to tend towards.[103] In the tolerant religious view, we might accept that government cannot adopt as a national religion the beliefs of any particular sect, though the idea of a broader civil religion might be on the table.[104] By contrast, a tolerant secular society cannot make religion or atheism illegal, but it might also prohibit religious exercise in the public sphere for the sake of avoiding the appearance of endorsement.

Neither of these models represents the United States, and the Establishment

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[98] *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (requiring neutrality under the Establishment Clause); Smith, *supra* note 97, at 313-16 & n.184 (describing the "allure of neutrality" and citing significant scholarship emphasizing neutrality).

[99] Lynch v. Donnelley, 465 U.S. 668, 627 (O'Connor, J. concurring).

[100] *Id.*

[101] County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., dissenting).

[102] RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 56 (2006).

[103] *Id.*

[104] *Id.* at 58; *cf.* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT, at Book IV, Ch.8 (Cranston ed., 1968) (1762) (describing civil religion and noting that "it is very important to the state that each citizen should have a religion which makes him love his duty, but the dogmas of that religion are of interest neither to the state or its members").

Clause does not require us to make such a binary choice. Yet, these two models help illustrate why the concept of neutrality is important for thinking about endorsement. Clearly, we do not have—or desire—a tolerant religious state. All agree that establishing any type of national religion, even the relatively benign requirements of a civil religion is off-the-table. At the same time, avoiding unconstitutional endorsement cannot be resolved by setting on a course overly hostile to religion.[105] Part of the reason for the tension between these poles relates to our collective history and the continual struggle between long-held beliefs and practices and the inevitable evolution of our basic values over time.[106] In the end, neutrality asks us to walk the line between over-exclusion of religion on one hand and, on the other, state sponsored endorsement of religion.

That task may be controversial, and will risk offending people on both sides, but full resolution of that debate is not my purpose here. Instead, these background considerations help us return to how to think about remedies for Establishment Clause violations. They must, therefore, simultaneously cure the violation—end the endorsement and lack of neutrality—but do so in a way that does not over-exclude religious expression at the risk that neutrality will turn into hostility. And, though not ideal for creating hard-and-fast rules, we must remember that remedies are tailored to particular violations and, for that reason, are context-specific.[107] Part of that context involves looking at the purpose of a given display, but it also requires us to assess the purpose of a remedial order.

Another important component of context-specificity is timing, for at least two reasons. First, given the historically rooted nature of our establishment clause disputes, newly erected religious symbols tend to have a more explicit purpose in sending out a religious message and, second, the freshness of the display may convey a stronger message to those in the current political community that they are not favored than a long-standing tradition might.[108] This older-is-likely-less-troublesome standard, however, has its limits. Some displays

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[105] *Cf.* Salazar v. Buono, 130 S. Ct. 1803, 1823 (Alito, J., concurring in part and in the judgment) ("The demolition of this venerable if unsophisticated monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage.").

[106] *Cf.* McCreary County v. ACLU of Kentucky, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (describing France as a secular republic where religion "is to be strictly excluded from the public forum. This was not, and never was, the model adopted by America. . . .").

[107] *See Buono*, 130 S. Ct. at 1839 n.11 (Stevens, J., dissenting) ("The proper remedy, like the determination of the violation itself is necessarily context specific.").

[108] Newly adopted sectarian monuments have, with some exceptions, been adopted to promote religion or have been in direct response to political majorities wanting to reject more religion into government institutions. *See., e.g*, Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Al. 2002) (holding Ten Commandments memorial at state courthouse unconstitutional, the installation of which was a judge's religiously-based campaign promise).

might be new, and feature religious symbols, but not—given their particular background—give rise to the same establishment worries as the relatively-new Ten Commandments displays in McCreary County, which have been replaced and again declared unconstitutional. Further, the older-is-better rule is risky in that political majorities now might have an incentive to, as quietly as possible, erect monuments with a religious purpose and pray that they are not challenged until after the passage of some time. Time should not itself cure what would otherwise be unlawful.

D. *Establishment Remedies and* Boerne

With the goal of parsing the middle-path between Dworkin's divergent poles and the importance of context-specificity in mind, we can begin charting a path to thinking about remedies more broadly. Consider the standard used to assess Congress's enforcement power under Section Five of the Fourteenth Amendment as described by *City of Boerne v. Flores*.[109] After drawing an admittedly hazy distinction between "curative" and "preventative" measures Congress might take, the Court (again, through Justice Kennedy) held that there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[110] A common theme underlying the distinction between *remedial* measures and *preventative* ones was an effort to prevent Congress from getting in the business of defining substantive rights. Otherwise, if Congress can use its *remedial* power in a manner that defines new rights, "legislation may become substantive in operation and effect."[111] At some level, this is simply impossible, given the way that rights and remedies are not hermetically sealed, even when Congress only formally has the power to define remedies. But, an explicit endorsement of Congressional rights-making, *Boerne* reasoned, would be problematic because if Congress were permitted to define the meaning of constitutional rights, the Constitution would become merely a legislative act. A legislative constitution, in turn, makes rights uncertain and would violate the basic concept of separation of powers tracing back to *Marbury v. Madison*.[112]

Putting to the side whether *Boerne*'s vision of separation of powers is accurate (given recent scholarship on popular sovereignty) or even desirable (because it means courts alone get to define constitutional rights), the distinction drawn between substance and enforcement provides a method for evaluating remedies more generally. Under the "congruence and proportionality" standard, Congress cannot define constitutional rights—as the *Buono* court was formally prevented from doing—but is left with the task of remedial enforcement contingent upon rights definition elsewhere. Even if Congress could de-

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[109] City of Boerne v. Flores, 521 U.S. 507 (1997).

[110] *Id.* at 520.

[111] *Id.*

[112] *See id.* at 529 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

fine rights, *Boerne* also draws on the intuition that Congress cannot be expected to identify precisely the scope of the constitutional prohibition. As such, Congress can use its remedial power to exceed the rights themselves, limited to a margin congruent and proportional with the actual constitutional prohibition. Put differently, *Boerne* allows Congress to create slightly over-inclusive remedial procedures, which ensure that no constitutional violations are without remedy, but cabins that over-inclusion by requiring congruence and proportionality between the means selected and the end being served.

Now, think about *Boerne*'s congruence standard in terms of establishment remedies. Assume again that a court, like Congress, cannot always, despite attentiveness to context, precisely define the right at issue—what I will call "Perfect Neutrality." Perfection, of course, is ideal. But assume that is impossible, or at least not guaranteed in each case. Given those assumptions, courts have three basic options when fashioning a remedy: (1) over-enforce the constitutional prohibition in a way congruent and proportional to the violation; (2) mirror our ideal norm of Perfect Neutrality; or, (3) under-enforce the constitutional guarantee and permit unlawful endorsement of religion. We, of course, want category two, but suppose we cannot have it. Like the difference between a religiously tolerant state and the secular state that tolerates religion, we are then forced to make remedial decisions in the context of a broader tradeoff.

Figure 2 gives a picture of these tradeoffs, and the final row paints the continuum of actual remedies a court might order to redress an Establishment Clause violation. Again, and what makes the inquiry difficult, is that there are no one-remedy-fits-all solutions; context drives the remedial inquiry (which, incidentally, is precisely the way to ensure congruence and proportionality in a given case).

Relationship between State-Type, Neutrality, and Remedy					
Model	Secular State	(1) Congruence/ Proportionality	(2) **Perfect Neutrality**	(3) Unconstitutional establishment (lawlessness)	Religious State
Remedial Tendency	Over-enforcement; hostility to religion				Under-enforcement; Permit endorsement
Type of Remedy	Prohibit all religious symbols	Permanent/temporary injunctions; Removal; Increased *in*clusion; Declaratory judgment; Land-transfer (?)			None, Damages

In the Establishment Clause context, as in other areas of constitutional law, we should be more worried about under enforcement, rather than over enforcement for several reasons. First, we must again look to the type of state we have, one that is more secular than religious. Under-enforcement of the Establishment Clause pushes us towards a religious state, and away from the mediated secular nation we have.[113] If the trade-off is between permitting govern-

[113] For an interesting argument related to social problems given the fact of under-enforce-

ment lawlessness (i.e., establishment) or congruent and proportional "over-enforcement," then the tie should go to enforcing the constitutional prohibition.[114] Second, as I suggested above, the political realities of Establishment Clause challenges mean that minority religions are likely to suffer the greatest harm.[115] Judges are less likely to strike down decisions that will cause significant political rancor,[116] and erring on the side of under-enforcement inevitably means increasing the already present right-remedy gap in constitutional adjudication.[117] Third, as Joshua Cohen argues, permitting exclusion via endorsement of religion has the effect of disenfranchising outsiders from the political process in ways that are unique to religion.[118] Finally, the Establishment Clause is buttressed against the Free Exercise clause, which serves to promote and ensure inclusion of even the most underrepresented groups in the public foray.[119] Someone harmed by an establishment of religion, however, may not be able avail themselves of the Free Exercise clause because what they want is not the chance to pursue their religion (if they have one); they want the state to stop endorsing another.

Returning to *Buono*, suppose that the initial 2002 permanent injunction is a category one remedy. Another fact without much significance to the plurality—but important for the actual conflict on the ground—is that the Ninth Circuit stayed the permanent injunction to the extent it required dismantling the cross itself. Was the remedy so overreaching that it was incongruent or out of proportion to the violation? No. And, with the Ninth Circuit's clarification, Congress was free to choose other options to remedy the unlawful establishment, so long as they served the purposes of the injunction.[120] The problem

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ment in constitutional law, see LAWRENCE SAGER, JUSTICE IN PLAINCLOTHES chs. 84-128 (2006).

[114] This is basically an extension of the idea that where there's a right, there should be a remedy, which, given the constitutional prohibition, is a fundamental concept in American law. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) (quoting BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1783)).

[115] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (advancing "representation reinforcement" theory of judicial review).

[116] *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE (2009) (describing the dialogic relationship between public opinion and judicial decisions).

[117] *See* John C. Jefferies, Jr., *The Right Remedy Gap in Constitutional Law*, 109 Yale L.J. 87 (1999).

[118] *See* Joshua Cohen, *Establishment, Exclusion, and Public Reason* (2009), *available at* http://www.law.nyu.edu/ecmdlv2/groups/public/@nyulawwebsiteacademicscolloquiaconstitutionaltheory/documents/documents/ecmpro063731.pdf.

[119] *See, e.g.*, Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (rights of Ku Klux Klan upheld to post cross in public park); Gonzales v. O. Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (requiring exemption for use of hallucinogenic tea for small religious sect. An 8-0 decision with Alito not sitting).

[120] *Cf.* Buono v. Salazar, 130 S. Ct. 1803, 1823 (2010) (Alito, J., concurring in part and in the judgment).

with the option they chose, is that it did very little—if anything—to change the way things appeared to those in that community. Treating such a move as adequate would undermine the purpose of the initial injunction because the cross itself is what displayed the message, and the transfer was the cheapest way to keep it standing. Congress did not even attempt, as in *McCreary*, to put up other *indicia* of an actual war memorial—like the names of the veterans who died in the war, an American flag, a statute, or even signs that could be seen from the road explaining the history of the cross. In addition, it is important to recall that this dispute began when the Park Service refused to allow Horpa to erect a stupa on Sunrise Rock, as well. With such a strong assertion of a majority religion buttressed against the exclusion of a minority, unlawful endorsement could not be resolved without creating a meaningful remedy mindful of this context.

To determine whether a remedy is congruent and proportional to a particular violation requires a court to assess, as best it can, the practical reality of its decision. This is what the reasonable observer standard attempts to create. A judge should ask how would a person not overly hostile to religion but not overly-eager to see it endorsed perceive a monument. Even if an individual might not personally (or subjectively) feel excluded, would they reasonably believe that the government is promoting religion? Such an inquiry is nearly impossible to square with a formal or categorical view of the right's violation. Reasonable people do not walk down the street looking for plat maps to see who owns the property, and a cross in the middle of a giant government-owned preserve, without more, sends a message of endorsement. Unfortunately, in sharp contrast to the context-based approach remedial equilibration requires, other members of the Court adopted a formal view of the division between private and public property, which stopped remedial efficacy dead in its tracks.

IV. Form Over Substance and The Public-Private Distinction

Part IV analyzes the opinions of Justices Alito and Scalia, which both, I will argue, put form over substance and rely on a dangerously formal version of the distinction between the public and private spheres. My point is not that this distinction fails or is not useful; it certainly is. The utility and worth of that distinction is diminished, however, when classification between the two worlds becomes categorical and mechanical rather than balanced and mechanical, which is exactly what happened here. Starting with Justice Alito, his opinion begins by describing the Sunrise Rock monument and admits that in this area of the Preserve "boundaries between Government and private land are often not marked."[121] Justice Alito also notes that the "cross is of course the preeminent symbol of Christianity, and that Easter services have long been held on Sunrise Rock," but reminds us that the original reason for the placement of the cross

[121] *Id.* at 1821-22

was to commemorate WWI veterans.[122] Worried about hostility toward religion, Justice Alito views the land transfer as "an alternative approach that was designed to eliminate any perception of religious sponsorship stemming from the location of the cross on federally-owned land, while at the same time avoiding disturbing symbolism associated with the destruction of the historic monument."[123] With that in mind, Justice Alito construes the aims of the injunction narrowly: "simply that the government could not allow the cross to remain on *federal* land."[124] Likewise, Justice Scalia reasons that the "only reasonable reading of the original injunction, in context, is that it proscribed the cross's display on *federal* land. Buono's alleged injuries arose from the cross's presence on *public* property."[125] From this premise Justice Scalia concludes that Buono does not have standing to challenge the land transfer because it has nothing to do with enforcing the 2002 injunction.[126] Justice Scalia's standing doctrine certainly has significant remedial implications for Establishment Clause plaintiffs: in some instances, no one will be able to challenge government action under the Clause.[127] This is another reason not to fear over-enforcement of the Clause when crafting remedies, and is troubling in its own right.

Regardless, my focus here is on the public-private distinction motivating parts of the Court. A better way to tee up the issue than either Justices Alito or Scalia's is found in Justice Stevens's dissent: "whether the shift from public to private ownership of the land sufficiently distanced the Government of the Cross."[128] By focusing on the "sufficient distance" between the government and the cross, rather than the formal status of the land as federal or private, Justice Stevens's formulation avoids the trap created by looking at whether land was "federal" or "public" and thinking that formal status alone can resolve the issue. The theory of Justices Scalia and Alito must be that the mere transfer of a title somehow "transforms" the unconstitutional endorsement into private speech. In the real world, that theory makes little sense. As such, other courts addressing precisely this situation have been more careful to see the potential for pretext and subversion by flexibly evaluating a host of factors—like "unusual circumstances" surrounding a transfer or the government's continued control of the land—to determine whether a particular transfer creates enough "dis-

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[122] *Id.*

[123] *Id.* at 1823.

[124] *Id.* at 1824.

[125] *Id.* (Scalia, J, concurring in the judgment).

[126] *Id.* at 1826 (Scalia, J., concurring in the judgment).

[127] *See, e.g.*, Freedom From Religion Found., Inc. v. Obama, 641 F.3d 803, 808 (7th Cir. 2011) (Easterbrook, C.J.) (denying standing to plaintiffs challenging the National Day of Prayer and concluding that "[i]f this means that no one has standing, that does not change the outcome").

[128] *Buono*, 130 S. Ct. at 1835 (Stevens, J., dissenting).

tance" between the government to end the endorsement.[129] Though the district court, judges on the court of appeals, and commentators find these factors compelling,[130] the plurality balks at circumstances suggesting pretext here.[131] Much like presuming that rights and remedies exist in formally separate hemispheres, the only way to ignore these factors is to assume that a title transfer alone somehow ends the message being sent by the cross, *i.e.*, by drawing a sharp line between public and private space. In both circumstances, however, drawing these lines is an instance, again, of legal fiction.

For a time, it seemed that the public-private distinction was doomed, and it was a matter of "legal sophistication to understand the arbitrariness of the division of law into public and private realms."[132] As the above demonstrates, public-private formalism is back and with a vengeance. Despite the apparent resurgence of this distinction, we should be mindful of compelling reasons to maintain a functional, rather than formal, approach to this sort of line drawing, especially in the remedial context.[133] Outside of *Buono*, the Court has frequently—and rightly—blurred these lines. In *Santa Fe Independent School District v. Doe*, for example, the Court considered the constitutionality of student-led prayers that were delivered over the school's public address system before each varsity football game.[134] When the lawsuit was filed, the student council "chaplain" delivered the "prayers." As is often the case, litigation prompted change, and the system shifted from a chaplain praying to a "speaker" delivering a "statement," "message," or "invocation."[135] In deeming the new program an unconstitutional establishment, it did not matter that the speech actually took place by formally private actors (the students). Instead,

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[129] *See, e.g.*, Mercier v. Fraternal Order of Eagles, 395 F.3d 693 (7th Cir. 2005); Freedom From Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000) (explaining that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion," but eschewing formalistic application of the inquiry in favor of a context- and substance-based approach); Jonathan R. Slabaugh, Note, *Selling the Government Property Beneath A Religious Monument that Violates the Establishment Clause: Constitutional Remedy or Infringement*, 29 ST. LOUIS U. PUBL. L. REV. 301 (2009).

[130] *See supra* note 129; Buono v. Kempthorne, 502 F.3d 1069 (9th Cir. 2007); Budd, *supra* note 10.

[131] *See Buono*, 130 S. Ct. at 1819-20; *id.* at 1823-24 (Alito, J., concurring in part and in the judgment).

[132] Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426-27 (1982). *Cf.* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

[133] *See City of Marshfield*, 203 F.3d at 491 ("We are aware . . . that adherence to a formalistic standard invites manipulation. To avoid such manipulation we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased.").

[134] Santa Fe Independent School District v. Jane Doe, 530 U.S. 290 (2000).

[135] *See id.* at 296-98.

the private speech became public because it took place at a school-function, and the formal designation of a "message" did not to cure the "prayer."[136]

As in the land transfer cases, *Santa Fe* pointed to the fact that aspects of the message were "subject to the control" of official actors.[137] Of course, *Santa Fe* is distinguishable from *Buono* in many ways. For present purposes, however, it is significant because the Court was willing to look beyond the pretextual alteration of the program to look at the substance of what remained; though the student's actions could be deemed formally "private," they were still significant enough to amount to an unlawful establishment. The court of appeals did the same thing in *Buono* by considering whether particular aspects of the transfer "evince continuing governmental control" over the cross.[138]

Moving outside of establishment context, consider *Marsh v. Alabama* where the Court held that a privately-owned town was nonetheless required to abide by the First Amendment and allow free expression and proselytizing by Jehovah's Witnesses on the town's sidewalks.[139] In *Marsh*, the Court addressed a situation where the "public" and "private" areas were visually indistinguishable: the "town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center, except the fact that the title belongs to a private corporation."[140] The same is true of Sunrise Rock where nothing distinguishes the formally public preserve from the "little donut hole of [private] land with a cross" on it.[141]

To reach its conclusion, *Marsh* rested heavily on the fact that the privately-owned sidewalk served a "public function."[142] The plurality in *Buono* did not consider this line of reasoning, though there are much stronger reasons to find such an ongoing function in the Preserve. Not only does the monument's location and lack of visible distinguishing cues make it functionally public, in the establishment context, unlike the free speech doctrine, we look to what a "reasonable observer" would perceive. In addition, *Marsh* realized that it is unreasonable to expect travelers to go searching for a property's title in order to determine whether a piece of land should be regarded as public or private.

Finally, and in tension with the rigid public-private distinction employed in *Buono*, *Marsh* explains that "[o]wnership does not always mean absolute dominion."[143] This sort of "dominion" is precisely what the district court and

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[136] *See id.* at 305-10.

[137] *Id.* at 307.

[138] Buono v. Kempthorne, 502 F.3d 1069, 1073-74 (7th Cir. 2007).

[139] Marsh v. Alabama, 326 U.S. 501, 509 (1946).

[140] *Id.* at 503 (emphasis added).

[141] *See* Salazar v. Buono, 130 S. Ct. 1803, 1812 (2010) ("The signs have since disappeared, and the cross now stands unmarked.").

[142] *See* Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (discussing origins of the public function doctrine).

[143] *Marsh*, 325 U.S. at 506.

courts of appeals considered when assessing whether the land transfer act would undermine the injunction, as described above. First, the "five-foot-tall cross" has been declared a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war."[144] As Justice Stevens notes, such a designation transforms the cross from a "local artifact" to an object with a "formal national status of the highest order."[145] Second, given Congress's other enactments, neither the VFW nor the Service could have taken down the cross even if they wanted to. Third, the land-transfer statute contained a reversionary interest clause stating that the land would revert to the federal government should the memorial fall into disrepair but, again, unlike any other war memorial, at Sunrise Rock the cross constitutes the entire display. The reversionary interest, then, is designed solely to keep this cross—the "memorial"—in-tact. A rigid adherence to the title of ownership as public or private to the exclusion of these facts seems hard to justify and creates a mechanism for ignoring reality—as rights essentialism does—in the name of limiting the remedy for a constitutional violation.

Again, the court has, in context after context, traditionally been *responsive to*, rather than *defiant of*, the real-world fact that formal ownership as either "public" or "private" ought not end our inquiry as to whether Constitutional rights require protecting or, where violated, have been remedied.[146] To get at the issue from the other side, consider *Oregon v. City of Rajneeshpuram*, where a federal district court granted a declaratory judgment to the state of Oregon when it refused to grant the City of Rajneeshpuram a charter, which would have made it a public municipality.[147] The "city" was a nearly 64,000-acre parcel of land called "Rancho Rajneesh," and was wholly owned by the Rajneesh Foundation International ("RFI"). The RFI was organized to advance the teachings of the Bhagawan Shree Rajneesh, whose followers believed he was "an enlightened religious master."[148] Through a series of complex arrangements involving RFI, and the Rajneesh Investment Corporation (the formal religious organization), the Rancho was technically owned by wholly private parties.[149] But, as the court noted, "the sovereign power exercised by the City is

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[144] Dep't of Defense Appropriations Act, Pub. L. 107-117, § 8137(a), 115 Stat. 2230, 2278 (2002); *Buono*, 130 S. Ct. at 1813.

[145] *Buono*, 130 S. Ct. at 1834.

[146] *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athl. Ass'n, 531 U.S. 288, 302-13 (2001) (finding a private athletic association a "state actor" for purposes of constitutional litigation).

[147] Oregon v. City of Rajneeshpuram, 598 F. Supp. 1208, 1216-17 (D. Or. 1984).

[148] *Id.* Indeed, Rajneesh had quite a devout following of 7,000, who were later subject to raids and arrests when government officials attempted to break up the commune. *See generally* James T. Richardson, *State and Federal Cooperation in Regulating New Religions: Oregon versus the Bhagwan Rajneesh*, *in* REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 477-90 (James T. Richardson ed., 2004).

[149] *Rajneeshpuram*, 598 F. Supp. at 1210.

subject to the actual, direct control of an organized religion and its leaders."[150] After considering whether there was too much "entanglement" or interaction between the religious organization and the private actors, the court held that the state was right to deny the municipal charter—to do otherwise would have likely violated the Establishment Clause.[151] Unlike the plurality in *Buono*, the court recognized that mere privatization could not cure the relationship between the religion and the private entities.

The lesson from *Marsh* and *Rajneeshpuram* is that a strict adherence to the public-private distinction is not a sure-fire method to getting the right answer. In both of these cases, which I consider rightly decided, adherence to such formalism would have allowed, and even compelled, the courts to ignore the "dominion" or "entanglement" that properly motivated disposition of the suit.

All that said, Justice Alito's opinion does provide us with important remedial insight. Justice Alito notes that there might have been alternatives to selling the land or dismantling the cross that could have remedied the ongoing endorsement of Christianity, such as broadening the religious symbols to include all of those who served in World War I.[152] This comment reminds us that not all injunctions are created equal, and that challengers to alleged endorsements—for the sake of seeking neutrality, not hostility—should be creative in conceiving ways of remedying the troubles of establishment. I have suggested that we should favor "congruence and proportionality" over under-enforcement, and that there are strong reasons why that approach favors neutrality, which should be viewed as an "essential command" of the Establishment Clause. In many instances, this will mean that religious symbols need to come down, but not every situation requires "dismantling." More speech might be a legitimate alternative—e.g., letting Horpa erect the stupa—so long as it is not motivated by the purpose of promoting religion.[153] When, however, a religious-based purpose (a pretext) motivates an alteration to a display—our remedial enforcement needs to be flexible enough to prevent the constitutional harm with force and meaning, despite formal labels.

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[150] *Id.* at 1211.

[151] *Id.* at 1216-17.

[152] Salazar v. Buono, 130 S. Ct. 1803, 1822 (2010) (Alito, J., concurring).

[153] There might be political and practical reasons to avoid this type of arrangement, which can become quite messy when one tries to figure out who is allowed to erect a display and under what terms they are allowed to do so. At the state capitol in Washington State, for example, efforts to allow open holiday displays led to public outcry when a group of atheists displayed a sign calling religion a myth next to a nativity scene. The next year, neither were allowed. *See* Janet I. Tu, *'Holiday' Tree Only for State Capitol; Last Year's Brouhaha Prompts New Policy—No More Nativity Scenes or Atheist Signs Allowed*, SEATTLE TIMES, Aug. 25, 2009, at A1.

V. CONCLUSION

We can conclude where we began: *Cummings* is a reminder that the Constitution deals with "substance" not "shadows." Contrary to conventional wisdom, and the rights essentialism view, remedies are a crucial part of the "substance" of the Constitution. Without them, there is no substance to speak of. For the land transfer, the "substance" is the ongoing control of the cross by the Park Service, and the fact that the land, even if "private," remains virtually indistinguishable from the rest of the Preserve. District courts need wide discretion to make sure that injunctions are appropriately tailored to their context, but also because clever violators will attempt to evade a remedy indirectly when their direct efforts have failed. Such discretion, however, is not boundless. In the search for neutrality, the congruence and proportionality standard cabins a court's bounds. To some, *Buono* might have been a dud because it failed to address what the post-O'Connor court thinks about the Establishment Clause right. But, perhaps, *Buono* teaches us more about the real value of that right by looking at the way the Court conceives how to *enforce* the constitutional prohibition. The outlook is not encouraging. Though the plurality technically leaves open the possibility of the district court again striking the land transfer, it must make a substantive rights-side decision. Not only does that effectively mean brushing aside a remedial enforcement claim, it also potentially gives the high court another bite at the substantive apple. Again, at Sunrise Rock, nothing much has changed; as a matter of law, the cross violates the Establishment Clause. Only time will tell, however, if Justice Kennedy truly meant what he said in *Weisman*: "Law reaches past formalism."[154]

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[154] Lee v. Weisman, 505 U.S. 577, 595 (1992).