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SALAZAR V. BUONO AND THE FUTURE OF THE ESTABLISHMENT CLAUSE

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Commentators often complain that Establishment Clause jurisprudence is incoherent and unprincipled. That accusation usually seems overwrought—perhaps we should not expect so much consistency from a Court that decides only the cases that come before it, holds multiple values, operates with continually changing personnel, and gives significant but unquantifiable weight to precedent.[1] Yet of the areas of Establishment Clause litigation, this complaint carries the most force in the context of passive-display cases—cases where the government passively displays a religious symbol, like a cross or a crèche, a Ten Commandments monument, or an illuminated Bible. Here the critics have a point.

Since 1984, the Supreme Court has had seven separate cases regarding the constitutionality of passive displays. In those seven cases, the Court has issued thirty-six separate opinions—more than five opinions per case on average.[2] Frequently the Court has been unable to get the necessary five votes to form a majority opinion.[3] And only one of the thirty-six opinions has ever garnered more than five votes.[4] Each case seems to involve wild factual disagreements over why the symbol was put up and what the symbol means. Each case seems to involve deep legal disagreements over what types of symbols should be permissible, how to draw lines separating the

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[1] *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

[2] *See* Salazar v. Buono, 130 S. Ct. 1803 (2010) (six opinions) (link); Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (five opinions) (link); McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) (three opinions) (link); Van Orden v. Perry, 545 U.S. 677 (2005) (seven opinions) (link); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (six opinions) (link); Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989) (five opinions) (link); Lynch v. Donnelly, 465 U.S. 668 (1984) (four opinions) (link).

[3] *See Salazar*, 130 S. Ct. 1803; *Van Orden*, 545 U.S. 677; *Capitol Square Review & Advisory Bd.*, 515 U.S. 758.

[4] The exception was *Summum*, 129 S. Ct. 1125, where the Court unanimously rejected the plaintiff's constitutional claim. As it was litigated, however, *Summum* was an exceptionally easy case—one that technically did not involve the Establishment Clause at all. *See* Christopher C. Lund, *Keeping the Government's Religion Pure*: Pleasant Grove City v. Summum, 104 NW. U.L. REV. COLLOQUY 46, 46–47 (2009) (explaining these points) (link).

acceptable from the unacceptable, and whether the judiciary should be involved in this business at all.

This lack of consensus has become so predictable as to be almost comical. In 2005, the Supreme Court decided together two cases about Ten Commandments displays: *McCreary County v. ACLU*[5] and *Van Orden v. Perry*.[6] On the day the Supreme Court agreed to hear these two cases, I wrote an email to the Law and Religion listserv. Noting how the cases were dissimilar, I predicted that the Court might "split the difference and confuse appellate courts for the next twenty years (i.e., Lynch/Allegheny County)."[7] It was an inside joke. In two cases, one from 1984 (*Lynch*) and one from 1989 (*Allegheny County*), the Court had badly fractured on the issue of holiday displays, leaving lower courts little guidance on when they were constitutional.[8] My comment was meant as a jest, but the jest came true: The Court upheld the Ten Commandments display in *Van Orden* but struck down the display in *McCreary County*, leaving lower courts in "purgatory," deprived of much real guidance on what to do with Ten Commandments displays.[9] When it comes to passive displays, it seems that the Supreme Court can agree only to disagree.

Earlier this spring, the Supreme Court decided another passive-display case—*Salazar v. Buono*, known widely as the Mojave Cross case.[10] *Salazar* offered interesting facts. And for the first time, Justice Kennedy would be the middle Justice. Justice Kennedy had sided with the liberals on some Establishment Clause matters,[11] but his expressed views on passive displays were solidly conservative.[12] People therefore rightly wondered whether *Salazar* might remake passive-display litigation or Establishment Clause jurisprudence altogether.

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[5] 545 U.S. 844.

[6] 545 U.S. 677.

[7] Posting of Christopher C. Lund, *More Cert. Grants*, to lawreligion listserv, http://www.mail-archive.com/religionlaw@lists.ucla.edu/msg01304.html (Oct. 12, 2004, 09:01:58 EST) (link). Moderated by Eugene Volokh of the UCLA School of Law, the Law and Religion listserv is popular forum for conversations among United States law professors and other parties interested in these issues.

[8] *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989) (striking down a nativity scene, but upholding a menorah accompanied by a Christmas tree) (link); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding a nativity scene) (link).

[9] The "purgatory" label comes from a Sixth Circuit panel who called the current situation, "Establishment Clause purgatory." ACLU v. Mercer County, 432 F.3d 624, 636 (6th Cir. 2005) (link).

[10] 130 S. Ct. 1803 (2010) (link).

[11] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (Stevens, J., for the Court, joined by Kennedy, J., *inter alia*) (link); Lee v. Weisman, 505 U.S. 577 (1992) (Kennedy, J., for the Court) (link).

[12] *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting, joined by Kennedy, J., in part); Van Orden v. Perry, 545 U.S. 677, 681(2005) (Rehnquist, C.J., for the plurality, joined by Kennedy, J.); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 758, 757 (1995) (Scalia, J., for the plurality, joined by Kennedy, J.); *Cnty. of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

But all of that was not to be. *Salazar* turned out to be a bust. The Court splintered yet again, with five opinions and no majority opinion. The governing plurality opinion is cryptic and obscure, focusing on one of the more minor issues in the case and even leaving that undecided. Of course, we may see *Salazar* again, especially if the district court ignores the Supreme Court's not-so-subtle signals and continues to take a hard line against the cross. But there is no promise of that, and the resulting appeals will take years to reach the Supreme Court in any event. With all that in mind, this piece reviews the issues in *Salazar*, the road the Court took, and the roads not taken, offering reflections on where we have been and where we are likely to go.

I. THE FACTS OF *SALAZAR V. BUONO*

Salazar v. Buono is a case full of important factual nuances and complicated legal maneuvers, but it begins simply enough: It begins with a cross. In 1934, on an isolated hill in the Mojave National Preserve known as Sunrise Rock, the Veterans of Foreign Wars (VFW) put up a cross to commemorate the loss of American soldiers in World War I. The VFW did not ask the government for permission to use the land, but the government did not object. And so there the cross stood, in its final iteration standing somewhat less than eight feet high, composed of four-inch diameter metal pipes, all painted white.[13]

For about seventy years, no one objected. But in 1999, a Buddhist asked permission from the National Park Service to put up a stupa in the same place as the cross. The Park Service denied his request, explaining that it did not want any new religious symbols and that it was actually trying to take down the existing cross (which never had the right to be there in the first place). Soon Congress got involved, first prohibiting the use of federal money to remove the cross, and then designating it a national memorial. But this did not shield the cross: A few months later, a federal district court ruled that its display violated the Establishment Clause.

Then things got interesting. The government appealed the district court's decision to the Ninth Circuit. But before the appeal was decided, Congress agreed by statute to a land exchange. Under the terms of the deal, the VFW would get the cross with the acre of land surrounding it, while the federal government would get a five-acre parcel of private land elsewhere in the preserve. Standing now on private rather than governmental land, the cross would move from being a prohibited religious establishment into being a protected act of free exercise. The cross could continue to stand, and the litigation would end.

But while Congress passed this land-transfer statute during the appeal to the Ninth Circuit, the land transfer did not affect the actual appeal. The

[13] These facts and those that follow can all be found (with further citations) in *Salazar*, 130 S. Ct. at 1811–14 and Joint Appendix at 38–47, *Salazar*, 130 S. Ct. 1803 (No. 08-472), 2009 WL 1526967.

Ninth Circuit affirmed the district court's invalidation of the cross and put the effect of the land-transfer statute off to a later date. In due time, the ACLU challenged the land-transfer statute back in the district court, arguing that it was inconsistent with the district court's earlier injunction. The district court agreed, as did the Ninth Circuit; the Supreme Court granted certiorari to hear the case.

II. *SALAZAR V. BUONO* AND THE ROADS NOT TAKEN

As the case developed, two issues stood at the center of *Salazar v. Buono*—the constitutionality of the cross and the legitimacy of the land transfer.[14] Litigated separately, these issues came together before the Supreme Court. But it helps to break the two apart, because there is more to each than meets the eye.

A. Religious Neutrality and the Meaning of the Cross

The antecedent question behind everything in *Salazar* is the constitutionality of the cross itself. To those on the plaintiff's side, this question virtually answered itself—even the more conservative Justices had long maintained that endorsements of particular religions are constitutionally off-limits. "I have always believed, and all my opinions are consistent with the view," Justice Scalia once wrote, "that the Establishment Clause prohibits the favoring of one religion over others."[15] Other opinions take the same position, including ones that would have upheld government-sponsored prayers on the condition that they stay nondenominational[16] and Ten Commandments displays on the theory that they are nondenominational.[17] Indeed, in a case decided over twenty years ago, virtually the only thing that all nine Justices agreed upon was that the prominent display of a large bare cross on important government property would be an unconstitutional promotion of Christianity.[18]

But an agreement that the government cannot endorse Christianity means nothing without an agreement about what constitutes such an endorsement. And here is where the consensus always breaks down. Twenty-five years ago, the Court upheld a nativity scene because of its nonreligious

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[14] *See* Lisa Shaw Roy, Salazar v. Buono: *The Perils of Piecemeal Adjudication*, 105 NW. U. L. REV. COLLOQUY 72, 77–79 (2010) ("*Salazar* presents the issue of the constitutionality of the Mojave Desert cross twice removed."), http://www.law.northwestern.edu/lawreview/colloquy/2010/23/LRColl2010n23Roy.pdf, (link).

[15] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting) (link).

[16] *See* Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (link).

[17] *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 894 (2005) (Scalia J., dissenting) (link).

[18] *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 599–600 (1989) (plurality opinion); *id*. at 629 (O'Connor, J., concurring); *id*. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part) (link).

meanings.[19] Five years ago, it approved a Ten Commandments display along the same lines.[20] These sorts of cases created an opening for the cross in *Salazar*. The government made a succinct and straightforward argument that the cross here was a "predominantly secular" symbol, stressing that the VFW had put it up as a war memorial and that Congress had embraced it as the same.[21]

This argument makes a good deal of sense, but it also plays with fire.[22] Objects can have many meanings, but the cross's religious meaning is undeniably primary. The cross is the central symbol of the central event of Christian theology—Jesus died on the cross and was resurrected for the salvation of mankind.[23] Much Christian doctrine is esoteric to people nowadays, but everyone knows that. And everyone also knows a second point—Jesus' death on the cross carries with it a promise of salvation, but that promise does not necessarily extend to all people. The cross saves some but might damn others. St. Paul captures both aspects of the cross in his summation of its meaning: "The message of the cross is foolishness to those who are perishing, but to us who are being saved it is the power of God."[24] Paul's letters have tremendous influence in the Christian community. Many Christians see the cross as he does.

But the challenge to this argument is actually twofold. One part of it is that the cross's primary meaning is religious. But another part of it is that all the secondary meanings of the cross are really just *derivative* meanings—they all flow back to and hinge upon the religious meaning of the cross. There is an important contrast here with the Ten Commandments. The Ten Commandments have secular meaning that disassociates from the religious meaning; one can read, understand, and follow the prohibitions on murder, theft, and perjury without believing that God appeared to Moses or

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[19] *See* Lynch v. Donnelly, 465 U.S. 668, 681 (1984) (holding that there are "legitimate secular purposes" for putting up a nativity scene, and rejecting the claim that "the primary effect of including the crèche is to advance religion") (link).

[20] *See* Van Orden v. Perry, 545 U.S. 677, 701 (2005) (Breyer, J., concurring in the judgment, and providing the fifth vote) (upholding the government's display of the Ten Commandments on the grounds that the display "communicates not simply a religious message, but a secular message as well" and that the "nonreligious aspects of the tablets' message . . . predominate").

[21] Brief for the Petitioners at 29, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472), 2009 WL 1526915 [hereinafter Petitioners' Brief] (citing *Van Orden*, 545 U.S. at 703–04 (Breyer, J., concurring in the judgment)).

[22] Two amicus briefs wrestle with this argument quite thoughtfully. *See* Brief of the American Muslim Armed Forces and Veterans Affairs Council, and the Muslim American Veterans Association, as Amici Curiae in Support of Respondent, *Salazar*, 130 S. Ct. 1803 (No. 08-472), 2009 WL 2418469 [hereinafter Muslim Veterans' Brief] (link); Brief for Jewish War Veterans of the United States of America, Inc. as Amicus Curiae Supporting Respondent, *Salazar*, 130 S. Ct. 1803 (No. 08-472), 2009 WL 2406367 [hereinafter Jewish Veterans' Brief] (link).

[23] *See* Muslim Veterans' Brief, *supra* note 22, at 9–10 ("The cross is *the* central symbol of *the* central theological claim of Christianity.").

[24] 1 *Corinthians* 1:18 (link).

even believing that God exists. Even in the Biblical narrative, for example, Cain was disciplined for murder long before the events on Mount Sinai.

But the cross is different. The cross can have no secular meanings independent of its religious meaning. The cross is a pure symbol; it has no words, no linguistic meaning. The Ten Commandments can be taken out of context. But the cross works only by evoking the event that it depicts: Jesus' death and resurrection. Every use of the cross therefore by necessity relates back to its original meaning as a religious symbol. To the extent that the cross works as a war memorial, it is only because of the cross's religious power. And there is a common sense underlying all of this. Precisely because the cross symbolizes the promise of salvation extended to Christian believers, Christians find comfort in having crosses in cemeteries. But the cross is not an intelligible symbol outside of Christianity's premises—and to the extent that outsiders come to understand those premises, they will probably not find comfort in the cross.[25]

Many amicus briefs focused on how the government's adoption of Christian symbols can threaten the legitimate interests of non-Christians. But it is worth some space to explain the danger on the other side. Understanding the game, both the government and its amici offered secular meanings of the cross, divorcing them as much as possible from the cross's religious meaning. The Solicitor General, for example, called the cross "a symbol of the sacrifices of fallen soldiers."[26] But this begged the key question: *How* does a cross serve as a symbol of the sacrifices of fallen soldiers? For Christians, the link between Jesus' death and their own deaths comes through atonement theology. Jesus' death conquers death, thereby freeing people from the powers of death. But on this account, of course, a key point is that Jesus' sacrifice is *unlike* other sacrifices—Christian theology depends on Jesus' death being fundamentally *different* from that of ordinary human beings. The Solicitor General strenuously avoids fleshing all this out, but that itself then becomes the problem: Reading the government's brief, one gets the impression that Jesus was a man who happened to die unjustly, just as a lot of men in World War I happened to die unjustly. Many Christians would flatly reject this as inconsistent with Christian theology. Yet if the Solicitor General's explanation of the cross's meaning creates problems, other variants offer trouble of their own. One amicus brief called the cross "a symbol of the ultimate sacrifice made for one's country."[27] Another called it "a uniquely transcendent symbol representing the decision

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[25] Similar arguments are pressed in Muslim Veterans' Brief, *supra* note 22, at 9–11 and Jewish Veterans' Brief, *supra* note 22, at 7–10.

[26] *See* Petitioners' Brief, *supra* note 21, at 28; *see also id*. at 39 (calling it "a symbol of the sacrifices of fallen service members").

[27] Brief of Thomas More Law Center et al. as Amici Curiae Supporting Petitioners at 16, *Salazar*, 130 S. Ct. 1803 (No. 08-472), 2009 WL 1629704 (link).

to lay down one's life for the good of others."[28] These explanations have even deeper implicit theologies; many Christians would forcefully reject the idea of Jesus as just a patriot who died for his country or a do-gooder who died for his friends.

The basic problem is that whenever the government puts up religious symbols, people will want to know what they mean. The government can try to dodge the question. It can say, as it did here, that the cross is a symbol which could be "interpreted by different observers, in a variety of ways."[29] But this does not solve the problem either. Christians have strong feelings about what the cross means. And when the government puts up the cross on the theory that it means something else—or even that it just has a lot of meanings, none of which have any priority—the government threatens to commandeer (or, better yet, expropriate) the meaning of the cross.[30]

B. Religious Neutrality and the Legitimacy of the Land Transfer

The first issue in *Salazar* was the constitutionality of the cross. The second was the legitimacy of the land transfer. At first glance, the land transfer appears as a unique twist layered on top of the usual Establishment Clause issues. But in fact this sort of twist is regularly featured in Establishment Clause cases. A common theme in Establishment Clause cases over the past thirty years has been what to do when the government disclaims responsibility for the religious message by pointing to a private party.

Over the past generation, the Court has resolutely spotted and rejected false claims of privatization.[31] Public schools cannot have devotional Bible readings over their PA systems, even if students do the actual reading.[32] They cannot put up displays of the Ten Commandments, even if the displays are donated by private citizens.[33] School officials cannot invite student volunteers to pray,[34] select clergy people to pray,[35] or arrange for a student election on who should pray.[36] The symbol cases go the same way.

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[28] Brief of Amicus Curiae the Am. Legion Dep't of Cal. in Support of Petitioners at 2, *Salazar*, 130 S. Ct. 1803 (No. 08-472), 2009 WL 1640372 (link).

[29] Petitioners' Brief, *supra* note 21, at 39 (quoting Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1135 (2009)).

[30] For another elaboration on this point, see Ian Bartrum, Salazar v. Buono: *The Sacred and the Secular*, 105 NW. U. L. REV. COLLOQUY 31, 38–40 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/20/LRColl2010n20Bartrum.pdf (link).

[31] On the other side, the Court has also resolutely spotted and rejected false claims of *publicitization*. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (rejecting the claim that the Establishment Clause prohibited a private club from meeting after school hours simply because the meeting took place on school property) (link).

[32] Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (link).

[33] Stone v. Graham, 449 U.S. 39 (1980) (link).

[34] Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981) (link), *aff'd without op.*, 455 U.S. 913 (1982).

[35] Lee v. Weisman, 505 U.S. 577 (1992) (link).

[36] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (link).

State action is present when the government's crèche goes up on private land,[37] or when a private party's crèche goes up on government land.[38] None of these factual differences make any legal difference. When the government gives preferential treatment to religion—either to the religious speaker or to the religious message—there is an Establishment Clause problem.

If you accept those cases and their principles, the land transfer crumbles quickly under the weight of their logic. In *Salazar*, the parties disputed whether the land-transfer statute actually *required* the VFW to keep the cross up, which would have made Congress obviously responsible for the cross.[39] But this debate obscured the real point: Even if the new owner could legally take the cross down, the deal was structured in a way which made it difficult. For one thing, the cross had tremendous inertia; it was big, bulky, and welded into the rock. By transferring the property with the cross in place, the government created obvious incentives for the recipient to leave the cross where it was.

But the bigger problem was that Congress decided to sell the land to the VFW without entertaining other suitors. There were many ways that the government could divest itself of the land that would have been truly neutral in regard to the cross. It could have held a lottery and sold the property to the winner; it could have held an auction and sold the property to the highest bidder. The government called the VFW the "logical purchaser" of the land because the VFW had put up the cross in the first place.[40] But that logic was hardly neutral—it gave the property back to the party who had the most invested in keeping the cross up.

An analogy here may illustrate this point best. Imagine a public school district asks for student volunteers to lead prayers in the classroom. Two students volunteer. A lawsuit is filed and a court finds the practice unconstitutional. The school says it will fix the problem by no longer asking these two students to lead prayers. Instead these same two students will simply have a minute to speak on whatever topic they like. The two students, now

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[37] Lynch v. Donnelly, 465 U.S. 668 (1984).

[38] Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989) (link).

[39] There were good arguments on both sides. Congress had designated the cross itself as the national memorial and had allocated money for a replica of the cross. *See* Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278–79 (2002). And the memorial's official title was the "White Cross World War I Memorial." 16 U.S.C. § 431 (2006). That all suggested the VFW had to keep the cross up. But the land transfer statute required only that the VFW maintain the property as "*a* war memorial." Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(e), 117 Stat. 1054, 1100 (2003) (emphasis added). The government argued that this latter statute had priority—that while the property had to stay as *a* war memorial, it did not necessarily have to be *the* war memorial (i.e., the cross) that Congress had designated. *See* Petitioners' Brief, *supra* note 21, at 32–33. The plaintiff thought it ambiguous as to whether the cross had to stay up. *See* Respondent's Brief at 42–43, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472), 2009 WL 2365232 (link).

[40] Petitioners' Brief, *supra* note 21, at 46.

free to say whatever they want, indicate that they will continue to offer prayers. Simple principles of state action here accord with simple common sense: The school board has not fixed the problem. This is a false privatization, just as the land transfer in *Salazar* was false.

In both cases, the government has put a thumb on the scale in favor of the religious message. And in the larger context of *Salazar*, this hardly comes as a surprise. Congress had passed several statutes declaring its allegiance to the cross.[41] So whether you phrase it in terms of purposes or effects, the result is the same: The land transfer demonstrated favoritism toward the cross. And this is true not just in *Salazar*—a number of lower court cases involving similar facts have all similarly involved such false privatizations.[42]

III. THE RESULT IN *SALAZAR*

All these interesting issues, however, went unresolved. As is by now well known, a procedural glitch prevented the Court from reaching any of them. The government's failure to appeal the Ninth Circuit's initial decision meant that all of the issues decided therein became res judicata.[43] The only remaining issue related to the land transfer. But even there, the scope of the Supreme Court's review was limited. The district court had struck down the land transfer not because it violated the Establishment Clause, but because it was inconsistent with the terms of the original injunction.[44] So the only thing squarely before the Supreme Court was whether the land-transfer statute could be read consistently with the existing injunction, or whether the injunction essentially barred the government from continuing on with the land transfer.[45]

The Court ultimately refused to authoritatively decide even that limited question. Justice Kennedy's plurality opinion rejects the district court's reason for seeing a conflict between the two, but in the end sends the case back to the lower courts for further review. The opinion opens by noting that, because of res judicata, the constitutionality of the cross and the propriety of the initial injunction should now be off the table.[46] But the plurality nevertheless frequently returns to the cross's meaning, offering not-so-

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[41] *See* statutes cited *supra* note 39; *see also* Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A-230 (2000) (restricting the use of federal funds to remove the cross).

[42] Two cases involve local governments selling off parts of a public park in order to avoid Establishment Clause challenges to a religious object in that part of the park. *See* Mercier v. Fraternal Order of Eagles, 395 F.3d 693 (7th Cir. 2005) (Ten Commandments display) (link); Freedom from Religion Found. v. Marshfield, 203 F.3d 487 (7th Cir. 2000) (statue of Jesus Christ) (link).

[43] *See* Salazar v. Buono, 130 S. Ct. 1803, 1815 (2010).

[44] Buono v. Norton, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005) (link).

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

[46] *Id.* at 1815.

subtle suggestions that the cross really was constitutional all along.[47] If one takes this seriously, Justice Kennedy seems to be suggesting that the land-transfer statute somehow changes the social meaning of the cross—it was initially an unconstitutional religious endorsement, but it became a predominantly secular object when Congress embraced it as a war memorial. The original injunction may have been appropriate, but changing facts (i.e., Congress's decision to transfer the land) necessitate reexamination of the cross's constitutionality.

Justice Kennedy's logic here is hard to follow; it is profoundly unclear how Congress's action could change the social meaning of the cross and even more unclear how Congress's action would *secularize* the cross. But perhaps the opinion was not meant to be parsed so finely. Most likely Justice Kennedy is just trying to put a thumb on the scales for the district court on remand. The message seems clear: You are free to decide on the land transfer any way you like, but uphold it if you can. Revise the terms of the earlier injunction if you need to do so.[48]

But although the plurality opinion signals approval of this particular cross, it also goes to lengths to suggest that not all crosses or passive displays will be constitutional. The left should take heart from the fact that Justice Alito and Chief Justice Roberts have now gone on record affirming that the Establishment Clause indeed prohibits overly denominational religious displays.[49] The plurality opinion (which both of them joined) adopts verbatim Justice Kennedy's conclusion in *Allegheny County*, where he said that "the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . 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."[50]

IV. BEYOND *SALAZAR*

For those who wanted a big change in the law—and even for those who wanted an exciting case to read—the Court's decision in *Salazar v. Buono* was a bust. *Salazar* officially left the Establishment Clause untouched, and it only really confirmed what most already suspected—with Justice Kennedy as the middle Justice, the Court will probably be more accepting of religious displays. But *Salazar* also shows an important hesita-

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[47] *See id.* at 1818, 1820.

[48] For a more in-depth look at the plurality opinion, see Mary Jean Dolan, Salazar v. Buono: *The Cross Between Endorsement and History*, 105 NW. U. L. REV. COLLOQUY 42 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/21/LRColl2010n21Dolan.pdf (link).

[49] *See Salazar*, 130 S. Ct. at 1816 (plurality opinion) (suggesting that symbols which "promote a Christian message" or that "set the *imprimatur* of the state on a particular creed" are unconstitutional).

[50] *Id*. (quoting Cnty. of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

tion on the part of Justice Kennedy, Justice Alito, and Chief Justice Roberts toward making quick and drastic changes. They will not require the city of Las Cruces to remove the crosses from its town seal.[51] But neither will they allow a city council to put up a big new cross on city property.[52] Refusing to draw any categorical line, they will find themselves handling these cases based on their own unique facts, one at a time, implicitly relying on a host of factors—such as the age of the display and the degree to which it is denominational—that they would likely feel uncomfortable explicitly defending. In short, the future of passive displays looks a lot like the past. The Court will continue to muddle through.

Many feared *Salazar* would bring sweeping changes. Some even feared it would be the end of the endorsement test.[53] This latter possibility troubles a lot of people, but I see it slightly differently. In other doctrinal areas, the tests really matter; if you know the tests, you can figure out how the cases will be decided. But with the Establishment Clause, the cases have always been more important than the tests, because the tests are too manipulable to do much work on their own. So it matters if the Court jettisons the endorsement test in favor of some other formal test. But what matters more is if the Court begins to decide the cases differently. *Salazar* indicates that it will not, or at least that any changes will be small and gradual. If the endorsement test is abandoned, it will probably be replaced by something that looks a heck of a lot like it. And should the Court adopt some new test, that test will surely struggle with the same problems that the endorsement test did—the central problem in the context of passive displays being that they have both religious and secular meanings.[54] The Court in the past dealt with this problem sneakily, often by simply ignoring one meaning or the other, or by subtly manipulating the standard of proof.[55] But

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[51] *See* Weinbaum v. City of Las Cruces, 541 F.3d 1017 (10th Cir. 2008) (rejecting such a claim) (link).

[52] *See supra* note 50 and accompanying text.

[53] Ian Bartrum talks about the future of the endorsement test in his piece. *See* Bartrum, *supra* note 30, at 34–38. Lisa Shaw Roy saw a change in the endorsement test going back to the Supreme Court's decision in Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009). *See* Lisa Shaw Roy, Pleasant Grove City v. Summum: *Monuments, Messages, and the Next Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 280 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/5/LRColl2010n5Roy.pdf (link).

[54] For thoughtful and more extended considerations of this problem, see Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545 (2010) (link); B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change of Meaning Over Time*, 59 DUKE L.J. 705 (2010) (link); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005) (link).

[55] One case brought this latter point out into the open. In *Pinette*, Justice O'Connor phrased the endorsement inquiry as asking whether *the* reasonable observer would see an endorsement of religion, while Justice Stevens asked whether *some* reasonable observer could see an endorsement of religion. *Compare* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 758, 779–80 (1995) (O'Connor, J., concurring), *with id*. at 807 (Stevens, J., dissenting) (link). In a similar manner, Justice Kennedy once suggested raising the bar with a proselytization test, which seemed to ask whether the reasonable ob-

the only way out entirely is by drawing some well-defined categorical line, which the Court seems unwilling to do. So, at the end of the day, *Salazar v. Buono* leaves us where we started—in a state of mild confusion about the last decision, definite uncertainty about the legal rule, and eager anticipation of the next case.

server would *clearly* see a *sectarian* endorsement of religion. Though Justice Kennedy's opinion criticized the endorsement test, the test he suggested was only modestly different. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (link).