

## SALAZAR V. BUONO: THE CROSS BETWEEN ENDORSEMENT AND HISTORY

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The striking image of a white cross on stark rock, silhouetted against the desert sky,<sup>1</sup> now symbolizes not only Christianity and, arguably, World War I military sacrifice, but also the equally dramatic, prolonged saga of the *Salazar v. Buono* litigation. The photos invoke the most recent Supreme Court battle in the legal and cultural war to define religion's role in the public square. Competing approaches stress either preserving history or avoiding government endorsement of religion; this brief article analyzes a potential new synthesis suggested by *Buono*.

The original cross war memorial was erected in 1934 by a local group of WWI veterans in the Mojave Desert,<sup>2</sup> an isolated area of federally-owned land which, 60 years later, became a National Preserve.<sup>3</sup> When Frank Buono brought an Establishment Clause suit over the display of the large cross on federal land, the district court held that it conveyed the appearance of a government endorsement of Christianity, and thus enjoined its display.<sup>4</sup> While the decision was pending before the district court, and in the aftermath of 9/11, Congress designated the cross a National Memorial.<sup>5</sup> Next, rather than remove the cross, while the first Ninth Circuit appeal was pending, Congress passed a land swap bill to transfer the underlying property to the Veterans of Foreign Wars (VFW), so long as the property continued to be used as a war memorial.<sup>6</sup> The Ninth Circuit affirmed, without resolving

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<sup>1</sup> For images, see, e.g., <http://latimesblogs.latimes.com/lanow/2008/10/good-morning-15.html> (link).

<sup>2</sup> See *Salazar v. Buono*, 130 S. Ct. 1803, 1811 (2010) (*Buono*) (link).

<sup>3</sup> California Desert Protection Act of 1994, Pub. L. No. 103-433, § 501, 108 Stat. 4471, 4889-90.

<sup>4</sup> *Buono v. Norton*, 212 F. Supp. 2d 1202, 1203-04, 1217 (C.D. Cal. 2002) (*Buono I*), *aff'd* 371 F.3d 543 (9th Cir. 2004) (*Buono II*).

<sup>5</sup> See Act of Jan. 10, 2002, Pub. L. No. 107-117, §§ 8137(a), 8137(c), 115 Stat. 2230, 2278-79; see also *Buono v. Kempthorne*, 527 F.3d 758, 770 (9th Cir. 2008) (*Buono IV*) (discussing the designation).

<sup>6</sup> See Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(a)-(b), (e), 117 Stat. 1054, 1100; see also *Buono II*, 371 F.3d at 545 (indicating that the act providing for the land transfer was passed after oral argument before the Ninth Circuit, while decision was still pending).

the issue of whether the land transfer would itself be constitutional or cure the Establishment Clause violation.<sup>7</sup> When Buono returned to the district court to stop the land transfer, that court found Congress's strategy to be an invalid attempt to circumvent the 2002 injunction and permanently enjoined the land transfer (the "2005 injunction").<sup>8</sup> The Ninth Circuit again affirmed.<sup>9</sup>

After sorting out the procedural morass, the issue before the Supreme Court technically was the validity of the 2005 injunction.<sup>10</sup> According to the plurality, this turned on whether the land transfer could cure the Establishment Clause violation previously adjudicated in 2002.<sup>11</sup> In a wildly splintered decision, five Justices suggested strongly that VFW ownership of the land would resolve Buono's original complaint,<sup>12</sup> but the Court remanded the case to the district court, leaving the final outcome somewhat unsettled.<sup>13</sup> Of interest here is the Court's emphasis on government efforts to "avoid[] the disturbing symbolism associated with the destruction of the historic monument," while also addressing the endorsement problem.<sup>14</sup>

Since the Court's decision, a startling vigilante two-step, complete with a theft in the night, has intensified emotions and disrupted the balancing act. Less than two weeks after the Supreme Court's decision, the cross was stolen from Sunrise Rock.<sup>15</sup> Veterans' groups expressed outrage<sup>16</sup> and offered

<sup>7</sup> See *Buono II*, 371 F.3d at 546, 550.

<sup>8</sup> *Buono v. Norton*, 364 F. Supp. 2d 1175, 1181–82 (C.D. Cal. 2005) (*Buono III*), *aff'd sub. nom.*, *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (*Buono IV*), *rev'd sub. nom.*, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (*Buono*).

<sup>9</sup> *Buono IV*, 527 F.3d at 783.

<sup>10</sup> See *Salazar v. Buono*, 130 S. Ct. 1803, 1814–16 (2010) (*Buono*).

<sup>11</sup> *Id.* at 1815–17.

<sup>12</sup> See *Buono*, 130 S. Ct. at 1816–18 (plurality opinion); *id.* at 1821–24 (Alito, J., concurring in part and concurring in the judgment) (expressing the belief that the land transfer ended the controversy and that remand was, therefore, unnecessary); *id.* at 1825–26 (Scalia, J., concurring in the judgment) (finding that the land transfer changed the contours of the case to such an extent that Buono needed to reestablish standing).

<sup>13</sup> *Id.* at 1821 (plurality opinion). For a discussion of the unsettled issues, see *After Supreme Court Decision, ACLU Will Continue To Argue That Mojave Cross Land Transfer To Veterans Group Does Not Remedy Establishment Clause Violation*, ACLU.ORG (Apr. 28, 2010), <http://www.aclu.org/religion-belief/after-supreme-court-decision-aclu-will-continue-argue-mojave-cross-land-transfer-vet> (“[W]e’re encouraged that the case is not over,” stated Peter Eliasberg, the ACLU attorney who argued the case.) (link).

<sup>14</sup> *Buono*, 130 S. Ct. 1803, 1823 (Alito, J., concurring in part and concurring in the judgment); see also *id.* at 1817 (plurality opinion) (“The 2002 injunction thus presented the Government with a dilemma. It could not . . . remove the cross without conveying disrespect for those the cross was seen as honoring.”).

<sup>15</sup> Caroline Black, *Mojave Cross Honoring U.S. War Dead Stolen in Middle of the Night*, CBSNEWS.COM (May 12, 2010), [http://www.cbsnews.com/8301-504083\\_162-20004719-504083.html](http://www.cbsnews.com/8301-504083_162-20004719-504083.html) (link).

<sup>16</sup> See *id.*

a substantial reward,<sup>17</sup> and a newspaper published an anonymous letter from the alleged thief, which claimed that he was a veteran and that he stole the cross to defend the Constitution.<sup>18</sup> Worse yet, one week later, a replacement metal cross was erected, also anonymously.<sup>19</sup> After years of covering up the cross in a plywood box pending appeals, the National Park Service (NPS) physically removed the new metal cross from Sunrise Rock<sup>20</sup>—thus engaging in the very symbolic act which first Congress, and then the Court, endeavored to avoid.

These bizarre, post-decision news flashes create a surreal backdrop for analyzing the decision's focus on averting destruction of a historic war memorial. But despite the apparent ease of removing and erecting this particular cross monument, this is a recurring "dilemma" for the government.<sup>21</sup> Many longstanding war memorials and public monuments include some religious imagery; few are so easily removed. More commonly, their scale and construction materials would require jackhammers and a demolition crew for removal.<sup>22</sup>

This Article explores whether, and in what sense, the Court's Establishment Clause analysis is likely to continue focusing on context and social meaning, using a recognizable endorsement test or otherwise. With six separate opinions, the Supreme Court's *Salazar v. Buono* decision was unusually splintered, even for an Establishment Clause decision. Given that much of the discussion involved procedural issues of standing, injunctive relief, and res judicata, only three of the opinions wrestled with the merits: Justice Kennedy's plurality opinion; Justice Alito's concurrence in the judgment, rejecting the remand as unnecessary; and Justice Stevens's dissent.<sup>23</sup>

<sup>17</sup> Liberty Institute, *Mojave War Memorial Torn Down by Vandals!*, LIBERTYINSTITUTE.ORG, [http://www.libertyinstitute.org/current\\_cases.php?category=6&article=67](http://www.libertyinstitute.org/current_cases.php?category=6&article=67) (announcing the Liberty Institute's \$125,000 reward for information leading to the arrest and conviction of the perpetrators) (link).

<sup>18</sup> See *Anonymous Letter Explaining Cross Theft Sent to Desert Dispatch*, DESERTDISPATCH.COM (May 11, 2010), <http://www.desertdispatch.com/articles/explaining-8465-anonymous-letter.html> (link).

<sup>19</sup> See *Replica Cross Mysteriously Appears in Mojave: Authorities Call it Illegal and Remove it from Federal Preserve*, MSNBC.COM (May 20, 2010), <http://www.msnbc.msn.com/id/37261550> (link).

<sup>20</sup> See *id.*; *Park Service Removes Mojave Cross Replica*, CBN.COM (May 21, 2010), <http://www.cbn.com/cbnnews/us/2010/May/Stolen-Mojave-Desert-Cross-Returned/> (link); see also Liberty Institute, *Put the Cross Back!*, <http://www.putthecrossback.com/> (last visited Aug. 30, 2010) (soliciting support for a letter campaign to President Obama asking him to put the Mojave Desert Cross back up) (link).

<sup>21</sup> Cf. *Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) (*Buono*) (stating that the government was confronted with a "dilemma" because it could not remove the cross without conveying disrespect).

<sup>22</sup> For example, the Mt. Soledad Cross War Memorial involved in *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), includes a large concrete cross and six granite walls with memorial plaques and has been standing since 1954 when it was first dedicated, *id.* at 1202–04.

<sup>23</sup> See *Buono*, 130 S. Ct. at 1811, 1816–21; *id.* at 1821–24 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1831–45 (Stevens, J., dissenting). Justices Scalia and Breyer, on the other hand, discussed solely procedural aspects of the case. See *id.* at 1824–26 (Scalia, J., concurring in the judgment) (concluding that *Buono* lacked standing because an injunction to prevent the land transfer

What makes the first two opinions interesting is the interplay between the endorsement test and the usually competing historical approach. To some extent, of course, the Court was saddled with considering the impact of the endorsement test because the district court had used it.<sup>24</sup> Once the Court agreed that the 2002 judgment in *Buono I* had res judicata effect,<sup>25</sup> the Justices had to confront whether, after the congressionally mandated transfer, the cross would still convey government endorsement of religion because of its National Memorial status, tangled history, and intertwined roles as both a symbol of Christianity and one of WWI military sacrifice. Constrained by this procedural straitjacket, the majority could not simply declare that the Establishment Clause permits the government to use Christian crosses to memorialize U.S. wars because that is “our tradition[.]”<sup>26</sup>

Instead, Justice Alito’s concurrence and, to a lesser extent, Justice Kennedy’s opinion, made two new, linked, rhetorical moves. Both suggested that a government’s efforts to preserve a religious symbol with a specific, secular, historical meaning—at least one involving military sacrifice—is unlikely to be viewed as a government endorsement of religion. And both implied that, when calculating a monument’s overall effect, the Court should consider how the “reasonable observer” would interpret a forced removal. *Salazar v. Buono* thus raises the question of just how far the endorsement test can be stretched before it loses all value for those who prefer it to an undiluted historical approach.

This Article first briefly reviews the key features of the competing doctrines, and then analyzes these two *Buono* opinions for hints of Justices Kennedy’s and Alito’s views and the endorsement test’s potential resiliency. It is possible to interpret these opinions as describing an expanded endorsement test, one which takes the “reasonable observer” one step further along an imagined “endorsement test continuum.” The goal of this Article is to investigate options, given scholars’ predictions that the Roberts Court is likely to reject altogether the viewer-centered endorsement test and adopt the moribund historical approach.<sup>27</sup> I conclude by looking at whether this

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was new relief); *id.* at 1842–45 (Breyer, J., dissenting) (arguing that the “law of injunctions” applied, not the Establishment Clause, and finding that the Court should have deferred to the district court’s interpretation of the scope of its injunction).

<sup>24</sup> See *Buono v. Norton*, 212 F. Supp. 2d 1202, 1214–15 (C.D. Cal. 2002) (*Buono I*) (applying the effect prong of the *Lemon* test and “ask[ing] whether, irrespective of government’s actual purpose, the practice . . . in fact conveys a message of endorsement or disapproval [of religion]” (internal quotation marks omitted) (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring))).

<sup>25</sup> See *Buono*, 130 S.Ct. at 1815 (plurality opinion).

<sup>26</sup> Cf. *Lynch*, 465 U.S. at 678 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)) (contemplating a role for tradition in the Establishment Clause analysis) (link).

<sup>27</sup> See, e.g., Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 1–4 (2006) (predicting that Justice Alito and Chief Justice Roberts will complete the transformation of the Establishment Clause from a doctrine protective of the separation of church and state to one that permits government endorsement of at least the majority religions); see also 2 KENT GREENAWALT, RELIGION

perspective on the Kennedy and Alito *Buono* opinions can be reconciled with the endorsement test's equality rationale.

### I. IRRECONCILABLE APPROACHES?

In the Court's prior religious display cases, the viewer-centered endorsement inquiry was proffered as a more sensitive antidote to the fixed, nativist historical approach. The plurality opinions upholding both the crèche in *Lynch v. Donnelly* and the Ten Commandments monument in *Van Orden v. Perry* relied on the government's "unbroken history" of petitioning God and acknowledging the role of Biblical religion in the Nation's public life.<sup>28</sup> This reductive historical approach is intrinsically indifferent to the impact of such displays on observers and outsiders. Rather, the judicial focus is on government's prior acts. These opinions convey the idea that past practice almost inexorably defines current constitutionality. For example, the *Lynch* plurality stressed the "countless . . . illustrations of . . . governmental sponsorship" of symbols of "our religious heritage,"<sup>29</sup> and the government's prerogative to display depictions of "a significant historical religious event long celebrated in the Western World."<sup>30</sup> The plurality's rationale, it seems, might just as easily support the government's right to display a crucifix as part of a community's Easter holiday display. As Professor Kent Greenawalt has cautioned, "[f]or the principle that bars government promotion of religion to have significance, it cannot be evaded by turning every presentation of the dominant religion into a paean of faithfulness to the country's traditions."<sup>31</sup>

In contrast, Justice O'Connor's endorsement test famously asks whether a "reasonable observer" would perceive the challenged symbol as conveying a message of governmental endorsement of religion.<sup>32</sup> The appearance of such endorsement is unconstitutional, she asserted, because it communicates to non-adherents that they are political outsiders and to adherents that they are favored insiders.<sup>33</sup> Interpreting a symbol's social meaning starts with its visible surroundings. This was the focus of the

AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 87 (2008) ("With [Justice O'Connor's] retirement, the fate of the endorsement test is uncertain.") (link).

<sup>28</sup> *Van Orden v. Perry*, 545 U.S. 677, 681, 686–88 (2005) (link); *Lynch*, 465 U.S. at 670–71, 674–78, 685. The apex of the historical approach is *Marsh v. Chambers*, 463 U.S. 783 (1983) (link), which held that the Establishment Clause allows each legislative session to begin with a prayer by a State-paid chaplain based on a tradition dating back to the First Amendment's enactment, *id.* at 784–85, 788–91.

<sup>29</sup> *Lynch*, 465 U.S. at 677 (emphasis added).

<sup>30</sup> *Id.* at 680; *see also Van Orden*, 545 U.S. at 690 (plurality opinion) (proclaiming that "[t]hese displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments").

<sup>31</sup> 2 GREENAWALT, *supra* note 27, at 72.

<sup>32</sup> *See Allegheny v. ACLU*, 492 U.S. 573, 595–97, 620 (1989) (adopting the test first proposed by Justice O'Connor in her concurrence in *Lynch*) (link); *Lynch*, 465 U.S. at 690–94 (O'Connor, J., concurring).

<sup>33</sup> *Lynch*, 465 U.S. at 688.

endorsement test in the Court's holiday display cases: a crèche was acceptable if outdoors, surrounded by Santa and snowmen, but unconstitutional if displayed alone inside the courthouse.<sup>34</sup> Similarly, to assert impermissible endorsement in *Van Orden*, the dissenters emphasized readily apparent contextual details—the Ten Commandments' location between the State Capitol and Supreme Court and the distance and incoherence of allegedly surrounding statues.<sup>35</sup>

In the next step along the endorsement test continuum, the endorsement test's "reasonable observer" also is deemed knowledgeable about the circumstances of a challenged symbol's installation and display. While both the propriety and the scope of this consideration still are debated, the Court's application of the endorsement test has not turned on the views of the "casual passerby" or "isolated nonadherents."<sup>36</sup> For example, in *Van Orden*, Justice Breyer's controlling concurrence not only noted the visible donor plaque, but also attributed to the reasonable observer the knowledge that the Fraternal Order of Eagles' donation of this Ten Commandments monument four decades earlier was part of its nationwide campaign against juvenile delinquency.<sup>37</sup>

Up to this point, though, the endorsement test has not required omniscience—or asked the hypothetical viewer to consider the social meaning of removing a challenged religious symbol. When Justice Breyer explained that his decision in *Van Orden* was focused primarily on avoiding "religiously based divisiveness" over "the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation," he did so following, but distinctly from, his use of endorsement-style reasoning.<sup>38</sup>

<sup>34</sup> See *Allegheny*, 492 U.S. at 598–602, 613–21 (applying Justice O'Connor's endorsement test to hold unconstitutional a crèche standing alone on the county courthouse steps, while finding permissible an outdoor menorah, placed next to a Christmas tree and generic holiday sign in front of a county building); *Lynch*, 465 U.S. at 679–83 (plurality opinion).

<sup>35</sup> *Van Orden*, 545 U.S. at 742–43 (Souter, J., dissenting) (Characterizing the "17 monuments with no common appearance, history, or esthetic role scattered over 22 acres" as a collection "does nothing to blunt the religious message and manifestly religious purpose behind it.")

<sup>36</sup> See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring) (link). Such knowledge has been attributed to the reasonable observer at least since *Pinette*, if not before. In *Pinette*, Justice O'Connor, whose views prevailed, clarified that the reasonable observer is not "the casual passerby" or "isolated nonadherents," but a hypothetical observer who is "deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* at 779–80. Justice Stevens' dissent, on the other hand, argued that the endorsement test's "reasonable observer" should employ the perceptions of passersby with no special knowledge of context. See *id.* at 799 (Stevens, J., dissenting). For a discussion on commentators' criticisms of the Court for failing to adopt the perspective of the "reasonable nonadherent" when applying the endorsement test, see, for example, B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 532–33 (2005) (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§14–15, at 1296 (2d ed. 1988)) (link).

<sup>37</sup> *Van Orden*, 545 U.S. at 700–02.

<sup>38</sup> *Id.* at 702–04 (Breyer, J., concurring) (explaining that even if the contextual factors, including the Eagles' role, provide a "strong, but not conclusive, indication that the Commandments' text conveys a

Next, this Article explores whether *Salazar v. Buono* thus suggested an expanded endorsement test.

II. THE “REASONABLE OBSERVER” AND PRESERVING (ARGUABLY) HISTORIC WAR MEMORIALS

One reading of the opinions by Justices Kennedy and Alito in *Buono* shows a new, potentially significant move: the creation of an exceedingly reasonable observer, one who considers the other side’s perspective on a challenged religious symbol.

Justice Alito’s concurrence provides the clearer picture of this hybrid analysis. The land transfer would satisfy the endorsement test, he concluded, in part because “a well-informed observer would appreciate that the transfer represents an effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns.”<sup>39</sup> He stressed concerns about the messages that would be conveyed not by the unconstitutional display of a cross on government land, but by its forced removal after seventy years on Sunrise Rock: “[T]his removal would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor . . . [and] interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion . . . .”<sup>40</sup> And the solution—the land transfer—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 the disturbing symbolism associated with the destruction of the historic monument.”<sup>41</sup>

Kennedy’s opinion for the Court made the same points, though in a more oblique fashion. According to Justice Kennedy, the district court erred because it failed to consider that a reasonable observer, knowing of the land transfer to the VFW, would no longer perceive any governmental endorsement of religion.<sup>42</sup> Justice Kennedy invalidated the 2005 injunction based on his belief that it was erroneously grounded in a suspicion that Congress had acted with an illicit, evasive purpose.<sup>43</sup> In a somewhat confusing twist, Justice Kennedy nonetheless advised that, when considering the message the cross conveys to a reasonable observer, the relevant factors should include Congress’ “policy of accommodation.”<sup>44</sup> According to Kennedy, the policy in this case was embodied in the land-transfer statute which Congress enacted when the 2002 injunction “presented the Government

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predominately secular message,” avoiding disputes over removals was “a further factor . . . determinative here”).

<sup>39</sup> *Salazar v. Buono*, 130 S. Ct. 1803, 1824 (2010) (*Buono*) (Alito, J., concurring in part and concurring in the judgment).

<sup>40</sup> *Id.* at 1822–23.

<sup>41</sup> *Id.* at 1823.

<sup>42</sup> *See id.* at 1816–19 (plurality opinion).

<sup>43</sup> *See id.* at 1816–20.

<sup>44</sup> *Id.* at 1818, 1820.

with a dilemma”); the federal government was required to remove the cross war memorial, but “it could not [do so] without conveying disrespect for those the cross was seen as honoring.”<sup>45</sup> Finally, he noted that if the land transfer is “an insufficient accommodation,” the Court should consider whether signs disclosing VFW’s land ownership would fully remedy the perception of government endorsement.<sup>46</sup> Putting it all together, it appears that Justices Kennedy and Alito have added a new contextual factor to the reasonable observer’s responsibilities. While not fully articulated, the idea in *Buono* seems to be this: if a viewer knows that the reason for the land transfer is to avoid tearing down a seventy-year-old symbol, first erected in 1934 by WWI veterans and revered ever since as a war memorial honoring the sacrifices of the war dead, then that viewer will not perceive the transfer, or the newly-privatized symbol, as a governmental endorsement of the Christian religion.

This approach certainly is related to Justice Breyer’s discussion of religious divisiveness in *Van Orden*, but there is a subtle difference. In *Van Orden*, Breyer found that the endorsement test probably, but not conclusively, favored allowing the Ten Commandments.<sup>47</sup> There, his concern over future disputes, which derived from his exercise of “legal judgment” and the Establishment Clause’s purposes, served as the tipping point.<sup>48</sup> In *Buono*, however, the value of preserving longstanding monuments appears to be folded into the endorsement test, and that mythical character, the reasonable observer, appears to be charged with adopting this political concern as her own. This expanded endorsement test seems to invert the central purpose of a test originally focused on protecting non-adherents, but often criticized as majoritarian in practice.<sup>49</sup> The impact of this transformation, evaluated below, interconnects with observers’ understandings of government motives, the level of contextual knowledge attributed to observers, and a government’s corresponding responsibility, if any, to communicate essential information through disclaimers.

### III. SEVERAL VERSIONS OF THE USUAL FACTORS

One’s opinion of the outcome of the *Buono* case, of course, depends at least partially on one’s version of the relevant facts. There are additional

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<sup>45</sup> *Id.* at 1817.

<sup>46</sup> *See id.* at 1820. Note that here Kennedy uses the term “accommodation” to refer to the concerns of non-adherents and the offended; these individuals are not the usual benefactors of the “accommodationist” position.

<sup>47</sup> *Van Orden v. Perry*, 545 U.S. 677, 703–04 (2005) (Breyer, J., concurring).

<sup>48</sup> *See id.* at 700. For a discussion of the Establishment Clause’s political/religious “divisiveness” rationale see, for example, Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1681–1708 (2006).

<sup>49</sup> *See, e.g.*, Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. STATE L. REV. 667 (link).

reasons for skepticism about Congress's motive for the land-transfer statute: NPS rejected a request to install a Buddhist stupa on Sunrise Rock, and took no action to address the cross display until that time;<sup>50</sup> the cross, which had been replaced over the years, failed to qualify as a National Historic Landmark;<sup>51</sup> and local residents hold an annual sunrise Easter service at the cross.<sup>52</sup> Perhaps not surprisingly, the story considered by the lower courts and broadcast in the media was substantially different than the narrative told by the Supreme Court's majority opinion and, at times, the dissent.

Looking first at the most widely-publicized perspective, the cross's unconstitutionality, even after the land-transfer maneuver, seems inescapable. As the Ninth Circuit emphasized, "carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement."<sup>53</sup> Congress' repeated attempts to block removal of the cross, particularly its designation of this sectarian symbol as the country's only WWI National Memorial, which placed it in an elite group with such icons as the Washington Monument, raises understandable concerns.<sup>54</sup> Further, contemplate the lower courts' statutory interpretations: the federal government retains full control of the land; it is required to fund and install a cross replica and plaque; and the land will revert back to the government if the VFW ever removes the cross.<sup>55</sup> It is hard to see how this scenario could pass constitutional muster.

The Court's factual assumptions, however, were far more benign. Most significantly, all the Justices assumed the cross's "National Memorial" status had a potentially limited shelf-life. Following the government lawyers' interpretation, their opinions agreed that, post-land transfer, the VFW has the legal authority to remove, modify, or supplement the cross, so long as it continues to use the land parcel to display some type of WWI memorial.<sup>56</sup> Focusing on the visuals, the Solicitor General described the

<sup>50</sup> See *Buono v. Norton*, 371 F.3d 543, 549 (9th Cir. 2004) (*Buono II*); Declaration of Mary Martin in Support of Defendants' Motion for Summary Judgment, Joint Appendix at 69, *Buono*, 130 S.Ct. 1803 (No. 08-472) (explaining that "[t]he NPS intended to remove the cross from public land following a written inquiry in 1999 by another individual about placing other religious symbols near the cross").

<sup>51</sup> *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008) (*Buono IV*).

<sup>52</sup> See *id.*

<sup>53</sup> *Id.* at 783.

<sup>54</sup> See *Buono*, 130 S. Ct. at 1841–42 (Stevens, J., dissenting) ("As far as I can tell, however, it is unprecedented in the Nation's history to designate a bare, unadorned cross as the national war memorial for a particular group of veterans."). In addition, during the litigation, Congress twice enacted bills to prohibit the use of federal funds to remove the cross memorial. See Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A–230 (2000); Pub. L. No. 107-248, § 8065(b), 116 Stat. 1519, 1551 (2002).

<sup>55</sup> See *Buono IV*, 527 F.3d at 777.

<sup>56</sup> *Buono*, 130 S. Ct. at 1823 (Alito, J., concurring in part and concurring in the judgment) ("Congress did not prevent the VFW from supplementing the existing monument or replacing it with a war memorial of a different design."); *id.* at 1826 (Scalia, J., concurring in the judgment) (stating that it is "merely speculative" to assert that the VFW will keep up the Cross because "[n]othing in the statutes compels the VFW (or any future proprietor) to keep it up"); *id.* at 1837 (Stevens, J., dissenting) (stating

Mojave Desert Preserve as riddled with private holdings<sup>57</sup> (effectively transforming the image to something closer to Swiss cheese), and the majority opinion went on to note the nearby private ranches.<sup>58</sup> This brief Article works from the understandings expressed in the Court's opinions, particularly its assumption that the VFW is required to maintain a WWI memorial—but not necessarily the cross—as a condition of keeping the transferred property.<sup>59</sup> Also, while not mentioned in the opinions, *Salazar v. Buono* is unlike the Court's precedents where governments have failed the “secular purpose” test.<sup>60</sup> It lacked direct evidence of any ulterior government motive to promote Christianity over Buddhism, or to use the cross' history as a WWI war memorial as a ruse, or to proclaim a “Christian Nation.”

#### IV. GLIMPSES OF THE ENDORSEMENT TEST'S FUTURE

In the concluding section, this Article evaluates whether the “expanded endorsement test” suggested by Kennedy's and Alito's *Buono* opinions could be any improvement over a retreat to the straight historical approach. Keeping an open mind for now, the next step is to review the two opinions for signs that either is open to any type of viewer-centered approach, once given a clean procedural slate.

Any assertion that the endorsement test is not dead yet must confront the claim that it was effectively killed off in *Pleasant Grove City v. Summum*.<sup>61</sup> The basis for this claim is a meandering passage in *Summum* in

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that the land transfer statute “does not categorically require the new owner of the property to display the existing memorial[,] . . . [although it] most certainly encourages this result”).

<sup>57</sup> Transcript of Oral Argument at 23, *Buono*, 130 S. Ct. 1803 (No. 08-472) (“[T]here are many, many private holdings within the preserve[;] people . . . could put up whatever religious symbols they wanted to. One simply wouldn't know whether it was on private land or on other land.”) (link).

<sup>58</sup> *Buono*, 130 S. Ct. at 1811 (plurality opinion); see also Deposition of Frank Buono, Joint Appendix at 79, *Buono*, 130 S. Ct. 1803 (No. 08-472) (acknowledging he did not know initially whether the land under the cross was public or private).

<sup>59</sup> Additional research of non-record facts indicates that neither of these judicial narratives fully describes the actual practice of National Memorial designations. See Mary Jean Dolan, *The Cross as National Memorial*, 21–35 (unpublished original legal research presented at the Law and Religion Roundtable on June 24, 2010 at Brooklyn Law School) (on file with author) [hereinafter *Cross as National Memorial*]. For example, National Memorial status is not as lofty or rare as it would seem, the cross does not appear to be the sole WWI memorial for the nation, and abolishing National Memorial status frequently has entailed specific congressional action. For an illustration of the seemingly random manner in which local statutes have received this congressional designation, see, for example, the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 2877, 122 Stat. 3, 563–64, which authorized the creation of a National War Dogs Monument, and National War Dogs Monument, Inc., <http://www.nationalwardogsmonument.org/> (last visited June 12, 2010) (link).

<sup>60</sup> See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 850, 858 (2005) (finding officials' religious purposes to be evident from their posting of the first two Ten Commandments displays) (link); *Wallace v. Jaffree*, 472 U.S. 38, 43 (1985) (reporting that the sponsor of a moment-of-silence bill testified that his purpose was to return prayer to the schools) (link).

<sup>61</sup> See Scott W. Gaylord, *Licensing Facially Religious Government Speech: Summum's Impact on the Free Speech and Establishment Clauses*, 8 FIRST AMEND. L. REV. 315, 391–98 (2010) (arguing that,

which Justice Alito, writing for the Court, seemed to suggest in dicta that any monument could mean anything to anyone.<sup>62</sup> Elsewhere, I have contested that claim on two grounds.<sup>63</sup> First, it is wholly inconsistent with the rationale of *Summum*. Justice Alito's government-speech holding relied on both the reasonable viewer's perception, based on contextual clues, that the monuments conveyed some message on the government's behalf, and the government's intent to convey some recognizable theme.<sup>64</sup> Second, elsewhere in the *Summum* opinion, Justice Alito expressly recognized that there can be a shared social consensus on the meanings of specific monuments.<sup>65</sup> Thus, *Summum* left open the possibility that the Court would continue to rely on observers' context-based interpretations.

So, which spin on the controversial *Summum* passage was validated by Justice Alito's *Buono* concurrence? Both reflect some truth. On balance, though, there is still some ground to believe that the Court will continue to pay attention to the viewer's perceptions of government endorsement of religion. The analysis here will start with Alito's *Buono* opinion, and then address Justice Kennedy's.

While Justice Alito repeated in *Buono* that a monument may be "interpreted by different observers, in a variety of ways,"<sup>66</sup> this time he delimited the phrase by use of examples of several plausible meanings, each shared by large, identifiable constituencies. In *Buono*, he observed that those who saw the cross monument "appear to have viewed it as conveying at least two significantly different messages," both as the "preeminent symbol of Christianity" and as a WWI memorial.<sup>67</sup> To say that a given symbol sends more than one message is not equivalent to saying that it conveys an

after *Summum*, the endorsement test no longer applies to government speech); see also Lisa Shaw Roy, Pleasant Grove City v. Summum: *Monuments, Messages, and the Next Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 280 (2010) (exploring inconsistencies between Justice Alito's *Summum* opinion and the endorsement test) (link). See generally Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132–34 (2009) (holding that donated monuments displayed in public parks are "government speech") (link).

<sup>62</sup> *Summum*, 129 S. Ct. at 1133–37. For commentary on Justice Alito's claim, see Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, IOWA L. REV. (forthcoming 2010) (manuscript at 50–51, 55), available at <http://ssrn.com/abstract=1544635> (link).

<sup>63</sup> See Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After Summum*, 19 WM. & MARY BILL RTS. J. (forthcoming Oct. 2010) (manuscript at 41–49), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1548761](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1548761) [hereinafter *Government Identity Speech*] (link).

<sup>64</sup> See, e.g., *Summum*, 129 S. Ct. at 1134 (explaining that the City's actions—"t[aking] ownership of [a] monument and put[ting] it on permanent display in a park that . . . is linked to the City's identity"—"unmistakably signifi[ed] to all Park visitors that the City intend[ed] the monument to speak on its behalf").

<sup>65</sup> See, e.g., *id.* at 1136 (explaining that the Statue of Liberty came "to be viewed as a beacon welcoming immigrants to a land of freedom").

<sup>66</sup> *Salazar v. Buono*, 130 S. Ct. 1803, 1822 (2010) (*Buono*) (Alito, J., concurring in part and concurring in the judgment) (quoting *Summum*, 129 S. Ct. at 1135).

<sup>67</sup> *Id.*

infinite number of messages, and thus effectively none. The endorsement test does not require a single possible message,<sup>68</sup> just a decision about the relative strengths of possible messages and a normative vision of whose perceptions should govern in a particular cultural context.

Other statements in *Buono* also weaken the claim that Justice Alito has rejected testing for social meaning. For one, Justice Alito expressly recognized that viewers can discern differences in meaning based on contextual details of location and the nature of the government's involvement. Responding to a claim in Justice Stevens' dissent,<sup>69</sup> Alito asserted that "a reasonable observer would not view the land exchange as the equivalent of the construction of an official World War I memorial on the National Mall."<sup>70</sup> Preserving the old is thus distinguishable from erecting the new. An action taken to resolve conflict over an historical war memorial conveys quite a different message from the triumphalism that many would perceive if, as in this example, the federal government chose now to erect a Christian cross in the Nation's Capitol to represent all veterans.

Also potentially relevant is Justice Alito's acknowledgement in *Buono* that, in a specific historical and cultural context, a symbol is likely to have a commonly-recognized meaning. Noting that the original reason WWI veterans installed the cross was "to commemorate American war dead,"<sup>71</sup> he wrote,

[P]articularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.<sup>72</sup>

At the time the cross was erected in 1934, and for some time thereafter, its meaning as a WWI war memorial would have been more clearly evident to a larger percentage of viewers. Thus, Alito's reasoning can be construed as acknowledging that social meaning varies by historical era. But in order for a government to defend a constitutional claim based on a monument's

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<sup>68</sup> See Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners at 30, *Buono*, 130 S. Ct. 1803 (No. 08-472) (arguing that the Court should overrule the endorsement test because it is based on an outmoded "single message assumption" that was rejected in *Sumnum*) (link). *But cf. Government Identity Speech*, *supra* note 63, at 66-74 (disagreeing that the viability of the endorsement test depends on the "single message assumption").

<sup>69</sup> See *Buono*, 130 S. Ct. at 1841-42 (Stevens, J., dissenting).

<sup>70</sup> *Id.* at 1824 (Alito, J., concurring in part and concurring in the judgment).

<sup>71</sup> *Id.* at 1822.

<sup>72</sup> *Id.*; see also *id.* at 1820 (plurality opinion) ("It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles . . ."); cf. American Battle Monuments Commission, Cemeteries, <http://www.abmc.gov/cemeteries/cemeteries.php> (last visited Sep. 1, 2010) (showing lists and photos of overseas military cemeteries) (link).

meaning at the time it was erected, as I suggest below, its origins and purpose must be disclosed. Without such constraints, a broader reliance on “context” morphs into a veneration of tradition and swallows the endorsement test altogether.

Even the passage discussed above, in which Justice Alito explains the two messages that the cross’s removal likely would convey, shows that recognition of viewers’ perceptions remains significant and cognizable. Consistent with the endorsement test, much of Justice Alito’s concurrence in *Buono* supports analyzing these types of Establishment Clause claims by parsing out the social meaning conveyed to a “reasonable observer.” Still, given his simultaneous denigration of the “so-called” endorsement test,<sup>73</sup> my prediction of his continued amenability to this approach is quite tentative.

Turning to Justice Kennedy, his continued rejection of the endorsement test per se seems likely, but his statements in *Buono* leave room for continued analysis of context and social meaning. He did not use *Buono* as an opportunity to announce any new categorical rules for the Establishment Clause or to eradicate the endorsement test. Unlike the plurality opinion in *Capitol Square Review & Advisory Bd. v. Pinette*, for example, which asserted that private religious speech in a public forum can never violate the Establishment Clause, regardless of viewers’ perceptions,<sup>74</sup> none of the opinions in *Buono* declared a similar absolute. That may not count for much, though; as Kennedy noted, “this case is ill suited for announcing categorical rules.”<sup>75</sup> Also, he suggested to the district court that, on remand, the endorsement test may no longer be the appropriate framework because, “[a]s a general matter, courts considering Establishment Clause challenges do not inquire into ‘reasonable observer’ perceptions with respect to objects on private land.”<sup>76</sup>

At the same time, however, Justice Kennedy implied that the Court necessarily will continue using “highly fact-specific” inquiries for these cases.<sup>77</sup> Also, he included in *Buono* his paradigmatic example of a display that would exceed constitutional limits: if a city permitted “an obtrusive year-round religious display,” such as “the permanent erection of a large Latin cross on the roof of city hall.”<sup>78</sup> While in *Allegheny*, he labeled such a

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<sup>73</sup> See *Buono*, 130 S. Ct. at 1824 (Alito, J., concurring in part and concurring in the judgment).

<sup>74</sup> 515 U.S. 753, 757 (1995).

<sup>75</sup> *Buono*, 130 S. Ct. at 1820 (plurality opinion).

<sup>76</sup> *Id.* at 1819 (emphasis added).

<sup>77</sup> *Id.* at 1820.

<sup>78</sup> *Id.* at 1816 (quoting *Allegheny v. ACLU*, 492 U.S. 573, 661 (1989)). Arguably, especially after *Sumnum*, Texas’s Ten Commandments display—a large unmediated religious text, prominently displayed, standing alone, with its proclamations from God unavoidably read by those walking to the State Supreme Court and the State Capitol—is equivalent to Justice Kennedy’s example. See Brief for Petitioner at 1–2, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500) (link).

display “coercion,”<sup>79</sup> in *Buono*, he used his city hall cross example to highlight a difference in motives; the war memorial cross was erected by a local VFW post and intended to memorialize fallen soldiers,<sup>80</sup> not installed by the government to display its approval.

Justice Kennedy, of course, is well-known for his strong dissent inveighing against the endorsement test in *Allegheny*.<sup>81</sup> His critique there expressed concern that a focus on the feelings of non-adherents would “invalidate scores of traditional practices recognizing the place religion holds in our culture.”<sup>82</sup> It may be that, twenty-one years after *Allegheny* and in light of the *Buono* reasoning, which imputes to the “objective, hypothetical observer” knowledge of “all the pertinent facts and circumstances,”<sup>83</sup> that the endorsement test has been “twisted and stretched”<sup>84</sup> sufficiently to placate Justice Kennedy. His city hall cross example now seems to better serve the “expanded endorsement test” described in *Buono* than his indirect coercion test, first invoked in *Lee v. Weisman* to prohibit high school graduation prayers.<sup>85</sup>

#### V. THE “ENDORSEMENT CONTINUUM”— ANY POTENTIAL VALUE ADDED?

In another piece in this symposium, Professor Lisa Roy looks at Justice Kennedy’s and Alito’s *Buono* opinions and asserts, quite reasonably, that they “confirm the move from no-endorsement toward its opposite pole, accommodation.”<sup>86</sup> While this conclusion may flow in part from an idealistic description of the endorsement test,<sup>87</sup> it also targets a root concern that “without a reasonable observer who can discern a message of exclusion[,] the endorsement test loses much of its content.”<sup>88</sup>

This risk is real, as proved by the glaring omission from both Kennedy’s and Alito’s *Buono* opinions of any noticeable attention to the perceptions of religious outsiders. Supplementary considerations of the message conveyed by removal of longstanding memorials, it should go without say-

<sup>79</sup> *Allegheny v. ACLU*, 492 U.S. 573, 659–62 (Kennedy, J., dissenting).

<sup>80</sup> *Cf. Buono*, 130 S. Ct. at 1816 (“Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed.”)

<sup>81</sup> *See Allegheny*, 492 U.S. at 660–62 (Kennedy, J., dissenting).

<sup>82</sup> *See id.* at 673–74.

<sup>83</sup> *Buono*, 130 S. Ct. at 1819.

<sup>84</sup> *Allegheny*, 492 U.S. at 674.

<sup>85</sup> *Lee v. Weisman*, 505 U.S. 577, 592–93, 599 (1992) (link).

<sup>86</sup> *See Lisa Shaw Roy, Salazar v. Buono: The Perils of Piecemeal Adjudication*, 105 NW. U. L. REV. COLLOQUY 72, 81 (2010), <http://www.law.northwestern.edu/lawreview/colloquy/2010/21/LRColl2010n21Dolan.pdf> (link).

<sup>87</sup> *See id.* at 80.

<sup>88</sup> *Id.* at 81 (“Justice O’Connor’s endorsement test focuses on the message conveyed to a religious outsider”). For the view that the test as actually practiced never conformed to this focus, see Strasser, *supra* note 49.

ing, can never replace and should not override existing endorsement test factors. But, other than their new focus on Congress's dilemma and the disrespect expressed by removal, Kennedy's and Alito's endorsement analysis was limited to the altered perceptions resulting from the change in land ownership. At least in this convoluted case, there is one possible legitimate explanation for the omission. The holding that a display of the cross on federal land violated the endorsement test had *res judicata* effect,<sup>89</sup> so the Courts' opinions focused on the propriety of the government's legislative remedy. Justice Kennedy (and Chief Justice Roberts), at least, left a more complete analysis of the endorsement principles to the district court on remand.<sup>90</sup>

Regardless of rationale, neglecting the perspective of offended viewers and outsiders is no minor point. Several *Buono* amici explained that, for them, every cross symbolizes the salvation of believers and the damnation of non-Christians,<sup>91</sup> and this is also the viewpoint of some Christians. The Court's failure to express empathy for the non-Christian perspective and corresponding focus on nailing down an irrefutable argument for its own position are all-too-common features of judicial opinion writing, particularly in religion cases. Since Establishment Clause opinions frequently must resolve irreducible values conflicts, empathizing with and expressly acknowledging the other side's painful losses should be integral to judicial decision-making.<sup>92</sup>

Given these circumstances, would there be any value added by the expanded endorsement test suggested by Kennedy's and Alito's *Buono* opinions? That depends on both its outer limits and on the available options. Justice Kennedy announced in *Buono* that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm."<sup>93</sup> Six Justices are likely to resist ripping out longstanding religious statuary from public squares,<sup>94</sup> so, which test is used may have a considerable effect. As noted above, commentators have speculated that a majority of the Roberts Court will adopt the inflexible historical approach,<sup>95</sup> which by definition ignores those with minority views, and allows govern-

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<sup>89</sup> *Salazar v. Buono*, 130 S. Ct. 1803, 1815 (2010) (*Buono*).

<sup>90</sup> *See id.* at 1820–21 (plurality opinion).

<sup>91</sup> *E.g.*, Brief of the American Muslim Armed Forces and Veterans Affairs Council, and the Muslim American Veterans Ass'n, as Amici Curiae in Support of Respondent at 9–14, *Buono*, 130 S. Ct. 1803 (No. 08-472) (link).

<sup>92</sup> *Cf.* Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform*, 112 PENN. ST. L. REV. 683, 717 (2008) (suggesting that, in Establishment Clause cases, increased transparency, including more candid explanations of assumptions and acknowledgment of weaknesses in hard choices, could increase perceived legitimacy and soften resistance to decisions on controversial church-state issues) (link).

<sup>93</sup> *Buono*, 130 S. Ct. at 1818 (dicta).

<sup>94</sup> These six, of course, include the five Justices who made up the *Buono* plurality and concurrences, and Justice Breyer, the controlling concurrence in *Van Orden*.

<sup>95</sup> *See* sources discussed *supra* at note 27.

ments to do what “we” have always done. The endorsement test asks the right question because it expresses the constitutional ideal of government neutrality in religious matters.<sup>96</sup> There is real value—expressivist, as well as functional—in retaining the endorsement test’s viewer-centered inquiry.<sup>97</sup>

Thus, rather than perpetuating two opposing camps, there may be some persuasive, consensus-building benefit to characterizing the Kennedy/Alito *Buono* approach as part of an “endorsement test continuum.” At least where the government’s options regarding historical-religious speech are publicized and widely-known, perhaps such facts could be counted among the varied contextual factors considered part of the reasonable observer’s knowledge. A synthesis of the historical approach and the endorsement test—if done well—shows some promise because it is still responsive to viewers’ reactions and cultural change.<sup>98</sup> After all, any iteration of the endorsement test, regardless of the type and scope of contextual facts included, functions well in practice only with judicial sympathy to its underlying equality rationale.

The endorsement test also takes into account that any given symbol, including a cross, can vary in social meaning, depending on factors such as its location, its origins, and the historical moment. When Justice Alito observed that a plain white cross erected by WWI veterans in 1934 symbolized their recent experience at war, while a cross erected now by the government in the National Mall would communicate a different message, he reflected the essence of the endorsement test. In another perspective from this symposium, Professor Christopher Lund makes the intriguing argument that a cross always primarily symbolizes the death of Jesus and the promise of salvation for Christians, in part because all of its secondary meanings are purely derivative.<sup>99</sup> While true at some level, this claim is debatable because much of current culture has some historical, often Christian, origin. Lund’s claim also does not address recent trends in social meaning. Many viewers’ interpretations have become increasingly metaphorical and universalist (*e.g.*, self-giving sacrifice, transformational suffering); one particular, exclusive perception is not inevitable.<sup>100</sup> The

<sup>96</sup> Cf. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 123–34 (2007) (expressing agreement with Justice O’Connor’s endorsement test rationale and noting similarities between its focus on social meaning and “the ‘Equal Liberty’ theory”) (link).

<sup>97</sup> For a comprehensive account of expressivist theory, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

<sup>98</sup> As my Conclusion explains, to be “done well,” the government must take affirmative steps to inform the “reasonable observer,” through disclaimers, of facts that support allowing a religious display which may raise government endorsement issues.

<sup>99</sup> See Christopher Lund, *Salazar v. Buono and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY 60, 64–66 (2010), <http://www.law.northwestern.edu/lawreview/colloquy/2010/22/LRColl2010n22Lund.pdf> (link).

<sup>100</sup> See, *e.g.*, Winnifred Fallers Sullivan, *The Cross: More Than Religion?*, THE IMMANENT FRAME (May 5, 2010), <http://blogs.ssrc.org/tif/2010/05/05/more-than-religion/> (discussing competing symbolic meanings of the cross, which include both universal meanings and specific meanings) (link); see also

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connections between these interpretations and official, specific religious dogma can be quite attenuated. The fact that some public manifestations of iconic symbols are translated by reference to their spatial and temporal context—as contemplated by the endorsement test—does not mean that all religious meaning is bleached out. The “corruption of religion” concerns, so well-articulated in this symposium by both Professor Lund and Professor Ian Bartrum,<sup>101</sup> to me seem primarily implicated in other contexts, such as where public funding tempts religious organizations to alter their missions.

### CONCLUSION

This brief discussion has attempted to weave threads from the opinions of conservative Justices into a centrist cloth. Whether this cross between the endorsement test and the historical approach was intentional, or simply forced by *Buono*'s unique circumstances, Justice Kennedy's and Justice Alito's opinions present interesting considerations for pursuing a “middle way.”<sup>102</sup>

To the extent that the reasonable observer is deemed both to appreciate the social costs of change and to consider the government's accommodationist motive for preserving a religious-historical symbol, however, the government should be given the corresponding duty to make its motives clear to observers. When Justice O'Connor first characterized the “reasonable observer” as a hypothetical, objective informed citizen,<sup>103</sup> she did so based on a concern that every challenged display would offend someone, and that only where there is some *collective* message of endorsement would religion be relevant to one's standing in the political community. At the same time, however, she declared that the Establishment Clause imposes an “affirmative obligation” on the government to use adequate disclaimers to correct any reasonable misimpressions of religious endorsement caused by its own actions.<sup>104</sup> The real risk presented by the *Buono* opinions is that lower courts will continue to use the endorsement test, but now will explicitly employ an omniscient hypothetical observer whose real sympathies lie with the majority and not the excluded.

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CHARLES TAYLOR, *A SECULAR AGE* (2007) (exploring the lack of boundaries between the “religious” and the “secular” in the modern age) (link).

<sup>101</sup> See Ian Bartrum, *Salazar v. Buono: Sacred Symbolism and the Secular State*, 105 NW. U. L. REV. COLLOQUY 31, 38–40, <http://www.law.northwestern.edu/lawreview/colloquy/2010/20/LRColl2010n20Bartrum.pdf> (link); Lund, *supra* note 99, at 63–66.

<sup>102</sup> See *Buddha, Eternalism, Nihilism and the Middle Way*, INTERNET ENCYCLOPEDIA OF PHIL., <http://www.iep.utm.edu/buddha/> (last visited Aug. 18, 2010) (describing Buddha's “middle way”) (link).

<sup>103</sup> *Capitol Square Advisory & Review Bd. v. Pinette*, 515 U.S. 753, 781 (1995) (explaining that the endorsement test employs the perspective of “[a]n informed member of the community,” and not an “ultra-reasonable observer” (internal quotation marks and citations omitted)).

<sup>104</sup> *Id.* at 777.

In a forthcoming article analyzing the Establishment Clause impact of *Pleasant Grove v. Summum*, I argue that, because social meaning has changed so dramatically over the decades, governments should generally be prohibited from displaying new religious monuments and longstanding monuments should be allowed only if accompanied by sufficient government disclaimer signs.<sup>105</sup> Adequately addressing the concerns raised in *Salazar v. Buono* requires a minimum of two steps. First, the National Park Service should erect signs on nearby Cima Road, visible to all passersby, which explain not only the VFW's new ownership, but also the story of the WWI veterans' erection of this war memorial in 1934. And second, the federal government must address the unconstitutional appearance of the cross's recent National Memorial designation. This requires (i) clarifying that preserving this cross does not mean that it represents all of the Nation's WWI war dead, and (ii) communicating that other, non-sectarian monuments also play this significant role.<sup>106</sup> While less than satisfying to many, this approach is worth considering. If done thoughtfully and sensitively, the "reasonable non-adherent" might come to view this particular cross, in this desert location, originated in this specific era of history, as a symbol of respect for military sacrifice, instead of a government endorsement of Christianity.

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<sup>105</sup> See *Government Identity Speech*, *supra* note 63, at 81–96.

<sup>106</sup> See *Cross as National Memorial*, *supra* note 59, at 22–24 (discussing other national WWI memorials and explaining that abolishing the cross' National Memorial status is the cleaner, more complete consitutional solution).