

SEPARATING CHURCH AND STATE:
TRANSFERS OF GOVERNMENT LAND AS CURES FOR
ESTABLISHMENT CLAUSE VIOLATIONS

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INTRODUCTION

Whether it is a monument of the Ten Commandments on the capitol grounds, a memorial cross dedicated to war veterans, or some other symbol, many of us have experience with public displays that include religious imagery. While such displays are scattered throughout America's communities, groups that advocate for strict separation of church and state have begun to aggressively seek their removal.¹ Some communities faced with Establishment Clause litigation over a government display will remove the object in order to avoid a lawsuit, while others are willing to fight enormous legal battles in attempts to keep their displays.² Recently, some governments have begun to seize on a new solution that lies between removal and continuing government ownership of a display: selling the display and the land on which it sits to private owners. Of course, any attempt at remedial sale of this sort raises its own constitutional issues. In fact, the U.S. Supreme Court will soon review *Buono v. Kempthorne*, renamed *Salazar v. Buono* upon the grant of certiorari, a Ninth Circuit case that involves these issues.³

Because the Court may resolve *Buono* on standing grounds before it

1. See, e.g., Christopher D. Tomlinson, Note, *Changing the Rules of Establishment Clause Litigation: An Alternative to the Public Expression of Religion Act*, 61 VAND. L. REV. 261, 262-63 (2008).

2. A different free speech issue can arise in similar situations, particularly if a private group donated the display. Rather than arguing for removal of the display, the plaintiffs may argue that the display constitutes private speech in a public forum, and that the government must therefore allow those with different viewpoints to erect other displays. This was a losing argument in *Pleasant Grove City v. Summum*, in which the Court held that permanent monuments in a public park, including a Ten Commandments monument, constituted government rather than private speech. See 129 S. Ct. 1125, 1129-30 (2009). The majority opinion did not analyze or even comment on any Establishment Clause issues raised by the monument. Christopher C. Lund, *Keeping the Government's Religion Pure: Pleasant Grove City v. Summum*, 104 NW. U. L. REV. COLLOQUY 46, 49 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/28/LRColl2009n28Lund.pdf>.

3. See *Buono v. Kempthorne*, 527 F.3d 758, 778-79 (9th Cir. 2008), cert. granted sub nom. *Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

reaches Establishment Clause issues,⁴ current Establishment Clause case law may or may not be impacted by the Court's pending decision. This article examines how courts should treat remedial sales in light of current case law. This note will argue that, given certain requirements, even the Supreme Court's strictest Establishment Clause tests should permit defendant governments to sell land in order to cure Establishment Clause violations arising from permanent displays that include religious imagery. Section I of the note discusses the Supreme Court's struggle to produce clear and consistent Establishment Clause standards and describes several tests that the courts use—or may in the future use—in Establishment Clause cases. Section II explains how these various tests apply to permanent physical displays on public property. Finally, Section III uses the *Lemon*-endorsement line of cases to illustrate issues likely to arise from a remedial sale of land. The section assumes an Establishment Clause violation caused by a permanent physical display on public land and analyzes how a defendant government might use a sale of land to remedy the violation.

I. PICKING THE TEST: WHEN IS THE ESTABLISHMENT CLAUSE VIOLATED?

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.”⁵ This brief clause has defied a consistent or settled manner of application. Over the last four decades, the Supreme Court has developed multiple tests to aid its Establishment Clause inquiries but has yet to settle on any one test that applies to all Establishment Clause cases.

A. *The Lemon Test*

In 1971's *Lemon v. Kurtzman*,⁶ the Supreme Court set forth a three-pronged Establishment Clause test. Under the *Lemon* test, government actions 1) must have a secular purpose; 2) may not as their principal or primary effect either advance or inhibit religion; and 3) must not foster

4. See Transcript of Oral Argument at 12–17, *Salazar v. Buono*, No. 08-472 (U.S. Oct. 7, 2009), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-472.pdf (raising question as to whether government is precluded from appealing the standing issue); Br. for the Pet'rs. 12–20, *Salazar v. Buono*, No. 08-472 (U.S. June 1, 2009). In this case, involving a Latin Cross in the Mojave National Preserve, the plaintiff lives in Oregon but alleged that he regularly visits the Preserve. *Id.* at 4–5. He is a practicing Roman Catholic and admitted that he “does not find a cross itself objectionable,” but rather claimed that he is offended that the disputed cross sits on government land. *Id.*

5. U.S. Const. amend. I.

6. 403 U.S. 602 (1971).

excessive government entanglement with religion.⁷ *Lemon* itself concerned government grants to religious schools for the purpose of paying teachers of secular subjects.⁸ The Court held the grants unconstitutional, reasoning that although the grants met the first two prongs of its new test, government funding of religious schools would risk excessive entanglement with religion.⁹

However, the Supreme Court has not treated *Lemon* as controlling in all Establishment Clause cases.¹⁰ The Court's reluctance to apply *Lemon* probably arises in part because the test implies a separation of religion from government more rigorous than the Court has been willing to enforce. Under a faithful application of *Lemon*, any government action, no matter how traditional or trivial, that has a "principal or primary" effect of advancing religion is unconstitutional.¹¹ Indeed, if the government truly violates the Establishment Clause whenever it advances religion in any way, one might expect that any government practice which prefers religion to irreligion could not stand.¹² However, the Court has, both before and after *Lemon*, held constitutional various practices that seemingly fall short of such complete separation, such as laws prohibiting sale of merchandise on Sunday,¹³ tax exemptions for religious entities,¹⁴ opening legislative sessions with prayer,¹⁵ and the temporary display of a nativity scene by a local government.¹⁶ In fact, just as the Court's justices have argued over the formulation of tests, they have disagreed whether the Establishment Clause requires strict neutrality.¹⁷ In spite of the controversy, both the Supreme

7. *Id.* at 612–13.

8. *Id.* at 608–09.

9. *Id.* at 613–14.

10. *See, e.g.,* *Marsh v. Chambers*, 463 U.S. 783, 792–93 (1983); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring). In *Lamb's Chapel*, Justice Scalia described the checkered past of the *Lemon* test: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again. . . . Over the years . . . no fewer than five of the [then] currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart. . . ." *Id.*

11. *Lemon*, 403 U.S. at 612.

12. *See* *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) ("[P]rohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'" (emphasis in original) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring))).

13. *See* *McGowan v. Maryland*, 366 U.S. 420, 451–52 (1961).

14. *See* *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970).

15. *See* *Marsh*, 463 U.S., at 792–93.

16. *See* *Lynch v. Donnelly*, 465 U.S. 668, 671–72 (1984).

17. *Compare, e.g.,* *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality") *with, e.g.,* *Van Orden v. Perry*, 545

Court and lower courts nevertheless continue to apply the *Lemon* test in certain situations, including in some cases about physical displays that incorporate religious imagery.¹⁸

B. Endorsement: Justice O'Connor Modifies the Lemon Test

In recent years, the dominant Establishment Clause test in the area of physical religious displays has been Justice O'Connor's modification of the *Lemon* test.¹⁹ This two-pronged test asks whether disputed government action has the "purpose or effect of endorsing religion."²⁰ Justice O'Connor's test essentially combines the purpose and effect prongs of the *Lemon* test under a single *endorsement standard*, while dropping *Lemon's* independent inquiry into entanglement.²¹ The test somewhat narrows *Lemon*, by prohibiting only government actions that rise to the level of endorsement or disapproval of religion, beyond mere "advancement or inhibition."²² According to Justice O'Connor, the endorsement test "captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'"²³ Prohibiting endorsement captures this central command because endorsement "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."²⁴ Furthermore, and relevant to the purposes of this note, the endorsement standard is somewhat better tailored than *Lemon* to analysis of physical religious displays on public property, as these sorts of displays generally cause problems because of their alienating "message to nonadherents."²⁵ and the very word "endorsement" implies a concern with such communicative effect,²⁶

U.S. 677, 684 n.3 (2005) (plurality opinion) ("[W]e have not, and do not, adhere to the principle that the Establishment Clause bars any and all government preference for religion over irreligion.").

18. See, e.g., *McCreary*, 545 U.S. at 858–60.

19. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004) (O'Connor, J., concurring); but see *McCreary*, 545 U.S. at 859–63 (applying the first prong of the *Lemon* test but also repeatedly citing Justice O'Connor's application of the endorsement test in *Wallace v. Jaffree*).

20. *Allegheny*, 492 U.S. at 592 (O'Connor, J. concurring)

21. See *id.* at 592; Jordan C. Budd, *Cross Purposes: Remediating the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 187–88 (2004).

22. *Lynch*, 465 U.S. at 691–92 (1984) (O'Connor, J., concurring); Budd, *supra* note 21, at 188.

23. *Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

24. *Lynch*, 465 U.S. at 688; Budd, *supra* note 21, at 188–89.

25. *Lynch*, 465 U.S. at 688.

26. See Budd, *supra* note 21, at 188–89.

as opposed to other concerns such as entanglement.²⁷

The endorsement test contains both subjective and objective inquiries into government action.²⁸ At the purpose prong, courts look to whether the government's subjective intent was to endorse religion.²⁹ For example, in *Wallace v. Jaffree*, the Court held that a school's practice of opening classes with prayer had the unconstitutional purpose of religious indoctrination.³⁰ At the effects prong, courts then make an objective inquiry into "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."³¹ This objective inquiry theorizes a reasonable observer whose sensibilities are determined by the "[collective] social judgment"³² but who at the same time possesses knowledge of the "text, legislative history, and implementation of the [government action] . . ."³³ For example, in *Santa Fe Independent School District v. Doe*, the Court invalidated a school policy in part because of its history.³⁴ The policy allowed students to deliver a "brief invocation" before high school football games, but an examination of the policy's history showed that it strongly encouraged students to deliver a religious message.³⁵ As this type of analysis illustrates, the reasonable observer standard supposes extraordinary factual knowledge, such that the court can use any facts in the record to judge whether the challenged government action could reasonably be perceived as government endorsement of religion.³⁶

C. *Impact of the 2005 Ten Commandments Cases*

In 2005, the Supreme Court further complicated its Establishment

27. *But see generally* James A. Campbell, Note, *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541 (2006); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499 (2002) (all arguing for abandonment of the endorsement test).

28. *Lynch*, 465 U.S. at 690; Hill, *supra* note 27, at 497.

29. *Lynch*, 465 U.S. at 690.

30. *See* 472 U.S. 38, 56–61 (1985).

31. *Id.* at 56 n.42 (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

32. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (quoting W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)) (alteration in original).

33. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)).

34. *See id.* at 307.

35. *Id.* at 306–07.

36. *See id.* at 308; Budd, *supra* note 21, at 189–90.

Clause jurisprudence with two cases—*McCreary County v. ACLU* and *Van Orden v. Perry*, involving displays of the Ten Commandments on public property. The dispute in *McCreary* centered on a legislatively-mandated display of the Ten Commandments in county courthouses.³⁷ This display originally included only the Ten Commandments but later was expanded to include more religious imagery.³⁸ In response to a preliminary injunction, the county government eventually ordered the display altered to include eight other historical-legal documents in frames of equal size, including the Magna Carta, the Declaration of Independence, and the Bill of Rights.³⁹ In a majority opinion penned by Justice Souter, the Supreme Court held that the display was unconstitutional. Applying the *Lemon* test, the Court found an Establishment Clause violation at the purpose prong, in that the display's origin could only be explained by a desire of the county to encourage adherence to certain religious beliefs.⁴⁰

On the same day, the Court allowed a similar Ten Commandments display in *Van Orden v. Perry*.⁴¹ The *Van Orden* display consisted of a six-foot tall Ten Commandments monument on the Texas State Capitol grounds, donated in 1961 by a private organization.⁴² The display was one of seventeen monuments surrounding the capitol.⁴³ In upholding the display, Chief Justice Rehnquist wrote for a four-justice plurality, while Justice Breyer penned a separate concurrence.⁴⁴ Finding the monument constitutional, Chief Justice Rehnquist refused to apply the *Lemon* test, declaring it “not useful in dealing with the sort of passive monument” at issue.⁴⁵ Instead, the plurality opinion looked to “the nature of the monument and [the] Nation’s history.”⁴⁶ The Chief Justice did not set forth any tangible rule but rather went on to cite examples of government displays similar to the one at issue, including prominent displays in the nation’s capital.⁴⁷

Meanwhile, Justice Breyer, in his controlling concurrence, likewise declined to apply any Establishment Clause test. He asserted that the Texas

37. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 851 (2005).

38. *Id.* at 852–54.

39. *Id.* at 854–56.

40. *See id.* at 870–71.

41. 545 U.S. 677, 681 (2005) (plurality opinion).

42. *Id.* at 681–82.

43. *Id.* at 681.

44. *Id.* at 680, 698. Although they joined in the plurality opinion, Justices Scalia and Thomas also wrote individual concurrences. *Id.* at 692 (Scalia, J., concurring); *id.* at 692 (Thomas, J., concurring).

45. *Id.* at 686 (plurality opinion).

46. *Id.*

47. *Id.* at 685–89.

monument represented a “borderline case[]” where the outcome must rest on “legal judgment” rather than any “test-related substitute.”⁴⁸ He considered a number of factors, including the religious and secular messages of the display, its origin, its physical setting, and the lack of complaints throughout the monument’s history.⁴⁹ According to Justice Breyer, the first three factors tended in the government’s favor but the forty-year lack of legal complaints proved “determinative,” because this history showed that the community understood the display as a message about cultural heritage rather than a promotion of religion or a religious sect.⁵⁰

Reconciling *Van Orden* and *McCreary* is not a straightforward task. Some have argued that the two cases are so inconsistent, given their similar facts, as to completely fail in providing guidance to lower courts.⁵¹ Squaring the two cases is made more difficult by the fact that Justice Breyer, the swing voter, did not write separately in *McCreary*, apparently agreeing with Justice Souter’s application of the *Lemon* test even while he refused to apply any defined standard in *Van Orden*.⁵² Nonetheless, Justice Breyer did distinguish *McCreary* in his *Van Orden* concurrence, highlighting the “short (and stormy) history” of the displays at issue in *McCreary*, and the “substantially religious objectives of those who mounted them.”⁵³ Accordingly, if *Van Orden* stands for anything, it is the relevance of the two factors that in Justice Breyer’s mind distinguished *Van Orden* from *McCreary*: 1) the history of complaints surrounding a display; and 2) the purpose of the government in allowing the display.⁵⁴ The latter consideration already existed as the purpose prong of the *Lemon* and endorsement tests, but the former is new, and lower courts have begun to seize upon it.⁵⁵

Moreover, although the case produced no majority, some lower courts have taken Breyer’s controlling concurrence in *Van Orden* as creating a

48. *Id.* at 700. (Breyer, J., concurring).

49. *Id.* at 701–02.

50. *Id.* at 702–03.

51. *E.g.* *Newdow v. United States*, 383 F. Supp. 2d 1229, 1244 n.22 (E.D. Cal. 2005) (“As last term’s [Ten Commandments cases] demonstrate, the distinction [between endorsement and permissible recognition of religion] is utterly standardless, and ultimate resolution depends on the shifting, subjective sensibilities of any five members of the High Court, leaving those of us who work in the vineyard without guidance.”); *see also Van Orden*, 545 U.S. at 698 (Thomas, J., concurring) (regretting that the conflict between *McCreary* and *Van Orden* “compounds” the confusion created by the Court’s inconsistent Establishment Clause jurisprudence).

52. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 848 (2005).

53. *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring).

54. *See id.*

55. *See, e.g., Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1221 (S.D. Cal. 2008); *Buono v. Kempthorne*, 527 F.3d 758, 764 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (O’Scannlain, J., dissenting from denial of rehearing en banc).

new, multi-factor Establishment Clause test for permanent displays.⁵⁶ Of course, any person who claims that the opinion's pragmatic approach signals a new "test" must overcome clear indications to the contrary, including the vagueness of the factors, to say nothing of Breyer's express resistance to applying or creating a new test.⁵⁷ Nevertheless, some courts evidently reason that drawing factors from *Van Orden* is the best way to honor it as precedent.⁵⁸ As articulated in a recent Ninth Circuit decision, *Card v. City of Everett*, the *Van Orden* test makes three inquiries: the government's secular purpose in acquiring the display; the strength of religious versus secular message imparted by the display; and the history of complaints—or lack thereof—concerning the display.⁵⁹ A California district court applying *Card* added three more factors of its own: whether the monument sits close to government buildings; who donated the display; and whether the monument has a passive or proselytizing effect.⁶⁰ Such multifactor "tests" do succeed in providing a checklist for the fact-intensive exercise that Establishment Clause jurisprudence has become, but they rest on shaky ground insofar as they draw from an opinion that seemingly rejects any principled approach in favor of ad hoc judgments.

D. Current Composition of the Court and the Coercion Standard

Today, one must wonder whether the fine balance between *Van Orden* and *McCreary* truly reflects the current composition of the Court.⁶¹ With three additions to the court since *Van Orden* and *McCreary* were decided, and particularly with the replacement of Justice O'Connor by Justice Alito, it would seem that the *Lemon* and endorsement tests are at risk.⁶² Justice Alito tended to favor defendants in Establishment Clause cases during his tenure on the Third Circuit,⁶³ which suggests that he may be open to relig-

56. See *Card v. City of Everett*, 520 F.3d 1009, 1019–21 (9th Cir. 2008); *Trunk*, 568 F. Supp. 2d at 1218. Other cases using *Van Orden* as controlling precedent have simply drawn parallels between *Van Orden* and the case at hand. See *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 (8th Cir. 2005) (en banc); *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 990–91 (D.N.D. 2005).

57. See *Van Orden*, 545 U.S. at 700.

58. *Card*, 520 F.3d at 1019–21; cf. also *Plattsmouth*, 419 F.3d at 778 (not applying factors but disposing of the case on the grounds of its factual similarity to *Van Orden*).

59. *Card*, 520 F.3d at 1019–21.

60. *Trunk*, 568 F. Supp. 2d at 1218.

61. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 21.3(e) (4th ed. 2008) (noting that changes in the Court's makeup render these decisions "of questionable importance for the future").

62. See, e.g., Jason Marques, Note, *To Bear a Cross: The Establishment Clause, Historic Preservation, and Eminent Domain Intersect at the Mt. Soledad Veterans Memorial*, 59 FLA. L. REV. 829, 853 (2007).

63. See *ACLU of N.J. ex rel. Lander v. Schundler*, 168 F.3d 92, 94–109 (3d Cir. 1999) (upholding

ion-friendly Establishment Clause tests. Notably, in a case upholding a town display that included a crèche and menorah, Justice Alito denied that the display's constitutional validity could depend upon the incorporation of secular symbolism. He wrote, "Demystification, desanctification, and deconsecration suggest a process of profanation, something that the Establishment Clause neither demands nor tolerates."⁶⁴

Likewise, Chief Justice Roberts, while working as Deputy Solicitor General during the first Bush administration, lobbied in two briefs for abandoning the *Lemon* test.⁶⁵ In one of these briefs, he argued for a coercion standard, asserting that the government only violates the Establishment Clause if its actions rise to the level of religious compulsion.⁶⁶ During his confirmation hearings, the now-Chief Justice highlighted the test's fact-intensiveness as both its greatest strength and greatest weakness.⁶⁷

Justice Sotomayor's views on the Establishment Clause are somewhat of a mystery, as she has addressed the provision in only a handful of cases, none of which required her to lay out her interpretation of the provision in any detail.⁶⁸

Meanwhile, Justices Scalia, Thomas, and Kennedy have often expressed distaste for both the *Lemon* and endorsement tests. The typically centrist Justice Kennedy has sharply criticized the *Lemon* and endorsement tests, complaining that the *Lemon* test has led to a "jurisprudence of minutiae."⁶⁹ He has instead argued for use of a coercion standard.⁷⁰ As Justice Scalia put it, a coercion test should ask whether the challenged practice "was coercion of religious orthodoxy and of financial support *by force of*

the Constitutionality of a town Christmas display that included a crèche); *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1489 (3d Cir. 1996) (en banc) (Mansmann, J., dissenting) (joining a dissent from a holding that a voluntary school prayer policy violated the Establishment Clause).

64. *Schundler*, 168 F.3d at 98–99.

65. Erwin Chemerinsky, John Roberts and the Establishment Clause and the Role of the Religious Test Clause in the Confirmation Process 5–7 (Aug. 17, 2005) (transcript available at http://www.acslaw.org/files/2005%20programs_Chemerinsky_white%20paper.pdf) (arguing that the confirmation of John Roberts would likely have far-reaching consequences for Establishment Clause jurisprudence).

66. *Id.* at 6 (citing Br. for the United States as Amicus Curiae 6, No. 90-1014, *Lee v. Weisman*, 505 U.S. 577 (1992)).

67. Marques, *supra* note 62, at 854.

68. See Melissa Rogers, *God in Government: Judge Sotomayor's Church-State Record*, THE BROOKINGS INSTITUTION, July 7, 2009, http://www.brookings.edu/opinions/2009/0707_sotomayor_rogers.aspx.

69. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in part and dissenting in part).

70. *See id.* at 659–61.

law and threat of penalty."⁷¹ Meanwhile, Justice Thomas has questioned whether the Establishment Clause should have even been incorporated to apply to the states.⁷² Alternately, Thomas has echoed Scalia's concept of a coercion test.⁷³ After the most recent changes in the Court's composition, Justice Kennedy or one of the new justices will likely replace Justice O'Connor or Justice Breyer as the middle vote on Establishment Clause issues. Thus, assuming the current membership when the Court next squarely faces an Establishment Clause issue, it seems likely that the majority of justices will ignore or outright repudiate both the *Lemon* test and Justice O'Connor's endorsement-centered modification of that test.⁷⁴ And the critical moment may arrive soon: the Court may or may not reach Establishment Clause issues in *Buono*, depending on how it resolves the standing issue.⁷⁵

On the other hand, if one or more "conservative" justices were to leave the Court while President Obama is in office, the majority view could veer in the other direction. Whatever the future holds, a coercion standard as of now has only been advanced by dissenting opinions and thus has no precedential value.

II. APPLYING THE COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE TO PERMANENT RELIGIOUS DISPLAYS

Before addressing remedies for Establishment Clause violations, it is useful to understand why a remedy might be necessary by examining how the Court's various tests treat permanent physical displays at the liability stage. This section briefly examines the treatment of such displays by the *Lemon*-endorsement standard, Breyer's *Van Orden* approach, and a coercion test.

71. *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis in original).

72. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring).

73. *See id.* at 52 (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (Scalia, J., dissenting) (emphasis in original)).

74. *Cf. Monte Kuligowski, The Supreme Court's Dilemma Respecting Establishment Clause Jurisprudence*, 38 *Cumb. L. Rev.* 245, 247 (2008) (arguing that *stare decisis* carries little weight in Establishment Clause jurisprudence).

75. *See supra* note 4 and accompanying text.

A. *Lemon-Endorsement*:⁷⁶ *General Disallowance of Permanent Religious Displays*

Courts that have applied the *Lemon* or endorsement tests to cases involving permanent religious displays on public land have frequently held that the displays are unconstitutional.⁷⁷ Such displays often run afoul of the purpose⁷⁸ or effects⁷⁹ prongs in the tests. Exceptions may arise where the religious symbol in a display can be characterized as secular in effect, often because the display includes secular messages in addition to the religious imagery. Common examples of these exceptions include Ten Commandments displays as part of monuments to legal or other secular history⁸⁰ and crosses as part of war monuments.⁸¹ In contrast, bootstrapping arguments about the long-time existence of a display are usually insufficient to confer a secular historical significance.⁸² Moreover, even defendants claiming a contextually secular use of an ordinarily religious symbol remain far from

76. Although the *Lemon* and endorsement tests do contain subtle differences in their purpose and effects prongs, their main difference is the endorsement test's dropping of *Lemon*'s entanglement prong. As such, where entanglement is not at issue, the courts tend to use "*Lemon*" and "endorsement" almost interchangeably; cases concerning physical religious displays often include this sort of analysis. *See, e.g., McCreary County v. ACLU of Ky.*, 545 U.S. 844, 861–62 (2005) (using O'Connor's objective observer in conjunction with the *Lemon* test); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000) (citing the three-part *Lemon* test as an inquiry into whether the government has "endorse[d]" religion).

77. *See, e.g., McCreary*, 545 U.S. at 870–71; *Stone v. Graham*, 449 U.S. 39, 40–41 (1980) (*per curiam*); *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001); *but see Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1207–18 (S.D. Cal. 2008) (holding that a war memorial that includes a Latin cross did not violate the *Lemon* test).

78. *See, e.g., McCreary*, 545 U.S. at 870–71.

79. *See, e.g., Ind. Civil Liberties Union*, 259 F.3d at 772–73.

80. *See, e.g., Card v. City of Everett*, 520 F.3d 1009, 1019–21 (9th Cir. 2008) (characterizing Van Orden as creating an exception to the *Lemon* test); *cf. also Van Orden v. Perry*, 545 U.S. 677, 703–04 (2005) (Breyer, J., concurring) (holding constitutional a Ten Commandments display as part of a collection of historical displays, but not applying the *Lemon* or endorsement tests).

81. *See, e.g., Trunk*, 568 F. Supp at 1218; *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) (O'Scannlain, J., concurring) (reasoning that crosses serve a secular purpose when part of a war memorial).

82. *See Gonzales v. N. Twp. of Lake County*, 4 F.3d 1412, 1422 (7th Cir. 1993); *cf. also Buono v. Kempthorne*, 527 F.3d 758, 768–69 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (disallowing a cross with a seventy-year history). However, this tenet might be called into question in light of *Van Orden*, where a long and generally uncontroversial history behind a Ten Commandments Monument proved "determinative" to convincing Justice Breyer that the relevant community understood the display as "predominantly secular" in nature. 545 U.S. at 702.

certain success.⁸³ As a result, many cases involving permanent displays of religious symbols have resulted in courts finding Establishment Clause violations, or in governments attempting to cure an alleged violation before a lawsuit comes to trial.⁸⁴ Considering the prevalence of religious or quasi-religious displays in communities across America, the question of remedies for these sorts of violations is a growing issue.⁸⁵

B. Breyer's *Van Orden* Approach

In an attempt to remain consistent with both *Van Orden* and *McCreary*, some lower courts have begun to apply both *Lemon*-endorsement and multi-factor tests derived from Breyer's controlling concurrence in *Van Orden* to cases involving permanent displays.⁸⁶ Because any factors to be drawn from *Van Orden*'s ad hoc analysis will most likely be highly dependent on the individual judge's impression of the record, the results are somewhat unpredictable.⁸⁷ In practice, courts applying *Van Orden* "factors" tend to rule for defendants.⁸⁸ For instance, a recent Ninth Circuit opinion applied both *Van Orden* and *Lemon* in upholding a Ten Commandments display.⁸⁹ Similarly, a recent Eighth Circuit analogized its case to the facts of *Van Orden* to uphold a display and merely noted that it would have come out the same way under *Lemon*.⁹⁰ In the end, given the flexibility of *Van Orden*-type "legal judgment,"⁹¹ those courts attempting to apply both *Van Orden* and *McCreary* will likely be able to massage their *Van Orden* analysis to come out the same way as their *Lemon* analysis.⁹²

C. Coercion Standard

Under a coercion standard, most religious displays would be al-

83. Cf. *Buono*, 527 F.3d at 770, 783 (disallowing a cross despite its designation as a national memorial to World War I veterans); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1528 (9th Cir. 1993).

84. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 870–71 (2005) (holding that a display violated the Establishment Clause); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 696 (7th Cir. 2005) (defendant town selling a display in response to an alleged violation).

85. Cf., e.g., *Van Orden*, 545 U.S. at 689 (plurality opinion) (listing such displays throughout Washington, D.C.).

86. See *Trunk*, 568 F. Supp. at 1206.

87. Cf. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring) ("I see no test-related substitute for the exercise of legal judgment.").

88. See *Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008); *Trunk*, 568 F. Supp. at 1206, 1225; *ACLU of Ohio Found. v. Bd. of Comm'rs*, 444 F. Supp. 2d 805, 816 (N.D. Ohio 2006).

89. *Card*, 520 F.3d at 1021.

90. *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 777–78 (8th Cir. 2005).

91. *Van Orden*, 545 U.S. at 700.

92. Cf. *Card*, 520 F.3d at 1021; *Trunk*, 568 F. Supp. at 1207–21.

lowed.⁹³ The government would have to coerce citizens in some way regarding religion before a violation occurred, and coercion implies some sort of negative consequence for those who refuse to comply.⁹⁴ It is hard to imagine how a religious display in itself could violate such a standard, for displays do not generally impose any obligations that one could refuse. For instance, a law requiring all passersby to bow before a statue might violate a coercion standard, but that violation would arise from the law requiring a certain response to the display, not from the display itself.⁹⁵ In contrast to the *Lemon* or endorsement standards, nonbelievers would not be able to claim a violation simply because they found it difficult to avoid a display that offended them.⁹⁶ Ultimately, because displays would not generally violate the Establishment Clause, courts would rarely have occasion to worry about remedial measures. As noted above, however, a majority of the Court has never adopted a coercion test, so the standard has no precedential value.

III. REMEDIAL ANALYSIS⁹⁷

If application of any of the above tests results in an Establishment Clause violation concerning a permanent display, some equitable remedy will most likely be necessary. This section assumes an Establishment Clause violation or alleged violation caused by a permanent physical display and proceeds to examine the issues that might arise if the defendant government attempts a sale of land to cure the violation, as an alternative to removing the display. It then illustrates these issues by examining them with *Lemon*-endorsement⁹⁸ analysis, because that line of cases has been the standard most often applied by the Supreme Court in the context of physical displays.⁹⁹ If a court applies *Lemon*-endorsement in its initial ruling on the constitutionality of a display, it only makes sense to apply that same

93. Campbell, *supra* note 27, at 584.

94. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring) (reasoning that for a violation of the Establishment Clause to occur, the government must coerce religious practice “by force of law and threat of penalty” (emphasis in original)); Dictionary.com, <http://dictionary.reference.com/browse/coercion> (last visited Sept. 10, 2009) (citing MERRIAM-WEBSTER’S DICTIONARY OF LAW (1996)).

95. See *Newdow*, 542 U.S. at 52; Campbell, *supra* note 27, at 569–70.

96. See Campbell, *supra* note 27, at 584–85.

97. For an application of a more restrictive understanding of the endorsement test to remedial sales, see Budd, *supra* note 21, at 212–56, to which Section III of this note owes much of its analytical framework.

98. See *supra* note 76.

99. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 859 (2005); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 623 (1989) (O’Connor, J., concurring).

test during any remedial analysis, because the same Establishment Clause violation remains at issue.¹⁰⁰ Ultimately, given certain requirements outlined below, the *Lemon*-endorsement standard should often allow a remedial sale.

A. Analytical Framework

In order to claim that a sale of land can cure an Establishment Clause violation, regardless of which test one employs, the defendant must show that the sale satisfies two separate constitutional concerns: 1) that the sale itself is constitutional and 2) that the sale ends the impermissible state action (i.e. sponsoring or hosting an unconstitutional display) that gave rise to an Establishment Clause violation in the first place.¹⁰¹ Regarding the former requirement, the sale itself must be constitutional because the sale itself is a state action subject to the Establishment Clause.¹⁰² Thus, assuming that the court applies the endorsement test, the sale may not endorse religion in purpose or effect.¹⁰³ Only after analyzing this first requirement does one reach the second requirement, that the sale must end the originally impermissible state action.¹⁰⁴ Logically, the government can meet this requirement in one of two ways: by ending state action altogether or by transforming the state's action into a constitutional sort. Below is an analysis of both requirements under the endorsement standard.

1. Constitutionality of the Sale Itself

If a court applies the endorsement test and finds an Establishment Clause violation, a sale of the land containing the display may nevertheless be constitutionally permissible. The initial Establishment Clause violation under this test would mean that the government through the impermissible display had endorsed religion either in purpose or effect.¹⁰⁵ However, the conclusion that a sale of land likewise endorses religion does not follow merely from the fact that the land contains a religious display, because only state action can give rise to an Establishment Clause violation.¹⁰⁶ When the

100. See Budd, *supra* note 21, at 216 (arguing for application of the endorsement standard at the remedial stage of Establishment Clause litigation).

101. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000).

102. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 701 (7th Cir. 2005).

103. See *Allegheny*, 492 U.S. at 592 (majority opinion).

104. See *Marshfield*, 203 F.3d at 493–96; *Buono v. Kempthorne*, 527 F.3d 758, 782 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

105. See *Allegheny*, 492 U.S. at 592.

106. See *Marshfield*, 203 F.3d at 491.

government completely ends its ownership and control over a display, what was government speech becomes private speech.¹⁰⁷ Thus, the state act of selling land does not violate the Establishment Clause unless the sale itself advances religion in such a way as to constitute endorsement.¹⁰⁸

Rather than endorsing religion, the government's sale will often have the primary and secular effect of encouraging religious tolerance and avoiding religious tensions within the community by showing respect for a religious monument that would otherwise have to be removed.¹⁰⁹ Moreover, a remedial sale will often be a more attractive financial option for the defendant government, allowing it to receive compensation for the display rather than paying to have the display removed.¹¹⁰ As long as the government's action has a non-endorsing purpose and effect of this sort, it should pass constitutional muster, even if the sale enables a private actor to proselytize in the future.¹¹¹

Some may object that the endorsement standard should only allow sales of land to cure Establishment Clause violations in limited circumstances, because a government desire to preserve the religious display often implies a preference for religion.¹¹² One analysis of the issue from an endorsement perspective argues that selling land to cure an Establishment Clause violation is permissible only where 1) "removal risks damaging or destroying the symbol itself" and 2) "the expressive force of the symbol is inextricably tied to its particular physical setting."¹¹³ Only then, it is argued, do interests in promoting respect and tolerance for religion create a sufficient secular purpose for transferring the land.¹¹⁴

The problem with this argument is that it overlooks the legitimate secular interest in avoiding the political divisiveness likely to be caused by tearing down a display.¹¹⁵ Where the local community has strong emo-

107. *See id.*

108. *See* *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 699 (7th Cir. 2005); *cf. also* *Buono*, 527 F.3d at 778–782 (analyzing whether the sale itself violated the Establishment Clause).

109. *Cf. Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).

110. For instance, the defendant town of Marshfield sold the land at issue for the highest value per square foot it had ever received. *Marshfield*, 203 F.3d at 490.

111. *Cf. id.* at 493 (holding that the city did not endorse religion by selling the property at issue to a religious organization).

112. *See* *Budd*, *supra* note 21, at 227–232.

113. *Id.* at 229–30.

114. *Id.*

115. For instance, voters in San Diego passed a "Save the Cross" proposition by a seventy-six percent majority, authorizing a sale of the disputed cross to private owners. *Paulson v. City of San Diego*, 294 F.3d 1124, 1126 (9th Cir. 2002) (en banc); *see also* *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) (noting that removing a previously uncontroversial display "could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.").

tional attachment to the display and any removal of the display will likely result in political furor, the government has a good argument that selling the land will curb political divisiveness.¹¹⁶

2. Curing the Violation Caused by the Display

If the sale of land is constitutional in itself, a court should next consider whether the sale brought an end to the state endorsement that arose from housing a religious display on state land. Such a cure can occur in one of two ways: 1) by ending state action altogether or 2) by transforming the impermissible state action into a non-endorsing one. For instance, an unconditional sale of land will generally end any state action regarding the land. On the other hand, a sale on condition that land be kept open to the public will transform the government's action from an endorsement of religion to a secular interest in the openness of the land. However, if state action continues to qualify as endorsement, then the Establishment Clause violation likewise persists, and the court will need to order further remedial action.¹¹⁷

B. Current Case Law

Three recent cases have given circuit courts a chance to squarely address whether sales of land cured Establishment Clause violations.¹¹⁸ A careful reading of these cases reveals that they essentially utilize the analytical framework outlined above, inquiring into whether the sale itself is constitutional and whether the sale cured the existing violation.

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

Freedom from Religion Foundation, Inc. v. City of Marshfield centered on a dispute over a statue of Jesus in a city park.¹¹⁹ After the Freedom From Religion Foundation filed a lawsuit seeking declaratory and injunctive relief, the city auctioned off the portion of the park containing the statue to a private foundation, on condition that the land be used only for

116. See *Van Orden*, 545 U.S. at 704.

117. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000) (holding that the defendant town continued to endorse religion despite its sale of land).

118. Circuit courts have also considered such remedial sales in the context of state constitutions, for instance the California Constitution's No Preference and No Aid Clauses. See, e.g., *Paulson*, 294 F.3d at 1133 (holding that a sale violated the California Constitution); *Kong v. City and County of S.F.*, 18 Fed. App'x 616, 617 (9th Cir. 2001) (ruling that a sale violated neither California's Constitution nor the Establishment Clause).

119. See *Marshfield*, 203 F.3d at 489.

“public park purposes.”¹²⁰ The district court granted summary judgment for the city.¹²¹ The Seventh Circuit, in vacating and remanding the lower court’s ruling,¹²² held that the sale of land itself did not constitute endorsement of religion and that the sale transformed the display into private speech, but nevertheless ruled that the layout and history of the park in relation to the now-private property constituted an Establishment Clause violation.¹²³ In reaching this conclusion, the Seventh Circuit reasoned that the context of the display resulted in preferential access to a public forum.¹²⁴ The court highlighted the historic association of the now-private property with the public park, the dedication of the property to public use, and the small magnitude of transfer combined with lack of demarcation as persuasive factors in its decision.¹²⁵ However, the panel also perceived that demarcation between government and private land could fix any defect in the remedial sale; rather than invalidate the sale, it remanded the case and ordered the trial court to find a remedy that would create differentiation between the private and public property.¹²⁶ On remand, the district court ordered Marshfield to build a wrought iron fence and post disclaimer signs around the private land.¹²⁷

The *Marshfield* decision, although somewhat confusing in its wording,¹²⁸ essentially followed the steps of analysis set out above, while applying the endorsement test.¹²⁹ The court first analyzed whether the sale itself was constitutionally permissible, looking to such factors as whether the city unfairly favored the religious buyer or insisted on maintaining too much control over the religious display.¹³⁰ Only after it concluded that the sale of land was permissible did the court proceed to analyze whether the sale cured the government’s impermissible action vis-à-vis the display itself.¹³¹ The opinion ultimately held that Marshfield violated the Establishment

120. *Id.* at 490. In fact, Marshfield sold the tract for the highest value per square foot it had ever received. *Id.*

121. *Id.*

122. *Id.* at 497.

123. *See id.* at 491, 493, 496.

124. *See id.* at 496

125. *Id.* at 494.

126. *Id.* at 497.

127. *Freedom from Religion Found., Inc. v. City of Marshfield*, No. 98-C-270-S, 2000 WL 767376, at *1 (W.D. Wis. 2000).

128. The opinion states that the city’s remedial sale “validly extinguished any government endorsement of religion,” only to proceed to find an Establishment Clause violation in the layout of the remaining parkland with respect to the statue. 203 F.3d at 492, 496.

129. *Id.* at 491, 493.

130. *See id.* at 491–93.

131. *See id.* at 493.

Clause by failing to create sufficient separation between its land and the now-private display; in other words, the court reasoned that the sale transformed the nature of state action with respect to the display (the government was now a neighbor rather than owner of the display) but that this action nevertheless remained unconstitutional.¹³² But rather than punishing the private owners of the display for the government's violation, the court ordered that the defendant government perfect the remedial sale by erecting demarcation between the public and private land.¹³³ Thus, the *Marshfield* opinion illustrates how a remedial sale can be a viable option under the endorsement test, if properly refereed by the court.

2. *Mercier v. Fraternal Order of Eagles*¹³⁴

Mercier v. Fraternal Order of Eagles is a similar case also arising in the Seventh Circuit, in which the defendants defeated a lawsuit by mimicking *Marshfield's* ultimate remedy. In this case, the defendant city of La Crosse had accepted as a gift a Ten Commandments monument and placed it on the edge of a city park, dedicating it to volunteers who helped save the city from a great flood in 1965.¹³⁵ When the Freedom From Religion Foundation sued to have the monument removed, the city sold the monument and a small surrounding tract to the original donors, the Fraternal Order of Eagles, on condition that the land be fenced and signage erected to commemorate the volunteers who had saved La Crosse from the 1965 flood.¹³⁶ As in *Marshfield*, no bid took place, but the buyers did pay at least fair market value for the land.¹³⁷ Moreover, the Eagles erected fences and signs around the property almost identical to those ultimately ordered in *Marshfield*.¹³⁸ The District Court held that this sale violated the Establishment Clause, but the Seventh Circuit reversed, noting the case's many similarities to *Marshfield*.¹³⁹

3. *Buono v. Kempthorne*

A recent Ninth Circuit decision, *Buono v. Kempthorne*, took a stricter approach to a similar sale, but the case is now under review by the Supreme

132. *See id.* at 496.

133. *See id.* at 497.

134. 395 F.3d 693 (7th Cir. 2005).

135. *Id.* at 694–96.

136. *Id.* at 697.

137. *Id.* at 702.

138. *See id.* at 697–98, 700–01.

139. *See id.* at 702–03.

Court.¹⁴⁰ *Buono* involved a dispute over a Latin cross on federal land.¹⁴¹ The Veterans of Foreign Wars had placed a cross on a rock outcrop in the Mojave Desert preserve in 1934, without permission from the government.¹⁴² It was visible from a highway about 100 yards away but otherwise sat in a remote area.¹⁴³ The VFW maintained the cross over the years, replacing it several times, until controversy surrounding the display emerged around the turn of the century.¹⁴⁴ In 2001 a former park service employee filed suit to have the cross removed.¹⁴⁵ The district court found an Establishment Clause violation and filed an injunction ordering the government to remove the cross.¹⁴⁶ In response, Congress enacted successive bills designating the site as a national memorial (§ 8137),¹⁴⁷ prohibiting the use of federal funds to “dismantle national memorials commemorating United States participation in World War I” (§ 8065)¹⁴⁸ and finally, providing for a transfer of the cross and surrounding acre to a private buyer (§ 8121).¹⁴⁹ Through a reversionary interest, Congress conditioned the sale on a requirement that the land be maintained as a memorial to “United States participation in World War I” and “American veterans of that war.”¹⁵⁰

The district court invalidated the attempted transfer as a violation of its injunction, and the Ninth Circuit affirmed, holding that the attempted sale violated the injunction because the sale could not end government endorsement of religion.¹⁵¹ The appellate court did not strike the sale as divergent from the literal wording of the injunction, but rather analyzed the

140. See *Buono v. Kempthorne*, 527 F.3d 758, 779 n.13 (9th Cir. 2008), cert. granted sub nom. *Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (declining to adopt *Marshfield*'s presumption that a sale of land ends an Establishment Clause violation).

141. *Id.* at 768.

142. *Id.* at 760 (O'Scannlain, J., dissenting from denial of rehearing en banc).

143. See *id.* at 769, 772 (majority opinion).

144. *Id.* at 760, 769–70. Before the lawsuit, an individual petitioned the NPS for permission to place a Buddhist monument nearby and was denied. *Id.* at 769.

145. *Id.* at 770.

146. *Id.* At the liability stage, *Buono* might conform with a rigid view of the endorsement test, but it seems to clash with *Van Orden*; where the *Van Orden* display existed for forty years before its first complaint, the *Buono* display had been around for seventy. Compare *id.* at 769 with *Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring). Moreover, if one considers the location of a display relevant to endorsement, one cannot help but compare *Van Orden*'s Ten Commandments display on state capitol grounds to *Buono*'s five- to eight-foot cross in a remote area of the Mojave desert. Compare *Van Orden*, 545 U.S. at 681 (plurality opinion) with *Buono*, 527 F.3d at 768, 772.

147. Pub. L. No. 107-117 § 8137, 115 Stat. 2278-79 (2002) (codified at 16 U.S.C. § 431 note) [hereinafter § 8137].

148. Pub. L. No. 107-248 § 8065(b), 116 Stat. 1551 (2002).

149. Pub. L. No. 108-87 § 8121(a)–(f) (2003) (codified at 16 U.S.C. § 410 aaa-56 note) [hereinafter § 8121]; *Buono*, 527 F.3d at 771.

150. § 8121, *supra* note 149.

151. *Buono*, 527 F.3d at 770, 783.

attempted cure on substantive constitutional grounds.¹⁵² It basically adhered to the framework outlined above, first addressing the sale and then considering continuing endorsement caused by the display.¹⁵³ The court held both that the sale itself violated the Establishment Clause and that the government continued to endorse religion vis-à-vis the monument.

The court highlighted three aspects of the transfer as problematic: “(1) the government’s continuing oversight and rights in the site containing the cross after the proposed land exchange; (2) the method for effectuating the land exchange; and (3) the history of the government’s efforts to preserve the cross.”¹⁵⁴ However, given the facts of the case, all three of these reasons pose problems.

The court’s first reason for striking the sale was “the government’s continuing oversight and rights in the site containing the cross after the proposed land exchange.”¹⁵⁵ The opinion explains that the various statutes leading up to the sale gave the government continuing control over the monument, both in that the National Park Service is responsible for maintenance of national monuments and in that the reversionary interest requires the property to be maintained as a war memorial.¹⁵⁶ However, both of these concerns fall apart under scrutiny. Concerning the supposed duty of the NPS to maintain the cross, nothing in § 8121 (the most recent statute) requires the NPS to provide maintenance after the transfer to private owners.¹⁵⁷ Moreover, few maintenance issues will likely ever arise, as the cross simply consists of two pipes welded together and embedded in a rock outcropping.¹⁵⁸ The court misstated the terms of § 8137 when it stated that the statute authorizes the NPS to “install replicas of the original plaque *and cross* located at the site.”¹⁵⁹ Although § 8137 authorizes the Secretary of the Interior to make replicas of the memorial plaque and cross, this is merely for purposes of “reinstallation of [the] memorial plaque,” which in turn communicates a purely secular message, dedicating the cross “[I]n Memory of the Dead of All Wars.”¹⁶⁰ Nothing in § 8137 authorizes the

152. *See id.* at 778–79.

153. *Id.* at 779, 782.

154. *Id.* at 779.

155. *Id.*

156. *Id.*

157. *See* § 8121, *supra* note 149.

158. ERIC CHARLES NYSTROM, FROM NEGLECTED SPACE TO PROTECTED PLACE: AN ADMINISTRATIVE HISTORY OF MOJAVE NATIONAL PRESERVE ch. 6 (2003), <http://www.nps.gov/archive/moja/adminhist/adhi6.htm> (last visited Sept. 12, 2009).

159. *Buono*, 527 F.3d at 779 (emphasis added).

160. *Id.* at 769–70.

government to replace or otherwise maintain the Latin cross.¹⁶¹ The minimal ongoing government involvement contemplated in statute therefore only involves the secular aspects of the memorial, as opposed to endorsing any religious message. As for the reversionary interest, § 8121 merely requires the land be maintained as a “memorial commemorating United States participation in World War I.”¹⁶² By the plain wording of the statute, the private owners of the memorial would be free to remove the cross as long as they replaced it with another “memorial commemorating United States participation in World War I.”¹⁶³ Thus, the Ninth Circuit overstated the government’s ongoing control of the land when it asserted that “§ 8121(a) expressly reserves NPS’s management responsibilities under § 8137.”¹⁶⁴

The Ninth Circuit next highlighted the method of sale as a second problem, noting that Congress deviated from Department of Interior regulations by failing to hold public hearings on the exchange or open bidding to the public.¹⁶⁵ The court admitted that Congress’s deviation from such regulations was not dispositive, but it cited that behavior coupled with the transferees’ “significant interest” in preserving the cross as sufficient evidence that the VFW was a “straw purchaser.”¹⁶⁶ It is somewhat odd that the court would even suggest holding Congress to a statute that governs a Congressionally-created agency; not only are these rules not “dispositive”¹⁶⁷ when considering Congressional procedure, they are wholly irrelevant.¹⁶⁸ More-

161. See § 8137, *supra* note 147.

162. § 8121, *supra* note 149.

163. *Id.*

164. *Buono*, 527 F.3d at 780. The court attempted to emphasize the significance of the reversionary interest by citing two cases in which reversionary interests led courts to hold that state action persisted. See *id.* However, both cases involved racial segregation by the private owners. See *Eaton v. Grubbs*, 329 F.2d 710, 711 (4th Cir. 1964); *Hampton v. City of Jacksonville*, 304 F.2d 320, 320 (5th Cir. 1962). Few would argue that the courts should treat religious expression with the same degree of scrutiny that they treat racial segregation; indeed, whereas many argue that the government must show neutrality toward religion, government action that results in racial segregation is reviewed under strict scrutiny. Compare *e.g.* *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (allowing government action that “neither advances *nor inhibits* religion” (emphasis added)) with *e.g.* *Johnson v. California*, 543 U.S. 499, 505–506 (2005) (prescribing strict scrutiny for racial classifications). When a remedial sale is at issue, the relevant distinction between the two types of cases lies in the fact that the government will rarely have any cognizable interest in enabling ongoing racial segregation, but it may often have lawful interests in allowing ongoing private religious expression—for instance in cases where a remedial sale would encourage religious tolerance or prevent religion-based political tensions in a community. Cf. *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).

165. *Buono*, 527 F.3d at 781.

166. *Id.* at 781–82.

167. *Id.* at 781.

168. See 16 U.S.C. § 4601-22 (2006) (defining procedures for the transfer of national park land in instances where the Secretary of the Interior executes the transfer). The statute mentions nothing of transfers ordered by Congress. *Id.*

over, although the Ninth Circuit did not provide its own definition of a “straw purchaser,” a private party’s interest in religious expression would not ordinarily merit such a label. Rather, the term normally applies to sham transactions where the transferee is a proxy for the real owner—for instance, if the private party were only a proxy for the government’s religious speech.¹⁶⁹ In *Buono*, the argument for a sweetheart deal or a straw purchase would have been more convincing if Congress had sold the land on the cheap, or had required the purchaser to maintain a religious symbol. But § 8121 required the purchaser to exchange a five-acre piece of land for the one-acre rock outcropping that contains the cross,¹⁷⁰ and as discussed above, the government’s only reversionary interest was purely secular in nature.¹⁷¹ These facts simply do not support the court’s “straw purchaser”¹⁷² conclusion.

Finally, the court cited the “government’s long-standing efforts to preserve and maintain the cross atop Sunrise Rock” as a third reason that the attempted sale failed the endorsement test.¹⁷³ The government may have engaged in “herculean efforts”¹⁷⁴ to prevent removal of the Sunrise Rock cross, but using the magnitude of those efforts as evidence of endorsement presupposes that the government acted with a religious purpose. However, where Congress itself has intervened in the dispute, the courts should not assume without convincing evidence that Congress had a primarily religious purpose in acting; the Court has stated that it will “not lightly assume that Congress intended to infringe constitutionally protected liberties”¹⁷⁵ Thus, in deciding whether the government had a religion-endorsing purpose when it sought a remedial sale, the courts should look foremost to the stated purpose, if any, of the sale.¹⁷⁶ Here, the only stated purpose of the government’s action was a secular interest in preserving the display as a World War I monument, as articulated by the reversionary

169. See Dictionary.com, [http://dictionary.reference.com/browse/straw man](http://dictionary.reference.com/browse/straw+man) (last visited Sept. 10, 2009) (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006), (“A person who is set up as a cover or front for a questionable enterprise.”)).

170. See § 8121, *supra* note 149.

171. See *id.* (requiring that the land be maintained as a “memorial commemorating United States participation in World War I”).

172. *Buono*, 527 F.3d at 782.

173. *Id.*

174. *Id.* (quoting the district court’s opinion, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005)).

175. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (addressing cannons of statutory construction).

176. See Christopher Lauderman, Note, *Building a Fence of Separation: The Constitutional Validity of Land Transfers in Escaping from Establishment Clause Violations*, 65 WASH. & LEE L. REV. 1193, 1218 (2008); *cf. also Edward J. DeBartolo*, 485 U.S. at 575.

interest in § 8121.¹⁷⁷ Moreover, unlike cases such as *McCreary* and *Santa Fe Ind. Sch. Dist.*, no legislative history exists to suggest that Congress's stated secular purpose was merely a cover for a religious purpose.¹⁷⁸ Thus, the *Buono* opinion erred by focusing merely on the magnitude of the government's efforts to save the cross, rather than its purpose.¹⁷⁹

After holding that Congress's attempted sale violated the Establishment clause by endorsing religion, the Ninth Circuit concluded its *Buono* opinion by asserting that the attempted sale would not have ended the government endorsement of religion caused by the display.¹⁸⁰ The court declared, "[C]arving 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."¹⁸¹ This statement rests on firmer ground than the court's analysis of the sale itself. Much as in *Marshfield*, even if the sale of land would not violate the constitution, the transfer arguably fails to end government endorsement of religion, because the private land would be insufficiently separated from government land.¹⁸² On the other hand, the defendants have noted that the Preserve is riddled with 1,800 private inholdings, so perhaps a reasonable observer would simply assume that any land containing a cross must be private.¹⁸³ Nevertheless, the small magnitude of the transfer, the lack of demarcation, and the history of the specific plot as public would likely lead our highly-informed reasonable observer to believe that the cross remained government speech, or at least that the government did not care to separate its land from the newly private land.¹⁸⁴ One can make a strong argument that demarcating the land in *Buono* could have provided sufficient separation, as

177. § 8121, *supra* note 149 ("The conveyance . . . shall be subject o the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war.").

178. Compare *Buono*, 527 F.3d at 779 with *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 851–56 (2005) (explicitly religious dedication speech by a government official, as well as late addition of secular symbols to the display); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). ("invocation" as proxy for prayer).

179. Cf. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) (identifying the key concern as whether government action has the "purpose or effect of 'endorsing' religion" (emphasis added) (citation omitted)).

180. See *Buono*, 527 F.3d at 783.

181. *Id.*

182. Cf. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 496 (7th Cir. 2000).

183. See Transcript of Oral Argument, *supra* note 4, at 20.

184. See *Buono v. Norton*, 212 F. Supp. 2d 1202, 1216 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004), *cert. granted sub nom. Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472); cf. also *Budd*, *supra* note 21, at 240.

was the case in *Marshfield*.¹⁸⁵ However, in contrast to *Marshfield*, the *Buono* court merely ordered the cross removed without exploring this idea, perhaps because it had already found the transfer itself to be unconstitutional.¹⁸⁶

On February 23, 2009 the Supreme Court decided to hear the case, now known as *Salazar v. Buono*.¹⁸⁷ On October 7, 2009, the court heard argument both on the constitutional issues discussed above, and on whether the plaintiff had standing to bring the case.¹⁸⁸

C. Application to Individual Fact Patterns

After surveying the relevant cases, one may discern that although each case presents unique challenges, several common issues often arise when a defendant government attempts a remedial sale of land to cure an Establishment Clause violation. This subsection divides the issues into three major inquiries: first addressing general justiciability concerns, then looking to whether a remedial sale is possible given a particular display, and finally analyzing whether the specific sale terms proposed by the defendant government do in fact cure the constitutional violation. As discussed earlier, for a remedial sale to succeed, the attempted sale must itself be constitutional and the sale must cure the existing violation.

1. Justiciability Concerns

Before a court reaches the particulars of a remedial sale, it might have to address justiciability arguments that arise from the sale itself. In particular, defendants may claim that the sale moots an injunction or ends state action, thereby rendering the case not justiciable.¹⁸⁹ These arguments might ultimately prevail, but as explained below, they will not obviate the need for the court to examine the remedial sale on substantive Establishment Clause grounds.

a. Mootness

If a defendant government sells the land under a religious display, the

185. See *infra* Part III.C.3.c.i.

186. Compare *Marshfield*, 203 F.3d at 497 with *Buono*, 527 F.3d at 782–83.

187. Supreme Court of the U.S. Docket for No. 08-472, <http://origin.www.supremecourtus.gov/docket/08-472.htm> (last visited Sept. 1, 2009).

188. See Br. for the Pet'rs. III, *Salazar v. Buono*, No. 08-472 (U.S. June 1, 2009).

189. Other justiciability arguments, particularly standing, commonly arise in these cases but do not depend on the remedial sale. See, e.g., *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1204 (S.D. Cal. 2008).

court will likely need to deal with a mootness argument, not only if a complaint spurs the sale but also post-remedy, if the government sells land in response to an injunction.¹⁹⁰ Even if the sale occurs post-injunction, the court should perform a substantive Establishment Clause review of the transaction, because “[i]n deciding whether an injunction has been violated it is proper to observe the objects for which the relief was granted”¹⁹¹ Of course, this principle cuts both ways: defendants should not be allowed to moot an injunction on the technical argument that they ended a constitutional violation with an unconstitutional sale, but at the same time, courts should not strike down an otherwise permissible sale simply because the transaction does not comport with the precise wording of an injunction ordering removal of a display.¹⁹² Rather, the court should consider the “object[] for which the relief was granted”—to end government endorsement of religion.¹⁹³

Some defendants might broadly claim that a sale moots the current litigation by ending the existing Establishment Clause violation and that any Constitutional challenge to the transaction must be brought in a new suit, but these mootness arguments are properly understood as assertions of voluntary cessation.¹⁹⁴ As such, defendants must shoulder the heavy burden described in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, showing both that their illegal activity has ceased and that “subsequent events made absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”¹⁹⁵ In order to satisfy this standard, defendants must show that their transaction truly cured any Establishment Clause violation, as opposed to merely shifting the violation from an unconstitutional display to an unconstitutional transaction.¹⁹⁶ Moreover, in order to verify that the sale extinguished any possibility of the violation reoccurring, the court will need to examine the method of sale and

190. See *Buono II*, 371 F.3d at 545.

191. *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d Cir. 1942) (invoking the “spirit of the injunction”); see also *Youakim v. McDonald*, 71 F.3d 1274, 1283 (7th Cir. 1995); *United States v. Christie Indus.*, 465 F.2d 1002, 1007 (3d Cir. 1972).

192. *Cf. id.*

193. *Id.*; see also *Christie Indus.*, 465 F.2d at 1007 (“The language of an injunction must be read in the light of the circumstances surrounding its entry . . . [including] the mischief that the injunction seeks to prevent.”).

194. See *Budd*, *supra* note 21, at 235.

195. 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)).

196. See *Buono v. Kempthorne*, 527 F.3d 758, 778 n.11 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (noting that constitutional analysis of the sale falls within a court’s broad powers to enforce its injunction).

any conditions attached to the transfer.¹⁹⁷ Thus, mootness arguments do not obviate the need for courts to conduct a substantive Establishment Clause review of sales meant to cure Establishment Clause violations.

b. State Action

Aside from mootness arguments, defendants may contend that a sale *per se* ends state action in that the government no longer exercises control over the religious display.¹⁹⁸ For this proposition, defendants often cite the plurality decision in *Capitol Square Review Board v. Pinette*,¹⁹⁹ which suggested a *per se* rule that private religious expression cannot violate the Establishment clause.²⁰⁰ However, courts have yet to accept this argument in the context of sales to cure Establishment Clause violations, instead considering any continuing government control over the land, as well as apparent endorsement caused by the layout of public land with respect to the display.²⁰¹ Moreover, state action arguments cannot avoid the fact that sale of public land is a government action itself subject to the Establishment Clause.²⁰² Thus, although a sale may transform the religious display at issue into private speech, courts still must examine the transaction to ensure that the method and terms of the sale both satisfy the Establishment Clause.²⁰³ In doing so, they must examine whether the inflammatory nature or sensitive location of the display precludes a remedial sale. If a remedial sale is possible, they must consider whether the size and shape of the property sold, along with any demarcation, creates sufficient separation between government and private land.

In addition, if the selling government attempts to retain a reversionary interest or provide some sort of support to the buyer, the plaintiff may claim that the display should be counted as government speech by virtue of the entanglement doctrine. Under the entanglement (or alternately, “en-

197. *Cf.* *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000) (allowing the transfer despite a condition that the land be used for public park purposes); *Buono*, 527 F.3d at 779 (striking down the sale in part because of a condition that a war memorial be maintained).

198. *See, e.g., Marshfield*, 203 F.3d at 491.

199. *See id.* at 493–94.

200. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (plurality opinion); *Marshfield*, 203 F.3d at 487.

201. *See Marshfield*, 203 F.3d at 494, 496 (holding that the layout of a monument in relation to a public park violated the Establishment Clause by creating apparent endorsement of religion).

202. *See Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 699 (7th Cir. 2005); *cf. also Buono v. Kempthorne*, 527 F.3d 758, 778–82 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (analyzing whether the sale itself violated the Establishment Clause).

203. *See Marshfield*, 203 F.3d at 493–94.

twinement”) doctrine, courts will treat private actors as government actors “if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”²⁰⁴ For instance, the Supreme Court’s most recent use of the doctrine held an interscholastic athletic association to be a state actor, where the nominally private entity was predominantly composed, funded, and governed by public schools.²⁰⁵ However, even if the doctrine is technically applicable, it will seldom add anything to the type of cases discussed in this article. In cases where the government involvement after a sale is so substantial that an entanglement argument could be won, the plaintiff will likely find it easier to argue that the involvement itself violates the Establishment Clause by endorsing religious speech.²⁰⁶ The aid itself is undoubtedly state action, and if the aid itself violates the constitution, there is no need for a plaintiff to take the extra step of making an entanglement argument. Indeed, the court did not find it necessary to perform entanglement/entanglement analysis in any of the three cases discussed above.²⁰⁷

Finally, public function doctrine must be addressed if the attempted remedial sale involves park land, because courts sometimes cite this doctrine in holding privately owned parks to be state actors. The Supreme Court in *Evans v. Newton* established that courts have the power to scrutinize land transfers meant to cure constitutional violations.²⁰⁸ In *Evans*, a town accepted a gift of land encumbered by a deed restriction that it be kept as a whites-only park.²⁰⁹ When it became clear that the city could not constitutionally run a segregated park, the city government attempted to transfer the park to private trustees and claimed that it had thereby extinguished any state action violative of the Fourteenth Amendment.²¹⁰ However, the Supreme Court held that state action persisted, reasoning that the park fell within the “public function” line of cases, in which private actors fulfilling a function that is traditionally the exclusive domain of government are held to the Constitution as if they were state actors.²¹¹

204. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

205. *See id.* at 299–300.

206. *Cf. Buono*, 527 F.3d at 780 (invalidating the transfer in part because of the government’s planned provision of a memorial plaque).

207. *See id.* at 778–82; *Mercier*, 395 F.3d at 699; *Marshfield*, 203 F.3d at 490–94 (addressing only the constitutionality of the sale).

208. *See* 382 U.S. 296, 299 (1966).

209. *Id.* at 297.

210. *Id.* at 297–99.

211. *Id.* at 301.

While the decision might appear a roadblock to governments wishing to cure Establishment Clause violations by selling park property, *Evans* is also significant for its somewhat narrow holding, and what the opinion did not say. Namely, the Court did *not* hold that all public parks necessarily qualify as a “public function,”²¹² but rather buttressed its conclusion by noting that the defendant city government remained intimately involved in the operation of this particular park by maintaining it as if it were still government property.²¹³ In fact, in *Flagg Bros., Inc. v. Brooks*, the Supreme Court recently emphasized that public parks are not *per se* public functions and suggested that the *Evans* decision in fact turned on ongoing government control (i.e., the city’s maintenance of the park) rather than the “public function” doctrine.²¹⁴ At the end of the day, *Evans* is better understood as an example of a sham transaction, or, as the *Flagg Bros.* opinion put it, “a finding of ordinary state action under extraordinary circumstances.”²¹⁵ Thus, under current case law, private ownership of park-like land does not automatically count as state action.²¹⁶ Of course, courts must nevertheless guard against sham sales of the sort in *Evans*, by ensuring that the private buyers do in fact assume the traditional duties of ownership.²¹⁷

2. Cases Ineligible for Remedial Sale

Before examining the specific terms of a remedial sale, courts should analyze whether a cure is possible at all through a sale. In some limited cases, the nature or location of the display will preclude a cure via sale of land.

a. *Whether Some Displays Must Be Removed*

The history of some displays might simply be too suspect to allow for a remedial sale. Specifically, courts should not allow remedial sales in situations where, given the state of the law at the time the government acquired the display, the offending government knew or should have known that the display violated the Establishment Clause.²¹⁸ Allowing a remedial

212. See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (holding that a corporation maintaining a privately owned “company town” was fulfilling a public function analogous to state action and thus could be sued for violating the First Amendment).

213. *Evans*, 382 U.S. at 301.

214. See *Flagg Bros. v. Brooks*, 436 U.S. 149, 159 n.8 (1978).

215. *Id.*

216. See *id.*

217. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702 (7th Cir. 2005); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000).

218. Cf. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 859 (2005) (noting the importance of *Lemon’s* purpose prong and citing *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam)); *Santa Fe*

sale after such bad faith acquisitions would open the door for governments to confer advantages on a preferred sect by hosting a blatantly unconstitutional display on a desirable piece of land and simply planning to sell the land should someone challenge the display.²¹⁹ In such cases the offending government would violate the Establishment Clause not only by hosting an unconstitutional display but also by planning to sell the land.²²⁰ Insofar as it furthers those unconstitutional plans, a remedial sale would also serve to endorse religion and therefore would violate the Establishment Clause. Cases like this would hopefully be somewhat rare, but a “bad faith” exception to a general rule allowing remedial sales is necessary to prevent the situation from arising.²²¹

As for proving bad faith, evidence of administrative or legislative history would obviously be relevant,²²² as would the nature of the display itself. For instance, legislative history that evinced a purpose to indoctrinate might raise suspicions of bad faith.²²³ Likewise, a display that serves no other purpose than facilitating religious worship (for instance a church or other place of worship) might be difficult to explain as good-faith acquisitions.²²⁴ It should, however, be noted that crosses will not necessarily qualify as this type of inherently suspect display, as numerous courts have held that cross displays can serve secular purposes.²²⁵

Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308–09 (2000); *Wallace v. Jaffree*, 472 U.S. 38, 56–61 (1985).

219. *Cf. Mercier*, 395 F.3d at 702 (noting, “We are not endorsing a non-remedial initiative designed to sell off patches of government land to various religious denominations as a means of circumventing the Establishment Clause.”).

220. *See McCreary*, 545 U.S. at 866 (holding that legislative intent is relevant to showing a religious purpose in acquiring a display). Justice Scalia argued that courts should not take the defendant government’s intent into account, because leads to different conclusions for identical displays. *Id.* at 907–908 (Scalia, J., dissenting).

221. *Cf. id.* at 859–69 (noting that the purpose prong “may rarely be determinative” but “nevertheless serves an important function” in Establishment Clause analysis (quoting *Wallace*, 472 U.S. at 75 (O’Connor, J., concurring))).

222. *Cf. id.* at 866.

223. *Cf. id.* at 869 (noting the relevance of a county official’s religious tone at the dedication ceremony of the display in question); *Stone*, 449 U.S. at 41 (holding that posting the Ten Commandments in schools had a clearly improper religious purpose).

224. *Cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294–316 (2000) (striking down a law that called for student-led prayer at football games); *Lee v. Weisman*, 505 U.S. 577, 586–87 (1992) (holding unconstitutional opening prayer at high school graduation ceremonies).

225. *Lauderman*, *supra* note 176, at 1222; *see also Briggs v. Mississippi*, 331 F.3d 499, 505–06 (5th Cir. 2003) (holding that a cross on the state flag of Mississippi did not violate the purpose prong of *Lemon*); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) (O’Scannlain, J., concurring) (reasoning that a cross served a secular purpose when used a part of a war memorial); *Friedman v. Bd. of County Comm’rs*, 781 F.2d 777, 789 (10th Cir. 1985) (holding that a cross in a city seal did not violate the Establishment Clause).

b. Land That May Not Be Sold

Even if a display was not a bad faith acquisition, some government land simply may not be sold. Such lands include those important to government function or highly symbolic due to their proximity to a seat of government power, for instance a town hall or capitol grounds, respectively.²²⁶ For example, if a city government decided to sell its town hall to a private religious organization, the degree of religious favoritism apparent in the transaction would almost certainly amount to endorsement in itself.²²⁷ Moreover, other lands have too much noneconomic value to the public for a sale to be acceptable, because of their aesthetic, recreational, or expressive importance.²²⁸ For instance, an Establishment Clause-violating cross planted atop Mount Rushmore would almost certainly need to be removed.²²⁹

3. Selling Land to Cure an Establishment Clause Violation

Next, if the history and location of the display would theoretically permit a remedial sale, the court should proceed to determine whether the particulars of a proposed sale would in fact cure the Establishment Clause violation, keeping in mind that the sale itself must also satisfy constitutional standards. At this point in analysis, the court will need to examine both the method of the sale and the degree to which the sale would create separation between the offending display and public land.

a. "Herculean" Government Efforts to Save a Display

Before even looking at the mechanics of a sale, some would argue that mere evidence of government efforts to avoid removing a religious display constitutes evidence of endorsement.²³⁰ However, the government's purpose in seeking a remedial sale may just as easily be secular as religious, and therefore the magnitude of the government's efforts should be irrelevant. For instance, the government may have purposes in promoting religious tolerance, easing religious tensions within the community,²³¹ and

226. See *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 599–600 (1989); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 703 (7th Cir. 2005).

227. See *Budd*, *supra* note 21, at 231; *cf. also* *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003) (ordering the removal of a Ten Commandment monument in the foyer of the Alabama Supreme Court building).

228. *Budd*, *supra* note 21, at 228.

229. See *id.* at 231.

230. See *Buono v. Kempthorne*, 527 F.3d 758, 782 (9th Cir. 2008), *cert. granted sub nom.* *Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

231. See *Nystrom*, *supra* note 158, at ch. 6.

even seeking to recoup funds expended in dealing with the lawsuit.²³² As discussed above, in cases such as *Buono*, where Congress itself has intervened in the dispute, the courts should not assume without convincing evidence that Congress had a primarily religious purpose in acting; the Court has stated that it will “not lightly assume that Congress intended to infringe constitutionally protected liberties”²³³ Thus, in deciding whether the government had a religion-endorsing purpose when it sought a remedial sale, the courts should look first to the stated purpose of the sale, if one exists.²³⁴ They should only find endorsement of religion if presented with clear evidence that the government had a religious purpose, regardless of the magnitude of government efforts to prevent removal of a display.

b. Method of the Sale

When examining whether the method of the sale satisfies endorsement standards, courts must also ensure that the state does not endorse religion either through continuing its control over the land or by showing unfair preference to certain potential buyers.

i. Conditions, Reversionary Interests, and Ongoing Maintenance

The state may not, through conditions or reversionary interests in the sale, mandate that the buyer maintain a religious display.²³⁵ Such conditions are tantamount to continuing government ownership of the display. However, this rule does not mean that the government must make an unconditional sale of land; it should be allowed to make requirements about non-religious aspects of the land—for instance, that the land be kept open to the public.²³⁶ Although such conditions represent a measure of government control, the control can hardly be said to endorse religion if it neither encourages nor discourages religious expression.

In contrast, courts generally should not allow the government to conduct ongoing maintenance of the land sold. Such government action is similar to that struck down in *Evans*,²³⁷ and as in *Evans*, it often indicates a

232. *Supra* note 110.

233. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (addressing cannons of statutory construction).

234. *See* *Lauderman*, *supra* note 176, at 1218; *cf. also Edward J. DeBartolo Corp.*, 485 U.S. at 575.

235. *See* *Buono v. Kempthorne*, 527 F.3d 758, 780 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (reasoning that if the government exercises continuing control over the land, the land must be held to constitutional requirements).

236. *Cf. Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 490, 492-93 (7th Cir. 2000) (upholding a sale despite a reversionary clause that the land be kept open to the public).

237. *See* *Flagg Bros., v. Brooks*, 436 U.S. 149, 159 n.8 (discussing *Evans*).

sham transaction in which the purchaser acts as a straw while the Government retains the traditional duties of ownership.²³⁸ Such maintenance almost always qualifies as endorsement of religion because it assists the private owner in perpetuating religious speech.²³⁹ That said, a limited exception should exist where the government assistance is narrowly tailored to enhance only the secular aspects of the private display; aid does not endorse religion when it benefits a purely secular aspect of some enterprise in which the government has a legitimate interest.²⁴⁰ For instance, whereas mowing or lighting would assist all aspects of a display, both religious and secular, provision of a purely nonreligious plaque designating the display as a war memorial would only enhance the secular nature of the display,²⁴¹ and the government has a legitimate interest in honoring veterans.²⁴² This distinction is why the *Buono* court erred in reasoning that the government provision of a plaque evinced endorsement of religion; the plaque was to emphasize the secular historical aspect of the display.²⁴³ Conversely, the *Marshfield* opinion is a good example of a case where the government retained some control over the private land but nevertheless completed a legitimate remedial sale.²⁴⁴ The transfer involved a purely secular condition—that the land be kept open to the public—but at the same time did not require religious speech or assist the new owners with the costs of their religious speech.²⁴⁵

ii. Mechanics of the Sale—May the Government Prefer a “Friendly Buyer”?

Governments attempting a remedial sale will often try to sell the land to the party who originally donated the display, or some other “friendly buyer” who intends to maintain the display.²⁴⁶ Often, the endorsement test

238. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702 (7th Cir. 2005); *Marshfield*, 203 F.3d at 492.

239. See *Mercier*, 395 F.3d at 702; *Marshfield*, 203 F.3d at 492.

240. Cf. *Mitchell v. Helms*, 530 U.S. 793, 801–02 (2000) (plurality opinion) (holding constitutional the provision by government of secular materials to religious schools).

241. Cf. *id.* at 809–10 (hinging analysis on whether government action subsidizes religious indoctrination).

242. See *Buono v. Kempthorne*, 527 F.3d 758, 763–64 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (O’Scannlain, J., dissenting from the denial of rehearing en banc).

243. See § 8137, *supra* note 147 (authorizing reinstallation of the original memorial plaque that signified the cross as a memorial to the dead of all wars).

244. See *Marshfield*, 203 F.3d at 492–93.

245. See *id.* at 490.

246. See *id.*; *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 703 (7th Cir. 2005).

will allow the state to favor sales to “friendly buyers.”²⁴⁷ Such favoritism can be justified where the government has a secular interest in fostering religious tolerance by showing respect for the religious beliefs represented by the display. If the government seeks to promote religious tolerance by showing respect for a display, then the government may legitimately inquire whether a prospective buyer will respectfully treat the display at issue.²⁴⁸ In contrast, the government may *not* favor a friendly buyer by offering to sell the land for less than market value.²⁴⁹ Such “sweetheart deals” could not likely find any legitimate secular justification and in any case would endorse religion by gifting land to religious entities.²⁵⁰

Some object that strict neutrality should be required in the sale process, because choosing a friendly buyer violates the endorsement test by showing a government preference that a display remain.²⁵¹ Adherents to this notion believe that any remedial sale must be completely neutral, even if that means ultimately selling the display to a buyer who intends to profane the religious symbol.²⁵² Of course, a sale to such a “hostile buyer” would likely stir up even greater community controversy, negating the secular virtues (i.e. tolerance for religion and calming of religious tensions) that supposedly justified the remedial sale.²⁵³ Thus, so the argument goes, the preferable remedy is that the government remove the display in as non-offensive a manner as possible.²⁵⁴

The problem with this argument is that it ignores the compromise position that the government takes when it seeks a genuine, non-sham remedial sale. The compromise lies between continuing government ownership on the one hand and removal of the monument on the other. Just as the government shows a preference for the religious message by owning and displaying the monument, the government would show disapproval for religion by knocking down or removing the monument.²⁵⁵ A non-sham

247. *Cf. Marshfield*, 203 F.3d at 492.

248. *Cf. Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) (noting that the removal of a monument because of its religious content can spur religious divisiveness).

249. *Compare Annunziato v. New Haven Bd. of Alderman*, 555 F. Supp. 427, 433 (D. Conn. 1982) (holding that a one dollar sale of property to a church violated the Establishment Clause) *with Marshfield*, 203 F.3d at 492 (reasoning that it need not address the issue because the defendant paid fair market value).

250. *See Annunziato*, 555 F. Supp. at 433; *Lauderman*, *supra* note 176, at 1225.

251. *See Budd*, *supra* note 21, at 246–49.

252. *Id.* at 247.

253. *Id.*

254. *Id.* at 253.

255. *See Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring); *cf. also Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and

remedial sale that ends government sponsorship of the display but permits supporters of the message to take over the display represents a practical compromise, and thus is often the course in which the government comes closest to evincing neutrality toward the religious message at issue.²⁵⁶ The effect of selling to a friendly buyer might seem largely the same as if the government required through reversionary interest that the religious display be maintained, but the causation of the ongoing display remains a crucial difference; in the former case the buyer's independent choice constitutes the sole source of ongoing religious speech, while in the latter case the government maintains a property right that compels religious expression.²⁵⁷ For this reason, the former should be constitutional, while the latter should not.²⁵⁸

c. Achieving Separation: Physical Attributes of the Land

Finally, even if a sale is permissible in all other respects, it must create enough separation between the offending display and government land so as to cure the Establishment Clause violation. When determining if this has occurred, courts need to consider whether any demarcation exists between the now-private and government land, as well as the size and layout of the private land relative to adjoining government land.

i. Evident Separation Through Demarcation

Demarcation of newly private land will usually be necessary in order to demonstrate to a reasonable observer that the government does not endorse the religious speech present on the now-private land.²⁵⁹ This requirement of course assumes that an observer might confuse the newly private land with nearby government land. Demarcation might not be required in instances where the government has sold all of its land adjoining the offending display.²⁶⁰ However, a complete sale often is not a viable option, either because the adjoining government land is too large²⁶¹ or be-

forbids hostility toward any.”).

256. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005).

257. Cf. *Mitchell v. Helms*, 530 U.S. 793, 809–10 (2000) (plurality opinion) (holding constitutional government aid to religious schools that does not result in religious indoctrination).

258. Cf. *id.*

259. See *Budd*, *supra* note 21, at 240; cf. also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring) (noting that disclaimer signs help to remove doubt about state approval of respondents' religious message).

260. Cf. *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1011 (W.D. Wis. 2004), *rev'd sub. nom.* *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005) (suggesting that it might have upheld the sale if the city had sold its entire park).

261. Cf. *Buono v. Kempthorne*, 527 F.3d 758, 768 (9th Cir. 2008), *cert. granted sub nom.* *Salazar*

cause a complete sale of the land would deprive the public of a socially valuable space—such as a recreational park.²⁶²

As for appearance, demarcation will usually take the form of a physical barrier and disclaimer signs.²⁶³ The physical barrier will likely be a fence,²⁶⁴ but may take other forms, such as a surrounding wall of trees or a clearing in the middle of trees,²⁶⁵ or anything else that would convey to reasonable observers that different parties own the two different plots. Sometimes, a physical barrier alone will prove insufficient to clearly convey the message of different ownership, especially if the newly private land has a history of public use.²⁶⁶ As a result, courts will often need to require disclaimer signs that communicate the difference in ownership and the government's lack of endorsement.²⁶⁷

The size or location of such signs may become an issue in some cases, especially where the offending display can be seen from a distance.²⁶⁸ A good rule of thumb is that, at a minimum, the demarcation should be visible from the same distance as the religious nature of the display is discernable.²⁶⁹ That way, the court avoids the case in which an observer could pass close enough to notice the religious nature of the display without coming close enough to perceive demarcation between public and private land.²⁷⁰ However, in the case of displays that are clearly identifiable from far away as religious symbols—large crosses, for example—such demarcation may prove difficult to achieve. One might conceive of situations in which the religious display is simply too dominant with respect to surrounding public land for effective separation to be achieved,²⁷¹ but most often, strategic placement of signs will do the trick. For instance, in *Buono*, the cross at issue was visible from a nearby highway but otherwise stood in

v. *Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472) (display within a 2,500 square mile preserve).

262. Cf. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 695 (7th Cir. 2005).

263. See, e.g., *id.* at 698; *Kong v. City and County of S.F.*, 18 Fed. App'x 616, 618 (9th Cir. 2001); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000).

264. See, e.g., *Mercier*, 395 F.3d at 697; *Freedom from Religion Found., Inc. v. City of Marshfield*, No. 98-C-270-S, 2000 WL 767376, at *1 (W.D. Wis. 2000).

265. *Kong*, 18 Fed. App'x at 618.

266. See *Marshfield*, 203 F.3d at 497.

267. See *Mercier*, 395 F.3d at 703–04; *Marshfield*, 2000 WL 767376, at *1.

268. Cf. *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001) (holding that a Ten Commandments display failed the endorsement test in part because the display's religious text was larger than accompanying secular text and thus visible from a larger distance).

269. Cf. *id.*

270. Cf. *id.*

271. Cf. *Paulson v. City of San Diego*, 294 F.3d 1124, 1125, 1133 (9th Cir. 2002) (striking down an attempted transfer of a large hilltop cross as violative of the California Constitution).

a remote area of the desert.

²⁷² Had the sale been allowed, the government likely could have achieved sufficient demarcation between its land and the newly private land simply by placing disclaimer signs along the highway, thereby ensuring that anybody likely to observe the cross would also observe the disclaimer.²⁷³

ii. Magnitude and Shape of Transfer

Beyond demarcation, the government must sell enough land to create obvious separation between government and private land. Courts will need to inquire whether the magnitude and shape of transfer creates enough separation between the religious display and public land that users of government land will not reasonably perceive that the government endorses the private display's religious message.²⁷⁴ However, because every plot of land is unique, there can be no standard point of reference to inform the court how much separation is enough.²⁷⁵ The minimum required size of the transfer will always depend on the fact finder's perception of the layout of government land in relation to the private land, and therefore will always be somewhat subjective.²⁷⁶

Nevertheless, certain situations may present clearly insufficient transfers. Particularly troublesome is the "donut hole" transfer, where the government conveys a tiny plot, scarcely larger than the display itself, that is completely surrounded by public land.²⁷⁷ The situation is exacerbated if the small parcel sits atop a hill that dominates the surrounding landscape.²⁷⁸ In such situations, a small transfer will almost certainly fail to cure an endorsement test violation, because the intimate proximity of the display to government land confers an advantage on the ability of the particular religion to communicate its message to the public.²⁷⁹ These sorts of transfers either will need to be redone on a larger scale or they will fail to save the

²⁷². See *Buono v. Kempthorne*, 527 F.3d 758, 768–69, 772 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

²⁷³. See *supra* note 1433.

²⁷⁴. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 703–04 (7th Cir. 2005) (noting that the transfer does not deprive visitors enjoyment of the park); Budd, *supra* note 21, at 241–42; *cf. also* *Murphy v. Bilbray*, No. 90-134 GT, 1997 WL 754604, at *11 (S.D. Cal. 1997) (holding a transfer invalid under California's No Preference clause, in part because the transfer was too small).

²⁷⁵. See Budd, *supra* note 21, at 242.

²⁷⁶. *Id.*

²⁷⁷. See *Buono*, 527 F.3d at 783.

²⁷⁸. See *Murphy v. Bilbray*, 782 F. Supp. 1420, 1436 (S.D. Cal. 1991); Budd, *supra* note 21, at 243.

²⁷⁹. See Budd, *supra* note 21, at 242.

display.²⁸⁰

Many transfers will not present such easy cases and will require more careful analysis. Despite the subjective nature of the inquiry, several common issues will often prove relevant. First, the size and visibility of the display matters; larger and more prominent displays will usually require larger transfers of land.²⁸¹ In addition, the intended use of the public land will be relevant, because private land open to the public carries with it a greater likelihood that observers will perceive it to be public land.²⁸² As discussed above, the government will likely need to counteract this risk with evident demarcation, except in the rare case where the government decides to sell all adjoining government land.

Finally, the court should consider whether any amenities or infrastructure support the display, and if practicable, should require that the transfer include those amenities or infrastructure.²⁸³ For instance, if the display sits as the evident focal point of a walkway leading up to it, continuing government ownership of the walkway would likely create a perception that the government endorses the display.²⁸⁴ Likewise, if the display is surrounded by benches oriented toward it, the government should include those benches in any transfer.²⁸⁵ In addition, courts might often find it useful to consider whether the display has easy access to a public road and, if so, whether some access point to the display was included in the transfer. Otherwise the display may unnecessarily be left as an island completely surrounded by park land.²⁸⁶ This concern is especially relevant if some infrastructure at a likely access point, such as a driveway or parking lot, supports access to the display and little else.²⁸⁷ Once again, continuing

280. See *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1011 (W.D. Wis. 2004), *rev'd sub. nom.* *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005); Budd, *supra* note 21, at 242.

281. See Budd, *supra* note 21, at 243; compare *Murphy v. Bilbray*, No. 90-134 GT, 1997 WL 754604, at *11 (S.D. Cal. 1997) (large hilltop cross) with *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 695 (7th Cir. 2005) (Ten Commandments monument in the corner of a park).

282. See *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 494 (7th Cir. 2000) (holding the display part of a public forum in part because of the land's dedication to public use).

283. See Budd, *supra* note 21, at 243; cf. also *Marshfield*, 203 F.3d at 490 (noting that the city separated the electrical service for the rest of the park from the transferred land); *Mercier*, 395 F.3d at 695. The monument in *Mercier* was accessible by a path of which the city did not transfer any part. *Id.* However, the path ran behind the monument and did not afford the monument "a particularly privileged location in the aesthetic scheme of the Park." *Id.*

284. Cf. *Mercier*, 395 F.3d at 697, 705-06 (not requiring transfer of any section of a path that ran behind the monument).

285. Cf. *id.* at 295 (noting the monument was not "displayed in a particularly prominent display or setting").

286. Cf. *Buono v. Kempthorne*, 527 F.3d 758, 783 (9th Cir. 2008), *cert. granted sub nom.* *Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

287. Cf. *Mercier*, 395 F.3d at 703 (noting that the transfer does not choke access to the park).

government ownership of such amenities would likely communicate a message of endorsement.

CONCLUSION

Every time a court orders a religious symbol torn down, it risks stirring up a certain measure of religious tension in the affected community. As the *Van Orden* plurality noted, our nation's capital and the rest of the country are full of monuments that remind us of the importance of religion to our national heritage.²⁸⁸ Sometimes a measure of divisiveness will be the necessary cost of ending a genuine Establishment Clause violation, but so much the better if the court can achieve a remedy that both cures the violation and allows the symbol to remain. Such attempt at compromise should be part of any jurisprudence that strives for government neutrality toward religion. Hence, given certain requirements, even the Court's strictest Establishment Clause tests should allow defendant governments to sell land in order to cure Establishment Clause violations arising from permanent physical displays.

In analyzing remedial sales under the Court's current *Lemon*-endorsement jurisprudence, courts must ensure that a sale satisfies two separate constitutional concerns: first, that the sale itself is constitutional, and second, that the sale ends the impermissible state action (i.e., creating or hosting an unconstitutional display) that gave rise to an Establishment Clause violation in the first place. In doing so, courts will need to ensure sufficient separation between government land and the display by considering the location and history of the display, as well as the precise terms of the proposed sale. Finally, if a completed sale comes close to achieving a cure but contains some easily-fixed defect, the court need not undo the entire sale but should instead take a cue from the *Marshfield* court and order the fix.²⁸⁹ Absent "unusual circumstances," remedial sales will often prove to be effective and desirable remedies for Establishment Clause violations.²⁹⁰

288. *Van Orden v. Perry*, 545 U.S. 677, 688–89 (2005) (plurality opinion).

289. *See Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000).

290. *Id.* at 491.