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Deed of Mistrust?: The Use of Land Transfers to Evade the Establishment Clause

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Deed of Mistrust?: The Use of Land Transfers to Evade the Establishment Clause

Keywords

Establishment Clause, First Amendment, Fourth Amendment, Constitutional Remedy, Religion, Presumption of validity, Religious symbol, Establishment Clause test

DEED OF MISTRUST?: THE USE OF LAND TRANSFERS TO EVADE THE ESTABLISHMENT CLAUSE

DAVID C. PEET*

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INTRODUCTION

Imagine your most recent visit to one of America's breathtaking national parks. While enjoying the stunning landscape and the smell of fresh air, you notice something in the distance. Bolted and chained to a set of large boulders stands what looks like an abandoned wooden billboard in the middle of a pristine landscape. Intrigued, you climb a small rock outcropping to get a better look at this square six-foot-tall plank of wood. After arriving, you notice the remnants of a small wooden sign that reads: "Erected in Memory of the Dead of All Wars."¹

Confused? If your answer is yes, many visitors to the Mojave National Preserve would most likely agree. The billboard-like structure on the Preserve is actually a Latin cross erected in 1934.² In 2007, after the Ninth Circuit determined that the symbol constituted government endorsement of religion and was therefore unconstitutional under the Establishment Clause, the cross was covered with a plywood box pending resolution of the case.³

A constitutional controversy regarding a cross on public land is not uncharted territory in the Ninth Circuit or other courts across the country.⁴ Indeed, the land that religious symbols occupy has proved

1. See *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and reh'g denied by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.*, *Salazar v. Buono*, 129 S. Ct. 1313 (2009) (describing past signs posted on the Mojave cross); see also Steve Brown, *Faith Under Fire in the Desert*, THE SUN RUNNER, Dec. 2006–Jan. 2007, available at http://www.thesunrunner.com/Stories/Faith_Under_Fire_in_the_Desert/faith_under_fire_in_the_desert.html (recounting the history of the memorial that the cross intends to commemorate).

2. *Buono v. Kempthorne (Buono IV)*, 527 F.3d 758, 769 (9th Cir. 2009). For pictures of the cross in its current condition and in its unaltered state prior to the court's involvement, see The Mojave Cross Christian Church Website, http://mojavecrosschristianchurch.com/cgi-bin/photoalbum/view_album/160040 (last visited Sept. 28, 2009).

3. *Buono IV*, 527 F.3d at 769.

4. See, e.g., *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996) (holding that a fifty-one-foot high Latin cross in a city park

to be a common constitutional battleground in courts across the country.⁵ The present dispute turns on whether the sale of a parcel of land occupied by a cross constitutes a valid remedy for an Establishment Clause violation.⁶ Two circuit courts of appeals have taken differing analytical approaches,⁷ and the Supreme Court is prepared to hear arguments.⁸

This Comment argues that courts should not adopt a presumption of validity in favor of the government when determining whether land transfers have remedied a violation of the Establishment Clause. The risks of continuing government action through manipulation of property designations necessitate more searching judicial review than the limited presumption test currently provides.

Part I of this Comment explores the development of Establishment Clause jurisprudence in the context of the display of religious symbols while tracking the Court's manipulation of property designations as proposed remedies in other constitutional contexts.

constituted government endorsement of Christianity regardless of the builders' intent to honor war veterans); *Carpenter v. City of San Francisco*, 93 F.3d 627, 630–32 (9th Cir. 1996) (holding that the city's ownership of a large cross in public park violated the "no preference" clause of the California Constitution due to the symbol's prominent location and significant religious meaning); *Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379, 384–85 (9th Cir. 1996) (rejecting a city's arbitrary policy that permitted the construction of a twenty-seven-foot menorah on public property but denied an application to erect a Latin cross on the same property).

5. See generally *Kong v. City of San Francisco*, 18 F. App'x 616 (9th Cir. 2001) (challenging the auction of a parcel of public land containing a religious symbol); *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (disputing displays of Latin crosses on the city and county seal as well as in public parks); *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336 (2d Cir. 1991) (calling into question the city's sale of land to a Hasidic congregation); *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008) (resisting the government's taking of a memorial site by eminent domain and the placement of a cross on the property for operation by a civic organization); *Chambers v. City of Frederick*, 373 F. Supp. 2d 567 (D. Md. 2005) (contesting the sale to a private organization of a parcel of a city park on which a Ten Commandments monument sits); *Murphy v. Bilbray*, No. 90-134 GT, 1997 WL 754604 (S.D. Cal. Sept. 18, 1997) (confronting, under the Establishment Clause, a private organization's purchase of a fifteen-square-foot parcel containing a thirty-five-foot cross).

6. *Buono IV*, 527 F.3d at 768.

7. Compare *Buono v. Kempthorne*, 502 F.3d 1069, 1071 (9th Cir. 2007), amended and reh'g denied by 527 F.3d 758 (9th Cir. 2008), cert. granted sub nom., *Salazar v. Buono*, 129 S. Ct. 1313 (2009), with *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000).

8. See *Salazar v. Buono*, 129 S. Ct. 1313 (2009). Aside from its relevance to the particular issue of land transfers, commentators such as Professor Erwin Chemerinsky view the case as potentially having a broader impact on Establishment Clause jurisprudence. See David G. Savage, *Desert Cross May Lead to Landmark Church-State Ruling*, L.A. TIMES, Oct. 22, 2008, at A8 (commenting that the Supreme Court's current makeup could result in the restriction of Establishment Clause violations to the government's literal establishment of a church or coercion of religious participation).

Part I also examines the history of the Mojave cross and presents the conflicting analytical frameworks of the Seventh and Ninth Circuits. Part II argues that the present framework is too lenient when it comes to permitting land transfers and that failure to apply more searching scrutiny ignores the potential for continued government violations of the Establishment Clause. Part II also reasons that, when viewed in light of the Supreme Court's response to defective desegregation plans and the use of a state official's illegally obtained evidence in federal proceedings, the proposed land transfer remedy is merely the latest example of the government's preservation of an unconstitutional result through seemingly lawful property-based means.

Finally, Part III proposes an abandonment of the presumption standard and a return to the Court's original (but oft-criticized) Establishment Clause test outlined in *Lemon v. Kurtzman*.⁹ Consistent with the Court's reasoning in the desegregation and Fourth Amendment contexts, this test would work in two important ways. First, it would require that the proposed transaction have a secular purpose. Second, it would assure that the change in ownership does not yield a potentially unconstitutional effect in advancing or endorsing religion. In addition, analysis through the *Lemon* lens would rightfully shift the focus of a court's analysis back to the true question at hand: whether an Establishment Clause violation persists in substance regardless of a change in form. Unlike the Seventh Circuit's presumption, an analysis in line with the First Amendment itself would help streamline an unpredictable line of cases while also addressing the danger of government actors circumventing a court injunction.

I. BACKGROUND

The use of land transfers to remedy Establishment Clause violations evades rather than honors the First Amendment's requirement that the government abstain from the endorsement or establishment of religion.¹⁰ Remedies for violations of the Establishment Clause must be properly and uniquely tailored to fully correct the infraction.¹¹ Two artifacts of Supreme Court history,

9. 403 U.S. 602, 612–13 (1971).

10. See *infra* Part II.B.

11. See *Bowen v. Kendrick*, 487 U.S. 589, 629 (1988) (noting a court's broad scope in remedying constitutional violations); see also Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 732–33 (2008) (arguing that the appropriate remedy in an equal protection approach to litigating

faulty desegregation plans after the second installment of *Brown v. Board of Education* and the emergence of the “silver platter doctrine” in contravention of protections against unreasonable searches and seizures,¹² illustrate the Court’s refusal to permit the ongoing manipulation of constitutional rights.

A. Religious Displays Under the Establishment Clause

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.”¹³ Whether it is in the interest of preserving religion from contamination by the state or guarding the state from government-sponsored indoctrination, our nation’s history evidences a long-standing interest in the separation of church and state.¹⁴ While the necessity of this tradition is universally recognized, the means of evaluating such separation has undergone extensive inquiry.¹⁵ The multitude of tests set forth in modern Supreme Court doctrine represents what one court has described as a kind of “jurisprudential schizophrenia.”¹⁶

Establishment Clause controversies will not always be inclusion of additional religious symbols, but will depend on the circumstances of each individual case).

12. See *infra* note 57.

13. U.S. CONST. amend. I.

14. Compare LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 249 (Univ. of N.C. Press 1994) (1986) (claiming the need for separation between the “garden of the church and the wilderness of the world” so that “His garden and paradise” may be restored (quoting Roger Williams, Mr. Cotton’s Letter Lately Printed, Examined and Answered (1644) *reprinted in* 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 392 (Perry Miller ed., Russell & Russell, Inc. 1963))), *with* Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802) (on file with the Thomas Jefferson Papers at the Library of Congress), *available at* <http://www.loc.gov/exhibits/religion/danburys.jpg> (stating that “religion is a matter which lies solely between man and his God” that requires “building a wall of separation between church and State”). In its first modern interpretation of the Establishment Clause, the Supreme Court echoed this separationist language when it enumerated the activities prohibited under the First Amendment. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (commenting that “[t]he ‘establishment of religion’ clause of the First Amendment means at least this: Neither can a state nor the Federal Government . . . pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’” (internal citation omitted)).

15. See LEVY, *supra* note 14, at 206 (recognizing that litigation over publicly sponsored religious symbols has produced conflicting interpretations of the Establishment Clause by forming sharp divisions on the Court).

16. *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 717 (9th Cir. 1999). One commentator argues that each test the Supreme Court “concoct[s]” is as misguided as the previous one because they have all failed to address the true historical reality behind the enactment of the Establishment Clause.

The Court's initial test for evaluating the constitutionality of religious displays was set forth in *Lemon v. Kurtzman*.¹⁷ Under this three-part test, displays passed constitutional scrutiny as long as they (1) had a secular purpose, (2) did not have the primary effect of advancing or inhibiting religion, and (3) did not promote any "excessive government entanglement with religion."¹⁸ This test symbolized a dramatic shift from the Court's prior perspectives of the role of religion in American society.¹⁹ Perhaps for this reason, the *Lemon* test has faced scrutiny for its nearly categorical rejection of religion and its inconsistency in application.²⁰

Out of this sometimes contradictory doctrine sprang new experimentation in evaluating public religious displays.²¹ In *Lynch v. Donnelly*,²² the Court charted a different course by electing to adopt a more permissive test for interpreting the Establishment Clause.²³ As part of an influential concurrence, Justice O'Connor employed an "endorsement test" in finding that the display of a crèche did not constitute an establishment of religion.²⁴ She reasoned that allegedly religious displays only violate the Establishment Clause when a reasonable person would understand that the symbol evokes government endorsement of religion.²⁵ Like *Lemon*, the endorsement test has also faced significant—though very different—scrutiny from within the Court²⁶ and from various commentators.²⁷

BARRY ADAMSON, FREEDOM OF RELIGION, THE FIRST AMENDMENT, AND THE SUPREME COURT: HOW THE COURT FLUNKED HISTORY 241 (2008).

17. 403 U.S. 602 (1971). See generally Stephen M. Feldman, *Critical Questions in Law and Religion: An Introduction*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 2 (Stephen M. Feldman ed., 2000).

18. *Lemon*, 403 U.S. at 612–13 (internal quotation marks and citation omitted).

19. See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (claiming that the citizens of the United States "are a religious people whose institutions presuppose a Supreme Being").

20. See PATRICK M. GARRY, *WRESTLING WITH GOD: THE COURTS' TORTUOUS TREATMENT OF RELIGION* 56 (2006) (detailing the Court's erratic application of *Lemon* to approve a state's provision of hearing devices to parochial school students while striking down the state's administration of remedial instruction to the same group).

21. See *id.* at 57 (highlighting two of the Court's experimental approaches, the coercion test and the neutrality approach).

22. 465 U.S. 668 (1984).

23. See *id.* at 674 (describing the "unbroken history" of religion as part of American life beginning in 1789); see also GARRY, *supra* note 20, at 68 (praising *Lynch* for its recognition that the *Lemon* analysis was hostile towards religion); LEVY, *supra* note 14, at 206 (asserting that *Lynch* "lowered the wall of separation between church and state" by permitting the display of a religious symbol in a public space).

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

25. *Id.*

26. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part) (characterizing the endorsement test as unworkable and flawed due to its disregard for religion's historical significance in the American tradition); see also *id.* at 593–94 (concluding that the principle of

Nonetheless, the endorsement test has remained the predominant standard for the evaluation of violations under the Establishment Clause²⁸ until—in typical contradictory fashion—the Court decided *Van Orden v. Perry*²⁹ and *McCreary County v. ACLU*.³⁰ In *McCreary County*, a majority of the Court employed the *Lemon* test to invalidate two displays of the Ten Commandments on courthouse property.³¹ After the ACLU’s initial challenge, the Kentucky counties made efforts on two separate occasions to secularize their display through the inclusion of other documents and messages rather than remove it as directed under the already-issued preliminary injunction.³² The Court reasoned that the original displays, as well as the attempts to make them more secular, did not demonstrate a secular purpose.³³

However, the *Van Orden* plurality upheld the display of the Ten Commandments on the Texas State Capitol on the grounds of the monument’s “historical role.”³⁴ The display on government land was situated among numerous other monuments and statues commemorating “Texan identity.”³⁵ Ignoring *Lemon*, the Court embraced the structure as a “passive monument,” acknowledging the strong role religion has played throughout the country’s history.³⁶ These rulings complicate the question of when (and whether) to apply *Lemon*, but also introduce yet another factor to consider when faced with similar controversies: the history and tradition of governmental acknowledgement of religion.³⁷

“endorsement” set forth in *Lynch* is a mere continuation of the privileges against religious “favoritism” and “promotion” that the *Lemon* test aims to counteract (majority opinion).

27. See GARRY, *supra* note 20, at 68 (critiquing the endorsement test’s disproportionate focus on emotional responses to religious symbols rather than constitutional doctrine).

28. *Id.* at 57.

29. 545 U.S. 677 (2005).

30. 545 U.S. 844 (2005).

31. *Id.* at 868–89.

32. See *id.* at 852–57 (recounting the Kentucky Legislature’s authorization of displays of the Ten Commandments as long as they included the posting of the Magna Carta, the lyrics to the Star-Spangled Banner, and other documents that made up “The Foundations of American Law and Government Display”).

33. See *id.* at 871–72 (refusing to accept the claim that a reasonable citizen would look at the more secular collection of symbols independently of the original, overtly religious display).

34. *Van Orden*, 545 U.S. at 690.

35. See *id.* at 681 (quoting H. Con. Res. 38, 77th Leg., Reg. Sess. (Tex. 2001)).

36. *Id.* at 677–78.

37. Compare *McCreary County*, 545 U.S. at 861–62 (reinforcing a court’s need to look at the “purpose” inquiry of *Lemon* in the Establishment Clause context), with *Van Orden*, 545 U.S. at 686–87 (questioning the greater significance of the *Lemon* test and instead opting to analyze the Establishment Clause issue in light of the monument’s history and tradition).

*B. Unconstitutional Responses to Desegregation and the
Fourth Amendment's Exclusionary Rule*

Confusion as to the continued viability of constitutional doctrine is certainly not unique to Establishment Clause jurisprudence.³⁸ The enforcement of school desegregation plans and the introduction of illegally obtained evidence in federal court are analogous to the proposed land transfer remedy due to the federal government's unique use of physical property to manipulate another party not bound by the same limits to achieve unconstitutional aims.³⁹ Perhaps more importantly, these two pieces of Supreme Court history illustrate the Court's tradition of recognizing and remedying seemingly inconsistent outcomes and government manipulation.

1. Faulty desegregation plans and the evasion of "deliberate speed"

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁴⁰ As stated in the landmark case of *Brown v. Board of Education (Brown I)*,⁴¹ segregated public school systems are “inherently unequal” and violate the Fourteenth Amendment.⁴² The Court in *Brown v. Board of Education (Brown II)* ordered that the desegregation of these unconstitutional binary school systems be effectuated “with all deliberate speed”⁴³ and under the direction of local district courts in the interest of making each district’s transition as site-specific as possible.⁴⁴ Unfortunately, by adopting measures that failed to firmly implement the ruling of *Brown I* in public school systems, *Brown II* permitted unconstitutional segregated school systems to persist.⁴⁵

38. See, e.g., *Harris v. New York*, 401 U.S. 222, 226 (1971) (allowing the use of statements at trial for impeachment purposes even though they had been obtained in violation of *Miranda*).

39. See *infra* Part II.B.2 (comparing the federal government's control over property through its use of state officials by way of the exclusionary rule, local school officials in the desegregation context, and private individuals through the land transfer remedy in response to an Establishment Clause violation).

40. U.S. CONST. amend. XIV.

41. 347 U.S. 483 (1954).

42. *Id.* at 493–95 (reasoning that the important benefit of education in modern society, as well as the adverse effects segregation inflicted on African-American youths, mandated the provision of an integrated school system).

43. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

44. *Id.* at 299 (“Because of [the district courts’] proximity to local conditions and the possible need for further hearings, the [district] courts which originally heard these cases can best perform this judicial appraisal.”).

45. See MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* 85 (2007) (“The Court approved gradualism, imposed no deadlines for

Desegregation plans across the country produced only token integration and almost completely diluted the “deliberate speed” standard.⁴⁶ However, in *Griffin v. County School Board*⁴⁷ the Court responded, concluding that “[t]here has been entirely too much deliberation and not enough speed” in instituting unitary school systems.⁴⁸ Desegregation plans were not meant to be lazy endeavors, but rather “quick and effective” relief.⁴⁹

The facts in *Griffin* epitomize the continuing segregation that *Brown I* attempted to eradicate but permitted through its adoption of the “deliberate speed” standard prior to 1964.⁵⁰ Officials in Prince Edward County, Virginia refused to levy school taxes for the 1959–1960 school year based on their opposition to a unitary school system, leaving the county’s schools closed from 1959 until 1963.⁵¹ While the public schools were closed, the county provided tuition grants and other subsidies to those students attending private, white schools.⁵² In holding that the complete closure of public schools in Prince Edward County denied African-American children equal protection of the law, the Court focused on the net effect of the school’s response to *Brown I*.⁵³ The Court refused to permit a transfer of public schooling responsibilities to private hands when the resulting social implications so blatantly contradicted *Brown I*.⁵⁴

Griffin signaled the beginning of a period in which the Court refused to tolerate manipulation of the public-private distinction to

beginning or completing desegregation, issued vague guidelines, and entrusted (southern) district judges with broad discretion.”).

46. See, e.g., *Kelley v. Bd. of Educ.*, 270 F.2d 209, 213–15 (6th Cir. 1959) (describing a school plan that allowed students to transfer from a school where their racial group was in the minority, thereby ensuring segregation of schools).

47. 377 U.S. 218 (1964).

48. *Id.* at 229.

49. *Id.* at 232.

50. See Charles Ogletree, *All Too Deliberate*, in THE UNFINISHED AGENDA OF *BROWN V. BOARD OF EDUCATION* 45, 49–50 (James Anderson & Dara N. Byrne eds., 2004) (recounting that a mere two years after *Brown I*, a large southern delegation that included representatives from Alabama, Virginia, and Georgia formed a “Southern Manifesto” to subvert the decision and keep schools segregated through state and local enactments as well as unofficial funding).

51. *Griffin*, 377 U.S. at 222–23. One commentator remarked that, “[b]y 1964, Prince Edward County had become a national and international embarrassment, as 1,700 black youngsters went largely uneducated for several years.” KLARMAN, *supra* note 45, at 102.

52. *Griffin*, 377 U.S. at 221.

53. See *id.* at 231 (“[T]he record in the present case could not be clearer that Prince Edward’s public schools were closed . . . to ensure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school.”).

54. See *id.* (“Whatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.”).

justify untimely desegregation.⁵⁵ Although *Brown II*'s porous "deliberate speed" standard allowed school districts to evade *Brown I*'s desegregation requirement, the Supreme Court recognized and attempted to counter this doctrinal deficiency.⁵⁶

2. *Fourth Amendment protections and the "silver platter doctrine"*

Like the responses of some school districts to *Brown I*, the "silver platter doctrine"⁵⁷ presented the Court with attempted stealth encroachments to constitutional rights. The Fourth Amendment protects individuals from "unreasonable searches and seizures."⁵⁸ In *Weeks v. United States*,⁵⁹ the Court articulated its landmark exclusionary rule, which prohibited the use of evidence obtained in violation of a defendant's Fourth Amendment rights in federal proceedings.⁶⁰ The Court reasoned that the exclusionary rule was necessary in order to prevent the complete devaluation of vital Fourth Amendment rights.⁶¹

While *Weeks* did much to limit Fourth Amendment abuses, the Court placed firm limitations on the reach of this new evidentiary rule by definitively announcing that suppression applied only to evidence unlawfully obtained by *federal* officials.⁶² The *Weeks* court

55. See, e.g., *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 490–91 (1972) (holding that the school board's fear that white students will leave public school for private and suburban schools does not justify postponement of compliance with school desegregation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28–29 (1971) (finding that a seemingly neutral plan assigning a student to the school nearest to her home is not acceptable because its overall effect may not achieve racial integration); *Keyes v. Sch. Dist. No. 1*, 396 U.S. 1215, 1217 (1969) (citing *Cooper v. Aaron*, 358 U.S. 1 (1958)) (denying the school district's claim that developing public support was necessary before implementing desegregation plan).

56. See, e.g., *Norwood v. Harrison*, 413 U.S. 455, 467 (1973) (finding that a state program that lent textbooks to private segregated schools was unconstitutional because the state may not provide financial aid to institutions practicing racial discrimination).

57. See *Lustig v. United States*, 338 U.S. 74, 79 (1949) (coining the phrase "silver platter" to refer to the interplay between state and federal agents in the use of illegally obtained evidence). Specifically, the "silver platter doctrine" permitted otherwise-excludable evidence to be served up on a silver platter to prosecutors in federal proceedings in violation of the Fourth Amendment. *Id.*

58. U.S. CONST. amend. IV.

59. 232 U.S. 383 (1914).

60. See *id.* at 391–93 (implying that the Fourth Amendment protects against the federal government's abuse of power).

61. See *id.* at 393 (affirming that while efforts to bring criminals to justice should be lauded, they should not be accomplished "by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land").

62. See *id.* at 398 (concluding that the Court could not prescribe a remedy in relation to the local policeman's misconduct because the Fourth Amendment does not apply to non-federal officials).

reasoned that state and local officials were not subject to the same constraints because the Fourth Amendment was designed to encompass only the federal government and its agencies.⁶³ Therefore, when federal agents were not involved in the unlawful acquisition of evidence, the exclusionary rule would not apply.⁶⁴

After *Weeks*, the Court began the process of eroding this bright-line exception. In *Byars v. United States*,⁶⁵ the Court excluded evidence where an officer's search "in substance and effect was a joint operation of the local and federal officers."⁶⁶ Another 1927 decision, *Gambino v. United States*,⁶⁷ focused on the nexus between the federal purpose and the state officers' search.⁶⁸ The Court had come so far as to say that, even when state agents had not acted specifically under the direction of—or in cooperation with—their federal counterparts, the use of illegally obtained evidence was unlawful when the seizure occurred "solely on behalf of the United States."⁶⁹

Regardless of the holdings in *Byars* and *Gambino*, the central tenets of *Weeks* held firm.⁷⁰ It was not until *Wolf v. Colorado*,⁷¹ that a unanimous Court found, by incorporation through the Fourteenth Amendment, that "[t]he security of one's privacy against arbitrary intrusion by the police . . . [is] implicit in 'the concept of ordered liberty' and . . . enforceable against the States through the Due Process Clause."⁷²

Though lower courts disagreed over the significance of this finding,⁷³ the Court would later put the final nail in the silver platter

63. *Id.*

64. *Id.*

65. 273 U.S. 28 (1927).

66. *Id.* at 33.

67. 275 U.S. 310 (1927).

68. See *id.* at 315 ("[The] facts . . . make it clear that the state troopers believed that they were required by law to aid in enforcing the National Prohibition Act, and that they made this arrest, search, and seizure, in the performance of that supposed duty, solely for the purpose of aiding in the federal prosecution.").

69. *Id.* at 312, 314–15.

70. Until 1949, illegally obtained evidence was excluded from federal proceedings when federal officers procured it or took a somewhat active role in obtaining it alongside state officers. *Elkins v. United States*, 364 U.S. 206, 212–13 (1960). Courts did not exclude such evidence when state officials provided it of their own accord for federal prosecutions. *Id.*

71. 338 U.S. 25 (1949).

72. *Id.* at 27–28.

73. Compare *Hanna v. United States*, 260 F.2d 723, 726–28 (D.C. Cir. 1958) (concluding that *Wolf*'s proscription of evidence obtained through unconstitutional searches and seizures by state officials under the Fourth Amendment nullified the distinction set forth in *Weeks* between federal and state agents), with *Burford v. United States*, 214 F.2d 124, 125 (5th Cir. 1954) (refusing to suppress evidence in federal court obtained through an unauthorized search and seizure by state officials

doctrine's coffin in *Elkins v. United States*.⁷⁴ Relying on the Court's incorporation of the Fourth Amendment in *Wolf*,⁷⁵ the Court ultimately held that personal property obtained by any officer—state or federal—was inadmissible in federal court if the defendant's right against unreasonable searches and seizures was violated.⁷⁶ Notably, the Court acknowledged the state's interest in promoting collaboration of all levels of law enforcement,⁷⁷ but refused to acknowledge the silver platter doctrine as a valid exercise of that interest.⁷⁸ By masking the identity of those seizing personal property, officials of all levels were not working under the Constitution, but in spite of it.⁷⁹

C. *The Mojave Cross: From the Desert to the Courtroom*

1. *The installation and maintenance of the Mojave cross*

The Mojave National Preserve is a primarily federally-owned tract of desert land spanning some 1.6 million acres.⁸⁰ The park was originally under the control of the Bureau of Land Management, but in 1994 the Bureau transferred ownership and the responsibility of maintaining the Preserve to the National Park Service.⁸¹

On top of a stone outcropping called Sunrise Rock, along Cima Road in the Mojave National Preserve, stands the most recent installment of the five-foot-tall cross.⁸² A prospector named J. Riley Bembry and a group of World War I veterans were the first to fasten

because, under *Gambino*, there was no collaboration or participation with federal officials).

74. 364 U.S. 206 (1960).

75. See *id.* at 213 (stating that *Wolf*'s inclusion of state searches under the Constitution directly contradicted the rationale that once justified the admission of state-seized evidence in federal court).

76. *Id.* at 223. The Court's decision was largely based on federalism grounds. See *id.* at 221 (reasoning that, in states that have adopted the exclusionary rule, the admission of unlawfully obtained evidence in federal court from the work of state officials frustrates the state's ability to set policy and honor its obligations under the Federal Constitution).

77. *Id.* at 221.

78. See *id.* at 221–22 (refusing to endorse cooperation that gives rise to the erosion of constitutional rights).

79. See *Mapp v. Ohio*, 367 U.S. 643, 658 (1961) (citing *Miller v. United States*, 357 U.S. 301, 313 (1958)) (postulating that requiring federal and state officials to observe the same constitutional standards in the prosecution of a crime will increase rather than hinder their effectiveness).

80. *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007), amended and reh'g denied by 527 F.3d 758 (9th Cir. 2008), cert. granted sub nom., *Salazar v. Buono*, 129 S. Ct. 1313 (2009).

81. Richard Lake, *That Old Rugged Cross*, LAS VEGAS REV.-J., Dec. 15, 2002, at 1B, available at http://www.reviewjournal.com/lvrj_home/2002/Dec-15-Sun-2002/news/20274896.html.

82. *Buono v. Kempthorne (Buono IV)*, 527 F.3d 758, 768 (9th Cir. 2009).

the cross atop Sunrise Rock in 1934.⁸³ Since then, the structure has been modified and replaced several times.⁸⁴ Bembry and his fellow veterans originally erected the cross to memorialize the sacrifice of fallen soldiers.⁸⁵ They also placed wooden signs near the cross expressing this purpose.⁸⁶ Over time, however, community members began using the cross as a site for sunrise services on Easter Sunday.⁸⁷

2. *The involvement of Congress and the courts*

Prior to May 1999, the cross at Sunrise Rock garnered little attention from either the National Park Service or the Bureau of Land Management.⁸⁸ However, the spark that ignited the ensuing legal firestorm involved a request to build another religious symbol—a Buddhist stupa—near the cross.⁸⁹ In denying this request, the Park Service acknowledged the existence of the Mojave cross and expressed its intention to remove it.⁹⁰ Perhaps also feeling pressure from the ACLU,⁹¹ the Park Service initiated a study of the cross's history to determine whether it could be designated in the National Register for Historic Places.⁹² The study concluded that, regardless of its commemorative value, the cross's previous religious use precluded it from being classified as a historical site.⁹³

Largely under the direction of Representative Jerry Lewis,⁹⁴ Congress responded by passing two separate appropriations bills in

83. Lake, *supra* note 81, at 1B.

84. *Id.*

85. Alliance Defense Fund, ADF to 9th Circuit: Mojave Land Transfer Was Legal, Uncover That Cross, Apr. 9, 2007, <http://www.alliancedefensefund.org/news/story.aspx?cid=4067>.

86. *Buono IV*, 527 F.3d at 769.

87. Lake, *supra* note 81, at 1B.

88. Brown, *supra* note 1. To some, the battle over the preservation of this Christian symbol is the “quintessential example” of the Bush administration’s stamp on the Justice Department in promoting what one group calls the “Faith-based Parks” initiative. See Press Release, Public Employees for Environmental Responsibility, Justice Department Undercuts Park System for Mojave Cross (Jan. 24, 2008), http://www.peer.org/news/news_id.php?row_id=976 (noting that the Mojave legal battle has endured for the duration of Bush’s presidency). See generally Public Employees for Environmental Responsibility, Faith-based Parks: News Releases, <http://www.peer.org/campaigns/earlier/faith-based/news.php> (last visited Sept. 28, 2009) (cataloguing the actions taken by the Bush administration).

89. *Buono IV*, 527 F.3d at 769.

90. *Id.*

91. See Lake, *supra* note 81, at 1B (reporting that the ACLU threatened to sue if the cross was not removed from Sunrise Rock).

92. *Buono IV*, 527 F.3d at 769.

93. *Id.*

94. Julie Cart, *Lawmaker Seeks Land Swap to Let Mojave Cross Stand*, L.A. TIMES, Oct. 18, 2002, at 6.

an attempt to preserve the cross.⁹⁵ At the same time, the ACLU initiated a suit on behalf of a former park employee to have the cross removed.⁹⁶ In July 2002, the Central District of California ruled in favor of the ACLU and entered a permanent injunction requiring the removal of the cross.⁹⁷

Before the Ninth Circuit affirmed the district court's ruling in June 2004,⁹⁸ Congress enacted a third appropriations bill in September 2003 which included terms for a land exchange between the United States, the Veterans of Foreign Wars, and Henry and Wanda Sandoz, a couple that had played an active part in preserving the symbol.⁹⁹ This exchange called for the conveyance of a one-acre parcel of the Mojave National Preserve and for the maintenance of the site as a national memorial.¹⁰⁰ In return, the government received a parcel of land from the cross's current curator, Mr. Henry Sandoz. Additionally, the exchange provided the federal government with certain reversionary rights conditioned upon a finding by the Secretary of the Interior that the new landowners were not maintaining the land according to the government's stipulations.¹⁰¹

Despite the circuit court affirming the injunction, the government continued its pursuit of the land exchange.¹⁰² In 2005, the ACLU

95. See Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137, 115 Stat. 2230, 2278-79 (2002) (codified at 16 U.S.C. § 410aaa-56 note (2006)) (establishing the cross as a national memorial); Consolidated Appropriations Act, Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A-230 (2000) (codified at 16 U.S.C. § 461 note (2001)) (restricting the use of federal funds to remove the cross). Some critics of the transfer claim that Representative Lewis's attempts are part of a larger scheme to politicize the National Park Service. See Michael Janofsky, *Critics Say the Park Service Is Letting Religion and Politics Affect Its Policies*, N.Y. TIMES, Jan. 18, 2004, at N16 (describing recent orders in Grand Canyon National Park and at the Lincoln Memorial as evidence of conservative interest groups penetrating the policy of the National Park Service as part of the Bush administration's faith-based initiatives).

96. *Buono IV*, 527 F.3d at 770; see Lake, *supra* note 81, at 1B (recounting the National Park Service's employment of Frank Buono from 1994 until his retirement in 1997).

97. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1215-17 (C.D. Cal. 2002).

98. *Buono v. Norton (Buono II)*, 371 F.3d 543, 548-50 (9th Cir. 2004).

99. See Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a)-(f), 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 note (2006)) (outlining the transfer of a parcel of land to the Veterans of Foreign Wars in exchange for land previously owned by Mr. and Mrs. Henry Sandoz); Lake, *supra* note 81, 1B (recounting Henry Sandoz's relationship to the cross's creator and commitment to maintaining the structure).

100. § 8121(a).

101. § 8121(e).

102. *Buono v. Kemphorne (Buono IV)*, 502 F.3d 1069, 1076 (9th Cir. 2007), amended and reh'g denied by 527 F.3d 758 (9th Cir. 2008), cert. granted sub nom., *Salazar v. Buono*, 129 S. Ct. 1313 (2009).

moved to enforce the injunction.¹⁰³ The Central District of California held that the land transfer appeared to selectively honor only the fallen soldiers of a particular religion and was “an attempt by the government to evade the permanent injunction.”¹⁰⁴ When it came time for the Ninth Circuit to review the district court’s latest determination in this third installment of litigation, the Seventh Circuit’s prior decisions provided the blueprint from which the Ninth Circuit would craft its decision.¹⁰⁵

*D. The Circuit Split: Contrasting Applications of the
“Unusual Circumstances” Test*

The Seventh Circuit set forth the original test for evaluating the land transfer remedy in *Freedom from Religion Foundation v. City of Marshfield*.¹⁰⁶ This test adopts a presumption in favor of the government’s sale of land to a private entity.¹⁰⁷ In order to rebut this presumption, the plaintiff must show “unusual circumstances” where the substance of the transaction still yields government endorsement of religion.¹⁰⁸ The “circumstances” that may surmount the government’s presumption of validity include a sale in violation of state law,¹⁰⁹ a sale to a straw purchaser,¹¹⁰ a sale well below fair-market value,¹¹¹ a sale of property “inextricably linked with the seat of government,”¹¹² and the sale of property placed prominently in the public community.¹¹³

This test favors the transfer while also acknowledging specific factual nuances through a case-by-case analysis.¹¹⁴ The court justified the presumption of a transaction’s validity due to the Constitution’s

103. *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005).

104. *Id.* at 1182.

105. See *Buono v. Kempthorne (Buono IV)*, 527 F.3d 758, 778–79 (9th Cir. 2009) (describing the factual background and rationale of the Seventh Circuit decisions regarding land transfers and its test that purports to evaluate a transaction based on its form and substance).

106. 203 F.3d 487 (7th Cir. 2000).

107. *Id.* at 491.

108. *Id.*

109. *Id.* at 492.

110. *Id.*

111. *Id.*

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

113. See *id.* (noting that the monument is not prominently placed within the context of the park and the sale of land is therefore not a serious constitutional threat); see also *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 494 (7th Cir. 2000) (considering the orientation and location of a statue of Jesus Christ in evaluating whether the symbol violates the Establishment Clause).

114. See *Freedom from Religion Found.*, 203 F.3d at 491 (requiring courts to “look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased”).

contrasting treatment of religious speech depending on the identity of the speaker.¹¹⁵ Because of the danger in potentially limiting private speech, the Seventh Circuit viewed the land transfer as not only a complete transfer of title, but also a transfer of expression.¹¹⁶

In considering the land exchange, the Ninth Circuit employed its own interpretation of the Seventh Circuit's test to achieve a very different result.¹¹⁷ In its amended opinion, the court agreed in principle with the need for a fact-based inquiry¹¹⁸ but refused to adopt the Seventh Circuit's same presumption of validity.¹¹⁹ The Ninth Circuit found continuing state action based on the government's ongoing maintenance of the cross after the transfer, the manner of exchange and bidding, and insistence in preserving the symbol itself.¹²⁰ The court reasoned that Establishment Clause jurisprudence and the Supreme Court's public function cases require that courts conduct a purely fact-specific inquiry to guard against continuing government action and state endorsement of religion.¹²¹

II. A PRESUMPTION OF VALIDITY FAILS TO ADDRESS THE POTENTIAL FOR CONTINUING STATE ACTION AND THE EVASION OF A VALID CONSTITUTIONAL REMEDY

In order to counteract the Seventh Circuit's presumption test, there must be a finding of "unusual circumstances."¹²² However, the current standard of qualifying "circumstances" fails to address subtle governmental intrusion like that in *Buono*. As a result, government involvement in religious displays slips through the porous cracks in the Seventh Circuit's framework. Without safeguards, the government's proposed transfer receives the functional equivalent of *per se* approval. The practical result of the government's use of land transfers echoes a tradition of attempting to circumvent Supreme

115. *See id.* ("[T]here is a 'crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990))).

116. *Id.* at 491.

117. *Buono v. Kempthorne*, 502 F.3d 1069, 1081–82 (9th Cir. 2007), *amended and reh'g denied by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.*, *Salazar v. Buono*, 129 S. Ct. 1313 (2009).

118. *Buono v. Kempthorne (Buono IV)*, 527 F.3d 758, 759, 779 n.13 (9th Cir. 2009).

119. *See id.* (advocating for a more searching review of proposed land transfer remedies in light of the remedy's potential impact on the Establishment Clause).

120. *Id.* at 783.

121. *Id.* at 779 n.13.

122. *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000).

Court precedent using property designations as instruments for furthering unconstitutional effects.

A. *The Weaknesses of the Exceptions in the Seventh Circuit's "Unusual Circumstances" Test*

The Seventh Circuit's test requires looking beyond the mere form of the land transaction and accounting for its true substance in determining whether there is continuing state action.¹²³ Specifically, it requires that the terms of transfer meet a particular checklist of conditions in order to rebut the presumption attached to the transaction.¹²⁴

Concededly, it is possible that procedural steps in approving a municipality's land conveyance, as well as the price at which the land is sold, may weed out egregious examples of continuing state action.¹²⁵ However, mere price-setting and bureaucratic procedures may, in effect, fail to place all prospective purchasers on equal footing.¹²⁶ To illustrate, the Ninth Circuit has previously provided this example:

Suppose that two similarly situated bidders—Bidder # 1 and Bidder # 2—each had the minimum acceptable amount of \$35,000 to bid on the project, and Bidder # 1 proposed to retain the cross, while Bidder # 2 proposed to construct a secular memorial. The structure of the sale ensured that Bidder # 1 would be awarded the land. Bidder # 1 could bid the full \$35,000 and still demonstrate the financial capability to maintain a historic war memorial because the City would subsidize the cost of Bidder # 1's proposed memorial by conveying the cross. Bidder # 2 could not compete successfully with Bidder # 1: If Bidder # 2 matched Bidder # 1's bid, then Bidder # 2 could not demonstrate the financial capability to maintain a historic war memorial, because all of Bidder # 2's resources would have been dedicated to the bid price, and none would have been reserved to fund removal of the cross and construction of a new memorial. Alternatively, Bidder # 2 could reserve the money needed to remove the cross and construct

123. *Id.* at 491.

124. See *supra* notes 106–113 and accompanying text (describing the exceptions to the Seventh Circuit's presumption test).

125. See, e.g., *Annunziato v. New Haven Bd. of Aldermen*, 555 F. Supp. 427, 433 (D. Conn. 1982) (finding the sale of public land to a church was a violation of the Establishment Clause where the church paid only \$1 as consideration and the transaction amounted to nothing more than a gift).

126. See *Paulson v. City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002) (holding that, independent of procedural regulations in conveying publicly owned land, the city created an economic incentive to perpetuate a sectarian symbol in violation of the California Constitution).

the new memorial. But that option would eliminate Bidder # 2 from the process, because Bidder # 2's bid in that instance would fall below the minimum acceptable bid.¹²⁷

As demonstrated by the example above, seemingly benign terms such as the price or method of bidding put in place as part of the conveyance could manipulate the outcome.¹²⁸

The Seventh Circuit's analysis of the identity of the purchaser is similarly inadequate. In that court's estimation, a "straw purchaser" is one who allows the government to "continu[e] to exercise duties of ownership" after the conveyance of land.¹²⁹ In attaching conditions to the preservation of a court-decreed unconstitutional religious symbol, the Veterans of Foreign Wars—the recipient of land under the *Buono* transfer—essentially becomes an extension of the government.¹³⁰ While title to the parcel indicates private ownership, the true operator of the site is indistinguishable from pre-transfer conditions. The mere "form" of a transaction should not blind courts from potential unconstitutional effects like the advancement of religious speech.

B. The Land Transfer Employs Property Designations to Create a Perception of State Endorsement that Evades a Constitutional Guarantee

Aside from its superficial terms, the government's proposed transfer has the effect of perpetuating a constitutional wrong through three principal means. First, the transfer does not remedy the appearance of continuing government action. Second, the transfer permits the government to continue its tradition of masking control over property in order to obviate constitutional rights. Finally, permitting such transactions to take place could produce the questionable policy of inviting private individuals and organizations to carve out pieces of public land for special interests. When confronted with a remedy that fails to look beyond the face value of

127. *Id.*

128. Notably, the Mojave transfer did not even go so far as to employ a bidding process, but rather merely effected an exchange between the original party responsible for the cross's construction—the Veterans of Foreign Wars—and the cross's current curator. Lake, *supra* note 81, at 1B.

129. Freedom from Religion Found. v. City of Marshfield, 203 F.3d 487, 492 (7th Cir. 2000).

130. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 cmt. d (2000) (describing the Constitution's general inapplicability to private conveyances except for those situations in which servitudes require the performance of "public functions" or in which the enforcement by a court could constitute government endorsement of unconstitutional servitudes).

title ownership, the Supreme Court should strike down any such backdoor attempts at circumvention.

1. The land transfer and the perception of continuing state action

Taken together, the terms of the land transfer and the government's active role in maintaining the religious symbol even after the transaction exemplify continuing state action. Title to the land on which the cross stands does not exonerate the government actor because the setting of the symbol may still give the impression of being part of government land.¹³¹ The Establishment Clause prohibits a perception of government endorsement of religious symbols affixed to state land.¹³²

The private beneficiary of the land transfer performs functions normally under the umbrella of the state.¹³³ The terms of the conveyance include a condition that the land, as well as the replica cross and commemorative plaque purchased with government funds,¹³⁴ be maintained as a memorial by the recipient, the Veterans of Foreign Wars.¹³⁵ The Mojave cross is a memorial site in the middle of an area that has been government property for most of the twentieth century.¹³⁶ By exercising control over this land, the government—not the private party—is the entity to whom the cross's message is attributed.¹³⁷

131. See Jordan C. Budd, *Cross Purposes: Remedyng the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 233, 238 (2004) (arguing that proposed land transfer remedies require greater scrutiny than removal of religious displays due to the potential for abuse in perpetuating government endorsement).

132. See McCreary County v. ACLU, 545 U.S. 844, 868–69 (2005) (remarking that the reasonable observer would find the counties' initial postings of the Ten Commandments replica tablets as emphasizing the text's religious message).

133. See Evans v. Newton, 382 U.S. 296, 301 (1966) ("The service rendered even by a private park of this character is municipal in nature.").

134. Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(c), 115 Stat. 2230, 2278–79 (2002) (codified at 16 U.S.C. § 410aaa-56 note (2006)).

135. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a), (e), 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 note (2006)).

136. See Buono v. Kempthorne, 502 F.3d 1069, 1072 (9th Cir. 2007), amended and reh'g denied by 527 F.3d 758 (9th Cir. 2008), cert. granted sub nom., Salazar v. Buono, 129 S. Ct. 1313 (2009) (explaining that the National Park Service received the Preserve as part of a land transfer in 1994 from the Bureau of Land Management); see also Brown, *supra* note 1 (noting that in 1934 the Bureau of Land Management controlled the land on which the Mojave cross stands).

137. See Pleasant City Grove v. Summum, 129 S. Ct. 1125, 1141 (2009) (Souter, J., concurring) (commenting that, where a government entity purports to maintain a monument, the entity will be presumed to be engaging in government speech).

Evans v. Newton,¹³⁸ a leading Supreme Court case in defining “public function,” helps illustrate the impact of continuing municipal maintenance after a transfer in title.¹³⁹ *Evans* involved the transfer of a tract of land from a United States Senator to the city of Macon, Georgia.¹⁴⁰ As a condition of the transfer, the parcel was to be controlled by the city and used as a park “for white people only.”¹⁴¹ Facing opposition from members of the community, the city removed itself as trustee of the property but continued its routine maintenance of the property just as it had when it was under public control.¹⁴² The Court held that the existence of a segregated park that benefited from city involvement was unconstitutional under the Fourteenth Amendment because the mere transfer of title from public to private hands did not instantly erase an established tradition of government involvement in the property.¹⁴³

Like the city of Macon in *Evans*, the federal government has played a key part in maintaining the Mojave Preserve for all visitors to enjoy.¹⁴⁴ In *Evans*, the city manicured and cleaned the segregated park both before and after its time as trustee.¹⁴⁵ Similarly, the government used funds to purchase a sign and replica cross and stipulated the methods of the Mojave Cross’s continued preservation.¹⁴⁶ Specifically, the proposed transfer provides that the Secretary of the Interior continue oversight regarding land use through the use of reversionary rights.¹⁴⁷ Just as the segregated park

138. 382 U.S. 296 (1966).

139. See *id.* at 301 (holding that, where the municipality has maintained a city park, the city park remains intertwined in its control and is therefore still subject to the Fourteenth Amendment).

140. *Id.* at 297.

141. *Id.*

142. *Id.* at 297–98, 301.

143. *Id.* at 301.

144. See *id.* (stating that a park is more like a police department than a social club in that it traditionally serves an entire community).

145. See *id.* (recounting that there has been “no change in municipal maintenance and concern” over the park since the exchange of trustees took place).

146. See Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(c), 115 Stat. 2230, 2278–79 (2002) (codified at 16 U.S.C. § 410aaa-56 note (2006)) (“The Secretary of the Interior shall use not more than \$10,000 of funds . . . to acquire a replica of the original memorial plaque and cross . . .”).

147. See Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(e), 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 note (2006)) (“The conveyance . . . shall be subject to the condition that the recipient maintain the conveyed property as a memorial If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.”); see also *Hampton v. City of Jacksonville*, 304 F.2d 320, 322–23 (5th Cir. 1962) (finding “complete present

in *Evans* did not shed its unconstitutional character through transfer, the mere substitution of ownership from public to private parties does not automatically free the land on which the cross stands of its public nature.¹⁴⁸

Of course, the Court has not categorically stated that a private party maintaining land in a public park always constitutes a quasi-public actor.¹⁴⁹ The Court has, in fact, narrowed the definition of public function in state parks significantly.¹⁵⁰ Because the *Buono* transfer contains reversionary language comparable to those cases in which there is no change in government involvement following the transfer of ownership, it falls within the scope of imputing “public function” to private parties in the context of public parks.¹⁵¹

Aside from oversight through maintenance over supposedly conveyed land, “public function” may also exist due to a lack of physical separation between public and private property.¹⁵² The Tenth Circuit’s decision in *Utah Gospel Mission v. Salt Lake City Corp.*¹⁵³ provides an example of effective separation of the public and private arenas.

control” by a municipality where a reversionary clause was included in deeds to segregated golf clubs).

148. See *Pleasant City Grove v. Summum*, 129 S. Ct. 1125, 1133 (2009) (remarking that public parks are often closely associated with the government unit that owns the land); *Evans*, 382 U.S. at 302 (holding that, regardless of title, the “public character” of a park prohibits racial segregation under the Fourteenth Amendment); see also *United States v. Mississippi*, 499 F.2d 425, 430–32 (5th Cir. 1974) (invalidating a lease of an educational facility from a municipal body to a private segregated school on the basis that government aid may not be used to further racially discriminatory measures such as the provision of a non-unitary school); *Hampton*, 304 F.2d at 323 (finding that there is continuing state action when a city sells golf courses to private parties with reversionary provisions requiring that the private owner continue operating the facility with the same racially discriminatory conditions as previously required under government ownership).

149. See, e.g., *Flagg Bros. v. Brooks*, 436 U.S. 149, 159 n.8 (1978) (doubting whether *Evans* was intended to extend to all situations where private parties operate parks for recreational purposes).

150. See *id.* (advocating for the position that *Evans* applies where there is no change in government involvement in the land after the transfer).

151. See *Hampton*, 304 F.2d at 320–21 (rejecting terms of a transfer permitting reversion of a segregated golf course to the government “if said property be not so maintained [as a golf course] or . . . converted to other use, said property will immediately revert to the [government], its successor or assigns, and it shall be lawful for the [government], its successors or assigns to re-enter and repossess said property and thereafter to peaceably hold and enjoy the same as if this conveyance had not been made”).

152. See *Marsh v. Alabama*, 326 U.S. 501, 507–08 (1946) (commenting that, in a town owned by a private corporation, an area designated as a “business block” is indistinguishable from other sections because it is openly accessible to all who choose to pass through).

153. 425 F.3d 1249 (10th Cir. 2005).

Utah Gospel Mission involved a controversy over a city's sale of a portion of a street to the Church of Latter-Day Saints.¹⁵⁴ As part of an easement, the city reserved rights to public access, but also provided that the church could restrict expression on the parcel.¹⁵⁵ After a legal challenge prohibiting the repression of speech on the street,¹⁵⁶ the city sold the easement to the church.¹⁵⁷ When challenged again on the grounds that the church-owned street and plaza constituted a public forum and could not, therefore, have speech restrictions, the Tenth Circuit held that the church could restrict speech and was not a state actor.¹⁵⁸ Notably, the court reasoned that the church's clear delineation of its parcel from surrounding public streets and sidewalks distinguished the case from past situations where the public function principle had previously applied.¹⁵⁹ The court also reasoned that because the city was not responsible for maintenance or other control of the street, the church's sole ownership precluded any claim of public function.¹⁶⁰

The parcel at issue in *Buono* is neither clearly delineated from other public spaces, nor solely under the control of the private party.¹⁶¹ While the "objective attributes" of the area covered under the easement in *Utah Gospel Mission* were distinguishable from the city streets surrounding it,¹⁶² the cross in question stands in the middle of the Mojave desert, without separation from the land around it.¹⁶³ Without physical separation of public and private land, there is a greater potential for government endorsement.¹⁶⁴ Here, continuing

154. *Id.* at 1252.

155. *Id.*

156. *Id.* at 1253. See generally *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1131 (11th Cir. 2002) (holding that speech could face content-based restrictions on the Plaza, which was found to constitute a public forum).

157. *Utah Gospel Mission*, 425 F.3d at 1253.

158. *Id.* at 1255.

159. *Id.*

160. *Id.*

161. See Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a)-(e), 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 note (2006)) (establishing the government's control over property).

162. See *Utah Gospel Mission*, 425 F.3d at 1252-53 (noting the Plaza's unique walking surface and elaborate structures around its points of entry).

163. See *Buono v. Kempthorne*, 502 F.3d 1069, 1072-73 (9th Cir. 2007), amended and reh'g denied by 527 F.3d 758 (9th Cir. 2008), cert. granted sub nom., *Salazar v. Buono*, 129 S. Ct. 1313 (2009) (describing the location and setting of the cross and noting the lack of a sign).

164. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (advocating the posting of a sign disclaiming government sponsorship of a cross erected by the Ku Klux Klan because of the fear that the symbol's proximity to government property could suggest government approval of a religious message); *Budd*, *supra* note 131, at 240 (noting the importance of visible demarcation by

government action exists due to the existence of reversionary language in the terms of transfer and the failure to separate the transferred land through physical delineation of the parcel.

2. *The masking of government actors using property concepts*

When remedying a violation of a constitutional right, the net effect cannot circumvent the protection afforded by the courts.¹⁶⁵ Though the form of the proposed transaction in *Buono* removes the government from legal ownership, government action persists in substance, as does the expression of a patently religious symbol on what is perceived to be public land.¹⁶⁶ At its core, the *Buono* transfer represents the potential for evasion of an adequate constitutional remedy.¹⁶⁷ Courts should take note of these unanticipated unconstitutional effects when the government manipulates property as part of a proposed remedy.

Faulty desegregation plans, the silver platter doctrine, and the Mojave land transfer demonstrate similar blending of property and government control. Through each process, the government, by exerting a measure of control over a supposedly independent party,¹⁶⁸ has permitted the use of property for an unconstitutional purpose.¹⁶⁹ In *Griffin*, county officials closed public property and replaced it with

stating that “[i]t does little good to sell property underlying a religious symbol if the change in ownership is apparent only to those who conduct a title search”).

165. See *Elkins v. United States*, 364 U.S. 206, 215 n.7 (1960) (noting the “basic incongruity in a rule which excludes evidence unlawfully obtained by federal officers, but admits in the same court evidence unlawfully obtained by state agents” (citing *People v. Defore*, 150 N.E. 585, 588 (N.Y. 1926))).

166. See *supra* Part II.B.1 (outlining the weaknesses in looking solely at the superficial terms of the transaction without investigating the potential for continuing government action).

167. See *Budd*, *supra* note 131, at 237 (describing the various doctrinal situations in which courts scrutinize land transfers for potential constitutional violations); *cf. Griffin v. County Sch. Bd.*, 377 U.S. 218, 231 (1964) (stating that the object of state action in closing the public school system must be constitutional, and opposition to desegregation does not qualify as such); *Elkins v. United States*, 364 U.S. 206, 215 (1960) (commenting that it would be “curiously ambivalent” to differentiate between unconstitutionally seized evidence when brought by federal agents as compared to state agents in contravention of Fourth Amendment protections).

168. See *Griffin*, 377 U.S. at 222–24 (cataloguing Prince Edward County’s efforts in funding segregated private schools by providing, *inter alia*, busing and tuition grants to students); *Elkins*, 364 U.S. at 221–22 (acknowledging that the silver platter doctrine invites federal officials to “tacitly . . . encourage state officers in the disregard of constitutionally protected freedom”).

169. See *Griffin*, 377 U.S. at 231 (determining that Prince Edward County’s funding and operation of segregated private schools was administered for the sole purpose of “ensur[ing] . . . that white and colored children . . . would not, under any circumstances, go to the same school”); *Elkins*, 364 U.S. at 209–10 (noting the rise of the silver platter doctrine and the past use of property seized by state officials in federal prosecutions).

government-subsidized segregated schools.¹⁷⁰ In the context of the silver platter doctrine, state actors deprived individuals of private property and used this illegally-obtained evidence to assist federal prosecutors build their cases in federal court.¹⁷¹ While the two contexts address different types of property, in substance they resemble situations in which a government body manipulated parties not constrained by the same constitutional limitations to hide its continued, unlawful involvement.¹⁷² Courts should take note of each of these historical constitutional struggles because the manipulation of public and private property presents itself again as part of the Mojave land transfer.

Additionally, the Fourth Amendment and Equal Protection contexts each demonstrate the Court's focus on the overall effects of the government's proposed remedies rather than mere form or process. Following *Brown*, the Court has often used firm language in requiring the immediate institution of unitary school systems,¹⁷³ and made strong efforts to weed out those parties whose programs failed constitutional muster.¹⁷⁴ Similarly, in *Griffin*, the Court looked beyond the county's plan to give aid to private schools and resolved that the program had the unconstitutional effect of depriving free public education for invidious purposes.¹⁷⁵

170. See *supra* notes 46–56 and accompanying text (tracking the significance of *Griffin* in the context of faulty desegregation plans).

171. See *supra* notes 57–79 and accompanying text (discussing the rise and fall of the doctrine and the role of *Elkins* in providing a declaration that illegally seized property could not be used as an instrument of the prosecution). Admittedly, the silver platter doctrine may be distinguished from the present situation because it involves the federal government's manipulation of another government body, rather than a private citizen. However, the identity of the manipulated party makes little difference. Constitutional requirements allowed the use of property seized by state officials in federal court because state officials were not bound by the same legal limitations as their federal counterparts. Thus, even though each party in this context may be classified as a government actor, the Constitution imposed on them crucially different limitations. This differential treatment permitted the federal government's circumvention of the exclusionary rule. See *supra* notes 62–64 and accompanying text (outlining the exception to *Weeks*'s exclusionary rule).

172. See *supra* Part II.B.1 (describing the government's continuing presence on the conveyed property); see also BLACK'S LAW DICTIONARY 1254 (8th ed. 2004) (defining private property as property "over which the owner has *exclusive* and absolute rights") (emphasis added).

173. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430, 436 (1968) ("The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . .").

174. See KLARMAN, *supra* note 45, at 102–03 (recounting that in 1968 the Court removed the power of evaluating desegregation plans from the parties themselves and directed courts to gauge compliance based on the actual quantity of black children attending previously segregated schools).

175. See *Griffin v. County Sch. Bd.*, 377 U.S. 218, 231–32 (1964) (declaring that the school board's plan to close public schools and provide aid for private schools was enacted for the sole purpose of perpetuating racial segregation).

The lineage of cases tracking the demise of the silver platter doctrine similarly exemplifies the Court's close focus on assuring that the purpose of a remedy continues to be served.¹⁷⁶ The silver platter doctrine had the effect of permitting the use of illegally seized property in federal court that would not be admissible evidence had federal agents performed the original seizure.¹⁷⁷ Thus, regardless of the true identity of the violator, a remedy for a constitutional violation like that in *Buono* must erase the infringement on the complainant's rights not just partially but completely.¹⁷⁸ Because the injured party retains the impression that there is government endorsement of religion, the mere change in title ownership does nothing to fully and effectively correct the government's constitutional wrong.¹⁷⁹

The substitution of actors in the *Buono* transfer is similar to that in the silver platter doctrine because in practice each allows prohibited government action to persist as long as it is masked by different actors.¹⁸⁰ This trend of cloaking a constitutional violation in a "private" identity continues in *Griffin*'s desegregation context.¹⁸¹ Like a cross on a small parcel of land that appears to be government-owned, the effect of the county's action was a segregated public school system.¹⁸² By examining potential unconstitutional effects, courts should take notice that the freedom from government endorsement of religion cannot be so easily avoided through the mere manipulation of property ownership.

176. See *supra* notes 57–79 and accompanying text (tracking the history of the constitutional loophole in the Court's original distinction between federal and state officials and the succeeding cases that worked to assure the exclusionary rule applied to unreasonable searches by any government official).

177. See *Elkins v. United States*, 364 U.S. 206, 215 (1960) (acknowledging the unintended result of the silver platter doctrine while recognizing that "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer" (citation omitted)).

178. See *Budd*, *supra* note 131 at 215 (citing Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 914 (1999)) (warning that remedies falling short of completely curing a constitutional injury may aggravate harm by rendering the original court ruling more of a request than an order).

179. See *Budd*, *supra* note 131 at 237–38 (noting the connection between perceived religious endorsement and state action as part of a land sale).

180. See *Byars v. United States*, 273 U.S. 28, 32–33 (1927) ("[T]he court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods.").

181. See *Griffin v. County Sch. Bd.*, 377 U.S. 218, 231 (1964) (finding that desegregation in publicly funded private schools in a county where the public school system had been closed resulted in the functional equivalent of a public segregated school system).

182. *Id.* at 232.

3. Carving up the commons: The slippery slope on Sunrise Rock

Additionally, the government action in *Buono* provides an implicit invitation to engage in similar conduct that could have unfortunate policy implications. Any entity desirous of erecting a permanent religious symbol on public land would have what amounts to a court-established right to a piece of the commons.¹⁸³ Governments would then need to determine the size of each particular group's plot and also become involved in the inevitable disputes over the relative sizes of each group's piece of public land.¹⁸⁴ Also, even if the government were to appease a broad range of groups through various land sales, it could run afoul of establishing a preference for believers over non-believers.¹⁸⁵

These potential scenarios directly contradict the Supreme Court's recent express disapproval of using public parks as a mosaic of expression through symbols and monuments. In *Pleasant Grove City v. Summum*,¹⁸⁶ the Court looked to the potential for abuse in refusing to allow a religious group to erect a monument in a public park.¹⁸⁷ Officials of Pleasant Grove City, Utah rejected a religious organization's request to build a monument containing the Seven Aphorisms of Summum.¹⁸⁸ Though the park in question featured eleven other displays, including a Ten Commandments monument, the City denied the organization's request because the proposed construction was neither privately donated nor did it reflect part of

183. See *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1013 (W.D. Wis. 2004), *rev'd*, 395 F.3d 693 (7th Cir. 2005) (stating that the sale of public land exacerbates an Establishment Clause violation through communicating to non-believers that a municipality is willing to erect a religious display *and* alter the composition of a public park to insure that the symbol does not have to share its space with other expressive displays).

184. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring) ("By allowing [the] government to encourage what it cannot do on its own, the proposed *per se* rule [that no government endorsement arises from private religious expression] would tempt a public body to contract out its establishment of religion . . . to exhibit what the government could not display itself").

185. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (observing the First Amendment's historical need for "neutrality between religion and religion, *and* between religion and nonreligion" (emphasis added) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947))).

186. 129 S. Ct. 1125 (2009).

187. See *id.* at 1138 (presenting the potential choice of a viewpoint-neutral government entity between a multitude of statues and displays in a public park, or the forced removal of each existing expressive monument).

188. *Id.* at 1127. For more information on the Summum tradition and the meaning of the Seven Aphorisms, see generally Summum—Sealed Except to the Open Mind, <http://www.summum.us> (last visited Sept. 28, 2009) (discussing the underlying philosophy of Summum and the Seven Summum Aphorisms).

the municipality's history.¹⁸⁹ In ruling for the City, the Court distinguished between the expression of speakers and monuments in a public park by emphasizing the enduring nature of the latter's message.¹⁹⁰ The Court found it "hard to imagine" a system that permitted the installation of any symbol desirous of its slice of the public pie.¹⁹¹ A framework that permits a multitude of monuments through the piecemeal distribution of the commons would also undoubtedly raise the Court's suspicions.¹⁹²

Finally, should the government be fortunate enough to avoid issues of religious preference and neutrality altogether, the practical result could yield unintended consequences. For example, a petition calling for a transfer of land to permit the placement of a wooden swastika¹⁹³ on public land would surely elicit a very different reaction than the cross in *Buono*. These hypothetical situations illustrate that carving out public lands into private parcels to appease particular religious groups—while at the same time conflicting with Supreme Court doctrine—could invite religious tension rather than alleviate it.¹⁹⁴

III. REPLACING THE LAND TRANSFER PRESUMPTION OF VALIDITY WITH ESTABLISHMENT CLAUSE JURISPRUDENCE

The preceding discussion demonstrates that the Seventh Circuit's present presumptive test does not appropriately take into account the potential perception of government endorsement where land on which a recognized violation occurs is sold to a private party.¹⁹⁵ In order to assure that the government fully complies with an injunction prohibiting the establishment of religion, courts should adopt a test that examines not only the form of such transactions

189. *Summum*, 129 S. Ct. at 1129–30.

190. See *id.* at 1137 (stating that monuments permanently monopolize public land, while speakers eventually tire and depart the space, taking their message with them).

191. *Id.*

192. See *id.* (stipulating that public parks were only meant to accommodate a limited selection of permanent displays).

193. See Hemant G. Padhy, *Information and Origin of Hindu Swastika*, Mar. 15, 2005, http://www.ivarta.com/columns/OL_050314.htm (describing the swastika as a symbol of the "endless nature of God" representing truth, compassion, tolerance and happiness in the ancient Vedic Dharma and Hindu Dharma traditions).

194. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 612–13 (1989) (invalidating the display of a crèche on public grounds based on the Constitution's required "respect for religious diversity" in permitting public displays).

195. See *supra* Part II.A (discussing the shortcomings of the Seventh Circuit's presumption).

(as originally expressed in *Freedom from Religion Foundation*), but also the potential for an unconstitutional effect.¹⁹⁶

A. The Use of Lemon and a Response to Its Critics

In order to evaluate whether the transfer has a constitutional purpose and effect, courts should return to one of its original sources of Establishment Clause jurisprudence. Though *Lemon* has its critics on and off the Court,¹⁹⁷ this multi-pronged approach could more adequately address constitutional concerns by looking not only at the purpose of the government's proposed remedy but also at the constitutional effect of such action.¹⁹⁸ By asking whether a land transaction satisfies a valid secular purpose, courts could effectively ferret out transactions that blatantly fail to accomplish a secular purpose.¹⁹⁹ Furthermore, by analyzing the potential effect of the transaction, courts could more adequately address concerns regarding an unconstitutional perception of government endorsement.²⁰⁰

196. See *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000) ("[A]dherence to a formalistic standard invites manipulation."); see also *Wolf v. Colorado*, 338 U.S. 25, 48 (1949) (Rutledge, J., dissenting) (commenting that, for judges and prosecutors desirous of admitting illegally obtained evidence into court, "[c]ompliance with the Bill of Rights betokens more than lip service"). Granted, *Freedom from Religion Foundation* does include language that expresses the need to look to the "substance" of a transaction as well as its form. 203 F.3d at 491. However, the test's presumption in favor of the government hamstrings any effect of such language on the practical application of the test. See *supra* Part II.A (describing the superficial nature on which the land transaction is evaluated under the Seventh Circuit's test).

197. See *McCreary County v. ACLU*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (noting that a majority of the Justices on the Supreme Court had previously expressed dissatisfaction with the principle of neutrality that the *Lemon* test embodies); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (finding the three prongs of *Lemon* to be "no more than helpful signposts"). See generally *infra* notes 201–203 and accompanying text.

198. See *supra* notes 17–37 and accompanying text (following *Lemon*'s focus as it has evolved since its original use); *supra* notes 204–206 and accompanying text (same).

199. See, e.g., *Stone v. Graham*, 449 U.S. 39, 42 (1980) (holding that a Kentucky law requiring the posting of the Ten Commandments in classrooms was for the unconstitutional purpose of imposing religious doctrine on students); *Staley v. Harris County*, 461 F.3d 504, 514–15 (2006) (finding that a county had a predominantly religious purpose for erecting a monument of an open bible memorializing a prominent philanthropist in front of a Texas Courthouse).

200. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring) ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions."). See generally Budd, *supra* note 131, at 215–20 (discussing various approaches to the remedial inquiry with respect to Establishment Clause violations).

Opponents of *Lemon* will undoubtedly be quick to point out its faults. For example, critics contend that judges can manipulate the test's malleable terms to their individual points of view,²⁰¹ while others believe *Lemon* fails to address all the complexities of our Constitution's treatment of religion.²⁰² Still others claim it misses the meaning of the anti-establishment guarantee by being too focused on government neutrality.²⁰³

While there may be some merit to these claims, the Court's inconsistent criticisms of the test have themselves produced a haphazard application.²⁰⁴ For all the controversy surrounding its use, *Lemon* has not been expressly overruled and remains a common

201. See, e.g., LEVY, *supra* note 14, at 156 (stating that the *Lemon* test of "excessive entanglement" is a completely relative term that has no readily distinguishable meaning).

202. See, e.g., Ronald Thiemann, *The Constitutional Tradition: A Perplexing Legacy*, in LAW & RELIGION: A CRITICAL ANTHOLOGY 345, 357–59 (Stephen M. Feldman ed., 2000) (noting that, like other tests, the *Lemon* test errantly considers the Establishment Clause and the Free Exercise Clause to be separate doctrines rather than intermingled legal principles); William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 194 (2000) (describing religion clause jurisprudence as so muddled that "[e]very new case accepted for argument presents the very real possibility that the Court might totally abandon its previous efforts and start over").

203. PETER K. ROFES, THE RELIGION GUARANTEES 41 (2005) (describing Justice Rehnquist's perspective that the *Lemon* test should permit the government's use of religious institutions to achieve secular means rather than maintaining a strict withdrawal from all religious activity).

204. Compare *McCreary County v. ACLU*, 545 U.S. 844, 861–62 (2005) (focusing on the "purpose" inquiry of the *Lemon* test as applied to the religious symbol's context), with *Van Orden v. Perry*, 545 U.S. 677, 686–87 (2005) (denying the *Lemon* test any constitutional significance when dealing with ambiguously identified "passive" monuments like that in question and instead evaluating the symbol under a history and tradition analysis). For a colorful commentary on *Lemon*'s continued existence, one need look no further than the exchange between Justice White and Justice Scalia in a 1993 case in which Scalia compared the test to a creature in a horror movie:

The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will When we wish to strike down a practice it forbids, we invoke it . . . ; when we wish to uphold a practice it forbids, we ignore it entirely. . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (citations omitted). Justice White acted as an advocate for this supposed "monster" in the majority opinion:

While we are somewhat diverted by Justice Scalia's evening at the cinema, we return to the reality that . . . *Lemon*, however frightening it might be to some, has not been overruled. This case, like *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, presents no occasion to do so. *Id.* at 395 n.7 (majority opinion) (citations omitted).

starting point for analysis.²⁰⁵ Moreover, the Court’s application of *Lemon* in recent decisions indicates that the test is not merely waiting to be overruled, but rather is an active member of Establishment Clause doctrine.²⁰⁶

The use of *Lemon* in this scenario also provides the additional benefit of uniformity. Subjecting the proposed land transfer to one test would provide lower courts with a framework connecting the analysis of the remedy to the infraction it claims to correct.²⁰⁷ This uniformity in analysis would be a rarity in Establishment Clause jurisprudence, particularly with regard to religious symbols.²⁰⁸

B. Applying Lemon to the Mojave Cross

The first prong of the *Lemon* test requires that a government enactment have a valid secular purpose.²⁰⁹ Second, *Lemon* requires that the relevant state action neither advance nor inhibit religion.²¹⁰ Finally, the proposed government action may not foster “excessive entanglement” with religion.²¹¹ In more recent applications of the *Lemon* test, the Court has blended the final two prongs together.²¹² Regardless of the grouping of its prongs, it is clear that the *Lemon* test targets the two necessary inquiries in light of our discussion of the

205. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 668–69 (2002) (O’Connor, J., concurring) (claiming that the *Lemon* test is a “central tool” in the Establishment Clause analysis relating to school vouchers); *Wallace v. Jaffree*, 472 U.S. 38, 63 n.3 (1985) (Powell, J., concurring) (declaring that *Lemon* has been used in many of the Court’s Establishment Clause cases and that stare decisis requires the continuance of this tradition); see also Jessica Gavrich, Comment, *Constitutional Law: Judicial Oversight—Inconsistency in Supreme Court Jurisprudence*, 58 FLA. L. REV. 437, 444–45 (noting that, because *Van Orden* merely avoided discussion of *Lemon* while *McCreary County* reasserted its importance, lower courts are left with confusion, but not express renunciation of the test).

206. See, e.g., *McCreary County*, 545 U.S. at 864–65 (finding that the two Kentucky counties’ displays of the Ten Commandments in courthouses violated *Lemon* because the displays did not have a secular purpose).

207. See DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE 131, 678–79 (3d ed. 2002) (stating that injunctive relief must safeguard legal rights without overprotecting).

208. See Budd, *supra* note 131, at 215–16 (noting the inconsistent methodology in structuring the question of remedies for religious symbols).

209. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

210. *Id.*

211. *Id.*

212. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997) (explaining the overlap of the *Lemon* prongs in the context of government aid to religious groups or programs by stating that the factors used in assessing “entanglement” are similar to those used in determining an unconstitutional “effect”); *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring) (interpreting the “effects” and “entanglement” prongs of *Lemon* as safeguards against “government practice[s] [having] the effect of communicating a message of government endorsement or disapproval of religion . . . whether intentionally or unintentionally”); ROFES, *supra* note 203, at 30 (tracking the evolution of the *Lemon* test).

Fourth and Fourteenth Amendments: (1) the purpose of the proposed government action and (2) the effect of the transaction regarding both real and perceived government control of a religious symbol.²¹³ As illustrated by the analysis of school desegregation plans and the silver platter doctrine, the use of property designations has led the Court to examine these same core concerns.²¹⁴ Having noted the congruence of *Lemon* with the need for a secular purpose and net constitutional effect, we may apply the test to the Mojave land transfer.

On its face, the transfer appears to have a secular purpose.²¹⁵ Concededly, the terms of the transfer make no express mention of Christianity or religion in general.²¹⁶ However, under *Lemon* the “secular purpose” prong is evaluated by “one presumed to be familiar with the history of the government’s actions and competent to learn what history has to show.”²¹⁷ In *Buono*, court rulings prior to the transfer held the cross to be a violation of the Establishment Clause,²¹⁸ and government legislation to preserve the cross took place only after the National Park Service announced its intention to remove the

213. The inquiry into perceived endorsement in the context of religious symbols has previously garnered criticism. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (refusing to use the Establishment Clause as a “modified heckler’s veto” in which one individual’s misperception defeats a group’s ability to engage in religious practice). In *Good News Club*, the school dissociated itself from a religious group by requiring that meetings take place after school hours and be open to all members of the public. *Id.* at 113–14. However, the land sale context is distinguishable from endorsement in *Good News Club* and similar cases because the land transfer context involves legislative action with continuing government oversight over land that it has supposedly completely renounced. See *supra* Part II.B.1 (explaining that even in a land transfer the monuments on the land will still be linked to government action).

214. See *supra* Part II.B (describing three ways the government’s proposed land transfer will offend the principles of the Constitution).

215. Cf. *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 346–47 (Or. 1976) (finding that a large concrete cross in a public park passed constitutional muster on the grounds that it was intended to be a memorial to war veterans).

216. See Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a)–(e), 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 note (2006)) (providing background on the terms of the transfer).

217. *McCreary County v. ACLU*, 545 U.S. 844, 866 (2005); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring) (characterizing the reasonable observer as one who is aware of the context in which the religious display exists).

218. See *Buono v. Kempthorne*, 502 F.3d 1069, 1073–75 (9th Cir. 2007), amended and reh’g denied by 527 F.3d 758 (9th Cir. 2008), cert. granted sub nom., *Salazar v. Buono*, 129 S. Ct. 1313 (2009) (noting that the plaintiff, Frank Buono, filed suit in March of 2001 and the Central District of California entered an injunction enjoining the display of the cross in July 2002, while the land transfer agreement passed through Congress in September 2003 after the parties had been heard on appeal in the Ninth Circuit as part of *Buono II*).

symbol.²¹⁹ Meanwhile, federal courts were in the process of hearing—and ultimately upholding—the original injunction.²²⁰ Moreover, the express terms of the original agreement providing for continued government oversight and a reversionary interest indicating that the government did not intend to relinquish its interest to a private party but rather to ensure the preservation of the cross itself.²²¹ A reasonable observer could potentially view repeated attempts at shielding the Mojave cross from forced removal through litigation and legislation as the preservation of a patently religious message.²²²

Even if one were to assume the government's purpose in enacting the legislation was wholly secular, the land transfer has the effect of endorsing a patently religious symbol due to continuing government action and the perception of public ownership.²²³ The cross stands surrounded by public property with no means of separation.²²⁴ Therefore, by mere observation the transfer fails to address the perception that the land remains under federal control.²²⁵ Such a

219. See Savage, *supra* note 8, at A8 (explaining the ongoing dispute over the cross and how this issue may give the Supreme Court an opportunity to reformulate the law on church-state separation); see also Cart, *supra* note 94, at B6 (discussing the controversy over the cross in the Mojave National Preserve).

220. See *supra* Part II.C.2 (outlining the history of the litigation and the government's legislative responses).

221. See *Buono v. Kempthorne (Buono IV)*, 527 F.3d 758, 782 (9th Cir. 2009) (recounting the government's various "herculean efforts" to preserve the cross); see also Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278-79 (2002) (codified at 16 U.S.C. § 410aaa-56 note (2006)) ("The five-foot-tall white cross . . . is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war."); § 8137(c) ("The Secretary . . . shall use not more than \$10,000 of funds . . . to acquire a replica of the original memorial plaque and cross"); § 8121(a) (providing for the land exchange while reinforcing the Secretary's responsibilities under § 8137).

222. See *McCreary County*, 545 U.S. at 872-73 (holding that the inclusion of nonreligious texts in a display featuring the Ten Commandments did not nullify the County's plainly religious purpose in violation of *Lemon*); *supra* note 217 and accompanying text.

223. See, e.g., *ACLU v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886, 891-92 (N.D. Ga. 1981) (holding that, although the city claimed it was constructed for the purpose of promoting tourism, an illuminated cross in a public park must be removed because it impermissibly promoted religion and the government's maintenance of the structure produced excessive entanglement).

224. See *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1205-07 (C.D. Cal. 2002) (noting that the cross is not surrounded by any enclosures or signs indicating that the cross is used for religious purposes or as a memorial to war veterans, but instead the symbol sits on a "natural desert environment").

225. See *supra* notes 134-148 and accompanying text (describing the government's continued involvement in the ownership and care of the cross).

policy that entrenches a government entity in the advancement of religion is impermissible.²²⁶

CONCLUSION

Legal doctrine concerning the display of religious symbols on public land has provided various tests to interpret state action and evaluate potential violations. However, the question currently at issue is not whether the government has established religion in the past, but what it may do to remedy a religious display on public land that violates the Establishment Clause. The Mojave land transfer illustrates one innovative response: a transaction transferring title ownership of land containing a religious symbol from public to private hands. Shrouded in plywood, the desert cross awaits the Supreme Court's release from juridical purgatory.

The Fourth Amendment and Equal Protection contexts reflect the need for courts to look beyond formalistic ownership-based categories to determine whether the proposed remedy produces unlawful continuing state action. Using these doctrines as guides, it is apparent that the Seventh Circuit's presumption of validity test fails to adequately address both the purpose and the overall effect of such land transfers with regard to Establishment Clause considerations. Courts can remedy this incongruity by employing the test set forth in *Lemon v. Kurtzman*. This test would work to safeguard against both an outwardly religious purpose on the part of legislators, and the practical effect of circumventing a constitutional right through manipulation of formal property categories.

More than two hundred years after Thomas Jefferson penned his famous letter to the Danbury Baptist Association,²²⁷ *Buono v. Kempthorne* provides the Supreme Court a chance to give Thomas Jefferson's "wall of separation" metaphor new meaning. The proposed property transfer brings to light both the symbolic and literal implications of this oft-cited analogy. A failure to view the proposed remedy in its broader context could provide future violators with a blueprint for eluding this historic boundary.

226. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315–16 (2000) (finding that a school policy calling for an elected student to deliver an "invocation" at the school's football games was an act of impermissible government supervision over religious debate).

227. Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802) (on file with the Thomas Jefferson Papers at the Library of Congress), available at <http://www.loc.gov/exhibits/religion/danburys.jpg>.