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Cross National Memorial: At the Intersection of Speech and Religion

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THE CROSS NATIONAL MEMORIAL: AT THE INTERSECTION OF SPEECH AND RELIGION

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INTRODUCTION

As the expanding concept of government speech has increasingly succeeded as a defense to private speech claims under the Free Speech Clause, questions abound as to how this will affect the existing doctrinal maze of public religiously themed speech. This Symposium Article explores and reflects on these questions using two frames: Justice Souter's final opinion on "government speech" and the underanalyzed 2002 National Memorial designation of the Mojave Cross war memorial.

Among his parting words on this topic, Justice Souter observed: "The interaction between the 'government speech doctrine' and Establishment Clause principles has not . . . *begun* to be worked out . . . [and] it may not be easy to work out."[1] These words may sound puzzling to some. Establishment Clause claims, after all, frequently involve determining whether the speech should be attributed to a private speaker or the government.[2] And so, whatever novelty exists, it derives from his use of the specific term

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[1] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1141 (2009) (Souter, J., concurring in the judgment) (emphasis added).

[2] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) ("[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)) (opinion of O'Conner, J.)).

"government speech doctrine," which perhaps is better conceptualized as the "government speech *defense*."

Before their departure from the Court, both Justice Souter and Justice Stevens described this "recently minted" doctrine as consisting of a narrow canon of cases, including *Rust v. Sullivan*[3] and *Johanns v. Livestock Marketing Ass'n*,[4] and now *Pleasant Grove City v. Summum*,[5] in which "government speech" was asserted to rebuff a Free Speech Clause claim.[6] The general idea is that governments must "speak" in order to govern, and that doing so necessarily requires expressing the political viewpoint they were elected to promote.[7] And so, even where private persons create or transmit the speech, their role does not trigger application of First Amendment speech protections—or require government viewpoint neutrality.[8]

The intersection of religion and speech is complicated by the fact that the two doctrines work in opposite directions. Turning again to Justice Souter's observations in *Summum*, he explained it as follows: In Establishment Clause cases—where government is required to be neutral, and so seeks to *avoid* appearing to express a religious message—it typically *increases* the numbers of speech objects, for

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[3] 500 U.S. 173 (1991) (upholding limiting federal funding to only those family planning clinics which agreed not to permit abortion counseling).

[4] 544 U.S. 550 (2005) (denying a compelled speech claim, although the targeted tax in dispute paid for pro-beef ads that appeared to be sponsored by the industry).

[5] 129 S. Ct. 1125 (2009) (holding that the placement of a privately sponsored monument in a public park was government speech not subject to First Amendment scrutiny).

[6] *See id.* at 1139 (Stevens, J., concurring) ("To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit."); *Johanns*, 544 U.S. at 574 (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise."). Justices Stevens and Souter also viewed the widely criticized public employee speech case, *Garcetti v. Cebellos*, 547 U.S. 410 (2006), as involving the "government speech doctrine." *Johanns*, 129 S. Ct. at 1139 (Stevens, J., concurring); *see Garcetti*, 547 U.S. at 437–38. In an earlier article, I analyzed three lines of cases, sometimes all referred to as "government speech" decisions, and argued that *Garcetti* can be distinguished, though perhaps not defended, as involving somewhat different, managerial interests. S*ee* Mary Jean Dolan, *Government Identity Speech and Religion: The Establishment Clause Limits After* Summum, 19 WM. & MARY BILL RTS. J. 1, 14–34 (2010) [hereinafter Dolan, *Government Identity Speech*] (referring to the three cases listed in the text as "core" government speech). That Article also analyzed at length the subtle differences between the binary choice of speaker in "government speech" cases and the more graduated options used in Establishment Clause cases.

[7] *Summum*, 129 S. Ct. at 1131 ("A government entity has the right to 'speak for itself.'" (quoting Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000))).

[8] *Id.* The doctrine has been highly criticized by First Amendment scholars; and the facts of the first two cases were particularly inflammatory. *See, e.g.*, Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing To Say?*, 95 IOWA L. REV. 1259 (2010) (questioning the necessity of the new government speech doctrine); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 168, n.103 (1996) (collecting articles criticizing *Rust*); Seana Shiffrin, *Compelled Association, Morality, and Market Dynamics*, 41 LOY. L.A. L. REV. 317, 321 n.26 (2007) (collecting articles criticizing *Johanns*).

the purpose of diluting any religious meaning[9] (think of the crèche surrounded by snowmen and carolers upheld in *Lynch*).[10] But, he explained, the more objects on display, the harder it then becomes to argue that each one conveys a governmental message. As a result, by taking steps to ward off an Establishment Clause violation, the government risks creating a private speech forum—which, in turn, means losing its "government speech" defense, and thus, being forced to include unwanted messages in its display or program.[11] Under forum doctrine, where a government opens up previously nonpublic property, access or funds to private speakers, it is allowed to set reasonable content or speaker limitations, but the First Amendment requires it to remain viewpoint neutral in administering those categories.[12]

The interaction between the changing speech and religion doctrines is currently framed by two recent, almost inverse, Supreme Court cases. In *Pleasant Grove City v. Summum*, a Free Speech Clause case, the Court allowed the City to use the new "government speech" defense to reject a small religion's "Seven Aphorisms" marker, while maintaining a donated Ten Commandments monument among its park's permanent collection.[13] While public attention and commentary focused on the unequal treatment of two religious symbols,[14] the Establishment Clause was not at issue there. Instead, the Court analyzed whether, by accepting numerous private monument donations over the years, the City had created a "permanent monument forum" for private speech.[15] The 9-0 decision held that monuments displayed in public parks are government speech, so that the government may express its own viewpoint through such displays.[16]

The second, *Salazar v. Buono*,[17] was an Establishment Clause case. There, a majority of the Court seemed to approve of privatizing a World War I cross memorial as a means of curing its previously

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[9] *Summum*, 129 S. Ct. at 1141–42 (Souter, J., concurring).

[10] Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (finding no Establishment Clause violation when the city displayed a Christmas crèche alongside other holiday-themed decorations, such as a Santa statue, reindeer pulling a sleigh, and carolers).

[11] *Summum*, 129 S. Ct. at 1141–42 (Souter, J., concurring).

[12] *Id.* at 1137.

[13] *Id.* at 1138.

[14] *See, e.g.*, Jess Bravin, *10 Commandments vs. 7 Aphorisms: A New Religion Covets Legitimacy*, WALL ST. J., Nov. 13, 2008, at A14 ("[T]he subtext of the battle—a New Age religion seeking the same treatment as a more established faith."); Editorial, *A Case of Religious Discrimination*, N.Y. TIMES, Nov. 12, 2008, at A30 (arguing that "[p]ublic property . . . must be open to all religions on an equal basis — or open to none at all").

[15] *Summum*, 129 S. Ct. at 1132–34.

[16] *Id.* at 1134.

[17] 130 S. Ct. 1803 (2010).

adjudicated Establishment Clause violation, while also averting the disrespect arguably conveyed by forced removal.[18] Procedurally complex and lasting over a decade,[19] *Buono* did not include a Free Speech claim, but the courts' analysis of the cross's meaning did include some related "government speech." Soon after Buono filed his Establishment Clause claim, Congress designated the controversial cross in the Mojave Desert as a "National Memorial" commemorating U.S. participation in World War I.[20] As discussed below, while the Justices mistakenly assumed that this Christian symbol was the only national monument honoring America's WWI soldiers, they avoided the constitutional issue by construing the land transfer statute as allowing removal of the cross.[21]

Therefore, while neither case presented an immediate need for answers, both *Summum* and *Buono* raised questions about the intersection of speech and religion—foreshadowing a more direct collision between two shifting doctrines. One way of framing the analysis is by evaluating the pensive puzzle left behind by Justice Souter:

> But the government could well argue, as a development of government speech doctrine, that when it expresses its *own* views, it is *free* of the Establishment Clause's stricture against discriminating among religious sects or groups. . . .
>
> Whether that view turns out to be sound is more than I can say at this point.[22]

Given his long history of championing strict religious neutrality,[23] this statement from his *Summum* concurrence is fairly interpreted as a prediction, not a proposal.

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[18] *Id.* at 1820.

[19] The litigation has generated five published decisions and is now on remand in the district court. Buono v. Norton, 212 F. Supp. 2d 1202 (C.D. Cal. 2002) (*Buono I*), *aff'd*, 371 F.3d 543 (9th Cir. 2004) (*Buono II*); Buono v. Norton, 364 F. Supp. 2d 1175 (C.D. Cal. 2005) (*Buono III*), *aff'd sub. nom.* Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008) (*Buono IV*), *rev'd sub. nom.* Salazar v. Buono, 130 S. Ct. 1803 (2010) (*Buono*).

[20] Department of Defense Appropriations Act, Pub. L. 107–117, § 8137(a), 115 Stat. 2230, 2278 (2002).

[21] *See Buono*, 130 S. Ct. at 1817–18, 1823 (Alito, J., concurring); *see also* discussion *infra* Part III.

[22] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring) (emphasis added). This statement was all the more puzzling because the majority opinion expressly noted, in passing, "government speech must comport with the Establishment Clause." *Id.* at 1132.

[23] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 737 (2005) (Souter, J., dissenting) (arguing that the Establishment Clause requires government neutrality toward religion as a general rule); Bd. of Educ. v. Grumet, 512 U.S. 687, 696 (1994) ("'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality'

This Symposium Article examines the multiple interpretations of Justice Souter's parting words by exploring hypothetical illustrations of the anticipated, post-*Summum* clash of doctrines. In doing so, it builds on two prior papers with more normative agendas. In an article analyzing *Summum*, I applied Professor Lawrence Lessig's work on social meaning to argue that the opinion exacerbates the Establishment Clause impact of religious-historical public symbols.[24] Especially given the changed, more combative culture, I proposed drawing a sharp line between preserving monuments erected in more homogenous times—which should be allowed only if accompanied by sufficient explanatory disclaimers—and new government display of religious symbols, which generally should be prohibited.[25] A second article, commenting on the *Buono* decision, showed how Justices Kennedy and Alito's opinions could be interpreted as using an "expanded endorsement test."[26] By their account, the "reasonable observer" would understand that government action to avoid destroying or removing a historic-religious symbol conveys a different message than would a government's erection of a Christian symbol today.[27]

It is this distinction between old and new—with its intriguing hint of an achievable compromise[28]—that focused my attention on Congress's 2002 designation of the Mojave Desert Cross as a "National Memorial" commemorating World War I. Although occurring during the *Buono* Establishment Clause litigation, it was not directly at issue in the case. Accordingly, and because the complicated procedural maneuverings took center stage, this

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toward religion . . . .'" (quoting Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792–93 (1973))).

[24] *See* Dolan, *supra* 6, at 52–57 (discussing how the government speech label more clearly "ties" the government to a monument, while extinguishing the private donor's role "de-ambiguates" the monument's social meaning) (citing Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 949 (1995)).

[25] *Id.* at 65–69 (providing extensive, detailed requirements for such disclaimers, and caveats for situations where new minority-religion monuments are proposed to dilute an older monument's religious meaning).

[26] Mary Jean Dolan, Salazar v. Buono: *The Cross Between Endorsement and History*, 105 NW. U. L. REV. COLLOQUY 42 (2010).

[27] *Id.* at 46 (also suggesting that this may be the most viewer-centered alternative available, given the current, more conservative Court, and the lesser option of a reductive, fixed historical approach).

[28] Based on their opinions in *Buono* and *Van Orden v. Perry*, 545 U.S. 677 (2005), six Justices (Chief Justice Roberts, and Justices Alito, Breyer, Kennedy, Scalia, and Thomas) are likely to resist ripping out longstanding religious statuary from public squares. *See, e.g.*, Salazar v. Buono, 130 S. Ct. 1803, 1818 (2010) ("The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm") (Kennedy, J., plurality opinion).

religiously themed government speech was underanalyzed. One unique contribution of this Article is new research on the Mojave Cross designation, the general process for creating National Memorials, and the broader range of WWI national memorials.[29]

Interesting in its own right, simply for the additional light cast on a recent Supreme Court Establishment Clause case, this National Memorial designation also provides a platform from which to explore the puzzle presented. Because the designation process turns out to involve substantial private participation—and to be somewhat ad hoc, nonselective, and political—it provides a nice hypothetical. While admittedly a long shot, it is a useful exercise to imagine a rejected speaker claiming that Congress has created a "National Memorial forum" and then suing, in the alternative, on both Free Speech and Establishment Clause grounds. As explained below, there are other credible candidates for WWI National Memorials, including a longstanding secular monument and a tribute to Jewish WWI veterans.

The examples worked through in this Article show that the addition of a Free Speech Clause "government speech" defense is likely to provide a mostly incremental, evidentiary difference. As compared to that common Establishment Clause actor, the offended observer, a rejected speaker-plaintiff, standing alone, will tend to function as a truth-tester for a government's proffered secular rationale. But even so, the added punch of forcing a government to argue *affirmatively* that a particular religion—and not the rejected other—best symbolizes the government's identity should prove even harder to justify.[30] In a doctrinal area as notoriously contextual as the

[29] All this original research on National Memorials, including the Mojave Cross designation discussed in *Buono*, was sent to the attorneys for both parties (Counsels of Record in the *Salazar v. Buono* District Court remand) upon completion in July, 2010; also, in October, 2010, when the unpublished research paper was posted on SSRN, *see* Mary Jean Dolan, *P.S. Untold Stories and the Cross National Memorial* (Oct. 26, 2010) (unpublished manuscript), *available at* http://www.ssrn.com/abstract=1697483), copies were mailed to both Counsel and the District Court Judge.

[30] Note that Summum did attempt to force the City into this position, by asking the Supreme Court to require the City to official adopt the meaning of the Ten Commandments as its own message, but the Court declined to do. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009). That case, however, did not involve a binary choice, or even the Ten Commandments, specifically, but rather the First Amendment categorization, generally, of all donated monuments displayed in the City's Pioneer Park (and, by extension, all donated monuments in public parks).

This Article brackets two types of government religious speech, legislative prayer (allowed as uniquely historical) and "ceremonial deism" (historical practices, e.g., the use of "under God" on U.S. currency, which have been explained away as rote phrases that have lost religious significance over time). While each can be distinguished from the symbols analyzed in *Summum* and *Buono* based on their unique features, to do so would require extended explanation, which would be distracting here. For comprehensive analysis of these two issues,

Establishment Clause, it is more effective to show, rather than to simply tell, these conclusions.

First, this Article briefly reviews how *Pleasant Grove City v. Summum* expanded the "government speech doctrine" to include broad "identity" messages. The second Section explores several possible interpretations of Justice Souter's melancholy reflections. Third, the Article provides the necessary background from *Salazar v. Buono*. Next, the Article sets forth the new National Memorial research and evaluates whether the Mojave Cross National Memorial, standing alone, violates the Establishment Clause. Finally, the last Section considers what would be added to the analysis if Congress were to refuse National Memorial status to the alternative WWI symbols, while continuing to bestow that honor on the small cross in the desert.

I. A BRIEF PERSPECTIVE ON *SUMMUM*'S EXPANSION OF GOVERNMENT SPEECH

Pleasant Grove City v. Summum is especially significant because, for the first time, the Court extended the developing "government speech doctrine" to situations where the government joins with private partners to express broad, thematic government "identity messages."[31] Earlier cases upheld "government speech" defenses against Free Speech Clause claims that involved established federal programs, which had specific, objective government policies (anti-abortion and promoting beef consumption).[32] *Summum* also,

see, e.g., B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705 (2009); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsement*, 94 MINN. L. REV. 972 (2010).

[31] *See* Dolan, *Government Identity Speech*, *supra* note 6, at 4 ("'[I]dentity speech' can be loosely defined as expression that is consistent with a government's identified or desired image and values, especially communitarian and promotional themes."); Brief of Amicus Curiae International Municipal Lawyers Association in Support of Petitioners at 12–13, Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (No. 07-665) [hereinafter IMLA Brief] (IMLA's "Municipal Practice Examples" showed how governments' decisions regarding monuments "express community ideals at the time of installation."). For supporting quotes from the *Summum* opinion, see *infra* note 37.

[32] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) (holding that a compelled subsidy to pay for pro-beef advertising was protected government speech); Rust v. Sullivan, 500 U.S. 173 (1991) (holding that a prohibition of Title X funding recipients from providing abortion counseling did not violate the First Amendment). The Circuit Courts, however, have been dealing with claims of broad, thematic "government speech" for some time, *see, e.g.*, Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 964 (9th Cir. 2008) (specialty license plates); Wells v. City & Cnty. of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001) (private sponsors and city's holiday display), but the Court did not address or adopt the Circuit Courts' government speech tests.

Also, in a related doctrine, the "speech selection cases," the Court has allowed the

correspondingly, relaxed the "government control" requirement for messages originating with a private speaker, finding "final approval authority" to be sufficient.[33]

In some ways, *Summum* was an easy case, as indicated by its 9-0 outcome. The Tenth Circuit held that because the City had displayed some donated monuments in its public park, and parks are traditional public forums for speech, it was required to display all private monuments on a content-neutral basis.[34] While this seemed a ridiculous outcome, the Court also declined to use limited public forum analysis, even though it seemed applicable.[35] Atypically, Pleasant Grove City had a reasonably consistent practice, later put into a written policy, of displaying in Pioneer Park only donations that either related to local history or were contributed by local organizations. Summum, a small religion based in Salt Lake City (and an experienced Ten Commandments litigator), fit neither category. Nonetheless, allowing a government to use "content limitations," such as "local history," would have been of little use in the monument context. Governments sought to be free of "viewpoint neutrality" too, in order to defend standard monument-context decisions, such as erecting a war memorial, but declining a statue portraying the war's foreign casualties.[36]

And so, the Court's decision in *Summum* emphasized that, in choosing to accept and display privately donated monuments, a government intends to convey some message—and that message is

government to make content-based—but not viewpoint-based—decisions regarding which private speakers to feature or fund when it acts in certain institutional capacities. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (holding that requiring the NEA to take into consideration respect for diverse beliefs in determining grant applications did not violate Free Speech Clause); *see also* Dolan, *Government Identity Speech*, *supra* note 6, at 14–24 (discussing the several types of "government speech" cases in depth). In fact, a wide variety of constitutional cases can be characterized as involving questions of government speech. *See, e.g.*, Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001) (analyzing eight categories of cases in which government speech problems have arisen); Abner S. Greene, *(Mis)Attribution*, 88 DENV. U. L. REV. 833 (2010) (analyzing numerous cases involving expression that is attributed, or misattributed, to the government).

[33] *Summum*, 129 S. Ct. at 1134 (quoting *Johanns*, 544 U.S. at 560–61). In contrast, the *Johanns* opinion had emphasized the government's control over "every word" of the beef advertisement. *Johanns*, 544 U.S. at 561–62.

[34] Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007).

[35] The limited public forum doctrine allows government to open up its property, but only for certain, specified types of content or speakers. *See* Summum v. Pleasant Grove City, 499 F.3d 1170, 1171, 1173–74 (10th Cir. 2007) (Lucero, J., dissenting from denial of rehearing en banc). For an in-depth explanation and critique of the *Summum* Court's treatment of forum doctrine, see Dolan, *Government Identity Speech*, *supra* note 6, at 40–44.

[36] *Summum*, 129 S. Ct. at 1137–38 (deciding that forum analysis was unworkable because then, by accepting the Statue of Liberty, the United States would have been obligated to accept and display a "Statue of Autocracy").

one which the decision makers have determined is consistent with the relevant community's desired image and perceived identity.[37] The Court also stressed that governments are "selective" in deciding whether to accept a donation because they do not wish to display "permanent monuments that convey a message with which they do not wish to be associated."[38] The opinion also relied heavily on the conclusion that observers will "reasonably" interpret donated monuments "as conveying some message on the [government] property owner's behalf." [39]

In many expressive contexts with mixed public-private roles (including permanent monuments in public parks), something like the government speech doctrine seems necessary—or at least a good fit with intuitively appealing outcomes.[40] But it is not only legal scholars who appear discomfited by the lack of limits on government speech, particularly given the broad concepts the Court used in *Summum*. The Justices, too, appear to be groping for ways to replace the fading lines of forum doctrine with an alternative means of cabining governmental discretion.[41] Justice Alito, for example, noted with approval Pleasant Grove City's now-written criteria for monument selection.[42] But this is a red herring because: (i) these criteria would not have provided the very discretion that was granted by the *Summum* decision, and (ii) written policies are not likely to become the norm in this sporadic context, where years, and administrations, may pass before the next installation, or offer, of a new monument.

Justice Breyer's concurrence proposed his own rule: governments' monument selections must be made according to "criteria reasonably

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[37] Three key statements from the Court's opinion support this characterization. First, the Court wrote that whether a government commissions a monument, or displays a privately financed or initiated monument, "it does so because it wishes to convey some thought or instill some feeling in those who see the structure." *Id*. at 1133. One main reason for finding that Pleasant Grove's monuments were "government speech" was that: "[t]he City has selected those monuments that it wants to display for the purpose of *presenting the image of the City that it wishes to project* to all who frequent the Park . . . ." *Id.* at 1134 (emphasis added). And again, the City's actions—taking ownership and putting the monument on permanent display in a park "that is *linked to the City's identity* . . . unmistakably signify[] to all Park visitors that the City intends the monument to speak on its behalf." *Id.* at 1134 (emphasis added).

[38] *Id.* at 1133.

[39] *Id.* ("In this context, there is little chance that observers will fail to appreciate the identity of the speaker.").

[40] *Compare* Abner S. Greene, *Speech Platforms*, 61 CASE W. RES. L. REV. 1253 (2011) (suggesting an alternative "speech platform" paradigm); Leslie Gielow Jacobs, The Public Sensibilities Forum, 95 NW. U. L. REV. 1357 (2001) (arguing for validity of limits on indecent and offensive speech in certain types of limited public forums).

[41] *See* Transcript of Oral Argument at 35, *Summum*, 129 S. Ct. 1125 (No. 07-665) (noting Justice Kennedy's reference to the forum analysis alternatives as a "tyranny of labels").

[42] *Summum*, 129 S. Ct. at 1134.

related" to the park's "legitimate ends."[43] Their laudatory goal, it seems, is to limit the risk that the "government speech doctrine" will be used to disguise, or excuse, governmental religious discrimination and other unconstitutional acts. This Article suggests that a rejected, nonmajority-religion speaker, who cannot be explained away by a religion-neutral criterion, may serve that purpose well.

II. EXAMINING JUSTICE SOUTER'S PENSIVE PUZZLE

Returning to Justice Souter's thought-provoking words, this Section examines the possible meanings of his conjecture that the developing government speech doctrine may allow government to argue: "when [government] expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups. . . ."[44] Because this "doctrine" refers to a government's defense to a Free Speech Clause claim, the confrontation doctrines will be most clear where, in a single lawsuit, the plaintiff claims both a Free Speech violation—e.g., based on exclusion from an alleged forum—and also claims that *if* the government asserts the "government speech" defense, *then* its speech violates the Establishment Clause by favoring one religion over another.[45]

The question after *Summum* was what, if anything, its government speech holding would add if Summum also claimed that the City's Ten Commandments display violates the Establishment Clause. The commentators were split, but many agreed (often grudgingly, to be sure) with Justice Scalia's preemptive proclamation: the *Summum* decision would not change the outcome, based on *Van Orden*.[46] In *Van Orden*, a plurality dismissed an offended observer's Establishment Clause challenge to a donated Ten Commandments' display on the Texas Capitol grounds, based on its allegedly secular

[43] *Summum*, 129 S. Ct. at 1141 (Breyer, J., concurring) (referring to "legitimate ends" such as "recreational, historical, educational, aesthetic, and other civic interests"). Justice Breyer's suggestion also appears potentially underinclusive.

[44] *Summum*, 129 S. Ct. at 1142 (Souter, J., concurring in the judgment).

[45] To sharpen the judicial focus further, it is also helpful to assume the same (or a relatively similar) government decision maker and social-cultural environment. Then, the Court would be directly reviewing a government's binary, affirmative choice (e.g., "yes" to the Eagles' Ten Commandments, "no" to the Summum's Seven Aphorisms).

[46] *Summum*, 129 S. Ct. at 1139–40 (Scalia, J., concurring) (citing Van Orden v. Perry, 545 U.S. 677, 690 (2005)); *see also* Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. COLLOQUY 70 (2009) (concluding that an Establishment Clause challenge to Pleasant Grove City's Ten Commandments display would not succeed due to *Van Orden*). *But see* Ian Bartrum, Pleasant Grove v. Summum: *Losing the Battle to Win the War*, 95 VA. L. REV. IN BRIEF 43 (2009) (concluding that *Van Orden* is insufficient to deflect a claim that Pleasant Grove's Ten Commandments violates the Establishment Clause).

historical purpose, and not by finding it private speech.[47] An intermediate perspective might be that the presence of a rejected minority-religion speaker would make an Establishment Claim violation more likely, even given *Van Orden*.

But in addition, I tend to think that in some circumstances, the very process of requiring a government first to argue on behalf of the religiously themed speech—to claim it affirmatively as representing the government's own viewpoint—sometimes will make a difference. It may expose a government's bluff. Where a case sits at the intersection of the government speech doctrine and Establishment Clause constraints, and both issues are before the court, the *combination* of arguments may act to flush out government's religious preferences. The following series of hypotheticals, all of which are based on the concept of replaying the *Pleasant Grove v. Summum* lawsuit, illustrate the range of possible meanings of Justice Souter's words.

A. Scenario #1: No Secular Reason Offered— Government Openly States Its Religious Viewpoint

In the two decades leading up to Justice Souter's *Summum* concurrence, there was a significant shift toward allowing a greater blend between church and state.[48] Accordingly, Justice Souter's quote may simply express concern over the future success of Justice Scalia's stated view: that the Establishment Clause permits governments to express their preference for monotheism and the God of the Bible.[49] Imagine if Pleasant Grove City had rejected Summum's Seven Aphorisms on the grounds that they are blasphemous. (Interestingly, it actually is a tenet of the Summum religion that God has proclaimed the Aphorisms superior to the Commandments.[50]) If the City then prevailed, using the "government speech defense," then the new doctrine truly would have capsized

[47] *Van Orden*, 545 U.S. at 690. Justice Breyer's controlling concurrence, however, undermines this view. Not only did he employ the endorsement test, with an added focus on the divisiveness of forced removal, *id.* at 703 (Breyer, J., concurring), but he relied in part on viewers' perception of a secular message based on the identity of the donor, the Eagles. *Id.* at 701–02. *See* Dolan, *Government Identity Speech*, *supra* note 6, at 30–32 (discussing this aspect of J. Breyer's opinion).

[48] *See, e.g.*, Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMENDMENT L. REV. 1, 1 (2006) (arguing that the new Court will continue the trend of abandoning traditional Establishment Clause jurisprudence in favor of the integration of church and state).

[49] McCreary Cnty. v. ACLU, 545 U.S. 844, 893–94 (2005) (Scalia, J., dissenting) (proclaiming that government is entitled to honor the Ten Commandments, in part because 97.7% of Americans believe that these rules were given by God).

[50] *See The Aphorisms of Summum and the Ten Commandments*, SUMMUM, http://www.summum.us/philosophy/tencommandments.shtml (last visited Mar. 26, 2011).

settled Establishment Clause jurisprudence. Such an extreme outcome, however, seems both unlikely and more easily attributed to cultural/political pressure than to the evolution of this particular judicial doctrine.[51]

B. Scenario #2: The Secular Reason Is a "Viewpoint-Neutral" Application of Reasonable "Content Limitations"

On one account, the *Summum* facts themselves constitute religious discrimination; all that was missing was an Establishment Clause claim.[52] But there, the City had provided a reasonable, religion-neutral rationale: the Ten Commandments monument was donated by a local organization, which was one of the two criteria for display in the Park, and Summum was not local, nor did its monument depict local history.[53] So, even with an Establishment Clause claim, there would be no call for the City to risk asserting that, based on the government speech doctrine, it was now "free" to express its own discriminatory views on religion.

C. Scenario #3: The Stated Secular Reason Is Viewpoint-Discriminatory, but May be Justified Without Reference to Religion

Next consider a situation where the rejected, religiously themed display *did* relate to Pleasant Grove City's local history, but in an objectively negative way. Assume, hypothetically, that the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), which continues to practice polygamy today, had deep roots in the City, although for decades its members had lived in a remote location.[54] Imagine that the FLDS descendants of the City's original

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[51] *See, e.g.*, Gregory A. Boyd, THE MYTH OF A CHRISTIAN NATION: HOW THE QUEST FOR POLITICAL POWER IS DESTROYING THE CHURCH (2005) (setting forth the players and the problems); Teddy Davis & Matt Loffman, *Sarah Palin's 'Christian Nation' Remarks Spark Debate*, ABC NEWS, Apr. 20, 2010, http://abcnews.go.com/Politics/sarah-palin-sparks-church-state-separation-debate/story?id=10419289 (discussing the ensuing debate sparked when conservative politician Sarah Palin called America a "Christian Nation" and noted that she rejects separation of church and state).

[52] *See, e.g.*, Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23 (2010).

[53] *See Summum*, 129 S. Ct. at 1129–30.

[54] Note that Pleasant Grove City is one of the original Mormon settlements, started by a group commissioned for that purpose by Brigham Young himself. *See Pleasant Grove History*, PLEASANT GROVE CITY, http://www.plgrove.org/arts-a-education/pleasant-grove-history (last visited Mar. 20, 2011). Mormon polygamy has a longstanding, but highly controversial history. Outlawing this religious practice was a condition of Utah statehood; the required renunciation split the Church; and the splinter group, the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), still engages in polygamy today. *See* MORMON FUNDAMENTALISM,

settlers donated a statute of a man with many wives and children for display in the park, and the City rejected this offer. Application of a viewpoint-neutral "local history" criterion would not help the City prevail in court, but the government speech defense approved in *Summum* would.

This could be one type of case to which Justice Souter referred, because the City's rejection of the FLDS statue would be viewed by some as government discrimination against a disliked religious group.[55] But the statue honors conduct that has been unlawful for over a century, and which portrays a painful chapter in Utah history. It seems more likely a court would hold that drawing this distinction is unrelated to *religious* discrimination, and therefore does not violate the Establishment Clause.

Similar doctrinal conflict can be anticipated in the current context of increasing expressive activism by atheist organizations. The legally interesting case is where a government rejects antagonistic speech, specifically, speech that arguably attacks others' religious beliefs.[56] Actually, one of the first Circuit Court "government speech" cases, *Wells v. City and County of Denve*r, held that Denver's holiday display was government speech.[57] The court thus allowed the city to exclude an atheist group's sign, which declared: "[t]here are no gods" and "the 'Christ Child' is a religious myth."[58] Arguably, the government's response was religion-neutral, done to preserve the display's celebratory spirit, rather than to malign atheism.[59]

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http://www.mormonfundamentalism.com/ (last visited Mar. 20, 2011) (providing a historical and doctrinal examination of Mormon Fundamentalism). For a thorough account of Mormon polygamy, from its origins in the early 19th Century to current fundamentalist outposts, see RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY (2d ed. 1989).

[55] A growing number of legal scholars are criticizing laws banning polygamy as based in religious and cultural discrimination. *See, e.g.*, Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287 (2010); Jonathan Turley, *Polygamy Laws Expose Our Own Hypocrisy*, JONATHANTURLEY.ORG (Oct. 3, 2004), http://jonathanturley.org/2007/08/20/polygamy-laws-expose-our-own-hypocrisy/.

[56] *See, e.g.*, Mallory Simon, *Missing Atheist Sign Found in Washington State*, CNN.COM (Dec. 5, 2008), http://www.cnn.com/2008/LIVING/12/05/atheists.christmas/ (last visited May 4, 2011) (story about, and photo of, a large sign posted by the Freedom From Religion Foundation, alongside a Nativity scene in a holiday display at the State of Washington Legislative Building, stating: "There are no gods. . . . Religion is but myth and superstition that hardens hearts and enslaves minds").

[57] 257 F.3d 1132 (10th Cir. 2001).

[58] *Id.* at 1137.

[59] *Id.*

[59] Of course, any time a government asserts an ostensibly religion-neutral rationale for excluding a minority group's message on religion, the use of such fine distinctions will be controversial, especially where the group faces discrimination even where engaged in expression that is clearly context-appropriate. *See, e.g.*, Caroline Mala Corbin, *Nonbelievers and*

D. Scenario #4: The Stated Secular Reason Is Viewpoint-Discriminatory, and Cannot Clearly Be Justified Without Reference to Religion

The core problem identified by Justice Souter will present where there are no easy escapes: no relatively objective, secular reason that is clearly distinct from religious preference. The clash of doctrines is most apparent where a government relies on *Summum*'s broad "government identity speech" concept, but its asserted reason for selection cannot be distinguished from the community's *religious* identity.

To illustrate, suppose that Pleasant Grove City was offered two religious symbols for display. The Church of Jesus Christ of Latter-Day Saints' (LDS or Mormons) headquarters donated a large replica of the golden plates (a central aspect of the Mormon foundation story).[60] Around the same time, the descendants of the City's first non-Mormon church donated a similarly sized Christian cross, with a plaque explaining its local historical import. Say the City chose to display the golden plates, and reject the cross—and then defended its decision as a closer fit with the City's image.[61]

If the City asserted government speech as its defense to the non-Mormon church's Free Speech Clause claim, this would be a paradigmatic example of "government identity speech" that cannot be explained without reference to religion. And so, the City would be in the precise position Justice Souter described, arguing to the court that because the monument-display decision was "government speech," it was entitled to express its own and the community's viewpoint—in favor of the Mormon-majority plates. Because such an affirmative act of religious preference would violate the Establishment Clause, to defend this result, the government would need to argue that under the new government speech doctrine, "when [government] expresses its

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Government Religious Speech, 97 IOWA L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1797804) (describing discrimination faced by atheists in America).

[60] LDS stands for The Church of Jesus Christ of the Latter-Day Saints; the LDS headquarters is located in Salt Lake City, Utah. For a brief history, see http://lds.org/church history/history/0,15486,3943-1-2104,00.html.

[61] Note that the Christian cross is not a central symbol for Mormons. *See* Am. Atheists, Inc. v. Duncan, No. 08-4061, 2010 U.S. App. LEXIS 26936 at *26 (10th Cir. Dec. 10, 2010) (holding that Utah Highway Patrol's 12-foot memorial crosses on shoulder of highway violated the Establishment Clause). Recall the Court's explanations in *Summum v. Pleasant Grove City*: "The City has selected those monuments that it wants to display for the purpose of *presenting the image of the City that it wishes to project* to all who frequent the Park." 129 S. Ct. 1125, 1134 (2009) (emphasis added).

own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups."[62]

Of course, the more disliked, unusual, or small the religious minority group whose symbol the government would like to reject, the more seductive this approach will be. To continue this thought experiment, what if Summum *had* been a local minority religion, with its historical origins in Pleasant Grove City? The City likely still would have preferred to reject the Seven Aphorisms monument based on the group's unusual—but not illegal—practices (e.g., mummifying household pets and worshiping in a backyard pyramid[63]). Exploring these points of intersection, between the government speech defense and the norm of government neutrality on religion, reveals the difficulties ahead.[64]

III. *BUONO*'S CROSSED SIGNALS: TRANSFERRING THE LAND, YET CREATING A NEW NATIONAL MEMORIAL

Salazar v. Buono stretched over a decade of procedurally complex litigation, and yielded six Supreme Court opinions, but still resulted in remand with directions to the district court to re-do its "endorsement test" analysis.[65] This Section provides only a brief sketch—just enough to provide background for the National Memorial issue, and to show the endorsement test's current contours.

At issue was Congress's attempt to transfer to a private owner, the local Veterans of Foreign Wars ("VFW"), the parcel of federal land underneath the challenged cross war memorial.[66] The original white cross on Sunrise Rock was erected in 1934 by a group of World War I veterans, members of the VFW post in this remote area. Originally, the cross bore a sign that identified it as a war memorial, and set out its origin.[67] Over the years, the cross was replaced, but the sign was

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[62] *Summum*, at 1142 (Souter, J., concurring).

[63] *See Modern Mummification for Pets & Animals*, SUMMUM, http://www.summum.us/mummification/pets/ (last visited Mar. 26, 2011).

[64] This Article is directed at the questions rather than potential solutions, and thus, I will not discuss here the efficacy of various proposals, including the disclaimer idea on which I have previously written. Dolan, *Government Identity Speech*, *supra* note 6, at 49–73.

[65] Salazar v. Buono, 130 S. Ct. 1803 (2010) (Kennedy, J., plurality); *id.* at 1821 (Roberts, C.J., concurring) (two-sentence opinion calling the sale an "empty ritual"); *id.* (Alito, J., concurring) (objecting to remand); *id.* at 1824 (Scalia, J., concurring) (joined by J. Thomas) (Buono lacked standing to appeal *Buono IV*); *id.* at 1828 (Stevens, J., dissenting on merits) (joined by Justices Ginsburg and Sotomayor); *id.* at 1842 (Breyer, J., dissenting) (based on the "law of injunctions," Court should have deferred to district court's interpretation of its injunction).

[66] *Buono*, 130 S. Ct. at 1815–16 (noting that the proposed land swap is with a private citizen named Harry Sandoz, who has agreed to transfer the land to the VFW, as part of his promise to his dying friend, one of the WWI veterans who erected the original cross memorial).

[67] *Id.* at 1812.

not; and most years, the site was used for a sunrise Easter service.[68] In 1994, Congress designated a large swath of desert, including this location, as the "Mojave Desert Preserve."[69]

When Frank Buono sued, asserting that allowing a cross display on federal land violated the Establishment Clause, the federal district court agreed and enjoined the cross's continued display.[70] During this time period, Congress responded to the lawsuit by passing a bill that prohibited using federal funds to remove the cross.[71] Then, while *Buono I* was pending, Congress passed the 2002 National Memorial Act, which provided:

> The five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 . . . now located within the boundary of the Mojave National Preserve . . . is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.[72]

The Act also required the government to acquire and install a replica of the original wooden cross and the 1934 plaque, using up to $10,000 of funds appropriated for administration of the Mojave Desert Preserve.[73] The original plaque, which was to be replicated,

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[68] *Id.*

[69] *See* California Desert Protection Act of 1994, Pub. L. No. 103–433, § 502, 108 Stat. 4471, 4890 (establishing the Mojave National Preserve). A "National Preserve" works to preserve open space similarly to a "National Park," while continuing to allow more private uses of the land. *See generally* U.S. NAT'L PARK SERVICE (Mar. 27, 2011), http://www.nps.gov/ (providing information about the National Park Service).

The government's passivity toward a cross on federal land for so many decades prior to this litigation may suggest tacit approval, but it actually is quite ambiguous in the context of Western land-use practices. According to an article on controversies over the use of presidential declarations of National Monuments, "[a]pproximately 27.7% of the land area of the United States, or some 630 million acres, is under federal ownership," and "[h]istorically, absent withdrawal or reservation for specific purposes, federal lands were considered to be in the public domain," originally, open for settlement, and generally, open for public use. Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 ECOLOGY L.Q. 707, 709 (2002) (citing U.S. DEPARTMENT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 208 (121st ed. 2001)).

[70] Buono v. Norton, 212 F. Supp. 2d. 1202 (C.D. Cal. 2002) (*Buono I*), *aff'd*, 371 F.3d 543 (9th Cir. 2004) (*Buono II*).

[71] *See* Consolidated Appropriations Act, Pub. L. No. 106–554, § 133, 114 Stat. 2763, 2763A-230 (2000) ("None of the funds in this or any other Act may be used by the Secretary of the Interior to remove the five-foot tall white cross located within the boundary of the Mojave National Preserve . . . .").

[72] Department of Defense Appropriations Act, 2002, Pub. L. No. 107–117, § 8137(a), 115 Stat. 2230, 2278 (2002).

[73] *Id.* § 8137(c) ("The Secretary of the Interior shall use not more than $10,000 of funds available for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial designated by subsection (a) and to install the plaque in a suitable location on the grounds of the memorial.").

had declared: "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884."[74] Finally, to avert removal of the Cross on a long-term basis, Congress enacted the Land Transfer Act.[75] When Frank Buono went back to court to stop the proposed land transfer, the district court issued a permanent injunction against its implementation, finding that Congress's transfer statute was an illicit attempt to evade the court's original injunction. The Ninth Circuit affirmed,[76] bringing the validity of the land transfer before the Court in *Buono*.

Justice Kennedy's plurality opinion reversed and remanded, strongly urging the district court to conclude that once the cross was on private land, the reasonable observer would no longer view the cross as conveying governmental endorsement of Christianity.[77] Both the plurality and Justice Alito's concurrence emphasized that a government's effort to *preserve* a religious symbol with a specific, secular, historical meaning is unlikely to be viewed by a "well-informed observer" as a government endorsement of religion.[78] They also agreed that the social meaning of a symbol derives from its historical era; when erected, the Cross's meaning as a WWI war memorial would have been clearly evident.[79] Significantly, Justice

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[74] *See* Salazar v. Buono, 130 S. Ct. 1803, 1812 (2010) (quoting Buono v. Kempthorne, 527 F.3d 758, 769 (9th Cir. 2008)).

[75] 16 U.S.C. § 410aaa–56 (2006). Additionally, in 2003, Congress had passed another bill prohibiting the cross's removal. *See* Department of Defense Appropriations Act, 2003, Pub. L. No. 107–248, § 8065(b), 116 Stat. 1519, 1551 (2002).

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

[77] *Buono*, 130 S. Ct. at 1819 (Kennedy, J., plurality opinion) ("The court made no inquiry into the effect that knowledge of the transfer of the land to private ownership would have had on any perceived governmental endorsement of religion").

[78] *See, e.g.*, *Buono*, 130 S. Ct. at 1823 (Alito, J., concurring) (the "well-informed observer" would appreciate that the land transfer was the government's attempt to "eliminate any perception of religious sponsorship," while avoiding the "disturbing symbolism associated with the destruction of the historic monument."); *id.* at 1817 (Kennedy, J., plurality opinion). For additional textual support for this interpretation, along with discussion of the limitations of such an "expanded" endorsement test, *see*, Dolan, *Endorsement and History*, *supra* note 26.

[79] Noting that the original reason WWI veterans installed the cross was "to commemorate American war dead," Justice Alito wrote:

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

Id. at 1822 (Alito, J., concurring in part and concurring in judgment); *see also id.* at 1820 (Kennedy, J., plurality opinion) ("It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles . . . ."); *cf. Cemeteries*, AMERICAN BATTLE MONUMENTS COMMISSION, http://www.abmc.gov/cemeteries/cemeteries.php (last visited Mar.

Alito noted that a reasonable observer could easily distinguish the social meaning of the transfer of a 70-year-old cross war memorial from the new "construction of an official World War I memorial on the National Mall."[80] Stressing "the highly fact-specific nature" of a "proper" endorsement inquiry, the Court remanded the issue to the district court for consideration of "all of the pertinent facts and circumstances surrounding the symbol and its placement."[81]

Congress's 2002 designation of the Mojave Cross as a "National Memorial" seems particularly "pertinent" to unraveling this multi-layered controversy.[82] The lower court opinions, and the majority of Justices who addressed it, focused on whether it meant that, even post-land transfer, the federal government would retain control over the land and the cross.[83] The Justices dismissed its impact by means of statutory construction, relying on the text of the controversial reversionary clause in the Land Transfer Act. That clause required the VFW to maintain the land as "a" WWI war memorial.[84] Ignoring the clear implications of the long saga to keep the Mojave Cross on Sunrise Rock,[85] they concluded that the Land Transfer Act gave the

28, 2011) (providing lists and photos of overseas military cemeteries).

[80] *Buono*, 130 S. Ct. at 1824 (Alito, J., concurring) ("[A] reasonable observer would not view the land exchange as the equivalent of the construction of an official World War I memorial on the National Mall"). These hints of Justices Alito and Kennedy's opinions are important because each is likely to continue playing key roles in future decisions involving religion.

[81] *Id.* at 1819–20 (plurality opinion) (stating that the district court should do this inquiry "in the first instance").

[82] Department of Defense Appropriations Act, 2002, Pub. L. No. 107–117, § 8137, 115 Stat. 2230, 2278–79 (2002).

[83] *Buono*, 130 S. Ct. at 1819–20; Buono v. Kempthorne, 527 F.3d 758, 779 (9th Cir. 2008) (*Buono IV*).

[84] The relevant provision of the 2003 Land Transfer Act appeared to restrict future use of the property only to use as "a" war memorial (and not, specifically, as the "white cross" war memorial named in the earlier National Memorial Act):

> (e) REVERSIONARY CLAUSE.—The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property *as a memorial* commemorating United States participation in World War I and honoring the American veterans of that war. 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.

Department of Defense Appropriations Act, 2004, Pub. L. No. 108–87, § 8121(e), 117 Stat. 1054, 1100 (2003) (emphasis added).

[85] The intensity of this fight is clear from the continued post-decision drama. First, the cross was stolen, allegedly to protect the Court's decision, and VFW-sympathizers quickly erected a replacement cross, also by cover of night. *See* Caroline Black, *Mojave Cross Honoring U.S. War Dead Stolen in Middle of the Night*, CBSNEWS.COM, May 12, 2010, http://www.cbsnews.com/8301-504083_162-20004719-504083.html; *Anonymous Letter Explaining Cross Theft Sent to Desert Dispatch*, DESERTDISPATCH.COM (May 11, 2010, 5:27 PM), http://www.desertdispatch.com/articles/explaining-8465-anonymous-letter.html (last visited Mar. 28, 2011);

VFW complete freedom to replace the cross with a different kind of WWI war memorial.[86]

Whether the National Memorial designation itself violates the Establishment Clause is a new and distinct issue. Only Justice Stevens' dissent addressed its significance.[87] He interpreted the Act as a congressional declaration that the Mojave Cross is "*the*" World War I National Memorial, thus granting the desert cross a status equivalent to the National Mall's iconic symbols: the Washington Monument, the Lincoln Memorial, and the Vietnam and WWII memorials.[88] If Justice Stevens' interpretation was accurate, if Congress has chosen

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Mojave War Memorial Torn Down by Vandals!, LIBERTYINSTITUTE.ORG, http://www.libertyinstitute.org/current_cases.php?category=6&article=67 (last visited Mar. 28, 2011). NPS responded by removing the cross as a violation of court orders—after refraining from doing just that during the many years during the litigation. (The cross had been covered by a cardboard box.) *See Replica Cross Mysteriously Appears in Mojave: Authorities Call it Illegal and Remove it from Federal Preserve*, ASSOCIATED PRESS, May 20, 2010, *available at* http://www.msnbc.msn.com/id/37261550; *Park Service Removes Mojave Cross Replica*, CBN.COM, May 21, 2010, http://www.cbn.com/cbnnews/us/2010/May/Stolen-Mojave-Desert-Cross-Returned/. Since then, veterans and conservative Christian organizations have campaigned loudly for the cross to be restored. *See, e.g.*, LIBERTY INSTITUTE, PUT THE CROSS BACK!, http://www.putthecrossback.com (last visited Mar. 28, 2011).

[86] *See Buono*, 130 S. Ct. at 1823 (Alito, J., concurring in part and concurring in the judgment) ("Congress did not prevent the VFW from supplementing the existing monument or replacing it with a war memorial of a different design."); *id.* at 1826 (Scalia, J., concurring in the judgment) (stating that it is "merely speculative" to assert that the VFW will keep up the cross because "[n]othing in the statutes compels the VFW (or any future proprietor) to keep it up"); *id.* at 1837 (Stevens, J., dissenting) (stating that the land transfer statute "does not categorically require the new owner of the property to display the existing memorial[,] . . . [although it] most certainly encourages this result"). Justice Kennedy's opinion for the Court (joined only by Chief Justice Roberts) avoided addressing the issue, merely noted in passing, as if an interesting fortuity, that "Congress *ultimately* designated the cross as a national memorial, ranking it among those monuments honoring the noble sacrifices that constitute our national heritage." *Id.* at 1817 (plurality opinion) (emphasis added).

[87] *See id.* at 1841–42 (Stevens, J., dissenting). Note that Justice Stevens' point was not to evaluate the constitutionality of the designation per se, but rather to provide additional support for his position that the land transfer to the VFW would be insufficient to cure the previously adjudicated religious endorsement. *Id.* at 1837–38.

[88] *Id.* at 1841–42 (Stevens, J., dissenting) ("As far as I can tell, however, it is unprecedented in the Nation's history to designate a bare, unadorned cross as the national war memorial for a particular group of veterans. Neither the Korean War Memorial, the Vietnam War Memorial, nor the World War II Memorial commemorates our veterans' sacrifice in sectarian or predominantly religious ways. Each of these impressive structures pays equal respect to all members of the Armed Forces who perished in the service of our Country in those conflicts. In this case, by contrast, a sectarian symbol *is* the memorial. *And because Congress has established no other national monument to the veterans of the Great War, this solitary cross in the middle of the desert is the national World War I memorial.*") (second emphasis added); *see also* Brief of Respondent at 38, *Buono*, 130 S. Ct. 1803 (No. 08-472) ("As a national memorial, the cross is in a select group. There are only 45 other national memorials in the United States, and the list features some of the nation's most significant and iconic symbols, including the Washington Monument, the Jefferson Memorial, the Lincoln Memorial, the Vietnam Veterans Memorial, the United States Marine Corps Memorial, the Flight 93 Memorial, and Mount Rushmore.").

to honor only the Christian military sacrifice in WWI,[89] then the National Memorial designation would almost certainly violate the Establishment Clause. Under that account, any reasonable observer would conclude that the 2002 Act conveys a Christian bias, and that Congress showed indifference to its harsh, exclusionary message.

IV. THE CONSTITUTIONALITY OF THE MOJAVE CROSS WWI NATIONAL MEMORIAL

Compiling the National Memorial story from various facts in the published decisions and media reports looks even worse. Not only was it assumed that Congress intentionally chose a Christian cross as the Nation's WWI symbol, but in the same 2002 Act, Congress directed the federal government to pay for and install a new, replacement cross monument. Also, unlike the three other legislative actions supporting the Mojave Cross during the *Buono* litigation, this Act's purpose was not directed at saving the cross from imminent removal. That this new honor was both superfluous to the preservation goal, and granted in the face of an Establishment Clause lawsuit, suggests disregard for the appearance of religious endorsement. Moreover, this same cross war memorial had earlier failed to qualify for the National Registry of Historic Places, which—in contrast to the National Memorial honor—is governed by objective standards and expert selection.[90] Proclaiming a new National Memorial, a designation shared by iconic symbols, appears to be a fundamental tool for creating, and publicly affirming, the national identity. As a result, its timing, immediately post-9/11, could raise suspicions that its intended message was to declare to the world that the United States is a Christian Nation.

The research presented in this Section IV, however, constructs a strikingly different, more ambiguous narrative. On the whole, the new information either rebuts or shows no foundation for the charges

[89] *See Buono*, 130 S. Ct. at 1842 (Stevens, J., dissenting) ("[T]he Government's interest in honoring *all* those who have rendered heroic public service *regardless of creed*, as well as its constitutional responsibility to avoid endorsement of a particular religious view, should control wherever national memorials speak on behalf of our entire country." (emphasis added)); *see also* Brief of Respondent at 40, *Buono*, 130 S. Ct. 1803 (No. 08-472) ("Because the cross is sectarian and specifies the divinity of Christ . . . [r]egardless of who owns the land on which the cross sits, its continuing designation as a national memorial excludes the contribution and sacrifice of hundreds of thousands of non-Christian World War I veterans and their families."); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211 (2011).

[90] *See infra* Section IV.B.3.

above, although it does identify some new issues which could be used to build the case for an invalid preference.

Because one goal of this Symposium Article is to explore the difference, if any, that would be made by the combination of an Establishment Clause and a Free Speech claim with a "government speech defense," this Section IV will start by presenting the baseline inquiry. Does the 2002 National Memorial designation, standing alone, violate the Establishment Clause? Then, Section V will address the ultimate question of how the new government speech doctrine might affect this analysis.

This Section is structured around the *Lemon*/endorsement test,[91] which continues to be the primary approach used by courts in symbolic speech cases.[92] It begins by examining the traditional indicators for determining whether a statute had a "secular purpose," and then presents most of the research findings as the contextual details used to assess "primary effect" and the appearance of governmental endorsement of religion.

A. Secular or Religious Purpose?

Under *McCreary County*, the Supreme Court's most recent case decided on "purpose" grounds, legislative purpose is viewed through the eyes of an "'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute.'"[93] Writing for the slim majority, Justice Souter counseled: "although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[94]

The text of the 2002 National Memorial Act states that Congress's purpose is to "commemorat[e] United States participation in World

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[91] Lemon v. Kurtzman, 403 U.S. 602 (1971) (as modified by Agostini v. Felton, 521 U.S. 203 (1997) (folding original three prong, excessive entanglement, into second prong); Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring) (clarifying the *Lemon* test by asking how purpose and effect would appear to a reasonable observer).

[92] *See, e.g.*, ACLU v. DeWeese, 633 F.3d 424, 434 (6th Cir. 2011) ("As reformulated in recent years, the second prong of *Lemon* asks whether 'the government action has the purpose or effect of endorsing religion.'") (quoting ACLU v. Mercer Cnty., 432 F.3d 624, 635 (6th Cir. 2005)); Am. Atheists, Inc. v. Davenport, No. 08-4061, 2010 WL 5151630, at *16-17 (10th Cir. Dec. 20, 2010) (applying the reformulated second prong of *Lemon* that asks "whether [the] government's actual purpose is to endorse or disapprove of religion") (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). Both cases are recent examples of Circuit Courts applying the *Lemon*/endorsement inquiry.

[93] McCreary Ctny. v. ACLU of Ky., 545 U.S. 844, 862 (2005) (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000)).

[94] *Id.* at 864.

War I and honor[] the American veterans of that war."[95] While the Act's stated purpose is secular, it surely is debatable whether the commemorative symbol chosen transforms that purpose into a primarily sectarian one. The Act's express reference to the cross's provenance, however, performs multiple secularizing functions. The text expresses that the memorial was erected by a private, secular group, the VFW; also, the year of origin conveys its members' likely status as WWI veterans and the memorial's almost 70 years of history. Finally, the Act's stated plan, to restore the explanatory plaque and provide a more historically accurate replica, suggests Congress's intent to emphasize that war memorial history and correct the misimpression that it is merely a Christian cross displayed on federal land.

Next, the Act has no legislative history at all. Indeed, the circumstances surrounding its passage suggest that few in Congress were even specifically aware of voting for it. The Mojave Cross National Memorial designation was but a few lines in an annual Defense Department appropriations bill. And this bill was exceptionally large based on its historic timing in the immediate aftermath of 9/11.[96] This January 2002 Defense Department behemoth also included three appropriations for the preservation of existing war memorials, and those (secular) grants were each in the $2–4 million range.[97]

Nor did a fairly exhaustive search for any press releases or news coverage of the Act uncover any public statements suggesting that its legislative sponsor, Representative Jerry Lewis, had a religious motive. Rather, all such statements expressed only the intent to help preserve the Mojave Cross on Sunrise Rock, and focused repeatedly

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[95] Pub. L. No. 107–117, § 8137, 115 Stat. 2230, 2278–79 (2002). Section 8137(a) reads in full:

> DESIGNATION OF NATIONAL MEMORIAL.—The five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 . . . now located within the boundary of the Mojave National Preserve . . . is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.

Id.

[96] *See* Helen Dewar, *$4 Billion Shifted for Security*, WASH. POST, Dec. 19, 2001, at A6–7 ("[T]he Pentagon . . . received a $42 billion increase, the largest one-year increase in more than two decades, according to Senate Appropriations Committee Chairman Robert C. Byrd (D-W.Va.).").

[97] Pub. L. No. 107–117 §§ 8136(a), 8138–1839, 115 Stat. at 2278–79 (granting $2,100,000 for restoration of the Lafayette Escadrille Memorial, a WWI memorial in Marnes La-Coguette, France; $4,200,000 for the preservation of the former U.S.S. ALABAMA as a memorial; and $4,250,000 for the preservation of U.S.S. INTREPID as a memorial).

on the need to support veterans and respect military sacrifice.[98] There is no evidence to analogize this situation to the few cases where the Court has found an Establishment Clause violation based on legislators' manifest religious purpose.[99]

Also troubling, though not relevant to show Congress's purpose in January 2002, is that Congress took similar action in 2004, when it designated the Mount Soledad Memorial in San Diego a "National Memorial." The Mount Soledad cross memorial has been litigated for decades; recently, the Ninth Circuit held its display on federal land unconstitutional.[100] While its National Memorial designation also was not at issue in the Mount Soledad litigation, there were legislators' statements to review. The court interpreted their stated desire to preserve the cross as reflecting only their intent to respect the

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[98] *See, e.g.*, Rene Sanchez, *Cross Creates Desert Storm: ACLU, Park Service Debate Makeshift War Memorial*, NAT'L ASS'N OF TRIBAL HISTORIC PRESERVATION OFFICERS, Dec. 9, 2002, http://www.nathpo.org/News/Sacred_Sites/News-Sacred_Sites35.htm ("'Preserving the cross is only about preserving a part of history in the desert,' said Jim Specht, a spokesman for Lewis. 'Residents out there have a very strong attachment to it as a war memorial, not as a religious symbol. People come from all over the desert to use it as a gathering point.'"); *Lewis Advances Resolution Urging Return of Mojave Cross*, VICTORVILLE DAILY PRESS, Sept. 28, 2010, http://www.vvdailypress.com/articles/resolution-22043-advances-return.html ("It is time to give our veterans groups the ability to replace this important memorial to those who gave their lives to defend our nation and freedoms." (quoting Rep. Jerry Lewis (R-CA))); *Congress Condemns Theft of Mojave Cross Memorial*, CHRISTIAN EXAMINER, Oct., 2010, http://www.christianexaminer.com/Articles/Articles%20Oct10/Art_Oct10_09.html ("'Supporting our veterans is one of the top priorities for members of Congress, and I am grateful that my colleagues took this important measure up before we went out of session,' said Lewis. 'Congress has repeatedly voted overwhelmingly to protect the Mojave Cross as a memorial to veterans and those who have died to defend our nation, and it is vital that we continue that support.'" (quoting Rep. Jerry Lewis (R-CA))).

[99] The Court has relied on the "purpose" prong only a handful of times. *See* McCreary Cnty, v. ACLU of Ky., 545 U.S. 844 (2005) (religious purpose in posting Ten Commandments in courthouses); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (where a school's policy, amended in response to litigation challenging long history of student-led prayer at high school football games, specified that one purpose of the student's address was to "solemnize" the event, and suggested an "invocation"); Edwards v. Aguillard, 482 U.S. 578 (1987) (teaching intelligent design in biology class); Wallace v. Jaffree, 472 U.S. 38 (1985) (statute's sponsor proclaimed his religious purpose for Alabama's "moment of silence" law); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (where a school posted the Ten Commandments in every classroom).

[100] *See* Trunk v. City of San Diego, 629 F.3d 1099 (9th Cir. 2011) (holding that memorial cross on federal land violated Establishment Clause). The Ninth Circuit opinion sets forth the entire, multiple-case history, which stretched out over two decades. *Id.* at 1103–04. Following federal courts' declaration that the cross display on city land violated the California Constitution, and later holdings that various efforts to save the cross memorial also were unconstitutional, Congress passed a law designating the Mount Soledad cross a National Memorial and authorizing the federal government to take ownership. *Id.* at 1104 (citing Consolidated Appropriations Act, Pub. L. No. 108–447, § 116, 118 Stat. 2809, 3346-47 (codified at 16 U.S.C. § 431 note)). Here, too, the honorary label appears extraneous; although for Mount Soledad, it arguably may have been necessary to establish a public purpose for eminent domain.

military, which it found a sufficiently "secular purpose."[101] In sum, while it is always an elusive quest to find a viable "legislative" intent,[102] there is insufficient evidence to show that the Mojave Cross National Memorial Act's express, secular goal is a "sham" or "merely secondary to a religious objective."[103]

While the Act's timing may cause speculation as to motive, that alone likely is insufficient to show a religious purpose. As Justice Souter observed in *McCreary*, "A secret motive stirs up no strife and does nothing to make outsiders of nonadherents. . . ."[104] It is undeniable that Representative Lewis introduced the Act as part of his response to Frank Buono's pending Establishment Clause lawsuit over the Mojave Cross; the Act was one of four bills he sponsored during his campaign to keep the cross war memorial at its original location.[105] In addition, while to some, passage after 9/11 is consistent with the nation's surge in patriotism, to others, that time period was infected with jingoism, often combined with religious fervor.

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[101] In *Trunk v. City of San Diego*, when analyzing the legislative purpose of the statute by which the federal government acquired a long-litigated cross war memorial, the Ninth Circuit initially stated that it found a secular purpose because the statute was directed at preserving the "war memorial" and did not specifically mention the cross. *Id.* at 1108. But even assuming the statute was ambiguous, the court found a predominantly secular purpose based on legislators' statements on the floor, described above, which the court interpreted as expounding a secular, and not a religious, purpose. *Id.* at 1108–09. Perhaps because it was not at issue, the court made no mention of the suspicious timing of the Mount Soledad National Memorial designation, which also occurred during extended Establishment Clause litigation.

[102] For summaries of the critiques of the "secular purpose" requirement, and proposed amendments to the versions in various precedent, see, for example, Josh Blackman, *This Lemon Comes as a Lemon: The* Lemon *Test and the Pursuit of a Statute's Secular Purpose*, 20 GEO. MASON U. C.R. L.J. 351 (2010) (arguing for statutory, over legislative, purpose, and rejecting of *McCreary*'s objective observer in favor of original public meaning); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88 (2002) (arguing that the secular purpose requirement should allow government to favor religion generally, so long as it does not violate the axiom against declaring religious truth).

[103] *McCreary*, 545 U.S. at 864; *see also Trunk*, 629 F.3d at 1118–22 (Ninth Circuit limited its "purpose" inquiry to the text and legislative history of the statute at issue there, and analyzed most facts as part of its broader "effects" inquiry, including facts showing that (unlike the Mojave Cross) Mount Soledad was created as a Christian monument, and only later, in response to litigation, acquired its current identity as a war memorial).

[104] *McCreary*, 545 U.S. at 863. Justice Souter further explains, "If someone in the government hides religious motive so well that the 'objective observer, acquainted with the text, legislative history, and implementation of the statute,' cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides." *Id.* (citation omitted) (quoting *Santa Fe*, 530 U.S. at 308).

[105] Consolidated Appropriations Act, 2001, Pub. L. 106–554, § 133 app. D, 114 Stat. 2763, 2763A-230 (2000); *see also* Department of Defense Appropriations Act, 2003, Pub. L. 107–248, § 8065(b), 116 Stat. 1519, 1551 (2002) ("None of the funds in this or any other Act may be used to dismantle national memorials commemorating United States participation in World War I."). The other two were the National Memorial designation act under discussion, and the Land Transfer Act. *See supra* Section III.

B. Appearance of Religious Endorsement?

In assessing an act's "primary effect," the endorsement test employs the device of the "reasonable observer." As the attributes of this "hypothetical construct" change over time—increasing in knowledge, and decreasing in sensitivity—criticism of the test has expanded.[106] Still, it remains more sensitive to the impact on viewers, and to changing social contexts, than the backward-looking "tradition" approach. Moreover, it survived *Salazar v. Buono*.[107] The Court's most recent expression of the test, Justice Kennedy's statement in *Buono*, is the most expansive yet: "That test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement."[108]

Some of the research on National Memorials presented below is not widely known, but all of it is publicly available. A "reasonable observer" challenging such a designation could be deemed aware of these background facts and laws, especially under the *Buono* formulation (one "who knows all" pertinent facts).[109] Thus, this Article presents all the relevant information on National Memorials, including history that some courts might decide is a bit too obscure for attribution to the endorsement test's hypothetical informed observer.

1. The Nation's Other WWI Memorials

By far the most significant discovery is that the U.S. already commemorates World War I with several more impressive, and secular, national memorials. Surprisingly, over the past several

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[106] *See, e.g.*, Lisa Shaw Roy, Salazar v. Buono: *The Perils of Piecemeal Adjudication*, 105 NW. U. L. REV. COLLOQUY 72, 81 (2010) ("[W]ithout a reasonable observer who can discern a message of exclusion the endorsement test loses much of its content"). Another main critique of the endorsement test is that in practice, its "reasonable observer" is the judge's usually majoritarian view, and thus inadequately fails its ostensible goal to protect non-adherents. *See* B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 521 (2005) ("[B]ecause the social context that produces meaning reflects the power structure of the larger society . . . the meaning discerned from [religious] displays will contain a majoritarian bias."). *See* Dolan, *Endorsement and History*, *supra* note 26, at 46–47 (for description of test's evolution).

[107] *See* Dolan, *Endorsement and History*, *supra* note 26, at 51–57.

[108] Salazar v. Buono, 130 S. Ct. 1803, 1819–20 (2010).

[109] My own normative position is two-fold. First, the "reasonable observer" should be considered a reasonably informed member of the community that is likely to be viewing the challenged display (or, as here, to become aware of the challenged government act). And second, where a government's actions create the misimpression that it is endorsing religion, it has an affirmative obligation to explain its plausible secular reasons to the immediate audience. *See* Dolan, *Government Identity Speech*, *supra* note 6, at 63 (discussing this position).

years—the very same time period in which *Buono* was before the Supreme Court—two have been competing to be *the* official WWI National Memorial. If the Mojave Cross does not enjoy a singular position, but instead is only one of numerous WWI tributes that are given special recognition by the federal government, then the charge of religious favoritism evaporates.

To start, in 2004, Congress passed a bill recognizing the Liberty Memorial Museum in Kansas City, Missouri as "America's National World War I Museum."[110] The Museum is located on the grounds of the "Liberty Memorial," an iconic white tower with clear national historical significance.[111] The site dedication in 1921 marks "the only time in history" that all five "supreme Allied Commanders . . . were together in one place."[112] And when the Liberty Memorial was completed, "President Calvin Coolidge delivered the dedication speech to a crowd of 150,000 people."[113]

Then, in April 2009, the House passed a bill requesting that the Liberty Memorial monument be designated as *the* National World War I Memorial. In sharp contrast to the assumptions in the *Buono* case, the bill states: "*There is no nationally recognized memorial honoring the service of Americans who served in World War I*."[114] Also, earlier in 2009, a competing bill was introduced, requesting that a District of Columbia World War I Memorial, which already is located on the National Mall, be re-designated as "The National and District of Columbia World War I Memorial."[115]

While the 111th Congress did not reach closure on which of these two monuments is the most fitting national WWI tribute, in March, 2011, a compromise bill was introduced, proposing to make both of

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[110] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108–375, § 1031, 118 Stat. 1811, 1820 (2004). Interestingly, while the government noted in passing, "America's National World War I Museum," Reply Brief for Petitioners at 17, Salazar v. Buono, 130 S. Ct. 1803 (2010) (No. 08-472), it did so only as one item on a list of National Memorials located on private land.

[111] For a brief history and a photo of the Memorial itself, see Jason Roe, Monumental Undertaking, The Kansas City Public Library (Feb. 7, 2011), http://www.kclibrary.org/?q=blog/month-kansas-city-history/monumental-undertaking.

[112] *Mission and History*, NAT'L WORLD WAR I MUSEUM AT LIBERTY MEM'L, http://www.theworldwar.org/s/110/new/index.aspx?sid=110&gid=1&pgid=1114 (last visited Mar. 31, 2011).

[113] *Id.*

[114] World War I Memorial and Centennial Act of 2009, H.R. 1849, 111th Cong. § 2, ¶13 (2009) (emphasis added).

[115] Frank Buckles World War I Memorial Act, H.R. 482, 111th Cong. (2009) (providing that the monument be repaired, and for the addition of a supplemental element or sculpture to signify its proposed new national status). Frank Buckles was the last surviving American WWI veteran. Until his recent death, Mr. Buckles was involved in this campaign for National Memorial designation. Richard Goldstein, *Frank Buckles, Last American World War I Doughboy Dead at 110*, N.Y. TIMES, Mar. 1, 2011, at B16.

them "National Memorials," and to create a new "World War I Centennial Commission" to spearhead Centennial ceremonies. The bill also proposes that this Commission would establish a new commemorative work on the National Mall, on the site of the existing D.C. Memorial, and supplementing it to convey its proposed new National Memorial status.[116] While one could argue that the Mojave Cross currently still stands alone as the only WWI "National Memorial," that stark picture is erased by reading the debates over the dueling candidates for that honor.

From a December 2009 hearing on the competing bills, it appears that neither the federal government, nor the public, is generally aware of the claim that the Mojave Cross was named by Congress to represent all who fought in WWI on behalf of the United States.[117] Also at that proceeding, a National Park Service (NPS) representative testified against both new bills because: "There has not been any study authorized or conducted to determine *which of the various World War I Memorials in the United States would be best suited to be named as the single or official National World War I Memorial*."[118] She explained that WWI veterans already are honored at the General John J. Pershing Park, "a national World War I Memorial on Pennsylvania Avenue," as well as on the Mall near the White House, by the 1st Division and 2nd Division Memorials.[119]

The sense conveyed is that the choice of the "official" WWI National Memorial is a significant decision with major fiscal and symbolic import; in contrast, the 2002 Act designating the Mojave Cross a National Memorial passed by unnoticed, just a bit player in the long *Buono* litigation saga.

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[116] H.R. 938, 112th Cong. (Mar. 8, 2011).

[117] *See also* Tony Dokoupil, *The War We Forgot—World War I Has No National Monument, No Iconic Images, And Only One Soldier Still Alive*, NEWSWEEK, Feb. 18, 2008, at 50 (describing WWI as publicly ignored, compared to other U.S. wars; hypothesizing on the "seeming lack of interest," the article suggests that one reason may be the lack of records: "WWI was the last war fought without modern methods of bearing witness").

[118] Before the Subcomm. on Nat'l Parks of the Comm. on Energy and Nat'l Res., Concerning S. 2097, to Authorize the Rededication of the D.C. War Mem'l as a Nat'l and D.C. World War I Mem'l to Honor the Sacrifices Made by American Veterans of World War I, 111th Cong. (Dec. 3, 2009), *available at* http://www.doi.gov/ocl/2006/S2097_120309.htm (statement of Katherine H. Stevenson, Assistant Director, Business Services, National Park Service, U.S. Department of the Interior) (emphasis added).

[119] *Id.*; *see also American Expeditionary Forces Memorial*, AMERICAN BATTLE MONUMENTS COMMISSION, http://www.abmc.gov/memorials/memorials/pe.php (last visited Mar. 31, 2011) (honoring General Pershing and the American Expeditionary Forces); *First Division Monument*, NAT'L PARK SERV., http://www.nps.gov/whho/historyculture/first-division-monument.htm (last visited Oct. 26, 2010). These monuments, however, are not on the official list of "National Memorials." *See supra* note 122.

2. The Unusual Transfer of the Cross National Memorial

A second point that is significant here, but which was not discussed in the *Buono* litigation,[120] is Congress's past practice of simultaneously "abolishing" the closely related "National Monument" status[121] when the government transferred previously designated National Monument land to another entity.[122] Congress similarly has the power to abolish any of the "National Memorials" it has designated.[123] One reason Congress has abolished monuments in the

[120] Discussion of the land transfer terms in the *Buono* litigation and commentary focused on: (i) whether the remedy was invalid because the government failed to solicit other potential purchasers for the parcel; and (ii) whether the National Memorial designation meant the government would continue to control the property post-transfer. *See, e.g.*, Brief of Plaintiff-Appellee at 26–37, Buono v. Norton, 371 F.3d 543 (9th Cir. 2004) (No. 05-55852) (arguing that the land was transferred "in a manner whose purpose and effect is to keep the cross standing, and the cross's continuing designation as a national memorial . . . reaffirm[ed] the government's continuing endorsement of a sectarian religious symbol"); Christopher Lund, Salazar v. Buono *and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY 60, 64–66 (2010) ("The land transfer demonstrated favoritism toward the cross.").

[121] "National Monument[s]" are defined as "landmarks, structures, and other objects of historic or scientific interest," which are located on government land, while "National Memorial[s]" are defined as "commemorative of a historic person or episode." *Designation of National Park System Units*, NAT'L PARK SERV., http://www.nps.gov/legacy/nomenclature.html (last visited Mar. 31, 2011).

In reviewing the law and examples of each, however, the two categories appear to be indistinguishable for purposes of the issues raised in *Salazar v. Buono.* The annotations to the Antiquities Act of 1906, 16 U.S.C. § 431 (2006), which gave the President authority to declare a "National Monument," provides a comprehensive list of all national monuments established by the President, all national monuments established by Congress, and all national memorials established by Congress. *Id*.

The most significant difference appears to be this separation of powers issue. While both Congress and the President have the power to declare a "National Monument," only Congress has authority to designate a "National Memorial." Congress has this power through its constitutional authority, *see* U.S. CONST. art. IV, § 3, cl. 2 (the "Property Clause"); U.S. CONST. art. I, § 8, cl. 18 (the "Necessary and Proper Clause"), while the President relies on the Antiquities Act § 431, which grants him authority to declare national monuments and to reserve a part of federal land for that purpose. In an interesting historical footnote, presidents often have used this power as a means of land preservation, particularly in the West. *See* Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333 (2002) (discussing this extensive, originally unexpected use of the Antiquities Act); Lin, *supra* note 70, at 709–19 (analyzing use of presidential declarations to preserve open lands in Western states against political opposition, especially President Clinton's unusual designation of 22 such "monuments").

[122] *See Antiquities Act 1906–2006: About the Antiquities Act*, NAT'L PARK SERV., http://www.nps.gov/archeology/sites/antiquities/abolished.htm (last visited Mar. 31, 2011) (listing eleven "abolished" national monuments).

[123] It is well-established that "Congress itself possesses, and has exercised, power to change the status of national monuments." Transfer of Nat'l Monuments to Nat'l Park Serv. in the Dep't of the Interior, 36 Op. Att'y Gen. 75, 79 (1929) (advising that only Congress has authority to transfer national monument from War Dept. to National Park Service); Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Att'y Gen. 185 (1938) (advising that the President lacks the authority to abolish national monuments, even if he originally designated them). Based on the similarities between national monuments and memorials, Congress's broad powers over the use and disposal of federal property, its exclusive authority to designate

past is where the monument is later determined to be "of less than national significance."[124] Typically, in those circumstances, Congress would pass one bill that both transferred the land from NPS to a state or local government, and abolished its existing "National Monument" designation.[125]

The most relevant example is the "Father Millet Cross National Monument," which also involved a lone cross on a small patch of land. A large bronze cross inscribed with Latin words glorifying Christ,[126] at one-eighth acre, it was once known as "America's Smallest National Monument." It commemorates a French missionary priest who, on Good Friday in 1688, blessed the first wooden cross erected on that spot to give thanks for the twelve living survivors, and to pray for the eighty-eight soldiers who died of starvation manning Old Fort Niagara. It was declared a "National Monument" by presidential proclamation in 1925, and a Catholic organization, the Knights of Columbus, donated the bronze upgrade in 1926.[127] But in 1949, after determining that this monument was of "questionable national significance," Congress passed a bill authorizing the Secretary of the Interior to convey the land and monument to the State of New York and abolishing the cross's "national monument" status.[128]

Moreover, reviewing the typical terms of transfer reveals additional irregularities with the Mojave Cross land transfer, which

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National Memorials, and exclusive power to abolish National Monuments, it appears unassailable to conclude that Congress also has power to abolish, or otherwise alter the status of, National Memorials.

[124] *See About the Antiquities Act*, *supra* note 123 (providing information about abolished national monuments).

[125] *Id.*

[126] Specifically, the cross is 18 feet high and 8 feet wide, and bears the inscription "REGN. VINC. IMP. CHRS." These abbreviations stand for, "Regnat, Vinci, Imperat, Christus," which is translated as "Christ reigns, conquers, rules." Thor Borresen, *Father Millet Cross: America's Smallest National Monument*, III THE REGIONAL REVIEW, no.1, July 1939, *available at* http://www.nps.gov/history/history/online_books/regional_review/vol3-1a.htm.

[127] *Id*. at 2; *see also* Bob Janiskee, *Pruning the Parks: Father Millet Cross National Monument, 1925-1949, Was the Smallest National Monument Ever Established*, NAT'L PARKS TRAVELER (Sept. 4, 2009), http://www.nationalparkstraveler.com/2009/09/pruning-parks-father-millet-cross-national-monument-1925-1949-was-smallest-national-monument-ever-es4482 (describing the monument and the history behind it).

[128] H.R. 4073, Pub. L. 81–292, 63 Stat. 691 (Sept. 7, 1949) ("The national monument, upon conveyance of such property to the State of New York, is abolished.") The bill further stated that the transfer was "without consideration, for public use as a part of the Fort Niagara State Park, under such terms and conditions as the Secretary may deem advisable[.]" *Id.* The NPS website, in its narrative, "About the 'Abolished' National Monuments," states that this was done due to "questionable national significance and limited federal development," and that the Fr. Millet cross monument is now part of Fort Niagara State Park. *About the Antiquities Act*, *supra* note 123.

are relevant here. First, where these abolished National Monuments have consisted of physical structures, rather than unique land features, none of these land transfer acts contained a reversionary clause that required continuing to maintain the monument.[129] What these acts did tend to include, however, was a reversionary clause requiring that the land be kept open for public use.[130] Given Sunrise Rock's beauty, its current location in the Mojave Desert Preserve, and its now-private owner, transferring the land to the VFW without an express public use requirement is an additional sign of untoward favoritism.

There are two more missed opportunities that also exacerbate the appearance of endorsement of religion from the Cross's continued National Memorial status. Given the long local history of Easter services at the Mojave Cross, one would expect a "religious use" restriction to appear as a condition of the transfer. And recall the National Memorial Act's requirement that the Secretary of the Interior install a replica cross and plaque to identity the site as a longstanding historic war memorial. Section IV.B.4. explains why federal funding of the cross is unconstitutional. But while pre-transfer, this requirement could have been used as evidence of a secular purpose, now any remaining federal obligation has the opposite effect. One would expect the land transfer act to require the *VFW* to acquire and install a replica cross and sign, if it chose to keep the original memorial, or to erect a replacement WWI memorial within a set time period of its removal.

In sum, for anyone aware of Congress' past practices, the fact that the Mojave Cross National Memorial status was not abolished in the land transfer act, and that the VFW is required to maintain a WWI memorial on the site, but is not also required to keep the site open for public use, refrain from religious worship use, or even pay for the replica and sign that are so essential to conveying a secular, historical message to viewers—all combine to suggest government endorsement of religion. The closer question is whether this history is too obscure to matter. The most recent act abolishing a National Monument was

[129] As mentioned, it appears that these transfers were to other governmental entities; given the Mount Soledad case law construing the California Constitution, doing that was not an option for the Mojave Cross. *See* Ellis v. City of La Mesa, 990 F.2d 1518, 1527 (9th Cir. 1993) (holding that the display of Mount Soledad, a large cross war memorial, on City property violated the California Constitution's "No Preference Clause").

[130] *See, e.g.*, S. Rep. No. 84-1785 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3708, 3710 (Verendrye National Monument's bill provided: "That the Verendrye National Monument, North Dakota, is hereby abolished, and the Secretary of the Interior is authorized to convey the lands . . . to the State of North Dakota for public recreation use and as a State historic site," and "the title and right to possession . . . shall revert to the United States upon a finding . . . that the grantee has not complied with the terms of the conveyance . . . .").

in 1980, but information about these acts is fairly easy to obtain online.[131] The Mojave Cross's unusual transfer terms, however, would be known to anyone who has closely followed the *Buono* litigation or read the judicial opinions.

3. Unqualified as a National Historic Landmark

After the controversy surfaced, in 1999, a NPS historian was asked to evaluate the Mojave Cross for a far more common honor, placement on the "National Register of Historic Places."[132] He found it unqualified. Given that government literature calls the National Register "the official list of the Nation's historic places worthy of preservation,"[133] this also suggests that the cross was made a National Memorial more because it is a Christian symbol with strong constituent support, than based on its historical importance and national significance.

But upon investigation, the grounds for this rejection do not necessarily undermine the validity of its National Memorial designation. To qualify as a National Historic Landmark, knowledgeable professionals must find that the property possesses both "exceptional value" in showing the Nation's heritage, and "*integrity*," a term that refers to consistency with its original appearance.[134] Because the physical object of the cross war memorial had been replaced several times, and because its original

[131] NPS lists eleven National Monuments that have been abolished, with the first occurring in 1930 and the most recent in 1980, which is approximately two decades prior to when the Mojave Cross controversy began. *Antiquities Act 1906–2006: Monuments List*, NAT'L PARK SERV., http://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Feb. 6, 2011). That list, however, is on the federal government's own website, and the primary web page is titled, "About the Antiquities Act," which is one of the first stops in looking at the National Memorial issue. *See About the Antiquities Act*, *supra* note 123.

[132] *See* Buono v. Kempthorne, 527 F.3d 758, 769 (9th Cir. 2008) (*Buono IV*).

[133] *See National Register of Historic Places Program: About Us*, NAT'L REGISTER OF HISTORIC PLACES, http://www.nps.gov/nr/about.htm (last visited Mar. 31, 2011).

[134] 36 C.F.R. § 65.4(a) (2009) (emphasis added) (NPS regulations set the criteria for evaluating and designating property as a "National Historic Landmark."). Primarily, properties are required to be "nationally significant," as determined through evaluations by "professionals, including historians, architectural historians, archeologists and anthropologists familiar with the broad range of the nation's resources and historical themes." *Id.* § 65.4. Subsection (a) further specifies that such landmarks must "possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history" or other areas, *and* "possess a high degree of integrity of location, design . . . materials, [and] workmanship . . . ." *Id.* § 65.4(a); *see also National Register of Historic Places: Fundamentals*, NAT'L REGISTER OF HISTORIC PLACES, http://www.nps.gov/history/nr/national_register_fundamentals.htm (last visited Mar. 31, 2011) (explaining "integrity" as whether the property "still look[s] much the way it did in the past").

commemorative plaque was missing, it lacked the necessary "integrity" to qualify—even given sufficient historical value.[135]

The second reason provided for the 1999 rejection is based on federal preservation laws, which have since changed. Most years, there has been an Easter service held outdoors on Sunrise Rock, and federal land-marking regulations at that time excluded sites that were "used for religious purposes."[136] Federal regulations are now quite flexible:[137] active houses of worship are on the National Registry and have even received federal preservation grants.[138]

4. Using Government Funds to Purchase a Cross

Turning to the 2002 Act's requirement that the Secretary of the Interior use federal funds to "acquire and install" a large wooden cross on Sunrise Rock, it presents an unmistakable Establishment Clause problem. The Act is salvageable, though, because this provision is both severable and unnecessary. Still, demonstrating this constitutional flaw is useful in evaluating the Act's overall "primary effect."

While many funding restrictions on religious organizations have loosened, Supreme Court precedent still requires it to be done as part of a broad, religion-neutral program, and still prohibits spending government funds for a "religious use."[139] Also, the Court has been particularly strict in evaluating Establishment Clause claims involving improvements to real property, which appreciates over time.[140]

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[135] *Buono IV*, 527 F.3d at 769.

[136] *Id.* at 769 (stating that the second reason NPS denied landmark status to the Mojave Cross is that "the site [was] used for religious purposes as well as commemoration").

[137] *See* 36 C.F.R. § 65.4(b) (2009) ("Ordinarily . . . properties . . . used for religious purposes . . . are not eligible for designation. Such properties, however, will qualify if they fall within the following categories: (1) A religious property deriving its primary national significance from architectural or artistic distinction or historical importance. . . ."). For a discussion of increased tolerance for public funding of the preservation of religious properties, *see infra* Part V.B.4.

[138] *See, e.g.*, Press Release, Nat'l Park Serv., Old North Foundation Awarded $317,000 Grant Under Save America's Treasures Program, (May 27, 2003), http://home.nps.gov/news/release.htm?id=395.

[139] The governing case is *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding a public program of lending computers and other instructional equipment to a broad range of schools, including parochial schools), where Justice O'Connor's controlling concurrence approved this *divertible* form of aid, based on the program's "secular use" requirement, but maintained that it is still unconstitutional to *divert* public aid to a religious use. *Id.* at 838–41 (O'Connor, J., concurring).

[140] In the principle case, Tilton v. Richardson, 403 U.S. 672 (1971), the Court allowed federal construction grants to church-affiliated universities as part of a broad-based secular program, but held that a 20-year restriction on religious use of the publicly financed buildings was inadequate because at that time, the building would retain full value. *See also* Comm. for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (striking down a program of

The 2002 Act presents an atypical case: the VFW is a secular entity, and the only religious "use" of its war memorial is the religious service held there one morning a year. But any use of tax funds to purchase and erect a large Christian cross raises a bright red flag. That holds true even if Congress required the replica solely to mitigate the Mojave Cross's religious appearance by emphasizing the war memorial's historicity. The Sixth Circuit made this point recently, while stretching to allow churches to participate in a downtown beautification program. It distinguished permissible repairs, those exterior portions of churches that "lack any content at all," from the unconstitutional use of public funds to purchase or improve anything that "itself has an inherently religious content"—such as paying for a cross.[141]

Indeed, the National Memorial Act's $10,000 grant does not comply with even the current, permissive historic-preservation policy. That policy is based on a 2003 legal opinion from the Department of Justice, Office of Legal Counsel,[142] which itself relied on features of the "Save America's Treasures" Program that were absent in the

grants for maintenance and repair of parochial schools). The Court has never repudiated either this aspect of *Nyquist* or its decision in *Tilton*.

[141] Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 292 (6th Cir. 2009) ("[A] program may have the primary effect of advancing religion *if the benefit itself has an inherently religious content. Governments may not dole out crosses* or Torahs to their citizens, even if they give them to all citizens, without running into an Establishment Clause problem. Yet no such aid was distributed here. In the first place, the government gave monetary grants, not religious symbols, to participating entities. In the second place . . . the vast majority of the reimbursed repairs—the renovation of exterior lights, pieces of masonry and brickwork, outdoor planters, exterior doors, concrete ramps, entrance ways, overhangs, building trims, gutters, fencing, curbs, shrubbery and irrigation systems—lack any content at all, much less a religious content. The thrust of the program goes to facade, not to substance, to giving the *exterior* of the buildings a clean, up-to-date appearance." (first emphasis added) (citations omitted)); *see also* Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. REV. 1139 (2002) (suggesting that the public aid should be allowed to restore the exteriors of historic houses of worship, but prohibited for the interiors, which have religious content).

[142] *See* Authority of the Dep't of the Interior to Provide Historic Pres. Grants to Historic Religious Props. such as the Old North Church, Op. O.L.C. (Apr. 30, 2003), *available at* http://www.justice.gov/olc/OldNorthChurch.htm [hereinafter 2003 OLC Opinion]. This was an about-face from an earlier opinion, Constitutionality of Awarding Historic Pres. Grants to Religious Prop., 19 Op. O.L.C. 267 (1995) [hereinafter 1995 OLC Opinion], which found this type of grant unconstitutional based on the pervasively sectarian nature of the church recipients and *Tilton v. Richardson*. This is not to say there will not continue to be legal challenges to specific cases.

Moreover, the 2003 OLC Opinion itself seems to have overstepped. It relied on the *Mitchell* plurality, where Justice Thomas, joined by only three members of the Court, opined that paying money directly to religious schools for use in religion class would be acceptable, so long as the program itself was available to schools on a neutral basis. 2003 OLC Opinion, *supra* note 143, at II.B. For a discussion of its additional constitutional flaws, see Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 22–25 (2006).

Mojave Cross designation. Specifically, these historic preservation grants are available to a broad array of mostly secular beneficiaries, and are awarded pursuant to a formal, neutral application process.[143] Moreover, the grant award process uses both subject matter experts and pre-established, relatively objective criteria.[144] Also, those grants included a 50-year deed restriction requiring owners to preserve the historical features, and a 50-year public use requirement.[145] In sum, if a court did apply the historic preservation analogy here, the funding provision of the Mojave Cross National Memorial Act would not survive.

C. The Baseline Establishment Clause Claim

It is inherently difficult to draw any reliable conclusions as to the constitutionality of the Mojave Cross National Memorial designation. Not only are outcomes generally unpredictable given the Establishment Clause's context-specific tests, but many facts are still in flux. As shown in Section IV.A., however, the Act is unlikely to fail the "secular purpose" test.[146] The questions posed by the National Registry of Historic Places issue, and the federal funding of a replica cross also have been accounted for.[147] This Section evaluates whether labeling this cross as a National Memorial conveys government endorsement of Christianity. Extrapolating some reasonable assumptions from the status quo, it appears that this particular honorary designation would have a fair chance of passing the endorsement test.

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[143] 2003 OLC Opinion, *supra* note 143, at II.B; *see also* Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 292 (6th Cir. 2009) (upholding property tax reimbursement grants given to several downtown churches by city development authority for renovations to building exteriors for purpose of improving streetscape appearance, stating: "No reasonable, reasonably informed observer, moreover, would infer from the churches' participation in this program, alongside and on equal terms with dozens of secular entities, that the agency endorsed or approved of the churches' religious views. The program's breadth, evenhandedness and eminently secular objectives help to break the link between the government and religious indoctrination." (citations omitted)).

[144] 2003 OLC Opinion, *supra* note 143, at II.C (citing *FY 2002 Federal Save America's Treasures Grants—Guidelines and Application Instructions*, PRESIDENT'S COMM. ON THE ARTS & THE HUMANITIES (2002), http://www.pcah.gov/sat/SAT2002.html).

[145] *Id.* at II.E.

[146] *See supra* Section IV.A (showing secular purpose in text, and lack of legislative history or sponsor's statements to suggest otherwise).

[147] *See supra* Section IV.B.3 (Mojave Cross not qualified based on lack of physical "integrity" due to replacement of original cross and superseded "religious use" restriction, so failure to qualify does not indicate lack of historic value); Section IV.B.4 (concluding that public funding of large cross remains unconstitutional, but that the funding portion of the Act is severable).

The essential factor is that the "reasonable observer" must be deemed aware of the other WWI national memorials, their current competition for supremacy, and the general ignorance of the Mojave Cross designation. This may in fact be reasonable, given WWI's approaching Centennial, and the correspondingly enhanced congressional and public interest in its commemoration. And unlike a local viewer of the Mojave Cross itself, a plaintiff challenging its National Memorial designation presumably would be interested in, and knowledgeable about, this backdrop.

Next, the Mojave Cross currently is missing from Sunrise Rock, and the VFW is eager to replace it. It also seems safe to assume that the VFW is likely to post a replacement plaque, in order to acknowledge their original 1934 installation and war memorial purpose. In addition, although the Land Transfer Act does not itself contain appropriate restrictions, assume further that the VFW will continue the preexisting use patterns. If so, the land will stay open to the public, and will be used for religious services only once a year, for an Easter sunrise service.

Weighing against constitutionality is the appearance of bias: Congress now has designated as National Memorials not one, but two Christian crosses, both in the midst of high-profile, controversial Establishment Clause lawsuits. Particularly egregious, in neither *Buono* nor the Mount Soledad litigation was the honorary designation necessary to save the longstanding war memorial from destruction or removal. Also troublesome is Congress's failure to abolish the Mojave Cross's superfluous honor once it settled on land transfer as the solution. The Court has recognized that government acts taken to preserve an historic war memorial will be viewed more favorably by the "reasonable observer," as compared to government acts to create new sectarian symbols, especially given today's vastly different, more pluralistic, divisive social culture.[148]

Another concern is that the unique circumstances of this type of "speech" renders it more difficult to explain to "viewers" of National Memorials why a Christian cross was given this honor. Posting an explanatory sign at the location of a monument is a relatively simple matter. Here, NPS can, and should, include a context-providing disclaimer in all government publications (including websites) that list National Memorials or feature the Mojave Cross, but not all relevant publications will be under its control. At a minimum, the federal government should use its existing opportunities to inform the

[148] *See supra* Section III; Salazar v. Buono, 130 S. Ct. 1803, 1817, 1820 (2010) (Kennedy, J., plurality opinion); *id.* at 1824 (Alito, J., concurring).

public of the cross's long history as a war memorial, and the fact that it is only "a" WWI symbol, and not "the" WWI memorial for the entire nation.

Based on available information, it seems reasonably likely that Congress will pass a bill similar to the one recently introduced. Then there will be an "official" WWI National Memorial, most likely located on the National Mall, near those commemorating the Nation's other major wars. The bill also contemplates additional publicity for the multiple existing WWI monuments. For purposes of this extended reflection, assume this to be the case. Once the Mojave Cross is one among many, and granted less status than several secular alternatives, its National Memorial designation, standing alone, is unlikely to violate the Establishment Clause. Taking this as the baseline, the next Section investigates the final hypothetical.

V. THE HYPOTHETICAL TEST CASE

This final section considers the process if other, equally historic WWI monuments were rejected as "National Memorials," focusing on two, very credible candidates. First, WWI was the first war in U.S. history in which the battlefield graves of Jewish American soldiers were marked by a Jewish Star.[149] Thus, a Jewish Star WWI Memorial would symbolize religious liberty and also recall those haunting battlefield cemeteries in Europe. Second, the Kansas City "Liberty Memorial" is a secular symbol with a more illustrious, well-documented WWI-related history than the simple Mojave Cross.

For these private speakers to claim the right to have their own WWI symbols elevated to "National Memorial" status, they would need to plead sufficient allegations to show that the Free Speech Clause protects this form of "speech." While initially this seems quite impossible, as it turns out, it is merely improbable.

Under familiar First Amendment doctrine, when a government entity creates a speech opportunity and allows private speakers to participate, it may create a speech "forum." If it then rejects a speaker who is within the established content limitations, or fails to establish

[149] *See* Brief for Jewish War Veterans of the United States of Am., Inc. as Amicus Curiae Supporting Respondent at 10, *Buono*, 130 S. Ct. 1803 (No. 08-472) ("During World War I, the War Department determined that the graves of Jewish soldiers who had died in battle would be marked with the Star of David. Major General Crosby explained in a 1930 address that '[m]any of our heroic dead lie in Flanders Field, Suresnes, Belleau Wood, and elsewhere. The star of David is mingled with the cross in beautiful and everlasting marble. As they lived together, fought together, so they lie buried, side by side.'") (quoting *Jewish Soldiers' Graves To Be Marked by a Double Triangle Instead of a Cross*, N.Y. TIMES, July 25, 1918, at 22; 72 CONG. REC. 11064 (June 17, 1930)).

content limitations, the rejected speaker may claim a Free Speech Clause violation.[150] Faced with this claim, the federal government would be almost certain to assert *Summum*'s expanded "government speech defense"; it would not willingly relinquish sole discretion over "National Memorial" designation decisions.

But although these congressional designations appear to be quintessential "government speech," involving deliberate choices to form and express the national identity,[151] a review of the facts suggests a more random, ad hoc process.[152] Admittedly, post-*Summum*, there is little chance of a court ultimately recognizing an alleged "National Memorial forum," but some facts are similar to those leading the Tenth Circuit to find a "permanent monument forum." A mix of the realistic and the imaginary serves well to explore the intersection of the Establishment Clause and the expanding government speech doctrine.

First, the legislative designation process for National Memorials is frequently driven by private speakers who are passionate about a specific commemorative message, and not by any formal or well-considered congressional selection process. To take a recent example, the "Flying Cross National Memorial" illustrates both private sector involvement and the political nature of these laws. The "Distinguished Flying Cross" was the first U.S. military aviation award, and it was given retroactively to WWI military aviators, who were the first to use planes in battle.[153] The project originated with individuals, and gradually came to involve first local, and then state representatives, and eventually the local congressman, who suggested seeking National Memorial status.[154]

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[150] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (discussing the Student Activities Fund at the University of Virginia as a forum); Widmar v. Vincent, 454 U.S. 263 (1981) (discussing a student forum created by the University of Missouri).

[151] *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) (discussing how symbols are used in national identity formation).

[152] *Compare Johanns*, 544 U.S. 550 (2005) (government "control" of the message is the key element for declaring mixed government-private speech to be "government speech").

[153] *See* THE DFC NATIONAL MEMORIAL, http://www.dfcnationalmemorial.org/ (last visited Mar. 31, 2011); Distinguished Flying Cross National Memorial Act, H.R. 2788, 111th Cong. (2010) ("To designate a Distinguished Flying Cross National Memorial at the March Field Air Museum in Riverside, California.").

[154] *See Society History*, THE DISTINGUISHED FLYING CROSS SOC'Y, http://www.dfcsociety.org/history.asp (last visited Mar. 31, 2011).

Two other examples include the National Law Enforcement Officers Memorial, Washington, D.C., and the National AIDS Memorial Grove. The National Law Enforcement Officers Memorial was initiated by detective Donald J. Guilfoil, then fifteen national law enforcement organizations worked with Congress to pass legislation designating the National Memorial; these organizations also were responsible for designing the Memorial, finding the site, and raising the funds to build the Memorial. *The Dream That Became Reality*, NAT'L LAW

Second, the research suggests that, at least in some instances, Congress exercises little control over the "messages" of its National Memorials. *Summum* did loosen this "government speech" requirement to "final approval authority."[155] But while a City Council vote to accept a "Ten Commandments" monument reflects some legislative knowledge of the new display's content,[156] this does not seem to be the case for all of Congress's National Memorial designations. Two relevant examples, the 2002 Mojave Cross designation and the 2004 designation of "America's National World War I Museum," merited just a few lines in voluminous annual defense appropriations bills, and neither had any legislative history. So there is nothing to indicate that anyone, besides the bills' sponsors, was even aware of voting to bestow these honors.

Indeed, the sense one gets from reading these accounts is that the National Memorial honor relates more to retail politics than to any particular criteria, or even to a uniquely high level of national status. While certainly many well-known icons are included, this designation also has been awarded to obscure monuments with far less, or even no national recognition. One of the better examples of this is the "National Military Working Dog Teams Monument."[157]

So, there actually is a plausible basis for the private groups who sponsor the Liberty Memorial and the hypothetical Jewish Star Memorial to allege a Free Speech Clause claim, asserting their right to have their monuments similarly designated. The federal government likely would fight to retain complete discretion over grants of "National Memorial" status, and so would assert the "government speech doctrine" as its defense.

ENFORCEMENT OFFICERS MEM'L FUND (Apr. 10, 2000), http://www.nleomf.org/newsroom/news-releases/the-dream-that-became-reality.html. Similarly, the National AIDS Memorial Grove was conceived in 1988 by a small group of San Francisco residents. Ground restoration began in 1991, supported by private funding from the Grove Endowment, and the site was designated as a National Memorial in 1996. *Learn More About the Grove*, NAT'L AIDS MEM'L GROVE, http://www.aidsmemorial.org/history (last visited Mar. 31, 2011).

[155] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1134 (2009) (internal quotations omitted).

[156] *See id*. at 1133 (quoting IMLA Brief, *supra* note 31, at 21) (noting that an IMLA survey documented municipalities' editorial control through a variety of factors, including "'prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals'").

[157] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 2877, 122 Stat. 3, 563–64 (2008) ("[A] national monument to honor the sacrifice and service of United States Armed Forces working dog teams that have participated in the military operations of the United States."); *see also* NAT'L WAR DOGS MONUMENT, INC., http://www.nationalwardogsmonument.org (last visited Oct. 26, 2010).

In the end, based on the factors outlined in *Summum*, a court is more likely than not to hold that National Memorial designations are "government speech," rather than any type of speech forum. Like monuments, these congressional declarations are an inherently expressive context.[158] And anyone aware of the designation would reasonably assume that the federal government is both speaking, and conveying its approbation.[159] Congress does vote on these proposals, and at least the bill's sponsors intend to convey a message of special honor. At a minimum, the 2002 National Memorial Act appears to communicate Congress's agreement that a longstanding Christian cross in the desert is an appropriate symbol with which to honor American participation in World War I.

What these alternative speech claims add to the endorsement-analysis mix, then, is the way in which the "government speech defense" puts the government in an indefensible position. It would be required to assert affirmatively that adopting the majority religion's preeminent symbol, the Christian cross, is *preferable* to using the secular, or the minority religion, symbol, to commemorate the U.S. role in World War I. When the alternatives have equal or superior historical value, judged objectively, then the government's preference for the Mojave Cross would unavoidably convey sectarian discrimination.

This hypothetical also shows how rejected speakers can provide a kind of functional limit for sifting through government speech claims.[160] While there are no general selection "criteria" for National Memorial decisions,[161] each specific designation act states Congress's commemorative purpose for the honor granted. Once there is an expressly stated purpose (e.g., commemorate WWI), then whether a particular government expression is primarily religious or secular can be tested by Congress's compliance with its own stated statutory purpose. When the only meaningful difference between proposals is their religious content (or lack thereof), then a rejection will tend to prove that the honorary status is based on religion. In that situation,

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[158] *See Summum*, 129 S. Ct. at 1133 ("A monument, by definition, is a structure that is designed as a means of expression.").

[159] *See id.* ("When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.").

[160] *See supra* at Section I (discussing references to role of criteria in government speech cases in *Summum* opinions of the Court (Justice Alito) and Justice Breyer).

[161] The only general criteria located for National Memorial is quite expansive and amorphous: they commemorate "a historic person or episode." *Designation of National Park System Units*, NAT'L PARK SERV., http://www.nps.gov/legacy/nomenclature.html (last visited Mar. 31, 2011).

the government would be left with nothing more than the nakedly unconstitutional claim that the Christian symbol better represents the national identity—or (and perhaps even worse) that it is more consistent with the image the government administration seeks to present to the world.[162]

This is the point at which Justice Souter's apocryphal prediction reenters the stage. [163] Because the Establishment Clause remains the one clearly acknowledged limit on the new broad "government speech doctrine," governments will try to explain their choices in secular terms. But in the hard test case, where the stated historical rationale rings false in light of rejected speakers, a government's effective choice is plausibly explained only by a religious preference.

To escape this dilemma, at some point, there will be some government actor who will end up claiming that the "government speech doctrine" frees government from Establishment Clause restrictions on religious viewpoint discrimination. While most courts would hold that claim unconstitutional, some will be attracted to claims that are allegedly predicated on community or national ideyntity, but actually are indistinguishable from assertions of national or local *religious* identity. As illustrated by the hypotheticals explored in this Article, there is a thin, but recognizable, dividing line. When the new government speech defense is used to justify religious-historical speech, remembering Justice Souter's warning may provide a useful caution.

[162] *See Summum*, 129 S. Ct. at 1134 ("The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park. . . . The City's actions . . . unmistakably signify[] to all Park visitors that the City intends the monument to speak on its behalf.").

[163] *See Summum*, 129 S. Ct. at 1142 (Souter, J., concurring) (discussed *supra* Part II).