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(DIS)OWNING RELIGIOUS SPEECH

*B. Jessie Hill**

INTRODUCTION

To claims of a right to equal citizenship, one of the primary responses has long been to assert the right of private property.¹ One need only think of *Dred Scott v. Sandford*,² for example, or the sit-ins of the civil rights movement to see the pull exerted by property rhetoric and principles on those who would resist the demands of inclusion and equality.³ The latest iteration of this dynamic, opposing property to equality, has taken shape in the Supreme Court's recent jurisprudence concerning the constitutionality of governmental choices with respect to the display of religious symbolism.

The permissibility of religious symbolism in public places has been a significant concern of Establishment Clause jurisprudence for the past thirty years, since the Supreme Court first held, in 1980, that a law requiring the display of the Ten Commandments in public schools was unconstitutional.⁴ Beginning with *Lynch v. Donnelly*⁵ in 1984, the Supreme Court decided a series of cases in which it struggled to clarify the doctrine and the nature of

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¹ See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1857) (stating, in response to the argument that Dred Scott should be accorded the rights of citizenship, that “[t]he unhappy black race . . . were never thought of or spoken to except as property”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

² 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

³ See *id.* at 493-94. Free association is another right that is often opposed to equality claims. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 175-77 (1976) (rejecting the claim of parents that the integration of schools violates their right to freedom of association).

⁴ The first Supreme Court case dealing with public displays of religious symbolism was *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam), which held unconstitutional the display of the Ten Commandments in public schools. However, *Stone* was a brief per curiam opinion utilizing no discernible doctrinal test.

⁵ 465 U.S. 668 (1984).

the right at stake, including *County of Allegheny v. ACLU*⁶ in 1989, *Capitol Square Review & Advisory Board v. Pinette*⁷ in 1995, and the companion cases *Van Orden v. Perry*⁸ and *McCreary County v. ACLU*⁹ in 2005. Though the doctrinal framework shifted somewhat, the primary question that the Court consistently sought to answer in those cases concerned the social meaning of the display at issue, with a specific focus on whether that display had the purpose or effect of conveying a message to nonadherents that they were outsiders to the political community.¹⁰ In addition, and relatedly, the Court has issued a series of holdings in recent years asserting the rights of religious speakers of all kinds to be included in various speech fora alongside other speakers, religious or secular.¹¹ To do otherwise, the Court has made clear, would constitute viewpoint discrimination that is inconsistent with the Free Speech Clause.¹²

In two recent cases, however, the Court made a surprising turn away from its traditional analytic frameworks, focused on social meaning and nondiscrimination, toward the language of property.¹³ In particular, the Court has embraced one particular vision of property—viewing property as synonymous with both *private* property and the right to exclude—and applied it in its treatment of religious speech issues in those cases.¹⁴ The first of the recent cases, *Pleasant Grove City v. Summum*,¹⁵ is a free speech case in which a municipality evaded a finding that it was discriminating against the plaintiff’s religious speech by claiming the “government speech” defense.¹⁶ In the process, the defendant claimed as its own speech a facially religious monument of the Ten Commandments.¹⁷ The second case, *Salazar v. Buono*,¹⁸ which turned away an Establishment Clause challenge to a Latin cross in the middle of the Mojave National Preserve, focused on the literal ownership of the religious speech at issue in the case, rather than the social

⁶ 492 U.S. 573 (1989).

⁷ 515 U.S. 753 (1995).

⁸ 545 U.S. 677 (2005).

⁹ 545 U.S. 844 (2005).

¹⁰ See, e.g., *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”).

¹¹ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993).

¹² *Good News Club*, 533 U.S. at 107-10.

¹³ See *Salazar v. Buono*, 130 S. Ct. 1803, 1819 (2010) (plurality opinion); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

¹⁴ See *Buono*, 130 S. Ct. at 1819; *Summum*, 555 U.S. at 469.

¹⁵ 555 U.S. 460 (2009).

¹⁶ *Id.* at 464.

¹⁷ *Id.* at 464-67.

¹⁸ 130 S. Ct. 1803 (2010).

meaning.¹⁹ What both cases have in common (other than that the plaintiffs did not prevail) is a claim, on one side, that the government has improperly and unconstitutionally excluded one religious group, both literally and metaphorically, and a response, on the other side, that is formulated in the language of ownership, private property, and sovereignty, rather than that of social meaning or equality.²⁰

This Article explores the possible causes and implications of the Court's recent embrace of property concepts and property rhetoric.²¹ This Article thus contributes to the substantial scholarship on the relationship between constitutional rights and property law—a body of scholarship that has, however, not yet fully explored the role of property law and rhetoric in religious display cases. More broadly, this Article attempts to examine, through the lens of the Supreme Court's rhetoric, the intense emotional investment that both sides seem to have in the precise issue of the constitutionality of symbolic religious expression in the (literal or metaphorical) public square.

This Article argues that the Court has turned to the language and the law of private property partly as a way of avoiding the knotty questions raised by Establishment Clause and free speech doctrine. It further argues that the rhetoric of property functions on another level, as well. The Court's property rhetoric legitimates and naturalizes the act of exclusion sanctioned by the Court's decisions. It also gives the illusion of a concrete stake held by a religious majority—a material loss that is incurred when dominant religious symbols are removed. This Article thus proceeds from the intuitive view that the passion expressed by individuals both in favor of and against such religious expression requires some explanation, given the apparently low material stakes and the concurrent difficulty that both sides have in articulating any precise benefit or harm.²²

One point about the Court's use of property law and rhetoric bears emphasizing at the outset. Property is a rich and extraordinarily complex concept, and a large legal and philosophical literature has developed to elucidate both the nature of property itself and the legal, cultural, and moral significance of property.²³ Although some property scholars have embraced

¹⁹ *Id.* at 1811.

²⁰ *See id.* at 1818; *Sumnum*, 555 U.S. at 469.

²¹ Although this Article observes a shift in the Supreme Court's focus in the recent religious symbolism cases, it also notes that property has long been implicated in this jurisprudence and indeed, is inextricable from it. *See infra* Part I.A-C. Never before has property played such a prominent role in the decisional framework or the rhetoric of the religious symbolism cases, however.

²² *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 156-58 (2007) (discussing the “extreme passions these cases provoke”).

²³ For a sampling of the wide array of works on the subject, *see, e.g.*, J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 68-69 (1997) (describing property as rights to take certain actions with respect to things, and thus understood partly as a right to exclude, but also as fundamentally embedded within our social relationships); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94

the traditional understanding of property as signifying primarily the right to exclude,²⁴ other understandings of property abound, and recently, numerous scholars have emphasized instead the inclusionary, public, and social dimensions of property.²⁵

It is not possible to do justice to that nuanced body of literature within the scope of this Article, nor is it one of the goals of this Article to do so. Instead, this Article contends that the Supreme Court adopted one particular conception of property in *Summum* and *Buono*—namely, the traditional view of property rights as centering on the right to exclude. Moreover, as explained in greater depth below, the Supreme Court elided the distinction between public and private property, often assuming that government entities are entitled to dispose of their land in the exact manner of a private person, and that government ownership of property must be treated as virtually identical, for all intents and purposes, to private ownership.²⁶ This Article criticizes the Supreme Court’s use of property-as-exclusion in these religious speech cases as inapposite, not only because that understanding of property is possibly flawed or at least highly contestable, but also because property-as-exclusion is a uniquely misguided concept when constitutional values are at stake.

At the same time, it is no contradiction to acknowledge that property has been implicated in the Supreme Court’s jurisprudence of religious symbolism all along, or that it is intertwined with the protection of many other

CORNELL L. REV. 745, 746-47 (2009) (rejecting the notion of property as dominated by exclusion); Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 920-21 (2010); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11-12 (1928); Hanoch Dagan, *Property and the Public Domain*, 18 YALE J.L. & HUMAN. 84, 85 (2006); Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of Pruneyard v. Robins*, 64 U. CHI. L. REV. 21, 36-40 (1997) (taking an extreme view of property as synonymous with the right to exclude); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734 (1998) (defending the view of property as the right to exclude); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1938-40 (2005) (outlining an understanding of property as providing entrance to a community, not exit from it); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 38-39 (1990); Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128 (1990).

²⁴ See, e.g., Epstein, *supra* note 23, at 36; Merrill, *supra* note 23, at 730.

²⁵ See, e.g., Alexander, *supra* note 23, at 746-47; Dagan, *supra* note 23, at 85; Peñalver, *supra* note 23, at 1938; see also generally PROPERTY & COMMUNITY, at xxxiii (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010) (explaining how property theory should evaluate the interaction between the individual and the community); cf. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012) (stating that “[t]here is no interest in exclusion per se” and that property serves the interest in using things).

²⁶ See *infra* note 27 and accompanying text. Professor David Fagundes has helpfully pointed out that exclusion may be an important aspect of *private* property, at least in our traditional conception of it, but that there is also a public dimension to property, which is often neglected. David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 656 (2010).

constitutional rights, as well.²⁷ Indeed, First Amendment scholars have long recognized the connection between property and speech. Ever since the rise of so-called “public forum doctrine,” according to which the government’s power to regulate speech depends on the nature of the forum in which the speech takes place, this connection has been made explicit, leading to a rich body of scholarship on the intersection of speech and property rights.²⁸ Most of this scholarship has focused on the concept of property in forum analysis, however; neither the importation of property concepts in the government speech doctrine nor the use of property law in Establishment Clause disputes has garnered as much attention.²⁹ Indeed, the turn to proper-

²⁷ See Timothy Zick, *Property as/and Constitutional Settlement*, 104 NW. U. L. REV. 1361, 1361 (2010) (“Certain constitutional rights are intricately bound up with, and in some cases critically dependent upon, access to and enjoyment of public properties.”). Professor Louis Seidman has thoughtfully examined the ways in which free speech rights and property rights are deeply intertwined, arguing that the strength of speech rights is directly proportional to the strength of economic rights. Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1547 (2008).

²⁸ It appears that Professor Harry Kalven, Jr. introduced the concept of the “public forum” in First Amendment doctrine in his classic article *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11-12. Written in the midst of the civil rights movement, Professor Kalven’s article meditates upon the relationship between the state’s property interest in public property and the public’s free speech rights, arguing that “in an open democratic society the streets, the parks, and other public places are . . . a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.” *Id.* at 11-12. Kalven thus famously spoke of a sort of “First-Amendment easement” on public property possessed by citizens. *Id.* at 13. More recently, Professor Timothy Zick has produced a deep and nuanced body of scholarship examining the relationship among property, space, and constitutional rights—especially free speech rights. See, e.g., Zick, *supra* note 27, at 1385 (criticizing the use of private property principles to avoid constitutional issues in resolving cases in the equality, religion, and speech contexts); Timothy Zick, *Property, Place, and Public Discourse*, 21 WASH. U. J.L. & POL’Y 173, 178 (2006) (arguing that “the ‘forum’ concept, which is rooted in principles of [public] property, should be replaced by a distinct conception of ‘place’”); Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 441-43 (2006) (introducing the concept of “expressive place,” which is distinct from, and richer than, the concept of “place as *res* or property”). Like Professor Zick, Professor Calvin Massey has written critically of courts’ inclination to place free speech problems in a property framework. Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 310-11 (1999). And Professor Joseph Blocher has thoughtfully examined the expressive dimensions of property and property rights, with particular reference to the concept of government speech. Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413, 1416-17 (2011).

²⁹ But see Zick, *supra* note 27, at 1386-1400 (discussing ownership of religious symbols); *id.* at 1362 (thus, for example, “anti-establishment principles require that officials operate and maintain public places in a manner that is not perceived as endorsing, through symbolic displays or otherwise, particular religious sects or sectarianism”); Blocher, *supra* note 28, at 1416-17 (discussing government speech); Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. COLLOQUY 70, 70 (2009).

ty in cases involving religious symbolism itself seems to be a relatively new phenomenon.³⁰

The doctrinal issues underlying cases such as *Sumnum* and *Buono* have not been fully resolved, moreover; the staying power of the Supreme Court's property-based focus is thus of imminent importance. Indeed, the Supreme Court recently denied certiorari in a case raising similar questions pertaining to the public or private nature of religious speech—privately financed and maintained crosses along public highways in Utah, commemorating fallen highway patrol officers.³¹ The denial came after much apparent hesitation, and some commentators expect that the Court will have to return to these issues eventually.³²

This Article thus examines the significance of the recent appearance of property law and rhetoric in the Supreme Court's religious symbolism cases. Part I of this Article describes the Court's decisions in *Sumnum* and *Buono* and briefly sketches the background of religious symbolism case law against which the Supreme Court decided those cases. That Part thus traces a shift to a "property paradigm" in the Court's treatment of religious symbolism. Part II considers possible doctrinal and pragmatic reasons for the shift. Part III then elaborates some of the troubling consequences of the focus on ownership of speech rather than on the meaning of the speech. This Article argues that the paradigm of property is an unfitting one to import into the First Amendment domain, since property rhetoric and law, as mobilized by the Court in those cases, center around, justify, and naturalize inequality and exclusion—values that are inherently antithetical to Establishment Clause and Free Speech Clause values. Returning to the explanatory project of this Article, Part IV contains some tentative meditations on the deeper cause and meaning of the shift to ownership discourse within Establishment Clause doctrine, viewed in the broader context of the U.S. culture wars and the passionate response to this particular issue that those culture wars entail. In Part V, this Article concludes that, for all their flaws, the endorsement test and public forum doctrine, which the Court appears to

³⁰ See *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470-71 (2009) (rejecting the plaintiff's free speech claim by placing the government in the role of a private property owner who is free to exclude unwanted speech).

³¹ *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting).

³² Dissenting from the denial of certiorari in the *Utah Highway Patrol Association* case, Justice Clarence Thomas asserted that "[i]t is difficult to imagine an area of the law more in need of clarity," and insisted that the Court "should not now abdicate [its] responsibility to clean up [its] mess" but rather should reconsider the currently predominant *Lemon*/endorsement test. *Id.* at 22; see also Stephen Wermiel, *SCOTUS for Law Students: Free Speech and Religious Freedom Intersect in Case of Utah Crosses*, SCOTUSBLOG (Oct. 24, 2011, 11:13 AM), <http://www.scotusblog.com/2011/10/free-speech-and-religious-freedom-intersect-in-case-of-utah-crosses> (noting that the Court listed the case three times for consideration at the Justices' private conferences without deciding whether to hear it, and noting that the case raises several issues left unresolved in *Sumnum* and *Buono*).

have temporarily marginalized, are superior approaches to the problem of public displays of religious symbolism. The Court should therefore return to its prior framework. It can, if necessary, avoid aggravating the divisiveness of religious symbolism disputes through more careful calibration of remedies, instead of modifying substantive doctrine.

I. FROM SOCIAL MEANING TO PROPERTY

When evaluating public displays of religious symbolism, the Supreme Court's approach has been to ensure that the government obeys the principles of nonendorsement and equality, both by avoiding any actual or perceived endorsement of religion and by ensuring that public fora are open to all speakers, religious and nonreligious, on equal terms.³³ *Pleasant Grove City v. Sumnum* and *Salazar v. Buono*, the two most recent Supreme Court cases dealing with religious symbolism, appeared to marginalize the "endorsement/equality" approach, however.³⁴ Those two cases adopted what might be called a "property framework" for analysis. In both cases, the Court's analysis and result turned primarily on the ownership and attribution of the displays' messages, rather than on the meaning of the messages themselves.³⁵ In *Sumnum*, the Supreme Court rejected the free speech claim of a religious group seeking to have its permanent monument displayed alongside the Ten Commandments and various more obviously secular items in a publicly owned park known as Pioneer Park.³⁶ The Court held that the monuments in the park, while uniformly donated by private parties, were government speech and therefore immune to claims of discriminatory treatment from a free speech perspective.³⁷ In *Buono*, a National Park Service employee challenged the presence on federal land of a Latin cross, which served as a memorial to the soldiers who had died in World War I.³⁸ Although there was no majority opinion in that case, the Court held against the cross's challenger.³⁹ A plurality opined that federal legislation transferring ownership of the cross to a private party, passed after the district court

³³ See, e.g., *Sumnum*, 555 U.S. at 469.

³⁴ This Article borrows the term "endorsement/equality" from Professor Martha Nussbaum. Professor Nussbaum refers to the "equality/endorsement framework" as the approach that is usually applied by the Court in Establishment Clause and Free Exercise Clause cases dealing with school prayer and religious symbolism displays; this Article extends the term to encompass public-forum free speech cases as well. See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 260-72 (2008).

³⁵ See *Salazar v. Buono*, 130 S. Ct. 1803, 1816-17 (2010) (plurality opinion); *Sumnum*, 555 U.S. at 472.

³⁶ *Sumnum*, 555 U.S. at 465.

³⁷ *Id.* at 473-74.

³⁸ *Buono*, 130 S. Ct. at 1811-12.

³⁹ *Id.* at 1816-17.

found an Establishment Clause violation, had the potential to alleviate a previously adjudicated constitutional violation.⁴⁰

In some ways, these cases are quite distinct and may even be considered mirror images of one another.⁴¹ In *Summum*, which did not directly deal with an Establishment Clause challenge,⁴² the Government claimed the purportedly religious speech as its own and thereby deflected any argument that it had behaved in a discriminatory manner with respect to the variety of speakers seeking to have their symbols displayed in the park.⁴³ In *Buono*, by contrast, the Government's strategy was to disown the allegedly religious speech by transferring title to a private party, thereby deflecting the claim that the Government had endorsed the religious message of the Latin cross.⁴⁴

Yet, the two cases have a number of things in common as well. First, of course, the challengers lost in both cases.⁴⁵ And, in holding for the governmental entity seeking to exclude a private religious speaker in both instances, the Court embraced the language of property, focusing on ownership and control of the challenged speech.⁴⁶ In both cases, the Court ultimately resolved the controversy against the plaintiffs by placing the religious speech into a framework in which the speaker has the virtually unlimited right to exclude any kind of speech for any kind of reason and is not subject to requirements of neutrality.⁴⁷ In other words, the Court found in both cases that the ownership of the religious speech—private ownership in one case and government ownership in the other—rendered the Government immune from claims of religious discrimination.⁴⁸

⁴⁰ *Id.* at 1814-15.

⁴¹ *Cf.* Tebbe, *supra* note 29, at 71 (“One of these cases, then, asks whether government can avoid a constitutional difficulty by publicizing private sectarian speech, while the other asks whether government can evade a different constitutional problem by privatizing such expression.”).

⁴² Although the Supreme Court alluded to the Establishment Clause implications of its holding, the plaintiffs had not raised a federal Establishment Clause claim, choosing instead to rely solely on the Free Speech Clause. *Summum*, 555 U.S. at 466. As Professor Bernadette Meyler explains, plaintiff *Summum* initially raised a claim under the Utah Constitution's anti-establishment provisions but did not pursue that claim in the litigation, and it was deemed waived by the Tenth Circuit. Bernadette Meyler, *Summum and the Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 95, 98-99 (2009). *Summum* subsequently amended its complaint to include an Establishment Clause claim, which was dismissed by the district court. *Summum v. Pleasant Grove City*, No. 2:05CV638 DAK, 2010 WL 2330336, at *4 (D. Utah June 3, 2010).

⁴³ *See Summum*, 555 U.S. at 467.

⁴⁴ *See Buono*, 130 S. Ct. at 1814.

⁴⁵ *Id.* at 1811; *Summum*, 555 U.S. at 466.

⁴⁶ *See Buono*, 130 S. Ct. at 1818-19; *Summum*, 555 U.S. at 473-74.

⁴⁷ *See Buono*, 130 S. Ct. at 1818-19; *Summum*, 555 U.S. at 473-74.

⁴⁸ *See Buono*, 130 S. Ct. at 1818-19; *Summum*, 555 U.S. at 473-74.

A. *The Endorsement-Equality Framework*

Although the Supreme Court's Establishment Clause jurisprudence concerning religious symbolism is famously messy and widely criticized, some general principles can be derived from it.⁴⁹ Above all, the analysis has focused on the social meaning of a given display and specifically on the question whether that display conveyed a message of endorsement of a particular religion, or of religion in general, thereby suggesting that nonadherents are social and political outsiders.⁵⁰ This analysis is embodied in the so-called "endorsement test," and it is—for the time being, at least—the predominant approach to evaluating the constitutionality of religious symbolism displays.⁵¹ Even when the Court has declined to apply the endorsement test in a given religious symbolism case, however, a majority of the Justices still sought to resolve the central question that the endorsement test also seeks to address—namely, the social meaning of the display to a reasonable observer, viewed in its physical, temporal, and historical context.⁵²

To date, the Supreme Court has not had as much opportunity to consider free speech challenges to the exclusion of religious symbols from public fora.⁵³ Nonetheless, it has developed a body of doctrine holding with great clarity that governmental entities may not discriminate against religious speech simply because of its religious, even devotional, character.⁵⁴ And in *Capitol Square Review & Advisory Board v. Pinette*,⁵⁵ involving the placement of a Latin cross by the Ku Klux Klan in a public square near the seat of government, the Court made it clear both that the Free Speech Clause required, and the Establishment Clause did not prohibit, equal access to public fora for those seeking to erect religious displays.⁵⁶ The animating principle in all of those cases was a prohibition on discrimination

⁴⁹ See, e.g., Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 719-20 (2001); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 493-95 (2005) (arguing that the endorsement test in its current application reflects certain difficulties that are inherent to any inquiry into social meaning but that the test ultimately asks the right questions); William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 536-37 (1986); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 276-301 (1987).

⁵⁰ See, e.g., Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 512 (1993).

⁵¹ See 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION* 88 (2008) (noting that a majority of the Justices "ha[ve] treated the [endorsement] inquiry as central only in the public display cases").

⁵² See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005) (Rehnquist, C.J.).

⁵³ See discussion *infra* Part I.A.2.

⁵⁴ See discussion *infra* Part I.A.2.

⁵⁵ 515 U.S. 753 (1995).

⁵⁶ *Id.* at 766.

against speech based on its religious viewpoint, both in public fora and in those spaces characterized as limited public fora.⁵⁷

1. The Endorsement-Social Meaning Framework in Establishment Clause Cases

The endorsement-social meaning framework first arose in Justice Sandra Day O'Connor's *Lynch v. Donnelly* concurrence, in which she formulated the endorsement test.⁵⁸ Though she ultimately agreed with the majority's decision to uphold the display of a nativity scene in a privately owned park at Christmastime, she famously asserted that the proper inquiry in such cases is whether, by symbolically endorsing religion, the challenged governmental action "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."⁵⁹ The newly minted endorsement test then garnered the support of a majority of Justices, though in a set of badly fractured decisions, in *County of Allegheny v. ACLU*.⁶⁰ That case involved a challenge to two different displays—a crèche and a menorah—both of which were owned by private groups and situated on government property.⁶¹ The Court upheld the menorah display but found the crèche unconstitutional, with members of the concurrence and dissents reaching different conclusions but agreeing on the applicability of the endorsement test.⁶²

Though the endorsement test appeared to provide some structure for the constitutional inquiry when religious displays were at issue, it did not take long for cracks to appear in its already-fragile façade.⁶³ The endorsement test fell from prominence—but without disappearing entirely—in two companion cases decided in 2005, dealing with challenges to displays of the Ten Commandments on government-owned property.⁶⁴ In *McCreary County v. ACLU*, the Court declared the displays, which had been erected by the local government inside county courthouses, unconstitutional as motivated

⁵⁷ *Id.* at 761.

⁵⁸ See generally *Lynch v. Donnelly*, 465 U.S. 668, 688-94 (1984) (O'Connor, J., concurring).

⁵⁹ *Id.* at 688.

⁶⁰ *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989); see *id.* at 623-37 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 637-46 (Brennan, J., concurring in part and dissenting in part); *id.* at 646-55 (Stevens, J., concurring in part and dissenting in part); *id.* at 655-79 (Kennedy, J., concurring in part and dissenting in part).

⁶¹ *Allegheny*, 492 U.S. at 579, 587 (majority opinion).

⁶² See *supra* note 60 and accompanying text.

⁶³ The cracks were already evident by the fractured nature of the *Allegheny* opinion. See *supra* text accompanying note 60.

⁶⁴ *McCreary County v. ACLU*, 545 U.S. 844, 850-51 (2005); *Van Orden v. Perry*, 545 U.S. 677, 681-82 (2005).

by a religious purpose.⁶⁵ In so doing, the Court applied the alternative Establishment Clause test set forth in *Lemon v. Kurtzman*.⁶⁶ In looking to *Lemon*, the Court chose an alternative test, but one affiliated with the endorsement test.⁶⁷ Moreover, the Court showed itself still to be concerned with the social meaning of the display. Invoking the language of the endorsement test, the Court noted that “[t]he reasonable observer could only think that the [c]ounties meant to emphasize and celebrate the Commandments’ religious message” when they mounted their initial Ten Commandments displays, and, given the counties’ continuing religious purpose, declined to find that this fact had been changed by the subsequent displays.⁶⁸ Finally, in *Van Orden*, the Court considered the constitutionality of a Ten Commandments display, which had been donated forty years earlier by a private entity, on the Texas statehouse grounds.⁶⁹ Although there was no majority rationale for upholding the display,⁷⁰ a majority of the Justices applied the endorsement test, or its substantial equivalent, in determining that the overall meaning of the Ten Commandments display was secular rather than religious.⁷¹

Thus, although the Justices have regularly divided over both the result and the precise doctrinal test for evaluating the constitutionality of religious symbolism, one relatively constant principle has been that a majority of Justices have focused on the social meaning of the display, as perceived by the so-called “reasonable observer.”⁷² In some instances the religious symbol was privately owned and in some instances it was government-owned,

⁶⁵ *Id.* at 850-51, 858.

⁶⁶ *Id.* at 859-61 (applying the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

⁶⁷ *See, e.g., McCreary County*, 545 U.S. at 866 (describing the purpose inquiry of the *Lemon* test in terms drawn from the endorsement test and citing cases that have applied the endorsement test).

⁶⁸ *Id.* at 855, 869, 869-73.

⁶⁹ *Van Orden*, 545 U.S. at 681-82 (2005).

⁷⁰ As Kent Greenawalt explains, in *Van Orden* and *McCreary*, eight Justices thought the cases should come out the same way, though they didn’t agree on how. Only Justice Breyer saw a difference between the two cases, and he therefore cast the swing vote. GREENAWALT, *supra* note 51, at 86. His opinion, joined by no one, also provides the relevant rationale for the case, as it provides the narrowest ground supporting the decision. *See, e.g., Paul E. McGreal, Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 ARIZ. ST. L.J. 585, 619 n.156 (2008).

⁷¹ Hill, *supra* note 49, at 502 (stating that Justice Breyer “analyzed the display in light of the physical and historical context in order to determine whether a religious or secular message was conveyed—an analysis that is functionally equivalent to the endorsement inquiry”); McGreal, *supra* note 70, at 619 n.156 (noting that four Justices in dissent applied the endorsement test). Justice Breyer did not claim to be applying any particular test but rather to be using “legal judgment”; in addition to the contextual factors, the divisiveness that would be caused by tearing down the monument, as opposed to the relative lack of divisiveness that the monument had caused during the forty years it had stood there, seemed to play an important role for Justice Breyer. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring).

⁷² *See McGreal, supra* note 70, at 619-20.

but the ownership of, or control over, the symbol itself never appeared to make any difference to the Court's analysis.⁷³ As described above, the displays in *Allegheny* were privately owned but placed in publicly owned spaces.⁷⁴ In *Van Orden*, the challenged display had been donated to the government by a private group and placed in a publicly owned park.⁷⁵ Though the provenance of the displays in *McCreary* is unclear, at the time of the lawsuits the government controlled them and they were located in public buildings.⁷⁶ Finally, the display in *Lynch* was owned by the government, but placed in a privately owned park.⁷⁷

2. The Equality-Nondiscrimination Framework in Free Speech Cases

In *Capitol Square Review & Advisory Board v. Pinette*, the Supreme Court addressed for the first time the free speech rights of those seeking to place a religious symbol in a public forum.⁷⁸ In *Pinette*, the Ku Klux Klan claimed that the City of Columbus, Ohio had discriminated against it, thereby violating the Free Speech Clause of the First Amendment, by refusing to allow it to place a large Latin cross in Capitol Square, a public plaza situated near the seat of government.⁷⁹ The city had claimed it was not discriminating against the Klan's message but rather had declined the symbol for fear of violating the Establishment Clause.⁸⁰ The question before the Court was therefore "whether a State violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government."⁸¹

⁷³ See generally *Van Orden*, 545 U.S. at 691-92 (failing to discuss ownership of the symbol in its analysis); *McCreary County*, 545 U.S. at 881 (failing to consider ownership of the symbol in its analysis); *County of Allegheny v. ACLU*, 492 U.S. 573, 600 (1989) (stating explicitly that private ownership did not alter the Court's analysis).

⁷⁴ *Allegheny*, 492 U.S. at 579.

⁷⁵ *Van Orden*, 545 U.S. at 681-82.

⁷⁶ None of the published opinions in *McCreary* discusses the counties' acquisitions of the Ten Commandments in any detail. See *McCreary County*, 545 U.S. at 861; *ACLU v. McCreary County*, 145 F. Supp. 2d 845, 846 (E.D. Ky. 2001), *aff'd*, 354 F.3d 438 (6th Cir. 2003), *aff'd* 545 U.S. 844 (2005); *ACLU v. McCreary County*, 96 F. Supp. 2d 679, 684 (E.D. Ky. 2000); *Doe v. Harlan Cnty. Sch. Dist.*, 96 F. Supp. 2d 667, 670-71 (E.D. Ky. 2000).

⁷⁷ *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) ("Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R.I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district.")

⁷⁸ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 759 (1995).

⁷⁹ *Id.* at 758-59.

⁸⁰ *Id.* at 759-60.

⁸¹ *Id.* at 757.

Justice Antonin Scalia, writing for the Court, began by articulating the now-uncontroversial proposition that “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”⁸² He then cited the body of precedent establishing the norm of equality and nondiscrimination with respect to religious speech in public and limited public fora.⁸³ Indeed, the Court has long held that it constitutes unconstitutional content- or viewpoint-based discrimination to treat religious speech—whether in the form of worship, prayer, or speech from a religious perspective—less favorably than secular speech.⁸⁴

In addressing the Establishment Clause issue, however, Justice Scalia represented only a plurality of the Justices.⁸⁵ Perhaps foreshadowing the property-focused approach that would soon come to dominate the Court’s case law, his opinion advocated for a *per se* rule that private religious speech in a true and properly administered public forum cannot violate the Establishment Clause.⁸⁶ Justice Scalia thus dismissed concerns about “mistaken” perceptions of endorsement by observers seeing an unattended cross in such close proximity to the seat of government.⁸⁷ Instead, he focused primarily on the nature of the forum and the access to it, as well as the public or private nature of the speech rather than on the message conveyed.⁸⁸ He thus dismissed “[t]he test petitioners propose, which would attribute to a neutrally behaving government *private* religious expression.”⁸⁹

Yet, Justice Scalia’s proposed categorical approach did not win out.⁹⁰ Justice O’Connor’s concurrence, joined by Justices David Souter and Stephen Breyer, persisted in applying an endorsement analysis.⁹¹ While noting that it was unlikely that private religious speech in a true public forum could be perceived as an endorsement of religion, Justice O’Connor’s opin-

⁸² *Id.* at 760 (citing *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

⁸³ *Id.* at 761.

⁸⁴ *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107-09 (2001) (holding that exclusion of a religious children’s organization from use of school property on the same terms as other groups constituted unconstitutional viewpoint discrimination); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830-35 (1995) (holding that denial of funding to religious student publication by a public university constituted viewpoint discrimination); *Widmar*, 454 U.S. at 267-70 (holding exclusion of student groups from using school property for religious worship and discussion to be unconstitutional content-based discrimination).

⁸⁵ *See Capitol Square*, 515 U.S. at 770. The plurality was composed of Justice Scalia, Chief Justice Rehnquist, and Justices Kennedy and Thomas.

⁸⁶ *Id.*

⁸⁷ *Id.* at 766, 770.

⁸⁸ *Id.*

⁸⁹ *Id.* at 763-64 (citations omitted).

⁹⁰ *See id.* at 757.

⁹¹ *Capitol Square*, 515 U.S. at 777 (O’Connor, J., concurring).

ion declined to sign on to a per se rule and maintained a focus on the message actually conveyed to the reasonable observer by the display, given its overall context.⁹² Even when private speech in a public forum is involved, Justice O'Connor argued, an endorsement effect may still arise in some circumstances, "whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others."⁹³

Thus, although the result in *Capitol Square* might suggest that issues of ownership and the private or public nature of the speech were central to the Establishment Clause analysis, in fact a majority of the Justices still perceived a different fundamental question.⁹⁴ They considered whether the privately owned cross, situated in a public forum, conveyed a message of endorsement of religion in light of its physical setting, proximity to the seat of government, and lack of disclaimer and accompanying secular symbolism.⁹⁵ *Capitol Square* may be viewed as a transitional case that foreshadows the decisions and the paradigm shift in *Summum* and *Buono*, but one that nonetheless remains firmly planted in the endorsement/equality framework.

B. Pleasant Grove City v. Summum, Salazar v. Buono, and the Turn to Property

The decisive shift toward the property framework began with *Summum*. Although the Court's unanimous holding—that the religious group Summum did not have a Free Speech right to install its monument among other permanent monuments in a city-owned park—likely surprised no one,

⁹² Justice O'Connor suggested that, because the "reasonable observer" is presumed to be aware that the forum is a traditional public forum, open to all comers, he or she would not perceive an endorsement of religion in the City's decision to allow the Klan to use the space on the same terms as all other groups. *Id.* at 775-77, 780-82.

⁹³ *Id.* at 778. Though Justice O'Connor did not give any examples of what she meant when she suggested that an inference of endorsement could still arise in a true public forum, one might imagine a case in which, for example, a religious group operating in a public forum includes the city seal on its religious symbols, thereby suggesting an official imprimatur. *Cf. Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1121 (10th Cir. 2010) (noting as one factor in finding the Establishment Clause violated by the placement of Latin crosses on public land—though not in a public forum—that each "cross conspicuously bears the imprimatur of a state entity"), *cert. denied sub nom. Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011).

In *Capitol Square*, Justices Stevens and Ginsburg dissented on the grounds that the cross's location, lack of a disclaimer attributing its message to a private group, and proximity to key government buildings conveyed a message of religious endorsement, notwithstanding the nature of the Capitol Square forum. 515 U.S. at 800-02 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

⁹⁴ See *id.* at 776, 778 (O'Connor, J., concurring); *id.* at 785 (Souter, J., concurring); *id.* at 800-02 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

⁹⁵ See *id.* at 776, 778 (O'Connor, J., concurring); *id.* at 785 (Souter, J., concurring); *id.* at 800-02 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

the Court's rationale appeared less foreordained.⁹⁶ Somewhat controversially, and one might even say implausibly, the Court held that the privately donated monuments in the public park constituted government speech, thereby rendering the City doctrinally immune from claims of viewpoint discrimination in its selection of monuments.⁹⁷

A small religious group brought the *Summum* lawsuit, seeking to place a permanent stone monument in a public park (Pioneer Park) in Pleasant Grove City, Utah.⁹⁸ As in *Van Orden*, the park already contained a Ten Commandments monument donated decades earlier by the Fraternal Order of Eagles, along with a number of permanent secular monuments.⁹⁹ The Summum group wished to add its "Seven Aphorisms of SUMMUM," which were roughly its equivalent of the Ten Commandments, to be "similar in size and nature to the Ten Commandments monument."¹⁰⁰ When the City refused the donation, the group asserted a violation of its free speech rights, claiming that the City had engaged in viewpoint discrimination by refusing to permit the group's expression in a public forum.¹⁰¹ In response, the City maintained that the monuments in the park were its own speech—"government speech"—and therefore immune to such claims.¹⁰² Though the Summum group had achieved an initial victory in the Tenth Circuit, ultimately the Supreme Court sided with the defendant City, embracing its government-speech rationale.¹⁰³

The label of government speech serves as a defense to a free speech claim.¹⁰⁴ If the government is expressing its own message rather than providing a forum for private speech, the doctrine holds, then it has leeway to exclude or discriminate against private messages in any way it sees fit.¹⁰⁵ Thus, the government assumes the role of a private speaker and is free from the rules against content- and viewpoint-based discrimination that apply

⁹⁶ See, e.g., Adam Liptak, *Justices Grapple with Question of Church Monument as Free Speech Issue*, N.Y. TIMES, Nov. 13, 2008, at A24 (stating that the oral argument questioning was "not a good sign for Summum"); Chris Lund, *Pleasant Grove City v. Summum*, PRAWFSBLAWG (Nov. 10, 2008, 12:06 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2008/11/pleasant-grove.html> ("I think the smart money is on Summum losing.").

⁹⁷ *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009).

⁹⁸ *Id.* at 465-66.

⁹⁹ *Id.* at 464-65.

¹⁰⁰ *Id.* at 465.

¹⁰¹ *Id.* at 466.

¹⁰² *Id.* at 467.

¹⁰³ *Summum*, 555 U.S. at 464.

¹⁰⁴ See, e.g., Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 573 (2011) ("If the speech is government speech . . . the Free Speech Clause does not apply.").

¹⁰⁵ *Id.*

when it acts as regulator.¹⁰⁶ No government could do its job, after all, unless it is able to express its views on matters like foreign policy or public health, without having to provide a platform for opposing views at every turn. The government may, and indeed must, exercise dominion and control over its own message. Of course, the fact that government speech is immune from claims of viewpoint discrimination does not mean that it is protected from claims that it violates other constitutional prohibitions—such as the Establishment Clause.¹⁰⁷ The Establishment Clause was not, however, directly relevant in the *Summum* case because the plaintiff had not pressed an Establishment Clause claim.¹⁰⁸

In holding that the monuments in the park constituted government speech, the Court in *Summum* adopted an analytic framework centered on concepts of sovereignty, ownership, and property.¹⁰⁹ More striking, this holding placed the governmental defendant in the role of *private* property owner. In transforming the central controversy in the case from a free speech issue into, essentially, a property issue, the Court was able to short-circuit the free speech claim.¹¹⁰ Having determined that the speech belonged to the government, the Court had automatically resolved the free speech issue. But putting the government in the place of the private property owner appears to ignore completely any claim that the public itself has to the land.

Indeed, government speech doctrine itself tends to place the government in the position of a private party—that is, of an employer, market participant, and exerciser of private law rights to control property and exclude others. For example, the government speech cases describe the government as “raising [its] voice in the ‘marketplace of ideas.’”¹¹¹ Following this paradigm, Justice Samuel Alito’s majority opinion in *Summum* repeatedly refers to the city as a “property owner”¹¹² and notes that it “took ownership”¹¹³ of the various monuments in the park.

Moreover, the Court expressly linked the City’s ownership of the monument not so much to expression of a *message* as to the City’s very

¹⁰⁶ *Id.* at 577; Joseph Blocher, *Property and Speech in Summum*, 104 NW. U. L. REV. COLLOQUY 83, 89 (2009) (“[W]hen the government speaks . . . , it has a near-absolute right to control its message.”).

¹⁰⁷ See, e.g., Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 367-68 (2009).

¹⁰⁸ See *supra* note 42 and accompanying text.

¹⁰⁹ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 470-74, 476 (2009).

¹¹⁰ See *Tebbe*, *supra* note 29, at 72 (describing *Summum* as a case in which the government “successfully insulated itself from a constitutional challenge through actions involving a property transfer”).

¹¹¹ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting). Of course, the “marketplace of ideas” is a familiar trope, but as Professor Blocher notes, the language of a speech market nonetheless implies concepts of privatization and rivalrousness. Blocher, *supra* note 106, at 91.

¹¹² See, e.g., *Summum*, 555 U.S. at 471 (using the term three times in one paragraph to refer to the city, albeit in the abstract).

¹¹³ *Id.* at 473.

identity.¹¹⁴ “[T]he City took ownership of [the Ten Commandments] monument and put it on permanent display in a park that it owns and manages and that is linked to the City’s identity. All rights previously possessed by the monument’s donor have been relinquished,” Justice Alito explained.¹¹⁵ Yet, in assuming the City’s possession of the monument to be an expressive act, the Court was again placing the government in the exact position of a private property owner. If a private individual or organization takes ownership of a monument and displays it, it is reasonable to assume that the act expresses something about the owner’s views. The government is not usually in the same position, however, given that it often holds land in public trust, for public use, and possibly for expression of the public’s views, with which the government may or may not agree.¹¹⁶ It simply makes no sense to analogize the government’s relationship to the monuments in a public park to the relationship of a private property owner to the expressive objects he or she displays.

At the same time, the Court downplayed the meaning of the Ten Commandments monument itself, as it questioned the determinacy of such messages with almost postmodern zeal—even going so far as to place the word “message” in scare quotes:

Respondent seems to think that a monument can convey only one “message” This argument fundamentally misunderstands the way monuments convey meaning. . . . Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. . . . Contrary to respondent’s apparent belief, it frequently is not possible to identify a single “message” that is conveyed by an object or structure¹¹⁷

Justice Alito’s opinion thus sidelines the issue of the Ten Commandments’ possibly exclusionary meaning by simply treating it as indeterminate.

Some of the Justices recognized that the category of government speech—with the proprietary and exclusionary dimensions that it implies—was a poor fit with the type of expressive activity involved in the *Summum* case.¹¹⁸ Justice John Paul Stevens asserted that “the reasons justifying the city’s refusal [of the monument] would have been equally valid if its acceptance of the monument, instead of being characterized as ‘government

¹¹⁴ Indeed, Professor Mary Jean Dolan refers to such monuments as governmental “identity speech.” Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits after Summum*, 19 WM & MARY BILL RTS. J. 1, 4 (2010) [hereinafter Dolan, *Government Identity Speech*]; see also Mary Jean Dolan, *Why Monuments Are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 CATH. U. L. REV. 7, 26-30 (2008).

¹¹⁵ *Summum*, 555 U.S. at 473-74.

¹¹⁶ The author is indebted to Dave Fagundes for raising this point.

¹¹⁷ *Summum*, 555 U.S. at 474, 476.

¹¹⁸ See Blocher, *supra* note 106, at 92.

speech,¹¹⁹ had merely been deemed an implicit endorsement of the donor's message.¹¹⁹ Likewise, Justice Souter suggested that

[t]o avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.¹²⁰

Those concurring opinions, while supporting the result, nonetheless demonstrate a discomfort with the property-based approach that the majority's rhetoric suggested, preferring to consider ownership as merely a factor relevant to the endorsement inquiry.

The Court's property-as-exclusion focus continued in its next religious symbolism case—this time, a seemingly more straightforward Establishment Clause challenge. In *Buono*, a retired National Park Service employee, Frank Buono, brought an Establishment Clause challenge to a Latin cross that was initially erected by private individuals acting unofficially and without permission at Sunrise Rock in the Mojave National Preserve.¹²¹ Buono brought his challenge after another individual sought to have a Buddhist shrine placed on the same site but was denied permission by the Government.¹²²

The rather byzantine procedural history of *Buono* may account to some degree for the strange configuration of the Justices' opinions in that case. Buono's claim initially succeeded on summary judgment in 2002 before the U.S. District Court for the Central District of California, resulting in an injunction requiring the cross to be dismantled.¹²³ During the pendency of that litigation and prior to the Ninth Circuit's affirmance of the district court's decision, however, Congress had intervened in various ways with the ostensible purpose of keeping the cross from being dismantled: first, by passing two separate appropriations provisions that forbade the expenditure of public funds for the removal of the cross; second, by designating the cross a national memorial; and third, by passing a statute transferring the land to the Veterans of Foreign Wars in exchange for another privately-owned parcel of land elsewhere in the National Preserve.¹²⁴ Despite the land transfer, the Government retained a measure of control over the land, in that

¹¹⁹ *Sumnum*, 555 U.S. at 481 (Stevens, J., concurring).

¹²⁰ *Id.* at 487 (Souter, J., concurring). Justice Souter also noted that “[t]his reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases.” *Id.*

¹²¹ *Salazar v. Buono*, 130 S. Ct. 1803, 1812 (2010) (plurality opinion).

¹²² *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008) (McKeown, J., dissenting from denial of rehearing en banc), *rev'd sum nom.* *Salazar v. Buono*, 130 S.Ct 1803 (2010).

¹²³ *Buono*, 130 S. Ct. at 1812. The Ninth Circuit stayed the requirement of dismantling the cross, however, and allowed the Government to cover it instead. *Id.* at 1812-13.

¹²⁴ *Id.* at 1813.

it would revert back to Government ownership if it ceased being maintained as a war memorial.¹²⁵

The Government did not petition for certiorari after the Ninth Circuit also decided in *Buono*'s favor.¹²⁶ In the course of affirming, however, the Ninth Circuit had not addressed the relevance, if any, of the congressional land transfer statute on the Establishment Clause holding.¹²⁷ Thus, *Buono* returned to the district court and sought to prevent the land transfer by asking the district court either to hold that the transfer violated the 2002 injunction or to modify that injunction to forbid the transfer.¹²⁸ The district court did the former, and the Ninth Circuit affirmed again.¹²⁹ The Government then successfully sought certiorari.¹³⁰

The controversy before the district court on remand from the Ninth Circuit, after the land transfer statute, had seemed to center around the relatively straightforward question whether the proposed transfer was a sham, intended to avoid the force of the initial injunction, or instead was a valid remedy for the Establishment Clause violation.¹³¹ Applying a series of factors based on other lower courts' encounters with this precise issue, the appellate court held that the circumstances of the particular sale at issue in *Buono* indicated that it was an attempt to evade the court's ruling and therefore that the transfer should be blocked.¹³²

The Supreme Court plurality's understanding of the problem before it was entirely different, however.¹³³ Instead of ruling on the validity of the land transfer, it assumed the transfer as a sort of *fait accompli* and then instructed the lower court to decide whether the fact of the symbol's presence on private property affected the Establishment Clause analysis.¹³⁴ To this inquiry, it appeared, the plurality expected the answer to be "yes."¹³⁵ In other words, the plurality treated the ownership or attribution of the symbol as the decisive factor in the case; rather than asking whether the Government's

¹²⁵ *Id.*

¹²⁶ *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004).

¹²⁷ *Buono*, 130 S. Ct. at 1813.

¹²⁸ *Id.* at 1813-14.

¹²⁹ *Id.* at 1814.

¹³⁰ *Id.*

¹³¹ *Buono v. Norton*, 364 F. Supp. 2d 1175, 1178 (C.D. Cal. 2005), *aff'd sub nom. Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), *rev'd sub nom. Salazar v. Buono*, 130 S. Ct. 1803 (2010).

¹³² *Id.* at 1179-82; *see Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702 (7th Cir. 2005); *Paulson v. City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002); *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000); *see generally* Paul Forster, Note, *Separating Church and State: Transfers of Government Land as Cures for Establishment Clause Violations*, 85 CHI.-KENT L. REV. 401 (2010).

¹³³ The plurality opinion was written by Justice Kennedy, joined by Chief Justice Roberts, and joined in part by Justice Alito (who agreed with the entire opinion except the decision to remand). *Buono*, 130 S. Ct. at 1811 (plurality opinion).

¹³⁴ *Id.* at 1820.

¹³⁵ *Id.* at 1819-20.

actions, taken as a whole, should be understood as an endorsement of religion in violation of the First Amendment, the plurality focused only on the ownership of the symbol.¹³⁶ “The injunction was issued to address the impression conveyed by the cross on federal, not private, land,” Justice Anthony Kennedy’s opinion explained.¹³⁷ The opinion then cited *Summum* for the notion that “[p]ersons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.”¹³⁸ Thus, the Court remanded to the district court to reconsider its decision “in light of the change in law and circumstances effected by the land-transfer statute” and even questioned whether on remand the “reasonable observer” standard embodied in the endorsement test remained the proper one for analyzing the constitutionality of “objects on private land.”¹³⁹

Justice Scalia, who concurred in the judgment but felt that the case should have been decided on standing grounds instead, also focused on the ownership of the cross, rather than on its meaning.¹⁴⁰ He opined that the Government could not be enjoined from “permitting” the display of the cross unless the Government owned the property on which it stood:

Barring the Government from ‘permitting’ the cross’s display at a particular location makes sense only if the Government owns the location. As the proprietor, it can remove the cross that private parties have erected and deny permission to erect another. But if the land is privately owned, the Government can prevent the cross’s display only by making it *illegal*.¹⁴¹

For at least a majority of the Justices, then, the most important fact in the case was the private rather than public ownership of the land on which the cross stood.¹⁴² Both Justice Kennedy’s plurality opinion and Justice Scalia’s concurrence evidence an overriding concern with questions of ownership rather than with questions of meaning.¹⁴³

This shift in focus, and its concomitant marginalization of the endorsement approach, troubled Justice Stevens, who authored the principal

¹³⁶ *Id.* at 1819.

¹³⁷ *Id.*

¹³⁸ *Id.* (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009)).

¹³⁹ *Buono*, 130 S. Ct. at 1819, 1821.

¹⁴⁰ *Id.* at 1824-25 (Scalia, J., concurring).

¹⁴¹ *Id.* at 1825. As such, *Buono* could not show that he was injured by the Government’s land transfer, since had not shown that he was harmed or “offended” by the existence of the cross on private, rather than public, land. *Id.* at 1826-27.

¹⁴² *Id.* at 1819 (plurality opinion) (comprising the opinion of Justice Kennedy and Chief Justice Roberts); *id.* at 1824 (Alito, J., concurring); *id.* at 1825 (Scalia, J., concurring) (joined by Justice Thomas).

¹⁴³ *Id.* at 1819 (plurality opinion) (comprising the opinion of Justice Kennedy and Chief Justice Roberts); *id.* at 1825 (Scalia, J., concurring) (joined by Justice Thomas).

dissent in the case.¹⁴⁴ For Justice Stevens, the issue before the Supreme Court was essentially the same as the question that was at issue throughout the litigation: whether the Government's actions—including the action of attempting to transfer the one-acre plot of land to a private party—resulted in an impermissible endorsement of religion.¹⁴⁵ “In evaluating a claim that the Government would impermissibly ‘permit’ the cross’s display by effecting a transfer,” Justice Stevens therefore explained, “a court cannot start from a baseline in which the cross has *already* been transferred.”¹⁴⁶ In other words, Justice Stevens contended, the Court should not have based its decision merely on the public or private ownership at the time of decision.¹⁴⁷ Rather, it should have considered whether the transfer would cure or continue the already-adjudicated Establishment Clause violation.¹⁴⁸

Although Justice Stevens's dissent did discuss the cross's ownership, along with the indicia of continuing governmental control over the cross despite its transfer, he considered those facts only insofar as they were relevant to an understanding of the social meaning of the Government's actions.¹⁴⁹ Thus, he argued that once the cross had been designated a national memorial, “changing the identity of the owner of the underlying land could no longer change the public or private character of the cross. The Government has expressly adopted the cross as its own.”¹⁵⁰ And of course, what the Government has adopted is a religious message: “We have recognized the significance of the Latin cross as a sectarian symbol, and no participant in this litigation denies that the cross bears that social meaning. Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian.”¹⁵¹ Justice Stevens distinguished

¹⁴⁴ *Id.* at 1828-42 (Stevens, J., dissenting) (joined by Justices Ginsburg and Sotomayor). Justice Breyer dissented separately on the ground that the case involved no substantial constitutional issues but rather revolved around the simple question of whether the district court had the power to interpret its own injunction as it did and to enforce that injunction as it saw fit—a question of the law of remedies. *Id.* at 1842-44. According to Justice Breyer, that question clearly should have been answered in the affirmative. *Id.* at 1845.

¹⁴⁵ *Buono*, 130 S. Ct. at 1828 (Stevens, J., dissenting).

¹⁴⁶ *Id.* at 1831.

¹⁴⁷ *Id.* at 1841.

¹⁴⁸ *Id.* at 1837. An analogous case to *Buono* is *Palmer v. Thompson*, 403 U.S. 217 (1971), in which the Supreme Court held that the decision by the City of Jackson, Mississippi to close its public swimming pools rather than to operate them on a racially integrated basis did not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 219. The Court decided that the City's decision to close the pools and even to transfer at least one of them to a private entity, to be operated on a segregated basis, did not implicate the City itself in any racially discriminatory action; thus, the private ownership of the pools became the dispositive factor. *Id.* at 222-23. Justice White's dissent in that case, by contrast, argued that the closing and the transfer of the pools should be viewed in a broader context, taking into account the City's apparent discriminatory motivations. *Id.* at 254-55 (White, J., dissenting).

¹⁴⁹ *See, e.g., Buono*, 130 S. Ct. at 1834-35 (Stevens, J., dissenting).

¹⁵⁰ *Id.* at 1834.

¹⁵¹ *Id.* at 1835 (footnotes omitted).

Pinette on the ground that the government action in that case, unlike in *Buono*, showed no favoritism toward religion.¹⁵² Because the contemplated private ownership of the patch of land in the national preserve was not a dispositive fact for Justice Stevens, he could ultimately conclude that “[c]hanging the ownership status of the underlying land . . . would not change the fact that the cross conveys a message of government endorsement of religion.”¹⁵³

C. *Summum and Buono Compared*

Summum and *Buono* treat distinct doctrinal issues. *Summum* was a free speech challenge, while *Buono* was an Establishment Clause case.¹⁵⁴ As such, the principal question in *Summum* was whether the city park was a speech forum—and if so, what kind of forum—or whether it constituted government speech immune to Free Speech Clause attack.¹⁵⁵ In *Buono*, by contrast, the issue was whether the cross display in the Mojave National Preserve impermissibly endorsed religion, in violation of the Establishment Clause.¹⁵⁶

But in several very important ways, *Summum* and *Buono* are closely related. At base, both cases arose out of an act of exclusion. In *Summum*, the challenge arose from the city’s exclusion of the Seven Aphorisms monument from its park, and in *Buono*, the government’s refusal to permit a Buddhist shrine to be erected at Sunrise Rock initially set in motion the litigation that ensued.¹⁵⁷ Though one case was styled as a free speech case and the other as an Establishment Clause case, both concerned the government’s ability to exclude some religious speech and to adopt other facially religious speech as its own.¹⁵⁸ In addition, in both cases, the First Amendment issues were resolved by reference to property and ownership, both literal and metaphorical, of symbolic speech.¹⁵⁹ In *Buono*, the plurality viewed the actual ownership of the plot of land on which the cross stood as central to the case, and possibly dispositive of the Establishment Clause

¹⁵² *Id.* at 1836.

¹⁵³ *Id.* at 1837.

¹⁵⁴ *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009); *Buono*, 130 S. Ct. at 1812 (plurality opinion).

¹⁵⁵ *Summum*, 555 U.S. at 464.

¹⁵⁶ *Buono*, 130 S. Ct. at 1811-12 (plurality opinion).

¹⁵⁷ *Summum*, 555 U.S. at 465; see also B. Jessie Hill, *Property and the Public Forum: An Essay on Christian Legal Society v. Martinez*, 6 DUKE J. CONST. L. & PUB. POL’Y 49, 52 (2010).

¹⁵⁸ *Buono*, 130 S. Ct. at 1834 (Stevens, J., dissenting); *Summum*, 555 U.S. at 473-74 (arguing that, although the City adopted ownership of the Ten Commandments monument, for instance, it did not thereby adopt a single meaning or symbolism for that monument).

¹⁵⁹ *Buono*, 130 S. Ct. at 1819 (plurality opinion); *Summum*, 555 U.S. at 470-72.

claim.¹⁶⁰ In *Summum*, the city's proprietary relationship to the Ten Commandments monument and other monuments in Pioneer Park was also seen as directing the outcome of the case.¹⁶¹ In both literally and symbolically "owning" that speech, the city assumed the right to exclude *Summum*'s desired message from a public place.¹⁶² The central place that ownership occupies in these two cases is reflected, moreover, in the cases' rhetoric, referring to the government with the privatizing term "property owner," for example.¹⁶³

Finally, although in one case the Court was setting aside questions about endorsement and in the other it was setting aside questions about viewpoint discrimination, in both cases it used formalistic, conceptual reasoning to do so.¹⁶⁴ In turning speech into a form of property and casting the government in the role of private property owner, the Court gave the government absolute power to control the constitutionality of its actions, merely by engaging in particular property transactions.¹⁶⁵

II. DOCTRINAL DEAD ENDS AND COUNTING HEADS: SOME POSSIBLE EXPLANATIONS FOR *SUMMUM* AND *BUONO*

Each of the cases just discussed is somewhat idiosyncratic—*Buono* because of its convoluted history of property transactions and *Summum* because of its free speech posture that hints at but expressly disclaims an Establishment Clause problem.¹⁶⁶ Despite their uniqueness, however, both the "government speech" category embraced in *Summum* and the property transfer remedy sanctioned in *Buono* may well have lives that extend beyond those individual cases. For instance, in a related context, Professor

¹⁶⁰ *Buono*, 130 S. Ct. at 1819 (plurality opinion).

¹⁶¹ *Summum*, 555 U.S. at 472-74.

¹⁶² *Id.* at 470-71.

¹⁶³ See *Buono*, 130 S. Ct. at 1819 (plurality opinion) ("[P]ersons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf." (quoting *Summum*, 555 U.S. at 471)).

¹⁶⁴ See, e.g., *id.* (treating the fact that the Latin cross stood on private land as virtually dispositive of the Establishment Clause); *Summum*, 555 U.S. at 481 (concluding that selecting certain monuments to include on public land is a form of government speech, not a form of censoring individuals' free speech).

¹⁶⁵ Cf. Zick, *supra* note 27, at 1396 (discussing several Establishment Clause cases involving settlement of constitutional issues through property disposition and reading the *Buono* plurality as giving "strong hints . . . that at least three [J]ustices are inclined to treat property dispositions deferentially, even in a case bearing some unusual indicia of favoritism toward a religious symbol").

¹⁶⁶ *Buono* involved a dispute over a land-transfer statute, which had permitted the government to grant the land where the cross stood to the Veterans of Foreign Wars and to receive private land to offset the value of the transferred land. *Buono*, 130 S. Ct. at 1813 (plurality opinion); see also *Summum*, 555 U.S. at 482 (Scalia, J., concurring) (suggesting that although he agreed with the Court's holding, the Court did not fully address the petitioner's Establishment Clause claim).

Helen Norton has observed that lower courts have tended to take the Supreme Court's broad understanding of public employee speech as government speech set forth in *Garcetti v. Ceballos*¹⁶⁷ and run with it, often applying it in factual settings where its relevance is less than obvious.¹⁶⁸ In addition, the Supreme Court's subsequent decision in *Christian Legal Society v. Martinez*,¹⁶⁹ rejecting a religious student group's claims for inclusion among a public law school's official sanctioned student organizations, may be understood as another iteration of the Court's approach in *Summum* and *Buono*. In that case, the Court applied the "limited-public-forum" doctrine to sideline the Christian Legal Society's ("CLS") free speech and free association claims.¹⁷⁰ The Court's use of property concepts—particularly in its unprecedented application of forum doctrine to the CLS's claim that the law school's actions burdened its freedom of association—was not required by precedent, and it functioned to conceal or subsume difficult questions about the meanings of pluralism and equality by appearing to resolve the case on cut-and-dried private law concepts.¹⁷¹

The primary focus of this Article is therefore on the troubling implications of importing property rhetoric into the case law dealing with religious symbolism. It is nonetheless helpful, in considering the future implications of *Summum* and *Buono*, to understand the possible reasons why the cases were decided as they were.

The first and perhaps most obvious explanation for the configuration of the Supreme Court's most recent religious symbolism cases is the retirement of Justice O'Connor in 2006. Justice O'Connor was the creator and most fervent supporter of the endorsement test.¹⁷² Although O'Connor's test managed to command a majority in the key religious symbolism cases, as the above discussion demonstrates, the majorities were fragile and fragmented, often composed of a mere five Justices, some of whom were writing in dissent.¹⁷³ In the wake of O'Connor's departure, commentators have

¹⁶⁷ 547 U.S. 410 (2006).

¹⁶⁸ Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4 (2009) [hereinafter Norton, *Constraining Public Employee Speech*]; Helen Norton, *Imaginary Threats to Government's Expressive Interests*, 61 CASE W. RES. L. REV. 1265, 1267-68 (2011) [hereinafter Norton, *Imaginary Threats*].

¹⁶⁹ 130 S. Ct. 2971 (2010).

¹⁷⁰ *Id.* at 2993-94.

¹⁷¹ Hill, *supra* note 157, at 51.

¹⁷² See, e.g., Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 137.

¹⁷³ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 593-594 (1989); see *id.* at 623-37 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 637-646 (Brennan, J., concurring in part and dissenting in part); *id.* at 646-655 (Stevens, J., concurring in part and dissenting in part); *id.* at 655-679 (Kennedy, J., concurring in judgment, concurring in part, and dissenting in part); see also Erwin Chemerinsky, *The Future of Constitutional Law*, 34 CAP. U. L. REV. 647, 665 & n.126 (2006).

widely, if prematurely, pronounced the death of the endorsement test.¹⁷⁴ Justice O'Connor was, of course, replaced by Justice Alito, who wrote the majority opinion in *Summum* and who joined Justice Kennedy's plurality opinion in *Buono* almost in its entirety.¹⁷⁵ Thus, one might argue, the only thing that changed in any meaningful way between *Van Orden* and *Summum* was the Court personnel—but it was a change that, unsurprisingly, turned out to have significant implications for the ways in which Establishment Clause challenges would subsequently be decided.¹⁷⁶ The dissents in *Buono* and concurrences in *Summum*, composed in part of those Justices who were formerly part of the majority applying the endorsement analysis in religious symbolism cases, thus persisted in focusing on questions of social meaning and the viewpoint of the reasonable observer rather than embracing the property law paradigm.¹⁷⁷

At the same time, it is somewhat surprising that the Court did not wholeheartedly adopt a coercion standard in *Buono*. As many commentators have observed, there are likely five votes for adopting Justice Kennedy's preferred, and more stringent, standard, according to which a government action does not violate the Establishment Clause unless it constitutes (physical or psychological) coercion or proselytizing.¹⁷⁸ That standard probably would have resulted in *Buono* being decided the same way, but it would have kept the focus of the Court's inquiry on social meaning—

¹⁷⁴ See, e.g., Chemerinsky, *supra* note 173, at 665-66; Samaha, *supra* note 172, at 137; Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 379-80 (2006).

¹⁷⁵ See *Buono*, 130 S. Ct. at 1821 (Alito, J., concurring) (stating that he concurred with the majority in all but one respect); Lisa Shaw Roy, *Pleasant Grove City v. Summum: Monuments, Messages, and the Next Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 280, 289 (2010).

¹⁷⁶ See, e.g., Chemerinsky, *supra* note 173, at 664-66 (predicting that Justice O'Connor's replacement by Justice Alito was likely to make a difference in Establishment Clause cases); cf. Roy, *supra* note 175, at 289 ("Nor should it be lost on the reader that the author of the majority opinion in *Summum*, Justice Alito, assumed Justice O'Connor's seat on the Court, which has both symbolic and practical implications."). Of course, Chief Justice Rehnquist was also replaced by Chief Justice Roberts during the period between *Van Orden* and *Summum*, but that change did not appear to have any meaningful impact on the pattern of decision making in religious symbolism cases.

¹⁷⁷ See *Buono*, 130 S. Ct. at 1830-33 (Stevens, J., dissenting) (joined by Justices Ginsburg and Sotomayor) (arguing that the plurality should have considered whether the transfer of the land itself perpetuated the already-adjudicated Establishment Clause violation); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 481-82 (2009) (Stevens, J., concurring) (noting, in an opinion joined by Justice Ginsburg, that the City's acceptance of a monument could be viewed as implicit endorsement of the monument's message); *id.* at 487 (Souter, J., concurring) (suggesting that the relevant inquiry should focus on how the reasonable observer would attribute the speech).

¹⁷⁸ See Chemerinsky, *supra* note 173, at 665 (opining that Justice Kennedy is one of five Justices likely in favor of "adopting a view that the government violates the Establishment Clause only if it literally establishes a church or coerces religious participation"); see also Simson, *supra* note 174, at 379-81.

requiring the Court to ask whether the cross's message was coercive or proselytizing—rather than on ownership.¹⁷⁹

A second pragmatic explanation for why these cases were decided as they were concerns the rather peculiar factual backdrops of both cases. The oddity of *Summum* lay in the religious sect's request to be included in a public park not on a transient basis by means of an ephemeral speech or temporary holiday display, for example, but by being allowed to erect a large, permanent monument. The sheer practicalities of the situation—the unsavory possibility, if *Summum*'s request were granted, of opening up a public park to physical overcrowding by a cacophony of monuments—seemed to dictate the result in that case.¹⁸⁰ One might then speculate that the Court reached whatever doctrinal lengths were necessary in order to avoid this bizarre and counterintuitive result.¹⁸¹ And as noted above, the fact that the case arose as a Free Speech Clause challenge rather than in the usual Establishment Clause posture certainly accounted for the Court's decision not to discuss questions of endorsement and social meaning in any direct way. Likewise, *Buono* was characterized by a complex and distracting factual and procedural history that both provided a number of alternate bases on which the case could be decided and made the determination of social meaning complex, to say the least. For this reason, a number of commentators predicted that the Supreme Court would decide the *Buono* case without seriously addressing the underlying Establishment Clause merits, which is exactly what it did.¹⁸²

Third, *Summum* and *Buono* can be seen as the end result of a doctrinal mess thirty years in the making. Ever since the Court first permitted religious speech in the public square, beginning with *Lynch v. Donnelly*'s sanctioning of a crèche display at Christmastime, it seemed virtually inevitable that more and more religious voices would seek entry to that space, until

¹⁷⁹ See generally B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE L.J. 705, 728 (2010) (discussing the relationship between the coercion test and the endorsement test); see also generally Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417, 431-33 (2009) (discussing the coercion test as applied in the context of symbolic speech).

¹⁸⁰ See *Summum*, 555 U.S. at 478-80 (referring to the space for different monuments in public parks as "limited").

¹⁸¹ See Liptak, *supra* note 96 (noting that at oral argument "the [J]ustices were finding it hard to identify a principle that would compel the city to accept the *Summum* monument without creating havoc in public parks around the nation" and describing such questions asked by the Justices as, "'You have a Statue of Liberty . . . Do we have to have a statue of despotism? Or do we have to put any president who wants to be on Mount Rushmore?'" (quoting Chief Justice Roberts)).

¹⁸² The *Buono* plurality did not directly decide what implications the land transfer would have for the Establishment Clause claim but rather remanded to the lower court for further proceedings. *Buono*, 130 S. Ct. at 1820-21 (plurality opinion). Justice Scalia felt that the case should have been decided on standing grounds, and Justice Breyer would have decided it as a matter of the law of remedies, not as a matter of constitutional law. *Id.* at 1824 (Scalia, J., concurring); *id.* at 1842-43 (Breyer, J., dissenting).

there was simply no more room.¹⁸³ Once the First Amendment was understood not to banish religious speech but simply to mandate equal treatment among speakers, one might argue, the flood of claims for equal treatment was inevitable.¹⁸⁴ Thus, for example, in the years after the Supreme Court's decision in *Lynch*, the Chabad-Lubavitch movement sought repeatedly to place menorah displays in prominent public places in various cities during the winter holiday season.¹⁸⁵ A number of these displays became the subject of litigation; the most famous was the menorah in *Allegheny*, but several cases also involved Free Speech Clause challenges to the exclusion of menorahs from prominent public places.¹⁸⁶ The Summum religion, too, fought and won on free speech grounds some cases involving access to public fora.¹⁸⁷

Summum thus represents a very concrete example of the crowding of the public sphere with religious voices demanding official recognition. But even in a less literally crowded public space, there are surely limits to the amount and types of religious speech a government is willing and able to include. There are only so many temporary holiday displays that can fit around the state capitol and only so many days on which a legislative prayer can be offered. Consequently, the Court had to reintroduce some boundaries, either by means of the government speech doctrine, which would allow the government to repossess the public space and thereby prevent it

¹⁸³ See *Lynch v. Donnelly*, 465 U.S. 668, 702 (1984) (Brennan, J., dissenting) (writing that, in the wake of the Court's decision to permit a crèche to remain in a municipal display, "Jews and other non-Christian groups . . . can be expected to press government for inclusion of their symbols, and . . . [the] government will have to become involved in accommodating the various demands").

¹⁸⁴ "If there is room at the public forum for the Good News Club, there must also be room for Summum." Ian Bartrum, *Pleasant Grove v. Summum: Losing the Battle to Win the War*, 95 VA. L. REV. IN BRIEF 43, 46 (2009).

¹⁸⁵ See *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 430 (6th Cir. 2004); *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1385 (11th Cir. 1993); *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109, 111 (2d Cir. 1991) (per curiam); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990).

¹⁸⁶ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); see also, e.g., *Chabad of S. Ohio*, 363 F.3d at 430 (holding that Chabad had a likelihood of success on the merits of its claim that its exclusion from a public square during the winter holiday season violated its free speech rights); *Chabad-Lubavitch of Ga.*, 5 F.3d at 1385 (holding that Chabad had a free speech right to maintain a menorah display in the state capitol during the holiday season). But see *Chabad-Lubavitch of Vt.*, 936 F.2d at 110-12 (upholding City of Burlington's denial of a permit to displaying Chabad's menorah in a city park, reasoning that the display would violate the Establishment Clause); *Lubavitch Chabad House*, 917 F.2d at 347-48 (upholding the exclusion of Chabad's menorah from O'Hare International Airport as a reasonable time, place, or manner restriction, despite the presence of city-owned Christmas trees).

¹⁸⁷ See, e.g., *Summum v. City of Ogden*, 297 F.3d 995, 1011 (10th Cir. 2002) (holding that the City of Ogden "cannot display the Ten Commandments Monument while declining to display the [Summum] Seven Principles Monument" consistent with the Free Speech Clause); *Summum v. Callaghan*, 130 F.3d 906, 910, 921 (10th Cir. 1997) (holding that Summum had stated a claim for denial of its free speech rights by being denied permission to erect its monolith on the county courthouse lawn alongside the Ten Commandments).

from being overcrowded with too many speakers, or by privatizing the property at issue, thereby cutting off the governmental connection to the alleged discrimination among speakers. In either case, a solution had to be found to allow some form of discrimination among, and exclusion of, religious voices, since including every religious speaker is simply impossible as a practical matter.¹⁸⁸

At the same time, as some commentators have observed, the government's ownership of religious speech creates a new problem—the appearance that the government is endorsing that religious speech whenever it takes ownership of it.¹⁸⁹ For this reason, it perhaps made sense for the Court to marginalize the endorsement test. In *Summum*, the Court suggested that there was a difference between government speech and government *endorsement* of speech, by allowing that the government could be speaking through its monuments without speaking the actual words contained on the monuments.¹⁹⁰ And in *Buono*, the Court allowed the government to avoid the implications of its ownership of a Latin cross by alienating that property.¹⁹¹ Property law presented a way out of the doctrinal mess the Court itself had created.

Finally, there is one more possibility that bears consideration: that the Supreme Court's turn to property stemmed from a genuine desire to minimize the conflict that arguably arises from or is aggravated by the endorsement/equality approach to religious symbols.¹⁹² It seems that the level of emotional investment that attaches to cases involving religious symbolism, the intense criticism of the Court's jurisprudence in this domain, and the volume of the debate concerning the constitutionality of religious symbols in public places has only increased rather than decreased since the Court entered the fray.¹⁹³ As such, it would certainly be reasonable for the Court to believe that it only makes things worse when it issues pronouncements on the social meaning of religious symbols and whether they belong in the public square. Professor and former Judge Michael McConnell suggests, for example, that “cultural and political polarization” based on religion has increased in recent years, and that the Court may be “perceiv[ing] that public passions are aroused more by the Supreme Court's endorsement of one position and repudiation of the other than by the ostensible subjects of the dispute.”¹⁹⁴ Indeed, McConnell further ventures that “few people care much

¹⁸⁸ *Pleasant Grove City v. Summum*, 555 U.S. 460, 478-80 (2009).

¹⁸⁹ Bartrum, *supra* note 184, at 46-47; Meyler, *supra* note 42, at 107.

¹⁹⁰ *Summum*, 555 U.S. at 476-77.

¹⁹¹ *Salazar v. Buono*, 130 S. Ct. 1803, 1811 (2010) (plurality opinion).

¹⁹² The author is indebted to several people for encouraging her to examine this possibility, especially Jonathan Varat and Scott Burris.

¹⁹³ See *supra* notes 4-12, 20, and accompanying text.

¹⁹⁴ Michael W. McConnell, *The Influence of Cultural Conflict on the Jurisprudence of the Religion Clauses of the First Amendment*, in *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* 100, 120, 122 (Peter Cane, Carolyn Evans & Zoë Robinson eds., 2008).

whether a seldom-seen monument on a county courthouse lawn contains a copy of the Ten Commandments, but many people care very much whether the Supreme Court says such a display is consistent with our constitutional values.”¹⁹⁵ The use of property principles thus provides a convenient but still legally defensible way for the Court to avoid magnifying the cultural tensions provoked by religious symbolism cases: if it decides those cases on property grounds, it need not address difficult and contentious questions about the meaning of a particular symbol and how much government sponsorship of religious speech is too much for a pluralistic democracy to permit.

This last possibility—that the recent cases are an effort to lower the temperature of the debate—may well offer the best explanation for the Court’s decision making of late. As discussed at greater length below,¹⁹⁶ however, it is not a satisfying answer to the conundrum highlighted by this Article. Although the Court’s treatment of religious symbolism cases may aggravate disputes that began as marginal or minor, it cannot be said to have created them. The disputes reach the courts because parties bring them there. Though there is a danger that courts will only make matters worse in articulating legal resolutions to those disputes, there is also a danger that courts’ refusal to intervene or to make pronouncements regarding the constitutional values that are truly at stake in a given case will simply render the harm arising from the display—the harm that gave rise to the plaintiff’s claim—all the more invisible. Though in some cases, perhaps, the turn to property may defuse the dispute with almost Solomonic cleverness, in some cases, no doubt, the harm, and the complaint it created, will be submerged but not eradicated.

There are thus a number of pragmatic reasons that may explain why the *Sumnum* and *Buono* cases were decided as they were, making them unsurprising if ill-fitting additions to the sequence of religious symbolism cases in the Supreme Court. Even if predictable and in some sense justifiable, however, the turn that the Court has taken in its rhetoric and reasoning has troubling implications. The following Section demonstrates that the property rhetoric of *Sumnum* and *Buono* is a particularly inappropriate overlay to Establishment Clause doctrine.

III. PROBLEMS WITH THE PRIVATE PROPERTY PARADIGM

This Part presents a critique of the Court’s decision to embrace a particular version of property law and language in *Sumnum* and *Buono*—modeled on the notion of private property as exclusion. Of course, to some degree, the concepts of property and ownership are always involved when a

¹⁹⁵ *Id.* at 122.

¹⁹⁶ *See infra* Part III.B.2.

legal challenge is presented to a religious display attributed to the government. Therefore, Part III.A examines the relationship among the concepts of endorsement, attribution, and ownership, highlighting the way in which the Court's opinion in *Summum* exploits the distinction between ownership and attribution in a way that favors the property perspective but undermines the goals of the government speech doctrine.

Next, Part III.B considers in detail the reasons why it is unwise for the Court to adopt this particular version of property rhetoric and principles in the religious symbolism context. That Part argues that property law's apparent appeal as a neutral, clear, and formalistic approach to deciding difficult constitutional cases actually has very little to recommend it. Worse, the language of private-property-as-exclusion introduces into the doctrine a potential for legitimizing the subordination of minority religious speakers by the government. In addition, the government's expressive possession of Christian religious symbols acts to construct the community as an openly Christian one, in which non-Christians and nonadherents are, at worst, unwelcome outsiders and, at best, tolerated guests.

A. *Endorsement, Attribution, and Ownership*

The very concept of attribution, which itself is central to both the endorsement analysis and the government speech defense, incorporates a notion of ownership—or at a minimum, of control. A party cannot endorse a message without somehow claiming it as its own, usually by means of exercising some measure of ownership or control over the message. Whether one is attempting to discern endorsement or ownership, the issue appears to turn on the relationship to a symbolic object. The concepts are therefore closely affiliated. Indeed, although this Article argues that the Supreme Court's turn to property in its religious symbolism cases is a relatively new phenomenon, it is also possible that the Court did not discuss the ownership of the symbolic speech in any meaningful way in older cases like *Lynch*, *Allegheny*, *Van Orden*, or *McCreary* because the symbol's ownership—its attribution to the government—simply was not contested in those cases. This Section therefore explores in greater depth the relationship of ownership to the concept of endorsement. Ultimately, while property rights and questions of ownership are inextricably linked with free speech concerns as well as Establishment Clause concerns pertaining to religious speech, ownership and endorsement are distinct concepts. The Court both recognized and exploited this distinction in *Summum*, with questionable results.¹⁹⁷

In applying the endorsement test to determine the constitutionality of a religious display, a court is required, implicitly, to make two determinations: first, whether the display's message endorses religion; and second,

¹⁹⁷ *Pleasant Grove City v. Summum*, 555 U.S. 460, 473-74 (2009).

whether that message of religious endorsement can be attributed to the government.¹⁹⁸ In early cases like *Lynch* and *Allegheny*, the focus was primarily on the first question.¹⁹⁹ In *Lynch* and *Allegheny*, the Justices divided primarily over their evaluation of the displays' context and the social meaning they drew therefrom; the Court never stopped to question whether the crèche display in *Lynch*, for example, was attributable to the government of Pawtucket, Rhode Island, although it technically stood in a private park.²⁰⁰ As one commentator has pointed out, the city owned the display itself and took responsibility for erecting and removing the display, thus exercising "effective control" over the display's message.²⁰¹ Indeed, the Court "has long resisted bright-line rules that would limit [the endorsement test's] contextual analysis only to those messages that are government owned or controlled."²⁰² Thus, the Court has clung to the endorsement test when a privately owned symbol stood on government property and when a publicly owned and erected display occupied private property.²⁰³

In more recent years, however, the second question—the problem of attribution—has garnered significant scholarly attention, particularly in light of the rise of the government speech doctrine.²⁰⁴ In the wake of percolating lower-court debates over the constitutionality of specialty license plate schemes as well as of the *Sumnum* case, much of this scholarship has focused on determining when the government should be able to claim speech as its own, thereby insulating that speech from challenge under the First Amendment's free speech protections.²⁰⁵ Commentators have also considered when the government must take responsibility for speech, thus

¹⁹⁸ Cf. Dolan, *Government Identity Speech*, *supra* note 114, at 24 ("Establishment Clause claims in religious display cases generally require two conditions: a given display conveys a religious message, and the government (usually along with a private party) has some role."). In theory, the Establishment Clause could also be violated by a message of governmental disapproval of religion. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

¹⁹⁹ See *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989); *Lynch*, 465 U.S. at 681, 683.

²⁰⁰ Haupt, *supra* note 104, at 606.

²⁰¹ *Id.* at 606-07.

²⁰² *The Supreme Court, 2009 Term—Leading Cases: Endorsement Test*, 124 HARV. L. REV. 219, 219 (2010).

²⁰³ *Allegheny*, 492 U.S. at 579, 597; *Lynch*, 465 U.S. at 671, 682. In *American Atheists, Inc. v. Davenport*, the Tenth Circuit declined to hold that a privately owned Latin cross on private property bearing the symbol of a public agency was immune from Establishment Clause challenge simply by virtue of the private object-private land combination. 637 F.3d 1095, 1121 n.12 (10th Cir. 2010), *cert. denied sub nom. Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011).

²⁰⁴ See, e.g., Abner S. Greene, *(Mis)attribution*, 87 DENV. U. L. REV. 833, 833 (2010); Haupt, *supra* note 104, at 594; Note, *Three's a Crowd—Defending the Binary Approach to Government Speech*, 124 HARV. L. REV. 805, 805 (2011) [hereinafter *Three's a Crowd*].

²⁰⁵ See, e.g., Haupt, *supra* note 104, at 575; Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 591-92 (2008); Olree, *supra* note 107, at 373; *Three's a Crowd*, *supra* note 204, at 805, 809.

opening itself to Establishment Clause challenges.²⁰⁶ Scholars such as Claudia Haupt, Professor Helen Norton, and Professor Andy Olree have proposed tests for identifying speech as governmental.²⁰⁷ Relatedly, Professor Caroline Mala Corbin has argued that courts should recognize a distinct category of “mixed speech,” which has elements of both private and governmental control.²⁰⁸ In the analyses of these commentators, as well as of lower courts that have struggled to find a systematic approach to determining responsibility for speech, actual ownership of either the symbols or the property on which they stand is often a factor, but not a dispositive one.²⁰⁹ Ownership and attribution, in other words, are related but not necessarily identical.

Recent work by Professor Abner Greene, moreover, demonstrates that the relationship between a government “speaker” and a particular message may take a wide variety of forms.²¹⁰ For example, sometimes the government provides “platforms” for private speech with which it does not necessarily wish to associate itself, but for which it appears to retain some responsibility.²¹¹ An example might be a specialty license plate program, or an adopt-a-highway program.²¹² In those instances, Professor Greene has argued that the government should have discretion to decline a platform for certain kinds of speech, such as speech that is hateful or vulgar; yet, the fact “[t]hat the state may be selectively advancing a contested view of the good does not entail that it is adopting the speech as its own, nor that it is correct to attribute the speech to the state.”²¹³

²⁰⁶ Haupt, *supra* note 104, at 572-73.

²⁰⁷ Haupt, *supra* note 104, at 575 (“effective control”); Norton, *supra* note 205, at 591-92; Olree, *supra* note 107, at 373.

²⁰⁸ Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 610 (2008). Professor Caroline Mala Corbin suggests that claims of viewpoint discrimination with respect to mixed speech should invoke intermediate scrutiny; she also implies that such speech would be attributable to the government for Establishment Clause purposes. *Id.* at 675-80 (advocating for intermediate scrutiny); *id.* at 689-91 (stating that government may discriminate against mixed religious speech in order to avoid Establishment Clause problems).

²⁰⁹ For Claudia Haupt, ownership of the property may play a role in determining the entity to which a reasonable observer would attribute a religious message. She specifically eschews such “categorical” approaches in favor of an examination of “effective control.” Haupt, *supra* note 104, at 593-601. Professor Helen Norton treats the public or private ownership of the property on which the speech occurs as a relevant “cue” to the proper attribution. Norton, *supra* note 205, at 608. Professor Andy Olree uses the ownership or control of the “medium or format” of the speech as one of three questions to ask in attributing speech. Olree, *supra* note 107, at 411. Professor Olree also notes that most lower courts have followed a four-pronged test for determining whether speech is governmental or private, and that actual ownership of the speech does not carry independent weight. *Id.* at 386, 398.

²¹⁰ Abner S. Greene, *Speech Platforms*, 61 CASE W. RES. L. REV. 1253, 1253-54 (2011).

²¹¹ *Id.* at 1255-56.

²¹² *Id.* at 1257.

²¹³ *Id.* at 1255; *see also* Greene, *supra* note 204, at 848.

This scholarship highlights the fact that the relationship between speech and a governmental or private “speaker” is not always a straightforward one, determined with simple reference to ownership of the locus or apparatus of speech.²¹⁴ To borrow from the terminology of philosophy of language, endorsement is but one of many “speech acts” that a speaker may perform.²¹⁵ It is one of many possible relationships between the speaker and the symbolic object. Depending on the context, the speech act may, instead, be one of referring to or commemorating a historical event;²¹⁶ of acknowledging or giving thanks for a contribution;²¹⁷ or even of “quoting” a private speaker’s speech by bracketing or distancing the message itself in favor of inclusion based on some other principle—such as when a government entity opens a library, operates a public forum for free speech, or selects works of art for a publicly owned museum.²¹⁸ The nature of the speech act depends on the context of the speech, which may consist of a large—even limitless—number of factors.²¹⁹ For this reason, though property ownership is inextricably interwoven with the problem of attribution and of the social meaning of a display, it is not always identical to, nor coextensive with, either meaning or attribution.

In *Summum*, Justice Alito exploited this distinction, discussing the relationship between attribution and ownership at some length.²²⁰ He began by noting that the government’s ownership of the park and acceptance of the privately donated monuments therein tended to indicate that the monuments were the government’s own speech: “It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.”²²¹ As such, in general, monuments, whether commissioned by the

²¹⁴ Greene, *supra* note 204, at 850.

²¹⁵ In other work, the author has used philosophy of language to illuminate problems associated with religious speech and the endorsement test. Hill, *supra* note 49, at 511-12; Hill, *supra* note 179, at 731-32.

²¹⁶ An example might be a monument that recognizes the role of a particular religious or missionary group in a city’s founding.

²¹⁷ *Cf.* Norton, *supra* note 205, at 622 (discussing acknowledgement of a private entity’s contribution as expressive behavior).

²¹⁸ *Cf.* *Pleasant Grove City v. Summum*, 555 U.S. 460, 476 n.5 (“Museums display works of art that express many different sentiments, and the significance of a donated work of art to its creator or donor may differ markedly from a museum’s reasons for accepting and displaying the work. For example, a painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same ‘message.’”).

²¹⁹ Hill, *supra* note 49, at 512-13. Professor Abner Greene also refers to “local” or “background” understandings. Greene, *supra* note 210, at 1255-56 (“local understandings”); Greene, *supra* note 204, at 851 (“background understandings”).

²²⁰ *Summum*, 555 U.S. at 471-77.

²²¹ *Id.* at 471.

government or simply accepted by it when offered, “have the effect of conveying a government message, and they thus constitute government speech.”²²²

In reaching this conclusion, Justice Alito was undoubtedly aware of the path he had to negotiate between the Scylla of *Summum*’s free speech claim and the Charybdis of a potential, future Establishment Clause claim. If the Ten Commandments and other monuments in the public park were not government speech, then the park was a public forum for private speech, and the city had discriminated against *Summum* by rejecting its contribution. But if the Ten Commandments were government speech, then the city was vulnerable to an Establishment Clause claim that it had openly endorsed the religious speech contained therein.²²³ Thus, Justice Alito carefully explained how government speech that is facially religious could nonetheless fail to be religious speech that is endorsed by the government.²²⁴

First, he pointed out that monuments can convey more than one message, and that the meaning of a monument can change over time.²²⁵ Additionally, and crucially, he described the act of possessing and placing the monument on city property as, itself, an expressive act—one that, presumably, expresses a relationship between the government speaker and the speech.²²⁶ He thus recognized that, while the Ten Commandments monument contains facially religious language, the speech act that results from the particular situation is not necessarily one of endorsement of the monument’s religious message. Indeed, for this reason he also rejected *Summum*’s argument that, if the City wanted to claim the speech in Pioneer Park as government speech, it should be required formally to endorse the speech.²²⁷ Instead, his opinion intimated, the actual message or effect is

²²² *Id.* at 472.

²²³ *Cf. Roy, supra* note 175, at 280 (“If Pleasant Grove argued too vigorously the theory that the existing Ten Commandments monument constitutes the city’s own message, then it risked violating the Establishment Clause in a follow-up lawsuit based on the same facts. If, on the other hand, Pleasant Grove attributed the monument’s message to its 1971 donor, then the city would be hard-pressed to explain why Pioneer Park was not, as *Summum* claimed, a public forum that must be potentially open to all monuments without discrimination based on content or viewpoint.” (footnote omitted)).

²²⁴ *Summum*, 555 U.S. at 474.

²²⁵ *Id.*

²²⁶ *Id.* at 476 (“By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument’s donor or creator.”); *cf. Blocher, supra* note 28, at 1438 (observing, by analogy to the law of expressive association, that “the inclusion or exclusion of a person or thing can itself be an expressive act”); *see generally* Randall P. Bezanson, *Speaking Through Others’ Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 985-86 (2003) (discussing “speech selection judgments” as expressive acts).

²²⁷ *Summum*, 555 U.S. at 474 (“Respondent seems to think . . . that, if a government entity that accepts a monument for placement on its property does not formally embrace *that* message, then the

dependent on various features of the physical, temporal, and social context—including the nature of the space in which the monument is placed and the other items surrounding it.²²⁸ Justice Alito seemed to suggest that while the message on the Ten Commandments monument itself was explicitly religious (exhorting the reader to, for example, keep holy the Sabbath), the message conveyed by the city’s placement of the Ten Commandments in Pioneer Park, along with “a historic granary, a wishing well, the City’s first fire station, [and] a September 11 monument”²²⁹ was more incoherent—perhaps something like, “These are things that are important to the citizens of Pleasant Grove.”²³⁰ Justice Alito therefore seemed to insist that the city has not automatically endorsed the content of the Ten Commandments monument by accepting ownership of it.

Nonetheless, the Court’s opinion at times suggests that not just the entire Pioneer Park display, but in fact each monument in it, is government speech. It asserts, for example, that “the City’s intends *the monument* to speak on its behalf,” and that “[t]he *monuments* that are accepted . . . constitute government speech.”²³¹ The Court equivocates somewhat on this point, however, later asserting that “the City’s *decision* to accept certain privately donated monuments while rejecting respondent’s is best viewed as a form of government speech.”²³² The opinion is decidedly indecisive as to what, exactly, constitutes the speech.²³³ Still, the overwhelmingly clear message is this: ownership of speech is distinct from endorsement of a specific message.

The distinction between ownership and attribution that Justice Alito exploited, however accurate as an abstract matter, is deeply troubling when placed in the context of government speech doctrine. Government speech, in *Sumnum*, is not so much speech attributable to or endorsed by the government, but rather speech that is, in an almost literal sense, owned by the government. But it is hard to see the justification for applying the govern-

government has not engaged in expressive conduct. This argument fundamentally misunderstands the way monuments convey meaning.”)

²²⁸ *Id.* at 476-77. Justice Alito’s view is clearly influenced by the mode of analysis the Court employed in other cases involving religious symbols, such as *Lynch v. Donnelly*. Elsewhere, the author has examined the idea of endorsement as a speech act and the importance of context in determining the message, or effect, of religious displays. See Hill, *supra* note 49, at 511-17.

²²⁹ *Sumnum*, 555 U.S. at 464-65.

²³⁰ *Id.* at 467 (discussing how the park conveys an image of the City). Professor Greene might refer to the City as creating a platform for private speech. Greene, *supra* note 210, at 1257. Professor Dolan refers to such speech as “identity speech” and argues that such speech describing a municipality’s identity should be considered to violate the Establishment Clause when it is religious in content, at least in the absence of any disclaimer. Dolan, *Government Identity Speech*, *supra* note 114, at 63-67; cf. NUSSBAUM, *supra* note 34, at 264 (noting, of *Van Orden v. Perry*, that “[i]f there is a common theme in all the displays, it might be said to be the history and ideals of Texas, as the state explicitly stated”).

²³¹ *Sumnum*, 555 U.S. at 472-73 (emphasis added).

²³² *Id.* at 481 (emphasis added).

²³³ *Id.* at 472-81.

ment speech doctrine in such a case—that is, to messages that the government refuses to claim as its own.

Government speech doctrine is generally justified on two instrumental grounds: first, as a valuable way of providing accurate information to the public, and second, as a means of informing the public of its governing body's viewpoint on certain issues, thus promoting political accountability.²³⁴ In the case of the Pioneer Park display (as opposed to public health-related communications, for example) the first justification seems irrelevant. The second justification appears more relevant to *Summum*—the public can vote its representatives out of office if it disagrees with the message of the monuments in the park—but is severely undermined by Justice Alito's approach. First, it is not clear how the goals of government speech doctrine are supported by qualifying government speech as speech owned by the government but not always directly attributable to the government. For political accountability to function, the speech must be attributable to the government. In addition, Justice Alito's refusal to specify a specific message expressed by the government speech—either from the individual Ten Commandments monument, or from the collection of monuments, or from the act of selecting particular monuments—similarly undermines the goals of the government speech doctrine. Neither information sharing nor political accountability for messages can be achieved when the message conveyed is itself unclear.

Nonetheless, according to Justice Alito's view, Pleasant Grove City obtained the right to exclude other voices, without necessitating any judicial inquiry into whether the exclusion was impermissibly discriminatory, by taking ownership of the speech in Pioneer Park while distancing itself from the resulting message.²³⁵ Justice Alito's particular take on government speech doctrine in the *Summum* case thus focuses on ownership rather than attribution, in direct contrast to the aims of the doctrine itself.²³⁶

²³⁴ See, e.g., Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 994 (2005); Norton, *Constraining Public Employee Speech*, *supra* note 168, at 20-23. Regarding the first justification, Professor Michael Dorf adds the perspective that:

[G]overnments must be permitted to speak freely because government speech is often a form of government action. Government speaks on issues of public health—for example, by discouraging smoking—as a means of promoting public health; government promotes responsible behavior—such as recycling—through campaigns of public education; and government builds community by such measures as erecting monuments and curating museums.

Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1285 (2011).

²³⁵ *Summum*, 555 U.S. at 473-74.

²³⁶ See *id.*

B. *A Critique of the Property Framework*

So far, this Article has illustrated the way in which the Court has turned to property concepts in dealing with the thorny First Amendment questions raised by public displays of religious symbolism. As illustrated above, there was nothing inevitable about the Court's choice of framework—the Court could have considered *Summum* within a viewpoint discrimination paradigm, or it could have adopted a government speech rationale that rendered the inclusion of the Ten Commandments constitutionally problematic. And it could have treated *Buono* under the endorsement test, by asking whether the social meaning of the Government's actions, including the land transfer, constituted an endorsement of Christianity and a message of exclusion to nonadherents. Instead, the Court turned to property, both as a legal solution and as a rhetorical framework.²³⁷ The Court treated the literal ownership of the land and symbols as a dispositive factor, whether the ownership was governmental or private.²³⁸ In addition, the language of private property permeates both opinions.²³⁹

This Section argues that property—or at least the Court's particular property-as-exclusion manifestation of property law and rhetoric²⁴⁰—is a poor fit with the Supreme Court's existing Establishment Clause and free speech doctrines and the ideals of equality, inclusion, and nondiscrimination that they embody.²⁴¹ Indeed, by shifting the focus in its religious symbolism cases from social meaning and viewpoint discrimination to ownership of speech, the Court not only minimizes the importance of those concepts but also introduces into the case law a perspective that is diametrically opposed to them.

The private property framework, as it is mobilized by the Court, is troubling in numerous respects. First, although property law appears to pro-

²³⁷ *Salazar v. Buono*, 130 S. Ct. 1803, 1815-20 (2010) (plurality opinion); *Summum*, 555 U.S. at 467-81.

²³⁸ *See Buono*, 130 S. Ct. at 1815-20 (plurality opinion); *see also Summum*, 555 U.S. at 467-81.

²³⁹ *Buono*, 130 S. Ct. at 1811-1821 (plurality opinion); *Summum*, 555 U.S. at 464-81.

²⁴⁰ As noted above, property is not unavoidably associated primarily with exclusion, but property-as-exclusion is one dominant mode of understanding private property. *See supra* notes 23-26 and accompanying text.

²⁴¹ The Court can be considered to have engaged in a form of “constitutional borrowing,” as defined by Professors Nelson Tebbe and Robert Tsai (unless property law is considered an area of non-constitutional doctrine). *See* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461 (2010) (defining constitutional borrowing as “the practice of importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends”). Professors Tebbe and Tsai cautiously endorse the practice, but they warn that borrowing can be unwise, for example, if it results in combining incompatible ideas, is disingenuously selective, or if it corrupts the doctrine so as to make it unworkable or unstable. *Id.* at 469-71, 482-84. Arguably, many or all of those problems are present in the Court's borrowing of property concepts in the free speech and Establishment Clause domains.

vide a convenient and noncontroversial set of neutral principles for deciding difficult controversial cases, that neutrality is largely illusory. The Court's use of property law and property-based reasoning, while formalistic and arguably even simplistic, merely masks enormous complexity rather than resolving it. In addition, the Court's use of the law and language of property is animated by concepts such as exclusion, absolutism, inequality, and hierarchy. Rather than enforcing true neutrality, the property paradigm helps to reinforce a particular political identity that excludes religious outsiders by both centralizing and naturalizing the exclusion that lies at the heart of the concept of property. Consequently, this Article argues that the Court should, in the future, dispense with the easy device of property law and rhetoric and instead confront the substantive First Amendment issues raised by the presence of religious displays in public places. This does not mean that property must be abandoned or ignored altogether, of course—but simply that it must be put in its place.

1. Property and Neutral Principles

Property law must have seemed to the Justices like a desirable way to resolve the complex issues in *Sumnum* and *Buono*. Rather than requiring messy inquiry into the heavily context-dependent concept of social meaning²⁴² or the unruly analysis of whether viewpoint discrimination has occurred in a government-sponsored forum, ownership and property appeared to be neat, formalistic categories.²⁴³ If the speech is government speech, then, according to the understanding of private-property-as-exclusion, the government has the right to exclude any other speakers, for any reason whatsoever. If the land on which the cross monument stands is owned by a private party, not the Government, it raises no Establishment Clause concerns. End of story.²⁴⁴

Sumnum and *Buono* are not the only cases in which the Court sought refuge in property law's neutral and categorical quality, but with limited

²⁴² See generally Hill, *supra* note 49 (discussing the difficulties that inhere in any analysis of social meaning, deriving from the centrality of context to social meaning).

²⁴³ See, e.g., Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1555 (1998) (“The post-*Perry* public forum doctrine may not be the most fractured area in modern constitutional law, but it comes close.”); Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2141 (2009) (“[I]n recent years, forum analysis has become a muddled area of First Amendment jurisprudence.”).

²⁴⁴ It is not difficult, moreover, to see the attraction of the “private law model” for a Court such as the Roberts Court, which seems to sympathize greatly with the traditional model of adjudication and valorization of the private law world. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288 (1976) (describing the affiliation between the private law model of litigation and traditionally conservative political attitudes).

success. In the 1979 case of *Jones v. Wolf*,²⁴⁵ the Supreme Court embraced the concept of “neutral principles” in the context of a church property dispute.²⁴⁶ In that case, the Court faced difficult Establishment Clause and free exercise issues raised by a dispute over who owned church property after a schism in a local church.²⁴⁷ The Court purported to avoid all of those issues, however, by allowing the state courts to apply “neutral principles of law,” apparently defined as “objective, well-established concepts of trust and property law familiar to lawyers and judges.”²⁴⁸ Applying those neutral principles, the Court held, “promise[d] to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.”²⁴⁹ Similarly, in *Adderley v. Florida*,²⁵⁰ the Court purported to apply straightforward trespass principles to hold that the First Amendment did not grant a right to engage in a civil rights protest on the grounds of a municipal jail: “Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute,” the Court explained.²⁵¹ “The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”²⁵²

The dissent in *Jones* argued, however, that the turn to purportedly neutral property principles often suppresses or assumes away the underlying constitutional questions.²⁵³ Similarly, the dissent in *Adderley* complained of the “violence” done to free speech principles when a case about the right to protest was “turned into a trespass action.”²⁵⁴ The formalistic language of the Court’s property analysis conceals difficult balancing questions that do not lend themselves to straightforward, formalistic analysis. Property rights simply are not as categorical as they appear, especially when public property is involved. Moreover, as discussed below,²⁵⁵ property law and property rhetoric is often charged with connotations of exclusion, inequality, and hierarchy.²⁵⁶

²⁴⁵ 443 U.S. 595 (1979).

²⁴⁶ *Id.* at 597.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 602-03.

²⁴⁹ *Id.* at 603.

²⁵⁰ 385 U.S. 39 (1966).

²⁵¹ *Id.* at 47.

²⁵² *Id.*

²⁵³ *Jones*, 443 U.S. at 614-16 (Powell, J., dissenting) (criticizing the majority for leaving unresolved the “basic question” of “which faction should have control of the local church” and “afford[ing] no guidance as to the constitutional limitations” on the use of neutral principles such as restrictive evidentiary rules).

²⁵⁴ *Adderley*, 385 U.S. at 52 (Douglas, J., dissenting).

²⁵⁵ See *infra* Part III.B.2-3.

²⁵⁶ The author has made some of these arguments, in much briefer form, with respect to the use of forum doctrine in *Christian Legal Society v. Martinez*. Hill, *supra* note 157, at 53-56.

Relatedly, the rhetoric of property-as-exclusion tends toward a certain absolute quality. Although property rights, like every other right, may at some point be limited or even sacrificed when necessary for the public good, the language of property-as-exclusion ignores those limits. The most famous example of this absolutism is Blackstone's widely cited (if inaccurate) description of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."²⁵⁷ Blackstonian ownership, moreover, is almost always configured not just as dominion and control but as *complete* dominion and control.²⁵⁸ Consider, for example, the following language from *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*,²⁵⁹ in which the City of Cincinnati justified its exclusion of a privately owned menorah from a holiday display on the city's central public square by claiming that the speech taking place in the square during the holiday season was government speech.²⁶⁰ The City passed an ordinance declaring:

The City has an inherent right to control its property, which includes a right to close a previously open forum. During times of exclusive use by the City of Cincinnati, the City will bear the ultimate responsibility for the content of the display or event. No other party, other than the City of Cincinnati, may make decisions with regard to any aspect of the event and/or display. No private participation with regard to any aspect of the event and/or display will be permitted at this time. However, the City may accept donations or funds from other entities for the event and/or display which is the subject of exclusive use. As a result of its sole responsibility, ownership, management and control by the City of Cincinnati during times of exclusive use, it is recognized the City is engaging in government speech.²⁶¹

The City's repeated use of terms such as "exclusive," "sole," and "ultimate," as well as the unyielding overall tone of its statement, suggest that it has embraced the view of property rights as absolute dominion.²⁶² The invocation of government speech, which implies the government's private ownership of speech, produces a sort of totalizing language.²⁶³

However, this categorical view of property rights, which makes cases like *Sumnum* and *Buono* suddenly appear to be clear and easy, turning on questions of ownership and nothing else, is thoroughly inaccurate. When public property is involved, at least, the case is considerably more compli-

²⁵⁷ See 2 WILLIAM BLACKSTONE, COMMENTARIES *2; see also FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 11 (1985); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 281 (1998).

²⁵⁸ See, e.g., *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427 (6th Cir. 2004).

²⁵⁹ 363 F.3d 427 (6th Cir. 2004).

²⁶⁰ *Id.* at 433-34.

²⁶¹ *Id.* at 431 (quoting CINCINNATI MUN. CODE § 713-1).

²⁶² *Id.*

²⁶³ *Id.*

cated. There is a long tradition of case law holding that the government does not possess an absolute right to exclude speakers from its property, merely by virtue of its ownership of that property.²⁶⁴ Indeed, the Supreme Court famously stated in *Hague v. CIO*:²⁶⁵

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.²⁶⁶

In so holding, the Court rejected the government's position, drawn from the older First Amendment case *Davis v. Massachusetts*,²⁶⁷ which opined, instead, that public property "was absolutely under the control of the legislature," and therefore that individuals had no right to use it "except in such mode and subject to such regulations as the legislature, in its wisdom, may have deemed proper to prescribe."²⁶⁸

Of course, there are other ways in which the law limits the government's power to exclude even in its role as property owner: nonpublic fora, for example, are subject to rules against viewpoint discrimination.²⁶⁹ The desegregation of public places limited the rights of governmental property owners in the interest of equality.²⁷⁰ For this reason, Professor Timothy Zick has argued, drawing on the language of *Hague*, that government property must be held in a sort of metaphorical public trust, "for the benefit of the public," such that "public officials owe fiduciary duties of fair dealing, preservation, and compliance with constitutional covenants."²⁷¹ Likewise, Professor Harry Kalven, Jr., has spoken of a "First Amendment easement" to use the public streets for expressive purposes.²⁷²

And indeed, even private property rights may be limited in the interest of constitutional values. Civil rights laws requiring equal access to privately owned accommodations limit private property rights in the interest of

²⁶⁴ See, e.g., *Hague v. CIO*, 307 U.S. 496 (1939).

²⁶⁵ 307 U.S. 496 (1939).

²⁶⁶ *Id.* at 515.

²⁶⁷ 167 U.S. 43 (1897).

²⁶⁸ *Id.* at 46-47 (quoted in *Hague*, 307 U.S. at 515).

²⁶⁹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (noting that a governmental entity, "like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated" (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993)), but it may not "exercise viewpoint discrimination, even when the limited public forum is one of its own creation").

²⁷⁰ See, e.g., Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6 (2006).

²⁷¹ Zick, *supra* note 27, at 1368, 1414.

²⁷² Kalven, *supra* note 28, at 13.

equality.²⁷³ Moreover, although the First Amendment does not generally require private property owners to permit private speech on their land, the Supreme Court has upheld the power of a state supreme court to do just that.²⁷⁴ In his concurrence in *PruneYard Shopping Center v. Robins*,²⁷⁵ Justice Thurgood Marshall rejected an “overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment’s guarantee of freedom of speech,” pointing out that common-law rights (unlike constitutional rights) are of course subject to legislative revision.²⁷⁶

Similarly, in *Marsh v. Alabama*,²⁷⁷ the Court refused to find that a corporation’s ownership of a “company town” meant that Jehovah’s Witnesses had no First Amendment right to solicit there, stating, “We do not agree that the corporation’s property interests settle the question.”²⁷⁸ Thus, the crux of the issue is, and has always been, not whether property law governs, but rather what substantive principles govern the limitations on the property owner’s rights. Blackstone notwithstanding, the Court in *Marsh* went so far as to affirm that “[o]wnership does not always mean absolute dominion.”²⁷⁹

Nonetheless, in *Summum* and *Buono* the Court held that ownership was essentially dispositive. This formalistic property-based approach was apparent both in *Buono*’s view that transfer of title to a private party instantly rendered the Establishment Clause question irrelevant²⁸⁰ and in the *Summum* Court’s formalistic and ownership-focused understanding of government speech as speech that is simply owned by the government, regardless of its actual attribution.²⁸¹ Far from resolving everything, in other words, the purportedly neutral principles of property law in fact resolve

²⁷³ See, e.g., Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6. Of course, the Civil Rights Act is a statutory enactment, passed pursuant to Congress’s commerce power, not a constitutional rule or an enactment pursuant to the Fourteenth Amendment. It therefore does not illustrate directly the use of constitutional laws to limit property rights, but it does illustrate the non-absolute quality of property rights.

²⁷⁴ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

²⁷⁵ 447 U.S. 74 (1980).

²⁷⁶ *Id.* at 91-93 (Marshall, J., concurring) (quoting *Hudgens v. NLRB*, 424 U.S. 507, 542 (1976) (Marshall, J., dissenting)). Indeed, as Professor Zick has demonstrated, the Court has often shown a willingness to look beyond formal indicia of ownership when considering the impact of property dispositions on constitutional rights claims. He surveys a series of cases, involving equal protection, free speech, and the Establishment Clause, in which the Court has looked behind a property transfer to consider its effects on constitutional liberties. Zick, *supra* note 27, at 1368-1412.

²⁷⁷ 326 U.S. 501 (1946).

²⁷⁸ *Id.* at 505; see also *id.* at 504-05 (“[A]n ordinance completely prohibiting the dissemination of ideas on the city streets can not [*sic*] be justified on the ground that the municipality holds legal title to them.”).

²⁷⁹ *Id.* at 506.

²⁸⁰ *Salazar v. Buono*, 130 S. Ct. 1803, 1819 (2010) (plurality opinion); cf. *Palmer v. Thompson*, 403 U.S. 217, 222-23 (1971); *supra* note 148 (discussing *Palmer*).

²⁸¹ *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

very little. Moreover, the inaccurate and totalizing view of property in those cases inevitably minimizes the constitutional values at stake. In treating the government as a private property owner, the Court completely ignores the public's expressive rights and stakes in what is, after all, *public* property.²⁸²

2. Property, Exclusion, and Inequality

The Supreme Court's property rhetoric thus draws upon and reinforces the traditional view that exclusion is at the heart of property. Indeed, as the preceding discussion has demonstrated, the exercise of property rights in both cases—taking metaphorical ownership of the monuments' speech in *Summum* and transferring literal ownership of the cross to a private party in *Buono*—resulted in the exclusion of particular undesired speakers or all other potential undesired speakers.²⁸³ The litigation, in both cases, was born of an act of governmental exclusion of a religious minority speaker, and that exclusion was upheld as valid in each case.²⁸⁴ An exclusion-based understanding of property is not the only possible one, of course; as explained above, many commentators, along with much Supreme Court precedent, recognize that property must be understood as fundamentally inclusive, and as serving other, more public values.²⁸⁵ The exclusion-based understanding of property is the one that drives the Court's language and rhetoric in *Summum* and *Buono*, however.

This particular concept of property is intimately associated with hierarchy and inequality. Consider, for example, the feudal origins of the modern private property regime. In feudal times, the sovereign owned all property, and thus all interests in property derived from the sovereign.²⁸⁶ One's ownership of an interest in property therefore signified one's relationship to the sovereign—in short, one's social and political status.²⁸⁷ This association between property and status was magnified, moreover, by the fact that an ownership interest in property generally meant a right to the income derived from the labor of others who, by their lesser wealth and lower social status, were required to work on the land.²⁸⁸ Even today, one might argue, as did Professor Morris Cohen, that dominion over things (in the form of property) also entails power over other human beings, because property law allows us to exclude others from the things that they need, compelling them to pro-

²⁸² Cf. Zick, *supra* note 27, at 1414.

²⁸³ *Buono*, 130 S. Ct. at 1819 (plurality opinion); *Summum*, 555 U.S. at 473.

²⁸⁴ See *supra* text accompanying notes 96-143.

²⁸⁵ See *supra* note 23.

²⁸⁶ See PENNER, *supra* note 23, at 212. Forrest McDonald contends that this view still persisted in seventeenth- and eighteenth-century England and influenced, if only negatively, the American conception of property. MCDONALD, *supra* note 257, at 11-12.

²⁸⁷ See PENNER, *supra* note 23, at 212-15.

²⁸⁸ See *id.* at 212-13.

vide their labor in order to obtain those necessities.²⁸⁹ Thus, private property's origin is, in part, a signifier of hierarchy and one's place within it.

Of course, in some ways, in America, property came to represent just the opposite of what it represented in the feudal system. Professor Joseph Singer has argued, for example, that property law is the “infrastructure of democracy”;²⁹⁰ that property, regulation, and equal opportunity are of one piece.²⁹¹ Others have pointed to the fact that property rights and civil liberties, rather than existing in irresolvable tension, were understood by the Founders as inextricably intertwined.²⁹² At the same time that the Founders appreciated the relationship between property and liberty, however, they worried that too much equality—too much democratic rule—would undermine property rights.²⁹³ According to Professor Jennifer Nedelsky, for example, the Founders themselves saw property both as central to their conception of democracy and as a reflection of natural inequalities.²⁹⁴ Since “an unequal distribution of property was the inevitable result of men's freedom to use their ‘different and unequal faculties of acquiring property,’” the property of the minority would always need to be protected from the majority that lacked it; individual property rights therefore had to be balanced with democratic rule in the form of a constitutional democracy.²⁹⁵ Property was understood as embodying a natural and inevitable hierarchy, and it is this version of property that seems to motivate the Court's decisions in *Sumnum* and *Buono*.²⁹⁶

²⁸⁹ Cohen, *supra* note 23, at 12. Yet, Professor Cohen continues, “[t]he character of property as sovereign power compelling service and obedience may be obscured for us in a commercial economy by the fiction of the so-called labor contract as a free bargain and by the frequency with which service is rendered indirectly through a money payment.” *Id.*

²⁹⁰ Joseph William Singer, *Property Law as the Infrastructure of Democracy*, in 11 POWELL ON REAL PROPERTY WFL11-1, WFL11-9 (Michael Allan Wolf ed., 2011).

²⁹¹ Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 776, 778 (2011) (“Property exists only if we have property law, and law exists only if we have government to issue regulations. One cannot be for property and against government.”).

²⁹² McDONALD, *supra* note 257, at 36; John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 64-71 (1996).

²⁹³ McDONALD, *supra* note 257, at 157.

²⁹⁴ Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY 241, 244-45 (Jon Elster & Rune Slagstad eds., 1988).

²⁹⁵ *Id.* at 244 (quoting THE FEDERALIST, NO. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961)).

²⁹⁶ Neil Hertz has discussed a similar concept of property in connection with the French Revolution—and particularly the views of those who were troubled by it. He identifies an appreciation of property as “a natural sign of legitimate inequalities” in the likes of Edmund Burke and Alexis de Tocqueville. Neil Hertz, *Medusa's Head: Male Hysteria Under Political Pressure*, REPRESENTATIONS, Fall 1983, at 27, 38. The Supreme Court, writing in the *Lochner* era, expressed a similar view:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune[.] . . . And, since it is self evident that, unless all things are held in common, some

Indeed, Professor Joan Williams has documented the continuing influence, exerted in part through the canonical cases of property law, of the view that property derives from individuals' own hard work and merit; as such it "sets . . . off limits" any question about the unequal distribution of property rights today, suggesting that such inequality is a natural effect of property's origins in "human hunger and human sweat."²⁹⁷ Relatedly, Professor Cheryl Harris has elucidated, powerfully and at length, the relationship between property and racial inequality.²⁹⁸ For example, she describes how the "racial and cultural otherness" of the Native Americans came to be "reinterpreted and ultimately erased as a basis for asserting rights in land"; today, when race-conscious remedies are proposed to make up for past inequalities, property rights are again asserted as a neutral reason for refusing to upset existing entitlements.²⁹⁹

This naturalization of inequality risks reinforcing existing inequalities by making them invisible. And by presenting apparently neutral principles for judicial decision making, in the form of protecting preexisting ownership rights according to well-established legal regimes, property law arguably both reinforces the underlying economic inequalities and makes those inequalities seem like a mere preexisting fact, a natural state of affairs in which the law has played no role.³⁰⁰ Though it is not the only possible conception of property, the Supreme Court's particular deployment of property in *Summum* and *Buono*—as a means of eliminating rather than embracing claims for inclusion and masking rather than leveling inequality—highlights the association between property and inequality. Moreover, by appearing to appeal to neutral principles of property law, the Court's decisions in both *Summum* and *Buono* resulted in governmental acts of exclusion. In *Summum*, the exclusion of Summum's message was literal. Once the speech in Pioneer Park was characterized as belonging to the City, the reasons for Summum's exclusion seemed irrelevant; the City could obviously construct its message—that is, use its property—however it wished. The inclusion of the Ten Commandments in that identity message, moreover, did not appear to strike the majority as problematic.

persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

Coppage v. Kansas, 236 U.S. 1, 17 (1915).

²⁹⁷ Williams, *supra* note 257, at 287-89. Professor Joan Williams attributes this view of property partly to John Locke, of course.

²⁹⁸ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993); cf. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 47 (1991) (describing "how the rhetoric of increased privatization, in response to racial issues, functions as the rationalizing agent of public unaccountability and, ultimately, irresponsibility").

²⁹⁹ Harris, *supra* note 298, at 1721, 1777-78.

³⁰⁰ Cf. Nedelsky, *supra* note 294, at 261-62.

In *Buono*, both the literal exclusion of all other speakers—including the Buddhists who wished to erect a shrine at the site of the cross—and the symbolic exclusion of nonadherents in the form of the cross’s message were reinforced by the use of the property framework.³⁰¹ Of course, a private party could not be forced to allow a Buddhist shrine on its land, property law tells us. The literal exclusion thus seems a matter of common sense. The symbolic exclusion of non-Christians from the war memorial—and its invisibility—is perhaps best exemplified by Justice Scalia’s exchange with plaintiff’s counsel over the sectarian nature of the Mojave Desert cross to this dynamic of naturalized inequality or hierarchy.³⁰² The exchange proceeded as follows:

JUSTICE SCALIA: [The cross is] erected as a war memorial. I assume it is erected in honor of all of the war dead. It’s the -- the cross is the -- is the most common symbol of -- of -- of the resting place of the dead, and it doesn’t seem to me -- what would you have them erect? A cross -- some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?

MR. ELIASBERG: . . . The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.³⁰³

Justice Scalia then characterized as “outrageous” the notion that “the only war dead that that cross honors are the Christian war dead.”³⁰⁴ Justice Scalia’s inability to see the sectarian nature of the cross as a symbol of the dead may well be due to personal experience, upbringing, or biases. But it also seems to reflect a viewpoint that resounds deeply with the rhetoric of property-as-exclusion and its tendency to treat social structures as inevitable and hierarchies as natural. Justice Scalia’s remark suggests that the cross’s meaning as a war memorial is owned by the majority and thus dictated by the majority viewpoint.³⁰⁵ Moreover, any claim for inclusion or equal regard is almost illegible in this context, in which the cross is private property, to be exchanged at will, rather than a symbol the meaning of which must be evaluated according to First Amendment constraints.

This propertization of the memorial and its message casts nonadherents to Christianity, if not as unwelcome intruders, then as “guests” in another’s home or ceremony, to adopt Professor Alan Brownstein’s elegant

³⁰¹ *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004).

³⁰² Oral Argument at 40:21, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472), available at http://oyez.com/cases/2000-2009/2009/2009_08_472 [hereinafter Oral Argument].

³⁰³ *Id.*

³⁰⁴ *Id.* at 41:24.

³⁰⁵ Though this Article uses the term “Christian majority,” the religious landscape in the United States is extremely complicated, and in actuality, no single religious denomination constitutes a majority. However, Christians in general are still the majority in America. See generally ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* (2010).

metaphor.³⁰⁶ To place non-Christian veterans and visitors to the national memorial in that role, whether because of the Government's ownership of the symbol or a private party's ownership, is to grant them the social status of an outsider, or at least a non-insider. But as Professor Martha Nussbaum argues, American democracy and respect for human dignity, expressed in part through the Establishment Clause, "may not make citizenship hierarchical. . . . [A]ll citizens must be able to enter the public square *on equal conditions*."³⁰⁷ Indeed, evoking feudal imagery, Professor Nussbaum asserts that "a failure of respect in the symbolic domain is like an insult, a slap in the face, and, moreover, it is the sort of slap in the face that a noble gives to a vassal, one that both expresses *and constitutes* a hierarchy of ranks."³⁰⁸

The Court's ultimate disposition of *Buono*—its privatizing of the cross and concomitant assumption that the property transaction would answer the Establishment Clause question—allowed the Court to decline to grapple with the very real challenge presented to Justice Scalia's viewpoint by plaintiff's counsel's response.³⁰⁹ But perhaps more importantly, it erased the very question that the Court was supposed to answer—whether the cross impermissibly cast non-Christians as outsiders—by treating that outsider status as a natural and inevitable function of the preexisting property entitlements, both legal and metaphorical.³¹⁰

The formalizing and naturalizing rhetoric of private property encourages the reader to focus not on the underlying constitutional values but rather on legal entitlements to land and objects. This function of the Court's rhetoric is particularly troublesome in the context of First Amendment doctrine, however. The property framework embraced in *Sumnum* and *Buono*, and the absolute control and right to exclude that it implies, conflict pro-

³⁰⁶ Professor Alan Brownstein discusses the "guest" analogy in the context of sectarian high school graduation prayers. Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 NEXUS 61, 78 (2000). As he explains:

If I attend a religious ceremony, such as a wedding, at the invitation of a friend of another faith, I am not going to feel offended at the prayers that are offered at this ceremony. I may not be able to participate in some of these expressive activities, but that is hardly the basis for offense. I am a guest, after all, a conceded outsider and visitor to the religious ceremony of another faith. . . . Public school graduations are very different. My children are not guests at their own graduation.

Id. Similarly, one might point out that non-Christian citizens and veterans are not guests in the National Park or at National Memorials. The author is grateful to Professor Brownstein for drawing her attention to this article. *Cf.* *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2989 n.18 (2010) (noting that a religious student group's "[w]elcoming all comers as guests or auditors . . . is hardly equivalent to accepting all comers as full-fledged participants").

³⁰⁷ NUSSBAUM, *supra* note 34, at 227.

³⁰⁸ *Id.* (emphasis added).

³⁰⁹ *See* Oral Argument, *supra* note 302, at 41:21.

³¹⁰ *See generally* *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

foundly with the core ideals of equality and inclusion that animate the endorsement test.

As Professors Christopher Eisgruber and Lawrence Sager have pointed out, the endorsement test is concerned primarily with equality, with “equal liberty” of conscience, and with avoiding the disparagement of religious outsiders in society.³¹¹ The concept of equality is closely tied to the concept of inclusiveness, particularly with respect to religious outsiders. Thus, other First Amendment scholars have also highlighted the connection among the endorsement test, inclusion, and equality. In an early meditation on the endorsement test, Professor Neal Feigenson argued that the test “prohibits government from using religion to affect its citizens’ participation in the political community” with the goal of ensuring equality.³¹²

After all, the purpose served by ensuring such specific civil rights as the right to vote, speak freely, hold office, or serve on juries is to guarantee to each citizen an equal opportunity to wield lawfully the power of persuasion and thus to help shape political decisions. Equal participation is the ultimate value.³¹³

Similarly, Professor Lisa Shaw Roy has noted that the Court’s Establishment Clause jurisprudence pertaining to religious displays “is largely about protecting the feelings of the nonadherent from a public manifestation that may confer outsider status.”³¹⁴

Professor Nussbaum has also, recently and influentially, articulated a theory of religious freedom and nonestablishment grounded in equality and equal respect.³¹⁵ In regard to public displays of religious symbolism, in particular, Professor Nussbaum contends that a decisional framework focused on supporting equality and avoiding the stigmatization of minority religions and nonreligious individuals is the best one.³¹⁶ Indeed, she argues that the equality-based understanding of the Establishment Clause fits best with the original, historical understanding of the First Amendment and its underlying principles.³¹⁷

For this reason, too, the defense of the Court’s recent religious symbolism jurisprudence on the ground that it is intended simply to defuse cultural tensions must be rejected.³¹⁸ The Court’s approach, though perhaps aimed at avoiding divisiveness, poses a significant risk of rendering invisi-

³¹¹ EISGRUBER & SAGER, *supra* note 22, at 122-27.

³¹² Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 66-67 (1990).

³¹³ *Id.* at 67 (footnote omitted).

³¹⁴ Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1, 20 (2004).

³¹⁵ NUSSBAUM, *supra* note 34, at 34-71.

³¹⁶ *See id.* at 260-65.

³¹⁷ *See id.* at 34-114.

³¹⁸ *See supra* text accompanying note 193.

ble the harm of exclusion—harm that will not be less real simply because it goes unacknowledged. The precise tendency of property language is to render natural and invisible the act of exclusion; it is thus no answer to those who claim to have received a symbolic message of exclusion to say that the Court will resolve religious disputes on property grounds in order to submerge disagreement over the exclusionary nature of the display’s message and whether it is constitutionally permissible. What appears to be consensus may be more accurately characterized as a suppression of debate in favor of the status quo.

3. Property, Identity, and Expression

Scholars have noted the expressive nature of property.³¹⁹ Justice Alito, too, highlighted the ability of monuments to “speak for” a city.³²⁰ In addition, monuments not only speak for the government—they purport to represent something about the government’s identity. In this way, the concepts of property, attribution, and identity are intimately related in the expressive function of both the symbol itself and the government’s ownership and placement of it. Indeed, the very term “property” derives from the Latin word that also refers to that which is individual and specific to oneself; we speak of persons and things as having certain “properties,” in the sense of identity traits.³²¹

Professor Carol Rose, in examining the concept of possession in relation to property, has written of possession as a form of communication. Using the example of adverse possession, Professor Rose notes that it is not so much actual control but a “declaration of one’s intent to appropriate” that is key to indicating possession for the purposes of triggering that doctrine.³²² “Possession as the basis of property ownership, then, seems to amount to something like yelling loudly enough to all who may be interested,” she concludes.³²³ “The first to say, ‘This is mine,’ in a way that the public understands, gets the prize, and the law will help him keep it against someone else who says, ‘No, it is *mine*.’”³²⁴

³¹⁹ *E.g.*, Blocher, *supra* note 28; Dolan, *Government Identity Speech*, *supra* note 114.

³²⁰ *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470 (2009).

³²¹ *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1405 (4th ed. 2006) (giving one definition of property as “[a] characteristic trait or peculiarity, especially one serving to define or describe its possessor,” and noting the word’s derivation from the Latin word *proprius*); C.T. LEWIS, ELEMENTARY LATIN DICTIONARY 664 (1963) (defining *proprius* as “not common with others, own, special, several, individual . . . each man’s own, . . . [p]ersonal”).

³²² Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 77 (1985) (citing 2 BLACKSTONE, *supra* note 257, at *9, *258).

³²³ *Id.* at 81.

³²⁴ *Id.*

Similarly, the government's possession of a religious symbol, and its treatment of that symbol as its property, seems to say that the symbol "belongs to" our polity and is intimately connected with it. It is an act of defining a political community through its possession of the symbol.³²⁵ One might think of the original act that gave rise to the *Buono* litigation as such an act.³²⁶ Whether so intended or not, the private citizens' act of installing a sectarian war memorial on government-owned property appears as a form of claim staking, forcefully and forcibly identifying the nation, and the national experience of loss in World War I, with the Christian symbol, and vice versa.³²⁷ In the words of Professor Nussbaum, "[s]tates really do want to announce that theirs is a Christian, or perhaps a Judeo-Christian, state," and they do so in part by erecting sectarian symbols in public spaces.³²⁸

The government's ownership and control of the symbol as property is itself a speech act that both describes and constructs a particular reality—a reality in which the community at issue is designated a Christian community.³²⁹ This effect, moreover, is magnified by the ultimately circular and self-defining nature of this exercise in possession. The more the government announces its exclusion of those who do not "belong," the more it is entitled to do so—that is, the less likely it is that the forum at issue will be found to be a public forum subject to constraints on viewpoint discrimination.

The longer and the more notorious the exclusion, too, the more likely that religious symbols challenged under the Establishment Clause will be found to have acquired a sort of immunity by "adverse possession."³³⁰ An example of this kind of adverse possession arises in the case of the Ten Commandments monument in *Van Orden v. Perry*, which, Justice Breyer noted, had gone unchallenged for forty years and was therefore unlikely to be divisive:

³²⁵ Relatedly, Professor Zick has expressed concern about the way in which *Summum*, and its use of private property analogies, undermines free speech and public forum concepts by treating a public park both as a locus for, and as a form of, expression of a government message, rather than as a space for expression of the public's messages in the form of a diversity of private voices. Timothy Zick, *Summum, the Vocality of Public Places, and the Public Forum*, 2010 B.Y.U. L. REV. 2203.

³²⁶ *Buono v. Norton*, 371 F.3d 543, 548-49 (9th Cir. 2004).

³²⁷ *Salazar v. Buono*, 130 S. Ct. 1803, 1811-12 (2010) (plurality opinion).

³²⁸ NUSSBAUM, *supra* note 34, at 266. Along similar lines, Professor Adam Samaha has suggested that one of the principal problems with public displays of religious symbolism is not so much that the displays attempt to proselytize as that they perform a "sorting" function along religious lines—they signal the religious composition of a community and encourage geographical separation along religious lines. Samaha, *supra* note 172, at 137-38.

³²⁹ In an earlier article, the author discussed at length the power of religious speech acts both to describe and to construct a particular reality. Hill, *supra* note 179, at 735, 756-58.

³³⁰ See JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 235 (3d ed. 2011).

As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage.³³¹

Through a kind of adverse possession, this language implies, the Ten Commandments have become a part of our culture, losing their quality as a religious symbol affiliated only with certain religious belief systems. Like many instances of so-called “ceremonial deism,” including the words “under God” in the Pledge of Allegiance and the words “In God We Trust” on our coins, Justice Breyer’s language and logic imply, such symbols are unchallengeable because our culture has come to possess them and become identified with them in this manner.³³²

Finally, and relatedly, the shift to a property paradigm for deciding religious symbolism cases also shifts control over the meaning of the government’s actions from the hypothetical “reasonable observer” back to the government. Although some have argued that the endorsement test’s “reasonable observer” embodies the viewpoint of the “reasonable nonadherent,”³³³ and others have criticized the test for failing to do so, the endorsement test clearly does not allow the government to definitively establish the meaning of its own message.³³⁴ In disjunctively providing that a governmental act is forbidden if it has the purpose *or* effect of sending an alienating message to religious outsiders, the endorsement test instead explicitly recognizes that the government may send a message that is other than what it intended, but that the unintended message may still cause constitutional injury.³³⁵ The property paradigm, by contrast, allows the government to short-circuit the endorsement inquiry, rendering the perspective of the viewer irrelevant. Although the endorsement test may have a tendency to-

³³¹ Van Orden v. Perry, 545 U.S. 677, 702-03 (2005) (Breyer, J., concurring). Indeed, it is unclear what the limitations period is for this form of adverse possession, but forty years seems to be a fair guess. See *id.*; Lynch v. Donnelly, 465 U.S. 668, 684 (1984) (“In any event, apart from this litigation there is no evidence of political friction or divisiveness over the crèche in the 40-year history of Pawtucket’s Christmas celebration.”).

³³² See generally Hill, *supra* note 179. Similarly, Neil Hertz, describing Alexis de Tocqueville’s memoirs (entitled *Souvenirs*), observes that Tocqueville begins by noting that it was written “à Tocqueville” (at Tocqueville). For Hertz, this coincidence of name and place is more than a pun or a random felicity: it demonstrates how property both represents privilege and naturalizes it. As Hertz explains: “Tocqueville himself no doubt hardly gave a thought, as he wrote that line, to the fact that his name was his place. Whatever self-satisfaction inheres in that coalescence of an individual, a family and some acreage would operate in ways that had, by time, been muted and quasi-naturalized.” Hertz, *supra* note 296, at 37-38.

³³³ See, e.g., Roy, *supra* note 314, at 17 & n.78.

³³⁴ See, e.g., *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 228, 234 & n.46 (1989); *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1648-49 (1987).

³³⁵ See Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

ward indeterminacy or even a majoritarian bias, the property paradigm eliminates consideration of the religious outsider altogether.³³⁶

IV. REFLECTIONS ON *SUMMUM* AND *BUONO* IN THE CONTEXT OF THE CULTURE WARS

This Part provides some brief reflections on how one might understand the shift to property law and rhetoric in the Supreme Court's religious symbolism jurisprudence, placed in the broader context of the culture wars. The property paradigm may be understood both as a way of harnessing the power of property in articulating the harm perceived by certain members of society when the public square is stripped of religious symbolism and as a way of re-inscribing a societal power structure that may have been threatened, in one domain, by the rise of the endorsement test.

First, the use of the private property framework may be understood as an attempt to find a powerful way of articulating the nature of the injury suffered by those who would keep their religious symbols in a privileged place. As Professors Eisgruber and Sager have eloquently explained, passions are intense both for and against the removal of religious symbolism in public places.³³⁷ Yet, it is difficult to explain precisely why individuals on both sides are so invested in the controversy—and, particularly, why the absence of religious symbolism is considered by some to be a form of disparagement equivalent to that experienced by religious outsiders confronted with symbols of the majority religion.³³⁸ By placing an overlay of private property rhetoric on the religious speech at issue, those who would preserve the right of the government to place certain symbols of its choosing in the public square call forth all of the emotional power that the concept of property—particularly in its traditional Blackstonian manifestation—evokes in the American imagination.

Numerous commentators have noted the uniquely emotional attachment that many Americans have to the concept of property. Indeed, the idea of property possesses a certain “mythic quality.”³³⁹ As Professor Nedelsky explains the appeal of property to the Founders, “[p]roperty was ‘something’ which was important, which required and was entitled to protection, which could be threatened and whose destruction or violation would cause far-reaching damage.”³⁴⁰ The mere invocation of property, especially when

³³⁶ Hill, *supra* note 49, at 493-95.

³³⁷ EISGRUBER & SAGER, *supra* note 22, at 128-30.

³³⁸ *Id.*

³³⁹ Nedelsky, *supra* note 294, at 244.

³⁴⁰ *Id.* at 252 n.19. Indeed, Professor Nedelsky adds, “It is as though property rights have remained infused with a natural-rights quality long after natural-rights theories were no longer accepted.” *Id.*

physical ownership of property is involved, is a “showstopper[] of persuasion.”³⁴¹

In other words, casting religious symbolism in terms of property rhetoric gives concrete shape to the injury that some members of society feel when their religious symbols are removed. The loss of the symbols is a loss of status, of one’s standing within the social hierarchy—just as a loss of one’s property in feudal times would accompany a loss of social or political status and of one’s particular relationship to the sovereign. Viewed as such, removal of religious symbols from the public square is a kind of “taking” of the Christian majority’s heretofore privileged status.

Indeed, Professor Gene Nichol has described in very similar terms his experience when, as President of the College of William and Mary, he made the decision to remove a historic crucifix from its place of prominence in the college chapel. “What surprised me,” he writes,

was how frequently and how powerfully so much of the discussion and correspondence I had with opponents of my decision also tracked the rhetoric of equality disputes—echoing not only the rejection of the different, of the stranger, but pressing claims of status, of entitlement, of expectation, of privilege and ownership.³⁴²

Tying his own experience to Professor Nussbaum’s theory that the value of equality must guide decision making on the permissibility of religious symbolism, he argues that “efforts to insist on the governmental display of majority religious symbols” tend to “stake a visible claim of ownership, identifying an institution, or a locale, or a government, as their own.”³⁴³

Property rhetoric may be appealing for another reason, as well. In her recent history of the role of religious groups in shaping the constitutional law of religion, Professor Sarah Barringer Gordon notes that in both the 1950s and the Cold War, perceived threats to the dominant Christianity from secularizing forces in American society were closely associated with communism in the minds and rhetoric of the Christian Right.³⁴⁴ “In their

³⁴¹ Fagundes, *supra* note 26, at 691 (quoting Margaret Jane Radin, *Information Tangibility*, in *ECONOMICS, LAW AND INTELLECTUAL PROPERTY* 395, 400 (Ove Grandstrand ed., 2003)); *see also* Dagan, *supra* note 23, at 84 (discussing the power of property rhetoric).

³⁴² Gene R. Nichol, *Establishing Inequality*, 107 MICH. L. REV. 913, 928-29 (2009) (reviewing NUSSBAUM, *supra* note 34).

³⁴³ *Id.* at 930. In a recent article, Professor Risa Goluboff similarly reflects that the Supreme Court’s opinion in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), which struck down a state vagrancy law as void for vagueness, was on one level a case about “place,” and the role of law in “demarkat[ing] who was out of place in a given community—who was denied full respect for their mobility, their autonomy, their lifestyle, or their beliefs”; thus “vagrancy cases both reflected and propelled the larger culture wars of the 1960s.” Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1371-72 (2010).

³⁴⁴ SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 145-46 (2010).

view, secularism and communism traveled hand in glove, while religion and American democracy provided the only reliable safeguards against the Communist conspiracy.³⁴⁵ In the later twentieth century, secularism also became associated with the struggle for equal rights for women and racial minorities.³⁴⁶ Today, these sentiments—anticommunism, antifeminism, and anti-civil rights—continue to hold some sway, in some contexts. Yet, they seem to lack the emotional power that they held fifty, or even twenty-five, years ago. Though culture war disputes continue to rage around women’s reproductive rights, the status of traditional marriage, and affirmative action, a return to the language of property conjures an emotional response unlike most appeals to anticommunism and anti-equal-rights sentiments. It draws on a rhetoric that is both new and venerable, distinct from the earlier rhetoric of anticommunism and antifeminism, yet affiliated with them in its individualism and in its valorization of the hierarchical status quo.³⁴⁷

The turn to property talk may also be a response to a perceived imbalance of power in this particular legal domain that had taken hold during the time that Justice O’Connor’s endorsement test held sway. The tendency of property to present the preexisting social order as natural and foreordained must be appealing to those Justices who felt that the “outsider” perspective of the nonadherent had come to dominate Establishment Clause jurisprudence in this area.³⁴⁸ The language of private property is a response to the rise of the reasonable observer and a reassertion of the government’s power, on behalf of the majority, to control the meaning of its symbols.

V. A RETURN TO FIRST AMENDMENT PRINCIPLES

The Court should abandon its focus on property in religious display cases, at least insofar as it serves as a device for simplifying difficult First Amendment questions. Though the endorsement/equality approach is not without its flaws, a further elaboration of the constitutional values underlying these disputes is preferable to avoidance.³⁴⁹ Moreover, to the extent that

³⁴⁵ *Id.* at 145.

³⁴⁶ *Id.* at 154-56.

³⁴⁷ Indeed, one need only observe the uproar surrounding the Supreme Court’s decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), a takings case that was relatively uncontroversial and unsurprising in terms of constitutional doctrine but that evoked enormous public protest, to see the continuing sway that property exercises in contemporary society and politics. See, e.g., Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2108-14 (2009).

³⁴⁸ Cf. Meyler, *supra* note 42, at 108 (noting that, to the extent the historicity of monuments becomes a reason for maintaining them, this rationale favors mainstream and longstanding religious traditions over newer ones).

³⁴⁹ See *supra* note 49 and accompanying text (noting commentators’ criticisms of the endorsement test); *supra* note 243 and accompanying text (noting commentators’ criticisms of the public forum doctrine).

the Court has adopted property as a means to defuse cultural tensions stemming from the Court's articulation of the meaning and import of religious symbolism, a more refined approach to the endorsement/equality inquiry may be possible.

Though there is reason to fear that the Court's property paradigm might continue to exert influence in future cases, there is also reason to believe that this is not an inevitable outcome. Both *Summum* and *Buono* were characterized by certain idiosyncrasies that would allow the Court to avoid their full impact in the future.³⁵⁰ In *Buono*, the complex history of procedural maneuvering and congressionally authorized property transactions make the case somewhat *sui generis*.³⁵¹ In addition, the Court neither decided the Establishment Clause question nor officially abandoned the endorsement test; consequently, it may well be able to return to the endorsement test in a future case raising the issue of a religious symbol on technically private, but ostensibly public, land.³⁵²

Likewise, *Summum* was an odd sort of public forum challenge. It is hard to imagine the Court reaching a holding that a public park must be open to anyone who wants to place a permanent monument there.³⁵³ Given the oddity of the facts and the particular nature of the plaintiffs' claims in *Summum*, then, the Court can limit its potential future damage by cabining its holding to its context of permanent, privately donated monuments in a public park, and resisting the temptation to allow the government speech doctrine to expand beyond its original borders.³⁵⁴ Finally, the Supreme Court in *Summum* decided no Establishment Clause issues, and it may well have occasion in the near future to decide a similar issue.

Indeed, the Supreme Court recently considered a case involving the constitutionality of privately owned Latin crosses on public property serving as memorials to fallen highway patrolmen, which the Tenth Circuit held to be government speech and to violate the Establishment Clause.³⁵⁵ Alt-

³⁵⁰ See *Salazar v. Buono*, 130 S. Ct. 1803, 1812-14, 1819-21 (2010) (plurality opinion); *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009); see also *infra* notes 351-354 and accompanying text.

³⁵¹ See *Buono*, 130 S. Ct. at 1812-14 (plurality opinion).

³⁵² See *id.* at 1819-21 (remanding to the district court for an inquiry into whether the reasonable observer would find an endorsement of religion in the cross's presence on private land). Although *Buono* is unusual in its procedural posture, it is not entirely unusual for governmental entities to seek to avoid Establishment Clause claims by manipulating the ownership of the symbol or the land on which it sits. See generally Forster, *supra* note 132.

³⁵³ See, e.g., Zick, *supra* note 325, at 2204 ("Insofar as the result is concerned, the decision in *Summum* is facially unassailable. Just imagine the chaos that would ensue if governments were required to accept either all privately donated monuments or none at all.")

³⁵⁴ See *id.* at 2223-28 (expressing concern that *Summum* will encourage expansion of the government speech doctrine); see also Norton, *Imaginary Threats*, *supra* note 168, at 1269-74 (documenting expansive uses of the government speech doctrine in the lower courts).

³⁵⁵ *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting).

though the Court ultimately denied certiorari, the existence of the case and the significant controversy it engendered—including two dissents from denial of rehearing en banc and one dissent from denial of certiorari—indicate that the debate over religious symbolism in public spaces has hardly died down.³⁵⁶ For this reason, it is particularly worthwhile to consider how the Court might approach such cases in the future.

As explained above, there is reason to be wary of the Court's avoidance of underlying issues concerning the social meaning of religious symbolism and the proper role of public religious speech in a pluralistic society. While appearing to resolve disputes in a neutral, legally defensible manner without aggravating cultural dissension, the Court may simply be papering over already-existing sentiments of exclusion and subordination. Using the law and language of property in religious symbol cases does not actually, or necessarily, turn a cultural and constitutional dispute into an ownership quibble. Rather, it only aggravates the naturalization of hierarchy and exclusion that the endorsement/equality inquiry was intended to combat. For this reason, a return to the underlying First Amendment principles is preferable to avoiding them.

Moreover, for the reasons described in Part III.B.1, the Court's use of property is overly simplistic. Property theorists and even the Court itself have long recognized that the existence of a property right is often only the beginning, not the end, of the inquiry, especially when public values are at stake. Public property, after all, is held in public trust. Thus, a more inclusive and accurate understanding of property would require the Court, in religious display cases, to consider property in a more nuanced way, and as merely one set of factors in the overall endorsement/equality analysis, rather than as its final answer. Though ownership is relevant to questions of attribution, social meaning, and access, it cannot define and limit them in the formalistic way the Court has suggested. A more nuanced and thus more desirable approach would recognize the complex relationship among property, identity, attribution, and expression.

Finally, if the Court's decisions are driven in large part by a desire to turn down the temperature on religious symbolism disputes, it could focus on refining the remedial side of the constitutional equation, rather than changing its analysis of the merits. To the extent that the Court is concerned, for example, about the social message that may be sent when longstanding monuments are dismantled in response to First Amendment lawsuits—as various Justices have suggested they are—it might encourage a more sensitive approach to remediation in such cases.³⁵⁷ Interestingly,

³⁵⁶ *Id.*; *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 12 (2011).

³⁵⁷ In *Buono*, for example, Justice Alito argued that removing the cross “would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor.” *Salazar v. Buono*, 130 S. Ct. 1803, 1823 (2010) (Alito, J., concurring). He continued:

both Justices Breyer and Alito have explicitly expressed such concerns, and both have hinted at precisely such a remedy-based solution.³⁵⁸ In *Buono*, Justice Alito suggested that the government might have “supplement[ed] the monument on Sunrise Rock so that it appropriately recognized the religious diversity of the American soldiers who gave their lives in the First World War.”³⁵⁹ Though perhaps still raising concerns about government endorsement of religion over nonreligion, such a solution could in some circumstances be appropriate—perhaps even more so if supplemented with secular memorials as well. Similarly, Justice Breyer devoted his *Buono* dissent to the notion that trial courts have broad discretion to shape and enforce their injunctive decrees, such that they are entitled to deference from appellate courts.³⁶⁰ Of course, detailed analysis of possible remedies, their pros and cons, and their constitutionality is beyond the scope of this Article; this Article simply argues that the possibility of more flexible remediation has not been fully explored in religious display cases, and it may hold potential for preventing the aggravation of existing cultural disputes while still recognizing and elaborating the underlying First Amendment values.

CONCLUSION

The Supreme Court appears to have turned to property law and property rhetoric as a way of simplifying or avoiding difficult First Amendment questions involving public displays of religious symbolism.³⁶¹ This turn to property is troubling, however. The property paradigm valorizes and naturalizes the acts of exclusion and discrimination in the course of expressing a message of religious identity. Both the endorsement test and public forum principles, marginalized in *Sumnum* and *Buono*, require reform but not interment; they are preferable to the current alternative.

The demolition of this venerable if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country’s religious heritage.

Id. Similarly, Justice Breyer’s concurrence in *Van Orden v. Perry* expressed fear that holding the Ten Commandments display unconstitutional “might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.” *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).

³⁵⁸ *Infra* notes 359-360 and accompanying text.

³⁵⁹ *Buono*, 130 S. Ct. at 1823 (Alito, J., concurring).

³⁶⁰ *Id.* at 1842-1845 (Breyer, J., dissenting).

³⁶¹ *Supra* Part I.