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# Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech

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JORDAN C. BUDD†

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> Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do.
>
> - Karl Llewellyn[1]

## INTRODUCTION

Religious symbols and imagery mark the American public landscape. Biblical statuary, religious inscriptions, crosses, crèches, and menorahs occupy positions of prominence in parks, civic buildings, and public squares across the nation.[2] Implicating both the First Amendment's prohibition against the establishment of religion as well as its guarantee of expressive freedom, these symbols have given rise to a vast and complicated jurisprudence that, in certain of its aspects, has been justly criticized as conflicting and incoherent.[3] The confusion is not surprising, given the complexity of the constitutional calculus. An array of factors enters the analysis, including the size, location, and historical context of the display at issue, its private or public sponsorship, and the extent of access to the public space by those seeking to exhibit other expressive symbols.

While application of these factors often produces erratic results, the courts have spoken with relative clarity in at least one area: the constitutionality of permanent religious displays on public land. The rule is increasingly clear that government may not permit its parkland and public spaces to be used as permanent platforms for symbolic religious expression.[4] But while the courts have developed a substantial jurisprudence that carefully addresses the question of constitutional liability in this context, there is very little authority addressing the more difficult and equally important remedial questions raised by such displays. It is not difficult to conclude that a solitary, towering Latin cross at the center of a public park violates constitutional norms: one can hardly imagine a more potent representation of religious endorsement.[5] It is much more difficult, however, to determine what must be done to correct the violation. May the cross and the land beneath it be sold rather than requiring that the display be removed from public property? If so, does it matter how much land attends the transfer? May government sell the cross and underlying property on condition that the symbol be preserved?

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1. KARL LLEWELLYN, THE BRAMBLE BUSH 83-84 (1960).
2. *See infra* notes 121-24.
3. *See, e.g.*, Murray v. City of Austin, 947 F.2d 147, 163 (5th Cir. 1991) (Goldberg, J., dissenting) ("confusion reigns" in Establishment Clause doctrine addressing temporary religious displays on public land; leading Supreme Court authority "is a confusing matrix composed largely of minority opinions that reach contradictory results and focus on the minutiae of scenic design and physical arrangement").
4. *See infra* notes 109-41 and accompanying text.
5. *See infra* note 121.

The absence of authority addressing such questions reflects the fact that, until relatively recently, unconstitutional displays were simply removed from public land in the typical case—a remedy that directly resolved the violation without need for elaborate judicial analysis. Over the last decade, however, government defendants have proposed increasingly complex remedies to avert the removal of unconstitutional displays, raising difficult questions that the federal courts have yet to answer satisfactorily.

This Article examines the broad range of remedial issues that increasingly arise in cases involving impermissible religious displays on public land. It argues that many of the newly proposed remedies fail to affirm the constitutional values at issue, and that the limited existing jurisprudence has not rigorously and consistently subjected the proposals to appropriate constitutional scrutiny. As a result, the doctrine is at risk of being trivialized despite the apparent victories, thus eroding rather than bolstering the force and dignity of the endorsement prohibition.

The Article is divided into three sections. Part I, an analytic preface, discusses the prevailing "perception of endorsement" test used to assess whether government action has the effect of advancing religion in violation of the Establishment Clause. The discussion focuses on the central analytic construct of the "objective observer," endowed with essentially perfect factual information, who is charged under the endorsement test with the task of assessing the perceived effect of government conduct. Part II reviews the application of the test to the question whether permanent religious displays on public land are constitutionally permissible. As set forth in Part II, courts have consistently held that the permanent integration of religious imagery with the physical presence of government itself violates the endorsement prohibition.

Part III, the principal focus of the Article, begins with the premise that the objective observer not only must discern the constitutional violation but also must arbitrate its remedy. Framing the remedial analysis from the vantage of an essentially omniscient observer yields important insights regarding the scope and rigor of the inquiry. Most generally, the analysis so framed requires that any remedial proposal withstand close scrutiny to assure that it does not subtly perpetuate government's established religious preference. To survive such review, a remedy must satisfy the interrelated imperatives of physical separation and expressive neutrality. This proposed two-part inquiry requires that remedial measures (1) achieve evident and substantial physical separation between government and impermissible religious displays (2) through means that the objective observer would perceive as strictly neutral with respect to the religious expression at issue. These dual principles are then applied across an array of remedial proposals advanced in recent cases concerning endorsed religious speech.

Throughout the discussion, the remedial implications of the proposed two-part inquiry are contrasted with the significantly less demanding requirements imposed by several of the courts that have addressed the same questions.

The Article argues in conclusion that the considerable divergence between the enforcement of rights and remedies in this area diminishes the vitality and dignity of the constitutional doctrine. Moreover, by giving rise to the appearance that litigation challenging government's endorsement of symbolic religious expression is a technical exercise with trivial consequences, constitutional adjudication in this context threatens to impair its own integrity as well.

## I. ENDORSEMENT AND THE OMNISCIENT OBSERVER

### A. *The Endorsement Standard*

In 1971 the Supreme Court adopted the tripartite *Lemon* test to evaluate claims arising under the Establishment Clause of the First Amendment to the United States Constitution.[6] Under *Lemon*, government conduct (1) must have a secular purpose, (2) must not have the primary effect of either advancing or inhibiting religion, and (3) must not lead to excessive entanglement between religion and government.[7] The test has inspired fierce and voluminous criticism[8] arising largely from the view that the standard is unmanageably fact-bound[9] and also—in the view of proponents of a less separationist Establishment Clause jurisprudence—that it reflects an undue hostility toward religion in the public sphere.[10]

While never expressly repudiating *Lemon*,[11] an increasingly conservative Supreme Court has relaxed the standard over time and now applies a markedly different variant of the original formulation.[12] In *County of Allegheny v. American Civil Liberties Union*, the Court fundamentally altered the focus of the *Lemon* test by introducing the

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6. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

7. *Lemon*, 403 U.S. at 612-13.

8. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 468-69 (1994) [hereinafter Gey I] ("[The *Lemon* test] is possibly the most maligned constitutional standard the Court has ever produced.").

9. *E.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring); Gey I, *supra* note 8, at 469; Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 503 (2002); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 269 (1987).

10. *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116 (1992); Choper, *supra* note 9, at 501-03.

11. Justice Scalia has famously derided the standard as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ." *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring).

12. Gey I, *supra* note 8, at 467; *see* Choper, *supra* note 9, at 499.

concept of endorsement as the touchstone of the inquiry.[13] By collapsing *Lemon's* first two prongs into the single query whether a "challenged governmental practice either has the purpose or effect of 'endorsing' religion," the Court exchanged *Lemon's* original condemnation of all non-secular purposes for a prohibition against the smaller universe of purposes which affirmatively endorse religion.[14] Likewise, the Court replaced *Lemon's* original prohibition of effects which advance religion with a proscription against its evident endorsement—a subset of the former which, rather than concerning itself with any direct assistance to religion, more narrowly targets assistance in the form of apparent sanction.[15] Finally, the Court "dispense[d] with the 'entanglement' prong"[16] altogether and now subsumes that inquiry into its analysis of the endorsing effect of certain forms of government aid.[17] While the Court occasionally employs alternative standards to assess the establishment prohibition,[18] the endorsement test indisputably governs the constitutionality of symbolic religious expression on public land.[19]

In embracing the endorsement principle in *Allegheny*, the Court adopted a position that Justice O'Connor had advanced separately in prior opinions. O'Connor argued that endorsement would clarify much of *Lemon's* analytic confusion while focusing the Establishment Clause inquiry on the core values that the provision should be understood to promote.[20] In O'Connor's view, "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[21] A prohibition against endorsement promotes this fundamental objective because endorsement "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to

13. 492 U.S. 573, 592 (1989).

14. *Allegheny*, 492 U.S. at 592.

15. Gey I, *supra* note 8, at 478 ("Even substantial state support for religion is permissible under Justice O'Connor's standard if the state cleverly packages the support, either by including nonreligious beneficiaries in the same program that benefits religious individuals or by providing a homogenizing context that subsumes the religious message within a general statement of support for social pluralism.").

16. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 174 (3d Cir. 2002).

17. *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 174 n.36; *see* Agostini v. Felton, 521 U.S. 203, 232-33 (1997); Mitchell v. Helms, 530 U.S. 793, 807-08 (2000); Moore v. City of Van, 238 F. Supp. 2d 837, 850 n.22 (E.D. Tex. 2003).

18. *See, e.g.*, Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1, 27, 48-58 (2002); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring).

19. DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 411 (2d Cir. 2001); *see, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1174, 124 S. Ct. 2301, 2321-22 (2004) (O'Connor, J., concurring); *cf.* Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 391 n.58, 444 (2000) [hereinafter Gey II].

20. Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring).

21. *Lynch*, 465 U.S. at 687.

adherents that they are insiders, favored members of the political community."[22]

With respect to assessing whether state conduct has the effect of religious endorsement—the second prong of the modified *Lemon* analysis—the *Allegheny* Court embraced the "perception of endorsement" approach first articulated by Justice O'Connor in *Lynch v. Donnelly*.[23] Under Justice O'Connor's formulation, the Court must ask "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[24] The test requires the Court to focus on the perception of an objective observer who possesses "reasonable as opposed to heightened (or diminished) sensitivity"[25] and who is "deemed more informed than the casual passerby."[26] This determination is "not entirely a question of fact"[27] but is instead "a legal question to be answered on the basis of judicial interpretation of social facts."[28]

The Court illustrated the endorsement analysis in *Santa Fe Independent School District v. Doe*.[29] In *Santa Fe*, the Court considered a policy that permitted students "to deliver a brief invocation and/or message . . . during the pre-game ceremonies of home varsity football games to solemnize the event . . . ."[30] Although the policy did not explicitly endorse religious messages, the Court concluded that "the actual or perceived endorsement of [religion] . . . is established by factors beyond just the text of the policy."[31] The Court noted that it must ascertain "whether an objective observer, acquainted with the text, legislative history, and implementation of the [policy], would perceive it as a state endorsement" of religion,[32] and stressed that the inquiry presumed knowledge of "the history and context of the community and forum."[33]

The "perception of endorsement" test thus posits an exceedingly well-informed observer who is knowledgeable of the "history and

22. *Id.* at 688.
23. *Id.* at 690.
24. *Id.*
25. Idleman, *supra* note 18, at 26.
26. Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring).
27. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).
28. *Lynch*, 465 U.S. at 694. Cases decided under analogous state constitutional provisions similarly turn on whether a challenged religious display creates an appearance of governmental endorsement or preference. The No Preference Clause of the California Constitution, for example, bans actual as well as apparent religious preference. CAL. CONST. art. I, § 4; *see, e.g.*, Hewitt v. Joyner, 940 F.2d 1561, 1567 (9th Cir. 1991); Carpenter v. City of San Francisco, 93 F.3d 627, 629 (9th Cir. 1996).
29. 530 U.S. 290 (2000).
30. *Santa Fe*, 530 U.S. at 298.
31. *Id.* at 307.
32. *Id.* at 308 (internal quotation omitted).
33. *Id.* at 317 (internal quotation omitted).

implementation" of challenged government conduct as well as the "history and context of the community and forum" to which that conduct relates—*i.e.*, virtually every relevant factual consideration bearing on whether religious expression enjoys the apparent endorsement of government.[34] Justice O'Connor asserts that this observer is "reasonable" in the sense that he or she reflects, as in tort law, "'a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'"[35] However, because "reasonable behavior" reflects the application of reasonable judgment to a reasonable understanding of the relevant facts, the assertion is only half right. While O'Connor's observer possesses reasonable sensibilities, he or she brings that judgment to bear on essentially perfect factual information that far exceeds any collective social norm.[36] The constructed persona is, in all relevant respects, factually omniscient.

### *B. Criticism and Analysis of the Standard*

Justice O'Connor's modification of *Lemon* has inspired criticism from a number of quarters. Various commentators have challenged the endorsement standard as both a retreat from and a step beyond the proper degree of separation between government and religion envisioned by the Establishment Clause.[37] Others, while accepting the concept of actual or perceived endorsement as an appropriate articulation of the constitutional prohibition, argue that Justice O'Connor's particular formulation is flawed.[38] While a survey of the critical literature is beyond the scope of this Article, a brief assessment of the most serious objections will place in sharper relief the test's remedial implications.

The primary objection to Justice O'Connor's standard, advanced by a number of scholars and embraced to some degree by several Justices of the Supreme Court, is that the test is too protective of separationist interests by wrongly defining the constitutional right in terms of an intangible "expressive" injury subjectively experienced by an idealized observer.[39] This inquiry, they argue, is flawed in two respects: it injects

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34. *See also Pinette*, 515 U.S. at 778 (O'Connor, J., concurring) (court must assess endorsing effect of government policy in light of its "history and administration").

35. *Id.* at 780 (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)).

36. In disclaiming Justice Stevens' characterization of the objective observer as "ultrareasonable," O'Connor points to only one body of information with which the observer is unfamiliar: "the vagaries of this Court's First Amendment jurisprudence." *Id.* at 781.

37. *Compare, e.g.*, Gey I, *supra* note 8, at 478 *with* Choper, *supra* note 9, *passim*.

38. *See infra* note 91 and accompanying text.

39. *See, e.g.*, Choper, *supra* note 9, at 525-26. A competing critique, advanced by separationists, argues that the endorsement test improperly dilutes the values underpinning the Establishment Clause by superseding the principle of strict neutrality implied by the original *Lemon* formulation. *See* Gey I, *supra* note 8, at 478. Unlike the critique discussed below, this objection has no proponents on the Supreme Court and plays essentially no role in the current judicial debate regarding the appropriate scope of the Establishment Clause prohibition.

too much subjectivity into the judicial analysis[40] while improperly thwarting the broader community's "felt need" to express religious conviction in circumstances where no concrete injury is inflicted.[41] They argue that the standard instead should focus on whether government conduct coerces participation in or support for religious activity, which can be measured without reference to the subjective perceptions of an idealized observer.[42] These arguments have been elaborated by several scholars and jurists.[43]

1. The Question of Subjectivity

Justice O'Connor's "perception of endorsement" test indisputably injects a degree of subjectivity into the analysis of constitutional injury. There is considerable debate, however, over the extent to which the standard is indeterminate. The objection is met in part by O'Connor's particular formulation of the test, which posits an objective observer who bases his or her judgment on essentially all relevant factual considerations.[44] In structuring the analysis in this manner, the test links the perception of the observer to a full factual record and thus diminishes the discretion with which the test can be applied.[45] Indeed, the artifice of the objective observer is essentially read out of the analysis insofar as the inquiry turns on the court's own assessment of the reasonable inferences drawn from the totality of circumstances.[46] The court expresses its own perception of endorsement—in the guise of an idealized observer—based upon the complete record.[47] The specter of a constitutional standard turning on the irreconcilable sense perceptions of competing reasonable observers, whose judgments arise from widely divergent knowledge and experience,[48] is accordingly unfounded—provided that the court in fact weighs the entire record rather than subjectively isolating some subset of

40. *See, e.g.*, Smith, *supra* note 9, at 292-93.

41. *See, e.g.*, Choper, *supra* note 9, at 526-27.

42. *See id.* at 504; Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

43. *See, e.g.*, *Allegheny*, 492 U.S. at 659-62 (Kennedy, J., concurring in part and dissenting in part); Choper, *supra* note 9, *passim*; *cf.* McConnell, *supra* note 10, at 157-66.

44. *See supra* notes 32-36 and accompanying text; *see, e.g.*, ACLU v. City of Plattsmouth, 358 F.3d 1020, 1040 (8th Cir. 2004) (discussing observer's detailed knowledge of factual and historical record, court notes that "[t]his is a well informed observer indeed"), *reh'g granted and opinion vacated*, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004).

45. In criticizing the construct of the objective observer, Professor Smith argues that "a purely fictitious character will perceive precisely as much, and only as much, as its author wants it to perceive; and there is no empirical touchstone or outside referent upon which a critic could rely to show that the author was wrong." Smith, *supra* note 9, at 292. An observer as knowledgeable as the one posited by Justice O'Connor, however, does in fact have an empirical touchstone—the full record.

46. Neil R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 88 (1990).

47. *Id.* at 90 ("[T]he 'objective' or 'reasonable' observer is, in the final analysis, the judiciary.").

48. *See* Smith, *supra* note 9, at 292.

evidence that a highly informed (but not entirely informed) observer purportedly might apprehend.[49]

The test articulated by Justice O'Connor nonetheless embeds within it a potentially significant degree of subjectivity, not because the standard employs an idealized observer but because the observer (in reality, the fully-informed court itself) is asked to discern actual or apparent "endorsement"—a concept that, depending on its definition, may inject an irreducible degree of discretion into the analysis. If the court construes the term to mean only a purposeful message of official sanction, both the purpose and effects inquiry collapse into the single question whether an intentional endorsing message has been made and thus can be perceived. This analysis is not appreciably more or less determinate than any other inquiry into legislative purpose.[50] While not notable for its subjectivity,[51] however, this understanding of endorsement would significantly restrict the reach of the constitutional prohibition in view of the fact that legislatures infrequently act with such demonstrable intent in matters of religion.[52] In turn, the construction would fail to address the concerns regarding political standing that undergird the test itself.[53] For this reason, Justice O'Connor has rejected this narrow understanding of endorsement and directed that the constitutional inquiry look beyond the professed legislative rationale to determine not merely its sincerity[54] but also the communicative impact of the resulting governmental action, irrespective of intent.[55]

In applying this broader standard, however, it is unclear whether the idealized observer should consider the communicative impact of government action entirely without regard to evidence of legislative intent or instead should assess such evidence as part of its broader effects inquiry. O'Connor's formulation of the objective observer implies the latter, since the observer is deemed aware of the text, legislative history, and implementation of the statute.[56] But if such evidence is probative of

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49. *Cf.* Choper, *supra* note 9, at 512-13 (comparing lower court decisions that impute to the objective observer widely divergent levels of factual knowledge).

50. *See, e.g.*, *Wallace*, 472 U.S. at 56-60; *cf.* Palmer v. Thompson, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."); Feigenson, *supra* note 46, at 84-85.

51. *Cf.* McConnell, *supra* note 10, at 143 ("[T]he argument about legislative purpose is one of the most important questions cutting across the fields of constitutional law. It affects everything from the Equal Protection Clause to the Commerce Clause to the Bill of Attainder Clause.").

52. *Cf. Pinette*, 515 U.S. at 791-92 (Souter, J., concurring).

53. Smith explains: "a focus . . . upon legislative intent . . . diverges from the purpose which Justice O'Connor attributes to the 'no endorsement' test . . . . If [political alienation] is the purpose of the test . . . then the pertinent fact controlling the application of the test should [not] be . . . the perhaps indiscernible intent of government officials . . . . [T]he controlling standard, rather, should be the actual perceptions of real citizens." Smith, *supra* note 9, at 294.

54. *Santa Fe*, 530 U.S. at 308; *Wallace*, 472 U.S. at 75.

55. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring).

56. *Santa Fe*, 530 U.S. at 308.

the endorsing effect of government action, and if the observer is truly as well informed as O'Connor implies, the effects and purpose inquiries will still merge, as discussed above,[57] and O'Connor's effort to differentiate between purposeful and apparent endorsement disintegrates—at least in those circumstances where legislative intent is discernible.

To make sense of an independent effects inquiry performed by an objective observer, then, the court must focus predominantly on facts that, considered without regard to direct evidence of legislative motive, give rise to an appearance of official sanction—*i.e.*, that are inferentially supportive of purposeful endorsement. Especially in instances where legislative intent is not easily discernible, the effects test should focus exclusively on such facts. Concurring in *Pinette*, Justice O'Connor suggests this understanding of the constitutional inquiry:

> The Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism; it also imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message. That is, the Establishment Clause forbids a State from hiding behind the application of formally neutral criteria and remaining studiously oblivious to the effects of its actions.[58]

This explication requires, at least "in some situations," that the court disregard direct evidence of permissible intent and focus instead on the apparent rather than intended meaning of government action.[59] The indeterminacy of this analysis will vary dramatically depending upon the kind of evidence that the court weighs in support of the allegation.

a. Evidence of Comparative Advantage

Evidence reflecting a comparative advantage conferred on religion by government—*e.g.*, differentially favorable treatment of religion in the allocation of public resources or assistance[60]—is highly probative of an intent to endorse and can be measured with significant objectivity. If government refuses to accept a Christian symbol for display in a public

57. Smith, *supra* note 9, at 293-94 ("[O'Connor's description of the well-informed observer] comes very close to saying that the observer knows . . . what the legislators intended. . . . [T]he judge who examines the text, background, and implementation of a law and concludes that the law was not intended to endorse religion should rule that an 'objective observer' examining the same factors would draw the same conclusion. To rule otherwise would be to confess that the judge is not being 'objective.'"); Feigenson, *supra* note 46, at 88 ("[B]ecause the objective observer looks to the 'intended' meaning rather than the 'objective' meaning, Justice O'Connor collapses the effect test into the purpose test.").

58. *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring) (citations omitted).

59. *Id.* ("Governmental intent cannot control . . . . Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated.") (citation omitted).

60. *Cf. Wallace*, 472 U.S. at 70 (O'Connor, J., concurring); *Grumet*, 512 U.S. at 714-15 (O'Connor, J., concurring in part and concurring in the judgment); *Pinette*, 515 U.S. at 766.

park while simultaneously permitting the display of Jewish imagery, the Christian faith has been objectively disadvantaged. When religion or a religious sect enjoys such a comparative advantage, an impermissible message of favoritism or preference[61] quite likely is communicated unless the arrangement is justified on the basis of some other neutral effect (*e.g.*, the accommodation of religious free exercise).[62] By affording comparatively advantageous treatment to religion in the allocation of its benefits and resources, government communicates to the political community that religion occupies a place of preference and that nonadherents are correspondingly disfavored—the very effect that Justice O'Connor's endorsement standard seeks to avert.[63]

With respect to the permanent religious displays considered in this Article, this variant of apparent endorsement is highly relevant; nearly all such displays found to violate the Establishment Clause enjoy some kind of measurable advantage over other religious and secular speech.[64] In this context, the constitutional inquiry largely reduces to a determination of differential advantage enjoyed by a particular religious display, *vis a vis* competing expressive viewpoints, that cannot be justified on the basis of some other neutral effect. Where religious speech enjoys superior communicative status in any objectively measurable respect—be it access to the forum, placement of the display, duration of occupancy, or size of the expressive symbol—the well-informed observer will reasonably conclude that the expression appears to enjoy the preference of government.[65] At a minimum, such differential treatment places a

61. *See, e.g.*, *Pinette*, 515 U.S. at 763 ("Our cases have accordingly equated 'endorsement' with 'promotion' or 'favoritism.'") (Scalia, J., writing for plurality); *Grumet*, 512 U.S. at 696; *Allegheny*, 492 U.S. at 591; Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

62. An example of such a permissible benefit would be the exemption of religious adherents from generally-applicable regulations requiring that they act in violation of religious beliefs. While not constitutionally compelled by the Free Exercise Clause after *Employment Division, Department Of Human Resources v. Smith*, 494 U.S. 872 (1990), such a legislative accommodation would not violate the Establishment Clause provided that it did not discriminate between similarly-situated religious adherents. *See, e.g.*, Choper, *supra* note 9, at 508-09; *Allegheny*, 492 U.S. at 632 (O'Connor, J., concurring); *but see* William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 320 (1991). Identifying the permissible boundaries of religious accommodation outside the context of compelled religious practice, however, requires subjective judgments that introduce an additional layer of indeterminacy into the analysis. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 48 (1985).

63. *See supra* notes 21-22 and accompanying text. This objectively measurable dimension of apparent endorsement enjoys broad doctrinal and scholarly support. *See, e.g.*, *supra* note 61; McConnell, *supra* note 10, at 156-57 ("The target of the endorsement test should be favoritism or preference . . . . [A] 'favoritism' or 'preference' test would enjoy the historical support that the pure 'endorsement' test so conspicuously lacks. The supporters of constitutional protections for religious freedom were insistent that sect equality is an indispensable element of that freedom. To be sure, their principal focus was on differences in material treatment, but it is no great stretch to extend the principle to lesser evils."); Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response To Steven D. Smith*, 78 CHI.-KENT L. REV. 729, 735-36 (2003).

64. *See infra* notes 121-31 and accompanying text.

65. *See, e.g.*, Mercier v. City of La Crosse, 305 F. Supp. 2d 999, 1010 (W.D. Wis. 2004) ("[A]lthough it is not always an easy task to reconcile all of the Court's decisions, one principle has remained clear: the government may not demonstrate a preference for one religion over another."),

heavy burden on government to offer some very persuasive reason why, based on the surrounding facts, its conduct does not have an endorsing effect.

b. Evidence of Intrinsic Advantage

By contrast, evidence reflecting an intrinsic advantage conferred on religion—*e.g.*, the inclusion of religious institutions in government programs or activities that are perceived to confer some special sanction or status upon participants[66]—is also consistent with an intent to endorse, but the probative force of the evidence is irreducibly linked to the subjective perceptions of the arbiter.[67] To the extent that government action does not distinguish between qualified religious and secular beneficiaries, either because the benefit is conferred broadly or because it is uniquely relevant to one or more religious recipients,[68] it is impossible to identify any objective advantage conferred on religion. Accordingly, the determination whether such conduct too closely aligns government with religion is inevitably a function of subjective judgment.[69] Even if two competing onlookers share identical information, the conclusions that they may draw regarding any appearance of endorsement arising in this context will remain the product of subjective perception.[70]

Permanent religious displays erected on public property can also communicate a message of intrinsic advantage and in this sense the analysis of their constitutionality can be highly subjective. Apart from any concrete advantage that religious speech enjoys in its access to a communicative forum, the permanent display of religious symbols on public parkland or adjacent to civic institutions strongly identifies the speech with government itself.[71] Assessing the degree to which such linkage occurs, and the extent to which it communicates a message of endorsement, is necessarily a function of the arbiter's personal values and perspective.

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*rev'd on other grounds sub nom.* Mercier v. Fraternal Order of the Eagles, Nos. 04-1321 and 04-1524, 2005 WL 81886 (7th Cir. Jan. 3, 2005).

66. *See, e.g.*, McConnell, *supra* note 10, at 156 (criticizing application of endorsement standard in circumstances where "the government 'endorses' religion along with many other institutions or ideologies").

67. *See* Gey I, *supra* note 8, at 478-79.

68. *E.g., infra* notes 338-45 and accompanying text.

69. *Compare, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) (majority upholds parochial school's participation in textbook loan program on grounds that "[t]he law merely makes available to all children the benefits of a general program to lend school books free of charge"), *with id.* at 257 (Douglas, J., dissenting) (arguing that the program impermissibly promotes religion because "[t]he textbook goes to the very heart of education in a parochial school").

70. Gey I, *supra* note 8, at 478-79 ("[E]very individual perceives the world differently, depending on factors such as the individual's background, prejudices, sensitivity, and general personality.").

71. *Pinette*, 515 U.S. at 786 (Souter, J., concurring).

The Supreme Court's decisions in *Pinette* and *Allegheny* reflect this kind of discretionary assessment of communicative impact. In both cases, the Justices reached widely divergent conclusions regarding the endorsing effect of the temporary religious symbols at issue based on widely divergent views of how closely the displays associated religion with government.[72] In *Pinette*, for example, the Justices sharply disagreed over the perceived endorsing effect of a Ku Klux Klan cross privately erected in the plaza adjacent to a state capital building.[73] Likewise in *Allegheny*, the Court sharply divided over the question whether a Nativity scene in a courthouse appeared to endorse religion, given that it stood alone at the base of the building's "Grand Staircase,"[74] and whether the display of a menorah outside the building in conjunction with a Christmas tree and a sign reading "Salute to Liberty" had a different communicative effect.[75] As these cases demonstrate, the question whether the public display of any particular symbol communicates that the government has conferred some form of intrinsic advantage on religion does not lend itself to predictable assessment.

2. The Question of Measurable Injury

The second major criticism of the endorsement standard—that it ties constitutional injury to the expressive impact of a challenged practice rather than to coerced religious observance or support—raises more fundamental concerns regarding the nature and purpose of the constitutional guarantee. While a general discussion of the question is beyond the scope of this Article, the critique has profound implications for the specific types of Establishment Clause violations discussed below. Under the critics' alternative analysis, the presence of a religious monument, display, or statue on public land would neither violate nor even implicate the Establishment Clause because its presence would not coerce religious observance.[76] Accordingly, the permanent display of a privately-erected and maintained religious monument (say, a 150-foot tall crucifix on the steps of the Capitol Building) would be a constitutional nonevent because any injury inflicted would merely be

72. *Infra* notes 73-75.

73. *Pinette*, 515 U.S. at 763-65 (Scalia, J., writing for plurality), 782-83 (O'Connor, J., concurring), 808-10 (Stevens, J., dissenting), and 817-18 (Ginsberg, J., dissenting).

74. *Allegheny*, 492 U.S. at 598-602 (Blackmun, J., writing for plurality), 663-67 (Kennedy, J., concurring in part and dissenting in part).

75. *Id.* at 613-21 (Blackmun, J., writing for plurality), 632-37 (O'Connor, J., concurring), 637-46 (Brennan, J., concurring in part and dissenting in part), 652-655 (Stevens, J., concurring in part and dissenting in part), 663-67 (Kennedy, J., concurring in part and dissenting in part).

76. *Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in part and dissenting in part) ("No one was compelled to observe or participate in any religious ceremony or activity . . . . Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."); Gey I, *supra* note 8, at 493 ("The placement of passive religious symbols on government property almost always would be upheld under the coercion standard, in contrast to the separationist approach, because it is virtually inconceivable that any religious symbol would 'coerce anyone to support or participate in any religion or its exercise.'").

expressive—that is, nothing would be at stake but the "distressed sensibilities"[77] of religious minorities who might perceive the display as alienating and degrading of their position in the polity.[78] Implicit in this critique is the premise that such injury is not sufficiently damaging to the aggrieved party—and thus, by aggregation, to the polity itself—to outweigh the majoritarian "felt need" to express religious conviction.[79]

This premise undervalues in at least two respects the impact of permanent religious symbols displayed on public property. First, it fails to acknowledge the concrete personal injury resulting from such offense: burdening or precluding the use of public space by nonadherents. Indeed, one of the two competing standing doctrines in this context[80] rests not on subjective "expressive" injury but on the concrete loss suffered by persons for whom the use of public space is measurably limited by the symbols of an alien faith.[81] As the Eleventh Circuit recently recounted in *Glassroth v. Moore*, "[f]or Establishment Clause claims based on non-economic harm, the plaintiffs must identify a 'personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.'"[82] The court found such an injury in *Glassroth* because plaintiffs had altered their conduct and incurred expenses "in order to minimize contact" with a Ten Commandments monument erected in the rotunda of Alabama's State Judicial Building, in part by avoiding entry into the building itself.[83]

Second, the coercion critique fails to admit the broader structural implications of these injuries. When a symbolic endorsement of religion taints and constrains the use of public space, more is at stake than the "distressed sensibilities" of impliedly hypersensitive religious minorities. By selectively burdening access to public institutions and property, the unconstitutional endorsement may distort the integrity and

77. *See* Choper, *supra* note 9, at 528.

78. *See, e.g., id.* at 525-26; *but see Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part) ("I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. . . . [S]uch an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."). As Professor Gey observes, "[t]his seems true, but so what? Under the coercion standard, if no one is coerced into practicing the particular faith represented by the cross, where is the violation of the Establishment Clause? . . . The real reason that Justice Kennedy's theory will not support his attempt to draw minute factual distinctions is that, at the most basic level, Justice Kennedy is not wholly committed to his theory." Gey I, *supra* note 8, at 496-97.

79. Choper, *supra* note 9, at 526-27.

80. *See, e.g.*, Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 510-19 (1995) (discussing the two doctrines).

81. *See, e.g.*, Separation of Church and State Comm. v. City of Eugene, 93 F.3d 617, 619 n.2 (9th Cir. 1996); ACLU v. City of St. Charles, 794 F.2d 265, 268 (7th Cir. 1986); ACLU v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1103-08 (11th Cir. 1983).

82. Glassroth v. Moore, 335 F.3d 1282, 1292 (11th Cir. 2003).

83. *Glassroth*, 335 F.3d at 1292-93.

representativeness of deliberative government itself and thus undercut its legitimacy.[84] For example, if religious monuments in the rotunda of a city hall deter religious minorities from entering the building to offer comment on matters of public concern—or, more generally, from participating in a civic discourse that they perceive as hostile to their faith[85]—the deliberative process will be literally skewed. While this distorting effect may seem trivial in the context of a single religious display erected in a park, courthouse, or civic building, implementation of the coercion standard may lead to a proliferation of such symbols in the public domain and accordingly result in a meaningful diminution of public participation by disaffected or intimidated religious minorities.[86] Because the coercion standard places virtually no constraints on government's ability to erect sectarian displays on public property,[87] it is not difficult to envision government officials—particularly those in regions where the political power of a dominant religious sect is most potent and the corresponding threat to the political integration of religious minorities is most severe—who exploit the opportunity to broadly transform public facilities and property into platforms for religious speech.[88] In this context, the possibility of deterring political participation by disaffected religious minorities is a genuine risk.[89] In turn, the threatened injury transcends the expressive interests of an aggrieved minority and implicates the integrity of the political process itself.[90]

In contrast to the assertion that the endorsement concept is too protective of separationist interests, others argue that Justice O'Connor's formulation is not sufficiently attentive to the injuries arising from religious preference. Justice Stevens, while accepting apparent endorsement as the appropriate constitutional standard, argues that O'Connor's objective-observer test wrongly discounts the perceptions of ordinary individuals and should be calibrated instead to "the universe of

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84. Feigenson, *supra* note 46, at 69 & n.82.

85. *Cf.* Lee v. Weisman, 505 U.S. 577, 607 (1992) ("When the government appropriates religious truth, it 'transforms rational debate into theological decree.' Those who disagree no longer are questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach.") (internal citation omitted).

86. Feigenson, *supra* note 46, at 81.

87. Any retreat from this position requires the recognition that such symbols may have a psychologically coercive effect on religious minorities, which in turn subjects the coercion standard to the very criticism that its proponents direct toward O'Connor's endorsement test—that it rests on a subjective rather than concrete injury. *Lee*, 505 U.S. at 640 (Scalia, J., dissenting).

88. *Compare* McConnell, *supra* note 10, at 169 (in contrast to "a triumphalist majority religion," argues that the "more serious threat to religious pluralism today is a combination of indifference to the plight of religious minorities and a preference for the secular in public affairs"), *with* Gey I, *supra* note 8, at 489 ("[G]iven the fractious political battles along religious lines that recently have taken place in large cities on both coasts, I doubt that the problem of overreaching by politically active religious groups is as inconsequential or as infrequent as Professor McConnell believes.").

89. Gey I, *supra* note 8, at 495.

90. Feigenson, *supra* note 46, at 79.

reasonable persons."[91] Several commentators have echoed this concern and observed that, by tying the standard to an idealized observer with essentially perfect knowledge, O'Connor betrays her ultimate objective: assuring that religious affiliation has no impact on political standing.[92] Political standing is not experienced by omniscient observers but by real people with perceptions and emotions that arise from unique personal experience.[93] In articulating the endorsement test, O'Connor thus faces an insoluble dilemma: either to promote political inclusion by adopting a standard that depends on the vagaries of myriad unique and competing perspectives,[94] or to promote a more objective test that conflicts with its very rationale.[95]

There is considerable force to this objection. As Professor Gey has observed:

> By employing an "objective observer" to decide questions of endorsement, Justice O'Connor relays the message to religious minorities that their perceptions are wrong; or, even worse, that their perceptions do not matter. I can think of no more effective way to "send[] a message to nonadherents that they are outsiders, not full members of the political community."[96]

It is not true, however, that the application of O'Connor's test inevitably undercuts separationist values by providing an endless source of legitimating rationales for apparent religious preference. This aspect of the critique does not account for the circumstance—encountered with some regularity—where the apparent preference arises not from the challenged government action, viewed in relative isolation, but instead from its broader factual context. In such situations, the test articulated by Justice O'Connor is potentially more protective of separationist values than the standard proposed by Justice Stevens. For example, in a recent challenge to a cross on undeveloped federal property, the government asserted that the cross was permissible because the land would likely appear to an objective observer to be privately owned.[97] Underscoring the sophistication imputed to the observer under Justice O'Connor's formulation, the district court rejected the argument and noted that the

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91. *Pinette*, 515 U.S. at 800 n.5 (Stevens, J., dissenting).

92. Feigenson, *supra* note 46, at 55; Gey I, *supra* note 8, at 481; Smith, *supra* note 9, at 294-95.

93. Feigenson, *supra* note 46, at 55; Note, *Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1648 (1987).

94. *But see* Feigenson, *supra* note 46, at 94-101 (arguing that the perceptions of ordinary individuals could be integrated into the application of the endorsement standard by borrowing the methodology of defamation law).

95. *See, e.g., id.* at 90-91.

96. Gey I, *supra* note 8, at 481.

97. Buono v. Norton, 212 F. Supp. 2d 1202, 1216 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

relevant inquiry presumed knowledge of public ownership.[98] The test, then, is not necessarily less protective of separationist values, as Justice Stevens asserts, but is instead concerned with comparatively less superficial appearances of endorsement—regardless of whether that standard makes it more or less likely in any particular case that a violation will be found.

As set forth in Part III, below, this conclusion has important implications for the analysis of remedies under the Establishment Clause. Careful consideration of the factual and historical context of an unconstitutional display will likely require more stringent corrective measures to dissipate the appearance of religious endorsement than an alternative approach that considers remedial outcomes in greater isolation from the circumstances giving rise to the violation itself. The well-informed observer, knowledgeable that government has, in fact or appearance, subjectively embraced and promoted a religious message, will carefully assess any proposed remedy to assure that it eradicates the taint of endorsement.[99] To survive such scrutiny, a remedy must not merely restore superficial neutrality but rather convince a skeptical observer that government's preferential sentiment no longer colors its conduct.[100]

## II. APPLICATION OF THE ENDORSEMENT STANDARD TO PERMANENT RELIGIOUS DISPLAYS ON PUBLIC LAND: THE THRESHOLD QUESTION OF CONSTITUTIONAL LIABILITY

Justice O'Connor's reformulation of *Lemon* broadens the evident scope of permissible religious expression on public land. A display that formerly advanced religious interests in violation of *Lemon* may now be permissible on grounds that it does not evince official endorsement of its message.[101] This refinement is evident in the Supreme Court's assessment of temporary and seasonal religious displays, which reflects considerable tolerance for various forms of religious expression in the public domain.[102] Despite this relaxation of the constitutional proscription, however, certain forms of symbolic religious speech remain squarely at odds with the Establishment Clause. Specifically, courts regularly conclude that religious symbols permanently displayed on public property create in the well-informed observer a perception of endorsement and thus violate the effects prong of O'Connor's reformulated *Lemon* test, irrespective of government's articulated

98. *Buono,* 212 F. Supp. 2d at 1216.
99. *See infra* notes 202-21 and accompanying text.
100. *Id.*
101. *See supra* notes 11-19 and accompanying text.
102. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

purpose in erecting the display.[103] Cases supporting the proposition are legion, and departures from it are rare.[104]

*A. The General Prohibition*

As the United States Supreme Court observed over half a century ago, symbolism is a direct and powerful method of expression:

> The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones.[105]

When potent religious symbols such as crosses, menorahs, and crucifixes are placed on public land, there is a real risk that the objective observer will impute to government the symbolic message itself. As Justice Souter has observed, "[w]hen an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands."[106] The risk of attribution is heightened dramatically when the religious display is not merely a temporary presence but instead a permanent fixture.[107]

While temporary religious displays can be diluted in their endorsing effect by various secularizing influences and thus have been upheld in a

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103. *See supra* notes 55-59 and accompanying text, and *infra* notes 121-24. In those instances where government erects a display with the demonstrable purpose of endorsing its religious message, the constitutional infirmity is clear. *See, e.g.*, Glassroth v. Moore, 335 F.3d 1282, 1296-97 (11th Cir. 2003); Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 771 (7th Cir. 2001); Books v. City of Elkhart, 235 F.3d 292, 302-04 (7th Cir. 2000); Gilfillan v. City of Philadelphia, 637 F.2d 924, 929-30 (3d Cir. 1980); ACLU v. Ashbrook, 211 F. Supp. 2d 873, 883-89 (N.D. Ohio 2002), *aff'd*, 375 F.3d 484 (6th Cir. 2004); ACLU v. Hamilton County, 202 F. Supp. 2d 757, 763-64 (E.D. Tenn. 2002); Adland v. Russ, 107 F. Supp. 2d 782, 784-85 (E.D. Ky. 2000), *aff'd*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003). The focus of the discussion below is on the more general case where permanent religious displays are erected on public land in the absence of such dispositive evidence of impermissible intent and are thus assessed by considering whether they give rise to a perception of endorsement.

104. *See infra* notes 121-24.

105. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943); *see, e.g.*, Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group, Inc., 515 U.S. 557, 569 (1995).

106. *Pinette*, 515 U.S. at 786 (Souter, J., concurring).

107. *See, e.g.*, Kaplan v. City of Burlington, 891 F.2d 1024, 1030 (2d Cir. 1989) ("[W]hile previous . . . uses of the Park suggesting religious activity could be clearly tied to a speaker, the display of this unattended, solitary, semi-permanent symbol could not; and in the absence of a live speaker to whom responsibility could be attributed, the City was perceived as fulfilling the role of sponsor."); Alberto B. Lopez, *Equal Access and the Public Forum:* Pinette's *Imbalance of Free Speech and Establishment*, 55 BAYLOR L. REV. 167, 214-15 (2003).

variety of contexts,[108] the permanent presence of a religious symbol on public property tips the constitutional calculation decidedly toward the appearance of endorsement.[109] Even Justice Kennedy, who emphatically opposes the endorsement standard as inappropriately hostile to the accommodation of religion, suggests that the permanent display of religious symbols fundamentally alters the constitutional equation.[110] In his dissenting opinion in *Allegheny*, Kennedy (joined by Chief Justice Rehnquist and Justices White and Scalia) repeatedly distinguished the temporary religious display at issue from more suspect cases involving "permanent," "year-round," and "continual" religious symbols on public property,[111] and pointed to the permanent display of a cross atop a municipal building as an archetypical case of unconstitutionality: "I doubt not . . . that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . . [S]uch an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."[112] In rejecting Justice Kennedy's intimation that the temporary nature of a display might immunize a religious symbol from constitutional challenge, the *Allegheny* majority underscored the indisputably suspect nature of permanent religious displays—indicating that every Justice of the Court agreed upon the predicate proposition.[113] A host of cases affirm the principle.[114]

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108. *E.g., Pinette*, 515 U.S. at 763; Chabad-Lubavitch v. Miller, 5 F.3d 1383, 1386-87 (11th Cir. 1993) (en banc); Kreisner v. City of San Diego, 1 F.3d 775 (9th Cir. 1993); Ams. United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1541, 1546 (6th Cir. 1992); Doe v. Small, 964 F.2d 611, 619 (7th Cir. 1992) (en banc).

109. *See infra* note 114.

110. *Allegheny*, 492 U.S. at 667-78 (Kennedy, J., concurring in part and dissenting in part).

111. *Id.* at 661, 664-65 & n.3; *see id.* at 608 n.56 ("In describing what would violate his 'proselytization' test, Justice Kennedy uses the adjectives 'permanent,' 'year-round,' and 'continual,' as if to suggest that temporary acts of favoritism for a particular sect do not violate the Establishment Clause.") (citations omitted).

112. *Id.* at 661.

113. *Id.* at 608 n.56 ("In any event, the Court [has] repudiated any notion that preferences for particular religious beliefs are permissible unless permanent . . . .").

114. *See, e.g., Ind. Civil Liberties Union*, 259 F.3d at 773; *Books*, 235 F.3d at 306; Gonzales v. N. Township of Lake County, 4 F.3d 1412, 1423 (7th Cir. 1993); Ellis v. City of La Mesa, 990 F.2d 1518, 1529 (9th Cir. 1993) (Beezer, J., concurring); Harris v. City of Zion, 927 F.2d 1401, 1412 (7th Cir. 1991); *Kaplan*, 891 F.2d at 1030; Friedman v. Bd. of County Comm'rs, 781 F.2d 777, 782 (10th Cir. 1985); Mercier v. City of La Crosse, 305 F. Supp. 2d 999, 1011 (W.D. Wis. 2004), *rev'd on other grounds sub nom.* Mercier v. Fraternal Order of the Eagles, Nos. 04-1321 and 04-1524, 2005 WL 81886 (7th Cir. Jan. 3, 2005); Kimbley v. Lawrence County, 119 F. Supp. 2d 856, 873 (S.D. Ind. 2000); Ind. Civil Liberties Union v. O'Bannon, 110 F. Supp. 2d 842, 858 (S.D. Ind. 2000), *aff'd*, 259 F.3d 766; Doe v. County of Montgomery, 915 F. Supp. 32, 38 n.16 (C.D. Ill 1996); Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp. 929, 937 (D.N.J. 1993); Murphy v. Bilbray, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991), *aff'd sub nom. Ellis*, 990 F.2d 1518; Joki v. Bd. of Educ. of Schuylerville Cent. Sch. Dist., 745 F. Supp. 823, 831 (N.D.N.Y. 1990); Spacco v. Bridgewater Sch. Dep't, 722 F. Supp. 834, 843 (D. Mass. 1989); ACLU v. Eckels, 589 F. Supp. 222, 235 (S.D. Tex. 1984); *cf.* ACLU v. City of St. Charles, 794 F.2d 265, 273 (7th Cir. 1986); McCreary v. Stone, 739 F.2d 716, 729 (2d Cir. 1984); Kreisner v. City of San Diego, 788 F. Supp. 445, 451 (S.D. Cal. 1991), *aff'd*, 1 F.3d 775; Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298, 313 (Or. 1986).

The endorsing message communicated by permanent religious displays typically results from both the comparative advantage conferred on religious speech by its superior access to an expressive venue as well as the intrinsic advantage conferred by the proximity of religious symbols to, and their integration with, the physical presence of government itself. Cases involving permanent religious displays usually arise in the physical context of public parks, plazas, or civic buildings.[115] These spaces figuratively or literally manifest government authority.[116] Affording religious speech permanent access to such quintessentially public space communicates to nonadherents that they are political outsiders, in derogation of the core value protected by the endorsement test, by literally merging the physical presence of the state with the message of another faith.[117]

Scores of suits have challenged permanent religious symbols on grounds that the displays violate the federal Establishment Clause or analogous state constitutional provisions. While no *per se* rule of unconstitutionality has been recognized[118]—and, indeed, such a rule would conflict with the fact-specific inquiry mandated by the endorsement standard[119]—the challenged displays have been struck down in the overwhelming majority of recent cases.[120] Courts have specifically rejected the constitutionality of crosses and crucifixes.[121]

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115. *See, e.g., infra* notes 121-24.

116. *Cf.* Evans v. Newton, 382 U.S. 296, 302 (1966); Chambers v. City of Frederick, 292 F. Supp. 2d 766, 772 (D. Md. 2003).

117. *Cf.* Idleman, *supra* note 18, at 25 ("Because it is perception-based, moreover, 'the endorsement test is particularly concerned with whether governmental practices create a "symbolic union" of church and state.'") (quoting Brooks v. City of Oak Ridge, 222 F.3d 259, 264 (6th Cir. 2000)).

118. *Cf.* Lopez, *supra* note 107, at 224 (proposing *per se* rule barring the permanent display of religious symbols on public land on grounds that religious organizations may monopolize available public space; "[t]o combat the exclusion fostered by the dominance of the public forum allowed under existing government policy, the only remedy that is truly neutral is to ban all permanent religious messages from public grounds"). As set forth *infra* notes 121-41 and accompanying text, this proposed rule would largely confirm the outcomes reached under existing doctrine, with the exception of cases involving symbols with mixed secular and religious significance.

119. *Pinette*, 515 U.S. at 778 (O'Connor, J., concurring); *Allegheny*, 492 U.S. at 597.

120. *See infra* notes 121-31. Some older cases upheld the permanent display of such symbols. *See, e.g.*, Meyer v. Oklahoma City, 496 P.2d 789 (Okla. 1972); Paul v. Dade County, 202 So.2d 833 (Fla. Dist. Ct. App. 1967); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338 (Or. 1976).

121. Decisions striking down the permanent display of crosses and crucifixes on public land include: Buono v. Norton, 371 F.3d 543 (9th Cir. 2004); Carpenter v. City and County of San Francisco, 93 F.3d 627 (9th Cir. 1996) (decided under the California Constitution); Separation of Church and State Comm. v. City of Eugene, 93 F.3d 617 (9th Cir. 1996); *Gonzales*, 4 F.3d 1412; *Ellis*, 990 F.2d 1518 (decided under California Constitution); ACLU v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983); Buono v. Norton, 212 F. Supp. 2d 1202 (C.D. Cal. 2002); *Murphy*, 782 F. Supp. 1420 (decided under the California Constitution); Jewish War Veterans v. United States, 695 F. Supp. 3 (D.D.C. 1988); *Eckels*, 589 F. Supp. 222; *cf. City of St. Charles*, 794 F.2d 265. Courts also have struck down the display of crosses on government shields, seals, and insignia. *Ellis*, 990 F.2d at 1528; *Harris*, 927 F.2d at 1412-15; *Friedman*, 781 F.2d at 781-82; *Murphy*, 782 F. Supp. at 1436; *contra*, Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991) (upholding cross on city insignia).

biblical statuary,[122] monuments engraved with the Ten Commandments,[123] and other sectarian symbols and images[124] which are permanently displayed on public property. Courts have reached this conclusion irrespective of whether the religious symbols were erected by government or private parties,[125] financed with private or public funds,[126] adjacent to or distant from government buildings,[127] displayed alone or in

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122. Decisions striking down the permanent display of religious statuary on public land include: Freedom From Religion Found., Inc., v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000), and Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991) (decided under the California Constitution).

123. Decisions striking down public monuments or plaques engraved with the Ten Commandments, as well as the posting of the Ten Commandments in public buildings, include: Stone v. Graham, 449 U.S. 39 (1980); ACLU v. Ashbrook, 375 F.3d 484 (6th Cir. 2004); ACLU v. City of Plattsmouth, 358 F.3d 1020 (8th Cir. 2004), *reh'g granted and opinion vacated*, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004); Baker v. Adams County/Ohio Valley Sch. Bd., Nos. 02-3776 and 02-3777, 2004 WL 68523 (6th Cir. Jan. 12, 2004); ACLU v. McCreary County, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004); *Glassroth*, 335 F.3d 1282; Adland v. Russ, 307 F.3d 471 (6th Cir. 2002); *Ind. Civil Liberties Union*, 259 F.3d 766; *Books*, 235 F.3d 292; *Mercier*, 305 F. Supp. 2d 999; Turner v. Habersham County, 290 F. Supp. 2d 1362 (N.D. Ga. 2003); Mercier v. City of La Crosse, 276 F. Supp. 2d 961 (W.D. Wis. 2003), *rev'd on other grounds*, 2005 WL 81886; *Ashbrook*, 211 F. Supp. 2d 873; ACLU v. Rutherford County, 209 F. Supp. 2d 799 (M.D. Tenn. 2002); *Hamilton County*, 202 F. Supp. 2d 757; ACLU v. Grayson County, No. Civ.A.4:01CV-202-M, 2002 WL 1558688 (W.D. Ky. May 13, 2002); ACLU v. City of Plattsmouth, 186 F. Supp. 2d 1024 (D. Neb. 2002); ACLU v. McCreary County, 145 F. Supp. 2d 845 (E.D. Ky. 2001); *Kimbley*, 119 F. Supp. 2d 856; *Adland*, 107 F. Supp. 2d 782; ACLU v. Pulaski County, 96 F. Supp. 2d 691 (E.D. Ky. 2000); ACLU v. McCreary County, 96 F. Supp. 2d 679 (E.D. Ky. 2000); Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000); Harvey v. Cobb County, 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994); Ring v. Grand Forks Pub. Sch. Dist. Number 1, 483 F. Supp. 272 (D.N.D. 1980); DiLoreto v. Downey Unified Sch. Dist., 87 Cal. Rptr. 2d 791 (Cal. Ct. App. 1999); Young v. County of Charleston, No. 97-CP-10-3491, 1999 WL 33530383 (S.C. Com. Pl. Jan. 21, 1999).

A few courts have upheld monuments engraved with the Ten Commandments on grounds that the inclusion of secular symbols diminishes the religious effect of the text (particularly where the text does not dominate the display), where the text itself is deemed predominantly secular rather than religious, or where the display has existed for an extended period of time and thus purportedly gained independent historical significance. Modrovich v. Allegheny County, 385 F.3d 397 (3d Cir. 2004); Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004); Freethought Soc'y v. Chester County, 334 F.3d 247 (3d Cir. 2003); ACLU v. Mercer County, 219 F. Supp. 2d 777 (E.D. Ky. 2002); Christian v. City of Grand Junction, No. 01-CV-685, 2001 WL 34047958 (D. Colo. June 27, 2001); Suhre v. Haywood County, 55 F. Supp. 2d 384 (W.D.N.C. 1999); Colorado v. Freedom From Religion Found., Inc., 898 P.2d 1013 (Colo. 1995). A thirty-year-old decision of the Tenth Circuit upholding a Ten Commandments monument based on similar reasoning appears to have been repudiated. Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973); *see* Summum v. City of Ogden, 297 F.3d 995, 1000 n.3 (10th Cir. 2002), and Summum v. Callaghan, 130 F.3d 906, 910 n.2 and 912 n.8 (10th Cir. 1997). The split in authority over the permissibility of such displays will likely be resolved by the Supreme Court this term, following its grant of certiorari to review the Fifth Circuit's opinion in *Van Orden* and the Sixth Circuit's opinion in *McCreary County*.

124. *See, e.g.*, *Kaplan*, 891 F.2d 1024 (menorah); *Doe*, 915 F. Supp. 32 (sign stating "The World Needs God"); *Eckels*, 589 F. Supp. 222 (Star of David).

125. *Compare, e.g., Hamilton County*, 202 F. Supp. 2d at 763-64, *Kimbley*, 119 F. Supp. 2d at 859-60, *and Eckels*, 589 F. Supp. at 224, *with Gonzales*, 4 F.3d at 1414, *Ellis*, 990 F.2d at 1525, *and Buono*, 212 F. Supp. 2d at 1205, 1216-17.

126. *Compare, e.g., Hamilton County*, 202 F. Supp. 2d at 759-61, *with Rabun*, 698 F.2d at 1110 & n.22.

127. *Compare, e.g., Glassroth*, 335 F.3d 1282, *and Books*, 235 F.3d at 306, *with Separation of Church & State Comm.*, 93 F.3d at 625-26 (O'Scannlain, J., concurring), *Mercier*, 305 F. Supp. 2d at 1008-09, *and Buono*, 212 F. Supp. 2d at 1216.

combination with other religious or secular items,[128] or characterized as serving either a religious or secular purpose.[129] The permanency of the symbols plays a central role in this reasoning.[130] As the court in *Doe v. County of Montgomery* noted:

> Unlike the vast majority of Establishment Clause cases (where a particular religious symbol is intended to be displayed for a short period of time, usually around the Christmas season), the sign here is displayed on the Courthouse 24 hours a day and 365 days a year. Both the Supreme Court and the Seventh Circuit have recognized that such a situation presents a more compelling scenario for finding a constitutional violation.[131]

The handful of cases departing from this paradigm involve less potent religious symbols which are occasionally characterized as secular in effect and thus outside the Establishment Clause prohibition.[132] This conclusion is especially likely when the challenged symbol is part of a larger display that includes secular objects in addition to religious imagery.[133] The most common case involves monuments engraved with the Ten Commandments. The minority of courts upholding such displays typically accord determinative significance to their characterization of the text as contextually secular,[134] in contrast to the undeniably sectarian import of other religious symbols,[135] and cast the monument as but one component of a larger collection of displays memorializing some broad, secular theme.[136] In dissenting from the denial of *certiorari* in a recent case, Chief Justice Rehnquist articulated the proposition: "To be sure, the Ten Commandments are a 'sacred text in the Jewish and Christian faiths,' concerning, in part, 'the religious duties of believers.' Undeniably, however, the Commandments have

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128. *Compare, e.g., McCreary County*, 354 F.3d 438, *Ind. Civil Liberties Union*, 259 F.3d at 778 (Coffey, J., dissenting), *Books*, 235 F.3d at 317 (Manion, J., concurring in part and dissenting in part), *Grayson County*, 2002 WL 1558688, *and Eckels*, 589 F. Supp. 222, *with Carpenter*, 93 F.3d 627, *Gonzales*, 4 F.3d 1412, *Ellis*, 990 F.2d 1518, *and Buono*, 212 F. Supp. 2d 1202.

129. *Compare, e.g., Hamilton County*, 202 F. Supp. 2d at 763-64, *and Eckels*, 589 F. Supp. at 233-34, *with Jewish War Veterans*, 695 F. Supp. at 12-14.

130. *Supra* note 114; *see, e.g., Gonzales*, 4 F.3d at 1423; *Ind. Civil Liberties Union*, 259 F.3d at 773; *Kimbley*, 119 F. Supp. 2d at 873.

131. *Doe*, 915 F. Supp. at 38 n.16.

132. *See, e.g., supra* note 123.

133. *See, e.g., Van Orden*, 351 F.3d 173; *Mercer County*, 219 F. Supp. 2d at 794; *Suhre*, 55 F. Supp. 2d at 395-96. In a related context, the Supreme Court has expressed approval of its own depiction of Moses and the Ten Commandments, in conjunction with the display of various other historical figures, on the wall of its courtroom: "Indeed, a carving of Moses holding the Ten Commandments, surrounded by representations of other historical legal figures, adorns the frieze on the south wall of our courtroom, and we have said that the carving 'signals respect not for great proselytizers but for great lawgivers.'" City of Elkhart v. Books, 532 U.S. 1058, 121 S. Ct. 2209, 2212 (2001) (Rehnquist, C.J., dissenting from the denial of certiorari) (internal citation omitted).

134. *Supra* note 123.

135. *See, e.g., infra* note 140.

136. *Mercier*, 305 F. Supp. 2d at 1007 ("[A]lmost without exception, the only public displays of the Ten Commandments that courts have upheld are those that are included in a larger display with an overall secular message.").

secular significance as well, because they have made a substantial contribution to our secular legal codes."[137] Rehnquist concludes that the disputed monument, in the context of its physical display alongside two secular monuments on the lawn of a municipal building, "simply reflects the Ten Commandments' role in the development of our legal system, just as the war memorial and Freedom Monument reflect the history and culture of the city of Elkhart."[138]

Whether one accepts the force of this or any similar distinction,[139] the argument is necessarily inapplicable to government's display of an intrinsically sectarian religious symbol such as a cross, crucifix, or Star of David.[140] However broadly or narrowly the courts may construe the religious character of a crèche or a monument to the Ten Commandments, the irreducibly religious import of certain symbols—and the resulting infirmity of their permanent display on public land—is not in meaningful dispute.[141]

### *B. Exceptions to the General Rule*

Courts are regularly urged to depart from this analysis on grounds that various secularizing influences dissipate the endorsing effect of permanent sectarian symbols. Most common is the effort to secularize the use of a religious symbol by characterizing its function as a memorial

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137. *City of Elkhart*, 532 U.S. 1058, 121 S. Ct. at 2211 (Rehnquist, C.J., dissenting from the denial of certiorari) (internal citations omitted).

138. *Id.* at 2212. The myriad cases dealing with temporary Christmas displays, in which courts often uphold the inclusion of a crèche amid secular items such as the now-infamous plastic reindeer of *Lynch v. Donnelly*, involve analogous reasoning. *See, e.g., Lynch*, 465 U.S. at 671, 679-83. Substantial weight is often accorded the fact that a crèche is an historical representation of the birth of Jesus rather than an exclusively religious symbol, which assertedly fortifies the secular effect of the overall display. *Id.*; *see, e.g.*, ACLU v. County of Delaware, 726 F. Supp. 184, 190 (S.D. Ohio 1989); Stein v. Plainwell Cmty. Sch., 610 F. Supp. 43, 47 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

139. The Supreme Court is expected to address and resolve the question this term. *McCreary County*, 354 F.3d 438, *cert. granted*, 125 S. Ct. 310; *Van Orden*, 351 F.3d 173, *cert. granted*, 125 S. Ct. 346.

140. Libin v. Town of Greenwich, 625 F. Supp. 393, 400 (D. Conn. 1985) ("The cross, in the context of Christmas, is a purely religious symbol. Unlike a crèche, it has no historical connection to the holiday. The only purpose served by the display of the cross, even in the context of the Christmas holiday, is to express religious sentiment."); *see generally Barnette*, 319 U.S. at 632; *Carpenter*, 93 F.3d at 630; *Separation of Church & State Comm.*, 93 F.3d at 620; *Harris*, 927 F.2d at 1403; *St. Charles*, 794 F.2d at 271; *Rabun*, 698 F.2d at 1103; *Murphy*, 782 F. Supp. at 1429 & n.26; Mendelson v. City of St. Cloud, 719 F. Supp. 1065, 1069 (M.D. Fla.1989); Hewitt v. Joyner, 705 F. Supp. 1443, 1449 (C.D. Cal.1989), *rev'd on other grounds*, 940 F.2d 1561; *Jewish War Veterans*, 695 F. Supp. at 13; *Eckels*, 589 F. Supp. at 234; Okrand v. City of Los Angeles, 254 Cal. Rptr. 913, 922 (Cal. Ct. App. 1989).

141. *See, e.g., supra* notes 121-22.

to war veterans,[142] although government defendants have also characterized the function of such displays on other secular grounds—asserting, for example, that a disputed cross serves merely as a tourist attraction[143] or a navigational reference for overhead aircraft.[144] Courts almost always find that these rationales are a pretextual excuse for otherwise unconstitutional activity and conclude, irrespective of pretext, that the endorsing effect of a sectarian symbol is not dissipated by any additional secular function it may serve.[145] As one court observed, "[e]ven if one strains to view the [religious] symbols in the context of a war memorial, their primary effect is to give the impression that only Christians and Jews are being honored . . . ."[146]

There are only a handful of circumstances in which courts have recognized possible exceptions to the general rule barring the permanent display of sectarian symbols on public land. In particular, where religious symbols have independent historical significance, or where private religious displays are erected in a public forum for permanent symbolic speech, courts have reasoned that the objective observer will perceive no endorsement of the religious message.

1. The Historical Rationale

Cases involving an historical rationale for the permanent display of religious symbols address two distinct arguments. The first involves sectarian symbols that are linked to independent historical events, while the second involves symbols whose historical significance derives from the duration of the display itself. The persuasive force of the respective assertions differs considerably.

When a religious symbol is linked to an event of independent historical significance, courts typically find that the communicative impact of the display is predominantly secular and thus permissible.[147] As the Ninth Circuit noted in *Ellis v. City of La Mesa*, "[e]ven a purely

142. *See, e.g., Separation of Church & State Comm.*, 93 F.3d at 619; *Gonzales*, 4 F.3d at 1421; *Ellis*, 990 F.2d at 1527; *Buono*, 212 F. Supp. 2d at 1215 & n.8; *Murphy*, 782 F. Supp. at 1437-38; *Jewish War Veterans*, 695 F. Supp. at 13-14; *Eckels*, 589 F. Supp. at 233-35.

143. *Rabun*, 698 F.2d at 1110-11.

144. *Murphy*, 782 F. Supp. at 1433.

145. *E.g., supra* notes 121-24.

146. *Eckels*, 589 F. Supp. at 235.

147. *See, e.g., Gonzales*, 4 F.3d at 1422 n.9 ("We distinguish between the historical significance that a symbol may achieve because of an unusual or unique event or circumstances surrounding it, from the local cultural landmark significance that a symbol may achieve simply because it is displayed."); *cf. Okrand*, 254 Cal. Rptr. at 922 (upholding display of Katowitz Menorah, saved from the Holocaust, on grounds that its "unique historical background [renders it] much more a museum piece than a symbol of religious worship").

religious symbol may acquire independent historical significance by virtue of its being associated with significant non-religious events."[148] Thus the public display of an historic crucifix on the wall of publicly-owned California mission[149] is not likely to be deemed an endorsement of religion in view of the secular significance of Catholic missionaries in the cultural, ethnic, and political history of the state.[150] This outcome is consistent with the principles underlying the endorsement standard, since there is no genuine comparative advantage afforded religion by such an historical display (unless government excludes secular items of similar historical significance), nor is there any intrinsic advantage conferred on religion (provided that the religious symbols are displayed as historical artifacts rather than objects of veneration).[151]

The proposition that permanent religious displays should be upheld on the basis of mere longevity, however, has been widely repudiated, as illustrated by the reaction to the district court's decision in *Carpenter v. City and County of San Francisco*.[152] In upholding defendant's display of the Mt. Davidson Cross, the lower court in *Carpenter* reasoned that the symbol was not predominantly religious in its effect because President Roosevelt had dedicated the exhibit and because the cross had gained recognition over the intervening years as a "cultural" landmark.[153] The Seventh Circuit replied:

> The [*Carpenter*] court's decision that local and cultural landmark status gave secular effect to the cross in that case smacks of bootstrapping . . . . [T]he landmark status seems to have been achieved, in large part, by virtue of the duration of the display—the longer the violation, the less violative it becomes . . . . We do not accept this sort of bootstrapping argument as a defense to an

148. *Ellis*, 990 F.2d at 1526.

149. Dana Wilkie, *Mission Funding Hits Constitutional Roadblock*, SAN DIEGO UNION TRIBUNE, March 10, 2004, at A1 (two of California's 21 missions are owned by the state; the remainder are owned by the Catholic Church).

150. *See generally*, James Sandos, *Between Crucifix and Lance: Indian-White Relations in California, 1769-1848, in* CONTESTED EDEN: CALIFORNIA BEFORE THE GOLD RUSH 196-229 (Ramón A. Gutiérrez & Richard J. Orsi, eds., 1998); ROBERT H. JACKSON & EDWARD CASTILLO, INDIANS, FRANCISCANS AND SPANISH COLONIZATION: THE IMPACT OF THE MISSION SYSTEM ON THE CALIFORNIA INDIANS 11-107 (1995).

151. Similarly, the display of religious symbols with independent artistic significance—*e.g.*, a painting of the Crucifixion in the National Gallery—is permissible as well, provided that the same conditions are satisfied. *See, e.g.*, *Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part).

152. Carpenter v. City and County of San Francisco, 803 F. Supp. 337, 349-50 (N.D. Cal. 1992) (decided under the California Constitution), *rev'd*, 93 F.3d 627.

153. *Carpenter*, 803 F. Supp. at 349-50.

> Establishment Clause violation, nor have we found any other case that adopted this reasoning.[154]

The Ninth Circuit subsequently reversed the district court, ruling that the cross lacked any "history independent of its religious significance" and noting that "there is nothing about FDR's transcontinental contact that converts the Cross into an historical relic."[155]

This analysis is consistent with Justice O'Connor's discussion of the role of history in assessing the endorsing effect of a religious practice or display. In *Allegheny*, O'Connor responded at length to Justice Kennedy's charge that application of the endorsement test "without artificial exceptions for historical practice"[156] would require the invalidation of "many traditional practices recognizing the role of religion in our society."[157] In defending the constitutionality of various forms of "ceremonial deism,"[158] Justice O'Connor stressed that such practices will not "survive Establishment Clause scrutiny simply by virtue of their historical longevity alone" but rather are permissible because they do not violate "the values protected" by the constitutional provision.[159] She specifically linked the permissibility of ceremonial deism to its "nonsectarian nature"—a consideration almost never present in disputes regarding the display of religious symbols on public land—and summarized the relevant inquiry as focusing on whether "longstanding practices . . . serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time."[160] Accordingly, as framed by O'Connor, the historical context of a challenged display is relevant not because of the mere passage of time but instead because independent historical developments may effectively divest the display of its religious significance.[161]

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154. *Gonzales*, 4 F.3d at 1422.

155. *Carpenter*, 93 F.3d at 631; *see also Ellis*, 990 F.2d at 1526 ("[A] display's historical significance must be independent of the display's religious content."); *Murphy*, 782 F. Supp. at 1431.

156. *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part).

157. *Id.* at 630 (O'Connor, J., concurring).

158. *Id.*

159. *Id.*

160. *Id.* at 631; *see also* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. at 2325-26 (2004) (O'Connor, J., concurring).

161. In a recent departure from this prevailing analysis, the Third Circuit revived the longevity rationale to justify the display of a Ten Commandments plaque in a Pennsylvania county courthouse. The court in *Freethought Society v. Chester County* held that "the *age and history* of the plaque provide a context which changes the effect of an otherwise religious plaque." 334 F.3d at 264; *see also Modrovich*, 385 F.3d at 406-12 (adhering to *Freethought* analysis). In attempting to characterize the religious display as a secular undertaking, the court offered the tautological proposition that

The weight of authority rejecting the longevity rationale properly reflects the values underpinning the prohibition against apparent endorsement. The endorsing effect of a permanent sectarian symbol that enjoys preferential access to an expressive venue—for example, the towering crosses at the apex of hilltop parks at issue in the *Carpenter* and *Murphy* cases—is not likely diminished by the passage of time. To the contrary, the duration underscores the depth of connection between the religious display and government itself.[162] When an irreducibly sectarian symbol on public land becomes so embedded in the self-identity of a political community that it attains the status of a cherished landmark, the fundamental concern of the endorsement standard—"send[ing] a message to nonadherents that they are outsiders"[163]—is squarely implicated.

2. The Public Forum Exception

The only other potential qualification to the general prohibition against permanent religious displays is the improbable case where government creates a public forum for permanent symbolic speech, thus permitting the perpetual display of many different private symbols without regard to content or viewpoint.[164] Because government could not favor the message of any proposed display in regulating access to the forum, all symbolic speech protected by the First Amendment would require equal accommodation without regard to how gravely it might offend the viewing public.[165] As the Supreme Court noted in *Pinette*, "giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate

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"[t]he reasonable observer, knowing the age of the Ten Commandments plaque, would regard the decision to leave it in place as motivated, in significant part, by the desire to preserve a longstanding plaque." *Freethought Soc'y*, 334 F.3d at 265. The analysis transforms the endorsement inquiry into a standardless race against the clock: if a concededly religious display survives long enough without challenge, the endorsing effect may disappear at some moment of the court's own choosing and the commemorated text then transmutes into a secularized object communicating merely the fact that it is old. As the court noted in *Gonzales*, this reasoning unhinges the inquiry from any meaningful connection to the actual communicative impact of a religious display. *Gonzales*, 4 F.3d at 1422.

162. *Carpenter*, 93 F.3d at 631 ("Rather than having a history independent of its religious significance, the Mount Davidson Cross' history is intertwined with its religious symbolism . . . . 'This kind of historical significance simply exacerbates the appearance of governmental preference for a particular religion.'").

163. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

164. *See, e.g.*, *Mercier*, 305 F. Supp. 2d at 1020.

165. *Id.* ("Perhaps like other communities experiencing similar controversies, the City is wary of the types of displays it would have to accept if it used content-neutral criteria in evaluating them."). The court in *Mercier* describes a controversy in Boise, Idaho, in which the city council voted to remove a Ten Commandments monument from a public park after receiving a request from an anti-gay activist to erect an accompanying monument "claiming that Matthew Shepard is in hell because he was gay." *Id.*

the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)."[166] The constitutional principles governing the administration of any public forum of this nature would thus give rise to the peculiar scenario of crosses, swastikas, pentagrams, menorahs, and myriad other private symbols, all displayed side by side on public land.[167]

While such a forum would diminish the appearance of endorsement for any particular viewpoint, religious or otherwise, it would create significant problems regarding regulation of access, apportionment of space, and the accommodation of other public uses. Because each parcel would represent a unique and differentially valuable venue for symbolic expression, and because the public space available for this use necessarily would be finite, how would government apportion the property among multiple applicants?[168] As a matter of public policy, why would government conclude that such a mélange of private symbols would be the best use of public space?[169] Finally, it is questionable whether such an arrangement would sufficiently dissipate the appearance of endorsement, since those speakers fortunate enough to obtain space would express their views in perpetuity and to the permanent exclusion of every other competing message.[170] Such considerations suggest that this possible exception to the general prohibition against permanent religious displays on public property is more likely a theoretical concern than a practical option.[171]

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166. *Pinette*, 515 U.S. at 766; *see also* Am. Jewish Cong. v. City of Beverly Hills, 90 F.3d 379, 383 (9th Cir. 1996) (en banc).

167. *Cf.* Fox v. City of Los Angeles, 587 P.2d 663, 665 (Cal. 1978) (Noting diversity of religious imagery, including "Coptic, Universalist, [and] Scientology crosses, the Buddhist wheel, Shinto torii, Confucian yang-yin, Jain swastika, Zoroastrian vase of fire, [and] Unitarian flaming chalice," court observes that "[t]he [Los Angeles] city hall is not an immense bulletin board whereon symbols of all faiths could be thumbtacked or otherwise displayed. Would it be justifiable, say, to allow only a Star of Bethlehem, a Star of David, and a Star and Crescent?").

168. *Cf. Pinette*, 515 U.S. at 777-78 (O'Connor, J., concurring) (identifying "the fortuity of geography" and "the nature of the particular public space" as factors which might lead to the apparent endorsement of private religious speech in a public forum).

169. *Cf. supra* notes 165, 167.

170. *See supra* note 168. In her concurring opinion in *Pinette*, Justice O'Connor signaled that private religious speech likely will not offend Establishment Clause principles if "allowed on equal terms in a vigorous public forum that the government has administered properly." *Pinette*, 515 U.S. at 775 (O'Connor, J., concurring). She stressed, however, that "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval." *Id.* at 777-78 (citation omitted); *see* Lopez, *supra* note 107, at 223 ("A facially neutral policy that allows domination of a public forum . . . by the permanent religious messages of one religious tradition in the absence of others prefers some religious sects over others and, at the very least, favors religion over nonreligion.").

171. In a related context, the Tenth Circuit recently assessed the First Amendment implications of a Ten Commandments monument displayed—evidently without challenge—on the grounds of a

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As the preceding discussion reflects, a very substantial body of federal decisional law condemns the permanent display of sectarian symbols on public property. If the expressive effect of a symbol is clearly religious, courts virtually never uphold its permanent display unless it possesses independent historical significance or is privately displayed in a public forum. This jurisprudence reflects the evident fact that the permanent integration of sectarian symbols with the physical presence of government itself communicates a powerful message of preference for the favored creed, in violation of the central value of political inclusion that animates Justice O'Connor's endorsement standard.

## III. APPLICATION OF THE ENDORSEMENT STANDARD TO IMPERMISSIBLE RELIGIOUS DISPLAYS: THE REMEDIAL INQUIRY

Having refined the *Lemon* inquiry by shifting the analytic focus to the question of actual or apparent endorsement of religion, and having entrusted the latter inquiry to an exceptionally well-informed observer, Justice O'Connor's endorsement standard requires a corresponding refinement of the analysis of remedies. The existing jurisprudence addressing permanent religious displays, however, reflects little attention to the quite rigorous remedial implications of the endorsement test. In contrast to the careful and consistent assessment of the prohibition itself, the analysis of remedies is an ad hoc and often superficial exercise with little doctrinal grounding—in keeping with the unfortunate treatment of

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municipal building in Ogden, Utah. *Summum*, 297 F.3d at 99-1000 & n.3 ("Summum's concession [that the display did not violate the Establishment Clause] may have been unwise; the Establishment Clause issue is certainly not so straightforward as the City would presume."). Plaintiffs, rather than seeking removal of the monument, argued that its presence required the city to accept for display monuments commemorating other religious beliefs, and challenged the city's refusal to permit the placement of a monument to the tenets of "Summum" on that basis. *Id.* at 1000. The circuit court concluded that Ogden's display of various monuments established a nonpublic forum, since the "gallery of permanent monuments on the Municipal Grounds constitutes 'public property which is not by tradition or designation a forum for public communication,'" and thus that the city's administration of the property was subject only to the requirements of reasonableness and viewpoint-neutrality. *Id.* at 1002-03. However, the court found that the city's refusal to "treat with equal dignity speech from divergent religious perspectives," *id.* at 1011, constituted precisely such impermissible viewpoint discrimination, *id.* at 1009, and accordingly barred Ogden from "display[ing] the Ten Commandments Monument while declining to display" competing religious monuments. *Id.* at 1011. Thus, even in circumstances where a permanent religious display survives or averts challenge under the Establishment Clause, the requirement of viewpoint neutrality in a nonpublic forum may compel the inclusion of competing religious speech.

remedies generally as "the poor cousin"[172] of corresponding substantive rights. Against this backdrop, Part III begins by posing a general framework for the remedial analysis, then turns to its application across a range of measures that have been proposed in recent litigation concerning permanent religious displays. The discussion focuses exclusively on injunctive remedies, since damages for such violations are nominally valued in the typical case[173] and are thus an insignificant aspect of the remedial scheme.[174]

As a preliminary matter, it is important to situate the discussion within the broader context of remedies law. Injunctive relief may take many forms and promote a range of objectives, and the identification of a proper remedy presupposes a particular remedial goal. While the general objective of all remedies is to "return a plaintiff to her rightful position—the position she would have been in but for the constitutional wrong"[175]—the particular means necessary to achieve that result will vary considerably depending upon the nature of the unconstitutional conduct at issue. Violations rooted in complex institutional practices, such as the entrenched racial inequalities at issue in the Supreme Court's desegregation jurisprudence[176] or the prison conditions addressed in contemporary Eighth Amendment law,[177] present difficult remedial challenges that the federal courts have met over time with widely divergent approaches. In some instances, the courts have employed

172. Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 679-80 (2001) (hereinafter Thomas I) (remedies "given short shrift in legal jurisprudence").

173. Chambers v. City of Frederick, 292 F. Supp. 2d 766, 772-73 (D. Md. 2003). Where plaintiffs seek damages in addition to injunctive or declaratory relief, they often plead for a nominal award only. *See, e.g., id.*; King v. Richmond County, 331 F.3d 1271, 1274 (11th Cir. 2003); Mellen v. Bunting, 327 F.3d 355, 363 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1750 (2004); Bonham v. Dist. of Columbia Library Admin., 989 F.2d 1242, 1243 (D.C. Cir. 1993); Yacovelli v. Moeser, No. 1:02CV596, 2004 WL 1144183, at *10 (M.D.N.C. May 20, 2004). For a general discussion of the difficulties faced by plaintiffs seeking damages in Establishment Clause cases, see Doug Rendleman, *Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?* 59 WASH. & LEE L. REV. 1343, 1355-64 (2002).

174. *See also* Rendleman, *supra* note 173, at 1353 n.40 ("The other basic category of remedy, restitution, hardly figures into constitutional remedies at all."); Mike Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 220 (1998) (noting the inadequate deterrent effect of attorneys' fee awards under 42 U.S.C. § 1988).

175. Thomas I, *supra* note 172, at 725.

176. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 896-99 (1999); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2455-59 (2003).

177. *See, e.g.*, Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981).

prophylactic remedies[178] that "reach beyond the limits of the legal violation to prohibit conduct that itself is permissible, but nevertheless must be restricted in order to prevent future violations"[179] because "other narrower remedies are ineffective due, for example, to . . . the defendant's ability to evade a simple prohibition."[180] In other circumstances, the courts have embraced an incremental approach that addresses only partially the web of conduct facilitating a constitutional violation.[181] These competing approaches to intractable constitutional problems reflect sharply conflicting views regarding the practicality of federal court supervision of complex institutional processes[182] as well as profound disagreement over the constitutional legitimacy of expansive equitable decrees.[183]

The unconstitutional display of permanent religious symbols presents a very different question. Unlike the structural violations at issue in desegregation or prison litigation, the illegality is typically a discrete and concretely remediable event.[184] The violation arises from a single act of government in sanctioning the display of a religious symbol on public property, and its remedy requires only the termination of the endorsing relationship between government and the symbolic speech.[185] While one could envision a broad prophylactic remedy in this context—*e.g.*, an injunction prohibiting a particularly recalcitrant and repetitive violator from displaying any religious imagery, to preclude the possibility that another violation might ensue—the scenario is implausible. Instead, the analytic task is to undo the violation itself

178. *E.g.*, Hutto v. Finney, 437 U.S. 678, 687 (1978); Milliken v. Bradley, 433 U.S. 267, 287-88 (1977).

179. Thomas I, *supra* note 172, at 691-92.

180. Tracy A. Thomas, *Understanding Prophylactic Remedies Through The Looking Glass of* Bush v. Gore, 11 WM. & MARY BILL RTS. J. 343, 389 (2002) (hereinafter Thomas II).

181. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 585 (1964); Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 598-606 (1983); *cf.* Lewis v. Casey, 518 U.S. 343 (1996).

182. John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of Federal Courts*, 84 CAL. L. REV. 1121, 1122-23 (1996); Rendleman, *supra* note 173, at 1371; *cf.* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

183. *Compare, e.g.*, Dickerson v. United States, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting), Missouri v. Jenkins, 515 U.S. 70, 124-33 (1995) (Thomas, J., concurring), *and* Yoo, *supra* note 182, at 1141-66, *with* Thomas II, *supra* note 180, at 380-82, 389, *and* Levinson, *supra* note 176, at 900-01.

184. Rendleman, *supra* note 173, at 1373 ("[C]ourts that have devised plaintiffs' remedies for officials' Establishment Clause infringements have not adduced logistical difficulties, separation of powers, and federalism to justify delayed and partial relief.").

185. *Cf. id.* at 1354 ("Judges grant structural injunctions for school desegregation, electoral reform, and, more recently, prison condition remedies. Usually these tasks are bigger jobs than the courts typically ask of Establishment Clause injunctions against religious observances.").

through means of a preventive or reparative injunction.[186] The following discussion focuses on the contours of such relief and thus bypasses the wider debate over the power of the federal judiciary to impose broad prophylactic decrees. While the remedies proposed below are more demanding than the measures required by at least some of the courts that have considered these issues,[187] their scope corresponds to the parameters of the constitutional violation itself, which reaches deeper than many courts have acknowledged.[188]

*A. Analytic Framework*

The endorsement standard rests on the principle that government may not communicate a message of political exclusion or inferiority to religious nonadherents.[189] When a religious display violates the Establishment Clause, injunctive relief must address directly and eradicate completely that disaffecting injury.[190] Any remedy falling short of this objective will exacerbate the harm by communicating that the prohibition is a mere formality that the political establishment, through a complicit judiciary, will render irrelevant in application.[191] This is not an abstract concern. In decisions addressing the remedial requirements of the Establishment Clause in this context, several courts have sanctioned ineffectual measures that trivialize rather than vindicate the constitutional interests at stake.[192]

This deficient jurisprudence derives, in part, from the absence of any consistent methodology to frame the remedial inquiry. The courts have instead produced a patchwork of ad hoc and often irreconcilable dispositions[193] reflecting a considerable disparity of analytic rigor.[194]

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186. Procedurally, a court may either issue a simple preventive injunction barring the continued endorsement of a religious symbol or delineate in greater detail the reparative steps required to achieve that objective. In some cases, the remedy unfolds in two steps. The court first issues a preventive injunction permitting the defendant to take whatever steps it deems appropriate to comply. If the plaintiff believes that defendant's remedial efforts are inadequate, he or she then requests the court to issue a modified reparative decree specifying the particular steps necessary to cure the illegality. *Compare, e.g.*, Murphy v. Bilbray, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991), *with* Murphy v. Bilbray, Nos. 90-0134-GT and 89-0820-GT, 1997 WL 754604 (S.D. Cal. Sept. 18, 1997).

187. *See, e.g., infra* notes 356-66 and accompanying text.

188. *See infra* notes 202-45 and accompanying text.

189. Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring); Books v. City of Elkhart, 235 F.3d 292, 308 (7th Cir. 2000).

190. *Cf.* Thomas II, *supra* note 180, at 389.

191. *Cf.* Levinson, *supra* note 176, at 914.

192. *E.g., infra* notes 356-66, 391-94.

193. *See generally* Mercier v. Fraternal Order of Eagles, Nos. 04-1321 and 04-1524, 2005 WL 81886 (7th Cir. Jan. 3, 2005); *Mercier*, 2005 WL 81886, at *12-*13 (Bauer, J., dissenting); Paulson v. City of San Diego, 294 F.3d 1124 (9th Cir. 2002) (en banc) (decided under the California Constitution); *Paulson*, 294 F.3d at 1134 (Fernandez, J., dissenting); Paulson v. City of San Diego, 262

Some decisions require that permanent religious displays be removed from public property,[195] others merely require their relocation,[196] while still others permit their sale along with a portion of the underlying public land.[197] Some decisions authorize the sale of religious displays and the underlying realty only on condition that the property be sold at open auction without preference afforded purchasers seeking to preserve the symbol,[198] while others permit negotiated sales with buyers committed to retaining the display.[199] The courts have diverged as well regarding the amount of underlying land that must be sold to eradicate the appearance of endorsement; some have closely scrutinized transactions involving tiny parcels[200] while others have expressed no concern over the size of the transferred plot.[201] Notably absent from this decisional law is any effort to assess the specific requirements of the endorsement test in the remedial context. The test, however, should squarely frame the analysis.

1. Level of Scrutiny

As a preliminary matter, the endorsement standard should be understood to require close and skeptical consideration of any remedy proposed by a government defendant.[202] This demanding remedial

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F.3d 885 (9th Cir. 2001), *rev'd en banc*, 294 F.3d 1124; Kong v. City and County of San Francisco, No. 00-15261, 2001 WL 1020102 (9th Cir. Sept. 5, 2001); Freedom From Religion Found. v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000); Mercier v. City of La Crosse, 305 F. Supp. 2d 999 (W.D. Wis. 2004), *rev'd*, 2005 WL 81886; Mercier v. City of La Crosse, 276 F. Supp. 2d 961 (W.D. Wis. 2003), *rev'd*, 2005 WL 81886; Paulson v. City of San Diego, Civ. No. 89-0820GT (S.D. Cal. Feb. 3, 2000), *rev'd en banc*, 294 F.3d 1124; Freedom From Religion Found. v. City of Marshfield, No. 98-C-270-S, 2000 WL 767376 (W.D. Wis. May 9, 2000); ACLU v. City of Plattsmouth, 186 F. Supp. 2d 1024, 1036 (D. Neb. 2002); *Murphy*, 1997 WL 754604 (decided under the California Constitution); *see also*, Ellis v. City of La Mesa, 990 F.2d 1518, 1529-31 (9th Cir. 1993) (Beezer, J., concurring); Separation of Church and State Comm. v. City of Eugene, 93 F.3d 617, 626 (9th Cir. 1996) (O'Scannlain, J., concurring); *Chambers*, 292 F. Supp. at 772.

194. *Compare, e.g., Kong*, 2001 WL 1020102, *City of Marshfield*, 2000 WL 767376, *and City of Plattsmouth*, 186 F. Supp. 2d at 1036, *with Paulson*, 294 F.3d 1124, and *Mercier*, 305 F. Supp. 2d 999 and 276 F. Supp. 2d 961.

195. *Mercier*, 305 F. Supp. 2d at 1020-21.

196. *City of Plattsmouth*, 186 F. Supp. 2d at 1036.

197. *Mercier*, 2005 WL 81886; *City of Marshfield*, 203 F.3d at 497; *Kong*, 2001 WL 1020102.

198. *Murphy*, 1997 WL 754604, at *10-*11.

199. *Mercier*, 2005 WL 81886, at *9; *City of Marshfield*, 203 F.3d at 497.

200. *Murphy*, 1997 WL 754604, at *11; *Mercier*, 305 F. Supp. 2d at 1019.

201. *Mercier*, 2005 WL 81886, at *9; *City of Marshfield*, 203 F.3d at 497.

202. The endorsement standard generally requires that "government practices relating to speech on religious topics 'must be subjected to careful judicial scrutiny,'" Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring) (internal citation omitted), but the particular degree of scrutiny applicable in the remedial context has not been addressed by the Supreme Court. Among the lower courts, the Seventh Circuit has held that any proposed remedy should be examined with respect to its "substance . . . as well as its form to determine whether government action endorsing religion has actually ceased." *City of Marshfield*, 203 F.3d at 491.

scrutiny is a necessary consequence of the endorsement test's relaxation of the *Lemon* liability standard. While *Lemon* prohibited "aid" to religion, the endorsement standard prohibits only such aid that reasonably implies government's subjective embrace of a religious beneficiary.[203] Having shifted the focus to government's actual or perceived intentions—and in so doing limited the reach of the constitutional prohibition—the new standard should be understood to impose a greater remedial burden on government in those instances where a violation is found. The need for greater scrutiny results from the evident fact that government aid to religion, considered objectively without regard to its apparent motivation or purpose, is more easily undone than the perception that government is subjectively attached to a religious beneficiary and seeks to promote its interests.

The concept of endorsement implies a particular type of intended behavior.[204] While objective conduct, without more, may give rise to a perception of endorsement (*e.g.*, affording religion superior access to government benefits or resources), it does so by implying an underlying purpose that itself is impermissible.[205] Conferring a comparative advantage on religion offends the endorsement standard because it suggests to the objective observer that government subjectively prefers or embraces a particular religious viewpoint.[206] The politically disaffecting impact of prohibited conduct—the ultimate concern of the endorsement inquiry—derives from its apparent motivation.[207] A constitutional violation thus rests on the conclusion that government, in fact or appearance, has acted with the subjective intention of promoting religion, not merely that it has unwittingly conferred some advantage upon it.

To remedy such a violation requires that the apparent favoritism itself be undone. Accordingly, courts must closely scrutinize the history and context of any proposed remedy, beginning most obviously with the underlying violation, to determine whether the corrective action will eradicate the perceived endorsement, and specifically whether any superficially neutral proposal is a subterfuge for subtle religious preference. Justice O'Connor's admonition in *Pinette* is particularly relevant in this regard: no circumstance more clearly justifies the imposition of an "affirmative obligation[] . . . to take steps to avoid being

203. *See supra* notes 14-15, 21-22 and accompanying text.
204. *Id.*
205. *See supra* notes 60-65 and accompanying text.
206. *Id.*
207. *See supra* notes 21-22 and accompanying text.

perceived as supporting or endorsing a private religious message"[208] than a finding of endorsement itself, which demands a remedy that not merely restores superficial neutrality but rather convinces the objective observer that government's preferential sentiment no longer colors its conduct.[209]

The analysis of the *en banc* court in *Paulson v. City of San Diego* illustrates the distinction.[210] In *Paulson*, the City of San Diego purported to remedy its impermissible display of a Latin cross in the center of a public park by auctioning the cross and a small parcel of the underlying parkland on condition that all bidders agree to use the property as a war memorial.[211] The city made clear that the existing cross satisfied the war-memorial use restriction but that purchasers were not required to retain the symbol.[212] In the district court and before the original three-judge panel of the Ninth Circuit, the transaction was upheld on grounds that it separated the city from the display in a manner that was sufficiently neutral with respect to the religious expression at issue, since the city did not require that the cross be preserved.[213] On rehearing, however, an *en banc* panel of the Ninth Circuit struck down the sale, reasoning that the city conferred a material advantage on purchasers seeking to retain the cross through the imposition of the war-memorial use restriction.[214] As the court explained, only purchasers intending to display the cross could satisfy the use restriction without further investment; all others would be forced to incur the substantial additional expense of removing the existing symbol and constructing a new memorial in its place.[215] Forced to reserve funds for these expenditures, bidders opposed to the cross had comparatively less money available with which to purchase the property.[216]

While the *en banc* decision rests on a provision of the California Constitution barring aid to religion,[217] the *Paulson* court's reasoning

208. *Pinette*, 515 U.S. at 777.

209. *Cf.* Schenck v. Pro-Choice Network, 519 U.S. 357, 381-82 (1997) (upholding injunction barring otherwise protected expressive activity based on defendants' record of unlawful conduct); Turner v. Habersham County, 290 F. Supp. 2d 1362, 1371 (N.D. Ga. 2003).

210. 294 F.3d 1124.

211. *Paulson*, 294 F.3d at 1127.

212. *Id.* at 1127, 1132.

213. *Id.* at 1128; *Paulson*, 262 F.3d at 894 ("Because the land was sold in an open bidding process, with its express provision that the purchaser's intent to keep or remove the cross from the property would not be considered in evaluating bids, any appearance of preference for religion is dispelled.").

214. *Paulson*, 294 F.3d at 1132-33.

215. *Id.*

216. *Id.*

217. *Id.* at 1133 n.7. The vacated panel decision affirmed the transaction on Establishment Clause grounds as well as state constitutional grounds. *Paulson*, 262 F.3d at 891 n.3.

properly reflects the endorsement inquiry in the remedial context. The well-informed observer, knowledgeable of the city's long battle to "save" the cross,[218] would scrutinize the transaction with far greater care than if the proposal had been made in a different context—for example, if the city had obtained the cross and surrounding parkland as a gift and had immediately volunteered to conduct an auction to remove the symbol from its newly acquired property.[219] The endorsement standard's historical and contextual analysis necessarily requires more searching scrutiny of a proposed remedy than would be required in circumstances where the relevant conduct is not the coerced response of political officials to an adverse and often fiercely unpopular court order.[220] Aware of government's embrace of religion and viewing subsequent conduct in light of that offense, the objective observer will skeptically assess

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218. *Paulson*, 294 F.3d at 1126.

219. A recent opinion of the Seventh Circuit conversely implies that the analysis of remedies under the Establishment Clause should be more lenient than the assessment of identical conduct arising in a nonremedial context. *Mercier*, 2005 WL 81886, at *8. In upholding a highly suspect remedial sale, *see, e.g.*, *infra* notes 275, 363-66, 392-94 and accompanying text, the *Mercier* court asserts that the remedial posture of the case lends justification to a land transfer that otherwise might be barred as an endorsement violation. *Mercier*, 2005 WL 81886, at *8. The court stresses that it is "not endorsing a non-remedial initiative designed to sell off patches of government land to various religious denominations as a means of circumventing the Establishment Clause," *id.*, but offers no explanation why it should be permissible for government to do precisely the same thing in circumstances where it has refused to acknowledge the infirmity of its conduct, invited a constitutional challenge, and lost. *See id.* at *2. As set forth above, a well-informed observer would likely view the coerced remedial response of an entrenched defendant with considerably greater suspicion than actions voluntarily taken by government in advance of litigation to resolve a constitutional concern.

220. Government officials often face significant political pressure to defend against challenges to religious displays on public property, as illustrated by a recent controversy in Los Angeles. After initially agreeing to a demand that the County of Los Angeles remove a cross from its official seal, the Board of Supervisors faced "a massive public outcry," including "angry letters, e-mails and phone calls [that] flooded" their offices along with a formal letter of protest from the Cardinal of the Archdiocese of Los Angeles. Troy Anderson, *Big Outcry Over Tiny Cross*, L.A. DAILY NEWS, June 4, 2004. Government defendants facing such pressure often adopt a defiant public posture in response to adverse judicial rulings. For example, a member of the San Diego County Board of Supervisors publicly characterized a federal court order striking down a cross at the center of a County park as "asinine" and "foolish . . . in a nation where we are one nation under God." Transcript of December 10, 1991 San Diego County Board of Supervisors Meeting, at 6, Ex. 18 to Memorandum of Points and Authorities in Support of Plaintiff's Motion to Modify and Enforce Injunction, *Murphy*, 1997 WL 754604 (No. 90-0134-GT). Another member asserted that "the problem is . . . frankly, an absurd court ruling by a judge who really is encouraging intolerance in our society." *Id.* at 12. In the *Paulson* case, public officials responded to the initial order barring display of the cross in a public park by launching a campaign to "save" the symbol through a negotiated sale to an entity committed to its preservation. *Paulson*, 294 F.3d at 1126. Given the pressure brought to bear on public officials in such cases, it is highly unlikely that an objective observer would embrace their proposed remedies without exceedingly close review.

corrective action to assure that superficially neutral means are not employed to effectuate government's established religious preference.[221]

2. Principles of Analysis: Separation and Neutrality

When government attempts to erase the perception of endorsement arising from a permanent religious display on public land, its "affirmative obligations" should be understood to encompass two interrelated and demanding duties: (1) achieving evident and substantial physical separation from the offending display (2) through means that are strictly neutral with respect to the religious expression at issue.

Courts must carefully scrutinize any proposed remedy to assure that both requirements are satisfied.[222] A superficially neutral remedy that in fact or appearance tends to favor religious speech perpetuates rather than eliminates a message of endorsement, and thus not merely fails to remedy the violation but also independently violates the constitutional proscription.[223]

a. The Futility of Message Dilution and the Corresponding Necessity of Physical Separation

As Justice Souter explained in *Pinette*, a religious display on public property—irrespective of its public or private sponsorship—implicates the endorsement prohibition because an objective observer will likely attribute the sectarian message to the owner of the underlying land.[224] To end that perception, government must either physically separate itself from the display or transform the message of the imagery itself. Courts have hypothesized three ways in which an endorsing message might be diluted: by moving the display to another location on public land,[225] by transforming the public property into a public forum for other permanent displays, so that none enjoys preferential status,[226] or by transforming the display through the inclusion of additional items which purportedly

221. *Cf.* Sue Fox & Karima A. Haynes, *Debate Over Crosses on City Seals Hits a Nerve*, L.A. TIMES, June 11, 2004, at B1 ("Erasing a cross, it now seems clear, is a politically perilous pursuit. What began as a murmur . . . swelled into a full-throated roar this month after the American Civil Liberties Union . . . call[ed] the small cross on the [Los Angeles] county seal an unconstitutional 'endorsement of Christianity.' When county supervisors voted last week to abandon the cross, the reaction was swift and furious. Thousands of people . . . flooded the supervisors with calls to keep the cross.").

222. *See supra* notes 202-21 and accompanying text.

223. *Cf. Paulson*, 294 F.3d at 1133-34 (remedial sale fails to cure original constitutional violation and independently violates California Constitution).

224. *Pinette*, 515 U.S. at 786 (Souter, J., concurring); *City of Marshfield*, 203 F.3d at 491.

225. *City of Plattsmouth*, 186 F. Supp. 2d at 1036.

226. *Mercier*, 305 F. Supp. 2d at 1020.

secularize its message.[227] Each of these proposed measures, however, will fail to effectively dissipate the endorsing effect of a permanent religious display, at least in the typical case.

Relocating a permanent display to other public property simply shifts the unconstitutional message of endorsement to a new locale. In assessing constitutional liability in the first instance, courts have ruled consistently that the objective observer is deemed knowledgeable of the ownership of public property—even if the land is not evidently associated with government—and have struck down religious displays irrespective of the location or nature of the public land upon which they sit.[228] In the remedial context, the objective observer's level of knowledge regarding the ownership of the underlying property should be deemed even more precise, for the reasons discussed previously.[229] Accordingly, it is difficult to envision any public property that might constitutionally support the permanent display of an otherwise impermissible sectarian symbol unless the symbol is placed in some closed or inaccessible space that the public (and thus the objective observer) cannot view. In any other public setting, the attribution of an impermissible religious message to the owner of the underlying property will not abate.

Likewise, the suggestion that government might remedy an unconstitutional religious display by transforming its physical setting into a public forum for permanent symbolic speech—thus permitting the perpetual display of many different private symbols without regard to content or viewpoint—is both practically implausible and analytically suspect, for reasons set forth earlier.[230] These shortcomings are exacerbated in the remedial context, where an existing religious display will likely occupy a desirable position within the larger physical space and thus retain an inherent communicative advantage over other symbols that might be added to the surrounding property.[231] For example, in a number of cases involving permanent Latin crosses displayed in public parks, the religious symbol sits at the center and often the apex of the

227. Adland v. Russ, 307 F.3d 471, 489-90 (6th Cir. 2002); ACLU v. McCreary County, 145 F. Supp. 2d 845, 852-53 (E.D. Ky. 2001).

228. *See, e.g.*, Buono v. Norton, 371 F.3d 543, 550 (9th Cir. 2004).

229. *Supra* notes 202-21 and accompanying text.

230. *Supra* notes 164-71 and accompanying text.

231. *See, e.g.*, *City of Marshfield*, 203 F.3d at 496 ("The statue is an unattended object fifteen feet in height and made of marble. For this reason alone, citizens who wish to endorse other religions or sects on 'equal terms' would find it exceedingly difficult to erect an object of equal expressive power or to maintain it on government property.").

public property.[232] Opening the surrounding slopes for the display of other permanent imagery will not establish a true public forum, since the original religious symbol will retain literal superiority over all other speech and thus will continue to enjoy an expressive advantage.

Finally, the proposition that an impermissible religious display can be contextually "secularized" by the inclusion of additional items within the display itself is, at best, a limited remedial option that applies only to imagery whose religious meaning is sufficiently mutable—for example, a crèche or an inscription of the Ten Commandments, both of which have been construed by some courts as potentially historical rather than religious representations, depending upon the manner of presentation.[233] With respect to intrinsically sectarian symbols, such as a cross or Star of David, the addition of secular items cannot alter the irreducibly religious character of the original imagery.[234]

The secularizing effect of an augmented display is also considerably less potent in the remedial context, irrespective of the intensity of the religious imagery at issue. As the Sixth Circuit observed in striking down a revised display, "the [reasonable] observer is charged with knowing the history of the respective displays, and in each case the history indicates that the displays were originally intended to enshrine the Ten Commandments; it was only upon fear of litigation that the displays were modified to include secular material in the hope of rendering the displays constitutional."[235] When otherwise impermissible religious imagery is coercively "secularized" under threat of court order, the objective observer will examine the revised display with heightened scrutiny to assure that government has not simply draped the symbol in secular dress to disguise its sectarian message.[236] When viewed with such skepticism, the remedial efficacy of augmenting an impermissible

232. *Ellis*, 990 F.2d at 1520-21 (Mt. Helix and Mt. Soledad crosses); Carpenter v. City and County of San Francisco, 93 F.3d 627, 628, 630-31 (9th Cir. 1996); *Separation of Church & State Comm.*, 93 F.3d at 618; Jewish War Veterans v. United States, 695 F. Supp. 3, 5 (D.D.C. 1998).

233. *Supra* notes 132-38 and accompanying text.

234. *See supra* note 140; *see, e.g.*, ACLU v. McCreary County, 354 F.3d 438, 459 (6th Cir. 2003).

235. *McCreary County*, 354 F.3d at 461; *see Mercier*, 305 F. Supp. 2d at 1016; *Turner*, 290 F. Supp. 2d at 1371; ACLU v. Rutherford County, 209 F. Supp. 2d 799, 808 (M.D. Tenn. 2002).

236. *See, e.g., McCreary County*, 354 F.3d at 459-61; *Turner*, 290 F. Supp. 2d at 1371; *cf. Adland*, 307 F.3d at 486-87; Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 768-69, 771-73 (7th Cir. 2001); *Books*, 235 F.3d at 307; ACLU v. Grayson County, No. Civ.A.4:01CV-202-M, 2002 WL 1558688, at *4-*5 (W.D. Ky. May 13, 2002); ACLU v. Ashbrook, 211 F. Supp. 2d 873, 890-92 (N.D. Ohio 2002); ACLU v. Pulaski County, 96 F. Supp. 2d 691, 699-700 (E.D. Ky. 2000); Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667, 675-77 (E.D. Ky. 2000).

display is necessarily diminished.[237] Moreover, the premise of the remedial proposal is itself subject to considerable criticism, as courts and commentators have noted with regard to the corresponding analysis of seasonal religious displays.[238]

Accordingly, at least with respect to intrinsically sectarian symbols (and arguably with respect to less intensive religious imagery as well), the only practical alternative is to physically separate government from the unconstitutional display. Such separation can be achieved in two ways: removing the offending display or privatizing the land beneath it. Removing an impermissible symbol is a direct and effective remedy that unmistakably achieves the required separation.[239] Privatizing the underlying land is less straightforward and requires additional analysis of the particular characteristics of the transferred parcel and its relationship to the remaining public land, if any. As discussed below, a remedial sale must achieve both evident and substantial separation from adjacent public property to affirm the interests of the Establishment Clause.[240]

b. The Accompanying Requirement of Strict Neutrality

Achieving evident and substantial physical separation between government and an impermissible display is a necessary but not sufficient remedial goal. Additionally, such separation must be achieved through means that are strictly neutral with respect to the religious expression at issue. For example, it accomplishes very little to sell land underlying a religious display on terms that prohibit the purchaser from displacing the symbol; while physical separation may be achieved, government has done nothing to dissipate its disaffecting promotion of the religious message.

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237. *Id.* For example, a solitary display of the Ten Commandments that is later supplemented with secular material is more likely to accord the original text a place of prominence—and less likely to coherently integrate it with the various surrounding items—than a display designed from the outset to reflect the interrelation and significance of multiple texts. The inclusion of Moses as a lawgiver among many others on the frieze above the Supreme Court's courtroom stands in contrast to the tactical addition, in the midst of litigation, of secular items to a longstanding religious display. *Compare, e.g.*, ACLU v. County of Allegheny, 492 U.S. 573, 652-53 (1989), *with McCreary County*, 354 F.3d at 454, 460.

238. *See, e.g.*, Murray v. City of Austin, 947 F.2d 147, 170 (5th Cir. 1991) (Goldberg, J., dissenting) (prevailing analysis immerses judges "in the minutiae of graphic design, our rulers and calipers in hand, scrutinizing each symbol for acceptable proportion, color, and gloss"); Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting); Laura Ahn, Note, *This is Not a Crèche*, 107 YALE L.J. 1969 (1998).

239. *Infra* notes 281-85 and accompanying text.

240. *Infra* notes 327-66 and accompanying text.

As the Supreme Court has repeatedly affirmed over the last half century, "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' towards religion, favoring neither one religion over others nor religious adherents collectively over nonadherents."[241] While the principle of neutrality is thus embedded in Establishment Clause doctrine, the Court has struggled to apply it in a manner that properly distinguishes between impermissible benefits conferred upon religion and the permissible accommodation of private religious practice.[242] In the remedial context, however, the neutrality principle must be strictly construed to assure that preferential treatment of religious expression is completely extinguished. In those instances where government purports to remedy a violation through the privatization of an endorsed display, any accommodation of the sectarian symbol must be subject to searching scrutiny, as discussed above,[243] to assure that the rhetoric of accommodation is not employed to subtly perpetuate government's established preference. Accommodations in the remedial context thus should be permitted only if they afford endorsed religious speech no expressive advantage *vis a vis* competing private viewpoints.[244] To otherwise permit government to project its perceived favoritism into the sphere of private expression will perpetuate rather than dissipate apparent endorsement in the view of a skeptical observer.[245]

This understanding of religious accommodation in relation to the remedial inquiry is consistent with the respective constitutional interests at play. The accommodation of private religious practice arises from the free exercise and free speech rights of individuals and entities who might otherwise be thwarted in the expression of their faith.[246] While relevant to the construction of the endorsement prohibition,[247] these constitutional

241. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S 687, 696 (1994) (citations and internal quotations omitted); *see, e.g.*, Lee v. Weisman, 505 U.S. 577, 590 (1992); *Allegheny*, 492 U.S. at 592-94; Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989); Wallace v. Jaffree, 472 U.S. 38, 60 (1985); Larson v. Valente, 456 U.S. 228, 244 (1982); Gillette v. United States, 401 U.S. 437, 450 (1971); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 225-26 (1963); Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

242. *See supra* note 62.

243. *Supra* notes 202-21 and accompanying text.

244. *See supra* notes 60-65; *cf. infra* notes 283-85 and accompanying text (discussion of a permissible remedial accommodation).

245. *Infra* notes 367-413 and accompanying text; *cf. Pinette*, 515 U.S. at 766.

246. *Allegheny*, 492 U.S. at 632 (O'Connor, J., concurring) ("In cases involving the lifting of government burdens on the free exercise of religion, a reasonable observer would take into account the value underlying the Free Exercise Clause in assessing whether the challenged practice conveyed a message of endorsement.").

247. *Id.*

interests "do[] not supersede the fundamental limitations imposed by the Establishment Clause."[248] Thus, where an Establishment Clause violation has occurred, a court must first assure that the perception of endorsement has been eradicated before turning to the constitutional interests associated with the newly privatized speech. The process of privatizing an impermissible display is itself state action that must comport with the dictates of the Establishment Clause;[249] the interests arising from the recipient's resulting ownership are contingent upon, not independent of, the legality of the preceding transfer.[250] Unless and until government effectively remedies its apparent religious preference by transferring a symbol to private hands in a strictly neutral fashion, a private recipient's free exercise and free speech rights remain inchoate.

Two decisions have addressed the relationship of the Establishment Clause and the Free Speech and Free Exercise Clauses in this context—the Seventh Circuit's opinion in *City of Marshfield* and the original panel decision of the Ninth Circuit in *Paulson*.[251] In *Paulson*, the court appeared to accept the proposition that the free exercise and free speech rights associated with a privatized religious display are contingent upon the constitutional validity of the preceding remedy.[252] The court's analysis of the "legitima[cy]"[253] of the remedy, however, ignored significant preferential features of the transaction[254] and thus sanctioned a substantive outcome that still elevated the expressive interests of the private recipient.[255] The other relevant decision—*Freedom From Religion Foundation v. City of Marshfield*—is less clear in its analysis. The court states "that because our holding limits private speech in a public forum, any remedy must be narrowly tailored to avoid an Establishment Clause violation."[256] To the extent this suggests that a

248. *Lee*, 505 U.S. at 587; *see, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000); *Pinette*, 515 U.S. at 775-76 (O'Connor, J., concurring); Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1101, 1104 n.9 (9th Cir. 2000).

249. *See infra* notes 307-26 and accompanying text.

250. This result corresponds with basic principles of property law, which require that a purchaser with "actual notice of the pendency of [a] proceeding" take the property "subject to any judgment that may be rendered" in the action. Albertson v. Raboff, 295 P.2d 405, 408 (Cal. 1956); *see* CAL. CIV. PROC. CODE § 1908(a)(2) (West 2004); *see also* Duncan v. Farm Credit Bank, 940 F.2d 1099, 1101 (7th Cir. 1991) (state *lis pendens* rules govern federal court proceedings).

251. *City of Marshfield*, 203 F.3d 487; *Paulson*, 262 F.3d 885.

252. *Paulson*, 262 F.3d at 896 ("[B]ecause the land was legitimately sold to the private Association, we must recognize and protect the Association's rights of Free Exercise and Free Speech as the Constitution demands no less.").

253. *Id.*

254. *See supra* notes 210-16.

255. *Id.*; *Paulson*, 262 F.3d at 891-6.

256. *City of Marshfield*, 203 F.3d at 497.

remedial order respecting the transfer of an impermissible display must be narrowly drawn for the purpose of facilitating the resulting private religious expression, it conflates separate constitutional interests that should be addressed distinctly and sequentially. In so doing, the analysis invites the preferential treatment of religious speech, at least where the required remedial "narrowing" is achieved at the expense of strict neutrality.

Equitable remedies must be tailored to address the illegality at hand.[257] In the Establishment Clause context, this maxim requires that remedial orders reach no further than necessary to dispel the appearance of endorsement.[258] Among its potential consequences, an excessively broad remedy might impair a private recipient's ability to engage in protected religious expression, and a court should assess such an effect in determining the scope of remedial measures.[259] Any constitutional excess, however, can only be determined by first establishing the baseline requirements of the Establishment Clause and then measuring the remedial proposal against that benchmark. Those requirements demand that government first separate itself from an unconstitutional display through means that are strictly neutral with respect to endorsed symbolic speech.

### *B. The Remedial Analysis*

Because there are two alternative means to achieve physical separation—removal of an impermissible symbol and privatization of the property beneath it—the first step of the remedial analysis is to establish whether government defendants are free to choose between the two in every case. While in many instances both alternatives are permissible, provided that certain rigorous safeguards are met, there are at least two circumstances in which courts should require that displays be removed rather than sold with the underlying public land. After addressing this threshold question, the remaining task is to determine the specific requirements of the separation and neutrality principles for each of the two remedial options.[260]

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257. 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2955 (2d ed. 1995) ("The primary objection to broad injunctive orders is the fear that they will impose unnecessary restraints on individual freedom and prohibit lawful and socially desirable activity. In particular, a court must be cautious in framing a broad injunction lest it prohibit the exercise of constitutionally protected rights."); FED. R. CIV. P. 65(d) ("Every order granting an injunction . . . shall be specific in terms . . . .").

258. Doe v. Small, 964 F.2d 611, 624-25 (7th Cir. 1992) (Cudahy, J., concurring).

259. *See, e.g., infra* note 361.

260. This analysis does not consider the special case of symbols held in trust by government, which require *sui generis* remedies that reflect the unique interplay of trust law with the endorsement standard. *Ellis*, 990 F.2d at 1529-30 (Beezer, J., concurring). The discussion presumes instead that government has an exclusive interest in the public property at issue and thus that its constitutional duties alone will shape the remedy. In circumstances where the property is held in trust, however, the grantor may impose restrictions on the use and disposition of trust property that also must be

1. Achieving Physical Separation: The Initial Remedial Choice

The most direct remedy in cases involving impermissible religious displays is to remove the symbol. Removing a display achieves complete physical separation between government and the offending object and thus addresses the concern at the core of such disputes—nonadherents' ability to use public space without the disaffecting influence of the endorsed religious symbol. In many earlier cases, including litigation involving large structures such as crosses, this remedy was ordered without discernible controversy or opposition.[261] However, defendants increasingly seek to avoid the remedy by attempting to sell or transfer religious symbols and the land beneath them to private parties.[262] In the general case, this alternative remedy satisfies the requirements of the Establishment Clause provided that certain stringent conditions are met.[263] However, there are at least two

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assessed in determining an appropriate resolution. *Id.* Where the trustor demands that a religious symbol remain on trust property, for example, and retains a reversionary interest to assure that the command is respected, the objective observer likely will take a quite different view of a remedy designed to preserve the symbol than in circumstances where government acts alone to perpetuate a religious display. For those interested in the complex questions raised by this unusual intersection of trust law and the Establishment Clause, the parties' briefing in *Murphy*, 1997 WL 754604, addresses the issue in considerable detail.

261. *See, e.g.*, *Eugene Cross Now in Place on Bible College Campus*, PORTLAND OREGONIAN, June 26, 1997 (describing removal and relocation of cross at issue in *Separation of Church & State Comm.*, 93 F.3d 617); Andrew Herrmann, *Indiana Township Ends Fight to Keep Crucifix in Park*, CHI. SUN-TIMES, Oct. 13, 1993 (describing decision to remove from public park the crucifix challenged in Gonzales v. North Township of Lake County, 4 F.3d 1412 (7th Cir. 1993)); Susan Jacobson, *St. Cloud Man Bears Legacy of Cross Fight*, OSCEOLA SENTINEL, Sept. 13, 1991 (describing plaintiff's success in "forc[ing] the city to remove a cross from its water tower" in Mendelson v. City of St. Cloud, 719 F. Supp. 1065 (M.D. Fla.1989)); Alan Sverdlik, *Guerrero Goes to Washington*, ATLANTA J.-CONST., May 31, 1989 (reporting that the decision in ACLU v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983), "forced Georgia officials to remove an illuminated cross from the Black Rock Mountain campgrounds"); Judy Wiessler, *Order to Remove Star, Crosses at Park Stands*, HOUSTON CHRON., Nov. 12, 1985 (documenting order to remove cross and Star of David at issue in ACLU v. Eckels, 589 F. Supp. 222 (S.D. Tex. 1984)); *Jewish War Veterans*, 695 F. Supp. at 4 ("[T]he Court is compelled to require that the [65-foot tall Latin] cross be removed or replaced by a nonreligious symbol."). Several cases involving Ten Commandments displays have also resulted in orders requiring their removal. *See, e.g.*, *Ashbrook*, 211 F. Supp. 2d at 896; *Grayson County*, 2002 WL 1558688, at *6; ACLU v. Hamilton County, 202 F. Supp. 2d 757, 767 (E.D. Tenn. 2002); Kimbley v. Lawrence County, 119 F. Supp. 2d 856, 876 (S.D. Ind. 2000); *Pulaski County*, 96 F. Supp. 2d at 702-03; ACLU v. McCreary County, 96 F. Supp. 2d 679, 691 (E.D. Ky. 2000); *Harlan County Sch. Dist.*, 96 F. Supp. 2d at 679; *see generally*, Dan Popkey, *Former Eagles Official Likes Monument Solution*, THE IDAHO STATESMAN, Mar. 28, 2004 ("At least 26 monuments in 15 states have moved since 2000 under court order or legal threat.").

262. *Buono*, 371 F.3d at 545-46 (describing transfer of cross property during pendency of appeal); *Kong*, 2001 WL 1020102 (analyzing sale of Mt. Davidson cross property); *Ellis*, 990 F.2d at 1528-29 (describing transfer of Mt. Soledad and Mt. Helix crosses and underlying property to private parties during pendency of appeal); *Murphy*, 1997 WL 754604 (analysis of transfers); *Paulson*, 294 F.3d 1124 (analysis of second sale of Mt. Soledad cross); *Mercier*, 305 F. Supp. 2d at 1009-21 and 276 F. Supp. 2d at 974-78 (analyzing sale of Ten Commandments monument and underlying property during pendency of litigation); *Chambers*, 292 F. Supp. 2d at 772 (property transfer conducted to avert constitutional challenge).

263. *See infra* notes 327-434 and accompanying text.

circumstances where the removal of a religious display, rather than the transfer of land beneath it, should be required.[264]

a. Displays That Must Be Removed

Privatization of the public fora typically at issue in cases involving permanent religious displays[265] represents a largely noneconomic loss to the public, whose aesthetic, expressive, and recreational enjoyment of the property is permanently impaired or prohibited.[266] The privatization of a public forum, for example, forever removes from the public's reach a unique venue for expressive activity. This loss cannot be measured economically and thus cannot be compensated through payment of a sum of money—particularly to the government itself, which is often the critical focus of the expressive activities that no longer can occur. Just as the deprivation of expressive rights gives rise to an award of nominal damages only, given that the loss cannot be expressed economically,[267] so too the loss of a public forum cannot be fully captured and compensated monetarily. When government chooses to privatize public property of this nature, there is a compensation gap in the transaction—a loss of value to the public that is not captured by payment of the purchase price. Presuming that the sale is rational, that gap must be closed by the realization of other noneconomic objectives of equivalent value to the political community.

While government is entitled to close public fora rather than continue to accommodate private speech,[268] any effort to do so must

264. Given the fact-intensive nature of the endorsement inquiry, there also may be situations where the specific history and context of a particular display requires its removal in a case that falls outside the circumstances set forth below. For example, in the *Paulson* case, the federal courts have already struck down two remedial attempts by the city to sell the cross at issue based on the conclusion that both transactions evinced religious preference. *Paulson*, 294 F.3d 1124; *Murphy*, 1997 WL 754604. The City Attorney has now proposed a third sale. Matthew T. Hall, *A New Idea for Mt. Soledad—Leave Decision To A New Buyer*, SAN DIEGO UNION-TRIB., June 29, 2004, at B1. If the transaction goes forward, its communicative impact cannot be assessed without reference to this tainted history. *Cf. Mercier*, 276 F. Supp. 2d at 979 ("At this point, selling a larger section of the park or putting up more signs and disclaimers would fail to communicate a genuine message that the endorsement has ended.").

265. The phrase "public fora," as used in this context, does not describe public property that has been opened for permanent symbolic speech, in contrast to the remedial proposal discussed above. *Supra* notes 230-32 and accompanying text. It instead describes the typical setting of impermissible religious displays in parks, plazas, and other public spaces that are traditionally held open for temporary expressive use. These spaces are almost never openly available for permanent symbolic expression, but instead contain selected displays that reflect—in fact or appearance—the endorsement and often the express sponsorship of government itself.

266. This is especially true in light of the requirements for a constitutional sale, which mandate that sufficient property be transferred to eradicate the appearance of endorsement. *See infra* notes 338-66 and accompanying text. Because a significant amount of public land must be transferred, the public's loss of access will likely be substantial.

267. Allah v. Al-Hafeez, 226 F.3d 247, 251 (3d Cir. 2000); Risdal v. Halford, 209 F.3d 1071, 1071-72 (8th Cir. 2000); Trewhella v. City of Lake Geneva, 249 F. Supp. 2d 1057, 1069-70 (E.D. Wis. 2003).

268. *Pinette*, 515 U.S. at 783-84 (Souter, J., concurring).

itself be free from the appearance of endorsement.[269] In the context of land sales proposed to remedy an unconstitutional religious display, any equalizing noneconomic value realized by the political community must derive from an objective that is independent of, and neutral toward, the display at issue. It cannot be enough for government to inflict this loss—which could be avoided altogether by removing the display—simply in the hope of preserving a religious symbol in its original location. That objective, standing alone, promotes no independent and neutral goal of value to the entire community, but instead reflects yet another special benefit bestowed on religious expression.[270] As the district court in *Mercier v. City of La Crosse* observed, "[i]f anything, the sale . . . exacerbates the violation because it communicates to nonadherents that not only is the City willing to display a Judeo-Christian symbol on public property, but it is also willing to carve up a public park to insure that the symbol does not have to be moved or share its space with displays expressing other viewpoints."[271]

If, however, the relocation of a religious symbol cannot be accomplished without significantly diminishing its communicative effect, other neutral concerns are then in play—most importantly, government's interest in promoting religious tolerance through the respectful treatment of the icons of private faith. Two circumstances implicate such an impairment of the expressive effect of a religious symbol: where removal risks damaging or destroying the symbol itself, and where the expressive force of the symbol is inextricably tied to its

269. *City of Marshfield*, 203 F.3d at 491; *cf.* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 8:51 ("[A] more difficult question is whether general First Amendment principles prohibiting viewpoint discrimination are sufficiently hale to prohibit a governmental entity from closing down a public forum in direct retaliation against a particular group's expressive message."). For purposes of free speech analysis, there is an important distinction between the closure of a public forum to all expression to avert the necessity of accommodating offensive speech and the closure of a public forum so that one preferred expressive symbol might remain. While the former results in no speech whatsoever, the latter results in the perpetuation of a single viewpoint. *Cf.* Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201, 1231-32 (D. Utah 2004) (in challenge to non-remedial sale of public forum property to religious organization, court rejects free speech objection on grounds, inter alia, that transaction reflects no viewpoint preference for purchaser). Moreover, at least where a forum is closed by a remedial sale—the intent of which is to rid government of the appearance that it favors a particular religious viewpoint—the regulatory premise of the sale itself should subject the transaction to scrutiny under the Free Speech Clause. *Cf.* First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114, 1124 (10th Cir. 2002) (government's subjective intent in regulating expressive activity relevant in determining degree of scrutiny).

270. As discussed more fully below, *infra* notes 367-94 and accompanying text, no sale of public property to remedy an unconstitutional religious display can rest on the requirement that the purchaser preserve the religious symbol. However, even in the absence of such an express requirement, a sale whose only discernible purpose is to preserve the *possibility* that the symbol might remain still lacks an independent and neutral rationale.

271. *Mercier*, 305 F. Supp. 2d at 1013; *see also id.* at 1020 (sale of entire park "could be problematic if the sale's only purpose was to maintain the monument's location and continue the promotion of its message").

particular physical setting (irrespective of the endorsing effect of public ownership).[272]

The first scenario would apply to large fixtures on public land such as the crosses at issue in the *Carpenter*, *Ellis*, and *Paulson* cases; evidence in *Paulson* specifically indicated that the Mt. Soledad cross could not be removed without risking its destruction.[273] If government must literally tear down a religious symbol to remove it from public land, that unavoidably provocative act and the apparent hostility it manifests toward religion may fuel private religious animosity that is in the interest of all members of the political community—adherents and nonadherents alike—to avert. The second scenario would likewise apply to the display of large religious symbols, such as crosses, whose communicative impact is linked to their ability to be seen from afar. Relocating a 50-foot cross from a hilltop to a less prominent vantage will appreciably diminish its communicative power—and if government so requires, it risks communicating a message of disrespect for the diminished symbolic expression. By contrast, moving a Ten Commandments monument between the same two points will have no such diminishing effect, since its communicative effect requires that the audience be close enough to read the engraved text and is therefore unrelated to its particular physical placement.[274]

In sum, when the communicative power of a religious symbol will be substantially diminished if it is removed and relocated to private land, government has an independent and neutral basis to sell the underlying property in the interest of averting private religious strife. When a symbol can be moved without any significant impairment of its

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272. It is important to note that these scenarios would permit, but not require, government to sell land beneath a religious display. Government may choose to remove the display instead, even if the symbol's communicative force is diminished as a result. Defendants have argued that to remove a display in such circumstances is constitutionally impermissible under the Free Exercise Clause. *See, e.g.*, Updated Brief by the Mt. Soledad Memorial Association, at *10-*11, *Paulson*, 294 F.3d 1124 (No. 00-55406), *available at* 2002 WL 32099878. Free exercise, however, must be asserted against the government, not on its behalf. At least with respect to religious symbols erected by government, there can be no constitutional objection. Alternatively, if the display was erected on public land by private parties, the question of ownership must first be resolved—and in the case of the large symbols at issue here, they are likely to be deemed fixtures upon the land and thus the property of the landowner. *See, e.g.*, CAL. CIV. CODE § 660 (West 2004). Even if the symbol itself is deemed the property of a private individual or entity, however, government can require its removal as owner of the underlying land. *See, e.g.*, CAL. CIV. CODE § 1013 (West 2004). The Free Exercise Clause cannot give a private individual who erects an unconstitutional religious display on public land an effective right to occupy the parcel in perpetuity and to force a closed sale of public forum property to accomplish that result.

273. Defendant City of San Diego's Brief at 2 n.1, *Murphy*, 1997 WL 754604 (No. 89-0820-GT).

274. The operation of this principle has the counter-intuitive effect of providing a more accommodating remedy for larger and more entrenched displays, and thus would appear to reward violations of greater magnitude. That legitimate perception must be factored into the analysis of apparent endorsement and underscores the significance of the other stringent conditions that must be present for such a sale to satisfy constitutional requirements. *See infra* notes 327-434 and accompanying text.

expressive force, however, government has no such basis to deprive the public of its use and enjoyment of the surrounding property.[275]

b. Public Property That Cannot Be Sold

Even if a religious symbol cannot be relocated without significantly diminishing its expressive force, there is at least one situation where removal still must be required. This circumstance involves a religious display on property that is so intrinsically public in character, and so closely enmeshed with the political community's self-identity, that any sale of the land itself would evince actual or apparent endorsement of the religious expression at issue. There are some public spaces that are literally invaluable to the political community; to sell them for any price communicates a message to nonadherents that government will go to any length, and sacrifice anything, to preserve the religious symbol in its present location. Were a cross displayed on the grounds of the Lincoln Memorial, for instance, or on Inspiration Point overlooking Yosemite Valley, the sale of land surrounding the display on any terms would communicate to the political community that its most cherished physical space may be bartered away in the service of a religious message.[276] The countervailing neutral considerations supporting a sale in many circumstances[277] are overwhelmed in such instances by the magnitude of the public's noneconomic loss—a sacrifice so facially disproportionate that it can only be understood as an expression of endorsement.[278]

*Glassroth v. Moore*[279] is the obvious case. There, the state of Alabama has only one permissible remedy to cure its unconstitutional placement of a two-ton Ten Commandments monument in the foyer of its Supreme Court building, even if the display cannot be moved without impairing its communicative effect.[280] Any attempt to sell the land underlying the monument, for any price, communicates that the state would rather auction off the seat of its highest court than disrupt the display of a sectarian text. The determination whether any particular

275. The one remedial sale that clearly offends this principle was struck down by the district court but upheld on appeal in an opinion that addresses none of the considerations discussed above. *Mercier*, 305 F. Supp. 2d at 1004-05, *rev'd*, 2005 WL 81886. In another transaction, where the court upheld the sale of land beneath a 15-foot marble statue of Jesus Christ, the record does not reveal whether the display could have been moved without damage. *City of Marshfield*, 203 F.3d at 489, 497; *see also Buono*, 371 F.3d at 545 (land underlying small cross to be transferred into private hands).

276. This result may be mandated independently by statutory provisions governing the sale of national monuments, public parks, and historic landmarks. *See generally*, Johanna H. Wald, *The Presidio Trust and our National Parks: Not a Model to be Trusted*, 28 GOLDEN GATE U. L. REV. 369 (1998) (describing unsuccessful legislative attempts during the 104th Congress to ease restrictions on the sale of national park property).

277. *See supra* notes 272-75 and accompanying text.

278. *Cf. Mercier*, 2005 WL 81886, at *9 ("Obviously, a city could not sell space under the dome of its City Hall or the sidewalk in front of the courthouse steps. Such sale would be, on its face, a sham.").

279. 335 F.3d 1282 (11th Cir. 2003).

280. *See Glassroth*, 335 F.3d at 1284.

parcel meets this standard is necessarily fact-bound, turning on the particular nature of the physical space and the court's subjective determination of its significance to the public. Nevertheless, the principle is not unbounded; for example, it would almost certainly exclude typical municipal parkland and conversely include national parks, monuments, and historic landmarks as well as the seats of local, state, and national government.

2. The Easy Remedy: Removing a Religious Display

The removal of an impermissible symbol unambiguously separates government from endorsed religious speech. Accordingly, the only remedial question is whether the removal has been accomplished with sufficiently strict neutrality. The neutrality inquiry is specifically linked to the source of financing for the religious display.

Where an offending display has been privately financed, the symbol need only be returned to its donor for relocation.[281] Because government did not expend funds to obtain or construct the symbol, it need not receive compensation for returning the object—even if formal ownership of the property has been transferred to government. The well-informed observer, focusing on the substance of the transaction rather than the formality of title, would perceive no actual or apparent benefit conferred on religion by simply returning a donated symbol to its original purchaser, even if government could have sold the object for gain. Religion receives no preferential benefit when government foregoes a windfall and instead returns a gift of religious property.[282]

The more difficult case involves the removal of symbols that government itself has purchased or constructed. In such cases, donating the symbol to a private entity for display elsewhere would constitute an impermissible gift of public resources in support of religious speech.[283] If government chooses to transfer the symbol to a private entity, it thus must receive fair market value to compensate the public for its investment. However, government need not obtain that value through an open auction. Because the value of the property relates exclusively to its expressive content, the only purpose of an open auction would be to preserve the possibility that someone opposed to the display might purchase it with the intention of suppressing that expression by either destroying the symbol or otherwise limiting its communicative reach. Precluding the suppression of private religious speech, however, does not confer any special benefit on religion or reflect an impermissible

281. *See, e.g.*, *Mercier*, 305 F. Supp. 2d at 1002, 1018.

282. *Id.* at 1014 ("I agree that the City would not violate the establishment clause simply because it chose to return the property to its original owner rather than another interested party.").

283. *E.g.*, Gilfillan v. City of Philadelphia, 637 F.2d 924, 930-31 (3d Cir. 1980); Annunziato v. New Haven Bd. of Aldermen, 555 F. Supp. 427, 433 & n.17 (D. Conn. 1982); *cf. Mercier*, 2005 WL 81886, at *9.

preference; it instead advances government's neutral interest in promoting religious tolerance by averting the denigration of private religious imagery.[284] It accordingly should be permissible for government to sell the symbol through a negotiated transaction with a purchaser committed to preserving the display, provided that the fair market value of the object is recovered.[285]

3. The Difficult Remedy: Selling a Display and the Land Beneath It

In a number of recent cases involving large crosses or religious statuary, and in another involving a Ten Commandments monument, defendants have declined to remove religious symbols and have instead proposed to remedy the violations by selling or transferring the underlying land.[286] Other municipalities have recently sold property beneath religious displays in an effort to avert litigation.[287] Privatizing the underlying property has the obvious political virtue of preserving the religious display in its original location, undisturbed but for the formality of title. Precisely because the remedy is potentially a mere recharacterization of title with little or no substantive effect on the perception of governmental endorsement, any proposed sale or transfer requires significantly greater scrutiny than the removal of an offending display.

As discussed above, the sale of property beneath a challenged religious symbol should be permitted only when the removal and relocation of the display will significantly impair its communicative force and only if the property at issue is not invaluably public in character.[288] Within these constraints, several additional conditions must be met for a sale to satisfy the requirements of the Establishment Clause. While proponents of such sales argue that the mere fact of privatization ends the controversy without further inquiry into the terms of the transaction, the remedial logic of the endorsement test requires substantially closer review.

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284. *E.g., Mercier*, 305 F. Supp. 2d at 1021 ("The City may respect the 'religious sensibilities' of its citizens who follow the Ten Commandments by giving the [donated] monument to a person or group that wishes to give the monument the respectful display that it deserves in another forum.").

285. By contrast, the sale of the land beneath a religious display must be done through an open process, *see infra* notes 378-79 and accompanying text, because the property can be put to many different uses. Most obviously, the sale of real property allocates permanent access to a venue for all manner of private expression. Government cannot permit only those whose expressive intentions coincide with its own to participate as potential purchasers.

286. *See supra* note 262.

287. *See, e.g.*, George W. Griggs, *High-Profile Cross for Sale in Simi*, L.A. TIMES, May 29, 2004, at B1 ("Seeking to avoid a lawsuit, Simi Valley park officials plan to sell a 12-foot cross that has stood atop Mt. McCoy . . . for more than 60 years . . . . The Simi Valley Historical Society . . . offered to buy the cross a year ago . . . to ensure it remained a fixture in the community . . . . [The transaction was arranged] after a recent controversy erupted in Ventura over a cross that had stood for decades in city-owned Grant Park. Acting under the threat of a lawsuit, the city sold the cross in September for $104,000 to a local historic preservation group.").

288. *Supra* notes 265-80 and accompanying text.

a. Preliminary Arguments: Mootness and State Action

In several cases involving unconstitutional religious displays, defendants have sold property beneath religious symbols during the pendency of litigation and then argued that the transaction ends the controversy, irrespective of the terms of the sale, on grounds of mootness or the termination of state action. The argument is at odds with both doctrines.

(1) Does a Sale Necessarily Moot the Case?

The broadest mootness argument made in this context contends that, irrespective of the constitutionality of the sale or the question whether it remedies any preceding violation of the Establishment Clause, changed circumstances render the case moot and require new litigation if plaintiffs wish to challenge the transaction.[289] The claim, typically asserted following entry of a permanent injunction and designed to preclude appellate review,[290] conflicts with basic principles of equitable jurisdiction.

It is a tenet of equity that "the spirit and purpose of an injunction, not merely its precise words . . . must be obeyed."[291] In ascertaining the requirements of an equitable command, "[t]he language of an injunction must be read in the light of the circumstances surrounding its entry: the relief sought by the moving party . . . and the mischief that the injunction seeks to prevent."[292] In applying these principles to efforts by a party to thwart or otherwise evade an injunctive decree, "courts have inherent equitable power to modify their injunctions to ensure that any injunctive relief granted fully vindicates the rights accorded by the underlying judgment."[293] This power derives from the principle that "[e]quitable jurisdiction having once attached, it will be continued for the final adjudication of all rights involved and thus avoid further litigation in the future . . . ."[294] Once "a court of equity has . . . obtained jurisdiction, it

289. *See, e.g.*, Appellant's Supplemental Reply Brief at 3-4, *Buono*, 371 F.3d 543 (No. 03-55032) ("any challenge . . . to the land transfer . . . must be brought in a new action . . . . Whether . . . the land transfer itself violate[s] the First Amendment [is an] issue[] that cannot be raised in this case, but must be the subject of a new lawsuit.").

290. *See, e.g., Buono*, 371 F.3d at 545; *but see Mercier*, 276 F. Supp. 2d at 971-72 (sale following filing of complaint alleged to moot dispute).

291. Nat'l Research Bureau, Inc. v. Kucker, 481 F. Supp. 612, 615 (S.D.N.Y. 1979); *see, e.g.*, Youakim v. McDonald, 71 F.3d 1274, 1283 (7th Cir. 1995); Pridgen v. Andresen, 891 F. Supp. 733, 740 (D. Conn. 1995); Ruiz v. McCotter, 661 F. Supp. 112, 144 (S.D. Tex. 1986).

292. United States v. Christie Indus., Inc., 465 F.2d 1002, 1007 (3d Cir. 1972); *see Youakim*, 71 F.3d at 1283.

293. Transp., Inc. v. Mayflower Servs., Inc., 769 F.2d 952, 954 (4th Cir. 1985); *see, e.g.*, United States v. United Shoe Mach. Corp., 391 U.S. 244, 251-52 (1968); Taylor v. United States, 181 F.3d 1017, 1033 (9th Cir. 1999); *Ellis*, 990 F.2d at 1531 (Beezer, J., concurring); Larken Minnesota, Inc. v. Wray, 881 F. Supp. 1413, 1419-20 (D. Minn. 1995), *aff'd*, No. 95-2219, 1996 WL 362672 (8th Cir. July 1, 1996).

294. G. L. CLARK, EQUITY § 24 at 35 (1954).

will do complete justice by deciding the whole case and determining the whole controversy."[295]

When defendants seek to escape the reach of an injunction by selling the property beneath an enjoined display, these principles are applicable. To "decid[e] the whole case and determin[e] the whole controversy,"[296] a court must conduct a substantive review of the transaction to confirm that the underlying constitutional violation has indeed been eradicated and that the sale itself does not independently offend constitutional norms. Only after establishing that the transaction satisfies the constitutional and remedial requirements imposed by the Establishment Clause may a court sitting in equity terminate its decree.

A less sweeping variant of the changed-circumstances argument contends that the sale of land beneath a religious symbol constitutes the voluntary cessation of illegal conduct and therefore moots the case. Unlike the broader argument, this contention presumes that the sale does, in fact, terminate all illegality and therefore presupposes that the court will examine the transaction to establish its constitutional and remedial adequacy. If the sale survives this substantive review, defendants must additionally establish to a very high degree of certainty that the illegality will not recur once the suit is dismissed.

The Supreme Court instructs that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; it if did, the courts would be compelled to leave 'the defendant . . . free to return to his old ways.'"[297] The two-part standard to secure a dismissal is accordingly stringent. Defendants must establish that "(1) 'subsequent events [have] made it absolutely clear that the allegedly wrongful behavior [cannot] reasonably be expected to recur,' *and* (2) 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'"[298] In meeting this standard, "[t]he defendant's burden is a heavy one to ensure the allegedly illegal activities do not temporarily cease only to resume after the claims have been dismissed."[299]

With respect to the first prong, courts have paid considerable attention to whether the voluntary cessation occurs only after an adverse judgment has been entered against the defendant.[300] In such circumstances, even changes that are the product of legislative enactment

295. McKevitt v. City of Sacramento, 203 P. 132, 138 (Cal. Dist. Ct. App. 1921).

296. *McKevitt*, 203 P. at 138.

297. United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)); *see* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 174 (2000).

298. Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1274 (9th Cir. 1998) (internal citations omitted); *see, e.g.*, Akers v. McGinnis, 352 F.3d 1030, 1035 (6th Cir. 2003); Granite State Outdoor Adver., Inc. v. Town of Orange, 303 F.3d 450, 451 (2d Cir. 2002).

299. Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 574 (2d Cir. 2003).

300. Jacobus v. Alaska, 338 F.3d 1095, 1103 (9th Cir. 2003).

rather than the exercise of administrative discretion are not always considered sufficiently irreversible to satisfy the test.[301] Thus in the case of *Buono v. Norton*, where Congress recently passed a law requiring the transfer of public property beneath an enjoined cross[302] but took various steps to preserve the symbol prior to the adverse ruling,[303] the Ninth Circuit noted that "there is nothing in [the new statute] that prevents the land from being otherwise returned to the government . . . ."[304]

At a minimum, this inquiry imposes on defendants an obligation to sell property without reserving a right to reacquire the land. For example, if government maintains a reversionary interest that is triggered by the purchaser's alteration or removal of the religious display, the terms of the sale itself memorialize government's vested right to reacquire ownership for the purpose of continuing its unconstitutional conduct. While this limitation may appear self-evident, similar provisions have been included in recent transactions purporting to moot the enforcement of injunctions barring the display of religious symbols on public land.[305]

The second prong of the inquiry—whether "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation"[306]—subsumes within it the full set of issues relating to the requirements of the Establishment Clause in the context of a remedial sale, which are discussed separately below.

(2) Does a Sale Necessarily End State Action?

Defendants also assert that state action terminates whenever a challenged religious symbol is transferred to private property, irrespective of the terms of the transaction, based on the fact that the state no longer exercises dominion over the display.[307] Any disposition of

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301. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1983).

302. Act of Sept. 30, 2003, Pub. L. No. 108-87 § 8121, 117 Stat. 1054 (2003).

303. Consolidated Appropriations, Pub. L. No. 106-554 § 113, 114 Stat. 2763 (2000) (forbidding expenditure of public funds to remove cross); Department of Defense Appropriations Act, Pub. L. No. 107-248 § 8065(b), 116 Stat. 1519 (2002) (same); Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-117 § 8137, 115 Stat. 2230 (2002) (designating cross a national memorial).

304. *Buono*, 371 F.3d at 546; *see, e.g.*, Appellees' Supplemental Brief at 4, *Buono*, 371 F.3d 543 (No. 03-55032) ("[There is] no reason to believe that Congress will not amend or repeal [the statute mandating the sale], or otherwise attempt to return the cross to federal land, if the appeal and the district court's judgment were dismissed.").

305. *Buono*, 371 F.3d at 545; Ex. 1 to Memorandum of Points and Authorities in Support of Plaintiff's Motion to Modify and Enforce the Injunction, *Murphy*, 1997 WL 754604 (No. 90-0134-GT).

306. *Norman-Bloodsaw*, 135 F.3d at 1274.

307. *See, e.g.*, *City of Marshfield*, 203 F.3d at 491; Appellee City of San Diego's Supplemental Brief, at *8 & n.8, *Paulson*, 294 F.3d 1124 (No. 00-55406), *available at* 2002 WL 32099877; Appellee Council of Armenian American Organizations of Northern California's Response Brief, *Kong*, 2001 WL 1020102 (No. 00-15261), *available at* 2000 WL 33986165; Defendants' Opposition to Plaintiff's Motion to Modify and Enforce the Injunction at 6-10, *Murphy*, 1997 WL 754604 (No. 90-0134-GT) ("There simply is no state action.").

public property, however, is itself state action that must comport with the requirements of the Constitution.[308] In at least two circumstances, the structure of a remedial sale may perpetuate religious endorsement and thus constitute impermissible state action, irrespective of the fact that it privatizes the property in question: where government projects its actual control over the property by dictating the terms of its private use, and where a transaction is structured so that the privatized speech continues to enjoy the apparent endorsement of the state.

Where government purports to remedy a constitutional violation by transferring property with restrictions on its use, courts clearly retain the ability to scrutinize the transaction for constitutional infirmity. The principle was made plain in *Evans v. Newton*,[309] where the Supreme Court held that the transfer of segregated public parkland to a private successor trustee for the continued operation of the property on a discriminatory basis failed to terminate state action.[310] As *Evans* made clear, state action does not dissipate when public land is transferred to a private entity in a manner that perpetuates an unconstitutional use. The same principle governed a number of cases barring various attempts by municipalities to preserve racial discrimination through the privatization of segregated public facilities.[311] Thus in *Hampton v. Jacksonville*, the Fifth Circuit held that the sale of property to private individuals on condition that they continue to operate the land as a golf course was insufficient to sever the city's involvement in racial discrimination at the facility.[312] Because the reversionary clause in the deed obligated the purchasers to operate the land exactly as the city had before them, the conduct of the new owners remained state action for purposes of the Fourteenth Amendment.[313]

The same state action analysis is applicable to efforts by government to assure that private recipients of public land preserve otherwise unconstitutional religious displays.[314] In *Murphy v. Bilbray*,

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308. *Mercier*, 305 F. Supp. 2d at 1010-11 ("[Defendant] is correct that there is an important difference between public speech and private speech and that there is no establishment clause violation without state action . . . . However, there *is* government action in this case: the City's sale of property to [a private purchaser].").

309. 382 U.S. 296 (1966).

310. *Evans*, 382 U.S. at 302.

311. United States v. Mississippi, 499 F.2d 425, 430-32 (5th Cir. 1974); Wright v. City of Brighton, 441 F.2d 447, 451 (5th Cir. 1971); Pennsylvania v. Brown, 392 F.2d 120, 123-24 (3d Cir. 1968); Hampton v. City of Jacksonville, 304 F.2d 320, 323 (5th Cir. 1962).

312. *Hampton*, 304 F.2d at 323.

313. *Id.* at 322.

314. *Cf. Chambers*, 292 F. Supp. 2d at 772. The typical objection to this argument is that race discrimination is disfavored in both the private and public context, whereas private religious practice is constitutionally protected. *See, e.g.*, Responding Brief of the City of San Diego at 19, *Paulson*, 294 F.3d 1124 (00-55406) (argument constitutes an attempt "to equate . . . the free exercise of religion . . . with the practice of racial discrimination"). However, the matter at issue is government's preferential facilitation of a private sectarian message, which enjoys no constitutional favor. *E.g.*, *infra* note 372; *see* Golden v. Biscayne Bay Yacht Club, 521 F.2d 344, 351 (5th Cir. 1975).

for example, the defendants transferred a cross and a tiny plot of land beneath it to a private organization following an adverse judgment in the district court.[315] The transfer was made at no cost to the recipient and on condition that the cross be preserved; moreover, the government indemnified the recipient for all costs associated with defending the transfer and retained a reversionary interest permitting it to reacquire the cross and underlying property in the event that a court struck down the display in its new setting.[316] On such facts, it is implausible to claim that a transaction terminates state action with respect to a challenged religious display, simply because title to the property is nominally transferred to a private party.[317] The *Murphy* defendants ultimately reached the same conclusion and abandoned the transaction.[318]

Even without projected control in the form of a deed restriction, reversionary interest, or other limitation on the private recipient's use and control of the property, a sale can still reflect apparent endorsement —and thus constitute state action within the reach of the court's remedial authority—simply by virtue of the perceived relationship of government to the privatized display. While government defendants have cited the plurality opinion in *Pinette* for the proposition that no endorsement violation can arise from private religious expression,[319] only four members of the Court embraced that position.[320] A majority of the Court took the opposing view, articulated by Justice Souter in his concurring opinion, that "[b]y allowing government to encourage what it cannot do on its own, the proposed *per se* rule [of the plurality] would tempt a public body to contract out its establishment of religion, by encouraging the private enterprise of the religious to exhibit what the government could not display itself."[321] In the remedial context, this reasoning requires scrutiny of any transaction that purports to privatize religious expression to assure that the speech does not continue to imply state endorsement of its message. Indeed, the rationale for applying such scrutiny to the remedial sale of a permanent religious symbol is significantly more compelling than in *Pinette* itself, where there was no

315. *Ellis*, 990 F.2d at 1528-29.

316. Exs. 1, 2, and 6 at 46, lines 10-15, Memorandum of Points and Authorities in Support of Plaintiff's Motion to Modify and Enforce the Injunction, *Murphy*, 1997 WL 754604 (No. 90-0134-GT).

317. *Cf. Mercier*, 2005 WL 81886, at *9 (impermissible to conduct "a sale to a straw purchaser that left the City with continuing power to exercise duties of ownership").

318. County's Brief in Response to Brief of the Attorney General at 2, 5, Murphy v. Bilbray, Civ. No. 90-0134-GT (S.D. Cal. Sept. 28, 1998) (order denying motion to appoint successor trustee).

319. *See, e.g.*, City Appellee's Brief, *Kong*, 2001 WL 1020102 (No. 00-15261), *available at* 2000 WL 33986166.

320. *Pinette*, 515 U.S. at 757.

321. *Id.* at 792 (Souter, J., concurring); *see Gey II*, *supra* note 19, at 428-29. This analysis is echoed in recent rulings extending First Amendment speech analysis to formerly public property that retains the character and appearance of a public forum. *See, e.g.*, ACLU v. City of Las Vegas, 333 F.3d 1092, 1094 (9th Cir. 2003); *First Unitarian Church*, 308 F.3d at 1131; Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd., 257 F.3d 937, 941-43 (9th Cir. 2001).

prior finding of endorsement and the private symbolic speech had been temporarily erected in a public forum for unattended displays.[322]

In *City of Marshfield*, the Seventh Circuit expressly embraced this analysis:

> Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion. We are aware, however, that adherence to a formalistic standard invites manipulation. To avoid such manipulation, we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased.[323]

This inquiry, the court noted, must include scrutiny of the resulting religious speech on private land insofar as "private speech which reasonably may be understood to constitute a public endorsement of religion" is at issue.[324] The *Marshfield* court concluded that the private speech could indeed be imputed to government, based on the lack of demarcation between the public and private parcels, and found an Establishment Clause violation on that basis.[325] At least three other courts have similarly rejected remedial sales on grounds that they failed to dissipate the appearance of preference for private religious speech.[326] The holding in each case properly reflects the premise that state action for purposes of the endorsement inquiry does not end with a title transfer but instead terminates only if the privatized message no longer enjoys the apparent preference of government.

b. The Attributes of the Transferred Land: The Requirements of Physical Separation

Any sale of public land beneath a religious display formally separates the symbol from government. The relevant substantive inquiry, however, is whether such separation succeeds in dispelling the appearance that government endorses the religious speech. To satisfy this requirement, the physical separation of government from a religious

322. *Pinette*, 515 U.S. at 757-59.

323. *City of Marshfield*, 203 F.3d at 491.

324. *Id.* at 494.

325. *Id.* at 494-95.

326. *Paulson*, 294 F.3d 1124; *Mercier*, 305 F. Supp. 2d at 1009-19, and 276 F. Supp. 2d at 974-978; *Murphy*, 1997 WL 754604, at *9-*11; *see also, Buono*, 371 F.3d at 546 (court declines to decide constitutionality of planned remedial sale but notes "that the presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause"); *cf. Paulson*, 262 F.3d at 896. Additionally, the court in *Kong* upheld a remedial sale after reviewing it within the framework of *City of Marshfield*, suggesting acceptance of the premise that a sale does not necessarily terminate state action and must independently survive Establishment Clause scrutiny. *Kong*, 2001 WL 1020102, at *1-*2. Finally, in reversing the district court decision in *Mercier*, the Seventh Circuit reaffirmed *City of Marshfield* in this respect and explicitly noted that remedial transactions must be subject to independent scrutiny to assure that there are "no unusual circumstances surrounding the sale . . . so as to indicate an endorsement of religion." *Mericer*, 2005 WL 81886, at *9.

display must be both evident and substantial. The former requirement relates to the visible demarcation of public and private parcels; the latter relates to the amount of land sold and its relationship to adjoining public property, if any.

(1) Evident Separation

The purpose of every remedy in this context is to communicate to the objective observer that government no longer endorses religious expression. The first requirement of any remedial sale thus must be to demonstrate the actual separation between government and an endorsed display. It does little good to sell property underlying a religious symbol if the change in ownership is apparent only to those who conduct a title search. While the objective observer is deemed knowledgeable of the ownership of property,[327] that observer will also take note that government has made no attempt to forthrightly manifest its separation from a display. In the remedial context, the failure to differentiate public and private parcels following a remedial sale reasonably suggests that government is not fully committed to dissociating itself from endorsed religious speech.[328] As a result, courts reviewing remedial sales have required in every case that public property be visibly demarcated from the transferred land.[329]

Demarcation typically has two components: some type of physical delineation of the transferred parcel coupled with signs that identify its private ownership. Physical delineation can take the form of a fence,[330] a series of bollards,[331] or even a dense forest surrounding a transferred clearing.[332] So long as the transition is evident to a reasonable observer, the delineation requirement is met.[333] The additional necessity of signs or plaques identifying the ownership of transferred property reflects the fact that government may fence off portions of its own land for a variety of reasons, and thus that the delineation of a parcel does not necessarily imply its private status. To make clear to a skeptical observer that government has embraced the constitutional objectives of a remedial

327. *Supra* notes 97-98.

328. *Cf. Pinette*, 515 U.S. at 776 (O'Connor, J., concurring) ("In context, a disclaimer helps remove doubt about state approval of respondents' religious message."); *id.* at 794 (Souter, J., concurring).

329. *Mercier*, 2005 WL 81886, at *10; *Paulson*, 262 F.3d at 895-96; *Kong*, 2001 WL 1020102, at *1-*2; *City of Marshfield*, 2000 WL 767376, at *1; *Paulson*, Civ. No. 89-0820-GT, at 8 (S.D. Cal. Feb. 3, 2000); *cf. City of Marshfield*, 203 F.3d at 494-97 (remedial sale fails for lack of demarcation).

330. *City of Marshfield*, 2000 WL 767376, at *1.

331. *Paulson*, Civ. No. 89-0820-GT, at 7-8 (S.D. Cal. Feb. 3, 2000).

332. *Kong*, 2001 WL 1020102, at *1-*2.

333. *Cf. City of Marshfield*, 203 F.3d at 497.

sale, the private ownership of a transferred parcel should be stated unambiguously.[334]

While all courts accept the necessity of demarcation in the context of a remedial sale, some require little or nothing more.[335] As Justice Souter made clear in *Pinette*, however, the endorsement analysis demands further scrutiny. "Of course, the presence of a disclaimer does not always remove the possibility that a private religious display 'convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred,' when other indicia of endorsement . . . outweigh the mitigating effect of the disclaimer . . . ."[336] In *Allegheny*, for example, the Supreme Court held that a sign identifying the private ownership of a crèche in a county courthouse "simply demonstrates that the government is endorsing the religious message of that [private] organization, rather than communicating a message of its own . . . . Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message."[337] With respect to property transferred in a remedial sale, the additional inquiry bearing on the appearance of endorsement relates to the size of the transferred plot and its relationship to adjacent public land.

(2) Substantial Separation

Irrespective of the clarity of its demarcation, a transferred parcel will fail to dissipate the appearance of endorsement if it does not also create substantial separation between government and an impermissible display. The necessity of this separate inquiry is illustrated by the remedial sales conducted in the *Murphy* and *Paulson* cases after the district court struck down the defendants' display of large crosses at the apex of hilltop parks.[338] The *Paulson* defendants purported to remedy their violation by selling the 43-foot cross and a fifteen-foot square parcel of land at its base to a private entity.[339] In *Murphy*, the defendants' transaction included a 36-foot cross and a 30-foot diameter parcel of land beneath it.[340] In both cases, the transferred plots were surrounded by over 99% of the original public parkland.[341] The district court struck down the sale in *Paulson* on grounds, *inter alia*, that the plot

334. *Paulson*, 262 F.3d at 895-96; *Kong*, 2001 WL 1020102, at *1-*2; *Paulson*, Civ. No. 89-0820-GT, at 8 (S.D. Cal. Feb. 3, 2000); *City of Marshfield*, 2000 WL 767376, at *1.

335. *Paulson*, 262 F.3d at 895 (according determinative significance to "whether the distinction between the public and private area is clearly marked"); *City of Marshfield*, 203 F.3d at 497; *Paulson*, Civ. No. 89-0820-GT, at 7-8 (S.D. Cal. Feb. 3, 2000); *City of Marshfield*, 2000 WL 767376, at *1.

336. *Pinette*, 515 U.S. at 794 n.2 (Souter, J., concurring) (internal citation omitted).

337. *Allegheny*, 492 U.S. at 600-01; *see, e.g.*, *Murphy*, 782 F. Supp. at 1430-31.

338. *Murphy*, 782 F. Supp. at 1438.

339. *Ellis*, 990 F.2d at 1528; *Murphy*, 782 F. Supp. at 1422 n.2.

340. *Id.*

341. *Ellis*, 990 F.2d at 1528; *Murphy*, 782 F. Supp. at 1422 n.3.

was too small to dissipate the appearance of preference.[342] The court observed that, given the tiny size of the parcel, "it is hard . . . to imagine that any visitor to the Mt. Soledad hilltop and cross would not conclude that the City was directly involved in the preservation and maintenance of the Mt. Soledad cross."[343] Facing the same fate, the *Murphy* defendants unwound the transfer and proposed a new transaction involving a larger parcel.[344]

These are easy cases: the plots at issue were so slight, and the nominally privatized religious symbols such an immense and dominating presence over the immediately surrounding parkland, that no reasonable observer would likely perceive the transactions as effectively separating government from religious speech. As such, the sales illustrate the need to assess the size and character of the transferred land; if demarcation alone were sufficient, both transactions would have ended the inquiry provided that the tiny parcels had been adequately bounded. The more difficult task is to define the parameters of the analysis in closer cases involving more substantial property transfers. In short, how much is enough? This is necessarily a fact-bound question that turns on the particular circumstances of each display and the court's subjective perception of them. Since in almost all cases the size and configuration of a transferred plot is uniquely related to the display at issue, there is no comparative benchmark against which to assess its preferential effect. Instead, the offense to the endorsement principle is the intrinsic advantage conferred on a religious beneficiary by the intimate proximity and relationship of its sectarian display to adjoining public land.[345]

Despite the irreducibly subjective nature of this determination,[346] there are several objective factors that should guide the inquiry. Returning to the core concern of the endorsement prohibition—the political disaffection of religious outsiders—any remedy should be designed to restore the beneficial use of public property to persons for whom its enjoyment has been burdened by the symbols of an alien faith.[347] To do so requires that public property adjoining a transferred

342. *Murphy*, 1997 WL 754604, at *11.

343. *Id.*

344. County's Brief in Response to Brief of the Attorney General, at 2, 5, *Murphy*, Civ. No. 90-0134-GT (Sept. 28, 1998). This subsequent transaction was also struck down on grounds that the larger parcel was still too small to dissipate the appearance of preference. *Murphy*, Civ. No. 90-0134-GT (Sept. 28, 1998).

345. *See supra* notes 66-75 and accompanying text. It is important to stress that this determination is made in the remedial context and thus rests on the knowledge that government previously supplied the platform for the religious speech in question and had, in fact or appearance, endorsed it. An objective observer would likely draw an entirely different and more benign conclusion from government's close physical proximity to private religious speech in the absence of this history of support and preference.

346. *Id.*

347. *See Rabun*, 698 F.2d at 1104-05. This determination, however, cannot be made from the perspective of the religious minorities themselves, but instead from the vantage of the objective observer. *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring).

symbol be reasonably free of the dominating influence of the religious display. If public property remains in the literal shadow of a transferred symbol, for example, the objective observer will likely perceive that government continues to communicate a disaffecting message of endorsement to nonadherents. As Professor Gey has observed in a related context:

> [When private religious speech is] so dominant, so prominently placed, or so persistent that it becomes a fixture of a public forum[, it] not only coerces a dissenter in the Lee [v. Weisman] sense of effectively forcing the dissenter out of the forum . . . but [it] also indicates when the dissenter is likely to perceive the message that he or she is not welcome as a full-fledged member of the political community.[348]

One analytic factor, then, is the size of a religious display in relation to the amount of land transferred. A more substantial amount of property must be sold to effectively separate government from a 100-foot cross than to accomplish the same result with respect to an equivalently situated 25-foot display. A second consideration is the character of the surrounding public property. If the surrounding public space is open and usable,[349] rather than densely forested or inaccessible,[350] more land must be transferred to achieve sufficient separation because a greater amount of the adjacent public property will be perceptibly dominated by the transferred display. Similarly, if the religious symbol sits at or near the apex of the property, with open slopes descending away from the display, it likely will appear to be the focal point of the literally inferior surrounding property and thus exert an especially powerful and far-reaching visual influence over the adjacent land.[351] A third consideration is the relationship between the private symbol and any supporting amenities or infrastructure remaining on adjoining public land. Where the remaining public property supports the use and enjoyment of the private religious display—for instance, by providing adjacent park benches to facilitate its viewing or other amenities such as parking, drinking fountains, trash receptacles, and the like—the efficacy of a remedial sale is less compelling than in circumstances where the transferred parcel is not dependent on the infrastructure of the surrounding property.[352]

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348. Gey II, *supra* note 19, at 444. Professor Gey proposes to measure this unconstitutional effect by examining whether "a dissenter is likely to feel obliged to opt out of a forum to avoid participating in a religious exercise." *Id.*

349. *See, e.g., Jewish War Veterans*, 695 F. Supp. at 5.

350. *E.g., Kong*, 2001 WL 1020102, at *1-*2.

351. *E.g., Murphy*, 782 F. Supp. at 1436.

352. *See, e.g.*, Appellant's Excerpts of the Record, Ex. 6 at 82, 86, 87, and 93, and Ex. 7 at 102-04, 106-07, 109-13, and 115, *Paulson*, 294 F.3d 1124 (00-55406).

While the analysis of these factors, alone and in combination, must turn on the facts of each case and ultimately be governed by the subjective sensibilities of the court itself, their application should be guided by a practical assessment of the ability of nonadherents to use and enjoy the remaining public land.[353] In certain cases this inquiry may substantially constrain government's remedial discretion. For example, if public property cannot be subdivided in a way that effectively separates some portion of the original land from the dominating presence of a religious symbol, government's only alternative will be to sell the entire parcel if it declines to remove the display.[354]

While a few courts have acknowledged the relevance of this inquiry,[355] others have ignored it and sanctioned sales without regard to the size and configuration of the transferred plot.[356] Most notably, the Seventh Circuit's decision in *City of Marshfield* accords exclusive significance to demarcation and, in so doing, sanctions the transfer of a small parcel of land at the center of a park to accommodate the continued display of a large statue of Jesus Christ.[357] While this failing may reflect the limited objections asserted by plaintiffs in the case,[358] the resulting precedent directly conflicts with the remedial analysis proposed above. *City of Marshfield's* narrow focus on demarcation—diluted further by its conflation of the endorsement inquiry with the free speech and free exercise rights of the private purchaser[359]—yields an exceedingly faint remedy: the court requires only that the defendant "construct some defining structure, such as a permanent gated fence or wall, to separate City property from [the private] property accompanied by a clearly visible disclaimer . . . ."[360] On remand, this directive resulted in an order imposing a "minimal enclosure" comprised of a four-foot high wrought-iron fence surrounding the private plot.[361] The 15-foot marble statue thus

353. *Cf. supra* note 348.

354. *Murphy*, Civ. No. 90-0134-GT, at 6 (Sept. 28, 1998) ("With the proposed split [of the Mt. Helix park], the presence of the cross still overshadows the amphitheatre, which would be entrusted to the County . . . . In this Court's view, the [transfer of] the entire property . . . would cure the constitutional infirmities."); *cf. Mercier*, 305 F. Supp. 2d at 1011 ("If the City had sold the entire to park to the Order, there would be a stronger argument that the City had 'divorce[d] itself from the religious content' of the monument.").

355. *Mercier*, 305 F. Supp. 2d at 1011, 1019; *Murphy*, 1997 WL 754604, at *11; *Murphy*, Civ. No. 90-0134-GT, at 6 (Sept. 28, 1998).

356. *Paulson*, 262 F.3d at 895-96; *City of Marshfield*, 203 F.3d at 497; *City of Marshfield*, 2000 WL 767376, at *1.

357. *City of Marshfield*, 203 F.3d at 497.

358. *Mercier*, 305 F. Supp. 2d at 1018 (describing the limited objections offered by plaintiffs in *City of Marshfield*).

359. *See supra* note 256 and accompanying text.

360. *City of Marshfield*, 203 F.3d at 497.

361. *City of Marshfield*, 2000 WL 767376, at *1. Plaintiff's alternative proposal—the construction of a ten-foot high masonry wall—was rejected by the district court as too restrictive of the private purchaser's speech interests. *Id.* The district court's ruling in this regard was appropriate: the demarcation requirement should be understood to require only that public and private property be clearly delineated, not that private speech be shrouded. The flaw in the *City of Marshfield* analysis,

stands exactly as it did prior to the litigation but for its fenced .15 acre enclosure, surrounded on all sides by public parkland and sidewalks.[362] Whether or not the court would have required more aggressive remedial measures had it engaged in the broader analysis proposed above, its singular focus on demarcation invites lower courts to authorize transactions, as in *Murphy* and *Paulson*, which offend rather than affirm the endorsement doctrine.

Any doubt regarding the risk posed by the *Marshfield* precedent was resolved by the Seventh Circuit's recent opinion in *Mercier*. Noting that the remedial sale at issue essentially mirrored the transaction upheld in *Marshfield*,[363] the majority in *Mercier* authorized the sale of a 20-by-22-foot parcel of parkland underlying a religious monument without addressing any concern regarding the size of the transferred plot.[364] Writing for the majority, Judge Manion suggests instead that the sale of such a "tiny share of the public domain"[365] is actually preferable to a more substantial land transfer:

> By selling the parcel around the Monument, the City has not suddenly deprived the visitors to the Park of normal access and enjoyment. Visitors to the Park remain free to utilize the park grounds, much the same way as before the sale. Other than the twenty by twenty-two-foot-space fenced around the Monument, which has occupied the space for forty years, access to the Park is not limited by the now-private parcel.[366]

By deeming it a virtue that park visitors will experience essentially no change in their use of the public space, the *Mercier* court turns the remedial inquiry on its head: the obvious objective of meaningful relief is not to preserve the status quo but rather to alter it in some appreciable respect. In particular, the "visitors" with whom the endorsement prohibition is concerned are not those identified by Judge Manion, who "remain free to utilize the park grounds, much the same way as before the sale." They are, instead, the religious nonadherents whose "normal access [to] and enjoyment" of the park was constrained in the first instance by the constitutional violation, and whose present use of the park property may well be burdened in a nearly identical fashion by the immediately adja-

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instead, is its failure to separately consider the endorsement implications of the size and configuration of the transferred plot.

362. *City of Marshfield*, 203 F.3d at 489-90; *City of Marshfield*, 2000 WL 767376, at *1.

363. *E.g.*, *Mercier*, 2005 WL 81886, at *7 ("Recall that the fencing and signs installed by [the defendant] is [sic] identical (even to the point of having the same-size lettering) to that ordered by the district court in *Marshfield*."); *see also id.* at *6, *8.

364. *Mercier*, 2005 WL 81886, at *3. The circuit court ignored the question despite the fact that the lower court had expressly addressed it. *See Mercier*, 305 F. Supp. 2d at 1011, 1019.

365. *Mercier*, 2005 WL 81886, at *12 (Bauer, J., dissenting).

366. *Id.* at *9.

cent religious display. Any remedy that ignores this foundational distinction will likely perpetuate rather than resolve the constitutional transgression.

c. The Method of Sale: The Requirements of Neutrality

In addition to achieving evident and substantial physical separation, a remedial sale must accomplish that objective through means that are strictly neutral with respect to the religious expression at issue. A number of recent transactions purporting to remedy impermissible displays contain terms that transgress this requirement.

(1) Viewpoint Neutrality and the Prohibition Against Express Religious Preference

In selling public property to remedy the unconstitutional display of a religious symbol, government allocates an exclusive and permanent right of access to land that is primarily, if not singularly, of value as a venue for expressive activity. While the end result of a permissible transaction is a private parcel free of constitutional constraints, the sale itself is state action regulating the use and disposition of public property.[367] As a practical matter, it is beyond dispute that a remedial sale regulates speech activity by allocating among competing viewpoints an exclusive right of access to a valuable (and in some instances a premier)[368] platform for speech. In so doing, government must comply with the fundamental neutrality requirements imposed by both the Free Speech and Establishment Clauses. As a matter of free speech, it is a bedrock principle that government may not engage in viewpoint discrimination.[369] As a matter of Establishment Clause Jurisprudence, favoring sectarian speech violates the endorsement prohibition.[370] In this regard, the requirements of the two constitutional commands largely correspond.[371]

These neutrality rules impose clear requirements on the structure of a remedial sale. First and most fundamentally, government may not transfer property on condition that the recipient embrace the viewpoint of the endorsed display.[372] Similarly, a viewpoint restriction that favors a

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367. *See supra* notes 269, 307-26.

368. *E.g.*, *Murphy*, 782 F. Supp. at 1422.

369. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); SMOLLA, *supra* note 269, § 2:12 ("Thus, the Court has erected what is essentially an absolute bar against 'viewpoint discrimination . . . .'"); *see supra* note 269.

370. *Pinette*, 515 U.S. at 766.

371. *Id.*; *Am. Jewish Cong.*, 90 F.3d at 384-85.

372. *See, e.g.*, *Murphy*, 1997 WL 754604, at *11 ("[T]he exclusion of any other purchasers of or bidders for the land . . . gives the appearance of preferring the Christian religion over all others."). If the selected recipient clearly acquiesces in the symbolic expression, it should make no difference whether the express terms of a negotiated transaction formally require the purchaser to preserve the display—the outcome is obvious in either case. *Mercier*, 305 F. Supp. 2d at 1014 ("It was a surprise

broader spectrum of religious expression is equally indefensible—for example, a requirement that the purchaser either maintain the existing display or erect an alternative sectarian symbol in its place.[373] Finally, a restriction on the property that permits the purchaser to retain or remove the existing display but prohibits the erection of any competing symbolic speech[374] discriminates in the same manner, since the only viewpoint that can possibly be communicated from the transferred land is the one expressed by the original display.

No doubt the public will be troubled, at least in certain circumstances, by a remedy that prohibits defendants from engaging in viewpoint discrimination with respect to the use of transferred property. It is not likely a popular proposition to suggest that government, in implementing a war-memorial use restriction on property underlying a hilltop cross,[375] must permit the removal of the symbol and the erection of a competing monument castigating all war as sinful. If government wishes to exercise such expressive control, however, it may easily do so (and without selling its own property) provided that it does not endorse a sectarian symbol in the process. Government's impetus in conducting a remedial sale is not to secure a war memorial that meets the expectations of the general public, for example, but instead to extricate itself from the endorsement of symbolic religious speech. If the former rather than the latter were at issue, the land would not be sold in the first instance and government could develop the property on its own terms without constitutional concern.[376] Once government chooses to remedy an endorsement violation by selling property beneath a religious symbol, however, it necessarily relinquishes its right to control the viewpoint communicated from the transferred land.[377]

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to no one when the Order chose to keep the monument in its present location."); *Murphy*, 1997 WL 754604, at *11; *cf. Mississippi*, 499 F.2d at 430-32; *Wright*, 441 F.2d at 451.

373. *Cf. Wallace*, 472 U.S. at 54 ("[T]he political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain."); *Torcaso*, 367 U.S. at 495.

374. *See* Hall, *supra* note 264, at B1 (recounting proposed remedial sale on such terms).

375. *Paulson*, 294 F.3d at 1127-28.

376. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234-35 (2000).

377. Some defendants have challenged this neutrality requirement by claiming that endorsed displays are historically significant and thus that their preservation promotes a secular and viewpoint-neutral goal. *E.g.*, Defendant's Opposition to Plaintiff's Motion to Modify and Enforce the Injunction at 16, *Murphy*, 1997 WL 754604 (No. 90-0134-GT). At least one court appears to have embraced the argument. *Mercier*, 2005 WL 81886, at *9 (concluding that the defendant "had an historical reason" for selling religious monument and underlying public property to a purchaser committed to preserving display, based on the fact that the monument purportedly commemorated efforts by local youth to protect city from a 1965 flood); *cf. supra* notes 142-63 and accompanying text. The argument overlooks the fact that the identical assertion would have been dispositive of the preceding liability determination: if a religious display is sufficiently historical to render its preservation a secular objective in remedial litigation, then the symbol must be sufficiently historical to remain on public land in the first instance. *See supra* notes 147-51 and accompanying text. Indeed, because greater scrutiny should be applied to government action in the remedial context, *supra* notes 202-21 and accompanying text, it is more likely that the historical preservation claim will prevail at the liability stage.

To accomplish a sale on non-preferential terms, government may auction the property to the highest bidder,[378] hold a drawing among prospective purchasers,[379] or otherwise transfer the property based on the objective application of viewpoint-neutral criteria. In virtually all instances, the sale of public land will be governed in part by state and local law.[380] While any sale must comply with such provisions to the extent that they do not conflict with remedial requirements, the fact that a procedure is authorized as a matter of local law does not answer the constitutional inquiry. In two recent cases, for example, courts have authorized viewpoint-biased remedial sales based predominantly on the conclusion that the transactions complied with state law.[381] Those remedial transfers, however, were fundamentally different than nearly any other land sale: the subject properties were traditional public fora, sold to remedy the defendants' endorsement of religious speech, and purchased for the sole purpose of perpetuating a religious message.[382] On such facts, a land transfer cannot be governed solely by standards applicable to the sale of vacant lots.[383]

While a prohibition against viewpoint bias in remedial transactions may not seem a particularly controversial proposition, several reported cases—including *Buono*,[384] *City of Marshfield*,[385] *Paulson*,[386] and *Mercier*[387]—involve negotiated sales with recipients who were committed to preserving the religious symbol.[388] In *Paulson*, and before the district court in *Mercier*, the infirmity was deemed fatal.[389] As the lower court in *Mercier* noted:

> The City has neither allowed any other group to express a message in the park (at least permanently) nor established a neutral program to determine which groups may purchase a portion of the land to express their messages. Instead, the Common Council passed a "spe-

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378. Tonkins v. City of Greensboro, 276 F.2d 890, 891-92 (4th Cir. 1960) (upholding remedial transaction where a segregated public pool was "sold at public auction to the high bidder"); *see also* Woodland Hills Homeowners Org. v. Los Angeles Cmty. Coll. Dist., 266 Cal. Rptr. 767, 775-76 (Cal. Ct. App. 1990) (lease of surplus school property to religious organization did not violate California Constitution, where lease resulted from open bidding); *cf. Mississippi*, 499 F.2d at 432; *Hampton*, 304 F.2d at 323.

379. *Cf. Mercier*, 305 F. Supp. 2d at 1021 ("Perhaps the most neutral method of ending the City's endorsement would be to hold a public auction for the monument or give the monument away through a drawing.").

380. *See City of Marshfield*, 203 F.3d at 492; *Murphy*, 1997 WL 754604, at *7-*8; *see, e.g.*, CAL. GOV'T CODE §§ 25520-25535 (West 2004).

381. *Mercier*, 2005 WL 81886, at *9; City *of Marshfield*, 203 F.3d at 492-93.

382. *E.g.*, *City of Marshfield*, 203 F.3d. at 489-90.

383. *Murphy*, 1997 WL 754604, at *7-*8, *11.

384. *Buono*, 371 F.3d at 545.

385. *City of Marshfield*, 203 F.3d at 489-90.

386. *Paulson*, 294 F.3d at 1126; *Murphy*, 1997 WL 754604, at *11.

387. *Mercier*, 305 F. Supp 2d at 1012.

388. *See also supra* note 287.

389. *Mercier*, 305 F. Supp. 2d at 1012; *Murphy*, 1997 WL 754604 *11.

> cial and unusual" act [authorizing the sale of a parcel of public parkland] to aid the promotion of one religious message.[390]

By contrast, the Seventh Circuit in *City of Marshfield* did not even address the fundamental bias in the transaction before it and thus impliedly sanctioned the preference.[391] Of considerably greater concern, the same circuit recently reversed the district court in *Mercier* and expressly sanctioned a viewpoint-biased transaction with the cursory observation that the objection was foreclosed by the holding in *Marshfield*.[392] By elevating *Marshfield's* silent acquiescence in a viewpoint-biased remedial sale to the status of controlling precedent, and by declining to assess or even acknowledge the lower court's contrary analysis,[393] the Seventh Circuit's decision in *Mercier* exemplifies the risk posed by judicial indifference (or antipathy) toward the vigorous remediation of endorsed religious speech. In the words of the *Mercier* dissent, the remedy authorized by the majority opinion "borders on a fraud."[394] If embraced by other courts, the perfunctory analysis giving rise to that outcome could substantially eviscerate the endorsement prohibition in this context.

#### (2) Structural Neutrality and the Prohibition Against Preferential Effects

Presuming that government transfers property with no express preference for a particular religious viewpoint, the structure of the transaction may still comparatively benefit prospective purchasers seeking to preserve the symbol. These preferential effects should be impermissible as well—at least in the remedial context, where the objective observer will scrutinize any sale to assure that it is strictly neutral with respect to endorsed speech. Structural preferences can take at least two forms. First, viewpoint-neutral content restrictions on the expressive use of transferred property may increase the likelihood that the endorsed display will remain. Second, facially neutral requirements regarding the development of transferred property may differentially burden bidders in ways that work to the advantage of those seeking to retain the display.

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390. *Mercier*, 305 F. Supp. 2d at 1012 (citations omitted).

391. *City of Marshfield*, 203 F.3d at 492-93.

392. *Mercier*, 2005 WL 81886, at *9 ("Although Appellees point to the fact that the land was offered solely to the Eagles, that was also true in *Marshfield*, where the City of Marshfield did not solicit alternative bids for the statue."); *see also id.* at *8 ("The desire to keep the Monument in place cannot automatically be labeled a constitutional violation . . . . The court in *Marshfield* approved the sale when removal was an obvious option, so the Appellees' complaint . . . is contrary to the holding in *Marshfield*.").

393. *Supra* note 390.

394. *Mercier*, 2005 WL 81886, at *12 (Bauer, J., dissenting).

(a) Preferential Content Restrictions

Unlike viewpoint discrimination, which is impermissible in almost all settings, viewpoint-neutral content discrimination[395]—while still highly disfavored—is permissible under a wider range of circumstances, largely depending on the forum-designation of the property in question.[396] For example, requiring that transferred property be used as a war memorial may be a permissible content regulation provided that it is viewpoint-neutral.[397] However, restricting the content of expression on transferred property in a way that facilitates the preservation of the existing display must be subject to special scrutiny to assure that the sale satisfies the neutrality requirements of the Establishment Clause.

The risk of apparent endorsement corresponds to how narrowly a facilitating content restriction has been drawn. As less and less alternative speech is permitted, the probability of preserving an endorsed display likely will increase. For example, any content restriction that limits expression on transferred property to the topic of religion, even if that restriction is viewpoint neutral, must be scrutinized closely for preferential effect—*e.g.*, by considering whether, in the context of a particular case, the restriction so narrows the field of potential purchasers that those interested in preserving the display are clearly advantaged.[398] Similarly, a war-memorial use restriction placed on transferred property[399] often will not merely facilitate the continued display of a challenged symbol but virtually restate the government's characterization of the display itself.[400] Such an exceedingly narrow and perfectly tailored content restriction creates a very high risk, in both fact and appearance, that government is merely seeking to achieve indirectly what it no longer may accomplish openly. By contrast, broader restrictions, such as limiting the use of property to "open space" or "public park" purposes, permit a greater range of competing viewpoints and thus pose far less of an endorsement risk.[401]

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395. Amato v. Wilentz, 753 F. Supp. 543, 553 (D.N.J. 1990) ("Content refers to the topic or matter treated in a particular work. Viewpoint refers to one's opinion, judgment or position on that topic.").

396. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45-47 (1983); *Cornelius*, 473 U.S. at 806.

397. *Cf. Paulson*, 294 F.3d at 1132 ("Here, the City sought to sell the land atop Mt. Soledad for the undeniably appropriate secular purpose of ensuring the presence of a war memorial on the site.").

398. Government would also have to articulate a sufficiently compelling rationale for such a content-restriction that itself reflects no religious preference; the mere hope of preserving the existing display in its present location is not adequate. *Supra* notes 268-71 and accompanying text.

399. *See Paulson*, 294 F.3d at 1127-28.

400. *Ellis*, 990 F.2d at 1527-28; *Murphy*, 782 F. Supp. at 1437-38; *see, e.g., Separation of Church & State Comm.*, 93 F.3d at 619-20; *Jewish War Veterans*, 695 F. Supp. at 14-15; *Eckels*, 589 F. Supp. at 233-35.

401. *City of Marshfield*, 203 F.3d at 490; *cf. Kong*, 2001 WL 1020102, at *2 (Canby, J., concurring).

The endorsing effect of any content restriction will turn on the specific facts of the proposal, its articulated rationale, the historical and factual context of the display at issue, and—once again—the subjective sensibilities of the reviewing court. Unlike viewpoint discrimination, which unambiguously advances the interest of one religious viewpoint over others and thus can be comparatively assessed, the endorsing effect of a facilitating content restriction cannot be determined by objective comparison alone. Because at least some competing speech will enjoy formally equal access, the court must make a subjective determination whether the use of such "formally neutral criteria"[402] effectively favors the endorsed display.[403]

The scant decisional law addressing this issue ignores its significance. The only court yet to consider the question—the original three-judge panel in *Paulson*—dismissed concerns regarding the endorsing effect of a facilitating war-memorial use restriction on grounds that the city permitted the participation of bidders who did not intend to preserve the cross.[404] The fact that government does not expressly limit a transaction to purchasers committed to preserving a symbol (and thus does not engage in viewpoint discrimination), however, does not end the inquiry. As Justice O'Connor stressed in *Pinette*, the endorsement test requires that courts look beyond "the application of formally neutral criteria" to ascertain more subtle preferential effects.[405] The *Paulson* panel also cited the Seventh Circuit's opinion in *City of Marshfield* in support of its analysis,[406] yet that decision addressed the propriety of a regulation permitting the use of transferred property for "public park purposes" and thus had no occasion to assess the permissibility of a content restriction that narrowly facilitates religious speech.[407] By sanctioning the use of a narrow content restriction without any meaningful scrutiny of its endorsing effect, the panel decision in *Paulson* set virtually no limits on a remedial tactic that may significantly promote endorsed religious expression.[408]

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402. *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring).

403. Once the court assures that a transaction does not in fact or appearance continue to promote religious speech, the remedial requirements of the Establishment Clause are met. The remaining questions regarding the permissibility of viewpoint-neutral content regulations in the context of a remedial sale turn on principles arising under the Free Speech Clause—*e.g.*, the forum-designation of the property at issue, the resulting standard of review, and the adequacy of government's articulated purpose in imposing a particular restriction.

404. *Paulson*, 262 F.3d at 892.

405. *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring).

406. *Paulson*, 262 F.3d at 892.

407. *City of Marshfield*, 203 F.3d at 490.

408. The endorsing effect of the content restriction considered in *Paulson* was exacerbated by the defendant's decision to assess, as part of its selection process, each bidder's expertise in maintaining war memorials. Appellant's Excerpts of the Record, Ex. 3 at 2, ¶¶ 2-3, *Paulson*, 294 F.3d 1124 (No. 00-55406). This criterion significantly benefited the defendant's favored purchaser—an organization that originally constructed the cross and had maintained it for the preceding half century. *Paulson*, 294 F.3d at 1125-26. Because the number of other private entities with expertise in

(b) Special Burdens Imposed on Competing Viewpoints

Another way in which the structure of a remedial sale may promote endorsed religious expression is by imposing facially neutral obligations regarding the development of the property that place a special burden on purchasers intending to remove the display. As discussed previously, the sale struck down by the *en banc* court in *Paulson* had this effect.[409] By requiring that all purchasers maintain a war memorial, and by stipulating that the existing cross would satisfy the use restriction, the transaction imposed a unique burden on bidders seeking to display a non-Christian memorial: they alone would be required to incur the substantial expense of removing the cross and constructing an alternative memorial in its place.[410] This requirement gave purchasers seeking to preserve the display an objective advantage, since they were not required to reserve funds for construction and thus could submit a comparatively higher bid.[411] This preferential effect would not be difficult to remedy. If the defendant offered to deliver the property with or without the religious symbol, at the buyer's direction, and additionally offered any purchaser a set amount of financial assistance to be used in the buyer's discretion to either construct a new war memorial or improve the existing one, no bidder would be comparatively disfavored.

The preferential effect highlighted in *Paulson* is present even where no affirmative development duty is imposed, to the extent that purchasers opposed to an existing religious symbol must pay for its removal before erecting an alternative display. In virtually any remedial sale where property is transferred "as is," the transaction will thus disadvantage bidders intending to use the property for competing expression.[412] However, there is a notable difference between the two scenarios. In the former, government requires as a condition of purchase that bidders agree to develop the property in a way that materially disadvantages those opposed to the existing display. In the latter case, no bidder is required by government to do anything with the property or to spend any additional funds after its purchase. While competing speech is still burdened, since only those purchasers opposed to the existing symbol face the additional expense of its removal, government does not coercively effectuate that bias by requiring the expenditure as a condition of sale.

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the arcane task of memorial maintenance is likely minute, this sale term effectively emptied the universe of qualified competitors. The original three-judge panel dismissed this preferential effect on grounds that, if the war-memorial use restriction itself was permissible, it was rational for the defendant to seek purchasers with expertise in that undertaking. *Paulson*, 262 F.3d at 892-93. With the gloss of this "expertise" inquiry, then, a facially neutral war-memorial use restriction was transformed into a powerful mechanism to bias the sale in favor of preserving an endorsed display. *Id.*

409. *See supra* notes 210-16 and accompanying text.

410. *Id.; Paulson*, 294 F.3d at 1132-33.

411. *Id.*

412. *E.g., Kong*, 2001 WL 1020102, at *1-*2.

Despite the absence of explicit coercion, however, any sale structured in this way still offends the neutrality principle. By requiring purchasers to accept property with an affixed sectarian display, government forces those opposed to the display to either acquiesce in symbolic speech with which they disagree or to incur the expense of removing the fixture. Both options place these purchasers at a comparative disadvantage in promoting their own expressive agenda, since they can only obtain the property on equal financial terms if they agree to communicate a competitor's message. As a result, government should be required to deliver the property with or without the religious symbol, at the buyer's direction. In addition to eliminating a significant preferential effect, this arrangement advances government's interest in assuring that the symbols of private faith are treated with care and respect. Rather than risk that a private purchaser will destroy a display in a provocative fashion, government can remove the symbol in a dignified manner and, if possible, preserve it for sale or transfer to a private entity.[413]

While government thus should be required to remove a symbol if the purchaser so directs, it should not be obliged to fund the construction of an alternative display. While this, too, is a cost that purchasers intending to preserve the symbol may avert, it is not one that must be offset to affirm the neutrality interests at stake. Here, all purchasers receive the property in a condition that does not offend any expressive interest; it is delivered either with no expressive symbol or with a display that the purchaser has sought to preserve. The purpose of the neutrality requirement is not to equalize perfectly the size, grandeur, and economic value of all private symbolic speech that may be communicated from a transferred parcel, but instead to eliminate government's influence over the prevailing private viewpoint. By agreeing to remove an unwanted religious fixture from transferred land, government accomplishes that objective.

#### (3) Procedural Transparency and the Prohibition Against Reserved Discretion

In addition to these substantive neutrality requirements, a permissible sale must be structured to assure that selection criteria are applied in a fair, consistent, and objectively verifiable fashion. This requirement, rooted both in free speech and endorsement principles,[414] condemns any effort by government to retain significant discretion in determining the prevailing bidder—for example, by reserving the right to accept or deny bids without cause[415] or to rank purchase offers based on unreviewable judgments regarding the aesthetic merit of competing plans

413. *See supra* notes 283-85 and accompanying text.
414. *Am. Jewish Cong.*, 90 F.3d at 385; *cf. supra* note 269.
415. *See infra* note 420.

to develop the property.[416] The only courts to consider such retained discretion in the context of a remedial sale, however, have dismissed these concerns and sanctioned the practice.

Among the basic principles governing the regulation of expressive activity is the requirement of clear and neutral rules.[417] Whenever a policy "allows for arbitrary application, it is not a valid time, place, and manner regulation . . . . In the Establishment Clause context, such a regulation also has the potential for impermissibly favoring a particular religious viewpoint."[418] Reserving discretion to accept or reject purchase offers without cause thus conflicts with core obligations imposed by both the Free Speech and Establishment Clauses of the First Amendment.[419] In the recent remedial sales at issue in *Kong* and *Paulson*, however, government defendants expressly reserved such authority in their bid invitations.[420] The Ninth Circuit in *Kong* ignored the objection and upheld the sale of the Mt. Davidson cross without addressing plaintiff's argument.[421] In *Paulson*, both the district court and the original three-judge panel of the Ninth Circuit considered and rejected the objection.[422]

The panel decision in *Paulson* articulated three rationales for its decision. First, the court characterized the constitutional principle as applicable only in instances where a regulatory scheme contains no standards whatsoever, and noted that "[s]uch truly absolute discretion without any standards is clearly distinguished from the city council's discretion here."[423] Whether no criteria or hundreds are set forth, however, a blanket reservation of discretion permitting the decision-maker to disregard any or all of them should condemn the entire process. Indeed, in *City of Lakewood,* the Supreme Court struck down a regulatory scheme that contained numerous criteria on grounds that the ordinance additionally reserved to the mayor discretion to impose "any 'other terms and conditions deemed necessary and reasonable . . . .'"[424] As the Court stated, such a scheme is subject to challenge so long as it

416. *E.g.*, Appellee's Supplemental Excerpts of the Record, Ex. D at 29, *Paulson*, 294 F.3d 1124 (No. 00-55406); *cf.* Hopper v. City of Pasco, 241 F.3d 1067, 1077-78 (9th Cir. 2001).

417. *Am. Jewish Cong.*, 90 F.3d at 384.

418. *Id.* at 385.

419. *See, e.g.*, Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755-59 (1988); Rosenbaum v. City San Francisco, No. 00-15147, 2001 WL 406963, at *2-*3 (9th Cir. Apr. 19, 2001); United States v. Linick, 195 F.3d 538, 541-42 (9th Cir. 1999); *Am. Jewish Cong.*, 90 F.3d at 384-86; Tokaji, *supra* note 176, at 2441-44.

420. *See Paulson*, 262 F.3d at 893; Appellants' Opening Brief, *Kong*, 2001 WL 1020102 (No. 00-15261), *available at* 2000 WL 33986167; City Appellee's Brief, *Kong*, 2001 WL 1020102 (No. 00-15261), *available at* 2000 WL 33986166.

421. *Kong*, 2001 WL 1020102, at *1-*2.

422. *Paulson*, 262 F.3d at 893; *Paulson*, Civ. No. 89-0820-GT, at 7 (S.D. Cal. Feb. 3, 2000). The *en banc* panel that subsequently struck down the remedial sale did so on other grounds and thus did not consider the question. *Paulson*, 294 F.3d at 1133 n.7.

423. *Paulson*, 262 F.3d at 893.

424. *City of Lakewood,* 486 U.S. at 754 & n.2; *see* Plain Dealer Publ'g Co. v. City of Lakewood, 794 F.2d 1139, 1141 (6th Cir. 1986) (text of ordinance).

"gives a government official or agency *substantial power* to discriminate based on the content or viewpoint of speech."[425] The complete discretion reserved by the bid solicitations in *Kong* and *Paulson* indisputably gave the defendants such power.

The panel next excused the reserved discretion on grounds that it appears in all of the government's bid invitations for the sale of real property.[426] As discussed previously, however, remedial sales regulate expressive activity as their primary, if not singular, objective, and thus are unlike nearly any other real estate transaction.[427] In such circumstances, the foundational requirements of neutrality and clear rules cannot be waived in favor of discretionary procedures used when selling surplus lots. Likewise, the panel's suggestion that this fact demonstrated government's non-censorial motivation fails to address the constitutional objection.[428] Irrespective of whether discretion is exercised in good faith, the First Amendment still prohibits its reservation.[429]

Finally, the *Paulson* panel concluded that the reserved discretion was justified by "the result of the process," which it claimed was "consistent with the evaluated factors."[430] This analysis conflicts with settled authority instructing that discretionary regulatory schemes should be assessed without regard to outcome, precisely because "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."[431] Thus the court in *American Jewish Congress* struck down the regulatory decision at issue without "determin[ing] the City's actual motivation in ruling on the applications or the extent to which its determinations were based on impermissible factors," because the discretionary scheme itself condemned the outcome for purposes of the Establishment Clause.[432] Justifications based on "the result of the process" also ignore the potential chilling effect of retained discretion, which may deter other bidders from even participating in a transaction and offering superior terms.[433]

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425. *City of Lakewood*, 486 U.S. at 759 (emphasis added).

426. *Paulson*, 262 F.3d at 893.

427. *Supra* notes 367-71 and accompanying text; *see City of Lakewood*, 486 U.S. at 759 (requiring clear and definite standards where law has "a close enough nexus to expression . . . to pose a real and substantial threat of the identified censorship risks").

428. *Paulson*, 262 F.3d at 893.

429. *City of Lakewood*, 486 U.S. at 757; Serv. Employee Int'l Union vs. City of Los Angeles, 114 F. Supp. 2d 966, 974 n.4 (C.D. Cal. 2000).

430. *Paulson*, 262 F.3d at 893.

431. *City of Lakewood*, 486 U.S. at 758; *see* Tokaji, *supra* note 176, at 2442.

432. *Am. Jewish Cong.*, 90 F.3d at 385-86.

433. *City of Lakewood*, 486 U.S. at 757 ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech . . . .").

It is exceedingly difficult in the typical case to determine whether reserved discretion has chilled the involvement of other participants or whether the defendant has utilized its power to select a purchaser based on impermissible considerations. Precisely because objective judicial review is nearly impossible, any sale containing such terms should be struck down under the Free Speech Clause.[434] With respect to the endorsement inquiry, reserved discretion forecloses any objective determination that religious preference played no role in the bid selection and thus underscores the appearance that the sale was designed to perpetuate endorsed religious speech.

* * * *

The foregoing argument extends the logic of the endorsement standard described in Part I to the remediation of the constitutional violations discussed in Part II. The premise of the analysis is that the objective observer not only must discern the constitutional violation but also must arbitrate its remedy. Framing the remedial analysis from the vantage of an essentially omniscient observer yields important insights. Perceiving that government has subjectively endorsed a religious message, the observer will skeptically assess any proposed remedy to assure that it does not perpetuate government's established religious preference. To survive such scrutiny and cure the disaffecting injury inflicted on nonadherents by the display of sectarian symbols, a remedial measure must accomplish two interrelated objectives: it must create evident and substantial physical separation between government and the display, either through removal of the symbol or sale of a sufficiently substantial parcel of land underlying it; and it must do so through means that are strictly neutral with respect to the religious message itself. As set forth above, the courts that have considered this remedial question have not yet developed a coherent jurisprudence that effectuates the endorsement doctrine—and, in several instances, have sanctioned remedies that directly conflict with its reasoning.

## CONCLUSION

Describing a phenomenon that he calls the "remedial substantiation"[435] of constitutional rights, Professor Levinson observes that "the cash value of a right is often nothing more than what the courts . . . will do if the right is violated. Consequently, rights can be effectively enlarged, abridged, or eviscerated by expanding, contracting, or eliminating remedies."[436] By failing to reconcile the constitutional proscription with its remedial consequences, the discordant analysis of

434. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969) (licensing scheme unconstitutional "without narrow, objective, and definite standards").

435. Levinson, *supra* note 176, at 904-11.

436. *Id.* at 887.

right and remedy described in this Article threatens to abridge the constitutional prohibition against permanent religious displays on public land and, in so doing, erode the legitimacy of constitutional adjudication in this regard.

On one hand, application of the endorsement standard to the question of constitutional liability has produced a coherent and well-developed body of decisional law that unambiguously condemns the permanent display of religious imagery in all but a handful of circumstances. These cases recognize the unremarkable fact that the permanent integration of a religious message with the physical presence of government itself will likely communicate to nonadherents that they are political outsiders, in derogation of the core value protected by the endorsement test.

By contrast, the remedial treatment of these violations is a haphazard affair reflecting little or no effort to ground the inquiry in the endorsement principles that define the right itself. Removal of an offending symbol, which was the simple and indisputably effective remedy in the typical case for many years, is increasingly bypassed in favor of more elaborate proposals designed to avert the necessity of displacing an unconstitutional display. These new remedies raise important questions that the federal courts have yet to satisfactorily address. The most troubling of the proposals—and the increasing number of decisions sanctioning them—trivialize rather than substantiate the constitutional right. By suggesting that litigation in this area is a rhetorical exercise with scant consequences, these outcomes ironically enhance the effect that the endorsement doctrine exists to preclude: the political alienation of religious outsiders.

The framework proposed in this Article realigns the remedial analysis with the judiciary's rigorous and consistent assessment of the proscription itself. By tethering the inquiry to the perceptions of Justice O'Connor's observer, the proposal seeks to vindicate the constitutional right as a fully effectuated restraint on the use of civic space as a permanent platform for symbolic religious expression.