

## PRIVATIZING AND PUBLICIZING SPEECH

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### I.

When should we allow governments to deploy private-law rules in order to circumvent public-law obligations? Two cases this year call that question to mind. They ask the Supreme Court to explore interactions between property law and constitutional rules concerning free speech and antiestablishment.

On the one hand, the Court recently handed down *Pleasant Grove City v. Summum*, which involved a Ten Commandments monument that a private religious organization donated to a city.<sup>1</sup> The Court concluded that the permanent monument became government speech when the city accepted the gift, displayed it in a municipal park, and formally took ownership of the monument itself.<sup>2</sup> The Justices therefore turned away a free speech challenge brought by Summum, a minority faith that wanted the city to display its monument—The Seven Aphorisms of Summum—alongside the Ten Commandments. Finding the existing monument constituted government speech allowed the Court to dismiss Summum’s claim that municipal officials selectively opened the parkland to only certain types of private sectarian speech in violation of the First Amendment. The Court reasoned that Pleasant Grove could exclude Summum’s monument because when the government itself speaks, it can select its message without giving equal airtime to other perspectives.<sup>3</sup> (Of course government endorsement of the Ten Commandments raised obvious antiestablishment questions, which the Court did not consider because of the way the case was litigated, as I will

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<sup>1</sup> *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1129 (2009) (link).

<sup>2</sup> *Id.* The fact that the city formally acquired the monument figured into the Court’s conclusion that the Ten Commandments constituted government speech, although ownership was not the only factor. *See id.* at 1134 (reasoning that “[t]he City has selected those monuments that it wants to display . . . ; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent’s concern; and the City has now expressly set forth the criteria it will use in making future selections”); *see also id.* (“[T]he City took ownership of that monument and put it on permanent display in a park that it owns and manages . . . . All rights previously possessed by the monument’s donor have been relinquished.”).

<sup>3</sup> For a limited defense of selective exclusion of religious perspectives from government speech, see Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1297–1300 (2008) (link).

explain.<sup>4</sup>) You can think of the city's decision to accept, display, and acquire the Ten Commandments monument as the opposite of privatization—it “publicized” a sectarian symbol, both in the sense that it formally took title to the display and in that it used public property to broadcast the message.

On the other hand, consider *Salazar v. Buono*, which the Court will hear in the fall. It concerns a white cross that has long stood in the Mojave National Preserve.<sup>5</sup> After a lower court ruled that the cross was an unconstitutional establishment,<sup>6</sup> Congress intervened and conveyed the small parcel of land containing the cross to a private organization.<sup>7</sup> Privatizing the speech was meant to quell antiestablishment concerns by disassociating the federal government from the sectarian message. Yet Congress retained ties to the land, including a property interest and certain regulatory power.<sup>8</sup> The transaction's highly structured nature left the federal government open to charges of ventriloquism—using a private party to convey what essentially remained a government message.<sup>9</sup>

Moreover, to the extent that Congress succeeded in privatizing the cross, it became vulnerable to just the sort of free speech objection that the government in *Sumnum* successfully evaded by publicizing the sectarian monument. In fact, another religious group—a Buddhist organization—initially sparked the controversy over the white cross when it wrote to the National Park Service and requested permission to display its monuments nearby. Although the Buddhists never brought legal action, it is not totally inconceivable to imagine them arguing today that once Congress has agreed to privatize one form of sectarian speech, it has a constitutional obligation to offer such deals to all private speakers on equal terms. As things turned out, however, only one constitutional issue is before the Court—the antiestablishment request to undo the privatizing transaction—and the government's evasion of that claim is likely to succeed, at least in the short term.

One of these cases, then, asks whether government can avoid a constitutional difficulty by publicizing private sectarian speech, while the other asks whether government can evade a different constitutional problem by privatizing such expression. Both cases present their issues in the context

<sup>4</sup> Cf. Editorial, *A Case of Religious Discrimination*, NYTIMES.COM, Nov. 11, 2008, [http://www.nytimes.com/2008/11/12/opinion/12wed1.html?\\_r=3](http://www.nytimes.com/2008/11/12/opinion/12wed1.html?_r=3) (arguing that the Supreme Court should address the Establishment Clause issue) (link).

<sup>5</sup> *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) [*“Buono IV”*] (link), cert. granted sub nom. *Salazar v. Buono*, 129 S. Ct. 1313 (2009) (link).

<sup>6</sup> *Buono v. Norton*, 212 F. Supp. 2d 1202, 1217 (C.D. Cal. 2002) [*“Buono I”*] (link).

<sup>7</sup> *Kempthorne*, 527 F.3d at 771 (citing Pub. L. No. 108-87 § 8121 (a)–(f), 117 Stat. 1100 (2003), codified at 16 U.S.C. § 410aaa–56 (note)).

<sup>8</sup> For a detailed description of the transaction, see *infra* Part II.B.

<sup>9</sup> For another example of a government sale of real property to deflect a religious freedom challenge, see *Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2007) (holding that a state constitutional challenge was mooted when the city transferred property containing a cross to the federal government, which is not bound by the state constitution) (link).

of government stewardship over its property, specifically real property that it has opened up to the public as parkland. Both involve government evasion of one constitutional question in a way that may raise a countervailing constitutional difficulty. And both will probably be resolved in favor of the government on the ground that it has successfully insulated itself from a constitutional challenge through actions involving a property transfer. (*Summum* already has been decided that way). Most generally, then, both cases concern the interrelationship between private-law arrangements and public-law obligations.

Differences separate the cases, of course. Most obviously, *Summum* was litigated exclusively as a speech case, whereas *Buono* presents only an antiestablishment question. Moreover, one concerns a locality, while the other challenges the federal government. Nevertheless, they can profitably be thought through together. Juxtaposing them may teach us something about government privatization and publicization of sectarian speech.

One question is whether the outcome of each case is correct (assuming I have accurately predicted the result in *Buono*). What people think about that will depend on their underlying theories of antiestablishment and freedom of speech. Some may focus on citizens' autonomy around matters of conscience and expression, while others may prioritize evenhandedness toward sects or viewpoints. Yet apart from the outcome question, there is the matter of whether straightforward application of property rules to these cases adequately serves the constitutional values at play. Does saying that a city's acquisition of a sectarian monument effectively renders its message government speech, thereby putting it beyond the reach of the Speech Clause, capture everything the First Amendment either permits or requires? Does it satisfy public principles to say that Congress can manage its Establishment Clause obligations by means of a sophisticated land transaction that formally privatizes the religious symbol? In short, are courts asking the right questions?

## II.

### A.

Before exploring these questions further, we need to understand certain details of each case. *Summum* concerned Pleasant Grove City, Utah, which maintains a park in the historic district of town.<sup>10</sup> Within the park are numerous permanent monuments or displays, including a granite representation of the Ten Commandments. Like many of the objects in the park, the Ten Commandments monument was donated by a private organization, the

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<sup>10</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009).

Fraternal Order of Eagles.<sup>11</sup> (Interestingly, this is the same organization that donated the tablets upheld in *Van Orden v. Perry*.<sup>12</sup>)

Controversy erupted when Summum, a small religious group founded in 1975 and headquartered in Salt Lake City, contacted Pleasant Grove officials and requested permission to erect its own monument alongside the existing ones.<sup>13</sup> Like the Ten Commandments monument, the “Seven Aphorisms of SUMMUM” would have been made of stone and would have been a similar size and shape.<sup>14</sup> After the city denied the request, stating that the park was reserved for monuments that either related to the history of the town or were donated by groups with “longstanding ties” to the local community, Summum filed suit.

Critically, Summum did not seek to have the existing monument removed, but instead sought to have its Seven Aphorisms included in the park. Accordingly, the group did not bring an Establishment Clause challenge, which might have resulted in exclusion of both monuments, but instead claimed only that the town’s policy abridged its rights under the Free Speech Clause. It argued that Pleasant Grove had opened the park to certain forms of private speech, and, having done so, the city could not then exclude other private speech in a discriminatory way. That made sense, again, because the relief Summum sought was to have its display included, not to have the Ten Commandments banned from the park. Yet framing the case that way meant that it would be litigated in a strange posture, under which only the speech aspects of the case could be considered. Nothing about the Court’s rationale would be specific to religion or religious speech. All of that was perfectly fine with Pleasant Grove, of course, which could then defend against the speech claim by arguing that the existing monument constituted government speech, without having to worry—at least in this litigation—about the antiestablishment ramifications of that argument.<sup>15</sup>

Earlier this year, the Supreme Court ruled unanimously against Summum.<sup>16</sup> Justice Alito’s majority opinion used straightforward logic. Simply put, the Speech Clause “has no application” to government speech.<sup>17</sup> When Pleasant Grove accepted the permanent monument and displayed it on pub-

<sup>11</sup> *Id.*

<sup>12</sup> 545 U.S. 677 (2005) (plurality opinion) (upholding a Ten Commandments display on the grounds of the Texas state capitol) (link). *See id.* at 682.

<sup>13</sup> *Summum*, 129 S. Ct. at 1129–30.

<sup>14</sup> *Id.*

<sup>15</sup> In all likelihood, an antiestablishment challenge to the Pleasant Grove Ten Commandments monument would not succeed in the Supreme Court. *Cf. Van Orden*, 545 U.S. 677 (upholding a similar display that was likewise surrounded by an array of other monuments). An earlier antiestablishment challenge had been withdrawn by the plaintiffs, presumably after a calculation that it would be unlikely to succeed because of *Van Orden*. *See* Christopher C. Lund, *Keeping the Government’s Religion Pure: Pleasant Grove City v. Summum*, 104 NW. U. L. REV. COLLOQUY 46 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/28/LRColl2009n28Lund.pdf> (link).

<sup>16</sup> *Summum*, 129 S. Ct. 1125.

<sup>17</sup> *Id.* at 1131.

lic property, the Ten Commandments message became government speech.<sup>18</sup> Therefore, the free speech challenge could not succeed.

Now, the Court did acknowledge that other limits constrain government speech, notably the rule against government establishment of religion.<sup>19</sup> And it recognized that the Speech Clause limits the ability of officials to regulate private speech on government property.<sup>20</sup> However, neither of those limits was applicable because, again, no antiestablishment claim had been brought and the Ten Commandments monument did not constitute private speech.

One aspect of the decision deserves mention, because it anticipated *Buono*. Justice Alito defended the proposition that permanent monuments on public property constitute government speech by reference to routine observers. People who view permanent displays typically and reasonably assume that they convey the views of the landowner, who accepts and displays them selectively.<sup>21</sup> That assumption holds whether or not the monuments themselves are owned by private donors, and whether or not they stand on public or private land. So the Court suggested that it will not simply defer to every private-law arrangement—ownership of the monument itself is not the only factor that matters when the Court determines who is speaking. That suggestion will be drawn out and tested in *Buono*, where the Court will confront a land transaction that is highly structured, so that ordinary observers may not be able to associate the message of a permanent monument with the property owner.

### B.

At the center of the *Buono* case is a white cross that has long stood in the wilderness of the Mojave National Preserve in southeastern California.<sup>22</sup> Because it sits on an elevated outcropping called “Sunrise Rock,” the cross is visible from a distance, including from a road that passes through the Preserve about 100 yards away.<sup>23</sup> A private organization, the Veterans of

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<sup>18</sup> *Id.* at 1134.

<sup>19</sup> *Id.* at 1131–32.

<sup>20</sup> *Id.* at 1132.

<sup>21</sup> *Id.* at 1133 (“[P]ersons who observe donated [permanent] monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf . . . . This is true whether the monument is located on private property or on public property, such as national, state, or city park land.”). The Court also noted that Pleasant Grove had taken ownership of the Ten Commandment monument and most other monuments in the Park, so that all rights of ownership were transferred from the private donor to the government, though its analysis does not seem to turn on this fact. *Id.* at 1134.

<sup>22</sup> For an image of the cross, as well as a description and brief historical account, see ERIC CHARLES NYSTROM, FROM NEGLECTED SPACE TO PRIVATE PLACE: AN ADMINISTRATIVE HISTORY OF MOJAVE NATIONAL PRESERVE Ch. 6 (Mar. 2003), <http://www.nps.gov/archive/moja/adminhist/adhi6.htm> (link).

<sup>23</sup> *Buono IV*, 527 F.3d 758, 769 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 129 S. Ct. 1313 (2009).

Foreign Wars (VFW), erected the cross in 1934, reportedly to commemorate the sacrifices of American soldiers who had given their lives in World War I.<sup>24</sup> No evidence suggests that the VFW ever received permission from the federal government, which owns and manages the land, to erect the original cross. Nor did the government apparently sanction the several replacement crosses that private parties from time to time put in place as the existing structure weathered. In recent years, the cross has been used for Easter religious services.<sup>25</sup>

As in *Sumnum*, attention was first drawn to the religious symbol not by separationists seeking to have the cross removed, but by a minority religious group that asked to have its symbol displayed alongside the existing one. In both cases, the complaint was against government exclusion of smaller faiths, not against official inclusion of Christianity. That raises interesting questions about the core function of the constitutional rule against establishments, of course, but I will leave those issues to one side for the moment. In *Buono*, it was a Buddhist group that sought permission to build a stupa on another outcropping near Sunrise Rock. Permission was denied by the federal government, which also said that it planned to remove the cross.<sup>26</sup>

Congress caught wind of what was happening and began passing legislation. First, it prohibited federal money from being used to remove the cross.<sup>27</sup> Next, Congress designated the cross as a national memorial and appropriated up to \$10,000 that would be used to acquire and install a replica of a plaque that had accompanied the original 1934 cross.<sup>28</sup> National memorial status meant, in part, that the federal government would now “supervis[e], manage[], and control” the cross—presumably even after transfer to private ownership.<sup>29</sup>

Meanwhile, a federal district court ruled in a lawsuit brought by the ACLU that the cross constituted an unconstitutional establishment of religion and entered a permanent injunction prohibiting the federal government

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* The National Park Service conducted a study and concluded that the cross did not qualify for historic preservation status, partly because worship services were regularly conducted there, and the NPS announced its intention to remove the cross. *Id.*

<sup>27</sup> Consolidated Appropriations Act, 2001, Pub. L. No. 106-554 app. D § 133, 114 Stat. 2763A-230 (link). Later, Congress passed another piece of legislation prohibiting federal funds from being used to dismantle the monument. *Kemphorne*, 527 F.3d at 771 (citing Pub. L. No. 107-248 & 8065(b), 116 Stat. 1551 (2002)).

<sup>28</sup> *Id.* at 770. The plaque, which was shown in historical photographs, read: “The Cross, Erected in Memory of the Dead of All Wars,” and “Erected 1934 by Members of Veterans of Foreign [sic] Wars, Death Valley post 2884.” *Id.* at 769.

<sup>29</sup> *Id.* at 771.

from “permitting display of the . . . cross . . . .”<sup>30</sup> A panel of the Ninth Circuit affirmed.<sup>31</sup> While the appeal was pending, the cross was covered with a plywood box, which presumably remains in place today as the case awaits final resolution in the Supreme Court.<sup>32</sup>

Lawmakers then took the step that lies at the heart of the case. Faced with the federal court injunction, Congress decided to transfer the one-acre plot of land containing the cross into private hands. It passed a law conveying title to the plot to the VFW in exchange for another parcel of land of equal or greater value.<sup>33</sup> The action was an obvious effort to moot the constitutional challenge by removing government ownership or endorsement of the religious symbol.

Importantly, however, the federal government retained certain ties to the white cross. Congress clarified, for instance, that officials would continue to carry out their responsibilities under the law designating the cross a national memorial. Those duties presumably included both general care and oversight over the national memorial, as well as the obligation to erect a replica plaque using government funds.<sup>34</sup> Moreover—and critically—Congress retained a property interest in the land. The VFW would take the land only on the condition that it would be used as a World War I memorial, and that if that condition were ever violated, ownership of the property would return to the United States.<sup>35</sup> Of course, Congress did not specifically require the VFW to pay tribute to veterans of that war *using a cross*, but presumably that was only because such a specific requirement would have raised an obvious constitutional difficulty.

ACLU lawyers filed a motion in district court seeking a declaration either that the land exchange violated the permanent injunction or that it constituted an independent violation of the Establishment Clause. The court granted the motion to enforce its injunction, and a panel of the Ninth Circuit affirmed.<sup>36</sup> A petition for rehearing en banc was denied over a strong dis-

<sup>30</sup> *Id.* at 770. See also Press Release, ACLU, ACLU Sues Federal Government over Christian Cross in Mojave National Preserve (Mar. 22, 2001), available at <http://www.aclu.org/religion/discrim/16319prs20010322.html> (link).

<sup>31</sup> *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) [*“Buono II”*].

<sup>32</sup> See Steve Brown, *Faith Under Fire in the Desert*, THE SUNRUNNER.COM, Dec. 2006–Jan. 2007, [http://www.thesunrunner.com/Stories/Faith\\_Under\\_Fire\\_in\\_the\\_Desert/faith\\_under\\_fire\\_in\\_the\\_desert.html](http://www.thesunrunner.com/Stories/Faith_Under_Fire_in_the_Desert/faith_under_fire_in_the_desert.html) (link).

<sup>33</sup> Not coincidentally, the five-acre parcel of land adjacent to the Preserve was conveyed to the federal government by Henry Sandoz. Department of Defense Appropriation Act, 2004, Pub. L. No. 108-87 § 8121(b), 117 Stat. 1100 (codified at 16 U.S.C. § 410aaa-56 note, 431 note (2006)) (link). This is the same Mr. Sandoz who designed and erected the current version of the cross in 1998. See *Buono IV*, 527 F.3d at 769.

<sup>34</sup> “Notwithstanding the conveyance of the property under this subsection, the Secretary [of the Interior] shall continue to carry out the responsibilities of the Secretary under such section 8137.” § 8121(a), 117 Stat. at 1100.

<sup>35</sup> § 8121(e), 117 Stat. at 1100.

<sup>36</sup> *Buono IV*, 527 F.3d at 768.

sent by Judge O’Scannlain and four others.<sup>37</sup> Certiorari was granted and the case was set for oral argument in the fall of 2009.<sup>38</sup>

### III.

So when should we allow governments to deploy private-law rules to circumvent public-law obligations? *Buono* is the more interesting of the two cases in this regard. There, again, Congress crafted a highly structured property transaction in order to avoid a court ruling that the white cross constituted an establishment. Reasonably, the lower courts concluded that this private-law transfer was impermissible subterfuge designed to avoid a violation of public law.<sup>39</sup>

Subterfuge for what? At least two possibilities exist. First, the transaction might obscure a straightforward antiestablishment difficulty, like the one that the first *Buono* court found and ordered the government to remedy.<sup>40</sup> Arguably, that violation continues even after the real estate transaction because observers passing through the Preserve may still conclude that the white cross sits on federal property and conveys a government message. That is one reason why courts might question a government’s attempt to moot a constitutional challenge by way of the common law.

Ordering the government to unwind a real estate transaction would be unusual, and yet it might be the best way to rectify the constitutional problem, understood in this first way. While governments have taken other steps to remedy a mistaken impression of public ownership—say, fencing off the private area and posting signs that identify it as private land<sup>41</sup>—that sort of fix is not likely to work in the *Buono* setting. After all, the white cross is meant to be viewed from afar, specifically from a road that winds through the Preserve and passes by the monument at a distance of 100 yards.<sup>42</sup> From that vantage point, fencing and signage are not likely to successfully differentiate public and private land. If Congress’s land transfer is masking an Establishment Clause violation, removal of the cross may be the only effective remedy. That is precisely the remedy the Ninth Circuit ordered.<sup>43</sup>

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<sup>37</sup> *Id.* at 760 (O’Scannlain, J., dissenting).

<sup>38</sup> *Salazar v. Buono*, 129 S. Ct. 1313 (2009).

<sup>39</sup> *See Buono IV*, 527 F.3d at 768 (panel opinion).

<sup>40</sup> *Buono I*, 212 F. Supp. 2d 1202, 1217 (C.D. Cal. 2002).

<sup>41</sup> *See, e.g., Freedom from Religion Found., Inc. v. Marshfield*, No. 98-C-270-S, 2000 WL 767376, at \*\*1–2 (W.D. Wis. May 9, 2000) (ordering a government to fence off a parcel of land containing a statue of Jesus, following a sale of the parcel to a private entity).

<sup>42</sup> *Buono IV*, 527 F.3d at 769.

<sup>43</sup> *Id.* at 768. In this regard, the form of the original district court order is interesting. It prohibited the federal government from “permitting display of the Latin cross,” something that could be read to require officials to take affirmative action to prohibit private parties from displaying the cross even after a land transaction. *Id.* at 770.

Considerations like these were raised in Justice Souter's concurrence in *Summum*. He resisted an easy association between public ownership or maintenance of permanent monuments and government speech. He imagined situations in which donated displays could begin to take on the characteristics of private speech. If a town or city felt compelled to avoid an Establishment Clause problem by surrounding a religious display with other donated memorials or testimonials—in order to dilute the sectarian message—a suspicion might be raised that some of the objects did not really convey government messages.<sup>44</sup> “[T]here are circumstances,” he explained, “in which government maintenance of monuments does not look like government speech at all.”<sup>45</sup> As in *Buono*, there may also be reasons to doubt whether a contract transferring property ownership to a private entity will effectively sever the semantic association between the government and the ostensibly privatized message. Quite possibly, constitutional considerations would require courts to qualify—or even unwind—private-law arrangements that work to frustrate public-law commitments.

There is a second way to understand Congress's ruse, namely as a maneuver designed to deflect any suspicion that the government has opened its parkland to private sectarian speech. On this second reading of *Buono*, the legislature would be seeking to manage not the Establishment Clause, but the Speech Clause and possibly the free exercise guarantee. After all, the Buddhist group that petitioned the National Park Service for permission to display its stupa alongside the white cross may well have thought that the federal government had authorized the VFW to display its symbol. If so, the Buddhist group may simply have been seeking equal treatment.<sup>46</sup> Viewed that way, the underlying constitutional difficulty becomes quite different, as does the remedy necessary to address it. Now the trouble is that park officials have allowed only certain private expression to take place on public land—in other words, they have discriminated on the basis of content or viewpoint in a way that presumptively contravenes the speech guarantee. Moreover, federal officials could face a religion-specific challenge, namely that they have violated the longstanding prohibition of discrimination against religious sects or denominations.<sup>47</sup>

One remedy for this second sort of wrongdoing would be to require Congress to make its special land transfer mechanism available to any private organization that wishes to display its symbol within the general boundaries of the Preserve, so long as it is willing to compensate the government for a plot of land (and perhaps be subjected to certain neutral restrictions

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<sup>44</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1141–42 (2009) (Souter, J., concurring).

<sup>45</sup> *Id.* at 1142.

<sup>46</sup> *Buono IV*, 527 F.3d at 769 (describing the Buddhist group's request).

<sup>47</sup> *See, e.g., Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”) (link).

concerning the amount of land available and similar considerations).<sup>48</sup> This could be considered the opposite of condemnation—perhaps “transferral.” Instead of a forced transfer of property from a private entity to the government for compensation, this would be a forced transfer of property from the government to a private entity for compensation.

Now of course it might not be wise or feasible to require the federal government to transfer land in order to remedy a constitutional violation, but the government has another option. Whenever it faces a finding that it has made its facilities available to speech in a discriminatory fashion, it always has the choice of shutting down the forum altogether. Here, if the National Park Service does not want to offer privatization deals to all sects on the same terms, it could simply reverse the VFW deal—using its power of eminent domain, if necessary—and remove the cross.

While it is not completely fanciful to imagine that the federal government would agree to allow other groups to display permanent monuments, it is certainly unlikely. After all, the Mojave National Preserve comprises a massive territory that could easily accommodate a variety of private monuments representing a variety of perspectives—something that presumably would not have been possible in Pleasant Grove’s much smaller park. Interestingly, if federal officials continued to structure these deals as land exchanges, they could maintain or even increase the overall acreage of the Preserve.

#### IV.

Questioning the power of property or contract rules to manage constitutional difficulties raises issues that are deeper and more widespread concerning the relationship between the government’s private-law arrangements and its obligations under public law. Court decisions regarding such arrangements cut across substantive fields and, considered together, can appear patternless. Sometimes judges look through private-law forms to enforce substantive constitutional law, while other times they defer rather readily to such mechanisms. Given this variation, there is a danger that government actors will not think they have reason to pause before structuring transactions in order to circumvent public obligations. *Buono* in particular could be viewed as an illustration of that danger.

An example of the judiciary looking past private-law forms is *Allegheny County v. Greater Pittsburgh ACLU*,<sup>49</sup> where the Court struck down a crèche displayed during the holiday season on the county courthouse even though a sign informed onlookers that the nativity scene had been do-

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<sup>48</sup> I am thinking of an equivalent of time, place, and manner restrictions for permanent monuments. Another remedy might be to allow the government to unwind the property transaction and then welcome a variety of private organizations to display monuments on the land. Of course, that would work here only if the resulting forum sufficiently disassociated the government from any religious message, so that the policy mollified the Ninth Circuit’s Establishment Clause concerns.

<sup>49</sup> 492 U.S. 573 (1989) (link).

nated—and was still owned—by the Holy Name Society, a private Roman Catholic organization.<sup>50</sup> While the fact that the government took ownership of the display in *Sumnum* helped to show that it constituted official speech, the fact that the display in *Allegheny* was privately owned did not disassociate the government from its message. The Court has investigated private-law arrangements across other areas of constitutional law as well. Think for instance of *Burton v. Wilmington Parking Authority*, where the racial discrimination of a private restaurant was attributed to the state of Delaware because the restaurant leased space in a building publicly owned and operated by a state agency.<sup>51</sup> The *Burton* Court scrutinized the terms of the lease, which set up a special relationship of interdependence between the two entities, and emphasized the fact that prominent signs identified the building as public property.<sup>52</sup> In *Shelley v. Kraemer*, the Court struck down an attempt to use private racial covenants, rather than public ordinances, to segregate neighborhoods,<sup>53</sup> while the Court in *Marsh v. Alabama* extended constitutional speech protections to expression that occurred in a company town.<sup>54</sup> Finally, a state that contracted out certain inmate rehabilitation services to a religious organization was found to have violated the Establishment Clause even though a private group performed the sectarian instruction and inmates ostensibly could choose whether to participate in the program.<sup>55</sup>

Yet courts have, at times, respected structured transactions across a range of constitutional domains. Consider the state program in *Freedom from Religion Foundation, Inc. v. McCallum*, which outsourced certain halfway house services to a private religious organization that relied on re-

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<sup>50</sup> *Id.* at 579–80 (opinion of Brennan, J.).

<sup>51</sup> 365 U.S. 715 (1961) (link).

<sup>52</sup> *Id.* at 720.

<sup>53</sup> 334 U.S. 1 (1948) (link).

<sup>54</sup> 326 U.S. 501 (1946) (link). Justice Frankfurter addressed the relation between property law and constitutional principles in his concurrence:

A company-owned town gives rise to a net-work of property relations. As to these, the judicial organ of a State has the final say. But a company-owned town is a town . . . . Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations. And similarly the technical distinctions on which a finding of “trespass” so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution.

*Id.* at 510–11 (Frankfurter, J., concurring). Also pertinent might be *Wooley v. Maynard*, where the Court invalidated a New Hampshire law that required car owners to display a license plate bearing the state motto, “Live Free or Die.” 430 U.S. 705 (1977) (link). The Court emphasized that the state was requiring display of its message on private property without mentioning that the license plate itself likely remained public property. *Id.* at 715.

<sup>55</sup> See *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 424–25 (8th Cir. 2007) (link).

ligious teachings to rehabilitate offenders.<sup>56</sup> Parolees could choose among a variety of halfway houses, some of which were secular, but their parole officers could also recommend Faith Works, which “encourage[d] the offender to establish a personal relationship with God through the mediation of Jesus Christ.”<sup>57</sup> Judge Posner approved the contractual arrangement, saying that the offender’s private choice of programs provided “insulating material” between government and religion.<sup>58</sup> That was so even though the funding flowed directly to the organization, rather than through the private individual, as in the typical school voucher scenario.<sup>59</sup> Think too of speech cases where Congress required private organizations to segment its operations—formally and legally—so that lawmakers could fund only speech of which it approved without running up against the unconstitutional conditions doctrine.<sup>60</sup> A bit farther afield are conservation easements, which allow a town to transfer the right to prohibit land development to a nonprofit conservation organization.<sup>61</sup> Honoring such agreements has been the unquestioned practice despite the fact that these government transactions can enshrine public policy against democratic revision even more effectively than legislative entrenchment, a legislative technique that remains disfavored.<sup>62</sup>

Some of these contractual arrangements may have properly addressed the underlying constitutional concerns, while others may have functioned more like gerrymanders that allowed the government to effectively evade constitutional limitations. The point to take from this short piece is that constitutional theorists may want to think—in a sustained way, across all substantive domains—about the effects of government private-law transactions on public-law obligations. If it is correct to say that officials are in-

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<sup>56</sup> 324 F.3d 880 (7th Cir. 2003) (link).

<sup>57</sup> *Id.* at 881.

<sup>58</sup> *Id.* at 882.

<sup>59</sup> *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 644–48 (2002) (describing how voucher funds are given to the parents of the schoolchildren rather than directly to the schools in which they choose to enroll their children) (link).

<sup>60</sup> *Compare FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down a funding restriction that prohibited public broadcasting stations from “editorializing”) (link), *with Rust v. Sullivan*, 500 U.S. 173, 173–74 (1991) (approving a funding restriction that prohibited subsidy of abortion-related speech, reasoning in part that organizations remained free to engage in abortion-related communication so long as they kept it “separate and distinct” from funded speech) (link).

<sup>61</sup> *See* Christopher Serkin, *Conservation Easements*, U. CHI. L. REV. (forthcoming 2009) (manuscript on file with author).

<sup>62</sup> *Id.* Interestingly, the private law itself may be less formalistic than public law courts sometimes assume it to be. A variety of doctrines allow courts to put aside contractual arrangements that seem fraudulent in one way or another. Perhaps the most famous of these is the doctrine that permits piercing the corporate veil under certain circumstances. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) (“[t]he veil separating corporations and their shareholders may be pierced in some circumstances”). *See also, e.g., Edward J. Janger, The Death of Secured Lending*, 25 CARDOZO L. REV. 1759, 1762–69 (2004) (describing the doctrine of “true sale” in property and contract law, under which courts treat a purported sale as a loan if the ostensible buyer has not assumed the risks or purchased the benefits of ownership).

creasingly resorting to structured transactions, for instance when establishing public/private partnerships or when outsourcing public functions, then it may make sense to think more systematically about when and how those arrangements are constitutionally permissible.