

SALAZAR V. BUONO: THE PERILS OF PIECEMEAL ADJUDICATION

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The recent U.S. Supreme Court decision in *Salazar v. Buono*,¹ a case involving a Latin cross placed on federal land in the Mojave Desert by the Veterans of Foreign Wars, approaches what many would assume to be the central issue in the case from an oblique. Does the Mojave Desert cross, sitting atop Sunrise Peak in a federal park preserve, violate the Establishment Clause of the First Amendment? Neither Justice Kennedy's plurality opinion nor any of the concurring or dissenting opinions in *Salazar* answers that question. *Salazar*'s complicated web of facts and procedural history precluded the Court from resolving the most compelling issue in the *Salazar* litigation.² Instead, most of the opinions in *Salazar* circle the merits of the constitutionality of the Mojave Desert cross in language ostensibly directed at the remedy—the land transfer statute enacted to preserve the cross—but arguably aimed at the cross itself. On a charitable view, the plurality, concurring, and dissenting opinions simply make the best of the facts and law given the tortured path of the case through the lower courts. But it is not folly to speculate that a different path would have presented cleaner issues for decision and resolution, and would have given some closure to the litigants involved. Perhaps most important, a decision on the merits of the constitutionality of the Mojave Desert cross could have clarified the trajectory of the Supreme Court's Establishment Clause doctrine for future cases.³

This Essay briefly reviews the facts and procedural history of *Salazar*, and offers some thoughts on why the litigation may have proceeded as it did, leading to piecemeal adjudication of an important constitutional issue.

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¹ 130 S. Ct. 1803 (2010) (link).

² See *Salazar*, 130 S. Ct. at 1814.

³ See Christopher Lund, *Salazar v. Buono and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY 60 (2010) (acknowledging the lack of clarity in the Court's Establishment Clause doctrine, particularly in cases involving symbols), <http://www.law.northwestern.edu/lawreview/colloquy/2010/22/LRColl2010n22Lund.pdf> (link).

Finally, the Essay concludes with a discussion of what *Salazar* may mean for the future of the Supreme Court's Establishment Clause doctrine.

I. THE FACTS AND PROCEDURAL HISTORY OF THE SALAZAR LITIGATION

In 1934, the Veterans of Foreign Wars donated the Mojave Desert cross to the Mojave National Preserve and perched it atop Sunrise Rock, where it sat for nearly seventy years without legal challenge. The cross has existed in several forms over the years, but its most recent iteration consists of four-inch diameter white metal pipes; the cross itself stands somewhere under eight feet tall.⁴ Citizens have used the area around Sunrise Rock as a campsite and have held Easter services at the site of the cross.⁵ In 1999, however, the park service received a request to install a "stupa," or Buddhist shrine, near the cross.⁶ The National Park Service denied the request but announced that it would remove the cross.⁷ In response to the Park Service announcement, Congress passed legislation to prevent federal money from being used to remove the cross.⁸ Meanwhile, Frank Buono, a retired National Park Service employee and former assistant superintendent of the Preserve, with the help of the local ACLU, sued to have the cross removed on the ground that it violates the Establishment Clause of the First Amendment to the U.S. Constitution.⁹ As a retired park service employee who regularly visits the preserve, Buono reportedly drove out of his way to avoid the cross on his visits, not because of religious offense (he is Catholic), but because he is offended by the presence of a religious symbol on public property where other symbols are not also allowed to be displayed. Buono obtained an injunction to have the cross removed,¹⁰ and the Park Service covered up the cross, first with a tarp and then with a plywood box during the pendency of the litigation.¹¹ Before Buono obtained the injunction from the district court,¹² however, Congress passed legislation designating the Mojave Desert cross a national memorial "commemorating United States participation in World War I and honoring the American veterans of that war."¹³

⁴ *Salazar*, 130 S. Ct. at 1812.

⁵ *Id.*

⁶ *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205–06 (C.D. Cal. 2002) (link).

⁷ *Id.* at 1206.

⁸ *Id.*

⁹ *Id.* at 1202.

¹⁰ *Id.* at 1217.

¹¹ *Salazar*, 130 S. Ct. at 1812–13.

¹² *Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005).

¹³ Department of Defense and Emergency Supplemental Appropriations for Recover from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137, 115 Stat. 2230, 2278–79 (2002) (link).

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The government appealed the injunction to the Ninth Circuit Court of Appeals, arguing that the Mojave Desert cross did not violate the Establishment Clause and that Buono lacked standing to challenge the monument.¹⁴ While the parties awaited a decision, Congress passed legislation barring the use of government funds to dismantle World War I memorials.¹⁵ Congress subsequently entered into the land exchange at issue in *Salazar*. Under the proposed land transfer, the government would give to the local VFW the cross and one acre of land on which the cross sits in exchange for five acres of land in the same preserve—a parcel owned by veteran Henry Sandoz and his wife.¹⁶ The statute contained a reverter in favor of the government if the VFW failed to maintain the property as a “war memorial,”¹⁷ but, given that the Sandozes had maintained the cross display since 1998, it was safe to assume that they would continue to maintain not just any memorial, but the cross that historically had been displayed at the site.¹⁸

When the Ninth Circuit rendered its decision on the injunction appeal, the government lost on both the merits and the standing issues.¹⁹ Rather than appeal the Ninth Circuit’s decision on the injunction to the U.S. Supreme Court, however, the government allowed the time for appeal to lapse. Meanwhile, Buono challenged the land transfer in the district court on the ground that the transfer violated the injunction. Specifically, Buono characterized the land transfer as an unconstitutional ruse to keep the cross in place, rather than a legitimate attempt to comply with the original injunction.²⁰ The government lost,²¹ appealed, and lost for the second time in the Ninth Circuit.²² This time, however, the government sought review from the U.S. Supreme Court on the issues of whether the land transfer violated the injunction and whether Buono had standing to challenge it in the first instance, but not whether either the Mojave Desert cross or the land transfer violated the Establishment Clause.²³ Thus, the somewhat complicated facts

¹⁴ *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (link).

¹⁵ Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1519, 1551 (2002) (link). Previously, Congress had passed legislation that barred the use of government funds to dismantle the Mojave Desert cross. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A-230 (2001) (link).

¹⁶ Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121, 117 Stat. 1054, 1100 (2003); *Salazar*, 130 S. Ct. at 1813.

¹⁷ *Id.*

¹⁸ Henry and Wanda Sandoz had maintained the cross since 1983. In 1998 Mr. Sandoz constructed the most recent version of the monument. *Salazar*, 130 S. Ct. at 1812. According to Sandoz, he made a promise to a dying veteran to preserve the monument. *Mojave Cross*, Religion & Ethics News Weekly (Oct. 2, 2009), <http://www.pbs.org/wnet/religionandethics/episodes/october-2-2009/mojave-cross/4424/> (link).

¹⁹ *Buono*, 371 F.3d at 548, 550.

²⁰ *Buono*, 364 F. Supp. at 1178.

²¹ *Id.* at 1182.

²² *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007).

²³ Petition for Writ of Certiorari at (I), *Salazar*, 130 S. Ct. 1803 (2010) (No. 08-472).

and procedural history before the Supreme Court left it with few options other than to dispose of the case on standing grounds (an unlikely result), to reconcile the land transfer statute with the final injunction, or to find that the land transfer violated that injunction.

II. THE SALAZAR OPINIONS²⁴

Justice Kennedy's plurality opinion, joined by Chief Justice Roberts and joined in part by Justice Alito, grudgingly acknowledges the District Court's decision, affirmed on appeal, that the Mojave Desert cross violates the Establishment Clause.²⁵ On the issue of whether the land transfer can be squared with the injunction, however, the plurality remanded the case so that the district court could consider the "change of law" created by congressional action.²⁶ According to the plurality, the land transfer resulted from a "congressional statement of policy applicable to the case" that the district court failed to consider: the policy of accommodation.²⁷ According to the plurality, "[t]he Constitution does not oblige government to avoid any public acknowledgment of religion's role in society. Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework."²⁸

Given the plurality's broad statements about the virtues of accommodation and the district court's supposed error in that regard, it seems curious that the plurality did not simply decide the issue in favor of the government. The additional reason given for the remand is not particularly persuasive. Justice Kennedy stated that the district court's original injunction was based on the perception of endorsement under the "effect" prong of *Lemon v. Kurtzman*,²⁹ while the court later enjoined the land transfer based on congressional intent, i.e., the "intent" prong of *Lemon*.³⁰ Putting aside the questions of whether this analysis metastasizes *Lemon* into several doctrines instead of one and whether the analysis is an unduly stringent construction

²⁴ Excluded here is any discussion of the concurring opinion of Chief Justice Roberts and the dissenting opinion of Justice Breyer. Neither Justice seems to believe that *Salazar* presents any live Establishment Clause issues. See *Salazar*, 130 S. Ct. at 1821 (Roberts, C.J., concurring); *id.* at 1842 (Breyer, J., dissenting). Likewise, Justice Scalia, joined by Justice Thomas, concludes that Buono lacked standing. See *Salazar*, 130 S. Ct. at 1824 (Scalia, J., concurring in the judgment). Justice Scalia's concurrence appears to follow a recent trend of disposing of controversial church and state disputes on standing grounds. See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (link); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (link).

²⁵ See *Salazar*, 130 S. Ct. at 1815.

²⁶ *Id.* at 1818.

²⁷ *Id.*

²⁸ *Id.* at 1818–19 (citations omitted).

²⁹ 403 U.S. 602 (1971) (link).

³⁰ See *Salazar*, 130 S. Ct. at 1819.

of the injunction,³¹ the question itself points to a very simple fix. The district court need only rephrase its earlier conclusion to declare that a reasonable observer would perceive the land transfer as an attempt by Congress to endorse religion. Why the plurality demands that the district court spell out this conclusion on remand is a puzzle, unless the plurality expects the district court to reach a different one.³²

Justice Kennedy's plurality opinion rests on very narrow ground; nonetheless, it states some broad propositions about the Establishment Clause. While distancing itself from the lower court decision, the plurality notes that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm."³³ The opinion leaves little doubt about how the plurality would have decided the case on the merits of the constitutionality of the Mojave Desert cross; likewise, there is little doubt about the direction the plurality expects the district court to take on remand.

Justice Alito would avoid this extra step; his concurrence reaches out to hold that the land transfer does not violate the injunction at all.³⁴ Justice Alito's opinion recasts the characterization of the Mojave Desert cross in unmistakable terms:

[T]he original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.³⁵

For the dissenters, Justice Stevens, joined by Justices Ginsburg and Sotomayor, provided a forceful defense of the district court's finding of endorsement.³⁶ Justice Stevens recognized the obvious: that Congress intended the land transfer to preserve the cross.³⁷ Moreover, because Congress designated the cross a national memorial, the lower court's finding of endorsement of religion should apply to the Mojave Desert cross whether it

³¹ Ironically, in the lower court proceedings following *Lemon*, the Court was more generous when it considered whether a subsequent injunction fulfilled the Court's mandate in that case. See *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (link).

³² See *Salazar*, 130 S. Ct. at 1820–21 (suggesting that the district court on remand should analyze the land transfer in the context of "all relevant factors" including the congressional policy of accommodation).

³³ *Id.* at 1818.

³⁴ *Id.* at 1821 (Alito, J., concurring).

³⁵ *Id.* at 1822.

³⁶ *Id.* at 1832–33 (Stevens, J., dissenting).

³⁷ *Id.*

sits on public or private land.³⁸ Speaking directly to the plurality, Stevens rejected the proposition that a congressional motive of accommodation could overcome a finding of endorsement of religion.³⁹ Justice Stevens highlighted the significance of the cross as a sectarian symbol throughout the dissent, and he countered the plurality's and Alito's contrary characterizations as an attempt to re-decide the underlying issue of whether the Mojave Desert cross violates the Establishment Clause.⁴⁰

III. THE PATH OF LEAST RESISTANCE

The reason that the opinions in *Salazar* fail to squarely address the issue of whether the Mojave Desert cross violates the Establishment Clause is simple: the district court's injunction and the finding upon which it was based, affirmed in the Ninth Circuit, became final and binding *res judicata* when the government failed to timely appeal that earlier decision to the U.S. Supreme Court.⁴¹ (As if to deflate any contrary expectations, Justice Breyer noted at oral argument that the only remaining legal dispute in the case was the "very technical boring issue" of whether in enacting the land transfer statute the government would be in compliance with the injunction.⁴²) It follows, then, that the proximate reason that the issue was foreclosed amounted to the government's decision not to appeal the Ninth Circuit's original adverse ruling.⁴³ That decision may have left some scratching their heads. If the government wanted to win, why not press its case all the way to the Supreme Court?

Had the Supreme Court been tasked with discerning the constitutionality of the Mojave Desert cross itself, the government would have had at its disposal some strong arguments based on a pair of 2005 Supreme Court Ten Commandments decisions—*Van Orden v. Perry*⁴⁴ and *McCreary County v. ACLU*.⁴⁵ The Mojave Desert cross had a 68-year historical pedi-

³⁸ *Id.*

³⁹ *Id.* at 1838–40.

⁴⁰ *Id.* at 1839.

⁴¹ *Id.* at 1815 ("The District Court granted the 2002 injunction after concluding that a cross on federal land violated the Establishment Clause. The Government unsuccessfully challenged that conclusion on appeal, and the judgment became final upon direct review. . . . The Government therefore does not—and could not—ask this Court to reconsider the propriety of the 2002 injunction or the District Court's reasons for granting it.")

⁴² Transcript of Oral Argument at 9, *Salazar*, 130 S. Ct. 1803 (2010) (No. 08-472) (link).

⁴³ I assume for the purpose of this essay that the Department of Interior would have wanted to obtain a judgment from the Supreme Court that overturned the Ninth Circuit ruling but either made a strategic decision not to petition for a grant of certiorari to obtain such a judgment or simply missed the deadline for filing an appeal.

⁴⁴ 545 U.S. 677 (2005) (upholding the constitutionality of a 40-year old Ten Commandments display donated by the Fraternal Order of Eagles) (link).

⁴⁵ 545 U.S. 844 (2005) (striking down a relatively recent government display including the Ten Commandments) (link).

gree, reminiscent of the 40-year Texas Ten Commandments display upheld in *Van Orden*. Unlike the Ten Commandments display struck down in *McCreary*, the Mojave Desert cross was donated by the Veterans of Foreign Wars, rather than having been commissioned by the government. Likewise, the Mojave Desert cross had a long usage as a commemoration of the war dead, in addition to its religious use as a site for Easter services.⁴⁶ In his contribution to this symposium, Professor Lund stresses the profound religious significance of the cross to Christian believers, a fact which distinguishes it from the Ten Commandments—and no doubt he is right.⁴⁷ Yet the history of the cross as a symbol of the slain, regardless of whether that meaning also has a religious connotation and regardless of its effect on those who do not embrace that connotation, resonates more closely with the prevailing view in *Van Orden*.⁴⁸ Nevertheless, neither *Van Orden* nor *McCreary* had been decided at the time of the Ninth Circuit's decision upholding the district court's finding of unconstitutionality. In fact, the Ninth Circuit issued a decision on the merits in June of 2004,⁴⁹ and the deadline to appeal passed two months later. The Supreme Court did not grant certiorari in *Van Orden* and *McCreary*, however, until October of that year.⁵⁰ Therefore, the government in its second appeal to the Ninth Circuit was left with the argument that the decisions in *Van Orden* and *McCreary* made the original injunction moot, a position the Ninth Circuit apparently rejected.⁵¹

Without *Van Orden* and *McCreary* to provide a template for Supreme Court litigation involving religious symbols, the government likely analyzed the potential fate of the Mojave Desert cross under the Court's prior pair of symbols cases—*Lynch v. Donnelly*⁵² and *County of Allegheny v. ACLU*.⁵³ A critical factor in evaluating the application of those cases was probably an attempt to predict the vote of Justice Sandra Day O'Connor, whose endorsement test was introduced in her concurrence in *Lynch* and

⁴⁶ Ninth Circuit Judge Diarmuid O'Scannlain made precisely these arguments in his dissent to the denial of rehearing en banc. See *Buono v. Kempthorne*, 527 F.3d 758, 764–65 (9th Cir. 2008) (denial of rehearing en banc) (O'Scannlain, J., dissenting) (link).

⁴⁷ See Lund, *supra* note 3, at 64–65.

⁴⁸ See *infra* p. 83; *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring); see also *Salazar*, 130 S. Ct. at 1817 (citing Justice Breyer's concurrence in *Van Orden*); *Van Orden*, 545 U.S. at 691–92 (“The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government.”).

⁴⁹ See *Buono v. Kempthorne*, 371 F.3d 543 (9th Cir. 2004).

⁵⁰ See *Van Orden v. Perry*, 543 U.S. 923 (2004); *McCreary County v. ACLU*, 543 U.S. 924 (2004).

⁵¹ See *Buono v. Kempthorne*, 527 F.3d at 764 (O'Scannlain, J., dissenting) (noting that the court failed to mention the argument).

⁵² 465 U.S. 668 (1984).

⁵³ 492 U.S. 573 (1989). *Stone v. Graham*, an earlier case applying the *Lemon* test, involved a Kentucky statute that required the posting of the Ten Commandments in every public school classroom. 449 U.S. 39 (1980).

adopted by the Supreme Court in *County of Allegheny*.⁵⁴ Although the Court in *Lynch* upheld the crèche in that case—a manger scene surrounded by a hodgepodge of Christmas holiday fare⁵⁵—a plurality of the Court in *County of Allegheny* applied O'Connor's endorsement test to strike down a stand-alone crèche in a county courthouse.⁵⁶ The endorsement test, the framework the district court used to invalidate the Mojave Desert cross,⁵⁷ has been applied in numerous lower court cases to invalidate other religious displays.⁵⁸ Whether the Supreme Court would have applied the endorsement test and how Justice O'Connor would have voted were two big questions that the government likely could not answer with any degree of certainty.⁵⁹

Viewed in light of this ambiguity, the government's decision (assuming it was a decision) to let the time for appeal of the injunction lapse and defer to Congress to solve the problem made sense. Congress postponed the need to ponder doctrinal uncertainties when it enacted the land transfer.⁶⁰ Congressional action represented an easy solution by a group of actors who were politically motivated to preserve the veterans' memorial cross. Ultimately, however, congressional action must pass constitutional muster, and the final arbiter of that question is the United States Supreme Court. So one way or another, one would expect that the issue of the constitutionality of the Mojave Desert cross would likely end up before the Supreme Court—if not on its own, then tangled up in the legislation designed to keep the cross in place.

Unfortunately, *Salazar* presented the issue of the constitutionality of the Mojave Desert cross twice removed. However, the opinions in the case

⁵⁴ Justice O'Connor's articulation of the endorsement test focuses on whether government symbols send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). O'Connor added that "[d]isapproval sends the opposite message." *Id.*

⁵⁵ *Id.* at 687.

⁵⁶ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (link). In *Allegheny*, a plurality of the Court distinguished *Lynch* on the ground that the crèche in that case had been surrounded by other items that detracted from its religious message, while the crèche in the county courthouse stood alone. *Id.* at 598.

⁵⁷ *Buono v. Norton*, 212 F. Supp.2d 1202, 1216-17 (C.D. Cal. 2002).

⁵⁸ See, e.g., *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987) (link); *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), *cert. denied*, 479 U.S. 939 (1986) (link).

⁵⁹ Although Justice O'Connor's endorsement test focuses on whether nonadherents are made to feel like outsiders, this expansive understanding of the Establishment Clause conflicts with O'Connor's approval of civil references to religion such as the Pledge and "In God We Trust" on the currency, sometimes described as "ceremonial deism." On more than one occasion O'Connor defended the doctrine of ceremonial deism, notably in her concurrence in the Pledge of Allegiance case, in which she argued that one factor weighing in favor of the Pledge was its "history and ubiquity." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37-38 (2004) (O'Connor, J., concurring).

⁶⁰ Cf. e.g., *Mercier v. Fraternal Order of the Eagles*, 395 F.3d 693 (7th Cir. 2005) (link); *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000).

occasionally pierce through to the merits, and also provide some insight into the Justices' views regarding the Court's Establishment Clause doctrine.

IV. THE FUTURE OF THE SUPREME COURT'S JURISPRUDENCE OF MONUMENTS AND SYMBOLS

Although the *Salazar* decision does not directly address the constitutionality of the Mojave Desert cross, the case does provide some potential insight into the current Court's approach to religious monuments and symbols. It can be argued that a slim majority of the Court now favors the principle of accommodation. Justice Kennedy's plurality decision makes the case for accommodation in broad terms, and Justice Alito's concurrence strikes a similar chord.⁶¹ Justices Scalia and Thomas would have denied the plaintiff standing to challenge the land transfer, but both Justices have been stalwart supporters of the principle of accommodation in the past.⁶² Even Justice Breyer has stated previously that cultural strife may be avoided when the Court's Establishment Clause jurisprudence does not demand removal of every longstanding religious symbol from the public square.⁶³

The fact that a majority of the Court appears to support the principle of accommodation of religion raises certain implications for the endorsement test. Some of the commentary on the meaning of the *Salazar* opinions involves speculation about whether the Supreme Court continues to be committed to Justice O'Connor's endorsement test as a measure of the Establishment Clause.⁶⁴ In an earlier article on the Court's government speech decision in *Pleasant Grove City v. Summum*, I argued that Justice Alito's majority opinion signaled a possible retreat from the endorsement test.⁶⁵ Justice Alito, writing for all of the Justices except Justice Souter,

⁶¹ The Chief Justice's somewhat cryptic concurrence reveals no motive to effect a doctrinal sea change, but the fact that he joined in Justice Kennedy's plurality opinion is sufficient to show agreement with the dicta in support of accommodation.

⁶² See, e.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139–40 (2009) (Scalia, J., concurring) (link); *McCreary*, 545 U.S. 844, 905 (2005) (Scalia, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) (link).

⁶³ *Van Orden*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring).

⁶⁴ See Ian Bartrum, *Salazar v. Buono: Sacred Symbolism and the Secular State*, 105 NW. U. L. REV. COLLOQUY 31 (2010), <http://www.law.northwestern.edu/lawreview/colloquy/2010/20/LRColl2010n20Bartrum.pdf> (link); Mary Jean Dolan, *Salazar v. Buono: The Cross Between Endorsement and History*, 105 NW. U. L. REV. COLLOQUY 42 (2010), <http://colloquy.law.northwestern.edu/main/2010/09/salazar-v-buono-the-cross-between-endorsement-and-history.html> (link); see also David G. Savage, *Supreme Court Allows Mojave War Memorial Cross*, L.A. TIMES.COM, Apr. 29, 2010, <http://articles.latimes.com/2010/apr/29/nation/lan-court-cross-20100429> (noting that Justice O'Connor had employed the endorsement test, and that the decision in *Salazar* suggests that the Supreme Court has "shifted somewhat to the right") (link).

⁶⁵ See Lisa Shaw Roy, *Pleasant Grove City v. Summum: Monuments, Messages, and the Next Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 280 (2010) <http://www.law.northwestern.edu/lawreview/colloquy/2010/5/LRColl2010n5Roy.pdf> (link). But see Dolan, *supra* note 64, at 52 (summarizing Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After Summum*, 19 WM. & MARY BILL RTS. J., (forthcoming 2010)).

seemed to suggest in *Summum* that the Court no longer views monuments and symbols through an exclusively outsider lens. Alito stated that a monument “may be intended to be interpreted, and may in fact be interpreted by different observers in a variety of ways.”⁶⁶ Particularly in the context of symbols and displays, without a reasonable observer who can discern a message of exclusion the endorsement test loses much of its content.

Now, in *Salazar*, a case that began as litigation under the Establishment Clause, Justice Alito’s concurrence and Kennedy’s plurality opinion appear to confirm the move from no-endorsement toward its opposite pole, accommodation.⁶⁷ The accommodation to which the Court referred shifts the focus away from whether a hypothetical observer may perceive an exclusionary message. Instead, as its definition suggests, accommodation requires that the parties attempt “a reconciliation of differences,”⁶⁸ and it invites potential litigants to make peace with some traces of religion in public life. Commentators have recognized that an unyielding Establishment Clause jurisprudence leaves the losing side no less alienated than the group prevailing in a lawsuit.⁶⁹ One can only imagine the stakes being higher in the case of the proposed removal of a veteran’s memorial, a lone cross in a remote desert outpost. Picking up on this intuition, Justice Alito repeatedly warned that the alternative to accommodation would lead to the “disturbing symbolism” of the dismantling of the Mojave Desert cross and other symbols and monuments like it.⁷⁰

Nonetheless, the shift to accommodation in *Salazar* is made piecemeal, and for that reason, there is room for disagreement about the direction of the Court’s symbols and monuments cases. For example, in contrast to my explanation, Professor Mary Jean Dolan argues in her symposium piece that Justice Alito’s opinion in *Summum* and his concurrence in *Salazar*, along with the reasoning of the *Salazar* plurality, all depend on a contextual un-

⁶⁶ *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134–35 (2009). I do not read Justice Alito’s language in *Summum* as an assertion that monuments have no meaning. *Contra* Dolan, *supra* note 64, at 52. Rather, Justice Alito’s *Summum* opinion introduces the idea that there are multiple, real observers to any monument, and that a monument’s perceived meaning depends on these actual perspectives. This is consistent with the idea that in the case of certain monuments, such as the Statue of Liberty, there can be a widely-shared consensus on a prominent meaning conveyed by the monument. See *id.* at 52–53 (citing *Summum*, 129 S. Ct. at 1135).

⁶⁷ In *Salazar*, for example, Justice Alito asserts that observers of the Mojave Desert cross “appear to have viewed it as conveying at least two significantly different messages.” *Salazar*, 130 S. Ct. at 1822 (Alito, J., concurring in part and concurring in the judgment) (citing *Summum* 129 S. Ct. at 1135).

⁶⁸ *Accommodation Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/accommodation> (last visited Sept. 18, 2010) (link).

⁶⁹ See, e.g., Richard M. Esenberg, *Must God Be Dead or Irrelevant: Drawing a Circle That Lets Me In*, 18 WM. & MARY BILL RTS. J. 1 (2009); Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1 (2004); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the ‘No Endorsement’ Test*, 86 MICH. L. REV. 266 (1987).

⁷⁰ *Salazar*, 130 S. Ct. at 1823–24 (Alito, J., concurring in part and concurring in the judgment) (referring to the “arresting symbol” and the “disturbing symbolism” of the destruction of the monument).

derstanding of monuments that is the hallmark of the endorsement test.⁷¹ Professor Dolan therefore suggests that in *Salazar*, the endorsement test's basic inquiry survives alongside accommodation as two points on a continuum rather than as opposite poles.⁷² While plausible, this interpretation fails to adequately account for the fact that Justice O'Connor's endorsement test focuses on the message conveyed to a religious outsider,⁷³ but the *Salazar* plurality and Justice Alito's concurrence do not.⁷⁴ Under the endorsement test, a key question is whether a reasonable observer who views the Mojave Desert cross would perceive a message of religious exclusion.⁷⁵

On the other hand, Justice Alito's concurrence in *Salazar* notes that multiple observers have understood the Mojave desert cross to convey "at least two significantly different messages"—one religious, and one historical.⁷⁶ Moreover, the fact that Justice Alito's *Salazar* concurrence expands the discussion to include observers who would be offended by the symbolism of having the cross removed runs counter to the logic of the endorsement test.⁷⁷ In fact, nowhere in *Salazar* does Justice Alito connect the "disturbing symbolism" of the destruction of the monument with the perceptions of the endorsement test's "reasonable observer."⁷⁸ Rather, to the extent that Justice Kennedy's plurality opinion in *Salazar* discusses the

⁷¹ Dolan, *supra* note 64, at 52–53.

⁷² *Id.* at 57.

⁷³ *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); *see supra* note 54. Justice O'Connor's endorsement test arguably served her vision of a society that would, as she described, "place ourselves in another's shoes, to see things that may not be as fair or as equitable as they appear from our own vantage points." SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 276 (2003).

⁷⁴ Professor Dolan acknowledges the lack "of any noticeable attention to the perceptions of offended viewers and religious outsiders" in the *Salazar* plurality opinion and Justice Alito's concurrence but explains that the lower court decision may have rendered such a discussion unnecessary. Dolan, *supra* note 64, at 19.

⁷⁵ *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); *Buono v. Norton*, 371 F.3d 543, 547–50 (9th Cir. 2004) (discussing plaintiffs' standing and the merits); *Salazar*, 130 S. Ct. at 1832 (Stevens, J., dissenting) (stating the test as prohibiting government from "appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community'" (quoting *Cnty. of Allegheny*, 492 U.S. 573, 593–94 (1989) and O'Connor's concurrence in *Lynch*, 465 U.S. at 687)).

⁷⁶ *Salazar*, 130 S. Ct. at 1822 (Alito, J., concurring in part and concurring in the judgment).

⁷⁷ There is one possible argument that Justice Alito's observations may be harmonized with the endorsement test. Justice O'Connor's initial formulation of the endorsement test contained a sentence that recognized the possibility of government disapproval of religion which presumably could lead to an Establishment Clause violation. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Nonetheless, to consider whether a monument's demolition, deemed necessary under the endorsement test, constitutes disapproval of religion under the same test, would collapse the test. *Cf., e.g., Vasquez v. Los Angeles County*, 487 F.3d 1246, 1257 (9th Cir. 2007) (rejecting argument that removing of cross from county seal evinced hostility to Christianity) (link).

⁷⁸ *See Salazar*, 130 S. Ct. at 1823–24 (Alito, J., concurring in part and concurring in the judgment).

proper application of the endorsement test, it seems, as the plurality notes from the outset, that it is simply constrained by *res judicata*.⁷⁹

The potential ascendancy of accommodation, however, presents challenges for its advocates. Professor Stanley Fish maintains that to “de-religionize” a monument to argue in support of its constitutionality is disingenuous; of course everyone knows that the cross is a religious symbol.⁸⁰ This assertion, while true, oversimplifies Justice Kennedy’s argument in an important respect. The Mojave Desert cross is religious *and* secular at the same time; Kennedy’s argument rests on a “both and”, rather than an “either or” proposition.⁸¹ In many cases, the religious aspect of the symbol is an irreducible and historically-identified component. A virtue of accommodation is that it does not demand a choice between two undesirable extremes—on the one hand, an obsessive focus on religion to the exclusion of important historical and cultural realities; and on the other, an implausible denial of a symbol’s religious character.

Perhaps a more serious challenge for religionists is the assertion that they can only obtain something of a Pyrrhic victory when the constitutionality of a religious symbol like the cross rests on the conclusion that the cross is also secular. As Professor Bartrum explains in his contribution to this symposium, a legal doctrine that emphasizes the secular aspects of a religious symbol arguably empowers the state to exercise a “corruptive power” over religion.⁸² He reminds us of the revival of scholarship on the legacy of Roger Williams, founder of Rhode Island and the intellectual forebear of modern-day evangelicals, who adamantly opposed state intrusion into the garden of religious life.⁸³ Nonetheless, it is far from clear that eighteenth century evangelicals would have opposed public religious symbols and monuments on separationist grounds.⁸⁴ Further, as to these evangelicals’ mod-

⁷⁹ *Id.* at 1818 (“Although, for purposes of the opinion, the propriety of the 2002 injunction may be assumed, the following discussion should not be read to suggest this Court’s agreement with that judgment, some aspects of which may be questionable. The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.”). Similarly, the plurality qualifies its use of the reasonable observer with citations to earlier criticisms of the endorsement test. *See id.* at 1819. Justice Alito’s concurrence voices the same skepticism. *Id.* at 1824 (Alito, J., concurring in part and concurring in the judgment) (“Assuming that it is appropriate to apply the so-called ‘endorsement test’, this test would not be violated by the land exchange.”).

⁸⁰ Stanley Fish, *When Is a Cross a Cross?*, N.Y. TIMES OPINIONATOR BLOG, May 3, 2010, <http://opinionator.blogs.nytimes.com/2010/05/03/when-is-a-cross-a-cross/>.

⁸¹ *See* Steven D. Smith, *Was Justice Kennedy Dishonest?*, LAW, RELIGION, AND ETHICS: A MULTI-FAITH DIALOGUE, (May 4, 2010), <http://lawreligionethics.net/2010/05/was-justice-kennedy-dishonest/>.

⁸² Bartrum, *supra* note 64, at 40.

⁸³ *See, e.g.*, MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965).

⁸⁴ *See* HOWE, *supra* note 83, at 172 (“The refusal of the Court to recognize that the importance of [the Establishment and Free Exercise Clauses] for most persons lay in the assurance that intruders from the federal wilderness would not trespass in the gardens of religion produced a gravely distorted picture of American intellectual and spiritual history. Furthermore, it permitted the Court to fill the space from which it had removed the vivid complexities of the eighteenth century’s political philosophy with a sim-

ern-day counterparts, the litigation of these issues reveals that religionists themselves appear to perceive little internal threat from Supreme Court statements about the secular character or appeal of religious symbols.⁸⁵

But all of this is not to suggest that we know precisely what accommodation means or what its limits are.⁸⁶ In the context of symbols and monuments accommodation may still be “a label, not a theory.”⁸⁷ If accommodation is, in fact, the Court’s new direction, then it will be important to understand its scope, and *Salazar*, unfortunately, does not aid in that process.⁸⁸

CONCLUSION

The long-awaited decision in *Salazar v. Buono* offers a partial view into the future of the Court’s Establishment Clause doctrine. The decision would have offered a nearly perfect window if the constitutionality of the Mojave Desert cross had been the central issue in the case. Instead, the piecemeal litigation in *Salazar* leaves us with many unanswered questions, and perhaps more litigation ahead. *Salazar* returns the dispute to the district court for a re-evaluation of the propriety of the land transfer. We are told that, on remand, the district court is to consider the policy of accommodation.⁸⁹ Perhaps we are also told that, in the coming years, a majority of the Supreme Court will be guided by it as well.

ple and false absolute—all aid to religion is unconstitutional.”). *But see* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 306–16 (2008).

⁸⁵ *See, e.g.*, Amici Curiae Brief of the American Center for Law and Justice and Fifteen Members of Congress in Support of Petitioners, *Salazar v. Buono*, 130 S. Ct. 1803 (No. 08-472) (link); Brief for Amicus Curiae Liberty Counsel in Support of Petitioners, *Salazar v. Buono*, 130 S. Ct. 1803 (No. 08-472) (link); Brief Amici Curiae of the Christian Legal Society and the National Association of Evangelicals in Support of Petitioners, *Salazar v. Buono*, 130 S. Ct. 1803 (No. 08-472) (link). Two of the three amicus briefs mentioned above argue that Buono lacks standing, but their participation in the litigation shows their willingness to defend the public display of the Mojave Desert cross.

⁸⁶ *See, e.g.*, *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 559 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment.”). One limit may be found in Justice Kennedy’s *Salazar* plurality opinion; he provides the same example of a forbidden establishment found in his *Allegheny* opinion—a Latin cross atop city hall. *Salazar*, 130 S. Ct. at 1816; *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁸⁷ Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 4 (1985). Then-Professor McConnell devoted his article to the discussion of legislative accommodations and free exercise exemptions, not the public display of religious symbols and monuments. *See id.*; *see also* Michael McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 687 (1992) (excluding symbols cases from discussion of the theory of accommodation).

⁸⁸ *Salazar*, 130 S. Ct. at 1820 (“To date, this Court’s jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules”).

⁸⁹ *See id.* at 1818, 1820–21.