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How Salazar v. Buono Synthesizes the Supreme Court's Establishment Clause Precedent into a Single Test

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HOW *SALAZAR V. BUONO* SYNTHESIZES THE SUPREME COURT'S ESTABLISHMENT CLAUSE PRECEDENT INTO A SINGLE TEST

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INTRODUCTION

Atop Sunrise Rock, a large Latin cross[1] casts a shadow over the Mojave National Preserve in Southern California.[2] This cross seems oddly out of place. It is not located in a church. It is not located in a museum. It is located in a national preserve that encompasses 1.6 million acres.[3] There is no fence surrounding the cross. There is no sign explaining why it is there. No other religious or cultural markers are in the vicinity. The cross sits alone in the middle of this vast public land. Does its presence on public land constitute a violation of the First Amendment Establishment Clause?[4] Would the answer change if the tiny parcel of land under the cross were transferred to a private party? If so, would the reasons why the government transferred the land matter?

The Supreme Court faced these facts in *Salazar v. Buono*.[5] The cross in *Salazar* was originally erected in 1934 by a veteran's organization called the Veterans of Foreign Wars ("VFW").[6] Frank Buono, a former park ranger who

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[1] A Latin cross "has two arms, one horizontal and one vertical, at right angles to each other, with the horizontal arm being shorter than the vertical arm." Buono v. Norton (*Buono I*), 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002).

[2] Salazar v. Buono, 130 S. Ct. 1803, 1811 (2010). Although the cross has recently been stolen, this Article assumes the cross is still present. David Kelly, *Mojave Desert Cross, Focus of Long Legal Battle, is Stolen*, L.A. TIMES (May 12, 2010), http://articles.latimes.com/2010/may/12/local/la-me-mojave-cross-20100512.

[3] *Mojave National Preserve*, U.S. NAT'L PARK SERV., http://www.nps.gov/moja/index.htm (last visited Mar. 18, 2011).

[4] The First Amendment Establishment Clause states: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. The First Amendment also applies to the states through the Fourteenth Amendment. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (stating that the First Amendment applies to the states).

[5] *Salazar*, 130 S. Ct. at 1803.

[6] *Id.* at 1811.

was offended by the cross's presence on federal land, challenged its Constitutionality.[7] The Supreme Court case of *Salazar* was the culmination of four previous federal district court and court of appeals rulings on the cross—*Buono I*,[8] *Buono II*,[9] *Buono III*,[10] and *Buono IV*[11] (collectively, the "*Buono* cases"). In *Buono I*, the district court found that the cross's location on federal land violated the Establishment Clause and granted injunctive relief against the government.[12] Following *Buono I*, Congress passed legislation to transfer the small piece of land under the cross to the VFW ("land-transfer statute").[13] Then in *Buono II*, the Ninth Circuit affirmed *Buono I*, although it chose not to address the Constitutionality of the land-transfer statute.[14] Buono then challenged the transfer of the land containing the cross and, in *Buono III*, the district court prohibited the transfer on the grounds that it did not, and would not, cure the government's Establishment Clause violation.[15] The Ninth Circuit affirmed in *Buono IV*.[16] The U.S. Secretary of the Interior, Ken Salazar, appealed to the U.S. Supreme Court challenging both Buono's standing to bring the case as a now retired national park employee and the district court's injunction and finding of continued unconstitutionality despite the land sale.[17]

The Supreme Court in *Salazar* reversed *Buono IV* and remanded the case.[18] In a jumbled set of seven separate opinions, the plurality, led by Justice Kennedy, held that although Buono had standing, the district court did not employ the proper Establishment Clause analysis and improperly extended its first injunction against the cross to reach the land-sale statute as well.[19] This Article argues that, however convoluted the multiple opinions in *Salazar* appear on first reading, they reveal that the Justices' opinions together stand for a single framework for addressing the Constitutionality of religious objects on public land[20]—what this Article calls the "inside/outside" test. Pursuant to the inside/outside test, a court must analyze the government's actions from

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7 *Id.* at 1812.
8 *Buono I*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002).
9 Buono v. Norton (*Buono II*), 371 F.3d 543 (9th Cir. 2004).
10 Buono v. Norton (*Buono III*), 364 F. Supp. 2d 1175 (C.D. Cal. 2005).
11 Buono v. Kempthorne (*Buono IV*), 527 F.3d 758, 768 (9th Cir. 2008).
12 *Id.*
13 Salazar v. Buono, 130 S. Ct. 1803, 1813 (2010).
14 *Buono II*, 371 F.3d at 543.
15 *Buono IV*, 527 F.3d at 768.
16 *Id.*
17 *Salazar*, 130 S. Ct. at 1803.
18 *Id.* at 1808.
19 *See infra* Part I.B.1 (examining Justice Kennedy's opinion in *Salazar*).
20 *See Salazar*, 130 S. Ct. at 1819–20.

both an *inside* and an *outside* perspective. The inside perspective asks a court to determine if the predominant purpose or intent of a government action is to promote religion. The outside perspective asks a court to look at a disputed action from an outsider's perspective to determine whether the effect of the government's conduct appears to endorse religion—regardless of actual intent.

After distilling this test from the *Salazar* opinions and the precedents on which they call, this Article argues that the inside/outside test is not only consistent with the apparent hodgepodge of Establishment Clause cases since the Supreme Court's seminal, multi-pronged approach in *Lemon v. Kurtzman*,[21] but the inside/outside test actually synthesizes that precedent into a single test. Finally, this Article applies the inside/outside test to the facts of *Salazar* as the district court is required to do on remand and concludes that the district court should strike down the land-sale statute because it violates the Establishment Clause.

I. DEVELOPING THE INSIDE/OUTSIDE TEST THROUGH AN ANALYSIS OF *SALAZAR V. BUONO*

Salazar is the most recent Supreme Court case addressing the issue of religious objects on public land. This Part first details the history of the *Buono* cases that led up to *Salazar*. Then it analyzes the seven opinions issued by the Court in *Salazar*. Finally, it argues that all of the opinions that deal with the merits of the Establishment Clause actually agree on applying a single framework, which this Article calls the inside/outside test.

A. The Buono *Cases*

The cross at issue in *Salazar* is "between five and eight feet tall" and is permanently located on Sunrise Rock—a prominent location within the Mojave National Preserve.[22] It was originally erected with private funds by the VFW in 1934 as a memorial to those who died in World War I.[23] The cross has since been replaced several times by private parties, although a plaque that was originally next to it stating its purpose has not been replaced; the cross now stands alone with nothing to indicate its purpose.[24] Although veterans have gathered at the cross to celebrate Easter sunrise services since 1935, there is no

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21 Lemon v. Kurtzman, 403 U.S. 602 (1971).
22 *Buono I*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002).
23 *Id.*
24 *Id.*

evidence that veterans, or any other persons, have gathered at the cross for any type of veterans memorial services.[25]

The public controversy surrounding the cross began in 1999 when the National Park Service denied a request to erect a Buddhist shrine near the cross.[26] Subsequently, the American Civil Liberties Union threatened legal action unless the cross was removed.[27] After a National Park Service evaluation concluded that the cross did not qualify for the National Register of Historic Places, the Park Service decided to remove it despite significant public opposition.[28]

In response to the Park Service's decision to remove the cross, a U.S. Congressman from California, Jerry Lewis, helped pass an appropriations bill in 2000, which prohibited using federal funds to remove the cross ("Anti-Removal Act").[29] The next year, Congress passed another appropriations bill, which designated the cross as a national World War I memorial and provided $10,000 to install a memorial plaque next to the cross ("Memorial Act").[30] This bill made the cross the only national World War I memorial in the nation.[31] Congress passed another defense appropriations bill in 2002 that included a section prohibiting the dismantling of the cross.[32]

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[25] *Salazar*, 130 S. Ct. at 1838 (Stevens, J., dissenting).

[26] *Buono I*, 212 F. Supp. 2d at 1206.

[27] *Id.*

[28] *Id.*

[29] Valerie Richardson, *Mojave Cross Can Stay on Display in Calif.*, WASH. TIMES (Apr. 29, 2010, 4:00 AM), http://www.washingtontimes.com/news/2010/apr/29/mojave-cross-can-stay-on-display-in-a-preserve/print. "None of the funds in this or any other Act may be used . . . to remove the five-foot-tall white cross located within the boundary of the Mojave National Preserve . . . ." Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763A–230 (2000).

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

> The five-foot-tall white cross . . . is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.
> . . . .
> . . . The Secretary of the Interior shall use not more than $10,000 . . . to acquire a replica of the original memorial plaque . . . .

Id.

[31] Salazar v. Buono, 130 S. Ct. 1803, 1842 (2010) (Stevens, J., dissenting).

[32] *Buono IV*, 527 F.3d 758, 768 (9th Cir. 2008). "Congress passed a defense appropriations bill that included a provision barring the use of federal funds 'to dismantle national memorials commemorating United States participation in World War I.'" *Id.* (quoting Department of Defense Appropriations Act of 2003, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1151 (2002)).

Meanwhile, Buono, a Christian and the former Assistant Superintendent of the Mojave National Preserve, filed *Buono I* in 2001 against the U.S. Department of the Interior, the National Park Service, and the Mojave National Preserve to challenge the presence of the Latin cross in the Preserve.[33] Buono claimed that the cross's display on public land violated the Establishment Clause.[34]

1. Buono I

In its 2002 *Buono I* decision, the United States District Court for the Central District of California held that the presence of the cross at Sunrise Rock violated the Establishment Clause.[35] The court explained that even though the cross is officially a war memorial, the cross's presence was unconstitutional because a reasonable observer would view the cross to be an endorsement of religion.[36] The district court issued an injunction prohibiting the display of the cross and granted declaratory relief in favor of Buono.[37]

Congress did not like the district court's decision in *Buono I*.[38] In response, Congress passed another appropriations bill that included a section requiring the government to transfer the land under the cross to the VFW in exchange for a privately-owned five-acre parcel elsewhere in the reserve.[39] The land-transfer statute states:

> In exchange for the private property [consisting of five acres next to the Preserve] the Secretary of the Interior shall convey to the [VFW the land containing the cross]. Notwithstanding the conveyance . . . the Secretary shall continue to carry out the responsibilities of the Secretary under [the Memorial Act].[40]

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[33] *Buono I*, 212 F. Supp. 2d at 1204. This Article does not discuss issues related to mootness or state action. See Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 215 (2004), for a discussion of these issues.

[34] *Buono I*, 212 F. Supp. 2d at 1203–04, 1207–08.

[35] *Id.* at 1217. The court did not consider the transfer of the land under the cross until *Buono III*. *See generally Buono III*, 364 F. Supp. 2d 1175 (C.D. Cal. 2005).

[36] *Buono I*, 212 F. Supp. 2d at 1215, 1217.

[37] *Id.* at 1217.

[38] Jesse Merriam, Salazar v. Buono*: Can Government Give One Religion's Symbol Prominence in a Public Park?*, PEW RES. CENTER (Sept. 24, 2009), http://pewresearch.org/pubs/1353/salazar-buono-establishment-clause-religious-display.

[39] Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1100 (2003).

[40] *Id.*

This transfer left "a little donut hole of land with a cross in the midst of a vast federal preserve."[41] It also required the federal government to spend $10,000 on a plaque after the transfer in accordance with the Memorial Act.[42] The land-transfer statute also included a reversionary clause, stating:

> The conveyance . . . shall be subject to the condition that the recipient maintain the conveyed property as a memorial . . . . If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.[43]

Thus, it effectively required the VFW to retain the cross by maintaining the property as a war memorial.

2. Buono II

The Ninth Circuit in *Buono II* chose not to rule on the effect of transfer under the land-transfer statute and simply affirmed *Buono I*.[44] The Ninth Circuit, relying on one of its earlier decisions that prohibited a cross on public land,[45] held that a reasonable observer would view a lone cross on public land to be an unconstitutional endorsement of religion.[46] This decision was not appealed.[47] Thus, the Ninth Circuit's determination in *Buono II* that the presence of the cross on federal land is a violation of the Establishment Clause became final.[48]

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[41] *Buono IV*, 527 F.3d 758, 768 (9th Cir. 2008).

[42] *Buono II*, 371 F.3d 543, 545 (9th Cir. 2004); *see also supra* note 30 and accompanying text (explaining the Memorial Act).

[43] Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(e), 117 Stat. 1100 (2003).

[44] *Buono II*, 371 F.3d at 543.

[45] Separation of Church & State Comm. v. Eugene, 93 F.3d 617 (9th Cir. 1996) (holding that a cross on public land violated the Establishment Clause because a reasonable observer might view the cross as showing a governmental preference of religion; this was despite the fact that the cross was clearly marked with a plaque saying it was a war memorial).

[46] *Buono II*, 371 F.3d at 548–50. Additionally, the court's dicta explained that because over ninety percent of the 1.6 million acres of the Mojave National Preserve are federally owned, a reasonable observer would believe the cross is on public land. *Id.* at 550.

[47] *See id.*

[48] Salazar v. Buono, 130 S. Ct. 1803, 1813 (2010).

3. Buono III

Following *Buono II*, Buono sued the government to prevent it from transferring the cross to the VFW under the land-transfer statute.[49] The United States District Court for the Central District of California in *Buono III* agreed with Buono and noted four "unusual circumstances" that made the transfer unconstitutional.[50] First, the district court found it unusual that the land-transfer statute gave the government reversionary rights if the land was used for any other purpose than as a memorial with a cross.[51] It found that clause to be problematic:

> [T]he government has tightly restricted the VFW's use of the subject property for one purpose and, more importantly, has reserved the right to reassert ownership and repossess the subject property any time . . . that the VFW is not adequately maintaining the Latin cross as a World War I memorial.[52]

Second, the Memorial Act, despite the transfer, still required the use of federal funds to create a memorial plaque.[53] The court explained that "demonstrate[s] that the government is intent on preserving the Latin cross, the primary symbol of Christianity, in the Preserve," and it "compel[s] the conclusion that the government reserved its rights to remain actively involved with the Latin cross, even though the VFW has ownership of the subject property."[54] Third, the land transfer was not executed through an open bidding process, but instead the land was conveyed directly to the VFW, the group actively seeking to keep the cross.[55] To the court, this conveyance "demonstrate[d] that the government's apparent endorsement of a particular religion ha[d] not actually ceased" and the court could "only conclude that, under these circumstances, the VFW [was] 'a straw purchaser.'"[56]

Finally, the court was troubled by the government's substantial legislative efforts to protect the cross.[57] After listing the legislation that the government passed, the court concluded that these "herculean efforts . . . can only be

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[49] *Buono III*, 364 F. Supp. 2d 1175 (C.D. Cal. 2005).
[50] *Id.* at 1178.
[51] *Id.* at 1181.
[52] *Id.* at 1179.
[53] Department of Defense Appropriations Act of 2002, Pub. L. No. 107-117, § 8137, 115 Stat. 2278 (2002).
[54] *Buono III*, 364 F. Supp. 2d at 1180.
[55] *Id.*
[56] *Id.* at 1180–81 (quoting Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 702 (7th Cir. 2005)).
[57] *Id.* at 1181–82.

viewed as an attempt to keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation."[58] The district court explained that because of these unusual circumstances, the transfer was a violation of the Establishment Clause and enjoined it.[59]

4. Buono IV

The Ninth Circuit affirmed *Buono III*, enjoined the transfer, and ordered the government to comply with the original injunction from *Buono I*.[60] The Ninth Circuit focused on three aspects of the proposed transfer that it found to be unconstitutional: (1) the government's continued oversight over the cross because of the reversionary clause in the land-transfer statute; (2) the details of the transfer itself; and (3) the significant legislative efforts to preserve the cross.[61]

First, the Ninth Circuit found that the reversionary clause in the land-transfer statute enabled the government to exercise substantial control over the cross after the transfer.[62] Second, it explained that Congress's decision to authorize the land transfer in a provision buried in an appropriations bill, and its choice not to conduct an open public bidding, evidenced that the VFW was a "straw" purchaser.[63] Additionally, the court was disturbed that the transfer would give the VFW only a tiny piece of land without any distinguishing marks, such as a fence, to clarify that it is not part of the Mojave National Preserve.[64]

Finally, *Buono IV* found the government's "herculean efforts" to preserve the cross to be evidence of an illegal endorsement of religion.[65] The repeated legislative attempts[66] to evade the injunction and keep the cross in place, and continued government spending on the cross to create a plaque,[67] would lead a

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58 *Id.* at 1182.

59 *Id.*

60 *Buono IV*, 527 F.3d 758, 768 (9th Cir. 2008).

61 *Id.* at 779.

62 *Id.* at 780–81 (relying on Fourth Circuit and Fifth Circuit case law stating that a reversionary clause results in government control of property even after it transfers the property); *see* Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Hampton v. Jacksonville, 304 F.2d 320 (5th Cir. 1962).

63 *Buono IV*, 527 F.3d at 781–82.

64 *Id.* at 783.

65 *Id.* at 782.

66 *See supra* Part I.A (discussing the legislative efforts to preserve the cross).

67 *See supra* notes 40–43 and accompanying text (explaining how the land-transfer statute requires the federal government to spend funds to install a plaque after the transfer).

reasonable observer, aware of this legislative history, to believe that the government is endorsing religion.[68] Therefore, the court held that the proposed transfer did not cure the Establishment Clause violation found in *Buono II*.[69] It affirmed the district court's ruling and required that the government not permit the display of the cross.[70] The Supreme Court granted a writ of certiorari to hear the government's appeal of *Buono IV*.[71] In 2010, the Court issued its ruling in *Salazar*.[72]

B. Examining the Salazar *Opinions*

The Supreme Court's plurality decision in *Salazar* reversed *Buono IV* and remanded the case.[73] Justice Kennedy presented the judgment of the Court, which held that the district court did "not engage in the appropriate inquiry."[74] Chief Justice Roberts filed a concurring opinion,[75] Justice Alito filed an opinion concurring in part and concurring in the judgment,[76] and Justice Scalia, joined by Justice Thomas, filed an opinion concurring in the judgment.[77] Justice Stevens, joined by Justice Ginsberg and Justice Sotomayor, filed a dissenting opinion,[78] and Justice Breyer filed a separate dissenting opinion.[79]

1. Justice Kennedy's Announcement of the Judgment

Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, delivered the judgment of the case.[80] Before discussing the merits of the case, Justice Kennedy stated that Buono had standing in *Salazar* as a proper way to

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68 *Buono IV*, 527 F.3d 758, 782 (9th Cir. 2008).

69 *Id.* at 779–82.

70 *Id.* at 782.

71 Salazar v. Buono, 130 S. Ct. 1803 (2010).

72 *Id.* The case name switched from *Buono v. Kempthorne* to *Salazar v. Buono* because Ken Salazar replaced Dirk Kempthorne as the U.S. Secretary of the Interior. Press Release, U.S. Dep't of the Interior, Secretary Kempthorne Applauds Nomination of Senator Salazar (Dec. 17, 2008), http://www.doi.gov/archive/news/08_News_Releases/121708a.html.

73 *Salazar*, 130 S. Ct. at 1821.

74 *Id.* at 1816.

75 *Id.* at 1821 (Roberts, C.J., concurring).

76 *Id.* (Alito, J., concurring in part and concurring in the judgment).

77 *Id.* at 1824 (Scalia, J., concurring in the judgment).

78 *Id.* at 1828 (Stevens, J., dissenting).

79 *Id.* at 1842 (Breyer, J., dissenting).

80 *Id.* at 1811 (majority opinion).

enforce the injunction and final judgment established in *Buono I* and *Buono II*.[81]

After reviewing the merits of the case, Justice Kennedy reversed and remanded because the district court did not employ the proper analysis.[82] According to Justice Kennedy, the land-transfer statute created a substantial change in circumstances between *Buono I* and *Buono III* because the government was required to transfer the land under the cross to a private party.[83] Justice Kennedy also believed that the district court improperly dismissed Congress's motives as illicit without properly considering why Congress passed the land-transfer statute.[84] Justice Kennedy explained that a proper analysis of the government's motives would have considered that Congress may have wanted to protect the cross not for its religious purposes, but for its historical meaning as a war memorial and gathering place for the public.[85] His opinion recognized the difficult predicament that Congress was in—it needed to comply with an injunction prohibiting it from displaying the cross, but it also wanted to respect a monument honoring veterans of World War I.[86] The Court noted that the cross is the only national memorial honoring the American soldiers killed in World War I and that it is reasonable to interpret that Congress intended to honor that historical meaning in transferring the cross rather than tearing it down.[87]

Justice Kennedy also instructed the district court to consider in its analysis a hypothetical reasonable observer.[88] This observer would be aware that Congress faces a difficult situation involving competing issues: a desire to respect the monument versus a desire to respect the Establishment Clause.[89] Additionally, this observer should not only focus on the religious aspects of the cross, but also consider the changes resulting from the land-transfer statute as well as how time may have played a role in changing the cross's meaning in the "public consciousness."[90] Finally, Justice Kennedy said it was incumbent

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[81] *Id.* at 1814–16. Justice Kennedy noted that his opinion was not meant to be an endorsement of the lower courts' rulings in *Buono I* and *Buono II*. *Id.* at 1818.

[82] *Id.* at 1816.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 1817.

[86] *Id.* at 1820.

[87] *Id.* at 1817.

[88] *Id.* at 1819–20.

[89] *Id.*

[90] *Id.* at 1817, 1819.

on the district court to have considered less drastic relief to cure the Establishment Clause violation—such as requiring the VFW to erect a sign indicating its ownership of the land—rather than completely invalidating the land-transfer statute.[91]

2. Chief Justice Roberts's Concurrence

Chief Justice Roberts gave a one paragraph concurrence.[92] He stated that he did not see a difference between the government's actions here and the multi-step process of tearing down the cross, selling the land, and then having the VFW re-erect the cross on its now private land.[93] He applauded Congress for skipping that empty ritual by just transferring the land.[94] Although this opinion alone does not add much to clarify how to approach a potential Establishment Clause violation, because he signed onto Justice Kennedy's opinion, he clearly agrees with Justice Kennedy's framework.

3. Justice Alito's Concurrence

Justice Alito also agreed with Justice Kennedy's approach, but stated that he would go one step further and hold the land-transfer statute Constitutional.[95] According to Justice Alito, the factual record was sufficiently established to apply the framework from Justice Kennedy's opinion, and he argued that if the Court were to do so, then the land-transfer statute would be Constitutional.[96]

Justice Alito did not believe that Congress's purpose in passing the land-transfer statute was improper.[97] He rejected the district court's finding that Congress passed the land-transfer statute to promote a religious message.[98] Instead, he found that Congress's purpose was to honor the World War I soldiers and to protect a national monument.[99] Rather than delving into why he

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91 *Id.* at 1820.

92 *Id.* at 1821 (Roberts, C.J., concurring).

93 *Id.* The body of this Article does not directly address this argument. It is clear, however, that this ritual makes a difference under the inside/outside test because if the government decided to tear down the cross, it would affect how a reasonable observer would view the land transfer. Additionally, it would show that the government's motive in the land transfer was not to maintain the cross.

94 *Id.*

95 *Id.* (Alito, J., concurring in part and concurring in the judgment).

96 *Id.*

97 *Id.* at 1824.

98 *Id.*

99 *Id.*

believed this to be true, Justice Alito simply deferred to Congress.[100] He noted that the land-transfer statute was very popular,[101] that Congress has generally shown notable concern for the rights of minorities,[102] and that congressional land transfers and exchanges are common in the western states with their vast tracts of federal land and national parks.[103]

Like Justice Kennedy, Justice Alito constructed a hypothetical reasonable observer that would be aware of the history and pertinent facts surrounding the display.[104] According to Justice Alito, this reasonable observer would know that the cross is on private land after the transfer and would appreciate that the government transferred the cross to sever any endorsement of a religious message that an observer would read into the cross.[105] Additionally, he said that although a cross can have a religious meaning, a reasonable observer here would understand the cross was a commemoration of those who died in World War I.[106] He noted that in this part of the country, it is common for there to be no demarcations distinguishing private and public land.[107] He also explained that taking down the cross could be viewed as hostile to religion.[108]

4. Justice Scalia's Concurrence

Justice Scalia, joined by Justice Thomas, argued that Buono lacked standing in his opinion which only addressed that issue.[109] Justice Scalia argued that enjoining the transfer of the land in *Buono III* and *Buono IV* was beyond the scope of the injunction from *Buono I* and *Buono II*.[110] Thus, Justice Scalia explains, the land transfer is a new case and Buono must possess independent grounds for standing.[111] Justice Scalia argued that because the VFW could take down the cross after the transfer, or because the cross would be on private property after the transfer, Buono has failed to allege any actual

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100 *Id.* at 1821.
101 The land-transfer statute passed 95 to 0 in the Senate and 407 to 15 in the House. *Id.* at 1823.
102 *Id.* at 1824.
103 *Id.* at 1823.
104 *Id.* at 1824 (citing Justice Kennedy's opinion, which says to look to *Van Orden v. Perry*, 545 U.S. 677 (2005), for determining a reasonable observer's awareness of the history surrounding the display).
105 *Id.*
106 *Id.* at 1822.
107 *Id.* at 1821.
108 *Id.* at 1822–23.
109 *Id.* at 1824 (Scalia & Thomas, JJ., concurring in the judgment).
110 *Id.* at 1824–25.
111 *Id.*

or imminent injury.[112] Therefore, Justice Scalia and Justice Thomas would not just remand the case, but dismiss it.[113]

5. Justice Stevens's Dissent

Justice Stevens, joined by Justice Ginsburg and Justice Sotomayor, wrote the dissenting opinion that addressed the merits of *Salazar*.[114] According to Justice Stevens, Buono had standing as a way to enforce the injunction and final judgment from *Buono I* and *Buono II*.[115] Although he "agree[d] with the plurality's basic framework" for addressing the issue, Justice Stevens argued that the Court should have affirmed the lower court's decision because the transfer would not cure the government's Establishment Clause violation.[116]

Justice Stevens found that the transfer was unconstitutional for "two independently sufficient reasons."[117] First, he found that Congress's purpose for the transfer was to preserve the display of the cross.[118] To do this, Justice Stevens explained that a court must look at the "indicia of [Congress's] intent."[119] After reviewing the record, Justice Stevens found that the government's intent in the transfer was to preserve the cross.[120] He pointed out that even the government admitted that Congress's goal in the transfer was to preserve the cross.[121] Thus, he explained, from looking inside the government's actions it was apparent the transfer had an illicit purpose.[122]

Second, Justice Stevens explained that even after the transfer, a reasonable observer would view the cross as a government endorsement of religion.[123] He argued that a reasonable observer under these circumstances would view the government's actions as an Establishment Clause violation for multiple reasons.[124] This included the facts that Congress transferred the cross to a

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112 *Id.* at 1825–27.
113 *Id.* at 1824.
114 *Id.* at 1828 (Stevens, Ginsburg & Sotomayor, JJ., dissenting).
115 *Id.* at 1829–30.
116 *Id.* at 1830, 1841–42. Justice Stevens points out that the "plurality does not conclude to the contrary," but rather that the district court did not conduct the proper analysis. *Id.* at 1832–33.
117 *Id.* at 1832.
118 *Id.* at 1831.
119 *Id.* at 1840.
120 *Id.* at 1831.
121 *Id.* at 1837–38.
122 *Id.* at 1831.
123 *Id.*
124 *Id.* at 1832–35.

specific purchaser so that the cross could be displayed in the same location and that the government retained a reversionary interest.[125] Additionally, Justice Stevens explained that changing the ownership of the land under the cross does not change the character of the cross because the government has adopted the cross as its own—whether on public land or private land—by making it the only national World War I memorial with the Memorial Act.[126]

6. Justice Breyer's Dissent

Justice Breyer's dissent argued for affirming *Buono IV* based on the law of injunctions.[127] Justice Breyer found that the court's injunction in *Buono III* forbidding the land transfer was properly a way to enforce the original injunction from *Buono I*.[128] Thus, he said that the Court should not have granted certiorari to hear the case.[129]

7. The Overall Holding of Salazar

Buono had standing to challenge the land-transfer statute by a seven-to-two margin,[130] but *Buono IV* was reversed by a narrow five-to-four margin.[131] However, with only three justices declaring the land-transfer statute Constitutional or unchallengeable,[132] and only three declaring it unconstitutional,[133] the district court was tasked with determining the statute's Constitutionality.

C. The Inside/Outside Framework Underlying the Opinions in Salazar

Despite their wide discordance, all the opinions in *Salazar* that address the Constitutional merits of the case apply the same two-part framework to

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125 *Id.* at 1833–34.

126 *Id.* at 1834–35.

127 *Id.* at 1842 (Breyer, J., dissenting).

128 *Id.* at 1843, 1845.

129 *Id.* at 1845.

130 Justices Scalia and Thomas were in the minority. *Id.* at 1824 (Scalia & Thomas, JJ., concurring in the judgment).

131 Justices Stevens, Ginsburg, Sotomayor, and Breyer were in the minority. *Id.* at 1828 (Stevens, Ginsburg & Sotomayor, JJ., dissenting); *id.* at 1842 (Breyer, J., dissenting).

132 Justices Scalia and Thomas argued that the statute was unchallengeable. *Id.* at 1824–28 (Scalia & Thomas, JJ., concurring in the judgment). Justice Alito argued that the transfer was Constitutional. *Id.* at 1821–24 (Alito, J., concurring in part and concurring in the judgment).

133 Justices Stevens, Ginsburg, and Sotomayor argued that the transfer was unconstitutional. *Id.* at 1831–32 (Stevens, Ginsburg & Sotomayor, JJ., dissenting).

determine whether the government is in violation of the Establishment Clause.[134] The Court looked inside the government's purpose to determine the motives for its actions and looked at the government's action from an outsider's perspective to determine if a reasonable observer would view the government's actions to be a violation of the Establishment Clause.[135] This Article denominates this the "inside/outside" test.

Justice Kennedy's opinion is a textbook statement of this inside/outside test. First, he criticized the district court's simple assumption that the government's purpose in transferring the land was illicit.[136] The district court failed to properly look inside the government's actual motive and intent[137]—the inside analysis. Second, he criticized the district court for failing to consider how a hypothetical reasonable observer would view the effect of the land-transfer statute and the history of the monument[138]—the outside analysis. In Justice Kennedy's formulation, the hypothetical reasonable outsider must be aware of all the circumstances and history surrounding the cross, not just a flat view of whether a cross standing in a national park constitutes a governmental endorsement of religion.[139]

Justice Alito accepted this same inside/outside framework, but he went one step further and applied the inside/outside test to the facts. He found that a look inside the government's motives and intent did not reveal an improper purpose, and that a reasonable outsider would not view the transfer to be a violation of the Establishment Clause.[140]

Justice Stevens's dissent also agreed with Justice Kennedy's inside/outside framework. Like Justice Alito, Justice Stevens applied the test to the facts in this case, but came to an opposite conclusion.[141] After looking inside at the government's motives and intent, Justice Stevens found that Congress's real intent was to continue displaying the cross more than it was to honor the war dead with a suitable memorial.[142] Additionally, he found that an outside reasonable observer—whether or not the observer is aware of the cross's

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134 *Id.* at 1814–17 (majority opinion); *id.* at 1824–28 (Scalia & Thomas, JJ., concurring in the judgment); *id.* at 1831–32 (Stevens, Ginsburg & Sotomayor, JJ., dissenting).

135 *Id.* at 1820 (majority opinion).

136 *Id.* at 1815–16.

137 *Id.* at 1816.

138 *Id.* at 1819.

139 *Id.*

140 *Id.* at 1821–25 (Alito, J., concurring in part and concurring in the judgment).

141 *Id.* at 1841 (Stevens, Ginsburg & Sotomayor, JJ., dissenting).

142 *Id.* at 1832–33.

complex history—would conclude that the government is endorsing religion.[143] Thus, although the Justices disagree about many things in *Salazar*, one thing that they do agree on is that the inside/outside test is the framework that should be applied to the presence of a religious object on public land.[144]

II. WHY THE COURT'S PRE-*SALAZAR* ESTABLISHMENT CLAUSE PRECEDENT CAN ALSO BE SUMMARIZED THROUGH THE INSIDE/OUTSIDE TEST

Many courts and commentators argue that the Supreme Court has failed to create a consistently accepted approach for determining if the government has violated the Establishment Clause.[145] This Part, however, argues that a careful analysis of the modern Establishment Clause Supreme Court precedent reveals that it can all be synthesized with the inside/outside test at work in the multiple opinions of *Salazar*. This Part first lays out the Court's pre-*Salazar* modern Establishment Clause precedents that deal with issues of religious symbols on public land. It then shows how the inside/outside test combines all these historically inconsistent approaches.

A. The Lemon *Test*

The Establishment Clause test set forth in *Lemon v. Kurtzman*[146] is the most well-known and commonly applied modern test to determine whether a government action violates the Establishment Clause.[147] At issue in *Lemon* were two state statutes that required the government to reimburse private schools—whether religious or secular—for the costs of teachers' salaries, textbooks, and other instructional materials relating to the teaching of certain secular subjects.[148] The Supreme Court held that those statutes provided aid to religious schools and violated the Establishment Clause.[149] The Court

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143 *Id.* at 1832–33, 1841.

144 *Id.* at 1814–17 (majority opinion); *id.* at 1824–28 (Scalia & Thomas, JJ., concurring in the judgment); *id.* at 1831–32 (Stevens, Ginsburg & Sotomayor, JJ., dissenting).

145 *See, e.g.*, Budd, s*upra* note 33, at 215 (explaining that, with reference to Establishment Clause tests, "[t]he courts have . . . produced a patchwork of ad hoc and often irreconcilable dispositions reflecting a considerable disparity of analytic rigor").

146 Lemon v. Kurtzman, 403 U.S. 602 (1971).

147 *See, e.g.*, CHRISTOPHER EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 212 (2007) (explaining that the *Lemon* test is usually used by the Court); Edith Brown Clement, *Public Displays of Affection . . . for God: Religious Monuments After* McCreary *and* Van Orden, 32 HARV. J.L. & PUB. POL'Y 231, 246 (2009) ("Most courts of appeals have concluded that the *Lemon* tripartite test of purpose, effect, and entanglement still stands . . . .").

148 *Lemon*, 403 U.S. at 606–07.

149 *Id.*

combined its precedent into a fact-specific three-pronged test.[150] Now, when challenged, government conduct must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not create an excessive government entanglement with religion.[151] The *Lemon* test calls for a stricter separation between church and state.[152] *Lemon* established that even if certain government support of religion was permitted in the past, it is no longer permissible because of the widespread diversity in the United States.[153] This test is still the "touchstone" of modern Establishment Clause jurisprudence[154] even though some scholars have accused the test of being overly broad and easily manipulated, and accused individual Justices of ignoring it in their opinions.[155]

B. The Endorsement Test

The endorsement test is a variation of the *Lemon* test that explains how to approach the outside analysis in the inside/outside test.[156] Although Justice O'Connor developed the test in her *Lynch v. Donnelly* concurrence in 1984,[157] the Court first accepted it in 1989 in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*.[158] This test clarifies *Lemon*'s second prong[159]—whether an action has the primary effect of advancing or

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150 *Id.* at 602–03.

151 *See id.* at 612–13.

152 *See* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 194 (2d ed. 2005) (explaining that "the Court gave the *Lemon* test a separationist reading" where there is to be a strict separation between church and state, and "[t]his 'separationist reading' of the *Lemon* test guided most of the Court's disestablishment cases for the next fifteen years").

153 *Id.* at 193 ("[E]venhanded accommodation and acknowledgment of religion is impossible in today's religiously heterogeneous society, even if it could have been permitted in the more religiously homogeneous eighteenth century."); Budd, *supra* note 33, at 187 ("[*Lemon*] reflects an undue hostility toward religion in the public sphere.").

154 *See, e.g.*, County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989) ("This trilogy of tests has been applied regularly . . . ."); Weinbaum v. Las Cruces, 541 F.3d 1017, 1030 (10th Cir. 2008) ("Despite scattered signals to the contrary, the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*.").

155 *See, e.g.*, WITTE, *supra* note 152, at 193 (explaining that the *Lemon* test is "amenable" to many different interpretations). This problem is solved by the inside/outside test.

156 *County of Allegheny*, 492 U.S. at 595.

157 Lynch v. Donnelly, 465 U.S. 668, 687–95 (1984) (O'Connor, J., concurring) (creating the endorsement test and writing that a government action is in violation of the Establishment Clause "irrespective of government's actual purpose, [when] the practice under review in fact conveys a message of endorsement or disapproval").

158 *County of Allegheny*, 492 U.S. at 595.

159 Although most scholars agree that the endorsement test is part of the *Lemon* test, this is not universally accepted. *Compare* Marcia S. Alembik, Note, *The Future of the* Lemon *Test: A Sweeter Alternative for*

inhibiting religion[160]—by explaining that the Constitutional inquiry is whether the government's action endorses religion.[161] Further, the endorsement test incorporates the third prong of *Lemon*—excessive entanglement—thus turning the *Lemon* test into a two-part inquiry.[162] In *Agostini v. Felton*, Justice O'Connor refined the second "outside" step of this test a bit further.[163] The kind of evidence that should be considered in whether a government action constitutes an endorsement of religion is whether the action results in: (1) religious indoctrination; (2) religious line-drawing; or (3) excessive entanglement between religious and political officials.[164]

The Court in *County of Allegheny* was faced with two government actions that potentially violated the Establishment Clause: (1) the placement of a crèche, which depicts the birth of Jesus, by itself in a prominent location in a county courthouse; and (2) the placement of a Chanukah menorah, next to a Christmas tree and a sign saluting liberty, just outside of a city building.[165] The Court applied the endorsement test to the crèche and the menorah.[166] The Court, looking at the factors a reasonable observer would consider in determining the effect of the government's decision to have each display, held that the crèche violated the endorsement test while the menorah did not.[167] To determine how an outsider viewed the objects, the Court looked beyond the symbols themselves and considered all of the surrounding circumstances.[168] The prominent location of the crèche in a public building, its solitary presence,

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Establishment Clause Analysis, 40 GA. L. REV. 1171, 1181–84 (2006) (explaining that the endorsement test is a modification of the *Lemon* test), *with* Matthew J. Morrison, *The* Van Orden *and* McCreary County *Cases: Closing the Gaps Remaining Between the Established Lines of Ten Commandments Jurisprudence*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 435, 451 (2007) (suggesting that the endorsement test and *Lemon* test are two separate tests).

160 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

161 *County of Allegheny*, 492 U.S. at 592.

162 *See* Agostini v. Felton, 521 U.S. 203, 232–33 (1997); *see also* J. Brady Brammer, *Religious Groups and the Gay Rights Movement: Recognizing Common Ground*, 2006 BYU L. REV. 995, 1008 ("The Court restructured the *Lemon* test by combining the excessive entanglement prong with the effects prong. Thus the new *Lemon* test has only two-prongs . . . ."); Christian W. Johnston, Agostini v. Felton*: Redefining the Establishment of Religion Through a Modification of the* Lemon *Test*, 26 PEPP. L. REV. 407 (1999) (discussing the Court's decision in *Agostini*); M. Craig Smith, *A Bad Reaction: A Look at the Arkansas General Assembly's Response to* McCarthy v. Boozman *and* Boone v. Boozman, 58 ARK. L. REV. 251, 275 (2005) ("[T]he second and third prongs of the *Lemon* test . . . have now been combined into one under *Agostini*.").

163 *Agostini*, 521 U.S. at 234.

164 *Id.*

165 *County of Allegheny*, 492 U.S. at 578.

166 *Id.*

167 *Id.* at 579.

168 *Id.* at 595.

and its use for religious activities such as caroling would cause an outsider to believe that the crèche was a governmental endorsement of religion.[169] In contrast, an outsider would not view the menorah to be an endorsement of religion because it was surrounded by other secular objects, it had a sign disclaiming any religious purpose, and the city did not have a reasonable alternative that was less religious in nature.[170]

The endorsement test is not only consistent with the inside/outside test, but it in fact provides the analysis required for the outside analysis. Under the endorsement test, the Court views potential violations of the Establishment Clause from an outside perspective and asks whether a reasonable outside observer would view the effect of the government's action as an endorsement of religion.[171] The focus is on the effect of the government's action, not the purpose.[172] This approach follows *Lemon*'s goal of limiting the role of religion in the public sphere;[173] even if the government's conduct does not have a religious intent, it is still unconstitutional if a reasonable observer would believe the conduct has the effect of endorsing religion.[174]

C. The Historical Approach

The Court's 1984 decision in *Lynch v. Donnelly*[175] created a historical approach to the Establishment Clause. In *Lynch*, town officials joined private merchants in erecting a Christmas display on a private park owned by a

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169 *Id.* at 598–600.

170 *Id.* at 618–20.

171 *Id.* at 595 ("[T]he question is 'what viewers may fairly understand to be the purpose of the display.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 692 (1984))).

172 *Id.*

173 *See* Budd, *supra* note 33, at 190 (arguing that the endorsement test has been criticized for being "too protective of separationist interests"). Scholars have also argued that the endorsement test permits more religion on public land because government conduct is allowed if it does not evince a message of endorsement. *Id.* at 200. This argument is flawed because it ignores that the first prong of the *Lemon* test, which prohibits conduct that does not have a secular purpose, still exists; the endorsement test just modified the second prong of the *Lemon* test rather than replacing the entire test. *See supra* Part II.B (explaining the endorsement test).

174 *See County of Allegheny*, 492 U.S. at 595 ("[The Court] squarely rejects any notion that this Court will tolerate some government endorsement of religion."); EISGRUBER & SAGER, *supra* note 147, at 127 ("Nor does this understanding of a public religious endorsement depend on what the public officials had in mind when they chose to make the endorsement. A particular official or group of officials may not intend to contribute to the disparagement of persons in their community and yet do or say something that constitutes such a disparagement, just as an individual speaker might overlook or misunderstand the linguistic meaning of her words."); WITTE, *supra* note 152, at 197 ("[T]he endorsement approach might now well require judges to outlaw the very legislative accommodations for religion that Justice O'Conner has so strongly favored.").

175 Lynch v. Donnelly, 465 U.S. 668 (1984).

nonprofit organization.[176] The display contained many figures, including a Christmas tree, clowns, candy-striped poles, Santa Clauses, and the like, most of which of were donated by the merchants.[177] The display also included a crèche that the city had purchased some forty years before and had put up each year as part of this larger display.[178] In determining the Constitutionality of the crèche, instead of rigidly following the *Lemon* test, the Court looked at the history, origins, and public views of the object to determine if its placement was a violation of the Establishment Clause.[179] The Court held that the crèche, in this setting, was only meant to depict the history of the Christmas season and thus did not violate the Establishment Clause.[180]

In the Court's 2005 decision in *Van Orden v. Perry*,[181] Chief Justice Rehnquist expanded upon the historical approach created in *Lynch v. Donnelly*. In *Van Orden*, a Ten Commandments monument was one of seventeen monuments and twenty-one historical markers on public grounds surrounding the Texas state capitol.[182] The Court held that the presence of a Ten Commandments monument did not violate the Establishment Clause.[183] In permitting the monument, the Court looked at its historical legal significance, its acceptance in other public settings, and its passive placement among other monuments.[184] The approach applied in *Van Orden*, which has been criticized by scholars,[185] requires the Establishment Clause analysis to be "driven both by the nature of the monument and by our Nation's history."[186] Therefore, *Van Orden* states that an Establishment Clause analysis not only includes the setting in which the monument sits, but also its history.[187]

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176 *Id.* at 670.

177 *Id.* at 668.

178 *Id.*

179 *Id.* at 678–80.

180 *Id.* at 680.

181 Van Orden v. Perry, 545 U.S. 677 (2005).

182 *Id.* at 686.

183 *Id.* at 681–83.

184 *Id.* at 689–91.

185 *See, e.g.*, Shawn Staples, *Nothing Sacred: In* Van Orden v. Perry, *the United States Supreme Court Erroneously Abandoned the Establishment Clause's Foundational Principles Outlined in* Lemon v. Kurtzman, 39 CREIGHTON L. REV. 783 (2006) (arguing that *Van Orden* goes against Supreme Court precedent).

186 *Van Orden*, 545 U.S. at 686.

187 *Id.* Justice Scalia, in his *McCreary County v. American Civil Liberties Union of Kentucky* dissent, argues unpersuasively for a pure historical approach. McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 905–07 (2005) (Scalia, J., dissenting). The argument is that religious symbols are part of U.S. history, and this religious symbolism, especially when it goes unchallenged for many decades, is not unconstitutional. *Id.* Under such an approach, the cross at Sunrise Rock would likely be Constitutional because Christianity—and its symbol, a cross—is recognition of that heritage. This approach, however, is not

The lower courts have had trouble applying the historical approach to potential Establishment Clause violations.[188] This is because courts have tried to treat the historical approach as an Establishment Clause test,[189] as many scholars recommended.[190] However, it should not be considered its own test. Rather, *Van Orden*'s use of the historical approach should be read as an addition to the endorsement test analysis. In the context of the endorsement test, the historical approach simply adds "the nature of the monument and . . . our Nation's history" to the factors that a reasonable observer considers.[191] In fact, the endorsement test contemplated the addition of the historical approach because the test presumes the reasonable observer is aware of "'the history and context'" of the conduct.[192] Adding this approach to the set of facts relevant to the endorsement analysis is consistent with its outsider perspective because, as the Court has written, a reasonable observer takes history into account.[193]

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preferable to the inside/outside test because it would have the Establishment Clause only apply to religions that are not part of U.S. history. *See* Budd, *supra* note 33, at 208 ("The proposition that permanent religious displays should be upheld on the basis of mere longevity, however, has been widely repudiated . . . ."). For example, a statue of Jesus Christ on public land in front of a courthouse would be Constitutional because of the United States's Christian history, but the exact same sized Buddha statue would not be because the United States does not have a Buddhist history. This approach is not only contrary to the Constitution because it allows the government to get around the Establishment Clause just because a religion has a long established history, but it is also inconsistent with the Establishment Clause jurisprudence. *See* WITTE, *supra* note 152, 41–70 (explaining that one of the major reasons that the Founders had for creating the Establishment Clause was to end the influence of a long standing religion—the Anglican Church); *supra* note 153 and accompanying text (explaining that even if the Court permitted government support of the religion in the past, it is no longer allowed).

188 *See* Trunk v. San Diego, 568 F. Supp. 2d 1199, 1206 (9th Cir. 2008) (discussing how the court is unsure if *Van Orden* applies to a cross, and although the court calls *Van Orden* a test, it refers to *Van Orden* as "the *Van Orden* exception," and ultimately deciding to apply *Lemon*, *Van Orden*, and *McCreary County*); Am. Civil Liberties Union of Ky. v. Garrard County, 517 F. Supp. 2d 925, 936 (E.D. Ky. 2007) (explaining that the Supreme Court's decisions, including *Van Orden*, has left courts "'in Establishment Clause purgatory'" (quoting Am. Civil Liberties Union of Ky. v. Mercer County, 432 F.3d 624, 636 (6th Cir. 2005))).

189 *See The Supreme Court, 2004 Term: Leading Cases*, 119 HARV. L. REV. 169, 248–49 (2005) (arguing that the *Van Orden* decision did very little to clarify the Establishment Clause jurisprudence).

190 *See, e.g.*, Douglas G. Smith, *The Constitutionality of Religious Symbolism After* McCreary *and* Van Orden, 12 TEX. REV. L. & POL. 93 (2007) (explaining that some lower courts have abandoned *Lemon* in favor of an analysis based on *Van Orden* for historical religious monuments); Staples, *supra* note 185 (explaining that the court abandoned *Lemon* and created its own test).

191 *Van Orden*, 545 U.S. at 686.

192 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment)).

193 *Id.* (stating that a reasonable observer is aware of "the history" of the activity).

Justice Breyer's controlling concurrence in *Van Orden* appears to embrace the idea that the historical approach should be viewed from the perspective of a reasonable observer.[194] He says the determination of an Establishment Clause violation "is not a personal judgment."[195] Rather, it is based on the "context of history . . . . [the object] communicates to visitors."[196] Justice Breyer bases his reasoning on how a reasonable observer, taking history into account, would view the monument.[197] This language is similar to Chief Justice Rehnquist's language in his majority opinion in *Van Orden* that considered "the history and context" of the monument.[198] Additionally, Justice Kennedy's opinion in *Salazar* agrees that the historical approach should be part of the outside analysis because he cites to *Van Orden* when explaining how to construct the reasonable observer.[199] In brief, the historical approach, as developed in *Van Orden*, adds an understanding of history and context to the outsider analysis that a reasonable observer would have when the court employs the endorsement test.

D. The Predominant Purpose Test

On the same day that the Court published its *Van Orden* decision, it created the "predominant purpose" test in *McCreary County v. American Civil Liberties Union of Kentucky*.[200] This test, like the endorsement test, adds a twist to the *Lemon* test.[201] Under the predominant purpose test, the first prong of *Lemon*—the requirement of a secular purpose—should be judged by looking at the totality of facts and circumstances surrounding the disputed action, such

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194 Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'") (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

195 *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

196 *Id.* at 702.

197 *Id.* ("[The monument] communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed.").

198 *See supra* note 192 and accompanying text (explaining a reasonable observer is aware of the history and context of the conduct).

199 Salazar v. Buono, 130 S. Ct 1803, 1817, 1819–20 (2010).

200 McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and *predominant purpose* of advancing religion, it violates . . . [the] Establishment Clause . . . .") (emphasis added); *see generally* Shannon F. Barkley, *U.S. Supreme Court Upholds Secular Purpose Prong of* Lemon *Test*, LAWS. J., Aug. 2005, at 3 (discussing the decision in *McCreary County*).

201 *See* Am. Civil Liberties Union of Ky. v. Mercer County, 432 F.3d 624, 635 ("After *McCreary County*, the first [prong of the *Lemon* test] is now the predominant purpose test.").

as its history and progression, to determine if the government's stated secular purpose is genuine or merely a "sham."[202]

In *McCreary County*, the Kentucky legislature repeatedly tried to require county courthouses to display the Ten Commandments.[203] The government argued that its purpose was to recognize how the Ten Commandments are the foundation of U.S. law.[204] Each time the lower court held the display to be unconstitutional, the legislature changed the law just enough to comport with what it believed was the law.[205] In applying the predominant purpose test, Justice Souter, writing for the plurality in *McCreary County*, held that the Kentucky legislature's repeated legislative attempts to display the Ten Commandments showed that its stated secular purpose was a sham.[206] The Court said that because the legislature's purpose in changing the law was to ensure the continuation of the display, the Court determined that the legislature's intent was not to cure an Establishment Clause violation but rather to find a way to keep displaying the Ten Commandments on its county courthouse walls.[207] The true or "predominant" purpose behind the Kentucky law was to display a religious object and this violated the Establishment Clause.[208] Therefore, under the predominant purpose test, if a court determines that the government's actions show that its predominant purpose is to favor religion—even if the government claims otherwise—the action violates the Establishment Clause.

Some scholars argue that this approach cannot work because the true purpose behind a law is unknowable and unpredictable.[209] That argument was unpersuasive to Justice Souter because "[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in

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202 *McCreary County*, 545 U.S. at 864; *see also* Jay A. Sekulow & Erik M. Zimmerman, *Posting the Ten Commandments is a "Law Respecting an Establishment of Religion"?: How* McCreary County v. ACLU *Illustrates the Need to Reexamine the* Lemon *Test and Its Purpose Prong*, 23 T.M. COOLEY L. REV. 25, 47 (2006) ("McCreary County reintroduced the previously discarded notion of 'taint' into First Amendment jurisprudence.").

203 *McCreary County*, 545 U.S. at 850–57.

204 *Id.*

205 *Id.* at 869–72.

206 *Id.* at 850–58.

207 *Id.*

208 *Id.* at 881.

209 *See, e.g.*, Carmen M. Guerricagoitia, *Innovation Does Not Cure Constitutional Violation: Charitable Choice and the Establishment Clause*, 8 GEO. J. ON POVERTY L. & POL'Y 447, 462 (2001) (questioning, skeptically, if it is "possible to discern the purpose of this legislation").

the country."[210] In fact, the Court has repeatedly held that a purported government purpose is not the legislature's true purpose.[211] Although Justice Scalia's claim that the Court cannot always know whether a singular true intent behind the law is correct,[212] Justice Souter easily bypasses this argument by pointing out that if the true intent is not readily apparent, it can be determined through the eyes of a hypothetical reasonable observer.[213] This means that a court must look inside the government's intentions based on the surrounding circumstances to determine the legislature's purpose. Thus, if a court cannot actually determine the true purpose behind a law, it can decide what the predominant purpose appears to be to a reasonable person.

Just as the endorsement test approaches Establishment Clause violations from an outside perspective, the predominant purpose test approaches violations from an inside perspective.[214] The Court discerns the internal intent of the legislature by determining the predominate purpose of the government's actions.[215] Thus, this analysis determines the actual intent,[216] or what the actual intent appears to be, regardless of its effect. Even if the stated purpose behind a law is not related to promoting religion, and the law does not have the effect of

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[210] *McCreary County*, 545 U.S. at 861 (citation omitted).

[211] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy . . . . it is nonetheless the duty of the courts to 'distinguish a sham secular purpose from a sincere one.'") (quoting Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in the judgment)); Stone v. Graham, 449 U.S. 39, 41–42 (1980) (holding that a law that required the posting of a Ten Commandments did not have a secular purpose despite the government's claimed secular purpose).

[212] Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia J., dissenting) ("[D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.").

[213] *McCreary County*, 545 U.S. at 848.

[214] *Id.* Additionally Justice O'Connor's concurrence, which provided the plurality in *McCreary County*, explained the outside endorsement test is still to be applied in addition to the inside analysis. *Id.* at 883–84 (O'Connor, J., concurring) (agreeing that the Ten Commandments display is unconstitutional based on the "reasonable observer" endorsement analysis created by her concurrence in *Lynch v. Donnelly*). *See generally* Vincent Phillip Muñoz, *Thou Shalt Not Post the Ten Commandments?* McCreary, Van Orden, *and the Future of Religious Display Cases*, 10 TEX. REV. L. & POL. 357 (2006) (discussing the various Justices' views in *Van Orden* and *McCreary County*).

[215] *McCreary County*, 545 U.S. at 845.

[216] *Id.* The Court has implied through dicta that a secret religious objective that is not apparent to a reasonable observer is permissible. *Id.* at 863. Practically, this is not a relevant issue for a court because if a religious motive is too secret for a court to notice, then it is not possible for a court to rule that the action is a violation of the Establishment Clause. However, if somehow the unknowable secret improper motive was known to a court, it seems a court would have to hold the action unconstitutional because "[a] government action *must* have 'a secular . . . purpose.'" *Id.* at 864 (emphasis added) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

promoting religion, a law is unconstitutional if a court believes its actual intent is to give preference to religion.[217]

E. Summarizing the Supreme Court's Precedent with the Inside/Outside Test

At first glance, there appears to be a disjointed set of Establishment Clause tests. As the foregoing analysis shows, however, the Supreme Court's Establishment Clause precedent, at least as applied to issues of religious symbols displayed on public land, can actually be summarized by the inside/outside test at work in *Salazar*.

Lemon's prongs, as modified into a two-part analysis,[218] can be understood as the base of the inside/outside test, where a court uses:[219]

(1) an inside approach that applies *Lemon*'s secular purpose prong, as modified by the predominant purpose test; and

(2) an outside approach that applies *Lemon*'s primary effect prong, as modified by the endorsement test and the historical approach.[220]

The inside approach looks into the government action and determines whether the primary purpose is to favor, endorse, or privilege religion in a way that violates the Establishment Clause, regardless of the effect.[221] It incorporates *McCreary County* by applying its inside approach to *Lemon*'s first prong.[222] This approach reviews not only the actual wording or official legislative history of the challenged statute or policy, but it also considers the background to the legislative conduct, the unofficial statements and actions that help evince the legislators' intent, and the totality of circumstances that have given rise to the challenged government action.[223] This includes reviewing the government's actions while the case is being litigated or pending and making a judgment whether those actions were a good faith effort to cure

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217 *See id.* at 900–01 (Scalia, J., dissenting) (noting that the Court's inquiry "focuses not on the *actual purpose* of government action, but the 'purpose apparent from government action'").

218 *See supra* note 162 (explaining that *Agostini* combined the second and third prongs of *Lemon*).

219 A court can choose to apply either approach first. The order does not matter.

220 The third prong, excessive entanglement, is no longer a separate inquiry because its reasoning is incorporated into the endorsement test. *See supra* note 162 (explaining that the second and third prong are combined by the endorsement test).

221 *See supra* Part II.D (explaining the predominant purpose test).

222 Agostini v. Felton, 521 U.S. 203, 232–33 (1997).

223 *Id.*

an unintended unconstitutional condition or mere stratagem to veil its religious preferences enough to escape Constitutional infirmity.[224]

The outside approach uses the concept of an objective outsider to look at the government conduct to determine what the effect of the conduct is, regardless of its actual intent.[225] Here, a reasonable observer is created who looks at all of the facts surrounding the government action, including history and context, to determine whether the government is primarily endorsing religion versus achieving some other Constitutionally licit goal or policy.[226]

Thus, under the inside/outside test, a court looks at an issue from the inside—*Lemon* as modified by the predominant purpose test—and determines if there is a violation.[227] Additionally, a court looks at the issue from the outside—*Lemon* as modified by the endorsement test and the historical approach—and determines if there is a violation.[228] Only if there is no violation under either approach does the government action pass the inside/outside test as being consistent with the Establishment Clause.[229] By utilizing this analysis, if the government's intent is to endorse religion, or if the government's actions have the effect of endorsing religion, the Establishment Clause is violated and the government's conduct must be declared unconstitutional. This fixes the original *Lemon* test's problem of being easily manipulated because this two-part test provides a simple and systematic approach that ensures potential Establishment Clause violations are analyzed from both appropriate angles.

As is shown above, the inside/outside test derived from *Salazar* is not only consistent with the Court's precedent, but the test also synthesizes its precedent into a single framework that is more easily applicable than the several alternative approaches standing alone. With the inside/outside test, lower courts will no longer struggle with the decision of whether to apply the *Lemon*, *Agostini*, *McCreary County*, or *Van Orden* precedents—which individually can

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224 *Id.*

225 *Id.*

226 *See supra* Part II.B (explaining the endorsement test).

227 *See supra* Part II.D (explaining the predominant purpose test).

228 *See supra* Part II.B (explaining the endorsement test). At least one scholar has argued that the endorsement test also has an inside and outside approach. *See* Susanna Dokupil, *"Thou Shalt Not Bear False Witness": "Sham" Secular Purposes in Ten Commandments Displays*, 28 HARV. J.L. & PUB. POL'Y 609, 620 (2005) (arguing that the endorsement test also looks to the "intent of the speaker").

229 *See supra* Part II.B (explaining the endorsement test).

lead to very different results.[230] Through the application of the inside/outside test from *Salazar*, all of these cases can be applied in a single consistent and systematic manner.

III. APPLYING THE INSIDE/OUTSIDE TEST TO THE FACTS OF *SALAZAR V. BUONO* AS REQUIRED ON REMAND

The Supreme Court in *Salazar* remanded the case to the district court to determine whether the transfer should be enjoined as unconstitutional.[231] The Court previously explained that a Constitutional violation cannot be cured simply by transferring public land to the private sector.[232] Thus, the Court required the district court to apply the framework provided in *Salazar*,[233] which this Article demonstrates is the inside/outside test.

This Part explains the analysis that the district court should employ by analyzing the land transfer using the inside/outside test. Since the Court's determination as to whether the cross should be a violation of the Establishment Clause is final, this Part will not further discuss that issue. First, this Part analyzes the facts from an outside perspective, and then it analyzes the facts from in inside perspective. And from this analysis, this Article concludes that the government's attempt to transfer the land does not cure its Establishment Clause violation.

A. Why the Transfer Is Unconstitutional from the Outside Perspective

To perform the outside analysis, a hypothetical outsider is created. This outsider will be asked to view the government's actions and evaluate whether the government appears to be endorsing religion. This reasonable observer is "aware of the history and all other pertinent facts relating to [the] challenged display."[234] As such, the hypothetical outsider is also familiar with the origin and history of the cross.[235] According to Justice Alito, this information would

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230 *See* Kristen Morgan, Comment, *The Public Expression of Religion Act: Promoting Equality in Establishment Clause Jurisprudence*, 57 CATH. U. L. REV. 543, 556 (2008) ("[The] application of each [Establishment Clause] test can yield different results.").

231 Salazar v. Buono, 130 S. Ct. 1803, 1821 (2010).

232 *See* Evans v. Newton, 382 U.S. 296, 302 (1966) ("[W]e cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law."); Budd, *supra* note 33, at 236–56 (discussing more in depth how the sale of land effects state action).

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

234 *Salazar*, 130 S. Ct. at 1824 (Alito, J., concurring in part and concurring in the judgment).

235 *Id.*

include knowledge that the cross would be on private land.[236] Although Justice Stevens's dissenting opinion assumes that the observer knows the cross is on private land, he does not concede the point.[237]

First, let us assume the outsider is not aware that the cross has been transferred to private property; even inspection of the site would reveal nothing.[238] Courts have consistently held that in order to prevent an observer from believing that a religious object has the effect of a government preference for or endorsement of religion, the land surrounding the private property and object should be sufficiently demarcated as to be clearly separate from the public property.[239] Some examples of what could accomplish this are a fence,[240] signs stating the land is privately owned,[241] natural physical barriers,[242] or the transfer of a large amount of land.[243] More than one of these measures is usually needed to achieve sufficient separation between what is private land and what is government land.[244] Because the transfer of the land under the cross at Sunrise Rock would only have the effect of a change of title—there is no demarcation such as a fence or sign and only a small amount of land is being transferred—a reasonable observer could continue to view the cross as part of the public land,[245] and thus the transfer would not cure the violation. Therefore, because the proposed transfer of the land under the cross

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236 *Id.*

237 *See id.* at 1834 n.4 (Stevens, Ginsburg & Sotomayor, JJ., dissenting).

238 This is a reasonable assumption because, after the transfer, there is no requirement that the private area be physically differentiated from the rest of the preserve. *Cf.* Freedom from Religion Found., Inc. v. Marshfield, 203 F.3d 487, 494–95 (7th Cir. 2000) (treating a small piece of former parkland that contained a Jesus statue that was sold to a private organization as though it was public land after the sale because a reasonable observer would believe it to be public land because it was not physically or visually differentiated from the rest of the park).

239 *See* Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring in part and concurring in judgment) (explaining that a sign stating that the government does not endorse an object's religious message can help disclaim an endorsement of a religious message); Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 703 (7th Cir. 2005) (allowing a Decalogue monument to stay because of the "extensive effort made to distinguish the now-private property from the Park").

240 *See Mercier*, 395 F.3d at 703 (noting the land had two fences).

241 *See id.* (noting there are two signs that say the land is not part of the city).

242 *See* Kong v. San Francisco, 18 F. App'x 616 (9th Cir. 2001) (noting that tree cover visually differentiated the private land).

243 *Cf. Buono IV*, 527 F.3d 758, 768 (9th Cir. 2008) (criticizing the government's choice to only transfer "a little donut hole of land with a cross in the midst of a vast federal preserve" so that the transfer would not be considered a sham).

244 *See Mercier*, 395 F.3d at 703 (having a fence and signs); *Kong*, 18 F. App'x 616 (having natural separation and signs).

245 *See* Budd, *supra* note 33, at 240 ("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.").

would not delineate private property from the rest of the Mojave Nation Preserve, an outside observer would view the cross as having the effect of the government endorsing religion after the transfer.

Even if a reasonable observer were aware of the change in property ownership from public to private, Congress's decision not to require that the land surrounding the cross be demarcated would cause an outsider to view the government as endorsing religion.[246] Incorporating *Van Orden*'s approach to create the reasonable observer, a person aware of the history of the transfer would know the government chose to transfer only a small parcel of land, to keep a reversionary interest in the cross, and to make no efforts to clarify that the land was now privately owned.[247] These many efforts to protect the cross, and to keep the cross associated with the government, would reasonably be viewed by an outsider as an endorsement of religion.

This analysis holds true under the outside approach even if the government truly had a secular motive in the transfer because an observer would reasonably interpret that the effect of not requiring the VFW to demarcate the land to be the government promoting a Christian message.[248] Further, the observer would impute to Congress an illicit intent because it chose to tuck this controversial issue into a completely unrelated defense appropriations bill, with no public debate.[249] As explained by Justice Stevens, a reasonable observer would know that "[t]he cross was once on public land, the [g]overnment was enjoined from permitting its display, Congress transferred it to a specific purchaser in order to preserve its display in the same location, and the [g]overnment maintained a reversionary interest in the land."[250] From this chain of events, the observer would perceive this to be an endorsement.

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246 *See* Religion Found., Inc. v. Marshfield, 203 F.3d 487, 496 (7th Cir. 2000) (explaining that even if someone knew the land was private, because of the lack of visual differentiation from the city property and prominent location, the land creates a perception of improper endorsement of religion).

247 *See* Murphy v. Bilbray, No. 90-134, 1997 WL 754604, at *11 (S.D. Cal. Sept. 18, 1997) (explaining that the small size of a lot sold shows a preference of religion); Budd, *supra* note 33, at 240 (stating how a government's choice to not demarcate private land probably shows that it is not committed to separating it endorsement).

248 Even though the city may want to keep the cross for historical reasons, it is still probable that the citizens value it for the Christian message, which makes it is reasonable for others to view it in that way. EISGRUBER & SAGER, *supra* note 147, at 138. Thus, in situations like this, context is of utmost importance. *Id.* For example, one looks to see if the land is set off or marked off. *Id.* at 138–39.

249 *Id.* at 138.

250 Salazar v. Buono, 130 S. Ct. 1803, 1833–34 (2010) (Stevens, Ginsburg & Sotomayor, JJ., dissenting).

A number of specific facts taken together make clear that the land transfer does not cure the violation. The reasonable observer would view the effect of the extensive legislative efforts that the government went through to protect the cross[251] as a preference for religion. And even though the cross would be on private land, the observer would know that the government maintained its public character by making the cross continue to be a federal World War I memorial—the only such memorial that exists.[252] In addition, the cross is not located where religious memorials for the dead would be expected, such as in a national cemetery.[253] Further, like the unconstitutional solitary crèche in *County of Allegheny*,[254] and unlike the Ten Commandments in *Van Orden*,[255] this cross sits by itself without surrounding context that explains any non-religious significance. A person aware of the cross's history would also know that it is regularly is used for religious gatherings such as Easter services, but not for memorial services on days such as Veterans Day or Armistice Day.[256]

For all these reasons, the land transfer does not cure the Establishment Clause violation from an outside perspective. As explained by Justice Stevens, even if the government did not intend to violate the Establishment Clause, this outsider test "'imposes affirmative obligations that may require [the government], in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message.'"[257] Thus, even though

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[251] *See generally* Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(a)–(f), 117 Stat. 1100 (2003) (granting the acre of land on which the cross stood to a private party); Department of Defense Appropriations Act of 2002, Pub. L. No. 107-117, § 8137, 115 Stat. 2278–79 (2002) (establishing the Mojave Cross as a national monument); Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763A–230 (2000) (banning the use of government funds to remove the cross).

[252] Nina Totenberg, *High Court Weighs Legality of Memorial Cross*, NPR: NAT'L PUB. RADIO (Oct. 7, 2009), http://www.npr.org/templates/story/story.php?storyId=113532854.

[253] The cross should not be viewed as the equivalent of thousands of smaller crosses, such as the ones that can be seen as gravestones in a national cemetery, because a cross on a soldier's gravestone represents the religion of that soldier. However, to say that a cross represents those non-Christian soldiers who died in World War I, such as the 3500 Jewish soldiers who died in that war, could be seen as insulting—just as requiring Jewish soldiers in a national cemetery to have crosses as their gravestones could be seen as insulting to those soldiers. *See* Salazar v. Buono, 130 S. Ct. 1803, 1823 (2010) (citing JOSEPH G. FREDMAN & LOUIS A. FALK, JEWS IN AMERICAN WARS 100–01 (5th ed. 1954)).

[254] County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 574 (1989) (holding a crèche that sat by itself to be unconstitutional).

[255] Van Orden v. Perry, 545 U.S. 677, 692 (2005) (holding that a Decalogue that was one of many memorials and part of a larger overall display to be Constitutional).

[256] *Salazar*, 130 S. Ct. at 1838 n.9 (Stevens, Ginsburg & Sotomayor, JJ., dissenting).

[257] *Id.* at 1837 (quoting Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring)).

Congress may have wanted their actions to pass Establishment Clause scrutiny, an objective analysis of those actions prevents that from happening.[258]

Justice Alito's outsider perspective reasoning in *Salazar* for allowing the land-transfer statute is unpersuasive for two main reasons. First, although he constructed a reasonable observer, he did not determine how the reasonable observer would view the effect of the land-transfer statute.[259] Second, he only looked at the effect after the cross is transferred, rather than also looking at the passage of the land-transfer statute itself.[260]

First, Justice Alito's reasonable outside observer knows that the cross is on private land—a questionable assumption[261]—and knows it is a monument to soldiers who had died in World War I. Even accepting this as the appropriate reasonable observer, Justice Alito did not take the critical next step and determine whether this observer would consider the facts surrounding the transfer to be an endorsement of religion.[262] He did not consider how a person could consider the government's decision to make this cross the *only* World War I memorial, and how its decision to put that memorial on private land so that the cross would not be torn down, would be viewed as promoting religion. Further, he did not fully consider how an outsider would view the effect of a cross that is not demarcated as privately owned, that sits by itself because the government will not allow monuments to be put up next to it, and that it is used for religious, but not patriotic, services. Thus, Justice Alito did not give his hypothetical outside observer all of the facts and he did not have the observer fully interpret the facts that were provided.

Second, Justice Alito only looked at how the outsider would view the cross after the transfer was complete, not whether the land-transfer statute itself constituted an endorsement of religion.[263] This is a fatal flaw, for it allows the reasonable observer to ignore the factors discussed above—why the transfer was tucked into a defense appropriations bill, why the government chose not to require the demarcation of the cross, why Congress repeatedly acted to protect

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258 *Id.* at 1839 ("The cross cannot take on a nonsectarian character by congressional (or judicial) fiat . . . .").

259 *Id.* at 1821–24 (Alito, J., concurring in part and concurring in the judgment).

260 *Id.*

261 *Id.*; *see also supra* note 238 (explaining that it is reasonable to assume an outsider would not know that the cross is on private land).

262 *Salazar*, 130 S. Ct. at 1821–24 (Alito, J., concurring in part and concurring in the judgment).

263 *Id.*

the cross, and why the reversionary clause effectively restricted the VFW to use their private land for a cross display and nothing else.[264]

In meeting the outside analysis, Justice Kennedy proposed a less drastic remedy than the complete invalidation of the land-transfer statute, such as requiring the instillation of signs to show the VFW's ownership.[265] Other possibilities include demarcating the private land with a fence, getting rid of the reversionary clause, or adding a sign stating that this is solely meant as a memorial. Although requirements such as these could help with how the outsider would view the cross after the transfer, they would not fix how an outsider would view the land-transfer statute itself. It would be different if Congress had put in these requirements. Because the reasonable observer with knowledge of the cross's history would know that Congress chose not to put in these requirements to prevent the appearance of endorsement, a reasonable observer would still view the land-transfer statute to be unconstitutional. Further, as explained below, such requirements would not cure the inside analysis showing that Congress had an improper motive when it passed the land-transfer statute.

B. Why the Transfer Is Unconstitutional from the Inside Perspective

The government also continues to be in violation of the Establishment Clause from an inside perspective. The intent or purpose of the land transfer, regardless of its effect, was to promote maintenance of a religious symbol.[266] Although determining whether a secular purpose is merely a sham is not always easy,[267] the government's secular claim to transfer the land does not seem to be sincere after examining the totality of the circumstances

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264 *Id.*

265 *Id.*

266 Even though a court will not easily assume that the legislature has an unconstitutional motive, if there is evidence of such motive, a court will treat the legislature's stated intent as a sham. *Compare* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("The courts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."), *with* McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 864, 881 (2005) (holding that the Kentucky legislature's repeated legislative attempts to display the Ten Commandments showed that the legislature's stated secular purpose was merely a sham). *See generally* Dokupil, *supra* note 228 (discussing sham secular purposes in legislation).

267 *See* Dokupil, *supra* note 228, at 639 (explaining it is sometimes difficult to tell a sham purpose from a legitimate purpose).

surrounding the transfer.[268] First, the land containing the cross was transferred, through a non-neutral process, to a group dedicated to preserving the cross; second, the government retained a reversionary interest; and third, Congress went to multiple legislative lengths to protect the cross, including inventing the idea—without debate—that this cross was a national memorial for World War I veterans.[269] An analysis of these facts makes it clear that every step the government took was designed to ensure that the cross would not be taken down.

The government's intent is evidenced by its decision to transfer the cross to a group devoted to keeping the cross—the VFW.[270] The government's decision not to have an open bidding process shows that the predominant purpose of the transfer was to preserve the cross rather than to transfer the land.[271] If the government just wanted to transfer the land then it would have had a neutral sales process in which any qualified purchaser could have participated.[272] Justice Alito argues that the government transferred it to the VFW to ensure the land contained a World War I memorial.[273] This argument is not persuasive because open bidding could have included a requirement that a World War I memorial of some sort be maintained on Sunrise Rock, but not necessarily this cross. The government's decision that the VFW would receive the land shows it had a purpose other than just transferring the land. The fact that the government likely would have received a better deal through an open bidding process, because it gave up the prime land atop of Sunrise Rock for less desirable land elsewhere in the preserve, provides additional evidence.[274] This improper intent becomes even more apparent because the bill passed after the land-transfer statute once again prohibited the government from dismantling the cross.[275]

The reversionary clause also shows the government's illicit intent. This reversionary clause of the land-transfer statute continues to give the

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[268] *See Salazar*, 130 S. Ct. at 1840 (Stevens, Ginsburg & Sotomayor, JJ., dissenting) ("Our precedent provides that we evaluate purpose based upon what the objective indicia of intent would reveal to a reasonable observer.") (citing McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 862 (2005)).

[269] *See generally id.*

[270] *Id.* at 1812.

[271] *Id.* at 1813.

[272] *See* EISGRUBER & SAGER, *supra* note 147, at 135 (explaining that a neutral way of selling the land is the fairest).

[273] *Salazar*, 130 S. Ct. at 1823 (Alito, J., concurring in part and in the judgment).

[274] Brief of Plaintiff-Appellee at 36, *Buono IV*, 527 F.3d 758, 760 (9th Cir. 2008).

[275] *See supra* note 32 and accompanying text.

government control over the cross because the land reverts back to the government if the VFW removes it.[276] Thus, the government, not the VFW, controls the land and its religious object.[277] Even if Justice Alito is correct that the reversionary clause does not require maintenance of the cross[278]—which would undermine his argument that the government just wanted to protect and give respect to the existing memorial—it certainly encourages the VFW to keep the cross.[279] If the government did not intend to continue to have control over the cross, the government would have acted as it has in other similar situations and severed all ties.[280]

This improper motive is further substantiated from an insider's perspective because the land-transfer statute required continued governmental monetary support for the cross by providing $10,000 to install a plaque.[281] And, unlike other laws requiring the installation of plaques that clearly demarcate the religious object from public property, this plaque would only replace the original one.[282] Thus, it appears that the government's actual purpose is to continue to be associated with the cross both monetarily and by implication.

Moreover, the government's multiple legislative attempts to preserve the cross evidence its actual intent.[283] The Court has previously found that such repeated efforts can evidence an improper internal motive. In *McCreary County*, the Court pointed to the legislature's multiple efforts to maintain a religious display as evidence that the stated secular purpose was a sham.[284] Here, the Anti-Removal Act, the Memorial Act, the Defense Appropriations Act of 2002, and the land-transfer statute, all attempt to maintain the cross.[285]

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[276] "The conveyance . . . shall be subject to the condition that the recipient maintain the conveyed property as a memorial . . . . [Otherwise,] the property shall revert to the ownership of the United States." 16 U.S.C.A. § 410aaa-56(e) (West 2011).

[277] For example, this is not like the reversionary clause in *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005), where private purchasers were required to maintain a fence and sign, showing the separation between the public and private land. *Id.* at 697.

[278] *Salazar*, 130 S. Ct. at 1823 (Alito, J., concurring in part and concurring in the judgment).

[279] *See id.* at 1838 (Stevens, Ginsburg & Sotomayor, JJ., dissenting) ("If it does not categorically require the new owner of the property to display . . . (the cross) . . . the statute most certainly encourages this result." (citation omitted)).

[280] *See, e.g.*, *Mercier*, 395 F.3d at 693 (building a fence, putting up signs, and not having a reversionary clause that requires that the religious object stay in place).

[281] *See supra* note 30.

[282] *Mercier*, 395 F.3d at 697 (requiring signs be placed that stated the land was private).

[283] *See supra* Part I.A (explaining the Memorial Act, Anti-Removal Act, and the land-transfer statute).

[284] McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 869–71 (2005).

[285] *See* Am. Civil Liberties Union of Ky. v. Garrard County, 517 F. Supp. 2d 925 (E.D. Ky. 2007) (explaining that legislation responding to lawsuit evidence of a violation of the Establishment Clause).

Like *McCreary County*, these legislative attempts to protect the cross, in response to threatened and actual litigation,[286] show that any stated secular intent was a sham and the predominant purpose of the land-transfer statute was to protect the cross.

We can further see inside the government's purpose by the national status that it placed upon the cross. By sanctifying it as the only national World War I memorial,[287] Congress ensured that the cross would continue to portray a government message, regardless of ownership.

Justice Alito's concurrence, which argued that an inside look does not show an improper motive,[288] is not persuasive because it failed to properly apply the inside analysis that the Court requires the district court to follow. His analysis fell into the pitfalls of presuming Congress's motives were proper and relying on irrelevant facts.

In determining Congress's purpose, Justice Alito relied on how land transfers are common in the western United States.[289] However, even if they are common, that does not mean that this land transfer was proper. The argument is not that land transfers violate the Establishment Clause, but rather that this one does. It is the facts surrounding this land transfer that the Court, and Justice Alito, needs to look at. These surrounding facts, as explained above, show that the motive for the land transfer was not proper, even though a different land exchange could be proper.

Justice Alito also relied on Congress's overwhelming support for the land-transfer statute.[290] Although it passed easily, that does not mean Congress had a proper motive in passing this statute. The popularity of the act does not constitutionalize it. If support for the passage of legislation, even significant support, meant that a law were Constitutional, then by definition no enacted law would fail the inside analysis of the Establishment Clause test. Thus, this reasoning would swallow up the rule. Further, as pointed out by Justice Stevens's dissent, the high support here most likely has to do with the transfer being tucked into a war-funding bill.[291]

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286 *See McCreary County*, 545 U.S. at 869–72 (explaining that because the legislature passed new laws to try to get around the Establishment Clause, they had an improper internal purpose).

287 Salazar v. Buono, 130 S. Ct. 1803, 1813 (2010).

288 *Id.* at 1823 (Alito, J., concurring in part and concurring in the judgment).

289 *Id.*

290 *Id.*

291 *Id.* at 1828 (Stevens, Ginsburg & Sotomayor, JJ., dissenting).

Justice Alito's conclusion also depends on his understanding of Congress's history of respecting the rights of minorities.[292] This is not only a debatable assertion, but it does not explain anything about Congress's internal purpose for this law. Just like above, this reasoning would presume that all of Congress's future actions are proper and thus it would swallow up the rule.

Looking at all the facts, the evidence demonstrates the internal purpose of the government's actions was to maintain the cross rather than to extricate itself from the cross. The government, in its oral arguments before the Court, even admitted that its purpose was to preserve the cross.[293]

Overall, by applying the inside/outside test set forth by both the majority and dissent in *Salazar*, it is clear that the government is still in violation of the Establishment Clause. From the inside, the government had an improper purpose when it transferred the land containing the cross. From the outside, the government appears to favor religion with the transfer. Thus, on remand, the district court should hold that the government continues to be in violation of the Establishment Clause.

CONCLUSION

Although the Supreme Court gave a jumbled set of opinions when it ruled in *Salazar*, an analysis of the various opinions reveals that they all support—in fact they all mandate—the framework that this Article distills into the inside/outside test. This Article reveals that by examining the apparently inconsistent Establishment Clause precedent through the inside/outside test, the Court's various rulings are actually consistent with each other. Finally, this Article provides the analysis that the district court should employ when it applies the inside/outside test to the facts surrounding the cross on Sunrise Rock.

Because the inside/outside test provides a clear distillation of the Court's precedent, lower courts have one test that can consistently be applied to effectively prevent the government from circumventing the Establishment Clause. The inside/outside test accomplishes this through its two-part approach: (1) a court employs an inside analysis to determine the government's intent; and (2) a court employs an outside analysis to determine how a reasonable observer would view the effect of the government's action. The

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[292] *Id.* at 1824 (Alito, J., concurring in part and concurring in the judgment).
[293] *Id.* at 1831 (Stevens, Ginsburg & Sotomayor, JJ., dissenting).

inside analysis, based on the primary purpose approach from *Lemon*, ensures that the government is not able to cover up an endorsement of religion with a superficial secular claim by looking at the intent behind the action.[294] As explained by the predominant purpose test from *McCreary County*, this requires a court to look at what the internal purpose of the conduct is, regardless of its effect.[295] The outside analysis, based on the endorsement approach to *Lemon* as modified by the historical approach from *Van Orden*, protects the public's trust in the government by prohibiting actions that appear to have the effect of endorsing religion by using the idea of a reasonable observer.[296] This requires a court to look from the outsider's perspective to determine the effect action, regardless of its intent. This dual approach ensures that the government and religion are fully separated.

Another benefit of the inside/outside test is that it is accepted by ideologically divergent members of the Court. Every Justice that addressed the merits of the Establishment Clause in *Salazar* agreed with this basic framework.[297] The only disagreement was with applying the facts of *Salazar* to the framework.[298] This Article, however, shows that from both an inside and an outside perspective, the government continues to be in violation of the Establishment Clause.

Of course, applying these approaches leads to a very important question: If it is not permissible to transfer the land containing an unconstitutional object as attempted in *Salazar*, what is the government supposed to do with all of the religious objects on public land that violate the Establishment Clause? The answer is that the government's actions must pass the inside/outside test. Just because it may not be easy to comply with the Constitution does not mean that the government can choose not to comply with the Constitution. This might have been accomplished in *Salazar* by actually separating the government from the cross when transferring the land. For example, if the land-transfer statute did not have a reversionary clause, the transfer took place as a part of an open bidding process, and the land was demarcated after the transfer, then the

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294 *See supra* Part II.E.

295 McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 881 (2005).

296 *See supra* Part II.E.

297 *Salazar*, 130 S. Ct. at 1803–21; *id.* at 1821 (Roberts, C.J., concurring); *id.* at 1821–24 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1824–28 (Scalia & Thomas, JJ., concurring in the judgment); *id.* at 1828–42 (Stevens, Ginsburg & Sotomayor, JJ., dissenting); *id.* at 1842–45 (Breyer, J., dissenting).

298 *Id.*

government would have likely cured its violation. Another viable option is to remove the cross and erect a secular war memorial.

Although the inside/outside test is designed to address religious symbols on public property, it potentially has additional Establishment Clause implications. Not only does it provide consistency for cases such as *Salazar*, but the two-part analysis could provide consistency to the application of Establishment Clause jurisprudence generally. In conclusion, the inside/outside test provides courts with the tools necessary to fully analyze an Establishment Clause question. With the adoption of this test and its consistent framework, courts will be further empowered with the ability to promote and to protect the Constitution.