SELLING THE GOVERNMENT PROPERTY BENEATH A RELIGIOUS MONUMENT THAT VIOLATES THE ESTABLISHMENT CLAUSE: CONSTITUTIONAL REMEDY OR INFRINGEMENT?

I. INTRODUCTION

In 1802, Thomas Jefferson assured religious adherents that the religion clauses of the First Amendment were designed to erect “a wall of separation between Church and State.” 1 Despite the tranquility that these words brought to the Danbury Baptists, 2 the history of the United States is replete with “official acknowledgment by all three branches of government of religion’s role in American life.” 3 From the words of the Founding Fathers transcribing their belief in God 4 to the presence of religious monuments in public parks, 5 our history is full of instances evincing religion’s strong role in government. In fact, religion has been so intertwined with our history and government that it is almost inseparable. 6

Undoubtedly, our country is a religious nation, 7 and although the total separation envisioned by Jefferson’s proverbial wall may not be feasible or required, 8 the religion clauses were designed “to prevent, as far as possible, the [unnecessary] intrusion of either the church or the state into the precincts of the other.” 9 Nevertheless, the ambiguity of the religion clauses and of the tests

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2. See id.
4. Id. at 683 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 212–13 (1963)).
6. See Van Orden, 545 U.S. at 687 (quoting Schempp, 374 U.S. at 212; Engel v. Vitale, 370 U.S. 421, 434 (1962)).
articulated by the Supreme Court has been a convenient weapon for all sides of
the current religious war being fought in America’s public parks.10

Under the guise of secular memorials, religious organizations of every
creed are seeking to promote their principles and beliefs by donating and
constructing religious monuments on government property.11 Although non-
adherents and other religious organizations typically challenge the
constitutionality of these religious monuments,12 their attempts to preserve
their religious equality are often thwarted by creative governmental action and,
in part, by the Supreme Court’s inability to articulate a fixed rule to evaluate
these monuments.13 However, through the confusion it remains evident that a
government may not demonstrate a preference for one religion over another.14

Even when a constitutional challenge is successful, and a court determines
that a monument violates the Establishment Clause, local governments, state
governments, and Congress suspiciously seek alternative measures to prevent
the removal of these unconstitutional religious monuments.15 Specifically,
governments sell the monument and the property directly beneath it to a
private party asserting that such action ameliorates the Establishment Clause
violation, because the post-sale display of the monument represents the private
religious speech of the new property owner.16 Typically, governments offer
these “sales” exclusively to an entity that has demonstrated its willingness to
preserve the monument.17 Even when the property is publicly offered for sale
and additional bids are accepted, governments sometimes refuse to follow local

10. Peter Irons, God on Trial: Landmark Cases from America’s Religious
Battlefields 2 (2007).
11. See Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 704 (7th Cir. 2005) (noting that
“there was a national effort to distribute as many as 5,000 monuments of the Ten Commandments
throughout the country”).
12. See, e.g., McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 850 (2005) (plurality
opinion).
citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
15. See Buono v. Kempthorne, 527 F.3d 758, 768–72 (9th Cir. 2008) (denying en banc
review) (Congress passed statutes to hinder the removal of a Latin Cross), petition for cert. filed
granted sub nom., Salazar v. Buono, 77 U.S.L.W. 3458, 3467 (U.S. Feb. 23, 2009) (No. 08-472);
see also Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 489–90 (7th
Cir. 2000) (city sold the religious statue after suit was filed).
16. City of Marshfield, 203 F.3d at 491.
17. See Buono, 527 F.3d at 781 (Congress did not open the bidding for the property to the
general public); Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 703 (7th Cir. 2005) (property
was solely offered to the original donor of the monument); City of Marshfield, 203 F.3d at 492
(City did not solicit alternative bids for the property).
law and, despite higher bids, engineer their way out of selling the property to a bidder who has not demonstrated a willingness to preserve the monument.18

This note will analyze whether the sale of a constitutionally infringing monument and the government property beneath it is sufficient to cure the Establishment Clause violation and whether it is permissible under the Constitution. Section II briefly surveys the Supreme Court’s turbulent Establishment Clause jurisprudence pertaining to religious monuments in public parks. Section III analyzes possible remedial options for curing an unconstitutional display of a religious monument in a public park. Section IV provides this author’s analysis of whether the overwhelming presumption that a sale of government property beneath an unconstitutional monument is sufficient to protect religious equality and whether the presumption, as applied, conforms to the principles of the Constitution. Section V concludes with this author’s proposal for a standard that is not prone to manipulation and that would provide more protection for the sacred right of religious equality.

II. SUPREME COURT ESTABLISHMENT CLAUSE JURISPRUDENCE

The Establishment Clause of the First Amendment of the United States Constitution provides that “Congress shall make no law respecting an establishment of religion. . . .”19 Though this language is explicitly directed at Congress, the First Amendment has been incorporated and made applicable to the States and localities through the Fourteenth Amendment.20

The Establishment Clause has generated much controversy, because governmental action “respecting the establishment of religion” is not easily identifiable.21 Specifically, although governmental action might not “establish” a religion, an action may “respect an establishment” by merely being a step that could eventually lead to an establishment of religion.22 Furthermore, being that the Establishment Clause resembles an objective more than an applicable statute, the Supreme Court has been unsuccessful in its attempts to articulate a rule that works for all instances to decipher whether governmental conduct violates the Establishment Clause.23 In fact, the opaqueness of the Establishment Clause has led various Supreme Court Justices to propose different approaches to determine when the outer limits of

18. See Chambers v. City of Frederick, 373 F. Supp. 2d 567, 572 (D. Md. 2005) (the City awarded the property to the original donor although its bid was smaller than those of its competitors).
19. U.S. Const. amend. I.
22. Id.
the Clause are breached.\textsuperscript{24} Regardless of the test employed, defining whether governmental conduct violates the Establishment Clause requires an extremely fact-intensive inquiry.\textsuperscript{25}

\textbf{A. The Lemon Test}

In \textit{Lemon v. Kurtzman}, the Supreme Court adopted a tripartite analysis to scrutinize governmental conduct under the Establishment Clause and to protect against “sponsorship, financial support, and active involvement of the sovereign in religious activity.”\textsuperscript{26} The “\textit{Lemon} test” provides that governmental conduct must (1) have a secular purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) not foster “an excessive entanglement with religion.”\textsuperscript{27} If governmental action violates any of these principles, it violates the Establishment Clause.\textsuperscript{28}

In \textit{Stone v. Graham}, the first case dealing with the display of religious symbols on government property, the Supreme Court employed the \textit{Lemon} test to analyze a Kentucky statute that required the Ten Commandments to be posted on the walls of public school classrooms.\textsuperscript{29} The court held that because the mandatory posting of the Ten Commandments had a preeminent religious purpose, it violated the purpose prong of the \textit{Lemon} test.\textsuperscript{30} The court also noted that an “avowed” secular purpose would be insufficient to avoid conflict with the Establishment Clause.\textsuperscript{31}

\begin{itemize}
\item[24.] See KENT GREENAWALT, RELIGION AND THE CONSTITUTION VOLUME 2: ESTABLISHMENT AND FAIRNESS 157 (2008) (noting five approaches by Supreme Court members as “(1) the threefold test of \textit{Lemon v. Kurtzman}…(2) endorsement, (3) consistency with historical practice or understanding, (4) coercion, and (5) decision of specific issues in light of the values of nonestablishment but without any guiding standard”). See also Lynch, 465 U.S. at 679 (noting the Supreme Court’s repeated unwillingness to be confined to a single test or criterion for evaluating Establishment Clause cases).
\item[26.] \textit{Lemon}, 403 U.S. at 612 (quoting Walz v. Tax Comm’n, 397 U.S. 664, 668 (1970)).
\item[27.] \textit{Id.} at 612–13; \textit{Id.} at 625 (holding that state statutes consisting of salary supplements paid to teachers of secular subjects in nonpublic schools and reimbursement of nonpublic schools for teachers’ salaries, textbooks, and instructional materials used in the teaching of specific secular subjects promoted secular purpose, but involved the excessive entanglement of the State with religion).
\item[29.] \textit{Id.} at 39–41.
\item[30.] \textit{Id.} at 41–43 (noting that instilling values and illustrating the connection between the Ten Commandments and the current legal system were possible secular motives).
\item[31.] \textit{Id.} at 41.
\end{itemize}
B. The Endorsement Test

Four years later, the Supreme Court again applied the *Lemon* test to evaluate the display of a religious symbol on public property. In *Lynch v. Donnelly*, the court analyzed whether the inclusion of a crèche in the City of Pawtucket’s Christmas display, which also included a Santa Clause house, a Christmas tree, and a Seasons Greetings banner, violated the Establishment Clause. In upholding the constitutionality of the display, the court concluded that the purposes of the city’s display, to celebrate the Christmas holiday and to depict its origins, were purely secular. Additionally, the court held that although the display of the crèche may incidentally benefit Christianity, the benefit conferred was merely an indirect result of recognizing the origins of the Christmas holiday and was insufficient to have an effect of advancing or endorsing religion.

In a concurring opinion, Justice O’Connor articulated and proposed a new “endorsement” test that sought to clarify the effect and purpose prongs of the *Lemon* test. Justice O’Connor’s endorsement test condemns any governmental favoritism of religion, because it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” Justice O’Connor also indicated that when analyzed under the endorsement test, *Lemon*’s purpose prong inquires “whether the government intends to convey a message of endorsement or disapproval of religion.” Similarly, the endorsement approach construes *Lemon*’s effect prong as an inquiry into whether “a government practice... [has] the effect of communicating a message of government endorsement or disapproval of religion[,]” regardless of whether the effect was intentional.

The endorsement test also indicated that the determination of whether the government has acted in a manner that creates the impression of endorsement

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33. *Id.* at 671, 687.
34. *Id.* at 681.
35. *Id.* at 683. The Court also determined that the display of the crèche did not excessively entangle the government and Christianity, because there was no evidence of “comprehensive, discriminating, and continuing state surveillance” of the display or any contact between the church and the government pertaining to the display at all. *Id.* at 684 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)).
36. *Id.* at 691–94 (O’Connor, J., concurring). Justice O’Connor concluded that the City of Pawtucket’s display of the crèche is not an endorsement of the Christian faith, but is instead a display celebrating a public holiday. *Id.* at 692.
38. *Id.* at 691.
39. *Id.* at 692.
depends on the message as interpreted by a “reasonable observer.”\(^{40}\) Justice O’Connor noted that this reasonable observer is more informed than a mere “casual passerby”\(^{41}\) and “must be deemed aware of the history of the conduct in question and must understand [the symbol’s] place in our Nation’s cultural landscape.”\(^{42}\)

In its first application of the endorsement test in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, the Supreme Court analyzed whether a crèche erected on the grand staircase of the County Courthouse and a menorah erected in front of the City-County Building during the holiday season violated the Establishment Clause.\(^{43}\) Noting that the crèche was the focal point of the County Courthouse’s holiday display and that there was nothing detracting from its religious message, the court held that the crèche was displayed in a manner that sent an “unmistakable message” that the county supports and promotes the Christian message.\(^{44}\) However, the court held that the display of the menorah, which was next to the county’s 45-foot Christmas tree and a sign saluting liberty, did not violate the Establishment Clause, because it was unlikely that it conveyed a message that the government was endorsing the beliefs associated with the menorah and denouncing all other religions.\(^{45}\)

C. Ostensible and Predominate Purpose

In *McCreary County v. ACLU of Kentucky*, the Supreme Court analyzed the constitutionality of two Kentucky Counties’ decisions to construct large displays of the Ten Commandments in their respective courthouses.\(^{46}\) Shortly after the suits challenging the displays commenced, the Counties expanded the Ten Commandments displays to include American historical documents but emphasized and focused on the documents’ religious passages and references to God.\(^{47}\) Subsequently, the district court awarded a preliminary injunction requiring the removal of the displays, but the Counties again amended the displays to include several more secular documents of historical and legal significance to the United States.\(^{48}\)

41. Id. at 779.
44. Id. at 598–600.
45. Id. at 620.
47. Id. at 852–54, 869–70.
48. Id. at 854–56.
In analyzing the Counties’ actions, a plurality of the Supreme Court noted that “[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of [maintaining] official religious neutrality.” Additionally, “an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter’s heart of hearts.” The court elaborated that the eyes that inquire into the government’s “purpose belong to an ‘objective observer,’ who takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation of the statute,’ or comparable official act.”

The McCreary Court also noted that when determining whether governmental action has a secular purpose, the legislature’s stated reasons will generally receive deference if the purpose is “genuine, not a sham, and not merely secondary to a religious objective.” However, government action is unconstitutional when the “openly available data support[s] a commonsense conclusion that a religious objective permeate[s] [from] the government’s action.” Additionally, when the claim is an apparent sham or the secular purpose is secondary, courts have found that there is not a sufficient secular objective in the government’s action.

In scrutinizing the Counties’ actions, the Supreme Court held that a reasonable observer would not be able to turn a blind eye to the government’s religious intention that motivated expanding the earlier displays nor accept the claim that the Counties had cast off their previous religious objectives in erecting the subsequent displays. Accordingly, the court held that the Counties’ actions violated the Establishment Clause, because their purpose in expanding the display was, despite their secular assertions, to keep the Ten Commandment monuments in the courthouses.

49. *Id.* at 860.
50. *Id.* at 862 (citing Wallace v. Jaffree, 472 U.S. 38, 74 (O’Connor, J., concurring)).
52. *Id.* at 864.
53. *Id.* at 865.  
54. *Id.* at 865.  
55. *Id.* at 869–70.  
56. *McCreary County*, 545 U.S. at 873.  
57. *Id.* at 873.  
58. *Id.* at 873.  
59. *Id.* at 873.  
60. *Id.* at 873.  
61. *Id.* at 873.
D. Nature and National History of the Monument

On the same day that *McCreary County* was decided, a different plurality of the Supreme Court decided another Establishment Clause case involving religious monuments that further blurred Establishment Clause jurisprudence.57 *Van Orden v. Perry* involved a challenge to the placement of a monument of the Ten Commandments, donated by a private organization, on the grounds of the Texas State Capitol, which also displayed 17 other monuments and 21 historical markers commemorating the “people, ideals, and events that compose Texan identity.”58

In analyzing the passive display, a plurality of the court held that the *Lemon* test is not useful.59 Instead, the plurality indicated that the court’s analysis should be “driven both by the nature of the monument and by our Nation’s history.”60 Furthermore, the plurality noted that the Establishment Clause is not violated if a monument simply has religious content or promotes a message consistent with religious doctrine.61 Ultimately, the plurality held that the placement of the Ten Commandments monument did not violate the Establishment Clause, because the monument served both a religious and secular purpose by being included in a group of monuments that represented several strands of Texas’s political and legal history.62

In his concurring and controlling opinion, Justice Breyer indicated that the context of the passive display must be examined and it must be determined as to how the text is being used.63 Accordingly, Justice Breyer concluded that the display of the Ten Commandments monument on the Texas State Capitol grounds did not infringe the Establishment Clause, because it served a mixed, but primarily nonreligious, purpose.64

III. REMEDIAL MEASURES TO CURE ESTABLISHMENT CLAUSE VIOLATIONS

Governments could avoid several Establishment Clause problems and the accompanying litigation by merely refraining from erecting monuments and displays that use religious words and symbols;65 but an aggrieved party is nonetheless often forced to seek vindication of his religious rights in the judicial arena. Accordingly, aggrieved parties are forced to seek or must

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58. *Id.* at 681.
59. *Id.* at 686. The plurality did not opine, however, on the *Lemon* test’s fate in the larger scheme of Establishment Clause jurisprudence. *Id.*
60. *Id.*
61. *Id.* at 690.
63. *Id.* at 700–01 (Breyer, J., concurring).
64. *Id.* at 703.
65. GREENAWALT, supra note 24, at 69.
threaten to seek a judicial remedy that is designed to restore them, as nearly as possible, to the position they would have been in but for the wrong of the other party.\textsuperscript{66} Especially, in the constitutional realm, it is important for a remedy to closely fit the asserted violation.\textsuperscript{67}

A. Governmental Removal of an Unconstitutional Religious Display

Given that the costs associated with defending an alleged Establishment Clause violation are often great, governments occasionally seek to avoid these expenses by removing the alleged infringement on the mere threat of judicial intervention.\textsuperscript{68} However, even a government’s decision to remove an alleged infringement is occasionally challenged on constitutional grounds.\textsuperscript{69} In \textit{Vasquez v. Los Angeles County}, Los Angeles County’s decision to remove a cross from its official Seal was challenged on the ground that the removal was motivated by the County’s disapproval of, and hostility toward, the Christian faith.\textsuperscript{70} However, the County defended the removal by asserting that it was seeking to avoid a potential Establishment Clause violation.\textsuperscript{71}

Agreeing with the County, the Ninth Circuit held that the County’s decision to remove a potentially infringing symbol or display in order to avoid an Establishment Clause violation has a secular purpose.\textsuperscript{72} Additionally, the court noted that a reasonable observer could not possibly conceive the effect of the County’s decision to remove the religious symbol from its seal as a disapproval of, or hostility toward, the associated religious beliefs.\textsuperscript{73} Instead, the court determined it was more reasonable that the County’s efforts would be perceived as an attempt to restore neutrality to its seal and to ensure compliance with the Establishment Clause.\textsuperscript{74} Accordingly, the court held the removal of a religious symbol or display in order to avoid a potential Establishment Clause violation does not, in itself, violate the Establishment Clause.\textsuperscript{75}

\textsuperscript{66} United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958).
\textsuperscript{68} \textit{See Vasquez v. Los Angeles County}, 487 F.3d 1246, 1255 (9th Cir. 2007).
\textsuperscript{69} \textit{Id.} at 1248.
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.} at 1255. In perceiving the governmental action as a desire to return to neutrality, as opposed to hostility towards particular religious beliefs, the Court noted that the removal came only after the presence of crosses on several other seals had been held unconstitutional. \textit{Id.} at 1257.
\textsuperscript{73} \textit{Vasquez}, 487 F.3d at 1257.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.} at 1258.
B. Injunction for Removal of the Unconstitutional Religious Display

An aggrieved party will typically have to seek judicial intervention to protect its religious rights. Accordingly, when it has been determined that a permanent religious monument on government property violates the Establishment Clause, the traditional remedy has been for a court to award an injunction mandating the monument’s removal. However, even these court-mandated removals are occasionally challenged on constitutional grounds.

In McGinley v. Houston, after the district court issued an injunction requiring the removal of a monument depicting the Ten Commandments from the Alabama Supreme Court’s rotunda, the injunction was challenged on the ground that it violated the Establishment Clause by favoring “a nontheistic religion/faith.” The Eleventh Circuit dismissed this claim as meritless. Specifically, the court held that the government’s removal of an unconstitutional religious monument does not discriminate against the religious beliefs associated with the monument being removed or favor “a nontheistic religion/faith”; but, instead, the governmental action was purely secular. The court additionally noted that if this claim had merit “an Establishment Clause violation could never be cured, because every time a violation is found and cured by the removal of the statute or practice that cure itself would violate the Establishment Clause by leaving behind empty space.”

C. Sale of Government Property Beneath an Unconstitutional Religious Monument

Instead of complying with an injunction mandating the removal of an unconstitutional religious monument on government property, governments often attempt to remedy the Establishment Clause violation by selling the monument and the property directly beneath it to a private party. Despite this sale, courts agree that “the presence of a religious symbol on once-public land ... may still violate the Establishment Clause.” In determining whether the sale of the monument and property beneath it passes constitutional muster, the court must, on a transaction by transaction basis, examine “both the form

76. See, e.g., McGinley v. Houston, 361 F.3d 1328, 1329–30 (11th Cir. 2004).
77. See, e.g., id.
78. Id.
79. Id. at 1332.
80. Id. at 1333.
81. McGinley, 361 F.3d at 1332.
82. See, e.g., Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 489–90 (7th Cir. 2000).
83. Buono v. Kempthorne, 527 F.3d 758, 778 (9th Cir. 2008) (quoting Buono v. Norton, 371 F.3d 543, 546 (9th Cir. 2004)).
and substance of the transaction to determine whether the governmental action endorsing religion has actually ceased.”\textsuperscript{84} However, in analyzing the sale of the unconstitutional religious monument and the property beneath it, the United States Circuit Courts are divided on whether the sale is sufficient to end an Establishment Clause violation.\textsuperscript{85}

1. Presumption of Constitutionality

The Seventh Circuit and a District Court in the Fourth Circuit have held that “absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion.”\textsuperscript{86} These courts have also noted that this formalistic standard is prone to governmental manipulation.\textsuperscript{87} Nevertheless, they have indicated that inquiring into the form and substance of the transaction is sufficient to determine whether the governmental endorsement has actually ceased.\textsuperscript{88} Furthermore, these courts have held that a governmental decision to sell the monument site to end an Establishment Clause violation serves a purely secular purpose.\textsuperscript{89}

The Seventh Circuit got its first glimpse of this issue in \textit{Freedom from Religious Foundation v. City of Marshfield}, where the City of Marshfield accepted a statue of Jesus Christ with his arms open in prayer standing atop a large sphere, which bore the inscription “Christ Guide Us On Our Way.”\textsuperscript{90} The statue was placed on undeveloped city property and in a manner that made it visible to travelers on the city’s main highway.\textsuperscript{91} Marshfield subsequently developed the property around the statue in order for it to be used as a public park.\textsuperscript{92} After much objection to the statue’s presence in the park and Marshfield’s repeated refusal to remove the statue, suit was filed.\textsuperscript{93} Shortly

\textsuperscript{84} Id. at 778–79 (citing \textit{City of Marshfield}, 203 F.3d at 491).
\textsuperscript{85} See id. at 779 n.13 (rejecting Seventh Circuit presumption permitting sale or transfer of land, absent unusual circumstances). See also Respondent’s Brief in Opposition of Certiorari, Salazar v. Buono, 527 F.3d 758, 778 (9th Cir. 2008), \textit{cert. granted}, 129 S. Ct. 1313 (U.S. Feb. 23, 2009) (No. 08-472) (asking the Supreme Court “[w]hether, after a court has held that the presence of a sectarian religious symbol on government land violates the Establishment Clause, the transfer of that land perpetuates the Establishment Clause violation. . . .”).
\textsuperscript{86} Mercier v. Fraternal Order of the Eagles 395 F.3d 693, 701 (7th Cir. 2005) (quoting \textit{City of Marshfield}, 203 F.3d at 491); Chambers v. City of Frederick, 373 F. Supp. 2d 567, 572 (D. Md. 2005) (quoting same). These courts assert that the Establishment Clause violation ends when the property is sold, because the post-sale display represents the expression of the private purchaser, not of the government. See, e.g., \textit{City of Marshfield}, 203 F.3d at 491.
\textsuperscript{87} Mercier, 395 F.3d at 700.
\textsuperscript{88} Id. (quoting \textit{City of Marshfield}, 203 F.3d at 491).
\textsuperscript{89} See id. at 705; Chambers, 373 F. Supp. 2d at 573.
\textsuperscript{90} \textit{City of Marshfield}, 203 F.3d at 489.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
thereafter, Marshfield erected a disclaimer that indicated the presence of the statue does not reflect an endorsement of the associated religious message.94 Subsequently, Marshfield sold the property beneath the statue to a private party who held views consistent with the monument’s message.95

In analyzing the sale, the Seventh Circuit agreed with Marshfield’s contention that the sale of the property effectively ended Marshfield’s religious expression, because the property owner was in exclusive control of the expression that takes place on the property after the sale.96 Furthermore, because the price was fair and because the necessary formalities required by state law were performed to consummate the sale, the court concluded that there were no extraordinary circumstances that evinced that the city endorsed a religion by deciding to sell the property to a religious organization.97 However, the court concluded that the sale failed to end the perception of government endorsement and granted the private purchaser preferential access to the city’s park, because the private property was not visibly differentiated from the city’s park in any sufficient way.98 In dicta, the court indicated that, in order to end the perception of endorsement, the city should erect a structure that clearly defines the private property and should maintain a clearly visible disclaimer.99

The Seventh Circuit got another look at the issue five years later in Mercier v. Fraternal Order of Eagles, where the City of LaCrosse granted the Fraternal Order of Eagles permission to erect a monument of the Ten Commandments in a public park.100 After the city’s approval to erect the monument, the city was inundated by severe flooding, and the monument was ultimately dedicated to those who helped during the flood.101 After the monument was unveiled, the city refused multiple requests to remove the monument and to move it to a private location.102 Instead, without a public

94. Id.
95. City of Marshfield, 203 F.3d at 490. The statue was originally donated by the Knights of Columbus and was ultimately sold to the Henry Praschak Memorial Fund, Inc. Id. at 489–90. Henry Praschak was a member of the Knights of Columbus and helped with the development of the park. Id. at 489.
96. Id. at 491. As a result of the sale, Marshfield no longer owns the property on which the religious expression occurs and, therefore, the sale ended Marshfield’s religious expression and cured any Establishment Clause violations. Id.
97. Id. at 492–93.
98. Id. at 497.
99. City of Marshfield, 203 F.3d at 497 (indicating that installing a permanent fence or wall would be sufficient to clearly express that the speech was expressive conduct of the private owner).
100. Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 694–95 (7th Cir. 2005).
101. Id. at 696.
102. Id.
offering, the city sold the property beneath the monument to the Eagles.\textsuperscript{103} Upon taking possession of the property, the Eagles erected a fence around the monument and a disclaimer, which indicated that the property was privately owned and the religious beliefs associated with the monument were those of the Eagles.\textsuperscript{104}

Despite the city offering the property solely to the original donor, an entity that had demonstrated its willingness to preserve the monument, the Seventh Circuit noted that the city’s decision to sell the property was motivated by the purely secular intention to end a perceived endorsement.\textsuperscript{105} The court ultimately concluded that there were no unusual circumstances to call into question the constitutionality of the sale; and, therefore, the sale of the property effectively ended the Establishment Clause violation.\textsuperscript{106} Additionally, the court noted that the extensive efforts taken to sell the property, erect a fence, and display signs would overcome a reasonable observer’s perception that the religious message of the monument was being endorsed by the city.\textsuperscript{107}

In Chambers v. City of Fredrick, a stone copy of the Ten Commandments was placed in one of Fredrick’s public parks, in a manner that made it visible from one of the city’s main roads.\textsuperscript{108} In light of the growing controversies surrounding the constitutionality of the monument, the local Fraternal Order of Eagles, which donated the monument to Fredrick, offered to purchase all or part of the grounds upon which the monument rested.\textsuperscript{109} After the city decided that it would be in its best interest to sell the property beneath the monument, three additional offers to purchase the property were received and several additional bids were solicited.\textsuperscript{110} However, despite the fact that the Eagles did not submit the highest bid, the property was sold to the Eagles upon the city’s determination that it was the logical and best bidder to maintain the property.\textsuperscript{111} The sale was subsequently challenged on the ground that it failed to ameliorate the Establishment Clause violation, because the transaction was a sham designed to permit the continued display of the monument.\textsuperscript{112}

\begin{itemize}
  \item \textsuperscript{103} Id. at 697.
  \item \textsuperscript{104} Id.
  \item \textsuperscript{105} Mercier, 395 F.3d at 705.
  \item \textsuperscript{106} Id. at 701–03 (indicating, in dicta, that unusual circumstances would be (1) “a sale that did not comply with applicable state law governing the sale of land by a municipality,” (2) “a sale to a straw purchaser that left the City with continuing power to exercise the duties of ownership,” or (3) “a sale well below fair market value resulting in a gift to a religious organization”).
  \item \textsuperscript{107} Id. at 703–04.
  \item \textsuperscript{108} Chambers v. City of Fredrick, 373 F. Supp. 2d 567, 569–70 (D. Md. 2005).
  \item \textsuperscript{109} Id. at 570 (the sale of the property also included the land beneath an additional monument that included the names of individuals buried on the grounds).
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} Id. at 571–72.
  \item \textsuperscript{112} Id.
\end{itemize}
Adhering to the presumption articulated by the Seventh Circuit, the court determined that, despite the fact that the city failed to adhere to local requirements for the sale of public land and failed to award the property to the highest bidder, there were no unusual circumstances to make the sale of the property suspect.\(^\text{113}\) Although the monument’s location might convey the impression to a passerby that Fredrick is endorsing its message, the court concluded that a reasonable observer would understand that the property was sold to dissociate Fredrick with any message the monument conveys.\(^\text{114}\) Accordingly, the court determined that a reasonable observer would take comfort in the fact that the Eagles, being the original owner of the monument, was the logical purchaser for the property and would not conclude that the sale was intended to advance the religion associated with the monument.\(^\text{115}\) Accordingly, the court held that the sale of the property and the monument’s continued display did not infringe the Establishment Clause.\(^\text{116}\)

2. Rejecting the Presumption

In the most recent challenge to a sale of property beneath an unconstitutional religious display, the Ninth Circuit, agreeing with the approach followed by the other circuits, indicated that the substance of a transaction for the sale of government property beneath an unconstitutional religious display must be analyzed on a transaction-by-transaction basis to determine whether the Establishment Clause violation has actually ceased.\(^\text{117}\) However, the Ninth Circuit refused to adopt the presumption that a sale of government property is an effective cure to the Establishment Clause violation.\(^\text{118}\) Instead, the Ninth Circuit noted that, typically, “constitutional violations are not presumptively cured when control is transferred from public to private hands.”\(^\text{119}\)

\(^\text{113}\) Chambers, 373 F. Supp. 2d at 572.

\(^\text{114}\) Id. at 573. The court’s analysis dubiously indicates that it is irrelevant to a reasonable observer, who is “aware of the history and context” of the display, that the procedures for selling public property were not adhered to nor was the property conveyed to the individual with the highest bid. Id.

\(^\text{115}\) Id.

\(^\text{116}\) Id.

\(^\text{117}\) Buono v. Kempthorne, 527 F.3d 758, 779 n.13 (9th Cir. 2008).

\(^\text{118}\) Id.

\(^\text{119}\) Id. (citing Evans v. Newton, 382 U.S. 296, 301 (1966) (“Where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.”); Terry v. Adams, 345 U.S. 461, 469 (1953) (lack of formal public control over election primary “immaterial” to analysis of constitutional violation)).
In Buono v. Kempthorne, an eight-foot Latin cross, which rests atop “Sunrise Rock” in the Mojave National Preserve, was challenged on the ground that it violated the Establishment Clause. After a request to construct a Buddhist shrine near the cross was denied, the National Park Service (‘‘NPS’’) announced its intention to remove the cross. However, upon notice of the NPS’s intentions, the United States Congress passed a series of laws designed to preserve the cross’s display.

Shortly before a panel of the Ninth Circuit heard and affirmed the district court’s permanent injunction, Congress enacted a final bill that authorized a land exchange for the area directly beneath and immediately surrounding the cross with the original donor, the Veterans of Foreign Wars (‘‘VFW’’). Undeterred by the Ninth Circuit’s affirmation of the injunction, the government began moving forward with the proposed land exchange. However, after motions were filed, the district court ordered the government to comply with the permanent injunction and prohibited implementation of the land exchange. On appeal, the Ninth Circuit analyzed whether the land exchange was an attempt to evade the injunction by scrutinizing three aspects of the exchange: ‘‘(1) the government’s continuing oversight and rights in the site containing the cross after the proposed land exchange; (2) the method for

120. 527 F.3d 758 (9th Cir. 2008), cert. granted, 129 S. Ct. 1313 (Feb. 23, 2009) (No. 08-472).
121. Id. at 768. A wooden cross was first erected at this location by the Veterans of Foreign Wars. This controversy spawned when the National Parks Service denied the request of an individual seeking to build a Buddhist shrine near the cross. Id. at 769.
122. Id.
123. Id. at 769. In December 2000, Congress passed its first piece of legislation, which prohibited the use of government funds to remove the cross. Id. In March 2001, suit was filed in district court challenging the constitutionality of the cross’s continued presence in the Preserve. Id. at 770. However, while suit was pending and before the district court was able to determine whether the continued display of the cross violated the Establishment Clause, Congress designated the cross a “national memorial commemorating [the] United States participation in World War I and honoring the American veterans of that war.” Id. (quoting Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-117, § 8137, 115 Stat. 2278-79 (2002) (codified as amended at 16 U.S.C. § 431 (2002))). Subsequently, the district court issued a permanent injunction prohibiting the continued display of the cross. Id. at 771. In response, Congress passed a bill prohibiting federal funds from being used to dismantle any national monuments commemorating the United States’ participation in World War I. Id. (quoting Department of Defense Appropriations Act, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1551 (2003)).
125. Buono, 527 F.3d at 773.
126. Id.
effectuating the land exchange; and (3) the history of the government’s efforts to preserve the cross.”

First, in analyzing the role the government would play in the continued oversight of the property after the exchange, the court held that the government’s ongoing supervision, maintenance, and oversight responsibilities coupled with its reversionary interest permitted it to retain substantial rights and control over the property despite the transfer of ownership to the VFW.

Next, the court noted that method of sale was peculiar, because the land exchange was made by Congress without holding a hearing and was deeply buried in an appropriations bill. It was also noted that Congress transferred the land without holding a public auction or notice and transferred the land to the monument’s original donor, who had a “significant interest and personal investment in preserving the cross that had been ordered removed.”

The court concluded that these facts demonstrate that the government had an unusual role in the transaction and provided additional evidence that the government was attempting to circumvent the injunction. Lastly, the court indicated that the government’s efforts to preserve the display of the cross were “herculean” and led to the “undeniable conclusion that the government’s [purpose] was to keep the cross in place.” Accordingly, the court held that the land exchange was merely a ploy designed to circumvent the injunction and keep the Latin cross in place.

The Ninth Circuit also analyzed whether the improper endorsement of religion ceased as a result of the land exchange. A reasonable observer, the court noted, would undoubtedly be aware of “the governmental attempts to preserve [the cross] and its denial of access to other religious symbols.” Accordingly, the court held that the land exchange was an improper endorsement of religion, enjoined the government from effectuating the land

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127. Id. at 779.
128. Id. at 779, 781. “NPS retains overall management and supervision of the Preserve. NPS is responsible for ‘the supervision, management, and control’ of national memorials…The transfer of land to the VFW is conditioned on the VFW’s maintenance of the conveyed property as a memorial to World War I veterans. The Secretary must carry out its duties under § 8137, which provides $10,000 for NPS to acquire and install replicas of the original cross and plaque. The property ‘shall revert’ to government ownership if ‘it is no longer being maintained as a war memorial.’” Id. at 779.
129. Id. at 781.
130. Buono, 527 F.3d at 781.
131. Id. at 781–82.
132. Id. at 782.
133. Id.
134. Id.
exchange, and required the government to comply with the original injunction requiring the removal of the cross.136

IV. ANALYSIS

When the government transacts to sell a religious monument that violates the Establishment Clause and the property beneath the monument, the transaction typically grants the property owner exclusive control over the use of the property and, thus, arguably ends any Establishment Clause violation.137 However, despite the sale, a religious monument’s presence on once-public land may be problematic.138 In analyzing these transactions, most courts rely on the illogical presumption that these sales are constitutional. Furthermore, the manner in which the courts have analyzed the circumstances surrounding these transactions is insufficient to protect against even the most blatant manipulations. In fact, most of the transactions analyzed by courts are problematic and infringe not only the principles of the Establishment Clause, but also the Free Speech and the Equal Protection Clauses. Additionally, when the government decides to sell its property after a court has issued an order mandating the monument’s removal, the government’s action amounts to contempt for the court’s inherent powers.

A. Presumption

Most courts have adopted the presumption that a sale of the government’s property beneath an unconstitutional religious monument is sufficient to end an Establishment Clause violation, unless “unusual circumstances” are present.139 These courts expressly note that this standard is highly susceptible to manipulation.140 However, they are confident that scrutinizing the form and substance of these transactions will enable it to sufficiently decipher whether the Establishment Clause violation has ceased.141

In light of the circumstances that typically surround a sale of an unconstitutional religious monument and the government property beneath it, the presumption is insufficient to protect religious equality. First, the mere fact that a sale is being conducted should draw into question the veracity of the

136. Id. at 782–83.
137. Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000). See also Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 786 (1995) (Souter, J., concurring) (“[A]n unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the lane on which it stands.”).
138. See, e.g., Buono, 527 F.3d at 778.
139. Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 701 (7th Cir. 2005); City of Marshfield, 203 F.3d at 491; Chambers v. City of Frederick, 373 F. Supp. 2d 567, 572 (D. Md. 2005).
140. City of Marshfield, 203 F.3d at 491.
141. Id.
government’s asserted secular purpose. Suspicion should arise from the
government’s decision to forgo removing the monument and, instead, design a
transaction that virtually guarantees the monument’s continued display.
Additionally, unlike a transaction for sale, a decision to remove the monument
is not susceptible to manipulation and ends the Establishment Clause violation
without an adverse impact on the constitutional rights of others. Second,
since the government property is typically only offered for sale when threats of
removal emerge, the sale appears to be a non-remedial measure designed to
preserve the display of the monument and to avoid the commands of the
Establishment Clause. Finally, because the government has previously
granted a religious organization preferential access to display its monument,
courts should be skeptical of its later decision to sell a part of its public park to
these same organizations. In fact, a government that has previously granted a
preference to a religious monument should not be presumed to act within the
bounds of the Constitution when it has opted to sell its property as opposed to
merely removing the monument. In dealing with a right as sacred as religious
freedom, more caution is necessary than a “formalistic standard” that runs a
high risk of manipulation.

Nevertheless, courts heavily rely on the presumption that the sale ends an
Establishment Clause violation. In fact, sales are typically upheld on the
complainant’s inability to demonstrate that the circumstances surrounding the
transaction are unusual.144 While this presumption correctly recognizes the
need for a fact-intensive inquiry into a government’s decision to sell its
property, the typical factors that could rebut the presumption, as applied by
the courts, have proven trivial and insufficient to protect against even the most
blatant manipulations.

One of the initial factors courts analyze when scrutinizing a sale is whether
the transaction conforms to state and local law for the sale of public

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142. Id. at 491–92.
143. The presumption appears to be endorsing a non-remedial initiative designed to sell off
patches of government land to various religious denominations as a means of circumventing the
Establishment Clause. See Mercier, 395 F.3d at 702. In the unlikely event that a monument that
carried a message which the administrator of the public forum disagreed with, the administrator
would undoubtedly remove the monument as opposed to selling the property. This evinces the
great need for these transactions to be viewed in a suspicious light.
144. See id. at 703 (indicating that the circumstances “do not entail the ‘unusual
circumstances’ that would otherwise override the type of legitimate sale approved by [City of]
Marshfield”); Chambers, 373 F. Supp. 2d at 572 (upholding the constitutionality of a sale where
the city failed to comply with its procedural requirements for the sale of public land and did not
award the sale to the highest bidder; instead subjectively determined that the original donor was
the only bidder that would be able to comply with the covenants and take care of the monument
property).
145. Mercier, 395 F.3d at 702.
property. Adherence to state and local law is often used by courts to demonstrate the legitimacy of the sale; however, courts have failed to even question a sale when the government fails to adhere to local laws or procedures. Furthermore, when the government permits—or accepts—bids from multiple entities to purchase the property, courts have failed to become suspicious of a government’s decision to sell the property to the original donor of the monument, despite the submission of higher bids.

Merely looking to whether a government complied with state or local law is insufficient to analyze the legitimacy of a transaction because often no alternative bids are permitted enabling the government to select and sell its property to an entity that has demonstrated its willingness to preserve the monument. By failing to permit other bids, the government can effectively alleviate the risk of the sale going to a bidder that will remove or change the monument. However, despite this blatant manipulation, courts have failed to deem the exclusive offering as an unusual enough circumstance to call into question the legitimacy of the transaction.

Third, courts often inspect the deed of sale to ensure that the government does not retain rights that would permit it to exert extensive control over the property or the manner in which it is subsequently used. Particularly, courts analyze whether there is a restrictive covenant or a reversionary clause that prohibits the purchaser from exercising the rights typically held by a property owner. However, courts are hardly suspicious of a transaction even when a restrictive covenant that mandates that the property be used in a particular

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146. See City of Marshfield, 203 F.3d at 492.
147. See id. (the sale of the property complied with the applicable state law); Mercier, 395 F.3d at 702 (the sale complied with state law).
149. See id. (noting that the original donor bid less for the property than other bidders).
150. See Buono v. Kempthorne, 527 F.3d 758, 781 (9th Cir. 2008) (Congress did not open the bidding to the general public, but directed the land to be transferred to the original donor, who has actively sought to preserve the cross’s display); Mercier, 395 F.3d at 702–03 (City offered the property exclusively to the original donor of the monument); City of Marshfield, 203 F.3d at 489–92 (City did not solicit alternative bids, but sold to an organization commemorating a member of the organization that donated the monument).
151. When the government permits only a single bidder, the fact that the sale complies with state or local law seems to become irrelevant to the courts. See City of Marshfield, 203 F.3d at 492.
152. See Mercier, 395 F.3d at 702–03 (finding no unusual circumstances, despite fact that the property was offered solely to the original donor); City of Marshfield, 203 F.3d at 492–93 (finding no unusual circumstances despite fact that no alternative bids were solicited).
153. Buono, 527 F.3d at 781; City of Marshfield, 203 F.3d at 492.
154. See Buono, 527 F.3d at 780 (government retained a reversionary interest that triggers if the property is not being used in a particular manner); City of Marshfield, 203 F.3d at 492 (a restrictive covenant was included in the deed of sale limiting the purchaser’s use of the property).
manner is included in the deed of sale.\footnote{155} In fact, only after a court disregarded the presumption of constitutionality has a reversionary clause, which set forth the manner in which the property was to be used post-sale, cast doubt on the legitimacy of the sale.\footnote{156}

Fourth, some courts consider the location of the property being sold as relevant.\footnote{157} However, attempting to distinguish public parks from other government property is futile for the determination of whether the sale sufficiently ends an Establishment Clause violation. Specifically, a legitimate sale of government property beneath an unconstitutional religious monument requires governmental action that sufficiently distances the government from the monument’s message. Accordingly, beyond the determination of whether the sale of the location is permissible under state or local law, the location of the property is irrelevant for the determination of whether the government is distancing itself from the monument’s message.\footnote{158}

Finally, courts often scrutinize the price at which the government sells its property.\footnote{159} Comparing the fair market price of the property and the transaction price is required to ensure that the transaction price is reasonable and not merely a gift to the purchasing party.\footnote{160} Although courts frequently use the selling price to evince the legitimacy of the sale, courts rarely analyze a transaction where the price of sale was shown to be below the fair market value.\footnote{161} However, by failing to select the highest bid to purchase the

\footnotesize{155. City of Marshfield, 203 F.3d at 492 (noting that the deed of sale included a restrictive covenant, which limited the use of the property to public park purposes). The court indicates that a restrictive covenant does not void a transaction for the sale of land under state law. Id. Additionally, the court held that because the City has made no effort to enforce the covenant, the court need not analyze whether it constitutes a perpetuation of the endorsement of religion. Id. at 492–93.}

\footnotesize{156. Buono, 527 F.3d at 781.}

\footnotesize{157. Mercier, 395 F.3d at 703 (noting that the property sold is not near or in any governmental building, but is merely a public park).}

\footnotesize{158. Instead, the location of the property in question is relevant only for the threshold determination of whether the religious monument violates the Establishment Clause, not whether the violation has or can be remedied through sale. See County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 598 n.48 (1989) (holding that crèche’s location in prominent location resulted in an unconstitutional endorsement); O’Connor v. Washburn University, 416 F.3d 1216, 1228 (10th Cir. 2005) (finding that location of monument weighted toward a finding of state endorsement).}

\footnotesize{159. See City of Marshfield, 203 F.3d at 492; Mercier, 395 F.3d at 702.}

\footnotesize{160. City of Marshfield, 203 F.3d at 492.}

\footnotesize{161. See Mercier, 395 F.3d at 702 (noting that the purchaser paid the market rate, as determined by the City Assessor), City of Marshfield, 203 F.3d at 492 (noting that the purchaser paid a fair market price for the land). Cf. Annunziato v. New Haven Bd. Of Aldermen, 555 F.Supp 427, 433 (D. Conn. 1982) (finding that a sale of property to a church for $1. $29,999 below market value, constitutes a gift of the remainder of the market value in violation of the Establishment Clause).}
property, a government is arguably selecting a price below fair market value. Nevertheless, a court has indicated that such action is not an unusual circumstance that warrants questioning the legitimacy of the transaction. 

Because of its susceptibility for manipulation and the inability of courts to apply factors to sufficiently scrutinize these transactions, the presumption of constitutionality is insufficient to protect religious equality and, therefore, should be rejected. Instead, given the suspicious nature of a government’s decision to sell the government property beneath an unconstitutional religious monument, courts should presume that the sale is insufficient to end the Establishment Clause violation. However, the government’s decision to sell a religious monument that violates the Establishment Clause as well as the property beneath it and the presence of any of the above factors might infringe the principles of the Establishment, Free Speech, and Equal Protection Clauses.

B. Establishment Clause

1. Purpose for the Sale

A government’s decision to sell a monument that violates the Establishment Clause and the property directly beneath it has not been satisfactorily analyzed in light of recent Supreme Court jurisprudence. As the Supreme Court indicated in McCreary County, the purpose of government action must be scrutinized when “an understanding of official objective emerges from readily discoverable fact.” Accordingly, although a government proclamation that the sale is designed to end an Establishment Clause violation is undoubtedly secular and entitled to deference, this secular

162. For a definition of fair market value, see BLACK’S LAW DICTIONARY 1587 (8th ed. 2004) (“The price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction.”). Arguably, when individuals bid to purchase a piece of property, the highest price a buyer is willing to pay to a seller would be the fair market value. The fair market value of the property, however, could be determined by an independent appraisal.

163. Chambers v. City of Frederick, 373 F. Supp. 2d 567, 571–73 (D. Md. 2005) (noting that purchaser did not submit the highest bid but was the original donor and determined by the city to be the most prepared to maintain the property).

164. See Buono v. Kempthorne, 527 F.3d 758, 779 n.13 (9th Cir. 2008) (rejecting the Seventh Circuit’s presumption permitting sale or transfer of land absent unusual circumstances).

165. The Supreme Court has recently been petitioned to decide whether the transfer of government property beneath a religious monument that has been held to violate the Establishment Clause perpetuates the violation. See Respondent’s Brief in Opposition of Certiorari at 2, Salazar v. Buono, No. 08-472 (U.S. filed July 27, 2009). Van Orden is not helpful in determining whether a government’s decision to sell a monument that violates the Establishment Clause and the property beneath it is constitutional, because it was designed only to scrutinize a monument. See Van Orden v. Perry, 545 U.S. 677, 686 (2005) (noting that a court’s analysis of a monument should be driven both by its nature and by our nation’s history).

purpose cannot be secondary to a religious objective.\textsuperscript{167} Despite the
government’s asserted secular purpose, when the government offers the sale
exclusively to an entity that will undoubtedly preserve the monument, the
“openly available data” supports the commonsense conclusion that a
predominately religious objective permeates from the government’s actions.\textsuperscript{168}

When the government changes the circumstances surrounding an
unconstitutional religious monument by selling it and the property beneath it,
the government’s primary purpose is to prevent the removal of the
monument.\textsuperscript{169} Although a government is not prohibited from selling or closing
a public forum,\textsuperscript{170} it is impermissible for the government to manipulate the
forum by selling only the property beneath the unconstitutional religious
monument to individuals that have demonstrated their willingness to preserve
the monument. By selling only the property beneath the monument the
government changes only the form necessary to remove the monument from
the commands of the Establishment Clause, however the substance of the
endorsement remains intact. Additionally, the sale of such a minuscule piece
of property in the midst of a public park essentially prohibits the purchaser
from any other effective use besides displaying the monument. Therefore, in
order to alleviate the only remaining threats, that the purchaser may remove or
change the monument, the government offers the property solely to an entity
that has demonstrated its willingness to preserve the monument.\textsuperscript{171}

Accordingly, when the government decides to offer its property exclusively to
such an organization, the government’s primary objective is unmistakably to
preserve the monument.\textsuperscript{172} Similarly, the government demonstrates its primary
objective of preserving the monument when it accepts or solicits additional

\textsuperscript{167} See id. at 864.
\textsuperscript{168} Id. at 863.
\textsuperscript{169} See id. at 881 (finding that the predominate purpose of attempting to keep the
monuments on display in the courthouse was undoubtedly religious).
\textsuperscript{170} See Summum v. Duchesne City, 482 F.3d 1263, 1270 (10th Cir. 2007), cert. granted,
vacated, 129 S. Ct. 1523 (2009), remanded, 319 F. App’x 753 (10th Cir. 2009) (noting that a
government may change the physical nature of its property in order to close a public forum).
\textsuperscript{171} Buono v. Kemphorne, 527 F.3d. 758, 781 (9th Cir. 2008) (Congress did not open the
bidding to the general public but directed the land to be transferred to the original donor who had
actively sought to preserve the cross’s display); Mercier v. Fraternal Order of Eagles, 395 F.3d
693, 702–03 (7th Cir. 2005) (City offered the property exclusively to the original donor of the
monument); Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 492 (7th
Cir. 2000) (City did not solicit alternative bids but sold to an organization commemorating a
member of the organization that donated the monument).
\textsuperscript{172} See Buono, 527 F.3d at 781–82 (holding that the exclusion of other purchasers and the
selection of a beneficiary of the land exchange with a significant interest in preserving the cross
evinces that the entity was a straw purchaser).
bids for the property, but selects, despite higher bids, an entity that will undoubtedly preserve the display of the monument.\footnote{173}

As the Supreme Court noted in \textit{McCreary County}, the display is to be viewed in light of the progression leading to its final status.\footnote{174} Accordingly, a “reasonable observer” would be unable to turn a blind eye to several circumstances that took place before the monument came to rest on private land. Particularly, in the wake of a determination that the display of the religious monument is unconstitutional, a reasonable observer would be suspicious of the government’s decision to end an Establishment Clause violation by taking a number of painstaking steps to sell the property, in lieu of simply removing the monument. In light of this information, a reasonable observer would suspect that the government is favoring the religious message associated with the monument it seeks to preserve.\footnote{175} Additionally, upon the realization that the sale was designed in a manner which virtually guarantees the continued display of the monument, a reasonable observer would be unable to accept the government’s asserted secular purpose.\footnote{176} In fact, the reasonable observer would likely draw the commonsense conclusion that the government is either endorsing the monument’s religious message or being controlled by the monument’s religious adherents. Either way the circumstances demonstrate that the government is willing to take any and all steps necessary to preserve the monument’s display.

In \textit{McCreary County}, the Supreme Court held that the Counties’ ploy, to circumvent the Establishment Clause and prevent removal of the unconstitutionally religious monuments by adding additional monuments to change the complexion of the display, violated the Establishment Clause.\footnote{177} Similarly, a governmental decision to sell the property beneath an unconstitutional religious monument to an entity that will undoubtedly preserve the monument is unconstitutional. By changing the circumstances surrounding the monument’s display, the government attempts to not only avoid its removal, but also to preserve its display.\footnote{178} Unfortunately, the world

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\footnotesize
173. \textit{See id.}
175. \textit{See id. at }873.
176. \textit{See id. at }866.
177. \textit{Id. at }848, 856–57.
178. \textit{Compare} Buono v. Kempthorne, 527 F.3d. 758, 760 (9th Cir. 2008) (“Congress enacted legislation requiring the Secretary of the Interior to convey the land beneath the cross to the VFW . . .”), \textit{and} Chambers v. City of Frederick, 373 F. Supp. 2d 567, 570–71 (D. Md. 2005) (City sold the parcel of land where the monument is located), \textit{and} Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 696 (7th Cir. 2005) (City sold the land under and immediately surrounding the monument), \textit{and} Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 490 (7th Cir. 2000) (City sold the portion of the land on which the statue stands), \textit{with McCreary}
cannot be made anew every morning, and the “implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.” The phenomenal efforts taken to sell the property, in lieu of removal, convey the unmistakable impression that the government is willing to take any steps necessary to prevent the removal of the monument. Furthermore, a government’s decision to award the property to an organization that will undoubtedly preserve the monument evinces the government’s religious purpose behind the sale. Accordingly, when the government sells its property in a manner designed to ensure the continued display of an unconstitutional religious monument, the governmental action appears to infringe the Establishment Clause.

2. Continuing Governmental Endorsement of Religion

Courts agree that “the presence of a religious symbol on once public land... may still violate the Establishment Clause.” Typically, if the government sells the property beneath an unconstitutional religious monument, the subsequent display of the monument is arguably the private expression of the purchaser. However, if the government maintains any significant control over the use of the post-sale property or if the property is not visibly distinguished from the surrounding public property, the sale may constitute a perpetuation of the Establishment Clause violation.

When a reversionary clause or a restrictive covenant is placed in the deed of sale, it draws into question the government’s argument that the post-sale display of the monument is private speech. A reversionary clause or a restrictive covenant is an effective way for the government to control the post-sale use of the property. Therefore, when the government requires the

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179. *McCreary County*, 545 U.S. at 866, 874.
180. *Id.* at 869–70.
181. *Buono*, 527 F.3d at 778. *See also City of Marshfield*, 203 F.3d at 496.
183. *See Buono*, 527 F.3d at 779 (suggesting that the government’s oversight and rights in a site after the exchange must be analyzed).
184. *City of Marshfield*, 203 F.3d at 490.
185. *See Buono*, 527 F.3d at 781 (holding that supervisory responsibilities with a reversionary interest permits the government to retain important property rights).
186. *See id.* (holding that a reversionary interest will show the government’s ongoing control over the property and the parties will conduct themselves accordingly); *Evans v. Newton*, 382 U.S. 296, 302 (1966) (holding that even in private hands, a park may not be operated for the public on a segregated basis if the private owners are nothing more than a trustee); *Eaton v. Grubbs*, 329 F.2d 710, 714 (4th Cir. 1964) (holding that a reversionary clause in deed permitted
purchaser to use the property in a particular manner, the post-sale expression on the property is arguably not the sole expression of the purchaser.\textsuperscript{187} Additionally, a deed of sale that permits the government to retain the rights to supervise, manage, or control the property indicates that the transaction was merely a sham to avoid the commands of the Establishment Clause.\textsuperscript{188} Arguably the reasonable observer would construe a sale with restrictions placed on the use of the property as a scam to enable the government to continue the display of the monument. Accordingly, it is likely that a restriction on post-sale use would be a perpetuation of the Establishment Clause violation.

Regardless of whether the government retains any control over the post-sale use of the property, courts have indicated that the purchased property must be visibly differentiated from the surrounding public property.\textsuperscript{189} In order to end a perception of government endorsement after the sale, courts have required that the purchased property be differentiated from the public property by constructing both a structure that clearly defines the private property or a clearly visible disclaimer.\textsuperscript{190} Accordingly, if the government fails to distinguish the purchased property from the surrounding public property the display of the continued monument will be perceived as a continued governmental endorsement.\textsuperscript{191}

3. Government Action With the Effect of Advancing Religion

The Establishment Clause requires that when a government acts, “its principal or primary effect must be one that neither advances nor inhibits religion.”\textsuperscript{192} Government action violates Lemon’s effect prong if “irrespective of the government’s actual purpose, the practice under review in fact conveys a
message of endorsement or disapproval.” However, a religious organization’s enjoyment of “incidental” benefits does not violate this prohibition against advancing religion. Accordingly, when “a reasonable person could perceive that a government action conveys a message that religion or a particular religious belief is favored or preferred, the Establishment Clause has been violated.”

Courts have consistently held that when the government sells its property beneath an unconstitutional religious monument, a reasonable observer would perceive the government’s action as an attempt to dissociate itself from the message conveyed by the monument. However, a reasonable observer would undoubtedly be aware that the government could have dissociated itself from the monument’s message by merely removing the monument. This realization alone would demonstrate to a reasonable observer that the monument’s continued presence is not “incidental.” Furthermore, a reasonable observer would note that the government has denied access to other religious monuments. These circumstances indicate that, even if inadvertently, the government views the message in a favorable light, because it decided to present an opportunity that might enable the monument to avoid removal.

Regardless, when a reasonable observer notes that the property is being offered exclusively to an entity that has demonstrated its willingness to preserve the monument, the sale conveys the unmistakable belief that the government favors the monument’s particular religion, even if that is not the government’s purpose. Similarly, when the government selects a bidder that will undoubtedly preserve the monument, despite receiving higher bids, the sale conveys the appearance of government favoritism regardless of actual purpose. Accordingly, a reasonable observer would perceive the government’s decision to sell its property, and the manner in which it effectuated the sale, as a manipulation of a public forum that is unmistakably

196 Id.; Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 705 (7th Cir. 2005).
197 See Buono v. Kempthorne, 527 F.3d 758, 781–82 (9th Cir. 2008) (government did not open the bidding for the property to the general public); Mercier, 395 F.3d at 702-03, 705; City of Marshfield, 203 F.3d at 492, 496 (City did not solicit alternate bids for the property); Chambers, 373 F. Supp. 2d at 572–73.
198 See Buono, 527 F.3d at 772.
199 See id. at 781 (government did not open the bidding for the property to the general public); Mercier, 395 F.3d at 703 (property was solely offered to the Eagles); City of Marshfield, 203 F.3d at 492 (City did not solicit alternate bids for the property). See also Chambers, 373 F. Supp. 2d at 572 (the City awarded the property to the original donor although its bid was smaller than those of its competitors).
200 Chambers, 373 F. Supp. 2d at 572–73.
an advancement of the religious message associated with the monument, regardless of the government’s actual purpose.

C. Free Speech Clause

“[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”

Undeniably, private religious speech receives as much protection under the Free Speech Clause as does secular private speech. However, speech that is protected from governmental suppression is not thereby guaranteed a forum on all property belonging to the government. Instead, the right to use governmental property for private expression turns on the nature of the property.

1. Governmental Speech Doctrine

The Free Speech Clause was designed by the Framers to restrict the government in its regulation of private speech. In contrast, the “government speech doctrine” provides that when the government speaks on its own behalf, its speech is not subject to the commands of the Free Speech Clause. The government speech doctrine also applies when the government “receives assistance from private sources for the purpose of delivering a government-controlled message.” Therefore, in order to fall within the purview of the government speech doctrine, it is vital that the government controls the message being conveyed.

Though it is not subject to the commands of the Free Speech Clause, government speech is not necessarily free from all restraints. Government speech undoubtedly must conform to the Constitution’s prescriptions; specifically, the Establishment and the Equal Protection Clauses. Government speech may also be restrained by laws limiting public official’s ability to engage in advocacy. Finally, the government or government...
officials that engage in advocacy will be held accountable by its constituents and subjected to the political process.212

In *Pleasant Grove City v. Summum,*213 the Supreme Court indicated that “[p]ermanent monuments displayed on public property typically represent government speech[,]” but also noted that there are situations in which it may be difficult to determine whether the government is speaking on its own behalf or merely providing a forum for private speech.214 The Court additionally noted that property owners will not permit the installation of permanent monuments on their property when they do not agree with the message that the monument conveys.215 Accordingly, the Court held that when the government accepts a permanent monument and subsequently places it in a public park, the permanent monument constitutes government speech.216

When the government has accepted a permanent monument that is found to violate the Establishment Clause and subsequently sells the monument and the property beneath it, the government speech doctrine appears to be inapplicable to the analysis of the post-sale monument.217 In categorizing a permanent monument as governmental speech, the Court looks to whether the private rights possessed by the monument’s donor have been relinquished.218 Typically, the private rights of the monument’s donor are relinquished when the government accepts a privately donated monument and displays it in a public park.219 However, in his concurring opinion in *Pleasant Grove City,* Justice Souter indicated that this presumption is faulty and there are some

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212. *Id.* (citing Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)) (“If the citizenry objects [to the governmental message], newly elected officials . . . could espouse some different or contrary position.”). However, if the government sells the property to a non-governmental entity, newly elected officials will not be able to reverse the action if the constituents disagree with the message being advocated.

213. In *Pleasant Grove City,* the City placed a monument of the Ten Commandments, among other monuments, in Pioneer Park. *Id.* at 1129. Summum, a religious organization, repetitively sought to erect its own monument containing “the Seven Aphorisms of Summum.” *Id.* However, the City denied the requests indicating that it only accepted monuments that directly relate to the history of the City or from groups with longstanding ties to the community. *Id.* at 1130. Ultimately, the Supreme Court held that Summum’s Free Speech rights were not violated by the City’s decision to accept a monument of the Ten Commandments, while rejecting Summum’s monument, which is best perceived as a form of government speech, and, thus, not subject to the Free Speech Clause. *Id.* at 1138.

214. *Pleasant Grove City,* 129 S. Ct. at 1132 (emphasis added). *See also id.* at 1141 (Souter, J., concurring) (noting that “accepting the position that public monuments are government speech categorically” is problematic).

215. *Id.* at 1133.

216. *Id.* at 1134.

217. *See* Freedom from Religion Found, Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2005).


219. *Id.* at 1136.
instances when governmental maintenance of monuments is not government speech at all.\textsuperscript{220} Instead, he indicated that the best way to identify whether a permanent monument is government speech, as opposed to private speech, is to view the monument through the eyes of a reasonable observer.\textsuperscript{221}

Under either the majority or the concurrence’s approach in \textit{Pleasant Grove City}, when the government sells the monument, it would not likely be perceived as government speech but would instead be perceived as the speech of the subsequent purchaser. Specifically, when a permanent monument is placed in a public park and is subsequently sold back to the private donor, or some other non-government entity, the monument represents the speech of the purchaser, because the private entity has property rights in the monument. Even when viewed pursuant to Justice Souter’s proposed analysis, the permanent monument would constitute private speech because a reasonable observer would know that the monument was originally donated to the government and was subsequently sold to a private entity in an attempt to remedy the Establishment Clause violation. Furthermore, because the government speech doctrine is limited by the Establishment Clause, the monument cannot constitute government speech after it is sold to a nongovernment entity if it can arguably be perceived as a remedy to the Establishment Clause violation. This notion is furthered by the requirement that disclaimer signs be constructed near the monument after the sale to indicate that the monument represents the expression of a private entity and that the government is not affiliated with the message.\textsuperscript{222} Accordingly, by selling the permanent monument to a private entity, the permanent monument arguably becomes the private speech of the purchaser and might be subject to the commands of the Free Speech Clause.

2. Forum Analysis

The existence of a right of access to public property and the standards by which limitations on such access are evaluated depend on the nature of the property at issue.\textsuperscript{223} In analyzing whether the government’s restriction of private speech on government property is permissible, the Supreme Court has recognized three types of forums: traditional public forums, designated public forums, and nonpublic forums.\textsuperscript{224} However, the Supreme Court indicated in \textit{Pleasant Grove City} that forum analysis is applicable only to those instances where the government-owned property is capable of “accommodating a large number of public speakers without defeating the essential function of the land

\textsuperscript{220} \textit{Id. at} 1142 (Souter, J., concurring).
\textsuperscript{221} \textit{Id. See supra} notes 40–45.
\textsuperscript{222} \textit{See} Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 704 (7th Cir. 2005).
\textsuperscript{223} Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 44 (1983).
\textsuperscript{224} \textit{Id. at} 45–46.
or the program.\textsuperscript{225} Unlike long-winded speakers, persons distributing leaflets and picketers carrying their signs, the Court noted that permanent monuments forever endure and do not go home.\textsuperscript{226}

The \textit{Pleasant Grove City} Court also noted that if public parks were considered traditional public forums for the purpose of erecting privately donated monuments, most parks would be required to refuse all donations.\textsuperscript{227} Additionally, the Court noted that there is no “long tradition” of allowing individuals to permanently occupy public space with any type of monument.\textsuperscript{228} The \textit{Pleasant Grove City} Court went on to distinguish \textit{Capitol Square}, which involved the temporary display of private monuments in public parks, on the ground that the monuments were merely temporary and would permit the accommodation of several speakers without an influx of clutter.\textsuperscript{229} Ultimately, the \textit{Pleasant Grove City} Court generally concluded that “forum analysis does not apply to the installation of permanent monuments on public property.”\textsuperscript{230}

While the \textit{Pleasant Grove City} Court correctly stated that the forum doctrine has been applied only to those instances where the government is capable of accommodating large number of public speakers without defeating the purpose of the property,\textsuperscript{231} this assertion misses the point and tells us nothing more than the fact that it is dealing with a novel issue. It is possible for any public park, street, or sidewalk to have an influx of speakers who simultaneously seek access to a particular quintessential public forum that effectively hinders its designated purpose, but this does not necessarily mean that forum analysis should not apply. Furthermore, the Court buffers its position by indicating that there is no “long tradition” of permitting the construction of permanent monuments in quintessential public forums,\textsuperscript{232} which certainly bolsters its conclusion that the public parks are not a traditional public forum for the erection of permanent monuments, but is not indicative of whether or not forum analysis is applicable.

When a monument is held to violate the Establishment Clause and the government sells the monument and the property beneath it to a nongovernment entity, the situation begins to look more like \textit{Capitol Square} than \textit{Pleasant Grove City}. Specifically, unlike the privately donated monuments in \textit{Pleasant Grove City}, when the government sells the unconstitutional religious monument to a nongovernment entity, the monument represents the expression

\begin{thebibliography}{99}
226. \textit{Id.}
227. \textit{Id.} at 1138.
228. \textit{Id.} at 1137.
231. \textit{Id.} at 1137.
232. \textit{Id.} at 1138.
\end{thebibliography}
of the owner and not the government. Accordingly, most of the Pleasant Grove City Court’s analysis is inapplicable when a non-government entity retains the rights associated with the monument and the government has attempted to distance itself from the monument and its message.

Furthermore, the Pleasant Grove City Court’s conclusion must be read narrowly, and in conformance with the Court’s premise, to apply to only those instances where the permanent monuments installed on public property belong to the government and not a private entity. When a private entity retains rights in the monument, the situation is better analyzed pursuant to the Court’s forum analysis as applied in Capital Square. It is impermissible for an administration to manipulate a public forum in a manner that permits only certain favored groups to take advantage of it.\(^\text{233}\) Accordingly, when a government permits a private entity access to government property to express its views through a permanent monument, forum analysis is necessary to preserve the First Amendment rights of individuals that are prohibited from constructing expressive monuments and to prohibit the government from using a private individual to erect a monument that it could not erect itself, while excluding all other individuals from expressing a different viewpoint.

a. Forum Analysis of Public Property Sold to a Private Party

The mere fact that the government sells its property to a private entity is not conclusive of whether the property is subject to forum analysis, because First Amendment principles may still govern “even when the government does not own the property at issue.”\(^\text{234}\) Accordingly, the protections of the First Amendment may not be circumvented by the government’s manipulation of a public park by selling only a portion of it, in an attempt to remedy an Establishment Clause violation, because it effectively permits the expression of a single viewpoint while excluding all other speakers.

The threshold issue of whether the property in question remains subject to forum analysis requires the determination of “whether the property issue is in fact privately owned.”\(^\text{235}\) Accordingly, if the transaction for sale fails to comply with applicable state and local law, the transaction is invalid, and the

\(^{233}\) Capitol Square, 515 U.S. at 764, 766.

\(^{234}\) Summum v. Duchesne City, 482 F.3d 1263, 1270 (10th Cir. 2007), vacated and remanded, 129 S. Ct. 1523 (2009) (in light of Pleasant Grove City, 129 S. Ct. 1125). See also Marsh v. Ala., 326 U.S. 501, 509 (1946) (holding that the First Amendment was violated when a corporate-owned municipality restricted individual speech); United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc., 383 F.3d 449, 452–53 (6th Cir. 2004) (holding that privately owned sidewalk surrounding privately owned park was a public forum); Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring) (“The government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.”).

\(^{235}\) See Duchesne City, 482 F.3d at 1271.
property remains part of the public forum.\textsuperscript{236} Although governments are typically cautious to ensure that the transaction complies with applicable law,\textsuperscript{237} even government property sold pursuant to a legally valid transaction may be subject to the strictures of forum analysis.\textsuperscript{238}

Although a forum subject to the constraints of the First Amendment may lose its status by closing or selling the entire forum, if government property is sold in a piecemeal fashion, the objective physical characteristics of the property must be significantly changed in order for the property to lose its forum status.\textsuperscript{239} Permitting a government to sell a small portion of a public park, as opposed to closing or selling the entire forum, permits a government to manipulate forums protected by the First Amendment. Specifically, manipulation of a forum would permit the government to circumvent forum analysis by effectively removing favored expression, which the Government cannot itself make, from the commands of the Free Speech Clause in order to forbid other speech and contrary viewpoints. Accordingly, merely selling a small piece of property beneath a monument that violated the Establishment Clause, in the midst of a public park, is likely to be insufficient to significantly change the objective characteristics of the property as to remove it from forum analysis.\textsuperscript{240}

\textsuperscript{236} See id. (noting that if the land transfer of a portion of a public park is invalid, the religious monument remains on a public forum).

\textsuperscript{237} Compare Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 702 (7th Cir. 2005) (the sale complied with Wisconsin state law), and Freedom from Religious Found. v. City of Marshfield, 203 F.3d 487, 492 (7th Cir. 2000) (the sale of the property complied with the applicable Wisconsin law governing the sale of land by municipalities), with Chambers v. City of Frederick, 373 F. Supp. 2d 567, 571–72 (D. Md. 2005) (City failed to comply with its procedural requirements for the sale of public land).

\textsuperscript{238} Duchesne City, 482 F.3d at 1270.

\textsuperscript{239} Id. at 1271. See Hawkins v. City and County of Denver, 170 F.3d 1281, 1284, 1287 (10th Cir. 1999) (holding that constructing the Galleria, an open air, glass-covered pedestrian walkway, which was formerly a public street, was a sufficient alteration of characteristics and function to remove forum status); Int’l Soc’y for Krishna Consciousness Inc., 505 U.S. at 700 (Kennedy, J., concurring) (explaining that to change a property’s public forum status, the state “must alter the objective physical character or uses of the property”).

\textsuperscript{240} See Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 678 (1998) (noting that government’s intentions and efforts to remove a piece of government property by transferring it to private owners is insufficient to dictate the status of the property); Duchesne City, 482 F.3d at 1270 (noting that a city’s intention and efforts to remove a piece of property does not dictate the property’s status). The portion of the public park sold as a result of the finding of an Establishment Clause violation is generally insufficient in size to serve any other significant purpose than to display a monument or to engage in other expressive conduct. Compare Hawkins, 170 F.3d at 1284, 1287 (holding that former public street which is now a glass-covered pedestrian walkway is a sufficient alteration of characteristics and function to remove forum status), and Duchesne City, 482 F.3d at 1271 (holding that a fence and disclaimer surrounding a small parcel of property in the midst of a public park does not necessarily remove the property
In addition to having significantly different physical characteristics, the property will not lose its forum status if it merely continues “to serve the same primary function as it did before the [sale].”\footnote{Duchesne City, 482 F.3d at 1270.} When the government decides to sell the property beneath an unconstitutional religious monument, the property typically continues to display the monument after the sale.\footnote{Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas, 257 F.3d 937, 944 (9th Cir. 2001) (finding no alteration because the sidewalk still performed the same role as it did previously); First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1128 (10th Cir. 2002) (finding the fact that an easement served the same purpose as a public sidewalk “a persuasive indication that the easement is a traditional public forum”).} Accordingly, if the property continues to display the religious monument or another expressive monument, the property arguably serves the same primary function as it did before the sale, and, thus, remains part of the public forum.

Lastly, the property will not lose its forum status if the government remains “inextricably intertwined with the ongoing operation” of the property.\footnote{Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1256 (10th Cir. 2005) (holding that signs posed at all entrance to Plaza and its differentiation from the surrounding sidewalks were sufficient objective, physical characteristics to demonstrate that the Plaza is privately owned).} If the deed of sale includes a reversionary clause or a restrictive covenant that mandates the manner in which the property is to be used, the government exercises great control over the use of the property. Similarly, the government is excessively involved with the use of the property if it retains the right to supervise, manage, or control the property.\footnote{Duchesne City, 482 F.3d at 1270 (citing Utah Gospel Mission, 425 F.3d at 1256–58).} Accordingly, unless the purchaser is granted ownership and usage rights that are not significantly hindered through restriction or government oversight, the property will remain subject to forum analysis.

Accordingly, when the government sells a monument that violates the Establishment Clause and only the portion of the public park beneath the monument, the post-sale use and physical characteristics will likely be insufficient to remove the property from forum analysis.

b. Traditional Public Forum

“Traditional public forums” are those places that “have immemorially been held in trust for the use of the public and . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”\footnote{Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).}
Typically, Courts have viewed streets, sidewalks, and parks as the quintessential public forums that have “by long tradition or by government fiat . . . been devoted to assembly and debate.”246 The Supreme Court has been unwilling to extend traditional public forum status beyond these historic confines or to areas where history is lacking.247

A speaker may not be excluded from a traditional public forum based on the content of his speech, unless the restriction is “necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”248 However, a reasonable, content-neutral time, place, or manner restriction that is “narrowly tailored to serve a significant government interest” that “leave[s] open ample alternative channels of communication” is permissible.249

The Supreme Court has recently indicated that a public park is not a traditional public forum for the construction of permanent monuments, because public parks lack a “long tradition” of being held open to the public for permitting people to construct permanent monuments.250 Accordingly, a speaker’s desire to erect a permanent monument in a public park, which also houses a permanent monument that was sold to a non-governmental entity in an attempt to remedy an Establishment Clause violation, would unlikely be analyzed as a traditional public forum.

c. Designated Public Forum

A government may create a “designated public forum” by intentionally opening property that has not traditionally been used as a public forum for use by the public at large for expressive activities.251 However, a designated public forum cannot be created by government inaction or limited disclosure; instead, the government must intentionally open a nontraditional forum for the purpose of public expression.252 Though the government is not required to keep a designated forum open indefinitely, so long as the forum remains open, it is subject to the same restrictions as a traditional public forum.253 When a government decision to sell a permanent monument in a public park is designed to remedy the Establishment Clause violation, the sale would not likely open a designated public forum for the construction of permanent

246. Id.
251. Cornelius, 473 U.S. at 802.
252. Id. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 758 (1995) (noting that the Board has permitted a variety of unattended displays in the park).
253. Cornelius, 473 U.S. at 800, 802.
monuments in a public park because the government does not intend to and cannot accidentally create a public forum.

d. Nonpublic Forum

Because the construction of a permanent monument in a public park is neither a traditional or designated public forum, it must be characterized as a nonpublic forum. In a nonpublic forum, government may, in addition to time, place, and manner regulations, “reserve the forum for its intended purposes. . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” The government, like a property owner, has the authority to preserve its property for the use to which it is lawfully dedicated.

The government undoubtedly has reasonable interests in forbidding the construction of permanent monuments in public parks in order to prevent against the influx of clutter and to preserve the purpose of the government property. However, when the government sells a permanent monument and a portion of the public park beneath it in an attempt to remedy an Establishment Clause violation, the government cannot then deny the construction of a similar monument expressing a different viewpoint. Specifically, when the government permits the construction or display of a religious monument in a nonpublic forum that it could not construct or display on its own while denying similar access to different religious monuments, the government is impermissibly discriminating on account of viewpoint. Accordingly, by permitting access to a government favored religious monument, while discriminating against other viewpoints, the government infringes on the Free Speech rights of an entity seeking equal access to the nonpublic forum to convey a different viewpoint.

D. Equal Protection Clause

In light of the shaky and inconsistent tests applicable to Establishment Clause claims, scholars have proposed that new tools, specifically the Equal Protection Clause, be used to preserve religious equality. In theory, the Equal Protection Clause prohibits discrimination against religion and requires that all religions be treated equally under the law. Although scholars have

254. See Perry Educ. Ass’n, 460 U.S. at 46.
255. Id.
256. Id.
257. See Susan Gellman & Susan Looper-Friedman, Thou Shall Use The Equal Protection Clause For Religion Cases (Not Just The Establishment Clause), 10 U. PA. J. CONST. L. 665, 741–43 (2008) (proposing that an Equal Protection Clause claim be used in addition to the typical Establishment Clause claim).
advocated its use, the Equal Protection Clause has not been successfully invoked or adopted by a court in a challenge against government action that allegedly discriminates based on religion.  However, the Equal Protection Clause has successfully been invoked to prohibit a government from granting access to government property for the expression of speech it deems acceptable, while denying use to less favored speech.

Nevertheless, if the government were to use religion to determine the purchaser of the property beneath an unconstitutional religious monument, the governmental action would be subject to the commands of the Equal Protection Clause. Accordingly, when the government selects its purchaser on account of religion, the decision is suspect and should be subject to the strictest scrutiny. When the government decides to extend an offer for the sale of a portion of a public park only to an entity that has demonstrated its willingness to preserve the monument, the government effectively discriminates against those who hold beliefs inconsistent with the monument’s message. Similarly, if the government rejects higher bids in order to sell the property to an entity that will undoubtedly preserve the monument, the government is effectively discriminating on account of religion. A government could attempt to justify its actions by explaining that nonadherents would desecrate the monument or demonstrate feelings of ill will towards the monument and its associated beliefs. However, even if this explanation were considered a compelling state interest, it would not be narrowly tailored, because the government could simply remove the monument without discriminating on account of religion and avoid the perceived harms of a public sale. Accordingly, a governmental decision to sell the property to an entity that has demonstrated its willingness to preserve the monument’s display appears to run counter to the principles of the Equal Protection Clause.

259. See, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) (noting there is no justification for applying the Equal Protection’s strict scrutiny to a statute that passes the Lemon test).
263. Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 705 (7th Cir. 2005) (noting that the purchaser was the original donor of the monument).
264. Chambers v. City of Frederick, 373 F. Supp. 2d 567, 572 (D. Md. 2005) (City failed to comply with procedural requirements for the sale of public land and despite the fact that the Fraternal Order of Eagles, the original donor of the unconstitutional religious monument, did not submit the highest bid, the property was sold to them upon the determination that they would be able to best take care of the monument).
E. Contempt of Court

Courts of equity have the inherent power to preserve the status quo of a case in which it has jurisdiction in order to protect its ability to render judgments. Any improper interference with property that is in custody of the law is contempt of court. Additionally, the willful diversion of the property, which is the subject matter of a pending suit, beyond the reach of the court “to defeat any decree which the court might ultimately make in the cause” may also constitute contempt.

When the government sells the unconstitutional religious monument and the property beneath it, in anticipation of litigation or after an order requiring the monument’s removal, the governmental conduct can be perceived as an attempt to remove the property from the reach of the court. Although the government’s actions might arguably remedy an Establishment Clause violation, such action violates an injunction that prohibits the monument’s display or mandates its removal. Furthermore, this disruptive conduct not only jeopardizes the effect of the court’s order, but also undercuts its ability to enter and effectuate future orders. Accordingly, the government’s willful decision to sell the government property beneath the monument is an attempt to evade the injunctive order and, thus, amounts to contempt. Furthermore, if it is shown that the purchaser had knowledge of the injunction at the time of the purchase, the purchaser could likely be held in contempt for acting in concert with the government in evading the injunction.

V. CONCLUSION

The manipulation of public parks in order to display passive religious monuments might not be the prevention of a “national ecclesiastical
establishment” that the founders feared and hoped to thwart when enacting the Establishment Clause. However, permitting the government to manipulate its property in a manner that allows the continued display of an unconstitutional religious monument, runs counter to the Constitution’s encouragement of equality and diversity. Although courts across the nation have continually struggled to draw a satisfactory line to adequately protect the church and the state from unnecessary intrusion into the sphere of the other, permitting governments to sell an unconstitutional religious monument and the property beneath it to ensure its continued display enables favored religious messages to flourish in public parks while avoiding the commands of the Establishment Clause.

Courts have consistently brought attention to the fact that the current presumption of constitutionality is highly susceptible to manipulation; thus, evincing the need for a standard that will curb this obvious danger and thwart extraordinary governmental efforts to preserve the continued display of unconstitutional religious monuments. Accordingly, courts should subject these suspect transactions to the highest level of scrutiny, and courts must analyze these sales on a transaction-by-transaction basis examining the form and substance to ensure that the Establishment Clause violation has ceased.

However, in light of the current presumption and the accompanying factors’ inability to protect religious liberty against even the most blatant manipulations, a court should begin its analysis with the strong presumption that the sale of the monument and the property beneath it is insufficient to end the Establishment Clause violation. In fact, the government’s decision to sell the unconstitutional monument and the property beneath it, in lieu of removal, is the precise religious favoritism that the Establishment Clause forbids.

Even if one were to assume that a sale would remedy the Establishment Clause violation, courts must analyze the transaction with an emphasis on equality, fairness, and neutrality to prevent the perception that the government is favoring the religious beliefs in question. Specifically, Courts should ensure that all individuals who desire to purchase the unconstitutional monument and the property beneath it are afforded an opportunity to do so and the property is awarded to the highest bidder. Additionally, courts should ensure that the


273. See Brief of Respondent in Opposition of Certiorari at 3, Kempthorne v. Buono, No. 08-472, (2008) (asking the Supreme Court “whether, after a court has held that the presence of a sectarian religious symbol on government land violates the Establishment Clause, the transfer of that land perpetuates the Establishment Clause violation”).
government retains no control over, or rights in, the post-sale use of the property.

Even if a court concludes that the monument and the property beneath it were sold in a manner that ends the perception of government endorsement, the governmental manipulation of its public park would likely subject the post-sale monument to the strictures of forum analysis. Specifically, if the monument is truly private speech and if the property has not undergone significant physical changes or is not used in a significantly different way, the Free Speech Clause requires equal access to monuments expressing different religious viewpoints. Accordingly, if the government prohibits the construction of any similar monument in the forum that expresses a different viewpoint, the denial of access may run counter to the Free Speech Clause.

Therefore, in order to properly preserve religious rights, courts must either simply forbid governments from selling a monument and the property beneath it, in lieu of merely removing the monument, in an attempt to remedy an Establishment Clause violation or must subject the transaction to the strictest scrutiny. To permit any lesser protection for such a sacred right would permit the government to manipulate its forums to ensure the continued display of a favored, unconstitutional religious monument, while excluding all other non-favored viewpoints. Only the strictest scrutiny of the sale of government property beneath an unconstitutional religious monument will ensure that the government will act with neutrality between religions and between religion and non-religion. Most importantly, the strictest scrutiny is necessary to preserve the religious equality principles guaranteed by the Constitution’s Establishment, Free Speech, and Equal Protection Clauses.

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