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SALAZAR V. BUONO: A MISSED OPPORTUNITY TO CLARIFY
THE REASONABLE OBSERVER TEST

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In *Salazar v. Buono*,¹ the Supreme Court of the United States considered whether the government could cure an Establishment Clause violation caused by the display of a Latin cross on federal property by conveying the property to a private group.² The Court, declining to issue a final determination, used the reasonable observer test, and held that the lower court should consider all of the relevant facts for the reasonable observer test analysis such as the background and context for the placement of the cross.³ In so holding, the Court missed an opportunity to clarify its definition of the reasonable observer test in its Establishment Clause jurisprudence by failing to adopt a display-focused analysis that accounts for information displayed at a religious statute or monument.⁴ As a result, the Court gave new life to a fiction that leads to inconsistent applications of the reasonable observer test.⁵ Even if the Court's reasonable observer test is appropriate, and this author asserts that it is not, the Court misapplied the test and thus came to the wrong conclusion.⁶

I. THE CASE

Frank Buono brought suit to challenge the preservation of a Latin cross on federal land within the Mojave National Preserve.⁷ The cross was located in an area known as Sunrise Rock.⁸ In 1934, the Veterans of Foreign Wars (VFW) erected the cross to serve as a memorial to veterans who died in World War I.⁹ Over the years, the cross was maintained and replaced several times by private parties.¹⁰

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1. 130 S. Ct. 1803 (2010).

2. *Id.* at 1811.

3. *Id.* at 1819–20.

4. *See infra* Part IV.A.

5. *Id.*

6. *See infra* Part IV.B.

7. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1204–05 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

8. *Id.*

9. *Id.* at 1205.

10. *Id.*

No signs or plaques were present to indicate that the cross was intended to function as a memorial for soldiers.¹¹ The National Park Service (NPS), which maintains the Mojave National Preserve, did not allow other individuals or private groups to erect other displays in Sunrise Rock.¹²

The controversy surrounding the cross began in 1999 when the NPS received a letter requesting permission to build a Buddhist shrine in an area located near the cross.¹³ The NPS responded that agency regulations forbid the construction of religious symbols and that it intended to remove the cross located at the site.¹⁴ The American Civil Liberties Union (ACLU) sent the NPS a letter threatening legal action if the cross was not removed.¹⁵ After evaluating the cross and its historical significance, the NPS determined that it would remove the cross.¹⁶ Before doing so, however, the NPS consulted local citizens who indicated that there would be considerable public opposition to removal of the cross.¹⁷ The individuals who maintained the cross refused to voluntarily remove the cross and stated their determination to replace the cross if it were taken down.¹⁸ After considering the public opposition, the NPS did not remove the cross.¹⁹ On December 15, 2000, Congress forbade the use of government funds to remove the cross.²⁰ Thereafter, the NPS could not remove the cross as a result of the legislative spending ban.²¹

Buono and the ACLU filed suit alleging a violation of the Establishment Clause of the First Amendment and seeking an

11. *Id.*

12. *Id.*

13. *Id.* at 1205–06.

14. *Id.* at 1206.

15. *Id.* The letter included a threat that the ACLU would pursue a private damage claim against government officials, stating “If we do go forward with a lawsuit, a court not only would order the government to remove the cross, but it also likely would assess damages against those responsible government officials who knew about the cross and yet did nothing about it [in] the face of the clear constitutional commands that make its presence on government property illegal.” *Id.*

16. *Id.* The NPS decided that the “cross did not qualify for inclusion in the National Register of Historic Places.” *Id.* Moreover, the NPS cited the threatened private damage claim in its decision to remove the cross. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A-230 (2000).

21. *Buono*, 212 F. Supp. 2d at 1206.

injunction to remove the cross.²² The litigation proceeded in four stages until it reached the Supreme Court of the United States.²³ In the first stage, the United States District Court for the Central District of California ruled in favor of Buono and ordered the removal of the cross (*Buono I*).²⁴ The court first found that Buono had standing to challenge the placement of the cross. Then, the court applied the *Lemon* test in determining that the cross was in violation of the First Amendment: “A government religious practice or symbol will survive an Establishment Clause challenge when it (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not foster excessive state entanglement with religion.”²⁵ First, the court expressly declined to analyze the purpose prong because the effect of the placement of the cross signaled governmental endorsement of religion.²⁶ Second, the court evaluated the primary effect of the cross on the reasonable observer.²⁷ The court concluded that the placement of a cross on federal land would convey an impression of governmental endorsement of religion to the reasonable observer.²⁸

While *Buono I* was pending before the district court, Congress designated the cross as a national memorial commemorating the United States’ participation in World War I and directed the Secretary of the Interior to spend up to \$10,000 to “acquire a replica of the original memorial plaque and cross and to install the plaque in a suitable location on the grounds of the memorial.”²⁹ Three months after *Buono I* was decided in favor of the Plaintiff, Congress again prohibited the use of government funds to remove the cross.³⁰ While

22. *Id.* at 1207. The First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

23. *Salazar v. Buono*, 130 S. Ct. 1803, 1812 (2010).

24. *Buono*, 212 F. Supp. 2d at 1217. The court found that Buono had standing to challenge the preservation of the cross because he came into unwelcome contact with the cross and was offended by its presence. *Id.* at 12102–14. The court found that Buono showed an actual, concrete and particularized injury. *Id.* at 1212.

25. *Id.* at 1215 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

26. *Id.* at 1215. The court noted that the *Lemon* test is a disjunctive test: “State action violates the *Establishment Clause* if it fails to satisfy any of these prongs.” *Id.* (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987)).

27. *Id.* at 1216.

28. *Id.*

29. Department of Defense Appropriations Act, 2002, Pub. L. 107-117, § 8137, 115 Stat. 2278 (2002).

30. Department of Defense Appropriations Act, 2003, Pub. L. 107-248, § 8065(b), 116 Stat. 1551 (2002).

the government's appeal was pending, Congress also passed a law directing the Secretary of the Interior to transfer the land on which the cross was located to the VFW.³¹ The statute provided that the Secretary of the Interior would continue to maintain the national memorial and that the property would revert back to the government if it was no longer maintained as a war memorial.³²

On appeal (*Buono II*), the United States Court of Appeals for the Ninth Circuit stayed the district court's order to the extent that it required the cross to be removed or dismantled but did not forbid alternative methods of complying with the order.³³ Accordingly, the government covered up the cross.³⁴ In *Buono II*, the Ninth Circuit affirmed the district court's judgment.³⁵ Using the reasonable observer test, the court found that a reasonable observer would know, or at least suspect, that Sunrise Rock is federally-owned land and that the cross is a Christian symbol.³⁶ The reasonable observer would know that the cross was erected by private individuals but that Congress has taken various measures to preserve the cross.³⁷ Consequently, the court held that the cross violated the effects portion of the *Lemon* test and signified governmental endorsement of religion in violation of the Establishment Clause.³⁸ The court did not address whether the land transfer statute was an independent violation of the Establishment Clause.³⁹ The government did not appeal the judgment in *Buono II* so that judgment became final.⁴⁰

After the court of appeals upheld the injunction ordering removal of the cross in *Buono II*, Buono returned to the district court to modify the original injunction to prevent the land transfer (*Buono III*).⁴¹ The district court declined to address whether the land transfer was an independent violation of the Establishment Clause.⁴² The court did however conclude that the land transfer was an attempt to keep the

31. Department of Defense Appropriations Act, 2004, Pub. L. 108-87, § 8121, 117 Stat. 1100 (2003).

32. *Id.*

33. *Buono v. Norton*, 371 F.3d 543, 545 n.1 (9th Cir. 2004).

34. *Id.*

35. *Id.* at 550.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 546.

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

41. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1176 (C.D. Cal. 2005), *aff'd* and *reh'g denied*, 527 F.3d 758 (9th Cir. 2008), *rev'd*, 130 S. Ct. 1803 (2010).

42. *Id.* at 1182 n.8.

cross atop Sunrise Rock and subvert the court's original injunction.⁴³ The court reasoned that the government's reversionary interest and continued involvement in maintaining the war memorial belied the contention that the government has given up control over the property.⁴⁴ Because the government engaged in "herculean efforts to preserve the Latin Cross on federal land," the *Buono III* court permanently enjoined the implementation of the land transfer statute.⁴⁵

On appeal, the United States Court of Appeals for the Ninth Circuit held that the district court did not abuse its discretion in enforcing its prior injunction (*Buono IV*).⁴⁶ The court in *Buono IV* agreed that the land transfer was an attempt by the government to keep the cross on display without actually curing the Establishment Clause violation.⁴⁷ The court reiterated its previous analysis of the reasonable observer in *Buono II*. Because the reasonable observer would know about the government's attempts to preserve the cross, that the government rejected the placement of other religious symbols, and that the area around the cross is public land, the presence of the cross violated the Establishment Clause.⁴⁸ The Supreme Court of the United States granted certiorari to consider the validity of the injunction in *Buono III* barring the implementation of the land transfer statute.⁴⁹

II. LEGAL BACKGROUND

A. The Supreme Court's Establishment Clause Jurisprudence

The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of

43. *Id.* at 1182.

44. *Id.* at 1179.

45. *Id.* at 1182.

46. *Buono v. Kempthorne*, 502 F.3d 1069, 1077 (9th Cir. 2007), *aff'd* and *reh'g denied*, 527 F.3d 758 (9th Cir. 2008), *rev'd*, 130 S. Ct. 1803 (2010).

47. *Id.* at 1085.

48. *Id.* at 1086 ("Under the statutory dictates and terms that presently stand, carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement.").

49. *Salazar v. Buono*, 130 S. Ct. 1803, 1811 (2010). After the Supreme Court issued its opinion, the cross was stolen. Caroline Black, *Mojave Cross Honoring U.S. War Dead Stolen in Middle of the Night*, CBSNEWS.COM (May 12, 2010), http://www.cbsnews.com/8301-504083_162-20004719-504083.html. Outraged veterans groups offered a \$25,000 reward for information leading to the capture of the individuals responsible for the theft. *Id.* One week later, a replacement cross was erected anonymously, but the National Park Service removed the cross from Sunrise Rock. *Offer of New Home for Mojave Cross Goes Unanswered*, DESERTDISPATCH.COM (June 15, 2010), <http://www.desertdispatch.com/news/cross-8679-mojave-home.html>.

religion”⁵⁰ In *Lemon v. Kurtzman*,⁵¹ the Supreme Court articulated a three-pronged test to determine if a government action violates the Establishment Clause.⁵² According to the test, the activity must (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not involve excessive government entanglement with religion.⁵³

Since 1983, however, the Court has failed to uniformly apply the *Lemon* test, and signaled that it might apply other tests to decide Establishment Clause violations.⁵⁴ A year after establishing the *Lemon* test, the Court dismissed it just as easily in *Lynch v. Donnelly*,⁵⁵ in which the Court stated “no fixed, *per se* rule can be framed. The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application.”⁵⁶ The Court explained that the Constitution does not require the complete separation between religion and the state.⁵⁷ Rather, what the Constitution requires is that the state not advance or endorse a particular religion.⁵⁸ Justice O’Connor concurred in the opinion and modified the purpose and effect prongs, creating the endorsement test.⁵⁹ The endorsement test essentially asks what message the government intended to convey and what message was actually conveyed to the reasonable observer.⁶⁰ However, there are competing definitions of the reasonable observer and disagreements over the amounts of information to impute to the reasonable observer.⁶¹

50. U.S. CONST. amend. I.

51. 403 U.S. 602 (1971).

52. *Id.* at 612–13.

53. *Id.*

54. Lisa Langendorfer, *Establishing a Pattern: An Analysis of the Supreme Court’s Establishment Clause Jurisprudence*, 33 U. RICH. L. REV. 705, 709 (1999). For instance, in *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), the Court upheld prayer in the Nebraska State Legislature without even applying the *Lemon* test. *Id.*

55. 465 U.S. 668, 678–79 (1984).

56. *Id.* at 678.

57. *Id.* 673.

58. *Id.* at 682.

59. *Id.* at 687–90 (O’Connor, J., concurring).

60. Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky and Van Orden v. Perry*, 4 FIRST AMEND. L.R. 139, 144 (2006).

61. *Id.*

B. Justice O'Connor's Reasonable Observer

According to Justice O'Connor, the purpose of the Establishment Clause is to prevent the government "from appearing to take a position on religion or from making adherence to religion relevant to a person's standing in the political community."⁶² Justice O'Connor argued that a government action violates the Establishment Clause when the action has the effect of "communicating a message of government endorsement or disapproval of religion."⁶³ Therefore, her endorsement test shifted the focus from the government act itself to perceptions of the act in the community.⁶⁴ Justice O'Connor expected the reasonable observer to be familiar with the "history and ubiquity" of the government's action.⁶⁵

Justice O'Connor more clearly stated the concept of the reasonable observer in her concurring opinion in *Capitol Square Review & Advisory Bd. v. Pinette*.⁶⁶ In *Pinette*, she argued that the reasonable observer must possess more information than the casual passerby or the actual perception of individual observers.⁶⁷ Rather, Justice O'Connor favored a definition similar to the reasonable person in tort law, who "is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'"⁶⁸ The reasonable observer must be deemed to have knowledge of the history and context of the forum in which a religious symbol is displayed, *and the knowledge must not be limited to the information available at the symbol*.⁶⁹ Instead, the reasonable observer would be "acquainted with the text, legislative history, and implementation of the statute" concerning the display.⁷⁰

Justice O'Connor applied this definition to a cross that the Ku Klux Klan displayed on the lawn in front of the Ohio State Capitol.⁷¹ She found that the reasonable observer would be aware that the displayed cross is a religious symbol, that the property is owned by the state, that the adjacent building was the state capitol, the general

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

63. *Id.* at 692.

64. Kosse, *supra* note 60, at 144.

65. *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

66. 515 U.S. 753 (1995).

67. *Id.* at 779 (O'Connor, J., concurring in part and concurring in the judgment).

68. *Id.* at 780.

69. *Id.*

70. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

71. *Capitol Square*, 515 U.S. at 780-81.

history of the place in which the cross is displayed, and that the square is a public place where secular and religious groups engage in expressive conduct.⁷² On these facts, Justice O'Connor concluded that this knowledge would lead the reasonable observer to believe that the state was not endorsing religion.⁷³

C. Justice Stevens' Reasonable Observer

In his dissenting opinion in *Capitol Square*, Justice Stevens sharply criticized Justice O'Connor's formulation of the reasonable observer.⁷⁴ He asserted that O'Connor's definition is a legal fiction because the reasonable observer "comes off as a well-schooled jurist, a being finer than the tort-law model."⁷⁵ To Justice Stevens, the tort law model would deprive constitutional protection to every reasonable person who falls below Justice O'Connor's ideal standard.⁷⁶ He would extend Establishment Clause protection "to the universe of reasonable persons and ask whether *some* viewers of the religious display would be likely to perceive a government endorsement."⁷⁷ Justice Stevens agreed that the purpose of the Establishment Clause is to protect an individual "from being made to feel like an outsider in matters of faith" and outside the political community.⁷⁸

In applying the reasonable observer test, Justice Stevens stressed the fact that the religious symbol was placed on government land, which implies official recognition and reinforcement of its message.⁷⁹ The reasonable observer of any unadorned symbol on public property would naturally assume that the government has sponsored and facilitated its message.⁸⁰ Because he would not impute any additional knowledge to the reasonable observer, Justice Stevens would hold that some reasonable person would perceive governmental endorsement of religion.⁸¹

72. *Id.* at 780–82.

73. *Id.* at 782.

74. *Id.* at 800 n.5 (Stevens, J., dissenting).

75. *Id.*

76. *Id.*

77. *Id.* (emphasis supplied).

78. *Id.* at 799.

79. *Id.* at 801.

80. *Id.* at 801–02.

81. *Id.*

D. The Ten Commandments Confusion

As a result of the disparities and disagreements on the Supreme Court in applying the reasonable observer framework, the lower courts have struggled in their analyses and applications of the rule.⁸² The Supreme Court failed to clear up the confusion in the spring of 2005 when it decided two similar cases applying the reasonable observer test in the Ten Commandments context. These two cases demonstrate the Court's inconsistent application of the reasonable observer test.

1. Van Orden v. Perry

In *Van Orden v. Perry*,⁸³ the Supreme Court decided whether or not the display of the Ten Commandments on the grounds of the Texas State Capitol violated the Establishment Clause.⁸⁴ The Fraternal Order of Eagles erected the monument in 1961. It stood about six feet high and three and one-half feet wide and was located in between the Capitol and Supreme Court building.⁸⁵ The text of the Ten Commandments was the largest inscription on the monument.⁸⁶ The monument was one of seventeen other statues, monuments, and items on the Texas State Capitol grounds that commemorate Texas' history but is the only monument with religious text.⁸⁷ While there was no clear purpose for the religious text, the government asserted that its purpose was to honor the Fraternal Order of Eagles' efforts, promote morality and prevent juvenile delinquency, and acknowledge the role of the Ten Commandments in American law.⁸⁸

In *Van Orden*, the Court declined to apply the *Lemon* test and held that displaying the monument on government property was constitutional.⁸⁹ Writing for a plurality, Justice Rehnquist acknowledged that the Ten Commandments monument had religious significance but argued that it was within the realm of acceptable acknowledgements of religion in the American heritage.⁹⁰ Justice Rehnquist cited instances where the Court acknowledged the role of

82. See B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 527–29 (2005) (discussing cases where the lower courts struggled with the Supreme Court's Establishment Clause jurisprudence).

83. 545 U.S. 677 (2005).

84. *Id.* at 681.

85. *Id.* at 681–82.

86. *Id.* at 681.

87. *Id.*

88. *Id.* at 701 (Breyer, J., concurring).

89. *Id.* at 686 (plurality opinion).

90. *Id.* at 690.

religion by permitting prayer before a state legislature's daily sessions and upholding laws "that prohibited the sale of merchandise on Sunday."⁹¹ Because the placement of the Ten Commandments monument was a "passive use" of the religious text, the Court upheld its placement on the Texas State Capitol grounds.⁹²

Justice Thomas concurred in the judgment.⁹³ Justice Thomas asserted that the Court's precedent commanded a judgment that the monument did not violate the Establishment Clause.⁹⁴ In so doing, he delivered a critique of the Court's precedent that requires the use of the reasonable observer test.⁹⁵ He reasoned that the test looks to the view of the "unusually informed observer," which does not serve religious adherents or nonadherents.⁹⁶ The nonadherent is likely more sensitive than the reasonable observer, and the adherent might take offense at the removal of the religious display.⁹⁷ Noting that the Court has inconsistently applied the reasonable observer test, Justice Thomas maintained that Establishment Clause jurisprudence turns on judicial predilections.⁹⁸

Justice Breyer concurred in the judgment.⁹⁹ Acknowledging that it was a borderline case, he determined that the context in which the religious symbol was displayed did not lend itself to government endorsement of religion.¹⁰⁰ Because the Ten Commandments monument communicated a secular message as well as a religious message and because the monument has been displayed for over forty years without challenge, Justice Breyer concluded that a reasonable observer would not perceive governmental endorsement of religion.¹⁰¹

Justice Stevens dissented because, using the reasonable observer test, he found the Ten Commandments monument only

91. *Id.* at 687–88.

92. *Id.* at 691.

93. *Id.* at 692 (Thomas, J., concurring).

94. *Id.* at 694.

95. *Id.* at 696.

96. *Id.* The Court came close to adopting Justice O'Connor's definition of a reasonable observer in *Good News Club v. Mildred Central School*, 533 U.S. 98, 127–28 (2001) (Breyer, J., concurring).

97. *Van Orden*, 545 U.S. at 697.

98. *Id.* Although he criticized the reasonable observer test for its inconsistency, Justice Thomas suggested a reworking of Establishment Clause jurisprudence to establish a presumption of constitutionality for religious symbols unless the symbol had the effect of coercing individuals to support or participate in a religious exercise. *Id.* at 697–98.

99. *Id.* at 698 (Breyer, J., concurring).

100. *Id.* at 700–01.

101. *Id.* at 701–03.

exhibited a religious message.¹⁰² He cast doubt on the secular purposes for erecting the monument, including the idea that the government should combat juvenile delinquency through biblical teachings.¹⁰³ The Ten Commandments unquestionably endorsed Christianity and commanded a preference for religion over irreligion, and, therefore, allowing the monument to display on public property would propagate a religious message.¹⁰⁴ He suggested that any religious display on public property should invoke a presumption of unconstitutionality.¹⁰⁵

Justice Souter wrote a separate dissenting opinion in which Justice Stevens joined.¹⁰⁶ Justice Souter used the reasonable observer test and concluded that a viewer of the Ten Commandments monument would unmistakably conclude that the Ten Commandments constitute a religious statement and that the purpose of selecting the Ten Commandments for a display is religious.¹⁰⁷ Justice Souter disagreed with the assertion that the Ten Commandments display when viewed with the other secular monuments denotes a secular message.¹⁰⁸ However, a viewer strolling through the state capitol grounds “would surely take each memorial on its own terms without any dawning sense that some purpose held the miscellany together more coherently than fortuity and the edge of the grass.”¹⁰⁹ Accordingly, the reasonable observer would have no difficulty discerning a religious message from the Ten Commandments monument.¹¹⁰ Justice O’Connor dissented for the reasons given by Justice Souter in the instant case and her concurrence in the companion Ten Commandments case, *McCreary v. ACLU*.¹¹¹

2. *McCreary v. ACLU*

In *McCreary v. ACLU*,¹¹² the Supreme Court considered the constitutionality of a display of the Ten Commandments and eight other documents purported to be foundational to American government on the walls of two county courthouses.¹¹³ Justice Souter,

102. *Id.* at 707–08 (Stevens, J., dissenting).

103. *Id.* at 715.

104. *Id.* at 720–21.

105. *Id.* at 721.

106. *Id.* at 737 (Souter, J., dissenting).

107. *Id.* at 738.

108. *Id.* at 743.

109. *Id.* at 742–43.

110. *Id.* at 738.

111. *Id.* at 737 (O’Connor, J., dissenting).

112. 545 U.S. 844 (2005).

113. *Id.* at 855.

writing for the majority, held that the government had an impermissible sectarian purpose in displaying the Ten Commandments.¹¹⁴

Justice Souter rejected the government's assertion that the Court need not consider the purpose of displaying the Ten Commandments in the courthouse because examination of legislative purpose is a staple of statutory interpretation.¹¹⁵ He asserted that the test to be used is the purpose belonging to an 'objective observer,' one 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."¹¹⁶ Justice Souter considered the statute's text and that a pastor accompanied the county executive when he posted the Ten Commandments, and concluded that the "reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message."¹¹⁷ In addition, the reasonable observer would find that the additional items displayed would not dilute the religious meaning of the Ten Commandments.¹¹⁸

Justice O'Connor wrote a concurring opinion in which she agreed that the government's purpose in the display of the Ten Commandments in the courthouse bespoke an endorsement of religion.¹¹⁹ She concluded "[t]he purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer."¹²⁰

3. *Van Orden and McCreary, thus, demonstrate the difficulty of consistently applying the reasonable observer test.*

The Supreme Court decided these two similar cases on the same day and came to different conclusions in each case. Such is the result of imputing different facts to the reasonable observer. In *Van Orden*, the Court upheld the display of the Ten Commandments on government property, stressing the historical significance of the Ten Commandments and that a private group displayed them for its own

114. *Id.* at 864.

115. *Id.* at 861.

116. *Id.* at 862 (quoting *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

117. *Id.* at 868–69.

118. *Id.* at 872–73. "If the observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of the courthouses constitutionally required to embody religious neutrality." *Id.* at 873.

119. *Id.* at 883 (O'Connor, J., concurring).

120. *Id.* at 883–84.

purposes. However, in *McCreary*, the Court rejected the historical significance of the Ten Commandments, focusing only on the religious meaning of the Ten Commandments and the government's role in displaying the religious document. These cases highlight the inconsistent application of the reasonable observer test in Establishment Clause jurisprudence.

III. THE COURT'S REASONING

In *Salazar v. Buono*,¹²¹ the Supreme Court of the United States used the reasonable observer test to conclude that the cross and the land transfer statute was not necessarily a governmental endorsement of religion but nonetheless remanded to the district court for further review.¹²² Writing for the plurality, Justice Kennedy concluded that Buono had standing to maintain the action because he obtained a final judgment and thus had a "judicially cognizable interest in ensuring compliance with that judgment."¹²³ The Court also took special note of the procedural disposition of the litigation, which narrowed the Court's scope to only determining the validity of the 2005 injunction barring the implementation of the land transfer statute.¹²⁴ The case turned on whether the land transfer could cure the Establishment Clause violation previously adjudicated in 2002.¹²⁵ The Court concluded that the district court did not properly assess the land transfer statute's significance.¹²⁶

The Court explained that injunctive relief is granted in light of what a court believes will be the best course of action, but a court must not ignore significant changes in the law or circumstances underlying an injunction.¹²⁷ The land transfer statute was a substantial change in the circumstances and should have bore on the propriety of the requested relief.¹²⁸ Even if the purpose of the land transfer was to prevent the removal of the cross and thus subvert the district court's injunction, the statute nonetheless might have been appropriate.¹²⁹

121. 130 S. Ct. 1803 (2010).

122. *Id.* at 1820.

123. *Id.* at 1814–15.

124. *Id.* at 1815.

125. *Id.* at 1815–16.

126. *Id.* at 1816.

127. *Id.*

128. *Id.*

129. *Id.*

The Court took into account the government's efforts to avoid removing a symbolic historical monument while also addressing the endorsement problem.¹³⁰ The Court explained that the cross was not erected to promote a Christian message, but rather to honor the nation's fallen soldiers.¹³¹ The land transfer was Congress' attempt to honor World War I soldiers while complying with the district court's order.¹³² The First Amendment does not force the government to avoid any public acknowledgement of religion's role in society.¹³³ Instead, it leaves room to accommodate religion within a constitutionally permissible framework.¹³⁴

Without deciding if it was appropriate, the Court used the reasonable observer test to conclude that the district court's analysis was not complete in light of the changed law and circumstances after the land transfer statute.¹³⁵ Using Justice O'Connor's definition of the reasonable observer, the Court stated that the "test requires the hypothetical construct of an objective observer who knows all the pertinent facts and circumstances surrounding symbol and its placement."¹³⁶ Applying the test requires a fact intensive inquiry.¹³⁷ The Court explained that the district court did not consider the background and context for the placement of the cross.¹³⁸ The background and context of the cross reveal that it is a symbol of honor for the nation's soldiers rather than a simple religious symbol.¹³⁹ Noting that other specific remedies might be appropriate, the Court remanded to the district court to reconsider its 2005 injunction and conduct the fact-specific inquiry of whether alternative legal remedies exist.¹⁴⁰

Justice Alito concurred with Justice Kennedy's opinion but would not remand to the district court for reconsideration.¹⁴¹ He explained that the factual record had been sufficiently developed to

130. *Id.* at 1816–17.

131. *Id.*

132. *Id.* at 1817.

133. *Id.* at 1818.

134. *Id.* at 1819.

135. *Id.* at 1819–20. The Court did not decide the appropriateness of the reasonable observer test because the land transfer would place the cross on private property, and as a general matter, courts do not consider Establishment Clause challenges to objects on private land. *Id.* at 1819.

136. *Id.* at 1819–20. *See supra* notes 67–71 and accompanying text.

137. *Id.* at 1820.

138. *Id.*

139. *Id.*

140. *Id.*

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

implement the land transfer statute.¹⁴² Justice Alito outlined the history of the placement of the cross and stressed that the cross was erected to commemorate the American war dead in World War I.¹⁴³ He contended that removing the cross would not signify governmental neutrality to religion but hostility to religious matters.¹⁴⁴ Thus, he would respect the alternative approach Congress has chosen to remedy the apparent Establish Clause violation.¹⁴⁵

Justice Alito also applied the reasonable observer test to decide whether the implementation of the land transfer statute would constitute endorsement of religion.¹⁴⁶ He used the same test Justice Kennedy articulated;¹⁴⁷ the reasonable observer would know the origin and history of the monument, that the monument is located on privately owned land, that the monument's owner is under no obligation to maintain the present design, and that the transfer reflects the government's best ability to deal with a unique situation and accommodate conflicting concerns.¹⁴⁸ He concluded that congressional intention was not to embrace the religious message of the cross, but rather to commemorate the nation's war dead.¹⁴⁹

Justices Roberts and Scalia separately wrote concurrences that did not implicate the reasonable observer test.¹⁵⁰ Justice Roberts reasoned that the government should implement the land-transfer statute because it would have been consistent with the injunction if the government removed the cross, transferred the land, and the VFW raised the cross again.¹⁵¹ The land transfer statute would merely dispense with the empty ritual.¹⁵² Justice Scalia agreed with the plurality but determined that Buono did not have standing to enforce the injunction.¹⁵³

Justice Stevens dissented because Congress' decision to transfer ownership of the property did not cure the Establishment Clause violation.¹⁵⁴ Like the plurality, Justice Stevens noted the

142. *Id.*

143. *Id.* at 1821–22.

144. *Id.* at 1823.

145. *Id.*

146. *Id.* at 1824.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1821 (Roberts, J., concurring); *id.* at 1824 (Scalia, J., concurring).

151. *Id.* at 1821.

152. *Id.*

153. *Id.* at 1824–25.

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

procedural straightjacket that constrained the Court.¹⁵⁵ Since the government did not seek review of the *Buono II* ruling, it was settled that the cross constituted a government endorsement of religion to a reasonable observer.¹⁵⁶ Justice Stevens reasoned that the narrow issue before the court was whether the district court properly enforced its 2002 injunction by enjoining the land transfer.¹⁵⁷ He agreed with the plurality that the Court must consider whether changed circumstances rendered enforcement of the original injunction inappropriate in order to achieve the intended objective of the injunction.¹⁵⁸ However, Justice Stevens contended that the district court was within its rights to find that the land transfer would violate its original injunction and that it would not cure governmental endorsement of religion.¹⁵⁹ The land transfer would require an affirmative act government act and would permit the display of the cross at Sunrise Rock, violating the express words of the injunction.¹⁶⁰

Justice Stevens used the reasonable observer test to determine that the government has endorsed religion notwithstanding the land transfer because its effect will continue government endorsement of religion and its purpose was to preserve the cross.¹⁶¹ The reasonable observer would consider “the nature of th[e] symbol, the timing and the substance of Congress’ efforts, and the history of the Sunrise Rock site” and could conclude that the government chose to preserve the cross because of the religious meaning of the cross.¹⁶² Justice Stevens found that because the government has taken actions that explicitly endorse the cross, the government’s relationship to the cross does not depend on the ownership of the land.¹⁶³ The government acted several times to prohibit the use of federal funds to remove the cross and designated the cross a national monument.¹⁶⁴ Far from simply accepting the cross on its property, the government actively mandated that the cross remain and will continue to maintain the site as a national memorial.¹⁶⁵ Such actions demonstrate that the cross enjoys

155. *Id.*

156. *Id.* 1829.

157. *Id.* Justice Stevens specifically stated that the constitutionality of the land transfer statute was not an issue before the Court. *Id.*

158. *Id.*

159. *Id.* at 1830–31.

160. *Id.* at 1831.

161. *Id.* at 1832–33.

162. *Id.* at 1841.

163. *Id.* at 1834.

164. *Id.*

165. *Id.*

the government's imprimatur regardless of the owner of the underlying land.¹⁶⁶

Even though Congress supported the placement of the cross because of its significance as a war memorial, Justice Stevens responded, "Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian."¹⁶⁷ Furthermore, the reasonable observer would understand that the purpose of the land transfer was to preserve the display of the cross.¹⁶⁸ This purpose would convey a message of government endorsement of religion.¹⁶⁹ Justice Stevens concluded by noting that the government should honor its service members but the government's decision to commemorate the nation's fallen soldiers with a solitary sectarian symbol was an inadequate and inappropriate tribute.¹⁷⁰

IV. ANALYSIS

The Supreme Court of the United States missed an opportunity to clarify the reasonable observer test in *Salazar v. Buono*. The reasonable observer test, as applied by the Court, credits individuals with more knowledge than that of an actual observer.¹⁷¹ The Court's actor-focused analysis produces error.¹⁷² Rather, the Court should adopt a display-focused analysis that accounts for information displayed at a religious symbol.¹⁷³ Using a display-focused analysis would impute the proper amount of knowledge to the observer because the information available to the observer would be gleaned from the symbol itself rather than some other historical knowledge.¹⁷⁴

Even if the Court's reasonable observer test was appropriate, the Court misapplied the test because it did not consider all of the relevant facts that a reasonable observer would know.¹⁷⁵ The reasonable observer would know that Congress intervened

166. *Id.*

167. *Id.* at 1835.

168. *Id.* at 1837.

169. *Id.*

170. *Id.* at 1842.

171. *See infra* Part IV.A.1.

172. *Id.*

173. *See infra* Part IV.A.3.

174. *Id.*

175. *See infra* Part IV.B.1.

extraordinarily to preserve the cross, and that fact alone signifies government endorsement of a religious message.¹⁷⁶

A. The Court's Reasonable Observer Test is an Inappropriate Mechanism to Decide Establishment Clause Cases.

When the government's purpose in the placement of a symbol is unclear or indefinite, the reasonable observer does not know the purpose of the government's action.¹⁷⁷ The Court's definition of the reasonable observer requires near omniscience, which is implausible.¹⁷⁸ Because symbols may have varying meanings, the Court imputes knowledge to the reasonable observer based on the meaning it finds in the symbol.¹⁷⁹ Unless the Court clarifies the reasonable observer test by using a display-focused analysis, the Court should dispense with the reasonable observer test.¹⁸⁰

1. The Court's definition of the reasonable observer is a fiction.

Under the Court's definition, a reasonable observer knows more about the government's purpose than an actual observer of a religious symbol.¹⁸¹ The fiction is the result of imputing knowledge based on the context and history of the religious display rather than on the information present at the display.¹⁸² While courts may plainly divine a clear religious purpose in the display of a religious symbol,¹⁸³ citizens normally will not be able to discern the legislative intent behind government action.¹⁸⁴ Justice Scalia stated as much in his dissent in *McCreary*, where he reasoned that the majority of people would be unfamiliar with the legislation mandating display of the Ten Commandments in courthouses.¹⁸⁵ Using the reasonable observer test

176. *See infra* Part IV.B.2.

177. *See infra* Part IV.A.1.

178. *Id.*

179. *See infra* Part IV.A.2.

180. *See infra* Part IV.A.3.

181. Kosse, *supra* note 60, at 163.

182. *Id.*

183. *See* *McCreary v. ACLU*, 545 U.S. 844, 871–72 (2005) (finding a clear religious purpose in the display of the Ten Commandments in a Kentucky courthouse).

184. *See* *United States v. Rybicki*, 354 F.3d 124, 158 (2d Cir. 2003) (Jacobs, J., dissenting) (“[A] ‘person of ordinary intelligence’ is unlikely to ‘perform[] the lawyer-like task of statutory interpretation by reconciling the text of [] separate documents.’”) “Ordinary people cannot be expected to undertake such an analysis [of legislative history]; rare is the lawyer who could do it; and no two lawyers could be expected to agree” *Id.* at 160.

185. *McCreary*, 545 U.S. at 911 (Scalia, J., dissenting).

to divine the government's purpose is also inapplicable when the government has not declared its purpose or no legislative purpose exists to discern the government's purpose.¹⁸⁶

Buono demonstrates this problem because the government's purpose was not clearly religious, but a person viewing the cross would not know the government's secular purpose in maintaining a cross on federal land.¹⁸⁷ An individual would know even less about the government's purpose in enacting the land transfer statute.¹⁸⁸ The Court suggests that the reasonable observer would know that Congress, trying to balancing two competing objectives, balanced the apparent Establishment Clause violation and interest in maintaining a World War I memorial by transferring the land to a private group.¹⁸⁹ Imputing such knowledge to the average American is illogical. Americans have a documented lack of knowledge regarding the functions of our government and national history.¹⁹⁰ An Intercollegiate Studies Institute study found that only twenty seven percent of Americans know that the Bill of Rights prohibits the establishment of an official religion, twenty five percent of Americans believe that Congress shares authority over foreign policy with the United Nations, and less than half of Americans can name all three branches of government.¹⁹¹ Because most citizens are uninformed, an assumption that the average American viewing a religious symbol will know the legislative purpose behind displaying the symbol is unfounded.

The reasonable observer test is also inappropriate in light of the significant gulf between the knowledge the plurality and the knowledge the dissent would attribute to the reasonable observer. The Court erred by expanding the reasonable observer test to require near omniscience by indicating that the reasonable observer knows the meaning of removing the cross.¹⁹² The idea is that if the reasonable observer knows that the purpose of the land transfer is to avoid dismantling an historic war memorial, then the viewer will not

186. Kosse, *supra* note 60, at 165.

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

188. *See id.* The statute includes no legislative findings and the provision mandating the land transfer is buried in a defense appropriations bill. *See* Department of Defense Appropriations Act, 2004, Pub. L. 108-87, § 8121, 117 Stat. 1100 (2003).

189. *Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010).

190. *Civic Literacy Report – Major Findings*, INTERCOLLEGIATE STUDIES INSTITUTE, http://www.americancivilliteracy.org/2008/major_findings_finding1.html (last visited April 14, 2011).

191. *Id.*

192. Mary Jean Dolan, *Salazar v. Buono: The Cross Between Endorsement and History*, 105 NW. U.L. REV. COLLOQUY 42, 47 (2010).

perceive the transfer or the continued display of the symbol as a governmental endorsement of religion.¹⁹³ The Court's approach requires a judge to prognosticate as to the effect of the removal of a religious symbol before it has occurred. The Court derived the idea from Justice Breyer's opinion in *Van Orden v. Perry*, in which he found that a monument's historical meaning was significant to the endorsement test.¹⁹⁴ The Court extended Justice Breyer's historical preservation idea to suggest that a reasonable observer would know of the value of preserving longstanding monuments and would adopt a similar view.¹⁹⁵ The knowledge that the Court now imputes to the reasonable observer "interconnects with observers' understandings of government motives, [and] the level of contextual knowledge attributed to observers"¹⁹⁶ An expectation that the reasonable observer would have such a deep understanding of the issues is unrealistic.

2. Because symbols vary in meaning, the Court imputes knowledge to the reasonable observer based on the meaning it finds in a symbol.

Symbols can vary in historical meaning, thus requiring the Court to choose among competing meanings. Justice Alito stated "a monument may be 'interpreted by different observers, in a variety of ways.'"¹⁹⁷ He explained "[t]he 'message' conveyed by a monument may change over time. A study of war memorials found that 'people reinterpret' the meaning of these memorials as 'historical interpretations' and 'the society around them changes.'"¹⁹⁸ Justice Alito stressed the historical aspect of the cross and argued that a reasonable observer would be aware of the origin and history of the cross.¹⁹⁹ Justice Alito's analysis reflects the idea that a court's function is to decide the relative strengths and a "normative vision of whose

193. *Id.* at 49.

194. 545 U.S. 677, 703 (2005) (Breyer, J., concurring) (concluding that the Ten Commandments monument's 40-year unchallenged history suggests that "the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage.")

195. Dolan, *supra* note 192, at 49.

196. *Id.*

197. *Salazar v. Buono*, 130 S. Ct. 1803, 1822 (2010) (Alito, J., concurring) (quoting *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1135 (2009)).

198. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1136 (2009) (quoting JAMES M. MAYO, *WAR MEMORIALS AS POLITICAL LANDSCAPE: THE AMERICAN EXPERIENCE AND BEYOND* 8-9 (1988)).

199. *Buono* 130 S. Ct. at 1824.

perceptions should govern in a particular cultural context.”²⁰⁰ Because a symbol has potentially myriad valid reasonable meanings, the reasonable observer will likely differ in the meanings they attach to symbols. If the reasonable observer readily comes to varying conclusions, a court’s reasonable observer test is rendered meaningless.

Discerning a symbol’s meaning using context alone is difficult.²⁰¹ It is usually impossible to delimit the outer bounds of context, and accordingly, any attempt to establish a legal rule dependent on context will lead to a subjective process of adjudication.²⁰² The diversity of views on the role of religion in society is another factor that makes it difficult to interpret the meaning of a religious symbol.²⁰³ Also, the imaginary construct of the reasonable observer and the knowledge imputed to the reasonable observer is manipulable depending on the context or social meaning,²⁰⁴ the outcome of a case turns on meaning that a reasonable observer finds.²⁰⁵ Thus, the Court’s definition of the reasonable observer turns on its interpretation of a symbol.²⁰⁶

3. A display-focused analysis would credit the reasonable observer with the correct amount of knowledge.

The reasonable observer test might be appropriate if it was display focused, relying on information available while viewing a religious symbol.²⁰⁷ Such a definition would cure the fiction that the hypothetical observer would know the context and history surrounding the placement of a religious symbol.²⁰⁸ Rather, a reasonable person would most likely be able understand the purpose of a religious symbol if information at the site explicitly stated the purpose.²⁰⁹

The cross at Sunrise Rock did not have a plaque or any information stating that it was a monument to those who died in World

200. Dolan, *supra* note 192, at 54.

201. Hill, *supra* note 82, at 515.

202. *Id.* at 515–16.

203. *Id.* at 518.

204. *Id.* at 506–07.

205. *Id.*

206. Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 519 (2002) (“It must be clear, however, that adoption of this definition would make explicit what is now implicit: it effectively converts the reasonable observer into a majority of the Supreme Court . . .”).

207. Julie Van Gronigen, Note, *Thou Shalt Reasonably Focus on its Context: Analyzing Public Displays of the Ten Commandments*, 39 VAL. U. L. REV. 219, 272–73(2004).

208. *Id.*

209. *Id.*

War I. This fact alone makes it farcical to assume that someone viewing the cross would know that Congress intended the cross to be a war memorial. For the government to defend a constitutional claim based on a religious symbol's historical meaning, it must disclose the origin and purpose.²¹⁰ Without such disclosure, the broader reliance on context and historical meaning turns into a reverence for tradition and renders the Establishment Clause irrelevant.²¹¹ The reasonable observer test is inappropriate without a display-focused analysis because the court credits a viewer of a religious symbol with more knowledge than that person likely possesses.

B. The Court Misapplied the Reasonable Observer Test.

Even if the Court's reasonable observer test is appropriate, the Court did not consider all the facts that a reasonable observer would know when applying the test.²¹² Because of this error, the Court failed to properly apply the reasonable observer test.²¹³

1. The reasonable observer would know that Congress specifically intended to support the placement of a religious symbol.

Congress' actions indicate that the land transfer statute was intended to preserve the placement of the cross at Sunrise Rock.²¹⁴ The *Buono* plurality argued that the hypothetical objective observer would know not only that the cross was a depiction of religious message, but that it was displayed by a private group to serve as a World War I memorial.²¹⁵ Moreover, the cross would be on private land, and therefore, would not evoke the government's endorsement.²¹⁶ However, the Court failed to consider the government's significant involvement in the placement of the cross. Justice Stevens correctly supplied more relevant facts that a well-informed, hypothetical observer would know.²¹⁷

According to Justice Stevens, the reasonable observer would be further informed that the government denied a private individual the right to place a Buddhist monument near the cross, Congress

210. Dolan, *supra* note 192, at 53–54.

211. *Id.* at 54.

212. *See infra* Part IV.B.1.

213. *Id.*

214. *See infra* notes 219–20 and accompanying text.

215. *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010).

216. *Id.* at 1819.

217. *Id.* at 1833–34 (Stevens, J., dissenting).

designated the cross a national memorial, Congress forbade the use of federal funds to remove the cross after the district court's original injunction, Congress enacted the land transfer statute specifically to keep the cross in place, and the government maintained a reversionary interest in the land if the cross is not displayed.²¹⁸ Because of Congress' actions, the district court concluded that the cross was a religious symbol, that the government put its imprimatur on the placement of the cross, and that the land transfer statute furthered a violation of the Establishment Clause.²¹⁹ The reasonable observer would understand the procedural history leading to the continued placement of the cross and that a federal district court decided that the cross was a violation of the Establishment clause. These facts would lead the reasonable observer to conclude that the Congress intended to support the placement of a religious symbol.

2. In the eyes of a reasonable observer, the land transfer does not cure the Establishment Clause violation.

Even after the land transfer, the reasonable observer would not know that only the land under which the cross is displayed is private property. The Ninth Circuit rightly observed that “carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement.”²²⁰ The government retains a reversionary interest in the land, and the government's ownership interest ripens if the cross is not displayed. The well-informed, and according the Court, reasonable observer, would be aware of the government's interest in the land. Such facts would lead well-informed, reasonable observers to conclude that the government has taken a position on the placement of a religious symbol that the supposed secular purpose could not overcome.

The reasonable observer would be aware of the government's efforts to “de-religionize” the cross after the land transfer by claiming that the cross has a secular meaning, suppressing the religious meaning, and contending that the government disavows its support for the placement of the cross by transferring the underlying land to a private party.²²¹ The argument is spurious because taking the religious

218. *Id.*

219. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005), *aff'd*, 527 F.3d 758 (9th Cir. 2008).

220. *Buono v. Kempthorne*, 502 F.3d 1069, 1086 (9th Cir. 2007), *aff'd and reh'g denied*, 527 F.3d 758 (9th Cir. 2008), *rev'd*, 130 S. Ct. 1803 (2010).

221. *Fish*, *supra* note 187.

meaning out of the cross eliminates the significance that provoked the desire to emplace the cross.²²² Professor Stanley Fish laid out the formula:

[I]f you want to secure a role for religious symbols in the public sphere, you must de-religionize them, . . . by claiming for them a non-religious meaning . . . So you save the symbols by leeching the life out of them. The operation is successful, but the patient is dead.²²³

When the Court contended that the reasonable observer would not perceive an Establishment Clause violation after the land transfer, the Court pretended that the reasonable observer would not see the government's hand in the placement of the cross despite accepting a definition of the reasonable observer that imputes great knowledge to him that far exceeds that of the actual observer.²²⁴ The Court's pretense, however, undermined its earlier statement that "[t]he Constitution does not oblige government to avoid any public acknowledgment of religion's role in society."²²⁵ The Court, then, admitted that the cross retains its religious meaning even after Congress acts.²²⁶

V. CONCLUSION

In *Salazar v. Buono*, the Supreme Court of the United States considered whether a judge should have barred enforcement of a land transfer statute that transferred property on which a Latin cross is erected from the government to a private party.²²⁷ The Court used the reasonable observer test to conclude that the district court did not consider all of the relevant facts to apply the test.²²⁸ Because the Court did not consider whether the reasonable observer test was appropriate, it missed an opportunity to clarify the test in its Establishment Clause jurisprudence.²²⁹ The test creates a fiction because it assumes much more knowledge than the average American possesses, and, therefore,

222. *Id.*

223. *Id.*

224. *Id.*

225. *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010).

226. Fish, *supra* note 187.

227. *Buono*, 130 S. Ct. at 1811.

228. *Id.* at 1819–20.

229. *See supra* Part IV.A.

should not be applied.²³⁰ The Court should have adopted a display-focused analysis when it applied the reasonable observer test.²³¹ Even if the reasonable observer test is appropriate, the Court erred in its application because it did not consider all of the facts that a reasonable observer of the Mojave cross would know.²³²

230. *Id.*

231. *See supra* Part IV.A.3.

232. *See supra* Part IV.B.

