homicide offender: "We learn, sometimes, from our mistakes."[109] Years ago, the Model Penal Code, in disapproving of the juvenile death penalty, declared that "civilized societies will not tolerate the spectacle of execution of children."[110] After *Graham*, the Court appears poised to declare something equally powerful: nor will civilized societies tolerate the spectacle of sentencing children irrevocably to die in prison.

B. Establishment Clause

Endorsement Test. — For the last two decades, the endorsement test has been the touchstone inquiry in Establishment Clause challenges. This highly contextual test[1] considers whether a reasonable observer would deem a government action or display to have the purpose or effect of endorsing religion.[2] The Supreme Court has long resisted bright-line rules that would limit this contextual analysis only to those messages that are government owned or controlled.[3] Last Term, in *Salazar v. Buono*,[4] the Supreme Court overturned an injunction that barred Congress from transferring a Latin cross to private ownership. Congress sought to transfer the cross, which stood on federal land, in order to cure an Establishment Clause violation. Although the *Buono* Court technically declined to consider whether the transfer *itself* constituted impermissible endorsement, a majority of the Court indicated that it would not apply the endorsement test to a now privately owned display. The Court thus appears to be moving toward a circumscribed version of its endorsement test, applying the test only to publicly owned or controlled messages.

In 1934, the Veterans of Foreign Wars (VFW) erected a Latin cross on federal land in the Mojave National Preserve.[5] The preserve encompasses 1.6 million acres of land, over ninety percent of which is federally owned and administered by the National Park Service (NPS).[6] The cross stands on a granite outcropping known as "Sunrise Rock,"[7] where it is visible to motorists from up to 100 yards away.[8]

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109 *Id.* at 2036 (Stevens, J., concurring).

110 MODEL PENAL CODE § 210.6 cmt. 5 at 133 (Official Draft and Revised Comments 1980 (withdrawn 2009)).

1 *See, e.g.*, Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice.").

2 *See, e.g.*, *id.* at 592; *see also* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 862 (2005).

3 *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 786–92 (1995) (Souter, J., concurring in part and concurring in the judgment).

4 130 S. Ct. 1803 (2010).

5 *Id.* at 1811.

6 *Id.* The remaining land belongs either to the State of California or to private parties. *Id.*

7 *Id.*

8 Buono v. Kempthorne, 527 F.3d 758, 769 (9th Cir. 2008).

The VFW originally mounted the cross in remembrance of those who died in World War I.[9] Although the site once featured signs explaining the commemorative nature of the cross, the signs have since vanished, and the site lacks any indication that the cross stands as a war memorial.[10] Since its placement in 1934, the cross has become an annual gathering place for religious groups celebrating Easter.[11]

In 1999, a retired NPS employee, Herman Hoops, requested permission from the NPS to erect a dome-shaped Buddhist shrine at a trailhead near the cross.[12] The NPS denied the request, noting that it intended to remove the cross.[13] After an investigation into the cross's history, the NPS determined that the cross did not qualify for inclusion in the National Register of Historic Places because, inter alia, "the site is used for religious purposes as well as commemoration."[14] The NPS consequently reaffirmed its decision to remove the cross.[15]

Protesting the NPS decision, local officials enlisted the help of Congressman Jerry Lewis.[16] Congressman Lewis, whose district encompasses the Mojave Preserve, was chairman of the House Defense Appropriations Subcommittee. Over the next two years, Congress passed two defense appropriations bills containing provisions related to the cross: one that bars the federal government from using federal funds to remove the cross,[17] and one that designates the cross as a national memorial commemorating Americans who fought in World War I.[18]

In 2001, Frank Buono — a retired NPS employee[19] and long-time acquaintance of Hoops[20] — filed suit in the Central District of California to challenge the cross.[21] Applying the endorsement test, the district court concluded that the presence of the cross on federal land conveyed an impression of endorsement in violation of the Establishment Clause.[22] The court issued a permanent injunction enjoining the

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[9] *Buono*, 130 S. Ct. at 1811.

[10] *Id.* at 1812.

[11] *Id.*

[12] Buono v. Norton, 212 F. Supp. 2d 1202, 1205–06 (C.D. Cal. 2002).

[13] *Buono*, 527 F.3d at 769.

[14] *Id.*

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

[16] *See id.*

[17] *See* Consolidated Appropriations Act, Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A-230 (2000).

[18] *See* The 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. 2230, 2278–79 (2002).

[19] Buono worked for the NPS from 1972 to 1997. He was Assistant Superintendent of the Mojave National Preserve from September 1994 to December 1995. *Buono*, 527 F.3d at 770 n.4.

[20] *See Buono*, 212 F. Supp. 2d at 1206.

[21] *Id.* at 1202.

[22] *Id.*

government "from permitting display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[23] Less than three months later, Congress passed another defense appropriations bill that included a provision forbidding the use of federal funds "to dismantle national memorials commemorating United States participation in World War I."[24] The Mojave cross is the only such memorial.[25]

The Ninth Circuit affirmed, holding that a reasonable observer would consider a cross on federal land to be government endorsement of religion.[26] The government did not appeal the order to the Supreme Court, and the Ninth Circuit's judgment became final. In the meantime, Congress passed yet another defense appropriations bill that included a provision ordering the Secretary of the Interior to transfer the cross and one acre of the underlying land to the VFW in exchange for five acres of private land.[27] The government retained a reversionary interest in the cross property, reserving the right to reclaim the property if it "is no longer being maintained as a war memorial."[28]

Buono filed another suit in the same district court seeking to enjoin the land transfer on one of two alternative bases.[29] First, Buono argued, the land transfer was an impermissible attempt to evade the prior injunction.[30] Second, he argued, "the land transfer itself is an independent violation of the Establishment Clause."[31] Addressing Buono's first argument, the court determined that the land transfer "could only be viewed as" the latest of Congress's repeated efforts to preserve the cross.[32] The court therefore enjoined the transfer as "an attempt by the government to evade the permanent injunction."[33] The court found it unnecessary to consider Buono's alternative claim.[34]

The Ninth Circuit affirmed.[35] Writing for a unanimous panel, Judge McKeown analyzed the "form and substance" of the land transfer "to determine whether the government action endorsing religion ha[d] actually ceased."[36] Judge McKeown first observed that the gov-

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[23] *Buono*, 527 F.3d at 770.

[24] Department of Defense Appropriations Act, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1519, 1551 (2002).

[25] *Buono*, 130 S. Ct. at 1842 (Stevens, J., dissenting).

[26] Buono v. Norton, 371 F.3d 543, 549–50 (9th Cir. 2004).

[27] *See* Department of Defense Appropriations Act, Pub. L. No. 108-87, § 8121(a)–(f), 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)).

[28] *Id.* § 8121(e).

[29] Buono v. Norton, 364 F. Supp. 2d 1175 (C.D. Cal. 2005).

[30] *Id.* at 1181.

[31] *Id.* at 1182 n.8.

[32] *Id.* at 1182.

[33] *Id.*

[34] *Id.*

[35] Buono v. Kempthorne, 527 F.3d 758, 768 (9th Cir. 2008).

[36] *Id.* at 779.

ernment would maintain substantial control over the cross even after the land transfer: not only would the government retain a reversionary interest in the land, but it would also continue to exercise supervisory control over the property.[37] Second, Judge McKeown noted that Congress "acted outside the scope of normal agency procedures for disposing of federal park land": instead of holding a hearing or opening bidding to the public, the government granted the land directly to the VFW.[38] Third, the opinion emphasized the "herculean efforts" that Congress took to preserve the display of the cross through repeated appropriations bills.[39] For these reasons, Judge McKeown concluded that the land transfer would exacerbate — not cure — the impermissible government endorsement enjoined by the prior injunction.[40]

The Supreme Court reversed and remanded.[41] Writing for the plurality, Justice Kennedy[42] began by addressing the issue of Article III standing. The government argued that Buono lacked standing to challenge either the cross or the land transfer because he did not personally "feel excluded or coerced" by the cross's presence.[43] With respect to the original injunction, Justice Kennedy rejected this argument as moot: the government had failed to appeal the Ninth Circuit's original affirmation of Buono's standing, rendering that judgment final.[44] With respect to the new injunction, Justice Kennedy concluded that Buono had standing because he had "a judicially cognizable interest" in ensuring compliance with the original injunction.[45]

However, Justice Kennedy next held that the district court erred in enjoining the land transfer because it "did not engage in the appropriate inquiry."[46] Specifically, he explained, the district court failed to take into account "significant changes in the law or circumstances underlying [the] injunction" — namely, a new congressional statement of policy.[47] In Justice Kennedy's view, the injunction presented the government with an intractable dilemma: either remove the cross and dishonor those it commemorates, or let the cross stand and violate the injunction. Justice Kennedy argued that the land transfer symbolized a

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[37] *Id.* at 779–81.
[38] *Id.* at 781–82.
[39] *Id.* at 782 (quoting *Buono*, 364 F. Supp. 2d at 1182).
[40] *Id.* at 782–83.
[41] *Buono*, 130 S. Ct. at 1821.
[42] Justice Kennedy was joined in full by Chief Justice Roberts and in part by Justice Alito.
[43] *Buono*, 130 S. Ct. at 1814.
[44] *Id.*
[45] *Id.* at 1814–15 (internal quotation marks omitted).
[46] *Id.* at 1816.
[47] *Id.* (quoting 11 C.A. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2961, at 393–94 (2d ed. 1995)).

compromise "framework and policy of accommodation" that merited deference, not skepticism, from the district court.[48]

Justice Kennedy further chastised the district court for altering its basis for injunctive relief. The original injunction was based on the endorsement test: the presence of the cross on federal land conveyed an impression of government endorsement. But the new injunctive relief rested on an entirely different basis: illicit government purpose. Justice Kennedy argued that any new relief grounded on the original injunction should have rested on the same original basis: the perception of endorsement.[49] He then noted that the endorsement test might not be appropriate in the land transfer context; courts generally do not apply the endorsement test to objects on private land.[50] But even if the endorsement test were applicable, he continued, a reasonable observer mindful of Congress's accommodation policy might find the transfer to be constitutionally valid.[51]

In a one-paragraph concurrence, Chief Justice Roberts questioned the respondent's admission that the government could — "consistent with the injunction" — remove the cross, sell the land to the VFW, and then give the cross to the VFW knowing that the group would raise it again.[52] If this "empty ritual" is permissible, the Chief Justice argued, so is the land transfer itself.[53]

Justice Alito concurred in part and concurred in the judgment.[54] Rather than remand the case, Justice Alito would have simply held the land transfer to be permissible.[55] In his view, the land transfer embodied a reasonable compromise: it would eliminate government endorsement while honoring Americans who died in combat.[56] Justice Alito further argued that the land transfer would not itself violate the endorsement test: he reasoned that a reasonable observer would conclude that the transfer is valid because it "represents an effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns."[57]

Justice Scalia concurred in the judgment, but would have resolved the case by holding that Buono lacked standing to challenge the land transfer.[58] Agreeing that Buono's standing to challenge the original in-

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[48] *Id.* at 1818.
[49] *Id.* at 1819.
[50] *Id.*
[51] *Id.* at 1819–20.
[52] *Id.* at 1821 (Roberts, C.J., concurring).
[53] *Id.*
[54] *Id.* (Alito, J., concurring in part and concurring in the judgment).
[55] *Id.*
[56] *Id.* at 1822–23.
[57] *Id.* at 1824.
[58] *Id.* (Scalia, J., concurring in the judgment). Justice Scalia was joined by Justice Thomas.

junction was moot, Justice Scalia argued that Buono sought an *expansion* of the injunction to cover new relief: relief from the display of the cross on private land.[59] In order to obtain this relief, Buono needed to establish that he would be harmed by the VFW's private display of the cross.[60] Because Buono admitted in his amended complaint that he had no objection to Christian symbols on private property,[61] Justice Scalia concluded that Buono lacked standing in the present case.[62]

Justice Stevens dissented.[63] He first emphasized the Ninth Circuit's res judicata judgment that the cross conveyed a message of endorsement.[64] He then addressed what he considered to be the only question in the case: "whether enjoining the transfer was necessary to effectuate the letter or logic of the 2002 judgment."[65] Textually, Justice Stevens determined that the land transfer "was a means of 'permitting' — indeed, encouraging — the display of the cross" in contravention of the injunction.[66] Next, applying the endorsement test, he concluded that the land transfer would not cure — and might even exacerbate — the government's endorsement of the cross[67] given that Congress had "engaged in 'herculean efforts to preserve the Latin Cross' following the District Court's initial injunction."[68] He also questioned the plurality's emphasis on Congress's policy of accommodation, since "the legislative action was 'buried in a defense appropriations bill' and . . . undertaken without any deliberation whatsoever."[69] Therefore, Justice Stevens concluded, the district court properly enjoined the transfer as a violation of the original injunction.

Justice Breyer also dissented.[70] In his view, the Court "need not address any significant issue of Establishment Clause law."[71] Instead, he asserted, the case ought to be determined based on two principles of injunction law: First, a district court enjoys considerable flexibility in the interpretation and application of its own injunctive orders.[72]

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59 *Id.* at 1825–26.

60 *Id.* at 1826.

61 *Id.*

62 *Id.* at 1827–28.

63 *Id.* at 1828 (Stevens, J., dissenting). Justice Stevens was joined by Justices Ginsburg and Sotomayor.

64 *Id.* at 1828–29, 1835–36.

65 *Id.* at 1830.

66 *Id.*

67 *Id.* at 1837–41.

68 *Id.* at 1837 (quoting Buono v. Norton, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005)).

69 *Id.* at 1840 (citation omitted) (quoting *Buono*, 364 F. Supp. 2d at 1181).

70 *Id.* at 1842 (Breyer, J., dissenting). Justice Breyer felt the Court should not have granted the writ of certiorari in the first place. *Id.* at 1845. Having granted certiorari, he argued, the Court should have dismissed the writ as "improvidently granted." *Id.* Failing these two alternatives, Justice Breyer believed that the Court should "simply affirm the Ninth Circuit's judgment." *Id.*

71 *Id.* at 1842.

72 *Id.* at 1843.

Second, a district court should interpret the scope of an injunction in light of its original purpose.[73] Interpreting the text of the injunction, Justice Breyer argued that the transfer "permits" public "display" of the cross because the transfer would enable a departure from the status quo in which the display cannot stand.[74] Turning next to the injunction's purpose, Justice Breyer determined that the injunction aimed to prevent the impression of endorsement.[75] He observed that a perception of endorsement might endure even after the transfer: the government designated the cross specifically, in addition to the underlying land, as a national memorial, and took several steps to preserve its display.[76] Therefore, he concluded, the district court reasonably determined that the transfer perpetuated an impression of endorsement.[77]

Salazar v. Buono's six complex opinions paradoxically say very little. Although many commentators expected the case to give contour to Establishment Clause jurisprudence,[78] the case's complexity proved to be its Achilles' heel; the fractured opinions yield little legal principle. In fact, the only point on which most of the opinions seem to agree is that the case did not involve the question of whether the land transfer was constitutional under the Establishment Clause.[79] And yet, nearly every Justice addressed and analyzed that very question. Although the question was not technically before the Court, the Justices' rhetoric on the issue is telling. The plurality and concurring opinions portend a shift toward a more formalistic endorsement test that is grounded in distinctions between public and private action.

In the mid-twentieth century, the Court's Establishment Clause jurisprudence turned, at least in part, on property-based distinctions between the public and the private. In *McCollum v. Board of Education*,[80] the Court invalidated a program that turned public school

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[73] *Id.* at 1843–44.

[74] *Id.* at 1844.

[75] *Id.*

[76] *See id.* at 1844–45.

[77] *Id.* at 1845.

[78] *See, e.g.*, Robert Barnes, *The Old Secular Cross? High Court to Consider Issue of Church-State Separation*, WASH. POST, Sept. 29, 2009, at A1; Jesse Merriam, Salazar v. Buono*: Can Government Give One Religion's Symbol Prominence in a Public Park?*, PEW FORUM ON RELIGION & PUBLIC LIFE (Sept. 24, 2009), http://pewresearch.org/pubs/1353/salazar-buono-establishment-clause-religious-display.html.

[79] *See, e.g.*, *Buono*, 130 S. Ct. at 1815 (plurality opinion) ("Although Buono also argued that the land transfer should be prohibited as an 'independent' Establishment Clause violation, the District Court did not address or order relief on that claim, which is not before us."); *id.* at 1829 (Stevens, J., dissenting) ("[T]he constitutionality of the land-transfer statute is not before us."); *id.* at 1842–43 (Breyer, J., dissenting). Justice Alito's opinion appears to be the only one that would have directly resolved the constitutionality of the land transfer. *Id.* at 1821 (Alito, J., concurring in part and concurring in the judgment) (finding the land transfer statute to be permissible under the endorsement test).

[80] 333 U.S. 203 (1948).

classrooms over to religious instructors for voluntary religious classes during the day.[81] Just four years later, however, in *Zorach v. Clauson*,[82] the Court upheld a similar program under which participating children were released early from public school to attend religious classes conducted at private religious centers.[83] The Court distinguished the two cases on the basis that *McCollum* involved religious instruction on public property using public resources, whereas *Zorach* involved religious instruction on private property and with private resources.[84] The Court rejected the more nuanced argument that, by halting classroom activities to allow students to attend religious instruction, the public school system effectively used its "weight and influence" to support religion.[85] The constitutionality of the program thus turned primarily on a formal public-private distinction.

In the last few decades, however, the endorsement test has become the Court's prevailing approach to Establishment Clause challenges.[86] A government practice fails the endorsement test if it "either has the purpose or effect of 'endorsing' religion."[87] Courts analyze endorsement from the perspective of an informed "reasonable observer" who is deemed to be familiar with the history and context of a challenged practice.[88] This reasonable observer is more than just a casual passerby; he or she is expected to take "account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act."[89]

The Court has applied the endorsement test functionally rather than formalistically, moving away from the bright-line distinctions between public and private that largely defined mid-twentieth-century Establishment Clause jurisprudence. The Court has found, for example, that government endorsement can persist even in cases of ostensible private choice. In *Santa Fe Independent School District v. Doe*,[90]

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[81] *Id.* at 212.

[82] 343 U.S. 306 (1952).

[83] *Id.* at 315.

[84] *Id.* at 308–09.

[85] *Id.* at 309.

[86] The Court formally adopted the endorsement test in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), although Justice O'Connor articulated the test in a number of earlier opinions. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). More recent Supreme Court cases have adopted the test without controversy. *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

[87] *County of Allegheny*, 492 U.S. at 592.

[88] *See* Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 190–96 (2004).

[89] *McCreary County*, 545 U.S. at 862 (quoting Wallace v. Jaffree, 472 U.S. 38, 73–74 (1984)).

[90] 530 U.S. 290 (2000). Although *Santa Fe* arose from events occurring on government property, the Court did not appear to base its opinion on that factor. To the contrary, the opinion fo-

a school district canceled its program of school prayer at football games and granted students the choice of whether to hold a pregame invocation.[91] Granting that private choice to students, the school district argued, cured the Establishment Clause violation.[92] But the Court struck down the revised policy, finding that although the final choice lay with private parties, the new policy impermissibly encouraged students to undertake religious prayer.[93] Thus, the Court indicated that simple divestment of government functions to private parties is not enough to cure an Establishment Clause violation. The divestment must be *neutral* — it cannot favor religion — if it is to avoid conveying the impression of endorsement.

Even in cases where the Court has determined that a private choice has intervened to cure an Establishment Clause violation, the Court has done so functionally, not formalistically. In *Zelman v. Simmons-Harris*,[94] for example, the Court upheld government subsidies to parochial schools because that aid was a result of "genuine and independent private choice" by parents using vouchers.[95] The Court, however, did not base its analysis on a formalistic public-private distinction. Instead, the Court applied the endorsement test to determine whether any "perceived endorsement of a religious message [was] reasonably attributable" to the parents, or whether, on the contrary, those parents had suffered government coercion.[96] Finding that the government had not "skewed incentives toward religious schools," the Court determined that the voucher program granted parents a "true private choice" that quelled any Establishment Clause concerns.[97] Thus, despite the initial appearance of private choice, the *Zelman* Court applied the endorsement test to scrutinize whether that choice was truly private.

Buono, however, represents a potential return to the more formalistic *Zorach* era. Five Justices in *Buono* appeared sympathetic to a formalist approach to the endorsement test that is grounded in public-private distinctions. The *Buono* plurality clearly suggested that the endorsement test does not apply to objects on private land.[98] Although it cited no precedential authority, the plurality declared that "[a]s a general matter, courts considering Establishment Clause challenges do not inquire into 'reasonable observer' perceptions with re-

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cused on implicit government coercion, *see id.* at 310–13, and the government's consequent association with the religious message, *id.* at 310–11.

91 *Id.* at 297–98.

92 *Id.* at 305.

93 *Id.* at 306–07.

94 536 U.S. 639 (2002).

95 *Id.* at 652.

96 *Id.* at 652–53.

97 *See id.* at 650–53.

98 *See Buono*, 130 S. Ct. at 1819.

spect to objects on private land."[99] In turn, because a land transfer situates the challenged display on private land, these Justices implied that the endorsement test would no longer be "the appropriate framework" for assessing the transfer's constitutionality.[100] Instead, these Justices appear to have moved toward a more formalistic, bright-line approach that turns on direct government ownership or control.[101]

Justices Scalia and Thomas likewise appear to prefer a formalistic endorsement test. Granted, by focusing on standing, Justice Scalia's concurrence formally avoided taking a position on the endorsement issue. And, as a logical matter, the concurrence seemed to suggest that Buono could have alleged a cognizable harm from a cross on private land.[102] However, the concurrence also suggested that these Justices would be unsympathetic to such a claim. The concurrence strained to read a public-private distinction into at least two key aspects of the *Buono* litigation: the original injunction itself[103] and Buono's pleadings.[104] This formalistic approach is consistent with the Justices' position in at least one other Establishment Clause case: Justice Scalia himself — joined by Justice Thomas — proposed such a public-private distinction in *Capitol Square Review & Advisory Board v. Pinette*.[105] In *Pinette*, Justice Scalia's plurality opinion emphasized the "crucial difference between *government* speech . . . and *private* speech,"[106] and rejected Justice O'Connor's claim that "even when we recognize private speech to be at issue, we must apply the endorsement test."[107]

Such a formalist approach, however, would effectively eviscerate the "effects" inquiry that lies at the heart of Establishment Clause jurisprudence. The test is highly contextual; it is not easily confined to formalistic distinctions between direct government control and private choice. Instead, the test requires "a sensitivity to the unique circumstances and context of a particular challenged practice."[108] By sacrificing such nuanced analysis for bright-line clarity, formalistic distinctions become dangerously manipulable. A public-private distinction "would tempt a public body to contract out its establishment of religion, by encouraging the private enterprise of the religious to exhibit

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[99] *Id.*

[100] *Id.*

[101] *See id.*

[102] *See id.* at 1826 (Scalia, J., concurring in the judgment).

[103] *See id.* at 1825.

[104] *See id.* at 1826.

[105] 515 U.S. 753, 763–70 (1995) (plurality opinion).

[106] *Id.* at 765–66 (quoting Bd. of Ed. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.)).

[107] *Id.* at 766 n.2.

[108] Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

what the government could not display itself."[109] The government could, for example, place a Latin cross on the steps of a city hall and then sell the underlying square foot to a private party. The Latin cross would formally lie in private hands, and yet would seem to fall at the center of what the Establishment Clause is designed to protect against. If the Court were to adopt such a test — as *Buono* suggests it might — the Court's Establishment Clause jurisprudence might countenance a wide swath of traditionally impermissible government activity.

C. Fourteenth Amendment

Incorporation of the Right to Keep and Bear Arms. — It is well accepted today that the Fourteenth Amendment makes a broad array of liberties — including most of those enshrined in the Bill of Rights — judicially enforceable against the states. But the manner by which it does so and the scope of those liberties remain substantially contested. Last Term, in *McDonald v. City of Chicago*,[1] the Supreme Court held that the Second Amendment right to keep and bear arms is fully enforceable against the states by virtue of the Fourteenth Amendment.[2] This decision reaffirmed the articulation of the right as previously defined in *District of Columbia v. Heller*.[3] But this case also presented the broader question of whether the proper basis for applying rights against the states comes from the Fourteenth Amendment's Due Process Clause or from the Privileges or Immunities Clause.[4] Although the Court could have relied on the Privileges or Immunities Clause in reaching its decision, the plurality was understandably hesitant to overturn precedent, as the Due Process Clause is the traditional basis for applying rights against the states. Though the result in this case would be effectively the same under either provision, many cases exist today where this distinction *would* be determinative and where the Privileges or Immunities Clause would be necessary to ensure the protection of rights long understood to be part of our legal tradition.

In 1982, Chicago enacted a city ordinance prohibiting possession of handguns by private individuals.[5] Otis McDonald was one of several Chicago residents who wanted to keep guns in their homes for self-defense.[6] After the Court decided *Heller*, these residents filed suit in the Northern District of Illinois, seeking a declaration that the Chicago

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[109] *Pinette*, 515 U.S. at 792 (Souter, J., concurring in part and concurring in the judgment).

[1] 130 S. Ct. 3020 (2010).

[2] *See id.* at 3026.

[3] 128 S. Ct. 2783, 2821–22 (2008) (holding that a ban on personal possession of handguns in the District of Columbia violated the Second Amendment).

[4] *See McDonald*, 130 S. Ct. at 3028.

[5] *Id.* at 3026.

[6] *Id.* at 3026–27. Chicago had one of the highest murder rates in the country, and McDonald himself had been threatened by drug dealers for his work as a community activist. *Id.*