

Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Religion/Establishment

Salazar v. Buono, 559 U.S. ____ (2010)

Frank Buono was a retired employee of the Park Service who was offended by a cross placed on federal land as a memorial to Americans who were killed during the First World War. Buono filed suit against Ken Salazar, the Secretary of the Interior, claiming that the cross violated the establishment clause of the First Amendment. After Buono was successful in the local federal district court, Congress passed a statute mandating that Congress transfer the land the statute was on (Sunrise Rock) to the Veterans of Foreign Wars. Buono immediately challenged the constitutionality of that measure. The local federal district court agreed that the transfer was invalid and that ruling was sustained by the Court of Appeals for the Ninth Circuit. Salazar and the United States appealed to the Supreme Court.

The Supreme Court reversed by a 5–4 vote. Justice Kennedy insisted that the federal district court had failed to consider whether a reasonable observer would consider the transfer of the cross an accommodation for, as opposed to an endorsement of, religion. Justice Alito maintained that the transfer was clearly a constitutional accommodation, not an unconstitutional endorsement. How did the justices distinguish between a constitutional accommodation and an unconstitutional endorsement? What reasons did the justices in the majority give for suggesting that the government merely accommodated religion? Why did the dissents disagree? Who had the better of the argument? If Buono was decided differently, would the government have been obligated to take down all nineteenth-century monuments with Christian symbols? At what point do such monuments become “grandfathered” into the Constitution?

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE joins and JUSTICE ALITO joins in part.

...

Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message. . . . Placement of the cross on Government-owned land was not an attempt to set the imprimatur of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.

Time also has played its role. The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness. Members of the public gathered regularly at Sunrise Rock to pay their respects. Rather than let the cross deteriorate, community members repeatedly took it upon themselves to replace it. Congress ultimately designated the cross as a national memorial, ranking it among those monuments honoring the noble sacrifices that constitute our national heritage. Research discloses no other national memorial honoring American soldiers—more than 300,000 of them—who were killed or wounded in World War I. It is reasonable to interpret the congressional designation as giving recognition to the historical meaning that the cross had attained.

...

The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. A cross by the side of a public highway marking, for instance, the place

where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society. Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.

Even assuming the propriety of the original relief, however, the question before the District Court . . . was whether to invalidate the land transfer. . . . The District Court made no inquiry into the effect that knowledge of the transfer of the land to private ownership would have had on any perceived governmental endorsement of religion, the harm to which the 2002 injunction was addressed. . . . Ordering relief under such circumstances was improper—absent a finding that the relief was necessary to address an independent wrong. . . .

The District Court should have evaluated Buono's modification request in light of the objectives of the 2002 injunction. The injunction was issued to address the impression conveyed by the cross on federal, not private, land. Even if its purpose were characterized more generally as avoiding the perception of governmental endorsement, that purpose would favor—or at least not oppose—ownership of the cross by a private party rather than by the Government. . . .

. . .
. . . As a general matter, courts considering Establishment Clause challenges do not inquire into "reasonable observer" perceptions with respect to objects on private land. Even if, however, this standard were the appropriate one, it is not clear that Buono's claim is meritorious. That test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement. . . .

. . . The District Court concentrated solely on the religious aspects of the cross, divorced from its background and context. But a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

. . . [I]t is best left to the District Court to undertake the analysis in the first instance. On remand, if Buono continues to challenge implementation of the statute, the District Court should conduct a proper inquiry as described above.

CHIEF JUSTICE ROBERTS, concurring.

At oral argument, respondent's counsel stated that it "likely would be consistent with the injunction" for the Government to tear down the cross, sell the land to the Veterans of Foreign Wars, and return the cross to them, with the VFW immediately raising the cross again. I do not see how it can make a difference for the Government to skip that empty ritual and do what Congress told it to do—sell the land with the cross on it. "The Constitution deals with substance, not shadows."

JUSTICE ALITO, concurring in part and concurring in the judgment.

. . .
. . . The cross is of course the preeminent symbol of Christianity, and Easter services have long been held on Sunrise Rock. But, as noted, the original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.

. . .
If Congress had done nothing, the Government would have been required to take down the cross, which had stood on Sunrise Rock for nearly 70 years, and this removal would have been viewed by

many as a sign of disrespect for the brave soldiers whom the cross was meant to honor. The demolition of this venerable if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage. . . .

One possible solution would have been to supplement the monument on Sunrise Rock so that it appropriately recognized the religious diversity of the American soldiers who gave their lives in the First World War. In American military cemeteries overseas, the graves of soldiers who perished in that war were marked with either a white cross or a white Star of David. More than 3,500 Jewish soldiers gave their lives for the United States in World War I, and Congress might have chosen to place a Star of David on Sunrise Rock so that the monument would duplicate those two types of headstones. But Congress may well have thought—not without reason—that the addition of yet another religious symbol would have been unlikely to satisfy the plaintiff, his attorneys, or the lower courts that had found the existing monument to be unconstitutional on the ground that it impermissibly endorsed religion.

...
There is also no merit in Justice STEVENS' contention that implementation of the statute would constitute an endorsement of Christianity and would thus violate the Establishment Clause. Assuming that it is appropriate to apply the so-called "endorsement test," this test would not be violated by the land exchange. The endorsement test views a challenged display through the eyes of a hypothetical reasonable observer who is deemed to be aware of the history and all other pertinent facts relating to a challenged display. . . . Here, therefore, this observer would be familiar with the origin and history of the monument and would also know both that the land on which the monument is located is privately owned and that the new owner is under no obligation to preserve the monument's present design. With this knowledge, a reasonable observer would not view the land exchange as the equivalent of the construction of an official World War I memorial on the National Mall. Rather, a well-informed observer would appreciate that the transfer represents an effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns.

Finally, I reject Justice STEVENS' suggestion that the enactment of the land-transfer law was motivated by an illicit purpose. . . . I would not jump to the conclusion that Congress' aim in enacting the land-transfer law was to embrace the religious message of the cross; rather, I see no reason to doubt that Congress' consistent goal, in legislating with regard to the Sunrise Rock monument, has been to commemorate our Nation's war dead and to avoid the disturbing symbolism that would have been created by the destruction of the monument.

...
JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

[Justice Scalia maintained that Frank Buono lacked standing to bring the lawsuit]

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, dissenting.

"The Establishment Clause, if nothing else, prohibits government from 'specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ.'" A Latin cross necessarily symbolizes one of the most important tenets upon which believers in a benevolent Creator, as well as nonbelievers, are known to differ. In my view, the District Court was right to enforce its prior judgment by enjoining Congress' proposed remedy—a remedy that was engineered to leave the cross intact and that did not alter its basic meaning. I certainly agree that the Nation should memorialize the service of those who fought and died in World War I, but it cannot lawfully do so by continued endorsement of a starkly sectarian message.

...
The first step in the analysis is straightforward: The District Court had to ask whether the transfer of the property would violate the extant injunction. Under the terms of that injunction, the answer was yes.

The 2002 injunction barred the Government from “permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.” The land-transfer statute mandated transfer of the land to an organization that has announced its intention to maintain the cross on Sunrise Rock. That action surely “permit[s]” the display of the cross. . . . True, the Government would no longer exert direct control over the cross. But the transfer itself would be an act permitting its display.

...

A government practice violates the Establishment Clause if it “either has the purpose or effect of ‘endorsing’ religion.” “Whether the key word is ‘endorsement,’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’ ”

In my view, the transfer . . . would not end government endorsement of the cross for two independently sufficient reasons. First, after the transfer it would continue to appear to any reasonable observer that the Government has endorsed the cross, notwithstanding that the name has changed on the title to a small patch of underlying land. This is particularly true because the Government has designated the cross as a national memorial, and that endorsement continues regardless of whether the cross sits on public or private land. Second, the transfer continues the existing government endorsement of the cross because the purpose of the transfer is to preserve its display. Congress’ intent to preserve the display of the cross maintains the Government’s endorsement of the cross.

...

. . . After the transfer, a well-informed observer would know that the cross was no longer on public land, but would additionally be aware of the following facts: The cross was once on public land, the Government was enjoined from permitting its display, Congress transferred it to a specific purchaser in order to preserve its display in the same location, and the Government maintained a reversionary interest in the land. From this chain of events, in addition to the factors that remain the same after the transfer, he would perceive government endorsement of the cross.

...

Even though Congress recognized this cross for its military associations, the solitary cross conveys an inescapably sectarian message. . . . As the District Court observed, it is undisputed that the “[L]atin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion.” We have recognized the significance of the Latin cross as a sectarian symbol, and no participant in this litigation denies that the cross bears that social meaning. Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian.

...

Even setting aside that the effect of the post-transfer cross would still be to convey a message of government endorsement of religion, the District Court was correct to conclude that . . . the very purpose of the transfer was to preserve the display of the cross. That evident purpose maintains government endorsement of the cross. . . . The land-transfer statute authorizes a conveyance to the particular recipient that has expressed an intent to preserve the cross. . . . Indeed, the Government concedes that Congress sought to “preserve a longstanding war memorial” at the site, and the only memorial that could be “preserved” at Sunrise Rock is the cross itself.

...

Our precedent provides that we evaluate purpose based upon what the objective indicia of intent would reveal to a reasonable observer. . . . The plurality nowhere engages with how a reasonable observer would view Congress’ “policy of accommodation” for this cross. Instead, the plurality insists that deference is owed because of “Congress’s prerogative to balance opposing interests and its institutional competence to do so.”

...

A reasonable observer, considering the nature of this symbol, the timing and the substance of Congress’ efforts, and the history of the Sunrise Rock site, could conclude that Congress chose to preserve the cross primarily because of its salience as a cross. . . . But no such conclusion is necessary to find for

respondent. The religious meaning of the cross was settled by the 2002 judgment; the only question before us is whether the Government has sufficiently distanced itself from the cross to end government endorsement of it. At the least, I stress again, a reasonable observer would conclude that the Government's purpose in transferring the underlying land did not sufficiently distance the Government from the cross. . . .

...

Congressional action, taken after due deliberation, that honors our fallen soldiers merits our highest respect. As far as I can tell, however, it is unprecedented in the Nation's history to designate a bare, unadorned cross as the national war memorial for a particular group of veterans. Neither the Korean War Memorial, the Vietnam War Memorial, nor the World War II Memorial commemorates our veterans' sacrifice in sectarian or predominantly religious ways. Each of these impressive structures pays equal respect to all members of the Armed Forces who perished in the service of our Country in those conflicts. In this case, by contrast, a sectarian symbol is the memorial. And because Congress has established no other national monument to the veterans of the Great War, this solitary cross in the middle of the desert is the national World War I memorial. The sequence of legislative decisions made to designate and preserve a solitary Latin cross at an isolated location in the desert as a memorial for those who fought and died in World War I not only failed to cure the Establishment Clause violation but also, in my view, resulted in a dramatically inadequate and inappropriate tribute.

...

Justice BREYER, dissenting.

...

. . . The injunction rested upon the District Court's determination that the display of the cross "conveys a message of endorsement of religion" to "a reasonable observer" in violation of the Establishment Clause. . . . The purpose of the injunction is to prevent the conveyance of such a message to the reasonable observer.

With that purpose in mind, consider the following facts that confronted the District Court when the plaintiff asked it to enforce the decree:

- The Government had designated the "white cross . . . as well as a limited amount of adjoining [land]" as a national memorial.
- The new statute directed the transfer of the "property . . . designated . . . as a national memorial" to a private entity with an interest in maintaining the cross in its current location, in exchange for a parcel of land located elsewhere in the Preserve owned by private individuals who have taken a similar interest in the cross.
- The transfer was made "subject to the condition that the recipient maintain the conveyed property as a memorial," and the property reverts to the United States if the Secretary determines that the recipient has failed to do so.
- After the transfer, the cross would sit on 1 acre of privately owned land in a 1.6 million acre national preserve, over 90% of which is federally owned.
- Congress had previously prevented the use of federal funds to remove the cross from its present location.

The District Court considered the facts before it through the lens of the injunction's original purpose. . . . And it concluded that the land transfer would frustrate that purpose. . . . In my view, this is a reasonable conclusion.

. . . Because my conclusion rests primarily upon the law of injunctions, because that law is fairly clear, and because we cannot properly reach beyond that law to consider the underlying Establishment Clause and standing questions, I can find no federal question of general significance in this case. . . .