SALAZAR V. BUONO: THE FAILED LANDMARK CASE AND ITS ILLUSTRATION OF THE TWO SIDES OF PLURALITY OPINIONS

A simple Latin cross,[1] placed on an outcropping of rock in the Mojave Desert, became the center of much controversy in 1999.[2] The cross had stood since 1934[3] when the Veterans of Foreign Wars (VFW) placed it to memorialize the deaths of soldiers in World War I.[4] The land was part of the Mojave National Preserve, which contains 1.6 million acres of land, including privately owned portions[5] and portions which belong to the State of California.[6] This mismatch of private and state ownership is sporadically positioned throughout the otherwise federally owned preserve.[7] Though the cross was located on a federal portion of the land,[8] its presence had gone unquestioned in terms of legality, despite frequent campers in the area and annual Easter Sunrise services that occurred nearby since 1935.[9] However, when permission was denied regarding the placement of a Buddhist stupa[10] near the cross, the cross's long presence in the desert was finally called into question.[11] A flurry of letters[12] between

1. "A latin cross has two arms, one horizontal and one vertical, at right angles to each other, with the horizontal arm being shorter than the vertical arm." Buono v. Norton (*Buono I*), 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002). "The cross is between five and eight feet tall, and it is bolted into the rock." *Id*. "The cross is constructed out of four inch diameter metal pipes that are painted white." *Id*.
2. *Id*.
3. Though admittedly, this was not the original incarnation of the cross, which had been replaced several times over the years. *Id*.
4. *Id*.
5. Private owners possess about 86,600 acres of the preserve's total land area. *Id*.
6. The State of California owned about 43,000 acres of the total land at the time of the suit. *Id*.
7. The land of the Mojave preserve itself was primarily federally owned. *Id*. However, the Mojave preserve is "riddled" with many pockets of private land holdings divided into about 1800 different plots of land, as well as some plots of state ownership. Transcript of Oral Argument at 20, Salazar v. Buono, 130 S. Ct. 1803 (2010) (No. 08-472).
8. *Buono I*, 212 F. Supp. 2d. at 1204.
9. *Id*. at 1205. Justice Alito stated in apparent disbelief particularly due to the area's inhospitably high temperatures and generally "rugged location", that the cross was viewed very often. Salazar v. Buono, 130 S. Ct. 1803, 1822 (2010) (plurality opinion). He further stated his belief that "at least until this litigation, it is likely that the cross was seen by more rattlesnakes than humans." *Id*.
10. The stupa is a mound-like structure, housing remains and relics, most often used for burial and memorial purposes by practitioners of the Buddhist faith and cultures influenced by it. The stupa is the most well recognized symbol of Buddhism, similar to the symbolism of the cross in Christianity. *See* Prudence R. Myer, *Stupas and Stupa-Shrines*, 24 ARTIBUS ASIAE 25, 25 (1961) (describing the vast recognition of stupa as Asian symbols of the life and death of the Buddha, his disciples, and the stupa's use to house everexpanding number of Buddhist relics similar to the growth in fragments of the True Cross in Europe).
11. *Buono I*, 212 F. Supp. 2d at 1206.
12. For a timeline and summary of the various letters sent between the parties involved, see *id*. at 1205–06.

the National Park Service (NPS),[13] the American Civil Liberties Union (ACLU), and private parties[14] quickly made it apparent that a resolution would not occur outside of the legal system.[15] What followed was a legal suit by a long-term employee of the park to have the cross removed from the government's land in the Mojave National Preserve.[16] This suit resulted in a series of legal actions that led all the way to certiorari before the Supreme Court.[17]

Salazar v. Buono[18] represented a focal point in religious display cases, not only looking for a new remedial answer to unlawful religious displays,[19] but also offering a new look at older holdings.[20] *Salazar v.*

13. Prior to the land in question being named a federal preserve by Congress—the period during which the Latin cross was placed on the rock—the federally owned portions of the land had been managed by the United States Bureau of Land Management, a division of the United States Department of the Interior. *Id.* at 1205.

14. The original letter sent to the NPS requesting permission to place the Buddhist shrine was sent from a "Sherpa San Harold Horpa," which was later revealed to be an alias used by the similarly situated Herman R. Hoops, who was a former coworker and long-term friend of Mr. Buono. *Id.* at 1206.

15. Originally, the NPS had denied construction of the Buddhist stupa, but stated an intent to remove the cross as well. *Id.* However, meetings with private individuals that maintained the cross led to these individuals expressing they would not remove the cross. *Id.*

16. Buono was employed by the NPS in various official capacities for over twenty-five years, including serving for over a year as the Assistant Superintendant for the Mojave National Preserve. *Id.* at 1207.

17. *See* Buono v. Norton, 212 F. Supp. 2d 1202 (C.D. Cal. 2002) (*Buono I*, the original suit to prohibit display of the cross); Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004) (*Buono II*, upholding the district court's injunction, but without answering the constitutionality of the pending land transfer); Buono v. Norton, 364 F. Supp. 2d 1175, 1182 (C.D. Cal 2004) (*Buono III*, enforcing the injunction ordered in *Buono I* including the attempted transfer of the land under the cross); Buono v. Kempthorne, 502 F.3d 1069 (9th Cir. 2007) (*Buono IV*, affirming the holdings of the district court on appeal); and Salazar v. Buono, 130 S. Ct. 1803, 1814 (2010) (*Salazar*, certiorari was granted by the Supreme Court following the Ninth Circuit's denial of an en banc hearing). For a more detailed explanation, see *infra* Part I.

18. 130 S. Ct. 1803 (2010) (plurality opinion).

19. The Supreme Court had yet to weigh in on the constitutionality of the land transfer issue despite several cases at the appellate and district court level leading to differing approaches amongst the various federal circuits. *See generally* Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1258–62 (10th Cir. 2005) (holding a sale of an easement by a city to church was not an endorsement of religion, though it did allow the church to advance its private holdings as it disentangled the city from the church who were joint owners); Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 705–06 (7th Cir. 2005) (holding the transfer of a Ten Commandments monument memorializing the efforts of an individual aiding the town during a flood from the public to private ownership was constitutional); Paulson v. City of San Diego, 294 F.3d 1124, 1133 (9th Cir. 2002) (holding that providing for the sale of public land to private parties on which a Latin cross stood on the condition it be maintained as a war memorial as violating the Constitution of California); Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 496 (7th Cir. 2000) (holding a sale of city property containing a statue of Jesus Christ to private party on the condition it remain open as a public park did not violate the Establishment Clause, but was an effective way to end an unconstitutional endorsement of religion if forum limitations were resolved); Chambers v. City of Frederick, 373 F. Supp. 2d 567, 572–73 (D. Md. 2005) (holding the transfer of property from public to

Buono and cases preceding it offered an opportunity for the Supreme Court to revisit their previous religious symbol display cases,[21] and led many academics to believe a clarification of Establishment Clause jurisprudence as a possible holding in the case.[22] However, as early as the oral arguments, it became immediately apparent that the case was not likely to be the landmark decision or drastic departure the case could have been.[23] As such, the case seemingly became just another in a long stream of plurality opinions written by the Supreme Court in more recent years.[24] But, the decision was not wholly without substantive value itself,[25] offering an opportunity to explore the judicial value of plurality decisions generally.[26] *Salazar v. Buono* can still offer great insight into the future of religious display cases.[27] Moreover, the multiple opinions authored by the

private ownership in an effort to cure Establishment Clause violations is presumed to be valid action absent unusual circumstances).

20. *See generally* David B. Owens, From Substance to Shadows: An Essay on *Salazar v. Buono* and Establishment Clause Remedies 20 B.U. PUB. INT. L.J. 289 (2011), *available at* http://ssrn.com/abstract=1622059.

21. For a discussion of the major legal precedents of the Establishment Clause, namely the various tests used by the Justices of the Supreme Court in deciding them, see Owens, *supra* note 20, at 295–98. For a direct look at the precedential cases, see also Lemon v. Kurtzman, 403 U.S. 602, 612–16 (1971) (relating the three-part analysis for Establishment Clause claims); Lynch v. Donnoley, 465 U.S. 668, 688–94 (1984) (O'Connor, J., concurring) (describing O'Connor's disapproval of *Lemon* and preference for a test that considered the views of a "reasonable observer"); Allegheny v. ACLU, 492 U.S. 573, 599–600 (1989) (citing positively O'Connor's opinion in *Lynch* by a majority of the Court); McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 881 (2005) (ruling the display of the Ten Commandments on government property unconstitutional citing the "religious purpose" of the display as problematic); Van Orden v. Perry, 545 U.S. 677, 699–700 (2005) (finding a display of the Ten Commandments constitutional after Justice Breyer ruled differently than in *McCreary*, citing the appearance of "difficult borderline cases" as the reason).

22. *See generally* Ian Bartrum, Salazar v. Buono*: Sacred Symbolism and the Secular State*, 105 NW. U. L. REV. COLLOQUY 31 (2010), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2010/20/LRColl2010n20Bartrum.pdf (discussing *Buono III* as the Supreme Court's first opportunity to address the issue since Justice O'Connor left the Court); Sumahn Das, Salazar v. Buono*: A Missed Opportunity to Clarify the Reasonable Observer Test*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 125 (2011); Lisa Shaw Roy, Salazar v. Buono*: The Perils of Piecemeal Adjudication*, 105 NW. U. L. REV. COLLOQUY 72 (2010), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2010/23/LRColl2010n23Roy.pdf.

23. Adam Liptak, *Religion Largely Absent in Argument About Cross*, N.Y. TIMES, Oct. 7, 2009, at A16, *available at* http://www.nytimes.com/2009/10/08/us/08scotus.html ("Most of the argument in the case, *Salazar v. Buono*, No. 08-472, concerned the tangled history of Mr. Buono's lawsuit.").

24. For a discussion relating to the increasing number of plurality opinions, their increased regard among commentators, and a historical analysis of plurality jurisprudence, see generally Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159 (2009).

25. *See infra* Part V.

26. *See infra* Part IV.

27. *See infra* Part IV.

Supreme Court Justices offer clues into the perspectives of those Justices sitting on the Court at the time the case was decided.[28]

Part I of this Note will provide an explanation regarding procedural intricacies of the first four actions that involved Buono's dispute and the Latin cross as they moved through the court system. Part I will also discuss various statutes enacted by Congress to counter the holdings of the aforementioned court decisions. Part II will examine the case of *Salazar v. Buono* as it was heard by the Supreme Court and the six opinions that make up the plurality ruling of the nine Justices. Part III will provide an indepth look at the Justices' reasoning in the Supreme Court's multiple opinions comprising the plurality decision in *Salazar v. Buono*. Furthermore, Part III will also look at the effect Justice Stevens had on the Supreme Court's jurisprudence—particularly with regard to the *Salazar v. Buono* decision—and discuss how his retirement will affect the legacy left by his final words on the Establishment Clause. Part IV will outline the various positive and negative aspects of plurality opinions generally, examining applicable academic commentary on the subject. Finally, Part V will explain why the decision is a good example of the positive aspects of plurality opinions and manages to avoid the negative aspects through the Court's remand to the lower court to further discuss the case's major issues.

I. PROCEDURAL HISTORY OF *SALAZAR V. BUONO*

When Buono first brought suit in the Central District of California[29] two relevant questions were presented for decision. First, did Buono have standing to sue?[30] Second, did the Latin cross's presence on federal land violate the Establishment Clause?[31] The district court found that Buono had standing to challenge of the constitutionality of the cross's presence.[32] Furthermore, the court determined that the cross was "exclusively a Christian symbol."[33] As such, the cross's presence on federal land was an unacceptable endorsement of religion and unconstitutional as a matter of

28. *See infra* Part III.
29. *Buono I*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002).
30. *Id*. at 1210.
31. *Id*. at 1214.
32. *Id*.
33. *Id*. at 1205. This topic, however, would be a more debatable point in the later cases of the *Buono* line, particularly amongst the various Justices of the Supreme Court. *See infra* notes 125, 179–82.

law.[34] As a resolution, the district court granted Buono's request for a remedial injunction, which would prohibit the cross's display in the park.[35] The government immediately appealed this decision, but while the appeal was pending, Congress enacted the Department of Defense Appropriations Act of 2004 (DDAA).[36] The DDAA transferred the ownership of one acre of federal land surrounding the cross to the VFW.[37] In return, the government received similar land elsewhere on the reserve from a private party, plus the difference in fair market values of the plots.[38] However, the relevant portion of the act contained a reversion clause, which would return the one acre surrounding the cross to federal ownership if the VFW failed to maintain the cross as a "war memorial."[39]

When the government appealed *Buono I* it found little help from the justices of the Ninth Circuit.[40] The court of appeals affirmed the district court's judgment as to standing to sue, finding that Buono had received "injury in fact" by the presence of the cross on the federal property, which he could not freely enjoy the use of.[41] Furthermore, the Ninth Circuit also found for Buono on the merits of the supposed Establishment Clause violation, holding that the presence of the cross was a demonstration of the government's preference of one faith over another—namely Christianity over Buddhism—when the Buddhist stupa[42] was denied a position similar to the cross.[43] However, besides a brief discussion of whether the case was moot in light of Congress's recent passage of the DDAA, the court declined to address the substantive remedial issue of the land transfer.[44] As such, the question of transferring the land as a potential and proper remedy

34. "[T]he presence of the cross on federal land conveys a message of endorsement of religion. Thus, the court concludes as a matter of law based on the uncontroverted facts that the presence of the cross on the federal land portion of the Preserve is unconstitutional . . . ." *Buono I*, 212 F. Supp. 2d. at 1217.

35. *Id*.

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

37. *Id*.

38. *Id*.

39. *Id*. Reversion to the government, however, was unlikely to occur. The previous caretakers of the cross would continue to maintain the monument, supposedly on a promise one of them made to a dying soldier, so it was unlikely they would stop doing so. *See, e.g.*, Interview by Tim O'Brien with Frank Buono, Henry Sandoz, Kell Shakelford, Rep. Jerry Lewis, & Erwin Chemerinsky, *Mojave Cross*, Religion & Ethics News Wkly. (Oct. 2, 2009), http://www.pbs.org/wnet/religionandethics/episodes/october-2-2009/mojave-cross/4424/.

40. Buono v. Norton (*Buono II*), 371 F.3d 543 (9th Cir. 2004).

41. *Id*. at 547–48.

42. *See supra* note 1 and accompanying text.

43. *Buono II*, 371 F.3d at 550.

44. *Id*. at 545–46.

to Buono's legal injury[45] and the DDAA's constitutionality was postponed for a later time.[46] The government, however, failed to remove the cross[47] and the land transfer took center stage when the case was once again brought up in district court.

The government's belief that the land transfer preempted a need to comply with the original injunction pushed Buono to once again bring suit.[48] The case was once again brought in district court, with Buono seeking enforcement of the original injunction or any necessary modification to halt the land transfer and the continued display of the cross.[49] The government argued that the decision in this case should have been postponed until the land transfer actually took place—a process that could conceivably take several years—but found no agreement from the judge hearing the case.[50] Instead, the court largely supported the previous holdings of *Buono I* and *Buono II* when it decided to address the 2002 injunction. [51] The court interpreted how the original injunction interacted with the land transfer statute.[52] Namely, the court denied Buono's motion to amend the prior injunction, believing it to be unnecessary, [53] but held that the previous injunction already permanently enjoined the government from implementing the land transfer, abrogating any need to amend its actual language.[54] Once again, the district court had granted relief for Buono,[55] but the government would not end its arguments there, again appealing the decision of *Buono III*.

The government, once again, appealed to the Ninth Circuit Court of Appeals[56] which upheld the district court's ruling on all issues.[57] The

45. "[W]e note that the presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause." *Id*. at 546 (citing Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 496 (7th Cir. 2000) (as amended on denial of rehearing and rehearing en banc)).

46. "We express no view as to whether a transfer . . . would pass constitutional muster, but leave this question for another day." *Buono II*, 371 F.3d at 546.

47. Presumably the government believed that the land transfer had solved any potential Establishment Clause violations by removing any injury suffered and either believed the transfer itself would be constitutional, or at the very least, sought to test such a remedy's constitutional viability in court. *See* Reply Brief for the Petitioners at 31–32, Salazar v. Buono, 130 S. Ct. 1803 (2009) (No. 08-472), 2009 WL 2625777.

48. Buono v. Norton (*Buono III*), 364 F. Supp. 2d 1175, 1175 (C.D. Cal. 2005).

49. *Id*. at 1177.

50. *Id*. at 1178.

51. *Id*. at 1177.

52. *Id*.

53. *Id*. at 1182.

54. *Id*.

55. *Id*.

56. Buono v. Kempthorne (*Buono IV*), 527 F.3d 758 (9th Cir. 2008).

entire panel also voted to deny rehearing of the case and deny hearing the case en banc, precluding all further petitions for rehearing.[58] However, a small group of dissenters issued an opinion as to their belief that the case should be held en banc, particularly due to a conflict with Seventh Circuit precedent[59] and the relative novelty of the remedial land transfer issue.[60] The dissenting judges also voiced their disagreement as to the merits reached by the *Buono IV* decision; namely, they believed that the monument also served a secular purpose.[61] With rehearing denied, the government once again appealed the decision to a higher court. This time, the federal government's case would be heard before the nine Justices of the Supreme Court of the United States.

II. *SALAZAR V. BUONO*'S MULTIPLE OPINIONS

The government fought the Ninth Circuit's ruling all the way to the Supreme Court.[62] However, when the Supreme Court heard the case it quickly became apparent that the Court's sitting Justices were divided on how to rule in the case.[63] Differences in the Supreme Court's idea of the case's actual focus produced several contentions and a plurality decision, with six Justices writing separate opinions—many of which discussed different issues.[64] With these multiple issues and the many separate opinions that discuss them the decision can be somewhat confusing.

57. "The district court did not abuse its discretion in enjoining the government from proceeding with the land exchange under § 8121 and ordering the government to otherwise comply with its prior injunction that it not permit the display of the Sunrise Rock cross in the Preserve." *Id*. at 783.

58. *Id*. at 760.

59. The Seventh Circuit had held that a similar public to private land transfer would generally cure Establishment clause violations caused by a government endorsement of religion. *See* Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000) ("Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion.").

60. *Buono IV*, 527 F.3d. at 760–68.

61. The court stated:

> While the cross at Sunrise Rock takes the form of an ordinarily religious symbol, it serves the secular purpose of memorializing fallen soldiers. Of course, the monument in *Van Orden* was also an ordinarily religious symbol, but that fact alone was insufficient to constitute a violation of the Establishment Clause. Additionally, while the statue in *Van Orden* was placed in a 'large park' with other monuments, the lack of *any* challenge to the Sunrise Rock memorial for *seven decades* surely demonstrates that the public understands and accepts its secular commemorative purpose.

Id. at 765 (citation omitted) (quoting Van Orden v. Perry, 545 U.S. 667, 703 (2005).

62. Salazar v. Buono, 130 S. Ct. 1803 (2010) (plurality opinion).

63. *See generally* Bartrum, *supra* note 22; Liptak, *supra* note 23.

64. *See infra* notes 66–110 and accompanying text. For more information, see Owens, *supra* note 20, at 293–94.

However, a careful analysis reveals that the Justices were in agreement on some issues; these issues simply were not the ones expected to be determined by the Supreme Court when it heard and decided the case.[65]

The Supreme Court's lead plurality opinion was written by Justice Kennedy, joined by Justice Roberts in whole and by Justice Alito in part.[66] After an overview of the case and a discussion of the issue of standing, Justice Kennedy recognized that the procedural history of the case limited the discussion of certain issues, namely the Establishment Clause violation caused by the Latin cross's presence on federal land.[67] Justice Kennedy held that applying the injunction to prohibit the land transfer was improper because the district court did not conduct the proper inquiry.[68] Justice Kennedy's opinion stated that the Establishment Clause does not require elimination of all religious symbols from public domain.[69] Justice Kennedy believed, furthermore, that remand was necessary for further consideration of the legality of the land transfer.[70] On remand, the lower court would need to show proper deference to the legislative branch and consider less stringent relief than completely striking down the land transfer statute.[71]

Though Chief Justice Roberts joined the plurality decision, he also wrote a short opinion himself.[72] In his opinion, the Chief Justice held that Buono's counsel made a telling admittance during his oral argument, making the Justice believe that any further development of the argument was rather unnecessary.[73] Namely, "[a]t 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

65. Bartrum, *supra* note 22, at 31.
66. *Salazar v. Buono*, 130 S. Ct. at 1808 (plurality opinion).
67. *Id*. at 1815–16.
68. The Court explained:

> The land-transfer statute was a substantial change in circumstances bearing on the propriety of the requested relief. The court, however, did not acknowledge the statute's significance. It examined the events that led to the statute's enactment and found an intent to prevent removal of the cross. Deeming this intent illegitimate, the court concluded that nothing of moment had changed. This was error."

Id. at 1816.
69. *Id*. at 1818.
70. *Id*. at 1820–21.
71. *Id*.
72. *Id*. at 1821 (Roberts, C.J., concurring). The opinion written by Chief Justice Roberts is only a single paragraph.
73. *Id.* at 1821.

raising the cross again.'"[74] Moreover, Chief Justice Roberts stated, "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.'"[75]

The next concurrence, which was written by Justice Alito (and joined by no other Justices), articulated only two major points.[76] First, Justice Alito found that the federal land transfer did not violate the original injunction granted by the Ninth Circuit.[77] Therefore, he believed that the case should have been remanded back to the district court, so that the injunction could immediately be lifted by the lower court.[78] Second, Justice Alito went on to characterize this particular cross as a war memorial rather than a religious monument.[79] Though this characterization is seemingly a similar treatment as prior dissenters' interpretation of the cross having a secular purpose,[80] Justice Alito does not give much explanation and this point is not spoken of by any other members of the Court. Justice Alito's opinion thus indicates he would find future arguments advocating that war memorials containing religious symbols or content are sufficiently distinguishable from other religious displays to warrant different treatment persuasive.[81]

The final concurrence making up the plurality in the case was written by Justice Scalia and joined by Justice Thomas; both concurred in the judgment, but wrote on very different grounds than the rest of the plurality.[82] This concurrence was the sole opinion that argued that the Supreme Court could not reach a decision on the merits of the case as it was presented before them because Buono lacked the requisite standing to sue.[83] This standing issue arose because Justice Scalia believed Buono had

74. *Id.* (quoting Transcript of Oral Argument at 44, Salazar v. Buono, 130 S. Ct. 1803 (2010) (No. 08-472)).

75. *Id.* (quoting Cummings v. Missouri, 4 Wall. 277, 325 (1867)).

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

77. *Id*. Justice Alito did not believe "the enactment of the land-transfer law was motivated by an illicit purpose." *Id*. at 1824.

78. *Id*.

79. Alito notes that the cross as a symbol is the "preeminent symbol of Christianity," but states that the "original reason" for the placement of this particular cross was to "commemorate American war dead" through use of a plain cross and references images common of military cemetaries seemingly in support of this idea. *Id*. at 1822.

80. *See supra* note 61 and accompanying text.

81. *See* Roy, *supra* note 22, at 82.

82. *Salazar v. Buono*, 130 S. Ct. at 1824 (Alito, J., concurring in part and concurring in the judgement).

83. As previously noted, the issue of standing was a major point to be determined in the case and was a debated portion in several of the lower courts' decisions. *See supra* notes 30, 32, and 40 and accompanying text. However, the issue was seemingly resolved well before the time the case had

sought an expansion of the original injunction, not just its enforcement, as the district court had determined.[84] Though the district court had the power to expand its original injunction it had not done so and its mere ability to do so did not make its erroneous grant of relief proper.[85] Furthermore, the lack of standing was also caused by Buono's failure to sufficiently allege actual harm from being offended by the cross.[86] Nor was he unable to freely use the land on the preserve.[87] Justice Scalia believed Buono had neither alleged nor proved that he was injured by the land transfer statute, which does not even require the cross to remain.[88] Since Buono lacked standing, the case was not properly before them and was therefore prohibited from being answered at the time of the case due to constitutional limitation.[89] Though not an outright statement by Justice Scalia, a new suit or remand, therefore, would be necessary for the substantive issues of the case to actually be heard.[90]

The remaining four Justices joined in dissent of the plurality.[91] The lead dissent, written by Justice Stevens and joined by Justice Ginsburg and Justice Sotomayor, largely mirrored and gave support for the findings and the holdings determined by the lower courts.[92] Justice Stevens recognized that the procedural process of the case limited the Supreme Court's ability to determine certain issues on appeal, including the Court's inability to

---

reached the level of the Supreme Court. The other seven Justices on the Supreme Court agreed with the lower courts that standing existed. *Salazar v. Buono*, 130 S. Ct. at 1815, 1843.

84. *Salazar v. Buono*, 130 S. Ct. at 1827 (Scalia, J., concurring in the judgement).

85. *Id*.

86. *Id*. at 1826.

87. *Id*. at 1827 n.5.

88. *Id*. at 1826–27.

89. Justice Scalia argued explained that:

> Keeping within the bounds of our constitutional authority often comes at a cost. Here, the litigants have lost considerable time and money disputing the merits, and we are forced to forgo an opportunity to clarify the law. But adhering to Article III's limits upon our jurisdiction respects the authority of those whom the people have chosen to make and carry out the laws. In this case Congress has determined that transferring the memorial to private hands best serves the public interest and complies with the Constitution, and the Executive defends that decision and seeks to carry it out. Federal courts have no warrant to revisit that decision—and to risk replacing the people's judgment with their own—unless and until a proper case has been brought before them. This is not it.

Id. at 1828. Interestingly, Justice Scalia recognizes the potential waste of resources that this case has caused from it only ending in a plurality opinion, but recognizes—despite an ideological approach that often casts the law as clear—that here, the law seemed to need clarification, but it would be improper to clarify it now.

90. *Id*. at 1824.

91. *Id*. at 1828 (Stevens, J., dissenting); *id.* at 1842 (Breyer, J., dissenting).

92. *Id*. at 1828–31 (Stevens, J., dissenting).

hear the Establishment Clause claim.[93] As such, Justice Stevens found that the district court was correct in determining that the cross was an endorsement of religion[94] and that transfer of the federal land would not solve this constitutionally violating endorsement.[95] Furthermore, Justice Stevens found that the land transfer was an unlawful attempt to allow the cross to remain,[96] particularly in light of separation of powers issues[97] and application of the reasonable observer test.[98] The latter of these holdings ultimately means that a reasonable observer would believe the actions of Congress were only an attempt to allow the cross to remain, not an attempt to remedy the injury suffered by Buono.[99] As such, Justice Stevens did not believe that the case needed to be remanded to the district court as the lower courts had already made the proper inquiries in their prior decisions.[100]

Justice Breyer wrote a second dissent that offered a more limited ruling than his compatriots' dissenting and plurality opinions.[101] Justice Breyer held the original Establishment Clause question was not properly before the Court because the government had already appealed and lost this issue on the district level.[102] Similarly, Justice Breyer agreed with the plurality

---

93. More fully stated:

> As the history recounted by the plurality indicates, this case comes to us in a procedural posture that significantly narrows the question presented to the Court. In the first stage of this litigation, the District Court and the Court of Appeals ruled that the Government violated the Establishment Clause by permitting the display of a single white Latin cross at Sunrise Rock. . . . The Government declined to seek a writ of certiorari following those rulings. Accordingly, for the purpose of this case, it is settled that . . . the District Court's remedy for that endorsement was proper.

Id. at 1828–29.

94. *Id*. at 1832–33.

95. "In sum, I conclude that the transfer ordered by § 8121 will not end the pre-existing government endorsement of the cross, and to the contrary may accentuate the problem in some respects." *Id*. at 1841.

96. *Id*.

97. *Id*. at 1840. Stevens explains that the position of Congress as a policy maker is not one that is particularly of benefit to solving Establishment Clause violations, an action that is the province of the judiciary. *Id*.

98. *Id*. at 1841.

99. *Id*.

100. *Id*. at 1830.

101. *Id*. at 1842 (Breyer, J., concurring).

102. *Id*. Justice Breyer explained the Court

> need not address any significant issue of Establishment Clause law. Because the Government has already lost the case, taken an appeal, and lost the appeal, we must take as a given the lower court's resolution of the Establishment Clause question before the land transfer. That is to say, as the plurality points out . . . we must here assume that the original display of the

about the standing issue, holding that it had to also be assumed for the case now before the Court, as rehearing the issue was barred by the failure to appeal.[103] Furthermore, Justice Breyer articulated that "a court should construe the scope of an injunction in light of its purpose and history, in other words, 'what the decree was really designed to accomplish.'"[104] In this case, Justice Breyer found that the injunction could have been easily interpreted to prohibit the land transfer.[105] Therefore, the lower courts correctly ruled for Buono, at least with respect to the injunction-based issue that arose during the case.[106] As such, the lower court was free and correct to decide that the land transfer statute violated the original injunction and was therefore invalid.[107] Justice Breyer's decision, however, was limited to these injunction-based arguments which he held had clear legal precedent, and therefore, no true issue of substance had been discussed due to the preclusion of issues.[108] In light of this limited basis for deciding the case's outcome, Justice Breyer believed that certiorari should have never been granted and should now be rescinded.[109] Notwithstanding, because the Supreme Court had failed to properly rescind certiorari, Justice Breyer held that the Court should have affirmed the holdings of the Ninth Circuit.[110]

---

cross violated the Constitution because "the presence of the cross on federal land conveys a message" to a "reasonable observer" of governmental "endorsement of religion."

Id. at 1842 (quoting Buono v. Norton, 212 F. Supp. 2d 1202, 1216–17 (C.D. Cal. 2002)).

103. *Id*. at 1843.

104. *Id.* (citing Mayor of Vicksburg v. Henson, 231 U.S. 259, 273 (1913)).

105. *Id*. at 1844. Justice Breyer explained in his dissent that:

> [A]s an initial matter, the plain text of the injunction is reasonably read to prohibit the transfer. Right now, the cross is covered with a plywood box; after the transfer, the box will be removed and the cross will be displayed. The transfer thus 'permits' the public 'display' of the cross. Indeed, that is the statute's objective.

Id.

106. *Id*. at 1843–44.

107. *Id*. at 1844.

108. *Id*. at 1845 ("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.").

109. *Id*.

110. *Id*. ("[W]e should not have granted the petition for certiorari. Having granted it, the Court should now dismiss the writ as improvidently granted. Since the Court has not done so, however, I believe that we should simply affirm the Ninth Circuit's judgment.").

III. ANALYSIS OF PROCEDURE

The absence of an appeal of the lower court's decision after *Buono II* caused confusion that ultimately led a greatly divided Supreme Court to issue a plurality decision.[111] Multiple opinions have risen out of the argument among the Justices over the actual procedural and substantive issues that required deciding in the case.[112] Many questions arose among the Justices over the validity and reviewability of the lower courts' rulings on the original Establishment Clause violation in addition to the substantive question regarding the constitutionality of the land transfer statute.[113] The issue of Buono lacking standing to sue also arises again and finds support from Justices Scalia and Thomas, although the other members of the Court find otherwise.[114] This great variance in questioning led to the only pressing majority decision to rule for remand back to the lower courts.[115]

The cause of much of the debate sprang from the fact that the Supreme Court was seemingly barred from revisiting the original Establishment Clause violation—namely, whether the cross represented a government supported preference of a particular religion.[116] Because the government failed to appeal the original claim in the lower courts, it permitted those

---

111. For the individual Justices' views concerning the government's failure to appeal *Buono II*, causing an inability to look toward the more common Establishment Clause issue, see *supra* notes 67, 93–94, 102–03 and accompanying text.

112. Many of the Justices gave great weight to the point that the government did not appeal the initial decision and caused them to have problems agreeing on what issues to discuss and how to proceed in judgment. This seems to be a key cause of division in the opinions. *See supra* note 111 and accompanying text.

113. For the debates that occurred between the various Justices in their opinions and particularly the debates these issues caused during oral arguments see *infra* notes 119–22 and accompanying text.

114. *See infra* note 124 and accompanying text.

115. Justice Kennedy's plurality opinion reaches the decision to remand and is further supported by Justice Alito's concurrence and Justice Scalia's concurrence. *See supra* notes 66, 70–71, 87 and accompanying text. This places five Justices on the side of remand—enough for a court majority on that specific issue, but no majority as to any substantive issue, only a plurality. For a discussion about the precedential weight of plurality opinions, see *infra* notes 153–63 and accompanying text.

116. Justice Kennedy explained the issue as follows:

> The District Court granted the 2002 injunction after concluding that a cross on federal land violated the Establishment Clause. The Government unsuccessfully challenged that conclusion on appeal, and the judgment became final upon completion of direct review. At that point, the judgment "became res judicata to the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Salazar v. Buono, 130 S. Ct. 1803, 1815 (2009) (quoting Travelers Indemnity Co. v. Bailey, 129 S. Ct. 2195, 2205 (2009)) (internal quotation marks omitted).

holdings to become final.[117] Every Justice on the Court effectively reached this conclusion, though many of them differed as to what they believed the effect of this failure was.[118] The reach of the *Buono* case was unquestionably limited, but the question debated by the Justices was to what degree it was limited. The issue of the case's reach was subjected to extensive debate during oral arguments.[119] Therefore, the validity of the land transfer was the sole substantive issue left for discussion.[120] However, the remedial land transfer issue was barely discussed during oral arguments and sparsely discussed in the Justices' multiple opinions, despite the land transfer issue being the seemingly primary focus of the appeal.[121] The "boring" procedural intricacies of the case were heavily debated, however, and took the forefront in oral arguments and in the Justices' opinions.[122] Finally, the standing to sue issue was also resurrected by Justice Scalia in his concurring opinion,[123] but the other Justices were rather dismissive of his findings: Justice Kennedy, Justice Stevens, and Justice Breyer outright dismissed its relevance and Chief Justice Roberts and Justice Alito remained completely silent on this issue in their individual concurrences.[124]

---

117. *See supra* note 111.

118. *Id.*

119. Particularly during Solicitor General Elena Kagan's oral arguments, the government's position was that it should be able to revisit the Establishment Clause issue as the second injunction granted additional relief not covered in the first injunction, making review before the Supreme Court proper. *See* Transcript of Oral Argument, *supra* note 7, at 15–19.

120. A majority of the Court reached the holding that the question on review does not extend as far as the government believes. Justice Kennedy explained "[t]he Court is asked to consider a challenge, not to the first placement of the cross or its continued presence on federal land, but to a statute that would transfer the cross and the land on which it stands to a private party." *Salazar v. Buono*, 130 S. Ct. at 1811 (plurality opinion). Similarly, Justice Stevens explained "[a]s the history recounted by the plurality indicates, this case comes to us in a procedural posture that significantly narrows the question presented to the Court." *Id.* at 1828 (Stevens, J., dissenting).

121. During Kagan's oral arguments, Chief Justice Roberts even cracked the joke that they should "spend a couple of minutes on the merits" before General Kagan's time runs out, rather than continuing with their lengthy discussion of the procedural issues, illiciting laughter from those present. Transcript of Oral Argument, *supra* note 7, at 19.

122. This is a reference to Justice Breyer's comment stating that he does not think there is an issue properly before the Court. Transcript of Oral Argument, *supra* note 7, at 8 ("I don't see why that's the issue before us. Look, procedurally this is a little boring, but it seems pretty well established in the law." However, the conversation over this issue remains in the forefront of oral arguments. *See supra* note 121. Justice Breyer's point of view, however, remained his own, as he dissented and did so on different grounds than even his fellow dissenters. *See supra* notes 101–10.

123. *See supra* notes 83–89.

124. *See Salazar v. Buono*, 130 S. Ct. at 1815 (plurality opinion) ("In arguing that Buono sought to extend, rather than to enforce, the 2002 injunction, the Government in essence contends that the injunction did not provide a basis for the District Court to invalidate the land transfer. This is not an argument about standing but about the merits of the District Court's order."); *id.* at 1830 n.2 (Stevens, J., dissenting) ("To the extent the Government challenges respondent's standing to seek the initial

With the ideological split between the Justices, several possible reasons for the holding in the case—particularly a push for change in precedent—are subtly revealed.[125] First, members of the plurality seem supportive of a historical monument exemption in religious display cases.[126] Secondly, some members of the plurality seem supportive of transfer of federal lands to private parties as an acceptable remedial action in religious display cases.[127] Finally, the dissenters would have reached a similar decision as the Ninth Circuit did in this case, disallowing displays similar to the cross and denying land transfer to private properties as a proper remedy in display cases.[128]

With Justice John Paul Stevens leaving the Supreme Court, many changes in the Court's jurisprudence are likely to occur and the future of the *Buono* line of cases' application is no exception. Stevens was one of the four dissenters and author of the lead dissent in *Salazar v. Buono*,[129] much as he had been in many previous cases.[130] Stevens had not officially

injunction, that issue is not before the Court for the reasons the plurality states."); *id*. at 1843 (Breyer, J., dissenting) ("[W]e must here assume that the plaintiff originally had standing to bring the lawsuit.").

125. *See id.* at 1818 (plurality opinion) ("The goal of avoiding governmental endorsement does not require eradication of all religious symbols . . . . The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society."); *id*. at 1823 (Alito, J., concurring) ("The demolition of this . . . 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."); *id*. at 1826–27 (Scalia, J., concurring) ("[E]ven assuming that being 'deeply offended' by a religious display (and taking steps to avoid seeing it) constitutes a cognizable injury, Buono has made clear that *he* will not be offended."); *id*. at 1828 (Stevens, J., dissenting) ("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 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."); *id.* (Breyer, J., dissenting) (quoting Buono v. Norton, 212 F. Supp. 2d 1202, 1216–1217 (C.D. Cal. 2002)) ("[W]e need not address any significant issue of Establishment Clause law. Because the Government has already lost the case. . . we must here assume that the original display of the cross violated the Constitution . . . .").

126. *See supra* notes 79 and 81.

127. *See supra* notes 68–75 and accompanying text (regarding Justice Kennedy's and Justice Roberts's opinions).

128. *See supra* notes 91–100 and accompanying text.

129. *Salazar v. Buono*, 130 S. Ct. at 1828 (Stevens, J., dissenting).

130. Justice Stevens was the "frequent dissenter even in his early years on the court . . . explaining on several occasions that the nation was best served by an open airing of disagreements. Justice Stevens stature as the bench's unlikely liberal voice grew greater . . . as the court itself moved further to the right, as Chief Justice John G. Roberts Jr. succeeded Chief Justice Rehnquist in 2005 and Justice Samuel A. Alito Jr. took the place of Justice Sandra Day O'Connor the following year. The Justice most often in the minority, Justice Stevens nevertheless helped shape the majority for a number of important decisions." *John Paul Stevens*, N.Y. TIMES, Nov. 29, 2010, http://topics.nytimes.com/top/reference/timestopics/people/s/john_paul_stevens/index.html?scp=1-spot&sq=justice%20stevens&st=

announced his retirement before the case, but with his advanced age[131] and a liberal President in office to appoint a similarly liberal replacement, there was logically a great probability that he would leave.[132] All nine Justices have regularly worked together in a single building since the Court of 1946 began working together,[133] and as such, his fellow Justices would likely be in the best position to estimate when Stevens would be ready to leave the Supreme Court.[134] Logically, therefore, fellow Justices—including the more conservative members of the Court—would have been in an interesting position to manipulate case decisions by influencing when the case would be heard, returned on remand, or postponed until a similar case was filed, in relation to Stevens' continued service on the Supreme Court.[135] Justice Stevens was arguably the most liberal Justice sitting on the Supreme Court at the time,[136] often standing against the more conservative portion of the Court.[137] Therefore, remand may have been a possible end around by the conservative majority, preventing a lead liberal dissenter from fully participating in a landmark case on the remedial side of the Establishment Clause.[138] More so, former Solicitor General Kagan, now Justice Kagan, could possibly be skewed more toward voting with the conservative voting bloc in a future similar case,[139] despite being a liberal

---

cse; *see also The Statistics*, 124 HARV. L. REV. 411, 416 (2010) (showing that Justice Stevens only joined the opinion of the Court in 47.1 percent of non-unanimous decisions).

131. Stevens was ninety years old at the time of his retirement. *John Paul Stevens*, *supra* note 130.

132. *See generally* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006) (discussing the politically motivated retirement of Supreme Court Justices being timed to fall when the President and Congress are in the position to place similarly minded Justices on the Court as a replacement)*;* Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999).

133. DAVID M. O'BRIEN, STORM CENTER 118–19 (7th ed. 2005).

134. *Id*. at 119–28 (articulating how even the placement of the Supreme Court building adds to the Court's institutional norms of secrecy and collegiality).

135. *Id*.

136. Stevens had an estimated Martin-Quinn score (posterior mean) of -0.815, with Breyer being the next most liberal with a score of -0.315. For an explanation into the value, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 134–53 (2002).

137. *See supra* note 130.

138. For a discussion of the potential strategic voting by Supreme Court Justices see, for example, Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999); Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998)); Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 MINN. L. REV. 131 (2001).

139. As the Solicitor General who argued the government's position in *Salazar v. Buono*, Elena Kagan is intimately familiar with the arguments supportive of allowing the cross to remain. During oral arguments, then-Solicitor General Kagan discussed the possibility of placing signs on the road

appointee.[140] Although it is unlikely that these particular parties will re-litigate this remedial land transfer, the issue is far from resolved. The avoidance of a major dissenter would likely lead to much more agreement from the Court, particularly when coupled with a potentially sentimental ear on the liberal side of the Court from Justice Kagan.

IV. BACKGROUND SCHOLARSHIP ON PLURALITY OPINIONS

Often, conflicts in the interpretation and application of the law will arise between circuits. This inescapable part of the judicial system is all too real, largely due to the regional nature of the intermediate appellate courts.[141] More so, circuit courts sometimes decide novel issues in the law that have never been decided, or only explored in a limited fashion without sufficient rationale for a completely precedent-based resolution.[142] The Supreme Court, sitting as the United States' highest court, has the power, position, and responsibility of correcting these conflicts and of answering these novel questions.[143] Problems can arise, however, when the Supreme Court itself is divided on an issue[144] and independent conclusions override the norm of consensus.[145] Division in the Supreme Court was once fairly

leading to the cross, as well as near the cross, that would designate that the cross and the portion of land surrounding it belonged to the VFW, a private party, rather than the federal government, who could then not be construed as endorsing a particular religion. Transcript of Oral Argument, *supra* note 7, at 21–25. This concept arises out of a discussion regarding the confusion caused by the presence of private land holdings scattered across the Mojave Preserve, which "between the State and the private inholdings, [is] about 10 percent of the total area. But they are dotted all over the place. So tomorrow, 1,000 crosses could go up and nobody would know whether they were on private land or on public land." *Id.* at 20.

140. *See* Moraski & Shipan, *supra* note 132, at 1701–02 (stating that presidents attempt to appoint judges which have ideological values as close to their own as they can get passed by Congress).

141. One of the major reasons why the Supreme Court will grant certiorari in to a case is due to a circuit split regarding same or similar issue. O'BRIEN, *supra* note 133, at 184–85. This is of great benefit to governmental agencies who can litigate in multiple jurisdictions until they receive the result that they are looking for. This of course increases the chances of the Supreme Court hearing a case to resolve the split. *Id.* With the many differing opinions created in *Salazar v. Buono* it is likely that federal appellate courts will hear similar cases, causing an incongruence among the circuits, unless the Supreme Court once again takes action and formally determines the validity of land transfers as a remedy to Establishment Clause violations.

142. The Supreme Court will often only take on what they perceive as the most important cases, following an organizational rule to minimize the Supreme Court's case load by limiting their action to cases with "compelling reasons" to argue them. *Id.*

143. "[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

144. Justices will divide over minor points in opinion language. When the Justices cannot agree what the actual issue is in a given case or the Court becomes entangled in extraneous issues—like in *Salazar v. Buono*—it is unlikely that agreement and a singular opinion will result. O'BRIEN, *supra* note 133, at 312–13.

145. *Id.* at 288–89.

rare, however disagreement does happen and has happened with increasing frequency in more recent years.[146] The Supreme Court will most often resolve the issue before it, when it hears a case,[147] but concurrences and dissents leave openings for future cases regarding different circumstances.[148] These openings allow attorneys in future cases to target specific issues that can potentially change, limit, or overturn the scope or validity of a holding in a previous opinion.[149] In this light, plurality opinions are especially representative of both ambiguity in the law and openings left in opinions for future interpretation, due to the multitude of opinions resulting from the Supreme Court's failure to unite and reach a majority decision.[150]

Plurality opinions sit in a peculiar place among Supreme Court decisions because plurality opinions can further confuse issues that arise in a case, rather than solve them and provide clarity. Furthermore, the Supreme Court's lack of consensus and building a majority makes the problem worse because the absence of a majority muddies the actual holding.[151] Although these opinions often leave the lower courts scratching their heads as to the proper application of the law, plurality opinions still serve a precedential purpose and can be useful.[152] As such, there are both positive and negative sides to plurality opinions.

Plurality opinions have several potentially harmful effects. Perhaps most prevalent is the failure of plurality opinions to provide proper

146. *See* O'BRIEN, *supra* note 133, at 281–303 (finding there to be approximately ten times the number of concurrences and four times the number of dissents issued by the Supreme Court than fifty years ago); *The Statistics*, *supra* note 130, at 416 (2010) (showing dissent in 57.5 percent of cases). *See also* C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890–98 (1941).

147. Of the thousands of cases that petition for certiorari before the Supreme Court every year less than one hundred are actually granted and end with disposition of a written opinion. O'BRIEN, *supra* note 133, at 160–61.

148. "An additional benefit of separate opinions stems from their ability to guide jurists when previous decisions prove unworkable or undesirable." Meredith Kolsky, Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2085 (1995).

149. "In a system that permits separate opinions, a court seeking to remedy a discredited legal doctrine will benefit from consideration of the conclusions and rationales suggested by dissenting or concurring opinions." *Id*.

150. *See generally* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981) [hereinafter *Plurality Decisions*].

151. "Because they do not provide any single line of reasoning supported by a clear majority of the Court, these decisions pose substantial difficulties for lower courts attempting to ascertain their precedential value, difficulties compounded by the variety of forms that plurality decisions can take." Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 756 (1980).

152. John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 62 (1974).

common law precedent.[153] Commentators have expressed that "[a]ppellate court decisions cannot serve as precedent . . . unless they are capable of reduction to clear legal principles on which . . . lower courts may depend in future cases."[154] As such, debate exists as to what plurality decisions actually say in terms of legally binding substance.[155] Part of this debate arises from a lack of a solid precedent in determining the precedential value of plurality decisions, particularly from the nearly silent Supreme Court.[156] *Marks v. United States*[157] is the lead case on the issue of plurality opinions and their potential interpretation as precedent. The *Marks* decision arose out of a line of obscenity cases dealing with hard core pornography and the First Amendment.[158] The *Marks* case's real contribution, however, was the Court's ruling on the precedential value of a prior plurality opinion and the articulation of a legal test or standard to follow in deciding similar cases involving the application and interpretation of a plurality precedent.[159] The *Marks* Test provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the *narrowest grounds*.'"[160] The "narrowest grounds" approach from *Marks* is still the leading case regarding plurality opinions, despite its shortcomings.[161] For instance, the Supreme Court has held the *Marks* "narrowest grounds" test is limited, but did so in an abstract way.[162] As such, plurality opinions are arguably wasteful to the judicial system because only the outcome of the particular case is clear,

153. Novak, *supra* note 151, at 757–58.

154. Douglas J. Whaley, Comment, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370, 370 (1968); *see also* Novak, *supra* note 151 (discussing the various models of interpreting plurality opinions).

155. Mark A. Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 419–21 (1992).

156. Novak, *supra* note 151, at 756, 761–67.

157. 430 U.S. 188 (1977).

158. *Id*. at 188–91 (describing the underlying dispute).

159. *See id*. at 193.

160. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion) (emphasis added).

161. *See* Thurmon, *supra* note 155, at 421 ("Unfortunately, the *Marks* approach does not always work. Its failings are not surprising, given the lack of analysis of plurality decisions in the *Marks* opinion, which merely makes a passing reference to the line of no-clear-majority decisions on obscenity that were issued between 1957 and 1973.").

162. Nichols v. United States, 511 U.S. 738, 745–46 (1994) ("We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.").

often necessitating further litigation to clarify the decision so it can be applied to future cases.[163]

Another problem with reaching plurality decisions is that they threaten, at least in appearance, the legitimacy of the judicial branch as a politically neutral entity.[164] This problem arises because these particular decisions imply that more than the law applies to the decision making of judges.[165] If the Supreme Court's individual Justices were simply in the position to apply concrete law then there would logically be no debate about what the proper decision in any given case should be.[166] That some cases are decided without unanimous opinion indicates that something more than just the law is at play.[167] However, judges often try to limit how much

163. Beyond the costs of the original trial and even revisiting an unclear rule of law multiple times, the lack of a clear rule of law to follow is costly to society. *See generally* Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-percolation After* Rapanos, 15 VA. J. SOC. POL'Y & L. 299, 300–17 (2008) (discussing the value and seeming necessity of a clear rule of law for the proper function of societal interaction).

164. "[P]lurality decisions bring to the surface a latent conceptual flaw in substantive reasoning that challenges the integrity of the judicial system. The legitimacy of judicial power rests on an appearance of impartial judges whose power is constrained by the Constitution." *Plurality Decisions*, *supra* note 150, at 1144.

165.

> Nonplurality decisions retain the appearance of legitimacy because of the united front presented, even though the exercise of judicial power is at times informed by substantive values external to the Constitution. However, when there is not only popular questioning of judicial power, but also a splintered Bench resulting in a plurality decision, the judicial tyranny inherent in the imposition of a Justice's personal values is bared to public scrutiny.

Id.

166. The Supreme Court's Justices themselves have debated this point, particularly during the highly publicized appointment debates in recent years. Though made in very political situations, even the evasive statements of nominees differ. *Compare Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr.) ("Judges are like umpires. Umpires don't make the rules, they apply them. . . . Nobody ever went to a ball game to see the umpire. . . . I will remember that it's my job to call balls and strikes, and not to pitch or bat.") *with The Nomination of Elena Kagan to Be Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 202–03 (2009) (statement of Elena Kagan) ([T]o the extent that what an umpire suggests that there has got to be neutrality, that there has got to be fairness to both parties, of course, that is right. . . . [T]he metaphor might suggest to some people that law is a kind of robotic enterprise, that there is a kind of automatic quality to it, that it is easy, that we just sort of stand there and, you know, we go 'ball' and 'strike' and everything is clear-cut and that there is no judgment in the process. And I do think that that is not right, and it is especially not right at the Supreme Court level, where the hardest cases go and the cases that have been the subject of most disputes go. . . . [J]udges do, in many of these cases, have to exercise judgment. . . . [T]hose legal judgments are ones in which reasonable people can reasonably disagree sometimes.").

167. This represents, essentially, the tenants of the attitudinal model of judicial decision making. Political scientists and legal academics have written countless pieces of literature on the subject. For information on the model, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Pritchett, *supra* note 146; Jeffrey A. Segal &

these issues arise as "[n]o matter how dissimilar the judges may be in temperament and outlook, they are united on the need to foster the myth of the law's impersonality and inexorability."[168] Recent empirical research has begun to explore the potential link between ideological differences among the Supreme Court Justices and the rate of occurrence of concurring opinions that may lead to plurality decisions.[169] This research has found interesting, but slightly conflicting, results on the causes of plurality opinions—depending on the specific model of research used[170] to interpret the results.[171] Even with all the aforementioned problems, plurality opinions are not wholly without their associated benefits.

There are several positive aspects of plurality opinions.[172] A lack of unanimity between members of a court—and the resulting plurality opinions—arises from a recognition that the law is not always clear.[173] Judicial disagreement is permissible among individual judges on appellate courts in the United States, but this ability to disagree is limited in several regards. For example, judges are expected to defer "to expert administrative determinations . . . to keep the individuality of our judges within tolerable bounds."[174] Disagreements, however, can yield multiple opinions that reveal the thoughts of individual justices and their

---

Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

168. Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 227 (1986).

169. *See, e.g.*, James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 515 (2011).

170. Spriggs and Stras apply both a case-level model and an individual-Justice model in analyzing the occurrence of plurality opinions by determining what factors most often lead to plurality opinions. *Id.* at 515. The case-level model drew data from Supreme Court opinions from 1953 to 2006. *Id.* The individual-Justice model looked to what factors would cause any given Justice to concur in result, rather than follow the majority's reasoning. *Id.*

171. The case-level model found that "a case is more likely to result in a plurality decision if it involves an issue of constitutional interpretation with respect to a civil liberties issue and lower court conflict did not influence the decision to grant certiorari." *Id.* However, the individual-Justice model yielded a different result, indicating that determined ideology—namely the distance between the opinion author and another Justice—as well as a prior lack of cooperation between the two was highly predictive of the rate at which an individual concurs with, rather than joins the majority. *Id.*

172. This section focuses on plurality opinions, but much of the literature discussed will focus on the importance of dissents in general. Literature regarding dissenting opinions is applicable to a discussion of *Salazar v. Buono*, because the case's various issues lacked a majority, effectively placing all the Justices into a dissenting position to some extent. Concurrences are likewise applicable because the attractiveness of writing separately causes a lack of consensus on the Supreme Court, leading to plurality opinions. O'BRIEN, *supra* note 133, at 286. For an empirically based discussion on the potential causes of plurality decisions, see generally Spriggs & Stras, *supra* note 169.

173. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134 (1990) (contrasting the court system of the United States with those of European code law countries, like France which require the law to appear unquestionable).

174. *Id.*

interpretations of where the law should be going.[175] Justice Brennan has even written that dissent and debate are essential to the judicial system, which is constantly being reinterpreted as new actions are brought.[176] Dissent and debate on the Supreme Court leads to better opinions, as it limits decisions from being overly broad and forces other Justices to consider other arguments.[177]

V. RESOLUTION

Salazar v. Buono offers an example of how a plurality decision and subsequent remand can be a good thing when circumstance calls for it. The plurality offers multiple views for future analysis on the various issues in the case.[178] For one, an Establishment Clause distinction between the display of purely religious monuments and those with historical backgrounds—like a long-standing war memorial—may have a supported future in arguments before the Supreme Court.[179] Part of this interpretation might have arisen out of several Justices' belief that a cross was not solely a Christian—or even generically religious—symbol,[180] despite the fact that

---

175.

> What do separate opinions contribute to the improvement or progress of the law? Most immediately, when drafted and circulated among the judges, they may provoke clarifications, refinements, modifications in the court's opinion. They provide, as Chief Justice Stone said, "some assurance to counsel and to the public that decision has not been perfunctory, which is one of the most important objects of opinion-writing."

Id. at 143–44 (quoting Harlan F. Stone, *Dissenting Opinions are Not Without Value*, 26 JUDICATURE 78 (1942)).

176.

> We are a free and vital people because we not only allow, we encourage debate, and because we do not shut down communication as soon as a decision is reached. As law-abiders, we accept the conclusions of our decision-making bodies as binding, but we also know that our right to continue to challenge the wisdom of that result must be accepted by those who disagree with us. So we debate and discuss and contend and always we argue. If we are right, we generally prevail. The process enriches all of us, and it is available to, and employed by, individuals and groups representing all viewpoints and perspectives.

William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986).

177. Kolsky, *supra* note 148, at 2082–85.

178. *See generally* Ginsburg, *supra* note 173 (discussing how separate opinions can offer multiple hints to future litigation on the potential issues and outcomes, including what specific Justices may find particularly important to the case).

179. *See* Bartrum, *supra* note 22, at 39 ("[I]t is hard to blame the advocates for their efforts to empty symbols like the cross of their religious content; they simply tailor their arguments to the Court's doctrinal landscape. And in recent years the Court has been a willing co-conspirator, if not the instigator, in a troubling effort to see the sacred as secular.").

180. Justice Kennedy, for instance, stated "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." *Salazar v. Buono*, 130 S. Ct. at 1803, 1820 (2010). Justice Scalia made a similar point during oral arguments,

such a conclusion has its own legal[181] and possibly cultural detriments.[182] Secondly, the argument that remedial application of similar land transfers solves issues of religious symbols on display on public property may have merit as well.[183] The Supreme Court, however, managed to avoid reaching a majority conclusion about either of these issues.

Salazar v. Buono also avoids issuing a prematurely constructed precedent.[184] The Supreme Court was in a position to drastically change the precedent in Establishment Clause jurisprudence.[185] Not only did *Salazar v. Buono* avoid a strong precedent that might have been socially, politically, and academically unpopular,[186] the ruling was limited as well.[187] The only part of the ruling that was reached by a majority of

---

believing crosses to be "the most common . . . symbol of . . . the resting place of the dead." Transcript of Oral Argument, *supra* note 7, at 38–39. Peter Eliasberg, Buono's representative, believed the contrary. "The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew. . . . So it is the most common symbol to honor Christians." *Id.* at 39. However, after Eliasberg's statements elicited laughter from the courtroom, Justice Scalia responded that Eliasberg's argument was jumping to "an outrageous conclusion" because Scalia thought it a ridiculous to assume that "the only war dead that the cross honors are the Christian war dead." *Id.* This is in contrast with Justice Stevens's statement that "[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." *Salazar v. Buono*, 130 S. Ct. at 1828. "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." *Id.*

181. *See*, *e.g.*, Bartrum, *supra* note 22, at 40 ("Most, if not all, establishment scholars recognize that one of the clause's central theoretical purposes is to protect religion from the corruptive power of the state.").

182.

> This suggests two equally problematic possibilities: (1) the Court itself is actively working to diminish the religious meanings of sacred symbolism; or (2) the Court is willing to accept and sanction the idea that long association with government can wash away a religious symbol's central significance. If either (or both) of these propositions is true, then I fear that we have been poor stewards of the disestablishment promise.

Id.

183. Transcript of Oral Argument, *supra* note 7, at 8, 41–45. For another view that runs largely counter to this point, see Christopher Lund, Salazar v. Buono *and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY, 60, 66–68 (2010), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2010/22/LRColl2010n22Lund.pdf (arguing that the Supreme Court would see through this remedy as a manipulation of the purpose of the Establishment Clause, as the Court has done in the past for similarly questionable issues).

184. The case actually decides very little in substance; thus nothing of major precedential value resulted that may cause inappropriate holdings in the lower courts.

185. Much of the this potential for change would have been an addition of clarity to the Establishment Clause case law, as the field remains relatively confusing to those attempting to litigate or even study this area. *See* Lund, *supra* note 183, at 60 ("Since 1984, the Supreme Court has had seven separate cases regarding the constitutionality of passive displays. In those seven cases, the Court has issued thirty-six separate opinions—more than five opinions per case on average.").

186. *See supra* note 173 and accompanying text.

187. The plurality decision was able to agree on very little, beside minor procedural arguments.

Justices was the scope of the issues the lower court should decide on remand.[188] This limited ruling avoided future difficulties in application by not reaching a conclusion on the substantive claims and remanding the case for further analysis of the issue.[189]

Buono highlighted many of the various positive sides of multiple opinions, by offering several pieces of insight into the interpretations of the issue by the various Justices and guidance to future argument.[190] Remand allows more novel issues to further ripen before an issue reaches the Supreme Court again.[191] Possibly, the next case to explore the constitutionality of a remedial land transfer[192] will be conducted in a manner that avoids the procedural problems that resulted in divisiveness among the Justices.[193] These arguments could now be heard again by a lower court with some Supreme Court direction based on the *Buono* opinions, in substantially similar, but ultimately different litigation.[194] Though it was once thought unlikely that the specific matter at issue in *Salazar v. Buono* will be litigated again—largely, because the cross on sunrise rock was stolen a few days after the case was decided[195]—recent

---

This created little in the way of precedent. Therefore, there is little to impede future application and resolution of Establishment Clause issues. *See infra* note 189.

188. *See supra* note 115 and accompanying text.

189. By avoiding any decision besides a simple remand, the case avoids many of the problems that occur when lower courts attempt to use the *Marks* analysis to determine the precedential value of appellate court cases decided by plurality decisions. *See* Marceau, *supra* note 24, at 160–74 (relating the confusion that the *Marks* rule is having on Eighth Amendment cases attempting to interpret it, including the split between the D.C. Circuit and the Third Circuit over how to interpret the meaning of "narrowest grounds" articulated in the *Marks* rule).

190. *See supra* notes 175–77 and accompanying text.

191. The injury claimed must have already occurred and all other possibilities for appeal must be exhausted before a case is properly ripe for judicial review by the Supreme Court. *See* O'BRIEN, *supra* note 133, at 174.

192. *See infra* notes 196–97 and accompanying text.

193. *See supra* notes 115–20 and accompanying text.

194. Any future litigation would quite possibly be unnecessary, and considering the current state of affairs, could be dismissed as moot for want of legal injury.

195. *See* Randal C. Archibold, *Cross at Center of Legal Dispute Disappears*, N.Y. TIMES, May 11, 2010, http://www.nytimes.com/2010/05/12/us/12cross.html (explaining the sudden disappearance of the cross soon after the case was decided by the Supreme Court); Caroline Black, *Mojave Cross Honoring U.S. War Dead Stolen in Middle of the Night*, CBS NEWS (May 12, 2010, 6:06 AM), http://www.cbsnews.com/8301-504083_162-20004719-504083.html (mentioning that the current VFW caretakers on Sunrise Rock, however, desire to replace the old cross, but questions exist as to their ability to do so legally after the *Buono* cases); *Anonymous Letter Explaining Cross Theft Sent to Desert Dispatch*, DESERT DISPATCH (May 11, 2010, 5:27 PM), http://www.desertdispatch.com/articles/explaining-8465-anonymous-letter.html (explaining that the cross, oddly enough, was removed by a veteran that believed "Anthony Kennedy desecrated and marginalized the memory and sacrifice of all those non-Christians that died in WWI when he wrote: '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

events have once again thrust the Mojave Desert War Memorial into the limelight.[196] The Ninth Circuit recently ruled that the Mount Soledad Memorial Cross located in the suburbs of San Diego was an unconstitutional violation of the Establishment Clause.[197] Whatever case is brought before the Supreme Court in the future, however, new arguments highlighted by the Supreme Court will allow the circuit courts to more fully explore the substantive issues outlined in *Salazar v. Buono*. Primarily, the lower courts can further explore the remedial quality of the land transfer, which remains rather novel.[198] The various circuits will also be able to further explore an exception for historical and war memorials from the standard Establishment Clause claims debating the constitutionality of religious displays on public land. Whatever the case, the road to clarifying Establishment Clause precedent will likely be a long one. No doubt this road will continue to be bereft with a plethora of plurality opinions[199] and, though this is not ideal, the situation is not as dire as commentators may believe.[200] Plurality opinions from the Supreme Court can serve an important purpose in developing legal doctrines;[201] however clarity in the law is also essential.[202] The Justices of the Supreme

---

Americans who fell in battles—battles whose tragedies are compounded if the fallen are forgotten.' The irony and tragedy of that statement is unique.").

196. On January 11, 2011 members of the VFW filed suit against the Obama Administration due to their refusal to transfer ownership of the land to the VFW as dictated by the Department of Defense Appropriations Act of 2004. *Veterans Sue Obama Administration Over 76 Year Old War Memorial*, VFW BLOG (Jan. 12, 2011, 10:15 AM), http://thevfw.blogspot.com/2011/01/veterans-sue-obama-administration-over.html.

197. Trunk v. City of San Diego, 629 F.3d 1099, 1125 (9th Cir. 2011), *reh'g denied*, 660 F.3d 1091 (9th Cir. 2011) ("[A]fter examining the entirety of the Mount Soledad Memorial in context . . . we conclude that the Memorial, presently configured and as a whole, primarily conveys a message of government endorsement of religion that violates the Establishment Clause.").

198. The procedural intricacies of *Salazar v. Buono* that led to it being substantively indeterminative was, potentially, the only reason why the remedial land transfer issue was "thrust into the limelight." *See* Owens, *supra* note 20, at 293. Cases like *Salazar v. Buono*, where the scope of what can be heard is limited, seem to be necessary as to keep the remedial aspect of Establishment Clause cases; as the remedial portions of Establishment Clause proceedings are often overshadowed in judicial opinions by an overly narrow focus on determining if the Establishment Clause was violated. *Id*. at 4.

199. *See supra* note 185 and accompanying text (discussing the prevalence of plurality opinions regarding religious displays).

200. *See supra* notes 153–71 and accompanying text (discussing the negative aspects of plurality opinions).

201. *See supra* notes 172–77 and accompanying text.

202. *See supra* notes 153–54 and accompanying text.

Court must move toward striking a balance in their opinions by increasing the clarity regarding the underlying law, even if consensus cannot be reached among the individual Justices.

Daniel Joseph Bass[*]

---

* J.D. (2012), Washington University School of Law; B.S. Psychology (2009), Missouri State University. I would like to thank all of my professors for providing me with an educational experience I will always remember. I would also like to thank the editors of the *Washington University Law Review* for their dedication, work, and excellent edits. Finally, I would like to thank my brilliant girlfriend, my family, and my friends for their constant help and support throughout.