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Property As/And Constitutional Settlement

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Property As/And Constitutional Settlement

I've posted a [new paper](#) with this title to SSRN. The article addresses the constitutionality and propriety of governments settling constitutional issues or claims by disposing of public properties through various forms of privatization or by taking the subject properties. Settlement-by-disposition has occurred with increasing frequency in Establishment Clause contexts. [Salazar v. Buono](#), which was argued in October and may be decided early next year, is an example. Public forum properties such as streets and parks have also been disposed of in order to settle constitutional controversies. Settlement-by-disposition is neither a new phenomenon, nor one limited to the sometimes contentious public display of religious symbols. In addition to the foregoing, consider [Boumediene v. Bush](#), in which Justice Kennedy pointedly reminded federal officials that the power granted by the Constitution to acquire and dispose of federal territories does not carry with it the power to "switch the Constitution on or off at will."

The article traces the practice of settlement-by-disposition to the civil rights era, when officials devised a variety of creative dispositions in an effort to avoid integration. Decisions from the 1960s and 1970s revealed no clear answer to the question whether officials could dispose of constitutional claims by disposing of public properties. Some lower courts stretched the nascent state action doctrine and equal protection principles to prevent dispositions that were plainly intended to thwart integration orders. But other courts, including the Supreme Court in a decision involving the disposition of public swimming pools, permitted officials to dispose of properties even though the result was to negate integration. The Court did resist dual school system and other sham dispositions in the public education context. But it was never forced to decide whether officials could simply close the public schools entirely in the face of desegregation mandates; although such proposals were made by segregationist public officials, southern parents and officials ultimately rejected the idea.

In the aftermath of the oral arguments in *Buono*, some media and commentators seemed rather disappointed that the case might be decided on mere "property" grounds rather than on the Establishment Clause merits. But I think settlement-by-disposition is actually the most significant aspect of the case, not least because this practice has implications far beyond the "donut hole" in the Mojave. As Nelson Tebbe recently [posed](#) the fundamental question: "When should we allow governments to deploy private-law rules in order to circumvent public-law obligations?" I propose a general framework for thinking about and analyzing the constitutionality and propriety of settlement-by-disposition, one that draws upon the lessons of the civil rights experience. The framework focuses on the fiduciary duties owed by public officials with regard to the critical assets subject to disposition. The trust analogy I propose is not perfect. But it responds directly to the danger that settlement-by-disposition can be used to render constitutional liberties discretionary.

I invite those interested to read the draft, and of course would welcome any comments.

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