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Property As/And Constitutional Settlement

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INTRODUCTION

Certain constitutional rights are intricately bound up with, and in some cases critically dependent upon, access to and enjoyment of public properties. This is true in a variety of constitutional contexts. For example, one of the distinct lessons of the civil rights era was that constitutional equality

[*] Professor of Law, William & Mary Law School. I would like to thank Nelson Tebbe for his helpful comments on an earlier draft. I would also like to thank my colleague, William Van Alstyne, for sparking my interest in this topic and for sharing his insights concerning this and countless other constitutional law subjects.

entails equal access to public properties and facilities.[1] Similarly, First Amendment anti-establishment principles require that officials operate and maintain public places in a manner that is not perceived as endorsing, through symbolic displays or otherwise, particular religious sects or sectarianism.[2] Anti-endorsement and antisectarianism ensure equality of enjoyment with respect to parks and other public properties. The First Amendment's free speech and free assembly guarantees also require that access to at least some public properties be provided.[3]

Of course, the mere fact that public properties may facilitate constitutional liberties does not mean that officials have an obligation to make them available or own them in perpetuity.[4] Governments possess the organic power to dispose of public assets. The Constitution does not generally constrain the choices *private* property owners might make in terms of equal access, religious displays, and expressive activity. Suppose, then, that the government sells or otherwise conveys public property to a private owner or simply closes a public facility such as a public park. Suppose further that, after these dispositions, some members of the community remain deeply offended by a religious display that remains on the subject property or that speakers continue to claim a right of access to what once was a traditional public forum. Has disposition of the subject property necessarily settled or extinguished their constitutional claims?

This question, which has recurred in various contexts since at least the civil rights era, has never been systematically analyzed or definitively answered.[5] Consider the following dispositions, or attempted dispositions, of public property:

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[1] DAVID DELANEY, RACE, PLACE, AND THE LAW 1836–1948 (1998) (highlighting the importance of physical and experiential geography in the history of racial conflict by discussing the connections between space, power, experience, and the law leading up to and during the civil rights era).

[2] *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 612–21 (1989) (applying "endorsement" test to religious displays on public property).

[3] For a general discussion of the importance of public places to speech and assembly rights, see TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2009). For an analysis of the intersection of property rights and free speech in cases decided by the Burger Court, see Norman Dorsen & Joel Gora, *Free Speech, Property, and the Burger Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195.

[4] *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1422–24 (1989) (noting the discretionary nature of most government benefits).

[5] Governments have always disposed of properties under broad grants of federal, state, and local power. *See, e.g.*, United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) ("Like any other owner [Congress] may provide when, how and to whom its land can be sold."). The extent to which these disposition powers are limited by constitutional rights was a question that frequently arose during the civil rights era. *See infra* Part I.

- Faced in the 1960s with the prospect of imminent, court-ordered desegregation of all of its municipal pools, a city council votes to close all public pool facilities.[6]
- A Latin cross is located on a small patch of federal parkland in the California desert. In response to a federal appeals court decision holding that the display violates the Establishment Clause, Congress conveys the property to a private landowner but retains a reversionary interest and an access easement with respect to the subject property.[7]
- To end a decades-long local controversy concerning a Latin cross displayed on public property, Congress takes the parcel by eminent domain.[8]
- A city sells a portion of Main Street to a private owner but retains an easement on the property for pedestrian use. After a court invalidates certain expressive limits imposed on speakers using the easement, the city sells its remaining present interest in the property to a religious organization but retains a reversionary interest.[9]
- In response to traffic and other public order problems stemming from abortion protesters' activity in a public cul-de-sac in front of an abortion clinic, city officials vacate a public pedestrian and parking easement with respect to the cul-de-sac.[10]

In these and other circumstances, seemingly ordinary property dispositions—i.e., sales, leases, easements, assignments, dedications, vacations, transfers, reversionary interests—have played a critical role in adjudicating and purportedly settling constitutional claims. As the examples above show, public officials have disposed of public properties to avoid constitutional litigation and, in some cases, to circumvent injunctive decrees. Property dispositions have also been used as a means of quelling public controversy, freeing public officials and private owners from constitutional fetters, and suppressing controversial speech.

As the first example indicates, the practice of what this Article calls "settlement-by-disposition" has deep and varied roots tracing at least to the civil rights era. Settlement-by-disposition has taken two principal forms.

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[6] *See* Palmer v. Thompson, 403 U.S. 217, 218–19, 226 (1971) (holding that the city's closing of all public pools did not violate the Equal Protection Clause).

[7] *See* Salazar v. Buono (*Buono*), 130 S. Ct. 1803, 1816 (2010) (holding that the district court erred when it failed to address whether a land transfer statute violated the Establishment Clause).

[8] *See* Trunk v. City of San Diego, 568 F. Supp. 2d 1199, 1224 (S.D. Cal. 2008) (holding that a federal taking of a memorial site resulting in the presence of a cross on federal property did not violate the Establishment Clause).

[9] *See* Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1254 (10th Cir. 2005) (upholding the city's eventual divestment).

[10] *See* Thomason v. Jernigan, 770 F. Supp. 1195, 1202–03 (E.D. Mich. 1991) (invalidating the government's vacation as impermissible destruction of a traditional public forum).

Some property dispositions are responses to pending or imminent legal claims or judicial mandates. The disposition serves as a purported settlement of the claims or court orders. Other dispositions may take place in the absence of any pending or threatened legal action. However, when an access claim is brought, the government cites the property disposition as a trump or settlement of any constitutional claims. In both instances, the disposition is claimed to have extinguished any constitutional claims or obligations. Settlements most often take the form of privatization of properties and facilities, but as we shall see they can also result from public ownership of formerly private property.

Although equality doctrine, antidiscrimination laws, and social norms have essentially negated the use of property dispositions to effectuate racial and other forms of segregation, property settlement has become increasingly common—and increasingly controversial—in some contemporary First Amendment contexts.[11] In several cases, officials faced with injunctions forbidding religious displays on public properties have sold or otherwise conveyed the parcel in question rather than remove the sectarian symbols.[12] Other means of property allocation, including federal takings of local properties, have also been used to purportedly settle speech and establishment controversies.[13] In public speech and assembly contexts, officials have privatized and otherwise disposed of traditional public forum properties, including public sidewalks and streets. After these dispositions, governments and the new private owners have claimed that any First Amendment difficulties have been settled or avoided.[14]

The practice of settlement-by-disposition raises fundamental constitutional questions. The dispositions examined in this Article represent far more than mere sales, land swaps, or routine takings. They raise critical questions about the nature of governmental power and responsibility, and about the character of constitutional liberties. If officials can settle or extinguish constitutional claims through property dispositions, does this mean that constitutional liberties that are intimately connected to public properties are in an important sense merely discretionary? Does it mean, to quote a recent Supreme Court decision involving the government's power over federal territories, that officials may use their authority to "acquire, dispose of,

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[11] There are other contexts in which private law regimes also have been used to settle or address constitutional obligations. *See, e.g.*, Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. COLLOQUY 70, 80–82 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/30/LRColl2009n30Tebbe.pdf (questioning the propriety of using various private law property and contract rules to manage or avoid constitutional constraints).

[12] *See, e.g.*, *Buono*, 130 S. Ct. at 1813; *see also infra* Part II.

[13] *See, e.g.*, *Trunk*, 568 F. Supp. 2d at 1202; *see also* Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 655–62 (2004) (discussing the use of eminent domain in the context of adult establishments).

[14] *See infra* Part III.

and govern [public property]" in order to essentially "switch the Constitution on or off at will"?[15]

As noted, governments obviously have the power to sell or otherwise convey public properties.[16] Once they do so, it would seem that constitutional restrictions no longer apply to either the subject properties or their new owners or possessors.[17] As we shall see, however, the reality is much more complicated. Since the civil rights era, courts have struggled to define the limits of settlement-by-disposition. In many cases, courts have focused primarily upon compliance with private property law principles to assess the constitutionality of dispositions. Absent the most unusual circumstances, bona fide sales and other dispositions have been treated as legitimate resolutions of constitutional disputes relating to a public property. Owing to the fact that the properties under consideration are public, however, many courts have not been comfortable relying solely on private property rules. Thus, at least some courts have acknowledged that formalistic review of public property dispositions does not adequately protect against the circumvention or evasion of public obligations and constitutional guarantees. Assessment of settlement-by-disposition has not proven susceptible to easy answers or bright-line rules. Indeed neither courts nor commentators have offered any coherent framework for considering the legitimacy of disposition as a means of constitutional settlement.

To better understand and articulate the constitutional boundaries of settlement-by-disposition, this Article examines the practice in three constitutional contexts: equality, establishment, and speech. Part I examines the devises, leases, sales, and closures that formed an important part of the massive resistance to desegregation from the 1950s to the early 1970s. During the civil rights era, local and state officials frequently sought to engage in "circumvention-by-disposition" by using the mechanisms of private property law to avoid equality obligations. Some courts thwarted these efforts by rejecting formalism, stretching state action principles, and assessing official motives and purposes. But, wary of the implications of a broad scale rejection of settlement-by-disposition, which included forcing localities or states to maintain public properties and facilities in perpetuity, other courts, including the Supreme Court, upheld dispositions even though the effect was circumvention of the equality guarantee. The civil rights era experience highlighted the fundamental tension between the government's power to dispose of public properties and the constitutional liberties that depend upon access to those properties. Although courts adopted an approach that focused on the bona fides of each disposition, they never devel-

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[15] Boumediene v. Bush, 553 U.S. 723, 765 (2008).

[16] *See* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915).

[17] *See*, *e.g.*, Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.").

oped a coherent framework for assessing the constitutional and democratic legitimacy of settlement-by-disposition. Court decisions during the civil rights era were understandably ad hoc and fact-specific; many were issued in response to circumvention tactics by local officials. Owing in part to the fact that equality doctrine was still in its infancy, courts tended to focus narrowly on the specific terms of a devise or sale rather than on officials' public obligations with regard to the subject properties. Although they invalidated some dispositions and questioned others, the courts ultimately left the outer boundaries of settlement-by-disposition unsettled. They did not, for example, rule on the constitutionality of closing the public schools entirely in response to integration orders.[18]

As Part II shows, the fundamental tension between governmental ownership of certain properties and constitutional liberties has recently resurfaced in Establishment Clause controversies. Public officials increasingly have turned to property disposition as a means of settling Establishment Clause controversies. As did their predecessors in the civil rights context, contemporary courts have attempted to distinguish between constitutionally legitimate property settlements and sham circumventions. Courts generally have purported to reject title formalism and to analyze both the form and substance of dispositions. In truth, however, courts have placed few limits on settlement-by-disposition. Only the most extraordinary circumstances will rebut the operative presumption that property dispositions are valid constitutional settlements. Moreover, as during the civil rights era, courts have focused primarily on the specifics of the bidding process and private property concerns, such as the retention of future interests, rather than on the public obligations officials owe with respect to the subject properties. In a few cases, officials have avoided establishment difficulties by taking or publicizing property rather than privatizing it. Although such settlements might be viewed as more democratically legitimate given the public obligations that apply in the takings context, as we shall see, there may be reasons to question their legitimacy as well. Like all other powers, eminent domain authority is limited by constitutional liberties. In sum, recent establishment cases generally have been as ad hoc and private-law-focused as the civil rights era disposition cases were. They have provided no overarching framework for considering the constitutional and democratic validity of settlement-by-disposition.

Part III examines settlement-by-disposition in the First Amendment speech and assembly context. The Supreme Court has never decided a case involving the lease, sale, closure, or other disposition of a traditional public forum. At the margins, the legitimacy of settlement-by-disposition in the speech and assembly context would seem to be relatively clear. For example, as in other contexts, mere leases of public forum properties will not automatically extinguish all constitutional claims. Moreover, officials pre-

[18] *See infra* text accompanying notes 129–31.

sumably cannot sell or otherwise dispose of public forum properties in a purposeful effort to suppress certain speakers or speech. In other contexts, however, courts have not offered a consistent and coherent framework for assessing settlement-by-disposition. Some members of the Court have indicated that the First Amendment does not prohibit officials from selling, physically altering, or otherwise disposing of traditional public forum properties.[19] In apparent reliance on that understanding, some lower courts have upheld dispositions so long as title formally passes to a private owner. As in the equality and establishment contexts, however, other courts have adopted a functional approach under which even some formally privatized properties may remain subject to First Amendment speech and assembly limitations. Courts using a functional approach, however, have not offered any convincing justification for requiring officials and private owners to consider First Amendment speech and assembly limitations despite the formal transfer of title and ownership. Finally, as in the establishment context, governments have purported to settle free speech claims by publicizing or adopting private property located in public fora. The government speech doctrine has become a form of settlement-by-disposition that may reallocate space and speech rights in public fora.

Part IV synthesizes the examination of settlement-by-disposition in the equality, establishment, and speech contexts. In each context, the government's power to dispose of properties conflicts with constitutional liberties that are intricately intertwined with or affected by disposition of those properties. History and a close examination of the cases demonstrate that a simple rule either permitting or forbidding this particular form of "workaround" or settlement in all cases is not viable.[20] However, the ad hoc approach that has prevailed since the civil rights era has failed to provide a coherent framework for considering the constitutional and democratic legitimacy of settlement-by-disposition. Ultimately, the legitimacy of settlement-by-disposition should not turn narrowly on the specific terms of conveyance, including possession of title, preservation of future interests, the scope of access easements, and other private property matters. Governments are not typical property owners. The assets involved are not ordinary properties subject mainly to private property law rules. Rather, these properties are critical constitutional assets. They are held subject to a public trust that imposes constitutional and democratic limits on their disposi-

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[19] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 699–700 (1992) (Kennedy, J., concurring) (noting that "in some sense" governments always retain the authority to sell or close a public forum).

[20] *See generally* Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503–04 (2009) ("Constitutional workarounds . . . occur only if the Constitution is in some sense at war with itself: One part of the text prohibits something, other parts of the text permit it, and the Constitution itself does not appear to give either part priority over the other." (footnotes omitted)). The proposed settlements examined in this Article are not technically "workarounds" as Tushnet defines that term, but they do involve a similar tension between political pressures and constitutional commitments.

tion.[21] Pursuant to this trust, public officials owe fiduciary duties of fair dealing, preservation, and compliance with constitutional covenants. It is these public obligations, rather than private law principles, that define the constitutional boundaries of settlement-by-disposition. The trust obligations apply whether the disposition is accomplished through private property mechanisms or through invocation of public means such as takings. Although courts ought to have the public trust duties in mind when reviewing settlement-by-disposition and deciding whether to enforce certain duties, the obligations apply whether or not courts are able or even asked to enforce them. Ultimately, the public trust imposes upon public officials the obligation to enter settlements that are constitutional in the sense that they are based upon valid trust purposes, comply with judicial decrees, and respect minority rights.

I. EQUALITY AND CIRCUMVENTION-BY-DISPOSITION

Racial segregation was a massive and all-encompassing spatial enterprise.[22] By law and local custom, people of color were separated from whites across the municipal landscape. Places of recreation and repose, including public parks, were subject to de jure and de facto segregation.[23] From the 1950s to the 1970s, equal access to public properties and facilities was a central claim of civil rights advocates. Persons of color who could not enjoy public schools, parks, swimming pools, and golf courses on an equal basis with whites did not enjoy equal protection under the Fifth and Fourteenth Amendments. Premised on the fundamental right to equality, *Brown v. Board of Education*[24] was the first in a line of cases that started with the desegregation of public schools but led to the extension of *Brown*'s desegregation mandate to other public properties, including parks and swimming pools.[25] As discussed in this Part, rather than integrate these facilities, local and state officials frequently sought to extinguish equality claims by selling, closing, or otherwise disposing of them. The judiciary

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[21] *See, e.g.*, Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (observing that traditional public fora are held in trust by government for the benefit of the people).

[22] *See* DELANEY, *supra* note 1, at 96 (describing public and private racial segregation as "a process of fanatical hyperterritoriality").

[23] A 1957 Montgomery, Alabama ordinance was typical. The ordinance made it a misdemeanor, subject to fine and imprisonment, "for white and colored persons to enter upon, visit, use or in any way occupy public parks or other public houses or public places, swimming pools, wadding [sic] pools, beaches, lakes or ponds except those assigned to their respective races." MONTGOMERY, ALA., CODE § 21-57 (1957), *quoted in* Gilmore v. City of Montgomery, 417 U.S. 556, 558–59 (1974) (alteration in original).

[24] 347 U.S. 483 (1954). The Court held that denial of access to critically important public school facilities stigmatized students of color. *See id.* at 494.

[25] *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526, 539 (1963) (enforcing injunction requiring desegregation of public recreational facilities); Dawson v. Mayor of Baltimore, 220 F.2d 386, 387 (4th Cir. 1955) (ordering desegregation of public beaches and bathhouses), *aff'd*, 350 U.S. 877 (1955).

was thus squarely confronted with a conflict between local power to dispose of public properties and civil liberties. The civil rights era was obviously a unique period, and we ought not to extrapolate too broadly from the courts' experience with settlement-by-disposition during this era. However, important lessons regarding the nature of constitutional liberties and the lawful boundaries of settlement-by-disposition can be drawn from the courts' first sustained analysis of this practice.

A. Devise and Divestment—The Baconsfield Saga

The Supreme Court first addressed the constitutional limits of settlement-by-disposition in a pair of cases involving a devise under the will of U.S. Senator Augustus O. Bacon.[26] Since they represent the Court's first thorough consideration of settlement-by-disposition and establish the basic contours of the debate, these cases are worth considering in some detail.

Senator Bacon had devised a tract of land in Macon, Georgia (Baconsfield) to the City of Macon and its mayor.[27] According to the devise, the land was to be used as "a park and pleasure ground" for white people only.[28] If the city ever determined that it could not maintain Baconsfield as a segregated park, the property was to revert to Senator Bacon's heirs.[29] Baconsfield was to be maintained under the control of a seven-member board of managers, each of whom was required to be white.[30] Macon officials maintained the park as a segregated facility for many years, but, in time, blacks were permitted to use the park.[31] Members of the board filed suit, asking that the city be removed as trustee.[32] Over the constitutional objections of several black individuals, the city resigned as trustee, seemingly divesting itself of any involvement with the property.[33] In order to prevent failure of the trust, a Georgia court appointed three private individuals as new trustees.[34] The Georgia Supreme Court upheld the appointment.[35]

In an opinion by Justice Douglas, the Supreme Court held in *Evans v. Newton* that the city's resignation as trustee and the subsequent appointment of private trustees did not settle the Fourteenth Amendment claims.[36] Given the city's longstanding maintenance of the park and the tax exemption granted to it, the Court stated that the "momentum it acquired as a pub-

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[26] *See* Evans v. Abney, 396 U.S. 435 (1970); Evans v. Newton, 382 U.S. 296 (1966).
[27] *Newton*, 382 U.S. at 297.
[28] *Id.*
[29] *Abney*, 396 U.S. at 436.
[30] *Newton*, 382 U.S. at 297.
[31] *Id.*
[32] *Id.* at 297–98.
[33] *Id.* at 298.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 302.

lic facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees."[37] City officials, said the Court, continued to be "entwined" in the management, maintenance, and control of the park.[38] Thus, the mere substitution of private trustees had not rendered the park a private facility.[39] The Court went on to note that under the developing state action doctrine, operating and maintaining a park of this character could be considered a "public function," thus subjecting the private trustees' actions to Fourteenth Amendment scrutiny.[40] In any event, the city's mere resignation as trustee did not achieve a constitutional settlement. Wherever formal title may lie, the Court held, the park still retained its public character.[41] If they were to manage the park, public officials would have to integrate it.

The Baconsfield saga did not end with the Court's decision in *Newton*, however. The Georgia courts held that, in light of *Newton*'s mandate that the park could no longer be maintained on a segregated basis, the trust had failed.[42] In light of this failure, the park property reverted to Senator Bacon's heirs.[43] In order to effectuate the testator's intent, the heirs planned to close the park altogether rather than integrate it.[44] The same plaintiffs who had sought access to the park in *Newton* now claimed that the courts should have applied the *cy pres* doctrine to amend the terms of the will by striking the racial restrictions, thus opening the park to all without regard to race.[45] The failure to do so, they claimed, resulted in maintenance of a segregated facility in violation of the Equal Protection Clause.[46]

Justice Black, writing for the Court in *Evans v. Abney*, appeared somewhat sympathetic to this claim: "When a city park is destroyed because the Constitution requires it to be integrated, there is reason for everyone to be disheartened."[47] Justice Black also said that "federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated."[48] Nevertheless, in *Abney* the Court up-

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[37] *Id.* at 301.

[38] *See id.* (noting that the park was "swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only").

[39] *See id.*

[40] *Id.* at 301–02; *see also* Terry v. Adams, 345 U.S. 461, 469–70 (1953) (applying Fifteenth Amendment scrutiny to the administration of elections by a private club); Marsh v. Alabama, 326 U.S. 501, 508–09 (1946) (applying First and Fourteenth Amendment scrutiny to private company town's restrictions on speech).

[41] *Newton*, 382 U.S. at 302.

[42] Evans v. Abney, 396 U.S. 435, 436 (1970).

[43] *Id.*

[44] *See id.* at 444 (noting that state courts had interpreted Senator Bacon's will as "embodying a preference for termination of the park rather than its integration").

[45] *See id.* at 439.

[46] *See id.* at 436–37, 440.

[47] *Id.* at 443.

[48] *Id.* at 443–44.

held Senator Bacon's apparent preference that the park be closed rather than integrated.[49] Foreshadowing future property disposition cases, the Court said that *Abney* was not a case "in which a city holds an absolute fee simple title to a public park and then closes that park of its own accord solely to avoid the effect of a prior court order directing that the park be integrated as the Fourteenth Amendment commands."[50] The Court was not prepared, said Justice Black, to declare that even this apparent act of circumvention would necessarily be unconstitutional.[51] Here, the Court stated, any "discriminatory motivation" had been injected not by any government actor but by the testator and his heirs.[52] Nor, said the Court,[53] was the case controlled by *Shelley v. Kraemer*,[54] which invalidated judicial action affirmatively enforcing a private scheme of restrictive residential covenants.[55] The Court held that the effect of the Georgia Supreme Court decision "eliminated all discrimination against Negroes in the park by eliminating the park itself."[56] Thus, any loss occasioned by closure of the park was shared equally by blacks and whites.[57]

The *Abney* majority construed the closure of Baconsfield as merely the unfortunate result of private racial discrimination. Justice Brennan, in dissent, saw the case very differently. He described the discriminatory closing of Baconsfield as "permeated with state action," including express state statutory authorization of discriminatory devises, the city's participation in an agreement that provided for a reversion to private heirs in the event the park could not be maintained as a segregated facility, the city's maintenance of the park as a segregated facility, and the state court's enforcement of the racial restriction.[58] According to Justice Brennan, "No record could present a clearer case of the closing of a public facility for the sole reason that the public authority that owns and maintains it cannot keep it segregated."[59] According to Justice Brennan, although it would be permissible to close a public park owing to expense or superfluousness, "under the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility."[60] The closing of Baconsfield, he con-

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[49] *Id.* at 444.
[50] *Id.* at 445.
[51] *See id.* ("assuming *arguendo*" that such a scenario would violate the Equal Protection Clause).
[52] *Id.*
[53] *Id.*
[54] 334 U.S. 1 (1948).
[55] *Id.* at 20; *see also Abney*, 396 U.S. at 445.
[56] *Abney*, 396 U.S. at 445.
[57] *See id.* at 446.
[58] *Id.* at 454–55 (Brennan, J., dissenting).
[59] *Id.* at 452.
[60] *Id.* at 453.

tended, "conveys an unambiguous message of community involvement in racial discrimination" that stigmatized blacks residing in the community.[61]

The Baconsfield saga demonstrates some of the core difficulties attending judicial review of settlement-by-disposition. On the one hand, official divestment would appear on the surface to be an appropriate means of settling equality claims relating to the subject property because the state would have fully divested itself of any involvement in the segregation of the park. On the other hand, courts must always be mindful of the dangers of circumvention and sham transactions. *Newton* showed that the Court was willing to look behind a formal disposition in order to test the bona fides of public divestment in a critical public facility. *Abney* demonstrated the limits of that intervention, even where the result was the closure of a former public park rather than its previously ordered integration. The decision effectively allowed the state to facilitate segregation while disclaiming any responsibility for it. Ultimately, the Court accepted the fiction that the closure affected whites and blacks equally. Note that during the Baconsfield saga, the Court carefully avoided deciding whether officials could simply close a public property, either in response to a judicial integration order or because they preferred closure to compliance with constitutional obligations. That question would arise in future equality cases, as well as in more contemporary First Amendment disputes.[62]

B. Leases of Public Property

Abney was a rather unusual case, insofar as the city's involvement stemmed from the terms of a private devise. More commonly, states and localities owned the subject properties from the outset. Rather than integrate these public properties, officials sought to extinguish equality claims by privatizing them. During the civil rights era, local officials faced with desegregation orders or political pressure to integrate frequently leased public properties to private lessees. Public officials claimed that the leases extinguished any constitutional obligation to integrate. Plaintiffs argued that the leases were sham or pretextual transactions, entered into to avoid desegregation decrees or with the intent that segregation continue unabated in violation of the Equal Protection Clause.

Not surprisingly, in light of *Brown*'s specific command, courts tended to view leasing arrangements involving public school facilities with particular skepticism.[63] For example, the en banc Fifth Circuit disapproved of one

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[61] *Id.* at 453–54.

[62] *See* discussion *infra* Parts I.D., III.D.

[63] The root problem was that localities subject to desegregation orders often undermined school integration and encouraged "white flight" by leasing or selling public school buildings and facilities to all-white academies. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455, 457 (1973) (noting a dramatic rise in private schools in Mississippi following desegregation orders).

such leasing arrangement in *United States v. Mississippi*.[64] A school board had leased an unused public school facility to a civic association, which in turn entered into a sublease with the Sylvarena Baptist Academy, a private segregated school.[65] The sublease, which was for a term of twenty-five years, provided that the Academy would pay an annual rent of five dollars to the school's superintendent.[66] The United States Department of Justice filed a complaint seeking to have the sublease set aside on the ground that it impeded a school desegregation order.[67] The district court found that the lease between the school board and the association was entered into in good faith, without any knowledge by the school board that the building would be used for an all-white school.[68] The sublease was a different matter. The court found that it had been entered into largely in response to local parental objections to desegregation of the public schools.[69]

Disagreeing with a panel decision that had allowed the sublease but enjoined the private school from making admissions decisions based on race, the Fifth Circuit sitting en banc set aside the sublease.[70] The court explained that local school districts that attempt to "continue or re-establish the previously discarded segregated order through private means [would be] prohibited from receiving government largesse in their endeavors."[71] It held that the school board had facilitated and encouraged the operation of a private segregated school facility by approving the sublease, receiving rent under the lease, and retaining a reversionary interest in the property.[72] Whatever the school board's motive or purpose, the court concluded that the arrangement had culminated in an "illicit union of the state with segregated education" that had emanated directly from public opposition to desegregation.[73] In ordering that the sublease be set aside and the transaction unwound, the Fifth Circuit found it particularly noteworthy that, as in a prior Supreme Court case overturning a city's aid to segregated private schools, the sublease "operated directly to contravene an outstanding school desegregation order."[74] The court also noted the Supreme Court's earlier admonition, in *Cooper v. Aaron*,[75] that the equal protection rights of children to attend desegregated schools could not be nullified directly or indi-

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[64] 499 F.2d 425, 428 (5th Cir. 1974) (en banc).
[65] *Id.* at 427.
[66] *Id.* at 428.
[67] *Id.* at 427.
[68] *Id.* at 430.
[69] *Id.*
[70] *Id.* at 430, 438.
[71] *Id.* at 428.
[72] *Id.* at 432.
[73] *Id.* at 435.
[74] *Id.* at 436 (quoting Gilmore v. City of Montgomery, 417 U.S. 556, 568 (1974)).
[75] 358 U.S. 1 (1958).

rectly "through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"[76]

Skepticism with regard to leasing arrangements extended to recreational and other public properties as well. An early district court opinion addressing desegregation of public pools summarized what would become the prevailing sentiment:

> It is not conceivable that a city can provide the ways and means for a private individual or corporation to discriminate against its own citizens. Having set up the swimming pool by authority of the Legislature, the City, if the pool is operated, must operate it itself, or, if leased, must see that is it operated without any such discrimination.[77]

Thus, civil rights era courts held that officials could not avoid constitutional obligations to integrate city golf courses, courthouse cafeterias, and public parks by simply leasing the properties to private individuals or interests.[78]

In sum, civil rights era courts generally agreed that mere leases of public properties like schools, golf courses, swimming pools, and courthouse cafeterias were not sufficient to extinguish constitutional claims. Unlike the complete divestment in *Abney*, municipalities continued to have a stake in these private enterprises. Although the lease agreement itself was generally sufficient evidence of state involvement, in most cases municipalities were more deeply involved in the joint enterprise.[79] In these cases, courts were not willing to permit public officials to use a private property law mechanism to undermine the constitutional guarantee of equal access to public properties. The courts generally saw leases for what they often were—efforts to circumvent or avoid the obligation to desegregate public properties.

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[76] United States v. Mississippi, 499 F.2d at 437 (quoting *Cooper*, 358 U.S. at 17).

[77] Lawrence v. Hancock, 76 F. Supp. 1004, 1009 (S.D. W. Va. 1948).

[78] *See* City of Greensboro v. Simkins, 246 F.2d 425, 426 (4th Cir. 1957) (upholding an injunction prohibiting a city golf course that was under lease to a private golf club from denying access to blacks); Derrington v. Plummer, 240 F.2d 922, 926 (5th Cir. 1956) (upholding an injunction prohibiting a county from renewing or extending the lease of a cafeteria located in a county courthouse to a vendor that refused to serve black customers); Dep't of Conservation & Dev. v. Tate, 231 F.2d 615, 616 (4th Cir. 1956) (per curiam) (upholding a decree requiring that a leased park be operated on a nonsegregated basis, whether or not it could be so operated profitably). This principle extended to arrangements that, either by express terms of the lease or a requirement that the lessee comply with local laws forbidding integration, required lessees to discriminate. *See* Recent Developments, *Transfer by City Held Effective to Avoid Finding of State Action*, 16 STAN. L. REV. 197, 199 n.9 (1963) (collecting cases).

[79] *See, e.g.*, *Plummer*, 240 F.2d at 925–26 (noting that the county not only had provided the courthouse building and services, but also had been aware of the private vendor's discriminatory practices prior to the lease). As the Supreme Court clarified five years after *Plummer*, the leased cafeteria was a classic symbiotic arrangement between the state and a private actor. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 723–26 (1961) (holding that a coffee shop and the state had entered into an interdependent relationship, such that the private shop owner's racial discrimination constituted state action).

C. Sales, Donations, and Other Transfers

Owing to the fact that leases were not generally considered adequate divestments or settlements, officials frequently turned to sales, donations, and other transfers of title. As in the leasing context, some of these dispositions were direct responses to pending desegregation decrees. Others were reactions to local community pressure to resist integration. The question posed by these dispositions was whether the transfer of title extinguished any equality obligations with respect to the subject properties.

As in the leasing context, courts were quite skeptical of local efforts to sell or otherwise transfer public school property to private academies or institutions. This was true even where the property was characterized by the government as surplus, abandoned, or otherwise not financially viable. In *Wright v. City of Brighton*, for example, the city initially planned to lease, but later sold, an abandoned school building to the Hoover Academy, a private, all-white school.[80] The record established that local officials, who at the time were operating under a desegregation order, were fully aware that the school property would be used to house a segregated private educational facility.[81] The Fifth Circuit rescinded the sale on the grounds that the city was facilitating and encouraging the establishment of a private segregated academy, thereby undermining ongoing efforts to desegregate the local schools.[82] The disposition was prohibited in *Wright* even though the property had been sold rather than leased, the city was no longer involved in its operation, the city provided no financial or other assistance to the private facility, and the city had retained no future interest in the property.[83] The *Wright* court readily conceded that it could find no precedent finding state involvement on similar facts.[84] Such support was not necessary, said the court, since plaintiffs were challenging not the discriminatory admissions policies of the academy but the actual *sale* itself.[85]

In holding that the sale violated the Equal Protection Clause, *Wright* relied on both its purpose and effect. As to purpose, the court found compelling the uncontroverted evidence that the city knew the purchaser would operate a segregated facility.[86] Issuing its opinion just prior to *Palmer v. Thompson*, in which the Supreme Court held that motive alone was not dis-

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[80] 441 F.2d 447, 448 (5th Cir. 1971). A district court judge had strongly suggested that under well-established law, a similar lease arrangement would have violated the Equal Protection Clause. *See id.* at 448–49.

[81] *Id.* at 452.

[82] *Id.* at 453.

[83] *Id.* at 449–50.

[84] *Id.* at 450.

[85] *Id.*

[86] *Id.* at 451.

positive in property disposition cases,[87] the Fifth Circuit condemned the city's motives in the strongest terms: "The transformation from a leasing arrangement to a sale is almost sardonic in its cynicism and makes it obvious that the city was completely aware of the buyer's racial policies at the time the sale was consummated."[88] In assessing the city's motive or purpose, the *Wright* court reviewed recent desegregation history. It took into account both the civil rights context in general and the particular year leading up to the sale (1969), which it described as "a febrile and frenetic year of desegregation freighted with plans for compliance, court decrees, and schemes of evasion."[89] The court emphasized that courts were hardly unaware of local resistance to desegregation and admonished officials that judges ought not to be considered "naively unsophisticated" when it came to local evasion and subterfuge.[90]

The court also relied on the practical effect of the city's sale of the property, which it said was to further segregation in the schools.[91] Acknowledging the symbolic significance of the subject property, the *Wright* court noted that the operation of an all-white school in a formerly public school building would "place a special burden and a badge of opprobrium on the Negro citizens of Brighton, Alabama."[92]

One year after *Wright*, the Fifth Circuit decided *McNeal v. Tate County School District*, another case involving the sale of public school property.[93] In *McNeal*, the local school board advertised for bids on an unused school that had been closed for educational and economic reasons.[94] The highest bid—indeed the only bid—was submitted by a private, segregated academy.[95] The school board sold the property to the academy and executed a quitclaim deed.[96] In contrast to the facts in *Wright*, however, the school board in *McNeal* did not know at the time of the sale that the property would be used for a private segregated school (although they were aware of a local movement to establish private segregated schools).[97] The district court found that the school board had acted in good faith and in accordance with the law in effectuating the sale, had received adequate consideration,

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[87] *See* Palmer v. Thompson, 403 U.S. 217, 224, 226 (1971) (holding that the closing of public pools did not violate the Equal Protection Clause).

[88] *Wright*, 441 F.2d at 452.

[89] *Id.*

[90] *Id.* at 453; *see also* Wright v. Baker County Bd. of Educ., 501 F.2d 131, 134–35 (5th Cir. 1974) (rescinding the sale of a surplus public school building to a private segregated academy specifically established to counteract the effects of court ordered desegregation).

[91] *Wright*, 441 F.2d at 451.

[92] *Id.* at 452.

[93] 460 F.2d 568 (5th Cir. 1972), *modified on reh'g*, 460 F.2d 574 (5th Cir. 1972) (per curiam).

[94] *Id.* at 570.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 570–71.

and had lawfully advertised the sale.[98] Moreover, the district court found that the sale was not entered into in response to an integration order and that the operation of the private academy would not interfere with the effort to desegregate the school system.[99]

McNeal initially reversed the district court and held that rescission of the sale was the appropriate remedy.[100] However, perhaps owing to the absence of bad faith and the district court's finding that the sale would not interfere with the desegregation of the local school system, the court held on rehearing that the sale should be upheld but the private academy should itself be required to admit applicants without regard to race.[101] Thus, although the sale was not considered a sham, the private purchaser's future use of the school facility was limited by the constitutional right of schoolchildren to attend without regard to race. The court did not explain the basis for imposing this continuing obligation on a private purchaser. One can surmise, however, that it stemmed from the school board's obligation to maintain an integrated school system.[102] Although it permitted the sale, on rehearing the *McNeal* court cautioned that future sales of public school property "should be scrutinized with the utmost care and caution to the end that public school property shall not be converted to use by private schools which engage in forbidden discriminatory practices."[103]

During the civil rights era, courts were also called upon to review the constitutionality of sales involving recreational properties. Some desegregation decrees involving such properties contained language forbidding disposition of the subject properties except by "bona fide sale."[104] The provisions were inserted to prevent evasion of desegregation orders.[105] Whether a sale or other disposition was bona fide or sham was a fact-intensive inquiry. Courts looked at all of the circumstances of the sale, including the terms of the purchase agreement and the timing of the transaction.

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[98] *Id.* at 569; *id.* at 572, 573 (Gewin, J., dissenting).

[99] McNeal v. Tate County Sch. Dist., No. EC7029-S, 1970 WL 118111, at *5–6 (N.D. Miss. Aug. 19, 1970).

[100] *See McNeal*, 460 F.2d at 570–71.

[101] *Id.* at 574; *accord* United States v. Mississippi, 499 F.2d 425, 432 (5th Cir. 1974) (en banc) (opining that the remedy in *McNeal* was based on the court's findings that the school board acted in good faith and that the sale did not appear to interfere with desegregation).

[102] *McNeal*, 460 F.2d at 571–72 (noting that school boards "are charged with the *affirmative* duty to take whatever steps might be necessary to bring about a unitary educational system which is free from racial discrimination").

[103] *Id.* at 574–75.

[104] *E.g.*, City of Greensboro v. Simkins, 246 F.2d 425, 426 (4th Cir. 1957) (per curiam).

[105] *E.g.*, *id.*

Some courts held that public property dispositions were collusive schemes designed to avoid integration.[106] Others refused to validate a proposed settlement-by-disposition even where no evidence of bad faith was present. For example, in *Hampton v. City of Jacksonville*, the Fifth Circuit held that the sale of two municipal golf courses to private purchasers did not extinguish the equal protection claims of prospective black patrons who were denied the right to play based on race.[107] Just one day before an injunction prohibiting it from operating the courses on a racially segregated basis was to take effect, the city closed the golf courses.[108] A few months later, the city council passed an ordinance authorizing the sale of the two properties.[109] The council then took bids on terms the court described as "very favorable to any prospective purchaser."[110] The purchase prices did, however, appear to reflect the properties' fair market value, and the court noted that there was no contention that the sales were made in bad faith; in other words, there were no "side agreements or understandings between the City and the purchasers to the effect that the purchasers would operate the golf courses on a segregated basis if they acquired title to them."[111]

Nevertheless, *Hampton* held that state action remained present even after the purchases were effectuated.[112] That conclusion was based almost entirely on the presence in both purchase agreements of a reversionary clause,[113] which provided that in the event the property was used for any purpose other than a golf course it would revert to the city or its successors.[114] The court acknowledged that the city was entitled to discontinue operation of its golf courses "if it decide[d] for any reason that it no longer wishe[d] to [run them]."[115] But it was not permitted, the court said, to impose an absolute obligation on the present owners to operate a golf course, thereby maintaining what the court characterized as "complete present con-

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[106] *See, e.g.*, Smith v. Young Men's Christian Ass'n of Montgomery, Inc., 462 F.2d 634, 638–41, 647–48 (5th Cir. 1972) (affirming a district court decision that the YMCA, which had purchased pools and other recreational facilities from the city just prior to the entry of a judicial integration order, was a state actor subject to constitutional guarantees of equality).

[107] 304 F.2d 320, 323 (5th Cir. 1962).

[108] *Id.* (Gewin, J., dissenting).

[109] *Id.*

[110] *Id.* at 320 (majority opinion). By this the court seemed to mean that the sales were effectuated based on relatively small down payments and extended payment periods. *Id.*

[111] *Id.* at 321.

[112] *See id.* at 323.

[113] *Id.* ("We conclude that the inclusion of the reversionary clause in these conveyances constituted the purchasers of the two golf courses state agents, within the purview of the Fourteenth Amendment.").

[114] *See id.* at 320–21.

[115] *Id.* at 322. It is likely that the court did not mean literally "any" reason, but valid and race-neutral reasons, such as expense.

trol" of the property.[116] According to the court, this would be no different from entering a long-term lease for a particular purpose with a right of cancellation should that purpose not be carried out—a situation courts would have no trouble characterizing as state action.[117] Although the opinion certainly was couched in the language of state action, its tenor, including the reference to the favorable terms of purchase, strongly suggested that the *Hampton* court viewed the sale as a sham or pretext. In relying heavily on the presence of a future interest in the purchase agreements, the court seemed to be stretching the state action doctrine to prevent circumvention of the equality guarantee.

This sort of careful judicial parsing of disposition instruments was not uncommon during the civil rights era. In *Eaton v. Grubbs*, for example, the Fourth Circuit held that the James Walker Memorial Hospital, which the city of Wilmington, North Carolina had donated to a private board, remained a state actor subject to the Equal Protection Clause.[118] Black physicians and their patients had sued the hospital for denying them admission to staff membership and treatment facilities based on their race.[119] Six years earlier, in a case involving the same parties, the Fourth Circuit had held that the conveyance of the hospital to the board had extinguished the equal protection claims of the physicians and patients.[120] In *Grubbs*, however, the court made an independent examination of the relationship between the city and the hospital.[121] The court found that "[p]erhaps the most significant evidence of the state's involvement in the hospital's affairs is the presence of the reverter clause in the deed."[122] The reverter clause in *Grubbs* provided that in the event the property was no longer used as a hospital, it would revert to the city.[123] While the court viewed the reverter clause as the "most significant" evidence of the city's control of the hospital and quoted

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[116] *Id.* As the dissenting opinion noted, however, a reversionary interest is not commonly considered a present estate, but rather the possibility of an estate sometime in the future. *Id.* at 327–28 (Gewin, J., dissenting).

[117] *Id.* at 322–23 (majority opinion). In the alternative, like the Supreme Court in *Newton*, the *Hampton* court relied on a public function theory of state action. The operation of municipal golf courses, the court reasoned, is the performance of a state function; it is, the court opined, the equivalent of granting a franchise for public transportation to a local bus company. *Id.*

[118] 329 F.2d 710, 711–12, 715 (4th Cir. 1964).

[119] *Id.* at 711.

[120] Eaton v. Bd. of Managers of the James Walker Mem'l Hosp., 261 F.2d 521 (4th Cir. 1958). The court noted that after the conveyance, the hospital was neither owned nor controlled by the municipality and received only 4.5% of its total income from public funds. *Id.* at 527.

[121] *Grubbs*, 329 F.2d at 712. In doing so, rather than affording the prior case res judicata effect, the court noted that both Supreme Court and circuit precedent had changed. *Id.* Among other things, the Supreme Court had decided *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), which clarified that the state action inquiry was fact-intensive and that courts must look closely at the mutually beneficial relationships involving state and private actors. *See Grubbs*, 329 F.2d at 712.

[122] *Id.* at 713.

[123] *Id.*

Hampton with approval,[124] there was also substantial additional evidence of state involvement. Among other things, the hospital was subject to detailed city regulations and the city continued to provide for most of its operational needs.[125] In essence, as in *Hampton*, the court detected an effort by the state to circumvent desegregation obligations without total divestment of public interest and control.

Not all civil rights era courts took such a jaundiced view of settlement-by-disposition, however. *Hampton* and *Grubbs* suggested that a good faith sale, particularly one effectuated without a reversionary clause, might be constitutional. Moreover, even in situations where there was strong evidence that officials were seeking to circumvent desegregation decrees through sales or donations, not all courts were willing to hold that the proposed dispositions were shams. For example, in *Wood v. Hogan*, a district court held that the transfer of a hospital from a municipal authority to a private corporation settled equal protection claims by patients that the hospital had segregated them by race.[126] This was so, according to the court, even though the transfer was plainly effectuated to avoid a desegregation order.[127] Other courts, while purporting to engage in close scrutiny of property dispositions, also upheld sales and other dispositions that appeared to be at least as questionable as those invalidated in *Hampton* and *Grubbs*.[128]

Civil rights era courts were undoubtedly aware that state and local officials sometimes, perhaps even often, used private property mechanisms such as sales and donations to avoid equality obligations. However, they were also mindful of local officials' traditional power to dispose of public properties. In light of *Brown*, courts were most likely to invalidate sales or donations of school properties. Even when the disposition was allowed, moreover, courts sometimes imposed equality obligations on the private purchasers of school properties. The treatment of recreational properties was less uniform. In assessing the bona fides of these dispositions, some courts invalidated even facially valid sales and donations on the thinnest of grounds—including the mere retention of a future property interest by the state or locality. Other courts seemed to be satisfied that constitutional requirements had been met so long as title formally changed hands. Although courts were gaining an education with regard to local civil rights evasion, judicial review of sales and donations of public properties tended to be a fact-specific and ad hoc reaction to local tactics. The decisions generally

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[124] *See id.* at 714 (quoting Hampton v. City of Jacksonville, 304 F.2d 317, 322 (5th Cir. 1962)).

[125] *Id.* at 714–15.

[126] 215 F. Supp. 53 (W.D. Va. 1963).

[127] *See id.* at 56. Interestingly enough, the same judge earlier had endorsed patient segregation on the ground that it would benefit the health of the patients. *See* Wood v. Vaughn, 209 F. Supp. 106, 116 (W.D. Va. 1962).

[128] *See, e.g.*, Tonkins v. City of Greensboro, 276 F.2d 890, 891–92 (4th Cir. 1960) (upholding the sale of a municipal pool at public auction to a corporation formed with the assistance of a city official who had opposed integration of the pool).

did not convey the sense that public officials were different from ordinary sellers, nor, outside the schools context, did they acknowledge the strong community resistance to desegregation and the powerful symbolism that segregated privatized properties conveyed.

D. Closures

As discussed, sales, donations, and other transfers of public property to private owners did not always settle equal protection concerns. If all other dispositions failed, municipalities had one more option. Governments are not constitutionally required to own or maintain public properties and facilities. Thus, officials appear to have the option of closing the public property or facility altogether. Indeed, *Abney* suggested that closing a public park to all residents might satisfy the equality guarantee—perhaps even if the closure followed an integration order.[129] Although closure was a drastic disposition in many respects, particularly since it would deprive entire communities of the use of certain public properties, officials sometimes resorted to closure in an effort to circumvent equal access obligations.

Closure of public school properties posed the gravest threat to desegregation. During the 1950s and 1960s, both the lower courts and the Supreme Court encountered public school closure laws. Lower courts held that officials could not constitutionally close *only* those schools subject to desegregation orders, while maintaining other facilities of a like kind.[130] In 1961, the Supreme Court affirmed a lower court judgment that held unconstitutional several Louisiana laws empowering the governor to close any school ordered to integrate, and to close *all* state schools if *any* were integrated.[131] Three years later, in *Griffin v. County School Board*, the Supreme Court held that Prince Edward County could not constitutionally close its public schools while contributing financial support to private segregated white schools that took their place.[132] Thus, it was made clear that maintenance of dual school systems violated the Equal Protection Clause. The courts held that these purported settlements offended the prohibition on dual school systems and would have had the purpose and effect of discriminating based on race.

Although the threat of school closures was present, the Court never ruled directly on whether a state or locality could simply shutter all of its public schools. In the end, although many Southern officials threatened to

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[129] Evans v. Abney, 396 U.S. 435, 445 (1970).

[130] *See, e.g.*, Allen v. County Sch. Bd., 207 F. Supp. 349 (E.D. Va. 1962); James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959).

[131] Orleans Parish Sch. Bd. v. Bush, 365 U.S. 569 (1961) (per curiam), *aff'g* 187 F. Supp. 42 (E.D. La. 1960).

[132] 377 U.S. 218, 231–34 (1964).

close the public schools, none actually exercised this drastic option.[133] Had they done so, the Court would have been faced with a ripe conflict between two fundamental principles: On the one hand, *Brown* guaranteed equal access to education, but on the other hand, the Constitution did not require that states maintain public school systems at all. As Michael Klarman has observed, one of the primary reasons Southern officials did not carry through with their public closure threats is that white Southerners, particularly parents with school-aged children, had calculated the costs of closure and were simply not willing to pay them.[134] Democratic limits, most importantly a public unwilling to go along with this gambit, were thus the primary obstacle to this particular form of circumvention-by-disposition.[135]

Closure was a more viable option with regard to other public properties, however. In the 1960s, some lower courts had assumed that municipalities could close recreational facilities, even in the face of a judicial order to desegregate them.[136] The Supreme Court was late in addressing the issue. In *Palmer v. Thompson*, decided in 1971, the Court upheld the decision of the City Council of Jackson, Mississippi, to halt operation of five public swimming pools.[137] The vote to close the pools was taken after a federal district court had declared segregation of the city's recreational facilities to be unconstitutional.[138] Writing for a five-justice majority, Justice Black found that while the closures constituted state action, they did not violate the Fourteenth Amendment.[139]

Justice Black began with the fundamental proposition that "neither the Fourteenth Amendment nor any Act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools."[140] He noted that the district court had accepted the city's explanation that the pools were closed owing to a combination of economic and public safety concerns.[141] Nor was it the case, he said, that in Jackson

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[133] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290–421 (2004) (recounting Southern efforts to gain support for public school closure laws).

[134] *Id.* at 417–19.

[135] *Id.* at 416–19.

[136] *See, e.g.*, Hampton v. City of Jacksonville, 304 F.2d 319 (5th Cir. 1962) (per curiam) (upholding a trial court's refusal to hold the city in contempt for closing public swimming pools after a permanent injunction had been entered ordering that the pools be desegregated); City of Montgomery v. Gilmore, 277 F.2d 364 (5th Cir. 1960) (upholding the closure of city parks under similar circumstances).

[137] 403 U.S. 217, 218–19 (1971). One pool, which the city had leased from the YMCA, was returned to the YMCA and was subsequently operated by it on a segregated basis. *Id.* at 222. Another pool was eventually purchased by Jackson State College. *Id.* The three other city pools were closed down completely. *See id.* at 220. Many other city recreational facilities remained open and were operating on a desegregated basis. *See id.* at 220 n.5.

[138] *Id.* at 219.

[139] *Id.* at 220, 224–26.

[140] *Id.* at 220.

[141] *Id.* at 225.

"whites [we]re permitted to use public facilities while blacks [we]re denied access."[142] The majority claimed the record contained nothing to discredit the city's claim that it had "completely and finally ceased running swimming pools for all time."[143] The city thus was neither involved in the operation of the pools, nor responsible for encouraging those operating the pools to discriminate.[144] In sum, the Court held that the city council had settled or avoided the equality controversy by eliminating the public facility itself.

Palmer has become perhaps best known for the Court's statements concerning judicial review of official motives.[145] Petitioners claimed that Jackson's decision to close the pools was motivated solely by a desire to avoid a judicial integration order.[146] Justice Black flatly (though arguably incorrectly)[147] stated that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[148] The Court relied in particular on *United States v. O'Brien*,[149] a First Amendment case decided three years earlier in which it had emphasized the difficulties inherent in motive analysis.[150] The *Palmer* Court also recast prior decisions, in which motive seemed to be critical to the outcome, as based not on motive but on the actual effects of the laws in question.[151] In the end, the majority accepted the city's race-neutral explanation for the closure.[152] In separate concurrences, Chief Justice Burger and Justice Blackmun both expressed concerns regarding the adoption of a rule "that every public facility or service, once opened, constitutionally 'locks in' the public sponsor so that it may not be dropped."[153]

Justice White wrote a vigorous dissent, joined by Justices Brennan and Marshall, in which he disagreed that the pool closings were racially neutral.

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[142] *Id.* at 220.

[143] *Id.* at 222.

[144] *Id.* at 222–24.

[145] *See* Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 99–102 (discussing the *Palmer* Court's approach to governmental motives). On the subject of legislative motives, see also John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1208–12 (1970), which discusses cases in a variety of doctrinal areas that, beginning in the 1920s, involved the Court in motive inquiries.

[146] *Palmer*, 403 U.S. at 224.

[147] *See* Brest, *supra* note 145, at 99–100 (characterizing prior equal protection cases as turning on legislative motive).

[148] *Palmer*, 403 U.S. at 224.

[149] 391 U.S. 367 (1968).

[150] *See Palmer*, 403 U.S. at 224–25 (citing *O'Brien*, 391 U.S. at 383, 384) (noting the difficulty in ascertaining legislative motive and the futility of invalidating acts based on improper motive).

[151] *Id.* at 225. For example, the Court described *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), in which a racial gerrymander had been invalidated, as a decision based upon the effect that virtually all blacks had been excluded from voting in town elections rather than one based upon the motive of the drafters of the racial gerrymander. *Palmer*, 403 U.S. at 225.

[152] *See Palmer*, 403 U.S. at 226.

[153] *Id.* at 228 (Burger, C.J., concurring); *see also id.* at 229–30 (Blackmun, J., concurring).

He interpreted the pool closings as "an expression of official policy that Negroes are unfit to associate with whites."[154] In contrast to the majority, Justice White was not at all troubled by judicial review of official motives; indeed, he noted that federal civil rights laws often explicitly demand proof of defendants' motive or animus.[155] After describing at some length Jackson's longstanding resistance to desegregation orders in various contexts,[156] Justice White concluded that its economic and public safety rationales were entirely pretextual. City officials had simply determined, he said, that compliance with the desegregation order "would be intolerable to Jackson's citizens."[157] Justice White concluded: "State action predicated solely on opposition to a lawful court order to desegregate is a denial of equal protection of the laws."[158]

Palmer, like *Abney*, demonstrated that there were limits to judicial review of settlement-by-disposition. The outcomes in both cases suggested that so long as they were willing to do without certain facilities, local officials could simply close them to the public. The closure had the effect of extinguishing all constitutional claims of equal access. In so holding, the Court refused to apply the same skepticism to pool closures that it had applied to school closures. In *Palmer*, Justice Black attempted to distinguish the school cases on the grounds that operating the schools was a more important enterprise than operating the public pools and that school boards were not attempting to actually close their schools but to operate dual systems.[159] But the majority did not explain why outright closure, particularly in the face of an integration order, was considered *less* constitutionally problematic than unequal access. Nor, in focusing narrowly on the terms of divestment, did it respond to Justice White's concerns regarding the discriminatory symbolism and disregard of minority rights that resulted from the closure. In the end, *Palmer* allowed public officials to avoid constitutional obligations and judicial integration orders so long as they articulated facially plausible economic or public safety reasons for their actions. Although subsequent doctrinal developments have called *Palmer*'s equal protection analysis into question,[160] the case has never been expressly overruled.

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[154] *Id.* at 240–41 (White, J., dissenting).

[155] *See id.* at 241–42.

[156] *See id.* at 243–50.

[157] *Id.* at 255; *accord id.* at 254 ("[T]here can be no disagreement that the desegregation ruling . . . was the event that precipitated the city's decision to cease furnishing public swimming facilities to its citizens.").

[158] *Id.* at 265.

[159] *Id.* at 221 n.6.

[160] When *Palmer* was decided, the Supreme Court had not yet clarified that intent or purpose was the touchstone of a racial discrimination claim. *See* Washington v. Davis, 426 U.S. 229, 239–40 (1976) (holding that disparate impact alone does not make out an equal protection claim). Today, intent or purpose is the primary focus of an equal protection claim. *See* LAURENCE H. TRIBE, 1 AMERICAN

As this examination of civil rights era cases demonstrates, the conflict between the state's authority to dispose of public properties and the protection of constitutional liberties that depend upon access to them is a long-standing concern. During this period, state and local officials often treated public properties as expendable in the face of equality claims. They disposed of properties to facilitate local majority preferences in favor of segregation. In terms of protecting equal access to public properties, the legacy of the civil rights courts was decidedly mixed. Circumvention-by-disposition was generally thwarted with regard to the schools, but was sometimes permitted with regard to other properties. As they moved from leases to sales to outright closures, courts eventually acceded to officials' dispositions. To be sure, a few courts stretched mightily to hold public officials accountable for what they saw as sham transactions. It ultimately became clear, however, that like any other owner of property states and localities could divest themselves of assets. *Palmer* suggested that even when executed in the face of judicial integration orders, such property divestments might represent legitimate constitutional settlements. In assessing the bona fides of a wide variety of property dispositions, civil rights era courts were sometimes remiss in emphasizing that public officials owed specific duties under the Equal Protection Clause to comply with integration orders, to preserve public facilities, and to protect minority rights to use public properties even in the face of public opposition.

II. PROPERTY DISPOSITION AND ESTABLISHMENT CONTROVERSIES

The civil rights era provided the courts with their first sustained look at settlement-by-disposition. The practice has recently resurfaced in the Establishment Clause context. Public officials have increasingly turned to property dispositions as a means of settling or avoiding establishment claims and controversies. Thus, rather than remove publicly displayed symbols that courts have found to violate the Establishment Clause, officials have privatized the public parcels and symbols. They also have occasionally privatized public forum properties, including public streets, in order to avoid Establishment Clause concerns.[161] In addition, public law mechanisms such as eminent domain have been used to transfer ownership of public properties at the center of establishment controversies.[162] As they did in civil rights era equality cases, courts have struggled to identify the constitutional limits of settlement-by-disposition in the establishment area.

CONSTITUTIONAL LAW 1504 n.23 (2d ed. 1988) (noting that "[a]lthough the formal obituary has not yet been published, *Palmer* has been quietly but unmistakably buried" by *Davis* (citations omitted)).

[161] *See* Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1259–63 (10th Cir. 2005) (upholding the sale of a public easement to a church).

[162] *See* Trunk v. City of San Diego, 568 F. Supp. 2d 1199, 1202, 1218 (S.D. Cal. 2008) (upholding the federal acquisition, through the exercise of eminent domain, of a parcel of land containing a cross to be designated as a national monument).

In *Salazar v. Buono*, its most recent encounter with settlement-by-disposition in the establishment area, the Supreme Court declined to make any "sweeping pronouncements" or announce any "categorical rules."[163]

A. Privatization and Religious Symbols

The constitutional standards relating to displays of religious symbols on public land are notoriously murky. To oversimplify matters, the Supreme Court has indicated that sectarian symbols generally must be displayed along with some secular elements in order to avoid the unconstitutional endorsement of religion under the Establishment Clause.[164] Thus, a statue of the Ten Commandments may not be displayed on its own, but may be included in a display of collected foundational legal and historical documents.[165] The display of unaccompanied religious symbols such as crosses, statues of Jesus Christ, and depictions of the Ten Commandments on public land will generally violate the Establishment Clause. The question then becomes what remedial action must be taken to cure the violation.

Public officials have at least four options when they are faced with a valid objection to the display of a religious symbol on public property or have been ordered by a court to remove the display.[166] First, they can simply remove the symbol,[167] which was the traditional response in such situations.[168] Second, where feasible, officials might alter the public display so that it comports with the Establishment Clause.[169] Third, assuming it can be

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[163] *Buono*, 130 S. Ct. 1803, 1820 (2010).

[164] McCreary County v. ACLU, 545 U.S. 844, 850–51, 874–76 (2005); Van Orden v. Perry, 545 U.S. 677, 684 (2005); County of Allegheny v. ACLU, 492 U.S. 573, 592–94 (1989); Lynch v. Donnelly, 465 U.S. 668, 679–80 (1984).

[165] *See McCreary County*, 545 U.S. at 874 (observing that sacred text may be displayed in the company of other legal or historical documents).

[166] A fifth possible option, adopting the religious symbol as government speech, is discussed below. *See infra* Part III.E.

[167] Some have argued that removal ought not to be ordered by a court where it cannot be done without substantially damaging or destroying the symbol. *See* Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 229–30 (2004).

[168] *See id.* at 186 (noting that "until relatively recently, unconstitutional displays were simply removed from public land in the typical case—a remedy that directly resolved the violation without need for elaborate judicial analysis"). *See generally* Christopher Lauderman, Note, *Building a Fence of Separation: The Constitutional Validity of Land Transfers in Escaping from Establishment Clause Violations*, 65 WASH. & LEE L. REV. 1193, 1201–06 (2008) (discussing cases involving land transfers and religious symbols).

[169] *See, e.g.*, *McCreary County*, 545 U.S. at 850 (considering a Kentucky courthouse's display of the Ten Commandments modified and supplemented with displays of other religious and historical texts to create a collective display purporting to present the foundations for Kentucky's laws). This option may be somewhat questionable after *McCreary County*. There the Court held that McCreary County's original sectarian purpose in erecting a Ten Commandments display was not cured by later secularization of the display. *Id.* at 871–72. But the Court also added that the county's past actions did not "forever taint" any public display of a religious symbol. *Id.* at 873–74. Thus, it appears that where the original purpose was severely tainted, secularization will not suffice. Where a display is not invalidated

done without destroying or substantially damaging the display, officials might relocate the symbol to private property. Lately, however, officials increasingly have resorted to a fourth option: privatizing the underlying property. Rather than remove or relocate sectarian symbols, local and federal officials have sold the public parcels on which they are located to private owners. Officials claim that these dispositions settle any Establishment Clause controversies because they extinguish any anti-establishment obligations with respect to the properties.

As was true during the civil rights era, the cases in this area demonstrate that some courts are aware of the possibility that officials might attempt to circumvent constitutional obligations by disposing of public properties. As the Seventh Circuit stated in *Freedom from Religion Foundation, Inc. v. City of Marshfield*, a formalist approach that bases the validity of an Establishment Clause settlement solely upon the locus of title after disposition "invites manipulation."[170] Still, courts have not generally reviewed settlement-by-disposition in this context with any deep skepticism. Indeed, the presumption seems to be that such dispositions constitute valid constitutional settlements. As the court stated in *Marshfield*, "Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion."[171] The cases indicate that the facts must be truly extraordinary for a purported settlement-by-disposition to be invalidated.

For example, in *Mercier v. Fraternal Order of Eagles, La Crosse Aerie 1254*, the Seventh Circuit upheld the sale of a Ten Commandments monument and the parcel on which it was located.[172] Installed in 1965 in order to honor the flood-fighting efforts of area youth, the monument was located in a corner of the 1.5 acre Cameron Park (in La Crosse, Wisconsin), directly across from the Fraternal Order of Eagles (FOE) headquarters.[173] The city expended no funds maintaining the display.[174] In 2001, residents asked that the monument be moved, but the city refused.[175] After then declining three separate offers from different groups to take the monument and move it to another location,[176] the city council passed a resolution indicating that it intended to keep the monument in its current location.[177] To effectuate this,

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on purpose grounds, however, but rather based upon its effects, secularization may remain a viable option.

[170] 203 F.3d 487, 491 (7th Cir. 2000).

[171] *Id.*

[172] 395 F.3d 693, 694 (7th Cir. 2005).

[173] *Id.* at 694–95.

[174] *Id.* at 696.

[175] *Id.* A previous lawsuit, filed in 1987, was dismissed for lack of standing. *See* Freedom from Religion Found., Inc. v. Zielke, 663 F. Supp. 606, 614 (W.D. Wis. 1987), *aff'd* 845 F.2d 1463 (7th Cir. 1988).

[176] *See Mercier*, 395 F.3d at 696.

[177] *Id.*

the city decided to sell the monument to the FOE, along with a twenty-foot by twenty-two-foot parcel of land around the monument.[178] A lawsuit challenging the display was filed on July 1, 2002.[179] Ten days later, the city council adopted a resolution authorizing the sale of the parcel to FOE for fair market value.[180]

As legal authority for the sale, the city council cited a Wisconsin law that allowed such sales when parkland was no longer needed for park purposes, a fact the city council had found with regard to the subject parcel.[181] The FOE erected a four-foot-high steel fence around the parcel, which was bordered on three sides by a public park and on the other by a public sidewalk.[182] It later added signs on all sides of the fence indicating that the parcel was private land and that the monument was dedicated to the flood volunteers.[183] The city then erected its own fence around the fenced-in parcel and placed signs on the north and south sides of the fence stating that the property was not owned by the city and that the city did not endorse "the religious expression thereon."[184]

The district court held that the display as it existed prior to the sale violated the Establishment Clause, and that the *sale itself* constituted an independent violation of the Establishment Clause.[185] It ordered that the plot of land be returned to the city and the monument be removed from the park.[186] The Seventh Circuit reversed.[187] It rejected the claim that the impending lawsuit, along with the city's rejection of three separate offers to move the monument, demonstrated an improper purpose to endorse religion by keeping the symbol in its present location.[188] According to the court, removal was an option but not a requirement.[189] Moreover, the court said that the "desire to keep the Monument in place c[ould not] automatically be labeled a constitutional violation."[190] At the same time, the court claimed that it was not "endorsing a non-remedial initiative designed to sell off patches of government land to various religious denominations as a means of circumventing the Establishment Clause."[191]

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178 *Id.*
179 *Id.*
180 *Id.* at 697.
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.* at 697–98.
185 *Id.*
186 *Id.*
187 *Id.* at 705–06.
188 *Id.* at 702.
189 *Id.*
190 *Id.*
191 *Id.*

Emphasizing the fact-specific nature of Establishment Clause inquiries, the court then analyzed whether the sale involved any "unusual circumstances," i.e., a failure to comply with local laws governing land sales, "a sale to a straw purchaser that left the City with continuing power to exercise the duties of ownership[,] or a sale well below fair market value."[192] The court found that none of the indicia of a sham transaction were present.[193] It noted that the FOE had a "long-standing and important relationship with the Monument," and thus it made "practical sense" for the city to sell it to the group.[194] Finally, the court emphasized that the location and post-disposition physical characteristics of the monument presented little danger of public misperception regarding ownership or endorsement.[195] In a strongly worded dissent, Judge Bauer stressed the city's "stubborn refusal to separate itself from the display of a purely religious monument."[196] The property disposition, he claimed, "border[ed] on a fraud."[197] Judge Bauer denounced the city's disclaimer as "an obvious sham."[198]

Similarly, in *Chambers v. Frederick*, a district court refused to enjoin the display of a Ten Commandments monument on a parcel that had been sold by the city to a different chapter of the FOE (once again the original donor).[199] Although the city's facilities administrator had failed to comply with local law requiring that the sale be publicly advertised and accepted, the court refused to declare that the sale was a sham.[200] The court emphasized the apparent sincerity of officials who sought to "dissociate" the city from the monument by privatizing it, including the facilities administrator who had mistakenly concluded that the sale was not subject to the public advertising requirement.[201] A reasonable observer, the court concluded, would understand that the city's sale of the property was intended to resolve the constitutional issues raised by display of a religious monument on public property.[202]

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[192] *Id.*

[193] *Id.* at 702–03.

[194] *Id.* at 703.

[195] *Id.* at 702–03. The court also held that the sale had a secular purpose and did not have the effect of endorsing religion, as required under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Mercier*, 395 F.3d at 704–05.

[196] *Mercier*, 395 F.3d at 706 (Bauer, J., dissenting).

[197] *Id.*

[198] *Id.*

[199] 373 F. Supp. 2d 567, 570, 573 (D. Md. 2005).

[200] *Id.* at 572–73.

[201] *Id.* at 572.

[202] *Id.* at 573; *see also* Kong v. City of San Francisco, 18 F. App'x 616, 618 (9th Cir. 2001) (upholding the display of a cross atop Mt. Davidson, where abutting public park property and the private parcel upon which the cross was displayed were visually and physically distinct, and the cross was accompanied by signs stating that it had been sold to a private group in order "to comply with a federal court decision holding that the presence of the cross on public land violated the California Constitution"). In *Kong*, the panel majority did not consider it significant that the property had been sold with a

In *Marshfield* itself, the court refused to invalidate the sale of the property but rather held only that the continued display of a fifteen-foot marble statue of Jesus Christ in a public park was prohibited absent additional signage and fencing.[203] The statue at issue in *Marshfield* had been located in the public park for thirty-nine years before a local resident filed a lawsuit claiming that the display violated the Establishment Clause.[204] Soon thereafter, a private organization offered to purchase the statue and the 0.15 acres of land on which it was located.[205] As required by Wisconsin law, the city solicited bids for the statue and property.[206] Upon accepting the organization's bid, the city executed a warranty deed that included a restrictive covenant requiring that the parcel be used for public park purposes.[207] After the sale, the city stopped providing electrical service to the parcel.[208] Although the parcel on which the statue was located was not visibly differentiated from other city park property, prior to the sale the city had erected a disclaimer stating that the location of the statue did not represent an endorsement of any religious sect or belief.[209] The disclaimer remained on the property after the sale, and the parties stipulated that the sale complied with all local laws.[210]

In arguing that the mere transfer of title did not extinguish the establishment conflict because in effect it was a "sweetheart deal" designed to circumvent the Establishment Clause,[211] plaintiffs relied on *Evans v. Newton*, in which the substitution of private trustees was held not to have cured the equal protection violation.[212] The court interpreted *Newton* as a "public function" case but in any event concluded that the continuing excessive involvement between the government and private actors in *Newton* was not present in *Marshfield*.[213] Indeed, the court concluded that the only possible indicator of continuing governmental involvement with the property in *Marshfield* was the presence of the restrictive covenant in the deed.[214] Parting company with civil rights era cases like *Hampton* and *Grubbs*, the court held that this was an insufficient basis for either finding continuing state in-

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restrictive covenant requiring that the land remain open to the public. *Kong*, 18 F. App'x at 617–18. *But see id.* at 618–19 (Canby, J., concurring) (emphasizing the restrictive covenant).

[203] Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 497 (7th Cir. 2000).

[204] *Id.* at 489.

[205] *Id.* at 489–90.

[206] *Id.* at 490.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 489.

[210] *Id.* at 490, 492.

[211] *Id.* at 491.

[212] *Id.* at 491–92 (citing Evans v. Newton, 382 U.S. 296, 301 (1966)).

[213] *Id.* at 492.

[214] *Id.* at 492–93.

volvement or voiding the transfer and concluded that the form of the transaction was not objectionable.[215]

Finding the form of the transaction to be valid, the *Marshfield* court went on to assess the substance or effect of the disposition, i.e., whether, even after the sale, the display of the statue on private property was an unconstitutional endorsement of religion. Based on the general location of the statue, the physical layout of the park, and the location and orientation of the statue, the court held that a reasonable observer would perceive that the statue remained part of the city park and continued to constitute government endorsement of religion.[216] Given that no other displays had ever been present in the park—indeed, the record suggested that the park was built for the purpose of displaying the statue—the court concluded that the statue's presence likely would be perceived by a reasonable observer as government, rather than private, endorsement of religion.[217] As for a remedy, the Seventh Circuit observed that either the owners had to remove the statue—an option that would obviously limit private speech in a public forum—or find "some way . . . to differentiate between property owned by the [private owner] and property owned by the City."[218] According to the court, the latter option was the "appropriate solution."[219] The court recommended the construction of "some defining structure, such as a permanent gated fence or wall, to separate City property from [private] property accompanied by a clearly visible disclaimer."[220] Ultimately, this was the remedy adopted on remand.[221]

Thus, prior to the Supreme Court's recent decision in *Salazar v. Buono*,[222] lower courts seemed to have settled on a few basic principles. As *Marshfield* suggested, absent very unusual circumstances privatization would be considered an appropriate settlement of Establishment Clause issues relating to the display of religious symbols on public property. A bona fide sale, which is one that complies with local land disposition requirements, has generally been considered an appropriate means of terminating establishment claims. As *Marshfield* also indicated, the fact that the government retains a reversionary or other future interest in the property does not constitute grounds for voiding the transaction.[223] However, in order to ensure that no continuing endorsement was present, *Marshfield* and other

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[215] *Id.*

[216] *Id.* at 494–95.

[217] *Id.* at 495.

[218] *Id.* at 497.

[219] *Id.*

[220] *Id.*

[221] The district court ordered that a four-foot-high wrought-iron fence and disclaimers be installed at the site. Freedom From Religion Found., Inc. v. City of Marshfield, No. 98-C-270-S, 2000 WL 767376, at *2 (W.D. Wis. May 9, 2000).

[222] 130 S. Ct. 1803 (2010).

[223] *Marshfield*, 203 F.3d at 492–93.

decisions required some post-disposition review of the circumstances relating to the display.[224] So long as adequate measures were taken to ensure that a reasonable observer would not attribute the post-disposition display to the government, Establishment Clause concerns were considered settled.

Against expectations that *Buono* would clarify the constitutional validity of settlement-by-disposition, the Court issued a fractured opinion that set forth no categorical rule.[225] *Buono* arose from some rather unusual circumstances. The case involves a congressional, rather than a local, disposition of public parkland. In 1934, the Veterans of Foreign Wars erected a memorial to fallen service members in the form of a wooden Latin cross set atop a rock outcropping in the Mojave National Preserve located in southeastern California.[226] Although the site once had a plaque commemorating veterans, the cross involved in the dispute sat alone on the property.[227]

Although the cross is between five and eight feet tall and is located in a remote part of the 1.6-million-acre preserve, it can be seen from a secondary road.[228] In 1999, the National Park Service (NPS) considered removing the cross.[229] The following year, Congress prohibited the NPS from spending any federal funds to do so.[230] In 2001, Frank Buono, a retired National Park Service employee, filed suit claiming that the display of the cross violated the Establishment Clause.[231] In January 2002, Congress designated the cross and any acreage associated with it as a national war memorial, directed the Secretary of the Interior to expend up to $10,000 to acquire a replica of the original cross and its memorial plaque, and further directed the Secretary to install a memorial plaque at a suitable location.[232]

In July 2002, the district court permanently enjoined the federal government from permitting the display of the cross.[233] Three months later, Congress enacted a statute barring the use of federal funds to "dismantle national memorials commemorating United States participation in World War I."[234] While an appeal from the district court's injunction was pending—in

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[224] *See id.* at 497; *see also, e.g.*, Mercier v. Fraternal Order of Eagles, La Crosse Aerie 1254, 395 F.3d 693, 702–03 (7th Cir. 2005) (examining the post-disposition physical characteristics of the monument and their effect on public perception regarding ownership and endorsement).

[225] *See Buono*, 130 S. Ct. 1803.

[226] *Id.* at 1811.

[227] *Id.* at 1812. Shortly after the Supreme Court decision, the cross was stolen from the site. Randal C. Archibold, *Cross at Center of Legal Dispute Disappears*, N.Y. TIMES, May 12, 2010, at A15, *available at* http://www.nytimes.com/2010/05/12/us/12cross.html.

[228] *Buono*, 130 S. Ct. at 1811–12.

[229] Buono v. Kempthorne (*Buono V*), 527 F.3d 758, 769 (9th Cir. 2008), *rev'd sub nom.*, Salazar v. Buono (*Buono*), 130 S. Ct. 18 (2010).

[230] *See* Act of Dec. 21, 2000, Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A-230.

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

[232] Act of Jan. 10, 2002, Pub. L. No. 107-117, § 8137(a), (c), 115 Stat. 2230, 2278–79.

[233] *See Buono I*, 212 F. Supp. 2d at 1217.

[234] Act of Oct. 23, 2002, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1519, 1551.

fact, one month after oral argument but before the appellate decision was issued[235]—Congress enacted legislation ordering the Department of the Interior to convey the land upon which the cross is displayed to the Veterans of Foreign Wars in exchange for a privately owned five-acre parcel of land located elsewhere in the preserve.[236] The transfer statute provided that "[i]f the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States."[237]

Without deciding whether the proposed land swap would avoid any constitutional controversy, the Ninth Circuit held that the display as it then existed violated the Establishment Clause.[238] On remand, the district court held that the proposed disposition was "an attempt by the government to evade the permanent injunction" enjoining display of the cross and, in any event, did not cure the Establishment Clause violation.[239] The district court permanently enjoined the government from effectuating the transfer.[240]

The Ninth Circuit affirmed.[241] It held that the disposition violated the Establishment Clause in both form and substance. The court concluded that the various congressional statutes, which designated the land as a national memorial, provided for federal management and supervision of the site, and secured an easement for certain purposes, evinced post-disposition "continuing government control" of the property.[242] Relying on *Hampton* and *Grubbs*, the court construed the reversionary provision as granting the government an automatic property interest if the property ceased to be used as a war memorial, which was comprised "at this juncture . . . [of] the cross itself."[243] According to the court, these facts demonstrated that the organization was a "straw" purchaser through which the government sought to circumvent the injunction.[244] It concluded that the government's "longstanding efforts to preserve and maintain the cross" led to the "undeniable conclusion that the government's purpose in this case is to evade the injunc-

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[235] *See* Buono v. Kempthorne (*Buono IV*), 502 F.3d 1069, 1074 (9th Cir. 2007).

[236] Act of Sept. 30, 2003, Pub. L. No. 108-87, § 8121(a)–(b), 117 Stat. 1054, 1100.

[237] *Id.* § 8121(e).

[238] Buono v. Norton (*Buono II*), 371 F.3d 543, 550 (9th Cir. 2004).

[239] Buono v. Norton (*Buono III*), 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005), *aff'd sub nom.*, Buono v. Kempthorne (*Buono V*), 527 F.3d 758 (9th Cir. 2008), *rev'd sub nom.*, Salazar v. Buono (*Buono*), 130 S. Ct. 1803 (2010).

[240] *Buono III*, 364 F. Supp. 2d at 1182.

[241] *Buono V*, 527 F.3d at 783.

[242] *See id.* at 779.

[243] *Id.* at 780. The court also noted that the means of transfer did not comport with federal laws and regulations governing federal land exchanges: no hearing was held, bidding was not open to the general public, and the appropriations bill directed that the land be conveyed to the organization that originally installed the Latin cross on the property. *Id.* at 781.

[244] *Id.* at 781–82.

tion and keep the cross in place."[245] The court held that the proposed disposition, which would "leave a little donut hole of land with a cross in the midst of a vast federal preserve," did not settle or avoid the Establishment Clause violation.[246] Accordingly, it upheld the district court's injunction ordering that the cross not be displayed.[247]

In a fractured decision,[248] the Supreme Court remanded the case to the district court for a determination as to whether the land transfer statute constituted an independent violation of the Establishment Clause rather than merely an attempted evasion of the district court's injunction.[249] Justice Kennedy, writing for himself and the Chief Justice, and joined in part by Justice Alito, held that the district court had erred by failing to determine whether the land transfer statute settled the establishment controversy by eliminating any endorsement of religion by the federal government.[250] The plurality strongly hinted that settlement-by-disposition had occurred. Justice Kennedy questioned whether the "reasonable observer" standard continued to be the appropriate framework after the subject property had been privatized, but ultimately opined that on remand the district court would need to determine whether a reasonable observer's impression would have changed once he became aware of Congress's "policy of accommodation" represented by the land transfer statute.[251] He also suggested that after the disposition the cross conveyed a secular message of respect for fallen soldiers.[252]

Justice Kennedy disclaimed any attempt to state "categorical rules" regarding settlement-by-disposition.[253] However, his opinion strongly urged the district court to defer to "Congress's prerogative to balance opposing interests and its institutional competence"[254] and "to consider less drastic relief than complete invalidation of the land-transfer statute."[255] The plurality appeared quite sympathetic to Congress's "dilemma" and its effort to accommodate both the terms of the injunction and the sentiments of those for whom the cross was a secular token of appreciation for fallen soldiers.[256] In a separate concurrence, Justice Alito opined that the Court should have de-

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[245] *Id.* at 782.

[246] *Id.* at 768, 782.

[247] *Id.* at 783.

[248] Six separate opinions were filed in the case. *See Buono*, 130 S. Ct. 1803 (2010).

[249] *Id.* at 1819–20.

[250] *Id.* at 1818–21.

[251] *Id.* at 1819–20.

[252] *See id.* at 1820.

[253] *Id.*

[254] *Id.* at 1817.

[255] *Id.* at 1820.

[256] *See id.* at 1817 (noting Congress's "dilemma" and observing that "Congress adopted a policy with respect to land it now owns in order to resolve a specific controversy").

cided that Congress had legitimately and finally settled the establishment claim through the land transfer statute.[257]

In the principal dissent, Justice Stevens, joined by Justices Ginsburg and Sotomayor, argued that the district court had properly determined that the land transfer statute did not cure the Establishment Clause violation identified by the district court.[258] The dissenters argued that the land transfer statute "was designed specifically to foster the display of the cross."[259] They opined that transfer of the land into private hands would not end government endorsement of the cross, a plainly religious symbol, because after the transfer a reasonable observer would still view the presence of the cross as an official endorsement of religion "notwithstanding that the name ha[d] changed on the title to a small patch of underlying land."[260] According to the dissenters, a reasonable observer would know that the cross was once on public land, that the government had been enjoined from displaying the cross, that Congress transferred the land and the cross to a private purchaser in order to preserve the display, and that the government retained a reversionary interest in the land.[261] Moreover, the dissenters claimed that the government's endorsement was ongoing because "the purpose of the transfer [wa]s to preserve [the] display" of the cross.[262] Congress, they argued, had "singled out that cross for special treatment, and [had] affirmatively commanded that the cross must remain."[263]

Unlike the plurality, the dissenters gave little weight to Congress's supposed desire to resolve controversy or avoid offense. The government, they opined, cannot "decline to cure an Establishment Clause violation in order to avoid offense."[264] Nor were they inclined to defer to Congress's institutional capabilities or considered judgment, especially given that the land transfer statute was buried in an appropriations bill and "undertaken without any deliberation whatsoever."[265] Finally, the dissenters opined that there was no need for the district court to consider less drastic remedies, such as the erection of fences and disclaimers at the site.[266] None of this would change the facts that the land had been "transferred in a manner favoring the cross and [that] the cross would remain designated as a national memorial."[267]

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[257] *Id.* at 1821 (Alito, J., concurring in part and concurring in the judgment).
[258] *Id.* at 1830–31 (Stevens, J., dissenting).
[259] *Id.* at 1831.
[260] *Id.* at 1832.
[261] *Id.* at 1833–34.
[262] *Id.* at 1832–33, 1837–40.
[263] *Id.* at 1834.
[264] *Id.* at 1839 n.11.
[265] *See id.* at 1840.
[266] *Id.* at 1841.
[267] *Id.*

Owing to the fractured nature of the decision in *Buono*, it is difficult to glean much guidance from it with regard to the constitutionality of settlement-by-disposition. However, although there are no categorical rules, there are strong hints in the plurality opinion that at least three justices are inclined to treat property dispositions deferentially, even in a case bearing some unusual indicia of favoritism toward a religious symbol.[268] Although deference to Congress certainly played some role, it is unclear to what extent the plurality decision rests upon the fact that congressional as opposed to local legislation was at issue. The *Buono* plurality strongly suggested that there may be few, if any, limits on settlement-by-disposition in religious display cases.

B. Privatizing Main Street

Establishment controversies involving public properties are not limited to religious displays. As discussed in Part III, officials increasingly have sold public forum properties to private purchasers.[269] Religious institutions, like any other private actor, are entitled to bid for and purchase public properties. Unlike sales to other private actors, though, sales to religious purchasers raise potential Establishment Clause concerns. When the subject property is a traditional public forum, the disposition may be suspect on free speech grounds as well.

In 1999, Salt Lake City, Utah, sold a block-long section of Main Street to the Church of Jesus Christ of Latter-Day Saints (LDS).[270] The city initially retained an easement on the property for public access and passage.[271] LDS imposed various speech restrictions on the easement, which were challenged as violations of the First Amendment's free speech guarantee.[272] After the Tenth Circuit held that the easement was a public forum and that LDS's content-based restrictions on speech could not be enforced, the city sold the easement to LDS for fair market value.[273]

Plaintiffs then challenged the sale of the easement to LDS on both free speech and establishment grounds. The speech claim is discussed in Part III below.[274] The Tenth Circuit upheld the lower court's dismissal of the establishment claim.[275] As the Supreme Court did in *Palmer*, the court expressed

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[268] It is possible that Justices Scalia and Thomas, who concurred in the judgment on the ground that the plaintiff lacked standing to challenge the land transfer statute, *id.* at 1824 (Scalia & Thomas, JJ., concurring), might have voted in favor of the disposition had the issue, in their view, been properly before the Court.

[269] *See infra* Part III.C.

[270] Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1252 (10th Cir. 2005).

[271] *Id.*

[272] *Id.* at 1253.

[273] *Id.*; *see* First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114, 1132 (10th Cir. 2002).

[274] *See infra* Part III.C.

[275] *Utah Gospel Mission*, 425 F.3d at 1258–62.

"reluctan[ce] to attribute unconstitutional motives" to the city and deferred to its characterization of the transaction as bona fide.[276] It also concluded that there were several secular purposes for the sale. In addition to receipt of fair market value for the land, the court observed that the sale to LDS allowed the city to "extricate itself from perceived entanglement with the Church and thereby reduce public outcry by eliminating joint ownership" of the property.[277] The court also cited resolution of the protracted legal contest regarding the property and avoidance of litigation as valid secular purposes supporting the disposition.[278]

The transaction did not have the effect of endorsing religion, the court said, because it merely allowed LDS "to advance itself" by allowing it to purchase the easement parcel.[279] The court characterized the sale as "a transfer of property from the government to a private entity, which happens to be a church."[280] As in the public display cases, plaintiffs challenged the sale as a sham transaction intended to endorse LDS's religious message.[281] The court noted that plaintiffs had not come forward with any evidence suggesting that the transaction was a sham; it observed that the city did not retain any significant interest in the property and that there was no evidence of improper motivation.[282]

As in the religious symbol cases, the court concluded that the disposition of the easement allowed the city to divest itself of any involvement and thereby avoid any constitutional difficulties. The ultimate effect was to transfer ownership of an entire portion of the city's Main Street to a religious purchaser. As a result of the title transfer, any speech, association, or conduct that does not comport with LDS's views now may be lawfully suppressed in what was once a traditional public forum.[283]

C. Publicization and Religious Symbols

Privatization is not the only means of property disposition that may be used to settle establishment controversies. Rather than privatize the property in question, the government may take possession of both the property and any religious symbol on it. This inverse privatization, or publicization,

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[276] *Id.* at 1259 (quoting Mueller v. Allen, 463 U.S. 388, 394–95 (1983)); *see* Palmer v. Thompson, 403 U.S. 217, 224–25 (1971).

[277] *Utah Gospel Mission*, 425 F.3d at 1259.

[278] *Id.* at 1260.

[279] *Id.* at 1261.

[280] *Id.*

[281] *Id.*

[282] *Id.* at 1262.

[283] Recently, for example, two men were detained and cited for trespassing after kissing each other on the LDS property. Erin Alberty, *Police Report on Men's Plaza Kiss Released*, SALT LAKE TRIB., July 17, 2009. The incident sparked a public protest. *See* Ben Fulton, *Kissing Protest Brings Cheers, Jeers*, SALT LAKE TRIB., July 19, 2009.

can be accomplished either by purchase or by the use of eminent domain.[284] Utilizing these processes, governments can embrace rather than attempt to distance themselves from the subject properties and symbols. Thus, along with private law mechanisms, officials may use public law principles and powers to avoid constitutional claims. Publicization raises the specter of governmental endorsement of religion. Assuming the post-disposition display comports with the Establishment Clause, however, publicization may represent another means of settlement-by-disposition.

The protracted controversy over the display of a religious symbol on Mt. Soledad in San Diego, California, serves as one example. A forty-three-foot-high Latin cross sits atop Mt. Soledad in a public park near San Diego, California.[285] The Mt. Soledad cross, which is surrounded by more than 2000 plaques paying tribute to war veterans, was the center of a decades-long legal controversy.[286] At one point in the cross's protracted legal history, the Ninth Circuit held that the display violated the California Constitution's prohibition on religious preference.[287] The court affirmed an injunction forbidding the city from maintaining the cross on public land.[288]

In response to the injunction, the city sold approximately 222 square feet of land under the cross to the same private association that had erected it decades earlier.[289] Although the sale was for fair market value, the city did not solicit bids or proposals from other prospective purchasers.[290] After a district court invalidated the sale, in part on the ground that the parcel sold was too small to remedy the constitutional violation, the city again sought to dispose of the land beneath the cross.[291] It expanded the size of the parcel to 0.509 acres and solicited bids.[292] The bid packages were required to contain, among other things, a detailed proposal for "the maintenance of an historic war memorial."[293] The association's bid was again accepted.[294]

The en banc Ninth Circuit held that the second sale also violated the California Constitution.[295] The court held that by indicating that the cross itself would be conveyed along with the land and that the purchaser could satisfy the condition that the site be used as a war memorial by keeping the cross in its present location, the city had granted an impermissible "prefer-

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[284] *See generally* Tebbe, *supra* note 11 (noting the government's use of privatization and publicization to avoid establishment and free speech claims).

[285] Trunk v. City of San Diego, 568 F. Supp. 2d 1199, 1202–03 (S.D. Cal. 2008).

[286] *Id.* at 1203.

[287] *See* Ellis v. City of La Mesa, 990 F.2d 1518, 1528 (9th Cir. 1993).

[288] *Id.* at 1520.

[289] Paulson v. City of San Diego, 294 F.3d 1124, 1125–26 (9th Cir. 2002) (en banc).

[290] *Id.* at 1126.

[291] *Id.* at 1126–27.

[292] *Id.* at 1127.

[293] *Id.* (internal quotation marks omitted).

[294] *Id.* at 1128.

[295] *Id.* at 1133.

ence" or benefit to a distinctly religious message in violation of the state constitution.[296] In essence, the court concluded that purchasers who intended to maintain the cross as part of the war memorial had been given an economic advantage, pursuant to the terms of the sale, in comparison to those who may have wished to remove the cross. The latter purchasers, said the court, would have been required to absorb the costs of removing the cross and constructing an alternative memorial.[297] This, then, was a case in which unusual circumstances overcame the presumption that the disposition was valid.

The court left it to the parties and the lower court to determine an appropriate remedy.[298] After further debate and consideration by numerous parties—lower courts, San Diego residents (in local referenda), and local public officials—failed to resolve the controversy,[299] Congress intervened. In 2004, Congress passed a resolution recognizing the Mt. Soledad property site as a national war memorial and agreeing to accept the property if the city chose to donate it to the federal government.[300] After efforts to effectuate a donation were blocked by a California trial court,[301] in 2006 Congress enacted a law taking the property by eminent domain.[302]

A federal district court held that neither the taking nor the preservation of the Mt. Soledad memorial violated the Establishment Clause.[303] Deferring to Congress's findings and expressing reluctance to impute any illicit motive to it, the court held that the purposes of the taking were to preserve a war memorial and to settle a protracted local controversy.[304] The reasonable observer, said the court, would regard Congress's decision to acquire the land as "an effort to preserve an important regional landmark."[305] For similar reasons, the court held that the continued presence of the monument did not violate the Establishment Clause.[306]

The disposition of the Mt. Soledad cross suggests that where the government does not own the property upon which a religious symbol sits, it may be able to settle constitutional objections by acquiring the property and adopting the symbol. Where federal law is more permissive than local law with regard to religious displays or where other means of disposition have failed, settlement-by-acquisition may present a viable option. Whether

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[296] *Id.* at 1132–33.

[297] *Id.*

[298] *Id.* at 1134.

[299] *See* Paulson v. Abdelnour, 51 Cal. Rptr. 3d 575, 580–86 (Cal. Ct. App. 2006) (recounting the factual and legal history relating to the subject property and the cross).

[300] Act of Dec. 8, 2004, Pub. L. No. 108-447, § 116(a), (b), 118 Stat. 2809, 3346.

[301] *Abdelnour*, 51 Cal. Rptr. 3d at 580.

[302] Act of Aug. 14, 2006, Pub. L. No. 109-272, § 2, 120 Stat. 770, 770–71.

[303] Trunk v. City of San Diego, 568 F. Supp. 2d 1199, 1207–18 (S.D. Cal. 2008).

[304] *Id.* at 1209–12.

[305] *Id.* at 1217–18.

[306] *Id.* at 1218–24.

Congress ought to intervene or be invited to participate in local affairs to this extent raises interesting issues regarding the scope of federal power. At least insofar as anti-establishment obligations are concerned, however, the congressional disposition of the Mt. Soledad cross rescued a symbol the city could not protect through either litigation or privatization. Publicizing the subject property and attendant symbols in this manner generally will not save an unadorned religious symbol.[307] But it might, as the resolution of the Mt. Soledad controversy shows, avoid or settle establishment claims in some cases.

Publicization does not require that officials use their eminent domain authority. It may result from a range of transactions, including donations and purchases. Indeed, one of the proposals that preceded the congressional taking in the Mt. Soledad contest contemplated that the city would donate the property to the federal government. Like privatization, such dispositions restructure ownership with the apparent goal of removing constitutional concerns. In some senses, privatization and publicization represent very distinct means of settlement. As Part IV argues, however, both disposition mechanisms raise serious constitutional concerns.

III. PROPERTY DISPOSITION AND EXPRESSIVE LIBERTIES

Freedoms of speech and assembly can also be substantially affected by settlement-by-disposition. During the past several decades, privatization of public properties has significantly diminished opportunities for public speech and assembly.[308] As in other constitutional contexts, dispositions affecting speech and assembly have ranged from leases to outright closures. Governments also have turned to taking ownership of private property in public fora to settle free speech claims.[309] As in the equality and establishment contexts, when First Amendment speech and assembly challenges to property dispositions have been brought, public officials have argued that the claims have been extinguished or settled by the dispositions. As in other constitutional contexts, officials have resorted to property dispositions

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[307] *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part, dissenting in part) ("I doubt not, for example, that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall."); *see also* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009) ("[G]overnment speech must comport with the Establishment Clause."); *id.* at 1139 (Stevens, J., concurring) (observing that government speakers are still bound by the Establishment Clause).

[308] *See generally* ZICK, *supra* note 3, at 2 (discussing the privatization of public streets, sidewalks, and other traditional public forum spaces). For a sociological perspective on privatization, in particular the migration to gated communities, see MARGARET KOHN, BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE (2004). Although the discussion will focus on rights of speech and assembly, the right to petition government for grievances is also implicated in some public property dispositions.

[309] *See Summum*, 129 S. Ct. at 1129–30 (describing the city's selective adoption of privately donated monuments).

in order to settle community disputes, to evade judicial mandates, and on rare occasions to purposefully suppress civil liberties. The Supreme Court has offered little guidance regarding the validity of settlement-by-disposition in speech and assembly contexts. Lower courts have adopted both formal and functional approaches to privatizing dispositions, and the implications of the evolving government speech doctrine for public forum properties are not yet clear. In sum, the constitutional and democratic limits of settlement-by-disposition are as uncertain in the speech and assembly areas as elsewhere.

A. Property Allocation and Public Fora

In *Hague v. Committee for Industrial Organization*,[310] a plurality of the Supreme Court stated that "[*w*]*herever the title of streets and parks may rest*, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[311] The *Hague* dictum is the foundation for contemporary standards regarding access to public properties for purposes of speech and assembly.[312] Many of these standards relate to the regulation of expression, rather than the disposition of the property itself, and we need not examine them in detail. However, four general observations regarding speech and assembly on public properties are relevant to the scope of this Article and form the basis for the discussion in this Part.

First, with regard to public properties such as parks, streets, and (most) sidewalks,[313] the Supreme Court has stated that "the rights of the State to limit expressive activity are sharply circumscribed."[314] This limitation is due in substantial measure to *Hague*'s recognition of the expressive functions and traditions associated with such properties. In light of these properties' importance to public speech and assembly, the government may not prohibit all expression in such fora.[315] The First Amendment thus requires that governments facilitate speech and assembly by making at least some spaces—traditional public fora—available for such activities. Moreover, the government may not regulate the content of expression in such places absent a compelling justification and a demonstration that the regulation is

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[310] 307 U.S. 496 (1939).

[311] *Id.* at 515 (emphasis added).

[312] *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[313] Not all sidewalks are created equal insofar as the First Amendment is concerned. *Compare* United States v. Kokinda, 497 U.S. 720, 723, 730 (1990) (holding that a postal sidewalk used primarily for access to a post office building is not a public forum), *with* United States v. Grace, 461 U.S. 171, 179 (1983) (holding that public sidewalks near the Supreme Court are within the category of properties that traditionally have been held open to the public for expressive activities).

[314] *Perry*, 460 U.S. at 45.

[315] *Id.*

narrowly drawn to achieve its end.[316] It may, however, generally impose content-neutral time, place, and manner regulations.[317]

Second, despite these limits, governments retain substantial discretion in terms of the operation, maintenance, and perhaps the disposition of public fora. With regard to any forum that traditionally has not been open to speech and assembly, but that officials have designated as a forum for such activities, the Court has stated that officials are "not required to indefinitely retain the open character of the facility."[318] So long as they do so, however, officials are required to abide by the standards applicable to traditional public fora.[319] Some of the Justices have also indicated that traditional public forum properties—streets, parks, and sidewalks—may be sold or closed. In a concurrence joined by three Justices in *International Society for Krishna Consciousness, Inc. v. Lee*, a case involving speech regulations in a public airport terminal,[320] Justice Kennedy stated that "[i]n some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use."[321] "Otherwise," he said, "the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require."[322] These statements suggest that the status of even a traditional public forum is mutable, either through disposition or substantial physical or functional alteration. The Court has never expressly decided whether and, if so, under what circumstances officials may constitutionally dispose of public streets, sidewalks, or parks.

Third, with regard to mutability, while the government may have the authority to sell, close, or alter public fora, it may not simply demote them, so to speak, by fiat or legislative pronouncement.[323] In *United States v. Grace*, the Supreme Court held that Congress could not by statute designate the sidewalks surrounding the Supreme Court building as nonpublic fora, thus permitting officials essentially to ban speech and assembly there.[324] The Court also held that a traditional public forum "will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expres-

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316 *Id.*

317 *Id.*

318 *Id.* at 45–46.

319 *Id.* at 46.

320 505 U.S. 672 (1992).

321 *Id.* at 699 (Kennedy, J., concurring).

322 *Id.* at 699–700.

323 *See* U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 133 (1981) ("Congress . . . may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums . . . ."); *see also* Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 FIRST AMENDMENT L. REV. 201, 207–13 (2007) (discussing various methods by which officials have sought to demote public fora).

324 461 U.S. 171, 180 (1983).

sion."[325] As Justice Kennedy indicated in *Lee*, to change the property's forum status, the government must "alter the objective physical character or uses of the property, and bear the attendant costs."[326]

Fourth, the Supreme Court has recently recognized that the government may itself speak in and perhaps through the public forum.[327] It may do so directly, by erecting monuments, placards, or other symbols.[328] Or it may do so by adopting formerly private monuments or symbols as its own, through donation or perhaps purchase.[329] In the latter type of disposition, transferring title to the government essentially allocates public forum property based upon the government speech principle. The Supreme Court has held that this type of disposition extinguishes the First Amendment claims of other speakers with regard to the public space at issue.[330]

The foregoing are the basic ground rules for public forum dispositions. Together, they represent the sense in which the government always has authority to dispose of public forum properties. As we shall see, however, application of these basic rules has proven somewhat difficult in certain speech and assembly contexts.

B. Leases of Public Forum Property

One area of general agreement across doctrinal areas is that merely leasing a public property does not settle constitutional claims or concerns. Recall that during the civil rights era, courts generally held that the mere leasing of public property did not settle Fourteenth Amendment claims. A similar rule applies in the speech and assembly contexts.

Courts have been skeptical of claims that lease agreements settle speech contests involving access to public forum properties. Several courts have held that a private lessee who polices or regulates speech in a place that traditionally has functioned as a public street or sidewalk is a state actor because he is serving a traditional public function, is involved in a symbiotic relationship with a public entity, or both.[331]

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[325] *Id.*

[326] *Lee*, 505 U.S. at 700 (Kennedy, J., concurring).

[327] *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132, 1138 (2009) (holding that the city's adoption of the Ten Commandments and other symbols displayed in a public park extinguished the First Amendment claims of a private speaker seeking access to the forum).

[328] *Id.* at 1132–33.

[329] *Id.* at 1133–34.

[330] *Id.* at 1132.

[331] *See, e.g.*, Fernandes v. Limmer, 663 F.2d 619, 627 (5th Cir. 1981) (concluding that airport terminals leased by private parties from the state were the functional equivalent of public streets to which First Amendment rights applied); Int'l Soc'y for Krishna Consciousness v. Schrader, 461 F. Supp. 714, 717–18 (N.D. Tex. 1978) (holding that lessees of the Dallas Convention Center, a city-owned facility, had to comply with the First Amendment); City of Jamestown v. Beneda, 477 N.W.2d 830, 836 (N.D. 1991) (holding that sub-lessees of a shopping mall owned by the city had to satisfy First Amendment standards for speech regulation on their property); *cf.* Bock v. Westminster Mall Co., 819 P.2d 55, 61

A good example is *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, in which a district court held that the streets and lanes separating the buildings at Faneuil Hall Marketplace in Boston, which had been leased to private merchants for a ninety-nine-year term, remained public fora subject to First Amendment protections.[332] Prior to the lease, the lanes were marked and operated as public streets.[333] The lessees argued that under the Supreme Court's state action decisions, the lanes at Faneuil Hall Marketplace were private property to which the First Amendment did not apply.[334] Relying in part on *Evans v. Newton* (the public park devise case discussed in Part I),[335] the district court held that in light of the public easement encumbering the lanes and the traditional public access to them, the lessees were operating the equivalent of a public park or policing access to the functional equivalent of a public street.[336] The lessees were thus serving a traditional and exclusive public function. The court also held that in light of the mutual financial benefits that accrued to the parties under the long-term lease, the private lessees had entered a "symbiotic relationship" with the city.[337] The court went on to hold that the lessee's restrictions on public protests at Faneuil Hall Marketplace were required to, but did not, satisfy the First Amendment.[338]

Faneuil Hall does not necessarily stand for the broad proposition that all leased public properties on which speech and assembly might occur are automatically subject to the First Amendment. As in other disposition contexts, much depends on the specific characteristics of the property itself and the leasing arrangement.[339] The subject property in *Faneuil Hall* was owned by the city, had traditionally been used as a forum for speech and assembly, was extensively regulated by the city, was indistinguishable from immediately adjacent public areas, and was subject to a public access easement.

Where a municipality or other public entity not only retains title to what once functioned as a public forum property, but also is involved in some mutually beneficial relationship with its private lessees, the First Amendment likely will apply to the subject property. In order to settle or avoid First Amendment speech and assembly concerns—or to assure their

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(Colo. 1991) (concluding that private lessees had to comply with the speech guarantees of the state constitution).

[332] 745 F. Supp. 65, 67 n.1, 76 (D. Mass. 1990).

[333] *Id.* at 67 n.1.

[334] *Id.* at 69 (citing Hudgens v. NLRB, 424 U.S. 507 (1976) (holding that the First Amendment did not apply at a private shopping mall)).

[335] *See supra* notes 27–41 and accompanying text.

[336] *Faneuil Hall*, 745 F. Supp. at 70–71.

[337] *Id.* at 73–74.

[338] *Id.* at 74–76.

[339] *See, e.g.*, Garrison v. City of Lakeland, 954 F. Supp. 246, 250 (M.D. Fla. 1997) (holding that union demonstrators did not have the First Amendment right to picket on a road leased from the city which led to a hospital and functioned primarily as an access road).

lessees that there are no such concerns—governments are required to divest themselves more fully of any interest in the subject property.

C. Sales and Substitutions

Suppose, however, that a municipality sells or otherwise completely privatizes a public forum property. Do these sorts of dispositions settle any speech and assembly claims or concerns? Owing to the trend toward privatization of public forum properties, this has become a critical question.[340] Consistent with the principle stated in Justice Kennedy's concurrence in *Lee*, courts generally have assumed that municipalities always may alter, sell, or close even traditional public forum properties. They have differed, however, in the degree of scrutiny they have applied to this particular type of settlement-by-disposition.

Some courts have taken a very formalistic approach to property sales and substitutions in speech and assembly contexts. These courts have held that, so long as the instrument of sale or substitution passes title, any constitutional difficulties have been avoided.[341] They have not been willing to look behind or beyond the terms of deeds and other instruments. Thus, even where the property continues to function as a traditional public forum after disposition, some courts have refused to impose First Amendment requirements. Recall that some courts adopted a similar formalism with respect to certain dispositions in the equal protection context.

Other courts, perhaps troubled by the apparent breadth of discretion granted to officials by the *Lee* dictum, have imposed some limits on settlement-by-sale. As discussed below, these courts have applied a more functional standard to post-disposition properties in order to determine whether the transaction has in fact settled First Amendment speech and assembly concerns. The functional approach is based on an examination of a variety of factors relating to the subject property. It asks whether, after disposition, the property still functions as a traditional public forum. If so, First Amendment requirements continue to apply. Although the functional approach has been somewhat effective at constraining officials' discretion to dispose of public forum properties, the approach generally allows officials and private purchasers to settle constitutional claims by altering the physical appearance of the subject properties or making aesthetic adjustments.

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[340] *See* ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 791 (9th Cir. 2006) (collecting cases addressing privatization in the First Amendment context); Chi. Acorn v. Metro. Pier & Exposition Auth., 150 F.3d 695, 704 (7th Cir. 1998) (noting "a nationwide trend toward the privatization of public property").

[341] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Reber, 454 F. Supp. 1385, 1390 (C.D. Cal. 1978) (holding that a portion of a sidewalk previously owned by the city but vacated to a private owner was not a public forum, despite the fact that it was "the functional equivalent of a public street"); S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243, 246 (Nev. 2001) (holding that reservation of a public easement for pedestrian access did not convert private sidewalks into a public forum).

Privatization of traditional public forum properties sometimes occurs as a result of construction and other municipal projects. For example, in one case the Venetian Casino Resort, which is located on the Las Vegas Strip, entered an agreement with the Nevada Department of Transportation that allowed it to demolish an existing public sidewalk fronting the casino.[342] Under the agreement, the Venetian was required to construct and maintain a private sidewalk connecting the remaining public sidewalks located on either side of its property and to dedicate a right-of-way to the Department of Transportation.[343] After the sidewalk had been completed, county officials issued a permit for a union protest on the sidewalk in front of the Venetian.[344] The Venetian attempted to have the protesters removed, but the District Attorney's Office declined to issue citations or make arrests.[345] The Venetian filed a federal lawsuit against the county, alleging that it had taken private property in order to create a public forum.[346] The casino also sought a declaratory judgment that the replacement sidewalk was not a public forum and an injunction requiring that the county recognize and enforce the Venetian's right to exclude the protesters.[347]

The Ninth Circuit held that the replacement sidewalk, which was actually located on a different parcel than the public sidewalk it had replaced, was a public forum to which the union protesters had a right of access under the First Amendment (subject, of course, to appropriate time, place, and manner regulations).[348] In making that determination, the court analyzed several factors: the historical use of the public sidewalk that had been replaced and its public forum status; the location of the now-private parcel and its relationship to the general pedestrian grid; the substitute parcel's character and use after disposition; the sidewalk's dedication to public use for purposes of unobstructed pedestrian access;[349] and the lack of any aesthetic, environmental, or architectural distinction between the sidewalk in front of the Venetian and the connecting public sidewalks.[350] The court concluded that it was "apparent that the function of the replacement side-

[342] Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd., 257 F.3d 937, 939–40 (9th Cir. 2001).

[343] *Id.* at 940.

[344] *Id.*

[345] *Id.* at 940–41.

[346] *Id.* at 941.

[347] *Id.* Although the county defended the suit, it ultimately took no position regarding whether the sidewalk was a public forum for First Amendment purposes. *Id.* at 941 n.4.

[348] *See id.* at 942, 948.

[349] A recorded servitude on the parcel provided that the Venetian, its successors, and assigns dedicated the parcel to public use for the purpose of unobstructed pedestrian access. *Id.* at 943. The court said that the servitude operated as either a restrictive covenant or an affirmative easement. *Id.* at 946. However the servitude was characterized, the court concluded that it operated to render the parcel public, not private, property. *Id.* at 945–46 ("Property that is dedicated to public use is no longer truly private.").

[350] *See id.* at 943–46.

walk on the Venetian's property was to be the same as the former public sidewalk in front of the Venetian and the sidewalks connecting on either side of the Venetian property."[351] It emphasized that there was nothing to indicate to pedestrians that they were entering a private enclave when they used the Venetian's sidewalk.[352]

Despite the fact that the Venetian had legal title to the sidewalk parcel, the court held that the sidewalk remained subject to First Amendment requirements. The fact that the property remained open to the public on essentially the same terms as the public sidewalk it had replaced meant that the First Amendment continued to apply even though the Venetian itself was a private actor. The Ninth Circuit did not make clear whether, through substantial physical alteration or otherwise, the Venetian could ever change the public forum status of its private parcel. The court seemed to suggest that the replacement sidewalk was unique and perhaps immutably public: "Even if the Venetian were to close its doors or to be converted into a members-only club or some other nonpublic enterprise, members of the public would still have the recorded right to pass across the Venetian's property along Las Vegas Boulevard and to express themselves as they do so with the same freedom as on any public sidewalk."[353] Two factors seemed to be critical to preserving the newly constructed sidewalk as a traditional public forum. The first was the unique geography—a replacement sidewalk that was sandwiched between two public sidewalks and thus critical to passage. The second was the recorded public easement.

The Tenth Circuit applied a similar functional approach in a pair of cases involving the sale of a portion of Main Street in Salt Lake City, Utah, to the Church of Jesus Christ of Latter-Day Saints (LDS).[354] As discussed earlier, Salt Lake City closed and sold a portion of the Main Street parcel[355] but initially retained an easement for public access and passage over a portion of the parcel.[356] The reservation of easement contained a number of restrictions on expressive activity on the parcel and gave LDS the right to exclude anyone who engaged in any of the prohibited conduct.[357] It also contained a right of reverter, which provided that if LDS did not use the property for the purpose set forth in the deed, the easement ownership would revert to the city.[358] LDS made several aesthetic and other changes to Main Street Plaza in order to convert it to an ecclesiastical park, including

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[351] *Id.* at 942.

[352] *See id.* at 945.

[353] *Id.* at 948.

[354] *See* Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1253 (10th Cir. 2005); First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114, 1117 (10th Cir. 2002).

[355] *First Unitarian Church*, 308 F.3d at 1117.

[356] *Id.* at 1118.

[357] *Id.* at 1118–19.

[358] *Id.* at 1119.

the addition of "planters, benches, and waterfalls, a large reflecting pool, and changes in grade."[359] The district court held that in light of these changes in function and appearance, the easement property was no longer a public forum.[360]

The Tenth Circuit reversed.[361] The court began with some general observations regarding property dispositions and the First Amendment. The court observed that "a deed does not insulate government action from constitutional review"; thus, formal title to the land was not dispositive.[362] The court also rejected the argument that an easement was not a significant enough property interest to merit public forum analysis under the First Amendment.[363] To the contrary, said the court, some public easements had been held to constitute Fifth Amendment takings.[364] The court indicated, however, that not every easement would constitute a public forum for purposes of the First Amendment.[365] That determination would depend on "the characteristics of the easement, the practical considerations of applying forum principles, and the particular context the case presents."[366]

In light of the city's clear purpose to retain public access to and use of the easement parcel, the property's relationship to the general downtown pedestrian transportation grid, and the fact that the easement was open to the public, the court concluded that the easement "share[d] many of the most important features of sidewalks that are traditional public fora."[367] The court further noted that the easement parcel had traditionally been open not only to public use but also to expressive activities in particular.[368] Further, although LDS had made certain physical alterations to the property, the court concluded that they were not sufficient to substantially alter the use of the property and thus demote the easement parcel from a traditional to a nonpublic forum.[369] The court said that while the government has the power to change the status of even a well-established public forum, it not only must alter the physical characteristics of the property but also must bear any

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[359] *Id.*

[360] First Unitarian Church v. Salt Lake City Corp., 146 F. Supp. 2d 1155, 1171 (D. Utah 2001), *rev'd*, 308 F.3d 1114.

[361] *First Unitarian Church*, 308 F.3d at 1117.

[362] *Id.* at 1122 (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (2000) (noting that "easements to which government is party are subject to the Constitution")).

[363] *Id.*

[364] *Id.*; *see, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (holding that a public easement constituted a regulatory taking).

[365] *See First Unitarian Church*, 308 F.3d at 1124–25.

[366] *Id.* at 1123 n.5 (citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672–77 (1998)).

[367] *Id.* at 1128.

[368] *See id.* at 1129–30.

[369] *See id.* at 1130.

attendant costs.[370] Here, the city had retained a significant property interest after the sale; "[i]n effect, the City want[ed] to have its cake and eat it too . . . ."[371] According to the Tenth Circuit, the First Amendment does not permit this type of arrangement.[372] In explaining its decision to apply the First Amendment to the privatized easement parcel, the court noted the increasing importance of preserving public spaces open to expressive activities, particularly in downtown areas.[373]

In a sequence of events reminiscent of the Baconsfield saga discussed in Part I and the *Buono* case discussed in Part II, following the Tenth Circuit's decision, Salt Lake City sold the easement to LDS in return for just over two acres of land in a low-income neighborhood and a $5 million recreation center to be built on the land.[374] This time, the settlement agreement provided that there was to be no right of public access or passage with regard to Main Street Plaza.[375] However, the city did retain a right of re-entry that allowed it to reclaim the public easement should LDS fail to maintain the plaza it had constructed on the former Main Street as "landscaped space."[376]

The Tenth Circuit held that the city now had sufficiently divested itself of any interest in the property to avert the transfer of any First Amendment speech and assembly obligations to LDS.[377] It concluded that LDS was not a state actor since it was neither performing a public function by maintaining and determining access to the plaza, now a wholly private property, nor involved in any symbiotic relationship with the city.[378] Relying on Justice Kennedy's observations in *Lee*, the court noted that the government always retained the options to close a public forum by selling the property or to change a property's status by altering its physical character or uses.[379] The court held that LDS had made sufficient physical changes to the plaza property as a whole to demonstrate that it was privately owned, including posting signs at all entrances to the plaza and erecting planters and other barriers.[380] Applying the functional approach, the court concluded that the plaza's walkways did not constitute public fora.[381] It noted that the primary

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[370] *Id.* at 1131 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 700 (1992) (Kennedy, J., concurring)).

[371] *Id.*

[372] *Id.* The court went on to invalidate the speech restrictions imposed under the easement and the reservation. *Id.* at 1131–33.

[373] *Id.* at 1131.

[374] Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1253 (10th Cir. 2005).

[375] *Id.*

[376] *Id.*

[377] *See id.* at 1255.

[378] *See id.*

[379] *See id.* at 1255–56.

[380] *Id.*

[381] *See id.* at 1257–58.

purpose of the plaza was to serve as an ecclesiastical park, that there was no public servitude that ran with the plaza property, and that the plaza was not seamlessly connected to any public sidewalks.[382]

Finally, the court discussed the fact that the city had retained a right of re-entry requiring that the plaza be maintained as a landscaped space.[383] It reasoned that this reversionary interest was not a present estate and thus was insufficient to render the plaza a public forum.[384] The court distinguished *Hampton* and *Grubbs*,[385] which, as discussed in Part I, held that the retention of a possibility of reverter was perhaps the most important factor in determining whether a disposition settled equality claims.[386] The court (incorrectly at least as to *Hampton*) said that these earlier cases had involved close post-disposition relationships between the government and the purchasers and that the subject properties served the same primary function post-sale as they had pre-sale.[387] Since these factors were not present with regard to the plaza, the court concluded that *Hampton* and *Grubbs* did not apply.[388]

The property dispositions described above represent only a small fraction of the public space that has been recently privatized. It is likely that most such dispositions have received no First Amendment scrutiny at all. On the occasions when private speakers have challenged property dispositions as violating speech and assembly rights, courts increasingly have scrutinized the details of the transfer instrument and the character of the post-disposition property.[389] These cases suggest that a carefully crafted disposition instrument that contains no recorded public easement and prescribes modest physical and aesthetic alterations generally will extinguish First Amendment speech and assembly claims. Although some courts have noted the precipitous decline in public forum spaces, particularly in urban

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[382] *See id.* at 1258.

[383] *See id.* at 1256–57.

[384] *Id.* at 1257.

[385] *Id.*

[386] *See supra* notes 107–28 and accompanying text.

[387] *Utah Gospel Mission*, 425 F.3d at 1257. In *Hampton*, there was no close relationship between the municipality and the purchasers of its golf courses; the court relied almost entirely on the right of reverter in finding state action. *See* Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962).

[388] *Utah Gospel Mission*, 425 F.3d at 1257.

[389] In addition to the cases discussed in the text, see *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 494–95 (7th Cir. 2000), reasoning, based on the historical use, the dedication of the property to public use, and the physical location of the property, that the parcel was a public forum for First Amendment purposes, and *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 576 (9th Cir. 1993), rejecting the city's argument that a portion of a public park was "semi-private." However, consider *Hawkins v. City of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999), holding that a pedestrian walkway in a city galleria, located on the site of a former public street, had been converted to a nonpublic forum.

areas, they have thus far been able to do relatively little to reverse the decline.[390]

D. Closure and Vacation of Public Access

Justice Kennedy's opinion in *Lee* suggested that officials had the discretion to close public forum properties.[391] Rather than selling or physically altering public forum property, officials might simply vacate any rights of public access or destroy the subject property, thereby effectively closing it to public access. What, if any, limits do the First Amendment's speech and assembly clauses impose on this type of disposition?[392]

The Supreme Court has never addressed a public forum closure. At least insofar as they are represented in reported cases, outright closures of public forum properties appear to be rare. One example is *Thomason v. Jernigan*, where local officials vacated a public right-of-way to a cul-de-sac in front of an abortion clinic.[393] The clinic had been the target of several public protests, and the city claimed that it had difficulty controlling crowds and traffic in and around the cul-de-sac.[394] It did not appear, however, that the local police had attempted to enforce existing traffic or other local laws.[395] The record, which included testimony at the public hearing on the property vacation, showed that the disposition was directly linked to the demonstrations.[396] The court observed that the vacation had essentially converted a traditional public forum that had been used for protest activity into private property.[397] The question, according to the court, was "whether that action constitutes the impermissible destruction of a public forum," subject to First Amendment review.[398]

Relying on *Grace* and other public forum cases, the court appeared to adopt a *presumption* that any property disposition that destroys a traditional

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[390] *See, e.g.*, ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 791 (9th Cir. 2006) ("If this trend of privatization continues—and we have no reason to doubt that it will—citizens will find it increasingly difficult to exercise their First Amendment rights to free speech, as the fora where expressive activities are protected dwindle.").

[391] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring).

[392] This concern extends to contexts other than the traditional public forum. *See, e.g.*, Rhames v. City of Biddeford, 204 F. Supp. 2d 45, 50–53 (D. Me. 2002) (concluding that the temporary closure of a public access television channel did not violate the First Amendment, but declining to decide whether permanent closure might do so).

[393] 770 F. Supp. 1195, 1196 (E.D. Mich. 1991). The city retained only an easement for utilities. *Id.*

[394] *Id.* at 1197–98.

[395] *See id.* at 1203.

[396] *See id.* at 1198–99 (describing municipal reports that had identified the protests as the impetus for the city's decision to vacate the right-of-way).

[397] *Id.* at 1200.

[398] *Id.*

public forum violates the First Amendment.[399] It ultimately held that the vacation was an impermissible content-based disposition and, in the alternative, that even if it was deemed a content-neutral disposition, the city had failed to satisfy the requirement that it be narrowly tailored.[400] Although the court acknowledged that precedents such as *Palmer* rendered the city's subjective "motives" largely, if not wholly, irrelevant, it repeatedly referred to evidence of the city's intent or purpose to suppress the clinic protesters' speech.[401] Ultimately, however, the court said that the case turned on the *effect* of the property disposition.[402] It concluded that despite the city's proffer of content-neutral justifications and despite the fact that no member of the public henceforth would have access to the cul-de-sac, the vacation of the public right-of-way effectively discriminated against a particular group of protesters in violation of the First Amendment.[403]

Thomason bears more than a passing resemblance to *Palmer*, which upheld the closure of the public pools after an integration decree had been entered.[404] In contrast to *Palmer*, however, *Thomason* refused to defer to the explanations proffered by local officials for their decision to vacate. Indeed, as noted, the court appeared to apply a presumption against the disposition of traditional public forum properties. The result in *Thomason* was colored by the city's rather obvious content discrimination. Insofar as it stands merely for the proposition that the government cannot close or vacate public access to a public forum for content-discriminatory reasons, *Thomason* breaks no new ground. If, however, *Thomason*'s apparent presumption were to apply even to dispositions effected for content-neutral reasons, it would substantially qualify the proposition that "[i]n some sense the government always retains authority to close a public forum."[405]

E. Government Ownership and Government Speech

Some free speech claims can also be settled or extinguished through publicization of property rather than privatization or closure. Publicization is a different kind of public-space-allocating disposition. It entails not the disposition of the underlying property, which is already owned or held in trust by the government, but rather the adoption or purchase of private

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[399] *See id.* at 1202 ("The vacation of an easement that transforms a public street and sidewalk into private property is almost prima facie evidence that the City's action was not narrowly drawn.").

[400] *See id.* at 1201–03.

[401] *See id.* at 1201 (finding that while the city "claim[ed] that it vacated the cul-de-sac solely to regulate conduct and control traffic problems[,] . . . the record clearly show[ed] that the conduct and traffic problems to be regulated [we]re the plaintiffs' protest activities").

[402] *See id.* at 1200 (acknowledging that, under *Palmer*, "the Court should not engage in a search for the motives of legislators, but for an inevitable unconstitutional effect resulting from their actions").

[403] *See id.* at 1201.

[404] *See* discussion *supra* notes 137–60 and accompanying text.

[405] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring).

speech by the government. The adoption or purchase of the speech in question purportedly settles any competing access claims by other private speakers.

This was the means of settlement at issue in *Pleasant Grove City v. Summum*.[406] *Summum* held that a city was not required, under the Free Speech Clause, to accept a private religious monument for permanent display in a public park where a city-owned Ten Commandments monument (along with other displays) was already located.[407] The Court reasoned that the public monuments already on display in the park, which had been donated to the city by private parties, were a form of government speech and thus were not subject to scrutiny under the Free Speech Clause.[408] The means of transfer in *Summum* was somewhat similar to the taking described earlier in the establishment context.[409] In this case, the transfer of ownership of the Ten Commandments monument from a private party to the city was held to extinguish any free speech claims.[410] The transformation of private speech into government speech effectively displaced the public forum doctrine.[411]

Summum is disconcerting in part because it suggests the possibility that the government speech principle might be used to effect an end-run around the Establishment Clause. But *Summum* raises serious free speech concerns as well. *Summum* treats the public square as an instrument of governmental speech, a location that exists to facilitate *the government's* own messages.[412] The notion that the public forum exists to convey governmental messages appears to turn the justification for the public forum—facilitation of the public's speech and assembly—on its head. *Summum* makes clear that governments are permitted to commandeer portions of the public square for their own permanent displays, to choose which displays (including perhaps religious ones) they will present to the public, and to insist on exclusive speech rights in some locations.[413] Although a government

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[406] 129 S. Ct. 1125 (2009).

[407] *Id.* at 1129.

[408] *See id.* at 1134.

[409] *See supra* notes 285–306 and accompanying text.

[410] *Summum*, 129 S. Ct. at 1132.

[411] *See id.* at 1133. This is yet another context in which public forum principles have been deemed inapposite in situations where speakers seek access to publicly controlled facilities. *See, e.g.*, United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 205 (2003) (holding that public forum principles were out of place in a public library context).

[412] *See Summum*, 129 S. Ct. at 1133 ("Public parks are often closely identified in the public mind with the government unit that owns the land."); *id.* at 1134 (observing that public parks "play an important role in defining the identity that a city projects to its own residents and to the outside world").

[413] This is not to suggest that the specific holding in *Summum* was wrong. After all, it would be impractical indeed to permit a permanent monument free-for-all in public parks and plazas. But we ought to recognize that, depending on the development of the government speech principle going forward, settlement-by-adoption (of speech), like settlement-by-disposition more generally, may substantially constrain public speech rights in the public square.

speech disposition does not necessarily settle establishment claims, it extinguishes all competing claims to access under the Free Speech Clause.[414]

After *Summum*, officials possess an additional mechanism for settlement-by-disposition. *Summum*'s impact on public forum properties and public speech rights is not yet known. At this point, however, it is at least clear that publicizing private monuments and perhaps other property will alter the allocation of free speech rights in some public forum spaces.

IV. SETTLEMENT-BY-DISPOSITION AND THE PUBLIC TRUST

As we have seen across a range of historical and doctrinal contexts, dispositions of certain public properties have a significant effect on constitutional liberties. Since the civil rights era, courts and public officials have tended to view most of these dispositions through the lens of private property law, with governments acting as ordinary sellers or purchasers. This private law framework has generally obscured the public obligations officials owe when disposing of certain public properties. Governments are not, of course, ordinary property owners or purchasers. Critical constitutional assets should not be alienated or purchased solely to favor specific viewpoints, symbols, or sellers. Courts and public officials ought to focus more directly on the public constitutional obligations that attach to certain properties subject to disposition.

In an effort to move us away from the private law mindset and to bring greater coherence to considerations of settlement-by-disposition across doctrinal areas, this Part relies by analogy on the public trust doctrine.[415] It argues that governments hold certain public properties in trust for the benefit of the public. Under the proposed public trust model, in order to constitutionally dispose of certain public properties officials would have to comply with trusteeship duties that I will label *fair dealing*, *preservation*, and *compliance with constitutional covenants*. Although courts have not used these specific labels, those that have placed some limits on settlement-by-disposition have invoked similar ideas. However, as we have seen, judicial review of settlement-by-disposition has not been uniformly protective of public trust interests. Thinking in terms of public trust duties may help courts and officials work through the constitutional implications of settlement-by-disposition. Ultimately, the goal is for public officials to act as re-

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[414] *Summum*, 129 S. Ct. at 1137.

[415] As will become apparent, the analogy is loose. I do not contend that the public properties under consideration here should be governed by the public trust doctrine that has been applied to natural resources. *See, e.g.*, Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892) (concluding that states hold title to submerged lands in trust for the benefit of the people); *see generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (discussing the origins and operation of public trust doctrine). Nevertheless, the public trust analogy provides a useful framework for conceptualizing and articulating some proposed limits to settlement-by-disposition.

sponsible stewards of public properties that they hold in trust for the benefit of the people and to enter into constitutional settlements.

A. (Discretionary) Property Allocations and (Mandatory) Constitutional Rights

As the description and analysis of settlement-by-disposition shows, no bright-line rule can resolve the fundamental conflict between the governmental power to dispose of (i.e., sell or purchase) public properties and the constitutional liberties that cannot exist without access to them. As the civil rights era first demonstrated, settlement-by-disposition raises a fundamental conflict between what is generally viewed as discretionary power to allocate and dispose of public properties and the seemingly mandatory nature of constitutional rights. As Parts II and III showed, this fundamental tension has resurfaced in contemporary First Amendment contexts. It has mainly arisen as a result of privatization of public properties. But as we have seen, public purchasing and taking powers also have raised questions regarding the legitimacy of settlement-by-disposition.

To hold that government can *never* dispose of public properties that are either critically important to constitutional liberties or at the center of an ongoing constitutional controversy would deprive officials of an aspect of their traditional authority. Further, as Justices Burger and Blackmun noted in their *Palmer* concurrences, such a limitation would require that in some cases government must maintain public parks, pools, schools, and other properties in perpetuity. The Constitution has never been interpreted to impose this sort of broad restraint on governmental disposition of public properties. Indeed, since the New Deal, economic decisions of this sort generally have been reviewed under a mere rationality standard.[416] Moreover, in the public forum context, with the possible exception of the requirement that *presently existing* public streets and parks must be open to some speech and assembly, the Constitution has not been interpreted to make property distributions either mandatory or impermissible.[417] Undoubtedly, governments also have the general constitutional power to take or purchase properties.[418] In sum, public properties are generally considered alienable and governments have the authority to add properties to their portfolios.

Governments also have a distinct and substantial interest in pursuing and achieving constitutional settlements. This interest includes avoidance

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[416] *See* Louis Michael Seidman, *The* Dale *Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1544–48 (2008) (describing the "New Deal compromise," pursuant to which enactments affecting economic liberties have generally been subjected to rationality review while measures affecting noneconomic liberties such as free speech have been subjected to heightened judicial scrutiny).

[417] *See id.* at 1592–94 (discussing the allocation of forum properties).

[418] *See* U.S. CONST. amend. V.

of litigation and its attendant costs. Legislative and executive officials, like their judicial counterparts, must be permitted to avoid constitutional issues where possible. Bona fide sales and other legitimate property dispositions may serve this valuable settlement function.

By the same token, a rule of automatic or presumptive validity for property dispositions would be unworkable and, frankly, unwise. As the civil rights era disposition cases demonstrated, to hold that the mere fact of disposition immediately and henceforth settles any constitutional claims would be to treat certain constitutional liberties—in particular those intimately connected to the subject properties—as wholly discretionary.[419] As *Palmer* starkly demonstrated, holding that the mere fact of disposition immediately extinguishes any constitutional concerns would grant governments the authority to turn the Constitution on or off at will.[420] Indeed, this is one of the enduring lessons of the civil rights era experience with settlement-by-disposition.

While governments may not have any constitutional obligation to provide schools, streets, and parks in the first place, once they do so, they must manage and dispose of such properties in a manner that complies with constitutional obligations and respects constitutional guarantees. Although the point has sometimes been obscured or misunderstood by courts and public officials, the dispositions themselves are state actions subject to constitutional limitations. Moreover, dispositions such as public purchases or takings are also subject to constitutional limitations. The purchase itself may be constitutionally or legislatively authorized, but it also must comply with the Bill of Rights and other constitutional guarantees. Disposition settles title; it does not, standing alone, settle all constitutional concerns.

B. The Public Trust Model

We need a framework and mechanism for conceptualizing and imposing some limits on settlement-by-disposition. The key is to prevent public officials from treating public properties as mere disposable assets. Courts have not failed entirely to recognize the dangers inherent in settlement-by-disposition. We can see this in some civil rights cases rejecting what seemed to be bona fide sales and in the functional approaches some courts have adopted in the establishment and speech contexts. But since the civil rights era, judicial efforts have tended to be ad hoc, reactionary, and uneven in terms of protecting public access and preserving public spaces. *Abney* and *Palmer* long ago demonstrated the limits of judicial review with regard to settlement-by-disposition. The plurality opinion in *Buono* shows that

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[419] *See* Seidman, *supra* note 416, at 1566 ("When property rights are discretionary, free speech rights tend to become discretionary as well.").

[420] *See* discussion *supra* notes 159–60 and accompanying text; *cf.* Boumediene v. Bush, 553 U.S. 723, 765 (2008) (observing that the federal government does not have "the power to switch the Constitution on or off at will" by manipulating territory).

courts are still inclined to apply a private law approach that presumes that governments, like private property owners, may generally dispose of properties notwithstanding public constitutional obligations.[421]

Restraints on alienation with respect to common resources are sometimes imposed under the public trust doctrine.[422] Public officials and courts might benefit from conceptualizing public properties that are critical to the exercise of constitutional liberties as critical assets held in trust by governments and thus subject to limited alienability. Under this proposed framework, in order to constitutionally dispose of these properties officials would have to comply with the proposed duties of fair dealing, preservation of the public trust, and compliance with constitutional covenants. Ultimately, public officials would have an obligation with regard to the subject properties to enter constitutional settlements that serve public purposes rather than private interests, comply with judicial decrees, and respect minority rights. These trust obligations, which are drawn and synthesized from the collective experience with settlement-by-disposition since the civil rights era, would apply whether the purported settlement takes the form of privatization or represents a more public law settlement such as a taking. They would also apply affirmatively—that is, whether or not courts are asked or even able to enforce them. Collectively, the trust duties and obligations discussed below would qualify and limit the sense in which governments "in some sense always" retain the authority to dispose of public properties.[423]

1. The Nexus Test and the Trust Corpus.—A question immediately arises regarding which properties constitute the trust corpus. On the one hand, limits on alienability should not be so broad as to cripple governmental power to dispose of properties and facilities. On the other hand, critical constitutional properties and public rights of use and enjoyment with regard to those properties ought to be preserved.

Public property is not, of course, a generic category. Not all property dispositions implicate substantial constitutional and democratic concerns. For example, dispositions of surplus properties such as abandoned municipal lots or waste facilities raise no special constitutional concerns. Such properties are not intricately connected to the exercise of constitutional liberties.

By contrast, public properties that are critical to the exercise of constitutional liberties ought to be considered part of the trust corpus. Insofar as the subject properties are public streets, sidewalks, and parks, the case for inclusion in the public trust corpus has substantial precedential support.

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[421] *See Buono*, 130 S. Ct. 1803, 1817–18 (2010) (urging deference to the legislative judgment that the property be sold in order to settle the establishment controversy).

[422] *See, e.g.*, Sax, *supra* note 415.

[423] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring).

The origins of the public forum doctrine lie in dictum from *Hague v. Committee for Industrial Organization*, which explicitly invokes the concept of the public trust: "Wherever the *title* of streets and parks may rest, they have immemorially been held *in trust* for the use of *the public* and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[424] All members of the community are entitled to enjoy this portion of the trust corpus on equal terms, not as special beneficiaries of governmental privatization or publicization.[425]

The public forum trust is far too narrow to encompass all of the properties and resources in the proposed trust corpus. For example, it would not have included many of the properties, such as public schools, restaurants, and swimming pools, used for settlement-by-disposition during the civil rights era. Nor would it include certain public parklands, such as the parcel at issue in *Salazar v. Buono*, that have not traditionally been used for expressive purposes. Moreover, it is not entirely clear that the public forum trust requires any sort of preservation of trust resources. At most, it seems to require that, in certain existing public places, the government make some opportunities for speech and assembly available. The public forum trust thus provides only limited support for the public trust model I am proposing.

The trust corpus must be somewhat broader than the traditional public forum category. The general public trust doctrine has been interpreted to limit the government's ability to dispose of a variety of critical public resources including coastal and other public lands.[426] These resources are shared in common by the public and are often scarce. A broader notion of trust resources as constitutional assets should apply in considerations of settlement-by-disposition. Since the civil rights era, the properties that have been disposed of in order to settle constitutional claims and concerns have been scarce constitutional resources. Integrated or soon-to-be-integrated facilities, public parklands, streets, and sidewalks all ought to be considered common but scarce public resources subject to certain limits on alienability. Disposition of these properties substantially affects the public's rights to

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[424] 307 U.S. 496, 515 (1937) (emphasis added).

[425] Although reliance on streets and parks for expression has declined, these properties remain critically important to public contention, self-government, and self-actualization. *See* ZICK, *supra* note 3 (arguing that public places such as streets and parks remain important as fora for the exercise of First Amendment liberties, despite a modern reliance on other expressive outlets). As Justice Kennedy has emphasized, privatization in particular poses a grave threat to the public square and to public expression. *See Lee*, 505 U.S. at 695–700 (Kennedy, J., concurring) (explaining the need to preserve public properties for speech and assembly).

[426] Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 640–41 (1986); *see also id.* at 649–50 (noting that public trust doctrine has been applied to rural parklands and downtown areas).

access, use, and enjoy common resources that are critically linked to various constitutional liberties.

Similarly, properties that are taken or purchased by governments may become part of or alter the existing trust corpus. The Mt. Soledad taking and the purchase of private speech in *Summum* are examples.[427] Again, the purchase or taking itself may be legally authorized. Nevertheless, as explained in the remainder of this section, certain pre- and post-disposition duties may apply to properties that are held in common for the benefit of the public. To be sure, there are some built-in limits on governmental property acquisitions. For example, the government's power to take private property is restricted by the Due Process Clause and the Takings Clause.[428] But minimal requirements of due process and the liability rule requiring payment of just compensation may not be adequate public safeguards. These limitations do not necessarily prevent collusive and sham dispositions. Further, while they provide some protection to property owners, due process and eminent domain limits may fail to protect both the rights of minority objectors and the public at large from the effects of property dispositions. In sum, it is appropriate to consider certain acquired parcels as part of the trust corpus and thus subject to the proposed trust duties.

Limiting the government's power to dispose of certain public properties will not entail invasive judicial or other inroads on generally discretionary allocative authority. In many cases, compliance with the basic procedures applicable to disposition of public properties will satisfy any legal and constitutional requirements. With respect to critical constitutional assets, however, additional duties ought to apply.

2. The Duty of Fair Dealing.—Under the proposed public trust approach, the most basic of the proposed public trust duties is the duty to engage in fair dealing with regard to the subject property. At a minimum, of course, any disposition must have a legitimate public purpose. However, contrary to the formalist approach taken by some courts, this means more than compliance with federal, state, and local laws relating to property disposition. The mere passage of legal title does not satisfy the proposed duty of fair dealing. The disposition must be executed for a legitimate and nondiscriminatory purpose.

Although courts did not use these terms, one could regard the history of settlement-by-disposition during the civil rights era as indicating an effort by some courts to impose such a duty. State and local officials frequently disposed of the trust corpus in a manner that breached what I call the duty of fair dealing through various attempts to evade equality guarantees. As discussed in Part I, during the 1950s and 1960s some courts became acutely aware that seemingly innocuous and routine property

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[427] *See supra* notes 285–306, 406–13 and accompanying text.

[428] U.S. CONST. amend. V; *id.* amend. XIV, § 1.

dispositions were not as they seemed on the surface. Over time, the courts received an invaluable education regarding the various forms and tactics used to achieve circumvention-by-disposition. As judges gained experience, some became highly skeptical of the legitimacy of property disposition as a means of settling Fourteenth Amendment concerns. Judge Wisdom voiced this judicial frustration when he stated that "in the sector of the law encompassed in the subject 'Civil Rights', case by case federal courts have acquired a thorough education in 'Sophisticated Circumvention.'"[429]

As discussed in Part I, however, there were limits to this judicial skepticism. Not all courts were willing to look behind or second-guess property dispositions. Even the Supreme Court, the very source of *Brown*'s national integration directive, upheld some very questionable dispositions. Although seemingly disheartened by the result, the *Abney* Court upheld the city's divestment and permitted Baconsfield to revert to Senator Bacon's heirs, even though that meant the closure of the park rather than its integration.[430] In *Palmer*, the Court ultimately deferred to local officials' economic and "public safety" justifications in allowing the closure of the city's public pools, even though the effect was circumvention of a pending integration order.[431] Still, in many cases, especially those involving the integration of schools, lower courts often prevented circumvention-by-disposition by insisting on fair dealing and a measure of public accountability.[432]

Public officials have continued to dispose of the trust corpus in ways that suggest circumvention of rather than compliance with constitutional guarantees. Yet in many cases contemporary property dispositions have not been viewed with serious skepticism. Today a duty of fair dealing, insofar as it applies in some form, appears to be satisfied so long as no "unusual circumstances"[433] are present. As the *Buono* plurality opinion suggested, courts are still reluctant to look behind property dispositions.[434] In some cases, so long as the dispositions have satisfied private law requirements for land transfers, they have been deemed valid.[435] Indeed, as *Buono* suggests,

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[429] United States v. City of Jackson, 318 F.2d 1, 5 (1963).

[430] *See supra* notes 42–57 and accompanying text.

[431] *See supra* notes 137–44 and accompanying text.

[432] *See supra* notes 64–76, 80–103 and accompanying text.

[433] *See* Freedom From Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000).

[434] *See Buono*, 130 S. Ct. 1803, 1817–18 (2010) (noting that the land-transfer enactment "embodie[d] Congress's legislative judgment that this dispute is best resolved through a framework and policy of accommodation" and that the district court should not have dismissed that judgment lightly).

[435] *See, e.g.*, cases cited *supra* note 341.

there appears to be a working presumption of fair dealing on the part of public officials.[436]

Civil rights era courts were of course reacting to more than two decades of attempted nullification and circumvention-by-disposition. Nothing we have seen in the First Amendment or any other context quite compares with this attempted violation of the public trust. Nevertheless, the fundamental reasons for skepticism, including the possibility of circumvention and government manipulation of the trust corpus, certainly remain present today.[437]

Thus, at a minimum, a "bona fide" property disposition is generally one that complies with all applicable land disposition laws, involves the fair solicitation of bids from the public, and is effectuated for fair market value or just compensation. Dispositions must be bona fide in the most elementary sense that the process of disposition is lawful and legitimate. However, this basic legal formality is merely a minimum requirement, not the full extent of the proposed duty of fair dealing.

Courts ought to scrutinize more carefully the underlying basis for governmental action when public trust values are at stake. In particular, they ought to ensure that the disposition is being executed for a valid public purpose. Although courts have not always treated them as such, we have encountered a host of indicators in disposition cases that might suggest a breach of the duty of fair dealing. For example, dispositions executed just prior to or in response to judicial orders requiring integration or removal of a public religious display may suggest an improper purpose. Where the extensive history relating to a disposition suggests a collusive effort to preserve a religious symbol, there is a basis for requiring a very clear secular justification for it. Similarly, where a disposition preserves access for only a select few speakers it might be considered presumptively violative of the duty of fair dealing. Even the deferential standard applied in ordinary takings cases arguably ought to be ratcheted up where a government intervenes for the specific purpose, or with the ultimate effect, of rescuing or preserving a purely sectarian symbol. Although the foregoing circumstances would not necessarily require rescission of the transaction, they would certainly justify further judicial inquiry.

Some might object that the proposed duty of fair dealing would embroil courts in difficult questions of governmental purpose and motive. They might suggest that courts ought to limit review solely to the disposition instruments and other objective facts. Purpose or motive review indeed

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[436] *See Buono*, 130 S. Ct. at 1817 (plurality opinion) (criticizing the district court for failing to acknowledge that "Congress's prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations").

[437] *See, e.g.*, *id.* at 1837 (Stevens, J., dissenting) (noting that the purpose of the land transfer statute was to preserve the cross, a religious symbol, on privatized land).

has long been controversial.[438] However, a few examples will demonstrate why such an inquiry is sometimes necessary to determine whether officials have complied with the duty of fair dealing.

Suppose, for example, that a state legislature, having been ordered by a court to remove a Latin cross from its capitol, enters an agreement to sell the small portion of the capitol building upon which the cross presently sits to a private party. The legislature stands ready to erect a plaque indicating that the cross is privately owned and does not constitute an endorsement of any religion or religious message by the state. Assume further that the sale complies with state laws and is the product of an open and fair bidding process. Although the transaction appears to be legally bona fide, there is ample reason in such a case to suspect that the object of this transaction, as well as its effect, is to preserve and endorse a religious message in a critical democratic space.[439]

Similarly, recall the vacation of public access to the cul-de-sac in front of the abortion clinic in *Thomason*.[440] There was no indication in that case that local regulations relating to land disposition had not been followed to the letter. Surely, though, that does not mean the judicial inquiry ought to be at an end. As it turned out, officials had not in fact dealt fairly with the cul-de-sac property. They had vacated the public's right of access precisely because protesters had used the property for protected First Amendment ac-

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[438] *See* Ely, *supra* note 145, at 1208 ("Opening skirmishes over the relevance of motivation occurred during the 1920's and early 1930's in cases involving the reach of federal power."). John Hart Ely and Paul Brest had a comprehensive debate concerning whether official motive or purpose was relevant to legislative, executive, and administrative decisions, and if so under what circumstances. *See* Brest, *supra* note 145; Ely, *supra* note 144, at 1208. In situations involving generally discretionary governmental decisionmaking, including disposition of governmental resources like public properties, Ely argued that illicit motive may require the government to present a legitimate defense of the choice made, while Brest argued that illicit motive was sufficient grounds for invalidation. *Compare* Ely, *supra* note 145, at 1295 (arguing that "[o]rdinarily a state need provide no legitimate defense of a decision to terminate one public service rather than another, but when the choice has been made for an unconstitutional reason, such a defense should be required"), *with* Brest, *supra* note 145, at 130–31 (arguing that courts should invalidate otherwise constitutional decisions when they are designed in part to serve an illicit or suspect motive, "unless the defendant comes forward with an extraordinary justification"). Enlightening as it was, neither that debate, nor any since, has settled the matter. The problems with motive review, including the difficulty of ascertaining motive and the futility of invalidating otherwise permissible laws or actions on motive grounds, were apparent well before *Palmer* held that official motive, standing alone, could not determine the constitutionality of the pool closures. *See* Brest, *supra* note 145, at 119–30 (discussing purported difficulties with motive review). Despite *Palmer*'s admonition, motive review remains present even in contemporary equality contexts. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 916 (1990) (holding that in challenging a voting district on equal protection grounds, the plaintiff had to show that race was the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district").

[439] *Cf.* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995) (plurality opinion) (acknowledging that government is not acting neutrally when it "giv[es] sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter)").

[440] Thomason v. Jernigan, 770 F. Supp. 1195, 1196 (E.D. Mich. 1991).

tivities.[441] A narrow focus on the procedural validity of these dispositions—i.e., whether they complied with local land use laws and regulations—would have been wholly inadequate.

Concerns about undertaking motive or purpose inquiries in establishment cases ought not be overstated, particularly since Establishment Clause doctrine expressly *requires* that courts assess official purpose.[442] While purpose review has not resulted in the invalidation of a great many enactments or governmental actions, Supreme Court precedents, particularly recent ones, provide ample support for undertaking the inquiry with an eye toward smoking out sham explanations, transactions, and policies.[443] Although the government's characterization of a disposition as a bona fide settlement is entitled to some deference, courts ultimately have a duty to "distinguish[] a sham secular purpose from a sincere one."[444]

It is thus appropriate, "where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of [an official's] heart of hearts," to undertake an objective inquiry regarding the purpose of a sale or other disposition of public property.[445] The discoverable and objective facts in disposition cases may include the retention of a property interest by the government, continued official involvement in the maintenance of the property after disposition, the structuring of the transaction such that the continued display of a religious symbol is favored, and any history of governmental efforts to ensure that a religious display is preserved in its original state. The fact that all of these elements were present[446] ought to weigh very heavily in the district court's reconsideration of the constitutionality of the transfer statute in *Buono*.

In sum, in assessing whether the government has complied with the duty of fair dealing in Establishment Clause cases, courts ought not confine the inquiry to the facial validity of the disposition instruments. To echo Judge Wisdom's observation with regard to civil rights circumvention, the skepticism evident in some recent Supreme Court Establishment Clause

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[441] *See id.* at 1201–03.

[442] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (requiring that legislation have a secular purpose).

[443] *See* McCreary County v. ACLU, 545 U.S. 844, 881 (2005) (holding that a display of the Ten Commandments at a county courthouse had a "predominately religious purpose" and thus violated the Establishment Clause); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000) (holding that it was reasonable to infer that the school district's stated purpose for allowing student-initiated prayer at football games was a sham); Edwards v. Aguillard, 482 U.S. 578, 589 (1987) (holding that Louisiana's "Creationism Act" violated the Establishment Clause because it did not fulfill its stated secular purpose of protecting academic freedom).

[444] *See* Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in the judgment).

[445] *McCreary County*, 545 U.S. at 862.

[446] *See Buono*, 130 S. Ct 1803, 1813 (2010) (describing the sequence of statutes Congress passed in order to preserve the cross memorial on privatized land).

cases stems from courts' having received, if not "a thorough education in 'Sophisticated Circumvention,'"[447] at least an introductory course or two.

The duty of fair dealing also limits dispositions of public forum properties such as public sidewalks, streets, and parks. Commentators generally have agreed with the proposition, stated in Justice Kennedy's *Lee* concurrence, that "[i]n some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use."[448] That authority is not unbridled, however. For example, *Thomason* demonstrates that the duty of fair dealing ought to incorporate the First Amendment prohibition on content discrimination,[449] as well as the principle that even a content-neutral disposition may fail to serve an important governmental purpose.[450] Where the objective facts indicate some reason to doubt that the disposition has been effected in good faith and for a proper public purpose, courts ought to carefully scrutinize the government's explanation for the transfer.

Ultimately, the duty of fair dealing has both procedural and substantive components. It is necessary but not sufficient that the sale or conveyance meets the minimum procedural standards for legal dispositions. The disposition also must have been effectuated for a proper public purpose. Because the properties in question are *constitutional* assets, the duty of fair dealing requires careful consideration of all substantive constitutional standards relating to the legitimacy of governmental purpose.

3. The Duty of Preservation.—One of the duties sometimes imposed upon governments under a public trust framework is to preserve the trust corpus for public enjoyment.[451] As interpreted by courts, this duty has included requirements that officials consider trust concerns prior to disposing of or altering the trust resource, engage in pre-disposition comprehensive resource planning and cost-benefit analysis, and allow only minimal or necessary harm to trust resources.[452] The preservation duty sometimes has also included a requirement that the public have access to trust resources regard-

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[447] United States v. City of Jackson, 318 F.2d 1, 5 (5th Cir. 1963).

[448] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 699–700 (1992) (Kennedy, J., concurring); *see* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1209 n.143 (1996) ("[A] government decision to bulldoze a park—thereby incidentally rendering speech in the park impossible—would raise no First Amendment issue."); David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?)*, 46 HASTINGS L.J. 335, 401–02 (1995) (noting that officials may close a public forum, but arguing against demotion of public forum properties to nonpublic fora); Sullivan, *supra* note 4, at 1460 n.193 (noting that the government retains authority to close public forum properties).

[449] *See* Thomason v. Jernigan, 770 F. Supp. 1195, 1202 (E.D. Mich. 1991).

[450] *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (requiring that content-neutral speech regulations be supported by an important or substantial interest).

[451] *See* Lazarus, *supra* note 426, at 652–53.

[452] *See id.* (synthesizing precedent).

less of who holds title.[453] For example, private owners of beachfront property may be required to allow public access.[454]

In settlement-by-disposition contexts, we might impose upon public officials a similar duty to preserve forum properties as public spaces open on equal terms to the public. This does not mean that such properties can never be sold, altered, closed, or otherwise alienated. It means simply that officials' discretion to alienate and dispose of public properties and facilities ought to be limited to some degree by preservation concerns. Sometimes courts can play a role in enforcing this duty. For the most part, however, this is a duty that public officials must internalize and self-enforce.

A duty of preservation could be formalized in public disposition laws and regulations. For example, prior to any disposition officials could be required to consider the effect on overall public use and enjoyment of the subject property. They could also be required to carefully—and transparently, for example at open public meetings—balance any constitutional objections or claims against the purposes served by the disposition. Finally, although it would complicate their efforts to divest themselves of the property and thereby avoid constitutional concerns, officials ought to consider recording at least limited public access rights and perhaps retaining some interest in the subject properties. Whatever specific form it ultimately takes, the duty of preservation would impose some limits on officials' power to alienate constitutional trust resources.

Although self-imposed limits are likely to be the most effective preservation measures, courts are not powerless to enforce a duty of preservation. During the civil rights era, courts were somewhat successful in enforcing a preservation obligation, although they did not label it as such. For example, some courts reviewed dispositions involving public school properties with heightened skepticism and ultimately refused to allow certain privatizations.[455] Although they did not hold that the government had a constitutional obligation to maintain or operate public schools, courts were not blind to the fact that widespread privatization of these properties might facilitate white flight and indefinite racial segregation.[456] Preservation of at least some public school properties was deemed critical to granting equal access to educational opportunities and to equality more generally. Similarly, although they did not hold that officials were prohibited from disposing of public golf courses, cafeterias, or other public properties, courts

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[453] *See* Saetz v. Heiser, 240 N.W.2d 67, 72 (N.D. 1976)); Lazarus, *supra* note 426, at 653 (citing Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 367 (Mass. 1979)).

[454] *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365–66 (N.J. 1984) (holding that private nonprofit association must allow public access to beachfront property).

[455] *See supra* notes 63–76, 80–103 and accompanying text.

[456] *See* Norwood v. Harrison, 413 U.S. 455, 457 (1973) (noting a dramatic rise in private schools in Mississippi following desegregation orders).

sometimes sought to preserve the public character of these properties in order to facilitate integration.[457] They did this by flexibly interpreting the state action doctrine or treating the retention of a future interest by government as a sufficient justification for imposing constitutional obligations. As *Palmer* suggested, however, there are limits to judicial enforcement of any preservation obligation.[458] Neither the plurality nor the dissent in *Buono* mentioned the negative effect settlement-by-disposition might have on efforts to preserve public resources.

Imposing the proposed duty of preservation could affect settlement-by-disposition in the establishment context in several ways. As noted, prior to disposition, officials ought to carefully consider the effect that selling an individual parcel located within a public park to a private speaker might have on overall public use and enjoyment of the space. They ought to acknowledge publicly and transparently that establishing exclusive property rights will remove the subject parcel from general public use. Officials ought also to consider whether privatization will deter use by those who do not share the religious beliefs of the new title holder. Disposal of substantial parcels may also impact speech and assembly rights in a park or other public place. Taking or otherwise publicizing private property can produce similar effects. Creating special enclaves through dispositions that serve primarily private interests is fundamentally inconsistent with the proposed duty to preserve public resources and public access. Granting what are in essence preferred positions in public fora to selected speakers is generally inconsistent with the proposed obligation to preserve scarce constitutional resources. Officials should be required to carefully consider and publicly defend the balance they have struck between disposition and public use. Legislators did not do so in *Buono*, for example, where they enacted the transfer statute "without any deliberation whatsoever."[459]

Especially given the variety of other constitutionally valid options typically available to them, officials faced with a contest over a public religious display should consider selling public properties only as a *last* resort—for example, where removing the religious symbol would actually result in its physical destruction. Similarly, takings and purchases ought generally to be reserved for dispositions intended to add to the trust corpus and increase public use and access, rather than to rescue private messages or take sides in local controversies regarding religious displays. Assuming such transactions are for an otherwise valid purpose and hence satisfy the duty of fair dealing, courts will be especially unlikely to invalidate them. That, again, is why it is imperative that officials view themselves as trustees of the constitutional corpus. Even if they are not inclined to write preservation limits into law, officials ought to approach disposition of constitutional

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[457] *See supra* notes 78–79, 106–25 and accompanying text.

[458] *See supra* notes 137–60 and accompanying text.

[459] *Buono*, 130 S. Ct. 1803, 1840 (2010) (Stevens, J., dissenting).

assets with the same sort of care that often attends disposition of other scarce resources. They ought to balance the need for settlement against the harm the disposition might do to the trust resource, the limits it will place on public liberties, and the message it will send to the community.

If after careful consideration of the costs and benefits and the effect on public resources officials remain intent on disposition as a means of settling establishment disputes, they ought to maximize preservation by privatizing the *smallest* possible parcels. This follows from the public trust principle that officials ought to minimize the harm to trust resources and allow for only limited encroachments.[460] Here courts can play an important role. In particular, they should not order officials to privatize ever larger parcels of public land to demonstrate compliance with the Establishment Clause.[461] If that is the only way to separate the state from a religious message, then removal of the symbol must be considered the only viable option. The public's right of access to a public park or other trust resource outweighs any interest the government may have in facilitating preservation of the private religious speech in question.

In the speech and assembly context, the principal preservation concern is the steady and continuing erosion of the public square. The public forum doctrine provides that existing public streets, parks, and sidewalks are held in trust for purposes of expressive activities. However, the Supreme Court has never decided whether public officials have any duty to preserve even traditional public forum spaces or whether they may be treated as disposable surplus property. Imposing a duty of preservation with regard to public parks and other forum properties raises a fundamental and unresolved First Amendment issue. As *Thomason* shows, dispositions that offend the neutrality requirement breach the proposed duty of fair dealing and are on that basis invalid.[462] Is there any basis for imposing a preservation duty where governmental decisions to close public forum properties such as parks and streets are based upon neutral and presumptively legitimate reasons?

Suppose, for example, that local officials want to bulldoze a public park in order to allow a private contractor to build a housing complex on the parcel.[463] Assume the reason for the proposed disposition is purely financial; officials insist that the park has simply become too costly to maintain and that the housing complex is a far more efficient use. A group of citizens objects that this disposition violates their speech and assembly

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[460] *See* Lazarus, *supra* note 426, at 652–53 (noting that some courts have required that public trustees minimize harm to trust assets and interests).

[461] *But see* Budd, *supra* note 167, at 244 ("[I]f public property cannot be subdivided in a way that effectively separates some portion of the original land from the dominating presence of a religious symbol, government's only alternative will be to sell the entire parcel if it declines to remove the display.").

[462] *See supra* notes 393–405 and accompanying text.

[463] A similar example is mentioned in Dorf, *supra* note 448, at 1209 n.143.

rights, and officials insist that the disposition extinguishes any such claims. One might argue that the First Amendment does not apply to such a disposition. After all, this is not a situation in which government has regulated speech or assembly directly, regulated expression in an existing public forum, or discriminated against particular speakers or messages.[464]

Yet even this incidental burden on speech and assembly may merit some First Amendment scrutiny.[465] The assumption in the hypothetical is that people will be able to assemble and engage in speech *elsewhere*.[466] But that assumption may well be false. The public forum doctrine takes a very narrow view of which properties constitute traditional public fora and gives officials broad discretion to decide whether to create designated fora for speech and assembly.[467] Moreover, privatization, audience mobility, public policing, and other forces make it even less likely that speech and assembly can or will simply be relocated to some other public space. The destruction of an entire public park may thus constitute a rather substantial burden on public speech and assembly rights. This is particularly likely to be the case in a locale that does not have ample and adequate alternative venues for such activities. Before a property that traditionally has been available for purposes of public speech and assembly is destroyed, First Amendment concerns ought to lead public officials to carefully consider the preservation implications of such a disposition.[468]

Courts likely would play only a very limited role in reviewing such dispositions. A duty of preservation rooted in First Amendment concerns does not entail locking officials into public properties and facilities for all time. For example, a local decision to bulldoze a traditional public forum on the facts suggested above likely would be upheld under the First Amendment. The government's objective—to preserve scarce budgetary resources and use the parcel in the most efficient manner—likely would be deemed important under the circumstances. The destruction would be content-neutral, and there would be no claim of unequal or discriminatory access in such a case.

Nevertheless, application of the First Amendment might at least require that officials explain what post-disposition alternatives for public speech and assembly would be available in the community. In the unlikely event that there essentially would be *no place* for such activities, the pro-

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[464] *Cf.* Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986) (holding that the First Amendment does not apply to the imposition of a general public health regulation to an adult bookstore where no expressive activity was actually burdened).

[465] *See* Dorf, *supra* note 448, at 1209 n.143 (noting that the seeming absence of a First Amendment issue in this situation is "more apparent than real").

[466] *See id.*

[467] *See* Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 448–51 (2006) (describing and critiquing public forum's categorical approach).

[468] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939).

posed disposition might indeed implicate the First Amendment.[469] In such a case, it might be appropriate for a court to either idle the bulldozer or at least insist that officials consider providing alternative fora.

Preservation concerns were at least implicit in some of the public forum disposition cases discussed in Part III. Some courts noted specifically that privatization has diminished opportunities for speech and assembly, especially in urban areas.[470] In the Venetian and LDS cases, the courts analyzed whether replacement of the public sidewalk and sale of the public plaza, respectively, had so transformed the properties that they could no longer be deemed public spaces.[471] By geographic happenstance, indefinite preservation appeared to be the result in the Venetian case. The replacement sidewalk in front of the casino was actually built into the local pedestrian grid.[472] Since the parcel continued to function as a public sidewalk even after disposition, the court held that the First Amendment continued to apply to the subject property.[473]

In the LDS case, by contrast, the city was ultimately able to avoid its preservation obligations. Compliance with the duty of preservation would have required public maintenance of (at least) the small public easement the city had retained after the first sale. The Tenth Circuit did not impose this obligation on the city.[474] As in the bulldozed-park hypothetical, the court ought to have at least inquired about post-disposition alternatives to the privatized portion of Main Street. Again, whether or not the First Amendment *required* this result, city officials ought to have taken it upon themselves to preserve the public easement rather than to sell the entire parcel to the LDS church. As a result of the sale of the last piece of what once was a municipal thoroughfare, the public's right of access was completely extinguished. Today, the LDS Church determines, by virtue of the trespass laws, who may speak and assemble on Main Street Plaza.[475]

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[469] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 35–36 (1993) (suggesting that a shopping center owner's decision to exclude political protesters "from the only place in town where people convene and are available to read and listen" may abridge First Amendment liberties of speakers).

[470] *See, e.g.*, First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114, 1131 (10th Cir. 2002).

[471] *See id.*; Venetian Casino Resort L.L.C. v. Local Joint Executive Bd., 257 F.3d 937, 941, 948 (9th Cir. 2001).

[472] *Venetian Casino*, 257 F.3d at 939–40.

[473] *See id.* at 948.

[474] *See* Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1255 (10th Cir. 2005) (holding that the sale of an easement to a private entity extinguished its public forum character).

[475] *See supra* note 283 and accompanying text. Perhaps one way to achieve public preservation here would be for courts to hold that LDS's invocation of judicial power to enforce state trespass laws implicates state action subject to First Amendment review. *See, e.g.*, Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1696 (2009) ("Every time the civil liability system is used for enforcement, the power of the state is invoked, and state action exists.").

The proposed duty of preservation, like the duty of fair dealing, does not forbid the sale or other disposition of public properties. It requires, however, that officials and courts address preservation concerns when engaging in or reviewing settlement-by-disposition. This may result in fewer or at least more carefully considered dispositions, the privatization of smaller parcels, and some consideration by officials regarding whether alternative fora are available for speech and assembly activities after disposition. In short, imposing a duty of preservation may prevent at least some impairment of constitutional trust resources.

4. The Duty to Comply with Constitutional Covenants.—Even if a disposition satisfies the duties of fair dealing and preservation, it does not necessarily settle all constitutional concerns regarding a trust property. Owing to the close nexus between the subject properties and constitutional liberties, the public trust may impose certain post-disposition duties on government and its successors-in-interest. Specifically, the alienation must not have the effect of violating any constitutional covenants that attach to and run with the property.

In the 1950s and 1960s, circumvention-by-disposition was premised on the basic notion that Fourteenth Amendment obligations did not attach to the subject properties and run with them through disposition. Officials seem to have believed that the equal protection guarantee could simply be leased, devised, or deeded away along with the property. As we saw, however, simple leases were deemed insufficient to extinguish Fourteenth Amendment obligations even where the government was only minimally involved as a lessor.[476] Moreover, some courts were willing to apply the state action doctrine flexibly in order to impose equal access requirements on properties that appeared to have been legally privatized.[477] The retention of any interest, no matter how minor, was sometimes considered an adequate basis for imposing constitutional duties on purchasers or devisees.[478] Further, if the sale or other conveyance had the post-disposition effect of interfering with school integration, or continuing segregation in public facilities, the courts sometimes rescinded the transaction.[479] In a figurative sense, then, courts at times were willing to treat the Fourteenth Amendment as a covenant that attached to and ran with the subject properties. Mere transfer of title or possession did not extinguish the constitutional covenant of equality. Officials had to either operate the properties or facilities them-

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[476] *See supra* Part I.C.

[477] *See supra* notes 107–25 and accompanying text. Doctrinal stretching of this sort was not uncommon, especially in the school desegregation context. *See* KLARMAN, *supra* note 133, at 342–43 (describing changes to constitutional doctrine following massive resistance to desegregation).

[478] *See* Hampton v. City of Jacksonville, 304 F.2d 320, 323 (5th Cir. 1962) (relying upon the existence of a public reversionary interest to impose an obligation on private owners to provide nondiscriminatory access to a golf course).

[479] *See, e.g.*, Wright v. City of Brighton, 441 F.2d 447, 453 (5th Cir. 1971).

selves or ensure that any private transferee complied with constitutional requirements.

In contemporary establishment cases, courts have sometimes taken steps to impose a duty to comply with constitutional covenants. In *Marshfield*, for example, the court properly identified the two separate issues that must be addressed to determine whether a property disposition settles an Establishment Clause claim.[480] The first is whether the disposition itself constitutes an establishment of religion.[481] That question is encompassed within the duty of fair dealing and, more specifically, the consideration of official purpose. The second is whether the property disposition has actually cured the constitutional violation associated with the display.[482] This inquiry, which relates to the *effect* of the disposition rather than its purpose, requires that courts examine the post-disposition property for compliance with the Establishment Clause. In this sense, the Establishment Clause covenant effectively attaches to the property regardless of formal privatization.

In the establishment context, governments have a duty to ensure that the disposition has actually settled any endorsement concerns. This constitutional covenant is based on the premise that governments have not only a negative duty under the Establishment Clause to avoid religious preference or endorsement, but also an affirmative obligation to ensure that their actions are not ultimately perceived as favoring religion.[483] In establishment terms, courts must assess whether a reasonable observer would still perceive, based on the physical characteristics and location of the privatized property, that government was favoring or preferring religion. They must also determine whether any restrictions intended to resolve Establishment Clause concerns give rise to new free speech concerns. These post-disposition inquiries must be made whether the disposition takes the form of privatization or publicization. In this sense, the Establishment Clause does not simply disappear upon transfer of title. Moreover, although a post-disposition endorsement does not "forever taint" the subject property,[484] the government has a continuing obligation to demonstrate that physical and other alterations to the property have extinguished any official endorsement of religion. In essence, then, there is a continuing duty to comply with the establishment covenant.

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[480] Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000).

[481] *Id.* at 493–96.

[482] *Id.* at 497.

[483] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (noting that the Establishment Clause "is more than a negative prohibition against certain narrowly defined forms of government favoritism; it also imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message" (citation omitted)).

[484] McCreary County v. ACLU, 545 U.S. 844, 874 (2004).

Justice Kennedy's plurality opinion in *Buono* might be read as casting some doubt on the very notion of constitutional covenants. As noted earlier, Justice Kennedy questioned whether the reasonable observer test even applied to privatized properties like the "donut hole" in the Mojave.[485] This merely demonstrates why compliance with a duty of fair dealing is necessary but not sufficient. Even if the purpose of the transfer statute was legitimate and secular, the effect of the transfer may still be a continuing governmental endorsement of religion. The anti-establishment covenant operates as an additional check on settlement-by-disposition. As Justice Stevens noted in his *Buono* dissent, where the issue presented is whether the disposition cures an existing Establishment Clause violation, it is particularly appropriate to inquire whether the disposition itself removes the perception of official endorsement of religion.[486]

In the speech and assembly context, some courts have imposed obligations on the government and its successors to comply with free speech and assembly covenants. Thus even after title passes to private owners, insofar as the property conveys subject to rights of public access or continues to function as a public forum its owners or possessors must continue to comply with constitutional commands. In the Venetian and LDS cases, the Ninth and Tenth Circuits imposed this duty by applying a functional post-disposition standard. As the court said in the LDS case, which initially involved retention of a public easement across a privatized plaza, "a deed does not insulate government action from constitutional review."[487] An easement or other parcel that functions as a public forum should be treated as one, these courts properly held, regardless of the attempted privatization. Thus, like the Establishment Clause, the Free Speech and Free Assembly Clauses attach to public forum properties and follow them through disposition. As the LDS case showed, the speech and assembly covenants do not apply in perpetuity. Rather, they attach to the subject properties until their uses and physical characteristics indicate they are no longer functioning as public fora.[488]

The duty to comply with constitutional covenants has been unevenly and indeed somewhat weakly enforced. As noted in Parts I and II, not all courts have adopted and applied the functional approach. Some have fo-

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[485] *Buono*, 130 S. Ct. 1803, 1819 (2010) (plurality opinion).

[486] *See id.* at 1837–38 (Stevens, J., dissenting).

[487] First Unitarian Church v. Salt Lake City, Corp., 308 F.3d 1114, 1122 (10th Cir. 2002).

[488] The functional approach is rooted in Justice Kennedy's concern that the rigid categorical approach of the public forum doctrine left too little space for public speech and assembly. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring) ("In my view, our public forum doctrine must recognize this reality, and allow the creation of public forums that do not fit within the narrow tradition of streets, sidewalks, and parks."). He proposed a more functional standard. *See id.* ("If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.").

cused narrowly on the disposition instrument and refused to impose any post-disposition obligations at all. Moreover, as noted, the plurality opinion in *Buono* casts some doubt on the post-disposition application of the endorsement test.[489] Recent cases have also backtracked from the civil rights era principle that mere retention of a reversionary interest may be sufficient to activate a constitutional covenant.[490] Even courts that apply a functional approach in disposition cases sometimes impose only minimal, largely superficial requirements—posting small signs or erecting fences—to satisfy continuing covenants.[491] Thus, minor aesthetic alterations may be sufficient to extinguish First Amendment obligations. For example, Main Street Plaza in Salt Lake City is still quite capable of functioning as a public forum. However, because the courts accepted the argument that landscape alterations and signage indicating that the space is now "private" property extinguished First Amendment covenants, the church may now exclude public speakers.[492] As applied, the functional standard often seems to allow governments both to enjoy the financial benefits of property dispositions and to avoid their constitutional obligations to allow public speech and assembly.

Imposition of post-disposition constitutional obligations would acknowledge that the passage of title or possession does not insulate a disposition from constitutional scrutiny. To some extent, then, First Amendment and other constitutional covenants ought to be deemed to run with the subject property. The challenge for courts is to ensure that these covenants are meaningfully enforced such that officials cannot simply walk away once the deed is done. The challenge for officials is to resist the temptation to reap the benefits of disposition while shirking their constitutional duties.

5. Remedial Issues.—Whether judicially enforced or voluntarily undertaken, the foregoing public trust duties would constrain officials' ability to alienate critical and scarce constitutional assets. In the event of a breach, we must consider what remedies are available. There are three principal remedies for breach of the public trust duties with regard to settlement-by-disposition. The first and most obvious is political. Voters who disagree with the disposition choices of their representatives may vote them out of office or lobby for a change in policy. This political remedy is not likely to be effective in disposition cases where title has already changed hands.[493]

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[489] *See Buono*, 130 S. Ct. at 1819 (plurality opinion).

[490] *See, e.g.*, Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1257 (10th Cir. 2005) (concluding that the retention of a reversionary interest by the city did not impose constitutional duties on the private purchaser or create a public forum).

[491] *See* Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 483, 497 (7th Cir. 2000) (recommending the erection of a fence or wall to remedy any continuing endorsement of religion).

[492] *See Utah Gospel Mission*, 425 F.3d at 1255–56 (concluding that the city had settled free speech claims in part by making adequate alterations to the plaza).

[493] It is of course theoretically possible that newly elected officials may attempt to use the taking power to reclaim previously sold or devised assets.

Nor is it likely to result in resale of properties taken to settle constitutional claims. A strong political reaction might lead, however, to a general change in policy regarding fair dealing, public property preservation, and compliance with constitutional covenants.

The two other principal remedies—rescission of the disposition and application of constitutional standards to post-disposition properties—are judicial in nature. Here, again, there are some lessons from the civil rights era. As noted earlier, where a disposition was effectuated with knowledge that it would lead to segregation, courts were more likely to order rescission. In other circumstances, though, courts were reluctant to rescind the sale, even though it had not completely dissolved the equal protection claim or controversy. For example, in *McNeal*, the Fifth Circuit determined that the appropriate remedy in a case involving the good faith sale of a public school property to a private segregated academy was not rescission of the sale but a requirement that the private academy admit students without regard to race.[494]

Where a court determines that the duty of fair dealing has been breached, an injunction rescinding the sale is the most appropriate remedy. Were the result otherwise, the establishment prohibition and free speech and assembly guarantees effectively could be nullified by the mere disposition of public property. The private purchaser cannot be heard to complain, with regard to either her property or speech rights. The sale has been rescinded on constitutional grounds, thus rendering it a nullity. Similarly, in the takings context, should a court determine that a property has been taken for an invalid discriminatory purpose, the taking must be invalidated. Finally, in the rare case in which a disposition destroys the only public forum available in a community, the disposition may either be rescinded or altered to provide for alternative public forum space.

However, where a court has determined that the disposition of public property is not a sham and does not violate the duty of preservation, rescission is not an appropriate remedy. Courts must take into account the significant property and speech rights of the private owner, who has now taken possession pursuant to a bona fide transaction. They must also consider the detrimental effects that would follow from rescission, including harms associated with possible destruction of religious symbols and the expectation interests of the parties.[495] As in *McNeal*, the only appropriate remedy in such cases is to enforce against the private owner the duty to comply with applicable constitutional covenants. In First Amendment contexts, the private owner must alter the property such that a reasonable observer will not perceive endorsement or the property will no longer be capable of functioning as a public forum.

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[494] McNeal v. Tate County Sch. Dist., 460 F.2d 568, 574 (5th Cir. 1972).

[495] *See* Budd, *supra* note 167, at 228–31 (discussing problems associated with the removal of religious symbols, including possible destruction and loss of communicative impact).

C. Constitutional Settlements

Ultimately, the point of imposing public trust duties on public officials is to ensure that they enter constitutional settlements. As the discussion indicates, the proposed duties are based upon and subsume various constitutional obligations. In general, constitutional settlements must serve a public trust purpose, comply with both the letter and spirit of judicial orders and decrees relating to the subject properties, and respect minority rights. These limits obviously go beyond the basic procedural and democratic requirements for ordinary property dispositions. As I hope to have explained in this Article, the dispositions at issue are in no sense ordinary.

A constitutional settlement must be distinguished from a purely majoritarian solution or a political settlement that is based upon special constituents' interests or discriminatory community attitudes. For example, one proposal for settling constitutional contests relating to public properties is to put the decision whether to sell the subject property to a public referendum.[496] Imagine that such a referendum had been placed before a small Southern community in the 1960s after a judge had entered a desegregation order, the question on the ballot being whether to sell the local public school to a private entity that happens to be segregated. Similarly, in a community committed to public expressions of faith, imagine putting a proposed disposition of public park property upon which a cross rests to a referendum after a court has ordered that the display violates the Establishment Clause and must be removed. Finally, suppose the question posed in the LDS Main Street case—whether a public easement for speech and assembly ought to be retained by the city—had been put to a direct vote of the people. The process in these situations would certainly be democratic. The problem, however, is that the process ignores public trust considerations and is sometimes based upon strategies for overturning judicial determinations regarding constitutional requirements, thereby providing little or no protection for the constitutional rights of minorities.

During the civil rights era, some lower courts rightly seemed skeptical that property dispositions that occurred close in time to the entry of a desegregation order and involved public school properties could constitute legitimate constitutional settlements. Outside the schools context, however, the Supreme Court and other courts seemed to have a more ambivalent view. They tolerated dispositions that were almost certainly based upon constituents' racial attitudes and their general objection to integration, and that seemed designed to thwart judicial desegregation decrees that communities found unacceptable.[497] A democratic settlement can give voice and

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[496] *See* John C. Crees, Note, *The Right and Wrong Ways to Sell a Public Forum*, 94 IOWA L. REV. 1419, 1444–46 (2009) (proposing a pre-disposition referendum procedure).

[497] *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 255 (1971) (White, J., dissenting) (arguing that city officials had determined to dispose of the public swimming pools because compliance with a desegregation order "would be intolerable to Jackson's citizens").

effect to such public attitudes, but a constitutional settlement cannot. Property dispositions ought to be based on a thorough consideration of constitutional interests rather than on political pressure or legislative expediency.

Contemporary courts have also upheld or otherwise signaled approval for what seem in some cases to be purely democratic or political, as opposed to constitutional, settlements. In *Buono*, for example, the plurality urged deference to a land transfer measure buried in an appropriations bill and apparently "undertaken without any deliberation whatsoever."[498] The plurality did not explain why deference to Congress's political determination, as opposed to its considered constitutional judgment, was appropriate.

Particularly in the religious symbols context but in others as well, there seems to be a type of fight-to-the-death mentality. Displays are blocked by judicial decrees, which in turn are countered by property dispositions, which in turn are reviewed for constitutionality. As *Buono* shows, multiple enactments may be required to preserve a single religious symbol[499]—one the legislature assures us has only secular import.[500] When all else has failed, the broad powers of Congress have been relied upon to settle matters by selling or taking properties.

There is something dubious, perhaps even unseemly, about this process. Officials obviously are entitled to defend allocations and dispositions of contested public properties. They can, for example, insist that a religious symbol be displayed on public land and may defend that display in court as being constitutional. Once they have lost that battle, however, one may legitimately question whether officials ought to stubbornly persist by turning to private-law-based transactions.

A constitutional settlement ought to convey the impression and convince the political community that officials have taken constitutional obligations seriously. Is that the impression conveyed by the creation of veritable donut holes in public parks, the taking by the federal government of properties at the center of local constitutional contests, or the conveyance in fee simple of portions of Main Street? The constitutional lessons for both the losers of these contests and the public at large may be: (1) that their public liberties are largely if not wholly discretionary in the sense that they can be terminated by disposition, and (2) that public officials are empowered to sell or otherwise dispose of the corpus of the public trust to advance the private interests of certain speakers or faiths.

Officials sometimes have claimed that selling or taking public property quells constitutional controversy. For example, when Congress took the Mt. Soledad property on which a Latin cross is presently located, it claimed

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[498] *Buono*, 130 S. Ct. 1803, 1840 (2010) (Stevens, J., dissenting).

[499] *Id.* at 1813 (plurality opinion).

[500] *Id.* at 1816–17 (claiming that the cross, "[a]lthough certainly a Christian symbol," was not placed on public land to convey a Christian message).

to do so in part to settle an intractable local controversy.[501] Similarly, when Salt Lake City officials sold the remaining easement on what used to be a portion of Main Street, they claimed to do so in part to "reduce the public outcry" that followed its joint ownership of the parcel with the LDS Church.[502] In *Buono*, the plurality characterized Congress's decision to enact the land transfer statute as intended to avoid offending those who believe the Latin cross represents a legitimate aspect of the country's religious heritage.[503] This controversy-avoidance justification has gained legitimacy in Establishment Clause cases, particularly as a result of Justice Breyer's concurring opinion in *Van Orden v. Perry*.[504] *Van Orden* upheld the display of the Ten Commandments on the grounds of the Texas State Capitol.[505] One of Justice Breyer's justifications for upholding the display was a concern that a contrary ruling "might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation[, and] . . . thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[506]

Quelling controversy is not an illegitimate goal, of course. For example, as noted earlier, serious concerns may arise from injunctive relief that essentially requires the destruction of a religious symbol.[507] However, settlement-by-disposition cannot generally be justified on the ground that it quells controversy or reduces divisiveness. For example, the maintenance of a religious symbol may reduce offense to some believers. However, "it does not follow that the government can decline to cure an Establishment Clause violation in order to avoid offense."[508] Moreover, some property dispositions may actually encourage controversy. For example, privatization of properties on which religious symbols are located may violate the free speech rights of private speakers. Other speakers may bring access claims of their own, insisting that officials privatize additional public properties to sanction their religious or other messages. Similarly, publicization of private religious symbols may settle free speech claims while at the same time giving rise to establishment concerns. It is not entirely clear that dis-

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[501] *See* Trunk v. City of San Diego, 568 F. Supp. 2d 1199, 1209–11 (S.D. Cal. 2008) (citing congressional findings indicating that the taking was motivated by lengthy litigation and unsuccessful efforts by local officials to settle the controversy).

[502] Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1259 (10th Cir. 2005).

[503] *See Buono*, 130 S. Ct. at 1817 (plurality opinion) (noting Congress's desire not to convey disrespect "for those the cross was seen as honoring"); *id.* at 1823 (Alito, J., concurring in part and concurring in the judgment) (noting that "removal would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor" and "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").

[504] 545 U.S. 677 (2005).

[505] *Id.* at 681.

[506] *Id.* at 704 (Breyer, J., concurring).

[507] *See* Budd, *supra* note 167, at 228–31.

[508] *Buono*, 130 S. Ct. at 1839 n.11 (Stevens, J., dissenting).

positions settle even the underlying political controversy. Indeed, rather than settle controversies, dispositions of properties that are at the center of constitutional contests may breed public resentment and cynicism. This is particularly true where purported settlements appear nakedly strategic or political rather than deliberative and constitutional.

In sum, officials may in some cases be reaching democratic or political settlements through the vehicle of property disposition. But several decades of experience with settlement-by-disposition have shown that democratic processes sometimes must be supplemented with measures designed to preserve public use and enjoyment of trust properties on equal terms. Ultimately, officials ought to seek and courts ought to enforce settlements that are based upon public trust purposes, comply with judicial decrees, and respect minority constitutional rights. Some of these settlements likely will be less politically popular; but they will be more constitutionally legitimate. That should be the public trustee's principal concern.

CONCLUSION

It has been clear since the civil rights era that government may not simply turn the Constitution off at will by disposing of public properties. As we have seen, however, the constraints on settlement-by-disposition are rather thin and ad hoc. In general, public officials have not acted as committed trustees of the subject properties. Instead, they have disposed of properties as if government is an ordinary owner or purchaser, and as if the subject properties are ordinary assets akin to surplus properties.[509] Neither of these things is true. Indeed, one of the critical lessons of the civil rights era is that governmental dispositions often have significant constitutional implications. Public officials, and in many cases courts, have failed to internalize this critical lesson.

It at least ought to be clear that formalistic treatment of governmental property dispositions will not adequately protect constitutional rights. The satisfaction of private law requirements relating to title transfer does not resolve whether officials have met their public constitutional obligations. Governmental takings and purchases ought likewise to be subject to more rigorous constitutional scrutiny. These dispositions are hardly free of the risk of circumvention-by-disposition.

As some courts demonstrated during the civil rights era, the judiciary does not lack the power or means to thwart circumvention-by-disposition. The adoption by some courts of functional approaches in First Amendment contexts attests to at least some judicial uneasiness with settlement-by-disposition. Unfortunately, however, bits and pieces of our public square continue to be auctioned off, conveyed, and taken as the supposed price of

[509] The state-as-ordinary-owner mentality is rooted in public forum doctrine. *See* Adderley v. Florida, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

settling constitutional claims and concerns. The purported settlements affect not only individual complainants' rights of use and enjoyment but also the public's right to enjoy access on an equal basis to a constitutional commons.

We need to rethink the nature and effect of settlement-by-disposition. This Article has proposed a different mindset or framework with regard to governmental disposition of properties. I have argued that public officials and courts ought to be guided by a public trust model. Under this approach, the decision to dispose of certain trust properties triggers duties of fair dealing, preservation, and compliance with constitutional covenants. Ultimately, settlements must be constitutional in the sense that they foster a valid trust purpose, comply with judicial orders and injunctions, and respect minority and dissenting rights.

I recognize that this framework runs counter to the trend toward expansion of governmental control over public properties. In the 1960s, Harry Kalven Jr. celebrated the public's ability to "commandeer" public fora for purposes of protest and assembly.[510] Today, however, it is government that controls such places through the public forum doctrine, an array of time, place, and manner restrictions, and now property dispositions. I also recognize the limitations of a public trust model, including the difficulties associated with judicial enforcement of trust duties and the real-world political pressures that often push officials in the direction of settlement-by-disposition. Without minimizing these limitations, however, the public trust model at least refocuses the discussion of settlement-by-disposition from purely private law concerns to a more appropriate set of public constitutional obligations. The private property paradigm has produced a vastly diminished constitutional commons. If that trend is to continue, we ought at least to have an honest debate regarding what is actually being allocated or settled by disposition.

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[510] Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 11–12.