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Privatizing the Temple Mount (*Haram es-Sharif*) and the Western Wall (*Kotel*)

A Swiftian Suggestion for Solving the Religious Freedom Problems

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Abstract

Proposals abound in Israel to address the question of pluralistic access to the Temple Mount and the Western Wall. Each of these proposals has been a source of great controversy. In this article, we propose a Swiftian solution of privatization. We propose that the government of Israel sell the Temple Mount, the Western Wall, and many other holy sites to specific faith groups that will then operate them as private property, with the ability to restrict various rights within them. This proposal is based on a model adopted and implemented in Salt Lake City, Utah, to address various questions regarding access to property purchased by the Church of Jesus Christ of Latter-day Saints.

Keywords

Temple Mount – Western Wall – privatization – religious freedom – private property – public forum – Jonathan Swift

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1 Introduction

The following essay proposes a solution to the problem of contested religious sites in Israel in the form of American-style privatization. Just as Jonathan Swift did not worry about the logistics of a floating city or evolved horse-people in *Gulliver's Travels*[1] to present his commentary on the human condition, so too we have determined not to be bogged down by formal details of how such a process might be carried out. Rather, our goal is to show that because the current situation at sites like the Western Wall or the Temple Mount, where restrictions are placed on the mode and manner of worship in ostensibly public spaces, is untenable in a Western-style democracy, a better solution is to privatize. Simple piecemeal changes are not sufficient because the foundation of government involvement with these sites is inherently flawed. Only a radical change in the nature of these areas, like privatization, can allow the *status quo* to be maintained in a manner that does not require the state to govern while ignoring its own ostensible values.[2]

Religious discrimination on public property is problematic, but religious discrimination on private property is in many ways an essential part of religious practice.[3] A religious group mandating exclusive manners of worship within a privately-owned space is not just legally protected; its actions are seen as involving no ethical or moral issues, because it is recognized that religious groups can set limits on religious conduct that would be considered discriminatory in other contexts. One can contrast this with racial discrimination by a religious organization, which is of questionable legal status[4] but would be deemed morally odious, a mode of conduct that would be in opposition to the values of society even on church-owned property.

We intend our proposed solution to be applicable as broadly as possible and not only to sites like the Western Wall, where many proposals have been put forth to resolve the current fights over the manner of prayer. We would also

1 See Jonathan Swift, *Gulliver's Travels* (Wordsworth Classics reprint ed., 1997).

2 We have chosen not to focus on the complexities surrounding religious corporations and unincorporated societies holding property for religious purposes, in trust or otherwise. Our intention, as noted, is not to get lost in the weeds of the specific details of carrying out our proposal.

3 Israel has laws concerning non-discrimination in public places, but these laws do not seem to contemplate religious institutions or provide exceptions when the discriminatory effect is inherent in the type of place or club (Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761–2000).

4 See, for example, *Bob Jones University* v. *United States*, 461 U. S. 574 (1983), where the US Supreme Court held that the IRS was within its rights to withhold tax-exempt status from a university that argued its religious beliefs precluded accepting students in interracial relationships or marriages.

apply our remedy to sites like the Temple Mount, where restrictions on prayer are too easily ignored or justified in the name of security concerns. Indeed, as we show in this paper, an incomplete version of this model has already been adopted for the Church of the Holy Sepulchre.

Note further that our solution is not intended to be applicable to all religious sites. In certain contexts, it may prove to be politically untenable. But the article rebuts arguments that the legal solution requires the government to impose pluralization on a site as a matter of basic religious freedom. Privatization removes the issue from the purview of "law and religion" and places it firmly within property law, allowing favoritism with respect to the owner. Note, finally, that although our solution is structured to maintain the *status quo* at these sites, this does not have to be so. The state can conduct itself differently, for example, by opening up the bidding for a free market sale. Our point in this Swiftian suggestion is to rebut the legal force of pluralism, and nothing more.

We begin with a brief overview of the different ways in which governments can deal with disputed religious sites. Next, we discuss the current situation in Israel, touching on the Church of the Holy Sepulchre before moving our focus to the Western Wall and the Temple Mount. We then use the public forum doctrine as a jumping off point to discuss privatization in the US as a method for restricting expressive conduct or maintaining religious monuments, with particular emphasis on two related cases dealing with the purchase of several blocks in downtown Salt Lake City, Utah, by the Church of Jesus Christ of Latter-day Saints.[5] Finally, we conclude with our Swiftian proposal concerning the Western Wall and the Temple Mount, to show how privatization can maintain the existing *status quo*, while allowing the government to maintain its liberal values.

2 Overview of Government Involvement with Religion and Religious Sites

Government involvement in religion and the regulation of religious sites has a long and complex history. Prior to the Protestant Reformation, governments

5 The public forum doctrine is typically applied only to speech cases, but the concept of privatization allows for the elimination of any First Amendment concerns, not only in speech cases. In the US, the ability of the government to impose neutral values on private property is almost null. Our Swiftian solution bypasses the core religious freedom arguments by approaching this as a property rights issue. We use the term "public forum" as a way of reflecting this, even if the term is inexact, as the public forum doctrine is where privatization of formerly public space is most developed under the law. Our proposal boils down to this: if it is carried out successfully, privatization eliminates core government interests.

were typically little concerned with treating religions with either favoritism or repression. Even the US initially applied its rules regarding the separation of church and state only to the federal government. It was in 1833 that the last official state religion was disestablished,[6] and not until the 1940s were the religion clauses of the First Amendment applied to the states.[7] Particularly in areas and countries with large minority populations or with equal numbers of adherents of different religions, government involvement in religion led to religious treatment being dependent on the sovereign's sympathies or subject to grand compromises to maintain peace.[8]

Beginning with Luther's conception of "two kingdoms", and leading to the articulation of the "wall of separation" between church and state by Thomas Jefferson,[9] policies favoring one religion or method of religious practice have gradually come to be seen as illiberal, and governments have faced increased tensions as historical legacy came into conflict with modern political outlooks. The record concerning natural sites that are seen as sacred by a minority (particularly an indigenous population) is historically mixed,[10] and it becomes

6 Michael W. McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion", 44 *Wm. & Mary L. Rev.* (2003), 2105, 2126.

7 *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), incorporated the freedom of expression clause as binding upon the states, while *Everson* v. *Board of Education*, 330 U. S. 1 (1947), did the same for the establishment clause.

8 These provisions apply not only to confessionalist countries, like Lebanon, where legislative seats and government positions are apportioned between members of different religious faiths. The British North America Act of 1867, which led to the formation of Canada, for example, contains provisions requiring the establishment of a Protestant school system in Quebec and Catholic school system in the other provinces, under the assumption that the "public" system at the time would cater to the majority religion in each province, and that each large religious group required legal protection in regions where they were the minority to agree to the confederation.

9 For a more comprehensive analysis of the history of these doctrines, see Daniel S. Dreiberg, "The Meaning of the Separation of Church and State: Competing Views" in Derek H. Davis (ed.), *The Oxford Handbook of Church and State in the United States* (Oxford University Press, 2010), 207.

10 For example, Uluru, in Western Australia was finally closed to climbers in October 2019 as a result of years of advocacy on the part of the Pitjantjatjara Anangu, although the Australian government previously broke an earlier agreement that would have ended climbing on Uluru as early as the mid-1980s (Greg Roberts, "Elders reflect on fight to end Uluru climb", 2019, Australian Associated Press, Retrieved 26 Oct. 2019, bluemountainsgazette.com.au/story/6459360/elders-reflect-on-fight-to-end-uluru-climb/?cs=9397). Contrast with North American cases like *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U. S. 439 (1988) and *Ktunaxa Nation* v. *British Columbia* (*Forests, Lands and Natural Resource Operations*), 2017 SCC 54, where the US and Canadian Supreme Courts, respectively, each decided that proposed construction that would destroy the sacredness of an area to indigenous people was not a violation of their freedom of expression.

even more complex when dealing with sites that are considered holy to more than one religion or denomination within a religion, and with sites where different members of a religion wish to practice in ways that may be perceived as mutually incompatible.

Jobani and Perez[11] identified five ways in which states address the issues surrounding what they termed contested religious sites, which can be described briefly as follows:

1. Non-interference – The state does not involve itself in the regulation of conduct at the religious site.
2. Separation and division – The state divides the site into separate locations where each group can practice as they see fit.
3. Preference – The state favors one group or way of practice over others.
4. Status-quo – The state retains whatever arrangements have previously existed at the site at a particular point in time, regardless of whether they were imposed from within or without.
5. Closure – The state selectively limits access to the site, typically to prevent violence between groups.

A policy of government non-interference in religious sites is the only one that can be justified in a state professing separation of church and state. Any state involvement in religious matters typically leads to highly questionable outcomes, particularly concerning disputed sites. Even a case of separation and division, which appears to be a fairly equitable method of state regulation, can turn on questions of the relative holiness of each area to each religious group, which can lead to favoritism of one group over another when claims to a given location are purportedly equal or when the physical location is small.

Courts are particularly ineffective when assessing minority religious beliefs and claims, which are often filtered through understandings of religion based on the majority religious experience.[12] It has been argued that when a site is seen as significant either religiously or politically to multiple faiths, it is

11 Yuval Jobani & Nahshon Perez, *Governing the Sacred: Political Toleration in Five Contested Sacred Sites* (Oxford University Press, 2020).

12 See, for example, Aaron R. Petty, "Faith, However Defined: Reassessing JFS and the Judicial Conception of Religion", 6 *Elon L. Rev.* (2014), 117, discussing the UK Supreme Court analysis of Orthodox Jewish beliefs regarding religious status through a lens of Christian understandings of religion, at times explicitly referencing Christian beliefs and negatively contrasting Jewish beliefs with them.

effectively impossible for the state to regulate competing religious claims in a way that avoids conflict.[13]

3 The Situation in Israel

Several sites in Israel are regarded as holy by more than one religion. Many of these are among the holiest sites of their faiths. In the case of several of these sites, the government of Israel has not been able to assume an attitude of non-interference because of both security and political concerns. Similarly, separation and division have proven to be difficult because of the significant holiness attributed to the sites and the difficulty in dividing them in any way that would approach equitability. Therefore, for prominent sites, Israel has generally alternated between models of preference, maintenance of the *status quo*, and closure to various populations. This paper focuses on the Western Wall, where Israel conducts itself based on a preference model of Orthodox Jewish practice, and on the Temple Mount, where it uses the closure model to prohibit non-Islamic prayer, and at times to restrict certain groups from accessing the site in the first place.[14]

We briefly touch on the *status quo* model below, although it is not the focus of our paper, because it is an example of significant state involvement in avoiding conflict. As opposed to non-interference and separation and division, the attitude of the state in this case is based on a model of property ownership. It has been used at Christian religious sites like the Church of the Holy Sepulchre, where Ottoman-era regulations regarding the ownership of different areas of the Church have been meticulously preserved. The Church and its property are divided between six Christian denominations, and access to

13 Yitzhak Reiter cites the example of Samuel's Tomb, which is a rather marginal holy site to Jews and Muslims, and requires little security, and contrasts in with the Cave of the Patriarchs, which is a more important location, both religiously and politically, and has been the site of interreligious violence and a considerable security concern (Yitzhak Reiter "Contest or Cohabitation in Shared Holy Places?" in Marshall J. Bregeret et al. (eds.), *Holy Places in the Israeli-Palestinian Conflict: Confrontation and Co-Existence* (Routledge, 2010), 158).

14 This can include both Muslims and non-Muslims (usually males under a certain age, the age limit being determined by Israeli security forces; see Nir Hasson, "Police Restrict Muslim Temple Mount Access Following Clashes", *Haaretz*, 27 Sep. 2015: "…[T]he Jerusalem District Police issued a statement restricting entry of Muslim worshippers to the holy site to men over the age of 50. Women worshippers of all ages are free to enter the site. The high age limit of the restriction is regarded as unusual. Previous restrictions have typically limited entry to the Temple Mount to Muslim men over the age of 40.").

the Church is controlled, at least nominally, by a neutral party,[15] to avoid one denomination using it to assert larger property rights than those to which it is entitled. This type of arrangement, in which the state maintains the terms imposed by a previous government while attempting to remain detached from current claims and concerns, can still lead to serious problems, partly because the property arrangements are not fully privatized, and therefore the claimants cannot count on the state to enforce their property rights. Because the parties want to avoid the risk of any dilution of their rights, they are often unable to work out compromises regarding access to areas that belong to several denominations. The defense of property interests can lead to hostilities and vigilantism. In the case of the Church of the Holy Sepulchre, for example, although at times the groups succeed in working out arrangements for scheduling prayers in shared spaces to avoid conflicts, including provisions for holy days,[16] at other times the situation has led to contested sovereignty rights[17] and violent confrontations.[18]

The Western Wall is currently administered by the Israel Ministry of Religious Services, under the authority of the Western Wall Heritage Foundation, led by a government-appointed Rabbi of the Wall.[19] Orthodox Jewish prayer is the only form of prayer officially tolerated at the Wall for public services, and there are no provisions for any form of mixed or egalitarian prayer services. Several court actions against this arrangement have been led by various Jewish religious streams and organizations, most prominently the Women of the Wall, a multi-denominational group that has conducted monthly women's group

15 The key to the Church has been held for generations by the Joubeh family, while the Nuseibeh family has historically had the responsibility of actually unlocking the door (Owen Lieberman, "Two Muslim families entrusted with care of holy Christian site for centuries", *CNN*, 27 Mar. 2016.) Neither family is Christian, and has been given these responsibilities to avoid interdenominational disputes.

16 "The night liturgies inside the Holy Sepulchre are regulated by a consolidated tradition: The Greek-Orthodox start to celebrate mass inside Jesus' Tomb at 12:30 a.m., before handing over to the Armenians and then the Franciscans… The night service is subject to some variations. On the feast of Saint Matthias on the morning of May 14, for example, Catholics lead a procession to Jesus' tomb during the Greek Orthodox liturgy", Daniela Berretta, "The Church that Never Sleeps", *Associated Press*, 5 Jun. 2012.

17 A ladder has rested against a window of the Church since at least 1852, supposedly because the window belongs to the Armenian Orthodox Church, while the ledge on which it stands belongs to the Greek Orthodox Church. ("Strata: Who Moved the Ladder?", 36(1) *Biblical Archaeology Rev.* (2010), 14).

18 See, for example, Allyn Fisher-Ilan, "Punch-up at Tomb of Jesus", *The Guardian*, 27 Sep. 2004 and "Monks brawl at Jerusalem shrine", *BBC*, 9 Nov. 2008.

19 The Western Wall Heritage Foundation, retrieved from https://english.thekotel.org/heritage_foundation/.

prayer at the Wall, which have included women wearing religious garb traditionally worn by men, and reading from Torah scrolls.[20] These cases have resulted in several court decisions ordering the government to establish some way for different forms of prayer to be conducted at the Wall.[21] Most recently, a compromise had been reached, where a separate area of the Wall, known as Robinson's Arch, was to be designated for mixed prayer,[22] but subsequently the government backtracked on these promises,[23] and the situation remains in flux. Note that this compromise did little for Orthodox members of the Women of the Wall, who wanted to continue to conduct gender-segregated services as they had before.[24]

The Temple Mount is administered by the Jerusalem Islamic Waqf, which is under the control of the Kingdom of Jordan, although Israel imposes additional security restrictions on the Mount. While non-Muslims can visit the Mount at designated times, non-Islamic prayer is strictly prohibited at all times, anywhere on the Mount. The Israeli courts have affirmed these restrictions to avoid potential conflict.[25] For security reasons, at times of potential conflict, Israel has barred Muslim men of certain ages from the Mount;[26] attempts in recent years at imposing other security measures, including metal detectors, have led to violent protests and stabbing attacks.[27]

As noted above, these types of models, while apparently justifiable for religious or security reasons, are difficult to justify within a framework of a Western democracy that guarantees freedom of religious expression. Other countries have developed different methods to deal with these issues. The US,

20 Yitzhak Reiter, "Feminists in the Temple of Orthodoxy: The Struggle of the Women of the Wall to Change the Status Quo", 34(2) *Shofar* (2016), 79, 82.

21 Among others, see HCJ 257/89 *Hoffman et al.* v. *the Official in Charge of the Western Wall et al.*, HCJ 2410/90 *Alter et al.* v. *Minister of Religious Affairs et al.*, IsrSC 48(2) 265 (1994); HCJ 3358/95 *Hoffman et al.* v. *Director General of the Prime Minister's Office et al.* IsrSC 54(2) 345 (2000); *Appeal by the State of Israel* CA 23834-04-13 *State of Israel* v. *Ras et al.* (24 Apr. 2013), interpreting *1994 Hoffman case*.

22 Isabel Kershner, "Israel Approves Prayer Space at Western Wall for Non-Orthodox Jews", *The New York Times*, 31 Jan. 2016.

23 "Israel freezes Western Wall compromise that was to create egalitarian prayer section", *Jewish Telegraph Agency*, 25 Jun. 2017.

24 Jeremy Sharon, "Original Women of Wall Reject Compromise at Site", *Jerusalem Post*, 29 Jan. 2016; Michele Chabin, "Prayer Deal Opens Rift Among Jewish Feminists", *The New York Jewish Week*, 3 Feb. 2016.

25 Among others, see HCJ 292/83 *Temple Mount Loyalists Society* v. *Police Commander of the Jerusalem Region* (1984).

26 See Hasson, *supra* note 14.

27 Judy Maltz, "Explained: What Sparked Temple Mount Crisis and Where Do We Go From Here", *Haaretz*, 24 Jul. 2017.

for example, has embraced privatization of public property as a way for governments to avoid issues of establishment of religion, and for groups to restrict freedom of expression or association. Privatization of public forums, however, is subject to certain conditions to take full effect.

4 Introduction to the Public Forum Doctrine

The genesis of the public forum doctrine is commonly held to be the *Hague* v. *Committee for Industrial Organization*[28] ruling, from 1939, where the US Supreme Court struck down a municipal ordinance requiring city permits for organizations to publicly meet and distribute literature. Previously, case law supported the contention that government "ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof,"[29] but in Hague, the Supreme Court rejected this conception of state property. Justice Owen Roberts articulated the position of the Court:[30]

> 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

The public forum doctrine continued to develop gradually over time. It was first identified by name decades later, in an academic paper, in 1965.[31] It was explicitly articulated by the Supreme Court only in 1983.[32] In that ruling, the Court noted that traditional public forums, such as streets and parks, are considered "quintessential," and "the government may not prohibit all communicative activity" therein, while other spaces can be "designated" as public by the state, and "as long as [the state] does so [they are] bound by the same standards as apply in a traditional public forum."[33]

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28 307 U. S. 496 (1939).

29 *Ibid.*, at 514, discussing *Davis* v. *Massachusetts*, 167 U. S. 43 (1897).

30 *Ibid.*, at 515.

31 Harry Kalven Jr., "The Concept of the Public Forum: Cox v. Louisiana, 1965", *Supreme Court Review* (1965), 1.

32 *Perry Education Association* v. *Perry Local Educators' Association*, 460 U. S. 37, 45–47.

33 *Ibid.*, at 45–46.

5 Privatization of the Public Forum

Almost since the beginning of the formulation of the public forum doctrine in American jurisprudence, there have been attempts to privatize public forums to allow the restriction of First Amendment freedoms, such as speech, assembly, and most relevant to our topic, expressions of religion.[34] Privatization has also been a strategy for avoiding issues regarding the establishment of religion, where a government sells public land containing a religious monument to a private organization.[35] This approach was explicitly condoned by Justice Anthony Kennedy in his concurrence in *International Society for Krishna Consciousness, Inc. v. Lee*.[36] Justice Kennedy noted 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."[37]

Yet the ability to effectively privatize a public forum and turn it into a nonpublic forum has been restricted and limited through jurisprudence.

5.1 *Early Jurisprudence Concerning Privatization*

Marsh v. *Alabama*[38] was a seminal early articulation by the Supreme Court of the limits of privatization of a public forum. The town of Chickasaw, Alabama, "[had] all the characteristics of any other American town" except that it was wholly "owned by the Gulf Shipbuilding Corporation."[39] It should be noted that Chickasaw had never existed as a regular town, but had always been company-owned, so this was not a case where the state attempted to privatize a public forum, yet the articulation of principles by the Court is still helpful for our purposes. The town attempted to use a state law against trespassing on

34 *Supra* note 5, the public forum doctrine, although typically applied to speech cases, is appropriate to be analyzed, as it is the most developed area in American law regarding privatization of public spaces. For a comprehensive analysis of ways of adopting the public forum doctrine more fully and completely in the realm of free exercise, see John P. Scully, "Unifying the First Amendment: Free Exercise, the Provision of Subsidies, and a Public Forum Equivalent", 54 *DePaul L. Rev.* (2004), 157, who discusses a proposed use of the doctrine in the context of school subsidies for religious education.

35 These trends are discussed in more detail in, for example, Kevin F. O'Neill, "Privatizing Public Forums to Eliminate Dissent", 5 *First Amend. L. Rev.* (2006–2007), 201, and Timothy Zick, "Property as/and Constitutional Settlement", 104 *Nw. U. L. Rev.* (2010), 1361, 1385–1415. Courts have also taken notice of the increased popularity of privatization; see, for example, *Chicago Acorn* v. *Metro. Pier & Exposition Auth.*, 150 F.3d 695, 704 (7th Cir. 1998), and *ACLU of Nevada* v. *City of Las Vegas*, 466 F.3d 784, 791 (9th Cir. 2006).

36 505 U. S. 672 (1992).

37 *Ibid.*, at 699.

38 326 U. S. 501 (1946).

39 *Ibid.*, at 502.

private property to prevent a Jehovah's Witness from distributing religious literature in town, and the conviction was upheld through the lower courts.[40] The Supreme Court reversed the conviction, noting that in the case of privately-owned property, "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[41] Because Chickasaw was indistinguishable from the surrounding neighborhood, and "the town and its shopping district [were] accessible to and freely used by the public in general,"[42] the corporation was found to have similar restrictions on it as the state in its ability to regulate expression.

Evans v. *Newton*[43] was another early case discussing the limits of privatization, although it dealt with equality considerations rather than expressive freedoms. A testator had left land to the city of Macon, Georgia, for use as a park, and had designated the city as a trustee. The testator had specified, however, that the park was for the use of white people only. After decades of enforcing segregation in the park, the city finally determined that it could no longer enforce the provision.[44] After being sued by other trustees of the park, who wished to retain the segregationist policies, the city of Macon attempted to resign as trustee of the park to allow private parties to join as trustees in its stead.[45] The Supreme Court denied the resignation of the city as trustee as an aid to segregation, noting that "the public character of this park requires that it be treated as a public institution… regardless of who now has title under state law,"[46] and that under the circumstances, the Court could not simply say "that the mere substitution of trustees instantly transferred this park from the public to the private sector."[47]

5.2 *General Doctrines of Privatization*

As a result of these decisions and others like them, some general doctrines have developed as to when privatization can effectively remove the public nature of a forum.[48] Attempting to simply legislate away the public nature of a

40 *Ibid.*, at 503–504.
41 *Ibid.*, at 506.
42 *Ibid.*, at 503.
43 382 U. S. 296 (1967).
44 *Ibid.*, at 297.
45 *Ibid.*, at 297–298.
46 *Ibid.*, at 302.
47 *Ibid.*, at 301.
48 For a detailed examination of these doctrines, see John C. Cress, "The Right and Wrong Ways to Sell a Public Forum", 94 *Iowa L. Rev.* (2009), 1419.

forum has been found to be ineffective,[49] as has vacation by the government of a public forum.[50] Typically, a proper sale of the property is required. Fraudulent transactions have been struck down by the courts,[51] although transactions that failed to follow local law through negligence have been allowed,[52] and sales have not necessarily required an open bidding process to be deemed valid.[53]

Additionally, even without privatization, governments can make significant changes to public spaces that cause them to lose their status as a public forum,[54] although this typically requires changes to the fundamental nature of the property rather than simply aesthetic alterations.[55] Generally speaking, successful privatization has required physical changes to the space to distinguish it from the surrounding areas.[56] Moreover, changes in public access or in the purpose of the property are significant. For example, sidewalks on private property that are not distinguishable from the surrounding sidewalks and are used as part of the pedestrian grid of a city are nearly invariably found to be public forums.[57]

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49 *United States* v. *Grace*, 461 U. S. 171 (1983).

50 *Thomason* v. *Jernigan*, 770 F. Supp. 1195 (E. D. Mich., S. Div., 1991); but cf. *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Reber*, 454 F. Supp. 1385, 1390 (C. D. Cal. 1978) (where the Court found it appropriate to limit protest activities on an access road to a private amusement park that had previously been vacated by the city, although there was no allegation that the vacation had been carried out deliberately to limit protest, as was the case in *Thomason*).

51 *Summum* v. *Duchesne City*, 482 F.3d 1263 (10th Cir., 2007), vacated on other grounds, 555 U. S. 1210 (2009) (city sold Ten Commandments monument in public park to Lions' Club; court found that failure to document the transaction, insufficient consideration, and non-arm's length nature of transaction [the mayor was also President of the Lions' Club and acted for both parties] served to invalidate the sale).

52 *Chambers* v. *City of Frederick*, 373 F.Supp.2d 567 (D. Md., N. Div., 2005) (failure of the city to follow local resolution requiring advertisement of sale of property owing to city employee's mistaken belief that resolution did not apply to small parcels of land did not invalidate the sale).

53 *Freedom from Religion Foundation, Inc.* v. *City of Marshfield*, 203 F.3d 487 (7th Cir. 2000); *Mercier* v. *Fraternal Order of Eagles, La Crosse Aerie 1254*, 395 F.3d 693 (7th Cir. 2005).

54 *Hawkins* v. *City & County of Denver*, 170 F.3d 1281 (10th Cir. 1999).

55 *ACLU of Nev.* v. *City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003); *Lee* 505 U. S. at 700 (Kennedy J., concurring): "[the State] must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property's forum status." Note that continued government ownership of the property would allow only restriction of certain types of expression, rather than restriction on certain classes of people engaging in expression.

56 *Rodriguez* v. *Winski*, 973 F. Supp. 2d 411 (S. D. N. Y. 2013).

57 *See*, e.g., *Jackson* v. *City of Markham, Ill.*, 773 F. Supp. 105 (N. D. Ill., E. Div. 1991); *United Church of Christ* v. *Gateway Economic Development Corp.* 383 F.3d 449 (6th Cir. 2004); *Lewis*

As noted above, the intention of the government in disposing of the property is not considered to be dispositive. Just as the government cannot simply legislate away a public forum, it cannot state its intention to end the status of a property as a public forum in a contract of sale or lease;[58] rather, the courts will examine the concrete circumstances to determine whether an existing public forum has been altered sufficiently to warrant a change in its status. The courts will also examine continued involvement by the government in the private property to determine whether it would be appropriate to describe it as a public forum, either in the form of property interests like easements,[59] or in the form of more concrete economic interactions.[60] Courts have found that contractual language, reserving a public right of passage,[61] and leases to private parties where the government continues to own the property[62] can be significant factors in this analysis, although they are not necessarily definitive.[63]

6 Illustrative Case Law: The Main Street Plaza Cases

The principles and concerns that courts apply when examining the privatization of public property and determining the subsequent status of the property as a public forum are illustrated by the Tenth Circuit cases of *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corp.*,[64] and *Utah Gospel Mission* v. *Salt Lake City Corp*.[65] Each case concerned the sale of a piece of property known as Main Street Plaza. These cases serve as a good comparison for the proposal put

v. *McCracken*, 782 F. Supp. 2d 702 (S. D. Ind., New Albany Div., 2011); *McGlone* v. *Bell*, 681 F.3d 718 (6th Cir. 2012); *Brindley* v. *City of Memphis*, 934 F.3d 461 (6th Cir. 2019).

58 "Traditional public fora are defined by the objective characteristics of the property"; *Ark. Educ. Television Comm'n* v. *Forbes*, 523 U. S. 666, 667 (1998).

59 "[T]he weight of authority is towards applying the public forum doctrine to places where the government holds an easement"; John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 *N. C. L. Rev.* 569, 573, n. 8 (2005). This would seem to only apply where the easement is intended for general pedestrian use and not simply for access to a specific location; see *United States* v. *Kokinda*, 497 U. S. 720, 727 (1990); *Sanders* v. *City of Seattle* 160 Wn.2d 198, 217 (Sup. Ct. WA 2007).

60 *Citizens to End Animal Suffering and Exploitation, Inc.* v. *Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65 (D. Mass., 1990).

61 *Venetian Casino Resort, L. L. C.* v. *Local Joint Exec. Bd.*, 257 F.3d 937 (9th Cir. 2001).

62 *Faneuil Hall Marketplace*, 745 F. Supp. 65; *Jamestown* v. *Beneda*, 477 N. W. 2d 830 (N. D. 1991).

63 *Hotel Emples. & Rest. Emples. Union, Local 100* v. *City of N. Y. Dep't of Parks & Rec.* 311 F.3d 534 (2nd Cir. 2002).

64 *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corp.* 308 F.3d 1114 (2002).

65 *Utah Gospel* 425 F.3d 1249 (2005).

forward in the present paper because they entail the sale of public property to a religious organization with the intention, among others, to allow restrictions on alternative religious expression (in this case, proselytization).

6.1 *Case Background*

In 1999, Salt Lake City sold a parcel of land to the Church of Jesus Christ of Latter-day Saints, popularly known as the LDS Church or Mormon Church. The parcel encompassed a block of Main Street that ran through what is known as Temple Square, which is the center of Mormon religious life.[66] As part of the sale, the city retained an easement on the property, which was specified contractually as being "for pedestrian access and passage only."[67] The reservation of easement stipulated that the Church was allowed to restrict any conduct that was not pedestrian passage,[68] and that "[n]othing in the reservation or use of this easement shall be deemed to create or constitute a public forum, limited or otherwise, on the Property."[69]

The sale was considered controversial as soon as it took place, and within months, the American Civil Liberties Union (ACLU) filed a lawsuit against the sale, deeming it, among others, an unconstitutional restriction on freedom of speech and expression.[70] As the case made its way to court, "the Church reconstructed the former street and sidewalks, making the area an attractive plaza [with]… paved walking areas interrupted by planters, benches, and waterfalls, a large reflecting pool, and changes in grade,"[71] as well as "pip[ing] in music by the Mormon Tabernacle Choir,"[72] creating what it termed an "ecclesiastical park."[73] The Church also attempted to impose rules on the plaza, including "disallow[ing] proselytizing for any faith except its own."[74]

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66 "…Temple Square [is] the closest U. S. approximation. to the Vatican"; T. R. Reid, "Salt Lake Street Fight" *Washington Post*, 23 Dec. 2002.

67 *2002 First Unitarian*, *supra* note 64, at 1118.

68 *Ibid.*, at 1118–1119; the reservation also set out several behaviors that the easement was not to be considered as permitting:

> "…loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging, littering, consuming alcoholic beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct, or otherwise disturbing the peace."

69 *Ibid.*, at 1118.

70 John Ritter, "Mormons' property buy challenged", *USA Today*, 23 Nov. 1999.

71 *2002 First Unitarian*, *supra* note 64, at 1119.

72 Reid, *supra* note 66.

73 *2002 First Unitarian*, *supra* note 64, at 1119.

74 Reid, *supra* note 66.

6.2 *The First Case: First Unitarian*

When the case reached the district court, summary judgment was entered in favor of the city and Church, with the court finding that the sale was valid and that the property was no longer a public forum.[75] The case was appealed to the Tenth Circuit Court of Appeals, where the court reversed the decision, finding that the area where the city retained an easement remained a public forum.[76]

6.3 *Validity of the Sale*

The plaintiffs did not appear to have contended that the sale itself was invalid. In the district court, it was established that the Church had paid the full market value of the property of $8.124 million,[77] and in its decision, the appeals court did not discuss the sale itself. There were also no concerns regarding the absence of an open bidding process, although the city council had been discussing selling the land specifically to the Church for three years prior to the conclusion of the sale.[78]

6.4 *Changes to the Site*

As noted above, the Church significantly altered the area of Main Street that it purchased, turning it into an ecclesiastical park. This was seen as dispositive by the district court, which found that the changes, together with the removal of automobile and bicycle access, had been significant enough to render the space no longer a public forum.[79] The appeals court disagreed, stating that although the physical space had been altered significantly, the easement retained its primary purpose, which was the provision of pedestrian passage.[80]

6.5 *Government Intention and Involvement*

The appeals court dismissed as irrelevant the fact that the government had specified contractually that it had no intention of creating a public forum,[81] but it did note that the city had argued that the sale would not have gone through without the easement.[82] The continued involvement of the government with

75 *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corp*., 146 F. Supp. 2d 1155 (Utah C. D. 2001); rev'd by *2002 First Unitarian*, *supra* note 64, at 1180.

76 *2002 First Unitarian*, *supra* note 64, at 1133–1134.

77 *2001 First Unitarian*, *supra* note 75, at 1159–1160.

78 *2002 First Unitarian*, *supra* note 64, at 1117.

79 *2001 First Unitarian*, *supra* note 75, at 1167–1168.

80 *2002 First Unitarian*, *supra* note 64, at 1127–1131.

81 *Ibid.*, at 1124–1125.

82 *Ibid.*, at 1126 (the declared importance of the easement "infused [it] with public purposes even broader than providing a pedestrian walkway").

the property in the form of the easement contributed to the conclusion of the court that the easement constituted the plaza into a public forum.[83]

6.6 *Public Interest*

The appeals court noted that the Church had acknowledged at city council meetings leading up to the sale that serving the "public interest" would require the space to remain open to pedestrians.[84] Although the sale provided revenue to the public, the court determined that "the City may not exchange the public's constitutional rights even for other public benefits such as the revenue from the sale."[85]

6.7 *Conclusion of the Court*

For all of these reasons, the Tenth Circuit concluded that the easement constituted the plaza into a public forum. As a result, the court advised that the city had two options to resolve the issue: it could allow expression on the public forum constituted by the easement, or "relinquish the easement so the parcel becomes entirely private."[86]

6.8 *Aftermath of the First Unitarian Decision*

"Immediately after the court's decision, protestors began to appear on the plaza."[87] As a result, political pressure on the city increased, with the Church undertaking "an unusual and massive public relations campaign"[88] to push the city to either sell the easement to the Church or to vacate the parcel. The city eventually sold the easement for considerably above market value, with consideration including two acres of church land in the west side of the city, which would be intended for use as a community center.[89]

6.9 *The Second Case: Utah Gospel*

The ACLU filed another lawsuit fighting the sale, alleging that the city had improperly sold the easement, and that the parcel should still be considered a

83 *Ibid.*, at 1122–1123 (finding that the easements are "constitutionally cognizable property interests").

84 *Ibid.*, at 1119.

85 *Ibid.*, at 1132.

86 *Ibid.*

87 J. Quin Monson & Kara L. Norman, "Salt Lake City's Main Street Plaza Controversy" in Paul A. Djupe and Laura R. Olson (eds.), *Religious Interests in Community Conflict: Beyond the Culture Wars* (Baylor University Press, 2007), 173.

88 Robert Peterson, "Law and Unity on Main Street", 16(5) *Utah B.J.* (2003), 18, 23.

89 *Utah Gospel Mission* v. *Salt Lake City Corp.*, 316 F. Supp. 2d 1201 (C. D. Utah 2004); aff'd by *2005 Utah Gospel, supra* note 65, at 1212–1213.

public forum. Both the district court[90] and the Tenth Circuit[91] found that the sale of the easement was effective in eliminating any public forum on the plaza.

6.10 *Changes to the Site*

As previously noted in *First Unitarian*, the site underwent physical changes, and the Church had the right to control access at its discretion. The agreement stated explicitly that there was now "[n]o right of public access" to the plaza.[92] Both courts noted that by allowing the public on its property at its discretion, the Church did not make the plaza a public forum.[93]

6.11 *Government Intention and Involvement*

The complete lack of involvement or interest of the city in the site made it clear to the courts that this was no longer a public forum. The language of the contract of sale for the easement stated that if any provisions, such as the right of re-entry by the city or a requirement that the Church maintain a viewing corridor, led to a court finding a public forum in the plaza, those provisions would "automatically terminate."[94]

6.12 *Validity of the Sale*

The court saw no reason to believe that the sale was a sham in view of the significant value of the consideration given. Although not all the consideration was given directly by the Church,[95] the city ended up receiving cash and land worth $5.3 million for an easement valued at $500,000.[96] Any alleged political pressure was not seen as relevant to the legitimacy of the sale.[97]

6.13 *Public Interest*

The perception of the court regarding the public interest underwent a significant shift since *First Unitarian*, when the appeals court had found that the public interest rested in free expression in the plaza. In *Utah Gospel*, by

90 *Ibid.*, at 1247.

91 *2005 Utah Gospel*, supra note 65, at 1258.

92 *Ibid.* at 1253.

93 *2004 Utah Gospel*, *supra* note 89, at 1225, n. 24; *2005 Utah Gospel*, *supra* note 65, at 1258.

94 *2004 Utah Gospel*, *supra* note 89, at 1217.

95 $5 million in cash and land were provided by a group known as the Alliance for Unity, with the "LDS Church [agreeing] to contribute an unspecified amount to the goal"; *ibid.*, at 1213.

96 *Ibid.*, at 1223.

97 *Ibid.*, at 1239.

contrast, the district court noted that the public interest now lay in retaining the agreement that had been reached, as "[t]he process to resolve the Plaza dispute [had been] extensive, time consuming, very public, and often wrenching and divisive… and it would not be in the public interest to set this process aside."[98]

6.14 *Conclusion of the Court and Aftermath*

As noted, the court found that the plaza was now fully private property and there was no right to free expression on it. Protests against the LDS Church have shifted to other areas in the proximity of the Temple Square,[99] and aside from one well-publicized incident,[100] there seems to have been little controversy concerning the plaza in recent years. The Church has continued to pump money into downtown Salt Lake City in an effort "to protect the Temple Square and the headquarters of the church," with the city "piggyback[ing] off church investment" to redevelop areas near where the Church is building.[101]

6.15 *Incentives and Drawbacks of Privatization: A Review*

Governments have several potential incentives to engage in privatization. As noted, privatization can extricate a government from several challenging and controversial situations. One such situation occurs when the government is perceived as favoring a particular religion by maintaining a monument; another occurs when there is a desire to restrict speech rights in areas where protests have become problematic, but the government cannot legally impose restrictions. Privatization can also help revitalize spaces at low cost to the government, and depending on the terms of the contract of sale or lease, it may produce a windfall for the government. This can benefit the public, if cities can be rejuvenated at no cost to the taxpayer, and governments can divert limited funds to other critical areas. Privatization, therefore, can make spaces more valuable and attractive, increasing profit for private entities, but also making

98 *Ibid.*, at 1223.

99 Paul Rolly, "Mormons, Anti-Mormons During General Conference Are a Testimony to the First Amendment", *The Salt Lake Tribune*, 22 Oct. 2016.

100 In 2009, two men were arrested for trespassing in the plaza after sharing a kiss. The Church alleged "belligerent and profane behavior," including "passionate kissing, groping, profane and lewd language." "Church Clarifies Record on Plaza Incident." 2009. LDS Church. https://newsroom.churchofjesuschrist.org/article/church-clarifies-record-on-plaza-incident. Charges were dropped by the city prosecutor, who, ironically, stated that the plaza "was perceived to be open to the public" and that "there continues to be a mistaken belief by many visitors that there is a public right of way." "No charges in Main Street Plaza trespassing case," *Deseret News*, 31 Jul. 2009.

101 Derek P. Jensen, "LDS Church Hoping Hefty Investment Will Shield Its Temples", *The Salt Lake Tribune*, 2 Apr. 2011.

spaces more tightly controlled in the kinds of expression allowed on the property.[102]

At the same time, privatization of public spaces can lead to a homogenization of viewpoints and ideas.[103] In an increasingly private and fragmented world, public spaces may be the only ones where people encounter different classes of people, as well as concepts and perspectives to which they would not normally be exposed.[104] Therefore, this type of privatization should undergo careful consideration of whether the benefits outweigh the drawbacks. Privatization may be easier to justify if the property has served as a flashpoint for conflict in the past, like the Main Street Plaza or the Temple Mount area.

7 A Modest Proposal to Privatize the Temple Mount Area

7.1 *Settlement-by-Disposition as a Private Law Solution to a Middle Eastern Problem*

This section discusses privatizing the Temple Mount. The discussion is highly theoretical and not intended to be implemented. Such implementation would be fraught with security problems, issues of international law, violations of many United Nations resolutions, and would seem to be deeply inconsistent with the relevant Israeli law, treaty obligations with Jordan, and the general *status quo* agreements that are in place governing the various holy sites, and to which Israel has agreed. The article speculates about what a privatized solution would look like to help the reader understand a variety of alternative solutions to the "law and religion" problems concerning holy sites in the Holy Land.

We propose the radical idea of privatization because on one hand we recognize the untenability of the current situation for a state that purports to be a modern Western-style democracy, and on the other, we are discontented with ostensibly liberal and religiously pluralistic proposals based only on the disestablishment of Judaism in Israel. These solutions appear to promote religious freedom against the established rabbinical Jewish traditions of Israel, but would never permit such religious freedoms at Christian or Islamic holy sites.

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102 Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (Routledge, 2004), 4–5.

103 Timothy Zick described these private spaces as "voids on the expressive topography" (Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (Cambridge University Press, 2008), 172). See also *ACLU of Nev.*, *supra* note 55, at 791.

104 Kohn, *supra* note 102, at 6–7.

The inability to apply what is otherwise a just and democratic solution equally to all faiths ought to disqualify its application in any democratic state. There is no way to allocate sacred property consistent with democratic principles, and the issue that the government should not be able to restrict when a specific religion can exercise its rights on public property in a fair way is, in our view, profound and important. Having articulated grounds for diverse prayer on the Jewish side of the Temple Mount in the name of religious freedom, many authors are unwilling to apply the same logic to permit Christian prayer or Jewish prayer on the Islamic side of the Temple Mount, or to permit Christian or Muslim prayer on the Jewish side.[105] Rather, often all they seek is to broaden the scope of Jewish prayer permitted on the Jewish side of the Temple Mount, without any real discussion of the rights of parties to engage in the kind of cross-cultural prayer that true liberal democrats ought to permit. These authors claim that permitting Jewish prayer in the Islamic area violates some principle that they fail to articulate clearly, and they appear equally unwilling to ponder whether Christian or Muslim prayer should be considered at Jewish sites or Jewish prayer at other Christian or Islamic sites. At a minimum, solutions grounded in ideals of democratic freedom, religious tolerance, and pluralism should be fully applicable to more than one faith and in more than one place. Indeed, one could argue that the Muslim religious claim to the Western Wall[106] would dictate some manner of recognition of Muslim prayer there as well.

The disestablishment model of privatization is a universal model that can be applied easily to holy sites of all faiths. The Baha'i Gardens in Haifa are an example of a current privately-owned holy site (although not a disputed one), where the owners are able to regulate conduct, and the Church of the Holy Sepulchre is an example of complex property rights being used to protect many different Christian interests.

Our proposal to privatize the Temple Mount and its surrounding area is an idiosyncratic American approach to a distinctly Middle Eastern problem. We propose that the government of Israel, the sovereign authority over all the holy

105 See, for example: Yuval Jobani & Nahshon Perez, *Women of the Wall: Navigating Religion in Sacred Sites* (Oxford University Press, 2017).

106 Muslims call it al-Buraq Wall, as it is believed to be the place where Muhammad tethered his winged horse, al-Buraq, and many regard it as an integral part of the Al-Aqsa Mosque. There have been also instances where leaders of other faiths have chosen to pray at the Western Wall due to its sacredness to Jews; for example, Popes John Paul II, Benedict XVI and Francis have all prayed at the Western Wall and left written notes within its stones: "Pope Francis made an unexpected stop at the Western Wall to pray and leave a note", *TheJournal.ie*, 26 May, 2014, retrieved 20 July, 2020 from https://www.thejournal.ie/pope-francis-western-wall-1485441-May2014/.

sites in the Land of Israel, acknowledge that government enforcement of religious norms in the State of Israel is highly complicated and frequently infringes on religious freedom.

The proposed privatization is based on a fundamental framework that the US Supreme Court has always put forward in matters of religious freedom, as described above: the right to exercise religious freedom does not apply to private property against the wishes of the owner of the property, as long as any public forum that may have existed on that property has been eliminated. Practically, this means that formerly public property, once privatized, loses its essential characteristics that guarantee religious freedom, allowing instead the owners (or lessors) of the property to limit core religious expression in a way that is consistent with their desires.[107] Property owners and lessors can and routinely do restrict the various First Amendment rights of people who are guests on their property for no reason other than the fact that it is displeasing to the owners of the property to have certain values expressed.

We proceed in the spirit of *Gulliver's Travels* to explore this theoretical universe that would be created if the government of Israel chose to privatize the holy sites in the State of Israel. According to the proposed arrangement, the government of Israel would maintain as little property interest as possible in these sites, other than what is necessary to maintain safety and security.[108] The Temple Mount Plaza can be regulated just like a movie theater, and similarly to a movie theater, what is showing in the theater is determined by the owner, even if fire and safety regulations apply. The worship services taking place in the Temple Mount would be subject to similar restrictions.[109]

Under the American model discussed above, the Temple Mount and Western Wall plaza are already distinctively circumscribed, with limited entrances to the prayer areas. There would be no need for retained property interest in having an open forum, because these are not thoroughfares or areas with a history of public expression; each have already been closed to particular religious expression.[110] Each property already meets the conditions of the ecclesiastical park discussed above in the Main Street Plaza cases, aside from government involvement; thus, all that is needed for the sites to conform to values of religious

107 See Section 5, "Privatization of the Public Forum," above.

108 Thereby satisfying any criteria concerning retained property interests, *supra* notes 59 to 61.

109 Certain regulations were still deemed acceptable in *2005 Utah Gospel*, *supra* note 65, such as maintenance of a viewing corridor.

110 Therefore, although there may not necessarily be material changes at the sites, they would already satisfy the conditions of being separate from the public square, *supra* note 56.

freedom is to remove the state from the picture.[111] Note that the sale does not need to be neutral and open to all to be justifiable in a secular and democratic nation; in the Main Street Plaza cases, and in various other cases involving the sale of monuments to private organizations,[112] courts have not required an open bidding process, although the Main Street Plaza case arguably involved an organization exerting its political power more so than its religious interests. Preferential sales to organizations interested in maintaining the *status quo* of a religious location have been constitutionally acceptable.[113]

Below are the points of our proposal.

1. The Dome on the Rock area should be sold to the Jerusalem Islamic Waqf for fair market value,[114] or rented to them for a specified period of time.[115] Upon completion of the transaction, the area shall be deemed private property, and the owner shall be authorized to determine what is and what is not proper use of the property. They may choose to allow tourists or not; allow Jewish prayer service or not; allow Christian prayer service or not. During the period of ownership of the property, the property shall be treated like any other private religious property. The state shall have entry rights with respect to security, health, and safety concerns, but the core pluralistic values that are central to the public square shall not apply, as the area will no longer be part of the public square but instead the private property of the Waqf.
2. The prayer area as currently constituted within the Western Wall Plaza shall be sold or leased to the Western Wall Heritage Foundation, for a fair market value. The Western Wall Heritage Foundation, like the Jerusalem Islamic Waqf, would be spun off into a private religious organization, which in this case is committed to conducting Orthodox Jewish prayer services, and they shall be deemed the owner or lessor of the property in question. Like all owners, they shall be entitled to determine what religious prayer services take place on their property, and under

111 As noted above, *supra* note 55, although a state can restrict types of expression in a non-public forum, limiting expression to certain classes of people is untenable, and only private owners can do it.

112 See *Marshfield*, *supra* note 53, and *Mercier*, *supra* note 53.

113 *Ibid.*

114 Note that a proper sale does not require an open bidding process; *ibid.* This applies to each of the proposed sales below.

115 Government retention of rented property is not dispositive, particularly when the other factors concerning the nature of the property are fairly clear; *Local 100*, *supra* note 63.

what conditions. They shall be allowed to treat the site no differently than any other synagogue in Israel, which is allowed to follow its own traditions as it sees fit, to charge an entrance fee, and to regulate the type of religious services allowed to be conducted in the property.

3. The Robinson's Arch area shall be sold or leased to a newly formed organization whose mission and purpose shall be to supervise and conduct non-Orthodox prayer in the area. This organization, similarly to the Western Wall Heritage Foundation, shall be constituted for its particular mission, with the intention that the area be owned and managed in a manner consistent with that mission. The trust shall have all the rights of a synagogue. It shall determine the kinds of religious services that shall be conducted in the area, at what times and in what manner. The trust may conduct religious services for any Jews, however it chooses to define them, or any other religious organization that according to its mission the trust determines that it should serve. Any limitations on the use of this private property shall be imposed only by the trustees of the synagogue itself, rather than by the government. There are many non-Orthodox synagogues in the State of Israel, and the government does not interfere in their private religious services, whether or not they are consistent with Orthodox Judaism.
4. The rest of the Western Wall Plaza shall remain public property of the State of Israel, to be used as it is already, for ceremonial state rituals related to Israeli society, such as the swearing-in of soldiers, and for other government activities that already take place in the area, behind the current prayer space. As in all public spaces in the State of Israel, there shall be no regulation of ritual and prayer, and all conduct permitted under Israeli law shall be permitted in this public space as well. Currently, for example, Christian Israeli soldiers are given the option of being sworn in with the New Testament, and Druze soldiers are sworn in with the Koran at a ceremony taking place in the Western Wall Plaza. A secular society ought to permit this, even if it is antithetical to Jewish worship, and it is prohibited in a Jewish worship space. This space shall be public Israeli ritual space, open to the general Israeli public to engage in any ritual that the State of Israel deems proper. Similarly to other societies, Israeli civil society engages in public rituals, such as the swearing-in of soldiers, which are conducted at a public "holy but pluralist" space, subject to the general requirements of religious freedom to which even a government of a state with an established church, like the UK or Israel, must adhere.

Thus, with regards to the prayer areas of the Western Wall Plaza, we have solved the many problems with regards to religious preference. In this proposal, the public area in the back of the Western Wall Plaza discussed above shall be open to all and subject to reasonable time and place regulation, no different from any public plaza in Israel. Either a general prohibition against all religious services will be enforced, or religion-neutral access will be allowed, as scheduled by the government.

American-style privatization solves the religious freedom problems. All the rights of a private house of worship shall be applicable to these private religious spaces. By enforcing different modes of worship and conduct at the sites, the property owners will simply be enforcing their secular property rights, rather than more nebulous or legally tenuous religious rights and rites.

8 Conclusion

Security concerns and maintenance of public order can serve as excuses only for so long before a state must confront the necessity to conform to its stated values. Half-solutions that apply to only one population or place are also insufficient, and therefore we are sceptical of proposals that call for open liberal access to the Western Wall, but allow restrictions on prayer on the Temple Mount.[116] We must break out of the box of our assumptions and expectations, and consider radical solutions to resolve these conflicts. We argue, therefore, that to grant the rights to only one faith to use a certain public property in a way consistent with the values of that one faith, a liberal democracy committed to principles of religious freedom and disestablishment could choose a simple, yet previously unthinkable solution: sell the property to that one faith. Hence, we propose to privatize the Western Wall and the Temple Mount.

In what sense is this proposal Swiftian,[117] the reader might ask? Not only in the sense that, like Swift in *Gulliver's Travels*, we have refused to become bogged down in the details of where exactly to draw the line and such, but also in the sense of *A Modest Proposal*.[118] We understand that privatization of holy sites is

116 As, for example, is advocated for by Jobani & Perez, *supra* note 105, and their sequel, Jobani & Perez, *supra* note 11.

117 As we note in the subtitle and Introduction.

118 See Jonathan Swift, *A Modest Proposal For preventing the Children of Poor People From being a Burthen to Their Parents or Country, and For making them Beneficial to the Publick* (Harding, London, 1729) satirically suggest that the impoverished Irish might ease their economic troubles by selling their children as food to the landed gentry. It is commonly felt that that this "satirical hyperbole mocked heartless attitudes towards the poor, as well

an unlikely solution to the problems that these sites are facing in Israel. This is because calls for religious freedom are hardly the real problem in the Middle East, and solutions to this problem will hardly bring peace to the Middle East. Solving the issues of religious freedom is likely a panacea for the real structural problems that must be confronted, and these proposals will do little in that regard to ultimately bring peace.

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as British policy toward the Irish in general," as noted by Wikipedia at https://en.wikipedia.org/wiki/A_Modest_Proposal.