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GOVERNMENT IDENTITY SPEECH AND RELIGION: ESTABLISHMENT CLAUSE LIMITS AFTER *SUMMUM*

Mary Jean Dolan*

ABSTRACT

This Article offers in-depth analysis of the opinions in *Pleasant Grove v. Summum*. *Summum* is a significant case because it expands “government speech” to cover broad, thematic government identity messages in the form of donated monuments, including the much-litigated Fraternal Order of Eagles-donated Ten Commandments. The Article explores the fine distinctions between the new “government speech doctrine”—a defense in Free Speech Clause cases that allows government to express its own viewpoint and to reject alternative views—and “government speech” analyzed under the Establishment Clause, which prohibits government from expressing a viewpoint on religion, and from favoring some religions over others. The Court’s decision, to characterize all public monuments as expressing “government-controlled” messages which reflect municipal identity, should impact the Establishment Clause calculus. Using social meaning theory, I show how the Culture Wars have transformed the message of governmental religious displays, and how *Summum* has eliminated the donor’s ambiguitating role, which played a part in Justice Breyer’s *Van Orden* concurrence.

The Article also serves a valuable function by contesting claims that *Summum* has eliminated the Establishment Clause endorsement test, or that it dangerously allows government to convert any and all private speech to its own, thus deflecting Free Speech claims. My interpretation shows that the decision is multi-faceted and contextual; it relies on government’s expressive intent, an inherently communicative medium, and viewers’ reasonable attributions regarding monument speech. As shown below, the Court’s exposition on the unfettered indeterminacy of monuments’ content either has been misconstrued, or renders the opinion internally inconsistent. I conclude by proposing a compromise solution: it requires a new level of transparency for the history-based rationales used to explain existing public religious displays, and closer scrutiny of any new government religious displays that are initiated in this religiously-divisive time. Finally, my proposal is illustrated by application to Ten Commandments monuments and the *Salazar v. Buono* narrative.

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INTRODUCTION

In *Pleasant Grove City v. Summum*, the United States Supreme Court held unanimously that a city's acceptance and display of privately-donated, permanent monuments in a public park is "government speech," so that its selection decisions are not subject to Free Speech Clause scrutiny.¹ This rejection of the Tenth Circuit's use of public forum analysis was virtually inevitable² because, as it turned out, a large percentage of the country's monuments were donated or initiated by the private sector, so that a win for Summum risked massive upheaval.³ The Court's reasoning, however, stands to have a strong impact on both the "recently minted" government speech doctrine⁴ and—because the park display included a donated Ten Commandments monument—the Establishment Clause challenges likely to follow.⁵

¹ *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009).

² See Mary Jean Dolan, *Pleasant Grove City v. Summum: 9-0 Decision Makes Sense*, NAT'L L. J., Mar. 23, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429210502&slreturn=1&hblogin=1> (providing the simple explanation for the unanimous decision); Mary Jean Dolan, *Issues and Implications: The Summum Oral Argument*, FIRST AMENDMENT L. PROF BLOG, Nov. 14, 2008, <http://lawprofessors.typepad.com/firstamendment/2008/11/summum-argument.html> (predicting 9-0 outcome).

³ See Brief for the United States as Amicus Curiae Supporting Petitioners at 28, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665) [hereinafter U.S. Brief] (listing national monuments donated in whole or part); Brief for the American Legion et al. as Amici Curiae Supporting Petitioner at 6–7, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665) [hereinafter American Legion Brief] (same for war memorials); Brief for the City of New York as Amicus Curiae Supporting Petitioners at 1–2, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665) [hereinafter NYC Brief] (same for New York City's monuments); Brief for the International Municipal Lawyers Ass'n as Amicus Curiae Supporting Petitioners at 6, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665) [hereinafter IMLA Brief] (providing the Court with a broad set of illustrations of privately-donated monuments from a broad range of municipalities of various sizes from all areas of the country); see also Marci A. Hamilton, *Pleasant Grove v. Summum: The Supreme Court's Puzzling, Fascinating New Free Speech Decision*, FINDLAW, Mar. 5, 2009, <http://writ.news.findlaw.com/hamilton/20090305.html> [hereinafter Hamilton Blog] ("[T]he case was carried to a large degree by the effective amicus briefs filed by [IMLA, NYC] and the American Legion . . . [T]he opinion is driven by the facts that they put on the table.").

⁴ See *Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring).

⁵ See, e.g., Press Release, Am. Humanist Ass'n, *In Wake of Summum, Humanists Will Target Ten Commandments Monuments* (Feb. 25, 2009), available at <http://www.americanhumanist.org/news/details/2009-02-in-wake-of-summum-humanists-will-target-ten-commandments-monuments> ("In the wake of today's U.S. Supreme Court ruling in *Pleasant Grove City v. Summum*, 07-665, the American Humanist Association announced it has been given just what it needs to pursue the removal of Ten Commandments monuments on public property all over America."); see also Robert Barnes, *City Can Reject Religious Display*, WASH. POST, Feb. 26, 2009, at A2 (Brian Barnard, Summum's lawyer, said that an Establishment Clause challenge to Pleasant Grove City's Ten Commandments monument "would be the church's next legal fight").

Summum is significant because the opinion extended the Court's government speech doctrine to include not only specific, objective program policies (e.g., promoting recycling), but also broad, thematic municipal identity messages.⁶ In earlier articles, and in an amicus brief filed on behalf of the International Municipal Lawyers Association (IMLA), I argued that extending the new doctrine to include municipal "identity speech" can enhance the speech market and frequently is necessary to facilitate the increasing number of public-private expressive partnerships.⁷ As reflected in my prior work and in the *Summum* opinion, "identity speech" can be loosely defined as expression that is consistent with a government's identified or desired image and values, especially communitarian and promotional themes.⁸ In addition, the Court took this step in a new context: *Summum* also is the Supreme Court's first government speech decision that does not involve a government-funded program.⁹

This Article analyzes *Summum*'s impact on the only clearly-acknowledged limit on government speech—the Establishment Clause—and shows why the Court's expansion of "government speech" as a Free Speech Clause defense should heighten the Court's scrutiny of government's religious speech.

⁶ *Summum*, 129 S. Ct. at 1133–34.

⁷ IMLA Brief, *supra* note 3 (cited in *Summum*, 129 S. Ct. at 1133, 1135 n.3, 1136); Mary Jean Dolan, *Why Monuments are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 CATH. U. L. REV. 7 (2008) [hereinafter Dolan 2008] (applying theory to unique context of monuments; explaining IMLA empirical research and noting Establishment Clause issue); Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71 (2004) [hereinafter Dolan 2004] (developing theory and applying to special programs, banners, and city websites). Defining the limits to this expanded doctrine to preserve free speech and other constitutional values is a critical project, one explored in an expanding body of valuable scholarship. See Dolan 2004, *supra*, at 75 n.18 (collecting early scholarly critiques); see *infra* note 115 (collecting additional articles proposing such limits).

⁸ See, e.g., *Summum*, 129 S. Ct. at 1133–34 (donated monuments are government speech in part because they are selected "for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park" and are displayed in a park "that is linked to the City's identity"); Dolan 2008, *supra* note 7, at 29 & n.131 (municipalities accept only those proposed monuments that are "consistent with that municipality's broad identity messages," which often are reflected in its public promotional statements); IMLA Brief, *supra* note 3, at 12–13 (IMLA's "Municipal Practice Examples" showed how governments' decisions regarding monuments "express community ideals at the time of installation"); Dolan 2004, *supra* note 7, at 111–12 (arguing that *Rust v. Sullivan* should be extended to certain contexts where "a government is communicating its own views on the city's identity and purposes, what will draw tourists and investments, and what image it should present to the larger world" and "has joined forces with the private sector . . . to convey its own broad subjective message"); see also *infra* Part IV (for additional illustrations of the "identity speech" concept).

⁹ For over a decade, however, the Circuit Courts of Appeal have been wrestling with government speech claims in contexts that cannot be characterized as government funding decisions, including public art programs, sponsor acknowledgments, and specialty license plates. See, e.g., *infra* note 195 (comparing cases finding certain license plates as government speech and others as private speech).

The focal point of all public attention on this free speech case, and its impetus, was Summum's claim of religious discrimination.¹⁰ The City's historically-themed Pioneer Park included one of the much-litigated Fraternal Order of Eagles' Ten Commandments monuments, and the City had turned down Summum's offer of its tiny religion's competing "Seven Aphorisms" monument.¹¹ Four years earlier, in *Van Orden v. Perry*, a 5-4 decision, the Court had dismissed an Establishment Clause challenge to the display of a similar Eagles-donated Ten Commandments monument on the Texas State Capitol grounds.¹²

And so, the litigation was permeated with the question Chief Justice Roberts posed to the City's counsel: "Mr. Sekulow, you're really just picking your poison, aren't you? I mean, the more you say that the monument is government speech to get out of the . . . Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause."¹³ Preliminary reactions among legal commentators, and the several Justices who addressed the issue, were mixed; some maintained that *Van Orden* is unaffected because it was based on the monument's secular meaning, and not on a finding that it was the Eagles' speech.¹⁴

¹⁰ See, e.g., Editorial, *A Case of Religious Discrimination*, N.Y. TIMES, Nov. 12, 2008, at A30; Jesse Bravin, *10 Commandments vs. 7 Aphorisms: A New Religion Covets Legitimacy*, WALL ST. J., Nov. 13, 2008, at A14 (stating that "the subtext of the battle—a New Age religion seeking the same treatment as a more established faith"); Michael Kessler, *The Court's Monumental Error*, ON FAITH, WASH. POST (Mar. 17, 2009, 9:39 AM), http://onfaith.washingtonpost.com/onfaith/georgetown/just_law_and_religion/ ("Pleasant Grove City, with the Court's blessing, endorsed one type of religious speech over another.").

¹¹ See *infra* Part I.

¹² *Van Orden v. Perry*, 545 U.S. 677 (2005).

¹³ Transcript of Oral Argument at 4, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665) [hereinafter *Summum* Transcript], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-665.pdf (Jay Sekulow was Counsel for Pleasant Grove City).

¹⁴ See, e.g., Michael Dorf, *You May Say Justice Alito Is a Dreamer, But He's Not the Only One*, DORF ON LAW (Mar. 2, 2009, 11:56 PM), http://michaeldorf.org/2009_03_01_archive.html (on impact of *Summum*, concluding that only two Justices (Scalia and Thomas) "argue[d] that if the Establishment Clause issue were squarely before the Court it would change nothing," while four Justices (Breyer, Ginsburg, Souter and Stevens) argued that "it would potentially change the analysis"); Calvin Massey, *Thoughts on Pleasant City v. Summum*, THE FACULTY LOUNGE, Feb. 26, 2009, <http://www.thefacultylounge.org/2009/02/thoughts-on-pleasant-city-v-summum-.html> ("[T]he effect of the decision is to increase the significance of the endorsement test for determining when governmental display of religious imagery or text violates the Establishment Clause."); Press Release, Am. Humanist Ass'n, *supra* note 5 (proclaiming that *Summum* has given it "just what it needs to pursue the removal of Ten Commandments monuments on public property all over America"). Compare Ian Bartrum, Essay, *Pleasant Grove v. Summum: Losing the Battle to Win the War*, 95 VA. L. REV. IN BRIEF 43, 47 (2009), <http://www.virginialawreview.org/inbrief/2009/05/16/bartrum.pdf> (concluding that *Van Orden* is insufficient to deflect a claim that Pleasant Grove's Ten Commandments violates the Establishment Clause), with Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. COLLOQUY 70, 73 n.15 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/>

This Article asserts that *Summum* should significantly impact the Establishment Clause calculus. The point of the new “government speech doctrine,” which is used as a defense in Free Speech Clause cases, is to *allow* government to express its own viewpoint and to reject alternative views.¹⁵ The essence of the Establishment Clause, in contrast, is to *prohibit* government from expressing a viewpoint on religion, and from favoring some religions over others.¹⁶ And now, the *Summum* opinion has characterized all public monuments as expressing “government-controlled” messages, selected to reflect that government’s identity.¹⁷ While many of its parameters are contested,¹⁸ the Establishment Clause does not permit governments to affirmatively communicate that a particular, stand-alone religious creed serves in that newly-articulated role.¹⁹ *Van Orden* should be reassessed in light of *Summum*’s strong statements describing why monuments are government speech,²⁰ and all public monuments with religious themes should be reviewed through *Summum*’s new lens. Also, Justice Breyer’s controlling concurrence in *Van Orden* relied in part on the donor’s mediating role²¹—extinguished by *Summum*.²² That *Summum* involved rejection of a minority religion’s monument highlights the dilemma, but is not the only problem.

The stakes are high. As Professor Noah Feldman recently described it, we are a nation “divided by God.”²³ As many have decried, the ongoing, heated battles over church-state issues between what he terms “legal secularists” and “values evangelicals” have dominated America’s politics and distracted us from productive compromise on pressing problems.²⁴ Governmental displays of the Ten Commandments have been a recurring rallying point; in Professor Steven Goldberg’s memorable phrase, some conservative activists have turned this Old Testament icon into “the Nike Swoosh of religion.”²⁵

2009/30/LRColl2009n30Tebbe.pdf (concluding that an Establishment Clause challenge to Pleasant Grove City’s Ten Commandments display would not succeed due to *Van Orden*).

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part III.

¹⁷ See *infra* Part IV.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part V.

²⁰ While *Summum* will have a larger impact, this Article focuses primarily on how *Summum* affects Establishment Clause analysis of passive government identity speech, particularly governmental display of religious monuments.

²¹ *Van Orden v. Perry*, 545 U.S. 677, 701–02 (2005) (Breyer, J., concurring).

²² *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134–36 (2009).

²³ NOAH FELDMAN, *DIVIDED BY GOD* 235 (2005).

²⁴ *Id.* at 235–36 (seeking a workable compromise between the two groups, Feldman argues that the best approach is to allow governmental religious symbolism, but to prohibit any government funding of religious organizations); see also, e.g., JIM WALLIS, *GOD’S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN’T GET IT* 3–7 (2005) (discussing the political impasse from a Christian theological perspective).

²⁵ STEVEN GOLDBERG, *BLEACHED FAITH: THE TRAGIC COST WHEN RELIGION IS FORCED INTO THE PUBLIC SQUARE* 1 (2008) (stating when “an overwhelmingly Christian government”

In addition, there has been much speculation among legal academics about the full impact of the Roberts Court on religion clause jurisprudence; *Summum* could pave the way for seismic change. Some separationists predict a new era of “non-preferentialism,” a term which means that government is allowed to prefer religion over non-religion, so long as it is neutral among different religions and sects.²⁶ Commentators have argued that Pleasant Grove City’s choices violate that doctrine, and even exemplify Justice Scalia’s sectarian view that the Establishment Clause allows government to embrace Biblical monotheism.²⁷ Simultaneously, the Court has re-imagined the neutrality principle to require equal access for religious speakers in government facilities and government-funded programs.²⁸ Equal access cases,

posts on the county courthouse the statement, “I the LORD thy God am a Jealous God, visiting the iniquity of the fathers upon the child unto the third and fourth generation of them that hate me,” they are not really advocating that particular passage, but rather “are posting a symbol,” one that has come to be associated with “the war to push religion into the public square”).

²⁶ E.g., Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 4, 24 (2006) [hereinafter Gey, *Vestiges of the Establishment Clause*] (predicting that Justice Alito and Chief Justice Roberts will complete the transformation of the Establishment Clause from a separationist model to an “integrationist” regime, and will follow Justice Scalia’s view that the United States is a monotheistic nation, entitled to display its religious symbols); Kelly S. Terry, *Shifting Out of Neutral: Intelligent Design and the Road to Nonpreferentialism*, 18 B.U. PUB. INT. L.J. 67 (2008) (arguing that Chief Justice Roberts and Justice Alito are likely to join Justices Scalia, Thomas, and Kennedy to create the 5-4 majority needed to overturn decades of Establishment Clause precedent and institute a new standard of “nonpreferentialism”). The departures from the Court of Justice O’Connor, the endorsement test’s creator and leading proponent, and Justice Souter, a strong dissenter in *Van Orden*, and Justice Sotomayor’s fresh slate, all create substantial uncertainty in this area. See, e.g., KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION 182–83 (2008) (questioning survival of endorsement test post-Justice O’Connor).

²⁷ Patrick M. Garry, *Pleasant Grove City v. Summum: The Supreme Court Finds a Public Display of the Ten Commandments to be Permissible Government Speech*, 2009 CATO S. CT. REV. 271, 291–92 (2008); see also Leslie Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 1, 43 (2010); see *infra* notes 188–90 and accompanying text (discussing nonpreferentialism in Justice Scalia’s dissent in *McCreary County v. ACLU*, 545 U.S. 844, 893–94 (2005) (Scalia, J., dissenting)).

²⁸ See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). In many contexts, such as the use of public meeting rooms to show an evangelical Christian film on parenting approved in *Lamb’s Chapel*, this new development has been relatively non-controversial; I agree with the outcome in both these cases.

My own perspective, though, is that as government partners more freely with religious organizations to achieve social welfare goals, it is all the more essential that it maintains neutrality between religious and secular perspectives in its symbolic identity speech (as well as in its distribution of aid and provision of services). See Mary Jean Dolan, *A New Risk on an Uncertain Path: Establishment Clause Guidelines for Municipal Aid to Religious Organizations*, 49 MUN. LAW. 15 (2008); Mary Jean Dolan, *Government-Sponsored Chaplaincies and Crisis: Walking the Fine Line in Disaster Response and Daily Life*, 35 HASTINGS CONST. L.Q. 505, 507 (2008). For a full development of this approach see Ira C.

such as *Rosenberger v. Rector and Visitors of University of Virginia*,²⁹ have transformed forum analysis by re-labeling content limits on all religion as discrimination against individuals' religious speech.³⁰ *Sumnum* risks recasting government speech promoting religion: changing it from an Establishment Clause problem, and into a Free Speech Clause defense against private speakers who assert a different viewpoint on religion.

The proposal set forth in this Article is a realistic approach to an intractable conflict. First, as to any previously-existing, permanent public displays with religious content, it is insufficient to have a religion-neutral rationale and use it as a defense in litigation: government's minimum duty is to declare and explain its religion-neutral rationale to all viewers.³¹ Contrary to a recent comment by Chief Justice Roberts, appropriate disclaimers with context-creating explanations are not "warning signs" that insult religion,³² but rather are an essential affirmation of Establishment Clause values. Second, now that monuments are defined as "government speech" expressing a government's viewpoint, *new* government monuments with arguably religious themes should be prohibited, unless the government can show that any religious content is negligible compared to a clear secular meaning.³³ This proposal addresses what remains a resilient issue: recently, a petition for certiorari was denied in yet another Ten Commandments case, *Green v. Haskell County*—and this time the case involved a recently-erected monument, which caused controversy from the start and led quickly to litigation.³⁴

The Court's recently-decided case involving religious symbols and government property, *Salazar v. Buono*,³⁵ did not resolve, or even address, the "government speech" conundrum raised by *Sumnum*. *Buono* involved a large cross war memorial, erected

Lupu, *Government Messages & Government Money: Sante Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 816–17 (2001) (arguing in support of the Court's then-current direction, for retaining "some form of separationist principle designed to keep government from taking positions on matters of religious faith, celebration, and observance," while allowing government aid to religious organizations under "a regime of equal access, nondiscrimination and formal neutrality").

²⁹ 515 U.S. 819 (1995) (denying funding to Christian evangelical student publication where other student publications funded violated Free Speech Clause).

³⁰ See *infra* notes 208–10 and accompanying text.

³¹ See *infra* Part V.

³² See Transcript of Oral Argument at 22, *Salazar v. Buono*, 129 S. Ct. 1313 (2010) (No. 08-472), available at http://www.scotuswiki.com/index.php?title=Salazar_v._Buono [hereinafter *Buono* Transcript] (This comment was Chief Justice Roberts's reaction to the new administration's proposal, mentioned at the *Buono* oral argument by General Kagan, that, should the land transfer be approved, then the National Park Service intends to post a sign along the road to explain that the cross stands on privately-owned land.).

³³ See *infra* Part V (explaining the very limited categories of religiously-themed monuments, such as statues of missionary explorers, which would satisfy this test).

³⁴ See *Green v. Haskell County Bd. of Commr's*, 568 F.3d 784 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010) (discussed *infra* notes 181, 318 and accompanying text).

³⁵ 130 S. Ct. 1803 (2010).

in 1934 by WWI veterans, and displayed on federal land in the Mojave National Preserve.³⁶ Starting from a complex procedural history, the Court's decision remanded the case, strongly suggesting that transferring the underlying land to the Veterans of Foreign Wars (VFW) was sufficient to remedy the previously-adjudicated Establishment Clause violation.³⁷ This Article focuses on *Pleasant Grove City v. Summum*, rather than a comparison of the two cases, but Part V does use *Buono*'s basic narrative as one of two illustrative applications of my proposed solution.

As Justice Souter observed: "The interaction between the 'government speech doctrine' and Establishment Clause principles has not . . . begun to be worked out [and *Summum*] shows that it may not be easy to work out."³⁸ Thus, substantial background on these two principles is essential to exegesis of the *Summum* opinions. Part I introduces the case as it reached the Court, including the Tenth Circuit's earlier precedent holding a Ten Commandments monument private speech, and an explanation of the limited public forum option not taken. Part II explains the Court's nascent "government speech" doctrine, the several lines of cases sometimes referred to by that name, and the critical meaning of the *Summum* Court's choice: to rely on its "core" government-viewpoint-based doctrine, rather than its precedent for discretionary selection of private speech. Part III begins to work out how the use of "government speech" in Establishment Clause case law differs from the new Free Speech Clause "government speech doctrine."

Part IV provides my in-depth analysis of Justice Alito's opinion for the Court, including his affirmative case for government speech, his secondary argument against using forum analysis, and his inconsistent musings on the meanings of monuments. Then, it evaluates all opinions addressing *Summum*'s Establishment Clause implications, whether explicitly or implicitly. Part IV shows that *Summum* repeatedly relied on government's intent to communicate meaning through donated monuments, and on viewers' attribution of monuments' messages to the government.

Part V then applies scholarship on law and social meaning to show why judicial labeling of an expressly religious creed as core "government speech"—particularly in the current cultural context—is unconstitutional. After analyzing two recent suggestions for doctrinal change, Part V details my proposal for using disclaimers and a robust endorsement test, and shows why this is the most feasible current option, as well as a balanced solution which respects both traditional culture and an increasingly diverse citizenry.

I. CASE BACKGROUND & ANALYSIS OF FORUM OPTIONS

Pleasant Grove City's Pioneer Park contains some fifteen historical buildings and permanent artifacts, many showcasing the City's history, and most donated by private

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1141 (2009) (Souter, J., concurring in the judgment).

persons or groups.³⁹ The Park's displays include a Ten Commandments monument, which was donated by the local Fraternal Order of Eagles in 1971, and displayed in the Park pursuant to the City Council's vote.⁴⁰ As is now common lore, this display was part of the Eagles' nationwide campaign to distribute the familiar code in an effort to combat juvenile delinquency.⁴¹ These monuments have been the subject of decades of litigation,⁴² culminating—though apparently not ending—with *Van Orden*.⁴³

Summum is a religious organization, founded in 1975 and headquartered in Salt Lake City, approximately thirty-five miles from Pleasant Grove.⁴⁴ In 2003, Summum's President wrote the Mayor, requesting permission to erect in the Park a stone monument of Summum's Seven Aphorisms, similar in size and appearance to the Ten Commandment monument.⁴⁵ Approaching Pleasant Grove followed several earlier lawsuits, where Summum's wins had been less than satisfying because the other local governments had removed their Ten Commandments displays, rather than erect the Seven Aphorisms.⁴⁶ Summum's request here, and in its earlier lawsuits, related to

³⁹ The permanent displays include a wishing well donated by Lions Club, a millstone from the City's first flour mill donated by a local resident, park benches donated by Pleasant Grove Garden Club, a stone from the original Mormon Temple in Nauvoo, Illinois donated by a City resident, a historic winter sheepfold donated by a private company, an old granary donated by City residents, the City's first fire station donated by local resident, two displays of a tree and a plaque that were donated by Pleasant Grove City Council and 4-H, and a September 11 monument constructed by a local Eagle Scout troop. U.S. Brief, *supra* note 3, at 2–3.

⁴⁰ *Summum*, 129 S. Ct. at 1129.

⁴¹ *Van Orden v. Perry*, 545 U.S. 677, 713–14 (2005) (Stevens, J., dissenting) (more than one-hundred largely identical monoliths were distributed by the Eagles to state and local governments during the 1960s and 1970s; initiated by a juvenile court judge to serve his stated goal of reducing juvenile delinquency, the national distribution was assisted by Cecil B. DeMille at the time of his movie, *The Ten Commandments*). See also *Books v. City of Elkhart*, 235 F.3d 292, 294–95 (7th Cir. 2000) (providing additional details of this fascinating story, including Eagles' original rejection of the idea based on fears that it might seem coercive or sectarian; subsequently, representatives of the Jewish, Protestant, and Catholic faiths developed what they viewed as a nonsectarian version of the Ten Commandments). For commentary on the impossibility of a “nonsectarian” Ten Commandments, see *infra* note 187.

⁴² See Jay A. Sekulow & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 34 (2005) (compiling long list of cases challenging Ten Commandments displays during the years 1997–2005).

⁴³ In fact, an attorney for Summum has promised a renewed legal attack on the monoliths based on *Summum*. Barnes, *supra* note 5.

⁴⁴ See About Summum, <http://www.summum.us/about/> (last visited Oct. 27, 2010).

⁴⁵ *Summum*, 129 S. Ct. at 1129–30.

⁴⁶ Previously, the Tenth Circuit twice had upheld Summum's free speech claims using limited public forum analysis, but in each case, the final result was removal of the Ten Commandments monuments—and not the display of Summum's alternative creed. See *Summum v. City of Ogden*, 297 F.3d 995, 1011 (10th Cir. 2002) (finding permanent monuments on lawn of city's municipal building a nonpublic forum, Ten Commandment monument private speech and city's rejection of Summum's monument unconstitutional viewpoint

its religion's doctrine that the Seven Aphorisms are similar in origin to, and spiritually more advanced than, the Ten Commandments.⁴⁷ The City denied the request by letter, stating that all permanent displays in Pioneer Park either "directly relate to the history of Pleasant Grove" or "were donated by groups with long-standing ties to the . . . community."⁴⁸

It is worth noting here that nothing in the Record suggested that any members of Summum had any ties at all to Pleasant Grove City, or that the Summum religion had any connection to the City or its history. Summum had argued, though, that the Ten Commandments monument also was outside the scope of the stated content limitations: the local Eagles chapter had been in existence for only two years prior to the donation.⁴⁹

discrimination); *Summum v. Callaghan*, 130 F.3d 906, 921–22 (10th Cir. 1997) (Summum stated claim under Free Speech Clause; remanded to determine whether Salt Lake County acted reasonably in declining Seven Aphorisms monument); *see also* Barnes, *supra* note 5 (according to Brian Barnard, Summum's lawyer, Summum's other challenges to Ten Commandments monuments led the government to remove the Ten Commandments, rather than to add the Seven Aphorisms).

The historical reason these lawsuits proceeded under the Free Speech Clause was an early Tenth Circuit precedent. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (1973) (Eagles' Ten Commandment monument on courthouse lawn did not violate Establishment Clause because such monuments convey a "primarily secular" message); *see also* *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007) (remanded in light of *Pleasant Grove* in 319 Fed. App'x 753 (10th Cir. 2009)) (rejection of Summum's monument while displaying Ten Commandments in public park violated strict scrutiny test for traditional public forum; question of material fact whether attempted sale of underlying parcel to private party altered analysis); *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1241 n.1 (10th Cir. 2005) (stating "*Anderson* is now superseded by *Van Orden*," and remanding case).

⁴⁷ *See* Summum Philosophy, The Aphorisms of Summum and the Ten Commandments, <http://www.summum.us/philosophy/tenccommandments.shtml> (last visited Oct. 27, 2010); *see, e.g.,* *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *see also* Bravin, *supra* note 10 ("A couple of decades after a visit from 'beings Extraterrestrial' inspired him to found the Church of Summum in 1975, Summum Bonum Amen Ra, born Claude Nowell and known as Corky, had another epochal encounter. He saw a monolith depicting the Ten Commandments on the courthouse grounds in Salt Lake City, says Su Menu, the Summum religion's current leader, and 'felt it would be nice to have the Seven Aphorisms next to them.' The monument would be inscribed with the principles that, according to Summum doctrine, Moses initially intended to deliver to the Hebrews before deciding they weren't ready to understand them.").

The Seven Aphorisms of Summum are: 1) psychokinesis, 2) correspondence, 3) vibration, 4) opposition, 5) rhythm, 6) cause and effect, and 7) gender. Seven Summum Principles, <http://www.summum.us/philosophy/principles.shtml> (last visited Oct. 27, 2010).

⁴⁸ *Summum*, 129 S. Ct. at 1130.

⁴⁹ *See* Brief of Respondent at 23, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665) [hereinafter Summum Respondent Brief] ("When the Eagles donated their display in 1971, they were not an 'established Pleasant Grove civic organization with strong ties to the community,' . . . their local chapter was just two years old."); *see also* Brief of Plaintiff/Appellant at 3, *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. June 28, 2006) (No. 06-4057) (charging that claimed monument criteria not only were *post facto*, but were viewpoint discriminatory as applied).

While this assertion was never conclusively resolved, there is reason to believe that the Eagles' donation was at least a closer fit to Pleasant Grove's criteria. It is likely that, when originated, the local Eagles chapter's members, at least, loosely complied with that criteria, in that its membership would have included primarily Pleasant Grove City residents, many with roots in the community.

The next year, the City Council passed a resolution which codified its stated past practice, and added procedures and additional criteria, including "safety and esthetics."⁵⁰ In 2005, Summum sued, claiming that the City's exclusion of its monument, while displaying other permanent monuments, violated the federal Free Speech Clause.⁵¹ After the district court declined to require installation of its monument, Summum appealed.⁵²

The Tenth Circuit decided for Summum, and required the City to erect the Seven Aphorisms monument.⁵³ The court reasoned that because a public park is a traditional public forum, the strict scrutiny test applied to the City's content-based rejection of Summum's request. Under longstanding First Amendment doctrine, in public streets and parks, citizens' free speech rights are robust, and government generally is allowed only to regulate time, place and manner. Any governmental restriction based on content must be narrowly tailored to serve a compelling state interest, and restrictions based on viewpoint are prohibited.⁵⁴ The Tenth Circuit held against the City on the grounds that showcasing local history and culture is not a compelling reason, nor is that criteria related to stronger state interests, including safety.⁵⁵

Subsequently, there were two opinions dissenting from the Tenth Circuit's denial of the petition for a rehearing en banc.⁵⁶ Judge Lucero asserted that limited public forum analysis should apply.⁵⁷ Under the established categorical approach, government may create a forum by opening up its property to private speech, and then may limit its use to certain categories of speakers or certain types of subject matter.⁵⁸ In a limited public forum, Free Speech Clause doctrine requires that any such content or speaker limitations be reasonable and viewpoint-neutral.⁵⁹ As Judge Lucero correctly noted,

⁵⁰ *Summum*, 129 S. Ct. at 1130.

⁵¹ *Id.*

⁵² *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007).

⁵³ *Id.* at 1057.

⁵⁴ *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), *discussed in* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1126–28 (3d ed. 2006) [hereinafter *CHEMERINSKY TREATISE*].

⁵⁵ *Summum*, 483 F.3d at 1050–52, 1054.

⁵⁶ *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1171 (10th Cir. 2007).

⁵⁷ *Id.* (Lucero, J., dissenting).

⁵⁸ *Id.* at 1174.

⁵⁹ *Id.* at 1175. Note that the test is identical whether referred to as a "nonpublic forum," a "limited public forum," or a "designated public forum" with content or speaker limitations. *See, e.g., Dolan* 2004, *supra* note 7, at 77–78 (analyzing terminology issue); *see also infra* Part IV.B for discussion of variations in forum terminology and the Court's usage in *Summum*.

in determining which kind of forum is involved, courts look to the type of access sought.⁶⁰ Here, he reasoned, *Summum* claimed the right to install a permanent monument in the public park; in essence, its claim was that the City had created a permanent monument forum by accepting some donated monuments. Finding the City's stated criteria to be reasonable content limitations, Judge Lucero argued for a remand to evaluate whether its application of those criteria had been viewpoint-neutral.⁶¹

Judge McConnell asserted that once a city accepts and displays a donated monument on public land, that monument is government speech.⁶² His argument relied heavily on city ownership and control of the physical structures, and applied the Circuit Courts' prevalent four-factor test for government speech.⁶³ That test evaluates: (1) the "central purpose" of the challenged speech; (2) the government's degree of "editorial control"; (3) the identity of the "literal speaker"; and (4) whether the government had "ultimate responsibility for the contents" of the speech.⁶⁴

In one of *Summum*'s earlier Free Speech Clause lawsuits, the Tenth Circuit had used that test, and expressly held that the donated Ten Commandments monument displayed on Ogden's city hall lawn was not government speech, but instead remained the Eagles' private speech.⁶⁵ In *Summum*, the Supreme Court did not explicitly address the four-factor test (which was discussed in all the briefs), and so it may be obsolete. But two points from *Ogden* bear mentioning here because they are relevant to the *Summum* Court's opinion and to this Article's Establishment Clause analysis. The Tenth Circuit found the fourth element, "ultimate responsibility," satisfied because the City had acquired title to the monument.⁶⁶ The Ten Commandments monument in *Ogden* failed the first element, the Tenth Circuit held, because the monument's "central purpose" was to advance the donor's view that the Ten Commandments provide a "moral code for youth."⁶⁷

In a final interesting point from the case below, Judge McConnell did not directly address the limited public forum option. Instead, he rejected the majority's use of the strict scrutiny test, pointing out that if governments were prohibited from considering

⁶⁰ *Summum*, 499 F.3d at 1072–73 (Lucero, J., dissenting).

⁶¹ *Id.* at 1174.

⁶² *Id.* at 1176 (McConnell, J., dissenting).

⁶³ *Id.* at 1176–77.

⁶⁴ *Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001), *cert. denied*, 534 U.S. 997 (2001) (finding that a sign acknowledging city sponsors on city's holiday display was government speech, triggering no obligation to include others); *see also* *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000), *cert. denied*, 531 U.S. 814 (2000) (public radio station allowed to reject KKK as sponsor); *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008) (applying similar factors to specialty license plates).

⁶⁵ *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002).

⁶⁶ *Id.* at 1005.

⁶⁷ *Id.* at 1004. For complete analysis of the four-factor test's application to Pleasant Grove City's donated monuments, see Dolan 2008, *supra* note 7, at 32–37.

content in accepting monuments, they would be forced to accept an “influx of clutter” or remove cherished monuments.⁶⁸ His implicit acknowledgment that the limited public forum doctrine does nothing to provide government choice in monuments presaged Justice Alito’s reductive approach to forum analysis in the *Summum* majority opinion.⁶⁹

II. PRE-EXISTING GOVERNMENT SPEECH DOCTRINE: THE *SUMMUM* COURT’S CHOICES

Justice Stevens noted in his *Summum* concurrence that the government speech doctrine is “recently minted,” its canon narrowly comprised of three cases: *Rust v. Sullivan*, *Johanns v. Livestock Marketing Association*, and *Garcetti v. Ceballos*.⁷⁰ As recently as 2005, Justice Souter similarly described the doctrine as “relatively new,” observing at that point: “the few cases in which we have addressed the doctrine have for the most part not gone much beyond such broad observations” as, “it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.”⁷¹ Given the ubiquity of governments working with the private sector and spending money on speech-related activities, it is worthwhile to pause here, and to clarify how the Court has used the term “government speech,” and has defined the “doctrine,” in the period leading up to *Summum*.

A. Core Government Speech & Government Messages

As shown below, Justices Stevens and Souter refer to a specific new category, what I will refer to in this Article as “core” government speech, or the “government speech doctrine.” Similar concepts have figured into the specific doctrinal areas of school speech and religious speech,⁷² and a related approach will be discussed in Part III.B below. *Summum* is a novel expansion of the government speech doctrine: not only

⁶⁸ *Summum*, 499 F.3d at 1175–76 (McConnell, J., dissenting).

⁶⁹ See *infra* Part IV.B (citing *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1137–38 (2009)). Judge McConnell’s approach related back, as well. The eradication of the amorphous distinction between content and viewpoint arguably began in the religious speech equal access cases, of which then-Professor McConnell was a chief architect. See FELDMAN, *supra* note 23, at 207–10 (laying out the litigation strategy and memorably describing McConnell as the “Thurgood Marshall of values evangelicalism”).

⁷⁰ *Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring) (citing *Rust v. Sullivan*, 500 U.S. 173 (1991), *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005), *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

⁷¹ *Johanns*, 544 U.S. at 574 (Souter, J., dissenting).

⁷² For a discussion of school speech, see *infra* note 120 and accompanying text (including showing new categorical blending, as school cases begin to cite *Rust* and *Johanns*, along with the Court’s well-developed school speech precedent). Part III will explore what the concept of government speech has meant in Establishment Clause claims.

does the opinion uphold broad, thematic government identity expression, but it does so outside the scope of a specific, clearly-defined institutional role or a government-funded program.

The impact of a finding of “government speech” is dramatic: it eliminates the requirement of viewpoint neutrality. The starting point for this analytical category is the truism that governments must express points of view on many topics as a necessary part of governing: it is what they are elected to do.⁷³ Citizens protesting that their own speech has been excluded, restricted, or compelled by the government’s speech—typically through a tax-funded program or policy—are said to have their remedy in the political process.⁷⁴ Moreover, as the Court reaffirmed in its starting point for analysis in *Summum*: “A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.”⁷⁵

The initial case listed by Justice Stevens, *Rust v. Sullivan*, did not coin the term. Rather, in later cases, the Court characterized *Rust* as holding that “where the government is itself the speaker,” it is permitted to make “viewpoint-based funding decisions.”⁷⁶ *Rust* upheld a restriction on abortion counseling in federally-funded health clinics, which served that Administration’s established pro-life policy, and thus rejected the affected physicians’ free speech claim.⁷⁷ The decision raised many troubling concerns, including the narrowed scope of medical information available to the poor women limited to these clinics, the money paid to induce providers to modify their speech,⁷⁸ and the governmental interference with physicians’ professional duty to prioritize their patients’ needs.⁷⁹

Prior to *Summum*, only one Supreme Court majority opinion, *Johanns v. Livestock Marketing Association*, had explicitly rested on the “government speech doctrine” to justify its holding for the government.⁸⁰ In *Johanns*, the Court dismissed a

⁷³ *Summum*, 129 S. Ct. at 1131 (2009) (citing *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000)).

⁷⁴ *Id.*

⁷⁵ *Id.* (quoting *Johanns*, 544 U.S. at 562).

⁷⁶ *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 541 (2000) (discussing *Rust*); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (discussing *Rust* and government’s ability to “use[] private speakers to transmit specific information”).

⁷⁷ *Rust v. Sullivan*, 500 U.S. 173, 192–201 (1991).

⁷⁸ *See, e.g., Martin H. Redish & Daryl I. Kessler, Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 576 (1996) (concluding that such “‘negative’ subsidies . . . [are] presumptively unconstitutional”).

⁷⁹ Indeed, subsequently the Court came to what seemed the precisely diametrical position when it was lawyers’ professional duties to their clients that were impinged by federal law, in *Velasquez*, 531 U.S. at 542. *See, e.g., Robert Post, Essay, Subsidized Speech*, 106 YALE L.J. 151, 167–77 (2006) (finding the distinctions drawn by the Court unsupportable to justify the differing outcomes).

⁸⁰ Note that the other cases cited in the *Summum* opinion to explain “government speech” are either dicta or not majority opinions. *See Summum*, 129 S. Ct. at 1131, 1137.

compelled-speech claim brought by a small group of specialty beef producers who objected to paying a federal tax on their cattle because the fund was used to encourage beef consumption generically, which they believed contravened their business interests.⁸¹ The ad campaign at issue had been created by an entity which included a large contingent of private industry representatives, and bore the tag line, “[f]unded by America’s Beef Producers.”⁸² Justice Scalia, writing for the Court, held that the ads were “government speech,” primarily for two reasons: (i) the federal government had a policy to promote beef consumption, which was documented in a federal statute; and (ii) the Secretary of the Department of Agriculture “exercise[d] final approval authority over every word used in every promotional campaign.”⁸³

Both *Rust* and *Johanns*, then, involved a specific government policy (anti-abortion, pro-beef). The Court has characterized both cases as situations involving government-funded programs in which private speakers were enlisted to express the program’s government policy message. Both cases were heavily criticized, particularly because the government’s directorial role—hidden behind the seemingly private expression (by individual physicians, and in the television ads)—was invisible to the public, except to those few who happened to be familiar with the relevant federal statutes; thus, neither was consistent with the government speech doctrine’s “political accountability” rationale.⁸⁴ Before turning to the third case, *Garcetti*, which detours from the *Rust/Johanns* model, this Part next will compare the function and contours of what are referred to here as the “speech selection” cases.

B. Discretionary Selection & Private Speech

The speech selection cases are grounded in “judgmental necessity,”⁸⁵ and *not* upon the elected government’s desire to express its views with the assistance of private persons. The Court has determined that when a government is engaged in certain types of roles, which thus far has included arts patron (*Finley*),⁸⁶ public television broadcaster (*Forbes*),⁸⁷ and library (*American Library Association*),⁸⁸ it necessarily must consider content in selecting among private speech, and so its discretionary

⁸¹ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 564–68 (2005).

⁸² *Id.* at 577 (Souter, J., dissenting).

⁸³ *Id.* at 560–61 (majority opinion).

⁸⁴ See, e.g., Post, *supra* note 79, at 168 n.103 (1996) (collecting articles criticizing *Rust*); Seana Shiffrin, *Compelled Association, Morality, and Market Dynamics*, 41 LOY. L.A. L. REV. 317, 321 n.26 (2007) (collecting articles criticizing *Johanns*).

⁸⁵ See Redish & Kessler, *supra* note 78, at 572 (coining the term “judgmental necessity” in their analysis of what I call here the “speech selection” cases to convey situations where one “cannot entirely preclude the influence of normative value judgments in the actual selection of competing applicants”).

⁸⁶ *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

⁸⁷ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998).

⁸⁸ *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003).

selection does not violate the Free Speech Clause.⁸⁹ This leeway to exercise discretion without clear guidelines is in sharp contrast, of course, to the usual constitutional prohibition on unfettered selection of private speakers by government actors.⁹⁰ This approach also differs from the limited public forum doctrine, where content limitations deemed overly vague are struck down on the grounds that they could provide government decision-makers with a screen to hide unlawful viewpoint discrimination.⁹¹

In *Finley*, the Court upheld a statute which allowed the National Endowment for the Arts (NEA) to consider “decency” and respect for Americans’ “diverse beliefs and values” when making arts funding decisions.⁹² The essential rationale was the Court’s recognition that, unavoidably, making aesthetic judgments on artistic excellence “is inherently content-based.”⁹³ Similarly, *Forbes* is relied on for the Court’s recognition that “when a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.”⁹⁴ Exercising that discretion necessarily involves considering content, and rejecting some private speech in favor of others, and so should not trigger judicial oversight or sanction.⁹⁵ And lastly, *American Library Association* stated that the “principles underlying *Forbes* and *Finley* also apply to a public library’s exercise of judgment in selecting the material it provides to its patrons,” so that forum analysis is inapplicable in that context too.⁹⁶

⁸⁹ See Redish & Kessler, *supra* note 78, at 572 (generally approving of considering content where selection otherwise irrational, such as in awarding arts grants and similar types of “positive auxiliary subsidies,” but critiquing *Finley* based on the specific limits pre-established by Congress); see also Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 91–92 (1998) (calling for such “institutional specificity” as the best method for resolving these complex First Amendment puzzles).

⁹⁰ See, e.g., *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 763 (1988) (striking down open-ended municipal regulation of news boxes on city sidewalks, the Court noted that, regarding the “specter of content and viewpoint censorship,” the “danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official”).

⁹¹ See, e.g., *Nat’l Abortion Rts. Fed’n v. Metro. Atlanta Rapid Transit Auth.*, 112 F.Supp. 2d 1320, 1327 (N.D. Ga. 2000) (striking down transit ad policy excluding matters of public controversy, in part based on finding that terms such as “widely reported” and “reasonably appears” gave government officials too much discretion).

⁹² *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998).

⁹³ *Id.* at 586; see, e.g., Redish & Kessler, *supra* note 78, at 581 (arguing that *Finley* was decided wrongly because decency bears no relationship to artistic merit).

⁹⁴ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998) (the case itself involved a televised candidate debate that was analyzed as a limited public forum; the Court described the debate as a narrow exception to public broadcasters’ general discretion to make content-based programming selections among private speakers).

⁹⁵ *Id.*

⁹⁶ *United States v. Am. Library Ass’n*, 539 U.S. 194, 205 (plurality) (upholding the Child Internet Protection Act, which requires libraries receiving certain federal financial assistance to install Internet pornography filters, the Court stated, “[p]ublic library staffs necessarily consider content in making collection decisions”). Note that none of the Justices disagreed with

These two lines of cases frequently have been referred to generically as “government speech”;⁹⁷ some variation in terminology is understandable given their similar outcomes—freedom from the usual Free Speech Clause constraints—and relative novelty. There is, however, a clear line of demarcation between them. The *Rust/Johanns* model approves the expression of a governmental policy—a viewpoint—through private speakers. In contrast, the *Finley/Forbes* paradigm involves the governmental “speech activity” of choosing among private speakers and their messages; this content-based selection is permitted based on the realities of a government’s particular functional role. The “government speech doctrine” explicitly allows a government administration to express its particular viewpoint on a subject without the corresponding obligation to express contradictory views (postponing, for now, the important subject of independent constitutional limitations). In the “speech selection” cases, however, there is uncertainty regarding government’s ability to consider “viewpoint” in making “content” based selections. While it is now unclear whether there is truly a viable distinction between content and viewpoint, such categorizing may continue in some specific contexts, as well as depend upon the degree, clarity, and impact of government’s alleged consideration of viewpoint.

For example, while not definitive, in the Court’s most extensive analysis of this issue, the *Finley* opinion seemed to conclude that discretionary arts funding selection is constitutional unless it risks actual “suppression of disfavored viewpoints,” such that certain views are driven from the marketplace.⁹⁸ On the other hand, there certainly

the point that libraries have discretion in content selections for their collections. *Id.* at 214 (Kennedy, J., concurring); *id.* at 220 (Stevens, J., dissenting); *id.* at 231 (Souter, J., dissenting).

⁹⁷ For sources referring to both *Rust* and *Finley* as “government speech,” see, e.g., *Gentala v. City of Tucson*, 244 F.3d 1065 (9th Cir. 2001) (vacated and remanded in light of *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)) (relied on *Finley*, *Forbes*, and *Rust* as government speech cases); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001) (analyzing *Rust*, *Forbes*, and *Finley* as three of eight different categories of government speech); Leslie Gielow Jacobs, *Who’s Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35 (2002) (referring to both categories as government speech). Using the term “government speech” in this broader sense, while noting the differences in the two lines of cases, flows from the novelty of a specially-named “government speech” doctrine. See CHEMERINSKY TREATISE, *supra* note 54, at 979, 982–84 (placing *Johanns* in the compelled speech category, and *Rust* in the unconstitutional conditions category, without combining them into a “government speech” category); KATHLEEN M. SULLIVAN, *FIRST AMENDMENT LAW* 337, SUPP. at 12 (2d ed. 2003 & Supp. 2007) (same). My earlier articles thus referred to the two lines of cases as two different types of government speech with different doctrinal justifications. More recently, the trend has been to use the term “government speech” exclusively to refer to the *Rust/Johanns* line of cases. See, e.g., Andy G. Oree, *Identifying Government Speech*, 42 CONN. L. REV. 365 (2009).

⁹⁸ See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 586–87 (1998) (holding that the arts funding statute was constitutional unless and until it “is applied in a manner that raises concern about the suppression of disfavored viewpoints” and that if funding imposed a “disproportionate burden calculated to drive ‘certain ideas or viewpoint from the marketplace’” that would be a “more pressing” question).

would be First Amendment implications if a library were to exclude all books sympathetic to socialism, or critical of Christianity, or if a public television station refused to put on the air any speakers who questioned the Iraq War.⁹⁹ In contrast, under *Summum*, a city which displays an Iraq War memorial is now, quite explicitly, permitted to reject proposals for monuments depicting Saddam Hussein, or that war's civilian casualties.¹⁰⁰ While both lines of cases were argued to the Court in support of Pleasant Grove City, only the *Johanns* doctrine clearly establishes the constitutionality of government expressing its views on debatable issues through its selection and display of privately-donated monuments. That choice, however, more clearly leaves the government exposed to Establishment Clause challenges when the views expressed are religious.

C. Managerial Prerogative & Government Institutions

Returning briefly to *Garcetti v. Ceballos*,¹⁰¹ the recent public employment decision that has been described as the Court's third "government speech" case, provides a useful case study. It shows how the choice between the two lines of cases can be outcome-determinative, and the perspective on which paradigm was used can affect assessment of the precedent. There, Ceballos, a supervising deputy district attorney, had criticized a search warrant used in an ongoing criminal prosecution, asserting in meetings and two inter-office memos that it was based on police misconduct.¹⁰² Alleging that his supervisors then retaliated against him for these statements, including by failing to promote him, Ceballos claimed a violation of his free speech rights.¹⁰³

Justice Kennedy's opinion for the Court emphasized at length public employers' need to manage their employees effectively and efficiently.¹⁰⁴ Characterizing the prosecutor's memos as "duty-related," and with "no relevant analogue to speech by citizens who are not government employees," he declined to apply the traditional *Pickering* balancing test.¹⁰⁵ *Pickering* provides some measure of protection to a public employee's

⁹⁹ *Am. Library Ass'n*, 539 U.S. at 236 (2003) (Souter, J., dissenting) (recognizing library's discretion over collection decisions, but pointing out that no one would agree that meant a library could exclude all books criticizing Christianity) (citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 870–71 (1982) (plurality)); see also Schauer, *supra* note 89, at 114–16 (discussing library example).

¹⁰⁰ *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009).

¹⁰¹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹⁰² *Id.* at 413–14.

¹⁰³ *Id.* at 414–16.

¹⁰⁴ *Id.* at 416–21.

¹⁰⁵ *Id.* at 421, 424 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). Justice Kennedy distinguishes the lawyer's memo to his supervisor from the letter to the newspaper written by the *Pickering* plaintiff. *Id.* *Pickering* was a high school teacher, dismissed from his job after writing a letter to the editor criticizing the school district's handling of a bond issue and use of tax revenue. Thus, commentators have focused on the public policy problems of providing First Amendment protections only to those public employers who take their complaints about management to the public, rather than attempting to address them internally.

interest in commenting upon “matters of public concern,” balanced against the government employer’s interest in delivering efficient public services.¹⁰⁶ *Garcetti* holds that where the public employee’s speech relates to his job, organizational needs prevail.¹⁰⁷

Justice Souter’s dissent, in contrast, characterized the *Garcetti* decision as a misuse of the government speech doctrine, based on the majority’s brief reference to “employer control over what the employer itself has commissioned or created.”¹⁰⁸ Souter argued that this application of *Rust* was wrong because: “Unlike the doctors in *Rust*, Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden.”¹⁰⁹ The majority of legal commentators have interpreted *Garcetti* as a government speech case following *Rust* and criticized the decision.¹¹⁰ For example, Professor Helen Norton has written that *Garcetti* goes too far, and proposed instead that government may claim as its own—and thus control entirely exempt from First Amendment scrutiny—the job-related speech only of those public employees that it has specifically hired to deliver its views.¹¹¹

Conversely, Professor Larry Rosenthal has argued that *Garcetti* serves First Amendment values because allowing “managerial control over employee speech is

¹⁰⁶ *Id.* at 417, 423–24.

¹⁰⁷ *Id.* at 421–22.

¹⁰⁸ *Id.* at 422. Justice Kennedy followed that statement with this citation: “Cf. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”).” *Id.* This is the line in *Rosenberger* where the Court described its holding in *Rust*, and thus first crystallized this concept, giving rise to what is now referred to as the government speech doctrine.

Whether Justice Kennedy intended to say that *Rust* applies to *Garcetti*, as described by Justice Souter, see *id.* at 437, is less than clear. See Ira P. Robbins, *Semiotics, Analogical Legal Reasoning, and the Cf. Citation: Getting Our Signals Crossed*, 48 DUKE L.J. 1043, 1056 (1999) (examining use of the *cf.* signal and arguing that its careless use by judges leads to confusing and incoherent developments in the law, and stating that “[w]hen courts use the *cf.* signal, legal discourse oft[en] goes up in smoke”). The signal “*cf.*” is used when the “cited authority supports a proposition *different from* the main proposition but *sufficiently analogous* to lend support.” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 47 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005) (emphasis added).

¹⁰⁹ *Id.* at 437 (Souter, J., dissenting). He added, while “[s]ome public employees are hired to ‘promote a particular policy’ by broadcasting a particular message set by the government, . . . not everyone working for the government, after all, is hired to speak from a government manifesto.” *Id.*

¹¹⁰ See, e.g., Helen Norton, *Constraining Public Employee Speech: Government’s Control of its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 30 (2009).

¹¹¹ *Id.* at 30. *Garcetti* “reflect[s] a distorted understanding of government speech that overstates government’s communicative claims to its employees’ on-duty speech while undermining the public interest in transparent governmental speech.” *Id.* at 20. Under Professor Norton’s proposed rule, other employees would continue to be governed by the *Pickering* balancing test. *Id.* at 33–34.

essential if [government] management is to be held politically accountable for the performance of public institutions.”¹¹² Rather than interpret this decision as a government speech case in the manner of *Rust* and *Johanns*, he described *Garcetti*’s conception of “managerial control over employee speech” as growing out of what this Article has termed the “speech selection” cases, *Forbes*, *Finley*, and *American Library Association*.¹¹³ In those cases, the Court has recognized that “some institutions must be granted a prerogative to evaluate and control the content of what would otherwise be constitutionally protected speech if they are to achieve otherwise constitutionally legitimate objectives.”¹¹⁴ In line with earlier work by Dean Robert Post and Professor Frederick Schauer, Rosenthal proposed that the standard for these types of cases should be “an assessment of the extent to which a challenged regulation distorts or advances legitimate institutional objectives.”¹¹⁵

Thus, viewed through the lens of *Johanns/Rust*, *Garcetti* is flawed because it did not involve an employee specifically hired for the purpose of delivering a government policy message.¹¹⁶ In contrast, if seen as related to *Finley*, *Forbes* and especially *American Library Association*, *Garcetti* is a sensible application of the doctrine allowing governmental discretion to control speech content where necessary to carry out a specific institutional function, here, that of public employer.¹¹⁷

D. Summarizing the Court’s Choice of “Government Speech” Paradigms Highlights the Establishment Clause Dilemma

In sum, while the terminology and categories are somewhat blurry and interwoven, this examination of the Court’s prior precedent highlights *Sumnum*’s transformative

¹¹² Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 38 (2008) (rejecting the scholarly consensus on *Garcetti*).

¹¹³ *Id.*

¹¹⁴ *Id.* at 52.

¹¹⁵ *Id.* at 93; see Post, *supra* note 79, at 167 (concluding that cases should be distinguished based on whether they involve the domain of “public discourse” or the “managerial domain.” Post suggested that in the latter, the proper inquiry is whether the “restraints on speech . . . are instrumentally necessary to the attainment of legitimate managerial purposes, and those that are not”); Schauer, *supra* note 89, at 119–20 (concluding that only institution-specific standards can decide questions raised by “government enterprise free speech cases”); see also *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1141 (2009) (Breyer, J., concurring) (proposing that the government’s monument-selection criteria be measured by their reasonable relationship to the various functions of a public park).

¹¹⁶ And thus, all three cases similarly are flawed by their lack of transparency. See *supra* note 84.

¹¹⁷ This brief sketch of two well-developed, sharply-contrasting, scholarly articles on *Garcetti* serves here only to illustrate how the choice between these two legal frameworks can drive decisions. It is beyond the scope of this Article to weigh in on the proper scope of public employee speech rights as a matter of policy, or to opine on *Garcetti*’s impact on, or fit with, prior case law on public employment and free speech.

doctrinal impact. “Government speech” under *Rust* and *Johanns* commonly meant that the government had a specific policy message, and used a private speaker to assist in delivering it. In other contexts, where government has a role that requires selecting among private speakers to accomplish its particular function, it has been allowed some editorial discretion; under that paradigm, government is not seen as using those private speakers to deliver its own policy message.¹¹⁸ And when government is acting as manager of an institution, persons speaking within that institution, and who play an integral role in its function, may not enjoy the same free speech rights as they do when acting as citizens in the domain of “public discourse.”¹¹⁹ This tripartite summary is similar to Professor Alan Brownstein’s recent schema of the school speech cases, a doctrinal sub-category which involves an ongoing struggle with defining public roles and private speech rights.¹²⁰

¹¹⁸ See *supra* Part I.B.

¹¹⁹ See Post, *supra* note 79, at 169.

¹²⁰ Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717 (2009) (proposing a new First Amendment category, the “nonforum,” as a more doctrinally satisfactory method of permitting schools to perform their necessarily discretionary government function). Summarizing existing school speech doctrine, Brownstein stated that only teacher speech which conveys the content of courses to students can be analogized to “government speech” under *Rust*. *Id.* at 735–36. When student speech cannot reasonably be interpreted to express the government’s message, then the teacher’s choices regarding student speech are better deemed “government-selected speech,” which should be free from judicial “forum” scrutiny, by analogy to *Forbes*’s editorial discretion. *Id.* at 736–37. Finally, Brownstein views *Garcetti* as providing a third rationale: just as public employers need control over the workplace, First Amendment scrutiny of day-to-day decisions at school would interfere with teachers’ need to control student speech to further school’s educational mission. *Id.* at 739–40; see also Steven K. Green, *All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools*, 42 U.C. DAVIS L. REV. 843, 885 (2009) (noting that the Court’s school cases, *Morse v. Frederick*, 551 U.S. 393 (2007), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), have been characterized as allowing school administrations to control student speech based on “government speech,” but that they are more accurately viewed as involving “school-sponsored activity rather than surrogate government speech. . . . The category of ‘school-sponsored’ expression . . . suggests that it is not purely government speech, but rather speech that incorporates the expression of others, including their ideas and emotions.”); Rosenthal, *supra* note 112, at 96 (asserting that *Morse* “fits comfortably within the doctrinal parameters for a managerial prerogative . . . [because] the mission of the public schools is to teach; [schools] can therefore hardly be indifferent to advocacy that undermines their pedagogical objectives.”).

Courts deciding speech claims brought against school districts have started citing the *Johanns* and *Sumnum* government speech precedent, as well as the school cases. See *Griswold v. Driscoll*, 624 F. Supp. 2d 49 (D. Mass. 2009), *aff’d*, 2010 WL 3169372 (1st Cir. 2010) (relying in part on *Sumnum*, politically-charged change to state school board’s website, which outlined approved curriculum, deemed a curricular decision, and thus government speech outside the scope of Free Speech Clause challenge).

This discourse on the state of “government speech” precedent leading up to the *Sumnum* case serves two distinct purposes. It provides the necessary background to show how that doctrine has been expanded. But perhaps more critically, this sense of the case law provides a context for analyzing the doctrinal dilemma that is the primary focus of this Article: the interaction of government speech under the Free Speech Clause and the Establishment Clause.

The arguments presented to the Court reflect an intricate dance around these two pillars and the case’s religious speech subtext. *Sumnum*’s counsel gave lip service to retaining the Tenth Circuit’s public forum/strict scrutiny holding,¹²¹ but affirming that position never seemed a real possibility. Instead, *Sumnum* focused on asking the Court to require the City to officially “adopt”—as its own—the message conveyed by each of its donated monuments on display.¹²² The idea, of course, was to box the City in to a more precarious Establishment Clause position by forcing it to claim full ownership of the religious inscription on the face of its Ten Commandments monument.

The City’s response helped to frame the doctrinal choices before the Court. At many points in its briefs and at oral argument, Pleasant Grove’s counsel asked the Court to find “government speech” based on *Finley*, *Forbes*, and *American Library Association*, and to agree that a city acts as an editor or curator when it selects monuments, so that it does not necessarily agree with any message inscribed on a displayed monument.¹²³ The City also noted that the message it intended to convey through the Ten Commandments display was not the religious creed written on the monument, but a locally-significant, historical message relating to the Mormon people’s own exodus story.¹²⁴

The final introductory frame for the *Sumnum* decision is a perspective on the Court’s complex, embattled Establishment Clause precedent. Both the parties’ arguments, and the various Justice’s rationales, can be fully understood only with this background, which is overviewed briefly next in Part III.

¹²¹ *Sumnum* Respondent Brief, *supra* note 49, at 18; *Sumnum* Transcript, *supra* note 13, at 44–46.

¹²² *Sumnum* Respondent Brief, *supra* note 49, at 32; *Sumnum* Transcript, *supra* note 13, at 52–53.

¹²³ Reply Brief of Petitioners at 12–13, *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125 (2009) (No. 07-665) [hereinafter *Sumnum* Reply Brief] (“[G]overnment speech includes selecting and presenting messages that the government does not necessarily itself adopt, as with books in a library . . . speakers with contrary views in a lecture series, and so forth.”); *Sumnum* Transcript, *supra* note 13, at 12, 65, *passim*; *accord* NYC Brief, *supra* note 3, at 12–15 (emphasizing that NYC acts as a “curator” when selecting monuments for its public parks).

¹²⁴ *Sumnum* Reply Brief, *supra* note 123, at 11 (asserting that, while the Eagles contributed the Ten Commandments monument as a moral code for youth, Pleasant Grove City installed it in Pioneer Park “to remind citizens of their pioneer heritage in the founding of the state” (quoting the Mayor at the monument’s unveiling ceremony)). Reminiscent of Moses and the Jewish people, Brigham Young led the Mormons, members of a new religion based on stone tablets given from God, away from persecution in Illinois, and into the desolate new land that became the State of Utah. See U.S. NATIONAL PARK SERVICE, THE MORMON PIONEER NATIONAL HISTORIC TRAIL, <http://www.nps.gov/mopi/> (last visited Oct. 27, 2010).

III. ESTABLISHMENT CLAUSE BACKDROP TO THE COURT'S INTRICATE DANCE IN *SUMMUM*

A. Overview of the Issue

In one sense, a large proportion of all Establishment Clause jurisprudence could be thought of as involving claims about government religious speech, with the other broad category relating to government aid. Part III begins to explore what “government speech” has meant in Establishment Clause cases, and how it relates to the “core government speech doctrine” which is evolving as a defense in Free Speech Clause cases. Until very recently,¹²⁵ references to government speech in Establishment Clause cases have never stood for its antithesis: a government’s ability to declare its own religious viewpoint.

Understanding the *Summum* opinions requires an introduction to the Court’s precedent on religiously-themed displays, most of which involved mixed public/private roles. These cases primarily have used two approaches: the endorsement test, which starts from an assumption of government neutrality toward religion, and a historical, tradition-based view.¹²⁶ Before turning to specifics, sketching some basic principles may help show how *Summum* relates to *Van Orden*.

Establishment Clause claims in religious display cases generally require two conditions: a given display conveys a religious message, and the government (usually along with a private party) has some role.¹²⁷ Correspondingly, a government defendant can win by either of two means. A government may be involved in an arguably religious display, and yet defeat the Establishment Clause claim, because a court decides that the content of the message communicated by that display is primarily secular.¹²⁸ Alternatively, a government may avoid Establishment Clause liability, despite having some role in an arguably religious display, if a court decides that government is neither the “speaker” of the display’s message, nor associated with the display under circumstances in which it appears to be endorsing the display’s religious message.¹²⁹ The content and the speaker/endorser routes to Establishment Clause compliance are disjunctive, so that when a court determines one is met, it does not necessarily make a decision or provide a clear holding on the other.

As further background, another range of Establishment Clause cases have involved more clearly intentional government expression of religious messages. The categories

¹²⁵ See, e.g., *Turner v. City Council*, 534 F.3d 352 (4th Cir. 2008) (applying four-part government speech test to uphold city’s nonsectarian prayer policy against claim that it violated speaker’s right to name Jesus).

¹²⁶ See *infra* Part III.B.

¹²⁷ See *infra* Part III.B.

¹²⁸ E.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984).

¹²⁹ E.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

include: (1) school prayer¹³⁰ and school curriculum,¹³¹ (2) benedictions and invocations, including at schools¹³² and legislative bodies,¹³³ and (3) symbols such as the national motto, “In God We Trust,”¹³⁴ and the inclusion of “under God” in the Pledge of Allegiance.¹³⁵

To summarize broadly, as the law currently stands, where a message communicated by the government is deemed primarily religious, generally the Establishment Clause is violated.¹³⁶ In a second category, religious phrases that could be characterized as constitutive of a government’s identity, several Justices’ opinions have suggested allowing them under the guise of “ceremonial deism.”¹³⁷ Frequently justified by claims that the brief, solemnizing words have minimal religious content and function as rote civic exercises, this rationale can be viewed as functionally equivalent to finding a secular message.¹³⁸

¹³⁰ See *Engel v. Vitale*, 370 U.S. 421 (1962) (holding daily prayer at public schools unconstitutional).

¹³¹ See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding required teaching of creation science at public school unconstitutional).

¹³² See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (invocations before high school football game violated endorsement test); *Lee v. Weisman*, 505 U.S. 577 (1992) (invocation before middle school graduation violated coercion test).

¹³³ See *Marsh v. Chambers*, 463 U.S. 783 (1983) (upheld state legislative chaplain based on history and tradition).

¹³⁴ See *Van Orden v. Perry*, 545 U.S. 677, 716 (2005) (assuming constitutionality of “In God We Trust”).

¹³⁵ See *Elk Grove Sch. Dist. v. Newdow*, 52 U.S. 1, 38 (O’Connor, J., concurring in dismissal on standing grounds of challenge to words “under God” in Pledge of Allegiance).

¹³⁶ See *infra* notes 145–47. Much of the precedent clearly supporting this broad general principle, however, is skewed by its source in the school context, where the Court is generally more careful due to the susceptibility of young students. See *Lee*, 505 U.S. at 592 (“As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”). *But see also infra* Part III.B (discussing the religious display cases).

¹³⁷ See, e.g., *Newdow*, 52 U.S. at 37–42 (O’Connor, J., concurring) (“ceremonial deism” features include long use, nonsectarian, minimal religious content, especially no prayer or worship); *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (dismissing such phrases from Establishment Clause scrutiny as a form of “‘ceremonial deism’ . . . chiefly because they have lost through rote repetition any significant religious content”). For two recent comprehensive analyses of ceremonial deism, see Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545 (2010) [hereinafter Corbin, *Ceremonial Deism*]; B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE L.J. 705 (2010) [hereinafter Hill, *Of Christmas Trees and Corpus Christi*]. See also Stephen B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996).

¹³⁸ See *supra* note 137 and accompanying text; see also *Newdow*, 542 U.S. at 35 (O’Connor, J., concurring) (“I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes.”). School children’s daily recitation of the words “under God,” added to the Pledge of

A competing theme of historical practice and original intent, however, is found in some plurality and dissenting opinions, discussed below in Part III.B, and in the anomalous case of legislative prayer. In *Marsh v. Chambers*, the Court upheld state funding of a Christian legislative chaplain, who regularly offered prayers before legislative sessions, based on the Framers' practice at the time of enacting the Bill of Rights.¹³⁹

Thus far, legislative prayer is an Establishment Clause exception: it is the only context in which the Court has permitted prayer as a regularly-occurring government practice. Now it has become the lower court testing grounds for use of the "government speech" defense at the intersection of the Establishment Clause and the Free Speech Clause.¹⁴⁰ Recent scholarship has detailed the jarring results, which seem to be directly at odds with core principles of neutrality and religious liberty.¹⁴¹ While the ongoing, interactive nature of legislative prayer does multiply and exacerbate the conflicts, the current spate of litigation sheds some light on the difficulties ahead if, after *Summum*, religious monuments are both protected by the "government speech doctrine" from sharing the stage with competing viewpoints, but still are held compliant with the Establishment Clause.

B. Analysis of Context and Signs in the Court's Religious Display Cases

This analysis of the Court's religious display cases focuses on the three variables which are most relevant to the endorsement inquiry and significant to appreciating

Allegiance in 1954, seems a poor fit with more infrequent and passive forms of "ceremonial deism," but the opinion explains the concept well. *Id.* at 35–39.

¹³⁹ *Marsh v. Chambers*, 463 U.S. at 789, 792 (upholding Nebraska legislature's paid chaplain against an Establishment Clause challenge "[i]n light of the unambiguous and unbroken history of more than 200 years," and emphasizing that Congress reached final agreement on the language of the Bill of Rights on September 25, 1789, three days after authorizing the appointment of paid legislative chaplains).

¹⁴⁰ For a particularly troublesome recent case, see *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005), *cert. denied*, 546 U.S. 937 (2005) (rejecting excluded Wiccan's free speech and free exercise claims regarding monotheist legislative prayer policy on grounds that legislative prayer is government speech, so that government is free to enlist private speakers to convey its preferred prayer content).

¹⁴¹ See, e.g., Christopher Lund, *Legislative Prayer and the Secret Costs of Religious Endorsement*, 94 MINN. L. REV. 972 (2010) (including a comprehensive collection of cases and news articles regarding recent conflicts); see also Bernadette Meyler, *Summum and the Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 95, 101 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/32/LRColl2009n32Meyler.pdf> (using a legislative prayer decision, *Snyder v. Murray City Corp.*, 73 P.3d 325 (Utah 2003), to illustrate the fundamental contradictions between the "tradition" standard, the Establishment Clause neutrality principle, and the emerging government speech doctrine); Robert Luther III & David B. Caddell, *Breaking Away From the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands a "Practice-Focused" Analysis*, 48 SANTA CLARA L. REV. 569 (2008); Robert J. Delahunty, *"Varied Carols": Legislative Prayer in a Pluralistic Polity*, 40 CREIGHTON L. REV. 517 (2007).

Summum: (1) government ownership—of both land/building and challenged religious symbol; (2) labeling signs—including both signs explaining the display’s purpose, and those that indicate the private party’s role; and (3) the general context—both physical and conceptual. It shows that the overall context trumps all; that who owned what has not been a critical factor in the analysis; and that if government favoritism toward (or viewpoint about) religion is conveyed clearly enough by the context, then even prior to *Summum*, a donor plaque alone lacked mitigating value.

Starting with the endorsement test, it was first proposed by Justice O’Connor in her concurrence in *Lynch v. Donnelly*,¹⁴² a holiday display case, and then adopted by the majority opinion in a similar case, *County of Allegheny v. ACLU*.¹⁴³ Stated generally, the test inquires whether a reasonable observer, viewing the display in its context, would understand the challenged display of a religious symbol as sending a message of government endorsement of religion.¹⁴⁴ The endorsement test “asks the right question,” Justice O’Connor reasoned, because “[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”¹⁴⁵ According to her familiar explanation: “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”¹⁴⁶ Originally, she described it as a clarification of the then-predominant *Lemon* test, which requires that governments’ actions have a secular purpose and not have a primary effect that advances or inhibits religion.¹⁴⁷

In the two seasonal displays that satisfied the endorsement test, their overall physical appearance was deemed to emphasize the festive, secular component of the holidays. First, in *Lynch v. Donnelly*, while the plurality upheld the City of Pawtucket’s display of a crèche on historical grounds,¹⁴⁸ Justice O’Connor wrote separately to emphasize that the City had not endorsed Christianity by including the crèche in its regular holiday display, where it also had included a Santa Claus house, reindeer pulling Santa’s sleigh,¹⁴⁹ a Christmas tree, carolers, large toys, and a large banner stating “Seasons Greetings.”¹⁵⁰ And a few years later, in *Allegheny*, the Court

¹⁴² 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

¹⁴³ 492 U.S. 573 (1989).

¹⁴⁴ *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 688.

¹⁴⁷ *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1979)). Note that *Lemon*’s third prong, which prohibited excessive government entanglement with religion, was subsumed into the “primary effect” inquiry in *Agostini v. Felton*, 521 U.S. 203 (1997).

¹⁴⁸ *Lynch*, 465 U.S. at 677–78 (plurality opinion) (finding that the crèche “depicts the historical origins of this traditional event long recognized as a National Holiday,” and the country’s history is “replete with official references to the value and invocation of Divine guidance”).

¹⁴⁹ *Id.* at 693 (O’Connor, J., concurring).

¹⁵⁰ *Id.* at 670 (plurality opinion).

held that the City of Pittsburgh's display of an 18-foot Hanukkah menorah outside the city-county building did not endorse the Jewish religion, where it was placed next to a 45-foot Christmas tree and a sign bearing the mayor's name and the words, "Salute to Liberty."¹⁵¹

In both of these holdings, the focus was on the content of the message conveyed by the crèche and the menorah, given the overall setting, especially the surrounding objects.¹⁵² Significantly, there was no constitutional meaning attributed to the fact that the two displays involved two contrasting ownership scenarios. Once the content was deemed secular, the Court did not separate out the speakers' identities. In *Lynch*, the city owned all the display items, including the crèche, while the display itself was located on a private park near the shopping district.¹⁵³ Justice O'Connor found that this commercial location further supported finding a secular message, but did not suggest that the display's message could then be attributed to the private land owner.¹⁵⁴ In *Allegheny*, that the menorah was owned by Chabad, a Jewish organization, although stored and erected by the city on a plaza outside of city hall, was not a part of the Court's analysis.

In the second situation, where the message conveyed by a display is deemed religious, closer scrutiny is given to the identity of the speaker. In the other challenged display in *Allegheny*, the County had displayed a crèche, unaccompanied by any distracting secular objects, on the prominent Grand Staircase of the county building.¹⁵⁵ Justice Blackmun, writing for the Court, held that any viewer would understand that by showing such special favor towards one religion's symbol, the County was promoting the crèche's religious message, including the words of its inscription, "Glory to God in the Highest."¹⁵⁶ Given this unique treatment, the outcome was not altered by the private speaker's role or by the sign stating: "This Display is Donated by the Holy Name Society."¹⁵⁷

In a third situation, where the Court determines that a private speaker's challenged religious display would not be attributed to the government, then it does not need to resolve any arguments regarding the primary content of the message. In *Capitol Square Review and Advisory Board v. Pinette*,¹⁵⁸ the Court held that the State of Ohio had violated the Ku Klux Klan's free speech rights by rejecting the Klan's request to display a large Latin cross on the statehouse plaza during the December holiday

¹⁵¹ *County of Allegheny v. ACLU*, 492 U.S. 573, 582 (1989).

¹⁵² *Id.*; *Lynch*, 465 U.S. at 677-78.

¹⁵³ *Lynch*, 465 U.S. at 671.

¹⁵⁴ *Id.* at 693 (O'Connor, J., concurring).

¹⁵⁵ *Allegheny*, 492 U.S. at 598.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 580. "On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the religious content of the government's own communications." *Id.* at 600.

¹⁵⁸ 515 U.S. 753 (1995).

season. The State had claimed that permitting such a display would violate the Establishment Clause. The plurality categorically stated that private religious speech in a public forum can never violate the Establishment Clause, regardless of public perception.¹⁵⁹ At least in that case, though, five Justices continued to support the endorsement test, with some differences in approach.¹⁶⁰

In *Pinette*, Justice O'Connor refined her description of the "reasonable observer," as one who "must be deemed aware of the history and context of the community and forum in which the religious display appears."¹⁶¹ There, the reasonably informed observer would know that Capitol Square had been used over time by numerous private speakers of various types.¹⁶² And, most significantly here, the concurring Justices stressed the importance of affixing to the cross an adequate disclaimer sign, "sufficiently large and clear," to prevent any inference that the government endorsed the Klan's cross.¹⁶³ As Justice O'Connor described it, the Establishment Clause "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."¹⁶⁴ Given this conclusion of "no government endorsement," the Court did not resolve Justice Thomas's argument that the Establishment Clause was not even implicated because the content of the Klan's cross's allegedly religious message instead had a primarily political message of white supremacy.¹⁶⁵

Most significant to any analysis of *Summum's* government speech holding, is the factually-similar *Van Orden v. Perry*.¹⁶⁶ The 5-4 decision upheld the Texas display of an Eagles-donated Ten Commandments monument, which was located between the State Capitol and Supreme Court building, on the 22-acre Capitol grounds which

¹⁵⁹ *Id.* at 770 (Rehnquist, C.J., Scalia, Thomas, & Kennedy, JJ.).

¹⁶⁰ *Id.* at 772 (O'Connor, Souter & Breyer, JJ.); *id.* at 799 (Stevens, J.); *id.* at 817-18 (Ginsberg, J.).

¹⁶¹ *Id.* at 779-80 (O'Connor, J., concurring) (proposing a "hypothetical observer" that is not based on the "the actual perception of individual observers," but instead "is similar to the 'reasonable person' in tort law"); *see also id.* at 801-02 (Stevens, J., concurring) (arguing that the "reasonable observer" will assume that the government has endorsed the message of any unattended display located in front of its capitol).

¹⁶² *Id.* at 781-82 (O'Connor, J., concurring).

¹⁶³ *Id.* at 785 (Souter, J., concurring) (basing his concurrence "in large part" on the condition that "the Klan attach a disclaimer sufficiently large and clear to preclude any reasonable inference" that the government was endorsing Christianity); *id.* at 782 (O'Connor, J., concurring) (assuming an adequate disclaimer, found that a reasonable observer would conclude that Klan cross in public forum was private speech). *Contra id.* at 818 (Ginsburg, J., dissenting) (based in part on the inadequacy of the disclaimer sign used: it "was unsturdy; it did not identify the Klan as sponsor; it failed to state unequivocally that Ohio did not endorse the display's message; and it was not shown to be legible from a distance").

¹⁶⁴ *Id.* at 777 (O'Connor, J., concurring) (emphasis added).

¹⁶⁵ *Id.*

¹⁶⁶ 545 U.S. 677 (2005).

contained seventeen monuments and twenty-one historical markers.¹⁶⁷ The 6-foot high, 3.5-foot wide monolith displayed the Decalogue, with the first line in larger lettering (“I AM the LORD thy GOD”) and bearing a simple donor plaque, which states only: “Presented to the People and Youth of Texas by the Fraternal Order of Eagles of Texas 1961.”¹⁶⁸

The plurality opinion, written by then-Chief Justice Rehnquist, and joined by Justices Kennedy, Scalia, and Thomas, relied on the long history of “[r]ecognition of the role of God in our Nation’s heritage” and “acknowledgements of the role played by the Ten Commandments in our Nation’s heritage.”¹⁶⁹ The plurality concluded that the display did not violate the Establishment Clause after stating the following: “Texas has treated its Capitol grounds monuments as representing the several strands in the State’s political and legal history. The inclusion of the Ten Commandments in this group has a dual significance, partaking of both religion and government.”¹⁷⁰

The four dissenters, Justices Souter, O’Connor, Stevens, and Ginsburg (only two of whom remain on the Court) found the display unconstitutional because it declares God’s commands to all who walk on the sidewalk to the Texas Supreme Court, with no mediating explanation other than the donor plaque, and accompanied only by other statues which are spread over a large grounds, and unreadable when facing the Ten Commandments.¹⁷¹ Because the display lacks any attempt to provide an historical context or to explain its connection to the development of rules of law, they concluded, it conveys only the unconstitutional message of government endorsement of the particular religious creed it expounds.¹⁷²

Justice Breyer’s controlling concurrence also applied a version of the endorsement test, seasoned by his “legal judgment.”¹⁷³ To find endorsement, he used two main

¹⁶⁷ *Id.* at 681.

¹⁶⁸ *Id.* at 681–82; *id.* at 707 (Stevens, J., dissenting).

¹⁶⁹ *Id.* at 687–88.

¹⁷⁰ *Id.* at 691–92. This opinion also distinguished an earlier case finding a classroom display of the Ten Commandments unconstitutional, *Stone v. Graham*, 449 U.S. 39 (1980), on the grounds that it was justified by the special vigilance the Court has shown in the elementary and secondary schools. *Id.* at 690–91.

It should be noted that the background facts quote the authorizing legislation, which refers to Texan identity, but that language was not discussed by the plurality. *See id.* at 681 (quoting Tex. H. Con. Res. 38, 77th Leg. 2001) (monuments are to commemorate the “people, ideals and events that compose Texan identity”).

¹⁷¹ *Van Orden*, 545 U.S. at 737 (O’Connor, J., dissenting); *id.* at 737 (Souter, J., dissenting, joined by Justices Stevens and Ginsburg); *id.* at 717 (Stevens, J., dissenting, joined by Justice Ginsburg).

The Texas Ten Commandments, which visually emphasizes the religious commands, is located facing the sidewalk between the Capitol and the Texas Supreme Court, only 123 feet from the Court, and the closest other monuments are blocked from view by hedges. Erwin Chemerinsky, *Why Justice Breyer Was Wrong*, 14 WM. & MARY BILL RTS. J. 1, 9–10 (2005).

¹⁷² *Van Orden*, 545 U.S. at 737.

¹⁷³ *Id.* at 698 (Breyer, J., concurring).

factors to conclude that this Ten Commandments display conveys a predominantly secular message.¹⁷⁴ One was the physical setting, including the other monuments and markers, which he concluded illustrated Texas history and moral ideals.¹⁷⁵

The essential point here, though, is that Justice Breyer relied on the donor plaque to shift some responsibility away from the State. “The tablets, as displayed on the monument, prominently acknowledge that the Eagles donated the display, a factor which, though not sufficient, *thereby further distances the State itself from the religious aspects* of the Commandments’ message.”¹⁷⁶ Because the Eagles “sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency,” he reasoned, the park’s other monuments “together with the display’s inscription about its origin” communicates that the State intended the moral message to predominate.¹⁷⁷ Federal courts have relied on this portion of Breyer’s opinion in upholding some public Ten Commandments monuments.¹⁷⁸

The determinative fact for Justice Breyer on this “borderline” case was his concern over “religiously-based divisiveness.”¹⁷⁹ He balanced the statue’s forty years without legal challenge against the risk of numerous disputes if the Court’s decision led to “removal of longstanding depictions of the Ten Commandments from public buildings

¹⁷⁴ *Id.* at 701–02.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (emphasis added).

¹⁷⁷ *Id.*

¹⁷⁸ See *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008) (Eagles Ten Commandments monument on land near former city hall, and near other monuments, did not violate Establishment Clause). There, the Ninth Circuit noted that the monument “bears a prominent inscription showing that it was donated to the City by a private organization,” and concluded from that fact: “As in *Van Orden*, this serves to send a message to viewers that, while the monument sits on public land, it did not sprout from the minds of City officials and was not funded from City coffers.” *Id.* at 1020. The court relied here on Justice Breyer’s statement in *Van Orden* that “[t]he presence of the graven dedication from the Eagles on the face of the monument ‘further distances the State itself from the religious aspect of the Commandments’ message.” *Id.* at 1019 (quoting *Van Orden*, 545 U.S. at 701–02 (Breyer, J., concurring)); *Twombly v. City of Fargo*, 388 F.Supp.2d 983 (D. N.D. 2005) (Ten Commandments monument on city-owned land facing city hall and other public buildings did not violate Establishment Clause, despite absence of other surrounding monuments). In *Twombly*, the court stated:

Justice Breyer suggested that this inscription served to distance the State from the religious aspects of the monument’s message. . . . The fact that an inscription exists evincing private sponsorship serves to weigh against the probability that the religious message will be attributed to the state. . . . Justice Breyer’s note of the Texas display’s acknowledgment of its private origin presumably makes it more likely that the speech will not be attributed to the government and therefore cannot convey a message that the state deems a non-adherent a political or social outsider.

Id. at 990.

¹⁷⁹ *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

across the Nation.”¹⁸⁰ His opinion, therefore, may not extend to new monuments, especially where it is their initial installation which causes division and litigation.¹⁸¹

To complete the picture, Part III of this Article closes with the other 2005 Ten Commandments case, *McCreary County v. ACLU*,¹⁸² where Justice Souter’s opinion for the Court held that the Ten Commandments displays inside several Kentucky courthouses violated the Establishment Clause because of the governments’ religious purpose.¹⁸³ According to the 5-4 majority, this improper purpose was demonstrated by the current display’s immediate history: the officials had started out with a campaign to post the Ten Commandments, standing alone, in all county courtrooms, and had added the “remarkably transparent fig leaf” of surrounding documents only in response to Establishment Clause litigation.¹⁸⁴

One part of Justice Scalia’s dissent, joined by Justices Kennedy, Thomas and then-Chief Justice Rehnquist, repudiated the very process of analyzing governmental motivation.¹⁸⁵ The dissent found a secular purpose based on considering only the third and final version, where the Ten Commandments was accompanied by other documents, including the Magna Carta, the Declaration of Independence, and the Bill of Rights, and also displayed a written explanation stating: “The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.”¹⁸⁶ Many have pointed out the weakness in claiming a sectarian religious code, which proscribes allegiance to one conception of God, as the basis for a constitutional system that protects individual religious liberty.¹⁸⁷

¹⁸⁰ *Id.*

¹⁸¹ See *Green v. Haskell County Bd. of Commr’s*, 568 F.3d 784 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010) (new Ten Commandments monument erected on courthouse lawn, initiated for religious reasons, legally challenged within the year, and supported by public religious rallies, violated the Establishment Clause) (discussed *supra* Part V). But see *Green v. Haskell Cty. Bd. of Commr’s*, 574 F.3d 1235 (10th Cir. 2009) (Kelly, J., dissenting from denial of petition for *reh’g en banc*) (rejecting idea that result should turn on whether the government Ten Commandments display was erected recently and challenged promptly, or erected decades ago, in an era where such displays were not typically challenged as Establishment Clause violations).

¹⁸² 545 U.S. 844 (2005).

¹⁸³ *Id.* at 881.

¹⁸⁴ *Id.* at 904–07; see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 141, 143 (2007) (discussed *infra* Part V) (using “fig leaf” metaphor to convey the difference between the Kentucky displays, where “everything besides the Ten Commandments was an afterthought, and the linkage among them was obscure,” and the Supreme Court frieze, which depicts Moses and the tablets in an “immediately recognizable . . . coherent composition, ‘great lawgivers,’” and de-emphasizes the religious aspects).

¹⁸⁵ *McCreary*, 545 U.S. at 912 (Scalia, J., dissenting).

¹⁸⁶ *Id.* at 856 (majority opinion).

¹⁸⁷ See, e.g., EISGRUBER & SAGER, *supra* note 184, at 141 (noting that our Constitution is different because it does not require worshiping God, and that our laws do not prohibit purely

In the more dramatic section of the *McCreary* dissent, Justice Scalia, accompanied by only one current member of the Court, Justice Thomas, argued that the Constitution allows, and even contemplates, governmental preference for religion over irreligion.¹⁸⁸ Justice Scalia went further, and asserted the constitutionality of government expressing a preference for monotheism; indeed, he made the polemical claim that 97.7% of the believers in the United States are Christian, Jewish, or Islamic, and “believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life.”¹⁸⁹ Thus, he argued, for the government to honor the Ten Commandments is the constitutional equivalent of honoring God, and so does not violate the Establishment Clause.¹⁹⁰

Returning to the present decision, in analyzing the Free Speech claim presented in *Pleasant Grove City v. Summum*, it seems apparent that the Justices kept in mind how their decision in *Summum* would affect the Court’s prior precedent on religious symbols—and their own preferred vision of the Establishment Clause’s essential meaning.

To summarize, at the time the Justices worked through the interlocking doctrines implicated by the facts in *Summum*, the Establishment Clause backdrop included the following competing approaches: (1) the fact-intensive endorsement test championed by the departed Justice O’Connor; (2) Justice Breyer’s “legal judgment” test, which adds to endorsement-style analysis a political concern for increasing religious divisiveness; (3) the *Lemon* test and its “secular purpose” prong (at least given clear evidence of government officials’ intent to promote religion); (4) the “basic” historical approach, which relies on sometimes sweeping generalizations to support some public religion; and (5) Justice Scalia’s sectarian monotheist historical approach, which abandons any pretense of neutrality. When *Summum* was decided, Justice Breyer’s approach controlled. The open question is whether the Roberts’s Court will shift the Establishment

spiritual sins, such as coveting); Chemerinsky, *supra* note 171, at 5–6 (noting that the first four commandments are religious commands, several others bear no relation to American law, and those that do are common to all cultures) (citations omitted); Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1516 (2005).

Steven Goldberg also has raised the interesting point that the Ten Commandments include proclamations that arguably were superseded by Jesus’s teachings. See GOLDBERG, *supra* note 25, at 14–18 (comparing, “I the LORD . . . am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me; and shewing mercy unto thousands of them that love me,” with Jesus’s law of love, and requirements of forgiveness).

¹⁸⁸ *McCreary*, 545 U.S. at 885–87 (Scalia, J., dissenting). Note that while Justice Kennedy failed to join Justice Scalia’s extreme version of nonpreferentialism, elsewhere he has supported the milder, traditional version and rejected the endorsement test for passive symbols. See *County of Allegheny v. ACLU*, 492 U.S. 573, 673 (1989) (Kennedy, J., dissenting).

¹⁸⁹ *McCreary*, 545 U.S. at 894 (Scalia, J., dissenting).

¹⁹⁰ *Id.*

Clause paradigm for government-sponsored speech—from a search for neutrality, to an originalism which purports to allow government endorsement of religion.¹⁹¹

IV. DECONSTRUCTING THE COURT'S RATIONALES

Drawing the line between private speech facilitated by government, and government speech effectuated through private speakers, is inherently difficult.¹⁹² When Justice Alito, writing for the Court, set forth the affirmative case for applying the government speech doctrine, he based this holding on two main principles: (1) governments intend to convey some message when displaying privately-donated monuments in public parks; and (2) viewers attribute such monuments' expression to the government.¹⁹³ Part IV.A both presents and critiques the opinion; in particular, it shows how this rationale is fundamentally incompatible with the postmodern idea, arguably also expressed by Justice Alito, that monuments have undefined, unlimited meanings. In addition, Part IV.B critiques the opinion's negative case for why forum analysis is unworkable here, and demonstrates how this part of the opinion, too, relies on the need for government to express its viewpoints through monuments. Finally, Part IV.C addresses all the opinions relating to the lurking Establishment Clause issue, including Justice Alito's segment on meaning, and the direct discussions found in the concurrences by Justice Scalia and Justice Souter.

A. The Establishment Clause Significance of the Case for Government Speech

The *Sumnum* opinion starts by setting forth the transformative impact of defining a challenged private-public expression as government speech: "A government entity may exercise [its general] freedom to express its views when it receives assistance from private sources for the purpose of delivering a *government-controlled message*."¹⁹⁴ As mentioned, the government speech doctrine is applied here based on government's

¹⁹¹ Compare, e.g., Andrew Koppleman, *Phony Originalism & the Establishment Clause*, 103 NW. U. L. REV. 727 (2009) (arguing that Justice Rehnquist's nonpreferentialism and Justice Scalia's biblical monotheism misstate history), with Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 22 (2005) (arguing from history that "the framers intended to promote religious exercise in the public sector").

¹⁹² The binary approach is so unworkable that recently, some commentators have argued to abandon it. See, e.g., Brownstein, *supra* note 120 (advocating treating school-related speech as a nonforum); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (arguing for treating such "mixed speech" as its own First Amendment category); see also Schauer, *supra* note 89 (advocating an "institutional" approach to the private/governmental speech questions).

¹⁹³ *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125 (2009).

¹⁹⁴ *Id.* at 1131 (emphasis added).

communicative intent and viewers' attribution—which both resonate with Establishment Clause analysis. In addition, the decision's appeal and unanimity are bolstered by the fact that, in this context, finding government speech does not undermine, and sometimes promotes, First Amendment values.

1. The Opinion Emphasized Government's Intent to Send a Message

The finding of governmental expressive intent in *Summum* rested on a number of factors, all of which have broad applicability to the other expressive contexts that are now percolating through the courts.¹⁹⁵ To start, monuments are an inherently expressive context; here, this is bolstered by the long tradition of governments using monuments “to speak to the public.”¹⁹⁶ Thus, regardless of whether a government commissions a monument, or displays a privately-financed or -initiated monument, the Court stated, “it does so because it wishes to convey some thought or instill some feeling in those who see the structure.”¹⁹⁷

The opinion's second, and most significant, point on the requirement of government's expressive intent echoed this focus on content. The Court concluded that Pleasant Grove's monuments were “government speech” in part because “[t]he City has selected those monuments that it wants to display for the purpose of *presenting the image of the City that it wishes to project* to all who frequent the Park”¹⁹⁸ Combined with the first point, government's intent to instill a feeling or convey a thought when deciding to display a monument, the *Summum* decision clearly adopted the idea that the “government speech doctrine” encompasses broad identity messages, and not just specific written policy points.¹⁹⁹

¹⁹⁵ For instance, there is a Circuit split in the specialty license plate cases. *Compare* *ACLU v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (holding that “Choose Life” specialty plates are government speech) (minority view) *with* *Choose Life v. White*, 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009) (holding that specialty license plates are private speech).

¹⁹⁶ *Summum*, 129 S. Ct. at 1137.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1134 (emphasis added); *see also* IMLA Brief, *supra* note 3, at 12–13 (Municipal Practice Examples provided in the IMLA Brief showed “how governments’ decisions regarding whose lives to honor [with monuments], and how they should be portrayed, express community ideals at the time of installation”); *Dolan 2008*, *supra* note 7, at 29 & n.131 (concluding, based on IMLA survey, that “[e]ven where a donated monument lacks a specific expressive message, however, as with an abstract sculpture, municipalities still make an affirmative decision regarding whether the broad thematic message conveyed by the offered monument is consistent with that municipality’s broad identity messages,” which often can be gleaned from its public promotional statements, including on municipal websites); *Dolan 2004*, *supra* note 7, at 111–12 (based on experience counseling municipalities, showing how in analogous public-private expressive contexts, such as some street light pole banner and special events programs, “a government is communicating its own views on the city’s identity and purposes, what will draw tourists and investments, and what image it should present to the larger world”).

¹⁹⁹ *Summum*, 129 S. Ct. at 1133 (noting that display of monuments in park “linked to the City’s identity” also signals the City’s intent to speak through such monuments). Because I

Third, a government must affirmatively decide whether to accept a donated monument and install it in a public park. In doing so, the Court observed, it generally exercises selectivity.²⁰⁰ The reason provided by Justice Alito to explain this selectivity is an argument that is made regularly, with sporadic success, in many cases where the government speech defense has been asserted.²⁰¹ It is because property owners are unlikely to permit installation on their property of “permanent monuments that convey a message with which they do not wish to be associated.”²⁰² Finally, even where private donors created a monument, the Court held that the linchpin of government speech was present because “the City . . . ‘effectively controlled’ the messages sent by the monuments in the Park by exercising ‘final approval authority’ over their selection.”²⁰³

Note how the *Sumnum* Court’s statement on the required government control modified the guidance given in *Johanns*, which specified that the federal government controlled “every word” of the challenged beef advertisements.²⁰⁴ “Final approval authority” arguably is implicit in the very fact of installation in a public park. This broader standard for content control appears to lower the bar for government speech in order to comport with the realities of the monument context, which is far less systematic than the government-funded programs previously analyzed. *Sumnum*’s broad rationale thus is sufficient coverage for the many government entities which have exercised only informal control over monument selection, or lack any proof of specific control, decades or more after the fact.²⁰⁵ In contrast, note that without specific written

view the *Sumnum* opinion as based on the City’s expressive intent, the expressive context of monuments, and viewers’ consequent attribution of monuments to the government, I conclude that *Sumnum* cannot fairly be used to assert a “government speech” defense when excluding private speakers from meeting rooms. See Christopher C. Lund, *Keeping the Government’s Religion Pure: Pleasant Grove City v. Sumnum*, 104 NW. U. L. REV. COLLOQUY 46, 54 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/28/LRColl2009n28Lund.pdf> (interpreting *Sumnum* as based on government selectivity, and suggesting that “in theory, if [a school district] is selective enough, then at some point its determination of which clubs can meet in its building after school looks like government speech, thereby making it constitutionally immune to any Free Speech challenge”).

²⁰⁰ *Sumnum*, 129 S. Ct. at 1134.

²⁰¹ See, e.g., *Knights of the Ku Klux Klan v. Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000).

²⁰² *Sumnum*, 129 S. Ct. at 1133.

²⁰³ *Id.* (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–61 (2005)). On this point, Justice Alito appeared to approve a variety of methods to demonstrate such “final approval authority.” See *id.* at 1133 (quoting IMLA Brief, *supra* note 3, at 21) (IMLA survey documented municipalities’ editorial control through “prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals”).

²⁰⁴ See *Johanns*, 544 U.S. at 561.

²⁰⁵ An alternative, or additional, account for this modification is as an effort to shield governments from the Establishment Clause impact of strong, unambiguous ties to each word of the content of their monuments, religious and otherwise. See *infra* note 271 and accompanying text.

criteria or, minimally, consistent past practice, a government would be unable to establish a limited public forum.²⁰⁶

2. The Court's Focus on Observers' Attribution of Monuments to the City Echoes the Establishment Clause Endorsement Test

Turning next to the attribution point, in order to determine speaker identity, the Court in *Summum* relied on endorsement test-style analysis.²⁰⁷ This opinion demonstrated, but did not expressly point out, that monuments satisfy the transparency requirement. Transparency has been advocated by a number of legal scholars as essential to proving that a given context comports with the political accountability rationale, which is the underlying justification for the government speech doctrine.²⁰⁸ From the outset, the Court's opinion relied heavily on the factual assumption that: "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker."²⁰⁹

This attribution point is developed most fully in the extended response to *Summum*'s repeated concern: that the government speech doctrine could be used "as a subterfuge for favoring certain private speakers over others based on viewpoint."²¹⁰ In an effort to turn up the Establishment Clause heat, *Summum* had argued that any government relying on the doctrine should be required to publicly adopt each donated monument's message through a formal resolution process.²¹¹ As shown below, in rejecting this proposal, the Court's layered response goes beyond rejecting this demand.

To begin, the Court held that the City's actions—taking ownership and putting the monument on permanent display in a park "that is *linked to the City's identity*. . . . provided a more dramatic form of adoption . . . unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf."²¹² Consequently,

²⁰⁶ See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (enforcing "commercial only" transit advertising policy based on twenty-six years of consistently-enforced limit); *Dolan* 2004, *supra* note 7, at 80–83 (collecting cases).

²⁰⁷ *Summum*, 129 S. Ct. at 1131–36.

²⁰⁸ E.g., Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 101 (2008).

²⁰⁹ *Summum*, 129 S. Ct. at 1133; see also IMLA Brief, *supra* note 3, at 17–18; *Dolan* 2008, *supra* note 7, at 32 (IMLA Municipal Practice Examples showed that citizens complain to, and take action against, the administration when they dislike a monument's message, thus demonstrating that donated monuments are attributed to the government and satisfy the political accountability rationale for government speech).

²¹⁰ *Summum*, 129 S. Ct. at 1134. Note that the response centered on the "subterfuge" aspect because, of course, favoring particular viewpoints is the very essence of recognizing government speech.

²¹¹ *Id.*

²¹² *Id.* at 1134 (emphasis added).

the proposed ritual—a formal resolution adopting the previously-donated monument—would serve no additional communicative purpose. The critical language here is the expressed recognition that the reasonable observer understands—based on the contextual clues of the park location and the nature of monuments—that park monuments express a government’s identity message.²¹³

In contrast, *Sumnum* does not make actual legal ownership of the disputed structure an essential criterion for a finding of government speech. Indeed, Justice Alito explicitly acknowledged that Pleasant Grove City owned most, but not all, of the Park displays.²¹⁴ The opinion did not, however, ascribe a different doctrinal status to those Park displays to which the donor retains title, or remand the case to determine these ownership facts.²¹⁵ The Court’s approach thus declined to adopt the more specific interpretation of “ownership” used in the Circuit Courts’ four-factor government speech test.²¹⁶ Instead, it applied a broader contextual approach, similar to the one used in Establishment Clause cases to find that the government was endorsing a private donor’s religious message.²¹⁷

In the monument context, the land’s status as a public park more reliably signals to observers (who will not, of course, have instant access to transfer documentation) that a governmental entity is responsible for the monument and its expressive content. Thus, the opinion focused on ownership of the real property on which the donated monument is located. The extent to which this aspect of *Sumnum* will apply to other contexts, however, is not clear: it can be explained away as a simple acknowledgment of the reality of how monuments are accumulated over time. To require, as a condition of the government speech defense, that a government provide documentation of a donor’s transfer of legal title to a monument frequently would present an insurmountable practical obstacle in a context where many donations occurred decades, or

²¹³ The *Sumnum* opinions’ reliance on viewer attribution of the monuments to the government, and not to the donors, leads me to disagree with Professor Scott Gaylord’s contrary interpretation of the case in a recent article. See Scott W. Gaylord, *Licensing Facially Religious Government Speech: Sumnum’s Impact on the Free Speech and Establishment Clauses* 64 (Elon Univ. L. Legal Studies Research Paper No. 2009-10, 2009), available at <http://ssrn.com/abstract=1463335> (asserting that *Sumnum*’s use of the “control test,” which he appears to view as the newly exclusive criterion for government speech, “precludes application of the endorsement test to facially religious government speech” (emphasis added)); see also *infra* Part IV.C.1 (for discussion of J. Souter’s concurrence, and federal courts’ post-*Sumnum* use of endorsement analysis).

²¹⁴ *Sumnum*, 129 S. Ct. at 1134.

²¹⁵ *Id.* at 1136.

²¹⁶ See, e.g., *Sumnum v. City of Ogden*, 297 F.3d 995, 1004–05 (10th Cir. 2002) (finding the fourth factor, “ultimate responsibility,” satisfied based on city’s title to the monument, and finding the third factor, “literal speaker,” mixed because city owned monument, but Eagles composed speech); see *supra* notes 63–64 and accompanying text (describing the four-factor test).

²¹⁷ See *supra* Part III (discussion of ownership in *Allegheny*).

even centuries, ago.²¹⁸ Alternatively, the Court's approach to ownership can be explained more strategically, as the prequel to a holding for the government in *Salazar v. Buono*, where a private party then would own the land beneath the challenged memorial cross.²¹⁹

The Court proffered three additional reasons for rejecting Summum's "adopt the monument" proposal. The process of requiring this additional, formal legislative action was rejected as completely impractical given the thousands of donated monuments around in the country and the myriad jurisdictions which would have to undertake this "pointless exercise."²²⁰ Another justification was directed less at the "subterfuge" point, and more at the underlying concern expressed by several Justices at oral argument: characterizing donated monuments as "government speech" appears inconsistent with the basic First Amendment principle against governments "favoring certain private speakers over others based on viewpoint."²²¹ In response, the Court noted briefly that there were no allegations of any attempts by the City to interfere with the exercise of the traditional forms of protected expression in Pioneer Park (such as speech and leafleting), by Summum or anyone else.²²² Thus, this response seems to suggest, giving governments control of park monuments' content does not result in any *pervasive* disfavoring of speakers or views, but instead is limited to one specific, intentional mode of government expression.

The above rationales appear sufficient, especially collectively, to justify rejection of Respondent's "adoption" request; nonetheless, the opinion continued with a lengthy analysis of the indeterminacy of monuments' messages. Justice Alito questioned Summum's apparent assumption that "a monument can convey only one 'message,'" and concluded instead that a "monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."²²³ Given that the Court's religious display cases have focused on the secular message which is conveyed along with the religious one, Justice Alito's extensive discussion of this point

²¹⁸ See Dolan 2008, *supra* note 7 (discussing the IMLA Survey).

²¹⁹ This distinction—between ownership of the land versus ownership of the monument itself—has become a critical issue for the Establishment Clause analysis in *Salazar v. Buono*. See discussion of *Buono*, *infra* at Part V.D.3.

²²⁰ See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009) ("Requiring all of these jurisdictions to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.").

²²¹ *Id.* at 1134.

²²² *Id.* at 1135; see also *supra* note 98 and accompanying text (discussing *Nat'l Endowment for the Arts v. Finley*, and the Court's statements in the arts funding context that it was the *suppression* of disfavored views, rather than selections expressing preferred views, that would create the clear constitutional violation); Dolan 2004, *supra* note 7, at 116–18 (arguing that both core government speech and speech selection should be unconstitutional if the impact of a governmental denial would tend to suppress a disfavored viewpoint altogether).

²²³ *Summum*, 129 S. Ct. at 1135.

appears to relate more to future Establishment Clause challenges, and so will be described and analyzed fully below in Part IV.C.

To summarize a bit at this juncture, though, his long riff on meaning most clearly establishes that what the government means to express by a monument's display is not necessarily consistent with the donor's intended message. To the extent his claim is broader, and seeks to establish that monuments' meanings are indeterminable, and unknown even to the government administrations which decide to display them, that claim appears fundamentally irreconcilable with the *Sumnum* opinion's many statements describing how governments use monuments (regardless of provenance) to express messages of which they approve and which are consistent with the public image the polity seeks to present.

B. Critique of the Court's Stated Reasons for Rejecting Forum Analysis

The *Sumnum* opinion's argument for why forum analysis should not apply to decisions on monument donations for public parks does not stand alone as a second, independent justification for its outcome. Instead, and perhaps inevitably, it circles back to the affirmative case for government speech: ultimately, it relies on the need for viewpoint in monument display. Part IV.B demonstrates this point in part through comparison with the neutral, constitutional policies for distribution of scarce space for common First Amendment uses in both traditional and limited public forums. In addition, it shows how the opinion may exacerbate confusion in First Amendment doctrine because it lumps together existing forum categories, without clear acknowledgment, and then appears to claim that the dividing line between government speech and public forums rests on the number of speakers.²²⁴

The Court's focus on numbers began with this proclamation of the governing rule: "The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a *large number* of public speakers without defeating the essential function of the land or the program."²²⁵ Support for this proposition included the claim that in the following prior precedent, which upheld government-created limited forums, *hundreds of groups* could be accommodated: (1) the annual campaign that allowed a limited number of direct-service charitable organizations to solicit donations from federal employees,²²⁶ and (2) the university policy that provided meeting room space for student organizations.²²⁷

These examples are puzzling, though; large numbers, per se, provide little guidance. To the contrary, New York City's amicus brief showed that some governments

²²⁴ See Hamilton Blog, *supra* note 3, at 4 (concluding that *Sumnum* left all the related First Amendment doctrines involved "muddier than ever before").

²²⁵ *Sumnum*, 129 S. Ct. at 1137 (emphasis added).

²²⁶ *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (using the term nonpublic forum)).

²²⁷ *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263 (1981) (using the term "designated" public forum); see *supra* note 59 (for a discussion of terminology issue)).

can accommodate large numbers of donated monuments.²²⁸ Not only are there some 1200 monuments in Central Park, but the city annually processes hundreds of new proposals from private donors proposing public art installations.²²⁹

More importantly, every day, smaller governmental entities dole out limited public meeting room space that can accommodate only a small number of private users.²³⁰ Where the number of requests from groups which satisfy the reasonable content limitations (e.g., local civic, educational, or charitable purposes) exceeds the space available, the constitutional default rule is to assign available slots based on neutral procedures, such as first-in-time or lottery.²³¹ Indeed, this observed rule would apply to the Court's own example of a permanent monument situation where forum analysis would apply: a permanent monument where all the town residents could inscribe a private message.²³² As the population grew, and this hypothetical stone obelisk or memorial brick area ran out of space, exclusion of later applicants would not violate limited public forum principles.

Turning to its application to public park space, the Court reasoned:

A public park, *over the years*, can provide a soapbox for a very large number of orators—often, for all who want to speak—but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.²³³

No one could dispute the fact that any particular public park must limit the number of large permanent monuments displayed on its premises, so as to preserve that park for its other uses, such as space for play and sports and aesthetically-pleasing open areas.

But this focus on numbers provides an unsatisfying account—even when analyzing speech claims in the traditional public forums of public parks and streets. In that

²²⁸ NYC Brief, *supra* note 3, at 4.

²²⁹ *See id.* at 12.

²³⁰ *See, e.g.*, Rapid City Public Library Meeting Room Use Policy, http://www.rapidcitylibrary.org/webevent/meeting_room_calendar.asp (last visited Oct. 27, 2010).

²³¹ *See generally* *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (public meetings rooms are limited public forums requiring viewpoint-neutral administration and reasonable content and speaker limitations); The Seattle Public Library Meeting Rooms Use Policy, http://www.spl.org/default.asp?pageID=about_policies_meetingrooms (last visited Oct. 27, 2010). Based on over a decade of advising and writing laws and policies for the City of Chicago and other municipalities, I can confirm that first-in-time policies and lotteries are two neutral means which local governments use as methods of settling competing demands.

²³² *Summum*, 129 S. Ct. at 1138.

²³³ *Id.* at 1137 (emphasis added) (“Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing literature and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space.”).

context, too, there are numerous conflicts over prime locations or desirable dates, as reflected in the Court's own precedent upholding government permit systems for public assemblies.²³⁴ Consider the rejected organization which cannot use the public way to lead the parade on St. Patrick's Day in their city's Irish neighborhood because of a competing organization's prior claim; or reflect on the anti-war protestors, on the eve of war, who are denied access to the highly-visible town square based on a long-scheduled cultural event.²³⁵ From the speakers' perspective, there does not seem to be much difference between the expressive harms caused by waiting to try another year or by being relegated to a less desirable alternative location,²³⁶ versus having one's monument proposal denied because that particular park lacks space for additional structures. It is possible—if not desirable—to apply forum analysis to offers of permanent monuments, and use content-neutral selection criteria and time/place/manner rules. Just like with park event permit systems, monument applications could be handled by government proposing an alternate site, or a smaller or temporary display, or by a contingent denial based on whether more park space later became available.

The real issue in the donated monument context, the essential reason that the Court rejected forum analysis and embraced core government speech, is that the Court agreed with the government's stated need to make viewpoint distinctions in this expressive context. Most compellingly, it reasoned, if viewpoint neutrality was imposed upon monument selection, then the many governments which display donated war memorials could be forced to display memorials "questioning the cause for which the veterans fought."²³⁷ And, based on the common understanding of the function of monuments, the message conveyed by that permanent physical structure would be attributed to the government which installed it.²³⁸ In stark contrast, viewers assume that protestors marching, giving speeches, or distributing leaflets in a park speak for

²³⁴ See *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002) (upholding content-neutral permit policy to reserve park space for events); see also *MacDonald v. Chi. Park Dist.*, 132 F.3d 355 (7th Cir. 1997) (applying *Thomas* to uphold City of Chicago parade ordinance as a valid time/place/manner regulation, and acknowledging need to plan distribution of limited public resources).

²³⁵ See, e.g., CHI., ILL. MUNICIPAL CODE § 10-8-330 (1990) "Parade, public assembly or athletic event" (establishing general first-in-time rule, and a neutral system for resolving disputes over leadership of parade organizations). It is not uncommon in large cities for more than one group to assert leadership of an established annual parade, or for the city's central square to be reserved in advance for cultural and entertainment events.

²³⁶ Cf. Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587 (2007) (discussing how the location that government makes available for First Amendment activities can greatly impact the effectiveness of private expression).

²³⁷ *Sumnum*, 129 S. Ct. at 1138 (also relying on Pleasant Grove's example that it would be ludicrous to require display of a "Statue of Autocracy" based on display of the donated Statue of Liberty).

²³⁸ SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 127 (1998).

themselves; the more educated viewer might also understand that the government is required to allow such speech under the First Amendment.²³⁹

The Court never expressly analyzed whether the “limited” (as opposed to traditional or designated) public forum should apply.²⁴⁰ *Summum* may come to be viewed as the case which finally erased the faint, yet lingering line between “content” and “viewpoint” discrimination.²⁴¹ When Justice Alito rejected *Summum*’s request that these governmental decisions be handled through *content-neutral* time, place and manner restrictions, he did so by responding that it is unworkable to require governments to “maintain *viewpoint neutrality* in their selection of monuments.”²⁴²

Interestingly, the *Summum* decision suggested use of objective selection criteria—like those required for limited public forums. In listing various reasons for finding government speech, Justice Alito’s opinion for the Court mentioned approvingly that Pleasant Grove City had “expressly set forth criteria [for] future selections.”²⁴³ Similarly, Justice Breyer’s concurrence stated that his preferred approach would allow cities to choose monuments “according to criteria reasonably related to one or more of [a public park’s] legitimate ends,” which include “recreational, historical, educational,

²³⁹ See *id.* at 126–27 for a similar observation regarding the public’s conclusions on seeing airport solicitors. Consequently, I am more optimistic than Dean Chemerinsky regarding future application of *Summum* in public forums, and conclude that it could not fairly be applied to traditional private uses of parks as public forums, i.e., assembly, speech, and literature distribution. See Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 413, 424–27 (2009) (asserting that after *Summum*, there is nothing to stop government from converting private pro-war speech to its own, and then barring anti-war speakers from public parks). Note that these observations apply only in established contexts, where there are some settled public expectations. See *infra* Part V.B for discussion of social meaning.

²⁴⁰ *Summum*, 129 S. Ct. at 1132.

²⁴¹ The Court’s increasing disenchantment with the categories of forum analysis was on display in this case. See, e.g., Justice Kennedy’s comment at oral argument: “This case is an example of the . . . tyranny of the labels.” *Summum* Transcript, *supra* note 13, at 35. Federal courts still sometimes draw clear distinctions. See, e.g., *Choose Life v. White*, 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009) (specialty license plates a nonpublic forum so content limitations, but not viewpoint discrimination, allowed).

²⁴² *Summum*, 129 S. Ct. 1137–38 (emphasis added). Similarly, in support of the conclusion that public parks should not be considered “*traditional* public forums for the purpose of erecting privately donated monuments,” he cited cases from three different forum categories (designated public forum, limited public forum, and nonpublic forum), with no reference to the labels noted here, or to their historically distinctive features. *Id.* at 1137 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (school mail system a “nonpublic forum”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (university student activities fund a “limited public forum”); *Widmar v. Vincent*, 454 U.S. 263 (1981) (university facilities made generally available for student activities deemed a “designated public forum”)).

²⁴³ *Summum*, 129 S. Ct. at 1134. While noting criteria with approval, Justice Alito did not address *Summum*’s challenges regarding the *post hoc* nature, or the alleged discriminatory application, of these criteria. *Id.*

aesthetic, and other civic interests.”²⁴⁴ Unless coupled with the government speech doctrine, however, such criteria are too flimsy to limit monuments to the viewpoint-based war memorials and commemorative statues which the decision seemed to approve for Pleasant Grove City and its government amici. For example, a content limitation requiring donated monuments to reflect “local history” provides no basis for rejecting a proffered monument depicting town founders as racist, murdering thieves.

Establishing selection criteria, however, is valuable for two reasons. Published rules enhance political accountability;²⁴⁵ they also provide some protection against government viewpoint distinctions based on impermissible reasons of racism, animus or retaliation.²⁴⁶ In earlier articles, I advocated adherence to such criteria as a limit on government speech.²⁴⁷ While this limit is difficult to apply to monuments, which are acquired sporadically over the decades, *Summum* may encourage governments to begin a new practice of written monument selection policies. Additionally, written policies are valuable to cabin governments’ otherwise unbridled discretion, and to bring this unsettling new doctrine more into line with other constitutional protections.

In Pleasant Grove City’s situation, approving its selection criteria may also serve a secondary purpose: providing it further protection from the anticipated post-decision Establishment Clause challenge. As mentioned in Part I, *Summum* and its proposed monument have no local connection to Pleasant Grove City; also, there is a specific case to be made connecting the stone Ten Commandments to Utah’s own exodus story.²⁴⁸ Thus, regardless of whether *Van Orden* is weakened, in the particular context of Pioneer Park, this City’s selection criteria likely will provide a defense against the charge that its rejection of the Seven Aphorisms was based on sectarian religious discrimination.

The opinion’s final rationale for rejecting forum analysis for monument decisions is that the result would be “less speech, not more.”²⁴⁹ Justice Alito reasoned that “if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments,” most parks would refuse all donations and shut down such forums.²⁵⁰ He concluded: “where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.”²⁵¹ While this sweeping statement may stir fears of a now virtually limitless

²⁴⁴ *Id.* at 1141 (Breyer, J., concurring).

²⁴⁵ *See, e.g., id.* at 1133 (majority opinion).

²⁴⁶ *See id.* at 1132.

²⁴⁷ *See Dolan 2008, supra note 7, at 25* (showing difficulty of requiring selection criteria for monuments because they frequently are acquired sporadically, over periods of years); *Dolan 2004, supra note 7, at 114–16* (recommending tying constitutionality of government speech selection decisions to consistency with stated program standards).

²⁴⁸ *See supra note 124.*

²⁴⁹ *Summum*, 129 S. Ct. at 1137 (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 681 (1998)).

²⁵⁰ *Id.* at 1138.

²⁵¹ *Id.* Note that one reason this Article concludes that *Summum* is based on *Johanns*, rather than the “speech selection” cases, is that the opinion’s references to the latter are fleeting and

government speech doctrine, *Summum* rests not on this negative case against forum analysis, but on its affirmative case for government speech, which requires a context imbued with expressive intent.

C. *Summum's Complex Establishment Clause Implications*

Two of the concurrences, and portions of Justice Alito's opinion for the Court, begin to address how *Summum* will affect the most commonly acknowledged limit on government speech, the Establishment Clause.²⁵² This Part describes these conflicting views, and then shows how the *Summum* opinion recognized the social meaning of monuments, which heightens the impact of governmental religiously-themed displays.

1. The Conflicting Concurrences

Only Justice Scalia, joined by Justice Thomas, preemptively proclaimed that *Summum's* holding creates no Establishment Clause risk for Pleasant Grove.²⁵³ Justice Scalia declared forcefully that nothing in *Van Orden* suggested it was based on a finding that the monument was the Eagles' private speech; thus, in his view, nothing has changed.²⁵⁴

Justice Souter was the only other Justice to examine the decision's Establishment Clause implications directly,²⁵⁵ his opinion sought to begin working out the interaction of the two principles.²⁵⁶ Concurring only in the judgment, he advocated applying the

located in the section focused on the logistics of rejecting forum analysis. *See id.* at 1137 (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (for general point that forum principles "are out of place in [this] context")); *id.* (quoting *Forbes*, 523 U.S. 666, 681) (for point that allowing all speakers would be logistically burdensome); *see also id.* at 1131 (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (Scalia, J., concurring)) (noting, during the earlier "government speech" portion of the *Summum* opinion, that Justice Scalia's concurrence in *Finley* expressed his individual opinion that government can limit NEA funding to only those private artists whose art expresses government viewpoints).

²⁵² *See Summum*, 129 S. Ct. at 1132; *id.* at 1139 (Stevens, J., concurring). *But see id.* at 1142 (Souter, J., concurring in the judgment) (making more complex statements regarding the interaction).

²⁵³ *Summum*, 129 S. Ct. at 1139–40 (Scalia, J., concurring).

²⁵⁴ *Id.* *See Dorf*, *supra* note 14 (on impact of *Summum*, concluded that only two Justices (Scalia and Thomas) "argue[d] that if the Establishment Clause issue were squarely before the Court it would change nothing," while four Justices (Breyer, Ginsburg, Souter and Stevens) argued that "it would potentially change the analysis").

²⁵⁵ Justice Stevens, joined by Justice Ginsburg, noted the Establishment Clause limitation on government speech, and asserted that the case could have been decided based on the government's "implicit endorsement of the donor's message." *Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring); Justice Breyer was silent on the Establishment Clause issue. *See id.* at 1140–41 (Breyer, J. concurring).

²⁵⁶ *Id.* at 1141 (Souter, J., concurring in the judgment).

same “reasonable observer” endorsement test for both issues,²⁵⁷ using that standard, he agreed that the Pioneer Park monuments were government speech.²⁵⁸ This proposal was his proffered solution to a “numbers problem” different from that focused on by Justice Alito.²⁵⁹ When a monument has some religious aspect, he wrote, a government frequently tries to avoid violating the Establishment Clause by adding additional, secular displays; but the more numerous and diverse the exhibits, the harder it becomes to conclude that the government is speaking its own viewpoint with any particular monument.²⁶⁰

Going straight to the heart of the issue, Justice Souter wrote that Pleasant Grove’s “Ten Commandments monument is government speech, that is, an expression of a government’s position on the moral and religious issues raised by the subject of the monument.”²⁶¹ As he somewhat gleefully reminded the others at oral argument, he was a dissenter in *Van Orden*,²⁶² thus, one passage in his concurrence is puzzling. Anticipating future arguments that the government speech doctrine frees governments of the Establishment Clause prohibition on discriminating among religions, he stated: “Whether that view turns out to be sound is more than I can say at this point.”²⁶³

²⁵⁷ *Id.* at 1142. Specifically, he proposed “to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.” *Id.*

In a post-*Sumnum* specialty license plate case, the Eighth Circuit did just that. See *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009) (After reviewing the *Sumnum* decision, the Eighth Circuit stated: “Informed by the Supreme Court,” its own prior precedent, and the other Circuits’ decisions on specialty plates, “[o]ur analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party,” and holding that the plates are the vehicle owners’ speech); see also *Choose Life v. White*, 547 F.3d 853, 863 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009) (specialty license plate case where court reduced the four-factor test to: “Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?”); *Gaylord*, *supra* note 213, at 61 (concluding that the *Sumnum* decision precluded further application of the endorsement test).

²⁵⁸ *Sumnum*, 129 S. Ct. at 1142 (Souter, J., concurring) (“I find the monuments here to be government expression”; more precisely, his opinion focused solely on the Ten Commandments).

²⁵⁹ *Id.* at 1141–42.

²⁶⁰ *Id.* “[I]t will be in the interest of a careful government to accept other monuments to stand nearby, to dilute the appearance of adopting whatever particular religious position the single example alone might stand for. As mementoes and testimonials pile up, however, the chatter may well make it less intuitively obvious that the government is speaking in its own right simply by maintaining the monuments.” *Id.* at 1141.

²⁶¹ *Id.* at 1141 (citing *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) (an early Supreme Court decision discussing the theory and meaning of core government speech)).

²⁶² *Van Orden v. Perry*, 545 U.S. 677, 736–45 (2005) (Souter, J. dissenting); *Sumnum* Transcript, *supra* note 13, at 63.

²⁶³ *Sumnum*, 129 S. Ct. at 1142 (Souter, J., concurring).

Given Justice Souter's longstanding adherence to neutrality in his Establishment Clause opinions, this reference seems to reflect a weary resignation to a possible future victory for Justice Scalia's "monotheist nation" argument.²⁶⁴ Or, it may be an indirect reference to the expanding litigation over legislative chaplains, where the more culturally liberal approach has become to characterize such prayers as "government speech" in order to require that they be inclusive and nonsectarian.²⁶⁵ Given his departure from the Court, the puzzle over his meaning may linger.

2. A New Perspective on Justice Alito's Many-Layered Points on the Content of Monuments' Messages

Turning back to the *Sumnum* majority opinion, its only explicit reference to this topic was to acknowledge, in passing, that "government speech must comport with the Establishment Clause."²⁶⁶ As mentioned above, however, Justice Alito's extensive discussion on the content of messages conveyed by monuments appears directed toward the underlying religious speech controversy. He wrote, "Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."²⁶⁷ While quoting the entire lyrics of John Lennon's song "Imagine" drew comment,²⁶⁸ far more

But the government could well argue, as a development of the government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.

Id. One interpretation that seems to me quite unfounded, given Justice Souter's long-term consistent position that the Establishment Clause requires government neutrality between religion and irreligion, as well as among sects, is that Justice Souter was advocating this radical change. *But see* Gaylord, *supra* note 213, at 71 ("Under Justice Souter's proposal, the government would have broad discretion not only to choose which message to convey but also to promote religion or one sect over another.").

²⁶⁴ See *McCreary County v. ACLU*, 545 U.S. 844, 893–99 (2005) (Scalia, J., dissenting). See also Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097 (2006).

²⁶⁵ See, e.g., *Turner v. City of Fredericksburg*, 534 F.3d 352, 354–55 (4th Cir. 2008) (finding legislative prayer "government speech" under four-factor test and denying Free Speech claim by speaker rejected for sectarian Christian prayer); see also *supra* notes 139–41 and accompanying text.

²⁶⁶ *Sumnum*, 129 S. Ct. at 1132.

²⁶⁷ *Id.* at 1135.

²⁶⁸ See, e.g., Tony Mauro, *Justice Alito "Imagines" John Lennon*, LEGAL TIMES (Feb. 25, 2009), available at <http://legaltimes.typepad.com/blt/2009/02/justice-alito-imagines-john-lennon.html> (noting reference to "Imagine" monument in Central Park and opinion's footnote with full text of Lennon's lyrics to the song); Orin Kerr, *Pleasant Grove v. Sumnum*, THE

striking was his statement that even a very simple monument—a statue displaying the word “peace” in many languages—is “almost certain to evoke different thoughts and sentiments in the minds of different observers.”²⁶⁹ Recently Professor Steven Gey used this puzzling passage to argue for elimination of the government speech doctrine, categorizing *Summum* as: “Government Speech When the Government Has Nothing (Legal) to Say.”²⁷⁰

This line of analysis—which was completely extraneous to deciding *Summum*—already has been used to argue the futility of the Establishment Clause endorsement test.²⁷¹ It does seem likely that Justice Alito was carefully laying the groundwork to preserve *Van Orden*’s focus on the secular messages conveyed by religious symbols.²⁷² But the broader interpretation, that this *Summum* riff means the endorsement test is obsolete, is contradicted by numerous statements in his *Summum* opinion.

First, such statements—which suggest that it is impossible to determine the expressive content of monuments—are internally inconsistent with the opinion’s reasons for finding that the monuments are government speech. Recall how the Court’s affirmative case focused on the government’s expressive intent and viewers’ reasonable attribution. Selecting a monument to convey an idea and present a desirable image to the public is quite distinguishable from displaying a monument for no particular purpose.²⁷³ Even more clearly, the decision borrowed liberally from the contextual analysis used in Establishment Clause cases: the Court placed great emphasis on its conclusion that observers, viewing donated monuments in public parks, would “reasonably [i]nterpret them as conveying some message” from the government.²⁷⁴

VOLOKH CONSPIRACY (Feb. 25, 2009, 5:43 PM), <http://volokh.com/2009/02/25/pleasant-grove-city-v-summum/> (generally praising Justice Alito’s “well-reasoned” majority opinion, but criticizing the footnote with complete lyrics as unnecessary and “a bit too cute”).

²⁶⁹ *Summum*, 129 S. Ct. at 1135 (citing IMLA Brief 6–7).

²⁷⁰ Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government has Nothing to Say?*, 95 IOWA L. REV. 1259, 1301–02 (2010) (*Summum* created a “new concept of government speech in which the government apparently never intended to say anything,” but used the doctrine to surreptitiously convey a religious message).

²⁷¹ See Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners at 28–34, *Salazar v. Buono*, 129 S. Ct. 1313 (2009) (No. 08–472) (arguing that the endorsement test cannot survive *Summum* because the Court “squarely rejected [its] single-message assumption”).

²⁷² See *Buono*, 130 S. Ct. at 1823 (Alito, J., concurring in the judgment).

²⁷³ Compare *Summum*, 129 S. Ct. at 1133 (when a government installs a monument, “it does so because it wishes to convey some thought or instill some feeling in those who see the structure”) and *id.* at 1134 (emphasis added) (“The City has selected those monuments that it wants to display for the purpose of *presenting the image of the City that it wishes to project* to all who frequent the Park . . .”) with *id.* at 1135 (“[T]he monument may be intended to be interpreted . . . in a variety of ways.”).

²⁷⁴ *Id.* at 1133. While one could argue that ascertaining the identity of the speaker is a simpler task than agreeing on a monument’s primary message, it may not be, given the extensive lower court litigation on whether the speaker at issue should be deemed the government or a private person.

Second, even within the section discussing the content of monuments' expressions, several of Justice Alito's statements acknowledged the familiar experience where a monument does send a commonly-understood message.²⁷⁵ Most clearly, the Court noted that the Statue of Liberty is now universally viewed as a welcoming beacon to immigrants.²⁷⁶ In addition, the Court's explanation that the meaning of a monument can change over time with the culture, and can be modified by the later addition of other monuments close by, implicitly recognized that monuments send communal messages.²⁷⁷ They do not typically function as abstract images for individualized contemplation, like post-modern art or Rorschach tests. Moreover, these points in the opinion echo, and thus reinforce, the Establishment Clause endorsement test.

Finally, the clearest conclusion from this part of the opinion was that the government's intended message may differ from the donor's and the creator's.²⁷⁸ The Court used the public museum example: in that context, viewers would not perceive the State as intending to convey a religious message by displaying a painting of a religious scene among the collection.²⁷⁹ This point, of course, could work in both directions: it is certainly possible that the Eagles could intend to deter juvenile delinquency by promoting a moral code, while government officials could intend to communicate the biblical identity of their community.

V. A MODEST PROPOSAL FOR ESTABLISHMENT CLAUSE LIMITS ON PASSIVE GOVERNMENT IDENTITY SPEECH

This Part integrates the arguments for why *Sumnum* should impact the Court's Establishment Clause approach, particularly regarding government's display of

²⁷⁵ *Buono*, 130 at 1821–23 (Alito, J., concurring in the judgment).

²⁷⁶ *Sumnum*, 129 S. Ct. at 1136 (The Statue of Liberty came “to be viewed as a beacon welcoming immigrants to a land of freedom.”).

²⁷⁷ *Id.* (referring to Vietnam Veterans Memorial, where addition of flagstaff and Three Soldiers statue sufficiently changed overall effect of original design to achieve agreement on display). For other examples of this principle, see Dolan 2008, *supra* note 7, at 26–27 (“The expressive symbolic power of monuments also is highlighted when the public’s perception of a given monument changes along with cultural mores,” (e.g., IMLA example of a now politically incorrect statue of Native Americans), or when a newly-installed monument transforms the prior identity message (e.g., a statue of African-American tennis great Arthur Ashe altered the cultural message of Richmond’s “Monument Avenue,” which was previously comprised solely of Confederate generals)). See also IMLA Brief, *supra* note 3, at 13.

²⁷⁸ *Sumnum*, 129 S. Ct. at 1136 (stating that “the thoughts or sentiments expressed by a government entity that accepts and displays [a monument] may be quite different from those of either its creator or its donor”).

²⁷⁹ *Id.* at 1136 n.5. This point was relied on recently to disassociate a county from a donor’s religious motivation for posting the Ten Commandments. See *ACLU v. Grayson County*, 591 F.3d 837, 851 (6th Cir. 2010) (quoting *Sumnum*, 129 S. Ct. at 1136) (upholding Ten Commandments display in county courthouse, despite donor’s apparent religious purpose); see *infra* note 366 for further discussion of *Grayson*.

recognizable religious symbols. It also explains my modest proposal for the minimum, compromising next steps on this hotly-contested political and legal issue: (1) requiring a clear disclaimer explaining government's intended secular message, and (2) imposing strict neutrality requirements on any future public monuments with religious themes. This practical approach is an effort to break the impasse, to find compromise between contrasting worldviews, rather than to create an ideal scheme.²⁸⁰

After recapping the doctrinal reasons for *Sumnum*'s impact, Part V discusses the "social meaning" of governmental Ten Commandments displays, how it has changed over time, and the essential point that Justice Alito's opinion recognized the shifting social understandings of monuments. Then, it explains why the endorsement test may have staying power, and analyzes two recent scholarly articles which recommend more stringent standards. Finally, this Part provides a more detailed account of my suggested compromise proposal, which retains practical value even if the endorsement test fails to survive.

A. Recapping the Doctrinal Background Shows Why Sumnum Matters

Part II took some time to lay the groundwork for my argument that the Court's opinion puts donated monuments into the "core" government speech category—what Justice Stevens referred to as its "recently minted" doctrine, exemplified by *Johanns*.²⁸¹ This is meaningful for Establishment Clause purposes because the Court did not emphasize the government's institutional role as curator, selecting which private donors' expressions should be displayed in its park monuments.²⁸² Instead, when analyzing government's role in accepting private monuments, the Court took the position that government is making decisions that express the community's identity and convey "government-controlled" messages—even where those "messages" are broad and thematic, rather than precise and clearly articulated.²⁸³

²⁸⁰ My effort to find compromise on this specific issue is inspired by other recent works which are expressly directed towards resolving (more comprehensively) the conflict between accommodationists and separationists. See, e.g., FELDMAN, *supra* note 23, at 9 (explicitly seeking a "third way that could produce reconciliation between . . . the extremes of both values evangelicals and legal secularists. In place of their mutually exclusive visions," he proposed permitting government to continue symbolic religious speech, while rigorously prohibiting government aid to/partnership with religious institutions); Bruce Ledewitz, *Could Government Speech Endorsing a Higher Law Resolve the Establishment Clause Crisis?*, 41 ST. MARY'S L.J. 41, 103 (2009) ("The goal at the end of the day is to find common ground where possible. . . . Recognizing that traditional religious language . . . can be understood as promoting very broad claims about reality might allow a new kind of consensus to emerge.").

²⁸¹ *Sumnum*, 129 S. Ct. at 1139.

²⁸² See *supra* Part II (defining *Rust* and *Johanns* as "core" government speech because they are based on specific policy messages, in contrast to both "speech selection" cases, e.g., *Finley*, and *Garcetti*, which were based instead on facilitating government's valuable institutional roles).

²⁸³ See *supra* Part IV.A. The Court relied on points that the City "selected those monuments it wants to display for the purpose of presenting the image of the City that it wishes to project

Part III provided the backdrop for explaining why this type of core “government speech” defense to Free Speech Clause claims is a more potent determination than a finding, in Establishment Clause litigation, that the government is speaking or endorsing private speech.²⁸⁴ Specifically concerning donated religious displays, Part III showed that *Van Orden*’s outcome was based in part on the distancing role of the donor; Justice Breyer found that the Eagles’ plaque made it more likely that the monument conveyed their civic message. *Summum* has now dissolved that helpful construct.

More broadly, *Summum*’s novel, affirmative declarations of government identity speech make a stronger statement than does a judicial determination—in an Establishment Clause case—that government officials, rather than private speaker participants, bear more responsibility for challenged religious content.²⁸⁵ Also, integral to the “government speech doctrine” espoused in *Summum* is that the government is allowed to reject offers to display competing religious icons, and to do so solely on the grounds that such messages do not comport with the city’s preferred values and image.

Making this explicit sends a clearer message of governmental favoritism. This degree of candor is itself damaging to the constitutional ideal of neutrality, as shown by Justice Scalia’s *McCreary County* dissent, in which he argued that the Establishment Clause allows governmental Ten Commandments displays because 97% of Americans believe its religious truth.²⁸⁶ While, given the contextual factors discussed above, many might see the *Van Orden* plurality as similarly motivated, explaining the decision in terms of the Ten Commandments’ history as an early legal code at least sends a less troublesome message.

B. Endorsement and the “Social Meaning” of Summum

While the endorsement test has been attacked regularly, and understandably, as subjective and indeterminate,²⁸⁷ at the same time, other scholars have sought to clarify

to all who frequent the Park,” and the City “unmistakenly signif[ied] to all Park visitors that the City intends the monument to speak on its behalf” by putting it in a park “that is linked to the City’s identity.” See *Summum*, 129 S. Ct. at 1134.

²⁸⁴ See *supra* Part III.A.

²⁸⁵ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

²⁸⁶ *McCreary County v. ACLU*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting); see also Laura Underkuffler, *Through Glass Darkly: Van Orden, McCreary, and the Dangers of Transparency in Establishment Clause Jurisprudence*, 5 FIRST AMEND. L. REV. 59 (2010).

²⁸⁷ See, e.g., Jessie H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499 (2002) (criticizing the endorsement test as incapable of principled application and inconsistent with government accommodation of religion). Indeed, this flaw was acknowledged even in the law review article that is frequently cited as a primary defense of this approach. See William P. Marshall, “*We Know It When We See It*”: *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 533–34 (1986) (acknowledging the “essential weakness” of the symbolic approach, that it is “potentially highly individualistic and subject to extraordinary manipulation,” and has a “critical dependence on who is interpreting the ‘symbol’”).

and expand its use. The expressivist approach to constitutional law has provided a new theoretical basis; it supports judging Establishment Clause compliance by the social meaning of the State's involvement with religious messages and institutions.²⁸⁸ And the recent comprehensive work on the religion clauses by Provost Christopher Eisgruber and Dean Lawrence Sager, their "Equal Liberty" theory, similarly embraces the endorsement test and its focus on social meaning.²⁸⁹ Echoing Justice O'Connor's rationale, "Equal Liberty insists that no member of the community ought to be devalued on account of the spiritual foundations of his or her basic commitments."²⁹⁰

Eisgruber and Sager provide an accessible working definition of "social meaning" as "the meaning that a competent participant in the society in question would see in that event or expression."²⁹¹ As noted, parts of the *Sumnum* majority opinion seemed to question that possibility, by focusing on the multiple possible meanings of a given symbol.²⁹² Professor Lawrence Lessig's work on social meaning provides a convincing response. As he wrote, to say "that more than one construction may be possible . . . does not imply that every construction is possible. . . . What is 'possible' hangs upon particular histories and material conditions, and the constraints of both are real."²⁹³

²⁸⁸ See David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 563–65 (2002) (proposing using "an expressivist approach to the Establishment Clause, built upon Justice Sandra Day O'Connor's endorsement test, as a mediating principle" between "separationists" and "assimilationists," and arguing for extending use of that test to the arena of "charitable choice" social work funding decisions). For a comprehensive account of the expressivist theory, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). For a prominent scholar's critique of expressivist theories and the endorsement test, see Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506 (2001) (arguing that expressivism is best understood as an attempt to reconcile jurisprudence with the general cultural discomfort with the lack of foundational justifications for law in a secular age, but concluding that the expressivists are ultimately unsuccessful, precisely because society lacks this shared metaphysical grounding). My own response to Professor Smith's detailed critique is that the degree of logical consistency required among philosophers to justify a particular position differs markedly from the everyday rationales accepted daily by citizens, judges, and lawmakers as reasonable justifications for their actions. Moreover, while his account of the pre-modern world as sharing common ideas about ultimate, supernatural meaning is persuasive, less so is his apparent assumption that this pre-modern shared belief in ultimate meaning translated into uniform agreement on particular hard questions.

²⁸⁹ EISGRUBER & SAGER, *supra* note 184, at 125–46.

²⁹⁰ *Id.* at 18.

²⁹¹ *Id.* at 127.

²⁹² See *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1135–36 (2009).

²⁹³ Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 949–50 n.19 (1995) (citing and responding to Pierre Bourdieu, *Social Space and Symbolic Power*, 7 SOC. THEORY 14, 19 (1989)). Lessig defines "social meanings" as "the semiotic content attached to various actions, or inactions, or statuses, within a particular context." *Id.* at 951. He defines "context" as a "collection of understandings or expectations shared by some groups at a particular time and place." *Id.* at 958. The more uncontested, the more powerful the social meaning, and "the more contested . . . , the less powerful." *Id.* at 960–61.

Two of Professor Lessig's examples show how shifting cultural interpretations, and the *Summum* opinion, have changed the social meaning of government's religious displays. First, for many decades, the Confederate flag was a fading symbol of regional pride and the lost Civil War, but "early in the 1950s, it was revived as a political symbol by those most firmly resisting civil rights legislation in the South."²⁹⁴ In this new context, when predominately white legislatures voted to raise the Confederate flag, the social meaning to black Southerners was a message of racial inequality and resistance to proposed political change.²⁹⁵

Second, much of Lessig's work examined "cases where contexts *are changed*, not where they simply *change*."²⁹⁶ Looking at how countries construct their national identities, he focused on the example of Ecuador. Evolving from its earlier history, where "a relatively unified national self was constructed in opposition to an inferior indigenous other,"²⁹⁷ since the 1980s Ecuador has reintegrated the "Indian" into its national identity, using techniques such as national holidays and state-sponsored festivals.²⁹⁸ Under the new First Amendment doctrine espoused by *Summum*, these techniques—like public monuments—now would be labeled "government speech."

While analyzing active efforts to modify cultural context, Lessig identified two semiotic techniques that serve to alter or preserve social meanings.²⁹⁹ "Tying," a staple of the advertising world, can transform a symbol's social meaning by associating it with the social meaning that the actor intends the symbol to have.³⁰⁰ And "ambiguation" gives a particular symbol a second meaning, without denying its existing meaning, "and thereby blurs just what it is that X is."³⁰¹

The social meaning of governmental religious monuments, especially the Ten Commandments, has changed based on both types of phenomena identified by Lessig: significant shifts in sociological/cultural context, and intentional actions by legislatures and now the Court. The significant increase in religious pluralism since the Eagles' distribution project in the 1960s and early 1970s has changed the message conveyed

²⁹⁴ *Id.* at 953.

²⁹⁵ *Id.* at 953–64 (citing James Forman, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitals*, 101 *YALE L.J.* 505 (1991)); see also Dolan 2008, *supra* note 7, at 52 & n.245 (relying on Forman to argue for a prohibition on such racist government speech).

²⁹⁶ Lessig, *supra* note 293, at 962.

²⁹⁷ *Id.* at 981 (quoting Mary Crain, *The Social Construction of National Identity in Highland Ecuador*, 63 *ANTHROPOLOGY Q.* 43, 46 (1990)).

²⁹⁸ *Id.* at 982.

²⁹⁹ *Id.* at 1009.

³⁰⁰ *Id.* (providing the commercial example of beautiful models used by Gap to transform the image of traditional workers' clothing).

³⁰¹ *Id.* at 1010–12 (giving the example of the Civil Rights Acts, and how these laws helped white businessmen who wanted to serve or employ blacks—whether for altruistic or commercial reasons—to avoid negative consequences from prejudiced customers, by ambiguing the social meaning of what was now behavior required by law).

by governmental actions (and inactions) in this regard. And the Court's decision in *Sumnum* itself has altered the social meaning of *Van Orden*, based in part on the techniques identified above.

Looking first at the *Sumnum* decision, the Court's act of identifying all donated monuments, including the Eagles-donated Ten Commandments, as "government speech"³⁰² exacerbates the Establishment Clause dilemma. Using Lessig's terminology, this label more clearly "ties" the government to what formerly could be viewed as a message communicated by the monument's donors. It increases the status of the Ten Commandments from what could be viewed as unintentional endorsement of the religious text, to a government-controlled message expressing agreement with this creed. At the same time, the *Sumnum* opinion performs a "de-ambiguating" function here. By removing the donor's communicative role, it undercuts efforts to blur legal responsibility for the monument's face value: its religious text.³⁰³

Moreover, judicial opinions themselves can construct new social meanings.³⁰⁴ This may be particularly true here, where the opinion has given a new, or at least newly-defined, descriptive label to an existing symbol. Borrowing from Professor Jessie Hill's application of "speech act theory" to Establishment Clause cases, descriptive words "may also help to construct the reality that they describe or purport to describe," particularly where that description is proclaimed by "the voice of sovereign authority," which includes the Court.³⁰⁵ As mentioned above,³⁰⁶ the equal access cases provide a good example. A common government meeting room use policy, which excluded religious groups based on the then-current understanding of constitutional requirements

³⁰² *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1134 (2009).

³⁰³ *But see* *ACLU v. Grayson County*, 591 F.3d 837, 851 (6th Cir. 2010) (providing an unusual, and I think incorrect, interpretation of *Sumnum* and the Court's precedent, the court stated that a Ten Commandment donor's religious motivation could be attributed to the county defendant if there were a sign on the Foundations display linking it to the religious donor (citing *Sumnum*, 129 S. Ct. at 1136, *Van Orden v. Perry*, 545 U.S. 667, 701–02 (2005) (Breyer, J., concurring) and *County of Allegheny v. ACLU*, 492 U.S. 573, 600 (1989))).

³⁰⁴ *See* Lessig, *supra* note 293, at 1014 n.241 ("And indeed, one could say, the opinion in *Barnette* itself was an act that was constructing a certain social meaning—this time the social meaning of the First Amendment. Through its proclamation, Jackson established a conception of neutrality in America . . .").

³⁰⁵ Hill, *Of Christmas Trees and Corpus Christi*, *supra* note 137, at 733–35. Words that only describe a state of affairs often nonetheless function as "performatives," or speech acts, a type of "utterances that can bring about an effect by the mere fact of their utterances." *Id.* at 733 (quoting J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 5 (1962)). Speech act theory is a branch of linguistic theory.

Professor Hill also notes that a judicial opinion can engage in such descriptive speech acts; a court's description of a symbol's historical and interpreted meaning "attempts to construct the reality it describes." *Id.* at 757. As shown next, writing pre-*Sumnum*, her applications of speech act theory have led to a rejection of the endorsement test. *See infra* Part V.C.2.

³⁰⁶ *See supra* Introduction.

and an effort to avoid favoritism or divisiveness, was redefined by the Court as unconstitutional discrimination based on religious viewpoint.³⁰⁷ Doing so changed not only legal doctrine, but cultural norms and social group expectations as well.

Looking next at the cultural background changes, there are three relevant points in time: (1) when the Eagles' displays were installed; (2) when *Van Orden* was decided; and (3) the post-*Summum* period. First, there was an extraordinary cultural shift in this country from the time the Eagles began distributing the Ten Commandments monuments around the country (1955) and carried out most of the campaign (during the 1960s),³⁰⁸ to the time of the *Van Orden* and *Summum* decisions.

When the Eagles embarked upon their philanthropic mission to stem juvenile delinquency, it was during the Cold War, and prior to many of the changes to the traditional family structure and social mores which have stimulated much of the current cultural conflict.³⁰⁹ Participation in both organized religion and fraternal civic organizations was at a high point, and the Eagles' efforts to create a "nonsectarian" version of the Ten Commandments reflected society's relatively newfound integration of Catholic and Jewish citizens and embrace of its shared "Judeo-Christian" faith.³¹⁰ Given that context, there is a more reasonable likelihood that viewers at these dedications associated the monuments with their local Eagles' extensive secular charitable works,³¹¹ and their well-publicized efforts to reduce juvenile crime by promulgation of a moral code—which may have been perceived at that time as inclusive and pluralistic.

But by 2005, the time of the Court's *Van Orden* decision, the social meaning of Texas's display had changed. There is a clear parallel here to scholarly observations about the resurgence of the Confederate flag based on its new social meaning as a symbol of resistance to racial equality.³¹² Similarly, commentators have noted that the more recent push to spread the Ten Commandments to public squares and government buildings, and to litigate to defend existing monuments, derives from conservative religionists' frustration over significant social changes wrought by a more liberal

³⁰⁷ See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394–97 (1993).

³⁰⁸ The Eagles campaign began with the distribution of over 7,000 prints of the Ten Commandments starting in 1951, the first monoliths were dedicated in 1955, and the last one was dedicated in 1985. See *Ten Commandments Project Impacts Lives*, <http://www.foe.com/about-us/ten-commandments.aspx> (last visited Oct. 27, 2010). The majority of the campaign, which included approximately 145 monuments, occurred through the 1960s. Sue A. Hoffman, *The Real History of the Ten Commandments Project of the Fraternal Order of Eagles*, <http://www.religioustolerance.org/hoffman01.htm> (last visited Oct. 27, 2010).

³⁰⁹ See FELDMAN, *supra* note 23, at 165–70.

³¹⁰ See *id.* (discussing the invention of the term "Judeo-Christian" in the 1950s, calling it a "creative misreading of the American past with the aim of retrospectively including Jews in the American national project," and emphasizing shared morality (citing WILL HERBERG, *PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* (1955))).

³¹¹ Fraternal Order of Eagles, <http://www.foe.com/index.aspx> (last visited Oct. 27, 2010).

³¹² Chris Springer, *The Troubled Resurgence of the Confederate Flag*, 43 *HIST. TODAY* 7 (1993).

Court, particularly the legalization of abortion and the end of school prayer.³¹³ Beginning in the 1970s and prominently by the 1980s, religious evangelicals and values conservatives became a powerful political force.³¹⁴ Deep and intense divides on polarizing social issues, particularly abortion and now gay marriage, sometimes are summarized as the “Culture Wars” or “Red States versus Blue States.”³¹⁵

With respect to any Establishment Clause claim brought against a government’s Ten Commandments monument post-*Sumnum*, the social meaning has changed again. When *Sumnum* was decided, the larger “Culture Wars” backdrop was relatively stable, but its case-specific context raised new religious discrimination charges not present in *Van Orden*. In addition to the semiotic issue created by the “government speech” label, most media accounts and legal commentary painted Pleasant Grove City’s actions as sending a message of religious discrimination, and the Court’s new government speech holding as allowing such selectivity.³¹⁶ Under these circumstances, even provisionally accepting that a Ten Commandments *monument* conveys a secular message, a city’s *acts* of defending its selective display risks being perceived as promoting the majority religion, and thus requires a clear, consistent, public explanation of the government’s secular rationale. Recently, the Tenth Circuit recognized as much, when it interpreted local political leaders’ enthused defense of a *new* Ten Commandments display as endorsement of the icon’s current social meaning of religious activism.³¹⁷ There, some of the commissioners’ statements were made during a religiously-themed community rally to support the monument in the face of an Establishment Clause lawsuit.³¹⁸

In an important, overlooked aspect of Justice Alito’s majority opinion, he expressly acknowledged this phenomenon, stating: “The ‘message’ conveyed by a

³¹³ See FELDMAN, *supra* note 23, at 243 (“Evangelicals’ perceived exclusion fuel[ed] resentment and a reactionary attempt to impose brand-new symbols, like the Ten Commandments in courthouses, where none existed before.”); see also GOLDBERG, *supra* note 25, 7–38.

³¹⁴ FELDMAN, *supra* note 23, at 188–99.

³¹⁵ See *id.* (describing the rise of Jerry Falwell’s “Moral Majority” political organization, Pat Robertson’s Christian Coalition, and religious conservatives’ influence on presidential politics, and the new concerted legal strategies). See generally, JAMES DAVIDSON HUNTER, CULTURE WARS (1991). Note that Pat Robertson founded the ACLJ legal advocacy organization, which is led by Jay Sekulow, Counsel for Pleasant Grove City in the *Sumnum* case. See Andrew Buttarro, *A Lawyer Conservatives Can Love*, TOWNHALL MAGAZINE 62 (April 2009), available at <http://www.aclj.org/media/pdf/TownhallMagazine-Sekulow.pdf>.

³¹⁶ See *supra* note 9.

³¹⁷ See *Green v. Haskell Cty. Bd. of Commr’s*, 568 F.3d 784, 801–02 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010).

³¹⁸ See *id.* (holding the new Ten Commandments monument on courthouse lawn violated Establishment Clause based in part on commissioner statements expressing a desire to fight to keep the Ten Commandments display for sectarian religious reasons); Dolan 2008, *supra* note 7, at 50–51 (briefly making similar claim in reference to the social meaning of litigating to keep monument).

monument may change over time” as society’s interpretation of history and culture evolves.³¹⁹ While Justice Alito did expound on the indeterminacy of monuments’ messages, he also attributed at least part of that indeterminacy to these temporal changes in social meaning.³²⁰ Moreover, the opinion explicitly recognized the possibility, and the reality, of discerning a shared communal meaning attached to a particular monument. He explained how the Statue of Liberty began as a symbol of international friendship, and later became commonly understood as “a beacon welcoming immigrants to a land of freedom.”³²¹ In addition, Justice Alito’s majority opinion acknowledged that government retains some control in shaping how viewers will understand a monument’s meaning, including by adding additional elements to a display.³²² To be sure, government’s ability to alter social meaning by adding additional elements to a display has been the basis for much endorsement test analysis in Establishment Clause challenges to displays.³²³

Applying this reasoning from the *Sumnum* majority opinion supports the idea that, given the cultural changes and the new judicial paradigm, a monument that once was viewed as a benevolent reminder of a shared moral code, now would be understood more commonly as a symbol of the “Culture Wars” and of attempts by the majority religion to hold on to control of religious messages in the public square.

³¹⁹ *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1136 (2009) (noting that “[a] study of war memorials found that ‘people reinterpret’ the meaning of these memorials as ‘historical interpretations’ and ‘the society around them changes.’” (quoting JAMES M. MAYO, *WAR MEMORIALS AS POLITICAL LANDSCAPE*, 8–9 (1988))); see also Dolan 2008, *supra* note 7, at 26–27, 50–51 (published prior to opinion) (citing MAYO, *supra*, and examples from the IMLA Municipal Practice Examples, to show that monuments’ meanings change over time with cultural mores, and then arguing from there that these kinds of cultural changes can run up against Establishment Clause limits on a government’s formerly noncontroversial religiously-themed monuments).

³²⁰ *Sumnum*, 129 S. Ct. at 1136.

³²¹ *Id.*; see also B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 519 & n.159 (2005) [hereinafter Hill, *Putting Religious Symbolism in Context*] (while generally asserting the difficulty of ascertaining social meaning, she posed a hypothetical of a tiny cult starting to worship an abstract sculpture in a town square; while initially not likely to be deemed “religious” within the Establishment Clause, over a period of years, “eventually a critical mass of people would agree that the symbol qualifies as religious”).

³²² See *Sumnum*, 129 S. Ct. at 1136 (noting that a government may change the message conveyed by a given monument “by the subsequent addition of other monuments in the same vicinity,” and explaining that when the government purposefully added a flag and soldier statue to the Vietnam War Memorial, “many believed [the addition] changed [the Memorial’s] overall effect”); see also Dolan 2008, *supra* note 7, at 27 (explaining how the City of Richmond, Virginia located a new statue of Arthur Ashe in line with existing statues of Confederate Generals to alter the overall message).

³²³ See *supra* Part III.

C. The Endorsement Test Remains the Best Realistic Option

1. Justice Alito & the Endorsement Test's Potential Staying Power

My proposal is grounded in—and yet independent of—retaining the endorsement test, despite its often-recognized flaws, both because it asks the right questions³²⁴ and because it is the best realistic option, given the current Court's views. As noted above, some prominent law and religion scholars predict that Justice O'Connor's endorsement test is unlikely to survive in the Roberts Court.³²⁵ The larger concern, that the Court will adopt a new nonpreferentialist approach and allow government favoritism of religion over non-religion (and perhaps even monotheism over other faith traditions), is based on the belief that Chief Justice Roberts and Justice Alito will create a new 5-4 majority for that position.³²⁶

There is reason to believe, however, that Justice Alito will not completely reject the endorsement test. Most significantly, as detailed above, endorsement-style analysis permeates his opinion for the Court in *Summum*.³²⁷ Moreover, not only did he use it as a third circuit judge,³²⁸ but Justice Alito also relied on endorsement-type analysis to determine the *content* of a speaker's message in *Morse v. Frederick*, the "Bong Hits 4 Jesus" student free speech case. There, he concurred on the assumption that the decision "goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use."³²⁹

³²⁴ See *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

³²⁵ See, e.g., Gey, *Vestiges of the Establishment Clause*, *supra* note 26, at 48. See generally GREENAWALT, *supra* note 26 (questioning survival of endorsement test after Justice O'Connor).

³²⁶ See, e.g., Gey, *Vestiges of the Establishment Clause*, *supra* note 26, at 1 (predicting that Justice Alito and Chief Justice Roberts will complete the transformation of the Establishment Clause to an "integrationist" regime, even incorporating Justice Scalia's monotheistic nation view); Terry, *supra* note 26, at 70–71 (predicting Chief Justice Roberts and Justice Alito will join Justices Scalia, Thomas, and Kennedy to create a 5-4 majority, overturn decades of Establishment Clause precedent, and institute nonpreferentialism).

³²⁷ See generally *Summum*, 129 S. Ct. 1125.

³²⁸ E.g., *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 531 (3d Cir. 2004) (where the Bible camp "Good News Club" met in after-school meeting space pursuant to an equal access policy, held that distribution of its fliers would not violate the endorsement test because a reasonable observer would know of the school district's policy to distribute a broad range of community group fliers); *ACLU v. Schundler*, 168 F.3d 92, 106 (3d Cir. 1999) (upholding a Jersey City holiday display as similar to those upheld in *Lynch* and *Allegheny*, then-Judge Alito also advocated consideration of "the general scope of Jersey City's practice regarding diverse cultural displays and celebrations" in evaluating the message conveyed to a reasonable observer by a display).

³²⁹ *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring). In addition, a number of Justice Alito's statements in his *Salazar v. Buono* concurrence illustrate contextual analysis that resonates with the endorsement test. See Mary Jean Dolan, *Salazar v. Buono: The Cross Between Endorsement and History*, 105 NW. U. L. REV. COLLOQUY 42,

While his opinions regarding religious speech are assimilationist and easily characterized as conservative,³³⁰ Justice Alito's primary concern appears to be with preserving individual rights to private religious speech as a valid mode of discourse within governmental spheres, particularly in public schools.³³¹ This emphasis, which differs from Justice Scalia's spirited defense of government endorsement of majority religion, suggests Justice Alito's concern for minorities' liberty of conscience, even if his opinions sometimes may show ambivalence regarding feelings of exclusion when majority religious expression is sponsored by the government.³³²

No one would assert at this juncture that the endorsement test is a panacea. Commentators are correct that it can be, and has been, used to defend majoritarian religious displays and to diminish legitimate minority concerns.³³³ At the same time, the test retains some value, and not only in contradistinction to the threatened alternatives. When courts start their Establishment Clause analysis by asking whether a reasonable observer would conclude that the government is promoting or endorsing religion, the question itself has valuable social meaning. The act of asking this question reaffirms the Court's adherence to an even-handed neutrality, which supports liberty of conscience.³³⁴ Optimally, identified problems of majority bias and indeterminacy would

<http://www.law.northwestern.edu/lawreview/colloquy/2010/21/LRColl2010n21Dolan.pdf> [hereinafter Dolan 2010].

³³⁰ This is most clear from Justice Alito's opinions on standing. *See* *Hein v. Freedom From Religion Found. Inc.*, 551 U.S. 587 (2007) (no taxpayer standing to sue White House faith-based office over its funding religious organizations for conferences unless Congress specifically authorized the challenged programs); *see also* *ACLU v. Twp. of Wall*, 246 F.3d 258 (3d Cir. 2001) (plaintiffs/residents lacked taxpayer standing to challenge township religious holiday display because they failed to show the township had spent any money, employee time spent was de minimus, and insufficient allegations of personal contact with modified display).

³³¹ *C.H. v. Olivia*, 226 F.3d 198, 210–12 (3d Cir. 2000) (Alito, J., dissenting). Where a school removed as inappropriate a first grader's drawing of Jesus made in response to an assignment to draw something for which each child was thankful, Judge Alito would have found a First Amendment violation: "I would hold that public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment," except that he would permit school authorities to intervene "if the expression of a particular religious viewpoint, such as one espousing racial hatred, creates a sufficient threat." *Id.* at 210, 212.

³³² One troubling sign in lower court cases is the contrast between Justice Alito's very formalistic approach to dismissing the holiday display case in *Wall*, as compared with his dissent in the *Olivia* school poster case, which the third circuit had dismissed for similarly technical procedural reasons. Put in the most favorable light, it shows that he prioritizes protecting individual speech over protecting minorities from offense caused by religious speech in the public square.

³³³ *See, e.g.*, Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. STATE L. REV. 667 (2008); *see also infra* Part V.C.2.

³³⁴ *See* EISGRUBER & SAGER, *supra* note 184 (embracing endorsement approach). *But see* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007). Professor Laycock's famous theory of "substantive neutrality" provides a unified theory of the religion

be corrected, and the endorsement test realigned with its minority-protective rationale by, for example, adopting proposals to use the reasonable non-adherent's perspective.³³⁵

Even at present, though, the endorsement test offers some minimal level of concern for religious minorities. Next, an analysis of two recent scholarly articles which offer potentially more appealing solutions underscores my proposal's practical value.

2. Professor Hill's Rebuttable Presumption & Removing Most Religious Displays

Professor Jessie Hill uses linguistic theory to critique and reject the endorsement test as irremediably indeterminate and majoritarian.³³⁶ She argues that consensus on the meaning of religious symbols is impossible because of "[t]he diversity of religious beliefs and of attitudes toward the role of religion in society."³³⁷ Professor Hill further asserts that any agreement which does exist necessarily will reflect and reinforce majority religious beliefs.³³⁸

To remedy these very real and sympathetic concerns, Hill proposes an elegant, yet ultimately unmarketable, doctrinal change: adding "a presumption against religious symbols on government property to the current endorsement test."³³⁹ While a government could rebut the presumption by showing "that the message conveyed by a given display is unequivocally secular and nonendorsing," as described by Hill, this would occur very rarely and "the vast majority" of religious displays would be unconstitutional.³⁴⁰ She is willing to tolerate overbreadth to gain certainty, and to allow for the possibility that under her proposal, courts would "hold[] unconstitutional an enormous quantity of symbolic speech that is not, in fact, endorsing religion."³⁴¹

clauses which requires that governmental acts provide neither an incentive nor a disincentive for any religious belief or non-belief and related actions. *Id.*; see also MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008).

Currently, the Court's conservative members advocate formal neutrality on government aid, *e.g.*, *Mitchell v. Helms*, 530 U.S. 793 (2000), but argue for government preference of majority religion in expressive contexts, *e.g.*, *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (Rehnquist, J., dissenting) (joined by Scalia, J. and Thomas, J.).

³³⁵ See, *e.g.*, Corbin, *Ceremonial Deism*, *supra* note 137, at 30 (using insights from Title VII sexual harassment theory to emphasize the need for an outsider perspective). Difficulties in implementation could be dealt with by adopting reliable assessment tools. See Shari Seidman Diamond & Andrew Koppleman, *Measured Endorsement*, 60 MD. L. REV. 713, 716 (2001) (proposing systematic assessment of community members' reactions to determine any message of religious endorsement).

³³⁶ Hill, *Putting Religious Symbolism in Context*, *supra* note 321, at 493.

³³⁷ *Id.* at 518–19.

³³⁸ *Id.* at 521.

³³⁹ *Id.* at 539.

³⁴⁰ *Id.* at 542.

³⁴¹ *Id.* at 543. To illustrate, she would allow the classic scenario of a museum with a religious painting, but would prohibit the menorah which was featured along with the Christmas tree in *Allegheny*. *Id.*

It is this predicted impact, however, that renders her solution illusory, at least in the Roberts Court. Even leaving aside the nonpreferentialists, Justice Breyer also likely would reject any doctrinal change which insists on removal of most religious monuments and displays.³⁴² There is a strong case for respecting the powerful emotional ties that “values” voters have for these religious displays, and for building consensus when fashioning constitutional rules.³⁴³ Removing most religious monuments would profoundly alienate a large demographic and dissipate the Court’s social capital for cultural conflicts with more substantial impact on peoples’ lives.

3. Professor Griffin’s Tolerance Theory & Adding All Religious/Philosophical Displays

In contrast, the second alternative considered here relies on additive counter-speech. Writing post-*Sumnum*, Professor Leslie Griffin advocates prohibiting religious displays in the public square unless a government will allow display of the symbols of any and all religions and philosophies, including the less common, such as the Seven Aphorisms and the Wiccan pentacle.³⁴⁴ Refusing new religious monuments while continuing to display existing ones because the older ones show “our” history is not tolerant, she argues, because it privileges traditional Protestant Christianity.³⁴⁵ This is one illustration of Professor Griffin’s comprehensive theory of the religion clauses; her proposal is rooted in a religious tolerance that extends beyond the Framers’ vision, of diversity among Christian sects, to encompass other religions and philosophies.³⁴⁶ Griffin rejects as intolerant not only the conservative historical approach, but also the endorsement test and Justice Breyer’s legal judgment test, because they have allowed religious displays where “secularized” by surrounding non-religious symbols.³⁴⁷

While I fully support Professor Griffin’s expanded religious tolerance coverage and non-originalist constitutional interpretation, this particular proposal is too impractical to solve the Establishment Clause conundrum posed by *Sumnum*. Not surprisingly, the positive example Griffin provided involved temporary holiday displays, rather than permanent monuments. The City of Mission Viejo, California first added a Muslim

³⁴² *Id.* at 501–02.

³⁴³ See, e.g., EISGRUBER & SAGER, *supra* note 184, at 157; FELDMAN, *supra* note 23, *passim*.

³⁴⁴ Griffin, *supra* note 27, at 43, 64.

³⁴⁵ *Id.* at 64.

³⁴⁶ *Id.* at 42. See generally NUSSBAUM, *supra* note 334.

³⁴⁷ Griffin, *supra* note 27, at 66–69. But see Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O’Connor*, 62 NOTRE DAME L. REV. 151, 187 (1987) (cited in *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O’Connor, J., concurring)). Professor Beschle saw Justice O’Connor’s newly-formulated endorsement test as embodying tolerance, a core principle of liberal neutrality and the proper goal of the religion clauses. Writing before much application of the test, he saw it as prohibiting clearly religious symbolism, such as the Ten Commandments, while allowing holiday displays like the one approved in *Lynch*. *Id.*

crescent alongside a crèche and menorah and, upon receiving applications from fifteen different religions, the City accepted all of them and moved its holiday display to a larger city park.³⁴⁸ While symbolic counter-speech is an effective and valuable method of altering the message conveyed by prior divisive and exclusionary public symbols,³⁴⁹ there are physical space constraints for permanent monuments, and there is no agreed-upon constitutional limiting principle for selecting among religious monuments.

As discussed extensively throughout the *Summum* litigation, a government that is required to display all private monuments—or all monuments that reflect any citizen’s religion or philosophy—will be forced to display none at all and to remove existing donated monuments. The problem is easy to demonstrate. To start, Griffin asserts that Pleasant Grove City’s rejection of Summum’s monument violates even Justice Scalia’s narrow version of nonsectarianism because the Summum religion is a form of Gnostic Christianity.³⁵⁰ As it turns out, there has been a complete overhaul of the Summum website since the Court’s decision. While formerly it emphasized the founder’s mummification of pets in his backyard pyramid, and his receiving the religion through a series of visits from extraterrestrials,³⁵¹ the website’s homepage now displays images of medieval Christian saints and highlights the worldwide use and historical pedigree of the mummification process.³⁵² This observation is not intended to disparage the Summum religion, or to convey agreement with any version of nonpreferentialism. Rather, it suggests how difficult and inappropriate it would be for courts to order that a particular religion must be permanently memorialized in a city’s public park.

Additionally, Griffin’s approach re-opens the concern over forcing governments to display divisive or offensive permanent monuments, which then makes public parks less welcoming. As explained to the Court in *Summum*, while the Tenth Circuit ruling stood, the Reverend Fred Phelps proffered an anti-homosexual “religious” monument to cities that displayed an Eagles-donated Ten Commandments monument.³⁵³ Also, rather than requesting to add a “Happy Solstice” sign to a public holiday display, it has become fairly common for atheist groups to display signs proclaiming, sometimes in harsh terms, that there is no god.³⁵⁴ Indeed, Professor Griffin’s well-regarded law

³⁴⁸ Griffin, *supra* note 27, at 71.

³⁴⁹ See, e.g., LEVINSON, *supra* note 238.

³⁵⁰ Griffin, *supra* note 27, at 63–64.

³⁵¹ See About Summum, <http://www.summum.us/about/> (last visited Oct. 30, 2008); Classes with Summum Bonum Amen Ra, The First Encounter, <http://www.summum.us/insidethepyramid/?class=FirstEncounter> (last visited Oct. 27, 2010).

³⁵² Summum, <http://www.summum.us/summum.shtml> (last visited Oct. 27, 2010).

³⁵³ See Brief for the City of Casper, Wyoming et al. as Amicus Curiae Supporting Petitioners at 1–5, *Pleasant Grove City v. Summum*, 128 S. Ct. 1737 (2007) (No. 07-665) (quoting monument as stating: “MATTHEW SHEPARD Entered Hell October 12, 1998, in Defiance of God’s Warning ‘thou shalt not lie with mankind as with womankind; it is abomination.’ [sic] Leviticus 18:22”); Chuck Oxlex, *Boise Faces Phelps Controversy*, ASSOC. PRESS, Dec. 3, 2003, available at <http://www.religionnewsblog.com/5332/boise-faces-phelps-controversy>.

³⁵⁴ See, e.g., Mallory Simon, *Missing Atheist Sign Found in Washington State*, CNN.com, <http://www.cnn.com/2008/LIVING/12/05/atheists.christmas/index.html> (Dec. 5, 2008) (last

and religion textbook shows the wide range of potential claimants if all religions' monuments must be displayed; among those judicially recognized are Satanists, who might desire to memorialize some fairly shocking ceremonies.³⁵⁵ It is this potential cacophony that led to a 9-0 decision in *Sumnum*, and which renders the appealing "more speech" solution also illusory.

In sum, given today's strident political rhetoric, and the voices on the Court claiming baldly that the government can endorse this Nation's monotheistic religions, the endorsement test—which purports to consider religious outsiders—may be the most tolerant, yet realistic, of the Court's current approaches.

D. Disclaimers and a Moratorium: The Price of Government Speech

In *Sumnum*, the Court recognized government's unequivocal right to select monuments for display on public land based on the message conveyed, and whether it is viewed by the decision-makers as consistent with that government's broad themes and values, or "identity" messages.³⁵⁶ *Sumnum* granted cities the right to accept or reject any privately-donated monument, and held that accepted and displayed donations then are exclusively "government speech."³⁵⁷ Given this characterization of all public monuments, government now has an enhanced affirmative obligation to address the reasonable perception that a monument is promoting a religious message.³⁵⁸

The proposal set forth here seeks to balance respect for tradition, and concern about the discriminatory impact of privileging historical symbols. It does so, in part, by differentiating between old and new monuments. As discussed above, the changed cultural climate supports different presumptions of government intent regarding decisions to display religious symbols. And it also takes into account that there tends to be a stronger human reaction to the physical removal of a longstanding symbol on the shared landscape, as compared to a written denial of a request to erect a new symbol. Political divisiveness concerns suggest great care in calling for court-ordered removal of public religious symbols.

1. Disclaimers

When sued under the Establishment Clause based on public displays with religious themes, governments regularly have proffered secular justifications. What I

visited Oct. 27, 2010) (story about, and photo of, a large sign posted by the Freedom From Religion Foundation, alongside a Nativity scene in a holiday display at the State of Washington Legislative Building, stating: "There are no gods. . . . Religion is but myth and superstition that hardens hearts and enslaves minds.").

³⁵⁵ LESLIE G. GRIFFIN, *LAW & RELIGION*, 24–25 (2007) (describing a number of unusual religious and philosophical claims, including a Satanic ritual involving eating human flesh, and citing *Howard v. United States* as protecting a prison inmate's right to practice Satanic rituals).

³⁵⁶ *Sumnum*, 129 S. Ct. 1125.

³⁵⁷ *Id.*

³⁵⁸ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 772–73 (1995) (O'Connor, J., concurring).

propose here, for monuments that were erected in a more homogenous time, is the minimum response to *Summum* required by the Establishment Clause: governments should be required to display large, clear disclaimers setting forth these secular justifications to all viewers.

A similar type of explanatory disclaimer already has been modeled in cases involving non-religious monuments.³⁵⁹ Not uncommonly, a government's original view of history, one espoused when erecting a monument in an earlier era, now offends people who have become full members of the political community. Modern administrations sometimes have addressed this problem by adding signs which provide historical context and conciliatory outreach, instead of destroying the monument.³⁶⁰ This practice is optional, however, because there is "no political Establishment Clause."³⁶¹

Applying the disclaimer proposal to the much-litigated, Eagles-donated Ten Commandments provides an example. Governments that claim to rely on its "secular message" to avoid Establishment Clause liability should be required to explain in some detail how the display is related to civil ideals, and to demonstrate that its display in

³⁵⁹ See Dolan 2008, *supra* note 7, at 35 & nn.160–65 (citations omitted) (describing Santa Fe's addition of a plaque mitigating use of the term "savage" in a central monument, and New Orleans's addition to the "Liberty Monument," which originally commemorated a Reconstruction Era white supremacist battle).

³⁶⁰ *Id.*

³⁶¹ See Kathleen Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government "Neutrality,"* 28 CONN. L. REV. 243, 258 (1996) ("There is no political establishment clause. . . . The Establishment Clause operates as a unique gag order on government speech and symbolism. Government itself may espouse any viewpoint a democratic majority wishes *except* a religious viewpoint.").

An interesting twist on this phenomenon occurred during the *Summum* oral argument. In response to *Summum's* counsel's proposal that, to take advantage of the government speech defense, all governments should be required to officially adopt the message of each donated monument on public land, Pleasant Grove's counsel countered with the example of a Holocaust memorial which incorporated on its face anti-Semitic Nazi propaganda. *Summum* Transcript, *supra* note 13, at 65. The City argued that this would not mean the government had adopted the Nazi messages inscribed on the monument, only the history of that era. *Id.*

Instead, the analogy demonstrates the opposite: the monument's meaning would vary depending on the specific cultural context; if there were any ambiguity, a well-meaning government would include an explanatory sign. Picture a six-foot-tall slab of granite, inscribed with ten Nazi-era sayings disparaging Jews and calling for discrimination against them. If located in a majority Jewish suburb with a plaque identifying B'nai B'rith as the donor, perhaps the benign meaning would be clear. But if located in a Christian-majority town, with few or no Jewish citizens, accompanied only by a small plaque stating, "donated by the Freemason Lodge," the social meaning would differ. Without further explanation, clearly condemning the statements inscribed and placing them in historical context, reasonable viewers would question the monument's meaning, and likely would attribute its text to the government displaying it. Similarly, as discussed here, a stone monument inscribed with "I AM the LORD thy God" and setting forth all God's commands, supplemented only by an Eagles donation plaque, is likely to suggest government agreement with the religious content of the Ten Commandments, so long as nothing on the monument suggests any alternative government message.

a public park is consistent with governments' constitutional commitments to religious liberty and tolerance.³⁶² In finding that Texas intended the secular, moral message to predominate when it displayed the Ten Commandments, Justice Breyer's controlling concurrence relied heavily on the Eagles' role as a secular organization working to combat juvenile delinquency.³⁶³ And in rejecting the Summum's Seven Aphorisms monument, while defending its existing Ten Commandments display, Pleasant Grove City relied on the Eagles' role as a secular charitable group with long-standing ties to the community.³⁶⁴ Accordingly, as a starting point, I propose that courts should require a disclaimer—sized sufficiently to be noticed and read by viewers of the monument—that is similar to the one illustrated here, and contains the following elements:

This Ten Commandments monument was donated in 1971 by the local chapter of the Fraternal Order of Eagles, a charitable organization which plays an important role in the life of this community. The donation was made in connection with FOE's nation-wide campaign to combat juvenile delinquency by reminding those who viewed these monuments of a foundational moral code shared by many.

The City continues to maintain this display in this public park for the purpose of expressing its citizens' gratitude to the Eagles for their decades of civic and charitable works, and to honor the role that the Ten Commandments has played in inspiring many to lead good lives.

The City recognizes that this diverse Nation is founded on the principle of religious liberty for all and, by maintaining this historic monument, the City does not intend to express or convey any religious message or to take any position on matters of religious doctrine. May this monument inspire all citizens and visitors to our community to reflect on their own individual sources of moral values.

An explanation along these lines would provide needed transparency and would allow governments, and courts, to walk the fine line between offending religious believers

³⁶² This proposal is different, of course, from the one proffered by Summum during the Supreme Court appeal; Summum requested an order that every government entity go through a formal legislative process to adopt the message of every single monument donated or initiated by a private person or group. My proposal relates only to the small subset of religiously-themed monuments, and requires a brief clarifying communication to the public.

Note, too, that disclaimers are not a workable solution in all contexts, including where they are not easily readable and where the content is interactive or not fixed. See Dolan 2004, *supra* note 7, at 126–27 (discussing some limitations on using disclaimers).

³⁶³ Van Orden v. Perry, 545 U.S. 677, 701–02 (2005) (Breyer, J., concurring).

³⁶⁴ Summum Reply Brief, *supra* note 123, at 9–10.

by tearing down long-cherished monuments, and offending religious minorities and non-believers by promulgating a sectarian religious creed.³⁶⁵

The more commonly provided “historical” rationale for governmental religious displays presents a more complex problem. Whether such disclaimer signs resolve or worsen Establishment Clause problems depends on both the overall physical and social/political context, and the content of the government message about that history.

As noted in the earlier discussions of *Allegheny* and *Pinette*, the overall context affects a sign’s usefulness for correcting the appearance of government endorsement of a display’s religious meaning. At one end of the spectrum is the ubiquitous example of the Supreme Court frieze, where the religious text is unreadable, and the “origins of law” message is diverse and readily apparent to viewers, so that no disclaimer is necessary. At the other end is the Ten Commandments display in *Van Orden*, with its unavoidable, large-scale religious text, and its singular placement, right next to the sidewalk that citizens traverse on their way to conduct business at the State’s Supreme Court and Legislature. Now that *Summum* has clearly labeled donated monuments as exclusively government speech, this stand-alone Ten Commandments is an unfiltered religious creed, promulgated by the State of Texas. Given the distance of the other statues on the Capitol grounds, a sign proclaiming that it represents Texas’s history and a source of its laws, while consistent with the plurality’s reasoning, would add to the Establishment Clause violation. Using the disclaimer proposed above would be an adequate remedy; using the disclaimer, and moving it to a less prominent space on the Capitol grounds is a more complete solution.

The middle ground regarding the overall context includes the increasingly common “sources of law” displays, which typically feature the Declaration of Independence, the Magna Carta, and similar Anglo-American documents. In the absence of a government actor’s religious motive, the overall context is generally defensible, and the Establishment Clause focus turns to the disclaimer’s content, and how the government explains the role of religious commands in its history. Where a sign proclaims, as a government’s purported “secular” purpose, that “The Ten Commandments provide the foundation of our legal code,” that historical explanation not only is inaccurate, but also unconstitutional.³⁶⁶

³⁶⁵ This example could be modified if specific historical contexts provide a different, plausible secular rationale. In its brief, Pleasant Grove City asserted that the Ten Commandments’ role in the Exodus story corresponded with its own local history as a Mormon pioneer town. *Summum Reply Brief*, *supra* note 123, at 1. If that was the City’s secular purpose for the display, the disclaimer sign could provide that alternative explanation.

³⁶⁶ See *McCreary County v. ACLU*, 545 U.S. 844, 971 (2005) (final sign included, “The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition;” the legislative resolution authorizing the second version of the display stated, “The Ten Commandments are ‘the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded’”). See *supra* note 184 for the academic critique. See also *ACLU v. Grayson County*, 591 F.3d 837, 849 & n.6 (6th Cir. 2010) (interpreting identical sign, the sixth circuit stated that although it may be historically untrue, that is irrelevant to determining whether county’s stated historical/educational purpose for displaying Ten

Disclaimers, of course, cannot resolve all Establishment Clause issues involving government's religious displays. In some cases, a government has intentionally promoted a specific faith or religion generally, or the government has not provided any plausible secular purpose; in such cases, a court should require removal of the challenged display. Also, the disclaimer proposal put forth here does not promise to quiet all controversy; one can imagine vociferous debate over the size, placement, and wording of the required sign. Nonetheless, it provides a preferable baseline for such arguments: a clear acknowledgement that government cannot promulgate religion based on majority preferences.

2. Additional Restrictions on New Monuments

As the country has become more diverse, with increasing numbers of citizens belonging to minority religions or none at all,³⁶⁷ erecting a new religious monument frequently will be viewed as a deliberate act to proclaim and preserve the majority religion's political power, rather than as an unintentional slight. Thus, after *Sumnum*, a different standard should apply to any government plans to display a new monument containing religious themes or symbols. Similar to the rebuttable presumption proposed by Professor Hill for all such displays,³⁶⁸ the burden of proof should be placed on the government to show that the message conveyed by the proposed monument is secular and does not endorse religion.

The simplest, most defensible example is where there is a very clear historical reason, which is tied specifically to the community or geography, such as a monument memorializing a missionary explorer, civil rights leader, or community service provider.³⁶⁹ Where a new monument is likely to appear religiously-themed to observers, an accompanying written explanation should explain its historical relevance, and some cases will require a pointed disclaimer. At the other end of the spectrum,

Commandments was a sham). In *Grayson*, the court rejected an Establishment Clause claim where a private citizen, Reverend Chester Shartzler, proposed posting the Ten Commandments in the county courthouse and suggested surrounding it with other documents to avoid upsetting "the Civil Liberties;" the county voted to approve posting of "the Historical Documents and the Ten Commandments," and allowed him to post the display, along with an "Explanation Document" that the county government had not seen. *Id.* at 841–42.

³⁶⁷ See The Pew Forum U.S. Religious Landscape Survey (Feb. 2008), available at <http://religions.pewforum.org/> (comprehensive report, including findings that barely 51% of Americans now are affiliated with a Protestant church, 16.1% are unaffiliated with any church (including atheists and agnostics), and 4.7% are affiliated with non-Christian religions (1.7% Jewish, 3% a variety of other religions)).

³⁶⁸ See *supra* Part V.C.2.

³⁶⁹ *E.g.*, Reply Brief for the Petitioners at 17, *Buono v. Salazar*, 129 S. Ct. 1313 (2009) (No. 08-472) [hereinafter *Buono Reply Brief*] (stating the statue of missionary explorer Father Marquette is a National Monument with a religious subject); see also IMLA Brief, *supra* note 3, Appendix C (listing monuments).

and not salvageable by disclaimer, would be a newly-installed towering Latin cross, or a new monolith reciting specifically religious text, in a prominent location, and sized to be read by passersby.

The next scenario to consider is where an existing religious monument continues to be maintained on public lands—assuming, for purposes of this discussion, that its impact will be modified by a new disclaimer explaining its secular purpose. Given the public presence of a majority religion's symbol, the question arises whether governments should be at least permitted (if not required, as envisioned by Professor Griffin) to install new monuments symbolizing minority religions. The selectivity and limits problems described above, however, still would arise.

Here, Professor Bruce Ledewitz's recent work on what he terms "higher law" offers a helpful perspective.³⁷⁰ While government may not endorse religion, it is free to endorse traditions of objective moral value, to promote ideals of justice and tolerance, and to reject nihilism and discrimination.³⁷¹ Professor Ledewitz's proposed standard is "whether it is plausible to view the religious language, imagery, or symbols at issue as endorsing the principle of higher law."³⁷² Similar to the disclaimer proposed here, Ledewitz would "force government officials to state, for the record, that particular instances of religious symbolism" are being used "for a deep secular purpose," and "to affirm a more universal justification for [their] use."³⁷³

Returning to the idea of a government trying to send a more inclusive message by adding countervailing monuments with minority religious themes or symbols, doing so could present real challenges. New installations of the monuments of one or two religions might re-open claims of sectarian religious discrimination; at the least, it offer new opportunities for religious divisiveness. And creating a park space where a government agreed to display any monument expressing a religious or philosophical

³⁷⁰ Ledewitz, *supra* note 280, at 93 (stating by "higher law" he means "that there is something binding on all human beings everywhere"). Increasing global interdependence, along with religious and philosophical diversity worldwide, particularly the deep divide between secular rational and religious fundamentalist worldviews, has led academics in many disciplines to work on the project of finding common references for communication between the two perspectives. See, e.g., JURGEN HABERMAS, *BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS* (2008); Michael Perry, *Human Rights as Morality, Human Rights as Law*, in *HUMAN RIGHTS RECONSIDERED* (Mark Goodale, ed., forthcoming, Oxford Univ. Press), available at <http://ssrn.com/abstract=1274728>.

³⁷¹ Ledewitz, *supra* note 280, at 95. For a different approach on this issue see Beschle, *supra* note 347, at 177–90 (stating government may influence, or attempt to influence, its citizens' beliefs and values, but only as relates to the temporal welfare).

³⁷² Ledewitz, *supra* note 280, at 98.

³⁷³ *Id.* at 102. Consistent with the "social meaning" discussion above in Part V.B, Ledewitz asserts that this statement of deep secular purpose "becomes self-authenticating: . . . by forcing government officials to affirm a more universal justification for its use, the Court would be creating the broad community of believers and nonbelievers to which the justification refers." Ledewitz, *supra* note 280, at 102.

message, proposed by any group or organization, risks creating a public forum for religious speech—the very opposite of *Summum*'s practical result.

Where a religiously-themed monument from an earlier era remains on public land (now accompanied by a clear explanatory sign), one reasonable option for including other faiths may be to create a single new monument with a more universal theme. A monument fashioned to express a widely-shared ideal—such as peace, tolerance, or religious liberty—could include the symbols and images of a diverse range of faith traditions and moral philosophies. Where the majority religion's symbol was preserved, doing this would show respect for minority religions and would provide the necessary balance, while still avoiding cacophony.

This proposal should satisfy the religion clauses because any religious symbol used would be displayed as one among many, and the message expressed would be an explicit community ideal that is independent of, though likely consistent with, religious beliefs. Depending on the statue's degree of religiosity, it, too, may require a sign explaining the governmental purpose and disclaiming governmental endorsement of religion. Such communications would clarify that government's role is provider of religious liberty, and not arbiter of religious truth claims. While there are no easy answers, these practical proposals provide a means for both sides in these ongoing religious disputes to have some voice, some presence, in the public square.

3. Application to the *Salazar v. Buono* Story

*Salazar v. Buono*³⁷⁴ presents the converse of *Summum*: the government has tried to cure an Establishment Clause violation by privatizing ownership of the public land underlying the Veterans of Foreign Wars (VFW) cross memorial.³⁷⁵ The end of this Article is not the place to analyze the recent *Buono* decision or explore fully *Summum*'s application to the ongoing saga, but briefly applying my proposal to a simplified version of the story provides a useful illustration.

In 1934, the local VFW post erected a large Christian cross as a war memorial on Sunrise Rock, located on federal land in what is now the Mojave Desert National Preserve.³⁷⁶ After the National Park Service (NPS) denied a request to erect a Buddhist stupa nearby because such installations violate federal law, Frank Buono sued, alleging that the cross on federal land violated the Establishment Clause.³⁷⁷ In January 2002, while Buono's suit was pending, Congress designated the Cross as a National Memorial commemorating United States participation in WWI.³⁷⁸ Several years earlier, NPS

³⁷⁴ 130 S. Ct. 1803 (2010) (5-4) (six opinions).

³⁷⁵ For an interesting exploration of the "interrelationship between private-law arrangements and public-law obligations" posed by the two cases, see Tebbe, *supra* note 14.

³⁷⁶ Brief of Respondent at 9, *Salazar v. Buono*, 129 S. Ct. 1313 (2009) (No. 08-472) [hereinafter *Buono* Respondent Brief].

³⁷⁷ *Id.* at 2-3.

³⁷⁸ *Id.*

had concluded that the Cross, which had been replaced over the years and was used for Easter services, did not satisfy criteria for the National Register of Historic Places.³⁷⁹

After the district court held the Cross display unconstitutional, and while an appeal was pending, Congress passed a law ordering transfer of the underlying property to the VFW.³⁸⁰ The transfer was in exchange for a parcel owned by the private citizens who maintained the cross to help their deceased friend, one of the original WWI veterans involved.³⁸¹ The transfer statute contains a reversionary clause that requires the VFW to continue using the land as a war memorial. The government maintained, and the Supreme Court assumed, that the VFW may remove the Cross and replace it with another kind of war memorial without triggering a reversion.³⁸²

The Cross is visible primarily to those driving on nearby Cima Road. At oral argument, then-Solicitor General Kagan asserted that NPS plans to erect a sign explaining that the Cross is a war memorial, “that it was put up by the VFW, that it is maintained and owned by the VFW,” and that the land on which it sits is now owned by the VFW.³⁸³ This larger sign is in addition to a replacement plaque on the Cross, and would be posted on federal land facing the road.³⁸⁴ This proposal triggered Chief Justice Roberts to complain that this would be requiring “special warning signs” discriminating against only “religious property.”³⁸⁵

Applying my conclusions from *Summum*, *Buono* presents another situation where the social meaning of a longstanding religious display has changed over time; a clear disclaimer is required to satisfy Establishment Clause principles; and where the new religious symbolism—the “National Memorial” designation—should be subject to a rebuttable presumption of unconstitutionality.

Like the Eagles-donated Ten Commandments, the Cross at Sunrise Rock has a historical origin that is far removed from its more controversial present-day significance. The VFW amicus brief tells the moving story of a group of World War I veterans, who moved to the desert based on physicians’ orders, seeking solace and healing from the “shell shock” of that brutal war.³⁸⁶ The VFW brief explained, and the

³⁷⁹ *Buono*, 130 S. Ct. at 1812–13.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Buono* Reply Brief, *supra* note 369, at 20. *Buono*, 130 S. Ct. at 1823 (Alito, J., concurring in the judgment) (“Congress did not prevent the VFW from supplementing the existing monument or replacing it with a war memorial of a different design.”); *id.* at 1826 (Scalia, J., concurring in the judgment); *id.* at 1837 (Stevens, J., dissenting).

³⁸³ *Buono* Transcript, *supra* note 32, at 23.

³⁸⁴ *Id.* at 24.

³⁸⁵ *Id.* at 21–22. (“Well, isn’t that an interference or it’s singling out someone, [a] private property owner, who’s using his property in a particular way, a religious way? You are going to be putting up signs only for people putting up religious symbols. . . . [I]t would be only religious property that would have these special warning signs.”).

³⁸⁶ Brief for Veterans of Foreign Wars of the United States et al. as Amici Curiae Supporting Petitioners at 15, *Salazar v. Buono*, 129 S. Ct. 1313 (2009) (No. 08-472).

Supreme Court's opinion emphasized, that in 1934, a lone Christian cross was commonly used, and easily recognized, as the symbol memorializing the many soldiers who sacrificed their lives in that War.³⁸⁷ In that particular era, despite the significant participation of soldiers of other faiths,³⁸⁸ it may well be that the primary social meaning of the Sunrise Rock Cross was as a tribute to the many lives lost in that war.

At the time Frank Buono sued in federal court, however, the cultural significance of a large cross, strikingly displayed on federal land and used annually for religious services, had changed dramatically. Equally as poignant as the VFW's story is the amicus brief filed by American Muslim veterans associations.³⁸⁹ It describes their perception of the Christian cross as a sectarian religious symbol that cannot serve as a memorial to non-Christian soldiers because to them, it communicates that only those who believe in the divinity of Jesus will have eternal life.³⁹⁰

Applying *Summum* to the Cross's placement is not as simple as equating land ownership with speaker identity because in *Summum*, when the Court stated that viewers attribute any message communicated by a monument to the landowner, it relied on the land's observable status as a public park, linked with the city's identity.³⁹¹ In *Buono*, there are no plans to demarcate the small transferred parcel, so without any additional signage, viewers are just as likely to attribute the monument to the federal government.³⁹² Moreover, the government's reversionary interest means, minimally, that it maintains some control over the messages conveyed by the Cross. While a Cross monument on VFW land would not be "government speech" under *Summum*, neither is it unambiguously private speech that clearly puts an end to the appearance of government endorsement of Christianity. And so even in this situation the minimum Establishment Clause requirement should be a disclaimer sign, visible to observers driving by, on which the government would explain: the Cross's purpose as a war memorial, its VFW ownership, and its historical roots as the symbol for honoring

³⁸⁷ *Id.*

³⁸⁸ See Buono Respondent Brief, *supra* note 376, at 40 n.26 (estimating that approximately 250,000 Jewish soldiers served in the United States armed forces in WWI).

³⁸⁹ Brief for American Muslim Armed Forces & Veterans Affairs Counsel et al. as Amici Curiae Supporting Respondent at 9–13, *Salazar v. Buono*, 129 S. Ct. 1313 (2009) (No. 08-472).

³⁹⁰ See *id.* at 12 ("According to the central Christian claim that is symbolized by the cross, Muslim soldiers, and other non-Christians, outside the saving grace of the cross, will be eternally damned. . . . The threat of the cross is inseparable from the use of the cross to honor the Christian dead. The cross is an appropriate symbol for Christian dead because it promises resurrection and eternal life. But that promise is only to some, and it is paired with a threat of condemnation to all others." (quoting John 3:18 (King James))).

³⁹¹ See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009) (discussed *supra* Part II.D).

³⁹² See Brief of Petitioner at 51–52, *Salazar v. Buono*, 129 S. Ct. 1313 (2009) (No. 08-472) (citing *Freedom From Religion Found. v. City of Marshfield*, 203 F.3d 87 (7th Cir. 2000) (upholding transfer of park parcel underlying religious monument as an Establishment Clause cure where marked off by a fence and private ownership was explained by a disclaimer sign)).

WWI fallen soldiers. This proposal is consistent with, but more extensive than, Justice Kennedy's suggestion to the district court that, if deemed necessary to end the appearance of government endorsement of religion, on remand the court should consider requiring signs to indicate VFW ownership.³⁹³ A disclaimer sign should be not only welcomed, but required by the Court, for it would balance respect for military sacrifice, and consideration of soldiers who feel excluded by such a memorial.

Turning to Congress's designation of the Cross as a National Memorial, that action is a form of government identity speech.³⁹⁴ Like the Ecuador government's intentional acts to re-frame their national identity to integrate indigenous peoples,³⁹⁵ naming the Cross as a WWI National Memorial is a declaration of the United States' national identity.

Under the approach presented in this Article, the government bears the burden of proving that any *new* government speech involving a religious symbol or theme has a primarily secular message. Here, the federal government would be charged with showing that the purpose, and common understanding, of this January 2002 designation was to honor those who died in service, and not to make a sectarian statement. Weighing against rebuttal, however, is that the designation appears extraneous to the goal of preserving the Cross as a war memorial. Congress previously had acted to prevent the use of government funds to remove the monument, so there was no immediate risk, and the land transfer is a more typical way to preserve a historical religious symbol than is proclaiming it a government symbol.³⁹⁶ Determining the constitutionality of this government identity speech, however, requires in-depth contextual analysis which is beyond the scope of this Article.³⁹⁷

Whatever the final outcome for the cross war memorial, its symbolic impact is heightened by the country's ongoing wars and the military's current sacrifices. This calls for special deference to war memorials, and also special concern for veterans

³⁹³ *Buono*, 130 S. Ct. at 1820 (plurality opinion).

³⁹⁴ For another article that identifies the National Memorial designation as government speech, and discusses whether government endorsement issues would persist post-land transfer, see Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, TUL. L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1616167> (comprehensive analysis of government speech issue proposing an "effective control" theory).

³⁹⁵ See *supra* Part V.B.

³⁹⁶ For discussion purposes, this Article assumes away the procedural irregularities; transferring ownership of the real property on which a public religious monument is situated sometimes is the best resolution of an Establishment Clause issue. See Jordan C. Budd, *Cross Purposes: Remediating the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 229 (2004) (Professor Budd, following a decade as Legal Director of the ACLU-San Diego, wrote: "If, however, the relocation of a religious symbol cannot be accomplished without significantly diminishing its communicative effect, other neutral concerns are then in play—most importantly, government's interest in promoting religious tolerance through the respectful treatment of the icons of private faith.").

³⁹⁷ For additional analysis of *Salazar v. Buono*, see Dolan 2010, *supra* note 329.

who feel excluded by the Cross memorial. Thus, as in *Allegheny*, a sign indicating ownership by the VFW is insufficient. In the event that the cross is displayed and its National Memorial status continues, then the government's posted sign, as well as all the government's written and online descriptions regarding this war memorial, must explain to all that the designation was based on WWI historical symbolism and should expressly affirm that the government honors the sacrifices made by all of its soldiers, of all religions and none.

CONCLUSION

When the government has some role in a display with religious meaning, it is constitutionally obligated to explain its secular message to viewers in a clear, visible, and wholly transparent manner. The message must be plausible, and not one that endorses a religious creed as governmental identity speech. That transparency and neutrality are particularly essential in core government speech, where the government sets out to express its own message, but also remains critical in government endorsement contexts, where its stance toward private speech raises Establishment Clause concerns of favoritism.

Explanations of historical bases, and clear disclaimers stating the government's broad-based religious neutrality, will not be sufficient in many contexts, but they are a reasonable, workable solution for monuments. So non-burdensome, in fact, that resistance to the idea suggests that behind the unwillingness to *express* government neutrality on religion lies the belief that government should not *be* neutral. Whether framed in the strict originalist terms of nonsectarian Christianity—or expanded to encompass Judeo-Christianity, the Abrahamic religions, or even theism—the real danger now for religious liberty in the United States is governmental nonpreferentialism. Beginning judicial analysis with some form of the endorsement test, and requiring a transparent statement of secular reasons where religious symbols are used, may not satisfy either side in these disputes, but is far better than the threatened alternative: relinquishing even the appearance of neutrality.

