Pleasant Grove City v. Summum: The Supreme Court Finds a Public Display of the Ten Commandments to Be Permissible Government Speech

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I. Introduction

In *Pleasant Grove City v. Summum,* the Supreme Court reversed a Tenth Circuit Court of Appeals decision to grant an obscure religious sect's request to display a permanent religious monument in a city park that contained other privately donated monuments, including a Ten Commandments monument.[1] In granting the request, the Tenth Circuit found that the city had engaged in viewpoint discrimination by refusing to include the proffered monument in its park.[2]

For the Supreme Court, this case presented several important issues and challenges. As Justice Samuel Alito wrote in his opinion for the Court: ''No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park.''[3] If the Tenth Circuit ruling were upheld, municipal governments would lose practically all ability to shape and design their public spaces to reflect local tastes, values, and culture.

This case was also the first opportunity for the Supreme Court to address the relatively new government speech doctrine in a context that did not involve public funding. The Court's previous government speech decisions had involved publicly funded programs seeking to promote a specific governmental policy through private speakers, or

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[1] Pleasant Grove City v. Summum, 555 U.S. _____, 129 S. Ct. 1125 (2009).

[2] Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007).

[3] Summum, 129 S. Ct. at 1131.

programs involving discretionary decisionmaking in the areas of arts-funding or state-owned broadcasting.[4]

By ruling that, for free speech purposes, public parks constitute traditional public forums irrespective of the particular means of communication sought (e.g., permanent monuments versus public gatherings or leaflet distributions), the Tenth Circuit undercut the city's authority to determine what monuments it could place in public parks. Municipalities would thus have an all-or-nothing choice: they had to prohibit all monuments or permit all monuments unconditionally. As a practical matter, this is not a choice. No government would be so careless as to open a public park to any monument knowing that it would have no subsequent ability to deny any other monument.

Finally, even though no Establishment Clause issue was involved in the litigation or ruled on by the Court, the case does present various Establishment Clause implications for future cases. Indeed, these implications may well turn out to have the most significant impact on *Summum*'s legacy.

After describing in Part II the factual and procedural background of the case, this article in Part III will examine the Supreme Court opinion in *Summum.* While the Court's decision rested solely on the government speech doctrine and the Free Speech Clause, Part IV analyzes the implicit Establishment Clause issues the decision did not resolve. This analysis will include a discussion of how the endorsement test might apply to similar factual settings. It will also examine in depth how the nonpreferentialism model of the Establishment Clause might be violated by a monument refusal of the kind that occurred in *Summum.*

II. Background

A. Facts of the Case

In 1971, the city of Pleasant Grove, Utah, accepted a Ten Commandments monument from the local Fraternal Order of Eagles to

[4] See Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553–57, 562, 564–67 (2005) (finding that a government-sponsored beef advertising campaign funded by a beef producers' tax was government speech, since the message of the ads was effectively controlled by the federal government, and not unconstitutionally compelled speech); Rust v. Sullivan, 500 U.S. 173, 177–78, 203 (1991) (allowing government promotion of pro-life policy through selective funding of family planning clinics); Nat'l Endowment of the Arts v. Finley, 524 U.S. 569, 572–73 (1998) (involving decency guidelines on public arts funding decisions); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998) (involving public broadcasting decisions on programming).

be displayed in Pioneer Park, a 2.5 acre public park containing some 15 permanent historical displays, most of which were donated by private individuals or groups. In 2003, Summum, a religious organization founded in 1975 and headquartered in Salt Lake City, requested permission to erect a monument of its Seven Aphorisms in Pioneer Park, to be similar in size and appearance to the Ten Commandments monument.[5] The mayor of Pleasant Grove denied that request, stating that all permanent displays in Pioneer Park had to either ''directly relate to the history of Pleasant Grove or be donated by groups with longstanding ties to the Pleasant Grove community.''[6] Even though Summum met neither of these requirements, it made a second request in 2005 to erect its monument in Pioneer Park. After this request was denied, Summum filed suit in Federal District Court, claiming that the city's refusal to accept the proposed Seven Aphorisms monument, while simultaneously displaying the privately donated Ten Commandments monument, amounted to viewpoint discrimination in violation of the Free Speech Clause of the First Amendment.[7]

B. The Tenth Circuit Decision

The Tenth Circuit Court of Appeals ruled in favor of Summum and ordered Pleasant Grove to display the Seven Aphorisms monument in Pioneer Park.[8] This holding rested on the finding that the Ten Commandments monument already on display in the park constituted the private speech of the Fraternal Order of Eagles rather than government speech.[9] This finding was important because government speech is generally immune from First Amendment mandates. The government, after all, can engage in its own expressive

[5] The Seven Aphorisms form the central beliefs of the Summum religion. According to Summum belief, the Seven Aphorisms were set out on the original tablets given to Moses by God on Mount Sinai. But Moses, believing the Israelites unprepared to receive the Aphorisms, revealed them to only a select group of people. He then destroyed the tablets on which the Aphorisms were inscribed and returned to Mount Sinai, where he acquired a second set of tablets containing the Ten Commandments. Brief for the Respondent at ¶ 1, Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (No. 07-665), 2008 WL 3851624, at *1–2.

[6] Summum, 483 F.3d at 1047 (internal quotation marks and citation omitted).

[7] *Id.*

[8] Summum, 483 F.3d at 1057.

[9] *Id.* at 1047.

conduct, free from any content-neutrality requirements.[10] Only after the speech at issue—the Ten Commandments monument—is found to be private speech can a court then engage in a forum analysis to see if the government can exclude the proposed speech—the Seven Aphorisms monument—from the forum.[11]

Finding that Pioneer Park was a traditional public forum with respect to every kind of speech activity, the Tenth Circuit found that all speech activities within the park, including the placement of permanent monuments, had to be treated with the same kind of content-neutral consideration.[12] The Tenth Circuit reached this decision, concluding that the monuments within the park were a traditional public forum themselves, because that forum (or expressive use) was located inside a city park—which the Supreme Court had previously characterized as a traditional public forum.[13] Because the city of Pleasant Grove had created a public forum for permanent monuments, any content-based decision on the installation of future permanent monuments was thus subject to strict scrutiny.[14] The court also concluded that the reasons underlying the city's refusal of the Seven Aphorisms monument—namely, that the monument had no local historical significance and that Summum had no longstanding ties to the city—amounted to viewpoint discrimination and could not survive a strict scrutiny review.[15]

In dissent, Judge Michael McConnell disagreed with the court's holding that the donated monuments within Pioneer Park constituted the private speech of their donors.[16] According to McConnell,

[10] See Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (stating that the government is free to ''speak for itself''); Rust v. Sullivan, 500 U.S. 173, 194 (1991) (stating that government is free to select the views it wishes to express).

[11] See Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797 (1985).

[12] Summum, 483 F.3d at 1050–52. In conducting its forum analysis, the Tenth Circuit considered both the government property at issue and the type of access sought, and in doing so found the permanent monuments in the park to be the relevant forum. *Id.* at 1050.

[13] See Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) (designating public streets and parks as traditional public forums). A traditional public forum is open to all speech activities. See Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 667 (1998).

[14] Summum, 483 F.3d at 1050.

[15] *Id.* at 1054.

[16] Summum v. Pleasant Grove City, 499 F.3d 1170, 1177 (10th Cir. 2007) (McConnell, J., dissenting) (dissenting from the Tenth Circuit's denial of the city's petition for a rehearing en banc).

the monuments were government speech, and so there was no need for any forum analysis because government speech is generally not subject to Free Speech Clause restrictions.[17] McConnell argued that once a city accepted a donated monument and displayed it on public land, the monument became government speech.[18] Thus, no forum was created because the city did not ''invite private citizens to erect monuments of their own choosing in these parks.''[19] In a separate dissent, Judge Carlos Lucero argued that Pioneer Park did not qualify as a traditional public forum for the purpose of displaying permanent monuments.[20]

III. The Supreme Court Opinion

The issue before the Supreme Court was whether the First Amendment's Free Speech Clause entitled a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments had been previously erected.[21] In answering this question in the negative, the Court essentially agreed with Judge McConnell's dissent and held that the Pioneer Park display of permanent monuments constituted government speech, to which forum analysis does not apply to prohibit content-based decisions.[22]

The specific claim asserted by respondent Summum was that the city of Pleasant Grove had violated the Free Speech Clause by displaying the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument, thereby engaging in an impermissible viewpoint discrimination between the two religious symbols.[23] In addressing this claim, the Supreme Court first examined the issue of

[17] *Id.* (stating that even though the monuments had been donated by private donors, the government had adopted the message of the monuments).

[18] *Id.* at 1175.

[19] *Id.*

[20] *Id.* at 1171, (Lucero, J., dissenting) (dissenting from the Tenth Circuit's denial of the City's petition for a rehearing en banc).

[21] Summum, 129 S. Ct. at 1129 (2009).

[22] *Id.*

[23] *Id.* at 1130. Viewpoint discrimination occurs when the government discriminates against the ideology of the message. See e.g., Boos v. Berry, 485 U.S. 312, 317 (1988). When such content-based regulation occurs, it is subject to strict scrutiny. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45–46 (1983). In recent years, the rule against viewpoint discrimination has been of great value to speakers of religious messages. See, e.g., Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001).

whether the Ten Commandments monument constituted private or government speech. The question was whether, by previously permitting privately donated monuments to be erected in Pioneer Park, the city was engaging in its own expressive conduct or whether it was simply providing a forum for private speech. If the city was engaging in its own expressive conduct—thus rendering the Ten Commandments monument a form of government speech—then the Free Speech Clause had no application. As Justice Alito wrote for the Court: ''The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.''[24]

In analyzing this issue—whether a permanent monument constituted government or private speech—the Court did not engage in a merely formalistic inquiry. The fact that a monument was designed and donated by a private group did not thus, by itself, determine the issue. According to the Court, ''A government entity may exercise the same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.''[25] Determining whether, through the display of privately donated permanent monuments, a government entity is speaking on its own behalf or is providing a forum for private speech was not a difficult one for the Court. There was no disagreement on this point.[26] As Justice Alito noted, permanent monuments displayed on public property have typically represented government speech and, indeed, ''governments have long used monuments to speak to the public.''[27] The opinion made no distinction between government-commissioned monuments and privately financed monuments that the government accepts and displays on public land. In either case, the monument becomes government speech once it is erected on public property.

After citing a number of famous monuments that have been privately financed and then donated for display on public property—

[24] Summum, 129 S. Ct. at 1131 (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring)).

[25] *Id.* at 1131.

[26] Justice Alito wrote that there ''may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation.'' *Id.* at 1132.

[27] *Id.* at 1132–33 (discussing the historical use of monuments by an array of governmental entities).

the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial—Justice Alito concluded that the traditional practice has been one of ''selective receptivity'' by the accepting governmental entity, reflecting a specific government endorsement or expression of a particular message to be conveyed by the particular monument.[28] Pursuant to this traditional practice, government entities have been highly discriminating in their choices of which monuments to accept for public display.[29] This selectivity occurs because public parks, and the monuments within those parks, play an important role in defining a city's identity that is projected to the outside world. In *Summum*, this desire to project a particular image greatly influenced the city's choice of monuments: ''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.''[30]

The Court dismissed the argument that the Ten Commandments monument was not government speech. Although the city had not participated in designing the monument or composing its text, by adopting or embracing the monument, the city effectively made that message its own.[31] Indeed, after the monument has been adopted or embraced by a governmental entity, that entity possesses sole control over the expressive nature of the monument.[32] Despite not

[28] *Id.* at 1133 (stating that a ''great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties'').

[29] *Id.* (recognizing that all across the country, ''municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals'' (internal quotation omitted)).

[30] *Id.* at 1134.

[31] *Id.* at 1135. In People for the Ethical Treatment of Animals, Inc. v. Gittens, the Court found government speech where the government worked with private sources to create a display of public art. 414 F.3d 23 (D.C. Cir. 2005). In *Gittens,* the city sponsored a temporary sidewalk sculpture display of 100 donkeys and 100 elephants, entitled ''Party Animals.'' *Id.* at 25. The court found that the displayed sculptures were government speech, because the city officials had retained the right to approve designs and reject any entries they considered inappropriate. *Id.* at 29–30.

[32] The Court rejected respondent's claim that the city had to go through a formal legislative-type process of adopting a particular message to be conveyed by the privately donated monument. 129 S. Ct. at 1134 (stating that requiring such statements of formal adoption ''would be a pointless exercise that the Constitution does not mandate'').

having any involvement in the original design of the donated monuments, the government's editorial control over them is ongoing and continual, extending over generations.

Justice Alito disagreed that a monument can convey only one ''message''—namely, that intended by the original donor of that monument—and hence that only the donor could control the message of the monument. Once the monument has been adopted and displayed on public property, the message conveyed by that monument can change over time.[33] As an example of how messages conveyed by monuments may change over time, Justice Alito cited the history of the Vietnam Veterans Memorial in Washington, D.C. and found that, particularly with respect to war memorials, ''people reinterpret the meaning of these memorials as historical interpretations and the society around them changes.''[34]

Although he concluded that the Ten Commandments monument in Pioneer Park constituted government speech, Justice Alito nonetheless conducted a sort of public forum analysis—if only to show that the public forum doctrine didn't apply here. According to the Tenth Circuit, the installation of permanent monuments in a public park was similar to the delivery of speeches or the holding of demonstrations in such parks, and thus subject to all the requirements pertaining to governmental regulation of speech in a traditional public forum.

As Justice Alito explained, however, the public forum doctrine has been applied only ''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.''[35] Unlike the situation with

[33] Summum, 129 S. Ct. at 1136 (''By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator.''). Moreover, by recognizing that the meaning given by a city to a donated monument may differ from the meaning intended by the donor, Justice Alito gave some Establishment Clause breathing room to cities that accept a monument from a private group that espouses strong religious meanings regarding its donated monument.

[34] *Id.* (internal quotation marks and citation omitted).

[35] *Id.* at 1137 (stating that a public park ''can accommodate many speakers and, over time, many parades and demonstrations''). For this rule, the Court cited *Cornelius v. NAACP Legal Def. & Educ. Fund,* where the federal campaign program at issue permitted hundreds of groups to solicit donations from federal employees. 473 U.S. 788, 804–05 (1985). The Court also cited *Rosenberger v. Rector & Visitors of the Univ. of Va.,* where a public university's student activity fund provided money for many

individual speakers and literature distributors, public parks can accommodate only a limited number of permanent monuments; whereas temporary speech may last only hours or perhaps days, permanent speech—such as a monument—most likely lasts for the life of the forum. The Court stated that, ''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.''[36] Moreover, any finding that the placement of permanent monuments in public parks constituted a public forum would inevitably lead to a closing of that forum, because if government entities had to maintain viewpoint neutrality in their selection of donated monuments, they would either have to ''brace themselves for an influx of clutter or face the pressure to remove longstanding and cherished monuments.''[37]

In *Summum,* the Court unanimously agreed that the donated monuments displayed in Pioneer Park constituted government speech. Even Justice John Paul Stevens, a critic of the Court's previous government speech decisions, had no objections on this issue.[38] In previous cases, the Court had articulated two factors that needed to be present for the government speech doctrine to apply: the government had to control the message[39] and there had to be political accountability regarding the speech.[40] For this accountability to exist, there must be

campus activities, and *Widmar v. Vincent,* where a public university's buildings provided meeting space for hundreds of student groups. Rosenberger, 515 U.S. 819, 825 (1995); Widmar, 454 U.S. 263, 274–75 (1981).

[36] Summum, 129 S. Ct. at 1137.

[37] *Id.* at 1138 (internal quotation marks and citation omitted) (''The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations.''). The Tenth Circuit, on the other hand, by holding that a city's display of privately donated monuments in a public park creates a public forum for such monuments, effectively ruled that the acceptance of a single donated monument at any time wiped away a city's ability to control its permanent landmarks. Summum v. Pleasant Grove City, 483 F.3d 1044, 1050–52 (10th Cir. 2007).

[38] See Summum, 129 S. Ct. at 1139 (Stevens, J., concurring) (''To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.'').

[39] See Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560, 562 (2005) (finding that government speech can occur even when the text is composed by private persons).

[40] See Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (''When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political

transparency regarding the source of the speech—that is, citizens must be aware that the government is the entity responsible for the speech.

The political accountability factor has previously been the source of much criticism surrounding the government speech doctrine. For instance, as Justice David Souter stated in his *Johanns* dissent, few Americans would be aware that the government was actually sponsoring advertisements that carried the tagline ''Funded by America's Beef Processors.''[41] Donated monuments on display in public parks have no such accountability problem, however, because their sponsor's identity is completely obvious and transparent. As a result, none of the justices in *Summum* found a political accountability problem in connection with the monuments displayed in Pioneer Park.[42]

Aside from the political accountability factor, the object of some previous criticism concerning the government speech doctrine involved the risk of government control of, or interference with, the private speech market.[43] But, as Justice Stevens recognized in his concurrence in *Summum,* there is little risk that governmental displays of donated monuments on public lands will eliminate or crowd out other private speech on those lands.[44] Indeed, because Pioneer Park is so large and the permanent monuments occupy such a relatively small amount of space, there is ample opportunity for other speech activities in the park. Even with the presence of the Ten Commandments monument and without a monument of its own, Summum still retained the opportunity to disseminate its message in the park through such traditional public forum speech activities as organized gatherings and literature distribution.

process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.'').

[41] Johanns, 544 U.S. at 577 (Souter, J., dissenting) (referring to ads that stated: ''Beef. It's What's For Dinner'').

[42] See Summum, 129 S. Ct. at 1139 (Stevens, J., concurring) (stating that the city would not ''be able to avoid political accountability for the views that it endorses or expresses through'' its monuments).

[43] The decision in *Rust v. Sullivan,* for instance, sparked ''sharply critical academic commentary.'' Robert Post, Subsidized Speech, 106 Yale L.J. 151, 168 (1996). See Rust v. Sullivan, 500 U.S. 173, 177–80 (1991) (upholding a law limiting federal funding to those family planning clinics where medical personnel agreed not to discuss the abortion option with their patients).

[44] See Summum, 129 S. Ct. at 1139 (Stevens, J., concurring) (''[O]ur decision in this case excuses no retaliation for, or coercion of, private speech.'').

IV. Establishment Clause Implications

A. Concerns Raised by the Concurring Opinions

The only issue argued by the parties before the Court in *Summum* involved the First Amendment's Free Speech Clause and whether it required the city to place the Seven Aphorisms monument in Pioneer Park. The plaintiffs made no claims based on the Establishment Clause.[45] Consequently, the Court did not address possible Establishment Clause violations. The Court did recognize, however, that the Establishment Clause could have some bearing on similar types of factual settings. For instance, even though Justice Alito found that the Free Speech Clause has no application to government speech, he acknowledged that ''government speech must comport with the Establishment Clause.''[46]

Curiously, in reviewing a history of public monuments for the purpose of determining whether the Pioneer Park monuments constituted government speech, the Court cited only secular monuments. The Court stated that such monuments ''commonly play an important role in defining the identity that a city projects to its own residents and to the outside world.''[47] This finding was, of course, important for the purpose of concluding that such monuments constitute government speech.

But what if the image or identity that a city wishes to convey relates to a particular religious faith or denomination? Even though the government speech doctrine permits a city to express a message, identity, or image to the public, the Establishment Clause may well act to carve out an exception to that rule: namely, that the city cannot convey a message constituting an endorsement of religion.

Although no Establishment Clause claim was before the Court here, Justice Antonin Scalia recognized in his concurrence that the issue had been lurking in the shadows since the case's onset.[48] Justice

[45] This may have been because of a belief that the Court's decision in Van Orden v. Perry, 545 U.S. 677 (2005), had foreclosed any such claims.

[46] Summum, 129 S. Ct. at 1132.

[47] *Id.* at 1134 (stating that such monuments ''are meant to convey and have the effect of conveying a government message'').

[48] See 129 S. Ct. at 1139 (Scalia, J., concurring) (''It is also obvious that from the start, the case has been litigated in the shadow of the First Amendment's Establishment Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called wall of separation between church and state; respondent exploiting that hesitation to argue

Souter's concurring opinion similarly recognized that even though ''Establishment Clause issues have been neither raised nor briefed before us, there is no doubt that this case and its government speech claim has been litigated by the parties with one eye on the Establishment Clause.''[49]

According to Scalia, any *Summum*-related Establishment Clause issue had already been settled in *Van Orden v. Perry*, where the Court dismissed a challenge to a Ten Commandments monument displayed on the Texas State Capitol grounds that was virtually identical to the monument displayed in Pioneer Park.[50] But the issue in *Van Orden* was whether the mere display of a particular Ten Commandments monument violated the Establishment Clause. *Summum*, on the other hand, implicated a slightly different issue: whether by displaying such a monument it then had to display monuments offered by other religious groups. An argument could be made that the Establishment Clause forbids any governmental preference for one religious sect over another, and that such favoritism was evident in Pleasant Grove's refusal to display the Seven Aphorisms while continuing to display the Ten Commandments.

A related Establishment Clause issue involves the distinction between temporary monuments or displays and permanent ones.[51]

that the monument is not government speech because the city has not sufficiently adopted its message.'' (internal quotation marks and citation omitted)).

[49] *Id.* at 1141 (Souter, J., concurring).

[50] 545 U.S. 677 (2005). But this ruling also rested on the plurality's finding that the Ten Commandments ''have an undeniable historical meaning,'' and thus a secular meaning, in addition to their ''religious significance.'' *Id.* at 678, 690. Of course, one way to avoid any Establishment Clause issues with publicly displayed monuments such as the Ten Commandments is for courts to find that such monuments carry secular messages or meanings, and to focus only on those meanings and messages rather than on any religious meaning or message. This was the approach offered by Justice Scalia during oral arguments in *Summum.* He argued that a city could erect a Ten Commandments monument not for the purpose of endorsing any religious message but just for the purpose of conveying a more limited message that the Ten Commandments is ''worthy of respect.'' Transcript of Oral Argument at 55–56, Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (No. 07-665) (statement of Scalia, J.), 2008 WL 4892845, at *55–56.

[51] Several circuits have previously distinguished between temporary and permanent speech in connection with determining traditional public forums. See Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989); Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341 (7th Cir. 1990). But the Tenth Circuit failed to make such a distinction between temporary and permanent speech here.

In *Summum,* the fact that the Ten Commandments monument was a permanent one played a significant role in the Court's ruling that it was government speech—and hence immune from any Free Speech Clause restrictions. But the nature of the Ten Commandments display in *Summum,* as well as the Court's treatment of it, stands in contrast to the Court's treatment of the Ten Commandments display in *Van Orden*'s companion case, *McCreary County v. ACLU.*[52]

In *McCreary County,* the Court's ruling of unconstitutionality hinged on a finding that the purpose behind the display was religious rather than secular, even though the county had altered and modified its displays on two different occasions so as to give them an increasingly secular image.[53] The display's ultimate version, entitled ''The Foundations of American Law and Government,'' contained nine framed documents of equal size, including the Declaration of Independence, the Bill of Rights, the Mayflower Compact, the lyrics of the Star Spangled Banner, and the Ten Commandments—all of which were accompanied by an educational statement about the documents' ''historical and legal significance.''[54] But the Court ruled that the county's attempts to expand and modify the displays merely demonstrated an initial and continuing religious purpose.[55] The Court also ruled that a ''reasonable observer'' would in fact reach certain specific understandings regarding the county's intent to endorse the Commandments' religious message.[56] According to the Court, a reasonable observer would read into all the documents contained in the display a religious theme highlighting and supporting that of the Ten Commandments.[57]

A comparison of *Summum* and *McCreary County* raises the question of whether the Establishment Clause might apply differently to permanent displays of religious messages than to temporary ones.[58]

[52] 545 U.S. 844 (2005) (finding that a framed poster of the Ten Commandments hanging in a county courthouse hallway violated the Establishment Clause).

[53] *Id.* at 869–72.

[54] *Id.* at 856–57.

[55] *Id.* at 871–74.

[56] *Id.* at 868–69.

[57] *Id.* at 871–74.

[58] The Court seemed to recognize this distinction when it suggested that religious displays, at particular times of the year—for example, a menorah—were temporary displays, which public parks can much more easily accommodate then they can permanent monuments. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1138 (2009).

That question in turn raises the issues of when a Ten Commandments display becomes permanent and what makes a display sufficiently secular in nature rather than impermissibly religious.

In his *Summum* concurrence, Justice Souter seemed to anticipate these questions when he stated that ''[t]he interaction between the ''government speech doctrine'' and Establishment Clause principles has not, however, begun to be worked out.''[59] There was no dispute among the justices that municipalities could use monuments such as those displayed in Pioneer Park to convey a particular communal image or identity to the outside world. If the communal image was to be a religious one, however, expressed through permanent monuments reflecting particular religious sects or beliefs, then there seems to be a rather obvious Establishment Clause problem because ''the government's adoption of the tenets expressed or symbolized'' in the monuments might rise to the level of an establishment of religion.[60] Such a preference for a particular religion would very likely violate the Establishment Clause prohibition ''against preferring some religious speakers over others.''[61]

Justice Souter warned that the government speech doctrine, as articulated in *Summum,* could possibly be used to circumvent the Establishment Clause's prohibition of government discrimination among religious sects or groups. He warned that the government should not be allowed to exercise such sectarian preferences simply by engaging in government speech. As Justice Souter stated, ''It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate.''[62] Of course, it is precisely this speculation that will likely lead to further litigation over the relationship between the government speech doctrine and the Establishment Clause.

[59] Summum, 129 S. Ct. at 1141 (Souter, J., concurring).

[60] *Id.*

[61] *Id.* at 1142 (Souter, J., concurring) (citing Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (''The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.'')).

[62] *Id.* at 1142.

B. The Endorsement Test and a City's Refusal to Display Competing Religious Monuments

While the government speech doctrine may protect the city against a First Amendment challenge regarding its refusal to display a particular monument offered by a particular religious group, it may not necessarily prevent Establishment Clause liability. According to *Van Orden,* the Establishment Clause does not prohibit a government entity from displaying a permanent Ten Commandments monument, especially given the Commandments' historical and cultural importance.[63] The issue left unanswered in *Summum,* however, is whether the Establishment Clause might apply differently if a government entity that is already displaying a Ten Commandments monument subsequently refuses to display a monument reflecting the beliefs of another religion. Such a refusal might be judged under the endorsement test to convey to the reasonable observer a message of establishment of the religion (or religions) associated with the Ten Commandments.[64]

In 1984, Justice Sandra Day O'Connor offered the endorsement test as a means of resolving Establishment Clause issues relating to religious expression on public property.[65] Courts have since then frequently used this test for analyzing the constitutionality of displays similar—for legal purposes—to the ones at issue in *Summum.*[66] Under the test, the government unconstitutionally endorses a religion whenever it conveys the message that this religion or its religious beliefs are favored by the state.[67] In *County of Allegheny v. ACLU,* for example, the Court decided that the display of a crèche violated the Establishment Clause, but that the display of a menorah

[63] Van Orden v. Perry, 545 U.S. 677, 691-92 (2005).

[64] The distinction between *Van Orden* and *Summum,* in terms of possible Establishment Clause implications, can also be seen in terms of the differing ''injured parties'' in each case. In *Van Orden,* the party was the observer of the Ten Commandments who was offended by its display; in *Summum,* it was the religious believer (the Summum) who was denied equal treatment.

[65] Lynch v. Donnelly, 465 U.S. 668 (1984).

[66] See Alberto B. Lopez, Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment, 55 Baylor L. Rev. 167, 195 (2003) (stating that since County of Allegheny, which confirmed the endorsement test as the Court's preferred method of analysis, the Court has continued its reliance on the endorsement test for Establishment Clause cases).

[67] County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989).

next to a Christmas tree did not.[68] The Court held that the crèche, located on the steps of a county courthouse, was prominent enough to constitute an endorsement of Christianity.[69] The tree and menorah display were acceptable, on the other hand, insofar as together they did not give the impression that the state was endorsing any one religion.[70] Any religious message conveyed by the menorah was sufficiently diluted by the presence of the tree.

The endorsement test is grounded upon the premise that the Establishment Clause prohibits the government from conveying ideas that divide the community into outsiders (the minority) and insiders (the majority).[71] In *Lynch,* Justice O'Connor wrote that ''[e]ndorsement 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.''[72] Under this interpretation, the endorsement test strives to become a vehicle for ensuring an equality of treatment between all religions—a kind of religious equal protection clause.[73]

In his *Summum* concurrence, Justice Souter suggested that the endorsement test should be used to evaluate the relationship between the government speech doctrine and the Establishment Clause.[74] This suggestion seems somewhat suspect or perhaps outdated, however, especially after the Court declined to employ the endorsement test in either *Van Orden* or *McCreary County.* Moreover, because the test calls for judges to speculate about the impressions that unknown viewers may have received from various religious

[68] *Id.* at 578–79.

[69] *Id.* at 598–602.

[70] *Id.* at 620–21. The Court concluded that, as to the crèche, ''[n]o viewer could reasonably think that it occupied this location without the support and approval of the government.'' *Id.* at 599–600. The tree and menorah, on the other hand, did not present a ''sufficiently likely'' probability that observers would see them as endorsing a particular religion. *Id.* at 620.

[71] Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

[72] *Id.* at 688. To Justice O'Connor, the endorsement test functioned to prevent government from ''making a citizen's religious affiliation a criterion for full membership in the political community.'' *Id.* at 690.

[73] Edward B. Foley, Political Liberalism and Establishment Clause Jurisprudence, 43 Case W. Res. L. Rev. 963, 972 (1993).

[74] Summum, 129 S. Ct. at 1142 (Souter, J., concurring).

speech or symbols, it is incapable of achieving certainty.[75] One judge has written that the endorsement test requires ''scrutiny more commonly associated with interior decorators than with the judiciary.''[76] In *County of Allegheny,* this meant that the Court had to examine ''whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols'' to draw attention away from the religious message conveyed by the crèche display.[77]

If, per Justice Souter, the endorsement test is to be used to determine Establishment Clause violations, then the key issue is what the reasonable observer perceives from the relevant government action. That is, if a government entity refuses to accept one religious display while continuing to display another, then that denial alone could convey a message of endorsement, even when the previous display did not convey such a message. So even though Pleasant Grove's acceptance of the Ten Commandments monument in 1971 may have passed constitutional muster, the refusal to display the Summum monument may make the Ten Commandments' continuing display an Establishment Clause violation.[78]

[75] Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the ''No Endorsement'' Test, 86 Mich. L. Rev. 266, 301 (1987).

[76] Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

[77] County of Allegheny v. ACLU, 492 U.S. 573, 674 (1989).

[78] In *Freethought Soc'y v. Chester County,* the Third Circuit Court of Appeals dealt with an array of factual issues relating to whether a ''reasonable observer'' would view a Ten Commandments display as a governmental endorsement of religion. 334 F.3d 247, 251, 270 (3d Cir. 2003). The subject of the lawsuit was a plaque of the Ten Commandments that had been erected in the county courthouse in 1920, and that a group of atheists, agnostics, and other ''freethinkers'' demanded be taken down in 2001. *Id.* at 255. In subsequent litigation seeking to force the county to remove the plaque, the plaintiff stated that although she had been aware of the plaque since 1960 she did not find it offensive until she became an atheist in 1996. *Id.* at 254. Replying to the plaintiffs' claim that the plaque represented an affirmative governmental endorsement of religion, the county argued that the plaque's long history detracted from any conclusion that the county was endorsing religion. *Id.* To decide the issue, the court investigated not only the initial purpose behind the plaque's erection, but also the reasons for why the county refused to remove the plaque when so demanded—as well as whether a reasonable observer would know of the plaque's long history and whether the age of the plaque was visually apparent. *Id.* at 262. This inquiry then devolved into one of whether a viewer would be aware of the entire context in which the plaque was erected. *Id.* at 264.

C. Constitutional History and the Tradition of Nonpreferentialism

One paradigm that may relate directly to the factual setting of *Summum*, as well as to the interaction between the government speech doctrine and the Establishment Clause, is nonpreferentialism. American constitutional history lends much support to the nonpreferential model. As this history demonstrates, the ratifying generation believed that religion should play a prominent part in society and that government should acknowledge and support this role.

To Americans of the constitutional period, religion was an indispensable ingredient to self-government. According to the Framers, only through the guidance of religion would people develop the civic virtue necessary for self-government.[79] Late-eighteenth-century Americans generally agreed that ''republican government required a virtuous citizenry, and a virtuous citizenry required morality, with religious observance the only sound ground for morality.''[80] They ''saw clearly that religion would be a great aid in maintaining civil government on a high plane'' and hence would be ''a great moral asset to the nation.''[81] The prevailing view during the constitutional period was expressed by a 1788 New Hampshire pamphleteer: ''Civil governments can't well be supported without the assistance of religion.''[82]

As the Founders believed, religion ''fostered republicanism and was therefore central to the life of the new nation.''[83] George Washington, for instance, was committed to the notion of religion being an incubator for the kind of civic virtue needed to serve as a foundation for democratic government.[84] In his Farewell Address to the nation at the end of his presidency, he warned that ''reason and

[79] See Joseph Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society (1999).

[80] J. William Frost, Pennsylvania Institutes Religious Liberty, in All Imaginable Liberty: The Religious Liberty Clauses of the First Amendment 45 (Francis Graham Lee ed., 1995).

[81] Anson Phelps Stokes, Church and State in the United States 515 (1950).

[82] The Complete Anti-Federalist 4:242 (Herbert J. Storing ed., 1981).

[83] Richard Vetterli & Gary C. Bryner, Religion, Public Virtue, and the Founding of the American Republic, in Toward a More Perfect Union: Six Essays on the Constitution 91–92 (Neil L. York ed., 1988).

[84] *Id.* at 127.

experience both forbid us to expect that national morality can prevail in exclusion of religious principle.''[85]

During this time, there was overwhelming agreement that government could provide special assistance to religion, so long as such assistance was given without any preference among sects.[86] Catholics in Maryland, for instance, opposed any state established religion, yet supported state aid to religion if conferred without discrimination.[87] As Thomas Cooley argued, the Establishment Clause prohibited only ''discrimination in favor of or against any one Religious denomination or sect.''[88]

The nonpreferentialist tradition was firmly embraced by the postratification generation.[89] This tradition reflected the belief that the religion clauses were designed to foster a spirit of accommodation between religion and the state, as long as no single church was officially established and governmental encouragement did not deny any citizen freedom of religious expression.[90] James Madison repeatedly stressed that government could accommodate or facilitate religious exercise, so long as it did so in a nonpreferential manner.[91]

More broadly, the early adherence to nonpreferentialism hinged on the belief that the Exercise Clause is superior to the Establishment Clause.[92] This superiority meant that government should not be

[85] A Compilation of the Messages and Papers of the Presidents 212 (James D. Richardson ed., 1897).

[86] Patrick W. Carey, American Catholics and the First Amendment, in All Imaginable Liberty 115 (Francis Graham Lee ed., 1995). Even in Virginia, with the established Anglican Church, the growing sentiment in the late eighteenth century was that, while government could indeed give aid to religion, there should be equal treatment in such aid. See Rodney Smith, Public Prayer and the Constitution 45 (1987).

[87] Mary Virginia Geiger, Daniel Carroll: A Framer of the Constitution 83–84 (1943).

[88] Thomas M. Cooley, A Treatise on the Constitutional Limitations 583 (1883). The Reverend Jaspar Adams, cousin of John Quincy Adams, wrote in 1833 that the term ''establishment of religion'' meant ''the preference and establishment given by law to one sect of Christians over every other.'' Daniel Dreisbach, Real Threat and Mere Shadow: Religious Liberty and the First Amendment 70 (1987).

[89] James McClellan, Joseph Story and the American Constitution 134 (1971).

[90] *Id.*

[91] Rodney K. Smith, Public Prayer and the Constitution 56 (1987). What Madison opposed was government promotion of religion in a manner that would compel individuals to worship contrary to their conscience. *Id.* at 82.

[92] James Madison agreed with Justice Story's articulation of the intent of the Framers: that the right of free exercise was the preeminent right protected by the First Amendment. *Id.* at 111.

hindered in accommodating individuals in their efforts to exercise their religious beliefs in public.[93] Daniel Webster, for one, believed that government could not only permit, but *promote* religious exercise in the public square.[94] Indeed, the ratifying generation was almost universally opposed to the kind of strict separation of church and state that twentieth-century separationists would later espouse because those in the eighteenth century believed such separation would hinder the free exercise of religion.[95]

D. Government Speech and the Threat to Nonpreferentialism

Nonpreferentialism, which strives to be even simpler and more accommodating of government interactions with religion than does the endorsement test, is generally favored by those who support public displays of religious symbols like Ten Commandments monuments. Strangely enough, the result in *Summum* may actually violate nonpreferentialism despite the Court's sanction of the continuing display of the Ten Commandments monument—even though the Ten Commandments may represent the freely chosen beliefs or values of the Pleasant Grove community. This is because, under nonpreferentialism, Pleasant Grove may have violated the Establishment Clause by giving preference to the Ten Commandments monument and discriminating against a monument expressing the beliefs of a different religious sect.

Under the nonpreferential model, the Establishment Clause does not forbid the government from conferring special recognition or benefits on religion in general, as long as the recognition or benefits are given without preference to any religious sect or denomination. Accordingly, the Establishment Clause should apply only when government singles out one or more sects for special benefits or burdens, or when governmental accommodation of one religion begins to

[93] *Id.* at 84. See also Mark DeWolfe Howe, The Garden and the Wilderness 31 (1965).

[94] See 6 Works of Daniel Webster 176, cited by Carl Zollman, Religious Liberty in American Law, 17 Mich. L. Rev. 355, 370 (1919).

[95] *Id.* at 108. See also Joseph Story, 2 Commentaries on the Constitution of the United States 593–97 (1851). According to Story, the Establishment Clause merely helped to effectuate the inalienable right of free exercise by preventing any particular sect from being established, at the national level. *Id.* For the seminal treatment of the First Amendment's religion clauses and myths surrounding the separation concept during the Founding Era and beyond, see Philip Hamburger, Separation of Church and State (2002).

infringe on some other individual's or group's religious exercise rights. A nonpreferential approach tries to understand and accommodate the special needs of religious exercise and expression, based on a recognition of the uniqueness of religion in general.[96] The Establishment Clause issue under this approach is not whether religion in general is better off because of some government recognition or support, but whether the government has singled out one or more religious sects for preferential treatment or burden. In then-Justice William Rehnquist's words: ''governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice does not . . . violate the Establishment Clause.''[97]

The nonpreferentialism model is favored by many who wish to narrow the reach of the Establishment Clause and thus give greater freedom to representative government to acknowledge and support religion in general.[98] Those who advocate nonpreferentialism believe that democratic society should be free to express its religious values and identity, and that the Establishment Clause should not be interpreted to prohibit such expression by mandating that religion be confined to some strictly private sphere. Nonpreferentialism thus reflects an interpretation of the Establishment Clause that permits a greater public role for religion in civil society.

Nonpreferentialism supports the freedom of public expression of religious symbols and messages, such as the public display of the Ten Commandments. But even though nonpreferentialists would support a display of the Ten Commandments in a public park, as occurred in *Summum*, they might find something troubling about the Court's decision—something that could actually undermine the nonpreferentialist position. The troubling aspect is that the Court essentially sanctioned the governmental display of a monument to one religious belief while simultaneously denying the display of a monument reflecting the beliefs of another.

In short, nonpreferentialists favor a vibrant presence of religion in society. To facilitate this, government must be able to acknowledge

[96] For a discussion of the nonpreferentialism model, see Patrick M. Garry, Wrestling With God: The Courts' Tortuous Treatment of Religion 147–65 (2005).

[97] Thomas v. Review Bd., 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting).

[98] See Garry, *supra* note 96, at 147–65.

and support religion to some degree, given the pervasive role that government plays in civil society. But the only way to achieve such a governmental recognition of religion is to require that government treat all religious denominations the same. The *Summum* Court arguably used the government speech doctrine to sanction treating different religions differently. And if the government is allowed to engage in such religious discrimination when it comes to monuments, it could cause a backlash against future governmental acknowledgment or support of religion in general.

E. Summum *and the Possible Conflict with Nonpreferentialism*

During the 1960s and 1970s, the Court crafted a broad view of the Establishment Clause.[99] This broad view extended the reach of the clause so as to invalidate many government programs that sought to accommodate the traditional religious practices of American society. It was during this time period that the Court began taking a more separationist view of the Establishment Clause—a view that seemed to cast constitutional doubt on the value of religion in American society. Under this view, the Establishment Clause was interpreted to mandate a wall of separation between government and religion. But eventually, this strict separationist reading of the Establishment Clause came under criticism for being unnecessarily hostile and antagonistic to religion.

Throughout the 1980s and 1990s, as jurists and scholars began searching for an Establishment Clause doctrine that would be more accommodating to longstanding religious practices and traditions, they made gains in crafting a more narrow doctrine.[100] These gains occurred in part because of the realization that religion played a special and historic role in society, and that it was not unconstitutional for the state to acknowledge and accommodate this special role.

Among the scholars who most contributed to this liberalization of the Establishment Clause were those who believed in nonpreferentialism.[101] The nonpreferentialists believed that, given the history of

[99] For a discussion of the recent constitutional history of the Establishment Clause, see Garry, *supra* note 96, at 44–54.

[100] See *id.* at 55–57, 69–73.

[101] See *id.* at 139–46. Justice Scalia has also endorsed nonpreferentialism. In *Board of Education of Kiryas Joel* v. *Grumet,* he stated that ''I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others.'' 512 U.S. 687, 748 (1994) (Scalia, J., dissenting).

religion in American society, government could indeed give special accommodation and treatment to religion in general, so long as it never discriminated among religious sects. Therefore, to allow the government to discriminate in any way among sects is to risk losing the gains made in Establishment Clause doctrines that allowed the Court to move away from the historically dubious strict separationism of the 1960s and 1970s.

This risk, however, is one that is subtly raised in *Summum.* In its decision, the Court ended up sanctioning—indirectly—a government's preferential treatment of one set of religious beliefs over another. As I described in Part IV.A *supra,* although *Summum* involved the Free Speech Clause, the case does highlight a future Establishment Clause conflict—namely, a possible challenge to a city's refusal to display one religious symbol even though it is displaying a symbol representing another religious sect.[102] To reiterate, if the city is seen as giving preferential treatment based on religion, it would violate the most fundamental principle of Establishment Clause doctrine—and one on which virtually no First Amendment scholar disagrees.

V. Conclusion

The primary issue in *Summum* involved the government speech doctrine. The question was whether a permanent Ten Commandments monument constituted government speech. As it turned out, that issue proved relatively simple to the Court. There was no disagreement among the justices that the monument constituted government speech and that the city did not have to maintain content neutrality in the choice of the monuments it publicly displayed.

Aside from its unanimity on the doctrinal aspects of its holding, the Court also seemed in complete agreement regarding the practical

His dissent in *McCreary,* however, might indicate a belief that the First Amendment tolerates some preference toward monotheistic religions: the Ten Commandments ''are assuredly a religious symbol, but they are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another. The Ten Commandments are recognized by Judaism, Christianity, and Islam alike as divinely given.'' McCreary County v. ACLU, 545 U.S. 844, 909 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

[102] Of course, the resolution of this issue will depend on the resolution of the issue of when a monument, such as a Ten Commandments monument, qualifies as a religious monument, rather than as a secular one.

aspects of its decision. It recognized that if it held otherwise, government units would be incapable of designing their public spaces and the monuments in them once they accepted even one privately donated monument—and as a result would never allow any monument to be displayed in those spaces.

The issue that was not litigated or even addressed, however—but which is the more complex (and academically interesting) one—is the Establishment Clause issue. This issue arises not because the city was displaying a religious monument but because it refused to display the Seven Aphorisms while continuing to display the Ten Commandments. Several of the concurring justices articulated concern about Establishment Clause challenges that might arise in similar factual situations. In that future litigation, courts may have a much more difficult time resolving the Establishment Clause issues than the *Summum* Court did in resolving the free speech issues.