Government Identity Speech and Religion: The Endorsement Test After Summum

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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 Eagles-donated Ten Commandments. This 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 the Establishment Clause – which prohibits government from expressing a viewpoint on religion, and from favoring some religions over others. I argue that the Court’s decision, to characterize all public monuments as expressing “government-controlled” messages which reflect municipal identity, alters 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 ambiguating 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 which 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 “newly minted” government speech doctrine⁴ and—because the park display included a donated Ten Commandments monument—the Establishment Clause challenges likely to follow.⁵

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 [“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).
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 applying the new doctrine to include municipal “identity speech” – essentially, communitarian and promotional themes – adds value to the speech market and frequently is necessary to facilitate the increasing number of public-private expressive partnerships.7 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.8

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, in many contexts, also transform the Court’s analysis of government’s religious speech.

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6 Summum, 129 S. Ct. at 1133-34.
8 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 infra at 15 n. 70.
The focal point of all public attention on this free speech case, and its impetus, was Summum’s claim of religious discrimination. 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. 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 Capital grounds.

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. . . .” 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.

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9 See, e.g., Michael Kessler, *The Court’s Monumental Error*, http://newsweek.washingtonpost.com/onfaith/georgetown/2009/03/when_government_speaks_for_god.html (March 17, 2009) (”Pleasant Grove City, with the Court's blessing, endorsed one type of religious speech over another.”); Jesse Bravin, 10 Commandments vs. 7 Aphorisms: A New Religion Covets Legitimacy, THE WALL STREET JOURNAL at A24 (November 24, 2008)(”the subtext of the battle – a New Age religion seeking the same treatment as a more established faith. . . .”); Editor, A Case of Religious Discrimination, THE NEW YORK TIMES (November 12, 2008).

10 See infra Part I.


13 Compare Ian Bartrum, Pleasant Grove v. Summum: Losing the Battle to Win the War, 95 VA. L. REV. IN BRIEF 43, 47 (May 16, 2009)(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
My thesis is that *Summum* has significantly changed the Establishment Clause calculus and *Van Orden* must be reassessed. 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 alterative views. 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. And now, the *Summum* opinion has characterized all public monuments as expressing “government-controlled” messages, selected to reflect municipal identity. While many of its parameters are contested, the Establishment Clause does not permit governments to affirmatively communicate that a particular, stand-alone religious creed serves in that role. That *Summum* involved rejection of a minority religion’s monument exacerbates the dilemma, but is not the only problem.

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*Publicizing Speech, 104 NW. U. L. REV. COLLOQUIY 70 (2009)(concluding that an Establishment Clause challenge to Pleasant Grove City’s Ten Commandments display would not succeed due to *Van Orden*). See also, e.g., Michael Dorf, Exclusion or Damages, DORF ON LAW, March 2, 2009, http://michaeldorf.org/2009_03_01_archive.html (on impact of *Summum*, concluded that only two justices (Scalia and Thomas) “argued 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). See also American Humanist Association Blog, supra note 6 (proclaiming that *Summum* has given it “just what it needs to pursue the removal of Ten Commandments monuments on public property all over America”).

Because the issue of *Van Orden’s* continued viability is so pivotal, while I maintain that *Summum* will have a larger impact, this Article focuses primarily on how *Summum* affects Establishment Clause analysis of governmental display of religious monuments; my earlier articles provide other examples of contexts where this broad “municipal identity” type of government speech should be applied (e.g., municipal web sites and special event programs). See supra note 8.

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14 See infra Part II.
15 See infra at III.
16 See infra Part IV.
17 See infra Part III.
The stakes are high. As Professor Noah Feldman recently described it, we are a nation “divided by God.” 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. 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.”

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. Commentators

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19 NOAH FELDMAN, DIVIDED BY GOD (2005).
20 Id. (seeking a workable compromise between the two groups, he 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 (2005)(discussing the political impasse from a Christian theological perspective).
21 STEVEN GOLDBERG, BLEACHED FAITH 1 (2008)(when “an overwhelmingly Christian government” posts on the county courthouse the statement, “I the LORD they 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”).
22 E.g., Steven G. Gey, Vestiges of the Establishment Clause, 5 FIRST AMEND. L. REV. 1, 48 (2006-07) (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 (Fall 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 GREENAWALD, RELIGION AND THE CONSTITUTION, Vol. 2 (2008)(questioning survival of endorsement test post-O’Connor).
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. Simultaneously, the Court has re-imagined the neutrality principle to require equal access for religious speakers in government facilities and government-funded programs. Equal access cases, such as Rosenberger v. Rector and Visitors of University of Virginia, transformed forum analysis by re-labeling content limits on all religion as discrimination against individuals’ religious speech. Summum risks recasting government speech promoting religion: changing it from an Establishment Clause problem, and into a Free Speech clause defense against private speakers asserting a different viewpoint on religion.

This Term’s Establishment Clause case, Salazar v. Buono, may provide some answers regarding this Court’s views on religious symbols and the endorsement test, but it will not resolve the “government speech” conundrum raised by Summum. Buono


26 See infra note 120 and accompanying text.

involves a large Christian cross displayed in the Mojave National Preserve, erected by the VFW in 1934 as a WWI war memorial; there are a number of complex procedural issues which may determine its outcome. Regardless, the issue of how to situate \textit{Summum}'s government speech holding between the “Free Speech Clause frying pan” and the “Establishment Clause fire” will remain. Characterizing unadulterated religious expression as broad, thematic government identity speech enters dangerous new territory. Moreover, this is a resilient issue: now pending before the Court is a petition for certiorari in yet another Ten Commandments case – this time involving a recently-erected monument which caused controversy from the start and led quickly to litigation.

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, government’s minimum duty is to explain its religion-neutral rationale to

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Thus, many observers have predicted that \textit{Buono} will not, in fact, provide broad pronouncements on the Establishment Clause. See, e.g., Tony Mauro, \textit{Justices zero in on Congress' role in Mojave-cross dispute} (10/08/09), First Amendment Center Website (available at: http://www.firstamendmentcenter.org/analysis.aspx?id=22177) ("By the end of the hourlong (sic) argument before the justices, it appeared to be less about the establishment clause and more an inquiry into the procedural oddities of the case, and about the latest effort by Congress to end the controversy"); Dahlia Lithwick, \textit{Cross-Eyed: The high court looks again at religious symbols on public lands} (10/7/09), SLATE ONLINE (available at: http://www.slate.com/id/2231805/) ("There's (sic) just one person at oral argument in Salazar v. Buono this morning who really wants to talk about whether a 5-foot cross on federal government land in the Mojave National Preserve violates the Constitution's Establishment Clause. But Justice Antonin Scalia really, really wants to talk about it").


\item[30] See Green v. Haskell Cty. Bd. of Commr’s, 568 F.3d 784 (10th Cir. 2009), \textit{pet. for cert. filed}, 78 USLW 3294 (Oct. 28, 2009) (No. 09-531) (discussed \textit{infra} notes 159, 271 and accompanying text).
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viewers. Contrary to Chief Justice Roberts’ comment in the *Salazar v. Buono* oral argument, appropriate disclaimers with context-creating explanations are not “warning signs” that insult religion, but rather are an essential affirmation of Establishment Clause values. Second, now that monuments are defined as “government speech” expressing a government’s viewpoint, governments must be prohibited from erecting any new displays with arguably religious themes unless they strictly comply with neutrality principles.

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.” And so, 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 finding the Ten Commandments monument private speech, and the limited public forum option not taken. Part II explains the Court’s nascent “government speech” doctrine, and the varied frameworks of the several lines of cases which are sometimes referred to by that name. 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,” and provides a useful perspective on the donor’s role in *Van Orden*.

Part IV sets out an in-depth analysis of Justice Alito’s opinion for the Court, including his multi-faceted affirmative case for government speech, his secondary

31 See infra Part V.
32 See *Buono* Transcript, *supra*, note 28, at 22 (Chief Justice Robert’s reaction to General Kagan’s suggestion of posting a sign along the road to explain that the cross now 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 *Summum*, 129 S.Ct. at 1141 (Souter, J., concurring in the judgment).
35 See infra Part I.
36 See infra Part II.
argument against using forum analysis, and his inconsistent musings on the meanings of monuments. Most essential for purposes of this Article’s thesis is (i) the Court’s choice of its “core” government speech doctrine over the “speech selection” theory which allows discretion in selecting private speech; and (ii) the Court’s reliance on an endorsement test rationale. This Part also evaluates the concurring opinions, particularly those addressing Summum’s Establishment Clause implications. 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.37 After analyzing several recent suggested alternatives, Part V concludes that my suggestion of using disclaimers and a robust endorsement test is the most feasible current option.

**Part I: Background of the Case & Forum Options**

Pleasant Grove City’s Pioneer Park contains some 15 historical buildings and permanent artifacts, many showcasing the City’s history, and most donated by private persons or groups.38 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.39 As is now common lore, this display was part of the Eagles’ nationwide campaign to distribute the familiar code in an effort to combat

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37 See infra Part V.
38 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 28.
juvenile delinquency.\textsuperscript{40} These monuments have been the subject of decades of litigation,\textsuperscript{41} culminating – though apparently not ending – with \textit{Van Orden}.

Summum is a religious organization, founded in 1975 and headquartered in Salt Lake City, approximately 35 miles from Pleasant Grove.\textsuperscript{42} 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.\textsuperscript{43} 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.\textsuperscript{44} Summum’s request here, and in its earlier lawsuits, related to its religion’s

\textsuperscript{40} \textit{Van Orden} v. Perry, 545 U.S. 677, 703 (2005)(Breyer, J., concurring) (more than one-hundred largely identical monoliths were distributed by the Eagles to state and local governments during the 1960’s and 1970’s; 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). \textit{See also Books v. City of Elkhart, Indiana,} 235 F.3d 292, 294-295 (7th Cir. 2000) (for 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 sources cited infra at note 163.


\textsuperscript{42} \textit{Summum,} 129 S.Ct. at 1129-30.

\textsuperscript{43} 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. \textit{See City of Ogden v. Summum,} 297 F.3d 995 (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 discrimination); Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997) (Summum stated claim under Free Speech Clause; remanded to determine whether Salt Lake County acted reasonably in declining Seven Aphorisms monument). \textit{See 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, \textit{Anderson v. Salt Lake City,} 475 F.2d 19 (1973) (Eagles Ten Commandment monument on courthouse lawn did not violate Establishment Clause because such monuments convey a “primarily secular” message). \textit{See also Soc. of Separationists v. Pleasant Grove City,} 416 F.3d 1239, 1241 n.1 (10th Cir. 2007) (“\textit{Anderson is now superseded by \textit{Van Orden},”} and remanding case); Summum v. Duchesne City, 482 F.3d 1263 (10th Cir. 2007) (remanded in light of \textit{Pleasant Grove,} 2009 WL 921158)(rejection of Summum’s monument while displaying Ten Commandments in public park violated strict scrutiny test for
doctrine that the Seven Aphorisms are similar in origin to, and spiritually more advanced than, the Ten Commandments. 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.

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.

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

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45 See Summum Philosophy, The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml. See, e.g., Summum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002). See also Jesse Bravin, 10 Commandments vs. 7 Aphorisms: A New Religion Covets Legitimacy, THE WALL STREET JOURNAL, November 13, 2008, at A14 (“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.”.)

46 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.

47 See Brief for Respondent at 23, Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125 (2009) (No. 07-665) ["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, Utah, 483 F.3d 1044 (10th Cir. 2007) (No. 06-4057) [Summum Plaintiff/Appellant Brief"] (charging that claimed monument criteria not only were post facto, but were viewpoint discriminatory as applied: “The Ten Commandments are clearly not related to the history of Pleasant Grove and the donor, the Utah State FOE, had a local chapter in Pleasant Grove for only two (2) years before the monument was accepted.”).
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.\(^48\) In 2005, Summum sued, claiming that the City’s exclusion of its monument, while displaying other permanent monuments, violated the federal Free Speech Clause. After the district court declined to require installation of its monument, Summum appealed.\(^49\)

The Tenth Circuit decided for Summum, and required the City to erect the Seven Aphorisms monument.\(^50\) 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.\(^51\) 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.\(^52\)

\(^{48}\) Summum, 129 S. Ct. at 1130.

\(^{49}\) Id. Summum likely brought this and its earlier suits under the Free Speech Clause due to an earlyTenth Circuit precedent, Anderson v. Salt Lake City, 475 F.2d 19 (1973), which held that an Eagles Ten Commandment monument on a courthouse lawn did not violate the Establishment Clause because such monuments convey a “primarily secular” message.

\(^{50}\) Summum v. Pleasant Grove City, Utah 483 F.3d 1044, 1057 (10th Cir. 2007).


\(^{52}\) 483 F.3d at 1050-52, 1054.
Subsequently, there were two opinions dissenting from the Tenth Circuit’s denial of the petition for a rehearing en banc. Judge Lucero asserted that limited public forum analysis should apply. 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. In a limited public forum, Free Speech Clause doctrine requires that any such content or speaker limitations be reasonable and viewpoint-neutral. As Judge Lucero correctly noted, in determining which kind of forum is involved, courts look to the type of access sought. 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.

Judge McConnell asserted that once a city accepts and displays a donated monument on public land, that monument is government speech. 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. That test evaluates: (1) the “central purpose” of the challenged speech; (2) the government’s “degree of editorial

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53 Summum v. Pleasant Grove City, Utah, 499 F.3d 1170, 1171 (10th Cir. 2007).
54 Id. (Lucero, J., dissenting). 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 at 52, 52 n.209 for discussion of variations in forum terminology and the Court’s usage in Summum.
55 Summum, 499 F.3d at 1072-73.
56 Id.
57 Id. at 1176-77 (McConnell, J., dissenting).
control”; (3) “the identity of the literal speaker”; and (4) whether the government had “ultimate responsibility for the content of the speech.”

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. 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. And 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.”

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 content in accepting monuments, they would be forced to accept an “influx of clutter” or

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58 Wells v. City and County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001) (sign acknowledging city sponsors on city's holiday display was government speech, triggering no obligation to include others). See also, e.g., KKK v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000) (public radio station allowed to reject KKK as sponsor); Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 964 (9th Cir. 2008). Note that the Supreme Court’s Summum decision did not refer to these Circuit Court decisions or the four-factor test.

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

60 Id. at 1005.

61 Id. at 1004. For complete analysis of this case and the four-factor test, see Dolan 2008, supra note 7 at 32-37.
remove cherished monuments. 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.

Next, Part II explains the Supreme Court’s prior government speech-related precedent, which served as the backdrop of the *Summum* decision.

**Part II: Pre-Existing Government Speech Doctrine: the Summum Court’s Choice**

Justice Stevens noted in his *Summum* concurrence that the government speech doctrine is “newly minted,” its canon narrowly comprised of three cases: *Rust v. Sullivan, Johanns v. Livestock Assn.*, and *Garcetti v. Ceballos*. 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.” 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*.

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62 Id. at 1175-76.
63 See infra Part IV.B. at 55-56 (citing *Summum*, 129 S.Ct. at 1137-38). 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 19-, at 207-10 (laying out the litigation strategy and memorably describing McConnell as the “Thurgood Marshall of values evangelicalism”).
65 *Johanns*, 544 U.S. at 574 (Souter, J. dissenting).
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, and a related approach will be discussed in Part III.B. below. *Summum* is a novel expansion of the government speech doctrine: not only 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. 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. Moreover, as the Court reaffirmed in its starting point for analysis in *Summum*, “A government entity may exercise this same freedom to express its own views when it receives assistance from private sources for the purpose of delivering a ‘government-controlled message.’”

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66 For a discussion of school speech, see infra note 113 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.
68 *Id.*
69 *Id.* (quoting *Johanns*, 544 U.S. at 562.)
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.” *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. 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, and the governmental interference with physicians’ professional duty to prioritize their patients’ needs.

Prior to *Summum*, only one Supreme Court majority opinion, *Johanns v. Livestock Mktg. Ass’n*, had explicitly rested on the “government speech doctrine” to justify its holding for the government. In *Johanns*, the Court dismissed a compelled-speech claim by beef producers who objected to a mandatory check-off tax on their product. 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, “funded by America’s Beef Producers.” 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

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72 *See, e.g.*, Martin Redish, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 576 (1996)(concluding that such “negative subsidies” are presumptively unconstitutional).
73 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, 177 (finding unsupportable the distinctions drawn by the Court to justify the differing outcomes).
74 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.
76 *Id.* at 577 (Souter, J., dissenting).
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.”

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 televisions ads) – was invisible to the public, except to those few who happened to be familiar with the relevant federal statutes.

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 may be termed the “speech selection” cases.

B. Discretionary Selection & Private Speech

The speech selection cases are grounded in “judgmental necessity,” and not upon the elected government’s need to express its policy 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*), public television

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77 *Id.* at 560-61.
79 *See* Redish, *supra* note 71, at 572 (coining the term “judgmental necessity” in his critique of the “speech selection” cases).
broadcaster (Forbes),\(^{81}\) and library (American Library Association),\(^{82}\) it necessarily must consider content in selecting among private speech, and so its discretionary selection does not violate the Free Speech Clause.\(^{83}\) 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.\(^{84}\) This approach also differs from the limited public forum doctrine, where content limitations which are deemed overly vague are struck down on the grounds that they could provide government decision-makers with a screen to hide unlawful viewpoint discrimination.\(^{85}\)

In *Finley*, the Court upheld a statute which allowed the NEA to consider “decency” and respect for Americans’ “diverse beliefs and values” when making arts funding decisions. The essential rationale was the Court’s recognition that, unavoidably, making aesthetic judgments on artistic excellence “is inherently content-based.”\(^{86}\) 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.”\(^{87}\) Exercising that discretion necessarily involves considering

\(^{83}\) See Redish, supra note 71, at 572 (criticizing *Finley* and its type, which he categorized as “positive auxiliary subsidies”). See also Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84 (1998) (calling for such “institutional specificity” as the best method for resolving these complex First Amendment puzzles).
\(^{84}\) See, e.g., City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 (1988)(striking down open-ended municipal regulation of newsboxes on city sidewalks, Court noted that, regarding the “specter of content and viewpoint discrimination,” 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”).
\(^{85}\) 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.)
\(^{86}\) *Finley*, 524 U.S. at 586. Compare, e.g., Redish, supra note 71, at 581 (arguing that *Finley* was decided wrongly because decency bears no relationship to artistic merit).
\(^{87}\) Forbes, 523 U.S. at 674 (dicta) (finding a televised candidate debate to be a narrow exception to broadcasters’ general discretion, but holding that objective lack of voter support for candidate was a reasonable content limitation for that type of limited public forum).
content, and rejecting some private speech in favor of others, and so should not trigger judicial oversight or sanction. And lastly, American Library Association stated that the “principles underlying Finley and Forbes 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.\textsuperscript{88}

These two lines of cases frequently have been referred to generically as “government speech”;\textsuperscript{89} 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/Johannes 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

\textsuperscript{88} Am. Library Ass’n, 539 U.S. at 205 (plurality)(upholding 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 the point that libraries have discretion in content selections for their collections. \textit{Id.} at 214 (Kennedy, J., concurring); \textit{Id.} at 220 (Stevens, J., dissenting); \textit{Id.} at 231 (Souter, J., dissenting).

\textsuperscript{89} For sources referring to both Rust and Finley as “government speech,” see e.g., Leslie Gielow Jacobs, \textit{Who’s Talking? Disentangling Government and Private Speech}, 36 U. MICH. J.L. REFORM 35 (2002); Randall P. Bezanson & William G. Buss, \textit{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); Gentala v. City of Tuscon, 244 F.3d 1065 (9th Cir. 2001) (vacated and remanded in light of \textit{Good News Club})(relied on Finley, Forbes, and Rust as government speech cases). 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 \textit{TREATISE}, supra note 50, at 979, 982-84 (placing Johanns in compelled speech category, and Rust in unconstitutional conditions category, without combining them into a “government speech” category); KATHLEEN M. SULLIVAN, FIRST AMENDMENT LAW (Foundation Press, 2nd ed. 2003)(& Supp. 2007), at 337, Supp. at 12 (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/Johann line of cases. See, e.g., Andy G. Olree, \textit{Identifying Government Speech}, 42 CONN. L.REV. (forthcoming 2009)(available at https://ssrn.com/abstract=1393414).
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—and some express reservations—about government’s ability to intentionally exclude disfavored viewpoints in making its content-based selections.\(^90\)

For example, there certainly 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 air any speakers who questioned the Iraq War.\(^91\) 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.\(^92\) To clearly establish the constitutionality of a government expressing its views on debatable issues through its selection and display of privately-donated monuments, basing Summum on the Johanns “government speech doctrine” may have been the Court’s only real choice.

\[\text{C. Managerial Prerogative & Government Institutions}\]

Returning briefly to Garcetti v. Ceballos,\(^93\) the recent public employment decision that has been described as the Court’s third “government speech” case, provides a useful

\(^{90}\) See National Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998)(suggesting different outcome if government “leveraged its power to award subsidies based on subjective criteria into a penalty on disfavored viewpoints”).

\(^{91}\) U.S. v. Am. Library Ass’n, 539 U.S. 184, 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 Ed. v. Pico, 457 U.S. 853, 870-71 (1982) (plurality). See also Schauer, supra note 82 at 114-16 (discussing library example).

\(^{92}\) Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1138 (2009).

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. 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.94

Justice Kennedy’s opinion for the Court emphasized at length public employers’ need to manage their employees effectively and efficiently.95 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.96 Pickering provides some measure of protection to a public employee’s interest in commenting upon “matters of public concern,” balanced against the government employer’s interest in delivering efficient public services.97 Garcetti holds that where the public employee’s speech relates to his job, organizational needs prevail.

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

94 Id. at 414-16.
95 Id. at 416-21.
96 Id. at 421 (citing Pickering v. Bd. of Ed., 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 thus 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.
97 Id. at 417, 423-24.
“employer control over what the employer itself has commissioned or created.” 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.” The majority of legal commentators have interpreted *Garcetti* as a government speech case following *Rust* and criticized the decision. 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.”

Conversely, Professor Larry Rosenthal has argued that *Garcetti* serves First Amendment values because “allowing managerial control over employee speech is essential if government management is to be held politically accountable for the

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98 *Id.* at 421-22. Justice Kennedy followed that statement with this citation: “Cf. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (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.*, which is the line in *Rosenberger* where the Court described its holding in *Rust*, and thus first crystalized 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)(“When courts use the cf. signal, legal discourse often 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.” Bluebook, 18th Ed, Rule 1.2(a) (emphasis added).

99 *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.*

100 Helen Norton, *Constraining Public Employee Speech: Government’s Control of its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 20 (*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 transparently governmental speech.”) Under Prof. Norton’s proposed rule, other employees would continue to be governed by the *Pickering* balancing test. *Id.* at 33-34.
performance of public institutions.”

Rather than interpret this decision as a government speech case in the manner of Rust and Johanns, he described “Garcetti’s conception of a managerial prerogative” as growing out of what this Article has termed the “speech selection” cases, Forbes, Finley, and American Library Association. 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.”

In line with earlier work by Dean Robert Post and Professor Frederick Shauer, 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.”

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. In contrast, if seen as related to Finley, Forbes and especially ALA, 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.

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102 Id. at 52.
103 Id. at 93. See Post, supra note 72, 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 note82, at 119-20 (concluding that only institution-specific standards can decide questions raised by “government enterprise free speech cases”). Compare Pleasant Grove City, Utah v. Summum, 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).
104 And thus, all three cases similarly are flawed by their lack of transparency. See supra p. 20 n.91.
105 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
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, prior to Summum, the Court’s precedent had reached some points of stasis. “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 which 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. 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.”

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.

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.

106 See Post, supra note 72, at 169.
107 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 (2008-09)(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, he 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; where 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 government review, by analogy to Forbes’ editorial discretion, id. at 736-37; and finally, Brownstein views Garcetti as a 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 (Feb. 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,”
This discourse on the state of “government speech” precedent leading up to the *Summum* 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. *Summum*’s counsel gave lip service to retaining the Tenth Circuit’s public forum/strict scrutiny holding, but affirming that position never seemed a real possibility. Instead, *Summum* focused on asking the Court to require the City to officially “adopt”—as its own the message—the message conveyed by each of its donated monuments on display. 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.\textsuperscript{110} Alternatively, the City argued 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.\textsuperscript{111}

The final introductory frame for the Summum 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.

\textbf{Part III. Establishment Clause Backdrop to the Court’s Intricate Dance in Summum}

\textit{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

\textsuperscript{110} Reply Brief for Petitioners, at 12-13, passim, 129 S. Ct. 1125 (2009) (No. 07-665) [“Summum Reply Brief”] (“government speech includes selecting and presenting messages that government itself does not necessarily adopt, as with books in a library, speakers with contrary views in a lecture series, and so forth”)(quoting Forbes); Summum Transcript, supra note 12, 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).

\textsuperscript{111} Summum Reply Brief, supra note 109, 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 their founding of the state”) (citing J.A. 97, 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 Pleasant Grove History, http://www.plgrove.org/.
government speech doctrine” which is evolving as a defense in Free Speech Clause cases. At least up until very recently in the federal courts, 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 used two approaches: the endorsement test, which starts from an assumption of government neutrality toward religion, and an historical, tradition-based view. 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. 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. 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.

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112 See, e.g., Turner v. City Council of City of Fredericksburg, Va. (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).
113 See infra Part III.B.
content and the speaker/endorser routes to Establishment Clause compliance are
disjunctive, so that where 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 include: (1) school prayer\textsuperscript{116} and school curriculum,\textsuperscript{117} (2) benedictions and
invocations, including at schools\textsuperscript{118} and legislative bodies,\textsuperscript{119} and (3) symbols such as the
national motto, “In God We Trust,”\textsuperscript{120} and the inclusion of “under God” in the Pledge of
Allegiance.\textsuperscript{121}

To summarize broadly, where a message communicated by the government is
deemed religious, generally the Establishment Clause is violated.\textsuperscript{122} In a second
category, religious phrases that could be characterized as constitutive of a government’s
identity, the Court’s opinions have suggested allowing them under the guise of
“ceremonial deism.”\textsuperscript{123} This disputed theory regularly is justified by claims that the brief,

\textsuperscript{116} See Engel v. Vitale, 370 U.S. 421 (1962)(daily prayer at public schools held unconstitutional).
\textsuperscript{117} See Edwards v. Aguillard, 482 U.S. 578 (1987)(required teaching of creation science at public school
held unconstitutional).
\textsuperscript{118} See Santa Fe Ind. School 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)(invitation before middle school
graduation violated coercion test).
\textsuperscript{119} See Marsh v. Chambers, 463 U.S. 783 (1983)(upheld state legislative chaplain based on history and
tradition).
\textsuperscript{120} See Van Orden v. Perry, 545 U.S. 677, 716 (2005)(assuming constitutionality of “In God We Trust”).
\textsuperscript{121} See Elk Grove School 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).
\textsuperscript{122} See supra notes 131-33. Note that the Court’s relevant precedent is skewed by the school context
because the Court is generally more careful about the susceptibility of young students. See Lee, 505 U.S. at
582 (“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.”).
\textsuperscript{123} 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, \textit{Ceremonial Deism and the Reasonable Religious Outsider}, 57 UCLA L. REV. (forthcoming}
solemnizing words have minimal religious content, and function as rote civic exercises, which is essentially equivalent to finding a secular message. 124

Legislative prayer is the anomaly. Marsh v. Chambers upheld state funding of a Christian legislative chaplain who regularly offered prayer before legislative sessions; doing so was justified as a relic of the Framers’ practice when enacting the Bill of Rights. 125 Legislative prayer is the sole Establishment Clause exception in which the Court has allowed for full-fledged prayer conducted as a regular government practice. As such, it has been the test case for what happens when the “government speech” defense is asserted at the intersection of the Establishment Clause and the Free Speech Clause. 126 Recent scholarship has detailed the jarring results, which are seemingly directly at odds with core principles of neutrality and religious liberty. 127 While the ongoing, interactive nature of legislative prayer multiplies and exacerbates the conflicts, the current spate of


124 See id.; 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”).

125 Marsh, 463 U.S. at 794-95.

126 For a particularly troublesome recent case, see Simpson v. Chesterfield County, 404 F.3d 276 (4th Cir. 2005)(rejecting excluded Wiccan’s free speech and free exercise claims re monotheistic 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). Compare Katcoff v. Marsh, 755 F.2d 223 (2nd Cir. 1985)(upholding paid military chaplaincy as a necessary accommodation).

litigation sheds some light on the potential difficulties ahead for new Establishment Clause challenges to Ten Commandments monuments deemed “government speech.”

B. 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 *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*, a holiday display case, and then adopted by the majority opinion in a similar case, *County of Allegheny v. ACLU*. 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. The endorsement test “asks the right question,” Justice O’Connor reasoned, because the Establishment Clause “prohibits government from making adherence to a religion relevant in any way to a person’s standing in the

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political community.”

According to her familiar explanation: “Endorsement sends a message to non-adherents 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.” 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.

In the two seasonal displays which 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, 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 Clause house, reindeer pulling Santa’s sleigh, a Christmas tree, carolers, large toys, and a large banner stating “Seasons Greetings.” And a few years later, in *Allegheny*, the Court 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.”

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

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131 *Id.*
132 *Id.* at 688.
133 *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).
134 *Lynch v. Donnelly*, 465 U.S. 668, 677-78 (1984) (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”).
135 *Id.* at 692 (O’Connor, J., concurring).
objects. 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. 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.\(^{137}\) 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, then 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.\(^ {138}\) 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.”\(^ {139}\) Given this unique treatment, the outcome was not altered by the private donor’s role or by the sign stating: “This Display is Owned by the Holy Name Society.”\(^ {140}\)

\(^{137}\) *Lynch*, 654 U.S. at 693 (O’Connor, J., concurring).

\(^{138}\) *Allegheny*, 492 U.S. at 598.

\(^{139}\) *Id.*

\(^{140}\) *Id.* at 582. “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 601.
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*, the Court held that the State of Ohio had violated the Klu 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 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. At least in that case, though, five justices continued to support the endorsement test, with some differences in approach.

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.” There, the reasonably informed observer would know that Capital Square had been used over time by numerous private speakers of various types. Also, and perhaps most significantly, the concurring justices stressed the importance of affixing to the cross an adequate sign, clearly disclaiming any government sponsorship or endorsement of the Klan’s cross. As Justice O’Connor described it, the Establishment Clause “imposes affirmative obligations

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142 Id. at 778 (Rehnquist, C.J., Scalia, J., Thomas J., and Kennedy, J.)
143 Id. at 780 (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”). Compare 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).
144 Id. at 781-82 (O’Connor, J., concurring).
145 Id. at 782 (O’Connor, J., concurring); id. at 785 (Souter, J., concurring)(joined by O’Connor, J., and Breyer, J.). Compare id. at 817-18 (Ginsburg, J., dissenting)(based primarily on the inadequacy of the disclaimer sign).
that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message.”

Given this conclusion of “no government endorsement,” the Court did not resolve Justice Thomas’ argument that the Establishment Clause was not even implicated because the content of the Klan’s cross’ allegedly religious message instead had a primarily political message of white supremacy.

In analyzing whether Summum’s government speech holding will have any Establishment Clause impact on donated religious monuments, however, the key decision is the factually-similar Van Orden v. Perry. 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 contained 17 monuments and 21 historical markers. The 6-foot high, 3-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.”

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.” The plurality concluded that the display did not violate the Establishment Clause after stating the following: “Texas has treated her Capitol grounds monuments as representing the several strands in the State’s

146 Id. at 777 (O’Connor, J., concurring)(emphasis added).
148 Id. at 681.
149 Id. at 681, 707.
150 Id. at 687-88.
political and legal history. The inclusion of the Ten Commandments in this group has a
dual significance, partaking of both religion and government."\textsuperscript{151}

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.\textsuperscript{152} Because the display lacks any attempt to provide an historical
countext 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 portrays.\textsuperscript{153}

Justice Breyer’s controlling concurrence also applied a version of the
endorsement test, seasoned by his “legal judgment.”\textsuperscript{154} To find endorsement, he used two
main factors to conclude that this Ten Commandments display conveys a predominantly

\textsuperscript{151} Id. at 691-92 (noting, “Whatever may be the fate of the Lemon test,” it is not useful for dealing with a
“passive monument”). Id. at 686. This opinion also distinguished an earlier case finding a classroom
that it was justified by the special vigilance the Court has shown in the elementary and secondary schools.
It should be noted that the background facts quote the authorizing legislation, which refers to Texas’
identity, but that language was not discussed by the plurality. See id. at 681 (quoting Tex. H. Con. Res. 38,
77\textsuperscript{th} Leg. 2001)(monuments are to commemorate the “‘people, ideals and events that compose Texas
identity’”).

\textsuperscript{152} Van Orden, 545 U.S. at 737 (O’Connor, J., dissenting); id. at 738 (Souter, J., dissenting, joined by
Justices Stevens and Ginsburg); id. at 717 (Stevens, J., dissenting, joined by Justice Ginsburg).
The Texas Ten Commandments is located facing the sidewalk between the Capitol and the Texas
Supreme Court, only 123 feet from the Court, and the other closest other monuments are blocked from
view by hedges. Erwin Chemerinsky, Why Justice Breyer Was Wrong, 14 WM. & MARY BILL RTS. J. 1, 15
(2005). When an observer is facing the monolith, which visually emphasizes the religious commands, he
or she is not simultaneously able to read or determine the messages conveyed by the other monuments,
which are spread across the 22-acre green space. (August 2009 conversation with Dean Chemerinsky, who
argued the Van Orden case).

\textsuperscript{153} Id.

\textsuperscript{154} Van Orden, 545 U.S. at 698 (Breyer, J., concurring).
secular message. One was the physical setting, including the other monuments and markers designed to illustrate the “ideals” of Texans.

More significantly for purposes of this Article, 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.” 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. Federal courts have relied on this portion of Breyer’s opinion in upholding some public Ten Commandments’ monuments.

The determinative fact for Justice Breyer on this “borderline” case, though, was his concern over religiously-based divisiveness. He balanced the statue’s 40 years without legal challenge against the risk of numerous disputes if the Court’s decision led

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155 Id. at 701-02 (emphasis added).
156 Id.
157 See Card v. City of Everett, 520 F.3d 1009 (9th Cir. 2008)(Eagles Ten Commandments monument on land near former city hall, 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 “[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); 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,” and “Justice Breyer’s note of the Texas display’s acknowledgment of its private origin presumably makes its 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.
to “removal of longstanding depictions of the Ten Commandments from public buildings across the Nation.” 158 His opinion, therefore, may not extend to new monuments, especially where it is their initial installation which causes division and litigation. 159

To complete the picture, this Part III closes with the other 2005 Ten Commandments case, McCreary County v. ACLU, 160 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. 161

According to the 5-4 majority, this improper purpose was demonstrated by the current displays’ 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. 162

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. The dissent found a secular purpose based on considering only the third and final version, where the Ten Commandments was accompanied by other documents,

158 Van Orden, 545 U.S. at 704.
159 See Green v. Haskell Cty. Bd. of Commr’s, 568 F.3d 784 (10th Cir. 2009), pet. for cert. filed, 78 USLW 3294 (Oct. 28, 2009)(No. 09-531)(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 pet. 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).
160 McCreary County v. ACLU, 545 U.S. 844 (2005).
161 Id. at 881.
162 Id. at 869-70. 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 between 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).
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.”¹⁶³ 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.¹⁶⁴

In the more dramatic nonpreferentialist 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.¹⁶⁵ 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.”¹⁶⁶ Thus, he argued, for the government to honor the

¹⁶³ Id. at 856.
¹⁶⁴ See, e.g., EISGRUBER & Sagar, supra note 161, at 141 (noting that our Constitution is different because it does not require worshiping God, and that our laws do not prohibit purely spiritual sins, such as coveting); Chemerinsky, supra note 151, 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’ teachings. See Goldberg, supra note 21, at 14-18 (comparing, “I the LORD...am a jealous God, visiting the inequity of the fathers upon the children unto the third and fourth generations of them that hate me; and shewing mercy unto thousands of them that love me,” with Jesus’ law of love, and requirements of forgiveness).

¹⁶⁵ McCreary County v. ACLU, 545 U.S. 844, 674-5 (2005) (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).

¹⁶⁶ McCreary, 545 U.S. at at 894 (Scalia, J., dissenting).
Ten Commandments is the constitutional equivalent of honoring God, and so does not violate the Establishment Clause.\footnote{167}{Id.}

Returning to the present decision, in analyzing the free speech claim presented in\footnote{167}{Id.} \textit{Pleasant Grove City v. Summum}, it seems apparent that the justices simultaneously kept in mind how to reconcile their decision on \textit{Summum} with the Court’s prior precedent on religious symbols.

To summarize, at the time the justices worked through the interlocking doctrines implicated by the facts in \textit{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 “basic” historical approach, which relies on somewhat sweeping generalizations and papers over past disputes and discrimination; (4) Justice Scalia’s radical monotheistic historical approach, which abandons all pretense of neutrality; and (5) in the face of clear evidence of government officials’ intent to use government to promote religion, the \textit{Lemon} test, including its “secular purpose” prong.

With the essential Supreme Court precedent on both Free Speech Clause “government speech” and the Establishment Clause in mind, Part IV now examines the Court’s opinions in \textit{Pleasant Grove City v. Summum}.

\textbf{Part IV. The Court’s Rationale: Why Monuments Are Government Speech}

Drawing the line between private speech facilitated by government, and government speech effectuated through private speakers is notoriously difficult.\footnote{168}{And Id.}
so it is not surprising that Justice Alito, writing for the Court, described numerous considerations, rather than formulating a clear-cut “government speech” test. The opinion presented first the affirmative case for applying the government speech doctrine, and then the negative case for why forum analysis is unworkable here. Concurrences by Justice Scalia and by Justice Souter confronted the lurking Establishment Clause issue directly, while portions of Justice Alito’s opinion appear obliquely directed toward that anticipated challenge. Part IV will address each issue in turn.

A. The Case for Application of the Government Speech Doctrine

The *Summum* 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.”169 The opinion’s case for applying the government speech doctrine here is grounded in 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. 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.

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168 The binary approach is so unworkable that recently, some commentator have argued to abandon it. *See*, e.g., Brownstein, *supra* note 106 (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 82 (advocating an “institutional” approach to the private/governmental speech questions).
1. Government intends 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. 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.” 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.”

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. . . .” 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,” in addition to specific written policy points.

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170 E.g., the 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 Illinois, Inc. v. White, 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 130 S.Ct. 59 (2009)(holding that specialty license plates are private speech).

171 *Summum*, 129 S. Ct. at 1133.

172 *Id.*

173 *Id.* at 1134 (emphasis added).

174 *Id.* (noting that display of monuments in park “linked to City’s identity” also signals City’s intent to speak through such monuments). Because I view the *Summum* 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 *Summum* cannot fairly be used to assert a “government speech” defense when
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. 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. 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.”

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.” Note how this statement modified the guidance given in Johanns, which specified that the federal government controlled “every word” of the challenged beef advertisements. “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 excluding private speakers from meeting rooms. Compare Christopher C. Lund, Keeping the Government’s Religion Pure: Pleasant Grove City v. Summum, 104 NW. U. L. REV. COLLOQUIY 46, 54 (2009)(interpreting Summum 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 after school looks like government speech, and thus becomes constitutionally immune to any Free Speech challenge”).

175 Summum, 129 S.Ct. at 1134.
176 See, e.g., KKK v. U. Mo., 203 F.3d 1085 (8th Cir. 2000); Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000).
177 Id. (quoting Johanns v. Livestock Marketing 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’”).
178 Id. at 1134.
179 Compare Johanns, 544 U.S. at 561.
analyzed. *Summum*’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.\footnote{180} In
contrast, note that without specific written criteria or, minimally, consistent past practice,
a government would be unable to establish a limited public forum.\footnote{181}

2. \textit{Reasonable observers attribute park monuments, and their messages, to governments}

Turning next to the attribution point, the *Summum* opinion demonstrates, but does
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.\footnote{182} 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.”\footnote{183} Thus, to determine
speaker identity, the Court relied on endorsement-test type analysis.

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

\begin{footnotesize}
\footnote{180}{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 at 58, 58 n.234.}
\footnote{181}{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).}
\footnote{182}{E.g., Gia B. Lee, \textit{Persuasion, Transparency, and Government Speech}, 56 HASTINGS L.J. 983 (2005);
\footnote{183}{Pleasant Grove City, Utah v. Summum, 129 S.Ct. 1125, 1133 (2009).}
\end{footnotesize}
subterfuge for favoring certain private speakers over others based on viewpoint.”184 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. 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.”185 Consequently, 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.186

In contrast, Summum 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. The opinion did not, however, ascribe a different doctrinal status to those Park displays. The opinion did not, however, ascribe a different doctrinal status to those Park displays.

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184 Id. Note that the response centered on the “subterfuge” aspect because, of course, favoring particular viewpoints is the very essence of recognizing government speech.
185 Id. at 1134 (emphasis added).
186 The Summum 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: Summum’s Impact on the Free Speech and Establishment Clauses at 61 (August 2009)(available at: http://ssrn.com/abstract=1463335)(asserting that Summum’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 at 56, 56 n.222 (for discussion of J. Souter’s concurrence, and federal courts’ post-Summum use of endorsement analysis).
displays to which the donor retains title, or remand the case to determine these ownership facts.\textsuperscript{187} The Court’s approach thus declined to adopt the more specific interpretation of “ownership” used in the Circuit Courts’ four-factor government-speech test.\textsuperscript{188} 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.\textsuperscript{189}

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 Summum 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 even centuries, ago.\textsuperscript{190}

Alternatively, the Court’s approach to ownership can be explained more strategically, as the prequel to a holding for the government in \textit{Salazar v. Buono}, where a private party then would own the land beneath the challenged memorial cross.\textsuperscript{191}

\textsuperscript{187} \textit{Summum}, 129 S.Ct. at 1136.
\textsuperscript{188} \textit{See}, e.g., \textit{Summum v. City of Ogden}, 297 F.3d 995, 1004-05 (10th Cir. 2002) (finding fourth factor, “ultimate responsibility,” satisfied based on city’s title to the monument, and finding third factor, “literal speaker,” mixed because city owned monument, but Eagles composed speech). \textit{See supra} Part II.
\textsuperscript{189} \textit{See supra} Part III (discussion of ownership in Allegheny.)
\textsuperscript{191} This distinction – between ownership of the land versus ownership of the monument itself – has become a critical issue for the Establishment Clause analysis in \textit{Salazar v. Buono}. \textit{See} discussion of \textit{Salazar}, infra at Part V.D.3.
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.” 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 government’s “favoring certain private speakers over others based on viewpoint.” 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. 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

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192 See Pleasant Grove City, Utah v. Summum, 129 S.Ct 1125, 1135 (2009) (“[r]equiring 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”).

193 Id.
be interpreted by different observers, in a variety of ways.”  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 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 *Summum* 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. *Deconstructing the Court’s Stated Reasons forRejecting Forum Analysis*

The *Summum* 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. Along the way, however, the opinion may exacerbate confusion in First Amendment doctrine because it lumps together existing forum

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194 *Id.*

195 *See infra* Part IV.C. at 58, 58 n. 234.
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.\footnote{See Hamilton Blog, supra note 3, at 4 (concluding that Summum left all the related First Amendment doctrines involved “muddier than ever before”).}

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 \textit{large number} of public speakers without defeating the essential function of the land or the program.”\footnote{Pleasant Grove City, Utah v. Summum, 129 S.Ct. at 1137 (emphasis added).} Support for this proposition included the claim that in the following prior precedent, which upheld government-created limited forums, \textit{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,\footnote{Id. (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985)(using the term nonpublic forum).} and (2) the university policy that provided meeting room space for student organizations.\footnote{Id. (citing Widmar v. Vincent, 454 U.S. 263 (1981)(using the term “designated” public forum). See supra note 66 (for a discussion of terminology issue).}

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 can accommodate large numbers of donated monuments. 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.\footnote{See NYC Brief, supra note 3, at 12.}

More importantly, every day, smaller governmental entities dole out limited public meeting room space that can accommodate only a small number of private users. 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. 201 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. 202 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.” 203 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 context, too, there are numerous conflicts over prime locations or desirable dates, as

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

202 Summum, 129 S.Ct. at 1138.

203 Id. “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.” Id.
reflected in the Court’s own precedent upholding government permit systems for public assemblies. 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. 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, 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

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204 See Thomas v. Chicago Park District, 534 U.S. 316 (2002) (upholding content-neutral permit policy to reserve park space for events). See also MacDonald v. Chicago 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.)

205 See, e.g., City of Chicago Municipal Code § 10-8-330 “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.

206 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).
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.” 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. In stark contrast, viewers assume that protestors marching, giving speeches, or distributing leaflets in a park speak for themselves; the more educated viewer might also understand that the government is required to allow such speech under the First Amendment.

The Court never expressly analyzed whether the “limited” (as opposed to traditional or designated) public forum should apply. Summum may come to be viewed as the case which finally erased the faint, yet lingering line between “content” and “viewpoint” discrimination. When Justice Alito rejected Summum’s request that these governmental decisions be handled through content-neutral time, place and manner

207 Id. 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). As discussed supra Part III, not even the speech selection cases of Finley, Forbes, and American Library Association, would clearly prevent this result.

208 See, SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998), 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, THE GREEN BAG (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) (available at: http://www.greenbag.org/v12n4/v12n4_chemerinsky.pdf). 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).

209 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 12, at 38. Federal courts still sometimes draws clear distinctions, see Choose Life v. White,
restrictions, he did so by responding that it is unworkable to require governments to “maintain viewpoint neutrality in their selection of monuments.”

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.” 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, aesthetic, and other civic interests.” 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.

210 *Summum*, 129 S.Ct. 1126, 1137-38 (2009) (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 Ed. Assoc. v. Perry Local Educators’ Assoc., 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”), and Widmar v. Vincent, 454 U.S. 263 (1981)(university facilities made generally available for student activities deemed a “designated public forum”).

211 *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).

212 *Id.* at 1141 (Breyer, J., concurring)(explaining that his preferred approach would be to allow the City to choose monuments “according to criteria reasonably related to one or more of [a public park’s] legitimate ends,” which include “recreational, historical, educational, aesthetic, and other civic interests).”

213 See Mary Jean Dolan, *Pleasant Grove City v. Summum: The Supreme Court’s First Look at Municipal Government Speech*, 50 MUNICIPAL LAWYER 6 (July/August 2009)(providing advice for municipal attorneys, suggesting in response to *Summum*’s guidance that local governments create policies and include criteria such as “welcoming to all ages and cultures”).
Establishing selection criteria is valuable for two reasons. Published rules enhance political accountability; they also provide some protection against government viewpoint distinctions based on impermissible reasons of racism, animus or retaliation. In earlier articles, I advocated adherence to such criteria as a limit on government speech. 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 government’s 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. Thus, regardless of whether *Van Orden* is weakened, the 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.’” Justice Alito reasoned: “if public parks were considered to be traditional public forums for the purpose of erecting

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214 See Dolan 2004, *supra* note 7, at 114-16 (recommending tying constitutionality of government speech selection decisions to consistency with stated program standards); Dolan 2008, *supra* note 7, passim (showing difficulty of requiring selection criteria for monuments because they frequently are acquired sporadically, over periods of years.)  
215 See *supra* note 110.  
privately donated monuments,” most parks would refuse all donations and shut down such forums. 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.”

While this sweeping statement may stir fears of a now virtually limitless 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.

In sum, the Court held that the display of a permanent monument is the government’s speech, and not the donors, and that the government may express its own views through such donated monuments. The next section analyzes the several opinions which offer ideas on how this finding of government speech interacts with the constraints of the Establishment Clause.

C. The Justices’ Thoughts on Summum’s Establishment Clause Implications

The most commonly acknowledged limit on government speech is the Establishment Clause. This Section will describe the relevant concurring opinions, and then will analyze the Establishment Clause implications of Justice Alito’s multiple points on the content of monuments’ messages.

217 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 located in the section focused on the logistics of rejecting forum analysis. See id. at 1137 (quoting U.S. 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. at 681)(for point that allowing all speakers would be logistically burdensome). See also id. at 1131 (quoting NEA v. Finley, 524 U.S. 569 (1998)(Scalia, J., concurring)(in the earlier “government speech” portion of the opinion, quoting Justice Scalia’s concurrence in Finley, which states his individual opinion that government can limit NEA funding to only those private artists whose art expresses government viewpoints).

218 See Summum, 129 U.S. at 1132 (J. Alito); Id. at 1139 (Stevens, J., concurring). But see id. at 1142 (Souter, J., concurring in the judgment)(making more complex statements regarding the interaction, discusses infra at p. 61, 61 n. 233).
1. The concurrences

Only Justice Scalia, joined by Justice Thomas, preemptively proclaimed that

*Summum*’s holding creates no Establishment Clause risk for Pleasant Grove. 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.

Justice Souter was the only other Justice to examine the decision’s Establishment Clause implications directly; his opinion sought to begin working out the interaction of the two principles. Concurring only in the judgment, he advocated applying the same “reasonable observer” endorsement test for both issues; using that standard, he agreed that the Pioneer Park monuments were government speech. This proposal was his proffered solution to a “numbers problem” different from that focused on by Justice Alito. When a monument has some religious aspect, he wrote, a government frequently

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219 Id. at 1139-40 (Scalia, J., concurring).
220 Id. See Dorf, supra note 14 (on impact of *Summum*, concluded that only two justices (Scalia and Thomas) “argued 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”). See supra note 16 (for additional commentary).
221 Id. at 1139 (Stevens, J., concurring); Justice Breyer was silent on the Establishment Clause issue. See id. at 1140-41 (Breyer, J. concurring).
222 Id. at 1141 (Souter, J., concurring in the judgment).
223 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 government land.”

In a post-*Summum* specialty license plate case, the Eighth Circuit did just that. See Roach v. Stouffer, 560 F.3d 860 (8th Cir. 2009)(After reviewing the *Summum* 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?”). Compare Gaylord, supra note 185, at 61(concluding that *Summum* decision precluded further application of the endorsement test).
224 Id. (“I find the monuments here to be government expression”; more precisely, his opinion focused solely on the Ten Commandments).
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.\textsuperscript{225}

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.”\textsuperscript{226} As he somewhat gleefully reminded the others at oral argument, he was a dissenter in \textit{Van Orden};\textsuperscript{227} 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.”\textsuperscript{228} 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.\textsuperscript{229} Or, it may be an indirect reference to the

\begin{footnotes}
\textsuperscript{225} Id. at 1141-42 (“It 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 exhibit may stand for. As mementos 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.”)

\textsuperscript{226} Id. at 1141 (citing Bd. of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 235 (2000)(an early Supreme Court decision discussing the theory and meaning of core government speech)).


\textsuperscript{228} Pleasant Grove City, Utah v. Summum 129 S. Ct. 1125, 1142 (2009). (“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 strictures against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it could be easy for a government to favor some private religious speakers over others by its choice of what monuments to accept.”).

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. \textit{But see} Gaylord, supra note 185, 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.”).

\end{footnotes}
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.\(^{230}\) Given his departure from the Court, the puzzle over his meaning may linger.

2. Justice Alito’s majority opinion & the content of monuments’ messages

Turning back to the *Summum* majority opinion, its only explicit reference to this topic was to acknowledge, in passing, that “government speech must comport with the Establishment Clause.”\(^ {231}\) 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. While perhaps the simpler view is that this section was meant to provide an Establishment Clause escape hatch, this Part IV.C. argues that this interpretation is inconsistent with the opinion’s contradictory statements.

One view of the *Summum* majority opinion is that it carefully laid the groundwork to preserve *Van Orden*’s focus on the secular messages conveyed by religious symbols, particularly the Eagles-donated Ten Commandments monuments. Justice Alito 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.”\(^ {232}\) While quoting the entire lyrics of John Lennon’s song “Imagine” drew comment,\(^ {233}\) far

\(^{230}\) 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 140-43 and accompanying text.

\(^{231}\) *Summum*, 129 S.Ct. at 1132.

\(^{232}\) *Id.*  at 1135.

more striking was his statement that even a very simple monument—a statue displaying the word “peace” in many language—is “almost certain to evoke different thoughts and sentiments in the minds of different observers.” This line of analysis, which was extraneous to deciding *Summum*, already has been used in support of the government in *Salazar v. Buono* to demonstrate the futility of the Establishment Clause endorsement test.

But a careful analysis of the majority opinion’s many-layered statements provides numerous useful tools for the opposite position. First, these 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 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. 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

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234 *Summum*, 129 S.Ct. at 1135 (citing IMLA Brief 6-7).
236 Compare *Pleasant Grove City, Utah v. Summum* 129 S. Ct. 1125, 1135 (2009) (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 (“the monument may be intended to be interpreted. . . . in a variety of ways”).
public parks, would “reasonably interpret” them as conveying some message from the government.\textsuperscript{237}

Second, even within the section discussing the content of monuments’ expressions, several statements acknowledged the familiar experience where a monument does send a commonly-understood message. Most clearly, the Court noted that the Statue of Liberty now is universally viewed as a welcoming beacon to immigrants.\textsuperscript{238} 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,\textsuperscript{239} implicitly recognized that monuments send communal messages. 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.\textsuperscript{240} 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

\textsuperscript{237} \textit{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.

\textsuperscript{238} \textit{Id.} at 1136 (The Statue of Liberty came “to be viewed as a beacon welcoming immigrants to a land of freedom.”)

\textsuperscript{239} \textit{Id.} at 1136 (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).

\textsuperscript{240} \textit{Id.} at 1136 (“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”).
scene among the collection.\textsuperscript{241} 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. Next, Part V will complete my analysis of the \textit{Summum} decision and the intersecting doctrines explored throughout.

\textbf{Part V: A Modest Proposal for Establishment Clause Limits on Government Identity Speech}

This Part V integrates the arguments for why \textit{Summum} should impact the Court’s Establishment Clause approach, particularly regarding government’s display of 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.\textsuperscript{242}

After recapping the doctrinal reasons for \textit{Summum}’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

\textsuperscript{242} 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. \textit{See}, e.g., FELDMAN, supra note 19, 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, \textit{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).
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 and offers a few preliminary reflections on the Salazar v. Buono
situation.

A. Recap of the Doctrinal Arguments for Why Summum 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 “newly minted” doctrine, exemplified by Johanns. This
is meaningful for Establishment Clause purposes because the Court did not emphasize
government’s institutional role as curator, selecting which private donors’ expressions
should be displayed in its park monuments.243 Instead, when analyzing government’s
role in accepting private monuments, the Court took the position that government is
making decisions which express the community’s identity and convey “government-
controlled” messages—even where those “messages” are broad and thematic, rather than
precise and clearly articulated.244

Part III provided the backdrop for explaining why this type of core “government
speech” defense to Free Speech Clause claims should be distinguished from findings, in
Establishment Clause claims, that the government is speaking, or endorsing private

243 See supra Part II (defining Rust and Johanns as “core” government speech because they are based on a
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).

244 See supra Part IV.A (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 to all who frequent the Park,”
and City “unmistakenly conveyed 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 Pleasant Grove City, Utah v.
speech. Where a government is viewed as promoting the religious message of a private organization, it may violate the Establishment Clause by such indirect promotion even in the absence of an intentionally-transmitted “government-controlled” message. And where the Court finds secular content, it does not necessarily stop to unravel the public-private roles. Most specifically, Part III showed that Justice Breyer’s controlling concurrence in *Van Orden* was based in part on the distancing role of the donor. *Summum* now has dissolved that helpful construct.

**B. Endorsement and the “Social Meaning” of Summum**

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

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245 *See supra* Part III.A.

246 *See, e.g.*, Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POLITICS 499 (Spring 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*, 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’”).

247 *See* David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 563 (2001-2002) (proposing using “an expressivist approach to the Establishment Clause, in essence Justice 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 and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (1999-2000). 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
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.248 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.” 249

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.”250 As noted, parts of the Summum majority opinion seemed to question that possibility, by focusing on the multiple possible meanings of a given symbol.251 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.”252

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 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.

248 EISGRUBER & SAGER, supra note 161, at 125-146.
249 Id. at 18.
250 Id. at 127.

Lessig defines “social meaning” 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.
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.”\textsuperscript{253} 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.\textsuperscript{254}

Second, much of Lessig’s work examined “cases where contexts are changed, not where they simply change.”\textsuperscript{255} 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,’”\textsuperscript{256} since the 1980’s Ecuador has reintegrated the “Indian” into its national identity, using techniques such as national holidays and state-sponsored festivals.\textsuperscript{257} Under the new First Amendment doctrine espoused by \textit{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.” “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.\textsuperscript{258} And “ambiguation” gives a

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\textsuperscript{253} \textit{Id.} at 953.
\textsuperscript{254} \textit{Id.} at 953-64 (citing James Forman, \textit{Driving Dixie Down: Removing the Confederate Flag from Southern State Capitals}, 101 YALE L.J. 505 (1991). \textit{See also} Dolan 2008, \textit{supra} note 7, at 52, 52 n.245 (relying on Forman to argue for a prohibition on such racist government speech).
\textsuperscript{255} \textit{Id.} at 962 (emphasis in original).
\textsuperscript{256} \textit{Id.} at 981 (quoting Mary Crain, \textit{The Social Construction of National Identity in Highland Ecuador}, 63 ANTHROPOLOGY Q. 43, 46 (1990)).
\textsuperscript{257} \textit{Id.} at 982 (citing Crain, \textit{supra} note 255, at 47, 50).
\textsuperscript{258} \textit{Id.} at 1009 (providing the commercial example of beautiful models used by GAP to transform the image of traditional workers’ clothing).
\end{flushleft}
particular symbol a second meaning, without denying its existing meaning, “and thereby
blurs just what it is that X is.”

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 1960’s and early 1970’s has changed the message conveyed by
governmental actions (and inactions) in this regard. And the Court’s decision in
Summum itself has altered the social meaning of Van Orden, based in part on the
techniques identified above.

Looking first at the Summum decision, the Court’s act of identifying all donated
monuments, including the Eagles-donated Ten Commandments, as “government speech”
greatly 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 Summum opinion performs a “de-ambiguating” function here. By
removing the donor’s communicative role, it undercuts Justice Breyer’s efforts in Van
Orden to blur legal responsibility for the monument’s face value: its religious text.

259 Id. at 1010 (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 ambiguating the social meaning of what was now behavior
required by law).

260 But see ACLU of Ky. v. Grayson Cty., Ky., 591 F.3d 837, 851 (6th Cir. 2010)(providing an unusual,
and I think incorrect, interpretation of Summum and the Court’s precedent, court stated that a Ten
Commandment donor’s religious motivation could be attributed to the county defendant if there were a sign
Moreover, judicial opinions themselves can construct new social meanings.\(^{261}\) 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 Jesse Hill’s application of “speech act theory” to Establishment Clause cases: “Descriptive words may help to construct the reality that they describe or purport to describe,” particularly where that description is proclaimed by “the voice of the sovereign authority,” which includes the Court.\(^{262}\) As mentioned above,\(^{263}\) 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 and an effort to avoid favoritism or divisiveness, was redefined by the Court as unconstitutional discrimination based on religious viewpoint.\(^{264}\) 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 \textit{Van Orden} was decided; and (3) the post-\textit{Summum} period. First, there was an extraordinary cultural shift in this country from the time the Eagles began distributing the Ten Commandments monuments on the Foundations display linking it to the religious donor)(quoting \textit{Summum}, 129 S.Ct. at 1136, citing \textit{Van Orden}, 545 U.S. at 701-02 (Breyer, J., concurring) and \textit{Allegheny}, 492 U.S. at 600)).\(^{261}\) See Lessig, \textit{supra} note 251, at 1014 n.241 (“And indeed, one could say, the opinion in \textit{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. . . .’’\(^{262}\) Hill, \textit{supra} note 122, at 25-26 (“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.’”\(^{263}\) (quoting J.L. Austin, \textit{HOW TO DO THINGS WITH WORDS} (1962)). Speech act theory is a branch of linguistic theory.

Prof. 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.”\(^{264}\) Id. at 50-51. As shown next, writing pre-\textit{Summum}, her applications of speech act theory have led to a rejection of the endorsement test. \textit{See infra} at Part V.C.2.

\(^{261}\) See Lessig, \textit{supra} note 251, at 1014 n.241 (“And indeed, one could say, the opinion in \textit{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. . . .’’\(^{262}\) Hill, \textit{supra} note 122, at 25-26 (“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.’”\(^{263}\) (quoting J.L. Austin, \textit{HOW TO DO THINGS WITH WORDS} (1962)). Speech act theory is a branch of linguistic theory.

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around the country (1955) and carried out most of the campaign (during the 1960s), 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. 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. Given that context, viewers at these dedications were reasonably likely to associate the monuments with their local Eagles’ chapter’s extensive secular charitable works, and their well-publicized efforts to reduce juvenile crime by promulgation of a moral code, one that may well 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’ 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. Similarly, commentators have noted that the more recent push to spread the Ten Commandments to public squares and government buildings, and

265 The Eagles campaign began with the distribution of over 10,000 prints of the Ten Commandments starting in 1951, the first monoliths were dedicated in 1955, and there was last one was dedicated in 1985. See http://www.foe.com/about-us/ten-commandments.aspx. 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.

266 See FELDMAN, supra note 19, at 166-70, 182 (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,” emphasizing shared morality)(citing WILL HERBERG, PROTESTANT-CATHOLIC-JEW (1955)).

267 Indeed, particularly because the Ten Commandments are an iconic Old Testament symbol, for some of the Christian-majority small towns and states which erected the primarily Jewish symbol during this era, the meta-message conveyed by government’s role may even have been somewhat pluralist.
to litigate to defend existing monuments, derives from conservative religionists’ frustration over significant social changes wrought by a more liberal Court, particularly the legalization of abortion and the end of school prayer.\textsuperscript{268} Beginning in the 1970s and prominently by the 1980s, religious evangelicals and values conservatives became a powerful political force. 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.”\textsuperscript{269}

With respect to any Establishment Clause claim brought against a government’s Ten Commandments monument post-\textit{Summum}, the social meaning has changed again. When \textit{Summum} was decided, the larger “Culture Wars” backdrop was relatively stable, but its case-specific context raised new religious discrimination charges not present in \textit{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.\textsuperscript{270} Especially under such circumstances, even provisionally accepting the idea that a Ten Commandments \textit{monument} itself conveys a secular message, a city’s \textit{acts} of defending its selective display of that monument clearly risks being understood as expressing a strong governmental adherence to the majority religion. In a recent case, the Tenth Circuit recognized as much, when it interpreted local

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\item[\textsuperscript{268}] See FELDMAN, \textit{supra} note19, at 243 (“Evangelicals’ perceived exclusion fuel[ed] resentment and a reactionary attempt to attempt brand-new symbols, like the Ten Commandments in courthouses, where none existed before.”) See also GOLDBERG, \textit{supra} note 21, Chapter 2.
\item[\textsuperscript{269}] See FELDMAN, \textit{supra} note 19, at 188-99 (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). Note that Pat Robertson founded the ACLJ legal advocacy organization, which is led by Jay Sekulow, Counsel for Pleasant Grove City in the \textit{Summum} case. See generally, \textit{e.g.}, JAMES DAVIDSON HUNTER, CULTURE WARS (1992).
\item[\textsuperscript{270}] See \textit{supra} note 9.
\end{itemize}
political leaders’ enthused defense of a new Ten Commandments display as endorsement of the icon’s current social meaning of religious activism. 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.\textsuperscript{271}

In an important, overlooked aspect of Justice Alito’s majority opinion, he expressly acknowledged this phenomenon, stating: “The “message” conveyed by a monument may change over time” as society’s interpretation of history and culture evolves.\textsuperscript{272} 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. 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.”\textsuperscript{273} In addition, Justice Alito’s majority opinion acknowledged that government retains some control in shaping how viewers will understand a monument’s meaning,

\textsuperscript{271} See Green v. Haskell Cty. Bd. of Commr’s, 568 F.3d 784, 801-02 (10th Cir. 2009), \textit{pet. for cert. filed}, 78 USLW 3294 (Oct. 28, 2009)(No. 09-531) (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.) Compare Dolan 2008, \textit{supra} note 7, at 50-51 (briefly making similar claim re the social meaning of litigating to keep monument).

\textsuperscript{272} Pleasant Grove City, Utah v. Summum, 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 J. MAYO, WAR MEMORIALS AS POLITICAL LANDSCAPE, 8-9 (1988). \textit{See also} Dolan 2008, \textit{supra} note 7, at 26-27, 50-51 (published prior to opinion)\textit{citing MAYO, supra, and examples from the IMLA Municipal Practice Examples, to show that monuments’ meaning changes 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.)

\textsuperscript{273} Summum, 129 S.Ct. at 1136. \textit{See also} B. Jessie Hill, \textit{Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test}, 104 MICH. L. REV. 491, 519, 519 n.159 (2005-2006) (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”).
including by adding additional elements to a display. 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.

Applying this reasoning from the Summum 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.

C. The Endorsement Test is the Best Realistic Option

1. Justice Alito & the case for the endorsement test’s staying power

My proposal is based on retaining the endorsement test, despite its often-recognized flaws, both because it “asks the right questions” 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. The larger concern, that the Court will adopt a new nonpreferentialist approach and will allow government favoritism of religion over non-religion (and perhaps even monotheism over other faith traditions), is based on the belief

274 See Summum, 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”). Compare 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).

275 See supra Part III.


277 See, e.g. Gey, supra note 22, at 48; GREENAWALD, supra note 22 (questioning survival of endorsement test post-O’Connor).
that Chief Justice Roberts and Justice Alito will create a new 5-4 conservative majority supporting that position.278

At least as of this writing, however, there is reason to believe that Justice Alito will continue to apply the endorsement test. Not only did he use it as a Third Circuit judge,279 but in another context involving a free speech claim, Justice Alito relied on endorsement-type analysis to determine the content of a speaker’s message. Concurring in *Morse v. Frederick*, the “Bong Hits 4 Jesus” case, he joined 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.”280

While his opinions regarding religious speech are assimilationist and easily characterized as conservative,281 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.282 This emphasis, which

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278 See, e.g., Gey, *supra* note 22, at 48 (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 22, at 70-71 (predicting Chief Justice Roberts and Justice Alito will join Justices Scalia, Thomas, and Kennedy to create 5-4 majority, overturn decades of Establishment Clause precedent, and institute nonpreferentialism).

279 E.g., Child Evangelism Fellowship of N.J., Inc. v. Stafford Township. School 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 flyers); ACLU v. Schundler, 168 F.3d 92 (3d Cir. 1999)(upholding a Jersey City holiday display as similar to those upheld in *Lynch* and *Allegheny*, 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).


281 This is most clear from Justice Alito’s opinions on standing. See *Hein v. FFRF*, 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-NJ v. Township Of Wall*, 246 F.3d 258 (3d Cir. 2001)(plaintiffs/residents lacked taxpayer standing to challenge township religious holiday display because failed to show Township had spent any money, employee time spent was de minimus, and insufficient allegations of personal contact with modified display).

282 C.H. v. Olivia, 226 F.3d 198, 211-12 (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
differs from Justice Scalia’s spirited defense of government endorsement of majority religion, suggests his concern for minorities’ liberty of conscience, even if his opinions may show some ambivalence regarding feelings of exclusion when majority religious expression is sponsored by the government.283

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.284 For evidence, one need look no farther than the unadorned Ten Commandments monument which virtually guards Texas’ Supreme Court building. 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.285 Optimally, identified problems of majority bias and indeterminacy would be corrected, and the endorsement

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. . . .”)

283 One troubling sign in lower court cases is the contrast between his 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.


test realigned with its minority-protective rationale by, for example, adopting proposals
to use the reasonable non-adherent’s perspective.286

Even at present, though, the endorsement test offers some minimal level of concern for religious minorities, and seems the best likely option on a conservative Court. Next, analyzing two recent scholarly articles which offer potentially more appealing solutions serves to underscore my proposal’s practical value.

2. Professor Hill’s rebuttable presumption & removing most religious displays

Professor Jesse Hill uses linguistic theory to critique and reject the endorsement test as irremediably indeterminate and majoritarian. She argues that consensus on the meaning of religious symbols is impossible “because of the great diversity of both religious beliefs and attitudes toward the proper interactions between church and state.”287 Professor Hill further asserts that any agreement which does exist necessarily will reflect and reinforce majority religious beliefs.288

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.”289 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

286 See, e.g., Corbin, Ceremonial Deism, supra note 122 (using insights from Title VII sexual harassment theory to emphasize the need for an outsider perspective).

287 Hill, supra note 271, at 518-19.
288 Id. at 521.
289 Id. at 539.
unconstitutional. 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.”

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. 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. 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-*Summum*, 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. 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. 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

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290 *Id.* at 542-43 (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*).

291 See, e.g., *Eisgruber & Sager*, *supra* note 161, at 157; *Feldman*, *supra* note 19, passim.

292 Griffin, *supra* note 24, at 43.

293 *Id.* at 50.
diversity among Christian sects, to encompass other religions and philosophies. 294

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. 295

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 Summum. 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 Crescent alongside a crèche and menorah and, upon receiving applications from 15 different religions, the city accepted all of them and moved its holiday display to a larger city park. 296 While symbolic counter-speech is an effective and valuable method of altering the message conveyed by prior divisive and exclusionary public symbols, 297 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, Griffen asserts that

294 Id. at 42. See generally NUSSBAUM, supra note 283.
295 Id. at 48. Compare 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 (1987)(cited in Allegheny, 492 U.S. 573, 620 (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.
296 Griffin, supra note 24, at 50.
297 See, e.g., LEVINSON, supra note 207.
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.\(^298\) 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,\(^299\) the website’s 2009 homepage now displays images of medieval Christian saints and highlights the worldwide use and historical pedigree of the mummification process.\(^300\) This observation is not intended to disparage the Summum religion, or to suggest 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 Rev. Fred Phelps proffered an anti-homosexual “religious” monument to cities that displayed an Eagles-donated Ten Commandments monument.\(^301\) Also, rather than asking for the addition of a “Happy Solstice” sign to a public holiday display, it has become fairly common for atheist groups to display signs proclaiming, sometimes in

\(^{298}\) Griffin, *supra* note 24, at 42-43.


harsh terms, that there is no god.\textsuperscript{302} Indeed, Professor Griffin’s well-regarded law 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.\textsuperscript{303} It is this potential cacophony that led to a 9-0 decision in \textit{Summum}, 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 realistic tolerant approach.

\textit{D. Disclaimers and a Moratorium: The Price of Government Speech}

Now that government has the unequivocal right to accept or reject any privately-donated monument, and any message conveyed is deemed a government-controlled identity message, governments have an enhanced responsibility regarding their religiously-themed monuments. As the Court recognized in \textit{Pinette}, but with much more urgency here, in circumstances where a religious symbol is likely to be attributed to the state, the rock-bottom requirement for government is to clearly explain to viewers its constitutionally-permissible reason for displaying the religious content.

\begin{quote}
\textsuperscript{302} \textit{See}, e.g., CNN.com, http://www.cnn.com/2008/LIVING/12/05/atheists.christmas/ (Dec. 5, 2008)(last visited Jan. 13, 2009)(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”).
\textsuperscript{303} \textit{Leslie G. Griffin, Law & Religion}, 21-23, 22 (Foundation Press 2007)(describing a number of unusual religious and philosophical claims, including a Satanic ritual involving eating human flesh, and citing \textit{Howard v. U.S.} as protecting a prison inmate’s right to practice Satanic rituals).
\end{quote}
1. Disclaimers

In the pre-*Summum* era, where the lingering donor role still ambiguated the state’s constitutional responsibility for religious displays, governments proffered some non-religious justifications for such displays. What I propose here—the absolute minimum response to *Summum* which the Establishment Clause requires—is that governments must display large, clear disclaimers presenting these justifications to all viewers. Using the much-litigated, Eagles-donated Ten Commandments as an example, governments that rely on its “secular message” to avoid Establishment Clause liability should be required to explain in detail how the display is related to secular ideals, why it is on display in a public park, and why the display is consistent with government’s commitment to religious liberty and tolerance.  

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.

Signs making statements such as, “The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition,” would not be sufficient. As many scholars have shown, the Ten Commandments begin with a demand for exclusive allegiance to the God of Moses, includes purely spiritual imperatives, and its criminal prohibitions are common to all societies. Promulgating the story that they are the foundation of this country’s legal

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304 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 (for a discussion of some limitations on using disclaimers).
system and constitutional liberties not only is inaccurate history, but that governmental overstatement alone suggests a religious purpose.\textsuperscript{305}

If \textit{Van Orden} has staying power, it rests on Justice Breyer’s concern for the religious divisiveness that would ensue from rooting out religious monuments around the country pursuant to court orders. Under the Court’s current precedent, it is the unique historical background of these Eagles-donated monuments, along with this stated concern, that is the constitutional justification for their continued display. Accordingly, as a starting point, I propose that courts should require a disclaimer similar to the one illustrated here, that contains the following elements:

\begin{quote}
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.
\end{quote}

\textsuperscript{305} \textit{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”). \textit{See supra} note 163 (for the academic critique). \textit{Compare} ACLU of Ky. v. Grayson Cty., Ky., 591 F.3d 837, 849, 849 n.6 (6th Cir. 2010)(interpreting identical sign, 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 Commandments was a sham). In \textit{Grayson}, the court rejected an Establishment Clause claim where a private citizen, Reverend Chester Shartzer, 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” which the county government had not seen. \textit{Id.} at 841-42.
An explanation along these lines would provide needed transparency and would allow
governments, and courts, to walk the fine line between offending religious believers by
tearing down long-cherished monuments, and offending religious minorities and non-
believers by promulgating a sectarian religious creed. This example could be modified,
of course, where specific historical contexts such as that described by Pleasant Grove
City provide a different, plausible secular rationale.

A similar type of explanatory disclaimer already has been modeled in cases involving
non-religious monuments. 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.\footnote{See Dolan 2008, supra note7, at 35, 35 nn.160-165 (citations omitted)(describing Santa Fe’s addition of a plaque mitigating use of the term “savages” in a central monument, and New Orlean’s addition to the “Liberty” Monument, which originally commemorated a Reconstruction Era white supremacist battle).} That practice is optional,
however, because there is “no political Establishment Clause.”\footnote{See Kathleen Sullivan, Parades, Public Squares and Voucher Payments: Problems of Government “Neutrality,” 28 CONN. L. REV. 243, 258 (Winter 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”).} Now that donated

\begin{footnotes}
\item[306] See Dolan 2008, supra note7, at 35, 35 nn.160-165 (citations omitted)(describing Santa Fe’s addition of a plaque mitigating use of the term “savages” in a central monument, and New Orlean’s addition to the “Liberty” Monument, which originally commemorated a Reconstruction Era white supremacist battle).
\item[307] See Kathleen Sullivan, Parades, Public Squares and Voucher Payments: Problems of Government “Neutrality,” 28 CONN. L. REV. 243, 258 (Winter 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”).
\end{footnotes}
public monuments are exclusively “government speech,” however, government has an affirmative constitutional obligation to alter any perception that it is endorsing a religious message.

2. Additional restrictions on new monuments

This disclaimer proposal relates primarily to existing monuments, those erected in a less pluralistic time. As the country has become more diverse, with increasing numbers of citizens belonging to minority religions or none at all, erecting a new religious monument typically will be viewed as a deliberate act to proclaim and preserve the majority religion’s political power, rather than as an unintentional slight.

Thus, in the post-\textit{Summum} era, 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, 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

\footnote{See The Pew Forum U.S. Religious Landscape Report (Feb. 25, 2008), available at: \url{http://religions.pewforum.org} (comprehensive report, including 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)).}
Where a new monument is likely to appear religiously-themed to observers, an accompanying written explanation still should explain its historical relevance, and in some cases a disclaimer may be necessary. Where the religious theme is quite muted, as in the famed Supreme Court building frieze, which features Moses among the great lawgivers, holding tablets not meant to be read, endorsement concerns are not raised. At the other end of the spectrum, clearly not defensible, would be a new landmark Latin cross or another monolith reciting specifically religious text, 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. While government may not endorse religion, it is free to endorse traditions of objective moral value, to promote ideals of justice and tolerance,

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

310 Ledewitz, supra note 241, at 93 (by “higher law,” he does not mean Thomist natural law, but rather “what Oliver Wendell Holmes called a ‘naive state of mind’—that there is something binding on all humans 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. For an interesting account from a leading political philosopher, see JÜRGEN HABERMAS, BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS (2008).
and to reject nihilism and discrimination. 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.”

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 religious monument proposed by any religious or philosophical organization risks creating a public forum for religious speech—the very opposite of Summum’s practical result.

Perhaps the most workable option would be for a government to create a new monument to express non-specifically-religious ideals, such as peace, tolerance, or religious liberty. Monuments intended to promote those ideals could then include religious symbols and themes reflecting diverse traditions, representing many—but not necessarily all—religions and moral philosophies. Depending on the degree of religiousity, this scenario also may require a sign explaining the governmental purpose

311 Ledewitz, supra note 241, at 95. Compare Beschle, supra note 293 (government may influence, or attempt to influence, its citizens’ beliefs and values, but only as relates to the temporal welfare).
312 Ledewitz, supra, note 241, at 98.
313 Id. at 102. Consistent with the “social meaning “discussion above, see supra Part V.B., he asserts that this statement of deep secular purpose “becomes self-authenticating”: “by forcing government officials to affirm a more universal justification for use, the Court would be creating the broad community of believers and nonbelievers to which the justification refers.” Id.
and disclaiming governmental endorsement of religion. Such communications would clarify that government’s role is provider of religious liberty, and not arbiter of religious truths.


Salazar v. Buono presents the converse of Summum: the government has tried to cure an Establishment Clause violation by privatizing ownership of the public land underlying the VFW’s cross memorial.314 The end of this Article is not the place to dissect its complex procedural issues,315 or to explore fully Summum’s applications. Briefly applying my conclusions to a simplified version of the Buono story, especially to the cross’ designation as a National Memorial, however, provides a useful illustration.

In 1934, the local VFW post, acting on its own, erected a large Christian cross on Sunrise Rock, located in the vast Mojave Desert National Preserve, to honor those who died in war. When replaced over the years, the cross lacked any plaque or sign indicating its role as a war memorial, and Easter services have been held at the site for over 70 years. In 1999, the National Park Service denied a request to erect a Buddhist stupa near the Cross, stating that installing any memorial there violated its management policies and federal law.316

Shortly after Respondent Frank Buono, a Catholic and now-retired NPS employee, complained that the presence of a cross on federal land violated the Establishment Clause, Congress put into an appropriations bill a provision that no

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314 For an interesting exploration of the “interrelationship between private-law arrangements and public-law obligations” posed by the two cases, see Tebbe, supra note 13.
315 These issues include the Establishment Clause issue of standing to sue, and those relating strictly to civil procedure, include the scope of the injunctive relief and res judicata. See generally Buono Respondent Brief, supra note 28, at 9.
316 Id. at 2-3 (citing Pet. App. 118a-20a).
government funds could be spent to remove it.\textsuperscript{317} Then, in January 2002, while Respondent’s Establishment Clause lawsuit was pending in federal district court, Congress designated the Cross as a National Memorial commemorating United States participation in WWI. It is one of only 45 National Monuments in the country. Several years earlier, an historian commissioned by NPS had concluded that the Cross lacked sufficient historical significance for a more common designation, placement on the National Register of Historic Places.\textsuperscript{318}

After the district court held the Cross display unconstitutional, and while the Ninth Circuit appeal was pending, Congress passed a law ordering the transfer of the property on which the Cross sits to the VFW, in exchange for a parcel owned by Henry Sandoz, the private person who had erected a replacement Cross in 1998.\textsuperscript{319} The law provides that the Secretary of the Interior shall affix on the Cross a plaque similar to that on the original, stating: “This cross was erected in memory of the dead of all wars, erected in 1934 by members of Veterans of Foreign Wars, Death Valley Post 2884.”\textsuperscript{320} The transfer statute contains a reversionary clause requiring the VFW to continue using the land for a war memorial. While disputed, the government’s counsel maintains that the VFW could take down the Cross and replace it with another kind of war memorial without triggering reversion of the land back to government.\textsuperscript{321}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{317} Id. at 4 (citing Pub. L. No. 106-554, § 113 (2000)).
\item\textsuperscript{318} Id. at 3.
\item\textsuperscript{319} Id. at 3-5.
\item\textsuperscript{320} \textit{Buono} Transcript, \textit{supra} note 28, at 39-40. Some confusion exists on the wording on the proposed plaque. \textit{See} Brief of American Muslim Armed Forces and Veterans Affairs Council, and the Muslim Veterans Association, as Amici Curiae in Support of the Respondent at 15, \textit{Salazar v. Buono}, 129 S. Ct. 1313 (2009) (No. 08-472) [“Muslim Veterans \textit{Buono} Amicus Brief”] (noting confusion and stating that the law requires the restored plaque to read, “‘Erected in Memory of the Dead of All Wars’”(quoting Pub. L. No. 107-117, § 8137(c), Jt. App. 44)).
\item\textsuperscript{321} \textit{Buono} Reply Brief, \textit{supra} note 307, at 20.
\end{enumerate}
\end{footnotesize}
The Cross is visible from about 100 yards away to the only people likely to see it in person, those driving on nearby Cima Road. At the oral argument, Solicitor General Kagan stated that the 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. This larger sign would be posted on federal land facing the road. This proposal triggered Chief Justice Roberts’ (disheartening) complaint that to do so would be requiring “special warning signs” discriminating against only “religious property.” Approximately ten percent of the Preserve is private land, though the other parcels are larger holdings, such as privately-owned ranches.

Applying my conclusions about 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 monument designation – should be subject to a rebuttable presumption of unconstitutionality.

Like the Eagles-donated Ten Commandments, the Cross at Sunrise Rock has an 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

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322 Buono Transcript, supra note 28, at 22, 24.
323 Id. at 22-24.
324 Id. at 21-22. (“Well, isn’t that an interference or it’s a 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. . . . it would be only religious property that would have these special warning signs.”)
“shell shock” of that brutal war.  It explains further that when these veterans first erected the Cross in 1934, a lone Christian cross was the pre-eminent symbol to memorialize the many soldiers who sacrificed their lives in that War; it was commonly recognizable as such, and displayed throughout Europe and America for that purpose.

In that era of American history, despite the significant participation of soldiers of other faiths, the primary social meaning of the Sunrise Rock Cross may have been 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. The NPS rejection of the Buddhist stupa, combined with Congress’ designation of the Cross as one of 45 National Monuments, heightened the perception of government endorsement of the Christian religion. Equally as poignant as the VFW’s story is the amicus brief filed by American Muslim veterans associations. It describes their perception of the Christian cross as a sectarian religious symbol which 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.

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326 Id.

327 See Buono Respondent’s Brief, supra note 28, at 40 n.26 (approximately 250,000 Jewish soldiers served in the United States armed forces in WWI).

328 Muslim Veterans Buono Amicus Brief, supra note 318, at 9-13.

329 See id. at 12 (“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. . . . 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.”) (quoting John 3:18 (KJV).
Looking at how *Summum* applies to the Cross’ placement is not as simple as equating land ownership with speaker identity. Even if the land transfer goes forward, the Cross would not be exclusively the VFW’s private speech. In *Summum*, when the Court stated that viewers attributed any message communicated by a monument to the landowner, it relied on the land’s observable status, there as a public park, linked with the city’s identity.\(^{330}\) In *Buono*, nothing will demarcate the small transferred parcel displaying the cross from the public lands encircling it, and so viewers are likely to attribute the monument to the federal government.\(^{331}\)

Moreover, the government’s reversionary interest means, minimally, that it maintains some control over the messages conveyed by the Cross. Imagine, for example, that the VFW decided to enhance the Christian symbolism of the Cross by adding statues of human figures or two nearby crosses. The government could (and presumably would) intervene because such additions would alter the monument’s meaning, and would interfere with the possibility that viewers would understand its message as a war memorial.\(^{332}\)

Thus, while a Cross monument on VFW land would not be “government speech” under *Summum*, neither would it be wholly private speech putting an end to the appearance of government endorsement of Christianity. In this situation, too, the minimum requirement of the Establishment Clause would be a disclaimer sign, visible to observers driving by, on which the government would explain: the Cross’ purpose as a


\(^{331}\) See Buono Petitioner’s Brief, supra note 28, at 51-52 (citing Freedom From Religion Foundation v. City of Marshfield, 203 F.3d 87 (7th Cir. 2000)(transfer of park parcel underlying religious monument upheld as Establishment Clause cure where marked off by a fence and private ownership was explained by a disclaimer sign).

\(^{332}\) Compare *Summum*, 129 S.Ct. at 1136 (explaining that additions to a monument can alter its commonly-understood meaning).
war memorial, its VFW ownership, and its historical roots as the symbol for honoring WWI fallen soldiers. 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’ designation of the Cross as a National Monument, that action is form of government identity speech. Like the Ecuador government’s intentional acts to re-frame their national identity to integrate indigenous peoples, including the Cross as one of only 45 National Monuments 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, nonendorsing 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 statement, in the immediate aftermath of 9/11, that this is a Christian nation.

In addition to the timing, another factor weighing against rebuttal 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. Subsequently, after the district court found that its display on federal land violated the Establishment Clause, Congress enacted the

333 See supra at 65.
land transfer, which is a more typical means of preserving an historical religious symbol than proclaiming it a government symbol.334

But this approach is not the current legal standard and—while the National Monument designation was done in the current era, with its more complex social meanings—eight years later, it is an established background fact, and not a proposal. During these intervening years, the nation has been at war; many soldiers’ lives have been sacrificed, many more are still at risk. Now is not an auspicious time for a ruling, based on new theory or established principles, to revoke National Monument designation from a war memorial. The special status accorded this Cross, however, makes it more imperative that government be required to explain the presence of a large cross landmark in the desert preserve. Moreover, just as the Nation’s ongoing wars call for special deference here, the continuing sacrifice also demands a clear disclaimer of any governmental preference for Christian soldiers. The government’s posted sign, and all written descriptions regarding this National Memorial, should explain that this designation was based on WWI historical symbolism, and 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 should be constitutionally obligated to explain its secular message to viewers in a clear, visible,

334 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: Remediing the Endorsement of Symbolic Religious Speech, 82 DENVER U. L. REV. 183 (2004-05)(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.”).
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 essential in both core government speech, where the government sets out to
express its own message, and government endorsement, 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 is nonpreferentialism. Beginning judicial analysis with the
endorsement test, and requiring a transparent statement of secular reasons where religious
symbols are involved, may not satisfy either side in these disputes, but is far better than
the threatened alternative: relinquishing even the appearance of neutrality.