THE GOVERNMENT'S TEN COMMANDMENTS: *PLEASANT GROVE CITY V. SUMMUM* AND THE GOVERNMENT SPEECH DOCTRINE

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TABLE OF CONTENTS

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In 1946, Judge E. J. Ruegemer, a Minnesota juvenile court judge, presided over a case involving a sixteen-year-old boy from St. Cloud, Minnesota, who had stolen a car and, in the process, hit and injured a priest.[1] The presentence investigation revealed that the young man had a less-than-ideal upbringing and had actually failed in school because of various physical impairments.[2] This legitimately hard-luck story moved Judge Ruegemer to compassion.[3] So instead of sentencing the young man to serve time in a reformatory school, the judge merely sentenced him, thenceforth, to abide by the Ten Commandments.[4]

In response to the judge's sentence, the young man represented in open court that he knew nothing about the Ten Commandments.[5] This

1. Warren Wolfe, *Monumental Show Down Has St. Cloud Roots; A Minnesota Judge Planted Seeds for Battles over the Commandments in 1946*, STAR TRIB. (Minneapolis), Aug. 30, 2003, at A1, A13.

2. *Id.* at A13.

3. *See id.*

4. *See id.*; *see also* Jabeen Bhatti, *Tables Turning: Courts Disagree on the Legality of Slabs Etched with the Ten Commandments*, INSIGHT ON THE NEWS, June 24, 2002, *available at* http://findarticles.com/p/articles/mi_m1571/is_23_18/ai_87917227/.

5. *See id.*

candid admission alarmed Judge Ruegemer, which provoked in the jurist a broader concern for America's troubled youth in the absence of some authoritative standard of conduct.[6] Judge Ruegemer believed that "if mankind would heed [the Ten Commandments], it would be a better world in which to live,"[7] and that the country's rising generation could use the Ten Commandments as a "code of conduct or standards by which to govern their actions."[8]

At the time, Judge Ruegemer was actively involved with an organization called the Fraternal Order of Eagles (the Eagles), "a service organization dedicated to promoting liberty, truth, and justice."[9] To put his more ambitious plan into action, Judge Ruegemer worked with the Eagles to disseminate nondenominational[10] paper versions of the Ten Commandments to juvenile courts throughout the country.[11] Judge Ruegemer believed that once the Ten Commandments were visible in courtrooms nationwide, "then judges could point them out to offenders,"[12] and troubled youths hauled before the courts "might be less inclined to

6. Books v. City of Elkhart, 235 F.3d 292, 294 (7th Cir. 2000).

7. Fraternal Order of Eagles, Ten Commandments Project Impacts Lives, http://www.foe.com/about-us/ten-commandments.aspx (last visited Dec. 1, 2009).

8. State v. Freedom from Religion Found., Inc., 898 P.2d 1013, 1017 (Colo. 1995).

9. *Books*, 235 F.3d at 294; *see also Freedom from Religion Found., Inc.*, 898 P.2d at 1017. The Eagles were founded in 1898 by a small group of theater owners wrestling with the complexities of a musicians' strike. *See* Fraternal Order of Eagles, http://www.foe.com/about-us/facts.aspx (last visited Dec. 1, 2009). Since then, the Eagles have expanded to an international force of nearly 1.5 million. *See id.* The Eagles claim seven former U.S. presidents as members: Theodore R. Roosevelt, Warren G. Harding, Franklin D. Roosevelt, Harry S. Truman, John F. Kennedy, Jimmy Carter, and Ronald Reagan. *See id.* The organization is involved in movements and legislation touching on significant social issues, such as family, Social Security, and employment discrimination. *See id.*

10. Judge Ruegemer's plan initially met some opposition from the Eagles leaders, who viewed the project as "sectarian." Card v. City of Everett, 520 F.3d 1009, 1012 (9th Cir. 2008). To allay these concerns, the judge worked with local professionals and leaders of various faiths to produce "a version of the Ten Commandments which was not identifiable to any particular religious group." *Id.*

11. *Books*, 235 F.3d at 294. Reflecting decades later upon the Ten Commandments project, Judge Ruegemer recognized that such an ambitious program would be unsuccessful in today's society, but still insisted on its merit: "Remember, it was a different time then. Everybody thought this was a good idea, a way to help build morality and character. I still think it's a good idea. People haven't changed much, but the times have changed." Wolfe, *supra* note 1, at A13.

12. Bhatti, *supra* note 4.

break the law" in the future.[13]

The success and widespread popularity of this project eventually grabbed the attention of famed movie director Cecil B. DeMille.[14] With the imminent release of his 1956 epic *The Ten Commandments*, DeMille seized upon a unique opportunity to publicize his film.[15] Consequently, the director approached Judge Ruegemer about making the impact of the Eagles' project more permanent,[16] suggesting that the Eagles distribute bronze plaques of the Ten Commandments instead of paper copies.[17] Judge Ruegemer liked the director's idea, but believed that inscribing the Ten Commandments in stone or granite, rather than bronze, would be "more suitable" in light of the Bible's account of the stone tablets Moses is said to have brought down with him from Mount Sinai.[18] Ruegemer and DeMille agreed. In partnership with the filmmaker, the Eagles began donating and dedicating monuments across the country, even having the stars of DeMille's big-budget spectacular—Charlton Heston, Yul Brenner, and Martha Scott—preside at some of the dedication ceremonies.[19] Over the course of the next few decades, local Eagles chapters dispatched numerous granite monuments to courts and schools around the country.[20]

Judge Ruegemer probably never envisioned the litigious landslide that his well-intentioned project would one day create. Within a generation, however, various individuals and organizations were strenuously objecting to the placement of the Ten Commandments monuments on public property. Lawsuits challenging the constitutionality of Ten Commandments monuments have employed two distinct strategies. One approach has focused on the religious character of the challenged

13. *Card*, 520 F.3d at 1012.

14. *Id.*; *see also* Wolfe, *supra* note 1, at A13. In the ensuing years, the Eagles sold over 10,000 paper copies of the Ten Commandments as part of the project. *See id.*; *see also* Fraternal Order of Eagles, *supra* note 7.

15. *See* State v. Freedom from Religion Found., Inc., 898 P.2d 1013, 1017 (Colo. 1995); *see also* Frank Rich, Op-Ed., *The God Racket, from DeMille to DeLay*, N.Y. TIMES, Mar. 27, 2005, http://query.nytimes.com/gst/fullpage.html?res=9502E5D81F3CF934A15750C0A9639C8B63&scp=2&sq=The%20God%20Rackt,from%20DeMille%20to%20to%20Delay&st=cse#; Wolfe, *supra* note 1, at A13.

16. *See* Wolfe, *supra* note 1, at A13.

17. *Id.*; *see also* Books v. City of Elkhart, 235 F.3d 292, 295 (7th Cir. 2000).

18. *Freedom from Religion Found., Inc.*, 898 P.2d at 1017; *see also Books*, 235 F.3d at 295; Wolfe, *supra* note 1, at A13.

19. *See* Wolfe, *supra* note 1, at A13; *see also* Rich, *supra* note 15.

20. *See Cecil B. DeMille's Day in Court*, FIN. TIMES, Oct. 13, 2004, http://www.ft.com/cms/s/0/b75d0450-1cb3-11d9-8d72-00000e2511c8.html?nclick_check=1.

monument and asserted constitutional rights protected by the First Amendment's Establishment and Free Exercise Clauses, which declare that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[21] Alternatively, the other approach has divorced its claims from the religious character of the disputed monument and grounded the asserted claims in the First Amendment's Free Speech Clause, which proclaims that "Congress shall make no law . . . abridging the freedom of speech."[22]

Under the Free Speech Clause, the government may not favor one speaker over another, but if the government provides a private party with a forum to express his or her views, the government must extend similar accommodations to others.[23] However, the Free Speech Clause's restrictions on the government, and the proper legal analysis of the government's actions, change when the speech in dispute is the government's own.[24] Under what has been termed the "government speech doctrine," the government has the "power to speak despite objections by dissenters,"[25] and when the government does so, it "is not restrained by the First Amendment from controlling its own expression."[26]

Until recently, the United States Supreme Court had never considered the status of a permanent monument on public property as speech or such a monument's constitutionality under the First Amendment's Free Speech Clause. In February 2009, in *Pleasant Grove City v. Summum*, the Supreme Court categorically settled that issue, holding that a city's installation of a permanent monument in a public park constitutes the government's own speech, which is unconstrained by traditional free speech principles and is therefore constitutional under the First Amendment's Free Speech Clause.[27] This Article explores the Supreme Court's holding in *Pleasant Grove City* and the litigation leading up to the Court's monumental decision. In addition to reviewing the

21. U.S. CONST. amend. I, cl. 1; *see also, e.g.*, County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 589–90 (1989).

22. U.S. CONST. amend. I, cls. 1, 2.

23. *See* Rosenburger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

24. *See id.* at 833–34.

25. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

26. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring).

27. Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009).

Court's opinion this Article seeks to go beyond what the Court said in its opinion, in an effort to develop a deeper understanding of why the Court held as it did and to provide additional support to bolster the Court's ruling.

Part I examines the government speech doctrine and its limitations. Part II reviews the litigation history that culminated in the Court's decision in *Pleasant Grove City* and the Court's own opinion. Part III argues that the government speech doctrine is sufficiently broad to encompass a government's installation of a permanent display in a government-owned park. Part IV summarizes the key precedential cases upon which the Tenth Circuit relied for its holding in *Summum v. Pleasant Grove City* and explains how the Tenth Circuit incorrectly applied those precedents. Part V, drawing upon Justice David Souter's concurring opinion, seeks to align Justice Souter's proposed solution to settling the relationship between the government speech doctrine and the Establishment Clause with the majority's opinion. In doing so, Part V argues that the endorsement test employed in Establishment Clause jurisprudence lends itself to adoption in the government speech context. Part V also contemplates the implications of the Court's recent decision for litigation strategy in similar cases in the future. Part VI provides a concise conclusion.

I. THE GOVERNMENT SPEECH DOCTRINE

In his concurring opinion in *Pleasant Grove City*, Justice John Paul Stevens characterized the government speech doctrine as a "recently minted" doctrine.[28] Because the nature and boundaries of this doctrine are not well-known or well-developed, an overview of the government speech doctrine is appropriate before launching into the *Pleasant Grove City* decision and its history.

A. *The Government's Ability to Regulate Private Speech Is Constrained by the First Amendment*

The First Amendment proclaims that "Congress shall make no law . . . abridging the freedom of speech."[29] As a result of the First Amendment's Free Speech Clause, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[30] In short,

28. *Id.* at 1139 (Stevens, J., concurring).
29. U.S. CONST. amend. I, cls. 1, 2.
30. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829

"[i]n the realm of private speech or expression, government regulation may not favor one speaker over another."[31] The government may base this prohibited favoritism on the "substantive content or the message [a speaker] conveys" or the "particular views taken by [a speaker] on a subject."[32]

Although the First Amendment restricts the government's conduct vis-à-vis its citizens' speech, the restriction is not absolute. The government may regulate private speech to varying degrees, and the extent of such limitation hinges upon the "forum" in which the individual chooses to speak.[33] According to the Supreme Court, there are three speech fora in which an individual may choose to express herself: (1) a traditional public forum, (2) a designated public forum, and (3) a nonpublic forum.[34] The government may regulate private speech in a traditional or designated public forum only when such regulation "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that interest."[35] In a nonpublic forum, the government has significantly broader discretion to

(1995).

31. *Id.* at 828.

32. *Id.* at 828–29.

33. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

34. *See id.* Traditional public fora include property characterized "by long tradition or by government fiat" as "devoted to assembly and debate." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (treating streets and parks as the quintessential examples of traditional public fora). Elsewhere, the Supreme Court has stated that public sidewalks constitute "a prototypical example of a traditional public forum." Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 377 (1997). Similarly, "the government creates a designated public forum when it makes its property *generally available* to a certain class of speakers." Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998) (emphasis added). For example, the Supreme Court has held that "a state university created a public forum for registered student groups by implementing a policy that expressly made its meeting facilities 'generally open' to such groups." *Id.* at 678 (quoting Widmar v. Vincent, 454 U.S. 263, 267 (1981)). However, when the government grants "selective access" to property rather than "general access," the government creates a nonpublic forum. *Id.* at 679–80. In *Arkansas Education Television Commission v. Forbes*, the Supreme Court held that a public broadcast of a political debate between candidates for Arkansas's Third Congressional District seat was a nonpublic forum because the broadcasting officials limited access to the debate to those candidates for one specific congressional seat, as opposed to the debate being open to candidates for the other congressional seats. *See id.* at 680. Such "selective access" made the publicly broadcasted political debate a nonpublic forum, rather than a designated public forum. *See id.*

35. *Forbes*, 523 U.S. at 800.

restrict private speech, but any regulation must be "reasonable in light of the purpose served by the forum" and cannot discriminate against speech on the basis of its viewpoint.[36]

B. *The Government's Broad Discretion in Regulating Its Own Speech*

The Free Speech Clause's guarantee and the applicable forum analysis are highly relevant when the disputed speech that the government is regulating is private speech, but the analysis shifts when the disputed speech is that of the government itself. The government's own speech "is controlled by different principles."[37] In the same decision in which the Supreme Court stated "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys,"[38] the Court observed that "when the State is the speaker, it may make content-based choices."[39] This distinction between private speech and government speech recognizes the specific, limited reach of the First Amendment: "The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents."[40]

The government speech doctrine also recognizes the democratic nature of government officials' duties and the pragmatic consequences of hampering their speech. The Supreme Court has explained these obligations:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making government decisions were not free to speak for themselves in the process.[41]

Thus, "[t]o govern, government has to say something."[42] However, a

36. *Id.* at 804–06; *see also Perry Educ. Ass'n*, 460 U.S. at 46.

37. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995).

38. *Id.* at 828.

39. *Id.* at 833.

40. Columbia Broad. Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) (quoting THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 700 (1970)) (internal quotations omitted).

41. Keller v. State Bar of Cal., 496 U.S. 1, 12 (1990).

42. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J.,

natural consequence of the government's obligation to speak and take positions is "that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens."[43] As Justice Scalia has noted, "[i]t is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects."[44] The consequences of a system that would permit the suppression of governmental expression on the mere basis that it conflicts with the views or positions of *some* citizens would be catastrophic:

> If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.[45]

Thus, to fulfill their duty as elected representatives of the people, government officials must be able to speak, and do so "despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard."[46] To make sure that such government speech is effective, the government must "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted."[47] To that end, "the Government may advance or restrict its own speech," even if the government must do so "in a manner that would clearly be forbidden were it regulating the speech of a private citizen."[48]

C. *The Government Can Speak Through Private Parties*

The government can speak directly, or it can adopt the speech of third parties as its own. The government is not limited to its own agents to

dissenting).

43. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000).

44. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring).

45. *Keller*, 496 U.S. at 12–13; *see also Johanns*, 544 U.S. at 574 (Souter, J., dissenting) ("[A] First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.").

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

47. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

48. Serra v. U.S. Gen. Servs. Admin., 847 F.2d 1045, 1048 (2d Cir. 1988).

convey its message. The government possesses significant discretion "to regulate the content of what is or is not expressed when it is the speaker *or when it enlists private entities to convey its own message.*"[49]

In *Johanns v. Livestock Marketing Association*, for example, several parties challenged the constitutionality of the Beef Promotion and Research Act of 1985, under which the federal government is authorized to collect assessments (or checkoffs) on the sale or importation of cattle, funds which are then used to promote "the marketing and consumption of 'beef and beef products.'"[50] The funded promotional campaigns were created by a committee that consists, in part, of nongovernmental parties.[51] Nonetheless, the Supreme Court held in *Johanns* that the federal government "effectively controlled" the message of the promotional campaigns and that it was "not precluded from relying on the government-speech doctrine merely *because it solicits assistance from nongovernmental sources in developing specific messages*."[52]

D. *Government Speech Is Unconstrained by First Amendment Forum Analysis*

When the government is the speaker—whether through its own employees or private parties—it is able to regulate its own speech free of the traditional First Amendment forum-analysis constraints. The government has a bundle of duties that it must fulfill at many different levels to successfully govern, all of which require the government to speak in some form. For example, the government operates and manages public libraries to facilitate the "learning and cultural enrichment" of its citizenry.[53] In that capacity, the government and its agents are responsible for selecting and providing materials "that would be of the greatest direct benefit or interest to the community."[54] In fulfilling this particular function, "the government speaks through its selection of which books to put on the shelves and which books to exclude."[55] The Supreme Court has recognized the degree of discretion that the government must exercise to successfully govern in its manifold capacities as "incompatible" with the

49. *Rosenberger*, 515 U.S. at 833 (emphasis added).
50. *Johanns*, 544 U.S. at 553–54 (quoting 7 U.S.C. § 2901(b) (2000)).
51. *See id.* at 560.
52. *Id.* at 560, 562 (emphasis added).
53. United States v. Am. Library Ass'n, 539 U.S. 194, 203 (2003).
54. *Id.* at 204 (quoting Am. Library Ass'n v. United States, 201 F. Supp. 2d. 401, 421 (E.D. Pa. 2002)) (internal quotations omitted).
55. PETA v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005).

"forum analysis and heightened judicial scrutiny" normally applied by the courts.[56] Thus, when the government speaks, First Amendment forum analysis is "out of place."[57]

Lest the significant discretion accorded the government under this doctrine concern its citizenry, the government's ability to speak contrary to the convictions of its citizens is tempered by democracy. As the Supreme Court has noted, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."[58] If the government's speech conflicts with the beliefs of a sufficient number of its citizens, those citizens will vote those responsible for that speech out of office in the next election cycle, and replace them with other officials who will better represent the citizenry's positions.[59] Furthermore, the government speech doctrine does not immunize government speech from violating other constitutional provisions, such as the Establishment Clause.[60]

II. THE SUMMA SAGA: THE BATTLE BETWEEN SUMMUM AND THE STATE OF UTAH

Exercising their right to speak on behalf of their constituents, the elected officials of the city of Pleasant Grove, Utah, decided in 1971 that a public park dedicated to honoring its Mormon pioneer heritage was an appropriate location for a Ten Commandments monument donated by the Eagles.[61] Decades later, the Utah-based Church of Summum decided that the city government should not be allowed to display such a monument on public property without allowing Summum to do the same.[62] The clash between Summum and Pleasant Grove is only the most recent of several

56. *Am. Library Ass'n*, 539 U.S. at 205.

57. *Id.*

58. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

59. *See id.*; *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 575 (2005) (Souter, J., dissenting) ("Democracy, in other words, ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message.").

60. *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009).

61. *Id.* at 1129–30; Joint App. at 144, *Pleasant Grove City*, 129 S. Ct. 1125 (No. 07-665).

62. *Pleasant Grove City*, 129 S. Ct. at 1129–30.

conflicts between Summum and government officials in Utah, which have generated a wealth of litigation and an erroneous precedent granting private parties the right to install and display a permanent monument of their choosing on government property.[63] The following section will briefly review Summum's origins and beliefs and the litigation between Summum and (1) Salt Lake City, (2) Ogden, (3) Duchesne, and (4) Pleasant Grove.

Regarding the litigation between Summum and these government entities, this Part will examine Summum's Free Speech Clause claims only. Although these lawsuits each involved Ten Commandments monuments and Establishment Clause or Free Exercise Clause claims, because the Supreme Court's decision in *Pleasant Grove City* was limited to the Free Speech Clause, this Article only addresses the Free Speech Clause and the application of the government speech doctrine.[64] Under the Free Speech Clause, the religious or nonreligious nature of the speech is irrelevant.

A. *Summum, the Seven Aphorisms, and the Ten Commandments*

The church or philosophy of Summum emerged from an alleged encounter between a Utah resident and planetary aliens over thirty years ago. In 1975, thirty-year-old Claude Nowell was resting in his Salt Lake Valley home when, as he related, he either had a vision or was transported to a place where he received instruction from a group of otherworldly beings that Nowell referred to as the Summa Individuals.[65] Through a set of crystals, the Summa Individuals communicated with and presented to Nowell a body of ancient concepts called "the Principles," which are designed to assist with humankind's progression and comprehension of the

63. *See, e.g.*, Summum v. Duchesne City (*Duchesne City II*), 482 F.3d 1263 (10th Cir. 2007); Summum v. City of Ogden (*City of Ogden II*), 297 F.3d 995 (10th Cir. 2002); Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997).

64. *See Pleasant Grove City*, 129 S. Ct. at 1141 (Souter, J., concurring) (stating that "Establishment Clause issues have been neither raised nor briefed before us").

65. *See* Summum, The First Encounter, http://www.summum.us/about/firstencounter.shtml (last visited Oct. 23, 2009); *see also* Patty Henetz, *Utah-Based Church Melds Wine, Sexuality, and Meditation*, LUBBOCK AVALANCHE-J., Apr. 22, 2002, http://www.lubbockonline.com/stories/042702/rel_0427020109.shtml. Nowell, under his current name Summum Bonum Amen Ra, authored a text in 1988 in which he summarized some of the basic Summum teachings. *See* SUMMUM BONUM AMEN RA, SUMMUM: SEALED, EXCEPT TO THE OPEN MIND (1988). In the introduction of his book, Nowell expresses his "gratitude to the Summa Individuals, who untiringly work the pathways of spiritual evolution," and for the teachings they presented to him. *Id.* at 1.

creation.[66]

After 1975, Nowell stated that he continued to meet with the Summa Individuals to further assist him with his grasp of the Principles.[67] Over time, Summum shared this information with others, a body of believers that has since grown into a considerable organization.[68] Although he never wished for the Summum philosophy to be referred to as a church or religion, it was designated as such by the Internal Revenue Service when Nowell applied for status as a nonprofit organization.[69] Nowell eventually changed his name to Summum Bonum Amen Ra, and went by "Corky Ra."[70] Today, Summum adherents regularly gather at a pyramid temple near Salt Lake City for instruction and meditation.[71] Over 250,000 individuals have received the Summum teachings.[72]

One component of the Summum teachings consists of the Seven Aphorisms.[73] Except for the aforementioned unfortunate sixteen-year-old young man, most Americans are probably familiar with the Biblical account of Moses, who ascended Mount Sinai where he received the Ten Commandments, which were inscribed upon stone tablets for Israel to read

66. *See* The First Encounter, *supra* note 65. According to Nowell, "[t]hese teachings cannot be accredited to any one person or human source, for these teachings represent the workings of Creation Itself," and they have been taught by the Summa Individuals to other individuals in the past who were "searching for the source of Creation" and who had sufficiently "evolved" to comprehend them. SUMMUM BONUM AMEN RA, *supra* note 65, at 1. Nowell attempted to describe the Summum teachings in his book, but he conceded that the "teachings are not found in books, to any great extent"; rather, they are "passed on from Master to Initiate; from Initiate to Student; from voice to open mind." *Id.* at 6.

67. *See* The First Encounter, *supra* note 65.

68. *See* Henetz, *supra* note 65.

69. *Id.*

70. *See id.* Nowell died in early 2008 as a "result of 'complications' from late-onset post-traumatic stress disorder from his time in Vietnam and chronic back pain." Jessica Ravitz, *Journey of One's Essence*, SALT LAKE TRIB., Nov. 15, 2008, at C3.

71. *See* Henetz, *supra* note 65.

72. *See id.* The Summum church's lack of membership records makes it difficult to pinpoint the number of Summum members. Ravitz, *supra* note 70. The Summum church does not require church attendance—adherents to the religion or philosophy merely need to learn certain teachings and meditations, at which point "they're free to go live their own lives." *Id.* The Salt Lake pyramid temple attracts approximately ten to fifteen people a week for Summum's weekly Saturday meeting. *See id.*

73. SUMMUM BONUM AMEN RA, *supra* note 65, at 13–22.

and obey.[74] Summum teaches that the Ten Commandments constituted the Lower Law.[75] Summum believes that Moses initially received a different set of commandments or instructions on stone tablets, referred to as the Higher Law or Seven Aphorisms.[76] The Seven Aphorisms embodied "principles underlying Creation and all of nature."[77] Realizing that the Israelites were not prepared to receive the Seven Aphorisms, however, Moses destroyed the first set of stone tablets, which were replaced by a new set of tablets containing the Ten Commandments, a lesser law that the Israelites were capable of receiving at that time.[78] For Summum believers, these aphorisms "are the principles upon which the Summum philosophy is based"[79] and serve as the means of becoming "the master of your life instead of a prisoner of your existence."[80]

B. *Summum and Salt Lake County*

In 1971, Salt Lake County installed a Ten Commandments monolith, donated by the Eagles, near the main entrance of the Salt Lake County Courthouse.[81] Twenty-three years later, Summum asked the County for permission to install a stone monolith displaying its Seven Aphorisms in front of the Salt Lake County Courthouse near the Ten Commandments

74. *Exodus* 31:18; *Deuteronomy* 10:1–3.

75. *See* Summum, The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (last visited Dec. 1, 2009).

76. *See id.* The Seven Aphorisms include the principles of (1) psychokinesis, (2) correspondence, (3) vibration, (4) opposition, (5) rhythm, (6) cause and effect, and (7) gender. SUMMUM BONUM AMEN RA, *supra* note 65, at 13–22.

77. *Id.*

78. *See id.*

79. *Id.*

80. *See* Summum, The Purpose and Mission of Summum, http://www.summum.us/about/purpose.shtml (last visited Dec. 1, 2009). One other distinctive, core element of the Summum faith is mummification. Ravitz, *supra* note 70. A mausoleum is currently under construction beneath the Summum property in Salt Lake, which will house Summum adherents who have chosen to be mummified after death. *See id.* Although Summum followers have mummified a number of animals (mostly cats), Nowell is the first human Summum believer to be mummified. *See id.*; *see also* Dennis Romboy, *Options Can Let Fluffy Rest in Peace*, DESERET NEWS, Nov. 15, 2002, at B1, *available at* http://www.deseretnews.com/article/948743/Options-can-let-Fluffy-rest-in-peace.html. Over one hundred individuals have prepaid for their mummification, a costly process, upon their death. *See* Hannah Wolfson, *Mummification a $63,000 Wrap*, DESERET NEWS, June 27, 2000, *available at* http://www.deseretnews.com/article/print/768507/Mummification-a-63000-wrap.html.

81. Summum v. Callaghan, 130 F.3d 906, 909–10 (10th Cir. 1997).

monolith.[82] The County denied Summum's request, explaining that it had development plans for that property and that installing a new monument on that property would be inappropriate.[83]

The Summum church filed suit in the District of Utah in September 1994. The district court ruled in favor of the County, granting its motion to dismiss. Regarding Summum's free speech claim, the district court held that "the County had not created a public forum simply by allowing one private organization access to the courthouse lawn."[84] Although the district court held that the County had not created a public forum by accepting the Ten Commandments monument, the district court failed to consider whether a limited or nonpublic forum had been created, and thus

82. *See id.* at 910.

83. *See id.* The Tenth Circuit criticized the County for having "shifted positions on its reasons for denying Summum's application." *Id.* at 920. On one occasion, the County explained that it could not accept Summum's monument because preparations were already underway to use the disputed property for certain purposes (i.e., construction of a prison) that precluded the erection of Summum's monument. *Id.* On another occasion, however, the County explained that it could not place Summum's monument on the disputed land for aesthetic reasons. *See id.* Then, on a different occasion, the County explained that it based its denial on its position that Summum's "religious tenets lacked the historical significance and antiquity of the Ten Commandments." *Id.* The multiple and conflicting explanations proffered by the County for its denial raised the specter, according to the Tenth Circuit, of the explanations being "post hoc rationalizations" or "pretext for viewpoint discrimination." *Id.* (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985)).

84. *Id.* at 912. The procedural history of this litigation became somewhat "convoluted." *Id.* n.7. Summum initially brought a complaint that alleged the County had violated the Establishment, Free Exercise, and Due Process Clauses of the federal and state constitutions. *Id.* at 910. Relying on the Tenth Circuit decision in *Anderson v. Salt Lake City Corp.*, "which held that the Ten Commandments monolith did not violate the Establishment Clause because it was primarily secular in nature, the district court dismissed Summum's Establishment Clause claims." *Id.* at 911 (citing Anderson v. Salt Lake City Corp., 475 F.2d 29, 31 (10th Cir. 1973)). Furthermore, because of the secular nature of the monument, the County did not create a forum for religious expression, and "Summum had no right under the Free Exercise Clause" to install its own monument on the courthouse lawn. *Id.* In light of these findings, the district court held that the County had not deprived Summum of any protected interest and that Summum had no due process claim. *Id.* The district court dismissed the complaint. *Id.* Summum subsequently "filed a motion to alter or amend judgment and a motion seeking leave to file an amended complaint," in which Summum claimed "that the County had created a public forum on the courthouse lawn and violated Summum's" free speech rights. *Id.* The district court eventually consolidated the two motions, and dismissed Summum's amended complaint. *Id.* at 912. The court of appeals only addressed Summum's free speech claims. *See id.* at 912 n.8, 922 n.20.

failed to apply the standard applicable to such a forum.[85]

Ruling only on Summum's Free Speech Clause claim, the Tenth Circuit held that the district court erred in its failure to consider and apply a nonpublic forum analysis, reversed the district court's holding, and remanded for further proceedings. The court of appeals held that Summum's amended complaint sufficiently alleged that the County had created a nonpublic forum by installing the Ten Commandments monument.[86] As a result, the County's conduct (i.e., allowing the Eagles' Ten Commandments monument to stand on the courthouse lawn while excluding Summum's Seven Aphorisms monument) needed to "be reasonable in light of the purpose served by the forum and [be] viewpoint neutral."[87] Therefore, according to the court of appeals, the district court mischaracterized the proper forum and as a result failed to apply the proper forum analysis. The court of appeals suggested that on remand the district court consider the County's lack of an established policy or protocol for evaluating which permanent displays should be allowed on government property as evidence of the County's unreasonable conduct and viewpoint discrimination.[88]

C. *Summum and the City of Ogden*

In 1966, the Eagles donated a Ten Commandments monument to the City of Ogden, Utah.[89] The City installed the monument on the grounds of

85. *See id.* at 919.

86. *See id.* The court of appeals spent a considerable part of its opinion deciphering the intended meaning of Summum's language "limited public forum," specifically whether Summum was arguing that the County had created a designated public forum or a nonpublic forum. *Id.* at 914. The court of appeals concluded Summum was arguing that the County had created a limited public forum, not a designated public forum, which was a significant distinction because different standards apply to each. *See id.* at 914–19.

87. *See id.* at 916 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

88. *See id.* at 920. The dispute between the County and Summum eventually became moot. The government soon abandoned the building that housed the courts and offices where the Ten Commandments monument resided. Joe Costanzo, *Courthouse Dispute May Prove to Be Moot*, DESERET NEWS, Dec. 2, 1997, at B1. The Ten Commandments monolith was removed from the disputed property in August 1998. Bob Mims, *Judge Rules Sect Can't Place Tenets Near Ten Commandments in Ogden*, SALT LAKE TRIB., Feb. 2, 2001, at A1.

89. Summum v. City of Ogden (*City of Ogden I*), 152 F. Supp. 2d 1286, 1291 (D. Utah 2001).

the Ogden City Municipal Building.[90] In November 1998, Summum asked the City to remove the Ten Commandments monument.[91] The City refused.[92] In March 1999, Summum responded by asking the City to install a Seven Aphorisms monument near the Ten Commandments monument.[93] Once again, the City rejected Summum's request.[94]

Shortly after the City denied Summum's request, Summum filed suit in the District of Utah, which granted summary judgment in favor of the City.[95] The district court ruled in favor of the City based on the government speech doctrine, holding that because the City owned the monument, the City had adopted the monument as its own speech.[96] As a result, the City did not discriminate between private speakers when it rejected Summum's monument.[97] Additionally, the district court held that the municipal grounds constituted a nonpublic forum and that the exclusion of Summum's monument was reasonable in light of the official uses for those grounds.[98]

The Tenth Circuit disagreed, particularly with the district court's

90. *See id.* at 1292. Although Ogden's Ten Commandments monument was identical to Salt Lake County's Ten Commandments monument, the settings for these two monuments were considerably different. Salt Lake's monument resided "next to the sidewalk leading to the main entrance of the courthouse," a "prominent" location "visible to all who enter[ed] the courthouse," and was the sole monument of its kind in that location. *Callaghan*, 130 F.3d at 910. In contrast, Ogden placed its monument some distance from the municipal building such that visitors to the building were not obligated to pass by the Ten Commandments monument. *City of Ogden I*, 152 F. Supp. at 1292. Furthermore, at least half a dozen other monuments—all having some alleged historical or cultural significance—were located on the grounds, some of which were "more prominent" than the Ten Commandments monument. *Id.* at 1292 n.5. In its opinion, however, the Tenth Circuit expressed doubt as to whether certain monuments in the Municipal Gardens (such as "a monument commemorating police officers who have given their lives in service to Ogden City" and "a tree and plaque commemorating Ogden City's sister city") had any historical relevance. *City of Ogden II*, 297 F.3d 995, 1008 (10th Cir. 2002).

91. *City of Ogden I*, 152 F. Supp. 2d at 1289.

92. *Id.*

93. *Id.*

94. *See id.* at 1289–90 (noting that although the letter sent to Summum by the County Attorney asked for thirty to forty-five days to conduct further research, Summum treated the letter as a denial).

95. *See id.* at 1290, 1297–98.

96. *See id.* at 1293–94.

97. *See id.*

98. *See id.*

treatment of the government speech doctrine.[99] The court of appeals focused on the City's "primary argument" that "because the City has adopted the speech of the Ten Commandments monument as the City's own, the City cannot be discriminating between speakers in violation of the Free Speech Clause."[100] To gauge whether the City had adopted the disputed monolith as its own, the court of appeals applied the following four-factor test, which had been articulated in the earlier Tenth Circuit decision of *Wells v. City & County of Denver*:

> (1) [W]hether the central purpose of the sign was to promote the views of the municipality; (2) whether the municipality exercised editorial control over the content of the sign; (3) whether the literal speaker was an employee of the municipality; and (4) whether ultimate responsibility for the content of the sign rested with the municipality.[101]

The Tenth Circuit held that three of the four factors weighed in favor of Summum.[102]

First, the court of appeals held that because the Eagles created the Ten Commandments monument "with the avowed purpose of providing a moral code for youth to emulate," such remained the "central purpose" of the monument when the City accepted and installed it.[103] As a result, "the Monument's central purpose [was] to promote the views and agenda of the Eagles rather than the City of Ogden."[104]

Second, because the Eagles completely designed and created the monument, handing it over to the City as a "completed product," the City exercised "no editorial control" over the monument.[105]

Third, because the Eagles designed and created the entire monument,

99. *City of Ogden II*, 297 F.3d 995, 1006 (10th Cir. 2002). Because Summum conceded in oral argument that the court of appeals could not reverse the district court's holding on the Establishment Clause claim in light of *Anderson v. Salt Lake City Corp.*, the court of appeals affirmed that portion of the district court's ruling. *Id.* at 999–1000. Despite the affirmation, the court of appeals expressed its doubt as to the controlling nature of *Anderson* over the dispute before it. *See id.* at 1000 n.3.

100. *Id.* at 1003–04.

101. *Id.* (quoting Wells v. City & County of Denver, 257 F.3d 1132, 1140–42 (10th Cir. 2001)).

102. *See id.* at 1005.

103. *Id.* at 1004.

104. *Id.*

105. *Id.*

the Eagles were the "literal speaker" of the message contained on the monument.[106]

Fourth, the court of appeals conceded that the City maintained "ultimate responsibility" for the monument because the City was free to do with the monument as it pleased after it acquired title to the monolith.[107] Nonetheless, the combination of the first three factors and the City's failure to identify any express declarations by city officials that the Ten Commandments monument constituted the City's views led the court of appeals to rule against the City.[108] The court of appeals reversed the district court's grant of summary judgment to the City on Summum's Free Speech Clause claim.[109] Therefore, the Tenth Circuit's decision stood for the proposition that a monument donated by a private party to a government entity remains the speech of the private donor.[110]

D. *Summum and Duchesne City*

In 1979, the City of Duchesne, Utah, accepted a Ten Commandments

106. *Id.*

107. *Id.* at 1005.

108. *See id.* at 1005–06. Four months after Summum filed the lawsuit, the City released a statement that it had "adopted the inscriptions [of each Monument on the grounds of the Ogden City municipal building] as expressions of the City." *Id.* at 1006 (quoting Appellee's Appendix at 80, 84, *City of Ogden II*, 297 F.3d 995 (No. 01-4022)) (internal quotations omitted). However, the City produced no such formal statements related to this matter prior to the lawsuit's commencement.

109. *Id.* at 1000. Summum also alleged in its complaint that the Ten Commandments monument violated the Establishment Clause. *Id.* at 999. The district court granted summary judgment in favor of the City on Summum's Establishment Clause claim based upon *Anderson v. Salt Lake City Corp. Id.* The court of appeals declined to evaluate the Establishment Clause claim and simply affirmed the district court's holding in light of Summum's concession that it could not prevail on the Establishment Clause claim absent en banc reconsideration of *Anderson. See id.* at 999–1000.

110. The court of appeals agreed with the district court that the municipal grounds constituted a nonpublic forum; however, it did not believe that the City's conduct was reasonable and viewpoint neutral. The City argued that its refusal of the Summum monument was reasonable based upon the criterion of historical relevance to the local community, but the court of appeals saw no evidence in the record that the City had a written policy or well-established practice to that end. *See id.* at 1007–09. As a result, a genuine issue of material fact existed as to the reasonableness of the City's conduct. After the Tenth Circuit's decision, the City of Ogden decided to simply remove the Ten Commandments monument. Associated Press, *Commandments Get a New Home*, DESERET NEWS, Jan. 20, 2003, at B5. The Eagles took back the monument and installed it in front of a local, private lodge. *Id.*

stone monolith as a gift from the Cole family—longtime Duchesne residents.[111] Duchesne installed the monument in city-owned Roy Park.[112] To avoid certain constitutional concerns surrounding the monument resting on government property, the City transferred the plot of land containing the monument in 2003 to the Duchesne City Lions Club.[113] In response, Summum demanded that the City transfer a similar plot of land to Summum so it could install and display a Seven Aphorisms monument.[114] The City refused.[115]

As a result, Summum filed a lawsuit in the District of Utah.[116] To resolve the conflict in an amicable manner, the City cancelled the land transfer to the Lions Club and sold the land to the Cole family at fair market value.[117] Additionally, the City passed an ordinance that permanently closed Roy Park to private displays.[118] In light of these latter actions, the district court found that the City had "undertaken adequate actions to make it clear that the monument sits on property that is neither owned nor controlled by the City, and that nothing on the property is in any way endorsed by or associated with Duchesne City."[119] The district court granted summary judgment in favor of the City.[120]

The Tenth Circuit disagreed, overruling the district court's analysis of Summum's Free Speech Clause claim.[121] The court of appeals found the district court to have inappropriately entangled Establishment Clause and

111. Summum v. Duchesne City (*Duchesne City I*), 340 F. Supp. 2d 1223, 1223–24 (D. Utah 2004).

112. *See id.* at 1224.

113. *See id.*

114. *See id.*

115. *See id.*

116. *Id.*

117. *See id.* at 1225.

118. *See id.*

119. *Id.* at 1229. The district court relied upon the Seventh Circuit decision of *Freedom from Religion Foundation, Inc. v. City of Marshfield.* *See id.* at 1228–29. To resolve constitutional concerns over a statue of Christ in a city park in that case, the City sold the disputed parcel of land to a private fund, which the Seventh Circuit held to be "a reasonable method of removing itself from promoting religious speech." *See id.* To avoid additional First Amendment concerns, the court of appeals suggested that the City build some form of separation between the City's property and that of the disputed property, accompanied by a disclaimer. *See id.*

120. *Id.* at 1230.

121. *Duchesne City II*, 482 F.3d 1263, 1271 (10th Cir. 2007).

Free Speech Clause analysis.[122] The district court had focused solely on Establishment Clause concerns, holding the conflict to be resolved by the City's disassociation of the disputed parcel of land to avoid the appearance of government endorsement of the Ten Commandments monument.[123] However, "a determination of whether the government is endorsing religion is not the same as a determination of whether speech is occurring in a public forum," and the district court completely failed to apply any forum or Free Speech Clause analysis to the disputed property.[124]

According to the court of appeals, the city park constituted a traditional public forum, requiring the City's conduct to satisfy a strict scrutiny analysis.[125] As a result, the crucial inquiry in this particular case was "whether the small plot of land with the Ten Commandments monument remain[ed] part of a public forum (i.e., the city park) despite the City's efforts to sell it to a private party."[126] Based upon the record, the court of appeals held that the land transfer to the Lions Club was invalid under state law and that there was a genuine issue of material fact as to whether the land transfer to the Cole family was invalid for failure to conduct the transactions "in good faith and for an adequate consideration."[127] Finally, because the City had not offered any "compelling state interest" that could satisfy the applicable strict scrutiny analysis, there was a genuine issue of material fact as to the constitutionality of the City's refusal of Summum's request.[128]

122. *See id.* (recognizing that the government's endorsement of religion is not analogous to public-forum analysis with respect to speech).

123. *See id.* (noting that even the sign and fence which surrounded the monument did not sufficiently remove its public-forum status).

124. *Id.* at 1271.

125. *Id.* at 1269, 1273.

126. *Id.* at 1270.

127. *Id.* at 1273–75 (citing Sears v. Ogden City, 533 P.2d 118, 119 (Utah 1975)). The first transfer had two problems: (1) neither the deed nor the contract of sale indicated that the Lions Club had given adequate consideration to the City in return for the land; and (2) the same agent—the mayor—represented both parties to the transaction. *See id.* at 1273. The second transfer was problematic because the City based the value of the land and the exchange on a county tax appraisal, rather than "an independent determination of the value of the exchange." *Id.* at 1275 (citing Price Dev. Co. v. Orem City, 995 P.2d 1237, 1249 (Utah 2000)).

128. *See id.* On November 21, 2007, the City petitioned the Supreme Court for certiorari. The appellant, Duchesne City, asked the Supreme Court to hold its petition pending the Court's resolution of the companion case *Pleasant Grove City v. Summum* in the event that the Court first granted review for the latter petition, which the Court did on March 31, 2008. *See* Pleasant Grove City v. Summum, 128 S. Ct. 1737 (2008).

E. Pleasant Grove City v. Summum

1. *Factual and Procedural Background*

In September 1850, Mormon pioneers settled in Pleasant Grove, Utah.[129] To celebrate the City's pioneer heritage, the City established a park called Pioneer Park, which displays a number of items of historical value, such as the facade of the City's first fire station, an artifact from a Mormon temple in Nauvoo, Illinois, a stone from the City's first flour mill, and a replica of a pioneer log cabin.[130] In 1971, the Eagles donated a Ten Commandments monument to the City, which the City installed in Pioneer Park.[131]

In 2003, Summum requested permission to install a Seven Aphorisms monument in Pioneer Park next to the Ten Commandments monument.[132] The City denied Summum's request. According to the City, the Seven Aphorisms monument failed to meet the City's criteria for permanent displays in Pioneer Park, which were required to "directly relate to the history of Pleasant Grove or be donated by groups with long-standing ties to the Pleasant Grove community."[133] The City subsequently passed a resolution formalizing its policy for permanent displays in the park.[134] The City did not respond to Summum's renewed request in 2005.[135]

Summum filed suit in the District of Utah in July 2005.[136] Summum moved for a preliminary injunction requiring the City to allow Summum to

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Following its decision in *Pleasant Grove City*, the Supreme Court vacated the judgment in *Duchesne City* and remanded to the Tenth Circuit for further consideration in light of the Supreme Court's decision in*Pleasant Grove City*. Duchesne City v. Summum, 129 S. Ct. 1523 (2009). The Tenth Circuit then remanded the case to the district court to reconsider the rationale of its decision in light of *Pleasant Grove City*. Summum v. Duchesne City, 319 F. App'x 753 (10th Cir. 2009).

129. *See* Pleasant Grove, Pleasant Grove History, http://www.plgrove.org/index.php?option=com_content&task=view&id=2&Itemid=23 (last visited Dec. 1, 2009).

130. Brief for Petitioners at 3–4, Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2008) (No. 07-665); *see also* Summum v. Pleasant Grove City, 483 F.3d 1044, 1047 (10th Cir. 2007).

131. *Summum*, 483 F.3d at 1047.

132. *Id.*

133. *Id.* (citation omitted) (internal quotations omitted).

134. Brief for Petitioners at 6–7, *Pleasant Grove City*, 129 S. Ct. 1125 (No. 07-665).

135. *Summum*, 483 F.3d at 1047.

136. Brief for Petitioners at 7, *Pleasant Grove City*, 129 S. Ct. 1125 (No. 07-665).

immediately erect its Seven Aphorisms monument in Pioneer Park.[137] Relying upon the Free Speech Clause, Summum argued that Pleasant Grove had "created a public forum for the display of permanent monuments."[138] In the alternative, Summum argued that the City had created a designated public forum by accepting the Eagles' permanent display.[139] Regardless of which theory prevailed, Summum argued that the City's conduct failed to satisfy a strict scrutiny standard.[140] The City argued that the park constituted a nonpublic forum,[141] and that the City's criteria for refusing the Summum monument were reasonable and viewpoint neutral.[142] The District Court denied Summum's request for injunctive relief, which Summum appealed.[143]

For the fourth time, the Tenth Circuit disagreed with the district court and ruled for Summum. In *Summum v. Pleasant Grove City*, the court of appeals held that Pioneer Park was a traditional public forum and that, as a result, the district court should have analyzed the City's alleged "historical relevance criteria" under a strict scrutiny standard.[144] The City had contended that it denied the Summum monument due to its interest in history, but the City failed to explain why such an interest was sufficiently "compelling" to meet its burden under strict scrutiny.[145] Furthermore, even if the court of appeals assumed that the City's history interest was compelling, the City failed to show how its exclusion of the Summum monument was "necessary, and narrowly drawn" to serve the City's history interest.[146] The City petitioned for a rehearing en banc, which the Tenth Circuit denied.[147]

137. *Id.* at 8.
138. *Id.* at 8–9.
139. *Id.* at 9.
140. *Id.*
141. *Id.* at 10.
142. Summum v. Pleasant Grove City, 483 F.3d 1044, 1050 (10th Cir. 2007) ("District Court indicated that the applicable analysis is whether Pleasant Grove's policy is reasonable and viewpoint neutral.").
143. Brief for Petitioners at 10–11, *Pleasant Grove City*, 129 S. Ct. 1125 (No. 07-665).
144. *Summum*, 483 F.3d at 1053.
145. *Id.* at 1052–53.
146. *Id.* at 1053 (citation omitted) (internal quotations omitted).
147. Summum v. Pleasant Grove City, 499 F.3d 1170, 1171 (10th Cir. 2007).

2. *The Supreme Court Decision*

Finally, on February 25, 2009, the Supreme Court settled the Summum saga once and for all, reversing the Tenth Circuit's decision.[148] In a unanimous decision, the Supreme Court held that governmental placement and display of a permanent monument in a public park is a form of government speech not subject to traditional public-forum analysis, which does not violate the Free Speech Clause.[149] As a result, the Free Speech Clause does not "entitle[] a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected."[150]

Justice Samuel Alito, writing for the Court, noted at the outset that there were two analytical perspectives that the Court could apply to the case.[151] The Court could treat the case as one of the government speaking itself, in which case its conduct would have limited restrictions, such as the Establishment Clause or democratic accountability.[152] Alternatively, the Court could treat the case as one of the government regulating private speech, in which case the government's conduct would be restrained by traditional forum analysis principles.[153]

The Tenth Circuit had adopted the latter perspective, but the Supreme Court chose the former.[154] Thus, the crucial issue was the identity of the speaker.[155] For the Court, this inquiry was a simple one—it was the government.[156] The next section of the Court's decision relied primarily on historical practice, observing that "[g]overnments have long used monuments to speak to the public," including privately financed monuments, and that public parks have historically been "identified in the public mind with the government unit that owns the land."[157] As a result, the Court concluded that "[p]ermanent monuments displayed on public property typically represent government speech."[158] Having reached this

148. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129 (2009).
149. *Id.*
150. *Id.*
151. *Id.* at 1131.
152. *Id.* at 1131–32.
153. *Id.* at 1132.
154. *Id.* at 1134.
155. *Id.*
156. *Id.* at 1132.
157. *Id.* at 1132–33.
158. *Id.* at 1132.

conclusion, the Court's holding was inherently simple: "[I]t is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech."[159]

The remainder of the Court's decision addressed three arguments made by Summum and adopted by the Tenth Circuit. First, Summum contended that to preclude the government speech doctrine from being "used as a subterfuge for favoring certain private speakers over others based on viewpoint," a government had to "go through a formal process of adopting a resolution publicly embracing 'the message' that the monument conveys" to render such speech the government's speech.[160] The Court rejected this argument, explaining that a government can more effectively and boldly adopt the speech of a monument as its own by assuming ownership of the monument and displaying it in a public park that it owns and manages.[161] Furthermore, the Court stated, such a requirement "fundamentally misunderstands the way monuments convey meaning" by overlooking the dynamic and diverse meaning that any particular monument can have for the ordinary onlooker.[162] In short, the meaning conveyed by any monument cannot be confined to a singular embodiment applicable to all persons at all times, making Summum's proposed requirement of a formal adoption of "the message" of the monument impossible.

Second, Summum and the court of appeals adopted the position that because "a public park is a traditional public forum" in the context of speech activities such as speeches and demonstrations, a public-forum analysis was applicable to "the installation of permanent monuments in a public park."[163] The Supreme Court rejected this view on the important distinction between the transient nature of a speech or a march in a public park and the enduring impact of a permanent monument. "Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure."[164] The capacity for a public park to entertain speeches and marches is unlimited, but the real estate to accommodate permanent monuments is not.[165] As a result, the traditional

159. *Id.* at 1134.
160. *Id.* (citation omitted).
161. *Id.*
162. *Id.* at 1135.
163. *Id.* at 1137.
164. *Id.*
165. *Id.*

forum analysis that is triggered by such transient speech activities cannot be imported into the analysis of a case involving a permanent monument.[166]

Lastly, Summum contended that the government should employ "content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays."[167] Justice Alito dismissed Summum's suggestion on pragmatic grounds. If such a practice were adopted, once a government installed a monument of its own choosing in a park and then received a request from a private citizen or group to place a related monument in the same park, the government would have two options: it would have to "either 'brace [itself] for an influx of clutter' or face the pressure to remove longstanding and cherished monuments."[168] Such a practice and such consequences were simply untenable.

3. *The Concurrences*

Six justices filed four separate concurring opinions, making them all relevant to the Court's decision. Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg, expressed skepticism about the government speech doctrine and even characterized the Court's prior decisions applying the doctrine as being "of doubtful merit."[169] For Justice Stevens, instead of characterizing the monument as government speech, the Court could have reached the same conclusion by merely treating the City's conduct as "an implicit endorsement of the donor's message."[170] Nonetheless, he believed the Court reached the right result while respecting the limitations on the government speech doctrine.[171]

Justice Antonin Scalia, joined by Justice Clarence Thomas, attempted to resolve any doubts left by the Court's decisions as to Summum's case under the Establishment Clause. Justice Scalia acknowledged that Pleasant Grove may be "wary of associating itself too closely with the Ten Commandments monument displayed in the park" for purposes of the Establishment Clause, but stated that "[t]he city can safely exhale."[172]

166. *Id.* at 1138.

167. *Id.* at 1137 (citing Brief for Respondent at 14, *Pleasant Grove City*, 129 S. Ct. 1125 (No. 07-665)).

168. *Id.* at 1138 (quoting Summum v. Pleasant Grove City, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting)).

169. *Id.* at 1139 (Stevens, J., concurring).

170. *Id.* at 1138–39 (citation omitted).

171. *Id.*

172. *Id.* at 1139–40 (Scalia, J., concurring).

Relying upon the Court's decision in *Van Order v. Perry*, Justice Scalia wrote that "the park displays do not violate *any* part of the First Amendment."[173]

Justice Stephen Breyer authored a concurring opinion in an effort to rein in the government speech doctrine from becoming a "rigid category."[174] Justice Breyer cautioned against turning "'free speech' doctrine into a jurisprudence of labels."[175] Instead, he wrote, the Court should "ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective."[176] Applying that test, Justice Breyer concluded that although Pleasant Grove's denial of Summum's request to install its monument in Pioneer Park burdened Summum's speech, it did "not disproportionately restrict Summum's freedom of expression"—Summum remained free to enter Pioneer Park and engage in a host of speech activities.[177] As a result, the City's actions were lawful.[178]

Finally, Justice David Souter, the only Justice who did not join the Court's opinion, wrote his own concurrence. Justice Souter agreed that the permanent monument in this case constituted government speech, but he expressed "qualms . . . about accepting the position that public monuments are government speech categorically."[179] His opinion dwelled primarily on the uncertain relationship between the government speech doctrine and the Establishment Clause and the type of governmental conduct this uneasy relationship may spur as the government seeks safe haven under both doctrines.[180] As one solution, he stressed the importance of recognizing that "there are circumstances in which government maintenance of monuments does not look like government speech at all" and recommended the adoption of a "reasonable observer test" similar to the endorsement test used in Establishment Clause cases.[181] Under such a test, a court would "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

173. *Id.* at 1139 (citing Van Order v. Perry, 545 U.S. 677 (2005)).
174. *Id.* at 1140 (Breyer, J., concurring).
175. *Id.* (citation omitted).
176. *Id.* (citation omitted).
177. *Id.*
178. *Id.* at 1141.
179. *Id.* (Souter, J., concurring).
180. *Id.* at 1141–42.
181. *Id.* at 1142.

monument to be placed on public land."[182]

III. NO FORUM FOR THE GOVERNMENT: THE HISTORY AND REACH OF THE GOVERNMENT SPEECH DOCTRINE

The Free Speech Clause protects the freedom of speech. The government speech doctrine is essentially a corollary of the Free Speech Clause that grants the government the right to speak for itself and the right to make certain content-based decisions that it could not otherwise make if the speech belonged to a private party.

The government speech doctrine is a young doctrine.[183] Justice Souter has previously noted that it "is relatively new, and correspondingly imprecise."[184] One could accurately state that the government speech doctrine "is still in its formative stages."[185] In his opinion on behalf of the Court in *Pleasant Grove City*, Justice Alito wasted no ink expounding upon the origins and scope of this "recently minted" doctrine.[186] Although he based the decision upon the government speech doctrine, Justice Alito restricted his discussion of the doctrine to its bare essentials and did not delve into the Court's previous decisions related to the doctrine.

Nonetheless, a discussion of the treatment of the government speech doctrine by the Supreme Court and the federal courts of appeals reveals that in its short life, the doctrine has already been recognized to apply to a wide variety of government functions. In fact, the government's responsibilities related to its parks differ little from the functions to which the doctrine has already been applied. Justice Alito chose not to approach the Court's decision from this perspective, but this Part will do just that, demonstrating that the scope of the government speech doctrine, as previously recognized by the courts, is sufficiently broad to justify the extension of the doctrine to permanent monuments in public parks.

182. *Id.*

183. *Id.* at 1141.

184. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

185. Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 305 F.3d 241, 245 (4th Cir. 2002); *see also* Wells v. City & County of Denver, 257 F.3d 1132, 1140 (10th Cir. 2001) ("The Supreme Court has provided very little guidance as to what constitutes government speech.").

186. *See Pleasant Grove City*, 129 S. Ct. at 1129–38 (majority opinion).

A. *Government as Educator*

America's colleges and universities constitute "one of the vital centers for the Nation's intellectual life."[187] Recognizing the importance of a university's ability to define and execute its own mission, Justice Felix Frankfurter stated the following:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[188]

Universities, colleges, and academic institutions generally must possess and exercise considerable discretion and autonomy to perform such academic duties.[189]

One specific duty that the government possesses in its role as educator is the selection of curriculum for students.[190] In *Chiras v. Miller*, the Fifth Circuit observed that "[d]esigning the curriculum and selecting textbooks is a core function" of the State.[191] In *Chiras*, the State of Texas—via a state-created body called the Texas State Board of Education (Board)—had a process in place for reviewing and deciding which textbooks should be included in the curriculum for the State's public schools.[192] The Board determined that a particular textbook was inappropriate for inclusion in the State's curriculum and the textbook author sued, arguing that the Board had engaged in unconstitutional viewpoint discrimination in violation of the Free Speech Clause.[193]

The court of appeals ruled against the textbook author on the basis of

187. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 836 (1995).

188. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting a statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand).

189. *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself . . . .") (citations omitted).

190. Chiras v. Miller, 432 F.3d 606, 614–15 (5th Cir. 2005).

191. *Id.*

192. *See id.* at 608–09.

193. *See id.* at 610.

the government speech doctrine, holding that "when the [Board] devises the state curriculum for Texas and selects the textbook with which teachers teach to the students, it is the state speaking, and not the textbook author."[194] Therefore, the speech at issue was that of the government, not a private individual. Consequently, the state had every right to reflect its own views in the selection of the curriculum—which was in fact the literal speech of private parties—for its schools, and forum analysis was inapplicable.[195]

Of course, "curriculum is only one outlet" that a government has to express its policy.[196] In *Downs v. Los Angeles Unified School District*, the Ninth Circuit recognized the ability of the government—in this case the school district—to convey its message or policy through school-sponsored bulletin boards in public schools.[197] In *Downs*, the Los Angeles school district set aside a month as Gay and Lesbian Awareness Month in an effort to educate students about diversity and to reduce discrimination toward gays and lesbians.[198] To that end, faculty members at one high school created a bulletin board to display materials related to gay and lesbian awareness.[199] In response, a schoolteacher from the same school created his own bulletin board across from his classroom that displayed materials expressing his negative views of homosexuality.[200] When the school removed the materials that this schoolteacher had posted on his own bulletin board, he sued the school district.[201]

The Ninth Circuit Court of Appeals ruled against the schoolteacher, holding that there was no private speech at issue against which the school district could have discriminated. Instead, this case presented "an example of the government opening up its own mouth," as the school-sponsored bulletin board for gay and lesbian awareness "served as an expressive vehicle for the school board's policy."[202] Because the government was "speaker," the "control of its own speech [was] not subject to the constraints of constitutional safeguards and forum analysis."[203]

194. *Id.* at 614.
195. *See id.* at 614–15.
196. Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1015 (9th Cir. 2000).
197. *Id.* at 1016–17.
198. *Id.* at 1006.
199. *Id.*
200. *Id.* at 1006–07.
201. *Id.* at 1008.
202. *Id.* at 1012.
203. *Id.* at 1013.

Additionally, the Supreme Court has recognized that the government speech doctrine is not limited to the government's speech in the context of school curriculum or a school's bulletin board—it gives the government similar discretion in "selecting a commencement speaker" for graduation ceremonies as well as "selecting speakers for a lecture series."[204]

B. *Government as Public Broadcaster*

The government possesses similar discretion in its role as public broadcaster. In their capacity as public broadcasters, governmental bodies or officials enjoy "the 'widest journalistic freedom' consistent with their statutory obligations to broadcast material serving the 'public interest, convenience, and necessity.'"[205] To fulfill these obligations, the government must "exercise substantial editorial discretion in the selection and presentation of [its] programming."[206] To that end, when the government selects and presents its chosen programming material, the government "engages in speech activity."[207] The Supreme Court has noted that in this editorial role, the government is simply compiling the speech of third parties, yet such editorial decisions constitute "communicative acts."[208] Virtually every decision that a government entity, official, or licensee makes regarding which material to broadcast "is inherently subjective and involves judgments which could be termed 'political.'"[209] Thus, to grant private parties a right of access to the public broadcasting system would subordinate the public interest to that of the private, impose significant burdens on the daily management of public broadcasting, and ultimately compel the government to espouse a position or view that is not its own.[210]

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204. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998).

205. Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093 (2000) (quoting 47 U.S.C. § 309(a) (2000); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973)).

206. *Forbes*, 523 U.S. at 673.

207. *Id.* at 674.

208. *Id.*

209. Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1045 (Former 5th Cir. 1982).

210. *See Columbia Broad. Sys., Inc.*, 412 U.S. at 124, 127. Speaking of a public right of access to public television channels, the Supreme Court stated the following:

> The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not. The public interest

In *Muir v. Alabama Education Television Commission*, the Fifth Circuit acknowledged the government's right to speak in its decision to air or not air a television program.[211] In *Muir*, the Alabama Educational Television Commission (AETC), a federal government licensee, chose to remove a previously scheduled television program from its programming schedule.[212] As a result, several Alabama residents who had planned on viewing the cancelled program sued AETC, alleging that AETC violated their First Amendment rights by depriving them of their right to view the program.[213] The court of appeals ruled in favor of AETC, holding that the decision to cancel the program was an editorial decision made in the execution of AETC's "statutorily mandated discretion" to air or not air content that "will best serve the public interest."[214]

C. *Government as Patron of the Arts*

The federal and state governments have taken considerable measures to support the arts in the United States. In 1965, for example, Congress passed the National Foundation on the Arts and Humanities Act, which authorized the National Endowment for the Arts to fund artistic projects meeting certain criteria.[215] The Supreme Court has recognized that the process of selecting which artistic works merit funding under programs such as the one created by this Act—similar to the content that should be aired on a public television channel—is a "highly selective" and subjective one that certainly requires the government to discriminate among the projects of many different artists.[216]

The government's decision to fund certain artistic projects, while refusing to fund others, is no different than the government's decisions about the textbooks that should form part of a student's curriculum or the content that should be aired over the television for citizens' viewing. The arts serve many important functions that are a benefit to society (e.g., education, entertainment). The government, therefore, has significant discretion in making "aesthetic judgments" that will convey its desired

would no longer be "paramount" but, rather, subordinate to private whim . . . .

Id. at 124.

211. *Muir*, 688 F.2d at 1048.
212. *Id.* at 1036.
213. *Id.* at 1037.
214. *See id.* at 1045, 1047.
215. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 573 (1998).
216. *Id.*

message to its citizens and that will benefit them.[217]

The District of Columbia Circuit applied the government speech doctrine to the government's promotion of art in *PETA v. Gittens*.[218] In that case, the District of Columbia instigated "a program intended to showcase local artists, attract tourists and enliven the streets 'with creative, humorous art.'"[219] PETA submitted artistic works that displayed a message that, according to the District of Columbia's officials, "was not an artistic expression consistent with the goals, spirit and theme of the art project."[220] The District refused to include PETA's projects in the exhibition.[221] According to PETA, the District of Columbia engaged in viewpoint or content discrimination in violation of the First Amendment.[222]

The court of appeals held that the government "spoke when it determined which" art pieces to include and which to exclude from the exhibition.[223] Although the art pieces that the District decided to include in the exhibition were not designed or created by the District or its agents, the court of appeals, noting that the "'compilation of the speech of third parties' is a communicative act,"[224] held that "[a]s a speaker, and as a patron of the arts, the government is free to communicate some viewpoints while disfavoring others."[225]

D. *A Broad Doctrine*

Courts have applied the government speech doctrine to the government's speech in its capacity as patron of the arts, as public broadcaster, and as educator. The government speech doctrine, however, is not confined to these three categories of authority. In fact, the doctrine reaches much further—to virtually any government speech conducted in furtherance of an authorized government function or duty.

217. *See id.* at 586.
218. *See* PETA v. Gittens, 414 F.3d 23 (D.C. Cir. 2005).
219. *Id.* at 25.
220. *Id.* at 26.
221. *Id.* at 26–27.
222. *See id.* at 27.
223. *See id.* at 28.
224. *Id.* at 30 (quoting Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998)).
225. *Id.*

1. *Libraries*

The government speech doctrine covers the government's speech related to its duty to operate and manage libraries. The government speech doctrine applies "to a public library's exercise of judgment in selecting material it provides to its patrons."[226] To ensure that public libraries "facilitat[e] learning and cultural enrichment," the government must have broad discretion to determine which materials are and are not appropriate to meeting that end.[227] As a result, "forum analysis and heightened judicial scrutiny are incompatible with" the government's achievement of this mission.[228]

2. *Funding*

The government speech doctrine covers the government's speech in the form of funding programs that promote a particular government policy. In *Rust v. Sullivan*, for example, the Supreme Court examined the government's decision to fund entities providing family planning services.[229] The federal government had decided to provide funding for family planning services, but excluded from such funding any entities that provided any kind of services that related to abortion.[230] Certain parties argued that the government was violating their free speech rights by prohibiting "all discussion about abortion as a lawful option."[231] The Supreme Court honored the government's right to speak for itself in pursuing the policy that it deemed was in the best interest of its citizens:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[232]

The government is entitled to formulate and set the scope of its own

226. United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003).
227. *Id.* at 203–04.
228. *Id.* at 205.
229. Rust v. Sullivan, 500 U.S. 173, 178 (1991).
230. *Id.* at 178–81.
231. *Id.* at 192 (quoting Brief for Petitioners at 11, *Rust*, 500 U.S. 173 (No. 89-1391)).
232. *Id.* at 193.

policies. In this instance, the government decided that its citizens needed assistance in beginning their families, but that abortion, and any abortion-related counseling, was not in its citizens' best interest. Therefore, the government "used private speakers to transmit specific information pertaining to its own program," meaning those entities would provide the type of counsel, referrals, and other services that, in the government's opinion, were in the best interest of its citizens' efforts to begin their families.[233] To that end, the government is entitled to convey, or have private parties convey on its behalf, the message that will best execute its chosen policies.[234]

3. *Legislation*

The government speech doctrine may apply to the government's endorsement or opposition of legislation. In *Page v. Lexington County School District One*, the School District—a government entity—used its website, e-mail, and newsletters to urge "District committees and groups, staff and students, school community in general, and the public at large" to oppose a bill pending in the South Carolina legislature.[235] A citizen and resident of Lexington County who supported the pending bill was agitated by the District's outspoken opposition, and requested access to the District's website to express his support of the bill.[236] The Fourth Circuit Court of Appeals ruled in favor of the District on the basis of the government speech doctrine.[237] The court of appeals held that the District "*established* its message to oppose" the bill and at all times controlled the content and the means of distributing the content related to its opposition.[238]

4. *Museums, Newspapers, and Cemeteries*

The courts continue to realize how far the limits of this doctrine stretch. The government speech doctrine applies to the decisions of a

233. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (citing *Rust*, 500 U.S. at 194).

234. *See id.* ("We recognized [in *Rust*] that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

235. Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 277–78 (4th Cir. 2008) (citation omitted) (internal quotations omitted).

236. *See id.* at 279.

237. *See id.* at 285.

238. *Id.* at 282.

government-owned museum regarding the pieces to include in its collection.[239] The government speech doctrine applies to the choices of government-owned newspapers about the content to include or exclude from their pages.[240] The government speech doctrine reaches the choices that the government makes regarding the message it wishes to convey in a government-owned cemetery.[241] The government, at all levels, has "many and varied functions" that it must fulfill.[242] In doing so, the government must "speak," and be able to define the content and limits of that speech, as it seeks to promote and execute those programs and policies that will enable it to successfully perform these "many and varied functions" for the benefit of its citizenry.[243] When it does so, the government is a speaker, and the traditional First Amendment forum-analysis principles "are out of place."[244]

In conclusion, the government speech doctrine is not a narrowly applied doctrine. Not only does it apply to the government's speech in its role as educator, public broadcaster, and patron of the arts, but the doctrine essentially applies to all speech employed by the government in supporting its policies and legislation generally. These latter two categories incorporate a broad array of areas in which the government "speaks," thereby triggering the government speech doctrine.

E. *The Government Speech Doctrine and Public Parks*

The role that Pleasant Grove has regarding its Pioneer Park is not altogether different from the role that a government plays in relation to a cemetery, the public airways, a school's curriculum, or a museum—all contexts in which the government speech doctrine has been held to apply. National, state, and local parks all have tremendous value for the community. President George W. Bush, in his proclamation in celebration

239. *See* PETA v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005) ("The curator of a state-owned museum, for example, may decide to display only busts of Union Army generals of the Civil War, or the curator may decide to exhibit only busts of Confederate generals. The First Amendment has nothing to do with such choices.").

240. *See* Bryant v. Gates, 532 F.3d 888, 898–99 (D.C. Cir. 2008) (Kavanaugh, J., concurring).

241. Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1324–25 (Fed. Cir. 2002).

242. Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 616 (4th Cir. 2002).

243. *See id*. at 616–17.

244. United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003).

of National Park week, quoted President Franklin D. Roosevelt, who said that "[t]here is nothing so American as our National Parks"; for that reason, "the Federal Government plays a vital role in protecting [America's] natural and historical treasures."[245] The government has a significant interest in ensuring that its citizens enjoy all the benefits that a park owned by the government has to offer.[246] The government regulates nearly all aspects of its parks, from a park's boat traffic[247] and the fish that can be taken from a park,[248] to the cliffs that can be climbed[249] and the areas that are appropriate for camping.[250] The government has a "substantial interest in maintaining the parks . . . in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them."[251] Typically, government employees see to the day-to-day maintenance of government-owned parks, such as "sweeping, mowing, painting, installing signs and other maintenance duties," which ultimately allows the government to execute its duties of keeping its parks in a condition that all of its citizens can appreciate and enjoy.[252]

Parks serve numerous functions. "Parks are usually constructed to beautify a city and to provide opportunities for recreation . . . ."[253] Parks

245. Proclamation No. 8239, 73 Fed. Reg. 21,213 (Apr. 15, 2008) (internal quotations omitted).

246. Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984)).

247. *See* 36 C.F.R. § 7.1(a) (2008) ("Except in emergencies, no privately owned vessel shall be launched from land within Colonial National Historical Park and no privately owned vessel shall be beached or landed on land within said Park.").

248. *See id.* § 7.37(a)(2) ("Within the Barataria Marsh unit, the superintendent may designate times and locations and establish conditions governing the taking of crayfish upon a written determination . . . .").

249. *See id.* § 7.78(a) ("All persons shall register at park headquarters before climbing any portion of the cliff face of Maryland Heights. A registrant shall check out, upon completion of climbing, in the manner specified by the registering official.").

250. *See id.* § 13.1402(a) (permitting camping in designated areas only).

251. *Clark*, 468 U.S. at 296. The government, as owner of a park, often has a duty to maintain its parks in a reasonably safe condition for visitors, and may incur liability for violation of that duty. *See, e.g.*, Pigott v. United States, 498 F.2d 1397 (4th Cir. 1974) (defining the duty of care under Virginia law); Ashley v. United States, 326 F.2d 499 (8th Cir. 1964) (defining the duty under Wyoming law).

252. Lines v. City of Ottawa, No. 02-2248-KHV, 2003 U.S. Dist. LEXIS 10203, at *5 (D. Kan. June 16, 2003).

253. United States v. Kokinda, 497 U.S. 720, 744 (1990) (Brennan, J., dissenting).

can also be used as a forum for speech.[254] The government also can establish parks for historic purposes to commemorate special events that have historical value for a particular locale.[255] As President George W. Bush stated, this nation's parks are some of its most valuable "historical treasures."[256] Parks can also convey a message that the government wishes to express about itself. In *Pleasant Grove City*, Justice Alito wrote that "[c]ity parks . . . commonly play an important role in defining the identity that a city projects to its own residents and to the outside world."[257]

Valley Forge National Historical Park, for example, "commemorates . . . the sacrifices and perseverance of the Revolutionary War generation."[258] To that end, the federal government has placed multiple monuments in the park that are consistent with honoring the sacrifices made at Valley Forge and in the Revolutionary War.[259] For example, the National Memorial Arch "was erected to commemorate the arrival of General George Washington and his Continental Army into Valley Forge."[260]

The State of Utah established This Is the Place Heritage Park to commemorate the entry of Brigham Young and the Mormon pioneers into the Salt Lake Valley in 1847.[261] The State of Utah commissioned a monument to be constructed by one of Brigham Young's grandsons to be placed in the state park to honor the sacrifices of those pioneers who made

254. *See id.*

255. *See* United States v. Gettysburg Elec. Ry., 160 U.S. 668, 682–83 (1896) (upholding the right of the government to condemn private property to commemorate the battle of Gettysburg); Gerritsen v. City of L.A., 994 F.2d 570, 580 (9th Cir. 1993) (articulating "the historic and commemorative purposes" of El Pueblo State Historic Park in Los Angeles).

256. Proclamation No. 8239, 73 Fed. Reg. 21,213 (Apr. 15, 2008) (internal quotations omitted).

257. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1133–34 (2009).

258. Nat'l Park Serv., U.S. Dep't of the Interior, Valley Forge National Historical Park, http://www.nps.gov/vafo/index.htm (last visited Dec. 1, 2009).

259. *See* Nat'l Park Serv., U.S. Dep't of the Interior, Valley Forge National Historical Park—Monuments and Markers, http://www.nps.gov/vafo/historyculture/monuments.htm (last visited Dec. 1, 2009).

260. *See* Nat'l Park Serv., U.S. Dep't of the Interior, Valley Forge National Historical Park—National Memorial Arch, http://www.nps.gov/vafo/historyculture/arch.htm (last visited Dec. 1, 2009).

261. *See* This Is the Place Foundation, A Brief History of This Is the Place Heritage Park, http://www.thisistheplace.org/info/parkhistory.html (last visited Dec. 1, 2009).

the arduous trek to the Salt Lake Valley.[262] The state manages, develops, and promotes the park.[263]

Like Valley Forge National Historical Park or This Is the Place Heritage Park, Pioneer Park has significant historical value for Pleasant Grove, Utah. Pioneer Park, which was originally known as the "Old Fort" settlement, was settled shortly after Brigham Young and the pioneers entered the Salt Lake Valley, making it the first Mormon settlement in Utah.[264] Important events took place in this small settlement, including "the first official meeting of the new provisional state of Deseret" and "the state's first elections."[265] The school built by the settling pioneers still stands on that property today.[266] Many other historical remnants from that early settlement period stand in Pioneer Park—for example, a stone used in the first flour mill and the granary that served the settlement—to preserve and honor the memory of those pioneers who sacrificed so much and made the settlement of Pleasant Grove possible.[267] In addition, the local government has seen fit to place other objects in Pioneer Park that are relevant to the Mormon heritage generally, such as a stone from the Mormon Nauvoo Temple in Illinois and a Ten Commandments monument.[268] As stated by one historical society member, "[i]t is important that we let people know the importance of [Pioneer Park] to the settlement and beginning of this great state and in honor of those first pioneers who lived there."[269]

In light of the commemorative purpose of Pioneer Park, the government of Pleasant Grove has the right to implement the speech it deems appropriate to maintaining an "atmosphere of tranquility and respect" and that is relevant to Pioneer Park's heritage.[270] The government

262. *See id.*

263. *See* UTAH CODE ANN. § 63-11-3.2 (2008).

264. *See* Pioneer Park, History, http://www.slcpioneerpark.com/history.htm (last visited Dec. 1, 2009). "Some referred to Old Fort as the Plymouth Rock or Jamestown of the West." Pat Reavy, *Pioneer Park: Prestigious Past, Perilous Present*, DESERET MORNING NEWS, Oct. 21, 2007, *available at* http://findarticles.com/p/articles/mi_qn4188/is_20071021/ai_n21063484/pg_1?tag=artBody;col1.

265. *See id.*

266. Brief for Petitioners at 4–5, Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (No. 07-665).

267. *Id.* at 5.

268. *See id.* at 4–5.

269. Pioneer Park Revitalization, Community Business and Vested Endorsements, http://www.slcpioneerpark.com/support.htm (last visited Dec. 1, 2009).

270. *See* Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1324 (Fed. Cir.

owns, controls, and maintains Pioneer Park, and in furtherance of that function (which is similar to its functions as an educator, patron of the arts, and librarian), the government may choose to deposit and display those monuments or objects that it believes represent its voice regarding the park and its heritage.[271] Although the Eagles donated the Ten Commandments monument to the City, the City decided that the monument was conducive to the atmosphere, solemnity, and message it wished to represent in Pioneer Park and those pioneers who sacrificed so much to settle there.[272] The government is permitted to speak directly through its own employees or it may "enlist[] private entities to convey its own message."[273]

The City's decision to "open[] its mouth to speak" by installing a Ten Commandments monument in Pioneer Park "does not give every outside individual or group a First Amendment right to play ventriloquist."[274] As poignantly put by the District of Columbia Circuit, if government "authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee."[275] The Supreme Court has recognized "that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens."[276] Although Summum and its adherents may be displeased with the City's decision, the government has opened its own mouth about the appropriate message to be conveyed in Pioneer Park, and the appropriate remedy is not judicial, but political. If

2002).

271. *Id.* ("The government is entitled to full control over its own speech . . . .").

272. *See* Brief for Petitioners at 3–5, Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (No. 07-665).

273. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

274. Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000).

275. PETA v. Gittens, 414 F.3d 23, 29 (D.C. Cir. 2005). In *Pleasant Grove City*, Justice Alito described a similar thought:

> On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (e.g., a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).

Pleasant Grove City, 129 S. Ct. at 1137–38.

276. Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217, 229 (2000).

the City's decision has misrepresented the majority's convictions, then it will not be speaking the same way after the next election. But for the present time, the City's leaders have opened their mouths and are not constrained by the traditional First Amendment forum principles.[277]

In *Pleasant Grove City*, Justice Alito did not march through the history of the government speech doctrine and expound upon its breadth, but such a discussion makes clear that the doctrine is a broad one, and one that justifiably reaches the government's display of a permanent monument in a public park.[278]

IV. THE MISAPPLICATION OF *WELLS*

In *Pleasant Grove City*, the Supreme Court did not touch upon the underlying Tenth Circuit decisions that led the Tenth Circuit to rule against Pleasant Grove in its decision.[279] Nonetheless, a critical review of the Tenth Circuit's decisions reveals how badly the Tenth Circuit botched the application of its own precedent. The Tenth Circuit's myopic mishandling of the government speech doctrine, created by its decision in *City of Ogden* and cemented by its decision in *Summum*, forged an erroneous precedent. Before arriving at the Supreme Court's doorstep, the Summum litigation gave rise to an arduous battle between the District Court of Utah and the Tenth Circuit. In *City of Ogden*, the City argued that the disputed Ten Commandments monument was government speech and that as a result the City had not discriminated between private speakers.[280] The court of appeals disagreed, holding that the Ten Commandments monument was the Eagles' speech.[281] The Tenth Circuit's holding that the Eagles' gift to the City remained private speech was premised on a four-factor test articulated in *Wells v. City & County of Denver*.[282]

In light of the binding precedent established in *City of Ogden*, Pleasant Grove did not raise the government speech doctrine to the district court or the Tenth Circuit. Nonetheless, relying upon *City of Ogden*, the

277. *See PETA*, 414 F.3d at 29 ("But those First Amendment constraints do not apply when the same authorities engage in government speech by installing sculptures in the park.").

278. *See Pleasant Grove City*, 129 S. Ct. 1125.

279. *See id.* at 1129.

280. *City of Ogden II*, 297 F.3d 995, 999 (10th Cir. 2002).

281. *Id.* at 1006.

282. *See id.* at 1004–05 (citing Wells v. City & County of Denver, 257 F.3d 1132, 1140–42 (10th Cir. 2001)).

Tenth Circuit found summarily that the Ten Commandments monument was the Eagles' speech, not the City's speech.[283] Upon losing its appeal, however, the City filed a petition for a rehearing en banc, arguing for a reversal of *City of Ogden* and the Tenth Circuit's decision in *Summum*. The City argued that the City's display of the Ten Commandments monument was more properly characterized as government speech, and as a result, there was no forum for private speech in the first place.[284] The court of appeals refused to grant an en banc rehearing.[285] In *Pleasant Grove City*, the Supreme Court chose not to critique the precedent underlying the Tenth Circuit's decision, but this Part will engage in such an analysis, showing how the Tenth Circuit erroneously relied upon its own precedent in *Wells*. Moreover, even though the Supreme Court did not expressly rely upon any multifactor test for reaching its ruling, its opinion in fact reveals that it at least implicitly relied upon three of the four factors that form the *Wells* test.

A. *Central Purpose*

1. *The Dual Nature of Speech*

Applying the *Wells* test, the *City of Ogden* court examined the central purpose of the speech. The Tenth Circuit held that "the central purpose of the Ten Commandments Monument [was] to advance the views of the Eagles rather than those of the City of Ogden."[286] The court of appeals based its holding on the fact that "[t]he Eagles designed, produced, and donated the Ten Commandments Monument, all with the avowed purpose of providing a moral code for youth to emulate."[287]

The Tenth Circuit erred by adopting an excessively narrow view of speech, disregarding its multifaceted nature. The same speech can serve different functions and develop different meanings as time and circumstances change. Justice Alito stressed this fact in denying Summum's proposal of requiring the government to formally adopt "the message" of any monument that it wished to display.[288] According to the

283. Summum v. Pleasant Grove City, 483 F.3d 1044, 1047–48 n.2 (10th Cir. 2007).

284. Petition for Rehearing En Banc at 5, Summum v. Pleasant Grove City, 499 F.3d 1170 (10th Cir. 2007) (No. 06-4057).

285. *Summum*, 499 F.3d at 1171.

286. *City of Ogden II*, 297 F.3d at 1004.

287. *Id.*

288. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1135 (2009) (discussing

position taken by the Tenth Circuit in *City of Ogden*, speech can serve only one purpose, and that purpose belongs exclusively to the speech's original creator or author.[289] In *City of Ogden*, the court of appeals held that the central purpose of the Ten Commandments monument was that of the Eagles—not the City—because "[t]he Eagles designed, produced, and donated the Ten Commandments Monument."[290] The court of appeals correctly recognized that the Eagles had a definite purpose at the time it designed and created the monument; however, the court of appeals failed to recognize that an unrelated party could subsequently find value in the Eagles' creation and use the Eagles' speech for its own distinct purpose.

In *Wells*, the Tenth Circuit recognized the dualistic nature of speech.[291] The City and County of Denver placed a holiday display near one of the entrances of the primary local government building in Denver.[292] The display included a sign publicly thanking six corporate entities whose contributions were used to reimburse the government for its costs related to the display.[293] In its evaluation of the central purpose served by this sign, the Tenth Circuit observed that the sign served purposes belonging to both the government and the listed corporate sponsors.[294] The court of appeals noted that the sponsors benefited from the sign, as they received "publicity and good will."[295] Yet the court of appeals also noted that the government benefited from the sign because the sign allowed the government to thank the display's sponsors and ultimately motivate third parties to contribute to the cost of the display.[296]

The purpose served by any speech is both time- and place-specific. In 1922, the American poet Carl Sandburg published a poem called *Washington Monument at Night*. The poem includes the following stanza:

> The republic is a dream.

the different interpretation that may be drawn from Central Park's Greco-Roman mosaic of the word "Imagine").

289. *See City of Ogden II*, 297 F.3d at 1004–05.

290. *Id.* at 1004.

291. Wells v. City & County of Denver, 257 F.3d 1132, 1141–42 (10th Cir. 2001).

292. *Id.* at 1136–37.

293. *Id.* at 1137.

294. *See id.* at 1141–42.

295. *Id.* at 1142.

296. *See id.*

Nothing happens unless first a dream.[297]

In 1981, President Ronald Reagan addressed a joint session of Congress regarding a proposed economic recovery plan.[298] In closing his address to Congress, President Reagan quoted this stanza, and added the following: "As Carl Sandburg said, all we need to begin with is a dream that we can do better than before. All we need to have is faith, and that dream will come true. . . . All we need to do is act, and the time for action is now."[299] When Carl Sandburg penned the quoted stanza in 1922, "the crushing burden of inflation" [300] hanging over the American people likely was not his inspiration. In fact, the 1920s were "a period of vigorous, vital economic growth."[301] Yet, sixty years later, an American president saw value in Sandburg's words (or speech) and adopted them to serve his own unique purpose, as well as that of the American people. But under the Tenth Circuit's reasoning, Carl Sandburg designed, produced, and created the words that he penned in *Washington Monument at Night*, and as a result, the central purpose of those words belongs exclusively to Sandburg.

However, in 1981, when President Reagan spoke those words before Congress, the central purpose served by those words was that of President Reagan—to bring spending and inflation under control and revitalize the American economy. President Reagan's central purpose behind those words could not possibly have been the same as the central purpose of those words when penned by Carl Sandburg at the beginning of the twentieth century. President Reagan was not "promot[ing] the views and agenda" of Carl Sandburg when he employed those words.[302]

The Tenth Circuit, in *City of Ogden*, misunderstood and misapplied this factor. In *City of Ogden*, the Tenth Circuit should have recognized that the City could determine that the Ten Commandments monument, even though created by the Eagles, suited the City's own purposes by conveying the message it wished to convey on its property. The Tenth

297. CARL SANDBURG, *Washington Monument by Night*, *in* THE COMPLETE POEMS OF CARL SANDBURG 282 (rev. & expanded ed. 1970).

298. Ronald Reagan, Speech to Joint Session of Congress (Apr. 28, 1981), *available at* http://www.pbs.org/wgbh/amex/reagan/filmmore/reference/primary/economic.html.

299. *Id.*

300. *Id.*

301. Gene Smiley, *The U.S. Economy in the 1920s*, *in* ENCYCLOPEDIA OF ECONOMIC AND BUSINESS HISTORY (Robert Whaples ed., 2008), http://eh.net/encyclopedia/article/Smiley.1920s.final.

302. *See* Summum v. Pleasant Grove City, 499 F.3d 1170, 1172 (10th Cir. 2007).

Circuit should have arrived at the same conclusion in *Summum*.

2. *Control over Construction, Message, and Placement*

The Tenth Circuit in *City of Ogden* stated that *Wells* was the Tenth Circuit's precedent for deciding cases such as those presented by Summum and his church.[303] Yet, if the court of appeals had properly applied *Wells* to its central-purpose analysis, the court would have come out differently. The *Wells* court held that the central purpose of a holiday sign was the City of Denver's based on four factors: (1) the City's control over the sign's construction; (2) the City's control over the sign's message; (3) the City's control over the sign's placement; and (4) testimony from a City official that the sign's purpose was to thank the corporate sponsors and citizens for supporting the costs of the display.[304] The *Wells* court ultimately relied upon the City's control over the sign's construction. This factor, however, cannot be controlling in the *Summum* litigation, which lacked similar facts on this point. In *Wells*, the City's own carpentry shop constructed the sign, so the City literally had control over the sign's construction.[305] This was not the case in *Summum*. Furthermore, courts have held elsewhere that, as a general matter, the government can outsource the actual creation of speech to nongovernment parties and retain the speech as its own.[306] Regardless of whether the government's own officials are speaking or whether the government "enlists private entities to convey its own message," the government speech doctrine still recognizes the speech as the government's own.[307]

The *Wells* court also relied upon the City's control over the sign's message.[308] A closer look at the *Wells* test, however, reveals that this factor was neutral in the court's central-purpose analysis. The second factor of the *Wells* test examines the government's editorial control over the speech.

303. *City of Ogden II*, 297 F.3d 995, 1004 (10th Cir. 2002).

304. Wells v. City & County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001).

305. *See id.* at 1137.

306. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) (stating that the government "is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages"); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or *when it enlists private entities to convey its own message*.") (emphasis added).

307. *Rosenberger*, 515 U.S. at 883.

308. *Wells*, 257 F.3d at 1141.

Therefore, the examination of the government's control over the speech's message in the first prong is also covered in the second prong of the *Wells* test.

The *Wells* court focused on the City's placement of the sign. Because the government placed the sign on government property, right in front of the primary entrance of the city and county building, the court of appeals treated the central purpose of the sign as that of the government.[309] Given that the first two factors are either irrelevant or have been ruled to not be dispositive, this factor is significant, particularly in *City of Ogden* and *Summum*. In *City of Ogden*, the Tenth Circuit completely overlooked this portion of the *Wells* court's analysis. The court focused on the fact that the Eagles created the monument, but the court failed to even mention in its analysis the placement of the Ten Commandments monument on government property.[310] As a result, the Tenth Circuit in *City of Ogden* misapplied the very precedent on which it claims to have relied for its decision. The placement of the Ten Commandments monuments on the City of Ogden's property and on Pleasant Grove's property should have resulted in the court of appeals finding the central purpose of the Ten Commandments monuments to be the cities' speech—a finding that was crucial to the Supreme Court's reversal of the Tenth Circuit's decision in *Summum*.

One other factor upon which the *Wells* court relied was the government's own testimony that the sign's central purpose was that of the government. In *Wells*, the court of appeals accepted the government's testimony that the sign was created to thank the citizens and sponsors for their support.[311] In *City of Ogden*, the Tenth Circuit criticized the City for admitting at oral argument that it had "no idea as to the meaning of parts of the Monument, particularly the Phoenician letters."[312] The City in *Summum* did not produce the type of testimony that the *City of Ogden* court found so hurtful to the government's case.

In contrast, Pleasant Grove clearly articulated the purpose of the Ten Commandments monument, as well as all monuments residing in Pioneer Park. When Summum applied for permission to deposit its Seven Aphorisms monument in Pioneer Park, the City stated that all permanent displays in the park, including the Ten Commandments monument,

309. *See id.* at 1137, 1141–42.
310. *See generally City of Ogden II*, 297 F.3d 995 (10th Cir. 2002).
311. *Wells*, 257 F.3d at 1141.
312. *City of Ogden II*, 297 F.3d at 1004.

"directly relate[d] to the history of Pleasant Grove" or "groups with long-standing ties to the Pleasant Grove community."[313] The City had never vacillated in its position regarding the purpose attached to the displays found in Pioneer Park. Under the analysis applied by the *Wells* court, significant weight should have been given to Pleasant Grove's articulated position.

In sum, the court of appeals in *Summum* relied heavily upon its decision in *City of Ogden*. However, in *City of Ogden* the court misapplied the decision that it espoused as precedent in its analysis of the first prong. A proper application of the *Wells* factors in both the *City of Ogden* and *Summum* decisions would have led the Tenth Circuit to hold that the central purpose of the Ten Commandments monument was that of the government. The Supreme Court impliedly renounced the legitimacy of any "central purpose" test by properly recognizing the multifaceted nature of speech and the implausibility of distilling one single message or purpose from a monument.[314]

B. *Editorial Control*

Relying upon *Wells*, the Tenth Circuit ruled that "the City of Ogden maintained no editorial control over the design and creation of the Monument. Rather, the Eagles exercised complete control over the content of the Monument, turning over to the City of Ogden a completed product."[315] In *Wells*, the facts were reversed. Because the government created the sign, and because the private parties had nothing to do with its creation or choosing the message on the sign, the court of appeals held that the government had complete editorial control over the speech.[316]

Nevertheless, the Tenth Circuit, in both *City of Ogden* and *Summum*, incorrectly treated "editorial control" as being synonymous with creation.[317] Such a definition, however, overlooks the key term—*editorial*. Public broadcasting cases illustrate the proper meaning of "editorial control." In *Arkansas Education Television Commission v. Forbes*, the Supreme Court recognized the applicability of the government speech

313. Summum v. Pleasant Grove City, 483 F.3d 1044, 1047 (10th Cir. 2007) (citing Appellant's Appendix at 59, *Summum*, 483 F.3d 1044 (No. 06-4057)).

314. *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1135 (2009) ("Respondent seems to think a monument can convey only 'one' message . . . .").

315. *City of Ogden II*, 297 F.3d at 1004.

316. *Wells*, 257 F.3d at 1142.

317. *See Summum*, 483 F.3d at 1044; *City of Ogden II*, 297 F.3d at 1004.

doctrine to public broadcasters.[318] The Supreme Court stated that television broadcasters enjoy the "widest journalistic freedom"[319] in fulfilling the public duties to provide programs that benefit "public interest, convenience, and necessity."[320] The Supreme Court observed that the government, in its capacity as public broadcaster, "exercises editorial discretion in the *selection and presentation* of its programming."[321]

Public broadcasters do not create, film, or design the programs that they air on television or radio. Like the Ten Commandments monuments, which were created and designed by the Eagles before they ever reached Ogden or Pleasant Grove, the programs and their messages are complete at the time they reach public broadcasters. By exercising editorial control or editorial discretion by selecting which programs to air and presenting them to the public, the government itself engages in speech activity that is not subject "to scrutiny under the forum doctrine."[322] When a public broadcaster decides whether to air a certain program, that public broadcaster is speaking because it is choosing "what to say, and what not to say."[323]

The Supreme Court's definition of editorial discretion or control has been applied to other contexts. In *PETA*, the District of Columbia Circuit held that the District engaged in government speech, and thus was not subject to forum analysis, through its selection and presentation of certain art exhibits.[324] When the government chooses which art to subsidize or present for public display, it is compiling "the speech of third parties" and engaging in editorial discretion or control.[325] Like the public broadcaster in *Forbes*, the District of Columbia received the art exhibits in their completed form.[326] The government did not design or craft the exhibits; rather, the participants in the program decided how to design the sculptures, including which message to convey through the models, and

318. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

319. *Id.* at 673 (citing Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973)).

320. *Id.* (citing 47 U.S.C. § 309(a) (1992)).

321. *Id.* (emphasis added).

322. *Id.* at 675.

323. Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1095 (2000).

324. PETA v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005).

325. *Id.* (quoting *Forbes*, 523 U.S. at 674) (internal quotations omitted).

326. *Id.* at 25.

submitted them to the government.[327] The government then decided which ones it would display on public property.[328] Even though the government had nothing to do with the models until they were completed, the District of Columbia Circuit held that the government exercised editorial control over the models and engaged in government speech by selecting and presenting them.[329]

The government's role as educator is another area in which the government exercises editorial discretion or control even though it has nothing to do with the speech before it is completed. In *Chiras*, the Fifth Circuit held that the Texas State Board of Education exercised editorial control or discretion when it selected the textbooks teachers used to teach students.[330] In this context, the government plays no role in the writing and publication of the books that it ultimately selects to be part of the school curriculum. The textbook authors are the ones who exercise complete control over the words that are penned and the message that is contained in their books. Once the government looks at them to consider them for inclusion in the school curriculum, the books are complete—much like the Eagles' Ten Commandments monument. However, the Fifth Circuit properly recognized that when the government selects which books to make part of the school curriculum, "it is the state speaking, and not the textbook author."[331]

Likewise, when the City of Ogden and Pleasant Grove City selected the Ten Commandments monuments for display on government property, the cities—not the Eagles—exercised editorial discretion in the *selection and presentation* of the monuments to be displayed. By doing so, the cities spoke, deciding what to say and what not to say in the use of their property. Thus, like the first factor, the Tenth Circuit misapplied *Wells* to the Ten Commandments monument in *City of Ogden* and, consequently, in *Summum*. The Supreme Court, in its decision, correctly applied this factor, noting that although the Eagles created the Ten Commandments monument, the City is the party that exercised "final approval authority" in deciding to select and place the monument in Pioneer Park.[332]

327. *Id.* at 25–26.
328. *Id.* at 26.
329. *Id.* at 28.
330. Chiras v. Miller, 432 F.3d 606, 615 (5th Cir. 2005).
331. *Id.* at 614–15.
332. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1134 (2009) (citations omitted).

C. *Ultimate Responsibility*

Relying upon *Wells*, the Tenth Circuit considered whether the City of Ogden "maintained ultimate responsibility for the content of the Monument."[333] This is the one factor that the Tenth Circuit decided weighed in favor of the Ten Commandments monument being the government's speech. Although the City of Ogden had no responsibility for the Ten Commandments monument during the time of its creation, once the Eagles donated the monument to the City, "the City could have sold, re-gifted, modified, or even destroyed the Monument at will."[334] At that time, the City had complete discretion to do whatever it wanted with the monument; the City had "ultimate responsibility" for the monument at that time.[335] Similarly, in *Wells* the Tenth Circuit ruled that the City had "ultimate responsibility" for the holiday display, as evidenced by the City tending to complete maintenance of and providing protection for the display (for example, building a fence to protect the display against theft and to protect citizens from electrical hazards).[336]

The facts in the *Summum* case were no different. Once Pleasant Grove accepted the Ten Commandments monument and deposited it in Pioneer Park, it assumed full responsibility for the care and security of the monument.[337] Therefore, this factor weighed in favor of the monument being Pleasant Grove's speech. This is the one factor that the Tenth Circuit correctly applied. The Supreme Court also correctly applied this factor in its decision, stressing that Pleasant Grove had assumed ownership of the Ten Commandments monument.[338]

D. *Literal Speaker*

Relying on *Wells*, the Tenth Circuit determined in *City of Ogden* that the "literal speaker" was the Eagles "based upon recognition of the fact that the Eagles, free from any City control, composed the speech contained on the Monument."[339] The Tenth Circuit noted, however, that one could reasonably conclude that the City of Ogden was the literal speaker because the Ten Commandments monument lay on government property, "every

333. *City of Ogden II*, 297 F.3d 995, 1005 (10th Cir. 2002).
334. *Id.*
335. *Id.*
336. Wells v. City & County of Denver, 257 F.3d 1132, 1142 (10th Cir. 2001).
337. Summum v. Pleasant Grove City, 483 F.3d 1044, 1051 (10th Cir. 2007).
338. *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1134 (2009).
339. *City of Ogden II*, 297 F.3d at 1004–05.

day proclaiming the contents of the Monument."[340]

For two reasons, the literal speaker factor should have favored the cities of Ogden and Pleasant Grove. First, in *Wells*, the Tenth Circuit did not rely upon a literal speaker factor to support its holding, nor did it express this to be a factor of any test. In *Wells*, the Tenth Circuit merely stated that the Eighth Circuit, in *Knights of the Ku Klux Klan v. Curators of University of Missouri*—the decision from which the Tenth Circuit adopted its multifactor test—had relied upon four factors in holding that the underwriting acknowledgments of public radio stations constituted government speech.[341] Nonetheless, the Tenth Circuit relied upon three of those four factors to reach its holding: (1) the central purpose of the speech; (2) editorial control exercised over the speech; and (3) ultimate responsibility for the speech.[342] The Tenth Circuit did not repeat the term literal speaker in holding that the holiday display in *Wells* was the government's speech.[343] Yet, in *City of Ogden*, the Tenth Circuit stated that *Wells*, "[i]n deciding that the sign constituted government speech, adopted and considered" all four of these factors.[344] The Tenth Circuit misstated the role of the literal speaker factor in *Wells*, which actually played no role in the *Wells* court's analysis. The Tenth Circuit's treatment of the literal speaker requirement in *Wells* was limited to stating that the Eighth Circuit had allegedly relied upon a literal speaker requirement in the *Knights of the Ku Klux Klan* decision.[345]

Additionally, the Tenth Circuit's statement that the Eighth Circuit relied upon a literal speaker requirement in *Knights of the Ku Klux Klan* is somewhat suspect. In *Knights of the Ku Klux Klan*, the Eighth Circuit did not use the phrase "literal speaker" or even the term "literal" once in its entire decision.[346] The only possible basis for the Tenth Circuit's statement hinges on a single sentence in the *Knights of the Ku Klux Klan* decision. The Eighth Circuit placed its analysis, on which its conclusion that the underwriting acknowledgments constituted government speech was based, in one paragraph of its opinion. The Eighth Circuit first discussed the

340. *Id.* at 1004.

341. *Wells*, 257 F.3d at 1141–42 (citing Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–94 (8th Cir. 2000)).

342. *See id.*

343. *See id.*

344. *City of Ogden II*, 297 F.3d at 1004.

345. *See Wells*, 257 F.3d at 1141.

346. *See Knights of the Ku Klux Klan*, 203 F.3d 1085.

central purpose of the enhanced underwriting program.[347] It then discussed the control that the radio station exercised over the program.[348] The court finished by discussing the ultimate responsibility assumed by the government over the program.[349] Between its treatment of the government's editorial control and ultimate responsibility of the underwriting program, the court stated that "[m]oreover, the station does not broadcast 'pre-produced' announcements submitted by underwriters; instead, KWMU employees themselves read the acknowledgments on air."[350] This statement was likely the basis for the Tenth Circuit conclusion in *Wells* that the Eighth Circuit had relied upon a literal speaker requirement in *Knights of the Ku Klux Klan*.

If so, the literal speaker requirement does not hinge on the party who created the speech, but the party who chooses to present it to the public. In *Knights of the Ku Klux Klan*, the underwriting messages typically consisted of a "fifteen-second message, drafted by the underwriter or KWMU staff."[351] Regardless of whether the private underwriter or the KWMU staff drafted the message, the Eighth Circuit relied upon the party who actually presented that message to the public over the air, not which party created the message.[352] Therefore, the Tenth Circuit in *City of Ogden* was very close to properly applying the alleged literal speaker requirement when it stated that one "might think that the City became the literal speaker, every day proclaiming the contents of the Monument."[353] If the Tenth Circuit had properly applied the Eight Circuit's decision in *Knights of the Ku Klux Klan*, then it would have understood that the fact that the Eagles "composed the speech contained on the Monument"[354] was irrelevant to this factor. This factor looks to the party that is presenting the disputed message to the public. In *City of Ogden* and *Summum*, a proper application of this factor would have led to a finding that the cities of Ogden and Pleasant Grove, having deposited and displayed the monument to the public on government property, were the literal speakers.

One could argue that the Supreme Court implicitly applied this factor, and did so in the correct manner, by focusing on the physical

347. *See id.* at 1093.
348. *See id.* at 1094.
349. *See id.*
350. *Id.*
351. *Id.* at 1088.
352. *See id.* (noting that UMSL, as licensee of KWMU, is ultimately liable).
353. *City of Ogden II*, 297 F.3d 995, 1004 (10th Cir. 2002).
354. *Id.* at 1005.

property on which the monument resided.[355] Pleasant Grove was the literal speaker because the speech resided on its property, property that is "closely identified in the public mind with the government unit that owns the land."[356]

Finally, even if the Tenth Circuit properly understood and applied the literal speaker requirement in *City of Ogden*, this requirement cannot be the predominant factor in the multifactor *Wells* test. If a court were to weigh the literal speaker requirement over the other three factors, the court would "run[] afoul of the admonition by the Supreme Court that the government may 'regulate the content of what is or is not expressed when it is the speaker or *when it enlists private entities to convey its own message*.'"[357] "If the 'literal speaker' factor were enough on its own to outweigh the government's purpose, responsibility, and editorial control, the government could never enlist a private entity to convey its own message, an outcome inconsistent with settled law."[358] Given that the central purpose of the Ten Commandments monument was that of the City, the City exercised editorial control over the monument, and the City assumed ultimate responsibility for the monument, this factor—even if it did weigh against the City, which it did not—could not overwhelm the other three factors.

In sum, in the *City of Ogden* decision, the Tenth Circuit improperly relied upon *Wells* and *Knights of the Ku Klux Klan*. As a result, the Tenth Circuit in *Summum*, relying upon *City of Ogden*, also improperly relied upon *Wells* and *Knights of the Ku Klux Klan* and arrived at the wrong conclusion. A proper application of the factors relied upon in *Wells* and *Knights of the Ku Klux Klan* would have compelled a finding that the Ten Commandments monument was Pleasant Grove's speech.

V. THE ESTABLISHMENT CLAUSE

In *Pleasant Grove City*, one recurring theme in both the Supreme Court's opinion and the concurring opinions was the inevitable relationship between the government speech doctrine and the Establishment Clause. The Establishment Clause seeks to avoid the government's entanglement with or endorsement of religious entities or messages. The Court and the

355. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1134 (2009).

356. *Id.* at 1133.

357. Chiras v. Miller, 432 F.3d 606, 618 (5th Cir. 2005) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).

358. *Id.*

concurring Justices stressed that as much freedom as the government speech doctrine may grant the government, the doctrine is ever constrained by the Establishment Clause. This relationship between government speech and the Establishment Clause is what largely generated Justice Souter's uneasiness with the Court's opinion. For Justice Souter, "[i]t is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate."[359] Yet his uneasiness was enough to result in him being the only Justice to not join the majority opinion.[360]

Despite Justice Souter's recognition that the Court's decision was not going to resolve his concern, he proposed a solution—that in government-speech cases, courts apply a "reasonable observer test."[361] Justice Souter's analysis sought to establish comity between the government speech doctrine and the Establishment Clause.[362] By employing a reasonable observer test, both analyses would look to a similar inquiry. The majority opinion did not expressly employ a reasonable observer test, but a closer reading of the Court's opinion in *Pleasant Grove City* reveals that it may have done so implicitly. This Part looks at the Establishment Clause and its endorsement test and examines how such a test is consistent with the Court's decision in *Pleasant Grove City* and is amenable to application in analogous cases.

A. *History of the Establishment Clause*

Since the time of America's founding, its citizens have prided themselves on recognizing and honoring the rights of others to worship as they choose, or to not worship at all. To ensure that the "religious diversity that is our national heritage" flourishes, America's Founders added the following words to the First Amendment of the country's young Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[363] The Establishment Clause, as it became known, eventually became binding upon the states and their political subdivisions through the Fourteenth

359. *Pleasant Grove City*, 129 S. Ct. at 1142 (Souter, J., dissenting).

360. *Id.*

361. *Id.*

362. *Id.*

363. U.S. CONST. amend I, cl. 1; *see also* County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 589–90 (1989).

Amendment.[364]

At the time that the Founders offered their approbation of the Establishment Clause, America was centuries away from becoming the religious melting pot that it is today. The Founding Fathers' concepts of religious diversity most likely differed from those held by most Americans in today's pluralistic society. Indeed, "for nearly a century after the founding, many accepted the idea that America was not just a *religious* nation, but 'a Christian nation,'"[365] and "many of the Framers understood the word 'religion' in the Establishment Clause to encompass only the various sects of Christianity."[366] America is now a religiously pluralistic nation, and the Establishment Clause protects the rights of all, "guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'"[367]

The government's violation of the Establishment Clause can manifest itself in diverse ways. The Supreme Court has noted that "'the myriad, subtle ways in which Establishment Clause values can be eroded' are not susceptible to a single verbal formulation."[368] Nonetheless, the Supreme Court has recognized certain, clear limits that the Establishment Clause imposes upon governmental conduct, namely that the "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs."[369]

B. *The Endorsement Test*

Over the years, the Supreme Court has struggled to agree upon a universal test that it can apply to evaluate whether governmental conduct violates the Establishment Clause. The most notable and longest running

364. U.S. CONST. amend XIV, § 1, cl. 3; *see also* Wallace v. Jaffree, 472 U.S. 38, 49–50 (1985) (discussing Fourteenth Amendment limitations on a state's power to legislate).

365. Van Orden v. Perry, 545 U.S. 677, 728 (2005) (Stevens, J., dissenting) (citing Church of Holy Trinity v. United States, 143 U.S. 457, 471 (1892)).

366. *Id.* at 726.

367. *County of Allegheny*, 492 U.S. at 590 (quoting *Wallace*, 472 U.S. at 52).

368. *Id.* at 591 (quoting Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)).

369. *Id.* at 590–91 (citations omitted).

test comes from *Lemon v. Kurtzman*.[370] Under *Lemon*, the challenged government action is unconstitutional if: (1) it lacks a secular purpose, (2) its primary effect either advances or inhibits religion, or (3) it fosters an excessive entanglement of government with religion.[371] In *Lemon*, the Supreme Court struck down two state statutes that provided financial aid to church-related elementary and secondary schools.[372]

In *Lynch v. Donnelly*, Justice Sandra Day O'Connor authored a concurring opinion that modified the three-prong *Lemon* test.[373] In *Lynch*, a city erected a Christmas display each year in a park owned by a non-profit organization, which was located in the center of the city's shopping district.[374] The majority opinion relied upon the traditional *Lemon* test, holding that the crèche had a secular purpose, that the crèche did not impermissibly advance religion, and that the crèche did not "create excessive entanglement between religion and government."[375] As a result, the majority held that a city's inclusion of a crèche in its annual Christmas holiday display did not violate the Establishment Clause.[376]

Justice O'Connor joined the majority's opinion, but believed that the facts required the application of a modified test.[377] In a concurring opinion, Justice O'Connor wrote that the government can violate the Establishment Clause in two ways. The first is when the government becomes excessively entangled with religious institutions.[378] The second is when government endorses or disapproves of religion.[379] The danger in the latter is that the government "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[380] For Justice O'Connor, the *Lemon* test was better suited to dealing with instances of "institutional entanglement."[381] The *Lemon* test was not tailored to deal

370. Lemon v. Kurtzman, 403 U.S. 602 (1971).
371. *Id*. at 612–13.
372. *See generally id.*
373. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).
374. *Id.* at 671 (majority opinion).
375. *Id.* at 685.
376. *Id.* at 687.
377. *See id.* at 687 (O'Connor, J., concurring).
378. *Id.* at 687–88.
379. *Id.* at 688.
380. *Id.* (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963)).
381. *See id.* at 689.

with situations like that presented in *Lynch*—a challenge to a religious display on government property.

The endorsement test discarded the *Lemon* test's entanglement prong, and basically joined the *Lemon* test's purpose and effect prongs into one. This inquiry focuses "on the perceptions of the 'reasonable observer' when viewing a religious display."[382] More specifically, the endorsement test "asks whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion."[383] Whether the term used is "endorsement," "favoritism," or "promotion," the core idea behind this test is that the government must abstain "from *appearing* to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[384]

In her concurring opinion in *Lynch*, Justice O'Connor highlighted the importance of viewing a religious display in its unique context. In her opinion, Justice O'Connor stressed that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."[385] More specifically, Justice O'Connor highlighted the need to examine the government's display of the crèche in its "particular physical setting."[386] Because the government displayed the crèche "in a privately owned park in the heart of the shopping district," Justice O'Connor believed, in agreement with the majority, that the crèche did not constitute government endorsement of the crèche, its message, or religion.[387]

In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, a majority of the Supreme Court seized onto and adopted Justice O'Connor's endorsement test.[388] In *County of Allegheny*, the Court held

382. Modrovich v. Allegheny County, 385 F.3d 397, 401 (3d Cir. 2004) (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 778 (1995)).

383. *Id*. (citing *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

384. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 594 (1989) (quoting *Lynch*, 465 U.S. at 687) (emphasis added).

385. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

386. *Id.* at 692.

387. *County of Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring). In addition to its physical location on private property, the inclusion of the crèche in a larger holiday exhibit that contained other secular symbols of the Christmas holiday (e.g., Santa's sleigh, candy-striped poles) persuaded Justice O'Connor that the display did not endorse religion. *See id*. at 623–26.

388. *County of Allegheny*, 492 U.S. 573.

that the display of a crèche in a county courthouse during the Christmas holiday season violated the Establishment Clause.[389] Relying upon Justice O'Connor's concurring opinion in *Lynch*, the Court emphasized the need to evaluate the "context in which the contested object appears."[390] The Court described its task as determining whether the display of the disputed objects (a crèche and a menorah display) had "the effect of endorsing or disapproving religious beliefs" when viewed in their "*particular physical settings*."[391]

In *County of Allegheny*, consistent with Justice O'Connor's concurrence in *Lynch*, the Court unequivocally declared the importance of the location of the disputed speech in determining whether that speech violates the Establishment Clause. In *County of Allegheny*, the Court stressed that the "crèche sits on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government."[392] Because of its prominent position on government property, the Court concluded that "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government."[393] Therefore, "by permitting the 'display of the crèche in this particular physical setting,' the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message."[394]

C. *Reconciling Justice Souter's Concurring Opinion and the Majority's Opinion in* Pleasant Grove City

In his concurring opinion in *Pleasant Grove City*, Justice Souter proposed the adoption of the Establishment Clause endorsement test in the government-speech context. Under that test, the Court would ask "whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land."[395] Justice Souter did not spend the time to cover the nature

389. *Id.* at 578–79.

390. *Id.* at 595.

391. *Id.* at 597, 595 (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)) (emphasis added).

392. *Id.* at 599–600.

393. *Id.*

394. *Id.* at 600 (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)).

395. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring).

of the endorsement test under Establishment Clause jurisprudence, but as shown in *Lynch* and *County of Allegheny*, a key inquiry involves the "particular physical setting" of the challenged speech. The application of this type of endorsement test is actually consistent with the majority's opinion.

In fact, the majority opinion in *Pleasant Grove City* implicitly conducted a type of endorsement test. There were two key factual findings underlying this implicit endorsement test. First, the Ten Commandments monument was located on government property, and not just any government property, but a public park, which is "often closely identified in the public mind with the government unit that owns the land."[396] Second, the Ten Commandments monument was a permanent monument.[397] Justice Alito stated that "[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated."[398] As a result, in contexts such as that in *Pleasant Grove City* involving a permanent monument on government property, "there is little chance that *observers* will fail to appreciate the identity of the speaker."[399] Thus, the majority opinion did consider how an "observer" of a permanent monument on public property would interpret the relationship between the monument and the government, which led the Court to conclude that the observer would inherently identify the government as the source of the speech embodied in the monument.[400] This test, like the endorsement test under the Establishment Clause, focuses on the particular physical settings of the challenged monument to gauge its constitutionality.[401]

There is no way of knowing if Justice Souter would agree with this assessment or how he would construe the majority's implied endorsement test to the test that he proposed in his concurrence, but based on another of his opinions, he likely would agree with it. In *Capitol Square Review & Advisory Board v. Pinette* (*Capitol Square*), a local government entity in Columbus, Ohio denied an application by the local chapter of the Ku Klux Klan to place a cross in the public square.[402] The Klan officer who

396. *Id.* at 1133 (majority opinion).
397. *Id.* at 1132.
398. *Id.* at 1133.
399. *Id.* (emphasis added).
400. *Id.* at 1134.
401. *Id.*
402. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 758–59

submitted the application sued the City, and the City defended its decision on the basis that granting the permit would have violated the Establishment Clause.[403] The Supreme Court held in favor of the Klan, deciding that the cross did not violate the Establishment Clause because it was purely private speech and that the public square constituted a "traditional or designated public forum, publicly announced and open to all on equal terms."[404] Thus, the Court ultimately resolved the controversy on free speech grounds.

Justice Souter, joined by Justices O'Connor and Breyer, authored a concurring opinion in *Capitol Square* which in many ways mirrors his concurrence in *Pleasant Grove City*.[405] In *Capitol Square*, like in *Pleasant Grove City*, Justice Souter sought to avoid what he perceived to be a categorical or per se rule articulated by the plurality.[406] In *Capitol Square*, the per se rule was that private religious expression cannot violate the Establishment Clause when it occurs in a public forum.[407] Justice Souter wanted to acknowledge that "in some circumstances an intelligent observer may mistake private, unattended religious displays in a public forum for government speech endorsing religion."[408]

Nonetheless, under the facts of *Capitol Square*, Justice Souter agreed with the majority's ultimate conclusion. "An observer need not be 'obtuse,' to presume that an unattended display on government land in a place of prominence in front of a government building either belongs to the government, represents government speech, or enjoys its location because of government endorsement of its message."[409] He further stated that "[w]hen an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands."[410] Thus, in *Capitol Square*, Justice Souter's analysis hinged upon his finding that the

(1995).

403. *See id.*

404. *Id.* at 770.

405. *See id.* at 783–94 (Souter, J., concurring) (concurring in the judgment but disagreeing with Justice Scalia and the plurality's Establishment Clause analysis).

406. *Id.* at 784 (arguing that such a rule would constitute an exception to the Court's endorsement test and thus be inconsistent with precedent).

407. *Id.* at 784.

408. *Id.* at 785.

409. *Id.* (citations omitted).

410. *Id.* at 786.

challenged monument or object was located on government property and was a stationary, unattended display—the two factual findings that in large part drove the Court's opinion in *Pleasant Grove City*.[411] Thus, in future free speech cases, the Court may want to be more explicit in its employment of an endorsement-type test that would focus on the particular physical settings of a monument, looking in particular to whether the monument is temporary or permanent and to whether the land on which it is located is privately owned or government-owned. Such analysis would be consistent with the majority opinion in *Pleasant Grove City*.

D. *Implications of the Supreme Court's Decision*

Although the Supreme Court based its decision in *Pleasant Grove City* exclusively on the Free Speech Clause and the government speech doctrine, between the lines the Justices alluded to an underlying concern about the implications of their decision for the Establishment Clause. As Justice Scalia put it, "the case has been litigated in the shadow of the First Amendment's *Establishment* Clause."[412] In other words, the harder a government party pushes on the government-speech-doctrine button, the harder the opposing party can push on the Establishment Clause button.[413] Even at oral argument, Chief Justice Roberts asked the following question of the City's attorney, Mr. Jay Sekulow: "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."[414]

In the Court's opinion, Justice Alito expressly noted the constraints that the Establishment Clause imposes on the government speech doctrine.[415] In his concurrence, Justice Stevens noted that despite the freedom the government may enjoy under the government speech doctrine, it is still obligated to adhere to the boundaries of the Establishment Clause.[416] Justice Souter's concurrence was driven by the

411. *See id.* at 783–86; *see also* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129 (2009).

412. *Pleasant Grove City*, 129 S. Ct. at 1139 (Scalia, J., concurring).

413. *See id.*

414. Transcript of Oral Argument at 4, *Pleasant Grove City*, 129 S. Ct. 1125 (No. 07-665), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-665.pdf.

415. *Pleasant Grove City*, 129 S. Ct. at 1131–32.

416. *See id.* at 1139 (Stevens, J., concurring).

ambiguous fit between the government speech doctrine and the Establishment Clause. He stated the obvious consequence of the Court's decision: "After today's decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech."[417] As a result, the focus of future litigation involving a permanent religious monument on public property may shift from the Free Speech Clause to the Establishment Clause.

A long time ago, cases involving religious activities or objects were routinely litigated with a focus on the First Amendment's Establishment and Free Exercise Clauses.[418] That all changed when Jay Sekulow, who represented Pleasant Grove before the Supreme Court, became general counsel for the national Jews for Jesus organization.[419] Shortly after Sekulow joined Jews for Jesus, the organization filed a First Amendment case against the City of Los Angeles's Board of Airport Commissioners.

As part of its proselytizing efforts, the organization's members handed out religious literature in the Central Terminal Area of the Los Angeles International Airport (LAX).[420] In response, the Board of Airport Commissioners passed a resolution prohibiting all First Amendment activities in the Central Terminal Area of LAX.[421] The Jews for Jesus organization sued.

At first, Jews for Jesus intended to litigate its cause of action under the First Amendment's Free Exercise Clause.[422] Under this theory, the organization would have argued that the Board's resolution violated its members' right to exercise their religion.[423] This approach made sense because of the religious nature of Jews for Jesus members' missionary activities inside the airport.

However, Sekulow decided to focus the litigation on a different theory. Instead of treating Jews for Jesus's lawsuit as a religion case, he would treat it as a speech case.[424] Under this theory, Sekulow would not

417. *Id.* at 1141 (Souter, J., concurring).

418. *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 90 (2007).

419. *See id.* at 89–90.

420. Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 571 (1987).

421. *Id.* at 570–71.

422. TOOBIN, *supra* note 418, at 90.

423. *See id.*

424. *See id.*

argue that the Board's resolution violated the members' right to exercise their religion, but rather their right to free speech. In fact, under this theory, the religious content of the members' speech was irrelevant.[425] This novel theory for a case of this sort was advantageous because the Supreme Court "had been far more generous in extending protection to controversial speech than to intrusive religious activities."[426]

Sekulow's gamble paid off in spades. The vote in favor of Sekulow's client was unanimous.[427] The Court stated that the Board's resolution sought to "create a virtual 'First Amendment Free Zone' at LAX" by prohibiting "*all* protected expression."[428] The Court was troubled that the absolute regulation was not limited to the specific speech activity of Jews for Jesus members in that case, or even just to speech that would lead to problems in the airport.[429] Instead, it covered "the universe of speech activity," prohibiting "even talking and reading, or the wearing of campaign buttons or symbolic clothing."[430] As a result, the Supreme Court held that the regulation was overbroad and unconstitutional under the First Amendment.[431]

Sekulow's victory in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.* was a springboard for a string of victories that involved religious activity cases litigated under the Free Speech Clause. Under free speech theories, Sekulow won resounding victories in cases such as *Board of Education of Westside Community Schools v. Mergens* and *Lamb's Chapel v. Center Moriches Union Free School District*, both of which vindicated activities of a religious nature in the name of free speech.[432] Sekulow once explained his take on his novel approach: "The first thing you always have to do is frame the issue, and I took a lot of heat from people on my side, who thought I was abandoning the religion clauses of the First Amendment . . . . But I wanted to win . . . ."[433] And win

425. *See id.*
426. *Id.*
427. *See id.* at 91.
428. Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987).
429. *See id.*
430. *Id.* at 575.
431. *See id.*
432. *See* TOOBIN, *supra* note 418, at 91–94; *see generally* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Bd. of Educ. of Westside Comm. Schs. v. Mergens, 496 U.S. 226 (1990).
433. Jeffrey Toobin, *Sex and the Supremes: Why the Court's Next Big Battle*

Sekulow did.[434] On another occasion, Sekulow admitted that "the free speech strategy has proven effective with judges across the ideological spectrum against opponents who rely on the First Amendment's clause against the establishment of religion."[435]

Sekulow's winning strategy did not fail him in *Pleasant Grove City*. Even though the disputed speech involved one of the quintessential religious symbols—the Ten Commandments—the Supreme Court unanimously upheld the speech purely on free speech grounds.[436] Nonetheless, Sekulow's victory today will likely shift the future focus of these types of cases—cases involving permanent monuments on government property—to the Establishment Clause. Justice Souter recognized in *Pleasant Grove City* that "there is no doubt that this case and its government speech claim has been litigated by the parties with *one* eye on the Establishment Clause."[437] But in light of the Supreme Court's holding that a permanent monument in a public park is categorically government speech, parties challenging such monuments are likely to direct and maintain *both* eyes on the Establishment Clause.

VI. CONCLUSION

In *Pleasant Grove City*, the Supreme Court correctly held that the government has the right to speak by installing permanent displays in its public parks. Consequently, private parties have no right to compel the government to install their own monuments in the government's park. The Court's holding, based upon the government speech doctrine, was entirely consistent with the federal courts' prior treatment of the government speech doctrine, with the correct application of Tenth Circuit precedent, and with an endorsement-type test that is routinely employed in Establishment Clause cases.

In Judge Michael McConnell's dissenting opinion to the Tenth Circuit's denial of a rehearing en banc for *Summum*, he characterized the

May Be About Gay Rights, NEW YORKER, Aug. 1, 2005, http://www.newyorker.com/archive/2005/08/01/050801fa_fact?printable=true (internal quotations omitted).

434. *See, e.g.*, Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009).

435. Gustav Niebuhr, *Conservatives' New Frontier: Religious Liberty Law Firms*, N.Y. TIMES, July 8, 1995, at 8.

436. *Pleasant Grove City*, 129 S. Ct. at 1138 (holding "that the City's decision to accept certain privately donated monuments, while rejecting [Summum's] is best viewed as a form of government speech" and thus, the Free Speech Clause is inapplicable).

437. *Id.* at 1141 (Souter, J., concurring) (emphasis added).

Tenth Circuit's precedent as "incorrect as a matter of doctrine and troublesome as a matter of practice."[438] Judge McConnell feared that the precedent portended a world in which the government would be required to either honor every private party's request to erect a permanent fixed monument in any public park in which the government has installed a monument of its own choosing and to "brace [itself] for an influx of clutter,"[439] or to remove the government's monument.[440] Inspired by a sixteen-year-old with a checkered and misguided past, Judge Ruegemer sincerely believed that the display of the Ten Commandments, whether on paper or in granite, would make the world a better place. Under the government speech doctrine and the Supreme Court's holding in *Pleasant Grove City*, the government can "safely exhale"[441] and rest assured that it has the right to adopt Judge Ruegemer's speech to convey the government's own message and to serve the government's own interests.

438. Summum v. Pleasant Grove City, 499 F.3d 1170, 1178 (2007) (McConnell, J., dissenting).

439. *Id.* at 1175.

440. *Id.*

441. *Pleasant Grove City*, 129 S. Ct. at 1140 (Scalia, J., concurring).