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ARTICLES

WHY MONUMENTS ARE GOVERNMENT SPEECH: THE HARD CASE OF *PLEASANT GROVE CITY V. SUMMUM*

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I. INTRODUCTION

This Term, the Supreme Court heard arguments in *Pleasant Grove City v. Summum*.[1] The facts are controversial: a city seeks to decline an obscure religion's request to display a monument of its "Seven Aphorisms," while continuing to display other privately donated monuments, including a Ten Commandments monument, originally donated by a local chapter of the Fraternal Order of Eagles.[2] At first, this situation appears disturbingly reminiscent of the recent, extreme claim that the government may promote biblical monotheism without violating the Establishment Clause.[3] While firmly rejecting that theory,[4] this Article supports the city's government speech argument on the Free Speech Clause claim, which is the only question presented in the case.[5]

When a municipality accepts and installs a donated monument in a public park, that monument should be recognized as the government's own speech, regardless of who originally conceived or funded the project. Under the government speech doctrine, a government may promote its own viewpoint,

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1. Pleasant Grove City v. Summum, 128 S. Ct. 1737 (2008) (No. 07-665) (mem.).

2. Brief for Petitioners at i, 5–6 & n.2, *Pleasant Grove*, 128 S. Ct. 1737 (June 16, 2008) (No. 07-665).

3. *See* McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 889, 893 (2005) (Scalia, J., dissenting) (referring to courtroom display of framed texts of the Ten Commandments, "[w]ith respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.").

4. An article by Professor Thomas Colby best summarizes the historical, doctrinal, and normative flaws of Justice Scalia's purported originalist argument. *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097 (2006). *But see* Kyle Duncan, *Bringing Scalia's Decalogue Dissent Down from the Mountain*, 2007 UTAH L. REV. 287, 288 ("[R]eading Scalia's McCreary County dissent against the backdrop of his constitutional methodology shows it is unlikely that he is engaging in 'monotheistic activism.'"). *See also infra* note 231 and accompanying text (acknowledging the risk that the incremental approach represented here may desensitize courts and culture to additional large-scale changes in church–state relations).

5. *See* Brief for Petitioners, *supra* note 2, at i. This fine point did not deter the Justices from extensive questioning of counsel on the Establishment Clause dilemma posed by a finding of government speech. *See infra* notes 227, 235. For a discussion of the potential Establishment Clause violation here, *see infra* Part V.B.1.

even by means of selecting among private speakers.[6] In an earlier article, I argued that, with important limitations, the government speech analysis should apply to public–private expressive partnerships, even where the government's expressive purpose is broad and thematic, and the analysis is necessary to avoid unwanted attribution that derails the government's intended message.[7] Monuments present a uniquely compelling context for this argument. The very reason for their existence is to symbolize what a particular community, through its elected representatives, has valued in terms of heroes, history, and culture; that values message often is broad.[8]

Based in part on information collected for the amicus curiae brief filed by the International Municipal Lawyers Association (IMLA) in this case,[9] this Article shows that a city's display of donated monuments satisfies both current judicial tests and many of the scholarly concerns regarding government speech.[10] First, at the time it accepts the donation and afterward, the government takes ownership of the message by exhibiting control over the meaning conveyed by permanent monuments displayed in its parks. Second, citizens both recognize the government as the speaker and hold it accountable. And third, monuments have little or no negative impact, and arguably some positive effect, on the private speech market.[11]

Surprisingly, the Tenth Circuit held that because a city park is a public forum, and the donated monument is located in a city park, Pleasant Grove City created a public forum for monuments—thus, the court found, the city's decision on Summum's offering is subject to strict scrutiny.[12] Predictably, the city's rejection of the Seven Aphorisms—based on criteria of local historical relevance and donors with long-standing ties to the community—failed this

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6. *E.g.*, Legal Servs. Corp. v. Velasquez, 531 U.S. 533, 541 (2001) ("[V]iewpoint-based funding decisions can be sustained in instances in which the government itself is the speaker . . . .").

7. *See* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 71, 73–75 (2004) (applying conclusions to streetlight pole banners, government-sponsored events and corporate event sponsors, and municipal websites).

8. *See* SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 10–11 (1998); *see also* Brief for Petitioners, *supra* note 2, at 6–7 (discussing the city's monument policy, which requires "historical relevance or donation by a civic group with strong community ties").

9. Brief of Amicus Curiae International Municipal Lawyers Ass'n in Support of Petitioners at apps. A–C, Pleasant Grove City v. Summum, 128 S. Ct. 1737 (June 23, 2008) (No. 07-665) [hereinafter IMLA Brief]. I was the counsel of record and sole author of the brief.

10. *See infra* Parts III.A.3, V.A.

11. Because the purpose of this Article is to add to the dialogue in *Pleasant Grove City v. Summum*, which is currently before the Supreme Court, it does not strive to offer a comprehensive theory of government speech. These three factors, however, represent a threshold; further analysis of their universality and sufficiency is required.

12. Summum v. Pleasant Grove City, 483 F.3d 1044, 1050 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008) (No. 07-665).

test.[13] This holding equates monument installation with public assembly; under the ruling, municipalities are left with a content-neutral, "first offered, first displayed" standard that is inappropriate for symbolic structures.[14] The more likely alternative is a limited public forum analysis, which allows some content limitations, but prohibits selection based on the government's viewpoint.[15] A municipality then would be barred from rejecting a monument that portrayed its admired statesman as a thief or scoundrel if, at some location in the park, he is memorialized as a noble leader.

Either approach strips municipal government of all ability to shape public green space to reflect local tastes, values, and culture.[16] The impact has been dramatized already by the notorious Fred Phelps in several cities within the Tenth Circuit that had displayed the Eagles' Ten Commandments monuments for decades.[17] Phelps proffered a so-called "monument" to Matthew Shepard, a gay student who was beaten to death in a hate crime, which quotes the Bible and proclaims that Shepard is now in hell because of his homosexuality.[18] To avoid forced display of this hate symbol, which is required under the public forum approach, Boise, Idaho, removed its donated Ten Commandments Monument.[19] If the government speech doctrine is not applied in *Pleasant*

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13. *Id.* at 1047, 1052–55. The strict scrutiny test requires government to show that the challenged rejection of the private speaker was the least restrictive means to serve a compelling government interest. *Id.* at 1052 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

14. At oral argument, many Justices seemed troubled by the Summum's argument equating permanent monuments with temporary assemblies. *See, e.g.*, Transcript of Oral Argument at 43, Pleasant Grove City v. Summum, No. 07-665 (U.S. Nov. 12, 2008) (statement of Scalia, J.) ("So that's all right, the first 95 monuments, . . . – whoever put them up . . . whatever [kind of monument], is that it?"); *id.* at 46 (statement of Kennedy, J.) ("[S]uppose we were to say that we were unconvinced by the comparison between speeches and parades on the one hand and monuments on the other . . . ."). *See also infra* Part IV.A.

15. *See* Summum v. Pleasant Grove City, 499 F.3d 1170, 1171 (10th Cir. 2007) (Lucero, J., dissenting from denial of rehearing en banc); *see also infra* notes 60–62 and accompanying text (discussing Judge Lucero's dissent).

16. This Article uses the terms "city" and "municipality" throughout, but its analysis applies equally where the park land is owned by park districts and any other form of local government, such as villages. Also, the Article's focus is on municipalities based on the case at issue; many, if not all, of the points made here would apply to other levels of government.

17. *See* Brief Amicus Curiae of the Cities of Casper, Wyoming et al., in Support of the Petition for Writ of Certiorari at 1–5, Pleasant Grove City v. Summum, 128 S. Ct. 1737 (Dec. 20, 2007) (No. 07-665) [hereinafter Casper Brief]; Chuck Oxlex, *Boise Faces Phelps Controversy*, ASSOCIATED PRESS, Dec. 3, 2003, *available at* http://www.religionnewsblog.com/5332/boise-faces-phelps-controversy.

18. Casper Brief, *supra* note 17, at 2–3; Oxlex, *supra* note 17. The monument states: "MATTHEW SHEPARD Entered Hell October 12, 1998, in Defiance of God's Warning 'thou shalt not lie with mankind as with womankind; it is abomination. [sic]' Leviticus 18:22." Casper Brief, *supra* note 17, at 3.

19. *See* Oxlex, *supra* note 17. The controversy began in response to a predecessor Tenth Circuit decision, *City of Ogden v. Summum*, 297 F.3d 995 (10th Cir. 2002), discussed *infra* Part III.B. Casper Brief, *supra* note 17, at 2. Casper City, Wyoming, responded to Phelps by moving

Grove City v. Summum, the outcome will be the same for cities with donated monuments celebrating gay rights or tolerance.[20]

This is a highly significant First Amendment case because it is the first time the Supreme Court will address the relatively new government speech doctrine in a context that does not involve a government-funded program. To date, the Court's decisions have involved either programs where the government promotes a specific policy through private speakers,[21] or government-financed programs that necessarily involve discretionary decisions, such as funding the arts or state-owned broadcasting.[22] A growing number of federal circuits, however, have grappled with the proper analysis in more analogous contexts, including the government's acknowledgement of sponsors and jointly produced, temporary outdoor art programs.[23] These courts have developed a four-factor test, which looks to the government's expressive purpose, editorial control, role as literal speaker, and ultimate responsibility.[24] There has been little concerted effort to analyze how these factors apply to donated monuments, so this Article fills that gap.[25]

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its monument to a newly created "Historical Monument Plaza" in 2007, *id.*, which does not appear to be a viable option under the *Pleasant Grove* decision.

20. *See infra* note 182 and accompanying text.

21. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553–57, 562, 564–67 (2005) (finding that the government's promotion of beef consumption through advertisements funded by beef-producers' tax was not unconstitutional compelled speech); Rust v. Sullivan, 500 U.S. 173, 177–78, 203 (1991) (allowing government's promotion of pro-life policy through selective funding of family planning clinics). *See also* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, they are not speaking as private citizens for First Amendment purposes . . . ."); *id.* at 436–39 (Souter, J., dissenting) (characterizing majority opinion as erroneously applying government speech doctrine).

22. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572–73 (1998) (arts funding); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998) (public broadcasting).

23. *See, e.g.*, People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23, 28–31 (D.C. Cir. 2005) (holding that elephant and donkey sidewalk sculptures were government speech); Wells v. City of Denver, 257 F.3d 1132, 1139–43 (10th Cir. 2001) (holding a sign listing corporate sponsors of city holiday display was government speech).

24. *See Gittens*, 414 F.3d at 28, 30; *Wells*, 257 F.3d at 1141.

25. *See* Summum v. Pleasant Grove City, 499 F.3d 1170, 1175–77 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc); Summum v. City of Ogden, 297 F.3d 995, 1004–05 (10th Cir. 2002); *see also infra* Part III.B (discussing the shortcomings of *Ogden*'s application of the four-factor test). Pleasant Grove's brief in the Supreme Court did not address this now-standard test. *See* Brief for Petitioners, *supra* note 2 at 18–20 (summary of argument).

Approaching the issue from different angles, one student note nicely analyzed the Tenth Circuit decision, but it focused on forum analysis and lower court cases' treatment of permanent-versus-temporary structures in public parks. *See* Keenan Lorenz, Survey, Summum v. Pleasant Grove City*: The Tenth Circuit "Binds the Hands of Local Governments as They Shape the Permanent Character of Their Public Spaces"*, 85 DENV. U. L. REV. 631, 646–48 (2008); *see also* Paul E. McGreal, *The Case for a Constitutional Easement Approach to Permanent*

Another contribution of this Article is to disseminate the results of a questionnaire distributed to members of IMLA to gather information on the interactions between city governments, private citizens, and the monuments displayed in local communities.[26] The resulting "Municipal Practice Examples" (MPEs), while not a representative survey, provide a broad set of examples and furnish a context for the *Pleasant Grove* case, including on the three key issues that should control a government-speech case: government content control, political accountability, and the impact on private speech.[27]

It is helpful to sketch current views on those three guideposts. First, the Court's most recent statement on the new doctrine emphasized that where both government and private speakers participate in the challenged expressions, to sustain a claim of government speech, the government must control the message.[28] Second, political accountability is the essential rationale for allowing government speech in the face of private speakers' claims of exclusion, restriction, or compelled speech.[29] The Court has taken a minimalist, structural stance on accountability, whereas most commentators agree on the need for transparency—that is, at a minimum, citizens must be aware that it is the government that is responsible for the challenged speech.[30] The third critical concern is that government speech may dominate discourse, crowding out or even silencing contrary private speech. Government speech is defensible only when it operates as an additional voice to enhance a given "marketplace of ideas."[31]

As discussed below, the MPEs provide useful information on all three points. First is the variety of methods by which municipalities control the message; especially significant are requirements for legislative decisions on specific content proposals and government's ongoing right of editorial

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Monuments in Traditional Public Forums, 103 NW. U. L. REV. COLLOQUY 185, 193–97 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/41/ (theorizing public speech rights on government property in terms of easements). This new easement approach resolves the permanent–temporary issue, but still leaves cities with the unsatisfactory "viewpoint-neutral" scrutiny of their monument selections, that given to limited public forums. *See infra* Part III.B.

26. *See infra* Part II.B.

27. *See infra* Part II.B and Appendix (summarizing results).

28. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560, 562 (2005).

29. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

30. *See, e.g.*, Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 49 (2000) (discussing the problem of "ventriloquism").

31. *See, e.g.*, Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 610–11 & n.218 (1980) (advocating an "eclectic" approach for government speech in the "intellectual marketplace"). The "marketplace of ideas," now a foundational metaphor in First Amendment analysis, was coined by Justice Holmes. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

control.[32] Second is the citizens' demonstrated perception that their government is responsible for the content of all monuments installed in their city parks.[33] Third, not only does the location—city parks—ensure that private speakers retain many alternatives, but the MPEs show that monuments may stimulate additional private speech.[34] Finally, application of the government speech paradigm provides an additional policy benefit. In contrast to private speakers in a public forum, the government is more likely to self-regulate by appealing to the broad spectrum of its relevant community, and is subject to constitutional limits on divisive and offensive speech. This includes, of course, the Establishment Clause, as well as theorized potential limits, such as on government speech based solely on animus.[35] Thus, allowing municipalities to display donated monuments that reflect community values is a well-grounded next step in developing the line between government speech and forum analysis.

In Part II, this Article will lay out the background of *Pleasant Grove City v. Summum* and explain the research methodology used to collect the MPEs. It also will show the unique local culture expressed by donated monuments, as well as the practical realities of expanding public–private partnerships. Part III will make the case for why the evolving government speech paradigm should govern here. Part IV will explain the deficiencies, in the monument context, of both the Tenth Circuit's use of strict scrutiny and the alternative limited public forum approach. Finally, Part V will explain why recognizing government speech is good policy in this case, because it enhances community by limiting divisive monuments, while preserving private speech opportunities.

II. BACKGROUND

A. Pleasant Grove City v. Summum*: The Litigation*

Pleasant Grove City is one of Utah's original Mormon settlements, established by settlers sent from Salt Lake City by Brigham Young in 1850.[36] The City's "Pioneer Park," a 2.5-acre public park, was established in the 1940s and contains some fifteen historical buildings and permanent artifacts, most of them donated by private persons or groups.[37]

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32. *See infra* Part III.B.2.

33. *See infra* Part III.B.4.

34. *See infra* Part V.A.

35. *See infra* Part V.B.

36. Pleasant Grove History, http://www.plgrove.org/ (follow "Unique to Pleasant Grove" hyperlink; then follow "Pleasant Grove History" hyperlink) (last visited Oct. 30, 2008).

37. Brief for the United States as Amicus Curiae Supporting Petitioners at 2, Pleasant Grove City v. Summum, 128 S. Ct. 1737 (June 23, 2008) (No. 07-665). The displays include:

> Old Bell School ([the] oldest known school building in Utah)
>
> . . . .
>
> Pioneer Winter Corral (historic winter sheepfold)

In 1971, the Pleasant Grove City Council voted to accept a Ten Commandments monument from the local Fraternal Order of Eagles and display it in Pioneer Park.[38] At the time, the local chapter had been established in Pleasant Grove City for two years; it now has been an active philanthropy there for nearly forty years.[39] As summarized in many cases, more than one-hundred largely identical monoliths were distributed by the Eagles to state and local governments over several decades.[40] The program was initiated by a juvenile court judge and adopted by the organization, with a goal of reducing juvenile delinquency by promulgating this moral code.[41] Cecil B. DeMille, who was then filming the movie *The Ten Commandments*, had a role in producing and distributing the granite monoliths seen around the country.[42]

Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah, approximately thirty-five miles from Pleasant Grove.[43] In September 2003, Summum sent a letter to "the mayor of Pleasant Grove requesting permission to erect [in Pioneer Park] a monument [of its] Seven Aphorisms," which "would be similar in size and [appearance] to the [Eagles'] Ten Commandments monument."[44] Although the letter did not explain their content, the Summum organization states that the Seven Aphorisms (psychokinesis, correspondence, vibration, opposition, rhythm, cause and effect, and gender)[45] are its equivalent of the Ten Commandments, and were revealed to the group's founder, known as Corky Ra, by other-worldly beings.[46]

. . . .

Nauvoo Temple Stone (artifact from Mormon Temple in Nauvoo, Illinois)

. . . .

Pioneer Water Well (donated by [the] Lions Club in 1946)

Pioneer Granary (built in 1874, donated by Nelson family)

[The] Ten Commandments Monument (donated by Fraternal Order of Eagles in 1971)

September 11 Monument (project of local Boy Scouts)

Petition for Writ of Certiorari at 5, *Pleasant Grove*, 128 S. Ct. 1737 (Nov. 20, 2007) (No. 07-665).

38. Summum v. Pleasant Grove City, 483 F.3d 1044, 1047 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008) (No. 07-665).

39. *See id.*

40. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 713 (2005) (Stevens, J., dissenting).

41. *Id.*

42. *Id.*

43. *Summum*, 483 F.3d at 1047; *see also* About Summum, http://www.summum.us/about/ (last visited Oct. 30, 2008).

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

45. Seven Summum Principles, http://www.summum.us/philosophy/principles.shtml (last visited Oct. 30, 2008) (identifying the aphorisms alternatively as "principles").

46. *See* The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (last visited Oct. 30, 2008); Discourses with Summum Bonem Amen Ra, The First Encounter, http://www.summum.us/insidethepyramid/?class=First Encounter (last visited Oct. 30, 2008) [hereinafter First Encounter]; *see also* Patty Henetz, *Utah-Based Church Melds Wine, Sexuality, Meditation*, ASSOCIATED PRESS, Apr. 27, 2002, *available*

The mayor of Pleasant Grove City sent Summum a letter in November 2003, denying the request and stating that all permanent displays in Pioneer Park either "directly relate to the history of Pleasant Grove or [must] be donated by groups with long-standing ties to the Pleasant Grove community."[47] In August 2004, the Pleasant Grove City Council passed a resolution that set forth a detailed process for permanent placement of objects in the parks, codified the criteria listed above, and further explained the factors the city council must consider when deciding a proposed monument's historical relevance.[48] In 2005, Summum sent a second letter renewing its request.[49] After the city did not respond, Summum filed suit in federal district court, claiming that the city's exclusion of its monument, although allowing display of other expressive permanent monuments, violated the Free Speech Clause of the United States Constitution and the Free Expression and Establishment Clauses of the Utah Constitution.[50] The district court, ruling from the bench, denied Summum's request for a preliminary injunction that would have required the city to install Summum's proposed monument.[51] Summum appealed based solely on the federal free speech claim.[52]

Several earlier Tenth Circuit Ten Commandments cases set the stage for the circuit court's decision in *Summum*. In 1973, in *Anderson v. Salt Lake City Corp.*, the court held that a municipality's prominent display of a Ten Commandments monument, even in its courthouse entrance, did not violate the Establishment Clause on the ground that such monuments convey a secular message.[53] Perhaps because of this precedent, when Summum challenged the display of donated Ten Commandments monuments in other cities, the Tenth

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at http://www.lubbockonline.com/stories/042702/rel_0427020109.shtml (last visited Oct. 30, 2008) (noting that Summum founder Claude Nowell changed his name in the early 1980s "to Summum Bonem Amen Ra and goes by Corky Ra"). Interestingly, the group claims that the Seven Aphorisms first were given to Moses on Mount Sinai, but that the Israelites were unable to understand them and so Moses then went back up to Mount Sinai and received the Ten Commandments. The Aphorisms of Summum and the Ten Commandments, *supra*. The Summum believe that "summa individuals," who were not of this world, appeared to Mr. Ra in his apartment and revealed the information on which he based the Summum philosophy. First Encounter, *supra*. The group practices mummification of people and pets, and creates and distributes wine to encourage meditation. Henetz, *supra*.

47. *Summum*, 483 F.2d at 1047 (internal quotation marks omitted). *See also id.* at n.1 (noting that Summum claims it did not receive the letter, but its president learned of the denial from a newspaper account).

48. *Id.* at 1047.

49. *Id.*

50. *Id.*

51. *Id.* at 1048.

52. *Id.* at 1047–48.

53. Anderson v. Salt Lake City Corp., 475 F.2d 29, 30, 34 (10th Cir. 1973). Note that Justice Breyer's controlling concurrence in the *Van Orden* decision characterized a similar Ten Commandments monument donated by the Eagles as conveying a mixed message, including both the religious and the secular. Van Orden v. Perry, 545 U.S. 677, 703 (2005) (Breyer, J., concurring in the judgment).

Circuit characterized the monuments as private speech and thus created a forum for other private speakers.[54] As analyzed below, in *Summum v. City of Ogden*, the Tenth Circuit confronted the government speech argument directly, applied the four-factor test, and held that the Ten Commandments monument was the Eagles' speech, and not the city's.[55] In the Tenth Circuit decision now before the Court, the possible application of the government speech paradigm was dismissed in a footnote.[56]

In *Summum v. Pleasant Grove City*, the Tenth Circuit took an unusual, and erroneous, approach to forum analysis. It reasoned that because city parks are traditional public forums, any content-based restrictions on private speech in Pioneer Park—including private speech in the form of installing a permanent monument—are subject to strict scrutiny.[57] The court then held that the city's interest in promoting its history was not compelling, and that its historical relevance criterion was unrelated to its stated interests in aesthetics, preserving park space, and reducing safety hazards.[58] Because the Summum "monument is similar in size, material, and appearance to the Ten Commandments monument already displayed," the court issued a preliminary injunction ordering the city to permit the display of Summum's monument.[59]

There were two opinions dissenting from the denial of the petition for rehearing en banc.[60] First, Judge Lucero correctly observed that forum analysis focuses on the specific type of access sought, and there is no

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54. *See* Summum v. City of Ogden, 297 F.3d 995, 1002 (10th Cir. 2002) (holding that permanent monuments, on the land of a municipal building, were a nonpublic forum); Summum v. Callaghan, 130 F.3d 906, 916 & n.14, 919 (10th Cir. 1997) (holding that the courthouse lawn was nonpublic forum).

55. *See infra* notes 145–48 and accompanying text.

56. *See Summum*, 483 F.3d at 1052 n.4.

57. *Id.* at 1050–52.

58. *See id.* at 1054.

59. *Id.* at 1055, 1057.

60. Summum v. Pleasant Grove City, 499 F.3d 1170 (10th Cir. 2007) (Lucero, J., dissenting from denial of rehearing en banc); *id.* at 1174 (McConnell, J., dissenting from denial of rehearing en banc). In their opinions, Judges Lucero and McConnell also dissented from the denial of the rehearing en banc of *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007), where a city had attempted to transfer to a private party a small plot of land within a public park, on which a challenged Ten Commandments monument stood, and Summum had sued to obtain a similar parcel for its own monument. *Id.* at 1266. In *Duchesne*, the Tenth Circuit remanded for a decision on whether the city's transfer complied with state law, noting that even if it did, Summum might have a First Amendment right to display its monument in the park while the Ten Commandments stood. *Id.* at 1275. The city of Duchesne filed a petition for certiorari to the U.S. Supreme Court on November 21, 2007. Petition for Writ of Certiorari, Duchesne City v. Summum, No. 07-690 (U.S. Nov. 21, 2007), *available at* http://www.aclj.org/media/pdf/Duchesne_City_v_Summum_Petition_for_Writ_of_Certiorari_11212007.pdf. The ACLJ, also counsel of record for Pleasant Grove, asked the Supreme Court to hold its decision on *Duchesne* until its decision on the Pleasant Grove case. Reply to Brief in Opposition at 7, *Duchesne*, No. 07-690 (U.S. Mar. 7, 2008), *available at* http://www.aclj.org/media/pdf/ACLJ_Duchesne-Reply-to-Brief-in-Opposition_030708.pdf.

traditional public forum right to the installation of permanent monuments.[61] He stated that the city created a limited public forum when it allowed several donated monuments to be erected for the purpose of historic preservation, and he would have granted a rehearing to consider the suggested impermissible viewpoint discrimination.[62] Judge McConnell, joined by Judge Gorsuch, argued that once a city accepts a donated monument and displays it on public land, the monument is government speech.[63] No forum was created because the city did not "invite private citizens to erect monuments of their own choosing in the[] park[]."[64] Summarily applying the circuit court's four-factor test, Judge McConnell found the test satisfied based on the city's ownership of the structure, which signaled its adoption of the message.[65] Finally, Chief Judge Tacha, author of the Tenth Circuit's original opinion, took the unusual step of issuing a response to Judge McConnell's dissent.[66] She argued that the monuments could not be government speech because the city did not exercise any control over the content of the monuments' messages and, further, to extend the doctrine in this case "would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own."[67]

B. The Municipal Practice Examples (MPEs): Research Methodology

The original purpose of the IMLA questionnaire was simply to provide the Court with a set of examples that was more comprehensive than the handful of anecdotes and hypotheticals presented in the briefs filed at the petition for certiorari stage.[68] My goal was to collect information from a broad range of municipalities of various sizes, from all areas of the country,[69] on monuments

61. *Pleasant Grove*, 499 F.3d at 1172–73 (Lucero, J., dissenting from denial of rehearing en banc) (quoting Graff v. City of Chicago, 9 F.3d 1309, 1314 (7th Cir. 1993) ("There is no private constitutional right to erect a structure on public property.")) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (narrowing the relevant forum to an internal mail system, not a school building)).

62. *Id.* at 1174.

63. *Id.* at 1175 (McConnell, J., dissenting).

64. *Id.*

65. *Id.* at 1176–77.

66. *Id.* at 1178 (Tacha, C.J., responding to dissent from denial of rehearing en banc).

67. *Id.* at 1182..

68. *See, e.g.*, Petition for Writ of Certiorari, *supra* note 37, at 27–29; Brief Amici Curiae of the American Legion et al. in Support of Petitioners for Writ of Certiorari at 6–7, Pleasant Grove City v. Summum, 128 S. Ct. 1737 (U.S. Dec. 20, 2007) (No. 07-665) [hereinafter Brief of the American Legion].

69. The Applicable Responses included 34 different states representing all regions of the United States. There were 71 cities with populations fewer than 100,000, 30 cities with populations from 100,000 to fewer than one million, 15 Applicable Responses not identifying any city, and only one city with more than one-million residents.

that fit the case criteria—privately donated, permanent structures that a city government had agreed to display in a municipal public park.[70]

The questionnaire's objectives were provided by the growing body of case law and commentary on the relatively new doctrine of government speech.[71] There were several, intertwined areas of interest: (1) the selection–decision process, including any established criteria and evidence of government content control or editing; (2) the government's ownership and control of the physical object; (3) any involvement of the political process, including the identity of the decision-makers and evidence of citizen participation or opposition; and (4) the impact on private speech, if such monuments are characterized as government speech. A review of the literature did not identify any reported similar questionnaires.

Based on these objectives, I drafted a list of questions for a convenience sample of IMLA's members—attorneys who represent one or more municipalities, either as government employees or outside counsel.[72] The tool used was a self-administered, computer-assisted questionnaire, distributed by IMLA through the website SurveyMonkey.com.[73] The respondents were informed by IMLA that the purpose of the questionnaire was to obtain information that would be used in IMLA's amicus brief in *Pleasant Grove*.[74] The questions were "closed," providing multiple-choice answers, with an "open" feature (labeled "please describe"), which also solicited narrative descriptions from the respondents. The questions were pre-tested for clarity and content-validity by four experienced municipal attorneys and one social scientist.

The MPEs discussed in this Article are offered only as a broad set of examples. I make no claim that the responses are representative of all municipalities in the United States. The response rate was slightly less than 20%, perhaps because of the short time-frame available for submitting an

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70. The term "monument" was broadly defined in the IMLA questionnaire to mean "a permanent fixed structure that must be erected or installed, and which conveys or tends to convey some communicative message." IMLA Brief, *supra* note 9, app. B, at 5a. Examples were given of various types of monuments, including "memorials" and "public art." *See* Appendix.

71. *See* cases cited *infra* at note 122, and commentary cited *infra* notes 135, 140, and 168.

72. IMLA Brief, *supra* note 9, app. A, at 1a.

73. *Id.* IMLA sent an e-mail to its approximately 2500 members, which requested that they follow a hyperlink to the "survey monkey" page and complete the questions. *Id.* For a complete copy of the questionnaire administered, please see *id.* app. B. The text in the member e-mail was the same as the text in the "Instructions and Purposes" section of the questionnaire. *Id.* app. A, at 1a.

74. *Id.* app. B, at 4a. All questionnaire responses included in this Article were previously made public in the amicus brief. *See id.* apps. C & D. Also, Question Number 1, which asked respondent's name, position, e-mail, municipality represented and its population, was optional, *id.* app. B, at 5a; a handful of respondents chose to provide information anonymously, *see id.* app. D, at 25a–26a. Most, if not all, information provided by respondents also would be publicly available, though not easily accessible, through other sources.

amicus brief. All responses were read and screened to eliminate non-responsive, non-applicable, or duplicate responses, as explained further below.[75] Thus, the set of Applicable Responses used for analysis and summarized in the Appendix is smaller than the original response rate. In addition, the respondents' presumed alliance with Pleasant Grove City raises the issue of bias, but it appears that the responses were free of significant bias. This conclusion is based on the non-self-serving nature of many of the responses given, and on the unclear state of the law (for example, a survey respondent could not always predict what would be the "right" answer to support Pleasant Grove's position).[76]

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75. As explained in the IMLA brief:

> Between April 24th and May 15th, 2008, IMLA received a total of 238 responses . . . . [T]he original deadline, based on the original *amicus* brief due date, was April 30th, and the bulk of the responses were received within that initial time frame. . . . Of the 238 total responses, 117 were deemed responsive and used for examples and analysis in these Appendixes and the brief.
>
> Of the 238 total responses, 88 gave no response to the substantive questions, but only completed all or part of the optional first question, which requested name, municipality, and contact information. Counsel of Record's assistant sent a follow-up email to these non-respondents (N/R), asking which of a list of potential reasons for not completing any of Questions Nos. 2–16 applied to them. Of the 20 who replied, 16 reported that the municipalities they represent do not display privately-donated monuments, 2 did not have the requested information, 1 had technical difficulties, and 1 was filing a brief in the case.

Id. app. A, at 2a.

With respect to "non-respondents" and the "applicable responses" that failed to respond on particular questions, no attempt was made to impute data by estimating how respondents would have answered particular questions if they had chosen to do so.

> In addition, of the 238 total responses, 16 responses were excluded from IMLA's legal analysis for this brief because they were not relevant enough to the legal questions presented in this case (N/A). Three [of the excluded responses] represented municipalities in Canada, and 13 [others] provided responses related to speech activities other than privately-donated, permanent monuments in parks (e.g., temporary banners or murals on a government building). Substantive responses [(i.e., responses that were not N/R)] were excluded from the set of "117 Applicable Responses" (summarized in [the Appendix]) solely because of the reasons stated in this paragraph.
>
> Finally, of the 238 total responses, 16 were duplicates, i.e., they self-identified as representing municipalities for which there were one or more other responses. Note that most of those were N/R, but they were counted in this separate category. Some of them contained additional narrative information. In those cases, all narrative information was used, but only one set of multiple-choice answers was counted per municipality. There were no identified inconsistencies.

Id. app. A, at 2a–3a.

76. Examples of responses against perceived interests include a number of narrative responses indicating that their municipalities did not, but should, have a written policy, and stories of lawsuits and potential legal exposure. *E.g.*, SurveyMonkey.com Survey Results Generated for Mary Jean Dolan, No. 229 (May 15, 2008) [hereinafter Survey Results] (on file with the *Catholic University Law Review*) (Boise, Idaho) (commenting on litigation regarding Boise's Ten Commandments monument removal, enjoinment of removal, and public referendum). Also, some of the "non-applicable" responses, described *supra* note 75 (for

The information collected was analyzed and is presented here. The multiple-choice responses are presented in the Appendix as tallies (that is, a list of the number of applicable responses for each provided choice).[77] Analysis of the narrative responses was done two ways. First, SurveyMonkey.com automatically generated a list of all narrative responses for each numbered question (without identifying which answer was from which respondent).[78] Second, each applicable respondent's answer to each numbered question was summarized in an Excel spreadsheet.[79] Selected narrative responses were used in the Article to provide more detailed stories of the experience of some municipalities.[80]

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example, government building murals and memorial brick programs), appear to reflect an incorrect assumption that those contexts are legally indistinguishable from the donated monuments context. *See infra* note 187 and accompanying text. That the lines between government speech and forum analysis remain unclear, generally, is shown by this case, as well as by the rash of specialty license plate cases. *See infra* note 146. Finally, most respondents appeared to be general municipal law practitioners, rather than First Amendment or appellate specialists. *See, e.g.*, Survey Results, *supra*, No. 197 (Boulder County, Colo.) ("Boulder County Attorney"); *id.* No. 32 (Moorehead, Minn.) ("City Attorney"); *id.* No. 26 (Neenah, Wis.) ("City Attorney/HR Director"); *id.* No. 28 (Sheboygan, Wis.) ("City Attorney"); *id.* No. 27 (Wheeling, W. Va.) ("City Solicitor").

77. *See* Appendix. The only analysis of an independent variable, population of municipality, did not show any observable differences between municipalities with populations fewer than and more than 100,000 people. *See* Survey Results, *supra* note 76, Nos. 67, 79, 117, 162, 197, 228, 229, 232, 235. Only two municipalities with populations of more than one million responded. *Id.* No. 129 (San Antonio, Tex.); *id.* No. 158 (Phoenix, Ariz.). Based on conversations with attorneys for three large cities, it appears that gathering information for responses was more burdensome for large cities, which are more likely to involve a larger number of persons in various departments. Telephone Interview with Benna Solomon, Deputy Corporation Counsel, City of Chicago Law Department (Apr. 28, 2008); Telephone Interview with Elise Bruhl, Deputy Corporation Counsel, City of Philadelphia Law Department (May 15, 2008); Telephone Interview with Barbara Rosenberg, Appellate Coordinator, Dallas City Attorney Office (May 28, 2008).

78. *See* Analysis Features, SurveyMonkey.com, http://www.surveymonkey.com/Home_FeaturesDesign.aspx (last visited Oct. 30, 2008).

79. *See id.* The process of creating, administering, compiling and analyzing the questionnaires followed guidance provided in ARLENE FINK, THE SURVEY HANDBOOK (2d ed. 2003). Guidance on the use of qualitative surveys and convenience sampling for legal analysis was taken from, among other sources, Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 436–42 (2004), and Richard Lempert, *Empirical Research for Public Policy: With Examples from Family Law and Advice on Securing Funding* 15–23 (Univ. Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 95, 2007), *available at* http://ssrn.com/abstract=1000700.

80. The complete results of the questionnaire are maintained at the author's offices, and additional copies of the responses cited in the Article are on file with the *Catholic University Law Review*. The results include: (1) the full set of responses (two to three pages from each of the 238 respondents, including the non-respondents, non-applicable responses, and duplicate responses, automatically generated by SurveyMonkey.com); (2) SurveyMonkey.com-automatically-generated summaries of all narrative answers listed by question number (neither listed nor cross-referenced by respondent number); (3) a SurveyMonkey.com-automatically-generated report

The usefulness of the MPEs is enhanced by triangulation. Triangulation is the use of multiple data sources to help control for inaccurate reporting by checking responses for general consistency with information from reliable outside sources.[81] Given the absence of quantitative studies on these questions, the outside sources used here are additional examples and persons with relevant experiential knowledge. These include: (1) news articles on monuments, including those discussed in this Article; (2) scholarly books and articles that are based on first-person observations of a wide variety of monuments and related stories; (3) telephone interviews with high-level attorneys with personal knowledge who represent Portland, Oregon, Philadelphia, Pennsylvania, Chicago, Illinois, and IMLA; and (4) ethnographic observations[82] based on my personal experiences as a municipal attorney specializing in the First Amendment.

C. Unique Local Culture and the Indivisibility of Public–Private Monuments

Monuments in city parks communicate messages about particular communities, regardless of their public, private, or joint origin. Because this valuable green space is owned and maintained by government entities where monuments reside—whether war memorials, testaments to bygone leaders, commemorations of current heroes or issues, or large abstract sculptures—it is understood by the public that the government has agreed to their installation.[83] One noted scholar, Sanford Levinson, observed that, frequently, private

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summarizing all 238 responses, using percentages and bar graphs (not presented in the Appendix, because those numbers are misleading in that they included the non-applicable and duplicate responses); (4) an Excel spreadsheet compiled by the author's assistant, which lists all responses to each question for the "117 Applicable Responses" in a user-friendly presentation; (5) a list identifying the non-respondents, and the reasons given by them, if any; (6) a list identifying the non-applicable responses and the reasons given; and (7) a list of duplicate responses.

81. *See* Etienne, *supra* note 79, at 441–42. For an example of that triangulation, see the integration of MPE examples and news reports illustrating the indivisibility of the public–private roles in monuments, as set forth in Part II.C.

82. Ethnography, a paradigm that originated in anthropology but has been used recently in other fields, including law, involves interacting with and observing research subjects. Etienne, *supra* note 79, at 442 n.58 (citing Barbara Tedlock, *Ethnography and Ethnographic Representation*, *in* HANDBOOK OF QUALITATIVE RESEARCH 470 (Norman K. Denzin & Yvonna S. Lincoln eds., 2d ed. 2000)). In her study, Etienne relied on personal experience as a criminal defense attorney to contextualize her interview results. *Id.* at 442–43.

I spent more than ten years as a special legal counsel to the City of Chicago, advising and writing laws and policies on projects that could be analyzed under government speech or public forum doctrines, including donated monuments and public art. Etienne notes that legal practitioner experience could be viewed as a potential source of bias, but "[b]ias . . . is not a flaw in ethnography, which is based largely on participation and immersion into the culture or group being studied." *Id.* at 443 n.61 (citing ROBERT M. EMERSON ET AL., WRITING ETHNOGRAPHIC FIELDNOTES 2 (1995)).

83. *See infra* note 138.

persons donate monuments for the purpose of obtaining "the state's special imprimatur for the message contained within the monument."[84]

The MPEs illustrate both the uniquely local character of many privately donated monuments, and the indivisibility of the public and private roles. Some statues reflect a type of individual admired by the community, whether a union organizer or captain of industry.[85] Others document a particular slice or version of local history; these may include, for example, both local Native Americans and the adventuring gold miners who took over their territory.[86] And some monument decisions express specific, locally influenced means of honoring our nation's conflicts, such as the Hmong-American Vietnam War Memorial displayed in Sheboygan, Wisconsin.[87]

The Tenth Circuit's fundamental error was drawing a sharp—and artificial—distinction between "private" and "public" monuments.[88] As the MPEs and other examples show, that is not how municipalities operate. Instead, the two sectors often blend roles in a seamless partnership. Under the Tenth Circuit's approach, if a city commissions and pays for a statue, that may be government speech, but the same statue donated through a private organization's initiative is private speech.[89]

Narrative responses from the MPEs tell a different story. "Often the projects . . . result from informal discussions among [the] leaders of the community and representatives of the City. It is often hard to determine who made the 'first move.'"[90] And, "[w]e make every effort to work with community groups who propose appropriate fountains, artwork, or other similar items. We almost never are made a 'take it or leave it' offer . . . ."[91] Similarly, in one municipality that has "accepted [private] money to construct memorials for the

84. *See* LEVINSON, *supra* note 8, at 90 (noting that "it is not at all unusual for private individuals or groups to finance monuments," such as many found throughout New York City's Central Park).

85. *See, e.g.*, Survey Results, *supra* note 76, No. 27 (Wheeling, W. Va.) (Walter Reuther, international labor organizer, born in the city); *id.* No. 10 (Anonymous) (John A. Roebling, founder of Roebling Steel, formerly the town's main business). *See also id.* No. 139 (Olney, Ill.) (Robert Ridgway, author, artist, scientist, founder of Bird Haven).

86. *Id.* No. 197 (Boulder, Colo.) (describing local monuments to both local Native American Chief Niwot and mining history statue). *See also id.* No. 115 (Benicia, Cal.) (Pony Express monument); *id.* No. 188 (Spanish Fork, Utah) (statue of Fathers Dominguez and Escalante, first European explorers of area, and monument to city's large Icelandic population); *id.* No. 198 (Hartford, Conn.) (Hartford Circus Fire memorial).

87. *See id.* No. 28 (Sheboygan, Wis.). *See also, e.g.*, *id.* No. 78 (Fredericksburg, Tex.) (monuments to local war heroes); *id.* No. 211 (Fayetteville, Ark.) (large bronze statue displaying the word "peace" in many world languages).

88. *See* Summum v. Pleasant Grove City, 483 F.3d 1044, 1047 n.2 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008) (No. 07-665).

89. Summum v. Pleasant Grove City, 499 F.3d 1170, 1180 (10th Cir. 2007) (Tacha, C.J., response to dissent from denial of rehearing en banc).

90. Survey Results, *supra* note 76, No. 117 (Kansas City, Mo.).

91. *Id.*

soldiers in Iraq, Korea, and Vietnam" and statues of the city's founders, the respondent commented that "there has been a [cooperative] effort between the Mayor's office and private citizen groups."[92] Indeed, private funds and citizen initiatives are the force behind many of the nation's significant monuments, including such icons as the Iwo Jima Monument in Arlington, Virginia, and the Vietnam Veteran's Memorial in Washington, D.C.[93]

Two publicized examples of specific donations give more detail. First, even commissioned public monuments often are funded through private donations, and large benefactors participate in selecting the content and creator of the monuments. For example, the City of Chicago's unique Crown Fountain, opened in 2004 in the new Millennium Park, was funded by the Crown family.[94] Following an invited competition, the private patron, city officials, and a public–private planning committee together selected its creator, Spanish sculptor Jaume Plensa, a leading contemporary artist.[95] The new landmark consists of two fifty-foot-high towers that display changing video images of photographed faces, bookending a water-filled area used for play and interaction.[96] The donors and city personnel worked together over several years on the implementation details, including previewing a mock-up of the structure and providing input and limitations on the content displayed.[97]

Second, when a private donor presents an existing monument as a proposed gift to a municipality, its display on public land requires a governmental decision and, often, the use of public funds. For example, in Lake Geneva, Wisconsin, a resort town close to Chicago, philanthropist Richard Driehaus donated a grand neoclassical fountain, a replica of one installed in New York's Central Park in 1873.[98] Originally purchased for his own estate, Mr. Driehaus offered the fountain as a town centerpiece, stating that it celebrates Lake Geneva's illustrious past and historic lake front estates. The city council

92. *Id.* No. 60 (Cedar City, Utah).

93. Brief of the American Legion, *supra* note 68, at 11 n.12 (documenting the private donations and donors for listed monuments).

94. TIMOTHY J. GILFOYLE, MILLENNIUM PARK: CREATING A CHICAGO LANDMARK 278, 291 (2006).

95. *See id.* at 280.

96. *Id.* at 277.

97. *See id.* at 279–80, 286–87, 290–91; Millennium Park History, http://www.millenniumpark.org/parkhistory/ (last visited Oct. 30, 2008). This information regarding implementation was confirmed by telephone interview with Ed Uhlir, Project Director, Millennium Park on June 17, 2008.

98. *See Fund-raiser Will Help Enhance Area*, LAKE GENEVA REGIONAL NEWS, June 24, 2004, http://www.lakegenevanews.net/Articles-i-2004-06-24-89458.112112_Fundraiser_will_help_enhance_area.html.

approved acceptance of the gift and committed $40,000 for its installation in a central location.[99]

These counterpoints also show how monuments convey thematic government messages, even where the donations are public art, rather than text or an historical figure. The Crown Fountain successfully sends its intended message: Chicago is cutting-edge, a world-class city, a leader in the arts. The Driehaus Fountain, by contrast, expresses a quieter message of privilege and embracing history. If Lake Geneva had been offered a large contemporary monument to anchor the traditional town, or if the Crown family had proposed a Gilded Age monument for Chicago's Millennium Park, such donations likely would have been declined as inconsistent with the municipalities' identities. With this broader background, which shows the interplay between public and private sectors and how the local culture is conveyed through park monuments, the next step is analyzing how the tests for, and concerns about, government speech apply in this context.

III. WHY MUNICIPAL DISPLAY OF DONATED MONUMENTS IS GOVERNMENT SPEECH

The government's role as the creator of beautiful and welcoming public parks makes a better case for government speech than many of those previously recognized by the Supreme Court. Government decisions about monuments synthesize the two lines of cases—municipalities both edit the communal landscape and convey broad local identity messages—and better satisfy the political accountability rationale. Further, application of the lower courts' four-factor test explains the government's role as speaker, and the acknowledgement of that role by its citizens.

A. Valid Principles Derived from Supreme Court Precedent

1. Inherently Discretionary Speech Selection

Some of the Court's government speech opinions involve a government role that necessarily involves discretion and is thus imbued with viewpoint, rather than the promotion of a specific, substantive government policy. *National Endowment of the Arts v. Finley*, which involved a federal funding program for the arts, upheld allowing the NEA to consider decency, diversity, and American values, where its decisions based on artistic merit were already "inherently content-based."[100] In *Arkansas Educational Television*

99. *See id.* For additional examples of similar partnerships between the public and private sectors with respect to monuments, see *infra* note 111 (regarding recent Arthur Ashe and Lincoln monuments in Richmond, Virginia).

100. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572–73, 586 (1998). The statutory amendment, passed in reaction to funding of art described as homoerotic and sacrilegious, *id.* at 572, 574–75, counseled, but did not mandate, "taking into consideration

Commission v. Forbes, the Court observed that the role of the public television broadcaster necessarily requires allowing editorial discretion, including discretion in its selection of which viewpoints and private speakers to include in its programming.[101]

The Tenth Circuit interpreted these cases narrowly when it rejected a role for discretion in monument decisions because the city was not acting as a "librarian, television broadcaster, or arts patron."[102] Similar to *Forbes*, agreeing to install a monument means allocating a portion of a limited public good—there, air time; here, open space—to a particular piece of originally private speech. When exercising their park-management function, municipalities balance many interests, including editing the landscape with an eye toward creating beauty and maximizing public enjoyment, while remaining consistent with the town's character. Where municipalities do have policies to guide decisions on proposed donations of monuments for parks, many recognize the importance of preserving open space in making these choices,[103] which supports the editing analogy. Like in *Finley*, monuments are a form of public art; they include representative statues, textual messages, and abstract sculptures with potent images.

At the same time, decisions on installing monuments are distinguishable because they occur sporadically. Because this form of speech is more inspired and unpredictable, it is typically outside the scope of an official government program with established criteria, such as the criteria in *Finley*.[104] Moreover, in contrast to the regular television programming role in *Forbes*,[105] decisions regarding monuments are more of an occasional job for most city-government

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general standards of decency and respect for the diverse beliefs and values of the American public," *id.* at 572 (internal quotation marks omitted).

101. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669, 674 (1998) (holding that televised candidate debates are a narrow exception to this discretion, but that an objective lack of support was a reasonable content limitation for that nonpublic forum).

102. Summum v. Pleasant Grove City, 483 F.3d 1044, 1052 n.4 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008) (No. 07-665); *see also id.* (citing United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 205 (2003)) (noting that "public library staffs have broad discretion to consider content in making collection decisions").

103. *See, e.g.*, Portland, Or., Admin. R. ARB-PRK-3.01 (Sept. 29, 2004), *available at* http://www.portlandonline.com/Auditor/index.cfm?a=68087&c=36767 (including in the policy objectives for accepting gifts and memorials, that gifts are "expected to enhance a park without hindering the quality of the open space"). Note that it appears that many municipalities do not have written policies. *See, e.g.*, Survey Results, *supra* note 76, No. 10 (Anonymous) (no written criteria); No. 26 (Neenah, Wis.) (no criteria); No. 28 (Sheboygan, Wis.) (no criteria); No. 54 (Kalispell, Mont.) (no indication of written criteria); No. 228 (Charlotte, N.C.) (noting "only content review," but no written criteria indicated).

104. *See Finley*, 524 U.S. at 573.

105. *See Forbes*, 523 U.S. at 673.

bodies or departments.[106] Therefore it is useful to look at how monument decisions blend inherent subjectivity with expressive messages, which are sometimes specific but often thematic.

2. Communities' Broad Identity Messages

Because all monuments convey ideas and values, whether stated explicitly or in broad themes,[107] a decision on monument display also fits, wholly or partially, into the other line of Supreme Court government speech cases: where the government promotes a substantive policy message through private speakers.[108] The MPEs illustrate how governments' decisions regarding whose lives to honor in this way, and how they should be portrayed, express an administration's view of community ideals at the time of installation.[109] Controversial monuments, especially, convey distinct political and philosophical messages. Examples include a Tucson, Arizona, statue of Pancho Villa, a Mexican revolutionary leader,[110] and a recently installed large-scale monument of Abraham Lincoln, which the Richmond, Virginia, city council voted to help finance in the face of substantial protests from some quarters.[111] The expressive symbolic power of monuments also is highlighted

106. *Cf.* Brief Amicus Curiae of the City of New York in Support of Petitioners at 5–7, Pleasant Grove City v. Summum, 127 S. Ct. 1737 (June 23, 2008) (discussing New York City's atypical ongoing public-art and monument program).

107. For a thorough treatise on government's policy expressions through war monuments, see JAMES M. MAYO, WAR MEMORIALS AS POLITICAL LANDSCAPE: THE AMERICAN EXPERIENCE AND BEYOND 1–13 (1988) (discussing symbolic messages from the perspective of an architecture and urban design professor). *See also* Nicolas Howe, *Thou Shalt Not Misinterpret: Landscape as Legal Performance*, 98 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 435, 437 (2008) ("Monuments . . . are the most obvious and ubiquitous means by which the nation-state signifies itself in the landscape. By arousing feelings of metaphysical belonging and focusing them on a symbol of historical and geographic subjectivity, they give concrete form to collective memory." (citation omitted)). *Cf.* Randall P. Bezanson, *Art and the Constitution*, 93 IOWA L. REV. 1593, 1596–97, 1601 (2008) (submitting that "nonpropositional" art should be protected by the First Amendment as art, not as speech, and describing such art as coming from a "sensual response . . . an act of newly imagined meaning" by each individual viewer, as opposed to speech, in which the speaker intends, and the audience understands, a cognitive message). I suggest that abstract art, where it is publicly owned and displayed, carries an intended broad identity message.

108. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562–65 (2005) (promoting beef consumption through advertisements funded by tax on beef producers was not unconstitutionally compelled speech); Rust v. Sullivan, 500 U.S. 173, 177–79 (1991) (allowing the promotion of pro-life policy through selective funding of family planning clinics).

109. *See supra* Part II.C.

110. *See* Survey Results, *supra* note 76, No. 235 (Tucson, Ariz.) (responding that display of a donated statue of Pancho Villa, a Mexican revolutionary leader who advocated for agrarian reform and the poor, has prompted opposition by some who view the figure as an "outlaw" rather than a "hero").

111. *See* Jeremy Redmon & Lindsay Kastner, *Lincoln Statue Unveiled*, TIMES-DISPATCH (Richmond, Va.), Apr. 6, 2003, at B1. There were extensive protests surrounding a new Abraham Lincoln monument, which was initiated by the U.S. Historical Society, a Richmond-based

when the public's perception of a given monument changes along with cultural mores.[112]

Each decision matters because the installation and placement of a new monument can transform a values message sent by previously existing displays. A striking, positive example of this occurred in 1996, when a large bronze sculpture of tennis great Arthur Ashe joined the existing statues of five Confederate leaders on Richmond's well-known "Monument Avenue."[113] After several years of debate over this proposed location,[114] which incorporated the longstanding debate over the meaning of Confederate symbols,[115] the final, democratic decision was that this location for a memorial to this modern-day Richmond hero sent a welcome message of change and opportunity.[116]

The Court's most recent pronouncement on government speech, *Johanns v. Livestock Marketing Ass'n*, provides the most comprehensive guidance for determining when the government is speaking, rather than private persons, when both are involved.[117] In *Johanns*, the respondent beef producers argued that tax-funded television ads ("Beef. It's What's For Dinner") were not government speech because their content was controlled by a nongovernmental entity, half comprised of cattle producers appointed by the Secretary of Agriculture, and the other half of industry members.[118] Despite a large

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organization. *Id.* The Richmond City Council passed a resolution calling the statue a "symbol of unity and reconciliation" and approved a public contribution of up to $45,000 toward the granite plaza at its location on nearby federal park land. *Id.*

112. *See, e.g.*, Survey Results, *supra* note 76, No. 92 (Longview, Wash.) (noting that some now question the accuracy of a statue's portrayal of Sacajawea, the Shoshone woman who was a guide for Lewis and Clark). *See also infra* Part III.B.2 (regarding the ongoing right to edit a message over time when citizens start to object).

113. J. Michael Martinez & Robert M. Harris, *Graves, Worms, and Epitaphs: Confederate Monuments in the Southern Landscape*, *in* CONFEDERATE SYMBOLS IN THE CONTEMPORARY SOUTH 130, 170–72 (J. Michael Martinez et al. eds., 2000).

114. *Race-Tinged Furor Stalls Arthur Ashe Memorial*, N.Y. TIMES, July 9, 1995, at 20.

115. *See, e.g.*, CONFEDERATE SYMBOLS IN THE CONTEMPORARY SOUTH (J. Michael Martinez et al. eds., 2000) (collecting multi-disciplinary essays against preserving symbols of racial oppression and for preserving Southern history).

116. *Cf.* LEVINSON, *supra* note 8, at 116–19, 127–28 (concluding, after considering numerous possible responses to historical monument speech that has become offensive, that the best response is government counter-speech—for example, display of monuments honoring successful African American citizens). Note as well that a private organization, the "Virginia Heroes," originated the proposal for the Ashe monument and presented the project to Richmond's City Council. *See* The Arthur Ashe Monument, http://www.cvco.org/arts/psculpt/ashe (last visited Oct. 30, 2008).

117. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 561 (2005). *Johanns* was a compelled-subsidy case, rather than a forum dispute, and involved a government program with a specific policy message. *Id.* at 553–54. *See also* Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 964–65 (9th Cir. 2008) (noting distinctions but applying the appellate courts' four-factor test and *Johanns* after observing that both tests are directed at the same issues).

118. *Johanns*, 544 U.S. at 554, 560.

creative role by private citizens, the majority found government speech because: "The message of the promotional campaigns is effectively controlled by the Federal Government itself."[119] There were two critical features. First, "the government sets the overall message to be communicated,"[120] based on a statutory federal policy of promoting beef consumption.[121] Second, the Secretary had final approval for all advertisements, as demonstrated by: (1) prior review of ad copy by Department officials; (2) rejection or rewriting of some proposals by the Department; and (3) participation by Department personnel in open meetings at which proposals were developed.[122]

The MPEs show that municipalities around the country exercise content control over monuments through procedures that are remarkably similar to those outlined in *Johanns*. First, although adopted less frequently because of the occasional nature of monument donation, some cities have applicable written policies setting criteria for donations of public art, park improvements, or monuments.[123] Second, many municipalities require submission of words and graphics before any government decision is made to accept a monument, and many require design input.[124] Third, some questionnaire respondents provided specific examples of times when a city required modification of words or images prior to display.[125]

Fourth, and perhaps most significant, the vast majority of municipalities in the MPEs require legislative acceptance of any privately donated monument.[126] Thus, for these municipalities, open meetings are required and the specifics of the proposed monument are discussed publicly before approval by elected representatives.[127] Given that the type of monument at issue usually conveys its symbolic content effectively—for example, a monument to the Hmong role

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119. *Id.* at 560.

120. *Id.* at 562.

121. *Id.* at 553 (citing Beef Promotion and Research Act of 1995, Pub. L. No. 99-198, 99 Stat. 1597 (codified at 7 U.S.C. § 2901(b))).

122. *Id.* at 561.

123. *E.g.*, Survey Results, *supra* note 76, No. 162 (St. Petersburg, Fla.) (new ordinance requires legislative consideration and approval of historic significance of any proposed monument).

124. *E.g.*, *id.* No. 79 (Newport News, Va.) (written policy regarding proposed monuments for military-related actions requires city review and approval of text detailing actions of honorees prior to approval of monument).

125. *E.g.*, *id.* No. 232 (Tucson, Ariz.) ("[The] wording is sometimes modified to be sensitive to a large audience[.] In the case of a monument (The Morman [sic] Battalion), [the] artist was asked to reconsider physical traits that appeared to lack sensitivity to a diverse population.").

126. *See* Appendix (citing 93—of the 117—applicable responses that stated their municipal client required legislative acceptance of all monuments prior to installation).

127. Municipal legislative bodies generally are required by state law to deliberate and vote in meetings open to the public, and to vote only on agenda items of which the public has been given advance notice. *See, e.g.*, Open Meetings Act, 5 ILL. COMP. STAT. ANN. 120 (West 2005 & Supp. 2008).

in the Vietnam War, or to local Chief Niwot[128]—legislative approval is, in almost all cases, the practical equivalent of a requirement for prior submission and approval of each monument's dominant message. Even where the MPE responses did not provide any narrative response describing the monuments displayed, it is highly unlikely that any city council would vote to approve a generic "monument." Thus, in almost all cases where legislative approval is required, it is reasonable to assume content control by the representative government.

Johanns, of course, is distinguishable from many municipal monument decisions. In one sense, but for the attribution issue discussed in the next section, *Johanns* is a classic case of defensible government speech. Through the legislative process, the government set a clear policy—to help the industry by promoting beef consumption—and implemented that policy with the participation of private citizens.[129] The policy in *Johanns* is not much different from the unobjectionable case where a government administration seeks citizen input on a public health policy, for example, and then hires an advertising firm for the public education campaign. In the monument context, the parallel example would be those cases where a city council voted to honor its Iraq War veterans and then established a public–private commission to hire a sculptor and raise funds. *Pleasant Grove* involves the next level, where a government votes to accept an offered monument that conveys an express message; the act of agreeing to accept ownership of the monument and display it on government property is a ratification of that message.[130] Even where a donated monument lacks a specific expressive message, however, as with an abstract sculpture, municipalities still make an affirmative decision regarding whether the broad thematic message conveyed by the offered monument is consistent with that municipality's broad identity message. Those types of messages may not always be expressly stated, but they often can be derived from a municipality's public promotional statements, which frequently appear to summarize the administration's essential vision of the community.[131]

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128. *See supra* notes 86–87 and accompanying text.

129. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553–55 (2005).

130. At least at oral argument, a number of the Justices appeared to agree that display of a monument on government property shows that government has adopted that message. For example, Justice Alito asked, "Isn't merely allowing the monument to be built on public property sufficient acceptance?", Transcript of Oral Argument, *supra* note 14, at 48, and Justice Souter noted that no one would doubt that a homeowner who agreed to display a McCain sign on his lawn supported McCain, *id.* at 49.

131. *E.g.*, *compare* Welcome to Village of Hinsdale, Illinois, http://www.villageof hinsdale.org/ (last visited Oct. 30, 2008) (describing municipality as one of "natural beauty, hometown charm, and a friendly community atmosphere"), *with* Oak Park, Illinois, Village Background, http://www.oak-park-us./Village_Background.html (last visited Oct. 30, 2008) (describing municipality as "known for its architectural heritage and diverse population," followed by details on diversity).

3. Political Accountability and the MPEs

The underlying rationale for allowing government speech in the face of differing views is the existence of political accountability. Accordingly, "[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."[132] That rationale is better satisfied by municipal display of donated monuments than by any of the Supreme Court government speech cases thus far.

Municipal decisions on donated monuments easily satisfy the *Johanns* majority's minimalist interpretation of the political accountability requirement; under its rule, all that is required is legislative involvement and administrative control.[133] Applying that standard to municipal park monuments, political accountability is enhanced by virtue of the closer connection between citizens and their local government, as compared with federal, or even state, governments.[134]

Johanns has been widely criticized for its thin requirements for political accountability, and correspondingly expansive take on government speech, because it exemplifies ventriloquism.[135] As Justice Souter stated in his dissent, few Americans would be aware that the government was behind advertisements with "the tagline, '[f]unded by America's Beef Producers.'"[136]

Decisions on monuments, by contrast, are transparent. Unlike line items in a complex budget, monuments displayed in city parks cannot be hidden from public view. There is no need for a "sunshine law"[137] to expose monuments to political commentary. When a private organization's monument is permanently installed on public land, people naturally expect that the municipality was involved and has granted prior express permission.[138]

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132. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (quoted in *Johanns*, 544 U.S. at 575 (Souter, J., dissenting)).

133. *See Johanns*, 544 U.S. at 563–64.

134. *Cf.* Hinrichs v. Speaker of the House of Reps. of the Ind. Gen. Assembly, 506 F.3d 584, 598 (7th Cir. 2007) (holding state taxpayers to same standing requirements as federal taxpayers for Establishment Clause-based suits). Applying *Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007), which narrowly circumscribed taxpayer standing in Establishment Clause suits, the Seventh Circuit noted in *Hinrichs* that the Court has always treated standing of municipal taxpayers more generously because their connection to the use of municipal funds is deemed more "'direct and immediate.'" *Hinrichs*, 506 F.3d at 590–93 (quoting Frothingham v. Mellon, 262 U.S. 447, 486 (1923)) (citing *Hein*, 127 S. Ct. 2553 (2007)).

135. *See, e.g.*, Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 988–89 (2005) ("[W]hen the government participates in public debate, it should make the fact of its participation transparent. . . . [T]he legitimacy of those communications depends on the public's ability to identify what the government says and how it does so.").

136. *Johanns*, 544 U.S. at 577 (Souter, J., dissenting) (alteration in original).

137. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 (2000).

138. *See, e.g.*, Graf v. City of Chicago, 9 F.3d 1309, 1313 (7th Cir. 1993) (citing Chi., Ill., Mun. Code § 10-28-040) (discussing a typical ordinance generally prohibiting erection of structures or stationary objects on any public ground); Serra v. U.S. Gen. Servs. Admin., 847 F.2d

Typically, as in Pleasant Grove, a plaque states that the monument was "donated" or "presented" by the named donor to the city.[139] Because this statement adequately conveys the message that the monument now is owned by the government, it should not be necessary for the municipality to post an additional affirmative statement on the same (or another) plaque, stating: "Any message expressed by this monument is from the government."[140] Similarly, where a city council has affirmatively voted to accept and display a specific monument—whether the Ten Commandments, Iraq War veterans' memorial, or an avant-garde sculpture—the council should not also need to pass a resolution expressly claiming that monument's message as its own.[141]

1045, 1048–49 (2d Cir. 1988) (holding that there is no First Amendment right to install a sculpture on government property; sale of art to government gave government the discretion to determine location of any display); *see also* LEVINSON, *supra* note 8, at 90, 126–27 (noting the difference in public perception between monuments, which have the government's imprimatur and, for example, airport solicitors, which people assume are merely tolerated by the government in deference to First Amendment rights). Newsracks are a distinguishable case. Because freedom of the press is an independent guarantee, municipal permission to install a newsrack conveys no governmental approval of the content of the newspapers. Thus, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412, 429–30 (1993) (finding city ban on newsracks for commercial handbills, but not newspapers, impermissible content-based regulation), is inapposite here.

139. Interpreting an Eagles' donor plaque virtually identical to the one in *Pleasant Grove*, one leading scholar stated that "the inscription implies, clearly and correctly, that it is the state which owns the monument. These Ten Commandments are, literally and constitutionally, the state's own words." Erwin Chemerinsky, *Why Justice Breyer Was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL RTS. J. 1, 8 (2005). See *infra* Part V.B.1. for a discussion of the Establishment Clause implications here.

140. *But see* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1482–83 (2001) (rejecting use of the government speech approach to avoid unwanted attribution and requiring use of disclaimers for that purpose). *Cf.* Dolan, *supra* note 7, at 126 (asserting that disclaimers are ineffective or inappropriate in certain contexts). As shown throughout this Article, monuments displayed on government property are another context where disclaimers are not needed to clarify the government's role.

A recent comprehensive account of government speech, Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008), proposes that the government speech defense be allowed only under two conditions: (1) "government must expressly claim the speech as its own when it authorizes or creates a communication *and* [(2)] onlookers must understand the message to be government's at the time of its delivery." *Id.* at 599. While the "expressly claim" language may suggest Summum's counsel's requirement that the city must explicitly "adopt" the Ten Commandments monument before it can use a government speech defense, *e.g.*, Transcript of Oral Argument, *supra* note 14, at 37–38, Professor Norton recently wrote that under her framework, Pleasant Grove City has a strong claim for government speech where it is using its own property for an expressive purpose, Posting of Helen Norton to First Amendment Law Prof Blog, http://lawprofessors.typepad.com/firstamendment/2008/10/city-parks-monu.html (Oct. 31, 2008).

141. *See* Brief for Respondent at 33–34, Pleasant Grove City v. Summum, 128 S. Ct. 1737 (Aug. 15, 2008) (No. 07-665) (suggesting the need for express control of content through resolution or a sign stating that monument is government's message).

The MPEs again underscore the practical realities. As shown in the Appendix, when citizens find a monument offensive, they turn to their municipal government for redress. The letters, public protests, and lawsuits[142] show that citizens believe that the government—and *not* the original private donor—is responsible for the objectionable state of affairs. Sometimes the municipality will respond to a citizen's complaint,[143] and sometimes the municipality does not[144]—but its officials can always be held politically accountable.

B. Application of the Circuit Courts' Four Factors

Various circuit courts have applied the relatively new government speech doctrine to expressive contexts beyond the government-funded programs that the Supreme Court has addressed. For example, two leading cases involved government speech that acknowledged private sponsors of public expressive projects,[145] and much recent litigation and commentary has focused on states' specialty license plate programs.[146] These courts have developed a four-factor test that evaluates: (1) "the central purpose" of the challenged speech; (2) the municipality's "degree of editorial control"; (3) "the identity of the literal speaker"; and (4) whether "ultimate responsibility for the content of the speech" rested with the municipality.[147]

In an earlier case, *Summum v. City of Ogden*, the Tenth Circuit applied these factors incorrectly and concluded that a Ten Commandments monument in a similar context was the donors' private speech;[148] the court did not repeat this process in *Pleasant Grove* when finding the monument to be private speech.[149]

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142. *See* Appendix (displaying responses to question No. 16, regarding "Public Opposition to the Existence or Location of Monument").

143. Survey Results, *supra* note 76, No. 32 (Moorhead, Minn.) (changing the wording on a private-donor-initiated "Norwegian Stave Church" display to make the tone "more historical, [and] less religious").

144. *E.g.*, *id.* No. 26 (Neenah, Wis.) (noting that the "Playing in the Rain" fountain was opposed by neighbors, but "city leaders stuck by the decision to place the fountain in the downtown park," and it is now a "beloved landmark[]").

145. Wells v. City of Denver, 257 F.3d 1132, 1141–43 (10th Cir. 2001) (explaining that a sign listing corporate sponsors of city's holiday display was government speech, not forum speech, and there was no First Amendment obligation to allow other private speech); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–95 (8th Cir. 2000) (holding that for a public radio station to reject the KKK as a sponsor, and thus exclude it from broadcast acknowledgement of sponsors, did not violate the First Amendment).

146. *See, e.g.*, Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008) (asserting that message on specialty license plate was primarily private speech, and thus created a limited public forum). *See also infra* note 156 (discussing additional cases).

147. *E.g.*, *Stanton*, 515 F.3d at 964 (internal quotation marks omitted); *Wells*, 257 F.3d at 1141.

148. *See* Summum v. City of Ogden, 297 F.3d 995, 997–98, 1004–06 (10th Cir. 2002).

149. *See* Summum v. Pleasant Grove City, 483 F.3d 1044, 1047 n.2, 1050–52 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008) (No. 07-665).

So, although the factors are simply rough markers for the control and accountability issues just discussed, this Part will show specifically how *Ogden*'s reasoning on each factor was based on a superficial, and impractical, understanding of the donated monument context.

1. Municipalities' Expressive Purpose

A municipality's central purpose for accepting and displaying a privately donated monument is universally expressive. As documented above, municipalities seek to enhance landscape aesthetics and to express a message, whether symbolic or literal, general or specific.[150] The Tenth Circuit in *Ogden* made two critical errors: (1) it focused on the monument's "avowed purpose," of advancing the donors' view that the Ten Commandments provide "a moral code for youth"; and (2) it rejected a municipal expressive purpose because "the City [had] no idea as to the meaning of parts of the Monument, particularly the Phoenician letters."[151]

To start, the Tenth Circuit's assumptions about city governments are incorrect: it would not be common for a mayor, or even a planning commissioner, to be familiar with every symbol on a particular monument, or every theme intended by a sculptor. For example, despite the grand scale of the City of Chicago's Millennium Park project, Mayor Richard Daley was involved in the selection process for the several landmark public-art installations.[152] Nonetheless, neither he nor many other participating city administrators would be likely to know specifically, for example, that the videos displayed on the Crown Fountain include one thousand Chicago citizens, or that the faces are "a reference to the traditional use of gargoyles in fountains, where faces of mythological beings were sculpted with open mouths to allow water, a symbol of life, to flow out."[153] That practical reality does not change the city administration's evident expressive purpose: showcasing Chicago as bold, modern, and world-class.

In addition, the first factor asks not what the *donors* of a monument had in mind, but rather, what was the *city*'s purpose in agreeing to display the monument.[154] When Pleasant Grove's city council voted to accept the Eagles' proffered monument, many of its members likely agreed with the Eagles' stated purpose of providing a positive effect on youth and it is also likely that

150. *See* discussion *supra* Part II.C.

151. *Ogden*, 297 F.3d at 1004.

152. *See* GILFOYLE, *supra* note 94, at 290. The six-year, $475,000,000 project also included Anish Kapoor's Cloud Gate sculpture and Frank Gehry's Pritzker Pavilion. Millennium Park, Cloud Gate, http://www.millenniumpark.org/artandarchitecture/cloud_gate.html (last visited Oct. 30, 2008); Millennium Park, Jay Pritzker Pavilion, http://www.millenniumpark.org/artand architecture/Jay_Pritzker_Pavilion.html (last visited Oct. 30, 2008).

153. *See* Millennium Park, The Crown Fountain, http://www.millenniumpark.org/artand architecture/crown_fountain.html (last visited Oct. 30, 2008).

154. *See* Wells v. City of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001).

some members had their own expressive purpose in mind.[155] Also, municipal monument displays show greater governmental expressive purpose than other contexts where appellate courts have found government speech. Two leading cases found this first factor satisfied by a very limited governmental expressive purpose: thanking sponsors.[156] If the donor acknowledgment plaques on monuments are government speech, the more substantive messages conveyed by donated veterans' memorials and monuments of town founders should be as well.

2. Municipalities' Editorial Control

Municipalities exercise editorial control over donated monuments through a variety of means, even where the government does not participate in creating them or require the donor to change the proffered gift as a condition of display. In *Ogden*, the Tenth Circuit held that this second factor was not met because the Eagles' monument was donated as a finished product.[157] The relevant inquiry is whether the government has the right to edit speech created by a private organization, and not whether such editing was needed in a particular instance.[158] Municipalities often exercise such control through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals.[159]

An essential, unheralded, point is that municipal ownership of monuments encompasses a right of *ongoing* editorial control. Pleasant Grove City retains that ownership right regardless of its lack of involvement in designing the monument. Imagine, for example, a city determines that one prominent symbol on an existing monument is now widely viewed as a sign for a satanic

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155. *See infra* Part V.B.1 for discussion of the Establishment Clause implications. Legislative intent is often hard to determine conclusively. *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60–64 (1988) (stating that ascertaining "the mental pattern of the legislature" assumes that it speaks with one voice and "ignores the fact that laws are born of compromise"). This may be especially true on the city council level, which typically produces fewer records than the federal and even state levels; the published decisions do not include any such discussion.

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

In the specialty-license-plate cases, some courts have held that the first factor is not met because the state's primary purpose when it sells these plates is to raise revenue. *E.g.*, Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 966 (9th Cir. 2008); Choose Life Ill., Inc. v. White, No. 04 C 4316, 2007 WL 178455, at *5 (N.D. Ill. Jan. 19, 2007). Other courts conclude differently despite the revenue-raising aspect. *See, e.g.*, Am. Civil Liberties Union of Tenn. v. Bredesen, 441 F.3d 370, 371–72, 376–77 (6th Cir. 2006) (holding where legislature affirmatively voted to create a "Choose Life" specialty plate, its primary purpose was government speech); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 793 (4th Cir. 2004) (finding primary purpose of the specialty license plate program to promote pro-life views).

157. Summum v. City of Ogden, 297 F.3d 995, 1004 (10th Cir. 2002).

158. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 561–62 (2005).

159. *See supra* Part III.A.

cult or warring gang: that city likely would exercise its editorial control by modifying the statue, if possible, or by removing it. Nor is this scenario far-fetched. One commentator wrote of a four-sided monument in Santa Fe, New Mexico, which describes fallen heroes from various conflicts, using the language of the applicable era.[160] On one side that refers to Native Americans, the word "Savage" has been carved out, unofficially.[161] In addition, a plaque has been added that attempts to explain and excuse the use of the terms "savage" and "rebel" and expresses hope for changed attitudes.[162] Sanford Levinson, a leading legal scholar on monuments, provides a number of other, lengthier examples of government modification of existing monuments to adapt to new values.[163] The most striking story is that of various attempts to alter or eliminate the message conveyed by New Orleans' "Liberty Monument," which memorialized a Reconstruction Era white supremacist battle.[164] Because permanent monuments continue to display their messages as generations pass and cultures change, the government's editorial control over them is not limited to one point in time.

Even in the unusual case where the donated monument arrives sight unseen, municipalities retain two additional types of editorial control. First, the installation process itself offers city personnel at least a last-minute chance to see the monument before it is erected, and thus to refuse any content that undermines the municipality's overall identity message. Second, it is generally easier to exercise editorial control over the smaller, often removable, plaque that acknowledges a private donor. Imagine a sign that read, "Donated by the Eagles to Assist Metropolis in its Mission to Promulgate the Word of the One True God." Any municipal lawyer would advise her client of the unconstitutionality of such language, and the municipality would likely require a modified message as a condition of its display.[165]

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160. Robert Justin Lipkin, *Down with Flags, Statues, and Monuments: Cultural Memory in a Deliberative Democracy*, 7 U. CHI. L. SCH. ROUNDTABLE 239, 262 (2000).

161. *Id.* at 263. The plaque originally read: "To the Heroes Who Have Fallen in the Battles with the Savage Indians in the Territory of New Mexico." *Id.* at 262. "[T]he plaque now reads [in part]: 'Battles with [ ] Indians.'" *Id.* at 263 (third alteration in original).

162. *Id.* at 263. The new caveat includes: "Monument texts reflect the character of the times in which they are written . . . . Attitudes change and prejudices hopefully dissolve." *Id.*

163. LEVINSON, *supra* note 8, at 4.

164. *See id.* at 45–52 (explaining various attempts to tear down the monument and efforts to change its signage, including the current, vague caveat: "A CONFLICT OF THE PAST THAT SHOULD TEACH US LESSONS FOR THE FUTURE").

165. *Cf.* Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1094 (8th Cir. 2000) (holding second factor of retained control met where public radio staff composed, reviewed, and edited sponsor acknowledgements to ensure compliance with FCC and station guidelines).

3. Municipalities As Literal Speakers

The Tenth Circuit in *Ogden* acknowledged that upon the transfer of a monument's ownership, the municipality becomes the "literal speaker," yet it hesitated to declare this third factor satisfied because the Eagles had composed the speech.[166] Under *Johanns*, however, a message may be government speech even where the exact words are composed by private persons.[167]

There has been much analysis of this third prong in the specialty license plate cases, which also involve a passive symbolic message involving both government and individuals.[168] Typically, state legislatures authorize a proposed new slogan, such as "Choose Life," upon application by an association, which assures the sale of a certain threshold number of plates; then individuals pay an additional fee for the plate, which expresses a message affiliated with a favorite cause.[169] The majority view holds that the individual vehicle owner is the literal speaker, based on his intentional display of the government-manufactured values message and on both the reality, and the public perception, that his message display is purposeful.[170]

The monument display context presents an easier case, and a less mixed message, on this factor. Applying the majority reasoning, Pleasant Grove City is the literal speaker because the municipality is intentionally displaying a message originally created by a private group, in circumstances where the public perception is that municipalities are responsible for any messages conveyed by monuments located in municipal parks. In addition, the

166. *See* Summum v. City of Ogden, 297 F.3d 995, 1004–05 (10th Cir. 2002).

167. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2005).

168. *E.g.*, Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 619–23 (2008) (using these cases as a springboard for a comprehensive analysis of the problem of mixed speech and proposing use of a rigorous intermediate scrutiny standard); Saumya Manohar, Comment, *Look Who's Talking Now: "Choose Life" Plates and Deceptive Government Speech*, 25 YALE L. & POL'Y REV. 229, 232–34 (2005). Note that Justice Souter specifically recognized the issue as a problem of "mixed speech" in the oral argument, asking "isn't the tough issue here the claim that there is—is in fact a mixture, that it is both Government and private. . . . [H]ow do you think we ought to deal with the mixture issue." Transcript of Oral Argument, *supra* note 14, at 10–11.

169. Corbin, *supra* note 168, at 620 & n.72 (reviewing details of state programs and noting fourteen states with at least one hundred such plates and eight states with at least fifty).

170. *See* Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 967 (9th Cir. 2008) (collecting cases); Choose Life Ill., Inc. v. White, No. 04 C 4316, 2007 WL 178455, at *6 (N.D. Ill. Jan. 19, 2007) ("[T]he specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages. Indeed, no one who sees a specialty license plate imprinted with the phrase 'Choose Life' would doubt that the owner of that vehicle holds a pro-life viewpoint."), *rev'd in part, vacated in part,* No. 07-1349, 2008 WL 4821759, at *9 (7th Cir. Nov. 7, 2008) (writing that the circuit courts' four-part test "can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?"). *Cf.* Wooley v. Maynard, 430 U.S. 705, 713, 715 (1977) (holding that because any message on a license plate is connected with the owner or driver of the vehicle, requiring all residents to display the state's motto on their cars' license plates is unconstitutional compelled speech).

monument donor's act is a one-time event; whatever message is communicated by the monument was the donor's message at the point of conveyance, and may not be today. But the municipality that continues to display the monument, without any modification or added explanation, is "speaking" its message on a long-term, ongoing basis.

4. Municipalities' Ultimate Responsibility

It seems reasonably apparent that municipalities bear "ultimate responsibility" for the content of monuments they display. The Tenth Circuit in *Ogden* recognized this, holding this fourth factor satisfied because "[a]fter the City acquired title to the Monument, . . . presumably the City could have sold, re-gifted, modified, or even destroyed the Monument at will."[171] In the MPEs, the majority of respondents with personal knowledge answered that the municipalities they represent have legal ownership and physical control of the donated monuments.[172]

Even in the absence of clear government ownership, however, the "ultimate responsibility" factor is demonstrated by municipalities' legal responsibility for monuments in their parks. As noted by the Tenth Circuit in *Wells*, where the plaintiff claimed that a government holiday display acknowledging sponsors opened a private-speech forum, "this litigation is itself an indication that the City bears the ultimate responsibility for the content of the display."[173] Regarding donated monuments, anyone who alleges some harm caused to them by a statue in a park, whether physical, emotional, or constitutional, will sue the municipality. It is highly unlikely that anyone would take legal action against the original donor of the statue, even if their contribution is acknowledged by a donor plaque.[174] In sum, all the judicial factors and rationales for applying the government speech paradigm point toward this conclusion: once a city accepts and displays a monument in a public park, it becomes the government's speech.

IV. PROBLEMS WITH PUBLIC FORUM ANALYSIS IN THIS CONTEXT

A. Strict Scrutiny's Inconsistency with Local Expression

The Tenth Circuit took an unusual step, with severe practical consequences, when it held that the municipal display of privately donated monuments in

171. Summum v. City of Ogden, 297 F.3d 995, 1005 (10th Cir. 2002).

172. *See* Appendix (listing responses to question Nos. 9–12).

173. Wells v. City of Denver, 257 F.3d 1132, 1142 (10th Cir. 2001). *See also* Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1094 (8th Cir. 2000) (noting radio station's ultimate responsibility for all broadcasts, including sponsor acknowledgments, because station was subject to legal sanctions for failure to comply with its statutory obligations).

174. *Cf.* LEVINSON, *supra* note 8, at 33 (describing a *New York Times* report that "at least one lawsuit has been filed, in Franklin, Tennessee, seeking not only removal of a statue of a Confederate soldier that towers over the town square but also $44 million in damages").

public parks creates a public forum for such monuments.[175] If a city's display of a single donated monument, from any era, inadvertently transforms a park into a public forum for the installation of private monuments, then the community loses all voice in fashioning its permanent landmarks.

When regulating speech in a public forum, of course, cities may constitutionally employ only content-neutral regulations.[176] Here, that would include safety regulations, such as those used for other types of private structures on the public way, and allocation rules used to distribute public-space resources.[177] For example, there is a limit on the number and location of large-scale public gatherings that are possible at any one time in municipal parks; thus, the Court has approved permit systems that assign such space to permit-applicants on a first-in-time basis.[178]

As a practical matter, application of these public-forum rules here would mean that city governments would be forced to accept and install private monuments on the basis that they are structurally sound. Open public park space is limited and highly prized. Permanent monuments, which require expensive installation, are a unique type of use that is distinguishable from more temporary uses.[179] To require a content-neutral, "first-come, first displayed," private monument policy—or no private monuments at all—risks permanently destroying a valuable, longstanding form of community expression.

That approach leaves municipalities confronted with donations of offensive monuments with little recourse but to purge their parks of donated monuments[180]—a harsh result that should trouble those on both sides of the political spectrum and the Decalogue debate. As noted, Fred Phelps already has proffered scripture-quoting, anti-homosexual monuments to cities within

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175. Summum v. Pleasant Grove City, 483 F.3d 1044, 1050–52 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008) (No. 07-665).

176. *E.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

177. *See, e.g.*, CITY OF CHICAGO, IL., MUN. CODE, § 10-28-750 *et seq.* (newsracks); *id.* § 10-28-800 *et seq.* (advertising benches).

178. Thomas v. Chi. Park Dist., 534 U.S. 316, 318, 325 (2002) (citing CHICAGO PARK DIST. CODE, ch. VII, §§ C.3.a(1), C.5.a.).

179. That governments often spend large amounts of taxpayer funds for the installation process highlights that difference. *See supra* text accompanying note 99 ($40,000 for installation of donated fountain in Lake Geneva, Wisconsin); *supra* note 111 (Richmond, Virginia, appropriated $45,000 for granite plaza for donated Lincoln statue).

For that reason, *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 758, 770 (1995) (holding that denial of Ku Klux Klan's request to place a cross in public square during Christmas season violated First Amendment), provides no traction here. Unattended temporary displays over a period of days or weeks, such as the holiday displays and art festival booths that previously had been allowed there, are more similar to assemblies than to structures, especially in terms of their effect on the public's use of the space.

180. *Cf.* Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 791 & n.1, 817 (1984) (upholding ordinance prohibiting all signs on public property, including light poles where private speakers frequently posted signs).

the Tenth Circuit and, to refuse this spiteful symbol without legal risk, Boise, Idaho, removed its pre-existing Ten Commandments monument.[181] Although that result may seem appropriate to many, on the other side of the cultural divide, donated monuments promoting tolerance and gay rights, such as one displayed in Madison, Wisconsin, are also at risk.[182] Boise also enacted a new policy for monuments, prohibiting those that are "inflammatory or discriminatory."[183] As shown in the next section, that kind of limitation has little chance of success without a Supreme Court holding that donated monuments are government speech.

B. Limited Public Forum Analysis Is Unworkable Here

The more expected option is to categorize a city's display of privately donated monuments as a limited public forum. But a closer look shows that this, too, is a bad alternative. The doctrine provides that where the government invites private speakers to use public property in a manner that is not generally open to the public, the government may set reasonable content limitations, so long as they are viewpoint-neutral.[184] But limited public forum analysis is unworkable here for two reasons. First, any accumulation of privately donated monuments occurs over a long period of time, encompassing numerous administrations and evolving cultural norms. Because monuments are not erected as part of a program, there is no reason to set pre-established content limitations. Second, any potentially appropriate criteria, such as "relates to local history and culture," are subjective, and thus inherently reflect the decision-makers' viewpoints—and that violates the limited public forum test.

To begin, the limited public forum test does not fit a context where years may go by between proposals for a new monument in a town. Consequently, many municipalities do not have a written policy, or even an established practice, regarding the types of donated monuments they accept.[185] The MPEs

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181. *See* Survey Results, *supra* note 76, No. 229 (Boise, Idaho); *supra* note 19 and accompanying text.

182. *See* Survey Results, *supra* note 76, No. 56 (Madison, Wis.); Appendix (listing the Madison monument in the responses to Question No. 16). *Cf.* Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1005, 1016–17 (9th Cir. 2000) (holding that, as one of the original analogous "government speech" cases, a school bulletin board promoting gay and lesbian awareness month was government speech, and therefore teacher had no First Amendment right to post anti-homosexual materials).

183. Survey Results, *supra* note 76, No. 229 (Boise, Idaho).

184. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

This Article uses the term "limited public forum" throughout to mean a context where the *Perry* "reasonable content limitations/no viewpoint discrimination" test applies. There continues to be controversy in the courts about terminology, and whether a "nonpublic forum" is equivalent. *See* Dolan, *supra* note 7, at 77 n.27 (analyzing at length); *see also* Summum v. City of Ogden, 297 F.3d 995, 1002 & n.4 (10th Cir. 2002).

185. In an earlier article I proposed, as one limiting criteria for government speech, that the viewpoint expressed must be consistent with the government's stated program purposes and limitations. *See* Dolan, *supra* note 7, at 114. That proposal does not transfer well to the

showed only a small number of municipalities with such written policies,[186] and most of those appeared to be enacted either to govern programs for regularly occurring memorials, which is a distinguishable context, or in the aftermath of litigation.[187] Under the familiar limited public forum standards, when a court finds no established content limitations within an alleged "limited" public forum, the court applies strict scrutiny.[188] Where municipalities never intended to create a forum for private speech, this is the wrong result.

Second, municipalities rightly want to create a positive, welcoming atmosphere in public parks, and doing so requires the discretion to decline divisive monuments. For example, one municipality in the MPEs, which did have an applicable written policy, set these criteria for monument donations: "[They must] engender respect [and] address a community-wide concern."[189] Applying the limited public forum test, however, courts regularly have rejected attempts to screen out hate groups, advocates of discrimination, public controversy, and sectarian religious practices.[190] Most compelling here are the cases where states have been forced to include the Ku Klux Klan in the Adopt-a-Highway program, in which government signs posted by the side of the road publicly acknowledge the listed organization for its work in keeping that

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somewhat unique, symbolic role of monuments. Part V of this Article provides other limits on government speech that apply to monuments, as well as additional reasons that finding government speech here is consistent with broader First Amendment values.

186. *See* Appendix (listing responses to questions Nos. 5–6, where only 16 out of 117 Applicable Responses had written policies and only 21 asserted "established practices").

Especially where the monuments displayed were initiated by private donors, expecting a written policy does not make sense. Regarding the circumstances of the donation, 71 Responses answered that the municipality had only "private-donor initiated" (PDI) monuments, 6 answered that that the municipality had only monuments where the "private donor responded to municipal request for proposals" (PDR), and 101 gave multiple responses, including monuments that were PDI. (Note that the third choice for this question was "other.") *See* Appendix; *see also* IMLA Brief, *supra* note 9, app. B, at 6a.

187. For example, some municipalities allow individuals to purchase a bench or tree for the park and include a plaque honoring a deceased family member. These programs—differing in kind and scope from the occasional acceptance of a monument—are more likely to be held limited public forums. *Cf.* Tong v. Chicago Park Dist., 316 F. Supp. 2d 645, 647–48 (N.D. Ill. 2004) (holding that fundraiser where donors gave money in exchange for opportunity to inscribe brick for park walkway was a limited public forum, so that impermissible viewpoint discrimination where rejected the religious message: "Jesus is the cornerstone").

188. *See, e.g.*, Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 248, 252, 255 (3d Cir. 1998) (finding advertising space in SEPTA train and bus stations a designated public forum, so that strict scrutiny applied, due to "SEPTA's practice of permitting virtually unlimited access to the forum").

189. *See* Survey Results, *supra* note 76, No. 54 (Kalispell, Mont.). Other examples from the MPEs of standards for donated monuments include: Missoula, Montana (No. 98) ("[A]ll installations [must] be approved for content, political/public acceptability and legality as well as derogatory language or images."); South Portland, Maine (No. 52) ("[S]uitable public purpose related to location and no endorsement of political or religious viewpoints[.]").

190. *See* Dolan, *supra* note 7, at 84–91 (collecting and analyzing cases).

stretch of highway clean.[191] The distinction between approaches is most noticeable when comparing these Adopt-a-Highway cases with the government speech case in *University of Missouri*, where the court allowed the University to refuse to accept, and thus be able to avoid publicly acknowledging, the KKK as a public radio sponsor.[192] In an earlier article, I argued that the difference lies in attribution: under some circumstances, where the context is an "endorsement relationship," so that forced inclusion of the private speaker would alter a government's broad identity message, such acknowledgement may be government speech.[193] The limited public forum doctrine does not provide a shield against monuments that are harmful to a community's spirit or its individual members. In that respect, it offers little improvement over the public forum problem.

Two cases illustrate my position that the government speech paradigm is preferable to limited public forum analysis in the monument context. First, *People for the Ethical Treatment of Animals, Inc. v. Gittens* broke new ground by finding government speech where the government partnered with the private sector to create and display public art.[194] The case involved Washington, D.C.'s temporary sidewalk sculpture display of one hundred donkeys and one hundred elephants, entitled "Party Animals."[195] The city rejected a proposed entry from the People for the Ethical Treatment of Animals

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191. *See, e.g.*, Robb v. Hungerbeeler, 370 F.3d 735, 737–39 (8th Cir. 2004); Cuffley v. Mickes, 208 F.3d 702, 704, 712 (8th Cir. 2000).

192. Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1087, 1095 (8th Cir. 2000). In a 2004 article, I pointed out:

> The most straightforward way of interpreting the *University of Missouri* case is to cite the Eighth Circuit's observation that there is no First Amendment right to have one's money accepted as a contribution to a government enterprise, and thus no corresponding right to make the government publicly thank the individual for that money. That is a facile solution, though, because . . . the Adopt-a-Highway cases could be portrayed the same way, but there was a different outcome. The courts could have said that there is no First Amendment right to be allowed to clean up a public highway, and thus no corresponding right to force the government to acknowledge an organization's work and publicize its name[, but it did not].

Dolan, *supra* note 7, at 123 (footnote omitted). *See also* Norton, *supra* note 140, at 135–41 (analyzing the contrast between the government thanks in the Adopt-a-Highway and the sponsor acknowledgements in *University of Missouri* and *Wells*).

193. Dolan, *supra* note 7, at 121–27. Note that my argument is not based in any claim that the government itself has protectable First Amendment rights. *Id.* at 125. *But see* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1676–77 (2006) (arguing for First Amendment protection of government speech under circumstances where constitutive of the entity's public function and supportive of democratic self-governance).

194. People for the Ethical Treatment of Animals v. Gittens, 414 F.3d 23, 25, 28 (D.C. Cir. 2005). *Cf.* People for the Ethical Treatment of Animals v. Giuliani, 105 F. Supp. 2d 294, 322–23 (S.D.N.Y. 2000), *aff'd*, 18 Fed. App'x 35 (2d Cir. 2001) (earlier case with similar outcome that relied on government speech principles, while purportedly applying limited public forum doctrine).

195. *Gittens*, 414 F.3d at 25.

(PETA), "a sad, shackled circus elephant," on the grounds that its portrayal of cruelty did not meet the stated criterion that the sculptures be "festive and whimsical."[196] The rejected entry featured a crying, shackled elephant with a sign tacked to its side that read: "The Circus is coming. See SHACKLES—BULL HOOKS—LONELINESS. All under the 'Big Top.'"[197] PETA had argued, and the district court agreed, that because the city had accepted other sculptures that were not festive, including tributes to 9/11 heroes and civil rights leaders, its rejection was viewpoint discrimination.[198] The appellate court held instead that the sculptures displayed were government speech, within the *Forbes–Finley* model, because the municipal decision-makers retained the right to approve designs and to reject any entries they considered inappropriate.[199]

Gittens demonstrates well the need for government discretion in public expressive projects that involve private speech. One can imagine the project organizers' concern that PETA's entry could negatively affect the tone of the entire public-art display, half of which consisted of elephant sculptures. Historical tributes, by contrast, could be judged as likely to have an inspiring, and more limited, effect. No specific, objective, pre-established content limitation can provide for that type of good-faith line-drawing.

The second case, *Putnam Pit, Inc. v. City of Cookeville*, also held for the municipality,[200] but only did so by stretching limited-public-forum analysis to its breaking point. *Putnam II* is unique in that it is the only published case involving a municipal website with hyperlinks to private web pages.[201] There, a non-resident, Mr. Davidian, became obsessed with an unsolved murder in Cookeville and started a website describing the city's alleged corruption.[202] After denying Davidian's request to add his website to the city's "local links" web page, the city adopted a policy that hyperlinks must not only relate to city services, attractions, and officials, but also must promote the city's tourism and economic welfare.[203] Davidian then added a tourism page to his web page,

196. *Id.* at 26.

197. *Id.* (internal quotation marks omitted).

198. *Id.* at 27.

199. *Id.* at 29–30.

200. Putnam Pit, Inc. v. City of Cookeville (*Putnam II*), 76 F. App'x 607, 609 (6th Cir. 2003).

201. *See id.* at 610. To date, the only similar case is *Page v. Lexington County School District One*, 531 F.3d 275 (4th Cir. 2008) (holding, in a case where a school district's web page stated its opposition to a pending "school choice" bill, and hyperlinked to the websites of two organizations also fighting the legislation, the state school board association and a private organization formed to oppose the bill, that those hyperlinks were the school district's government speech).

202. *Putnam II*, 76 F. App'x at 610.

203. *Id.* at 611.

which included information about health department restaurant investigations, and also claimed that his scrutiny of the city was in its long-term welfare.[204]

In *Putnam I*, the Sixth Circuit reversed the district court's summary judgment in favor of the city on the hyperlink claim, because the discretionary standard and its application suggested viewpoint discrimination, which violates the limited public forum test.[205] In *Putnam II*, however, the court upheld the jury's finding that, because Davidian's website was critical of the city and its officials, it was outside the content limitation of "promoting" the city; thus, they did not reach the issue of viewpoint discrimination.[206] Categorizing speech that promotes a government as a "content limitation"—and saying that excluding speech that criticizes that government is not "viewpoint discrimination"—turns these concepts inside out. The essential point of prohibiting "viewpoint discrimination" is to ban government from excluding from a speech venue those speakers who are critical of the administration. The *Putnam* approach is an inadequate resolution of the doctrinal dilemmas in public–private expressive partnerships.

It must be the case that there are some contexts, perhaps especially in the selection of monuments, where government is allowed to engage in community-building, promotional expression. The limited public forum paradigm cannot accommodate this goal. When a city does provide a content limitation, such as "monuments that are limited to local history," often the unstated modifier is "history that reflects well on the town and makes citizens proud and united." To approve that content limitation would gut the constitutional purpose of the viewpoint discrimination ban. To commemorate a favorable version of history, at least where government partners with any private persons, requires courts to use the lens of the government-speech doctrine.

To illustrate, one Missouri town explained in the MPEs that it "rejected [a] plaque to commemorate illegal hangings by [a] mob of three black men in [the] early nineteen hundreds in the public square," on the grounds that the "language was inciting and not necessarily accurate."[207] At the same time, the town allowed a plaque regarding the "first recorded gunfight west of [the] Mississippi," involving "Wild Bill Hickock."[208] This line-drawing, of course, can be characterized as viewpoint discrimination. Yet one plaque evokes a colorful past that may stimulate tourism because vacationing families enjoy play-acting, and the other is a permanent reminder of a painful chapter in history, which may increase racial division among today's citizens. Concluding that this decision is government speech does not undermine the

204. *Id.* at 611, 613.

205. Putnam Pit, Inc. v. City of Cookeville (*Putnam I*), 221 F.3d 834, 845–46 (6th Cir. 2000).

206. *Putnam II*, 76 F. App'x at 614.

207. Survey Results, *supra* note 76, No. 30.

208. *Id.*

rights of private speakers to broadcast this aspect of the town's history, nor is it inconsistent with the town itself deciding to publicize the incident in an educational or museum venue. Only the government speech doctrine fosters the valid municipal function of shaping public parks as welcoming spaces. The next Part explains why allowing this application of government speech enhances, rather than limits, private speech on monument topics.

V. THE BENEFITS OF RECOGNIZING MONUMENT DISPLAY AS GOVERNMENT SPEECH

For good reason, from the beginning scholars have been critical of the government speech approach as it has evolved in Supreme Court opinions.[209] The two leading cases on the expression of particular government policies through private speakers implicated the main concerns: (1) the risk of government control of or interference with the private speech market,[210] and (2) political accountability for its role.[211] *Rust v. Sullivan* involved a "gag rule" on family planning providers; the case upheld a law limiting federal funding to those clinics where medical personnel agreed not to discuss the abortion option with their patients.[212] In *Johanns v. Livestock Marketing Ass'n*, beef producers lost a compelled-speech case, even though they were taxed to pay for television advertisements which, in turn, proclaimed to the public that the ads were paid for by "America's Beef Producers."[213] And the Court's speech selection cases, especially *United States v. American Library Ass'n*,[214] raised concerns of government censorship.[215]

In contrast, municipal acceptance and display of donated monuments raises fewer, if any, of these concerns. As shown in Part III, citizens recognize and respond to the messages conveyed by donated park monuments as government speech. Part V shows that recognizing government speech in this context does not diminish, and sometimes even enhances, the private-speech market. Finally, there is an additional benefit: constitutional and political limits suggest

209. *See infra* notes 212–13.

210. *See* Rust v. Sullivan, 500 U.S. 173, 199–200 (1990).

211. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563–64 (2005).

212. *Rust*, 500 U.S. at 177–80. *Rust* sparked "sharply critical academic commentary." Robert C. Post, Essay, *Subsidized Speech*, 106 YALE L.J. 151, 168 & n.103 (1996) (collecting articles).

213. *Johanns*, 544 U.S. at 553–55, 566–67. *See also* Seana Shiffrin, *Compelled Association, Morality, and Market Dynamics*, 41 LOY. L.A. L. REV. 317, 321 & n.26 (2007) (collecting criticism of *Johanns*).

214. 539 U.S. 194, 198–201 (2003) (upholding as government speech a federal-funding condition requiring public libraries to use Internet-pornography filtering device, although filter is both over- and under-inclusive).

215. *Id.* at 234–35 (Souter, J., dissenting). *See also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998) (regarding applications for federal arts funding screened for indecency and "American values").

that, as applied to monuments, government speech is likely to be more inclusive and respectful of citizens than its wholly private counterpart.

A. Counter-Speech Options In Public Parks

The location of the challenged monument in Pleasant Grove actually cuts in favor of finding government speech. Precisely because it is situated in a public forum, there is ample opportunity for speech activities, including counter-speech. In city parks, there is no reason for concern that a relatively small amount of government speech, in the form of monuments of various pedigrees, will crowd out or dominate the on-site private speech.[216]

The MPEs demonstrate this point and more, for municipal park locations across the country. As it turns out, in some instances, the very existence of the donated monument has a positive impact on private speech: it serves as a focal point for protests and rallies. For example, in Kalispell, Montana, a private-donor group recently sought and obtained the city council's permission to place "a large bronze statue depicting an American soldier kneeling" in the city's "most highly visible park."[217] The respondent stated: "Since the monument was installed, the area has been used for rallies both for and against the war in Iraq."[218] Similarly, in Boise, Idaho, there are frequently human rights and other rallies around the Anne Frank Memorial.[219] In fact, numerous respondents with personal knowledge stated that they were aware of speech activities related to their city's privately donated monument occurring around that monument.[220]

The Summums, too, retain the opportunity to spread their message in Pleasant Grove's parks through traditional public-forum speech activities, such as organized gatherings and literature distribution. The disputed Ten Commandments monument may also serve as a stimulus for counter-speech. In the recent challenge to public library Internet pornography filters, Justices Kennedy and Breyer both based their concurrences on the rationale that because adults can ask libraries to turn off the filter, their speech rights are

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216. *Cf.* Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2588–90 (2007) (asserting that in various contexts, such as protesting at political party conventions and in the presence of the president, the regulation of "place" under the guise of security concerns is increasingly rendering dissent invisible).

217. Survey Results, *supra* note 76, No. 54 (Kalispell, Mont.).

218. *Id.*

219. *Id.* No. 67 (Boise, Idaho).

220. *See* Appendix. Of the 117 Applicable Responses, 32 answered "yes" to the following question: "Are you aware of any instances where members of the public engaged in any of the above-described speech-related activities in the area(s) adjacent to the monument(s) where the content of the speech was in some manner *related to the monument(s)* or its implied or stated message(s)?"

minimally impaired.[221] Similarly, First Amendment values do not require mandating that Pleasant Grove City relieve the Summums of the effort of conveying their religious message by traditional public-forum methods, and instead allow them to leave a permanent stone text at the park location.

B. Constitutional and Political Limits

The government speech paradigm suits the permanent monument context because the government is less free than private persons to speak in ways that divide communities and insult citizens. Although some scholars have argued for hate-speech restrictions on private expression,[222] for the most part the pride of the First Amendment is its protection of even the most offensive speech.[223] Allowing "uninhibited, robust, and wide-open" speech is considered valuable because it protects both the central value of autonomy and the free exchange of ideas and information necessary for democratic self-governance.[224] Thus, under the strict scrutiny used by the Tenth Circuit, and also under the limited public forum alternative, Fred Phelps may display his statue quoting scripture and condemning Matthew Shepard.[225] But most governments would not do so, and there is some constitutional support for the position that government could not do so.

1. The Establishment Clause

The Establishment Clause[226] provides the clearest constitutional constraint on government speech. There is some irony in referring to that protection here, of course, but the Establishment Clause is not an issue before the Court, nor has it been part of the litigation.[227] Instead, the Ten Commandments

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221. United States v. Am. Library Ass'n, Inc., 593 U.S. 194, 214–15 (2003) (Kennedy, J., concurring in the judgment); *id.* at 219 (Breyer, J., concurring in the judgment). The plurality relied on the government speech rationale to uphold the federal filtering requirement. *See id.* at 211–14 & n.7 (opinion of Rehnquist, C.J.) (plurality opinion).

222. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 437; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321 (1989).

223. *E.g.*, Collin v. Smith, 578 F.2d 1197, 1198–99 (7th Cir. 1978) (upholding right of Nazis to march in then-primarily Jewish suburb of Skokie, Illinois).

224. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 925–30 (3d ed. 2006) (reviewing the four main theories underlying First Amendment freedom of expression as self-governance, truth, autonomy, and tolerance). For a recent overview of the theoretical underpinnings of the First Amendment speech clause jurisprudence, see Crocker, *supra* note 216, at 2592–96, 2602–08.

225. *See supra* note 18 and accompanying text.

226. U.S. CONST. amend. I.

227. Summum v. Pleasant Grove City, 483 F.3d 1044, 1047, 1048 n.3 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008) (No. 07-665). Summum's complaint alleged violations of the U.S. Constitution's Free Speech Clause and the Utah Constitution's free expression and establishment provisions. *Id.* at 1047. The Tenth Circuit held that Summum waived its Utah Constitution claims because they were not argued on appeal. *Id.* at 1048 n.3.

monument in Pleasant Grove City appears to share a physical and historical context quite similar to the one upheld in *Van Orden v. Perry*.[228]

The critical next question is whether express recognition of the monument as government speech creates an additional analytical step, or is simply consistent with the Supreme Court's reference to the "Texas display" in *Van Orden*.[229] Even if *Van Orden* implies as much,[230] an express holding that a government

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Despite this fact, and despite the petitioner's counsel's consistent efforts to focus only on the issues presented, the Ten Commandments monument was unavoidable at oral argument, from the opening question, (Chief Justice Roberts: "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," Transcript of Oral Argument, *supra* note 14, at 4), through the last question (Justice Souter: "The Government isn't disclaiming [the Ten Commandments monument]. [Y]ou want this clear statement. . . . [I]t would also be the poison pill in the Establishment Clause. . . . [T]hat's okay with me. . . . I was a Van Orden dissenter," *id.* at 63). The issue before the Court, of course, is not whether the Ten Commandments must come down, but whether the Free Speech Clause supports a court ordering the city to erect the Summum's monument.

228. *See* Van Orden v. Perry, 545 U.S. 677, 681–82, 692 (2005). Both are one monument among many in an outdoor park, existing without controversy for thirty-plus years, and both were originally obtained from the Eagles as part of their nationwide campaign against juvenile delinquency. *Compare Pleasant Grove*, 483 F.3d at 1046 (monument in park since donated by Eagles in 1971), *with Van Orden*, 545 U.S. at 701–03 (Breyer, J., concurring in the judgment) (monument sat unchallenged on Texas state grounds for forty years). Indeed, some facts in *Pleasant Grove* are more favorable: Pioneer Park is not part of City Hall grounds (as compared with the Texas State Capitol grounds), and Pleasant Grove arguably has a stronger historical argument because the park as a whole commemorates the Mormon pioneer era of the city's heritage. Pleasant Grove was one of the original Mormon pioneer towns in Utah, founded by a group sent forth in 1850 by Brigham Young, leader of the original 1847 Mormon settlement in Salt Lake City. *See* Pleasant Grove History, http://plgrove.org/index.php?option=com_content &task=view&id=2&Itemid=23 (last visited Oct. 30, 2008); Salt Lake City History, http://www.utah.com/cities/slc_history.htm (last visited Oct. 30, 2008). According to Mormon doctrine, the Book of Mormon is translated from Golden Plates that founder Joseph Smith received from a visitation by an angel called Moroni in 1827. *See* Moroni: Messenger of the Restoration, http://josephsmith.net/josephsmith/v/index.jsp?vgnextoid=91fa0fbab57f0010Vgn VCM1000001f5e340aRCRD (last visited Oct. 30, 2008).

For a few of the many law review articles interpreting *Van Orden* and *McCreary*, see, for example, Vincent Muñoz, *Thou Shalt Not Post the Ten Commandments?* McCreary, Van Orden, *and the Future of Religious Display Cases*, 10 TEX. REV. L. & POL. 357 (2006), and Douglas G. Smith, *The Constitutionality of Religious Symbolism After* McCreary *and* Van Orden, 12 TEX. REV. L. & POL. 93 (2007). *See also* Card v. City of Everett, 520 F.3d 1009, 1010–11, 1021 (9th Cir. 2008) (applying *Van Orden*, and holding that city's display of Eagles-donated Ten Commandments monument on grounds of the Old City Hall, along with three war memorials, did not violate Establishment Clause).

229. *See Van Orden*, 545 U.S. at 705 (Breyer, J., concurring in the judgment) (referring to "the Texas display [as] serving a mixed but primarily nonreligious purpose").

230. *See* Brief for Petitioners, *supra* note 2, at 8; CHEMERINSKY, *supra* note 224, at 1225. By contrast, the Tenth Circuit disagreed, instead concluding by saying that finding that the Texas monument did not violate the Establishment Clause is not necessarily equivalent to finding government speech, because under *Capital Square v. Pinnette*, a display on public property may

can choose the Ten Commandments as its own message still would have strong symbolic impact. The incremental approach already has performed substantial work to change public perception of, and government policies regarding, the boundaries between church and state.[231]

The symbolism of an explicit holding that a city's display of the Ten Commandments is government speech carries some real risk of directly advancing Justice Scalia's stated view that the government is free to promote biblical monotheism without implicating the Establishment Clause.[232] Given that the import of the "government-speech" label is that government can control the content and express its preferred message, applying it to religious speech presents a constitutional conundrum. The doctrinal contradictions are evident in a recent series of cases that categorize legislative prayer, which has been justified by its unique history, under the expanding doctrine of government speech.[233] Pleasant Grove's decision can be defended while still

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violate the endorsement test based on appearances, even where the speech is in fact private. *Summum*, 483 F.3d at 1047 n.2 (citing Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 774 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (controlling opinion)).

231. The incremental approach is demonstrated by the success of Jay Sekulow, counsel for Petitioner Pleasant Grove, who has used the Free Speech Clause to break down earlier strict separationist church–state principles to increase religious-use access in the limited public forum context. The less controversial, generally approved opening of public-building doors to religious viewpoints on social topics originated in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). *Lamb's Chapel* led the way to the more troubling after-school religious instruction and prayer in elementary schools in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), and then to lower court decisions requiring local government to provide space for some worship services, as in *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001), albeit not yet weekly services, as shown by *Bronx Household of Faith v. Board of Education*, 492 F.3d 89 (2d Cir. 2007).

Another context where incremental legal changes have worked a powerful transformation of public opinion and policy—one I welcome—is the expanding recognition of gay rights. *See, e.g.*, Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is* Lewis v. Harris *a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291, 297–308 (2007) (summarizing history of rights won over the course of decades and the public's expanding familiarity with, and acceptance of, gay families).

232. *See supra* notes 3–4.

233. Nonsectarian legislative prayer was upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983), based on its unique, longstanding practice dating back to the First Congress. *Id.* at 790. Recently, courts evaluating Free Speech and Free Exercise Clause challenges to legislative prayer practices have borrowed from the new government speech cases to reject the claims of private speakers. *See, e.g.*, Turner v. City Council Fredericksburg, 534 F.3d 352, 354–55 (4th Cir. 2008) (O'Connor, J.) (applying four-part government speech test used by Fourth Circuit in specialty license plate cases and upholding city's nonsectarian prayer policy against claim that it violated speaker's right to name Jesus). More disconcerting was a use of the doctrine to justify government preference among religions. *See* Simpson v. Chesterfield County, 404 F.3d 276, 279–80, 288 (4th Cir. 2005) (quoting Simpson v. Chesterfield County Bd. of Supervisors, 292 F. Supp. 2d 805, 819 (E.D. Va. 2003) (quoting Rosenberger v. Rector, 515 U.S. 819, 833 (1995))) (rejecting excluded Wiccan's free speech and free exercise complaints re monotheistic prayer

retaining a robust view of the Establishment Clause's neutrality mandate only by emphasizing the secular portion of the mixed secular–sectarian message of such monuments, which courts allowing such displays routinely have done.[234]

This Article's analysis, however, suggests two potential arguments for why Pleasant Grove City's Ten Commandments monument may violate the Establishment Clause. First, in *Van Orden* itself and in most other Ten Commandments cases (excluding those litigated by Summum), the plaintiff was an offended observer, rather than a rejected counter speaker.[235] By contrast, Pleasant Grove's continued display of the Ten Commandments—in juxtaposition with its refusal to display the monument offered by a small religion—arguably sends a message of exclusion. These circumstances, taken as a whole, could be construed as broadly conveying the message: "This City stands for traditional Judeo-Christian religion; it does not identify with or support outsider 'fringe' religions." The very pursuit of extended litigation to secure the right to continue displaying the Ten Commandments underscores the strength of this subtext. Of course, to accept this argument would mean that all government displays of Ten Commandments monuments or other religious statues could be held hostage by any group claiming to be a religion

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policy because legislative prayer is government speech, so that government is free to enlist private speakers to convey its preferred content).

The use of the term "government speech" in Establishment Clause challenges generally leads to a different result; thus, considering all uses of those words as one uniform doctrine is problematic. Taking into account that private speech and government speech endorsing religion are distinguishable, holding that ostensibly private speech should be deemed the government's own speech *for purposes of* Establishment Clause analysis follows from cases like *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302 (2000), and not from *Johanns* or *Finley*. *See* Hinrichs v. Bosma, 400 F. Supp. 2d 1103, 1131 (S.D. Ind. 2005) (finding legislative prayer by invited clergy government speech, and holding that allowing sectarian references, where vast majority of speakers were Christian, violated Establishment Clause), *rev'd on standing grounds sub nom.* Hinrich v. Speaker of House of Representatives of Ind. Gen. Assembly, 506 F.3d 584 (7th Cir. 2007). For a summary of the existing case law, see Robert Luther III & David B. Caddell, *Breaking Away From the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands a "Practice Focused" Analysis*, 48 SANTA CLARA L. REV. 569, 571–73, (2008) (arguing that *Marsh* does not require restriction on sectarian references, and looking instead to neutral selection procedures for, and broad community representation in, legislative prayer speakers). My own extensive analysis of these factually wide-ranging cases is beyond the scope of this Article; ultimately, I conclude that because legislative prayer is considered *sui generis*, conditions placed upon it are best explained by reference to *Marsh*, and that borrowing reasoning from *Johanns* or *Finley* further weakens the Establishment Clause.

234. Ironically, that was the argument put forth by Justice Scalia at oral argument. He asserted that just as a city might erect a statue of George Washington to convey the message that he is "worthy of respect" by the citizens, without endorsing everything Washington ever said, so too can a city display a Ten Commandments monument for the limited message that it is "worthy of respect." Transcript of Oral Argument, *supra* note 14, at 55–56.

235. *See* Jay A. Sekulow & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 35–41 (2005) (summarizing Ten Commandments cases over the decade preceding *Van Orden*).

and seeking to install a monument, thus undermining the value of the government speech label sought here. This dilemma, however, is the predictable, politically divisive outcome that Establishment Clause jurisprudence has sought to avoid.[236] On the other hand, Pleasant Grove City's situation does not present the worst-case scenario.[237] The rejected speaker has no connection to the local community, so that the monument decision does not exclude the views of any local residents who belong to a religious minority group.[238] Even so, this line of reasoning supports the conclusion that, once donated monuments are declared "government speech," display of a donated monument expressing a religious message violates the Establishment Clause. At a minimum, this must be true under circumstances, not present here, that communicate governmental preference for some religious expressions over others.

The second reason involves recalling one of the arguments for why donated monuments are government speech: although the messages conveyed by monuments may change over time as the culture changes, municipalities retain an ongoing right of editorial control. Monuments to "defeating the savages" become the wrong message, with a corresponding need for explanation or modification.[239] It seems plausible that in 1971, the message conveyed by accepting and displaying the Eagles' Ten Commandments did not violate the Establishment Clause, at least as currently construed. For example, decision-makers and observers alike may have understood its meaning as: "Here are the rules of law by which we all strive to abide; if people are reminded of these rules, then they will be inspired to obey the civil and criminal laws, benefiting all." Now, however, the Decalogue has been one of the flash-points of the "culture wars" for decades.[240] Today, expending years of effort litigating to

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236. *See* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1681–1708, 1722–23 (2006) (explaining history of politically divisive rationale for Establishment Clause decisions, though rejecting that argument as unsound). *See also* Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1272–73 (2008) (arguing in support of government's ability to exclude religion from public programs in order to avoid emphasizing harmful divisions among citizens).

237. *Cf.* Colby, *supra* note 4, at 1098–99 (posing compelling hypotheticals of municipal displays of monuments that offend local families, for example, a Ten Commandments monument offending local Hindu families, and a university town's statue proclaiming "There is No God," offending local Catholic families).

238. *See* Summum v. Pleasant Grove City, 483 F.3d 1044, 1047 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008) (No. 07-665). Here, Pleasant Grove sought to limit its permanent displays to those relating to its history or donated by groups with long-standing ties. *Id.* The latter criterion can be defended on the grounds that community members will both understand the local culture and values and also be less likely to seek to offend. The Summums had no ties to Pleasant Grove, so this is not a case of a resident minority religious group suffering from government discrimination.

239. *See supra* notes 160–62.

240. *See* Sekulow & Manion, *supra* note 235, at 34 n.10 (compiling long list of cases challenging Ten Commandments displays during the years 1997–2005).

keep the monument arguably sends a different message: "We're the majority religion and we have the right to display our symbols, regardless of how outsiders perceive them." Thus, a finding of government speech in *Pleasant Grove City v. Summum*—which would indicate judicial acknowledgment of the city's control over the content of the donated monuments it displays—could lead to a subsequent Establishment Clause outcome contrary to the holding in *Van Orden*.[241]

2. Other Potential Limits

Government speech also may be limited by a newer legal argument, that municipalities are constitutionally prohibited from accepting and displaying "hate speech" monuments. Two landmark cases have recognized that it is not a legitimate government function to act based solely on animus toward a disfavored group. In *Lawrence v. Texas*, the Court held unconstitutional a state statute criminalizing sodomy only between persons of the same sex,[242] and in *Romer v. Evans*, it struck down a Colorado constitutional amendment that "prohibit[ed] all legislative, executive or judicial action . . . designed to protect" homosexuals from discrimination.[243]

Granted, as compared with the psychic pain of harmful symbolic speech, these cases involved more concrete and extreme burdens on disfavored groups—including imprisonment and exclusion from legal protections, respectively. Nonetheless, their rationale provides a starting point to circumscribe similarly motivated government speech. Recently, Steven Goldberg hypothesized that if a municipality displayed a private organization's plaque condemning homosexuals on a courthouse wall, based on *Lawrence* and *Romer*, such action could be held unconstitutional.[244]

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241. Whether this type of analysis remains viable in the newly constituted Supreme Court, of course, is questionable. *See* Smith, *supra* note 228, at 94–95 (positing that the new Court may well reject the endorsement test); *see also* County of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 677 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (objecting to "the very nature of the endorsement test, with its emphasis on the feelings of the objective observer"). Note that Justice Breyer's controlling concurrence in *Van Orden* used the endorsement test in fact, but not in name, instead terming the analysis "legal judgment." Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment).

242. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

243. Romer v. Evans, 517 U.S. 620, 624 (1996).

244. Steven Goldberg, *Beyond Coercion: Justice Kennedy's Aversion to Animus*, 8 U. PA. J. CONST. L. 801, 806–07 (2006); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEX. L. REV. 1273, 1282 (2007) (reading *Romer* and *Lawrence* as "support[ing] the conclusion that the gratuitous disparagement of homosexuals is unconstitutional").

Justice Stevens posed a similar hypothetical at oral argument, after hearing the Deputy Solicitor General's argument that government speech entitles the government to display the Vietnam Veterans Memorial without risking a requirement to display a Viet Cong memorial, Transcript of Oral Argument, *supra* note 14, at 22, he asked, "supposing the Government in the Vietnam Memorial decided not to put up the names of any homosexual soldiers. Would that be

A related parameter would prohibit racist government speech. James Forman has best developed this idea in the context of the Confederate flag cases, grounding it in both the Fourteenth Amendment Equal Protection Clause and a First Amendment chilling effect argument,[245] but the approach has not yet been relied on in case law. Much has been written on the multiple meanings symbolized by Confederate symbols, including monuments.[246] It may take a case of race-based government speech without that particular history before this limit on the emerging doctrine is adopted by the judiciary. As well, it may be that any restriction on allegedly racist government speech is necessarily folded into the broader category of speech that is based solely on animus toward a disfavored group, and thus outside government's legitimate function. This is because some defensible core political speech would be construed by some as racist—the easiest example is a government administration's speech criticizing affirmative action programs, which is one side of an ongoing political debate. Monuments, though, have a necessarily limited role in furthering complex political debates because they "speak" in broad strokes, rather than expressing sophisticated policy arguments or providing critical data. Thus, it may be that this proposed limit on racist government speech can be applied in the monument-decision context.

These potential constitutional restraints on discriminatory government speech mirror an important policy reason for extending the doctrine to municipalities' display of privately donated monuments.[247] In most, if not all, cases, governments are motivated, at least by political accountability, to permit installation of public monuments only where they are respectful of all citizens, at least as understood by the cultural standards of the day. Holding that acceptance of any donated park monument automatically creates a public

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permissible?" *Id.* at 23. Counsel responded "yes," then qualified: "as a matter of the Free Speech Clause, there are no limits. . . . Under the Equal Protection Clause, the Establishment Clause, perhaps the Due Process Clause, there might be thought to be independent checks on the Government's speech." *Id.* at 25.

245. James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 505–06 (1991) (making the case that racist government speech violates the First and Fourteenth Amendments and arguing that *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990), which rejected a claim that display of the Confederate flag on Alabama's state capitol was unconstitutional, was wrong). *See also* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 37 (2000) (proposing a ban on racist speech as one clear limit on government speech).

246. *E.g.*, John M. Coski, *The Confederate Battle Flag in Historical Perspective*, *in* CONFEDERATE SYMBOLS IN THE CONTEMPORARY SOUTH, *supra* note 115, at 118 ("Even if historical analysis and argument conclude—as this essay has—that the flag's white supremacist overtones are inherent and continuing . . . [t]he nonracist meanings that people attach to the flag [honoring Confederate soldiers and symbolizing Southern heritage] are real and deserve respect. [At the same time,] it is naïve and logically indefensible [for them to not appreciate that others see it as a racist symbol.]").

247. Note that this Part does not discuss all potential limits for the new doctrine of government speech that have been proposed by scholars; rather, it only discusses several that have particular import for the monument context.

forum would remove all municipal discretion to create beautiful, welcoming public green space in America's cities.

VI. CONCLUSION

"The government-speech doctrine is a relatively new and correspondingly imprecise" development in First Amendment jurisprudence.[248] Thus far, its emerging reputation has been tainted by uses that fall outside the scope of the limits proposed by commentators. Moreover, the Supreme Court cases to date have involved federal funding programs and controversial social issues; thus, the doctrine has become politicized.

Pleasant Grove City v. Summum does little to mitigate that impression. As addressed at the beginning of this Article, it presents the classic hard case. Even those in favor of government religious displays may cringe slightly at the posture of the case; while not the city's intent, it creates the appearance of dividing potential donors into sheep and goats.[249]

Careful consideration of the specific context, however, along with the broad set of detailed, practical examples from the MPEs, show the universal appeal of repudiating the Tenth Circuit's "public forum–strict scrutiny" approach to donated monuments in parks. The government speech doctrine is still developing and its broader implications should continue to be analyzed thoroughly. Even so, *Pleasant Grove City v. Summum* presents the next logical step for recognition of the government speech doctrine, and for express acknowledgment that forum analysis is not fully equipped to address the expanding world of expressive public–private partnerships.

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

249. *See* Matthew 25:32–33 (King James) ("And before him shall be gathered all nations, and he shall separate them one from another, as a shepherd divides his sheep from the goats.").

APPENDIX

IMLA QUESTIONNAIRE SUMMARY (OF THE 117 APPLICABLE RESPONSES)

Background Questions:

- *Respondent Identified Municipality and Gave Contact Information (Question #1):*

  Identified: 104

  Unknown: 13

- *Type of Monument (Question #2)*

  Memorial: 76

  Other Historical: 55

  Local: 22

  Cultural: 28

  Public Art: 65

  Any Religious Aspect: 14

  Other: 8

  (NOTE: many respondents checked several)

- *Circumstances of Donation (Question #3a):*

  Private Donor Initiated (PDI): 71

  Multiple Responses Including PDI: 101

  Private Donor Responded (PDR) to Municipality's Request (PDR only): 6

  Other: 7 (Other responses clarify that municipalities have privately donated monument(s))

  NR: 1 (same)

  (NOTE: many respondents checked several)

  (NOTE: NR = "no response"—question left blank)

Questions re: Municipal Content Control

- *Monument Accepted or Rejected (Question #3b):*

  Accepted monument(s): 102

  Rejected monument: 3 (1—rejected due to religious nature; 2—gave no reason)

  Accepted some & rejected others: 10 (1—based on neighbor's objection; 2—based on location; 4—no reason given; 3—rejected based on content: commemoration of lynching "inciting and not

necessarily accurate"; anti-homosexual monument "discriminatory"; monument to deceased children "too religious").

NR: 2

- *Municipal Decision Makers (Question #4)*

Requires Legislative Action: 93

Public or Cultural Department Personnel: 29

Public–Private Committee: 22

Requires Executive Action: 39

Other: 17

(NOTE: many respondents checked several)

- *Content-Related Criteria (Questions ##5-6):*

Responded that municipality uses content-related criteria: 57

Written Policy: 16

Established Practice: 21

Other: 20

Responded that municipality does not use content-related criteria: 41

(NOTE: Appendix D to the IMLA Amicus brief compiled the relevant responses for 112 municipalities, listed by municipality, and showed that content control displayed through answers to other questions)

Don't Know: 16

NR: 3

- *Control over the Message, Wording or Appearance (Questions ##7–8)*

Responded that municipality exercises control over the message, wording or appearance: 65

Design Input: 43

Prior Submission: 34

Modification of Words: 8

(NOTE: some respondents checked several)

Responded that municipality does not exercise control over message etc.: 38

(NOTE: Appendix D to the IMLA Amicus brief compiled the relevant responses for 112 municipalities, listed by municipality, and showed that content control displayed through answers to other questions)

Don't Know: 11

NR: 3

NOTE: The following are examples where municipalities responded that they did not control content based on the methods listed in

Questions ##5–8, but where content control was demonstrated by requiring legislative acceptance of specifically described monuments:

> Bozeman, Montana (#73) (Ten Commandments monument); Cibolo, Texas (#138) (statue of former city manager); Concord, North Carolina (#20) (Peace Pole donation); Delaware, Ohio (#209) (monument to police killed in the line of duty); Eagle, Idaho (#204) (Angel Monument to children who have died); Fargo, North Dakota (#234) (Ten Commandments monument); Fayetteville, Arkansas (#211) (peace fountain); Gallup, New Mexico (#165) (Bataan Death March); Kettering, Ohio (#185) (monument to lives lost on 9/11); Provo, Utah (#225) (Ten Commandments monument and war memorials); Rockford, Illinois (#44) ("Millennium Fountain"); San Antonio, Texas (#129) (statues of famous Texans); Sheboygan, Wisconsin (#28) (Hmong-American Vietnam War Memorial); Spanish Fork, Utah (#188) (monument to Fathers Dominguez and Escalante/ monument to City's Icelandic population); Swartz Creek, Michigan (#148) (war memorial); Warner Robins, Georgia (#133) (historical displays); (#10) (statue of John A. Roebling).

Questions re: Municipality's Physical Control over Structures

- *Municipal Ownership of Monument (Questions ##9–10):*

  Municipality owns monument(s): 69

  Municipality owns some, but not all, monuments(s): 22

  Municipality does not own monument(s): 6

  NR: 15

  Don't know: 5

- *Municipality Controls Monument (Question #11):*

  Right to control monument(s) (e.g., move/remove/dispose): 68

  Don't know: 3

  NR: 46

  (NOTE: based on the wording of Question #11, "NR" may, but does not necessarily, mean municipality does not have right to control monument(s))

- *Municipality Maintains Monument (Question #12)*

  Yes: 76

No: 15
Don't know: 12
NR: 14

Questions re: Private Speech Related to Donated Monuments

■ *Speech Activities Permitted Around the Monument (Questions ## 13–14)*

Allowed: 102
Aware of such activities taking place: 69
Not Allowed: 3
NR: 12

■ *Speech Related to Monument & Occurring Around the Monument (Question #15)*

Aware of such monument-related speech activities around monument: 32
Not aware of such activities: 67
Don't Know: 1
NR: 17

■ *Public Opposition to the Existence or Location of Monument (Question #16):*

Opposition to the monument: 24
(Please see summary of Question #3b for following four where monuments rejected: #26, #28, #30, #67)
Newton, Kansas (#13) (opposition to cost); Moorhead, Minnesota (#32) (person complained re wording on monument; city met with person and worked out a compromise); Madison, Wisconsin (#56) (opposition to monument re gay rights—city proceeded); Eau Claire, Wisconsin (#59) (ACLU questioned monument with religious connotation); Idaho Falls, Idaho (#63) (one letter questioning Ten Commandments monument); Bozeman, Montana (#73) (no details); Portland, Oregon (#86) (location); Longview, Washington (#92) (monument questioned re accuracy); Arlington, Texas (#93) (area churches requested removal of Stonehenge monument); Missoula, Montana (#98) (veterans group opposed a police monument close to the veterans monument); Marana, Arizona (#102) (opposition to unprofessional appearance of public art); Unidentified (#142) (lawsuits re cross monument); Yuma, Arizona (#166) (complaint re Ten Commandments monument); Charlottesville, Virginia (#174) (concerns that interactive First Amendment monument could encourage vulgarity or inflammatory messages); Troy, Michigan (#199) (location); Eagle, Idaho (#204) (location); Carlsbad,

California (#205) (city sued over public artwork display); Ogden, Utah (#221) (lawsuit re Ten Commandments monument); Pendleton, Oregon (#227) (complaints re proposed monument, proceeded); Tucson, Arizona (##232/235/237) (Pancho Villa monument opposed by some citizens as honoring villain, not hero).