

“Something Old Is New Again”: A Note on the Status of the “Government Speech Doctrine” after *Pleasant Grove City, Utah v. Summum*

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I. INTRODUCTION

It has been said that “[m]onuments are the grappling-irons that bind one generation to another.”² If that be so, despite the inelegance of the metaphor, then we should give greater attention to them, even beyond the point of the discipline's recognizing that they are forms of “visual [and/or three-dimensional] rhetoric.”³ That is especially true in the aftermath of a recent U.S. Supreme Court decision about a monument in Utah.

So, permit me to direct our attention to the existing monument standing tall in a public park in Pleasant Grove City, Utah, inscribed with the words of one version of the Ten Commandments; an erstwhile competing monument with another religious message on it, which the group sponsoring it has tried unsuccessfully at least three times since 2003 to have placed near the Commandments memorial and the 10 other monuments and memorials in the park; and arguably the expansion of the “government speech doctrine” by the U.S. Supreme Court as a result of resolving the conflict over the monuments that has raged for six years, raising fundamental questions about the existence of a First Amendment right, which, heretofore, many of us did not know existed.⁴ Few general texts on Freedom of Speech even mention it.⁵ As a result, this paper addresses the three topics listed below:

1. **Background and Process:** What are the pertinent facts regarding the monumental competition noted above?
2. **Basic Rules and Product:** How narrowly are the facts of *Pleasant Grove City, Utah v. Summum* to be applied in similar First Amendment cases in the future.
3. **Burgeoning of the “government speech doctrine”:** Is this the nadir or the zenith of the First Amendment doctrine?

II. DISCUSSION.

A. Background and Process: What are the pertinent facts regarding the monumental competition noted above? It all started in 2003, when the Summum religious organization in Utah requested permission to have a monument placed in Pleasant Grove City's public park. In the Historic District of Pleasant Grove City, Utah (hereinafter the City), there is a two and a half acre public park named Pioneer Park (Park). In the Park may be found 15 permanent displays, eleven of which were donated to the City by private groups or individuals. Among the displays are an historic granary, a wishing well, the City's first fire station, a 09/11/01 memorial, and the Ten Commandments monument, which had been donated to the City in 1971 by the Fraternal Order of Eagles.

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² Joseph Joubert, *quoted in* Tryon Edwards *et al.*, *The New Dictionary of Thoughts* 422 (1969).

³ *See, e.g.*, Lester C. Olson *et al.* eds., *Visual Rhetoric: A Reader in Communication and American Culture* 99-103 (2008)

⁴ *Pleasant Grove City, Utah v. Summum*, __U.S.__ (2009), 2009 U.S. LEXIS 1636

⁵ Exceptions include Linda R. Monk, *The Bill of Rights: A User's Guide* 66-67 (2d ed. 1995) and Paul Siegel, *Communication Law in America* 80-81 (2d ed. 2008).

Twice in 2003, Summum, an organization with headquarters in Salt Lake City, sought via letter to have a “stone monument” of its own erected in the Park, one similar in size and shape to the Ten Commandments monument and bearing the “Seven Aphorisms.” The City denied the requests, explaining that it limited monuments in the Park to ones that met two criteria: First, it must “directly relate to the history” of the City; second, it must be “donated by a group with long-standing ties to the ... community.” In 2004, the City formalized its policy and practice, adding safety and aesthetic criteria to the other two. In May, 2005, Summum’s president wrote another letter to the City, asking permission to have its monument erected, without reference to the stated criteria; in particular, he did not describe Summum’s connection to the community. Once again, the request was denied.

Rejected for the third time, Summum – a “gnostic” religious body which claims to have received its “Seven Aphorisms” from Moses at the same time Moses was hand-delivered the better known Ten Commandments – filed a legal action against the City in federal district court, demanding the right, on the basis of the Free Speech Clause of the First Amendment, to place its monument in the park with the 11 other structures. The district court denied the requested injunction, doubtless avoiding the inevitable temptation to remind Summum of the strictures of the tenth Commandment on coveting. The organization then appealed to the 10th Circuit Court of Appeals. A panel of that Court reversed the district court’s judgment, holding that the City could not reject the Seven Aphorisms monument unless it had a compelling justification for doing so that could not be served by more narrowly tailored means – the two elements of the familiar “strict scrutiny test.” The Court concluded that, since it had previously found, in another case, that the Ten Commandments monument represented private rather than government speech and that such public parks were traditionally treated as a “public forum,” the exclusion of the one monument in the face of inclusion of the other could not be justified. The panel thus ruled that the City had to erect Summum’s monument immediately.⁶

By the time *Pleasant Grove City, Utah v. Summum* reached the high court, its membership had changed, making the outcome of the appeal difficult to predict, but, reading the Court’s rationales for its judgment makes one wonder whether the Rehnquist Court would have reached a different conclusion. Nevertheless, the Court granted *cert* in 2008, heard oral argument on November 12, and announced its decision in the case on February 25, 2009. In an opinion by Justice Samuel Alito, the Court reversed the 10th Circuit Court of Appeals unanimously, albeit with a variety of rationales expressed in concurring opinions. Whether or not the “*Summum* rule” will survive to produce progeny, one thing is sure: It represents an unusual development in First Amendment jurisprudence and a departure from the line of “government speech” cases heretofore decided. So, it may well be limited by its facts, but I doubt it. Let us look at the Court’s four opinions, explaining its decision.⁷

B. Basic Rules and product: How narrowly are the facts of *Pleasant Grove City, Utah v. Summum* to be applied in First Amendment cases? Justice Alito framed the question thus in his opening sentence: “This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected.” The Court of Appeals held, he wrote, “that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches and

⁶ *Pleasant Grove City, Utah v. Summum*, 483 F.3d 1044, 2007 U.S. App. LEXIS 8715 (10th Cir. 2007); Thereafter, the 10th Circuit denied an *en banc* hearing by a vote of six to six!

other transitory expressive acts, the display of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”⁸ Well, why so, and what are the rules to be drawn from such a conclusion? It should be noted that no argumentative support is provided here and barely elsewhere for the claim that “the display ... is best viewed as a form of government speech...”⁹

Justice Alito wrote, “No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity’s acceptance of privately donated, permanent monuments for installation in a public park, and the parties disagree about the line of precedents that governs this situation.”¹⁰ Accordingly, we are informed that, “Petitioners [the City] contend that the pertinent cases are those concerning government speech. Respondent [Sumnum] ... agrees with the Court of Appeals panel that the applicable cases are those that analyze private speech in a public forum.”¹¹ He then stated, “If petitioners were engaging in their own expressive conduct, the Free Speech Clause has no application,” citing the seminal government speech case, *Johanns v. Livestock Marketing Assoc.*, 544 U.S. 550, 553 (“[T]he Government’s own speech ... is exempt from First Amendment scrutiny”), among other cases, none of which involves the government’s accepting the religious artifact from another, private party, thereby making it its own.¹² Added to that statement is one with a less clear argumentative source: “A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message,” citing *Johanns* and *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1991).¹³ At this point, Justice Alito felt compelled to write, “This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately ‘accountable to the electorate and the political process for its advocacy’ [citation omitted]”¹⁴ The efficacy of this dicta may or may not have force in the future.

Arguing this unique opinion, Justice Alito said, “While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks” (citations omitted), which cannot be arbitrarily abridged, although reasonable time, place, and manner restrictions, of course, are allowed.¹⁵

Slowly, the opinion began to center in on the relevant fact-related law: “There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. [He might not have been so convinced if he had read any of the several law review articles at this point;¹⁶ but he does not and goes on to say] ... that [p]ermanent monuments displayed on public property

⁷ To be found at the time of this writing at 2009 U.S. LEXIS 1636 (U.S. 2009).

⁸ 2009 U.S. LEXIS 1636, *4

⁹ *Id.*

¹⁰ *Id.* at *5

¹¹ *Id.*

¹² *Id.*

¹³ *id.* at *6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ e.g. Randall P. Bezanson and William G. Buss’s oft-cited essay, *The Many Faces of Government Speech*, 86 Iowa L.Rev. 1377 (2001) and Steven Shrifin, *Government Speech*, ___ U.C.L.A. L.Rev. 565 (1983),

typically represent government speech. Governments have long used monuments to speak to the public....”¹⁷ As he was writing such words, he was plainly thinking of such monuments as triumphal arches, columns and engravings on government buildings such as the ones on the Supreme Court Building itself. But, as I was reading them, I kept thinking of the huge Ten Commandments monument that a former Chief Justice of the Alabama Supreme Court unilaterally had placed in the rotunda of the Judicial Building in Montgomery! Suppose he had donated it to the State instead of retaining the legal right to it?

Writing further, Justice Alito then argued that privately funded monuments have been historically and may still be accepted by the government for public display, noting many of the publicly funded monuments in Washington, D.C. He concluded, “In this case, it is clear that the monuments in Pleasant Grove’s Pioneer Park represent government speech,” for “the City decided to accept those donations and to display them in the Park,” making them its own.¹⁸ Indeed, “the City has ‘effectively controlled’ the messages sent by the monuments in the Park by exercising ‘final approval authority’ over their selection,” citing *Johanns* again.

Finally, Justice Alito rejected Summum’s argument that for the monuments presently in the Park to be considered the City’s for the purpose of this analysis, the City should be required to go through a formal process of adopting the messages inherent in each of the monuments and memorials, which generated in the opinion a mini-lecture on how “monuments convey meaning” and the possible meanings of John Lennon’s mosaic, “Imagine,” which the martyred former Beatle donated to the City of New York’s Central Park.¹⁹ And, “[t]he message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity.”²⁰

Justice Alito concluded his encomium on public monuments by rejecting the “public forum” analysis proffered by Summum and used by the Circuit Court of Appeals’ panel. Public parks “can accommodate only a limited number of permanent monuments. Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. ... A public park, over the years, can provide a soapbox for a very large number of orators ... but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.”²¹

In concurring opinions, Justices Stevens and Ginsburg chose not to agree to the Court’s majority rationale, arguing that the Court’s only recently minted government speech doctrine cases “have been few and, in my view, of doubtful merit” (citing the key cases at that point).²² Justices Scalia and Thomas argued that even on Establishment Clause grounds the monument was permitted.²³ Justice Breyer said, “[T]he ‘government speech’ doctrine is a rule of thumb, not a rigid category.”²⁴ Justice Souter, who had dissented in *Johanns, supra*, wrote, “Because the government speech doctrine ... is ‘recently minted,’ it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet

¹⁷ e.g. Randall P. Bezanson and William G. Buss’s oft-cited essay, *The Many Faces of Government Speech*, 86 Iowa L.Rev. 1377 (2001) and Steven Shrifin, *Government Speech*, ___ U.C.L.A. L.Rev. 565 (1983),

¹⁸ 2009 U.S. LEXIS 1636, *6

¹⁹ *Id.*

²⁰ *Id.* at *10

²¹ *Id.* at 11.

²² *Id.*

²³ *Id.* at *12.

²⁴ *Id.*

explored,”²⁵ being clearly concerned about a future day in which “the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of [even] the Establishment Clause’s stricture against discriminating among religious sects or groups.”²⁶

An accurate prediction of the outcome of the *Sumnum* appeal may be found at Aaron Harmon, *Pleasant Grove City v. Sumnum: Identifying Government Speech & Classifying Speech Forums*, 4 Duke J. Const. Law & Pub. Policy 57 (Sidebar) (2008).

1. What are the First Amendment rules that this case reinforces or establishes? -- That:

a. Local, state, and federal governments may accept donated, privately funded monuments and memorials for permanent display on public property, regardless of whether or not the stone artifacts include on them or represent religious messages, where the respective government has made the donation and message its own.

b. It will be assumed that acceptance and public display of such monuments and memorials represent “government speech,” which, by definition, is not subject to the usual analysis under the Free Speech Clause of the First Amendment and which does not, therefore, trigger equal access to the public property by competing or opposing other religious groups.

2. What is to be made of the “transitory” factor in the case? -- That :

a. The permanence of a message as a criterion of constitutionality now has a preferred place in governments’ decisions to accept and display messages, including religious messages, on public property.

b. Speech-making, because of its “transitory” nature, is to be afforded a lesser standing than permanent monuments and memorials in regard to its transmission on public property.

C. Burgeoning of the “government speech doctrine”: Is this the nadir or the zenith of the First Amendment doctrine? This unusual case is the youngest in a short line of U.S. Supreme Court cases. As such, it may show us the outer reaches of the government speech doctrine; if it doesn’t, and if it is but the latest brick in a pathway leading into alarming new Constitutional terrain, then the concern many of us have about governments’ tendencies to restrict rather than to open up free speech is rightly activated. Let us look at the road behind us and the road ahead in explicating the whence and whither of the unfamiliar doctrine.

1. Historical overview: The road behind. It has been recognized by a number of commentators that *Rust v. Sullivan*, 500 U.S. 173 (1991), first recognized the modern right of “government speech.”²⁷ These authors have called attention to the fact that the government speech doctrine emerged most recently from government-mandated generic advertising campaigns in support of which farmers, ranchers, or manufacturers have been forced to pay fees, even if they disagreed with the campaigns,²⁸ wherein the Court treated the program as government speech rather than as government-compelled private speech. Moreover, the lower courts have adopted this understanding of *Rust*.²⁹

²⁵ *id.* at *13

²⁶ *Id.*

²⁷ See Monk, *The Bill of Rights*, *supra* at 66-67 (“While government must be content-neutral about citizen’s speech, it is not forbidden from communicating its own messages and making value choices”); Douglas Fraleigh and Joseph M. Tuman, *Freedom of Speech in the Marketplace of Ideas* 320-329 (1997) (“The government can use its considerable economic resources to further ideas it supports, and decline to fund ideas it finds objectionable”); and Siegel, *Communication Law in America*, *supra* at 79-81 (2008)

²⁸ See *Johanns*, *supra*. For a fuller discussion of the background and of the nature of such speech, see Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 *Hastings Law J.* 983 (2005), which argues that government must and does speak in a variety of ways in order to carry out its purposes, but that it should be transparent in doing so; and Mark G Yudof, *When Government Speaks: Politics, Law, and Government Expression in America* (1983).

²⁹ See, e.g., *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 378 (6th Cir. 2006).

The strange thing about *Rust v. Sullivan* is that at no point in it is the government speech doctrine invoked, explained, or even cited. It is given that reading for precedential purposes only afterward in subsequent cases, beginning with the acknowledgment of same in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) and *Johanns, supra*. In *Velazquez*, the Court said, “The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to government speech; when interpreting the holding in later cases, however, we have explained *Rust* in this understanding.”

That is why it was said in a law review article just five years ago that a mere twenty years ago, those inquiring into the government’s modern power as a speaker wrote on a “clean slate.”³⁰ Now, there is a burgeoning of the doctrine of government speech, which began in *Rust*, a case preventing the operators of government-supported family planning clinics from activities related to abortion, and has been broadened in *Johanns*-like cases that uphold government assessment of fees to fund generic ads. The *Summum* decision, however, is the first to apply the doctrine directly in regard to monuments and explicit messages communicated IN government-controlled fora but initially controlled by a private party. That leads one to wonder where this is all headed.

2. Implicative overview: The road ahead. The first challenge facing the Court and its critics is defining the limits of “government speech,” at least that form of communication that it has sought to justify under the Free Speech Clause of the First Amendment. After all, the First Amendment “is explicitly drafted as a restraint on government... If the government can claim to act as a First Amendment right holder, the First Amendment loses coherence, for in such situations there is nothing for the First Amendment to act on or constrain. The idea of government ‘speech’ under the First Amendment is thus both illogical and inconsistent with the text.”³¹ The authors add, “The government must be able to employ speech as a means of accomplishing its constitutional purposes, but it may not employ speech as a means in itself.”³² However, “government does not need a First Amendment right or immunity in order to express its views and inform the public about its actions. It can do so without any special protection from the First Amendment so long as” it “formulates and expresses its own message, with notice of authorship by government (rather than selecting others’ speech and adopting it as its own without attribution),” without displacing competing speech, or “transforming private speech into an expression of government preference,” and as long as its expressed choices “are made by professional and nonpolitical actors pursuant to an established and consistent process free of ideological or political considerations.”³³

The greater concern, though, must be when government acts as it did in the *Summum* case and takes the religious speech of private parties, treats it as its own, and then prohibits equal time for competing speech by a third party. Perhaps the only reason Pleasant Grove City got away with it is that *Summum* did not challenge the monument’s placement on Establishment Clause grounds, too. That seems obvious in the concurring opinions. Justice Stevens, joined by Justice Ginsburg, opined, “[E]ven if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.”³⁴ Justice Scalia, joined by Justice Thomas, wrote that “it is ... obvious that from the start, the case has been litigated

³⁰ *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 Harv. L.Rev, 2411, 2413 (2004)

³¹ Bezanson and Buss, *The Many Faces of Government Speech, supra* at 1502.

³² *Id.*

³³ *Id.* at 1511. See also Helen L. Norton (one of the most prolific commentators on the subject of “government speech”), *The Measure of Government Speech: Identifying Expression’s Source*, 88 Boston L.Rev. 587 (2008)

³⁴ 2009 WL 454299 (U.S. 2009).

in the shadow of the First Amendment's *Establishment* Clause..."³⁵ He added, "The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire... Indeed, there are very good reasons to be confident that the park displays do not violate *any* part of the First Amendment," citing the *Van Orden v. Perry*, 545 U.S. 677, a case decided in 2005, permitting a Ten Commandments monument to remain on the Texas State Capitol grounds in the midst of other, secular monuments.³⁶ "The city can [now] safely exhale," he concluded.³⁷ Justice Breyer observed, "The City has not closed off its parks to speech [for Summum or anyone else]; no one claims that the City prevents Summum's members from engaging in a form more transient than a permanent monument."³⁸ Justice Souter added, in one of his final writings at the Court, the final comments that presage cases to come: "[T]here is no doubt that this case and its government speech claim has been litigated by the parties with one eye on the Establishment Clause... The interaction between the 'government speech doctrine' and Establishment Clause principles has not, however, begun to be worked out..."³⁹ Moreover, "the case shows that it may not be easy to work out. After today's decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech. If the monument has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of ... establishment of religion, in the sense of the government's adoption of the tenets expressed or symbolized. In such an instance, there will be safety in numbers..."⁴⁰ "But the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is *free of the establishment clause's stricture against discriminating among religious groups*."⁴¹ "It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis."⁴²

But that speculation hardly scratches the surface of implications of this case. If government speech includes "all forms of state-supported communications," according to Steven Shiffrin, *Government Speech*,⁴³ a website with one of the few clear definitions on it, then the potential for government control of much communication in our society is great. Such communications are said to include "official government messages; statements of public officials at publicly subsidized press conferences; artistic, scientific, or political subsidies; even the classroom communications of public school teachers."⁴⁴ Other examples that might give one cause to pause are public museum curators, librarians, and other public officials.

And, of course, we can expect more appeals to the U.S. Supreme Court about the many, many religious artifacts across the country in national parks and on other public properties. Indeed, several are in the appellate pipe-line now.

III. CONCLUSION.

³⁵ *Id.*

³⁶ *Summum* at *16-17

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at *19.

⁴⁰ *Id.*

⁴¹ *Id.*, *emphasis added*.

⁴² *Id.* at *20.

⁴³ http://www.novelguide.com/a/discover/eamc_03/eame_03, retrieved on 3/13/09

⁴⁴ *Id.* at 1.

It has been well said, “They only deserve a monument who do not need one; that is, who have raised themselves a monument in the minds and memories of men.”⁴⁵ I know not which of the principals involved in *Pleasant Grove City v. Summum*, including the members of the Court that decided it, may qualify for a monument to be erected in his/her honor, but I am confident that we have not heard the last of religious monuments on public lands or of the “government speech doctrine.” In fact, the Court has already accepted for review in the fall a case involving a cross erected in 1934 by the VFW in the Mojave National Preserve in California.

That’s why it deserves our attention; especially does it deserve the attention of those of us who work for public colleges and universities in states where one or more public officials has already tried to place a Ten Commandments monument on display in a most public place.

⁴⁵ Wm. Hazlitt, quoted in *The New Dictionary of Thoughts*, *supra* at 422.