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WHEN GOVERNMENT EXPRESSION COLLIDES WITH THE ESTABLISHMENT CLAUSE

*Martha McCarthy**

I. INTRODUCTION

On February 25, 2009, the United States Supreme Court rendered its widely watched decision in *Pleasant Grove City v. Summum*.¹ Unanimously reversing the opinion of the Tenth Circuit Court of Appeals, the Supreme Court upheld the city's decision to reject a religious group's request to erect a monument in a public park even though a monument with the Ten Commandments was already displayed. The Court concluded that the city's decision as to which donated monuments to display represents government expression that is not subject to Free Speech Clause restrictions. The Court in this case avoided addressing 1) whether a city's expression of its own views by allowing the display of monuments with religious content, such as the Ten Commandments, promotes religion in violation of the Establishment Clause, and 2) whether there is a legitimate justification for cities to display monuments of some religious groups but not others.² Following a brief introduction and review of the recent Supreme Court decision, this article addresses the potential conflict between the government speech doctrine and the Establishment Clause and implications of this conflict for public schools.

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1. 129 S. Ct. 1125 (2009) [hereinafter *Summum*].

2. Prior to the Supreme Court's recent decision, a number of Utah cities removed Ten Commandments monuments rather than allow the Summum to place monuments in the parks. See Kristen Moulton, *Church-State Battle Looms Over Monuments in Parks*, SALT LAKE TRIB., Feb. 2, 2009, available at <http://www.scrippsnews.com/node/41282>.

A. Context and Lower Court Litigation in the Summum Case

The controversy focused on monuments in a public park in Pleasant Grove City, which has approximately 31,000 residents who predominantly adhere to the Mormon faith. Pleasant Grove's Pioneer Park displays 15 monuments, 11 of which were donated by private groups. In 1971, the city council voted to accept a monument of the Ten Commandments from the Fraternal Order of Eagles that had established a local chapter in the city two years earlier. Primarily in the 1960s, the Eagles distributed Ten Commandments monuments to more than 100 cities for the purpose of reducing juvenile delinquency by promoting this moral code.³ Summum, through President Summum Ra, requested permission in 2003 to erect a monument depicting the Seven Aphorisms of Summum to join the Ten Commandments and other donated monuments in Pioneer Park. Summum is a religious organization founded in 1975 as an offshoot of Christianity, and adherents claim that their seven principles were inscribed on the first set of tablets Moses received at Mt. Sinai before he received the Ten Commandments.⁴ In rejecting Summum's request in 2003 and again in 2005, the city argued that only monuments related to the city's history or donated by groups with longstanding ties with the city were allowed to be displayed in the park and that the Summum monument did not meet either criterion.⁵

Summum brought suit in 2005, claiming a free speech right to erect the monument in Pioneer Park. The federal district court rejected the claim, but the Tenth Circuit reversed that decision.⁶ Considering such monument displays to be private expression, the appeals court applied strict judicial scrutiny and concluded that the Summum monument could not be excluded unless there was a compelling government reason that did not entail viewpoint discrimination.⁷ The Tenth

3. The Eagles started distributing these monuments in conjunction with the release of the Ten Commandments movie in 1956.

4. See Warren Richey, *Court to Weigh Utah Sect's Monument*, CHRISTIAN SC. SCI. MONITOR, Nov. 12, 2008, available at <http://www.csmonitor.com/2008/1112/p03s05-usju.html>.

5. *Summum*, 129 S. Ct. at 1130.

6. *Summum v. Pleasant Grove City, Utah*, 483 F.3d 1044 (10th Cir. 2007), petition for rehearing *en banc denied*, 499 F.3d 1170 (10th Cir. 2007), *rev'd*, 129 S. Ct. 1125 (2009). See also *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *infra* text accompanying note 28.

7. *Summum*, 483 F.3d at 1054-55.

Circuit considered a public park to be a public forum not only in terms of content-based restrictions on private speech but also on the display of permanent monuments accepted from private donors. Finding it unlikely that the city would satisfy strict scrutiny, the Tenth Circuit granted the requested injunction against the city so the *Summum* monument could be erected.⁸

B. Supreme Court Summum Decision

The Supreme Court reversed the Tenth Circuit's decision.⁹ Writing for the unanimous Court, Justice Alito declared that "[p]ermanent monuments displayed on public property typically represent government speech," which is not subject to strict scrutiny under the Free Speech Clause.¹⁰ The Court reasoned that the First Amendment restricts government regulation of *private* speech but not *government* speech.¹¹ Recognizing that a park may constitute a public forum for speeches and other transitory expressive activities, the Supreme Court reasoned that forum analysis does not apply to the erection of a permanent monument.¹²

The Court concluded that when a city accepts a monument from a private donor the monument becomes the government's expression of its own message. Citing the International Municipal Lawyers Association's amicus brief in *Summum*, the Court noted that "[a]cross the country, 'municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals.'"¹³

8. *Id.* at 1055.

9. *Summum*, 129 S. Ct. 1125.

10. *Id.* at 1132.

11. *Id.*

12. *Id.* at 1137. Public places, such as streets and parks, are considered a traditional public forum for communication where content restrictions cannot be imposed without a compelling government interest. In a nonpublic forum, such as a public school, expression can be confined to the governmental purpose of the property. The government can create a limited public forum for expression on public property that otherwise would be a nonpublic forum. For a discussion of forum analysis, see *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001).

13. *Summum*, 129 S. Ct. at 1133 (quoting Brief for IMLA as Amici Curiae Supporting Petitioners at 21, *Summum*, 129 S. Ct. 1125 (2009) (No. 07-665)).

The Court acknowledged that a park plays an important role in conveying a city's identity and concluded that cities can accept monuments portraying views they want to express as their own, while rejecting others that do not mesh with their ideas.¹⁴ The Court declared: "City parks—ranging from those in small towns, like Pioneer Park in Pleasant Grove City, to those in major metropolises, like Central Park in New York City—commonly play an important role in defining the identity that the city projects to its own residents and to the outside world."¹⁵ Essentially, the government has the right to "speak for itself" and to "say what it wishes."¹⁶ The Court recognized that public parks may provide soapboxes for a range of speakers, but that it would be unrealistic to open parks to the display of all monuments any person or group proposed. However, the Court did acknowledge that government speech is not totally unrestricted. For example, as will be discussed, it must comply with the First Amendment's Establishment Clause even though the Court was not asked to address this topic in *Summum*.¹⁷

C. Concurring Decisions

Four concurring opinions were written to express support for the Court's holding but with slightly different reasoning. Justice Stevens, joined by Justice Ginsburg, voiced displeasure with the relatively new government speech doctrine and urged the Court to avoid any expansion of this doctrine. But he concluded that this case does not represent such an expansion since there is "no retaliation for, or coercion of, private speech" or the likelihood that the government will "be able to avoid political accountability for the views that it endorses or expresses through this means."¹⁸ Justice Stevens further emphasized that the Constitution's other prohibitions, including those in the Establishment and Equal Protection

14. *Id.* at 1131, 1134.

15. *Id.* at 1133-34.

16. *Id.* at 1131 (citations omitted).

17. *Id.* at 1132. In his concurring opinion, Justice Souter emphasized that the Establishment Clause issue was not briefed nor argued before the Supreme Court. *Summum's* appeal was based solely on the Free Speech Clause. *See id.* at 1141 (Souter, J., concurring); *see also infra* note 28.

18. *Id.* at 1139 (Stevens & Ginsburg, JJ., concurring).

Clauses, ensure that the government does not have “free license to communicate offensive or partisan messages.”¹⁹

In the second concurrence, Justice Breyer interpreted the government speech doctrine more expansively. He cautioned that the government speech doctrine should not be viewed as a rigid category, but instead, the purpose of the doctrine must be considered and not just the labels such as “government speech” or “public forum.”²⁰

In the third concurrence, Justice Scalia, joined by Justice Thomas, wrote separately to mention the Establishment Clause issue even though it was not addressed in the Court’s opinion. Justice Scalia noted that this “case has been litigated in the shadow of the First Amendment’s *Establishment* Clause.”²¹ He relied on the Supreme Court’s 2005 decision, upholding the display of a Ten Commandments monument on the Texas capitol grounds, as substantiating that the Ten Commandments have an historical meaning that insulates such monuments from an Establishment Clause challenge.²²

In the final concurrence, Justice Souter accepted the government speech doctrine but noted that its interaction with the Establishment Clause has not yet been sufficiently explored and may be difficult to reconcile.²³ He opined that if all monuments are viewed as government speech and some have religious overtones, then the Establishment Clause may be implicated.²⁴ He proposed adopting a “reasonable observer” standard, which is similar to that used to assess whether the government is endorsing religion.²⁵ Under this standard, the central question is whether a reasonable observer would view the monuments as government expression instead of private speech that is merely allowed on public land. If so, the expression would represent the government and would be shielded from strict scrutiny under the Free Speech Clause.

19. *Id.*

20. *Id.* at 1140 (Breyer, J., concurring).

21. *Id.* at 1139 (Scalia & Thomas, JJ., concurring).

22. *Id.* at 1140 (citing *Van Orden v. Perry*, 545 U.S. 677 (2005)).

23. *Id.* at 1141 (Souter, J., concurring only in judgment).

24. *Id.* at 1141-42.

25. *Id.* at 1142.

II. CAN THE GOVERNMENT SPEECH DOCTRINE BE RECONCILED WITH ESTABLISHMENT CLAUSE PROHIBITIONS?

The government speech doctrine has an intuitive appeal. It is logical for the government to be able to speak for itself without being subjected to strict scrutiny under the Free Speech Clause.²⁶ The government at times takes positions (e.g., stealing is bad; teenage alcohol use should be curtailed) or promotes subjects that it feels are in the best interests of the citizenry (e.g., the elimination of child abuse). It would be difficult for the government to function properly without the protection of perspectives it wants to promote in the interest of the general welfare.

A. Government Versus Private Expression

Several federal appellate courts have applied a four-factor test to evaluate whether expression should be considered government speech. Under this test, consideration is given to (1) the central purpose of the expression, (2) the extent that the municipality exerts editorial control, (3) the speaker's identity, and (4) whether the municipality has final authority for the content of the expression.²⁷ In *Summum v. City of Ogden*, the Tenth Circuit applied these four factors in finding a Ten Commandments monument in a public park and a proposed Summum monument for the park to be private, not government, speech.²⁸ Accordingly, the court reasoned that the

26. In *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005), two associations of beef producers and some individuals asserted that television ads were private speech because they were funded through compelled assessments of beef producers and the government solicited assistance from the Cattleman's Beef Promotion and Research Board in developing the ads. Disagreeing, the Supreme Court held that the ads were government speech because the message was controlled by the government in that the Secretary of Agriculture had final approval.

27. See *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008); *Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001); *Knights of the Ku Klux Klan v. Curators of Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir. 2000); see also *Mary Jean Dolan, Why Monuments are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 CATH. U. L. REV. 7, 32 (2008).

28. 297 F.3d 995, 1004-05 (10th Cir. 2002). In finding the Ten Commandments monument to be private speech, the appeals court focused on the purpose of the monument—to advance the donor's viewpoint that the Ten Commandments provide an appropriate moral code for youth to adopt. The court also reasoned that the city had no editorial control over the content because the monument was presented as a finished product. This decision motivated Summum to rely on the Free Speech Clause in the claim involving Pleasant Grove City.

city could not discriminate against selected private religious perspectives in authorizing which monuments to display.

The Tenth Circuit espoused similar reasoning in the recent *Summum* case, but the Supreme Court disagreed, finding the decision to display monuments in a city park to be protected government expression.²⁹ As discussed, government expression is not subjected to strict scrutiny, but the U.S. Constitution does place restrictions on government speech that are not placed on private expression. Paramount among these is that government expression cannot blatantly discriminate against certain perspectives or promote religious tenets. Whereas private religious expression is protected by the Free Speech Clause, the Establishment Clause prohibits the government from promoting religion.

B. Public Monuments as Government Expression

Interpreting the government speech doctrine in connection with monuments on public property, the Supreme Court has reasoned that when the public entity accepts a private donation it assumes ownership of the message as well as the physical monument that is permanently displayed.³⁰ Thus, monuments in city parks convey the government's views, and the general citizenry sees the government as the speaker. If a public park instead were considered a public forum where viewpoint discrimination is barred when deciding which monuments to display, the city would not be able to shape its parks to reflect local values.

The government makes choices in expressing its ideas, and there is always some element of viewpoint discrimination in such decisions. For example, when a school board decides who will be the graduation speaker, many possible speakers are excluded from consideration.³¹ Also, when public libraries decide to purchase certain books, they are not selecting many others. Similarly, the government must be able to select certain monuments for its parks; it cannot accept all that are proposed because there simply would not be enough space, and having too many monuments might defeat the park's purpose. Jay

29. *Summum*, 129 S. Ct. at 1132-33.

30. See *Summum*, 129 S. Ct. at 1134; see also Dolan, *supra* note 27.

31. Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of Chaos of Free Speech Cases Involving School-Sponsored Activities*, 542 U.C. DAVIS L. REV. 717, 737-38 (2009).

Sekulow, in his brief for Pleasant Grove City, stated that “[a]ccepting a Statue of Liberty does not compel a government to accept a Statue of Tyranny.”³² As noted previously, the Court in *Summum* agreed that most cities exert control over the form and content of donated monuments through guidelines they promulgate or through a required approval process.³³ The Court has recognized that when the government is promoting its own policies it has latitude in designing its message and “it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.”³⁴

C. Can Religious Views Be Government Expression?

The primary unresolved issue after the Supreme Court’s 2009 *Summum* decision is how the acceptance of some religious monuments and the rejection of others can comply with the Establishment Clause if such acceptance conveys the views of the government. The attorney representing Summum, Brian Barnard, has amended the lawsuit in federal court, focusing the new claim on the Establishment Clause. Voicing optimism that he will be successful in challenging the differential treatment of the Seven Aphorisms and the Ten Commandments under the Establishment Clause, he has asserted that given the Supreme Court’s decision, “it’s like they are handing it to me on a silver platter.”³⁵ If a city’s decision to accept or reject donated monuments is government speech, then how can a municipality allow either a Ten Commandments monument or one with the Summum’s Seven Aphorisms, since both promote religious tenets on behalf of the city?

The government is prohibited by the Free Speech Clause from discriminating against private religious views, but the government itself cannot endorse religious messages.³⁶ Stated another way, Ian Bartrum has asserted that Justices “Scalia and Thomas cannot have their constitutional cake and eat it

32. Brief for the Petitioners at 2, *Summum*, 129 S. Ct. 1125 (2009) (No. 07-665).

33. *Summum*, 129 S. Ct. at 1133 (citing Brief for IMLA as Amici Curiae Supporting Petitioners at 21; *Summum*, 129 S. Ct. 1125 (2009) (No. 07-665)).

34. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

35. Moulton, *supra* note 2.

36. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

too: If there is room at the public forum for the Good News Club, there must also be room for *Summum*.³⁷ Thus, the park is either a forum for expression where viewpoint discrimination would not be allowed, or the monuments are government expression, which is restricted by the Establishment Clause. It is difficult to argue that Pleasant Grove City's action speaks for the government AND complies with the Establishment Clause.

The American Humanist Association contends that the *Summum* decision provides a vehicle to use the Establishment Clause in requiring the removal of all Ten Commandments monuments from public property.³⁸ Justice Souter, in his *Summum* concurrence, recognized that the Establishment Clause issues were not raised in this case and that "the interaction between the 'government speech doctrine' and Establishment Clause principles has not yet begun to be worked out."³⁹ And he noted that it "may not be easy to work out,"⁴⁰ which is an understatement indeed.

Justice Scalia, in his *Summum* concurrence is the only justice who directly addressed the Establishment Clause issue, and he quickly rejected the concern. He opined that "[t]he city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire."⁴¹ He contended that the Ten Commandments can legitimately be displayed because they have historical significance in addition to their religious meaning. But on other occasions, he has stated that the government can even promote biblical monotheism without implicating the Establishment Clause,⁴² which the Supreme Court has rejected in a number of decisions.⁴³

Since the foundation of the government speech doctrine is that the government controls its message, a "constitutional

37. Ian Bartrum, *Pleasant Grove v. Summum: Losing the Battle to Win the War*, 95 VA. L. REV. IN BRIEF 43, at 46 (2009).

38. See Brief for American Humanist Ass'n et al. as Amici Curiae in Support of Neither Party, *Summum*, 129 S. Ct. 1125 (2009) (No. 07-665).

39. *Summum*, 129 S. Ct. at 1141 (Souter, J., concurring).

40. *Id.*

41. *Id.* at 1139 (Scalia, & Thomas, JJ., concurring).

42. *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 891-94 (2005) (Scalia, J., dissenting); see also *Dolan*, *supra* note 27, at 48 n.232.

43. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000); *Lee v. Weisman*, 505 U.S. 577, 589 (1992); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 220 (1963).

conundrum” presents itself whenever this doctrine is applied to religious speech.⁴⁴ And the display of a permanent monument with religious content differs from a public official making a religious reference in a speech. Not only is a speech transient, but also the public realizes that the speaker is expressing personal views. In contrast, a monument that is permanently displayed gives a “collective statement of government approval.”⁴⁵

D. Are the Ten Commandments Secular?

The only way to avoid an Establishment Clause violation would be to consider the religious monument to be primarily historical and secular, rather than sectarian. Calling this “a flimsy doctrine fraught with peril,” Bartrum has contended that “it transparently prefers well established or ‘historically significant’ religions—likely to be local majorities—to newer minority groups.”⁴⁶

The Supreme Court seemingly settled the religious nature of the Ten Commandments in *Stone v. Graham* when it struck down a state’s efforts to post the Ten Commandments in public school classrooms.⁴⁷ The Court was not persuaded that the constitutional violation was reduced by purchasing the copies with private donations and including the following notation on each copy: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”⁴⁸ The Court recognized that the first three commandments outline duties of believers toward God so they cannot be viewed as a secular code of conduct. The Court declared that “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”⁴⁹

44. Dolan, *supra* note 27, at 48.

45. Van Orden v. Perry, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting).

46. Bartrum, *supra* note 37, at 47.

47. Stone v. Graham, 449 U.S. 39 (1980) (per curiam).

48. KY. REV. STAT. § 158.178 (1980).

49. Stone, 449 U.S. at 41. The Court further stated that posting the Commandments was designed “to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.” *Id.* at 42.

Even when the splintered Supreme Court in 2005 upheld the display of a donated Ten Commandments monument⁵⁰ on the Texas state capitol grounds in *Van Orden v. Perry*, the Court indicated that *Stone* was still good law.⁵¹ And on the same day that *Van Orden* was rendered, the Court in another divided ruling struck down the display of the Ten Commandments in Kentucky county courthouses, finding the displays designed to promote religion.⁵²

Nonetheless, the five-member *Van Orden* majority found the display of the Ten Commandments monument on the Texas state capitol grounds to be a far more passive use of the religious document than when the Ten Commandments are displayed in public schools.⁵³ Because the state had accepted monuments representing several aspects of the state's political and legal history and the Ten Commandments were found to have historical as well as religious significance, the *Van Orden* majority could not conclude that the display of the Ten Commandments monument violated the Establishment Clause. However, the four dissenting justices in *Van Orden* strongly disagreed, noting that "the sole function of the monument on the grounds of Texas's State Capitol is to display the full text of

50. See *supra* text accompanying note 3 for a discussion of monuments donated by the Fraternal Order of Eagles.

51. *Van Orden*, 545 U.S. at 690-91.

52. *McCreary County, Ky. v. ACLU*, 545 U.S. 844 (2005); see also *Baker v. Adams County/Ohio Valley Sch. Bd.*, 86 Fed. Appx. 104 (6th Cir. 2004) (finding an unconstitutional religious purpose in displaying the Ten Commandments on the grounds of new high schools, noting that other historical monuments were added to the displays only after the religious monuments were legally challenged); *ACLU v. City of Plattsburgh*, 358 F.3d 1020 (8th Cir. 2004) (finding religious motives in the city's accepting and maintaining a Ten Commandments monument); *Books v. Elkhart*, 235 F.3d 292 (7th Cir. 2000) (finding a Ten Commandments monument in front of a municipal building to be an unconstitutional establishment of religion). In supporting the Supreme Court's denial of *certiorari* in *Books*, Justice Stevens declared that the first line of the monument's inscription (I am the Lord thy God) could not possibly be defended as religiously neutral. *Books, cert. denied*, 532 U.S. 1058 (2001).

53. *Van Orden*, 545 U.S. at 678; see also *ACLU Neb. Found. v. City of Plattsburgh*, 419 F.3d 772 (8th Cir. 2005) (en banc) (upholding a Ten Commandments display in a public park as recognizing the role of God and religion in our nation's history); *Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003) (upholding the display of the Ten Commandments on a plaque attached to a county courthouse because it is viewed as an historical artifact); *Sumnum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002) (finding no Establishment Clause violation in the display of a Ten Commandments monument and the proposed display of a Sumnum monument in a city park since both entailed private expression); *supra* text accompanying note 28.

one version of the Ten Commandments.”⁵⁴ Justice Stevens contended that by choosing one version, the selection put the state in the middle of a sectarian dispute.⁵⁵ He further faulted the majority for condoning the promotion of a code of conduct through biblical teachings, which “injects a religious purpose into an otherwise secular endeavor.”⁵⁶ He declared that “[i]f a state may endorse a particular deity’s command to ‘have no other gods before me,’ it is difficult to conceive of any textual display that would run afoul of the Establishment Clause.”⁵⁷ The *Van Orden* dissenters argued that the state could honor the Fraternal Order of Eagles for its efforts to combat juvenile delinquency without using a religious medium. Justice Stevens observed that there was no connection between the Ten Commandments monument and the state’s history or any individual or group; instead, any reasonable observer would view the monument as state endorsement of Judeo-Christian religion. He asserted: “This Nation’s resolute commitment to neutrality with respect to religion is flatly inconsistent with the plurality’s wholehearted validation of an official state endorsement of the message that there is one, and only one, God.”⁵⁸

If the Establishment Clause demands neutrality, then the government cannot advance any religious faith, despite Justice Scalia’s contention that monotheism can be promoted.⁵⁹ The state clearly cannot privilege those religious sects that are based on a belief in God.⁶⁰ The Supreme Court also has recognized that individuals have the right to select any religion or none at all.⁶¹

It is difficult to argue that the government is not embracing the majority religion when it displays a monument of the Ten Commandments. Does the Supreme Court’s decision in *Sumnum* stand for the premise that the government can promote Judeo-Christian religious views but it can reject the views of other “fringe religions,” as they do not convey tenets

54. *Van Orden*, 545 U.S. at 707 (Stevens, & Ginsburg, JJ., dissenting).

55. *Id.* at 718-19.

56. *Id.* at 715.

57. *Id.* at 735.

58. *Id.* at 712.

59. *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 891-94 (2005) (Scalia, J., dissenting); see *supra* text accompanying note 42.

60. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

61. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985).

that the government embraces?⁶² The American Jewish Committee, Americans United for Separation of Church and State, and several other groups, in an amicus brief in *Summum*, argued that the case should be litigated under Establishment Clause principles because the *Summum* actually are claiming that the city acted with religious hostility in refusing to display the monument.⁶³ Assuming that monuments in public parks represent the views of the government, additional ammunition is provided for a successful Establishment Clause suit if *any* of the monuments are religious in nature. Chief Justice Roberts even recognized this dilemma during the *Summum* oral arguments: “You’re really just picking your poison. . . 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. If it’s Government speech, it may not present a free speech problem, but what is the Government doing speaking—supporting the Ten Commandments?”⁶⁴

III. IMPLICATIONS OF THE *SUMMUM* DECISION FOR PUBLIC SCHOOLS

At first blush, it may appear that the implications of the *Summum* ruling for public education are minimal. The most apparent connection is in interpreting free speech guarantees. When public schools are speaking as the government, they are not subject to Free Speech Clause scrutiny. In a nonpublic forum, such as a public school, the government daily makes decisions regarding the curriculum to adopt, books to use, and speakers to invite that preclude consideration of other topics, materials, and individuals. The recent attention given the government speech doctrine has not changed the legal principles applied in assessing the public school’s expression of its own messages.

62. Dolan, *supra* note 27, at 49.

63. American Jewish Committee, Americans United for Separation of Church and State, Anti-Defamation League, Baptist Joint Committee for Religious Liberty, and People for the American Way Foundation as Amici Curiae in Support of Neither Party, *Summum*, 129 S. Ct. 1125 (2009) (No. 07-665).

64. Transcript of Oral Argument at 4, *Summum*, 129 S. Ct. 1125 (2009) (No. 07-665).

However, one could argue that the recently articulated government speech doctrine may strengthen, and perhaps even expand, the principle enunciated in *Hazelwood School District v. Kuhlmeier*.⁶⁵ The Supreme Court in *Hazelwood* announced that expression representing the public school can be curtailed for legitimate pedagogical reasons. But the *Hazelwood* principle was alive and well before the government speech doctrine became prominent. It is not likely that public schools have more latitude using the government expression rationale than they already have under *Hazelwood*, a decision that has been expansively interpreted as covering both employee and student expression that bears the imprimatur of K-12 public schools or state-supported postsecondary institutions.⁶⁶

The major implication of the *Summum* decision for public schools may be a subtle one, assuming that the Supreme Court continues to uphold Ten Commandments displays in city parks, while at the same time allowing cities to reject monuments from other religious groups. This may provide an incentive for public schools to further accommodate the dominant religious faith in their communities. For example, they may conclude that bricks donated for a public school sidewalk can include religious messages supported by the majority of the community, such as references to God, because such messages are considered the school's expression and convey that historically our nation's citizenry has professed a belief in God.⁶⁷ Public schools may interpret the *Summum* decision as

65. 484 U.S. 260 (1988).

66. See, e.g., *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002) (applying *Hazelwood* to a university's assessment of a student's academic performance); *Henerey v. City of St. Charles Sch. Dist.*, 200 F.3d 1128 (8th Cir. 1999) (upholding disqualification of student council candidate who handed out condoms with stickers bearing his campaign slogan); *Miles v. Denver Pub. Schs.*, 944 F.2d 773 (10th Cir. 1991) (upholding disciplinary action against a teacher who made comments during class about rumors that two students had engaged in sexual intercourse on school grounds during the lunch hour); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (upholding a university's order to a professor to keep religious beliefs out of the classroom).

67. Courts to date have rendered conflicting rulings on requests to include religious messages on bricks purchased for school walkways or on tiles hung at school. See, e.g., *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002) (upholding school authorities in barring religious messages on tiles to be hung at school because such expression represents the school and sectarian tiles would promote religion in violation of the Establishment Clause); *Kiesinger v. Mex. Acad. & Cent. Sch.*, 427 F. Supp. 2d 182 (N.D.N.Y. 2006) (finding viewpoint discrimination in removing from the school walkway donated bricks with references to Jesus since secular references were allowed); *Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp. 2d 1098 (D. Ariz. 2004) (finding viewpoint discrimination in the school

giving them more autonomy in determining what perspectives they will project.

Public schools in some locales might even resurrect efforts to display the Ten Commandments on school grounds, contending that such displays are permissible government speech. It would appear that if a Ten Commandments monument in a city park is permissible because it reflects the government's views and does not run afoul of the Establishment Clause due to its historical significance, the Ten Commandments could be displayed in public schools as well. Why would such displays abridge the Establishment Clause only in certain settings? Is the historical and secular significance of the Ten Commandments lessened when posted in public schools?⁶⁸ The argument used to justify the secular nature of the Ten Commandments does not seem context specific. The emphasis given to government expression and the types of speech it protects could alter how public schools respond in certain situations until the intersection of the government speech doctrine with the Establishment Clause is resolved by the Supreme Court.

IV. Conclusion

Government-commissioned monuments can speak for the government but so can privately funded monuments that the government accepts as donations. Few fault the utility of this strategy. Under the government speech doctrine, a municipality accepts selected monuments so it can project a particular image to all who visit the park, and the expression then becomes that of the government entity.⁶⁹ The argument developed here is that a government unit, whether a city or public school, cannot use "historical acceptance" or "ties to the

allowing parents to purchase tiles for school walls with motivational phrases but not religious references).

68. Granted, courts traditionally have been particularly protective of public school students in applying the Establishment Clause, but some recent decisions have preferred Free Speech Clause analysis to bar governmental discrimination against private religious expression. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (allowing a Christian organization to hold meetings in a public school right after classes end even though the evangelical club targets elementary-age children attending the school); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (rejecting an Establishment Clause challenge to the Equal Access Act that allows student religious clubs to meet in federally assisted secondary schools that have created a forum for student groups to meet during noninstructional time).

69. *Summum*, 129 S. Ct. at 1134.

community” rationales to accept a monument from a religious group it favors and reject a monument from a religious group it does not support. Otherwise, as Justice Stevens has noted, “[i]t would replace Jefferson’s ‘wall of separation’ with a perverse wall of exclusion—Christians inside, non-Christians out.”⁷⁰ If the government speech doctrine is dominant and overrides the Establishment Clause, “[t]his makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion.”⁷¹ It seems inevitable that the United States Supreme Court will have to address the collision of the Establishment Clause and the government speech doctrine in the near future.

70. *Van Orden v. Perry*, 545 U.S. 677, 730 (2005) (Stevens, J., dissenting).

71. *Id.* at 735. The concept of governmental neutrality toward religion has changed since first addressed in the mid-twentieth century. Initially, neutrality meant complete separation of church and state: “Neither a state nor the Federal government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). Now, the concept of neutrality has a more accommodationist connotation, often cloaked in terms of private religious expression protected by the Free Speech Clause. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors*, 515 U.S. 819 (1995); *see also Bartrum*, *supra* note 37.