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RonNell Andersen Jones

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Pick Your Poison: Private Speech, Government Speech, and the Special Problem of Religious Displays

*RonNell Andersen Jones**

I. INTRODUCTION

For years, the United States Supreme Court has debated the constitutionality of a governmental entity erecting or maintaining an arguably religious symbol on public property.¹ A deeply divided and often inconsistent Court has created significant complexity in this area. It has produced a much-maligned “reindeer rule,”² a sometimes difficult-to-decipher “endorsement test,”³ and, most recently, a pair of Ten Commandments cases decided in the very same Term that declared that such displays are sometimes constitutional⁴ and sometimes not,⁵ based on razor-thin distinctions loosely articulated

* Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. The author thanks student researchers Chris Whittaker and Sam Brooks for their excellent assistance.

1. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005); *Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

2. *Lynch*, 465 U.S. at 668 (holding that a crèche displayed on public property was not establishing religion because it was surrounded by other secular symbols associated with Christmas, including model reindeer).

3. *Allegheny*, 492 U.S. at 597 (Blackmun, J.) (plurality opinion) (adopting Justice O’Connor’s proposed endorsement test, which asks whether “the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices” (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985))). The test has been frequently criticized for the unpredictability caused by its subjective emphasis. *See, e.g.*, Patrick M. Garry, *A Congressional Attempt to Alleviate the Uncertainty of the Court’s Establishment Clause Jurisprudence: The Public Expression of Religion Act*, 37 CUMB. L. REV. 1, 12 (2006–07) (“Because the test calls for judges to speculate about the perceptions that unknown people may have about various religious speech or symbols, its application is inherently uncertain.”).

4. *Van Orden*, 545 U.S. at 677. *Van Orden* upheld a Ten Commandments monument that was located on the Texas State Capitol lawn. Chief Justice Rehnquist authored an opinion that was joined by Justices Scalia, Kennedy, and Thomas. Rehnquist concluded that while the Ten Commandments had religious significance, they also had an “undeniable historical meaning.” *Id.* at 690. Thus, the monument did not offend the Establishment Clause. *Id.* at 691–92. Justice Breyer concurred in the judgment but wrote separately to detail his reasons. *See infra* note 6.

5. *McCreary Cnty.*, 545 U.S. at 844. Justice Souter wrote the majority opinion in *McCreary* and was joined by Justices Stevens, O’Connor, Ginsburg, and Breyer. This time, the

by a single Justice.⁶ All told, the Supreme Court's handling of purportedly sectarian displays has been convoluted at best.⁷

Now it seems that the Court has added yet another unnecessary layer of complexity. The "recently minted"⁸ government speech

majority held that a Ten Commandments display within a county courthouse did violate the Establishment Clause. This finding was based largely on the history of the monument. *Id.* at 867–74. During a ceremony celebrating the installation of the monument, the Court noted, the county executive was joined by his pastor, who "testified to the certainty of the existence of God." *Id.* at 869. The monument also lacked, at least initially, any disclaimer that it was placed in the courthouse for the purpose of celebrating the Ten Commandments' effect on civil law. *Id.* at 868.

6. Justice Breyer famously voted on opposite sides of the two seemingly analogous cases. In *Van Orden*, he wrote separately to concur with Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy that the monument was not establishing religion, essentially because (1) the group that donated it had an arguably secular purpose in doing so, (2) it was surrounded by other secular monuments, and (3) it had been standing forty years and during that time there had been no objections. 545 U.S. at 701–02 (Breyer, J., concurring). In *McCreary Cnty.*, Justice Breyer crossed the aisle, joining Justices Stevens, O'Connor, Souter and Ginsburg (the dissenters in *Van Orden*) in finding that the monument was not permissible, without writing separately. 545 U.S. at 849. The basis for his equivocation, as articulated in his *Van Orden* concurrence, was that

the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. That history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document. And, in today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.

Van Orden, 545 U.S. at 703 (Breyer, J., concurring) (citations omitted).

7. See *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 717 (9th Cir. 1999), *withdrawn on other grounds by* *Thomas v. Anchorage Equal Rights Comm'n*, 192 F.3d 1208 (9th Cir. 1999) (en banc) (characterizing "recent Establishment Clause doctrine" as "suffer[ing] from a sort of jurisprudential schizophrenia"); Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 728 (2006) (characterizing Establishment Clause doctrine as "a hopeless muddle" and arguing that "[a]t one point or another in recent years, one or more of the nine Justices have signed opinions proposing ten different standards for enforcing the Establishment Clause"); Roxanne L. Houtman, *ACLU v. McCreary County: Rebuilding the Wall Between Church and State*, 55 SYRACUSE L. REV. 395, 397 (2005) ("[I]n the past thirty years, the Supreme Court's Establishment Clause jurisprudence has become increasingly ambiguous."); Sarah M. Isgur, *Play in the Joints: The Struggle to Define Permissive Accommodation Under the First Amendment*, 31 HARV. J.L. & PUB. POL'Y 371, 371 (2008) (noting that the court has created "multiple and overlapping analytical frameworks" in the Establishment Clause arena); Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93, 94 (2007) (characterizing the Court's efforts in *McCreary* and *Van Orden* as "doing little to clarify the law" and "leaving lower courts to sort out the principles that resulted in such disparate results regarding substantially similar displays").

8. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J.,

doctrine, already applied in a variety of other contexts,⁹ has in the last two Terms become almost inextricably intertwined with religious speech and Establishment Clause concerns.¹⁰ The rise of the government speech doctrine has created a new and exceptionally sticky relationship between the Establishment Clause and the Free Speech Clause, and presents a practical quandary that the Court as a whole has failed to reconcile or even to squarely acknowledge.

In the 2009 case of *Pleasant Grove City v. Summum*¹¹ and the 2010 case of *Salazar v. Buono*,¹² the Court faced fact patterns that almost perfectly demonstrate the way in which this complexity is likely to come to a head in the context of arguably religious displays. Both of these cases were layered with doctrinal intricacies and intra-Court splits that somewhat obscure this more basic lesson. But when stripped to their cores, *Summum* and *Buono* highlight the tensions that the Court has produced for itself in this particular corner of the government-speech arena.

The first case, *Summum*, involved arguably *private* speech that the government endeavored to characterize as *government* speech in order to avoid a First Amendment Free Speech Clause problem¹³—and in so doing, potentially created for itself a First Amendment Establishment Clause problem.¹⁴ The second case, *Buono*, involved arguably *government* speech that the government endeavored to characterize as *private* speech in order to avoid a First Amendment Establishment Clause problem¹⁵—and in so doing, potentially created for itself a First Amendment Free Speech Clause problem.¹⁶

concurring).

9. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (holding that a government advertising campaign funded by a compelled subsidy on the beef industry was government speech); *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that the government's decision to subsidize family planning services only if they declined to promote or encourage abortion constituted government speech); see also *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that a government employee's speech made pursuant to official duties constituted government speech and was not protected by the First Amendment from employer retaliation).

10. *Salazar v. Buono*, 130 S. Ct. 1803 (2010); *Summum*, 129 S. Ct. 1125.

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

12. *Buono*, 130 S. Ct. 1803.

13. *Summum*, 129 S. Ct. at 1129.

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

15. *Buono*, 130 S. Ct. at 1836 (Stevens, J., concurring) (noting that the plurality apparently believed that the land transfer had successfully made a Latin cross private speech, and thus eliminated any Establishment Clause issue).

16. Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. 70, 71 (2009) (noting that the government in *Buono*, by trying to recharacterize its speech as private,

This Article will utilize *Summum* and *Buono* to highlight the shared tension that the government speech doctrine creates between the Free Speech and Establishment Clauses. *Summum* and *Buono* are briefly summarized in Parts II and III respectively. Using the cases' fact patterns as bookend examples of the new doctrinal tensions, the Article will illustrate the ways in which the Court's newly developed government speech doctrine can be expected to interact with and implicate the Establishment Clause inquiry with potentially troubling ramifications. Part IV will underscore the practical ramifications of the Court's refusal to resolve the tension, and Part V will conclude by offering early thoughts on how the Court could clarify the doctrine in a cohesive way.

II. PLEASANT GROVE CITY V. SUMMUM

Summum was a suit brought by a religious group¹⁷ against the City of Pleasant Grove, Utah ("Pleasant Grove"). Pleasant Grove owns a small park in the town's historic district, containing more than a dozen permanent displays and monuments, including a depiction of the Ten Commandments made of granite.¹⁸ As was the case with a majority of the other displays and monuments in the park,¹⁹ the Ten Commandments monument was purchased, not by the city directly, but by a private organization that donated it to the city park.²⁰ In the case of the Ten Commandments monument, the donating group was the Fraternal Order of Eagles,²¹ whose donations of Ten Commandment monuments have featured prominently in some major Establishment Clause cases, most notably *Van Orden v. Perry*,²² which narrowly upheld the display of a Ten Commandments monument donated by the Fraternal Order of Eagles on the grounds of the Texas state capital in Austin.²³

Summum, a very small religious sect with roots in Utah, approached Pleasant Grove and requested permission to erect its

was making itself vulnerable to a Free Speech claim).

17. See *The Purpose and Mission of Summum*, SUMMUM: SEALED EXCEPT TO THE OPEN MIND, <http://www.summum.us/about/purpose.shtml> (last visited Jan. 31, 2011).

18. *Summum*, 129 S. Ct. at 1129.

19. *Id.* ("These included an historic granary, a wishing well, the City's first fire station, [and] a September 11 monument . . .").

20. *Id.*

21. *Id.*

22. 545 U.S. 677 (2005).

23. *Id.* at 678-79.

own monument in the park alongside the others.²⁴ This monument would contain the so-called “Seven Aphorisms of Summum,”²⁵ a set of guiding principles that the group said was central to its faith. The proposed monument would be largely comparable to the Ten Commandments monument. It would be roughly the same size and shape, would be made of stone, and would be placed within the city park.²⁶

Pleasant Grove rejected the request.²⁷ The city informed Summum that the park was restricted to donated monuments that either related directly to the history of the town or were donated by groups with “longstanding ties” to the community,²⁸ a policy the city did not have officially in place at the time, but adopted by resolution soon after the rejection of the Aphorisms.²⁹ After a subsequent request to erect the monument was also denied, Summum sued.³⁰

Importantly, for purposes of this analysis, a suit arising out of this fact pattern could have taken one of any number of forms. Indeed, the pages of the U.S. Reports are filled with cases in which minority sects—perhaps recognizing the political and practical barriers keeping their state or local government from permitting a display favoring the less prominent religion—sought instead to prohibit that state or local government from using a display to give the appearance of favoring a majority faith.³¹ In *Van Orden*,³² litigants with

24. *Summum*, 129 S. Ct. at 1129–30.

25. *Id.* at 1129; *See Seven Summum Principles*, SUMMUM: SEALED EXCEPT TO THE OPEN MIND, <http://www.summum.us/philosophy/principles.shtml> (last visited Jan. 31, 2011) (“Summum is mind; the universe is a mental creation”; “As above, so below; as below, so above”; “Nothing rests; everything moves; everything vibrates”; “Everything is dual; everything has an opposing point; everything has its pair of opposites; like and unlike are the same; opposites are identical in nature, but different in degree; extremes bond; all truths are but partial truths; all paradoxes may be reconciled”; “Everything flows out and in; everything has its season; all things rise and fall; the pendulum swing expresses itself in everything; the measure of the swing to the right is the measure of the swing to the left; rhythm compensates”; “Every cause has its effect; every effect has its cause; everything happens according to Law; Chance is just a name for Law not recognized; there are many fields of causation, but nothing escapes the Law of Destiny”; “Gender is in everything; everything has its masculine and feminine principles; Gender manifests on all levels.”).

26. *Summum*, 129 S. Ct. at 1129–30.

27. *Id.* at 1130.

28. *Id.*

29. *Id.*

30. *Id.*

31. *See, e.g.*, *Elkhart v. Books*, 532 U.S. 1058 (2001) (mem.) (denying certiorari for two plaintiffs, one of whom was an avowed atheist, who sued for the removal of a Ten Commandments Monument from the lawn of a city municipal building); *Lynch v. Donnelly*,

objections to the exact display at issue in *Summum*—a Ten Commandments display gifted to a government by the Fraternal Order of Eagles—had challenged the monument as violative of the Establishment Clause and argued that its removal was constitutionally required.³³ In fact, in earlier cases, the Summum sect itself had challenged other Utah municipalities' decisions to erect Ten Commandments displays in public places on Establishment Clause grounds,³⁴ arguing that the government's decision to display the Judeo-Christian tenets "violate[d] the church's First Amendment right to be free from an establishment of religion"³⁵ and demanding that the monument be removed.³⁶

But in *Summum*, the sect's first choice was not to have the Ten Commandments monument taken down; it was to have its own monument erected. Thus, it framed its suit not as an Establishment Clause case, but as a Free Speech Clause case,³⁷ arguing that Pleasant Grove's decision to include some monuments while excluding the Summum display was unconstitutional because, having created a public forum and opened the forum to private speech like that of the Fraternal Order of Eagles, the city could not discriminatorily exclude other private speech.³⁸

The district court denied Summum's request for a preliminary injunction directing the city to allow its monument in the park,³⁹ but

465 U.S. 668 (1984) (plaintiffs, including one with a Jewish background, *Donnelly v. Lynch*, 525 F. Supp. 1150, 1157 (D.R.I. 1981), sued for the removal of a crèche that was part of their city's annual Christmas display); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (plaintiffs, including a Quaker, a Unitarian, and a Jewish Rabbi, sued to overturn a law mandating the posting of a copy of the Ten Commandments in public school classrooms).

32. 545 U.S. 677 (2005).

33. *Id.* at 682.

34. *Summum v. City of Ogden*, 152 F. Supp. 2d 1286 (D. Utah 2001), *rev'd*, *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), *abrogated by*, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997).

35. *Ogden*, 297 F.3d at 998.

36. *Id.*

37. *Summum*, 129 S. Ct. at 1129–30.

38. *Id.*; *see also* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (holding that in a public forum restrictions on speech that are content based are impermissible unless they satisfy strict scrutiny); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.").

39. *Summum v. Pleasant Grove City*, No. 2:05CV00638, 2006 WL 3421838, at *2

the United States Court of Appeals for the Tenth Circuit reversed, accepting Summum's characterization of the speech in question and then agreeing with its Free Speech Clause analysis.⁴⁰ Because the park was a traditional public forum, and because the city was denying a private speaker access to the forum based on the content of that speaker's speech, the city's action was unconstitutional absent a compelling interest that could not be served by more narrowly tailored means and Summum was entitled to an injunction.⁴¹

The U.S. Supreme Court unanimously reversed, holding that Pleasant Grove had not acted unconstitutionally.⁴² It reached this holding not because it disagreed that the public forum doctrine prohibits governments from discriminating against private speakers,⁴³ but because it declined to view the plot line of the case through the public-forum-private-speaker lens that Summum had urged, and instead adopted Pleasant Grove's government-speech narrative.⁴⁴ The Ten Commandments monument, the city had argued, was not properly characterized as private speech because it was a donated gift from the Fraternal Order of Eagles. When the City permitted privately donated monuments to be erected in the park, those monuments changed in character, and became the government's

(D. Utah Nov. 22, 2006).

40. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1055, 1057 (10th Cir. 2007), *rev'd*, *Summum*, 129 S. Ct. 1125.

41. *Id.* at 1053–54. Judges Lucero and McConnell dissented from a subsequent order denying rehearing en banc. Judge Lucero agreed that the monument was private speech, but argued that a park is not a traditional public forum when the access sought is the permanent installation of a monument rather than “in-person” dissemination of ideas. *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1173 (10th Cir. 2007) (Lucero, J., dissenting). By allowing monuments in the park, he reasoned, Pleasant Grove had opened a limited public forum, and thus could reasonably control access to it based on content. *Id.* at 1173–74. Judge McConnell took a government-speech approach. He argued that, based on Tenth Circuit precedent, the Ten Commandments monument was government speech because Pleasant Grove owned the monument, exercised total control over it, and bore ultimate responsibility for its contents and upkeep. *Id.* at 1176–77 (McConnell, J., dissenting). Furthermore, when Pleasant Grove “accepted donation of the monument[] and displayed [it] on public land, the cit[y] embraced the message[] as [its] own.” *Id.* at 1177. Once the monument is characterized as government speech, he argued, the forum analysis is unnecessary. *Id.* Instead, “[t]he government may adopt whatever message it chooses—subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause—and need not alter its speech to accommodate the views of private parties.” *Id.*

42. *Summum*, 129 S. Ct. at 1138.

43. *Id.* at 1132.

44. *Id.* at 1138.

own expressive conduct:⁴⁵ “Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land.”⁴⁶ Thus, the city, in accepting the permanent monument from Fraternal Order of Eagles and displaying it in its park, changed the character of the monument from private speech to government speech.⁴⁷

The consequence of this recharacterization was not small. As the *Sumnum* Court boldly stated, the Free Speech Clause “has *no* application”⁴⁸ to government speech. Having cast the monuments into the “government speech” box, the city was free to choose among monuments the same way that any other private speaker was free to choose to share or not share a message.⁴⁹ By classifying the speech in question as its own government speech, Pleasant Grove had won.

Looming large over this Free Speech Clause win, however, was the Establishment Clause question that the plaintiff, in crafting its claim, had opted not to ask. After all, the message that the government of Pleasant Grove had fought so hard to have declared as its own was a core set of Judeo-Christian religious tenets—a message that, when adopted too fully as their own, has been the constitutional downfall of government entities in numerous cases.⁵⁰

45. *Id.* at 1134.

46. *Id.* at 1133.

47. *Id.* at 1134.

48. *Id.* at 1131 (emphasis added).

49. *Id.* at 1131–32. Although the Court emphasized that “it frequently is not possible to identify a single ‘message’ that is conveyed by an object or structure,” *id.* at 1136, and that by accepting a monument, “a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument,” *id.*, it nevertheless decided that the message of the monument, whatever it might be, was the government’s. *Id.* at 1138. “Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.” *Id.* at 1134.

50. *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam); *see Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 599–600 (1989) (holding that the display of a crèche in a county courthouse violated the Establishment Clause, in part because it sat in the “‘main’ and ‘most beautiful part’ of the building,” such that the reasonable observer must assume that the government intended to adopt the message (internal citation omitted)).

Justice Alito's majority opinion does not once address this quandary.⁵¹ Plainly, however, the issue was not wholly lost on the Justices, as the nascent Establishment Clause problem was a primary focus of oral argument questioning in *Summum*,⁵² and was addressed in several concurring opinions. Justice Souter's concurrence noted that "there [was] no doubt that this case and its government speech claim [were] litigated by the parties with one eye on the Establishment Clause."⁵³ In his concurring opinion, Justice Stevens insinuated that he thought the Ten Commandments display in the Pleasant Grove park might well fall afoul of the Establishment Clause, noting that "the effect of today's decision will be limited" because "even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including . . . the Establishment . . . Clause[]."⁵⁴ Conversely, Justice Scalia wrote separately to agree that "the case [had] been litigated in the shadow of the First Amendment's Establishment Clause,"⁵⁵ but to opine, on behalf of himself and Justice Thomas, that Pleasant Grove had not, in fact, gone out of "the Free Speech Clause frying pan [and] into the

51. Although noting in passing that the government-speech doctrine "does not mean that there are no restraints on government speech" and then amplifying that, "[f]or example, government speech must comport with the Establishment Clause," *Summum*, 129 S. Ct. at 1131–32, the opinion never once acknowledges that this restraint at least arguably applies to the City of Pleasant Grove in the very speech at issue.

52. Justice Kennedy noted, "[I]t does seem to me that if you say it's Government speech that in later cases, including the case of the existing monument, you're going to say it's Government speech and you have an Establishment Clause problem." Transcript of Oral Argument at 5, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (No. 07-665). Justice Souter also commented on the tension: "[T]hat would satisfy you, and it would also be the poison pill in the Establishment Clause." *Id.* at 63. Chief Justice Roberts' very first question was directed at it: "[T]he 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?" *Id.* at 4. Justice Ginsburg likewise suggested that the Establishment Clause element of the case was not resolved by *Van Orden*: "Because you don't have here a 40-year history of this monument being there, and nobody seems to be troubled by it." *Id.* at 7; *see also id.* at 47 (Justice Scalia: "You will say just the opposite when you come back here to challenge the Ten Commandments monument on—on Establishment Clause grounds. You will say something like this: Anybody who comes into this park and seeing this monument owned by the Government, on Government land, will think that the Government is endorsing this message.").

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

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

55. *Id.* (Scalia, J., concurring) (emphasis omitted).

Establishment Clause fire.”⁵⁶ Under these two Justices’ reading of the *Van Orden* and *McCreary County* precedents, there was “little basis to distinguish the monument in this case” from the Ten Commandments monument that passed constitutional muster,⁵⁷ and thus, they speculated, Pleasant Grove could survive the next case.⁵⁸

Neither of these views, of course, represents a holding from the Court, or even the position of a majority of Justices. And thus, Pleasant Grove was left only to surmise as to what consequence would result from its fervent efforts to characterize the arguably religious speech as its own, unsure whether it had picked its First Amendment poison.⁵⁹ Other governmental entities, whose decisions about monuments might be even closer calls under the Court’s discordant and sometimes imprecise Establishment Clause jurisprudence, would be at an even greater loss in speculating whether characterizing that speech as government speech for purposes of the Free Speech litigation would prove to be the critical evidence in a later case alleging that they had unconstitutionally established religion.

III. SALAZAR V. BUONO

While *Summum* set off a firestorm of discussion about what the government speech doctrine might now mean and how it might be invoked in future cases,⁶⁰ the case illustrated only one half of the

56. *Id.*

57. *Id.* at 1140.

58. *Id.*

59. At least one district court judge agrees with Justice Scalia. On remand to the Utah district court, *Summum* was given leave to amend its complaint to include an Establishment Clause claim. *Summum v. Pleasant Grove City*, No. 2:05CV638, 2010 WL 2330336, at *1 (D. Utah June 03, 2010). The district court held that the monument did not establish religion. *Id.* at *3. Citing Justice Scalia’s concurrence, and relying on *Van Orden*, the court concluded that, “The undisputed facts of record in this case show that—whatever the Eagles’ intended message—Pleasant Grove has, since the beginning, displayed the monument for reasons of history, not religion.” *Id.*

60. Blake R. Bertagna, *The Government’s Ten Commandments: Pleasant Grove City v. Summum and the Government Speech Doctrine*, 58 *DRAKE L. REV.* 1 (2009); Joseph Blocher, *Property and Speech in Summum*, 104 *NW. U. L. REV.* 83 (2009); Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 *ME. L. REV.* 23 (2010); Bruce Ledewitz, *Could Government Speech Endorsing a Higher Law Resolve the Establishment Clause Crisis?*, 41 *ST. MARY’S L.J.* 41 (2009); Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 *GONZ. L. REV.* 113 (2009–2010); Lisa Shaw Roy, *Pleasant Grove City v. Summum: Monuments, Messages, and the Next Establishment Clause*, 104 *NW. U. L. REV.* 280 (2010); Tebbe, *supra* note 16; L. Darnell Weeden, *A First Amendment Establishment Clause Analysis of Permanent Displays on Public*

larger Free Speech/Establishment tug-of-war. *Summum* had given reason for concern that governments that adopted speech as their own for Free Speech Clause litigation purposes might come to regret the decision if faced with Establishment Clause litigation, but *Salazar v. Buono*'s⁶¹ facts—if not its holding—illustrated the opposite: governments that take pains to distance themselves from speech for Establishment Clause purposes might create practical difficulties for themselves in the Free Speech area.

Argued just eight months after *Summum* was decided,⁶² *Buono* was a case with a complex procedural posture and a somewhat constricted question presented. But the facts that produced the dispute parallel those in *Summum* in some important ways. Again, the Court was faced with an arguably religious monument,⁶³ again donated by a private entity,⁶⁴ again displayed on public park land.⁶⁵ Indeed, the fuller history of the case demonstrates that the challenge against this arguably religious display was sparked, at least initially, not by a plaintiff who was seeking for the government to stop engaging in religious speech but by an adherent of a less prominent religion whose request for a monument was rejected.⁶⁶

In *Buono*, the display was a white Latin cross made of piping and standing between 5 and 8 feet in height.⁶⁷ The cross has stood for more than seven decades on a visible outcropping of rock in the federally owned land of the massive Mojave National Preserve in southeastern California.⁶⁸ Perched on a ledge called Sunrise Rock, the cross can be seen from all around, including from the road that passes through the Preserve, which is about 100 feet away.⁶⁹ The cross has been on Sunrise Rock since the Veterans of Foreign Wars initially built it in the 1930s, apparently as a “donated” memorial to mark the sacrifices of World War I soldiers,⁷⁰ although it has been

Property as Government Speech, 35 T. MARSHALL L. REV. 217 (2010).

61. *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

62. *Summum* was decided February 25, 2009. *Buono* was argued October 7, 2009.

63. *Buono*, 130 S. Ct. at 1811–12.

64. *Id.* at 1812.

65. *Id.*

66. *Id.* at 1833 (Stevens, J., dissenting); *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205–06 (C.D. Cal. 2002); see also discussion *infra* accompanying notes 77–79.

67. *Buono*, 130 S. Ct. at 1811–12.

68. *Id.* at 1811.

69. *Id.* at 1812.

70. *Id.* at 1811.

put to at least some religious use, including regular Easter services.⁷¹ While the cross has existed on government property for decades and has even been replaced by private entities over the years as it deteriorated in the weather,⁷² the government apparently never gave explicit permission for it to be erected, maintained, or located on the federal land.⁷³ It also never took the fairly easy step of chopping it down, arguably because doing so would appear disrespectful to the veterans in whose honor it initially was constructed.⁷⁴

The challenge to the cross that eventually came before the United States Supreme Court was a complicated one, tied to a piece of congressional legislation⁷⁵ and brought by a former parks supervisor whose standing was questionable in the eyes of at least some of the Justices.⁷⁶ But at earlier stages in the story, the tale almost perfectly paralleled the narrative with which the Court was presented in *Sumnum*. In 1999, a Buddhist Sherpa asked the National Park Service to permit the construction of a stupa—a mound-like structure containing Buddhist relics and serving as a sacred site of worship—in a location in the Mohave National Preserve near the Latin cross.⁷⁷ Citing a regulation that bars any commemorative installation in a national park area without headquarter’s permission, the Park Service denied the request.⁷⁸ In doing so, the Park Service acknowledged the presence of the cross, and indicated its intention to take it down.⁷⁹

Ultimately, however, the government did not dismantle the Latin cross. And ultimately, the suit that was brought to challenge the cross was not a suit by the Buddhists, arguing under the Free Speech Clause that the public forum should be open to all, but a suit by an individual offended at the presence of a religious symbol on

71. *Id.* at 1812.

72. *Id.*

73. *Id.* at 1822 (Alito, J., concurring).

74. *Id.* at 1823 (arguing that “removal would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor”).

75. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763A-230 (2001); Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1551 (2003).

76. *Buono*, 130 S. Ct. at 1824 (Scalia, J., concurring).

77. *Id.* at 1133 (Stevens, J., dissenting); *see also* *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205–06 (C.D. Cal. 2002).

78. *Buono*, 212 F. Supp. 2d at 1206.

79. *Id.*

federal land,⁸⁰ arguing under the Establishment Clause that the symbol must come down.

While characterizing the display as government speech had been the silver bullet for the municipality in *Summum*—and presumably would also have served this purpose for the Park Service if the lawsuit it had faced was a Free Speech challenge by the Buddhists—that characterization was a dangerous one in Establishment Clause litigation. Indeed, when Park Service officials had considered whether the cross might be preserved by qualifying as a historic place on the National Register,⁸¹ they decided that this was not a possibility, in part because the cross had been used for religious purposes.⁸² That is, the religious character of this speech on government property was, as a practical matter, impeding the government's ability to continue to characterize the expression as government speech. The incentive to avoid this characterization was even greater when Frank Buono, a previous assistant superintendent of the Preserve, filed the lawsuit challenging the cross as a violation of the Establishment Clause.⁸³

Thus, in what became the converse of the situation in *Summum*, the government took steps to recharacterize the Latin cross monument from government speech to private speech, again picking its poison based on the formulation of the suit brought against it. Congress gave the cross a memorial designation and installed a plaque specifically noting the sponsorship of the Veterans of Foreign Wars.⁸⁴ When a lower federal court held that the Latin cross nevertheless violated the Establishment Clause⁸⁵ and the case was appealed and pending before the Ninth Circuit,⁸⁶ Congress again took action, this time even more drastic, to try to recharacterize the speech from government speech to private speech. In 2004, it

80. *Id.* at 1207.

81. *Buono v. Kempthorne*, 502 F.3d 1069, 1073 (9th Cir. 2007).

82. *Id.*

83. Mr. Buono, a Roman Catholic, argued standing on the limited grounds that although he was not offended by a Christian cross or by a religious symbol on government property, if the site were open to other permanent displays, he would avoid the cross on future visits to the Preserve because the property was not open in such a way. *Salazar v. Buono*, 130 S. Ct. 1803, 1827 n.5 (2010) (Scalia, J., concurring).

84. Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2278 (2002).

85. *Buono v. Norton*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002).

86. The Ninth Circuit would also find that the cross violated the Establishment Clause. *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004).

ordered the Interior Department to convey the acre of land on which the cross sits to the Veterans of Foreign Wars in exchange for a parcel of privately owned land of equal or greater value nearby.⁸⁷ Although the bill specifically required that the land revert to federal ownership if it was no longer maintained as a war memorial, and thus the government retained at least some control over the message conveyed on the land,⁸⁸ Congress plainly wished for the speech to be viewed as private for purposes of any Establishment Clause analysis.

Buono went back to the district court and asserted the core argument that ultimately came before the United States Supreme Court: that the transfer of the property to the private owner was itself invalid under the Establishment Clause.⁸⁹ Buono contended that the transfer was a transparent attempt by Congress to evade the court ruling against the cross display and to keep the monument in place, an action that he argued remained a government endorsement of Christianity.⁹⁰ The district court⁹¹ and Ninth Circuit⁹² agreed, finding that the transfer did not end the endorsement and holding that, “[u]nder the statutory dictates and terms that presently stand, carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement.”⁹³

The Supreme Court’s decision in *Buono* was a limited one, and was delivered through a tangled set of six separate opinions, not one of which represented a majority. Although a total of five Justices agreed that the lower courts had erred in barring Congress’s transfer

87. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1100 (2004).

88. *Id.* § 8121(e). Congress did not require that the memorial be a cross, but did designate the cross as a national memorial before transferring the land. *Id.* § 8121(a). Justice Stevens noted that this fact, combined with the government’s retention of a reversionary interest, and its decision to transfer the land to a private group that had expressed its intent to keep the cross up, made it so that “[i]f it does not categorically require the new owner of the property to display the existing memorial meeting that description (the cross), the statute most certainly encourages this result.” *Buono*, 130 S. Ct. at 1837 (Stevens, J., concurring) (internal citations omitted).

89. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005).

90. *Id.* at 1180–81.

91. *Id.* at 1182 (“[I]t is evident to the court that the government has engaged in herculean efforts to preserve the Latin Cross on federal land and that the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation by Defendants.”).

92. *Buono v. Kempthorne*, 527 F.3d 758, 783 (9th Cir. 2008).

93. *Id.*

of the plot on which the cross stands to private ownership, the five did not agree in their reasoning, and only three reached this conclusion on its Establishment Clause merits.⁹⁴ Justice Kennedy's lead opinion boldly stated that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm," and spoke favorably of "Congress's legislative judgment that this dispute is best resolved through a framework and policy of accommodation."⁹⁵ However, only Chief Justice Roberts and Justice Alito joined him on this point. Neither Justice Kennedy's position that the message of the cross is not endorsement of religion,⁹⁶ nor his apparent position that the posting of a sign announcing the new private ownership of the property would remedy any possible endorsement⁹⁷ are binding precedent going forward. All told, the Court sent the case back to the district court for closer examination of the action by Congress.⁹⁸

Nevertheless, given the views expressed by Justices Scalia and Thomas in *Summum*—and their hints in *Buono* that they would join Justice Kennedy's views "in a proper case"⁹⁹—the federal government might conclude, after *Buono*, that a future case with a less peculiar procedural posture might result in five Justices willing to permit Congress to preserve a religious monument on government land by transferring to private ownership the immediate plot on

94. *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (Kennedy, J.) (plurality opinion). Justice Kennedy was joined in his reasoning in full by Chief Justice Roberts and in part by Justice Alito. Justice Alito wrote separately to say he agreed with Justice Kennedy on all points except the decision to remand, arguing that the record was sufficiently developed to allow for resolution of the issue. *Id.* at 1821 (Alito, J., concurring). Justice Scalia, joined by Justice Thomas, concurred in the judgment because he believed *Buono* lacked standing. *Id.* at 1824 (Scalia, J., concurring). See *infra* note 98.

95. *Buono*, 130 S. Ct. at 1818 (Kennedy, J.) (plurality opinion).

96. *Id.* at 1816 ("Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message.")

97. *Id.* at 1820 ("Even if, contrary to the congressional judgment, the land transfer were thought an insufficient accommodation in light of the earlier finding of religious endorsement, it was incumbent upon the District Court to consider less drastic relief than complete invalidation of the land-transfer statute. For instance, if there is to be a conveyance, the question might arise regarding the necessity of further action, such as signs to indicate the VFW's ownership of the land." (internal citations omitted)).

98. *Id.* at 1819–20. There were four votes in favor of remanding the case for more consideration, which were supported by two different rationales. There was one vote for remand but only to vacate the judgment of the court below. Four other Justices opposed the remand, based on two different analyses. The case does go back to the lower court, because that is the formal "judgment" of the Court, which received five total votes.

99. *Id.* at 1828 (Scalia, J., concurring).

which it stands. While this majority might be willing to reach this conclusion on the ground that the monument, while remaining government speech, does not endorse religion,¹⁰⁰ the Court might also achieve the same result by declaring that the transfer of property changed the character of the speech from government speech to private speech.

Should the Court take the latter approach, it will signal a serious practical problem for the new government speech doctrine in the context of religious displays. In *Summum*, the government's efforts to have potentially private speech classified as government speech produced the Pyrrhic victory of conceding a critical element of an Establishment Clause claim.¹⁰¹ Conversely, in the *Buono* development just hypothesized, a win for the government on the Establishment Clause front will not be without consequences on the Free Speech Clause front. If, for Establishment Clause purposes, the government successfully recharacterizes its own speech as private speech through land swaps and signage, the litigants in the next suit—perhaps the Buddhists who were denied their stupa—would no doubt seek to take advantage of that characterization in a Free Speech claim.

Indeed, the Buddhists in this hypothetical suit would successfully allege that the government was doing precisely what *Summum* had alleged that Pleasant Grove was doing: opening a public forum for private speech in the form of an arguably religious display. Once this forum has been opened to this private speech, the Free Speech Clause argument will go, the government is constitutionally obligated to be nondiscriminatory and to allow other private speakers to use the public land for similar expressive purposes.¹⁰²

100. *See id.* at 1818 (Kennedy, J.) (plurality opinion) (“The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society.”).

101. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1141 (2009) (Souter, J., concurring) (arguing that after the Court’s decision, because monuments on government land will always be viewed as government speech, governments will have to surround arguably religious monuments on their land with secular objects in order to avoid an Establishment Clause violation.). *Contra id.* at 1139–40 (Scalia, J., concurring) (arguing that the City of Pleasant Grove had not gone from the “Free Speech Clause frying pan into the Establishment Clause fire” because under *Van Orden* the Ten Commandments monument was properly viewed as a secular rather than religious object).

102. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that the government is free to limit participation in a charity drive to certain

Indeed, the particular way in which the Park Service endeavored to restructure the government speech as private speech in *Buono* could leave it open to the argument that the Free Speech Clause demands that the government engage in this complex congressional land transfer on behalf of every other private entity that would like to have a private plot within the reserve on which to erect its display.¹⁰³

Tellingly, in its string of cases against Utah municipalities based on Ten Commandments displays and requested Seven Aphorisms displays, Summum itself has litigated at least one case on precisely this premise. In *Summum v. Duchesne City*,¹⁰⁴ the sect asked the City of Duchesne to transfer a small plot of land in a city park to Summum for the display of its monument.¹⁰⁵ It argued that the city was constitutionally obligated to do so under the Free Speech Clause because the city had earlier transferred a plot of land in the park containing a Ten Commandments monument to the Lions Club, a service organization.¹⁰⁶

As was the case in *Summum v. Pleasant Grove City*, the *Buono* Court never squarely addressed the new-found fluidity between government speech and private speech or the dilemma that might be presented in the next case if the cause of action were styled differently. Nevertheless, questions posed at oral argument again hinted at the confusion,¹⁰⁷ and, as described above, the practical realities of the next case loomed in the background unresolved.

organizations, so long as the limitation is not based on the government's disagreement with an organization's viewpoint); *Police Dep't. of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972) (holding that discriminating between peaceful labor demonstrations and other types of peaceful demonstrations is unconstitutional).

103. See Tebbe, *supra* note 16, at 71.

104. 340 F. Supp. 2d 1223 (D. Utah 2004), *aff'd in part, rev'd in part*, 482 F.3d 1263 (10th Cir. 2007), *vacated*, 129 S. Ct. 1523 (2009) (mem.) (remanding for reconsideration in light of *Pleasant Grove City v. Summum*).

105. *Id.* at 1224.

106. *Id.* at 1224, 1229 n.13. After a complex line of litigation challenging the validity of the transfer to the Lions Club and a subsequent transfer back to a family that initially donated the monument to the city, *id.* at 1229–30; *Summum v. Duchesne City*, 482 F.3d 1263, 1271 (10th Cir. 2007), the city sought a Writ of Certiorari at the United States Supreme Court. Petition for Writ of Certiorari, *Summum*, 129 S. Ct. 1523 (No. 07-690), 2007 WL 4207131. While that petition was pending, the Court issued its opinion in *Pleasant Grove City v. Summum*. In response to the petition from Duchesne City, the Court then vacated the 10th Circuit opinion and remanded for reconsideration in light of *Pleasant Grove City v. Summum*. 129 S. Ct. 1523 (mem.). The 10th Circuit remanded to the district court, from which an opinion has yet to issue. *Summum v. Duchesne City*, 319 F. App'x 753 (10th Cir. 2009).

107. For example, Justice Sotomayor questioned how the government would go about

IV. THE PRACTICAL PROBLEMS

When placed side by side and played out to their logical conclusions, *Summum* and *Buono* illustrate that the Court has in fact created a “jurisprudence of labels,”¹⁰⁸ that can be expected to rear its head most prominently and most consistently in the context of religious displays on government property. The characterization of property as either government speech or private speech in one First Amendment litigation context presents practical problems of at least two varieties—one dealing with the motivations of governmental entities and the other dealing with the motivations of those who file suit against them.

First, there is the risk that cities and towns that recognize the great fluidity between government speech and private speech—and the benefits that inure from one characterization or the other in a given litigation context—will argue the characterization that behooves them in the case at hand, even if that characterization does not align with their true motivations. The *Summum* litigants labeled this governmental “subterfuge”;¹⁰⁹ others have referred to it as government “ventriloquism.”¹¹⁰ The concern is that a shortsighted governmental entity will recognize that the Supreme Court has largely given a free pass in a Free Speech Clause case at the invocation of the government speech label, or will recognize that the Court may be on its way to offering a free pass in an Establishment Clause case with the conveyance of the localized plot of land to private hands. In either event, the result may be that the government will invoke one or the other of these doctrines as an artifice when intending to convey an unconstitutional message. Thus, the Fraternal Order of Eagles can arrange a “donation” to any government wishing to convey the message of the Ten Commandments while excluding the message of other, smaller sects. Conversely, Congress, through the simple act of a land transfer, can make the Veterans of Foreign Wars the communicator of the

posting signage identifying the symbol as private speech. Transcript of Oral Argument at 24–25, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472). Justice Stevens probed into the details of the fraction of the area of the Preserve that is privately held. *Id.* at 20. This inquiry may have been motivated, at least in part, by an interest in the property as a forum that might be opened to private speakers.

108. *Summum*, 129 S. Ct. at 1140 (Breyer, J., concurring).

109. *Id.* at 1134 (majority opinion).

110. Tebbe, *supra* note 16, at 71.

message sent by the Latin cross, while still ensuring that the message is conveyed.¹¹¹

Of course, a government would only take this step if it focused exclusively and myopically on the individual case at hand. Looking longer-term, it might recognize the risk that the position might pose to the next round of litigation. This highlights the second, opposite risk in the form of the potential for *plaintiff* manipulation.

If, as a practical matter, the surest way for the government to prevail in a Free Speech case involving arguably religious displays is to have the display classified as government speech, and the surest way for the government to prevail in an Establishment Clause case is to have the display classified as private speech, a plaintiff like *Summum* or the Buddhists can force the government to pick its

111. The Court's apparent willingness to accept that a monument's message is not unitary, or even objectively identifiable, adds a level of complexity in this area. Justice Alito's opinion for the majority in *Summum* emphasizes that monuments can mean different things to different viewers and that the message intended to be conveyed by a private owner may not be the message adopted by the government taking possession of the display. 129 S. Ct. at 1135 ("The meaning conveyed by a monument is generally not a simple one Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."). If the government is not required to inherit the donor's message or specify which potential message it is adopting, the government may be able to classify any monument, even one conveying a message of civic excommunication immediately before conveyance, *Lynch v. Donnelly*, 465 U.S. 668 (1984), as government speech without fear of subsequent consequences, even if no obvious change was made to the monument post conveyance. In such circumstances, the city's response might be that if the observer senses a message that violates Establishment Clause principles, it is the donor's message, not the city's. Language from Justice Alito's opinion in *Buono*, referencing *Summum* in recognizing two reasonable interpretations of the meaning of the Latin cross, suggests his ongoing adherence to this position. *Salazar v. Buono*, 130 S. Ct. 1803, 1822 (2010) (Alito, J., concurring) ("Those humans who made the trip to see the monument appear to have viewed it as conveying at least two significantly different messages." (citing *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1135 (2009))). This potential free pass would remove the incentive for the government to strategically classify speech one way or the other. The government would always have the incentive to classify the speech as government speech and then to declare that its message was not the donor's religious message. While speculation as to the future application of Justice Alito's indeterminacy theory is beyond the scope of this Article, it is at least clear that any further development of that theory will have a profound impact on future government speech/religious monument cases. It suffices for the purposes of the present analysis to note that a willingness to allow an indeterminacy of the *message* being spoken is equally harmful to a neutral rule of law as a willingness to allow an indeterminacy of the identity of the *speaker*, the problem addressed here. If the approach proposed in this Article is adopted, *see infra* Part V, and the initial inquiry in these cases is whether the reasonable observer would believe the government or a private speaker was speaking, then the most consistent approach for the subsequent inquiry would be to inquire what the reasonable observer would believe the message to be.

poison. Such a plaintiff could easily bring one losing cause of action in which the government can be expected to argue a particular speech classification to ensure its victory, and then use that choice to the government's disadvantage in the next case, in which that classification ensures its defeat.¹¹² Indeed, there appears to be little to prevent such a plaintiff from simply setting this snare in a single filing. Organizations like Summum and the Buddhists might easily assert both a Free Speech Clause claim and an Establishment Clause claim in a single suit,¹¹³ pleading in the alternative¹¹⁴ that the Constitution demands either that the government open the park area fairly to all comers who wish to engage in private speech or that it adopt the park speech as its own and then remove all speech that is religious in character. In such a scenario, absent clarification of the doctrine from the Court, there is no neutral, unified ground on which to settle the question.¹¹⁵

112. The doctrine of judicial estoppel would prohibit the government from denying its earlier classification of the speech in a future litigation. *See* *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (“[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” (alteration in original) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895))).

113. *See* *Summum v. City of Ogden*, 152 F. Supp. 2d 1286 (D. Utah 2001) (alleging either Establishment or Free Speech violations), *aff’d in part rev’d in part*, 297 F.3d 995 (10th Cir. 2002).

114. *See* FED. R. CIV. P. 8(d)(2) (“A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.”).

115. Justice Alito's fluidity-of-message reasoning also has implications for this second problem, which played out in *Summum* (although again, a detailed analysis of the issue is beyond the scope of this Article). In *Summum*, the plaintiff tried to force the government to pick its poison by arguing that Pleasant Grove needed to formally adopt the message of the Ten Commandments monument's donors in order for the monument to qualify as government speech. 129 S. Ct. at 1134. Theoretically, the next step for Summum would have been to demonstrate that the government had “established” the religious message it had formally adopted. If Justice Alito's comments on message indeterminacy are to be taken seriously, however, then Summum's tactics are to no avail. Although the government was forced to claim the monument as its own speech to avoid a Free Speech issue, the government did not face an Establishment Clause problem because it could point to a secular message it intended to speak. *Id.* at 1130 (noting that the city claimed, in its letter to Summum, to accept only monuments that have some relationship to the history of the community). If the Court's apparent willingness to allow for fluidity of message continues, litigants would have no incentive to try to force the government to classify the speech as private or government speech. The government would always choose government speech, because it would be a First Amendment safe house, making it possible to avoid both Speech and Establishment Clause issues by claiming that it was speaking its own, secular message, regardless of whether observers

V. A FIRST STEP TO A COHERENT GOVERNMENT SPEECH
DOCTRINE

To begin to resolve this tangle, the Court must recognize the inextricable intertwining of the Free Speech Clause and the Establishment Clause in the context of religious displays, and then build an organized, workable government speech doctrine with a lens wide enough to keep the total picture in view.

One initial, important doctrinal step that the Court might take to bring about this cohesiveness is to clearly adopt—in both the Free Speech and the Establishment Clause arenas—an explicit¹¹⁶ “reasonable observer” test. Under such a test, a threshold question to be asked at the outset of either a Free Speech or an Establishment Clause case involving an arguably religious display on what is now (or has recently been) government property would be whether a

believe the message to be religious. Although the issue is worthy of more investigation, the logical approach would seem to be the adoption of two reasonable observer inquiries—the first to determine who is speaking and the second to determine what message is being conveyed. *See infra* Part V.

116. Some scholars writing post-*Summum* have argued that the Court has adopted such a test, albeit implicitly, in that context. *See* Blocher, *supra* note 60, at 85 (arguing that it is possible to view *Summum* as holding that “no matter what the property owner subjectively intends—speech occurs where a reasonable observer would *think* that a property owner’s acceptance of a monument or other speech act on his property amounts to approval and communication of its message. And although this viewer-centered approach may incorporate some notion of property ownership (as Justice Stevens has noted, we generally presume that a person endorses messages displayed on his property), it is not entirely coincident with the property-owner-as-speaker approach.”); Tebbe, *supra* note 16, at 74 (arguing that in *Summum* the Court “defended the proposition that permanent monuments on public property constitute government speech by reference to routine observers” and by so doing “the Court suggested that it will not simply defer to every private-law arrangement—ownership of the monument itself is not the only factor that matters when the Court determines who is speaking. That suggestion will be drawn out and tested in *Buono*, where the Court will confront a land transaction that is highly structured, so that ordinary observers may not be able to associate the message of a permanent monument with the property owner”); Bertagna, *supra* note 60, at 59–61 (arguing that the Court had implicitly adopted a “type of endorsement test” by considering how “an ‘observer’ of a permanent monument on public property would interpret the relationship between the monument and the government” and calling for the Court to be more explicit going forward about its employment of an endorsement-type test in the future, with a focus only on the observers’ knowledge of who owned the land and the permanence of the monument). *But see* Roy, *supra* note 60, at 286 (“The *Summum* opinion seriously undermines the proposition that a monument sends only one message or any particular message. . . . [As a result it] seems to exclude the possibility of a reasonable observer . . . either as an actual person or as a judicial amalgam of a range of different observers. Indeed, this lengthy discussion of messages creates a nuanced, open-ended view of the impact on passers-by of public displays that is at odds with the Court’s jurisprudence applying the endorsement test.”).

reasonable observer would believe that the government was speaking, or would instead believe that a private speaker was conveying the message. This question would be asked prior to, and apart from, any question about what message was being conveyed, thereby further neutralizing the inquiry and focusing it on the issue of who, objectively, seems to be speaking.

Adopting this approach, and assuming the same reasonable observer in both the Free Speech and the Establishment Clause contexts, would go a long distance toward resolving the fluidity of characterization that currently threatens to plague these cases. It would keep the analytical focus on an objective test, thereby preventing the arguments from focusing too heavily on who holds the deed to the particular plot of ground. It also would have the clear, practical benefit of ensuring that neither the plaintiff's litigation strategy nor the government's potentially disingenuous characterization of the speech drives the primary analysis.

Such a test presumably would take into account property ownership, but also would include an inquiry into the reasonable observer's *awareness* of property ownership, the ordinary observer's usual proximity from the monument, an investigation of local assumptions about governmental responsibility for the given property, and an examination of any ongoing role that the government had in maintaining or supporting the property.¹¹⁷ Thus, if a reasonable observer driving through the Mojave National Preserve knows only that she is traversing a massive national park and sees a Latin cross perched on an outcropping of rock 100 feet away, it would matter very little that a clever land deal had conveyed the immediately surrounding plot to private hands or even that there was a small sign immediately adjacent to the cross emphasizing its new private ownership. The reasonable observer would believe that her government has put a white cross on federal property to convey a government message, and the existence of a complicated real estate transaction would make little meaningful difference to the analysis. Conversely, if a city accepted a donated Ten Commandments monument but all objective signals suggested to the reasonable observer that private speakers had control over the display and its

117. See Blocher, *supra* note 60, at 85 (arguing that, in the *Sumnum* situation, the government speech test should take into account property ownership when determining the "speaker" of a monument, but should also ask whether the reasonable observer would think the property owner was speaking the message).

message, it should be irrelevant that the private speaker had gone through the motions of “donating” it. Thus, for example, if an organization executed a nominal donation of a monument bearing the text of the Ten Commandments, prominently preceded by the words “Organization X suggests that citizens should obey the following commandments,” the reasonable observer may well walk away feeling as if she had been spoken to by the organization, and not by the city, notwithstanding the city’s technical receipt of a “donation” within the park. In both instances, the threshold reasonable-observer test would assume that the reasonable observer’s view would not be altered by mere changes in form if there were no meaningful, observable differences in function.

The Court already has taken some small moves in this direction, laying doctrinal foundations on which this new, cohesive government speech approach could be built. Both *Summum* and *Buono* contain language that at least implicitly suggests that the observations of the reasonable person might matter to the government speech inquiry,¹¹⁸ and the Court has long pointed to the reasonable-observer standard in the context of the Establishment Clause endorsement test.¹¹⁹

118. Justice Alito wrote for the *Summum* majority that passers-by who observe donated permanent monuments routinely and reasonably interpret them as conveying some message on the property owner’s behalf, and that this is true whether the property is private or public property. 129 S. Ct. at 1133. In *Buono*, Justice Kennedy indicated that he was not certain that a reasonable observer test was appropriate to apply to a monument on private land, but went on to apply it anyway. 130 S. Ct. 1803, 1819 (2010). And although Justice Alito only assumed, rather than stated, that the endorsement test could be applied to a monument on private land, he did use the test to argue essentially that the monument was private speech. *Id.* at 1824 (Alito, J., concurring). Justice Stevens assumed the propriety of a reasonable observer test throughout his concurrence, arguing that “even assuming . . . that the cross would be purely private speech after the transfer . . . it would still be appropriate for the District Court to apply the reasonable observer standard” because “the relevant standard provides that the Establishment Clause is violated whenever ‘the State’s own actions . . . , and their relationship to the private speech at issue, *actually convey* a message of endorsement.’” *Id.* at 1836–37 (Stevens, J., concurring) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O’Connor, J., concurring)). *See also* sources cited *supra* note 116.

119. *See Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (Thomas, J., concurring) (noting with disapproval that when the Court analyzes an Establishment Clause challenge to a religious monument, it “looks for the meaning to an observer of indeterminate religious affiliation who knows all the facts and circumstances surrounding a challenged display” (citing *Pinette*, 515 U.S. at 780)); *McCreary Cnty. v. ACLU*, 545 U.S. 844, 883 (2005) (O’Connor, J., concurring) (“The purpose behind the counties’ display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer.”); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34 (2004) (O’Connor, J., concurring) (noting that the endorsement test “assumes the viewpoint of a reasonable observer”).

Significantly, in some Establishment Clause cases it has also expressed skepticism about after-the-fact alterations to meet this constitutional test. For example, in *McCreary County v. ACLU*,¹²⁰ the county officials in Kentucky altered their original display, which had contained only the Ten Commandments, to include other religiously themed historical documents and then, later, to include other largely secular documents, like the Magna Carta and the Bill of Rights, displayed alongside the Ten Commandments.¹²¹ The majority in that case emphasized that “no reasonable observer could swallow the claim” that these tinkering with the displays had removed their original religious aim.¹²² Although this analysis was asking about the reasonable observer’s view of the *content* of the material and whether it endorsed religion, an identical “reasonable observer” approach would be equally useful when asking whether original purposes as to the public or private identity of the speaker were altered through a donation to or a land transfer from the government.

Further, such a doctrine would also be in keeping with indications from the Court in other Establishment Clause cases that mere technicalities or tactical changes in property ownership are not enough to insulate the government from the Establishment inquiry. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter* the Court heard a challenge to a nativity scene that was installed in the stairway of a county courthouse.¹²³ One line of argument on the government’s part was that the crèche was accompanied by a small sign indicating that it had been donated by and continued to be owned by a local Catholic group.¹²⁴ Notwithstanding this effort—which in today’s terminology we might label an attempt to have government speech recharacterized as private speech—the Court concluded that, based on the perceptions of the reasonable observer, the principal or primary effect of the display was to advance religion within the meaning of the *Lemon* test,¹²⁵ when the display was viewed in its overall context.¹²⁶ Again, that particular use of the reasonable-observer test was focused on the question of what message the

120. 545 U.S. 844.

121. *Id.* at 853–56.

122. *Id.* at 872.

123. 492 U.S. 573, 573 (1989).

124. *Id.* at 600.

125. *Id.* at 574, 597.

126. *Id.* at 598, 602.

display conveyed—an inquiry that should come subsequent to the initial question of whether the speech is government or private speech. But the reasonable-observer inquiry made at the outset of any case involving arguably government speech should share this same insistence that neither private nor government speakers may shift accountability for their speech to others through technicalities not clearly noticeable to or meaningful for the reasonable observer.

This approach, which puts function over form, would prevent the Court from giving its blessing to perfectly timed switches in characterizations of the speech. It also would be consistent with what the Supreme Court has said is the very premise of the government speech doctrine. The Court, in crafting the doctrine, has stated that democratic accountability for speech is the doctrine's hallmark. That is, while the Free Speech Clause places significant constraints on governments when they are managing public fora in which private speakers are speaking, the government speech doctrine removes those constraints when the government is speaking, based on the understanding that "a government entity is ultimately 'accountable to the electorate and the political process for its advocacy.'"¹²⁷ Thus, if the people object to the government's speech, they can elect new representatives who "later could espouse some different or contrary position."¹²⁸ In other words, political accountability, rather than the Free Speech Clause, will provide the citizenry with its recourse against the government when the government itself speaks in ways with which the citizenry disapproves. This premise presupposes that governments will accept responsibility for messages that are objectively theirs and that this accountability will be determined through the eyes of a reasonable observer, not via a label affixed by the government or a private party with a vested interest in the message conveyed by the display.

Adopting the reasonable-observer approach will not, of course, eliminate either the government or the plaintiff's incentives to strategize. Both parties will endeavor to demonstrate that the governing test is met in their favor. Ultimately, in monument cases, the poison will have to be picked, because a monument will either be private or government speech, and consequences will flow from either outcome. However, a reasonable-observer test would at least

127. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2005) (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

128. *Southworth*, 529 U.S. at 235.

ensure that the picking happens in the same way in all instances, rather than at the whim of litigants or the caprice of the Court. The power of litigation choice can be neutralized on both sides by establishing a principled, more predictable way of distinguishing private and government speech, irrespective of the government's complicated real estate transactions or other would-be antidotal tinkering. Equally as significant, by making this foundational inquiry identical regardless of which case is brought first, the approach will place the deciding court in a more neutral, objective position and will demand that it view the Establishment and Free Speech issues as inextricably related to one another. Not only will the reasonable-observer approach facilitate political accountability—because citizens will be able to credit the speech to the right speaker and react accordingly—it also will build a cohesive, rather than piecemeal, approach to the relationship between the two clauses as applied to monuments, something the Court has thus far refused to provide.