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Adopted Speech: *Summum*'s Implications on Government-Sponsored, Student Speech

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ADOPTED SPEECH: *SUMMUM*'S IMPLICATIONS ON GOVERNMENT-SPONSORED, STUDENT SPEECH

INTRODUCTION

Few places exist where freedom of expression is more important than in public universities. Indeed, "[e]ducation is all about speech in its various facets. Schools are intrinsically expressive institutions. Their core functions involve choices about speech, judgments evaluating speech, limitations restricting speech, and mandates requiring speech."[1] Consequently, American public universities have become bastions of free thought and expression where the government goes even so far as to subsidize many students' free expression through moneys spent printing student newspapers, furnishing student studios, or maintaining student radio licenses. However, the expansive freedoms generally guaranteed to students of public colleges may have recently come under attack from a very unlikely source.

In *Pleasant Grove v. Summum*,[2] the United States Supreme Court reversed a Tenth Circuit decision[3] using the relatively new government speech doctrine.[4] This doctrine essentially allows the government to express (or not to express) whatever it wishes without restriction. However, the Court diverged from its prior decisions when, instead of requiring the government to be the impetus behind its speech, it allowed the government to adopt private speech and make it its own to the exclusion of others. This new take on the government speech doctrine looms threateningly over its untested application to student speech—

1. Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 728 (2009).

2. 129 S. Ct. 1125 (2009).

3. Summum v. Pleasant Grove, 499 F.3d 1170 (10th Cir. 2007), *rev'd*, 129 S. Ct. 1125 (2009).

4. *Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring) (referring to the government speech doctrine as "newly minted").

particularly government-sponsored, student speech—jurisprudence. If, under *Summum*, public universities can adopt government-sponsored, student speech as their own, there is effectively no restriction as to what university administrators can censor within that domain. In addition, if universities are given complete discretion to determine what they will or will not censor, what is to restrict them from censoring more than is beneficial to both students and society as a whole? The aim of this Comment is to demonstrate that the new government speech doctrine elucidated in *Summum* may pose a significant threat to government-sponsored, student speech by allowing college administrators to adopt student expression and then control and even censor "curricular speech" based on viewpoint. In addition, it will show that the regime created by *Summum* also creates perverse incentives that will encourage university administrators to censor more rather than less.

This Comment will illustrate how *Summum*'s new take on the government speech doctrine may threaten student speech by first explaining the significant role that public universities play in American society, as well as the importance of free speech within those universities. Next, this Comment will survey the different standards under which student speech is either protected or restricted in public institutions of higher learning, stressing the significance of government-sponsored, student speech. Then, it will explore the *Summum* decision, demonstrating its divergence from former government speech decisions. Finally, this Comment will discuss the implications of this new doctrine on student speech in the public universities, particularly how it may lead to an increase in regulation and censorship of government-sponsored student speech.

I. THE MISSION OF PUBLIC UNIVERSITIES: EDUCATION THROUGH EXPOSURE

The earliest of American colonists recognized the importance of higher education in their community. In fact, it was not long after they "had builded [sic] [their] houses, provided necessaries for [their] liveli-hood [sic], rear'd [sic] convenient places for Gods [sic] worship, and settled the Civill [sic] Government" that they looked "to advance Learning and

perpetuate it to posterity."[5] Consequently, the settlers established universities to prepare students "of refinement and culture, those destined to positions of responsibility and leadership in society."[6] Notably, these schools were very unlike their European predecessors—they were not established "by independent groups of faculty and students or by royal initiative" for the benefit of the sovereign or the rich.[7] These schools were founded "by private and public communities, and they were meant to serve important civic purposes."[8] According to Harvard's first president, colleges serve to elevate society, for without them,

> [t]he ruling class would [be] subjected to mechanics, cobblers, and tailors; the gentry would [be] overwhelmed by lewd fellows of the baser sort, the sewage of Rome, the dregs [of society] which judgeth much from emotion, little from truth . . . . [N]or would we have rights, honors, or magisterial ordinance worthy of preservation, but plebiscites, appeals to base passions, and revolutionary rumblings[.][9]

Indeed, these schools operated with the goal of "raising men up that will be useful in [their] learned professions."[10]

Today's public universities continue to further the colonial goal of improving communities by educating students who will contribute to society.[11] These universities view freedom of

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5. 1 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 6 (Richard Hofstadter & Wilson Smith, eds., 1961).

6. CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION: A HISTORY 104 (2d ed., Palgrave MacMillan 2006).

7. HAROLD T. SHAPIRO, A LARGER SENSE OF PURPOSE; HIGHER EDUCATION AND SOCIETY 15 (Princeton University Press 2005).

8. *Id.*

9. SAMUEL ELIOT MORISON, THE FOUNDING OF HARVARD COLLEGE 250 (Harvard University Press 1935).

10. THOMAS J. WERTENBAKER, PRINCETON 1746–1896, at 19 (Princeton University Press 1946).

11. *See* Arizona State University Mission Statement, *available at* http://www.asu.edu/aad/catalogs/general/gen-info.html ("Its mission is to provide outstanding programs in instruction, research, and creative activity, to promote and support economic development, and to provide service appropriate for the nation, the state of Arizona, and the state's major metropolitan area."); University of Utah Mission Statement, *available at* http://www.admin.utah.edu/president/mission.html ("The mission of the University of Utah is to serve the people of Utah and the world through the discovery, creation and application of knowledge; through the dissemination of knowledge by teaching, publication, artistic presentation and technology transfer; and through community engagement."); George Mason University Mission Statement, *available at* http://www2.gmu.edu/resources/visitors/vision/mission.html ("Educate the new generation of leaders for the 21st century men and women capable of shaping a

thought and speech as a necessary element for educating students to become good citizens.[12] As Harold T. Shapiro, former president of Princeton University and the University of Michigan noted,

> [t]he special freedoms and privileges enjoyed by university communities, whether public or private, must be seen as mechanisms to enable universities to meet their responsibilities more effectively and equitably. The intellectual and educational autonomy granted the university . . . [is] hardly [an] ancient right[] or rite[], but rather [an] instrument[] through which the university can more effectively pursue its public purpose.[13]

Allowing students free exposure to a multitude of thoughts, as well as the freedom to express their own, is currently recognized as one of the primary means by which universities meet their societal goals.[14]

The Supreme Court has also recognized the importance of a student's freedom of expression and thought in public universities, and has labored to preserve those freedoms. According to the Court, public universities are a "marketplace of ideas"[15] where the quality of education is directly related to

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global community with vision, justice, and clarity").

12. *See* George Mason University Mission Statement, *available at* http://www2.gmu.edu/resources/visitors/vision/mission.html ("Encourage freedom of thought, speech, and inquiry in a tolerant, respectful academic setting that values diversity."); University of Oregon Mission Statement, http://www.uoregon.edu/~uosenate/UOmissionstatement.html ("the conviction that freedom of thought and expression is the bedrock principle on which university activity is based."); California State University—Fullerton Mission Statement, *available at* http://www.fullerton.edu/aboutcsuf/mission.asp ("To ensure the preeminence of learning, we will: [i]ntegrate teaching, scholarly and creative activities, and the exchange of ideas, [as well as] [a]ffirm the university's commitment to freedom of thought, inquiry and speech").

13. SHAPIRO, *supra* note 6, at 13.

14. Rust v. Sullivan, 500 U.S. 173, 200 (1991) ("We have recognized that the university is a traditional sphere of free expression . . . fundamental to the functioning of our society").

15. Keyshian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'") (citing United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). *See also* Widmar v. Vincent, 454 U.S. 263, 267–68 n. 5 (1981) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"). Bd. of Regents v. Southworth, 529 U.S. 217, 231 (2000) ("[R]ecognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech"). Rosenberger v. Rector and Visitors of Univ. of Va.,

the atmosphere of "speculation, experiment[,] and creation."[16] Consequently,

> the precedents of [the Supreme Court] leave no room for the view that, because of [an] acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and [the Court] breaks no new constitutional ground in [defending] this Nation's dedication to safeguarding academic freedom.[17]

Indeed, because "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools,"[18] courts have extended varying First Amendment protections to the different forms of student speech at public universities.

II. FORMS OF STUDENT SPEECH AT PUBLIC UNIVERSITIES

Student speech at public universities is generally divisible into two categories. The first of those categories is pure student speech—which is regulated along the same standards as speech outside of institutions of higher learning. The second category, government-sponsored, student speech, is student speech that is aided by the public school through contributions, grants, scholarships, or other forms of aid. Government-sponsored, student speech plays a critical role in public universities, enriching education by making available to students resources and opportunities that would normally only be present in their future careers. Because of the role of the government in sponsoring this form of speech, as well as the role of the university in using government resources to instruct students,

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515 U.S. 819, 836 (1995) (observing that "[t]he quality and creative power of student intellectual" curiosity "remains a vital measure of a school's influence and attainment" and that limiting that curiosity "risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses").

16. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

17. Healy v. James, 408 U.S. 169, 180–81 (1972) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960) and *Keyshian*, 385 U.S. at 603).

18. *Shelton*, 364 U.S. at 487.

government-sponsored speech is regulated under different rules than pure student speech.

Moreover, because of these different rules, *Summum*'s new government speech doctrine may affect government-sponsored, student speech. Therefore, this Part will give a brief overview of pure student speech, explaining the lengths to which the Constitution allows universities to restrict it in order to give context for student speech in general. Then, this Part will give a more developed analysis of government-sponsored speech, explaining its protections and the extent to which a public university can maintain control over that speech. It will also highlight the importance of uninhibited government-sponsored speech.

A. Student Speech

Within the framework of this Comment, pure student speech encompasses any expression made by a student on the campus of a public university or college, outside of his or her normal curriculum, and without the school's help or funding. This type of speech is governed by the rule set forth in *Tinker*.[19] In *Tinker*, students wore black armbands to school in protest of the Vietnam War.[20] Recognizing the armbands and their purpose, the school administration implemented a policy of suspending any student who refused to remove his or her armband.[21] However, the Supreme Court recognized those students' actions as "pure speech" and that they were therefore fully protected from any abridgement by the First Amendment.[22] At the same time, the Court did not give students free reign over "playground speech." According to the Court, the First Amendment still allows school administrators to abridge "pure speech" through reasonable time, place, and manner restrictions created to further a significant government interest.[23] Therefore, in a school setting, "conduct by [a] student, in class or out of it, which for any reason . . .

19. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). *Healy*, 408 U.S. at 180 (stating that, as in *Tinker*, "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case").

20. *Tinker*, 393 U.S. at 504.

21. *Id.*

22. *Id.* at 508.

23. Lehman v. City of Shaker Heights, 418 U.S. 298, 311 (1974).

materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."[24]

The Supreme Court applies this same standard, based on broad constitutional principles, to cases involving colleges and universities.[25] In *Healy v. James*,[26] for example, Central Connecticut State College refused to recognize its students' efforts to organize a chapter of Students for a Democratic Society.[27] Without official recognition, this student group could not "place announcements regarding meetings, rallies, or other activities in the student newspaper, . . . [use the] various campus bulletin boards, . . . [or] use campus facilities for holding meetings."[28] According to the president of this public college, his administration denied official recognition to this organization, which had been the catalyst of significant violence and unrest on other college campuses,[29] because it maintained a "philosophy [that] was antithetical to the school's policies" and rules.[30] While recognizing that refusing to officially recognize a group would seriously inhibit its right to expression,[31] the Court held that the college could only refuse recognition to the student group after demonstrating that its refusal was related to a reasonable time, place, and manner restriction.[32]

Essentially, because students do not "shed their constitutional rights to freedom of speech or expression at the [university] gate,"[33] universities may not regulate or abridge a student's speech at the university any more than the government can regulate an average citizen's speech anywhere else.

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24. *Tinker*, 393 U.S. at 513.

25. Healy v. James, 408 U.S. 169, 180 (1972); Papish v. University of Missouri Board of Curators, 410 U.S. 667, 671 (1973).

26. *Healy*, 408 U.S. at 169.

27. *Id.* at 174.

28. *Id.* at 176.

29. *Id.* at 170.

30. *Id.* at 175.

31. *See id.* at 180 ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, *First Amendment* protections should apply with less force on college campuses than in the community at large").

32. *Id.* at 192–3. Also note that the Court considers that there is a "heavy burden" that rests upon the college to "demonstrate the appropriateness of that action." *Id.* at 184.

33. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

B. Government-Sponsored Speech

Because of the essential differences between government-sponsored, student speech and pure student speech, government-sponsored, student speech is regulated under a different standard set forth in *Hazelwood School District v. Kuhlmeier*.[34] In *Hazelwood*, the Hazelwood East High School Journalism II class was responsible for the publication of a school-funded newspaper.[35] Generally, before publication, the class' teacher would submit page proofs of each issue to the school principal for approval.[36] In this case, the students had written two "objectionable stories," one of them concerned three students' experiences with pregnancy and the other "the impact of divorce on students at the school."[37] The principal excluded those stories from publication, feeling that the story about pregnancy would embarrass its subjects and was inappropriate for the student body, and that the story about divorce did not properly allow the subjects' parents to respond.[38] The students responded by filing suit, seeking a declaration that the principal's actions violated their First Amendment rights.[39]

Although the Supreme Court recognized a student's general right to free speech,[40] it held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[41] According to the Court, "[e]ducators are entitled to exercise greater control over" government-sponsored, student speech than pure student speech because of their responsibility to "assure that participants learn whatever lessons the activity is designed to teach . . . and that the views of the individual speaker are not erroneously attributed to the school."[42]

The facts of this case are crucial to its holding. The setting

34. 484 U.S. 260 (1988).
35. *Id.* at 262.
36. *Id.* at 263.
37. *Id.*
38. *Id.* at 264.
39. *Id.*
40. *Id.* at 266 (citing *Tinker*, 393 U.S. at 506).
41. *Id.* at 273.
42. *Id.* at 271.

and the speech's sponsor do not only allow for the speech regulation, they also provide the boundaries for the governance of any public school-sponsored, student speech. Henceforth, government-sponsored, student speech regulations are limited to speech that is part of the school curriculum[43] and that "the public might reasonably perceive to bear the imprimatur of the school."[44] Even more importantly, because the Court continued to emphasize the importance of free speech to students, *Hazelwood* prohibits school administrators from regulating speech based on content.[45]

In spite of the significantly different missions of primary or secondary schools[46] and colleges or universities,[47] courts apply the *Hazelwood* standard to protect and regulate government-sponsored, student speech in public institutions of higher learning.[48] For example, in *Brown v. Li*,[49] the Ninth Circuit

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43. The Eleventh Circuit has found that the definition of "curricular activity" does not require that the activity be mandatory, "earn[ ] grades or credit, occur[ ] during regular school hours, or . . . require a fee." Bannon v. Sch. Dist. of Palm Beach County., 387 F.3d 1208, 1214 (11th Cir. 2004).

44. *Hazelwood*, 484 U.S. at 271. *Bannon*, 387 F.3d 1208, 1213–14 (11th Cir. 2004) (citing *Hazelwood*, 484 U.S. at 271–73) ("[W]hen 'students, parents, and members of the public might reasonably perceive [students' expressive activities] to bear the imprimatur of the school,' schools may censor student expression so long as their actions are reasonably related to legitimate pedagogical concerns").

45. *See Hazelwood*, 484 U.S. at 273 ("It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights.") (interior citations omitted). *Contra* C.H. *ex rel* Z.H. v. Oliva, 195 F.3d 167, 172–73 (3d Cir. 1999) ("*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns. . . . [T]he requirement of viewpoint neutrality, while essential to the analysis of a school's restrictions on extracurricular speech . . . is simply not applicable to restrictions on the State's own speech."), *reh'g en banc granted, vacated*, 197 F.3d 63 (1999); Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993) ("[T]he court in [*Hazelwood*] did not require that school regulation of school-sponsored speech be viewpoint neutral").

46. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 596 U.S. 822, 829–30 (2002) (holding that "Fourth Amendment rights . . . are different in public schools than elsewhere" because those schools have a "custodial and tutelary responsibility for children"). Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (finding that primary and secondary schools are largely concerned with the "inculcation" of "values").

47. *See supra* Part I. *See also* Beach v. University of Utah, 726 P.2d 413, 418–19 (Utah 1986) (stating that since the 1960s, universities have not acted *in loco parentis* for students, nor maintained the custodial role for students that they did in their distant past).

48. Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005) ("We hold . . . that *Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as

held that university administrators acted properly in refusing to approve a master's student's thesis as it was written.[50] The student, Mr. Brown, had insisted on including in his thesis a "disacknowledgements"[51] section where, instead of showing gratitude to a number of individuals, he disrespectfully listed persons that he felt had impeded his academic development.[52] Applying the *Hazelwood* standard,[53] the court found that the public university in question retained the privilege to "censor" Mr. Brown's speech because of its legitimate pedagogical interest in teaching him professionalism in scientific research and publication.[54]

Even while granting government officials the privilege to regulate some forms of student expression, *Hazelwood* confers significant protections to government-sponsored, student speech that are critical to a college education. Students, training to enter "expressive" professions, often participate in government-sponsored, expressive activities. For example, universities very commonly sponsor radio stations[55] and newspapers[56] that are student-operated and publish student-

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elementary and secondary schools."); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) ("[T]he *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum."); Bishop v. Arnov, 926 F.2d 1066, 1017 (11th Cir. 1991) (applying *Hazelwood* to a university setting to determine whether university classrooms could be considered open fora). *Hazelwood* itself failed to answer the question of whether its standard should apply in university settings. *Hazelwood*, 448 U.S. 273 n.7 ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level"). Judge Evans' vigorous dissent in *Hosty v. Carter* specifically attacks the idea that *Hazelwood* should be applied in university settings. Hosty v. Carter, 412 F.3d 731, 739–42 (7th Cir. 2005) (Evans, J., dissenting).

49. Brown v. Li, 308 F.3d 939 (9th Cir. 2002).

50. *Id.* at 955.

51. Mr. Brown had originally referred to his "disacknowledgements" as "special *Fuck You's*." *Id.* at 943. Even included in its less profane form, his thesis committee refused to permit approval of Mr. Brown's thesis while it contained his disacknowledgements section. *Id.*

52. *Id.* at 943.

53. *Id.* at 949 ("*Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work").

54. *Id.* at 952.

55. *See, e.g.*, Edgar Zuniga, Jr., *$2500 Added to KUTE Budget*, DAILY UTAH CHRON., June 18, 2008 *available at* http://www.dailyutahchronicle.com/news/2-500-added-to-kute-budget-1.341534 (reporting that university discretionary funds were going to fund the University of Utah's student-run radio station).

56. *E.g.*, Greg Miller, *Student Paper Sees Violation in Budget Cut*, COLUMBIA DAILY TRIB., Feb. 14, 2007 (stating that the Missouri Miner at the University of Missouri-Rolla received $39,500 from the university during the 2006–7 academic year).

created material. In an age where art and journalism thrive on First Amendment protections in order to push boundaries and enact social change,[57] many public institutions act to maintain and respect students' First Amendment rights in order to create an experience that is as true to the "real world" as possible.[58] Therefore, except when used to regulate speech based on "legitimate pedagogical concerns," *Hazelwood*'s prohibition on content-based speech regulation preserves the marketplace of ideas vital to a college education by preserving the First Amendment rights of students engaged in government-sponsored expression.

III. GOVERNMENT SPEECH AND THE NEW *SUMMUM* DOCTRINE

Quite different from speech in many other contexts, "the recently minted government speech doctrine"[59] has only been around since about the 1980s.[60] Generally, the doctrine stands for the proposition that the government may use its resources to "say" as it pleases,[61] without being compelled by private

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57. *See* Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1517 (1996) ("[T]he arts . . . have become highly politicized. Many academics and artists now see their purpose not as revealing truth or beauty, but as achieving social and political transformation." (citing National Endowment for the Humanities, National Endowment for the Arts: Hearing Before the Subcomm. on Interior Appropriations of the H. Comm. on Appropriations, 104th Cong. 940 (1995) (testimony of Lynne V. Cheney, Distinguished Fellow, American Enterprise Institute))). *See also* Roth v. United States, 354 U.S. 476, 484 (1957) ("[T]he First Amendment was not intended to protect every utterance. . . . The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

58. *See, e.g.*, KFSM 90.7 FM Mission Statement, http://www.csufresno.edu/kfsr/KFSRmission.html. (last visited.....) (stating that California State University-Fresno's radio station "90.7 KFSR is . . . a dynamic, educational resource, providing Fresno State students with valuable, real world experience in radio and media operations"). University of Houston Student Publications Mission Statement, http://www.uh.edu/sp/aboutus/index.html (last visited Dec. 11, 2009) (proclaiming that it is the mission of the University of Houston "to foster an open and objective environment . . . that provides a public forum for viewpoints and opinion; to teach that a news medium is a conduit for free speech and the clarification of public issues and ideas").

59. Pleasant Grove v. Summum, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring).

60. *See* Edward L. Carter, et al., *"Executing the Powers with Which it is Entrusted": Justifications, Definitions and Limitations of Government Speech*, 14 COMM. L. & POL'Y 453, 459 (2009).

61. Evidently, there are *some* restrictions to what the government may say. Justice Samuel Alito offered two constitutional limits to government speech in *Summum*, where he stated that "government speech must comport with the

individuals or groups to "say" or not "say" anything different. Although according to Justice Steven's concurrence "the Court's opinion in [*Summum*] signal[ed] no expansion of that doctrine,"[62] *Summum* represents a tremendous expansion of the former principle, and consequently poses a threat to student speech in public universities. This Part will set up an analysis of how *Summum*'s take on government expression threatens student speech by first briefly expounding upon the government speech doctrine prior to *Summum*. Then, this Part will provide an analysis of how *Summum* departed from the previous standard and significantly expanded the former rule.

A. Government Speech Prior to Summum

Pre-*Summum*, government speech fit conveniently into two different categories. Within the first category rests speech made "when public employees make statements pursuant to their official duties."[63] The government speaks within the second category when the government itself, or a governmental entity, either takes a position on an issue[64] or promotes a message through its own funds and supervision.[65] In either case, when the government speaks, it is not "constrained by the First Amendment from controlling its own expression."[66]

This rule of convenience was created as a consequence of democratic expediency.[67] The United States of America

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Establishment Clause" and that "the involvement of public officials in advocacy may be limited by law, regulation, or practice." *Summum*, 129 S. Ct. at 1132. In addition, according to Justice Stevens in his concurring opinion, the government speech doctrine does not "give the government free license to communicate offensive or partisan messages." *Id.* at 1139. However, as this Comment stresses, it is not what the government cannot express, but that which it may qualify as government speech that creates a problematic scenario in the case of government-sponsored student speech.

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

63. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

64. Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208, 1213 (11th Cir. 2004) (referencing Rosenburger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)) ("Government expression is expression delivered directly through the government or indirectly through private intermediaries, and the government is free to make subject-matter-based choices").

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

66. Colum. Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 n.7 (1973). Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 30 (2007) ("Government speech essentially operates as an 'exception' to the First Amendment").

67. *See* Keller v. St. Bar of Cal., 496 U.S. 1, 12–13 (1990) ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he

currently governs over 300 million residents,[68] and it can hardly act without stepping on somebody's toes. Therefore, when the government is the speaker, not only is it permitted to make "content-based choices,"[69] but

> [i]t is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making posts hereditary. And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doctors perform abortions); or by advocating it officially (establishing an Office of Art Appreciation, for example, or an Office of Voluntary Population Control); or by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood).[70]

The government simply cannot function without taking positions and expressing opinions, and the people cannot therefore hold it accountable for its speech in any way other than through the ballot box.[71]

Consequently, because "a First Amendment heckler's veto" to any position that the government actively takes would severely encumber the normal functions of a democratic government, the government is permitted to express whatever it wishes, however it wishes.[72] Nonetheless, it is important to

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disagreed, debate over issues would be limited to those in the private sector, and the process of government as we know it radically transformed").

68. U.S. Census Bureau, POPClock, http://www.census.gov/population/www/popclockus.html (*last visited* Dec. 1, 2010).

69. Rosenberger, 515 U.S. at 833.

70. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998). *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991) ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect").

71. Bd. of Regents of Univ. of Wis. Sys. v. Southwick, 529 U.S. 217, 235 (2000) ("When the government speaks . . . it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position").

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

once again emphasize that in each situation of government expression previously identified, the expression in question originated from a government source.[73] Because *Summum* changes this detail, its holding threatens the general freedom associated with government-sponsored, student speech.

B. Summum*'s Expansion of Government Speech*

In 2003, Summum, a religious organization headquartered in Salt Lake City, Utah, sent a letter to the mayor of a neighboring city requesting permission to erect a stone monument inscribed with several of its religious philosophies in one of the city's parks.[74] Various other monuments already resided in the park in question, including a stone Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.[75] According to Summum, since public parks "have traditionally been regarded as public forums,"[76] and because the city had already opened up the forum for the placement of other monuments by other organizations, the First Amendment required the city to accept its monument.[77]

However, as maintained by all nine justices of the Supreme Court, the Ten Commandments monument, as well as any other monument in that park, constituted government speech

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73. *See* Garcetti v. Ceballos, 574 U.S. 410, 421–22 (2006) (finding that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, but are making government pronouncements). *Johanns*, 544 U.S. at 560–61 (stating that "from the beginning to end," the message in question was directed, implemented, and paid for by the federal government). *Finley*, 524 U.S. at 597–99 (stating that by passing laws that created discriminatory standards for the distribution of government subsidies, Congress was "speaking"). *Sullivan*, 500 U.S. at 194 (holding that the government may "discriminate[ ] on the basis of viewpoint" by "choos[ing] to fund a program dedicated to advance certain permissible goals"). Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 284–87 (4th Cir. 2008) (holding that the school district's active advocacy of pending legislation through its use of the district's website and other information distribution channels was government speech and therefore not subject to the First Amendment). R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 919 (9th Cir. 2005) (stating that, under the government speech doctrine, the government may tax specific business and use all of the funds raised to vilify those very businesses). Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1012 (9th Cir. 2000) (holding that the school district's erection of a bulletin board promoting Gay and Lesbian Awareness in a public school was government speech.).

74. Pleasant Grove v. Summum, 129 S. Ct. 1125, 1129–30 (2009).

75. *Id.* at 1129.

76. *Id.* at 1130.

77. *Id.*

and was therefore not subject to the First Amendment.[78] According to the Court, the fact that a private organization donated the Ten Commandments monument did not matter;[79] nor did it matter that the monument itself proclaims to the world the identity of its donor organization.[80] For the Court, the only details of significance were the monument's placement on public property,[81] that the use of public property for erecting monuments does not normally constitute a public forum,[82] and that the city was able to "[take] ownership" of that monument[83]— "'effectively control[ing]' the messages sent by the monuments in the park by exercising 'final approval authority' over their selection."[84] Once the city used its own resources for the monument, and then asserted some sort of control over it, the city adopted that monument and everything that it could represent.

This holding is strikingly different from former government expression jurisprudence, offering one major departure from prior decisions. Namely, the government no longer needs to be the catalyst or source of government speech. Past cases featured the government as either the direct speaker through choices or pronouncements made by its officers, or as an indirect speaker through the programs that it proactively established and funded.

National Endowment for the Arts v. Finley[85] is an example of government speech where the government acted as a direct speaker. The National Endowment for the Arts is an independent federal agency created by the National Foundation for the Arts and Humanities Act of 1965.[86] This act requires the chairperson of this agency "to ensure that 'artistic

78. *Id.* at 1138, 1140. (Scalia, J., concurring) ("[A]ll the Justices agreed that government speech was at issue").

79. *See id.* at 1134 ("The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes. . . . Requiring all of these jurisdictions to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate").

80. *See id.* at 1135 (referring to the "Imagine" monument in New York City, which bears the lyrics to John Lennon's song of the same name).

81. *Id.* at 1136.

82. *Id.* at 1137–38.

83. *Id.* at 1134.

84. *Id.*

85. *Finley*, 524 U.S. 569 (1998).

86. 20 U.S.C.A. § 953 (WEST 2008).

excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[87] In *Finley*, four artists, whose applications for federal grants were rejected, sued the agency, claiming that the current law permitted the Foundation's chairperson to make unconstitutional viewpoint-based decisions in awarding federal funds.[88] The Supreme Court, however, disagreed. Recognizing that the National Endowment for the Arts was a federal institution, the Supreme Court ruled it could speak as a federal body by allocating its competitive funding according to any form of criteria, discriminatory or not.[89]

Johanns v. Livestock Marketing Association[90] is an example of the government speaking indirectly through an established program. In *Johanns*, the federal government had levied a tax on beef production in order to fund promotional projects encouraging beef consumption.[91] A non-governmental operating committee designed and implemented these promotional campaigns, which were directly supervised by the Secretary of Agriculture and a Beef Promotion and Research Board that the Secretary appointed.[92] However, American beef producers objected to this program, claiming that "the advertising promote[d] beef as a generic commodity, . . . [therefore] imped[ing] their efforts to promote the superiority of, *inter alia*, American beef, grain-fed beef, or certified Angus or Hereford beef."[93] Furthermore, they felt that since a non-governmental agency implemented the beef advertising campaign, the government speech doctrine did not make it immune to the First Amendment.[94] Again, the Supreme Court disagreed. According to the Court, even though the government used a non-governmental entity to design its promotional campaigns, because "[t]he message set out . . . [was] from

87. *Finley*, 524 U.S. at 572 (citing 20 U.S.C. § 954(d)(1)).

88. *Id.* at 577–78.

89. *Id.* at 599 ("The Government . . . may allocate both competitive and noncompetitive funding *ad libitum*, insofar as the First Amendment is concerned").

90. *Johanns*, 544 U.S. 550 (2005).

91. *Johanns*, 544 U.S. at 554–56.

92. *Id.* at 553.

93. *Id.* at 556.

94. *Id.* at 560.

beginning to end the message established by the Federal Government," those advertisements were a form of government speech where the government spoke indirectly.[95]

In *Summum*, the Supreme Court held that the government can adopt expression that is, at its origin, neither directly nor indirectly government speech but is explicitly attributed to a private party. Normally, one would reasonably infer that the Fraternal Order of the Eagles, the civic group that originally donated the stone monument at issue in *Summum*, initiated the speech thereon.[96] The monument itself bears a prominent inscription declaring that the Eagles donated it to the city, and the Eagles continue to maintain this monument and ensure that its text remains visible.[97] Yet, when the City of Pleasant Grove accepted the monument and used its resources to maintain it as a public display, that monument and everything that it could say or represent[98] became government speech and was therefore not subject to First Amendment restrictions.[99]

The idea that connects *Summum*'s new deviation to the Court's past decisions is that the government necessarily exerts control over its own speech.[100] When the government expends its resources to convey a message and controls the content of that message, that speech is attributed to the government, regardless of whether any third party conveys the message.[101] However, *Summum* goes further in that it permits the government to adopt third-party speech conceived and developed outside of any government influence when the government devotes its resources to the dissemination of that expression and exerts some final approval authority over it. This new standard becomes problematic when placed in the sphere of public education where a significant amount of student speech is government-sponsored.

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95. *Id.* at 561.

96. Pleasant Grove v. Summum, 129 S. Ct. 1125, 1129 (2009).

97. BRIEF FOR RESPONDENT AT 4, PLEASANT GROVE V. SUMMUM, 129 S. CT. 1125 (2009) (NO. 07–665).

98. Summum, 129 S. Ct. at 1135 (discussing the fact that a single monument may convey multiple messages).

99. *Id.* at 1138.

100. *See* Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 833 (1995) ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee").

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

IV. IMPLICATIONS OF *SUMMUM*'S EXPANSION ON STUDENT SPEECH

Summum's expansion of government speech has yet to be tested. Nevertheless, when measured against the standards set to protect government-sponsored, student speech, its plausible effects can be anticipated. Accordingly, this Part will explain some of the implications that *Summum* may have on government-sponsored, student speech by first explaining how *Summum*'s holding can allow the government to adopt school-funded, student speech. Then, this Part will describe how adverse incentives may encourage public universities to take advantage of speech adoption in order to censor government-sponsored, student speech without penalty. Next, this Part will explain how those same perverse incentives will push school administrators who already practice censorship through speech adoption, to exercise their censoring powers with increasing frequency, effectively stifling this form of student speech. Finally, despite all the incentives in favor of increased censorship, this Part will explore how some universities, may still have a very important reason for maintaining free expression—maintaining an attractive appearance for future students. Consequently, this may act as a counterbalance to the negative incentives of speech adoption and help keep public universities friendly toward uninhibited government-sponsored, student speech. Nevertheless, this Part will conclude that in spite of any countervailing incentives, *Summum*'s speech adoption theory poses a significant threat to free student speech.

A. Adopting Government-Sponsored, Student Speech

Summum's three-pronged approach feasibly creates a means by which college administrators may strictly regulate and censor government-sponsored, student speech, insulating it from its First Amendment protections by making it pure government speech. By its very nature, government-sponsored, student speech satisfies *Summum*'s first prong. As previously discussed, government-sponsored, student speech is speech that the government funds or supports which can reasonably bear its imprimatur.[102] The government has thus already

102. *See supra* Part II.B. *Contra* Rust v. Sullivan, 500 U.S. 173, 199 (1991)

ostensibly purchased its share of school-sponsored expression, and started to lay claim to school-sponsored, student speech by diverting resources to its development and dissemination.

Summum's second prong for adopting private speech, which requires that this speech be made in a nonpublic forum, is also already satisfied under *Hazelwood*. In a traditional public forum, the government's ability to limit speech is "sharply circumscribed."[103] In contrast, the First Amendment permits the government to make any restrictions to limit expression within a nonpublic forum.[104] While the *Hazelwood* standard guarantees First Amendment protection to government-sponsored student speech,[105] it nevertheless permits school administrators to censor and restrict that speech based on legitimate pedagogical concerns.[106] The First Amendment allows this restriction because a school's curricular requirements place such speech within a nonpublic forum.[107] Therefore, any speech that can feasibly be regulated under *Hazelwood* occurs in a nonpublic forum and is therefore exposed to *Summum*.

The government's adoption of subsidized student speech is then vested through its satisfaction of *Summum*'s third prong—exercising control over that speech. As noted previously, the *Hazelwood* standard prohibits schools from engaging in viewpoint discrimination of government-sponsored, student speech and only permits censorship for legitimate pedagogical concerns.[108] However, if the government may adopt speech as its own by exerting control over that expression in any manner that it sees fit, then *Hazelwood*'s restriction may no longer hold force. Universities could "exert control" by simply refusing to continue their support of "free student media," allowing less-restricted programs to lapse in favor of

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("[F]unding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is [not] invariably sufficient to justify Government control over the content of expression").

103. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995).

104. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity").

105. *See supra* Part II.B.

106. *Id.*

107. *See* Hosty v. Carter, 412 F.3d 731, 736 (2005) ("[I]n *Hazelwood*, being part of the curriculum [was] a sufficient condition of a nonpublic forum.") (emphasis omitted).

108. *See supra* Part II.B.

newer student programs whose content is more strictly monitored. Or, universities could arbitrarily change their policies and regulate subsidized speech as they see fit—even based on viewpoint—in order to complete their adoption and control over that speech. In any case, once a university begins to exert control over expression, the university adopts that expression and it becomes exempt from First Amendment restrictions under the government speech doctrine.

In *Hosty v. Carter*,[109] Judge Easterbrook presciently describes how such a situation might unravel. In one of the three hypotheticals that he proposes, a university offers "course credit to journalism students who prepare[] a publishable piece" for an alumni magazine.[110] Supposing that the university directly managed this publication, all of its contents would unquestionably be the university's speech.[111] Although an "alumni magazine" is arguably different from a student newspaper or a student art exhibition because it was not originally conceived as a form of student speech, the concept of creating government speech through imposing control is apparent and transferrable. The university necessarily controls all of the content within the alumni magazine, and it speaks through the magazine because of its control. By exerting control over that expression, the public university incorporates it into the university's curricular requirements and that expression loses all constitutional protections.[112]

As another illustration, consider a hypothetical law that allows an individual to claim property by simply writing her name on it. Once an individual claims property, there are no restrictions regarding what she can do with it. At the same time, a second hypothetical law protects property by prohibiting people from writing on it. However, the second law does little to keep an individual from writing on property if at the very moment she moves to assert *illegal* authority over any object, she gains the *legal* authority to do what she wishes with

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109. 412 F.3d 731 (7th Cir. 2005).

110. *Hosty*, 412 F.3d at 736.

111. *Id.*

112. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message").

it. Likewise, First Amendment protections to government-sponsored, student speech will do little good if the government can gain immunity from those restrictions by simply breaching them.

B. Speech Adoption May Increase Censorship in Public Universities

Because the government speech doctrine allows a government speaker to say or refuse to say anything that it wishes, adopting government-sponsored student speech can allow school administrators absolute discretion in censoring that form of student expression. This possibility presents public universities with two important questions: The first question a university would need to decide under this regime is whether it should take advantage of speech adoption under *Summum*. The second question is, if the university does decide to censor school-sponsored, student speech through adoption, how often will it use these powers to stifle student expression. Unfortunately, due to the perverse incentives associated with each of these choices, *Summum*'s expansion of the government speech doctrine may plausibly lead to the increased censorship of government-sponsored speech in public universities.

First, significant incentives weigh in favor of universities exercising their option to censor student speech through adoption. Government-sponsored, student expression, which is often broadcast to the public through government funds, can be a source of public embarrassment for a university. Either through its active criticism of university officials,[113] or through its distasteful subject matter,[114] government-sponsored, student expression may bring negative attention to schools. Consequently, many public universities still attempt to bridle student speech through unconstitutional restrictions.[115] If

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113. *E.g.*, *Hosty* 412 F.3d 731 (where students at a university newspaper directly attacked the integrity of one of the school's deans).

114. *E.g.* Logan Braman, *Kinky Cardinals Start Group for Students to Promote Safe, Sane, Consensual Sex*, BALL STATE DAILY NEWS, Feb. 5, 2009, *available at* http://www.bsudailynews.com/2.14295/kinky-cardinals-start-group-for-students-to-promote-safe-sane-consensual-sex-1.2004934 (interviewing and highlighting a student group which promotes deviant sexual behaviors).

115. Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2010: The State of Free Speech on Our Nation's Campuses*, at 6, *available at* https://www.thefire.org/public/pdfs/9aed4643c95e93299724a350234a29d6.pdf (noting that of the public universities surveyed in its latest report, 71% of them still

Summum's speech adoption doctrine grants public universities constitutional authority over school-sponsored, student expression, thus allowing them to avoid any of the costs associated with that form of expression, it would be foolish for a university to repudiate such a power.

Second, because *Summum*'s government speech doctrine requires a form of discretionary prior restraint, public universities that adopt *Hazelwood* speech as government expression will be more likely than not to censor speech that they find questionable. According to the Supreme Court, one of the primary means by which *Summum*'s Ten Commandments monument became government speech was the city's exertion of control over the edifice.[116] This control, exhibited through the city's final approval authority over which monuments are permitted in its parks,[117] is a form of prior restraint or a "scheme which gives public officials the power to deny use of a forum in advance of its actual expression."[118] Scholars and jurists alike recognize that prior restraint, a form of speech regulation that the Framers deemed to be particularly reprehensible,[119] "is so constructed as to make it easier, and hence more likely, that in any particular case the government will rule adversely to free expression."[120] This is because prior restraint regimes shift the burden of any expression's consequences from the government to the speaker.[121] For example, if a university encounters speech that it finds questionable, it has two choices: it can allow the speech and then cope with any of the negative consequences that it causes,

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maintained unconstitutional restrictions of student speech).

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

117. *Id.* (stating that the exercise of "final approval authority" over the monuments allowed in Pleasant Grove's Pioneer Park was an essential reason as to why the Ten Commandments monument represented government expression).

118. BLACK'S LAW DICTIONARY 1194 (6th ed. 1990).

119. Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) ("[Prior restraints] strike[ ] at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision.")

120. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 657 (1955).

121. *Id.*

or it can simply censor that speech before it is released. Of course, instead of choosing to shoulder the burden itself by dealing with the consequences of the expression that it has permitted, a university censor would use its power to censor the speech and thus force the speaker to bear the burden of having his expression stifled.

This type of situation does not appear to be too far-fetched. Consider the following hypothetical: Sophisticated public university administrators have been having significant difficulty with their student-run newspaper. Recent articles have been highly critical of the university administration's actions and have been creating a large amount of community and student discontent. Understanding that they cannot simply shut down the newspaper due to a potential §1938 lawsuit, administrators decide that they will instead give the newspaper an "upgrade" after its then-current staff finished its term. This upgrade consists of changing the newspaper's identity, giving it a new name and reorganizing its structure by requiring an administration appointed editor-in-chief. This new editor-in-chief is specifically instructed to ensure that the newspaper, as one of the university's voices to the community, never gives a negative impression of the university or its administration by approving all articles before they are printed. In this simple hypothetical, the university administrators closed the more public forum that existed during the newspaper's troubled era, in favor of a semi-public forum where they maintained much more control. In addition, by placing a supervisor of their choice in control the newspaper's content, they have adequately adopted the newspaper's speech as their own, placing it beyond the boundaries of any First Amendment protections.

Consequently, because of the nature of *Summum*'s adoption doctrine, public universities are confronted with substantial incentives to not only seek to adopt government-sponsored, student speech in order to censor it, but to also censor more often than not while using prior restraints.

C. External Incentives May Provide a Counterbalance to the Tendency to Censor

In spite of the significant incentives pulling public universities toward speech adoption and increased censorship, considerable pressures may continue to push schools toward

openness in education, and could act as a counterbalance to censorship incentives unless some factor were to upset that balance. Perhaps the most important of those pressures is the desire of some public universities to appear as schools that encourage free expression as they seek to attract large and diverse student bodies.

One of the ways in which many universities seek to attract those students is through accreditation. As a recent development, universities have increasingly become a consumer product—like any new pair of shoes or high-definition television.[122] Consequently, many students, as informed consumers, approach their choice of public university by weighing the risks and benefits provided by an institution.[123] Certainly, price and location are important features to consider, but more importantly, students have come to value the employability of an institution's graduates.[124] It is perhaps for this reason that university ranking systems have become such a popular magazine seller.[125]

Many students can measure the employability of any college program is through its accreditation.[126] The U.S. Department of Education recognizes "select accrediting agencies as reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit."[127] Generally, accreditation by a recognized

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122. Francine Rochford, *The Contested Product of a University Education*, 30 J. HIGHER EDUC. POL'Y & MGMT. 41, 43–44 (2008).

123. *Id.* at 44.

124. *Id.* at 46–47.

125. Samuel G. Freedman, *Putting a Curious Eye on a High School Ranking System*, N.Y. TIMES, Dec. 5, 2007 (stating that the U.S. News and World Reports College Rankings issues receives significantly higher Internet traffic than any of its other content, and even sells 50% more magazines than any of its other issues).

126. Some professions not only prefer that future employees attend an accredited school, but even require it. U.S. Dept. of Education. http://www2.ed.gov/students/prep/college/diplomamills/accreditation.html ("Attending an accredited institution is often a requirement for employment and can be helpful later on if you want to transfer academic credits to another institution"). N.Y.Ct.Rules, § 520.3 (McKinney's 2010) ("An applicant may qualify to take the New York State bar examination by submitting to the New York State Board of Law Examiners satisfactory proof that the applicant attended and was graduated with a first degree in law from a law school or law schools which at all times during the period of applicant's attendance was or were approved. b) Approved law school defined. An approved law school for purposes of these rules is one: . . . (2) which is approved by the American Bar Association.")

127. U.S. Dept. of Education. http://www2.ed.gov/students/prep/college/diplomamills/accreditation.html.

agency helps "to ensure [that] students receive a quality education and get what they pay for."[128] One method of ensuring quality in education, as was previously discussed in this article, is to preserve students' freedom of expression and allow them to be fully exposed to the marketplace of ideas.[129] Accreditation organizations such as the Accrediting Council on Education in Journalism and Mass Communications or the Middle States Commission on Higher Education recognize the educative value of free expression and require their accredited schools to respect their students' expressive rights.[130] Consequently, for a public university to receive the accreditation that it desires, it is critical that it give the appearance of preserving the freedom of speech and refraining from speech adoption and censorship.

In addition to accreditation, universities will attract students through the positive press that they receive—and, of course, by avoiding negative press. In this area, independent watchdog groups can have a large effect on a university's appearance. Possibly the most influential of free speech watchdogs at public universities, the Foundation for Individual Rights in Education persistently works to expose abuses of free expression in public universities. Annually, the Foundation publishes a Speech Code Report to "explore the extent to which schools are meeting their legal and moral obligations to uphold students' . . . rights to freedom of speech, freedom of expression,

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128. *Id.*

129. *See supra* Part I.

130. MIDDLE STATES COMMISSION ON HIGHER EDUCATION, CHARACTERISTICS OF EXCELLENCE IN HIGHER EDUCATION: ELIGIBILITY REQUIREMENTS AND STANDARDS FOR ACCREDITATION 21 (2006), *available at* http://www.msche.org/publications/CHX06_Aug08080728132708.pdf ("Academic freedom, intellectual freedom and freedom of expression are central to the academic enterprise. These special privileges, characteristic of the academic environment, should be extended to all members of the institution's community (i.e. full-time faculty, adjunct, visiting or part time faculty, staff, students instructed on the campus, and those students associated with the institution via distance learning programs). ACEJMC Accrediting Standards, http://www2.ku.edu/~acejmc/PROGRAM/STANDARDS.SHTML (last visited Jan. 23, 2010) ("The Accrediting Council on Education in Journalism and Mass Communications requires that, irrespective of their particular specialization, all graduates should be aware of certain core values and competencies and be able to[ ] understand and apply the principles and laws of freedom of speech and press for the country in which the institution that invites ACEJMC is located, as well as receive instruction in and understand the range of systems of freedom of expression around the world, including the right to dissent, to monitor and criticize power, and to assemble and petition for redress of grievances;")

and private conscience."[131] Furthermore, the Foundation acts to publicize speech abuses as they occur, working to draw negative attention to violating institutions for any actions repugnant to free speech.[132]

In sum, although public universities have significant incentives to participate in speech adoption and censorship, some considerable interests may act as a counterbalance to those incentives and preserve many freedoms normally guaranteed to school-sponsored, student speech.

CONCLUSION

Few places exist where free speech is more important than in a nation's universities. Freedom of expression is essential to higher education because it is through the free and open exchange of ideas that universities meet their societal purpose of training individuals to become good citizens and public contributors.

For this purpose, courts have actively worked to promote and protect student free speech in public universities. Consequently, students know that they do not surrender their First Amendment rights at the "schoolhouse gate"—they can meet and discuss topics and ideas without fear of repercussion. Students also know that when they benefit from government aid in producing and disseminating their expression, they can do so without fear of censorship based on their viewpoints. They understand that the government is more of a partner or an advocate in their learning than an opponent or a referee.

However, in issuing its opinion in *Summum v. Pleasant Grove*, the Supreme Court may have changed that dynamic. Almost certainly, the Supreme Court did not explicitly take aim at public education when it issued that opinion. *Summum* specifically concerned the right of a city to include or exclude privately donated monuments on public property. During the case, the Court correctly held that a city, because of the government speech doctrine, does not have to accept, and place

131. FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, SPOTLIGHT ON SPEECH CODES 2010: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, 3 (2010) *available at* https://www.thefire.org/public/pdfs/9aed4643c95e93299724a350234a29d6.pdf.

132. *See, e.g.*, Leonel Sanchez, Free-speech Advocates Challenge Southwestern's Actions, SAN DIEGO UNION-TRIB., Nov. 12, 2009 at B-3.

on public land, monuments from any private party after having accepted a monument from another private party. The government speech doctrine allows the city to say or not say what it pleases, without being compelled by any private party to say something different.

Yet, in deciding *Summum*, the Supreme Court expanded the government speech doctrine beyond its previous understanding. Until that time, the government had to be the impetus or catalyst behind a form of expression in order to consider that expression government speech. Since *Summum*, the government may adopt private speech as long as the speech takes place in a nonpublic forum, is "sponsored" by the government, and the government exercises adequate control over that expression.

This new adoption theory is particularly alarming when examined next to government-sponsored, student speech in public universities. Generally, the government may not encumber school-sponsored, student speech with any viewpoint-based restrictions. However, because government-sponsored, student speech already occurs in a nonpublic forum (being restricted by a school's curriculum), and because the government, by definition, subsidizes government-sponsored, student speech, it appears that the government may adopt that speech by simply exerting control over it. Then, once the government has laid claim to that speech, there is no limit to how much or how often it may regulate or censor it. Furthermore, when the government is afforded *carte blanche* to censor speech, there is little to stop it from expanding its regulation of "free expression" when it has incentives to continue regulating.

This Comment does not conclude that *Summum* was decided incorrectly. On the contrary, the Author believes that it was decided perfectly in its *context*. However, as time unfolds, and the judiciary further explores *Summum*'s application, it will be interesting to watch how government speech expands. Clearly, *Summum*'s version of government speech will not immediately and completely erase a college student's right to free expression. On the contrary, this Comment has gone so far as to enumerate some of the reasons why, in spite of the availability of speech adoption, many public universities will choose to refrain from adopting and censoring government-sponsored, student speech. Nevertheless, as it is currently

elucidated, *Summum* may be used by administrators at public universities to increase their oversight of student expression in areas that are subsidized by the government, opening a loophole to the abuse of students' First Amendment rights.

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