Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property/Subsidies, Employees, and Schools

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Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009)

Summum is a religious organization that sought to place a permanent monument displaying the "Seven Aphorisms of Summum" in Pioneer Park, a public park located in Pleasant Grove City, Utah. At the time of the request in 2003, Pioneer Park contained fifteen permanent displays, eleven of which were privately donated. One of those privately donated displays was a Ten Commandments monument. Pleasant Grove denied Summum's request, claiming that permanent monuments were limited to displays related to the history of the city or donated by persons "with longstanding ties to the Pleasant Grove community." Summum filed a lawsuit, claiming that this refusal violated the free speech clause of the First Amendment, as incorporated by the due process clause of the Fourteenth Amendment. A federal district court rejected the suit, but that decision was reversed by the Court of Appeals for the Tenth Circuit. Pleasant Grove City appealed to the Supreme Court of the United States.

The Supreme Court unanimously ruled that Summum had no constitutional right to place the monument in the park. Justice Alito's opinion for the court declared that permanent monuments were a form of government speech and that government officials had a constitutional right to determine what messages they wished to convey. Justice Alito made clear that city officials could not restrict private speech in Pioneer Park. How did he distinguish between public and private speech? Is that distinction sound? Suppose Summum had asked only that the display be exhibited for a month. Would the case have been decided the same way? Should the Court have also determined the constitutionality of the display of the Ten Commandments or is this case identical to Van Orden v. Perry *(2005)?*

JUSTICE ALITO delivered the opinion of the Court.

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. . . The parties' fundamental disagreement . . . centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were petitioners engaging in their own expressive conduct? Or were they providing a forum for private speech?

If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. . . . A government entity has the right to "speak for itself." . . .

Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." . . .

A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message. . . .

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While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public

questions.'" . . . Reasonable time, place, and manner restrictions are allowed, . . . but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, . . . and restrictions based on viewpoint are prohibited. . . .

With the concept of the traditional public forum as a starting point, this Court has recognized that members of the public have free speech rights on other types of government property and in certain other government programs that share essential attributes of a traditional public forum. We have held that a government entity may create "a designated public forum" if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose. . . . Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum. . . .

The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. . . . In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral. . . .

. . . Permanent monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. . . . A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. . . .

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. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

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. . . 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.

In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection. . . .

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Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But "public forum principles . . . are out of place in the context of this case." . . . The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. . . .

By contrast, public parks can accommodate only a limited number of permanent monuments. Public parks have been used, "'time out of mind, . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions,'" . . . but "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments." . . .

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. . . If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. . . . Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. . . . The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

Respondent compares the present case to *Capitol Square Review and Advisory Bd. v. Pinette* . . . (1995), but that case involved a very different situation—a request by a private group, the Ku Klux Klan, to erect a cross for a period of 16 days on public property that had been opened up for similar temporary displays, including a Christmas tree and a menorah. . . . Although some public parks can accommodate and may be made generally available for temporary private displays, the same is rarely true for permanent monuments.

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JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

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JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

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JUSTICE BREYER, concurring.

I agree with the Court and join its opinion. I do so, however, on the understanding that the "government speech" doctrine is a rule of thumb, not a rigid category. Were the City to discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, say solely on political grounds, its action might well violate the First Amendment.

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Were we to do so here, we would find—for reasons that the Court sets forth—that the City's action, while preventing Summum from erecting its monument, does not disproportionately restrict Summum's freedom of expression. The City has not closed off its parks to speech; no one claims that the City prevents Summum's members from engaging in speech in a form more transient than a permanent monument. Rather, the City has simply reserved some space in the park for projects designed to further other than free-speech goals. And that is perfectly proper. After all, parks do not serve speech-related interests alone. To the contrary, cities use park space to further a variety of recreational, historical, educational, aesthetic, and other civic interests. To reserve to the City the power to pick and choose among proposed monuments according to criteria reasonably related to one or more of these legitimate ends restricts Summum's expression, but, given the impracticality of alternatives and viewed in light of the City's legitimate needs, the restriction is not disproportionate. Analyzed either way, as "government speech" or as a proportionate restriction on Summum's expression, the City's action here is lawful.

JUSTICE SOUTER, concurring in the judgment.

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. . . The interaction between the "government speech doctrine" and Establishment Clause principles has not, however, begun to be worked out.

The case shows that it may not be easy to work out. After today's decision, whenever a government maintains a monument it will presumably be understood to be engaging in government

speech. If the monument has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of a flat-out establishment of religion, in the sense of the government's adoption of the tenets expressed or symbolized. In such an instance, there will be safety in numbers, and it will be in the interest of a careful government to accept other monuments to stand nearby, to dilute the appearance of adopting whatever particular religious position the single example alone might stand for. As mementoes and testimonials pile up, however, the chatter may well make it less intuitively obvious that the government is speaking in its own right simply by maintaining the monuments.

If a case like that occurred, as suspicion grew that some of the permanent displays were not government speech at all (or at least had an equally private character associated with private donors), a further Establishment Clause prohibition would surface, the bar against preferring some religious speakers over others. . . . But the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.

Whether that view turns out to be sound is more than I can say at this point. It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate. It is an occasion, however, to try to keep the inevitable issues open, and as simple as they can be. One way to do that is to recognize that there are circumstances in which government maintenance of monuments does not look like government speech at all. Sectarian identifications on markers in Arlington Cemetery come to mind. And to recognize that is to forgo any categorical rule at this point.

To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land. This reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases. . . . The adoption of it would thus serve coherence within Establishment Clause law, and it would make sense of our common understanding that some monuments on public land display religious symbolism that clearly does not express a government's chosen views.

Application of this observer test provides the reason I find the monument here to be government expression.