Mississippi College Law Review

Volume 30
Issue 1 *Vol. 30 Iss. 1*

Article 8

2012

Clear as Mud: Pleasant Grove City v. Summun and Riding the Undefined Line between Government Speech and Private Speech in a Public Forum

Jessica L. Thornhill

Follow this and additional works at: https://dc.law.mc.edu/lawreview

Part of the Law Commons

Custom Citation
30 Miss. C. L. Rev. 121 (2011-2012)

This Case Note is brought to you for free and open access by MC Law Digital Commons. It has been accepted for inclusion in Mississippi College Law Review by an authorized editor of MC Law Digital Commons. For more information, please contact walter@mc.edu.

CLEAR AS MUD: *PLEASANT GROVE CITY V. SUMMUM* AND RIDING THE UNDEFINED LINE BETWEEN GOVERNMENT SPEECH AND PRIVATE SPEECH IN A PUBLIC FORUM

*Jessica L. Thornhill**

I. INTRODUCTION

In recent history, the status of the government's own speech has come into question in relation to the constitutional guarantee of free speech under the First Amendment. The United States Supreme Court addressed this dilemma in *Pleasant Grove City v. Summum* holding that a privately donated Ten Commandments monument displayed in a public park was not subject to First Amendment scrutiny because the monument constituted government speech that Pleasant Grove City had effectively accepted as its own.[1] The *Pleasant Grove* decision is important, because the Court focuses on government speech rather than focusing solely on the type of forum involved.

This Note argues that while the Supreme Court's holding in *Pleasant Grove* appears well reasoned and fully justified as to the law, the Court fails to fully analyze the forum at issue, thus leaving a hurdle in distinguishing government speech from private speech in a public forum. The hole in the analysis leaves the opinion open to criticism and ultimately in need of clarification. By adopting an analysis that fully discusses the status of the forum, rather than merely making assumptions about the nature of the forum, the holding would provide a much clearer precedent to lower courts.

Part I of this Note discusses the relevant facts and reasoning considered by the Court in reaching its decision; part II provides the background of prior case law applicable to the relevant issues; part III explains *Pleasant Grove*'s holding, including the arguments presented and the rationalization of the Court; part IV analyzes *Pleasant Grove*'s holding and lays out a new three-pronged approach to analyzing issues regarding government speech.

---

* The author gratefully acknowledges the entire faculty and administration at Mississippi College School of Law, especially Professor Donald Campbell for his continuous guidance throughout the preparation, development, and drafting of this Note. His insight, expertise, and enthusiasm were essential to the end product and contributed greatly to my growth as a student. Lastly, I am forever indebted to my husband, Matthew, and my parents, Rusty and Kim Lenard, for their continuous support and encouragement throughout my law school career.

1. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1130 (2009).

II. Facts

A. Procedural History

In 2005, Summum, a religious organization, filed a complaint against the City of Pleasant Grove, Utah (the "City") and various local officials alleging violations of the First Amendment's Free Speech Clause.[2] The action arose when the City allowed a Ten Commandments monument to be erected in a public park, but rejected a Seven Aphorisms of Summum monument within the same park.[3] Summum filed suit in the United States District Court for the District of Utah requesting a preliminary injunction to require the City to allow Summum to erect its monument in Pioneer Park.[4] The court denied Summum's request for an injunction.[5] Summum subsequently appealed its free speech claim to the United States Court of Appeals for the Tenth Circuit.[6]

The Tenth Circuit reversed the district court's decision, noting a previous holding that a Ten Commandments monument constituted private speech rather than government speech, because public parks are traditionally regarded as public forums.[7] The Tenth Circuit also held that the City could not reject Summum's request to erect the Seven Aphorisms monument unless it had a "compelling justification," and therefore held that the City had to allow Summum to erect its monument.[8]

Subsequently, the City requested a re-hearing en banc, which the Tenth Circuit denied.[9] The City then appealed to the United States Supreme Court, which granted certiorari on the questions of whether the Tenth Circuit erred in holding that the privately donated monument that was thereafter owned, controlled, and displayed by the City was not government speech but private speech of the monument's donor, and whether the Tenth Circuit erred by ruling that a city park is a public forum for the erection and permanent display of privately donated monuments.[10]

B. Factual Summary

Located in the historic district of Pleasant Grove, Utah, Pioneer Park is a 2.5-acre public park that contains fifteen permanent displays, eleven of

2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*; *see also* Pleasant Grove City v. Summum, 483 F.3d 1044 (10th Cir. 2007), *cert. granted*, 552 U.S. 1294 (Mar. 31, 2008) (No. 07-665).
9. *Pleasant Grove City*, 129 S. Ct. at 1130.
10. *Id.*

which were donated by private individuals or groups.[11] These eleven monuments consist of a wishing well; a historic granary; the City's first fire station; a September 11 monument; and a Ten Commandments monument, which was donated in 1971 by the Fraternal Order of Eagles.[12]

Beginning in 2003, Summum wished to donate a monument to Pioneer Park and wrote two separate letters to Pleasant Grove's Mayor requesting permission to construct a stone monument of the "Seven Aphorisms of Summum."[13] The monument was to be similar to the Ten Commandments monument currently in the park, but the City denied Summum's request.[14] In its denial, the City explained that it only allowed monuments in Pioneer Park that (1) directly related to the history of the City, or (2) were donated "by groups with longstanding ties to the Pleasant Grove Community."[15]

In 2005, Summum again wrote to the City's mayor requesting to build the Seven Aphorisms of Summum monument, but did not mention the monument's religious nature or its historical significance or connection to the City.[16] The City again rejected Summum's request, and Summum subsequently filed suit.[17]

C. *Disposition*

Prior to *Pleasant Grove*, the United States Supreme Court had never addressed the Free Speech Clause's application to a government entity's acceptance of monuments in a public park.[18] The Supreme Court reversed the Tenth Circuit's judgment, holding that "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."[19] The City argued in favor of recognizing monuments as government free speech because the government entity selects which monuments it wants to display.[20] To the contrary, Summum argued that government speech

---

11. *Id.* at 1129.

12. *Id.*

13. *Id.* The Seven Aphorisms of Summum are at the center of the Summum faith in which followers believe that the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai, but that Moses shared the aphorisms only with a few and then destroyed the original tablets; followers believe Moses destroyed the tablets because he believed that the Israelites were not ready to receive the Aphorisms, and thus returned to Mount Sinai with a second set of tablets containing the Ten Commandments. *Id.* at 1129 n.1 (citing The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (last visited Feb. 15, 2011)). The Seven Aphorisms, also known as the Seven Principles of Creation, are as follows: "(1) The principle of Psychokinesis, (2) the principle of Correspondence, (3) the principle of Vibration, (4) the principle of Opposition, (5) the principle of Rhythm, (6) the principle of Cause and Effect, and (7) the principle of Gender." Seven Summum Principles, http://www.summum.us/philosophy/principles.shtml (last visited Feb. 15, 2011).

14. *Pleasant Grove City*, 129 S. Ct. at 1130.

15. *Id.* (citation omitted).

16. *Id.*

17. *Id.*

18. *Id.* at 1131.

19. *Id.* at 1129.

20. *Id.* at 1133.

should not be used to favor certain speakers over others based on viewpoint; instead, the government entity should embrace the monument's message as its own.[21] Justice Alito delivered the majority opinion.[22] Justice Stevens concurred and was joined by Justice Ginsburg.[23] Justice Scalia filed a concurring opinion that was joined by Justice Thomas.[24] Justices Breyer and Souter also wrote separate concurring opinions.[25]

III. Background and History of the Law

According to the First Amendment of the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech."[26] In *Pleasant Grove*, the Court took a different approach, diverging from traditional analysis of government free speech. To understand the Court's shift in approach, it is important to review the history of the Court's analysis of government free speech. The following caselaw represents the Supreme Court's interpretation of free speech regarding public and nonpublic forums provided by government entities and the progression of free speech on government property.

A. *Defining the Character of Government Property in Regards to Free Speech Access Under the First Amendment*

In *Pleasant Grove*, the Court relied on a prominent free speech case from 1983, *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[27] In *Perry*, the Supreme Court held that preferential access to an interschool mail system did not violate the First Amendment or the Fourteenth Amendment's Equal Protection Clause.[28] There, Perry Education Association (PEA), the union representing Perry School teachers, entered a collective-bargaining agreement with the Board of Education to provide PEA exclusive access to the interschool mail system, but no other union.[29] The Court held that the guarantee of free speech under the First Amendment applied to teachers' mailboxes, but did not necessarily require equivalent access and depends on the character of the property at issue.[30]

Next, the *Perry* Court categorized the types of property for permissive exclusions: the traditional public forum, the public forum, and the nonpublic forum. The Court stated that streets and parks "have immemorially been held in trust for the use of the public, and, . . . have been used for

21. *Id.* at 1134.
22. *Id.* at 1128.
23. *Id.* at 1138.
24. *Id.* at 1139.
25. *Id.* at 1140-41.
26. U.S. Const. amend. I.
27. 460 U.S. 37 (1983).
28. *Id.* at 38-55.
29. *Id.* at 38-39.
30. *Id.* at 44.

purposes of assembly, communicating thoughts between citizens, and discussing public questions," thus traditional public forums.[31] The government may not prohibit all communicative activity in these public forums, and for any content-based exclusion, the government must show a compelling state interest that the regulation is necessary; however, the government may impose content-neutral regulations that are designed to serve a "significant government interest."[32]

Then, the Court addressed a second category, the limited public forum, where the government has opened public property for use by the public for expressive activity.[33] In this category, the Constitution prohibits the government from enforcing certain exclusions, because this serves as a type of public forum, even though the government was not obligated to create it.[34] Because it serves as a public forum, as long as it is open, the government is bound by the same regulations that apply to traditional public forums; thus, "[r]easonable time, place[,] and manner regulations are permissible, and a[ny] content-based prohibition must be narrowly drawn to effectuate a compelling state interest."[35]

The Court defined a third category, the non-public forum, as public property that is not traditionally designated as a public forum and is governed by different standards, seeing that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[36] Here, the government may impose content-based restrictions, but may not discriminate according to a particular viewpoint.[37] The *Perry* Court further held that because the mailboxes were not open to the general public, the government property was not a public forum and the government was allowed to restrict access.[38] In regards to these non-public forums, *Perry* held that the government has the right to make "distinctions in access on the basis of subject matter and speaker identity," but must be reasonable in regards to the purpose of the forum and concluded the following:

> When speakers and subjects are similarly situated, the state may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the state may draw distinctions which relate to the special purpose for which the property is used.[39]

---

31. *Id.* at 45 (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 46 (citation omitted).
36. *Id.* (citation omitted).
37. *Id.*
38. *Id.* at 47-48.
39. *Id.* at 55.

In other words, the government may discriminate in non-public forums based on content, depending on how the government property is used and the purpose of the forum in question.

In 1985, the Supreme Court revisited speech exclusion from government property in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*[40] There, the Supreme Court addressed whether the federal government violated the First Amendment by excluding certain political advocacy organizations from a charity drive.[41] The lower courts felt the exclusion violated the First Amendment.[42] However, the Supreme Court reversed the lower court decisions and held that the federal government's speech was protected; although the government was not speaking, it was operating a non-public forum on public property and the government's reasons for excluding the political organizations satisfied the reasonableness standard.[43]

Writing for the Court, Justice O'Connor further stated that "[n]othing in the Constitution requires the [g]overnment freely to grant access to all who wish to exercise their right to free speech on every type of [g]overnment property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[44] Because the government, like any owner of private property, has the power "to preserve the property under its control for the use to which it is lawfully dedicated,"[45] the Court adopted a method of forum analysis aimed at determining whether the government's interest in using the property for its intended purpose "outweighs the interest of those wishing to use the property for other purposes."[46]

Whether the government can deny access depends on the type of forum in question.[47] The Court relied on *Perry* to determine that with regard to public forums, because they are designed for the free exchange of ideas, speakers can only be denied access only if the exclusion serves "a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[48] However, nonpublic forums are a different story, as access can be denied as long as the exclusions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."[49]

> [A] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of

40. 473 U.S. 788 (1985).
41. *Id.* at 790.
42. *Id.* at 796.
43. *Id.* at 797-813.
44. *Id.* at 799-800.
45. *Id.* at 800 (quoting Greer v. Spock, 424 U.S. 828, 836 (1976)).
46. *Id.*
47. *Id.*
48. *Id.*; *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
49. *Cornelius*, 473 U.S. at 800 (citing *Perry Educ. Ass'n*, 460 U.S. at 46).

> speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.[50]

The Court then applied a reasonable standard, stating that "[t]he [g]overnment's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation."[51] The Court ultimately concluded that the government did not violate the First Amendment when it excluded the political organization based on the reasonableness of the government's limitations on access.[52]

The Supreme Court again addressed this issue, specifically viewpoint discrimination, in *Rust v. Sullivan*, a 1991 case in which Rust argued that the

> regulations violate[d] the First Amendment by impermissibly discriminating based on viewpoint because they prohibit "all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term."[53]

In *Rust*, the Court held that the government can constitutionally choose to fund certain programs which it feels are in the public's interest, without having to fund an alternative program.[54] This is not considered viewpoint discrimination, but merely a selection to fund one activity, without funding another.[55] Writing for the Court, Chief Justice Rehnquist further stated: "To hold that the [g]overnment 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 [g]overnment programs constitutionally suspect."[56]

The Supreme Court continued its discussion of viewpoint discrimination in *Lamb's Chapel v. Center Moriches Union Free School District*.[57] There, the school district denied access to school property that was otherwise permitted for after-hours use including social, civic, and recreational activities, but did not include religious purposes.[58] Lamb's Chapel wished to show a film series on Christian family values dealing with family and

50. *Id.* at 806 (citations omitted).
51. *Id.* at 808.
52. *Id.* at 813.
53. Rust v. Sullivan, 500 U.S. 173, 192 (1991).
54. *Id.* at 193.
55. *Id.*
56. *Id.* at 194.
57. 508 U.S. 384 (1993).
58. *Id.* at 386.

child-rearing issues faced by parents today, but was denied access to the facilities.[59] The Court held that

> [w]ith respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[60]

Justice White wrote that it was clear that the film series involved a subject that was otherwise permissible under the regulations but was denied solely because it involved a religious viewpoint; therefore, the school board exclusion was in violation of the First Amendment because "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[61]

Next, the Supreme Court undertook *Rosenberger v. Rector and Visitors of the University of Virginia* involving a limited public forum;[62] the Court has relied on this case quite heavily in recent years to distinguish content discrimination from viewpoint discrimination. *Rosenberger* involved the University of Virginia's use of mandatory student activity fees to pay for printing costs of various student group publications and refusal to pay for a student newspaper that reflected a Christian perspective.[63] The district court granted summary judgment for the university, and the Fourth Circuit affirmed, holding that the university violation of the Constitution's Free Speech Clause by viewpoint discrimination was justified in order to comply with the Constitution's Establishment Clause.[64] However, the Supreme Court overturned the Fourth Circuit's decision, holding that the university's actions denied the student organization its free speech rights and the university's guidelines violated principles governing speech in limited public forums.[65]

When determining whether a state has legitimate power to exclude certain speech on government property, the Court distinguished content discrimination (speech discrimination based on subject matter, which may or may not be permissible based on whether it preserves the limited forum's purpose) from viewpoint discrimination (speech discrimination based on the speaker's motivating ideology, opinion, or perspective, which

---

59. *Id.* at 387.

60. *Id.* at 392-93 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (citations omitted)).

61. *Id.* (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).

62. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

63. *Id.* at 823-27.

64. *Id.* at 827-28.

65. *Id.* at 828-37.

is generally unacceptable if the speech is otherwise within the forum's limitations).[66] The Supreme Court held that the university's actions were viewpoint discrimination and thus impermissible because the university's policies did not exclude religion as a subject matter, but disfavored student publications with religious viewpoints.[67] Furthermore, the Court held that viewpoint neutrality is essential when the government is funding the message so to prevent unfair discrimination.[68]

Additionally, the Court held that the university's violation was not justified by the necessity of complying with the Establishment Clause, because the program at issue was neutral in regards to religion.[69] When faced with an Establishment Clause violation, neutrality is not offended "when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[70] There would have been more cause for concern if the university created the program to advance religion or aid a religious cause; however, that was not the university's intent with the program.[71] The program was merely instituted to provide a forum for speech and to support various student groups, including the publication of newspapers.[72]

The Court concluded that it was not necessary to deny eligibility to student publications based on their viewpoint to prevent an Establishment Clause violation, because in doing so, the university violated the Free Speech Clause through viewpoint discrimination based on religion, which "could undermine the very neutrality the Establishment Clause requires."[73] The Establishment Clause is not violated if a public university grants funds on a religion-neutral basis to a wide array of student groups, even if some of those groups use the funds for secular activities.[74]

Next, the Supreme Court considered *Good News Club v. Milford Central School*, a case where Milford Central School had enacted a policy allowing residents to use its facilities after hours for various educational and social gatherings.[75] In doing so, Milford denied a request to use the building for weekly after-school meetings by Good News Club, a private Christian organization for children.[76] Milford equated the proposed meetings to religious worship, which was prohibited by the community use policy.[77]

---

66. *Id.* at 829-30.
67. *Id.* at 831.
68. *Id.* at 834.
69. *Id.* at 838-40.
70. *Id.* at 839 (citing Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 704 (1994)).
71. *Id.* at 840.
72. *Id.*
73. *Id.* at 845-46.
74. *Id.* at 842-46.
75. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102-03 (2001).
76. *Id.* at 103.
77. *Id.*

The Supreme Court based its holding on the parties' agreement that Milford operated a limited public forum, and in such instances, the government is not required to allow all types of speech.[78] The government may reserve the forum for "certain groups or for the discussion of certain topics," but is limited from discriminating against speech based on viewpoint, and any restrictions must be "reasonable in light of the purpose served by the forum."[79] The Court relied on its previous holdings in *Lamb's Chapel* and *Rosenberger* when it determined that Milford's actions were viewpoint discrimination based on the request's religious nature.[80] The Court held that Milford opened the limited public forum to serve the community, and as such, "any group that 'promote[d] the moral and character development of children' [was] eligible to use the school building."[81]

The Supreme Court reaffirmed its holdings in *Lamb's Chapel* and *Rosenburger*, finding that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."[82] Therefore, the Court concluded that by refusing Good News Club's request, Milford engaged in viewpoint discrimination based on Good News Club's religious perspective.[83]

The most recent case cited by the *Pleasant Grove* Court is *Johanns v. Livestock Marketing Ass'n*, wherein the Supreme Court addressed government speech in a "compelled-subsidy" case, where an "individual [was] required by the government to subsidize a message he disagree[d] with . . . ."[84] The Court held that beef advertising funded by mandatory contributions under the Beef Promotion and Research Act of 1985[85] was "government speech" and therefore not susceptible to the First Amendment "compelled-subsidy" scrutiny.[86]

To determine whether the speech was that of the government, the Court looked to the root of the promotional campaign, which was effectively controlled by the federal government because Congress and the Secretary of Agriculture implemented it.[87] When the government controls the message and a government entity approved every work communicated, the government "is not precluded from relying on the government speech doctrine merely because it solicits assistance from non-governmental sources in developing specific messages."[88] The Livestock Marketing Association argued that the advertisements could not be "government speech" because

78. *Id.* at 106.
79. *Id.* at 106-07 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).
80. *Id.* at 107.
81. *Id.* at 108 (citation omitted).
82. *Id.* at 111-12.
83. *Id.* at 112.
84. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005).
85. Pub. L. No. 99-198, 99 Stat. 1354, 1597 (codified at 7 U.S.C. §§ 2901-2918 (2006)).
86. *Johanns*, 544 U.S. at 554-67.
87. *Id.* at 560-61.
88. *Id.* at 562.

they were attributed to "America's Beef Producers" and not the government, and "America's Beef Producers" were compelled to fund the message that they disagreed with which allowed them to raise a First Amendment claim.[89] However, the Court refused to address the argument's validity, holding that it related to "compelled-speech" rather than "compelled-subsidy."[90] The Court further held that "citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech" even when funding is achieved through congressional acts.[91]

B. The Progression of the Government Speech Doctrine

As Justice Stevens stated in his concurring opinion in the instant case, the government free speech doctrine is a newly minted doctrine, as its boundaries are not well known or developed.[92] Therefore, an overview of the government speech doctrine will assist in understanding the Court's decision in *Pleasant Grove* and grasp the Court's expansion of the doctrine.

The premise of the government speech doctrine is that the government should be allowed to promote its own policies.[93] This premise has led to the Court's development of the doctrine that when the government is speaking for itself, it is not bound by the same free speech guarantees afforded to private speech. In 1995, the Supreme Court recognized that "when the [s]tate is the speaker, it may make content-based choices" not subject to First Amendment scrutiny, as "[t]he purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression."[94] In *Keller v. State Bar of California*, the Court held that the government must be able to express certain viewpoints in order to function and would not be able to do so effectively if the government was not allowed preferences.[95]

The government speech doctrine was first recognized in 1991 with the Court in *Rust* holding that regulations regarding abortion funding did not violate the Free Speech Clause and allowed the government to restrict the free speech rights of the abortion clinics to talk about abortions.[96] The Court again addressed the topic ten years later in *Legal Services Corp. v. Velazquez*, but did not find that the speech in question was that of the government.[97] In 2006, the Supreme Court focused on the speech of government officials in *Garcetti v. Ceballos* and held that "when public employees make statements pursuant to their official duties, the employees

89. *Id.* at 564.
90. *Id.* at 564-65.
91. *Id.*
92. *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129 (2009).
93. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).
94. *Id.* at 834; Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring).
95. Keller v. State Bd. of Cal., 496 U.S. 1, 12 (1990).
96. Rust v. Sullivan, 500 U.S. 173 (1991).
97. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

are not speaking as citizens for First Amendment purposes . . . ."[98] The day before deciding the instant case, the Supreme Court decided *Ysursa v. Pocatello Education Ass'n* and also addressed government speech.[99] In *Ysursa*, the Court reiterated the holdings in both *Rust* and *Keller*, holding that a state must be able to regulate speech so as to achieve governmental objectives and further holding "the government function trumps the value of the speech at issue, and a private citizen's First Amendment rights take a back seat to the government's own."[100]

In deciding these cases, the Court categorized the government's relationship to the restricted speech to determine whether the government's interest was sufficient to preclude free speech scrutiny.[101] However, the government speech doctrine has garnered criticism due to the difficulty in determining when the government is speaking for itself and when it is aiding private speech; therefore, lower courts are left without a clear test to address government speech.[102]

C. *The Establishment Clause's Influence on Government Speech*

Although the Court in *Pleasant Grove* deferred discussion of the Establishment Clause, the Establishment Clause can prove to be problematic with regard to free speech on government property. The Establishment Clause provides for the free exercise of religion and prohibits the government from enacting laws that promote one religion over another or from supporting religious ideals.[103] In the following cases, the Supreme Court addressed possible Establishment Clause violations in allowing speech in government forums.

In 1981, the Supreme Court held in *Widmar v. Vincent* that the University of Missouri-Kansas City discriminated against student groups who wished to use an open forum for religious worship and discussion, which are protected forms of First Amendment free speech.[104] The Court further held that the only way to justify this type of discrimination was to show a compelling state interest in prohibiting the speech.[105]

The Supreme Court used a three-prong test to determine if a policy would offend the Establishment Clause: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.' "[106] In *Widmar*, the Supreme Court focused on the third prong.[107]

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

99. The Supreme Court 2008 Term Leading Cases, 123 HARV. L. REV. 242, 250 (2009).

100. Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093 (2009); *see also Rust*, 500 U.S. at 194; *Keller*, 500 U.S. at 173.

101. The Supreme Court 2008 Term Leading Cases, *supra* note 99, at 248.

102. The Supreme Court 2008 Term Leading Cases, *supra* note 99, at 238.

103. U.S. CONST. amend. I.

104. Widmar v. Vincent, 454 U.S. 263, 269 (1981).

105. *Id.*

106. *Id.* at 271 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

The Court stated that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices" just as "such a policy 'would no more commit the [u]niversity . . . to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities."[108] Finally, the Court concluded that the university created a forum generally open to student groups, but then sought to exclude religious speech which "violate[d] the fundamental principle that a state regulation of speech should be content-neutral," and could not be justified.[109]

As previously mentioned, in *Good News Club*, the Supreme Court not only addressed First Amendment concerns, but also concerns regarding a potential Establishment Clause violation. Milford argued that, even if its rejection of the club was viewpoint discrimination, the rejection was required in order to avoid violating the Establishment Clause; however, the Supreme Court disagreed.[110] The Supreme Court stated that "a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination. However, it is not clear whether a [s]tate's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination."[111]

The Court had previously held that "a significant factor in upholding governmental programs in the face of Establishment Clause attack [was] their *neutrality* towards religion," but the Court was not persuaded by Milford's argument.[112] In particular, Milford argued that granting Good News Club access would damage the policy's neutrality, because the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[113] The Court concluded that there was no valid reason to prohibit Good News Club from meeting on the schools premises because it did not violate the Establishment Clause.[114]

Another important Supreme Court opinion was *Van Orden v. Perry*, which was factually similar to *Pleasant Grove*.[115] Although the Supreme Court chose not to follow the same analysis in *Pleasant Grove*, it is important to illustrate the distinction between the two opinions. The United States Supreme Court considered *Van Orden* in 2005. The *Van Orden* case involved a Ten Commandments monument located on the premises of the

107. *Id.* at 271-72.

108. *Id.* at 274 (quoting Chess v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980)).

109. *Id.* at 277.

110. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112-13 (2001).

111. *Id.* at 112 (citation omitted).

112. *Id.* at 114 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839 (1995)).

113. *Id.* (quoting *Rosenberger*, 515 U.S. at 839).

114. *Id.* at 119.

115. Van Orden v. Perry, 545 U.S. 677 (2005).

Texas State Capitol that was donated by the Fraternal Order of Eagles of Texas in 1961.[116] The monument was one of seventeen monuments on the grounds that commemorated the "people, ideals, and events that compose[d] Texan identity."[117] The Court ultimately concluded that the Establishment Clause did not prohibit the display of the Ten Commandments monument on the Texas State Capitol grounds.[118]

In its determination, the Court's analysis focused on the monument's nature and the nation's history of acknowledging religion's role in American life.[119] The Court stated that "[w]hile the Commandments are religious, they have an undeniable historical meaning. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[120] However, the Court acknowledged limits to the government's display of religious messages or symbols by recognizing the unconstitutionality of posting of the Ten Commandments in every public classroom.[121] The monument was held to be constitutional because its placement was "a far more passive use of the [Ten Commandments]" than a daily display to elementary students.[122] Concurring in the judgment, Justice Breyer stated: "Despite the Commandments' religious message, an inquiry into the context in which the text of the Commandments is used demonstrates that the Commandments also convey a secular moral message about proper standards of social conduct and a message about the historic relation between those standards and the law."[123] Justice Breyer also stated that individuals visiting the capitol grounds were more likely to view the Ten Commandments as a moral and historical message rather than for its religious value or principles.[124]

IV. Pleasant Grove City v. Summum

A. *Majority Opinion*

In *Pleasant Grove City v. Summum*, the Supreme Court addressed an issue of first impression involving the application of the Free Speech Clause to a government entity's acceptance of a privately donated, permanent monument for installation in a public park.[125] Authored by Justice Alito, the Court held that the City's decision to allow such a monument was a form of government free speech not subject to scrutiny under the Free Speech Clause.[126]

---

116. *Id.* at 681.
117. *Id.*
118. *Id.* at 677.
119. *Id.* at 686.
120. *Id.* at 678.
121. *Id.* at 690-91 (referencing Stone v. Graham, 449 U.S. 39, 41-42 (1980)).
122. *Id.* at 691.
123. *Id.* at 679.
124. *Id.* at 701.
125. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009) (citing U.S. CONST. amend I).
126. *Id.* at 1138.

In reaching its decision, the Court addressed the fundamental disagreement between the petitioner, the City, and respondent, Summum, on whether the petitioner was engaged in its own expressive conduct or whether it was providing a forum for private speech—and thus, whether the correct precedent to decide the case involved government speech or private speech in a public forum.[127]

The City favored previous cases involving government speech, whereas Summum, on the other hand, agreed with the Court of Appeals, favoring cases involving private speech in a public forum.[128] If the Court had held that the monument was private speech in a public forum, then the speech would have to have been evaluated as to content and viewpoint discrimination to determine if the City was violating Summum's right to free speech, as private speech is protected by the First Amendment. On the other hand, had the Court adopted a government speech analysis, the City would not have been subjected to such scrutiny because government speech is not protected under the First Amendment. The government is allowed to discriminate based on content in order to fulfill its basic governing functions, so long as the discrimination is justified.

Recognizing the difficulty in differentiating between the two categories of speech, the Court held permanent monuments displayed on public property represented government speech and that the City was engaged in its own expressive conduct; therefore, the Free Speech Clause did not apply because it restricted government regulation of private speech but did not regulate government speech.[129] The Court reasoned that a government entity has the right to speak for itself, to say what it wishes, and to select the views that it wants to express.[130] Although the Free Speech Clause does not regulate government speech, government speech is limited by the Establishment Clause of the Constitution, which prevents the government from becoming entangled with religion.[131]

The Court set out its reasoning: "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," because persons who observe the monuments would reasonably interpret them as conveying a message on the property owner's behalf.[132] Governments have long used monuments to speak to the public. Throughout American history, government entities generally have been selective in regards to donated monuments.[133] Private parties have donated many well-known American monuments such

127. *Id.* at 1131.
128. *Id.*
129. *Id.* at 1131-32.
130. *Id.*
131. *Id.* at 1132.
132. *Id.* at 1133.
133. *Id.*

as the Statue of Liberty, the Iwo Jima monument, and the Vietnam Memorial.[134] By accepting these privately funded monuments, government entities save valuable tax dollars and are able to acquire monuments they would not be able to afford otherwise.[135] But in accepting these monuments, government entities select monuments they feel "portray what they feel is appropriate for the place in question," and exercise selectivity by controlling submission requirements, design input, modifications, written criteria, and legislative approval of specific content.[136] This selection process shows that the monuments that are chosen "are meant to convey and have the effect of conveying a government message" and thus constitute government speech.[137]

Applying the rule to the instant case, the Court held that the monuments in the City's Pioneer Park represented government speech because the City decided which monuments it would accept; therefore, the City "'effectively controlled' the messages sent by the monuments in the [p]ark by exercising 'final approval authority' over their selection."[138] The City selected the monuments based on whether they presented an image of the City that it wished to project to all park visitors.[139]

In addition, Summum argued that government speech should not be used to allow favoritism of certain private speakers based on their viewpoints.[140] Summum suggested that the government entity should be required to go through a formal process to adopt a resolution embracing the monument's message; however, the Court disagreed, stating that the formal documentation was not necessary because a monument's message is subjective and can change over time.[141] When a city accepts a privately donated monument and places it on city property, the city is engaged in expressive conduct; however, "the intended and perceived significance of that conduct" may not be the same intended by the monument's donor or creator.[142] "By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument."[143] Interpretation of the "message" conveyed by a monument may change over time as "historical interpretations" and "the society around them changes."[144]

Summum and the Tenth Circuit compared privately donated monuments in a public park to delivery of speeches or holding marches or demonstrations in public, therefore contending that the public park was a

134. *Id.*
135. *Id.*
136. *Id.* at 1133-34.
137. *Id.* at 1134.
138. *Id.* (citation omitted).
139. *Id.*
140. *Id.*
141. *Id.* at 1134, 1136.
142. *Id.* at 1135, 1138.
143. *Id.* at 1135.
144. *Id.* at 1136, 1138 (citations omitted).

"traditional public forum for these activities."[145] However, the Supreme Court held that these public forum principles were out of place in this case; although a public park may accommodate a large number of public speakers, it can only accommodate a limited number of permanent monuments.[146] Speeches and demonstrations undoubtedly come to an end, whereas monuments last for a significant period of time and "interfere permanently with other uses of public space," thus monopolizing the land's use.[147]

Ultimately, the Supreme Court overruled the Tenth Circuit's decision and held that a government entity's decision to accept or reject a privately donated monument is a form of government speech not subject to the Free Speech Clause on the grounds that "[i]f 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."[148] The Court further held 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."[149]

B. *Justice Stevens's Concurring Opinion*

Justice Stevens authored a concurring opinion, which Justice Ginsburg joined.[150] Justice Stevens agreed with the Court's holding, but stated that the monument could be characterized as an implicit endorsement of the donor's message instead of government speech.[151] Justice Stevens stated that previous precedent involving the government speech doctrine was limited and the majority opinion did not expand it.[152] He recognized that government speech via permanent displays on public property would not give the government a "free license to communicate offensive or partisan messages."[153] Justice Stevens further stated that although the Free Speech Clause does not restrict government speech, "government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses," which, along with checks imposed by democracy, ensure the limited effect of the majority's holding.[154]

---

145. *Id.* at 1137.
146. *Id.*
147. *Id.*
148. *Id.* at 1138.
149. *Id.*
150. *Id.* at 1138-39.
151. *Id.* at 1139.
152. *Id.*
153. *Id.*
154. *Id.*

C. *Justice Scalia's Concurring Opinion*

Justice Scalia authored a concurring opinion, which Justice Thomas joined.[155] Justice Scalia agreed fully with the majority's analysis pertaining to the Free Speech Clause, but he also felt that the case was "litigated in the shadow of the First Amendment's *Establishment* Clause."[156] Justice Scalia pointed out that Summum tried to exploit the City's hesitation to adopt the monument's message because it would raise Establishment Clause issues.[157] Accordingly, the City was cautious in associating itself too closely with the Ten Commandments monument already placed in the park.[158] Justice Scalia contended that the City should be confident that it "[did] not violate *any* part of the First Amendment."[159] Justice Scalia cited a factually similar case involving a Ten Commandments monument displayed on the grounds of the Texas State Capitol in which all the justices rejected an Establishment Clause argument because "the Ten Commandments 'have an undeniable historical meaning' in addition to their 'religious significance.' "[160]

D. *Justice Breyer's Concurring Opinion*

Justice Breyer authored a concurring opinion in which he agreed with the majority but on the understanding that "the 'government speech' doctrine is a rule of thumb, not a rigid category."[161] Justice Breyer stated that the Court should categorize types of speech as "government speech," "public forum," "limited public forum," or "nonpublic forum."[162] He further stated that the Court should look beyond the initial categorization and determine whether the "government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective."[163] Applying this view to the instant case, Justice Breyer believed that the City "[did] not disproportionately restrict Summum's freedom of expression" and, therefore, the City's action was lawful.[164] The City did not close off its parks to speech; it merely reserved space in its park to further recreational, historical, educational, aesthetic, and/or any other civic interest.[165]

E. *Justice Souter's Concurrence in the Judgment*

Lastly, Justice Souter concurred in the judgment, as he agreed that the Ten Commandments monument was government speech, but had qualms

155. *Id.*
156. *Id.* (citing U.S. CONST. amend. I).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 1140 (citation omitted).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 1141.
165. *Id.*

"about accepting the position that public monuments are government speech categorically."[166] Justice Souter stated that the Court should move slowly in establishing the boundaries of the government speech doctrine, as it is "recently minted," and its interaction with the Establishment Clause has not been worked out.[167] He warned that government entities should be careful in accepting monuments of a religious nature in order to prevent Establishment Clause violations.[168] In such instances, Justice Souter advised government entities to accept other monuments "to dilute the appearance of adopting whatever particular religious position" for which the monument might stand.[169] Justice Souter urged the Court to keep government speech issues as open and simple as possible and recognize that there are instances when government maintenance of monuments will not look like government speech at all.[170] Justice Souter favored a "reasonable observer test" over a per se rule to say when speech is governmental.[171] The "reasonable observer test," as espoused by Justice Souter, relied on whether a reasonable and fully informed observer would understand the expression of the monument to be government speech rather than private speech and would spot violations of the Establishment Clause.[172] Justice Souter relied on this "reasonable observer test" to find that the monument in question was government expression.[173]

V. Analysis

Although the *Pleasant Grove* Court's holding is analytically sound, the opinion is far from clear as to future cases involving public forums and government speech. This Note recommends that the Court reach the same conclusion, but by classifying the type of speech involved, as well as sufficiently addressing the forum in question. By re-evaluating and fully analyzing the forum, the Court could have properly categorized the monuments within the park—instead of assuming that the monuments were government speech and merely touching that a public park is traditionally a public forum. By correctly classifying the forum, the Court's holding would have more reasonably explained the City's selection process for privately donated monuments.

This analysis will address the implications of the Court's failure to adequately address the forum in question, as well as set out a new three-pronged approach to evaluating all types of public speech, not limited solely to evaluating monuments. By adopting such an approach, the *Pleasant Grove* holding would have laid a much more precise precedent for future cases.

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 1142.
171. *Id.*
172. *Id.*
173. *Id.*

Additionally, this approach would have fully evaluated future claims regarding Establishment Clause issues, even in situations where the issue is not raised in the case but there is a clear question as to a violation of the Establishment Clause.

A. Implications of Pleasant Grove City v. Summum and Where the Court Went Wrong

Essentially, the Court's holding fails to flesh out areas that would clarify its intentions and reasoning for deciding that the Ten Commandments monument in question constituted government speech. The Court jumped to the conclusion that the monuments were in a public park, and a public park is a public forum. However, in doing so, the Court failed to properly categorize the type of speech in question, which led to a blurring of the lines between private speech in a public forum and government speech.

Additionally, the Court's failure to adequately address an underlying Establishment Clause issue begs the question of whether Summum can bring a future claim for an Establishment Clause violation. The Court's holding allows for a proverbial re-bite at the apple of the Establishment Clause because the Court held that adoption of the message was not necessary. Therefore, the Court did not definitely terminate a future Establishment Clause claim.

B. A New Approach: A Three-Pronged Approach

Although the *Pleasant Grove* decision is supported by the law, the Court failed to properly analyze the forum in question and attempted to distinguish between private speech in a public forum and government speech. However, by improperly classifying the forum, the Court failed to adequately justify its conclusion that the Ten Commandments monument was government speech.

This Note proposes a new approach, combining the two lines of precedent involving private speech in a public forum and government speech into one test, and which allows for a more comprehensive approach to distinguish the two. This approach would allow for forum analysis and discrimination analysis without abruptly defining speech as government speech, in order to avoid a Free Speech Clause violation. The Court should have gone through all three prongs (forum, government speech, and discrimination) so that it could have fully justified its conclusion and given a more conclusive precedent for future cases. The Court would still have arrived at the same result that this was indeed government speech and the government has the right to speak for itself, to say what it wishes, and to select the views that it wants to express.[174] By adding the discrimination prong, the Court could have addressed content without an Establishment Clause issue raised and prevented future claims.

---

174. *Id.* at 1131.

Additionally, this approach would allow for less questioning of the government because it would fully justify the Court's decision on whether the content is government speech—instead of the current approach where the Court simply says it is government speech; thus, it is permissible to discriminate. The new approach would do a better job of explaining *why* the Court came to this conclusion.

1. First Prong: The Forum Analysis

Although it might seem redundant to go through a complete forum analysis to then ultimately classify the speech as government speech, it is an essential step in order to justify the government's actions in limiting access to the forum. The *Pleasant Grove* Court cited previous caselaw concerning forums, but failed to adequately explain its conclusion.[175] Because the Court did not go through the complete forum analysis, the Court improperly classified the forum. The forum was not simply a public park, but a permanent monument within a public park, and would have been better classified as a non-public forum because public forums provide for temporary types of access.

In *Cornelius v. NAACP Legal Defense Fund, Inc.*, the Supreme Court adopted a two-step forum analysis, stating that simply identifying the property is not enough; the Court must also look at the "access sought by the speaker."[176] The *Pleasant Grove* Court failed to do this analysis and simply stated that because Pioneer Park was a public park it was a public forum. Thus, the Court improperly classified the forum at issue. The two-step forum analysis includes the following:

> (1) *identifying* the forum in terms of both the property at issue (e.g., a public library), as well as the type of access sought by the speaker (e.g., distributing leaflets or an organized demonstration), and
>
> (2) *classifying* the nature of the forum (traditional public forum, designated public forum, limited public forum, nonpublic forum[,] or no forum.[177]

Applying this test to the instant case, The *Pleasant Grove* Court likely would have found that the forum was improperly classified because the Court failed to identify the type of access sought by the speaker.[178] The Court's holding in *Cornelius* implicitly mandates that determining the access sought (i.e., temporary or permanent types of expression) is a critical

175. *Id.*

176. Cornelius v. NAACP Legal Def. Fund, Inc., 473 U.S. 788, 801 (1985).

177. Brief of Amici Curiae American Humanist Association et al. Supporting Neither Party, *Pleasant Grove City*, 129 S. Ct. 1125 (No. 07-0655), 2008 WL 2511782, at *10 (citing *Cornelius*, 473 U.S. at 801) [hereinafter American Humanist Association Amicus Brief].

178. American Humanist Association Amicus Brief, *supra* note 177, at *11 (citing *Cornelius*, 473 U.S. at 801).

step in forum analysis.[179] By properly identifying the access sought, the Court could have properly identified the forum, which would have led to the correct classification.[180]

After applying the forum analysis, the forum would be properly identified as "permanent monuments in a city park."[181] Although the *Pleasant Grove* Court hinted at the correct forum determination by distinguishing temporary speeches and demonstrations from permanent monuments, the Court failed to change the classification from public forum to non-public forum.[182] Although a public park is traditionally a public forum in regards to speeches and demonstrations,[183] a public park is not a public forum for permanent monuments; this is because public parks do not have a long tradition of allowing the public to freely display permanent monuments.[184] Some type of approval is necessary for the installation of permanent monuments in public parks, because "[n]o reasonable person would assert the right to bring in a bull-dozer, dig up the earth, and erect a large stone monument on his own initiative, without first inquiring as to the procedures and seeking governmental approval."[185] Therefore, a "permanent monument in a city park" is not a public forum, but a non-public forum based on history and nature of use.

A non-public forum is public property that is not traditionally designated as a public forum and is governed by different standards, as the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[186] In a non-public forum, the government may impose content-based restrictions, but may not impose viewpoint-based restrictions.[187] Since the forum is not open to the general public, the government property is not a public forum and the government may restrict access.[188] Using public parks for public speeches and protests would be opening the park to the general public; however, placing monuments in a public park is not open to the public, as the park would quickly become overrun. By properly classifying the forum as non-public, the Court would then have had less trouble justifying the monument as government speech and could have moved to the second prong of the analysis.

179. American Humanist Association Amicus Brief, *supra* note 177, at *12 (citing *Cornelius*, 473 U.S. at 789).

180. American Humanist Association Amicus Brief, *supra* note 177, at *12 (citing *Cornelius*, 473 U.S. at 789).

181. American Humanist Association Amicus Brief, *supra* note 177, at *11.

182. *Pleasant Grove City*, 129 S. Ct at 1137; *see supra* text accompanying notes 145-47 discussing the classification of a park as a public forum.

183. *See* Summum v. City of Ogden, 297 F.3d 995, 1054 (10th Cir. 2002).

184. American Humanist Association Amicus Brief, *supra* note 177, at *12-13 (citing Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

185. Brief of Amici Curiae International Municipal Lawyers Association Supporting Petitioners, *Pleasant Grove City*, 129 S. Ct. 1125 (No. 07-0655), 2008 WL 2550618, at *5 [hereinafter International Municipal Lawyers Association Amicus Brief].

186. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

187. *See supra* text accompanying notes 31-39.

188. *Perry Educ. Ass'n*, 460 U.S. at 47-48.

2. Second Prong: Government Speech Analysis

Although the Court failed to properly classify the forum, the *Pleasant Grove* Court correctly classified the monument as government speech. A city's decision to allow a privately donated monument to be displayed in a public park fits in with the Supreme Court's prior "speech selection cases." Thus, where a city's decision to include certain monuments and exclude others is based on content and not viewpoint, the city is allowed to express preferences between speakers.[189]

When the government controls the message, it "is not precluded from relying on the government speech doctrine merely because it solicits assistance from non-governmental sources in developing specific messages," when it approved every word that was communicated.[190] In other words, although the Fraternal Order of the Eagles donated the monument, the City can classify the monument as its own because it approved its placement within the park. Additionally, a statement engraved on the monument stating that the Fraternal Order of Eagles presented the monument to the City supports the finding of government speech.[191] Inscriptions of this nature imply that the government owns and controls the monument.[192] Moreover, when a privately donated monument is permanently placed in a public park, reasonable people would believe that the city was involved and had previously granted permission.

The Supreme Court could have gone further with the government speech analysis and adopted the Tenth Circuit's four-factor government speech test laid out in International Municipal Lawyers Association's amicus curiae brief.[193] The four factors are as follows: (1) the main purpose of the speech in question; (2) the amount of editorial control by the government entity; (3) the identity of the literal speaker; and (4) whether the ultimate responsibility for the content rested with the government entity.[194]

3. Third Prong: Discrimination Analysis

After correctly deciding the first two prongs of the analysis, the third prong is quite easy. The correct forum distinction makes all the difference in justifying the Court's holding. "Because the forum here is non-public, the City has the right to deny private parties permission to install permanent monuments in the [p]ark so long as the City acts in a reasonable and

189. International Municipal Lawyers Association Amicus Brief, *supra* note 185, at *11 (citing Nat'l Endowment of the Arts v. Finley, 524 U.S. 569 (1998); Ark. Edu. Television Comm'n v. Forbes, 523 U.S. 666 (1998)).

190. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005).

191. American Humanist Association Amicus Brief, *supra* note 177, at *9.

192. American Humanist Association Amicus Brief, *supra* note 177, at *9.

193. International Municipal Lawyers Association Amicus Brief, *supra* note 185, at *18; *see, e.g.*, Ariz. Life Coalition, Inc. v. Stanton, 515 F.3d 959 (9th Cir. 2008); Wells v. City & County of Denver, 257 F.3d 1132 (10th Cir. 2001); Knights of the KKK v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000).

194. International Municipal Lawyers Association Amicus Brief, *supra* note 185, at *18.

viewpoint-neutral manner."[195] *Content discrimination* is defined as speech discrimination based on subject matter, whereas *viewpoint discrimination* is defined as "speech discrimination based on the speaker's motivating ideology, opinion, or perspective, which is generally unacceptable if the speech is otherwise within the forum's limitations."[196]

Likewise, in *Cornelius*, the Court applied a reasonable standard, stating that "[t]he [g]overnment's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation."[197] A government entity has the right to make "distinctions in access on the basis of subject matter and speaker identity."[198]

The Court's classification of the monuments as a public forum required the Court to walk a fine line to justify the City's exclusion of Summum's monument, because when speakers and subjects are similarly situated, the state may not pick and choose. On the contrary, if the government property is a non-public forum, not all speech is equally situated, and the state may discriminate based on the purpose for which the public property is being used. The *Cornelius* Court further stated that "[n]othing in the Constitution requires the [g]overnment freely to grant access to all who wish to exercise their right to free speech on every type of [g]overnment property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[199] Because the government, like an owner of private property, has the power "to preserve the property under its control for the use to which it is lawfully dedicated," the Court has adopted a method of forum analysis by determining whether the government's interest in using the property for its intended purpose "outweighs the interest of those wishing to use the property for other purposes."[200] Moreover:

> [A] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed with in the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit for the forum was created, the government violates the First Amendment when the government when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.[201]

195. American Humanist Association Amicus Brief, *supra* note 177, at *16 (citing *Cornelius*, 473 U.S. at 806).

196. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829-30 (1995).

197. Cornelius v. NAACP Legal Def. Fund, Inc., 473 U.S. 788, 808 (1985).

198. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).

199. *Cornelius*, 473 U.S. at 799-800.

200. *Id.* at 800 (quoting Greer v. Spock, 424 U.S. 828, 836 (1976)).

201. *Id.* at 806.

Because Summum did not meet the criteria laid out by the City by having a historical tie to the City or relate to the history of Pleasant Grove, the City was justified in refusing Summum's request to erect the Seven Aphorisms of Summum monument. The Fraternal Order of the Eagles had a historical tie to the City, whereas Summum did not.

Although Summum argued that the City was engaged in viewpoint discrimination, the Court in *Rust* held that the government can constitutionally choose to fund certain initiatives which it feels are in the public's interest, without having to fund an alternative initiative.[202] This is not considered viewpoint discrimination, but merely a selection to fund one activity without funding another.[203]

Furthermore, as the International Municipal Lawyers Association cleverly pointed out, Summum maintained the right to use the City's parks through traditional public forum speech activities such as speeches, demonstrations, or literature distribution.[204] Summum may even use the monument's presence as a motivation for counter-speech, but ultimately the First Amendment does not require the City to allow it to erect a permanent monument within the park.[205]

Using the discrimination prong, the Court could have taken the opportunity to dispel an Establishment Clause claim (even though it was not brought before the Court in this case). When faced with an Establishment Clause violation, neutrality is not offended "when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[206] Here, Pleasant Grove used neutral criteria in determining which monuments it accepted. The monuments had to either directly relate to the City's history or be donated by a group with longstanding ties to the community.[207]

Additionally, the City had an array of monuments within Pioneer Park, including monuments of a historic granary, a wishing well, the City's first fire station, a September 11 monument, and the Ten Commandments monument—all of which collectively illustrate a broad selection of viewpoints. There would have been more cause for concern if the City had created the forum to advance religion or aid a religious cause; however, that was not the City's intent with the selection of monuments.[208] The program was merely instituted to provide a forum for speech and allow the construction of monuments by various groups, including the Fraternal Order of Eagles.[209]

202. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

203. *Id.*

204. International Municipal Lawyers Association Amicus Brief, *supra* note 185, at *30-31.

205. International Municipal Lawyers Association Amicus Brief, *supra* note 185, at *30-31.

206. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839 (1995).

207. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1130 (2009).

208. *See Rosenburger*, 515 U.S. at 840.

209. *Id.*

C. *This New Approach Would Prevent Summum from Re-litigating to Assert an Establishment Clause Claim.*

Although most actions involving Ten Commandments monuments are brought as Establishment Clause violations, in *Pleasant Grove*, Summum alleged a Free Speech Clause violation, but the claim was nonetheless decided in the shadow of an Establishment Clause violation. By adopting the three-pronged approach, the Court could have reiterated *Van Orden* and proverbially "killed two birds with one stone" by preventing a subsequent Establishment Clause claim.

1. Although it was not brought before the Court in *Pleasant Grove*, Summum saved its potential Establishment Clause claim so that if the Court ruled in its favor and required the City to "adopt" the monument's message, there would be a clear Establishment Clause violation.

Although Summum chose not to originally pursue an Establishment Clause violation, as Justice Scalia correctly stated during oral arguments, Summum will likely be back to challenge the Ten Commandments monument on Establishment Clause grounds.[210] In an earlier case, Summum requested that a Ten Commandments monument be removed because it was an Establishment Clause violation.[211] But after its request was denied, Summum requested that its monument also be displayed.[212] In other words, Summum was merely trying to strengthen its future Establishment Clause claim by asking the Court to require the City to "adopt" the monument's language.

By pure technicality, the *Pleasant Grove* Court glazed over a looming Establishment Clause issue, instead of combining the Establishment Clause analysis adopted in *Van Orden* with the government speech analysis to show that no further claim would exist.[213] The Court could not only have shown that the monument constituted government speech, but also addressed the content of the monuments.

The Supreme Court in *Widmar* used a three-prong test to determine if a policy would offend the Establishment Clause: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the [policy] must not foster 'an excessive government entanglement with religion.'"[214]

210. *Pleasant Grove City*, 129 S. Ct. at 1125 (referencing Justica Scalia's statements during oral argument, *available at* http://www.oyez.org/cases/2000-2009/2008/2008_07_665).

211. American Humanist Association Amicus Brief, *supra* note 177, at *6 (citing Summum v. City of Ogden, 297 F.3d 995, 998 (10th Cir. 2002)).

212. American Humanist Association Amicus Brief, *supra* note 177, at *6.

213. *See* Van Orden v. Perry, 545 U.S. 677 (2005).

214. Widmar v. Vincent, 454 U.S. 263, 271 (1981).

2. The Ten Commandments Are Not Necessarily Religious.

This case has been "litigated in the shadow of the First Amendment's Establishment Clause,"[215] due to its express showing of a religious passage, so why not clear up any confusion as to a future claim, as Justice Scalia's concurring opinion has eased all fears that the monument "does not violate *any* part of the First Amendment"?[216]

The majority could have easily incorporated its holding in *Van Orden* to ease concerns about the possible Establishment Clause violation and possibly prevent other claims in the future. In *Van Orden*, the Court held that the Ten Commandments "have an undeniable historical meaning" in addition to their "religious significance" and do not offend the Establishment Clause.[217] The *Van Orden* Court stated that "[w]hile the Commandments are religious . . . [s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[218] Concurring in *Van Orden*, Justice Breyer stated: "Despite the Commandments' religious message, an inquiry into the context in which the text of the Commandments is used demonstrates that the Commandments also convey a secular moral message about proper standards of social conduct and a message about the historic relation between those standards and the law."[219] Justice Breyer also stated that individuals visiting the capitol grounds, much like the park in *Pleasant Grove*, were more likely to view the Ten Commandments as a moral and historical message rather than the religious aspects of the tablets.[220]

Whether the Ten Commandments are a violation of the Establishment Clause in a given situation,

> [would] depend[ ] on what the government speech consists of, what it is the government is saying about the Ten Commandments. If the government is saying the Ten Commandments are the word of God, that's one thing, and if the government is saying the Ten Commandments are important to our national heritage, that's something else.[221]

If the speech closely resembles the first example, it is not a far stretch to see a valid Establishment Clause violation; however, *Pleasant Grove*'s monument more closely resembles the second example and is free from First Amendment scrutiny. Had the Court applied the principles that the *Van Orden* Court laid out, the holding would have clearly shown that the monument did not violate the Establishment Clause—instead of ignoring

215. *Pleasant Grove City*, 129 S. Ct. at 1139 (Scalia, J., concurring).
216. *Id.*
217. *Id.* at 1140 (quoting *Van Orden*, 545 U.S. at 690).
218. *Van Orden*, 545 U.S. at 677.
219. *Id.* at 701.
220. *Id.*
221. *Pleasant Grove City*, 129 S. Ct. at 1125 (referencing Justica Scalia's statements during oral argument, *available at* http://www.oyez.org/cases/2000-2009/2008/2008_07_665).

the issue all together. Also, lower courts would have had a more comprehensive precedent to follow in future cases.

By adopting the three-pronged approach, the discrimination prong would have provided the Court with an avenue to address the Establishment Clause issue. The discrimination prong also would have clearly shown that Summum's future claim would be dead in the water, as the Ten Commandments are not solely religious.

VI. CONCLUSION

The Supreme Court should have used the opportunity in *Pleasant Grove* to clarify precedent on the issue of distinguishing government speech from private speech on public property and illustrate a more extensive approach to government speech by incorporating forum analysis and addressing the looming Establishment Clause issue through the discrimination prong. By adopting the three-prong analysis set out in this Note, the Court's holding would have seemed far more justified by addressing all the issues rather than merely saving the City from liability. By simply adding the forum analysis and correctly classifying the privately donated monuments in a public park as a non-public forum, the Court's holding would have been instantly more credible and convincing.