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Summum, the Vocality of Public Places, and the Public Forum

Timothy Zick*

I. INTRODUCTION

*Pleasant Grove City v. Summum*¹ unanimously held that a city's decision to exclude a private religious monument offered by adherents of the Summum religion from a municipal park was a form of government speech exempt from Free Speech Clause scrutiny. According to the Court, the Ten Commandments statue already located on park grounds had been adopted by the city as its own speech, thus negating any claim of content discrimination.² With regard to the acceptance and placement of permanent monuments, the Court held that public forum principles were simply "out of place."³

If *Summum* were merely a holding regarding the placement of permanent monuments in public parks, it would be rather unremarkable. However, notwithstanding the Court's denial that public forum principles were at all implicated,⁴ the decision raises important questions about the viability of the public forum concept and about the balance of power and rights in public places.⁵ *Summum* is the first decision to hold that public forum principles are "out of place" in a traditional public forum⁶—a place which has, according to the Court, "time out of mind . . . been used for

* Professor of Law, William & Mary Law School. I would like to thank Joseph Blocher for his insightful comments on an earlier draft of this piece. I would also like to thank the faculty and student organizers of the symposium for providing the opportunity to address some of the emerging complexities of the government speech principle. Finally, I would like to thank my research assistant, Chris Healy.

1. 129 S. Ct. 1125 (2009).

2. *Id.* at 1129.

3. *Id.* at 1138.

4. *Id.* at 1137.

5. See Joseph Blocher, *Property and Speech in Summum*, 104 NW. U. L. REV. COLLOQUY 83 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/31/LRColl2009n31Blocher.pdf> (noting *Summum*'s possible effects in the intersection between speech and property ownership).

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

purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁷ It is also the first to treat a public park as a channel of governmental as opposed to private speech. In addition, *Summum* is arguably the first Supreme Court case to take the vocalicity of public places—the manner in which they convey meaning—seriously. Indeed Justice Alito’s opinion reads, in part, like a graduate term paper on the communicative sociology of public monuments and places. In that discussion, the Court indicates, again for the first time, that parks and other public places may convey governmental image or “identity” claims.⁸

Insofar as the result is concerned, the decision in *Summum* is facially unassailable. Just imagine the chaos that would ensue if governments were required to accept either all privately donated monuments or none at all. I do not intend to challenge the result. Rather, I want to focus on some of the broader implications of the decision’s reasoning with regard to the concept of the public forum. *Summum* suggests that government speakers occupy something of a preferred position even in traditional public forums. This preferred position may permit governments to demote and commandeer portions of or perhaps entire public places like parks, plazas, and streets.⁹ It may also allow officials to regulate or prohibit private speech that is inconsistent with a governmental message conveyed in a public place. Because it is ostensibly speaking, the government need not comply with Free Speech Clause limits on subject matter and viewpoint discrimination.¹⁰ *Summum* may allow these results whether or not the governmental entity can identify the message it seeks to convey to the public.¹¹

This symposium contribution examines the additional layer of complexity *Summum* adds to the government speech doctrine. It pays particular attention to the decision’s potential implications with

7. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

8. See *Summum*, 129 S. Ct. at 1134 (noting that public parks “play an important role in defining the identity that a city projects to its own residents and to the outside world”).

9. See Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809 (2010) (arguing that government speech doctrine “is really a government speech *forum* doctrine”).

10. See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (noting that “the Government’s own speech . . . is exempt from First Amendment scrutiny”).

11. See *Summum*, 129 S. Ct. at 1136 (“[I]t frequently is not possible to identify a single ‘message’ that is conveyed by an object or structure . . .”).

respect to the balance of power and rights in traditional public forums such as parks, plazas, and streets. I argue that *Summum*'s rationale is based upon a false equivalence between public and private ownership, ignores the traditional functions of public forums, and turns the fundamental premise of the public forum concept—that public places like parks are held in trust by governments for the benefit of the people—on its head.

Part II discusses the Court's treatment of the public forum doctrine and principles of private versus public ownership, and its observations regarding the manner in which governments communicate in and through public places.

Part III claims that the logic and rationale of *Summum* undermine some of the fundamental premises of the public forum concept. Based on public ownership principles, the decision conceptualizes traditional public forums, such as parks, as channels of governmental expression. *Summum* may permit demotion, partitioning, and other forms of government control over public forums. Perhaps most disturbingly, its logic suggests that public forums may themselves constitute a form of government speech.

Part IV encourages courts and officials to resist some of the most troubling implications of *Summum*. Courts are urged not to displace public forum principles by expanding the already uncertain domain of the government speech immunity. For all of its many faults, the public forum doctrine, unlike the government speech absolute immunity, at least offers some constraints on official subject matter and viewpoint discrimination.¹² It is also vitally important that courts continue to press government officials to identify the content of their purported messages in public places and that they expressly reject the notion that public places are themselves a form of government speech. Finally, I argue that characterizing cases like *Summum* as government speech disputes merely obscures the fact that public properties are being manipulated and partitioned in order to settle underlying constitutional contests regarding expressive and religious liberties. The critical question to ask is whether such settlements are consistent with the neutrality and other constitutional duties officials owe the public as trustees of the contested public places.¹³ Part V briefly concludes.

12. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (setting forth standards for regulations in traditional, designated, and non-public forums).

13. See Timothy Zick, *Property As/And Constitutional Settlement*, 104 NW. U. L. REV.

II. PUBLIC PLACES, GOVERNMENT SPEAKERS, AND SPATIAL VOCALITY

In previous cases, the Supreme Court had applied government speech doctrine, rather than public forum doctrine, primarily in public spaces in which governments controlled the purse strings or purported to make editorial decisions with respect to private speech.¹⁴ *Summum* is the first case to hold that the government speech doctrine displaces the public forum doctrine in a “traditional” public forum. As noted, these are public places such as parks and streets which have “time out of mind” been open to private speech and assembly.¹⁵ Although the Court concluded that the public forum doctrine was not applicable in *Summum*, several of its statements and observations could substantially affect public forum principles and private speech rights in public places.¹⁶

A. *When Is a Public Park Not a Traditional Public Forum?*

In *Summum*, the Court began by purporting to pay homage to the fundamental principles of the public forum doctrine. The government, it said, “does not have a free hand to regulate private speech on government property.”¹⁷ The Court acknowledged that “members of the public have strong free speech rights when they venture into public streets and parks.”¹⁸ These places, said the Court, are quintessential public forums, “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.”¹⁹ In these and other public places that “share essential attributes of a traditional

(forthcoming 2010).

14. See *Johanns*, 544 U.S. 550 (agricultural marketing campaign); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (student activities fund); *Rust v. Sullivan*, 500 U.S. 173 (1991) (regulations prohibiting federal fund recipients from advocating, counseling, or referring patients for abortion); see also *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998) (applying government speech principle in somewhat more tangible context of a public candidate debate).

15. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

16. *Summum*, 129 S. Ct. at 1137.

17. *Id.* at 1132.

18. *Id.*

19. *Id.* (quoting *Hague*, 307 U.S. at 515).

public forum,” governments are strictly limited in their ability to regulate private speech.²⁰

This assumes, however, that a public park is always a traditional public forum. Prior to *Summum*, that was a fair assumption. The Court had never indicated otherwise. According to the *Summum* Court, public parks remain traditional public forums insofar as “speeches and other transitory expressive acts” are concerned.²¹ But, said the Court, with regard to publicly commissioned monuments, or private ones that are “adopted” by government officials, public forum principles are simply “out of place.”²² Justice Alito explained: “Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space.”²³ Owing to this scarcity issue, and to the fact that governments, under traditional public forum rules, would face the untenable choice of either accepting all privately donated monuments or declining to display any at all, the Court concluded that the public forum doctrine did not apply.²⁴

To be sure, this was not the first time the Court had displaced the public forum doctrine. But to hold that public forum principles are “out of place” in, for example, a public library setting is quite a bit different from holding that they are “out of place” in a public park.²⁵ How can the concept of the public forum be “out of place” in the very place that gave rise to it? How can a public park be a traditional public forum for some but not all purposes?

One might observe that the Court had previously held in *United States v. Kokinda* that not all public sidewalks are necessarily traditional public forums.²⁶ If a sidewalk can be something other than a traditional public forum, then why can not the same be true

20. *Id.*

21. *Id.* at 1129.

22. *Id.* at 1137 (quoting *United States v. Am. Library Ass’n*, 539 U.S. 194, 205 (2003)).

23. *Id.*

24. *Id.* at 1138.

25. See *Am. Library Ass’n*, 539 U.S. at 205 (holding that public forum principles are “out of place” in the context of public library selection policies).

26. See *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (holding that sidewalk leading from parking lot to front door of post office is not a traditional public forum).

of a public park? *Kokinda* was based on an examination of the actual functioning of the public sidewalk at issue, rather than the fact that the government held title to it and was itself a speaker there. The sidewalk served primarily governmental purposes. By contrast, the public park in *Summum* retained its character as a public park and did not cease functioning as a public forum. According to the Court, however, the park was not a public forum insofar as the erection of public monuments was concerned.

On its face, the permanent-transitory distinction the *Summum* Court draws is both pragmatic and defensible. Surely members of the public have no right to insist that their monuments, religious statues, and other cultural artifacts be placed in the nation's public parks. Just imagine the *monumental* free-for-all that would follow.²⁷ But the Court has seemingly rejected the permanent-transitory distinction in at least one other instance.²⁸ Moreover, as we shall see, there is no assurance that lower courts will limit *Summum*'s effect to permanent monuments. Speakers come in varying degrees of long-windedness, and some pamphleteers are quicker to tire than others. At what point on the spectrum does speech become permanent?

The Court's reliance on a scarcity or "rivalrousness" rationale is also somewhat suspect. After all, similar concerns arise whenever there are more potential speakers than space.²⁹ The analysis in *Summum* also obscures the potential dominance of the government speaker. In non-elastic markets, *Summum* grants the government an immunity to suppress private speech that is inconsistent with its own.³⁰ As the Court noted, *Summum* did not involve any dispute regarding whether the government was itself speaking or was instead providing a forum for private speech.³¹ Nor did it involve any effort by the city to restrict protesters, pamphleteers, or other private speakers in the public park in order to preserve or defend its message.³² In sum, although it was clear that the government had

27. One is of course forced to imagine it, since prior to *Summum* this does not seem to have been a local or national problem of any pressing importance.

28. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (holding that city's restriction on permanent commercial newsracks on public sidewalks was an impermissible content-based restriction on speech).

29. See Blocher, *supra* note 5, at 89–90 (discussing elasticity of speech markets and rivalrousness).

30. See *id.*

31. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009).

32. *Id.* at 1135.

officially entered the traditional public forum, the Court did not elaborate on the effect its presence and voice might have on the rights of private speakers (other than those seeking to donate monuments).

Moreover, prior to *Summum*, courts relied on public forum principles to resolve disputes regarding access to the public commons. In previous cases in which speakers sought to engage in less transitory displays in public parks, the Court never suggested that public forum and time, place, and manner principles were “out of place.” Rather, it had allowed officials to grant or deny permits, on a content-neutral basis, when speakers sought overnight or more permanent access to public places.³³ Further, even if it was not a traditional public forum for purposes of monumental speech, the park might have been characterized as a limited public forum in which discrimination based upon speaker identity (but not viewpoint) could be relied upon to resolve access claims.³⁴

The point of this discussion is, again, not to challenge the result in *Summum*, but to elaborate upon and begin to critically engage the Court’s reasoning. Without apparent irony, the Court held for the first time that public forum principles were “out of place” in the very spaces in which the concept of the public forum itself originated.³⁵ “Long-winded” speakers, persistent pamphleteers, and other transitory actors are apparently still welcome in the park, so long as they comply with rules and regulations regarding the time, place, and manner of speech and assembly there. But it is no longer safe to assume that a public park is a traditional public forum for all purposes. The Court concluded 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.”³⁶

33. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding Park Service regulation prohibiting overnight camping on National Mall and Lafayette Park).

34. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (recognizing that a forum may be “created for a limited purpose,” and that “[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity”). But see Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1757 (1987) (criticizing concept of the limited public forum).

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

36. *Id.* at 1129.

B. The Government, Like Any Private Owner of Property?

In *Commonwealth v. Davis*,³⁷ then-judge Oliver Wendell Holmes upheld a refusal to allow a speech on Boston Common on the ground that the state, like any private owner, may refuse to permit expressive activities on land it owned. *Hague v. Committee for Industrial Organization*, which was the impetus for the modern public forum doctrine, rejected the premise that the government was like any private owner in this respect. With regard to public properties such as Boston Common, the famous dictum in *Hague* stated that, wherever title to them might lie, such places have been used “time out of mind . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”³⁸ Public parks, streets, and similar places such as sidewalks were henceforth to be held “in trust” by the government for the benefit of private speakers.³⁹

Various marginalized speakers and groups used these places to make identity claims, engage in self-governance, and participate in public debates.⁴⁰ Harry Kalven, Jr. declared during the civil rights era that the public streets and other forums had been “commandeer[ed]” by the people for the cause of equality.⁴¹ As it turns out, Kalven was overly optimistic. The idea that the government, like any private owner of property, may determine who may speak on “its” property was never completely eradicated from what would eventually become the public forum doctrine. Indeed it surfaced on occasion during the civil rights struggle itself. For example, in a case upholding a conviction for trespass on a driveway next to a local jail where protesters alleged political prisoners were being held, the Court, through Justice Black, stated: “The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”⁴²

37. *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895).

38. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

39. *Id.*

40. See TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 42–53 (2009) (describing use of streets, sidewalks, and parks from the early twentieth century through the civil rights era).

41. Harry Kalven, Jr., *The Concept of the Public Forum*: *Cox v. Louisiana*, 1965 SUP. CT. REV. 1, at 11–12.

42. *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

Although *Summum* did not cite this precedent, its analysis seems to be based in substantial part upon an extension of its reasoning. Because Pleasant Grove City possessed title to the park, the Court concluded that it was not obligated to accept any private monuments. This was so because “[i]t 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.”⁴³ In other words the city, like any other property owner, was not obliged to accept all monuments offered to it. We can probably stipulate that it is not at all common for *private* property owners to install permanent monuments of the sort at issue in *Summum*, or to be faced with requests by strangers that they do so. In any event, it is clear that as your neighbor I have no right to demand that you display on your front lawn my New Orleans Saints flag, or the campaign signage of my preferred candidate, or some work of art I created from scrap metal in my garage.

Summum treats the government’s newfound exclusionary right as an uncontroversial extension of public control over public properties. However, the government had never formally been granted such authority. As the Court well knows, government owners are not like other property owners in significant respects. Although a speaker can claim special access rights with regard to public properties such as parks, he has no expressive easement or right of access with respect to private properties.⁴⁴ It has long been understood that the Free Speech Clause is not implicated when my neighbor refuses to install my proffered scrap metal masterpiece. By contrast, prior to *Summum* it appeared that the government could not refuse private speech based on its content in places such as public parks and plazas.⁴⁵ Nor, unlike a public owner, is a private property owner required to comply with the Establishment Clause, the Due Process Clause, the Equal Protection Clause, or any other public constitutional obligation.

43. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009) (emphasis added).

44. Unless, that is, a state law or constitution requires such compliance. *See, e.g., Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (upholding California constitutional provisions permitting individuals to exercise speech and petition rights on privately owned property).

45. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (holding that government could not refuse to accept private speech for temporary display once it had opened a forum for speech on public property).

In sum, state action, public forum, and government speech principles mark some rather obvious and important differences between private and public owners and speakers. The Court's public-private ownership analogy suggests that there is nothing new or extraordinary involved in allowing governments to exclude private speech based on its content. To the contrary, the ownership analogy cuts to the heart of the public forum concept. It raises important questions regarding the degree of control officials may exercise over private speech when unconstrained by Free Speech Clause safeguards.

C. The Vocality of Public Places

As commentators have observed, "one of the important uses of government property [is] communication by the government of its own messages."⁴⁶ Indeed, governments routinely communicate in public places. Much of this communication is instrumental or has a regulatory function. Municipalities convey basic information and instructions with regard to public order and safety. For example, speed limit and stop signs are technically forms of government speech that communicate directions and instructions to the public. Governments also convey local historical and other information to help guide visitors.

Further, through the manner in which they regulate, manage, and even construct public properties, governments can convey broad themes such as power, commercialization, or disapproval of public contention and dissent.⁴⁷ For example, structures that are built to house and regulate private speakers in public places, such as pens and cages ("free speech zones") communicate something about state power and the status of those confined inside.⁴⁸ Business districts convey an image of commercial opportunity and financial success. In sum, governments use public places to convey both specific and more general messages, often in the interest of assisting, guiding, informing and regulating the public.

The official speech at issue in *Summum* was of a unique character. The individual monuments the city had accepted for

46. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1406 (2001).

47. See Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 637–38 (2006).

48. *Id.*

display, like many that municipalities have commissioned or erected, were not text-based. This made the interpretive analysis much more challenging.⁴⁹ The Court nevertheless proceeded to identify what I will call adoption, exclusion, and identity forms of government speech. It is important to separate these various forms. Although each carries some power to displace or suppress private voices or messages, the nature and extent of that power differ depending on the form of government speech.

1. Adoption

Official adoption of a private monument or other item may communicate a specific message.⁵⁰ As the *Summum* Court noted, “[g]overnments have long used monuments to speak to the public.”⁵¹ Whether they are erecting publicly commissioned and financed monuments or accepting privately donated ones, the Court concluded that governments are thereby engaging in expressive conduct.⁵² It observed that donated monuments on private property are “routinely—and reasonably” interpreted as conveying the owner’s messages.⁵³ “This is true,” the Court claimed, “whether the monument is located on private property or on public property, such as national, state, or city park land.”⁵⁴ Under this analysis, communication via private and public properties essentially follows the same path: expression can be traced to location, which in turn signifies ownership, which in turn evinces power to include or exclude, which communicates something to the public at large. Like the private property owner, the governmental owner is presumed to own not just the property itself but everything permanently (or at least non-transitorily) on the property.

But if, as the Court held, the government is not required to formally adopt, explain, or validate the item, how do we determine

49. See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1135 (2009) (noting the additional difficulties that may attend interpretation of non-text-based monuments).

50. Of course, governments can also independently commission and display their own monuments, statues, and artifacts. The government speech principle applies to these items in the same manner. See *id.* at 1133 (noting that “government-commissioned and government-financed monuments speak for the government”).

51. *Id.* at 1132.

52. *Id.* at 1136.

53. *Id.* at 1133.

54. *Id.*

the content of the government's message?⁵⁵ With regard to adoption of the private monuments already in the park, including the Ten Commandments statue, Justice Alito offered this explanation regarding "the way monuments convey meaning"⁵⁶:

Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. Monuments called to our attention by the briefing in this case illustrate this phenomenon. What, for example, is "the message" of the Greco-Roman mosaic of the word "Imagine" that was donated to New York City's Central Park in memory of John Lennon? Some observers may "imagine" the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that obviously inspired the mosaic and may "imagine" a world without religion, countries, possessions, greed, or hunger.⁵⁷

The Court concluded that by adopting or erecting a statue or monument and placing it in a public place, a governmental entity thereby engaged in symbolic conduct.⁵⁸ But at the same time, it noted that public monuments are variable and polysemous; thus, they may have no single identifiable message, and their meaning may change over time and depending on the specific audience.⁵⁹ Moreover, Justice Alito wrote, "the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. . . . By accepting such a monument a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument."⁶⁰ In sum, the point of the Court's ode to Lennon's "Imagine" seems to be that government speakers are entitled to the absolute immunity of the government speech principle whether or not they can identify any specific message.⁶¹

Putting aside for the moment the problem with applying government speech immunity absent an identifiable message, the

55. *Id.* at 1134.

56. *Id.* at 1135.

57. *Id.* (citations omitted).

58. *See id.* at 1136.

59. *Id.*

60. *Id.*

61. Justice Alito quoted the lyrics to the song. *Id.* at 1135 n.2.

manner in which public places convey meaning is more complex than the Court acknowledges. According to the *Summum* Court's logic, just as a "Bring Our Troops Home" sign in a private homeowner's front yard will be "routinely—and reasonably—interpret[ed]" as conveying the owner's message, so too will any sign, monument, or other permanent display in a public park automatically be attributed to the city or town.⁶²

It seems likely that private yard signs and the like will automatically be attributed to homeowners or businesses.⁶³ But the extrapolation of that communicative principle to government speech in public places assumes, for one thing, that the lines of public and private property are always clearly drawn. That is an increasingly questionable assumption, at best, given the rise in privatization of once-public spaces, including parks. It also assumes that the public views parks and other places just as the Court does—namely as canvases upon which governments convey messages to the public rather than public forums through which the collective sentiments of individuals are conveyed to government officials.

Is it so clear, for example, that an iconic monument such as the Lincoln Memorial conveys a *governmental* message? Is the National Mall, where the monument is located, a sacred place inscribed with individual memories and messages, or a parcel of land upon which the national government conveys various messages to the people?⁶⁴ Does a local war memorial or other display necessarily convey some governmental message simply because it is placed on land for which the municipality holds title? Similarly, to use one of the Court's own examples, is it so clear that the "Imagine" display in Central Park conveys a governmental message to the public? Given that many public monuments are erected with the sometimes substantial financial and other support of private parties, is it accurate to label all of this speech "governmental"?⁶⁵

62. *Id.* at 1133.

63. See *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (noting that residential yard signs are a "unique and important" means of private expression); *Spence v. Washington*, 418 U.S. 405, 408 (1974) (noting that state did not contest the fact that display of flag with peace symbol affixed thereto from apartment window conveyed message of protest against invasion of Cambodia and killings at Kent State University).

64. See ZICK, *SPEECH OUT OF DOORS*, *supra* note 40, ch. 6 (discussing "sacred" places like the National Mall and Central Park).

65. See Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2009) (arguing that "much speech is the joint

The Court's response to the message problem—that symbols are often polysemous—is hardly controversial.⁶⁶ Indeed the answer would be perfectly acceptable in sociology classes or academic analyses of spatial vocality. But given the absolute immunity that is riding on this determination, one would expect some level of precision in the identification of the actual message of adoption. To state the obvious, if the government is allowed to define and even alter the meaning of its speech in a public forum and to distance itself from any private donors, how are we to know whether it is engaging in an unconstitutional ruse or some form of meaningful communication?

In *Summum*, the obvious peril in forcing the municipality to expressly adopt the Ten Commandments monument is that this may constitute an endorsement of religion in violation of the Establishment Clause. The Court sought to avoid that result by refusing to identify what precisely is communicated by the official act of adoption. Instead it reasoned that adoption communicates something, and that this is sufficient to trigger the government speech immunity. A private speaker seeking access to a public park who made these same arguments would not likely be able to mount a successful First Amendment challenge.⁶⁷ More to the point, as Stephen Gey has asked, why should we bother to recognize and protect government speech in this or any other context if the government in fact has nothing to say?⁶⁸

The debate regarding the way monuments convey meaning is not purely theoretical. If we are to accept *Summum*'s adoption principle, several constitutional obligations might be skirted or negated in public places. By describing the message of the Ten Commandments monument as variable, polysemous, and not necessarily that of its donor, the Court suggests that even a sectarian symbol may be adopted without violating the Establishment Clause. Nor, contrary to Justice Stevens's concurring opinion, is it clear that

production of both government and private speakers and exists somewhere along a continuum, with pure private speech and pure government speech at each end").

66. See generally Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261 (2004).

67. Cf. *Spence*, 418 U.S. at 410–11 (requiring, for symbolic conduct to be eligible for Free Speech Clause protection, "[a]n intent to convey a particularized message" and a great likelihood "that the message would be understood by those who viewed it").

68. See, e.g., Stephen Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259 (2010).

governments will be denied “free license to communicate offensive or partisan messages” in public places.⁶⁹ Based upon *Summum*’s logic, a municipality might be able to skirt Equal Protection Clause concerns regarding the adoption of racially charged symbols by claiming to reject the donor’s intended message, while refusing to identify any clear message of its own. Presumably, it would then be up to the people to discern whether the message was one of racial hatred or something else. If the municipality is not required to identify a particularized message, how are the people to know whether to be offended and object, to agree with the government’s sentiment, or simply to ask for clarification?

Finally, it is also far from clear what, in addition to permanent monuments, may be swept into the government speech category under the adoption principle. One recent case, *Liberty and Prosperity 1776, Inc. v. Corzine*,⁷⁰ involved a free speech claim alleging that private speakers opposed to the governor’s debt reduction plan were denied an opportunity to make their views known at a town hall meeting convened to discuss the plan, while supporters were permitted to speak. The *Summum* opinion was issued after the district court heard oral arguments on the governor’s motion to dismiss the viewpoint discrimination claim. With regard to *Summum*’s possible impact on that claim, the court characterized the decision as raising a “threshold question in many First Amendment cases, including, potentially, this case—namely, is the speech in question government speech, which is not subject to Free Speech Clause scrutiny, or private speech, to which Free Speech Clause protections attach?”⁷¹ The court declined to address the impact of *Summum* further but stated that, should the governor renew his motion to dismiss, he ought to clarify whether the speech of private groups that were permitted to speak in favor of his budget plan at the town hall meeting “constituted government or private speech.”⁷² Like the permanent monuments in *Summum*, perhaps even the speech of private citizens at a town hall meeting could be characterized as an adopted governmental message.

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

70. *Liberty & Prosperity 1776, Inc. v. Corzine*, Civil No. 08-2642 (JBS), 2009 WL 537049 (D.N.J. March 3, 2009).

71. *Id.* at *8.

72. *Id.* at *9.

2. *Exclusion*

An official message might also be communicated through a government's rejection of proffered private monuments or other speech. In *Summum*, the Court indicated that like a private owner of property, a municipality is not required to accept a donated monument with which it does not wish to be associated.⁷³ With regard to donated monuments, the Court observed that municipalities had a history of exercising "selective receptivity" and editorial control in parks and other public places.⁷⁴

Adoption and exclusion are sometimes simply two sides of the same coin. Just as a private homeowner may suggest disapproval of other candidates by placing a favored candidate's campaign sign on his lawn, public officials may send a message of disapproval-by-rejection. Explicit rejection, by contrast, could land a municipality in hot water. In *Summum* the city never stated that it was in fact rejecting the Summum monument based upon any disagreement with the substance of its message. Rather, it initially based its decision not to accept the statue on the fact that it did not relate to the history of Pleasant Grove and was not donated by a group with "longstanding ties" to the community.⁷⁵ Although the Court suggested that a government speaker would be privileged to reject a monument or other symbol owing to disagreement with its message, the municipality was not making that explicit claim in *Summum*. If it had done so, Pleasant Grove City would presumably have had to explain how it could expressly disavow the proffered Summum monument, accept the Ten Commandments monument, and still comply with the anti-endorsement principle.

In any event, the Court does not explain how anyone, including the putative donor, will know what message rejection conveys absent some explanation from officials. In many cases, rejection might just as well convey lack of space or other resources as disapproval of content. Here, again, the government speaker is being given the benefit of an absolute Free Speech Clause immunity without any requirement that a distinct and particularized message—this time of disapproval—be identified.

73. *Summum*, 129 S. Ct. at 1133.

74. *Id.*

75. *Id.* at 1130.

3. Governmental identity claims

According to the *Summum* Court, there was a third sense in which the municipality could be said to have communicated its message—this time not in but through the channel of the public park.⁷⁶ Specifically, the Court suggested that the park property *itself* may communicate a message on behalf of the government. Justice Alito wrote:

*Public parks are often closely identified in the public mind with the government unit that owns the land. City parks—ranging from those in small towns, like Pioneer Park in Pleasant Grove City, to those in major metropolises, like Central Park in New York City—commonly play an important role in defining the identity that a city projects to its own residents and to the outside world.*⁷⁷

According to the Court, the public park itself may be thought to communicate a distinct message regarding “the image of the City that it wishes to project to all who frequent the Park.”⁷⁸ The Court observed that the city had taken ownership of several donated items and had placed them “on permanent display in a park that it owns and manages and that is linked to the City’s identity.”⁷⁹

It is not entirely clear whether Justice Alito meant to link the identity function with the adoption or exclusion functions mentioned above, or whether it is a separate form of government speech. Although one hesitates to read too much into a somewhat free wheeling discussion of the vocality of monuments and public places, it is worth noting that Justice Alito made the identity point on *four* separate occasions in a relatively brief opinion.⁸⁰ Thus, it certainly appears that the Court viewed the city as conveying not merely or solely a specific monument-oriented message, but a more holistic identity or image through the public park itself. As commentators have noted, in metaphysical forums “almost anything can be either the locus of individual speech opportunity or the manifestation of government speech.”⁸¹ *Summum* indicates that this principle might extend to physical public forums such as parks.

76. *See id.* at 1133–34.

77. *Id.* (emphasis added).

78. *Id.* at 1134.

79. *Id.*

80. *Id.* at 1133–34.

81. Bezanson & Buss, *supra* note 46, at 1407.

As the discussion thus far demonstrates, reading or interpreting the vocality of public places is a complicated endeavor. In prior cases the Supreme Court was generally faced with funds or governmental programs which, largely through their limitations and selection processes, communicated some governmental message of approval or disapproval of private speech. Discerning a governmental message in a metaphysical forum that is specifically designed to communicate “family planning” or “pro-beef” messages is far different from discerning the message of a public monument, a collection of monuments, or an entire public park.⁸²

There is, of course, no question that governmental entities generally take pride in their parks and other public places. Well-maintained public parks and plazas are often identified as municipal accomplishments and tourist attractions. In a broad sense, some such places may be symbols of responsiveness to community needs, public investment in infrastructure, or support for public recreational and other activities. New York City’s image is indeed partly bound to its great parks, including Central Park.

However, a jurisprudential rule treating public places like parks as channels for official identity claims runs counter to, and may well interfere with, the traditional identity functions of these places. The expressiveness of public places has arisen primarily from the uses to which public properties have been put by the people, not by their elected officials. Throughout American history public places such as parks and streets have been critical sociological, political, and expressive resources for speakers, pamphleteers, proselytizers, and dissidents of all stripes.⁸³

To a speaker intent on conveying a public message, such places are primary to expressive rights; they can often be as critical to a speaker’s expressive experience as voice, sight, and auditory function.⁸⁴ Thus, a protest on Main Street is not the same as one on a side street; a demonstration on the National Mall is not the same as one in a local public plaza; and a sidewalk next to an abortion clinic

82. See *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991) (explaining that the purpose of the federal funding program was to convey information regarding family planning, not prenatal care and abortion); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 554 (2005) (analyzing government speech in the context of the well-known advertising message “Beef. It’s What’s for Dinner.”).

83. See generally ZICK, *SPEECH OUT OF DOORS*, *supra* note 40.

84. See *id.* at 8–12 (discussing the expressiveness of place, as experienced by private speakers).

is not the same as one in the center of town. On a deeper level, people, not governments, experience social and personal connections to public places. With regard to certain places, they develop what one human geographer calls “topophilia”—an affinity for and connection to place.⁸⁵ By contrast, governments’ primary interests in public places have always been and remain primarily regulatory and managerial. Insofar as governments have distinctly expressive interests in public properties, including the nation’s streets and parks, they are quite different from, and secondary to, private individuals’ First Amendment interests in speech, assembly, and petition.

In addition to their sociological functions, for individuals and assemblies, public places also serve a variety of broader democratic functions.⁸⁶ They allow individuals and groups to make specific identity claims—to be publicly present and counted by one another and by authorities.⁸⁷ Thus, presence in a public place is itself an expressive claim to political identity. It is a form of “representation.”⁸⁸ Further, public places like parks and streets are “theatrical” in the sense that they are places within “which [one] is seen and shows oneself [off] to others.”⁸⁹ Throughout American history, beggars, proselytizers, leafletters, protestors, and a host of others have relied upon public places to make identity and representational claims.

Owing to their special character, traditional public forums such as parks and streets serve other unique communicative functions as well. Anthropologists and geographers have referred to the process of “inscription,” or the manner in which “people form meaningful relationships with the locales they occupy, how they attach meaning to space, and transform ‘space’ into ‘place.’”⁹⁰ Through inscription, experiences are “embedded in place.”⁹¹ A public place often “holds memories that implicate people and events.”⁹² Inscription may occur

85. YI-FU TUAN, *TOPOPHILIA: A STUDY OF ENVIRONMENTAL PERCEPTION, ATTITUDES, AND VALUES* (1974).

86. See ZICK, *SPEECH OUT OF DOORS*, *supra* note 40, at 13–19 (describing the democratic functions of public places).

87. *Id.* at 13–15.

88. DON MITCHELL, *THE RIGHT TO THE CITY* 33–36 (2005).

89. *PUBLIC SPACE AND DEMOCRACY* 5 (Marcel Henaff & Tracy B. Strong eds., 2001).

90. *THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE* 13 (Setha M. Low & Denise Lawrence-Zuniga eds., 2003).

91. *Id.*

92. *Id.*

physically, as when graffiti artists mark a public place. It is also a broader experiential phenomenon by which certain public places serve as “centers of . . . human significance and emotional attachment.”⁹³ Through the process of inscription, by which peoples’ experiences are literally and figuratively written into spaces, public streets and parks may come to define our neighborhoods and communities.⁹⁴ In this respect, iconic places like the National Mall in Washington, D.C. and Central Park in Manhattan serve as mass cultural repositories.

To be sure, not all public parks and streets are inscribed in this sense. Many public streets, sidewalks, and parks are either un-inscribed or express very little beyond the basic facts of their names and locations. The essential point is that public places have historically been open to inscription, and in many cases have actually been inscribed by individual speakers and assemblies. That does not mean that governments have no stake in the images these places convey to the public. But it is another thing entirely to recognize—and indeed give preemptive effect to—governmental identity claims in parks and other public places. The local and national histories inscribed on the National Mall and in other sacred places in some sense belong to the people who participated in and witnessed the demonstrations and other events there.⁹⁵ It is their identity claims we ought to be concerned about preserving.

Officials and members of the public have long fought over who owns and controls public places, including public parks. However, the idea that the venues communicate some message on behalf of governments has no support in free speech history or jurisprudence. To be sure, courts have recognized that governments have important interests in maintaining public safety, order, and aesthetic beauty in public places. But in none of the debates and contests involving traditional public forums did anyone ever suggest that Boston Common, Central Park, the National Mall, or any other public place make identity claims *on behalf of governments*. If indeed these and other public places are all potential canvases for governmental

93. *Id.* at 228.

94. See generally JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

95. ROY ROSENZWEIG & ELIZABETH BLACKMAR, THE PARK AND THE PEOPLE: A HISTORY OF CENTRAL PARK (1992); CHRISTOPHER TILLEY, A PHENOMENOLOGY OF LANDSCAPE: PLACES, PATHS AND MONUMENTS (1994).

speech, then it is possible that anything that is done in those places will either have to conform to the government's identity and image or be subject to exclusion.

III. *SUMMUM* AND THE DEGRADATION OF THE PUBLIC FORUM

The space available for exercise of private speech rights in public forums has steadily declined over the past several decades.⁹⁶ Among other things, officials have privatized, regulated, and beautified public parks and other places in ways that have diminished opportunities for speech and assembly in these critical democratic spaces. Although it did not do so intentionally or directly, the *Summum* Court may nevertheless have inflicted further damage on the already substantially degraded concept of the public forum.

A. "Public" Forums

The very manner in which the Court conceptualized the public park and the speech that takes place there suggests further degradation of the public forum. More than eighty years after *Hague* identified public parks as quintessential forums for public debate and assembly, the Court held that a public park was, at least for some purposes, a channel of government speech. As I noted earlier, there is no question that governments communicate in places like public parks. However, building on my prior observations regarding identity claims, these forums are labeled "public" not because government speakers have a right to communicate there but because the people do. To treat a public park, or at least a portion of it, as a governmental forum in some sense turns this conception on its head.

As *Hague* suggested and numerous subsequent cases have affirmed, places like public parks are vitally important "for purposes of assembly, communicating thoughts between citizens, and discussing public questions."⁹⁷ Among these most vital functions, governments can arguably perform only the last. However, it is far from clear based on the record in *Summum* that Pleasant Grove City was in any sense engaged in a discussion of public questions. Indeed, the Court stated that the city was not ultimately required to identify, much less explain, its message. The private speaker must generally

96. See generally ZICK, *SPEECH OUT OF DOORS*, *supra* note 40.

97. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

demonstrate both intent to communicate a message and the likelihood that an audience will understand what is being said.⁹⁸ Conversely, the governmental speaker is not required to make any such demonstration. The park belongs to it, and ownership apparently has its privileges.

The Court's focus on legal ownership and title also suggests a troubling turn insofar as the concept of the public forum is concerned. The Court has already interpreted public forum principles such that governments have a substantial degree of managerial deference.⁹⁹ Governmental entities are generally permitted to determine which public properties will be open to public speech and assembly, to regulate the time, place, and manner of such activities, and to sell, close, or even demolish public forum properties.¹⁰⁰ However, between *Hague* and *Summum*, the Supreme Court refrained from explicitly comparing public ownership of traditional speech forums like parks with private ownership. Instead, it consistently invoked principles of public "trust," property management, and proprietorship when discussing public forum properties.¹⁰¹

Granted, the *Summum* Court's discussion was premised on the notion that the park is not a public forum at all with regard to the government's speech. But this demotion or partitioning of the public park itself suggested a change in judicial attitude with regard to the public forum. In defending the principle of immunity of government speech, the Court characterized the public forum owner as literally *just like* any private owner of property. As Justice Stevens described the dispute in *Summum*: "This case involves a property owner's rejection of an offer to place a permanent display on its land."¹⁰² Not

98. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

99. See generally Post, *supra* note 34.

100. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Int'l Soc'y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 699–700 (1992) (Kennedy, J., concurring).

101. See *Hague*, 307 U.S. at 515 (stating that certain public properties are held "in trust" for the benefit of the people); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (noting that the Court's decisions do not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained").

102. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009) (Stevens, J., concurring).

just *a* property owner, of course—and not just *any* ordinary parcel either.

Although, again, one hesitates to read too much into the language the Court used, a vision of expressive activity in the park begins nonetheless to emerge. In defense of its proposed transitory-permanent distinction, the Court noted that even the “long-winded” speaker and the most persistent marchers and pamphleteers will eventually (thank goodness) tire and go home.¹⁰³ Permanent government speech, however, will endure—hence the need to carve out a special place for it. The Court did not mention, of course, the obvious fact that the long-winded speaker and persistent demonstrator are not permitted to remain in the park beyond their officially allotted times. Government speakers can maintain a permanent presence in the park owing to the fact that they exercise ownership and control over the place.

We shall have to wait to see whether the private ownership analogy and other aspects of the government speech approach will have any effect on lower courts’ adjudication of private speech rights in public forums. As I discuss below, there is already some evidence that this concern is not entirely unwarranted.

B. Regulation by Demotion and Partition

With ownership, of course, comes a certain measure of control. Not merely the control that accompanies adoption, exclusion and the making of identity claims—although these are hardly insignificant. Rather, ownership may entail broader powers of demotion, partition, and regulation of private speech in public forums.

Prior to *Summum*, the Court had held that governments could not by regulatory fiat or *ipse dixit* alter or demote the status of a traditional public forum.¹⁰⁴ After *Summum*, officials may be able to reach the same result through application of the government speech principle. There is no limitation in the decision’s holding or logic relating to the government’s own ability to clutter a public space with commissioned or adopted structures.¹⁰⁵ It is not necessary that

103. *Id.* at 1137 (majority opinion).

104. *See* *United States v. Grace*, 461 U.S. 171, 180 (1983) (“Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.”).

105. *See Summum*, 129 S. Ct. at 1141–42 (Souter, J., concurring) (suggesting that

officials occupy the entire space in order to have a substantial effect on private speech rights. The mere introduction of government speech into the traditional public forum appears to present a court with a conceptual choice: namely, to apply either public forum or government speech principles. As discussed below, and particularly in situations where the public place is said to convey a governmental image or identity claim, a public forum may be demoted to a mere public space in which governments select speech unencumbered by Free Speech Clause limitations.

If not an outright demotion, *Summum* may support a kind of public place partitioning. Even if the traditional public forum remains such insofar as more transient speakers are concerned, those speakers must now share parks and other public places with governmental speakers. Under a modified categorical approach, a public park in which there is no, or perhaps minimal, governmental expressive conduct would presumably remain a traditional public forum.¹⁰⁶ In these forums content-based regulations of private speech would be subject to strict scrutiny and time, place, and manner restrictions would receive a form of intermediate scrutiny. However, as monuments and more permanent forms of governmental communication are added to the property, public forum principles would gradually be displaced.

Where transitory private speech occurs in proximity to governmental speech, a *mixed* public-private forum might develop.¹⁰⁷ In such a forum, private speech rights may depend in part on whether officials will be allowed to regulate or even exclude speech that is incompatible with the substance of the proximate governmental message. Moreover, depending on the size of the public park or other space, insofar as the government is entitled to displace or suppress private speech that is not compatible with its own, a *governmental* forum may develop. In these forums only the government's message would be permitted.¹⁰⁸ Free Speech Clause limits would not apply in such forums.

complications may arise "[a]s mementoes and testimonials pile up," but failing to suggest any limit on governmental "chatter" in public places).

106. I am focusing on the type of expression at issue in *Summum* rather than the more typical government speech (road signs, instructions, etc.) because this speech is the most likely to conflict with the speech of private individuals seeking access to the public places at issue.

107. See Corbin, *supra* note 65 (discussing "mixed" public-private speech).

108. Cf. Bezanson, *supra* note 9, at 809 (describing the government speech doctrine as a "government speech forum doctrine").

Under this modified categorical approach, the mixed and governmental forums would essentially expand the circumstances under which officials may limit or even prohibit private speech in what once were considered traditional public forums. A traditional public forum such as a municipal park could be carved into sections, only some of which are fully open to private speakers, or could be closed to all private speech by virtue of the presence of government speech.

This sort of regulatory control is implicit in *Summum*'s government speech rationale. Officials may be able to create regulatory exclusions through governmental adoption, exclusion and identity expression. As Randall Bezanson and William Buss inquired well before *Summum* was decided: "Is it conceivable . . . that the awarding of municipal parade permits by a city official—long a government act subject to the strictest of First Amendment scrutiny—might be recharacterized from a regulatory act to be an instance of government 'free speech activity,' that involves the 'exercise of editorial discretion in the selection and presentation of . . . programming'?"¹⁰⁹ Following this logic, suppose a municipality erected, along a large expanse of a local public park, a permanent memorial to U.S. troops serving in foreign conflicts. Would the city be entitled to deny a permit for an anti-war rally in or near that same space on the ground that it conflicts with the city's own message?¹¹⁰

Moreover, as noted earlier, the permanent-transitory distinction the Court relied upon may not be so easy to cabin or administer.¹¹¹ The Court did not address whether somewhat less permanent displays, such as public festivals and other cultural events, would be subject to the government speech adoption or attribution principle. Does a Super Bowl display on the National Mall convey the government's message or that of its private organizers? Does "Fashion Week" in New York City express municipal support and

109. Bezanson & Buss, *supra* note 46, at 1443 (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998)).

110. See Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 426–27 (2009) (expressing concern that *Summum* will permit governments to adopt demonstrations as their own on the basis of viewpoint and thus engage in "clearly unconstitutional viewpoint discrimination").

111. See *id.* ("Perhaps a distinction could be drawn between permanent monuments, as in *Summum*, and transitory speech, such as demonstrations. It is impossible to explain, though, why this is a distinction that would matter under the First Amendment.").

adoption of the fashion industry's message? If these and other displays communicate governmental messages, is the government privileged to prefer them over other private events also seeking a permit for the same space?

Summum may give rise to demotion, adoption of a modified categorical approach, and confusion of regulatory acts with expressive ones. The logic of the decision expands the circumstances under which officials can contend that the public forum doctrine and its attendant content-neutrality rules do not apply.

C. Public Forums and Governmental Identity

In most First Amendment decisions, the “place” where speech and assembly occur lurks somewhere in the background.¹¹² Although it is an obvious fact that place is critical to expressive liberties in a variety of respects, it is often ignored or addressed only superficially. The idea that public places are merely legal properties is deeply entrenched in the public forum and time, place, and manner doctrines.¹¹³ Public properties are managed, controlled, and conveyed. As bundles of legal rights, they are often treated as if they communicate legal ownership but express little else.

One is therefore tempted to applaud Justice Alito's effort to engage the human geography and spatial sociology of the monuments and the public park at the center of the dispute in *Summum*. The effort at least signifies recognition that public places such as parks, plazas, and squares are not merely inert spaces. They are more akin to public canvases. The ultimate question, of course, is for whose benefit such canvases exist and are to be maintained.

The Court's suggestion that governmental entities speak not just *in* parks and other public places but also *through* them goes directly to the heart of that question. According to the Court, Pioneer Park conveyed a municipal image or identity.¹¹⁴ I have already criticized the idea that parks and other public places ought generally to be conceptualized as vehicles or canvases for official identity claims rather than private ones. In addition to the sociological problems with this characterization, the implications for the public forum concept are grave indeed.

112. ZICK, SPEECH OUT OF DOORS, *supra* note 40, at 8–9.

113. *Id.*

114. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133–34 (2009).

Under *Summum*'s identity conception, governmental entities could claim that parks, streets, classrooms, museums, subway platforms, university campuses, municipal buildings, public meetings, municipal websites, and other places are not public forums but tangible expressions of a governmental identity or image. Any private speech that is not consistent with that preferred image or identity would be subject to exclusion under the government speech principle. The government's identity claims would be immune to public forum and content-neutrality principles.

For those who think the argument farfetched or the danger that public forums will be swallowed whole by governmental identity claims nonexistent, I would note that the reasoning has not only been cited by litigants but has influenced some judges. Consider, for example, the recent contest involving public speech in *Berger v. City of Seattle*.¹¹⁵ The case involved a dispute concerning speech and assembly near the Seattle Center, an eighty-acre public space containing museums, sports arenas, theatres, the Space Needle, and thirty-two acres of public parkland.¹¹⁶ The Director of the Seattle Center promulgated a set of rules governing the use of its outdoor spaces.¹¹⁷ Among other things, the rules required that street performers obtain a permit prior to performing, prohibited active solicitation, limited the locations for performances, and banned performances within thirty feet of a "captive audience."¹¹⁸ "Magic Mike" Berger, a street performer, challenged several of the rules on free speech grounds.¹¹⁹ A majority of the en banc Ninth Circuit invalidated some of the new rules on the ground that they failed to meet time, place, and manner standards.¹²⁰

In dissent, however, Chief Judge Kozinski, writing for himself and Judges Gould and Tallman, expressly relied upon the *Summum* language and rationale regarding municipal identity claims.¹²¹ The Chief Judge argued that Seattle had a "legitimate—indeed a vital—interest in maintaining the character of the multi-use facility that is

115. 569 F.3d 1029 (9th Cir. 2009) (en banc).

116. *Id.* at 1034–35.

117. *Id.* at 1034.

118. *Id.* at 1034–35.

119. *Id.* at 1034.

120. See *id.* at 1040–42 (invalidating permitting requirements); *id.* at 1053 (invalidating passive solicitation rule); *id.* at 1056–57 (invalidating "captive audience" rule).

121. *Id.* at 1063–64 (Kozinski, J., dissenting).

the crown jewel of its civic enterprise.”¹²² He was particularly concerned that if the majority, which had upheld most of the contested rules, was correct in its analysis, “then Seattle and other municipalities hoping to use their parks *to promote civic virtue, neighborliness, hospitality and the peaceful enjoyment of the arts* cannot possibly draft a set of rules that will protect visitors, concessionaires and other artists from overly aggressive street performers bent on increasing their own visibility and income by bullying those around them.”¹²³

Chief Judge Kozinski claimed that because the Seattle Center “play[s] an important role in defining the identity that [the] city projects to its own residents and to the outside world,” misbehavior by street performers had to be addressed through rules that might not be appropriate in other circumstances.¹²⁴ He argued that misbehavior by street performers “who are a constant presence” (like “Magic Mike”) was a “disaster in the making” because it interfered with a public space that was intended “to delight and inspire the human spirit in each person and bring us together as a rich and varied community.”¹²⁵ Further, Chief Judge Kozinski noted that street performers fell somewhere in between the permanent monuments addressed in *Summum* and more transient speakers.¹²⁶ He claimed that this gave the city “a far greater interest in regulating the activities of permanent street performers than occasional political or religious speakers.”¹²⁷

In short, three judges would have held that what they regarded as the street performer’s bad public behavior was inconsistent with the image and identity of the Seattle Center, which according to the Chief Judge was one of “civic virtue, neighborliness, hospitality and the peaceful enjoyment of the arts.”¹²⁸ Moreover, as I mentioned earlier, *Summum* did not address less-transient private speech like that of street performers. Chief Judge Kozinski’s opinion suggested that insofar as such speech might interfere with the government’s own identity claim, it could be restricted pursuant to the

122. *Id.* at 1064.

123. *Id.* (emphasis added).

124. *Id.* (quoting *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133–34 (2009)).

125. *Id.* at 1070.

126. *Id.* at 1068.

127. *Id.*

128. *Id.* at 1064.

government speech principle. Although the Chief Judge's position did not represent a majority view, it follows directly from *Summum's* identity principle. If, as *Summum* suggests, public parks speak on behalf of governments, then private speech that interferes with or is contrary to such messages may be excluded from what is otherwise a traditional public forum.

That proposition, if accepted, would cast doubt upon the free speech rights of almost any dissenting or contentious voice in a park or other public place. For what municipality does not wish to convey a message of "civic virtue, neighborliness, hospitality and . . . peaceful enjoyment"?¹²⁹ If municipal officials can deny access to public forum properties on the ground that the proposed activities are contrary to the city's own identity claims or preferred imagery, a wide range of public speech activities could be imperiled. Suppose, for example, that a historic public pavilion is constructed in the town square as a celebration of emancipation. Further suppose that the town has tried for decades to overcome the racial divisions of its past. The Ku Klux Klan applies for a permit to hold an event at the pavilion, during which it plans to fly a Confederate flag and to denounce integration. May the town deny the permit on the ground that the proposed activity is inconsistent with the message and overall mission of the town and its pavilion? Similarly, may a municipality restrict the use of a public park on July 4th to preferred "patriotic" activities?¹³⁰

Although my primary concern is with more traditional public forums, *Summum's* governmental identity principle may turn out to have a broader impact. Even websites might be characterized as vehicles for municipal identity claims.¹³¹ For example, in *Sutcliffe v. Epping School District*, the First Circuit held that a town's action in setting up a website and choosing not to allow certain hyperlinks constituted government speech.¹³² By deciding which links to permit, the court reasoned the town had "engaged in its own expressive conduct"¹³³ and "conveyed an important government

129. *Id.*

130. Bezanson & Buss, *supra* note 46, at 1423.

131. For a discussion of this and other government speech issues relating to new technologies, see Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899 (2010).

132. 584 F.3d 314, 329 (1st Cir. 2009).

133. *Id.* at 330.

message about the *identity* of the city.”¹³⁴ As in *Summum*, the court did not specify what the town’s selection or adoption of links actually communicated. Although the town presumably intended to communicate information about itself, nothing more specific was mentioned. Having determined that the choice of links was government speech, the court did not apply public forum or other First Amendment doctrines. Indeed, it concluded that the public forum doctrine, which arose in the context of real physical properties such as streets and parks, was “not a natural fit”¹³⁵ in the context of website speech. Rather, the court extended the government speech doctrine to any “communication channels” with regard to which the government exercises some selection discretion.¹³⁶

In dissent, Judge Torruella expressed concerns that there were no “limiting principles” with respect to the nascent government speech doctrine and that governments could (*ex post*) repackage viewpoint discrimination as municipal speech.¹³⁷ He too questioned whether the government speech doctrine might apply even to parades or other official events.¹³⁸ Judge Torruella rejected the town’s argument that those who disagree with the government’s message or its exercise of discretion could always vote officials out of office. Reliance on political safeguards would be hampered, he argued, by allowing the government to “silence opposition by narrowing the fora in which opposing views may be expressed.”¹³⁹ Judge Torruella would have allowed the jury to determine whether the town had designated a forum for speech on the municipal website and had engaged in viewpoint discrimination.¹⁴⁰

Though few in number, these cases demonstrate the difficulty in narrowing *Summum*’s vocality principles to permanent monuments in public parks. Once public places are understood to speak to or communicate governmental identities, preservation of those identities will predictably be relied upon to support restrictions on private speech in public places. If governmental identity and image principles apply in physical forums, then why not also in new forums

134. *Id.*

135. *Id.* at 334.

136. *Id.* at 330.

137. *Id.* at 337 (Torruella, J., dissenting).

138. *Id.*

139. *Id.*

140. *Id.* at 339.

where public forum principles may not seem like “a natural fit” anyway? In short, on closer examination, *Summum* looks less like a narrow decision about permanent monuments and more like a decision which could have serious consequences for private speech in public forums.

IV. MANAGING GOVERNMENT SPEECH CLAIMS IN PUBLIC PLACES

I have raised a variety of concerns regarding the manner in which *Summum* may undermine public forum principles, particularly as a result of its analysis of the vocality of public places. It is too soon to tell what, if any, lasting impact *Summum* may have on the public forum or on private speech rights in such places. But it is not at all premature to think about steps courts and officials might take to avoid the most troubling implications of *Summum*’s government speech analysis.¹⁴¹ In one sense, *Summum* merely highlights aspects of the government speech doctrine that commentators have been concerned about for some time. However, in light of the special context in which it arose, *Summum* also raises some unique problems.

A. Public Forum as a Presumptive Doctrine

The path from *Hague* to *Summum* charts a precipitous decline with respect to the concept of the public forum. *Summum* and a few subsequent lower court decisions suggest that the government speech doctrine may displace the public forum doctrine, or at least severely limit the contexts in which it will be the central focus—even in what would otherwise be considered traditional or quintessential public forums. The threshold question will no longer be what kind of place a speaker or assembly seeks to occupy, but whether the speech in question is properly considered “public” or “private.” In other words, questions regarding *who* is speaking rather than *where* speech is taking place may come to predominate.

141. I disagree with those who claim that democratic limits, in particular exercise of the franchise, are the only limits that will make a meaningful difference in stemming the rise of the government speech doctrine. See Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 147–48 (2010) (claiming that “the government speech doctrine is unlikely to be limited by the court, except in the most exceptional circumstances where there is an explicit constitutional limit on government speech like the Establishment Clause or an exercise of government speech that threatens the functioning of the democratic system itself”).

Public forum categorization is a notoriously messy endeavor. Courts have long struggled to distinguish among traditional, designated, limited, and non-public forums. After *Summum*, courts may be tempted to conclude that public forum principles are “out of place” or “not a natural fit” and to turn instead to government speech principles.¹⁴² While it may be simpler to analyze the status of a speaker than the characteristics and functions of various public places, the government speech principle offers little doctrinal improvement at a potentially substantial cost to private speech and assembly rights in public places.

This is due, in part, to the rather extraordinary lack of clarity regarding what qualifies as “government speech.” Commentators have noted that the Supreme Court “seems largely to be operating on an intuitive, even inchoate, sense of what government speech is.”¹⁴³ As these commentators have correctly observed: “If government may be treated as a First Amendment speaker, virtually every regulatory act of government could be transformed into an act of government expression, and then sheltered from attack under the shield of the First Amendment.”¹⁴⁴ *Summum* implicates, and may even exacerbate, this problem in the context of public places that have traditionally served as outlets for private speech and assembly. Under the vocalty principles described in *Summum*, things, places, and events as varied as permanent monuments in a public park, the Seattle Center, a public pavilion, a parade, and even speech at a town hall meeting might all be characterized as forms of government speech.

I am certainly no defender of the public forum doctrine.¹⁴⁵ Regardless of how deeply flawed it may be, however, we ought not to replace the public forum doctrine with the emerging government speech privilege. Although it may indeed be out of place in some situations, the public forum doctrine ought to at least operate as a default doctrine in cases raising a conflict between private speech and government speech in public places. At a minimum, for the reasons stated earlier, courts should review with special care any efforts to

142. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009); *Sutcliffe*, 584 F.3d at 334 (majority opinion).

143. Bezanson & Buss, *supra* note 46, at 1436.

144. *Id.* at 1442 (emphasis omitted).

145. See ZICK, *SPEECH OUT OF DOORS*, *supra* note 40, at 53–59 (criticizing the judicial “bureaucratization” of public places under the public forum doctrine).

demote or partition public forums, avoid treating regulatory acts as government speech, and reject the notion that public places themselves convey governmental identities that can displace private speech and assembly. All of these things pose unique threats to private speech and assembly in the traditional public forum.

As courts and commentators have noted, the government speech principle threatens to mask or obscure content and other forms of government discrimination.¹⁴⁶ Unlike the government speech principle, when properly applied, public forum principles constrain or check governmental regulation of speech at least to some degree. Had *Sutcliffe* been resolved under ordinary public forum principles, the court could have determined that the website was a non-public forum and that the exclusion of links other than those it had posted on the site was both reasonable and viewpoint-neutral. However, by characterizing the website links as “government speech” that facilitated conveyance of the town’s identity message, the court bypassed these questions entirely. As the government speech realm expands, the contexts in which viewpoint neutrality is required will obviously contract. The public forum doctrine at least requires that the neutrality question be asked and answered, even where the forum is determined to be non-public.

As *Sutcliffe* also suggests, expansion of the government speech doctrine at the expense of forum doctrine may also limit speakers’ access to new public forums. Owing to certain of its own faulty premises, including the principle that new places cannot be considered traditional public forums, the public forum doctrine already limits opportunities for expanding access to public places.¹⁴⁷ Government speech principles leave even less room for expansion. For example, public websites may still be categorized as designated public forums, thereby permitting some public access. However, as *Sutcliffe* demonstrates, one can reach that conclusion only by applying public forum principles all the way through. The court discovered what it believed to be a better fit in the government speech doctrine. The government speech doctrine offered a way out of the difficult task of categorizing the place in question and adjudicating viewpoint

146. See, e.g., *Sutcliffe*, 584 F.3d at 337 (Torruella, J., dissenting); Chemerinsky, *supra* note 110, at 426–27.

147. See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (noting the importance under public forum categorization of the history and tradition with respect to expression in a particular place).

neutrality. As a result, however, citizens were denied even the opportunity to demonstrate that the website could and should accommodate their speech.

It is particularly imperative that courts reject the proposition that public places may be designated as symbols of governmental identity and hence treated in effect as governmental forums. That principle, more than any other, threatens to eliminate the public forum concept. Governments cannot by regulation set the tone of public debate by insisting on “civil” public places and a “neighborly” environment.¹⁴⁸ Nor should they be allowed to do so by the simple act of maintaining public places. Contrary to *Summum*’s suggestion, courts ought to continue to view public places like parks and plazas as public forums open to private assembly and expression.

Summum highlights the need to maintain judicial focus on place rather than speaker status or source. Whatever faults the public forum and time, place, and manner doctrines possess, at least under these longstanding principles the government may not engage in outright discrimination against disfavored speakers. By contrast, under the government speech principle, official biases are not only permissible but entitled to preemptive effect and immunity.

B. The Government, Like Any Other Speaker

Courts that are still inclined to apply government speech principles in public places despite the foregoing concerns ought to ensure that free speech immunity is warranted. One of the jarring incongruities present in *Summum*’s analysis of speech in the public park is that the Court essentially gave a pass to governmental speakers insofar as it did not require that they identify any particular messages they seek to communicate.

As noted earlier, a private speaker who cannot identify what message he purports to communicate in a public place stands little chance of mounting a successful First Amendment claim. For example, in a recent case involving a religious group that challenged a restriction on its practice of feeding the homeless in public parks, a federal appeals court held that the group’s activities did not convey any discernible message and therefore no Free Speech Clause issue

148. See, e.g., *Cohen v. California*, 403 U.S. 15, 25 (1971) (arguing that government has no right to “cleanse public debate”).

was properly raised.¹⁴⁹ Thus, although both governmental and private speakers may be engaged in expressive conduct, only the latter appear to be subject to the requirement that their messages be identified and understood by some audience.

As several commentators have argued, if governmental entities are to have the benefit of Free Speech Clause immunity when they purport to speak, they ought to at least be required to identify their purported messages.¹⁵⁰ Particularly where their speech is to be given preemptive effect, governments ought to be required to demonstrate that they are seeking to engage in some form of public discussion and communication. In short, the government, *like any other speaker in a public place*, ought to be required to show not only that it intends to communicate a message, but that an audience would likely understand its substance.

Summum essentially excused officials from making this showing in the specific context of public monuments in public parks. But not all monuments are non-text-based and hopelessly indeterminate. There is no reason why courts cannot demand the proposed showing in other contexts.

C. Public Places and Constitutional Obligations

As Stephen Smith has recently suggested, we may not find answers to government speech problems in Free Speech Clause principles and doctrines.¹⁵¹ The “big problem,” as Smith says, is “the collapse of any working consensus about the proper domain and functions of government.”¹⁵² As *Summum* demonstrates, this observation applies to the management of public properties.

149. *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274, 1282–83 (11th Cir. 2010), *vacated, reh’g en banc granted*, 616 F.3d 1229 (11th Cir. 2010).

150. See Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 599 (2008) (“[G]overnment can establish its entitlement to the government speech defense only when it establishes itself as the source of that expression both as a formal and as a functional matter. In other words, government must expressly claim the speech as its own when it authorizes or creates a communication and onlookers must understand the message to be the government’s at the time of its delivery.”) (emphasis omitted); see also, e.g., Bezanson & Buss, *supra* note 46; Corbin, *supra* note 65; Leslie Gielow Jacobs, *Who’s Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35 (2002); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005).

151. Steven Douglas Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DENV. U. L. REV. 945 (2010).

152. *Id.* at 946.

That does not mean we should not try to preserve the public forum doctrine in an effort to protect private speech rights in public places. But ultimately we have to ask: what is the proper role of government with respect to public forum and other properties? Are they, as the *Summum* decision and Chief Judge Kozinski's *Berger* dissent suggest, public assets through which officials communicate messages such as civic virtue or an image of neighborliness? Or are they critical constitutional assets that ought to be preserved for even contentious private speakers such as protesters and street performers, and in which a diversity of religious and other viewpoints are on display?

Although the Court characterized the issue as one of government speech, the question in *Summum* is actually less about communication than it is about the management of public properties. As governments have been pressed to meet constitutional neutrality requirements, they have increasingly responded by altering or manipulating the relationship between public property and private rights.¹⁵³ As I have argued at length elsewhere, public places like the park in *Summum* are held in trust for the public and ought to be maintained on a neutral basis for its benefit.¹⁵⁴ Until that fundamental principle is acknowledged and respected, officials and courts will continue to chip away at public space through, among other things, spatial tactics that limit assembly and dissent, privatization of public venues in the face of Establishment Clause and other constitutional challenges, and the application of the government speech doctrine.¹⁵⁵

Ideally, of course, the public space commons would facilitate many kinds of expressive and religious activities. Governments ought to be able to convey historical and other information to the public. Members of the public ought to be able to sit on a public bench and read poetry. Public protesters and those engaged in street theatre ought to find space for their activities. The public forum and time, place, and manner doctrines are partially intended to mediate these

153. See generally Zick, *Property As/And Constitutional Settlement*, *supra* note 13 (discussing instances in which religious and expressive liberties have been affected by privatization of public properties).

154. *Id.*

155. See Zick, *Speech and Spatial Tactics*, *supra* note 47, at 590 (noting that a "precise geometry of place has begun to fashion an expressive topography that limits, confines, and controls protest and dissent"); *Salazar v. Buono*, 130 S. Ct. 1803, 1813–14 (2010) (describing steps taken by Congress to preserve a cross on public land).

sometimes conflicting uses. By contrast, spatial tactics like expressive zoning, privatization of public properties, and assertions of government speech immunities are not designed to mediate so much as control or commandeer public places for the government's own benefit.

The government speech doctrine has developed in complicated circumstances involving metaphysical forums, governmental programs in which neutrality may be difficult or impossible to achieve, and the placement of religious symbols on public property. This is no coincidence. Indeed, it is a mistake to view the attempted privatization of federal property upon which a stand-alone cross is located in *Salazar v. Buono* and the governmental "adoption" of the permanent monuments in *Summum* in isolation.¹⁵⁶ Rather, these are merely the latest means by which officials have sought to avoid or settle constitutional challenges relating to public places.¹⁵⁷ Viewed in this context, calling a monument "government speech" is simply another means of avoiding demanding constitutional neutrality obligations.

Instead of engaging in esoteric debates regarding the government's capacity to speak in public forums, we ought to have a serious debate about the functions these properties serve and how we expect governments to manage them. Governmental ownership comes with certain powers—i.e., to devise, exclude, and regulate. However, legal ownership is not the same as constitutional ownership. Public forums, particularly traditional ones, are not reserved solely for uses the majority of the people and their representatives find appealing or acceptable. The street performing bully has at least as much right as the bench-sitter to use the park. Indeed, the bully, assuming he is not otherwise violating the law, has a First Amendment right to be there owing to his expressive activity. Parks and other public places exist in part to facilitate challenges to governmental identities and official efforts to compel conformance.

Moreover, rather than seeking ways to avoid religious neutrality obligations, officials ought to be looking for ways to meet them by working to accommodate a diversity of faiths in public places. If the

156. See *Buono*, 130 S. Ct. at 1813 (describing sale of public property upon which a Latin cross sits).

157. See generally Zick, *Property As/And Constitutional Settlement*, *supra* note 13 (describing means of purporting to settle constitutional contests through property dispositions from the civil rights era to the present).

neutrality rules are themselves deemed too onerous, there are judicial and other means of challenging and perhaps changing the constitutional baselines. So long as they exist, however, we ought to expect governments to try to meet them rather than to continue searching for new methods of subterfuge and avoidance.

Governments will likely continue their efforts to preserve public tranquility and sectarian symbols in public places. What we need is a meaningful debate regarding whether spatial tactics, privatization, and government speech principles satisfy the requirements of constitutional stewardship of public places.

V. CONCLUSION

Pleasant Grove City v. Summum is a remarkable decision in many respects. It represents many firsts: first to hold that public forum doctrine is out of place in a public park; first to treat a park as a channel of governmental speech; and first to engage the communicative aspects (the vocality) of public place. Because the Court dispatched the public forum doctrine so quickly, one might think the decision has nothing much to say about the concept or status of the public forum. To the contrary, a close reading of *Summum* shows that the decision's analysis and rationale may have a substantial effect on private speech rights in public places. The government speaker is not like any other speaker in a park or other public place. Its voice is louder, and its right to remain is stronger, than that of any private speaker. Most importantly, government speakers have the power to exclude other voices.

It is particularly unfortunate that the Court's first foray into the complex realm of spatial vocality was on behalf of government rather than private speech. The Court's conception of public places as channels of government speech, its heavy reliance on the analogy of private property ownership, and its suggestion that public places convey governmental identity claims threaten to undermine fundamental tenets of the public forum concept. Although we will have to wait to discover the true extent to which it alters the balance of power and rights in traditional and other public forums, there are already some signs that official speech may limit and distort private speech in public forums.

It is thus imperative that courts continue to ask place or forum questions rather than rely upon amorphous government speech principles. With regard to the public forum doctrine, better the devil

we know than the “recently minted” devil we don’t.¹⁵⁸ Better also that courts, if they are inclined to apply the government speech immunity, first demand that governments identify their purported messages and also reject the notion that public places can ever themselves constitute government speech. I do not pretend that these proposals will suffice to preserve the public forum. Ultimately, that will require a commitment by officials to meet rather than avoid difficult constitutional neutrality requirements.

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

