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The Government-Speech Doctrine: "Recently Minted," but Counterfeit

Steven H. Goldberg
Elisabeth Haub School of Law at Pace University

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The foci of this Article are the ill-advised creation of a government-speech doctrine in Pleasant Grove City v. Summum, *129 S. Ct. 1125 (2009), and its potential for substantial First Amendment mischief, particularly with respect to the establishment of religion. Created out of whole cloth, with no regard for precedent, and in a case that did not even raise the issue of government speech, the doctrine permits the government to speak with viewpoint about controversial cultural issues upon which the government has no constitutional right to act. Asked to find unconstitutional the refusal of a municipality to allow a Summum religious monument—the Seven Aphorisms of Summum—in a public park, the Court ignored the refusal and created a justification for the municipality's past permission to allow a private party to put a Jewish religious monument—the Ten Commandments—in the same park. This Article argues that by avoiding the traditional public-forum analysis and making an end run around the establishment-of-religion problem, the Court created a doctrine that allows the government to diminish the marketplace of ideas. By creating a doctrine that allows the government to choose between private speakers and endorse one idea to the detriment of another in an area where it has no constitutional power to act, the Court has done substantial damage to the First Amendment.*

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"To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit."[1]
-Pleasant Grove City v. Summum (Stevens, J., concurring)

I. INTRODUCTION

The law of free speech in the Supreme Court has been fairly described as "notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories."[2] The First Amendment, as it has been interpreted in Supreme Court cases, has little relationship to the founders' original intent, meaning, or purpose;[3] and the case results are hardly famous for their consistency.[4] The recent warning that the Court will "turn 'free speech' doctrine into a jurisprudence of labels"[5] flatters the already existing conglomeration of labels by calling it jurisprudence.

"Government speech" is a most recent and potentially dangerous example of a label transformed into a doctrine. Mentioned only as an aside

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[*] Professor of Law, Pace Law School. My thanks to Professors Daniel Farber, Bridget Crawford, Bennett Gershman, and John Humbach for encouragement and helpful comments on earlier drafts of this article.

[1] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring).

[2] Robert Post, *Symposium on Law in the Twentieth Century: Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2355 (2000).

[3] "Congress shall make no law" has suggested to many that the original meaning of the First Amendment, as Justice Thomas has argued, was to protect the states against the new federal government interfering with their established religions. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring) ("This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause. I have previously suggested that the Clause's text and history 'resis[t] incorporation' against the States." (alteration in original)).

[4] *Compare* Virginia v. Black, 538 U.S. 343, 367 (2003), *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (opposite results in cross-burning cases); *compare* Agostini v. Felton, 521 U.S. 203, 234–35 (1997), *with* Aguilar v. Felton, 473 U.S. 402, 414 (1985) (finding the same New York law providing for public school special education teachers in parochial schools first unconstitutional and then constitutional); *compare* Scales v. United States, 367 U.S. 203, 259 (1961), *with* Dennis v. United States, 341 U.S. 494, 517 (1951) (Communist-party seditious-speech cases).

[5] *Pleasant Grove*, 129 S. Ct. at 1140 (Breyer, J., concurring).

in earlier cases,[6] government speech was minted into a doctrine in the very case in which Justice Stevens made his observation about "doubtful merit."[7] As crafted by Justice Alito in his *Pleasant Grove City v. Summum* opinion, the government-speech doctrine carries the potential for government, as a spokesperson for the private speech of some citizens, to dominate the marketplace of ideas to the detriment of the viewpoint of other citizens.

The doctrine was minted as a response to a Tenth Circuit decision invalidating Pleasant Grove, Utah's exclusion of a privately donated religious monument—Summum's Seven Aphorisms—from a public park already containing another privately donated religious monument: Judaism's Ten Commandments.[8] Using classic forum analysis, the Tenth Circuit found Pleasant Grove's Pioneer Park to be a traditional public forum.[9] Applying strict scrutiny, it held that Pleasant Grove did not have a compelling interest for excluding the Summum Aphorisms Monument.[10] Justice Alito rejected the traditional forum analysis that both lower courts, though they reached different results, found to be a serviceable tool for deciding what to do about permanent monuments proposed for or existing on government-owned property.[11] He replaced it with a government-speech doctrine, cobbled together from dicta in a short series of unrelated cases. It might be argued fairly that the *Pleasant Grove* result is salutary, but describing placement of the Ten Commandments in Pioneer Park as government speech was neither necessary nor wise.

This Article contends that the Supreme Court's newly minted government-speech doctrine is counterfeit, and if usable in free speech issues beyond placing stone monuments in government parks, it will further debase First Amendment jurisprudence. Part II examines the *Pleasant Grove* Court's authorities and arguments for a government-speech doctrine and contends that neither the doctrine nor its use is justified. Part III discusses the disconnect between a government-speech doctrine and the various theoretical underpinnings that scholars have offered or the Court has used to explain its free speech decisions. Part IV shows why a government-speech doctrine is not needed to maintain monuments in public places and argues that turning private speech into government speech is dangerous

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[6] *See id.* at 1139 (Stevens, J., concurring) (listing earlier cases mentioning government speech).

[7] *See id.*

[8] *See* Summum v. Pleasant Grove City, 483 F.3d 1044, 1047, 1057 (10th Cir. 2007), *rev'd*, 129 S. Ct. 1125 (2009).

[9] *Id.* at 1050.

[10] *Id.* at 1053.

[11] *Pleasant Grove*, 129 S. Ct. at 1129.

alchemy. Part V addresses the "elephant in the room"—the Ten Commandments and government facilitated public religiosity. The Article then briefly concludes.

II. "GOVERNMENT SPEECH" WAS MINTED ON *RUST*[Y] METAL

Pleasant Grove should never have been a government-speech case. There was no government speech, only government censorship; an act almost always prohibited by the First Amendment. Pleasant Grove, Utah refused to allow the adherents to the Summum religion, headquartered in Salt Lake City, Utah, to erect a monument containing their "Seven Aphorisms of SUMMUM" in a public park that contained other monuments, including a monument of Judaism's Ten Commandments.[12]

Justice Alito's opinion starts by seeming to recognize that the issue is Pleasant Grove's refusal to allow Summum's speech in Pioneer Park: "This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected."[13] But rather than answer that censorship question, he begins his analysis with a bit of judicial sleight of hand that puts the government-speech rabbit into the hat of his decision. He opens the analysis portion of the opinion by observing that "[n]o prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's *acceptance* of privately donated, permanent monuments for installation in a public park,"[14] and he claims that the parties disagree about the "line of precedents that governs this situation."[15] He dismisses the forum-analysis approach without any explanation of its inapplicability and frames the issue in the case as "the nature of [Pleasant Grove's] conduct when they permitted privately donated monuments to be erected in Pioneer Park."[16] Having taken Pleasant Grove's refusal to allow the Summum monument in Pioneer Park out of the case, the opinion asks, "Were petitioners engaging in their own expressive conduct? Or were they providing a forum for private speech?";[17] and then he takes the First Amendment out of the case by observing that "[i]f petitioners were

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[12] *Id.* at 1129–30.

[13] *Id.* at 1129.

[14] *Id.* at 1131 (emphasis added).

[15] *Id.* (describing that Summum argued private-speech-in-public-forum cases were applicable and that Pleasant Grove argued that the pertinent cases were government-speech cases).

[16] *Id.*

[17] *Id.*

engaging in their own expressive conduct, then the Free Speech Clause has no application."[18]

The issue switch that allows Pleasant Grove to censor Summum's speech and keep its monument out of the park by cloaking it in a government-speech doctrine does far more damage than the mere manipulation of one case. It was once "axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[19] Content-based government regulation of speech is presumptively unconstitutional,[20] and viewpoint discrimination is the most egregious content-based regulation.[21] Before the *Pleasant Grove* decision, there was no government-speech doctrine of consequence, certainly none that would allow a city to permit one kind of speech but not another in a public park, or worse, one view about a subject but not another.

Justice Alito avoids the normal consequence of the city's viewpoint discrimination—that it would be held unconstitutional—by creating a government-speech doctrine out of whole cloth: "'[T]he Government's own speech . . . is exempt from First Amendment scrutiny.' . . . A government entity has the right to 'speak for itself.' It is entitled to say what it wishes, and to select the views that it wants to express."[22] He weaves his tapestry from some concurring opinion musings about government speech and some narrow decisions of doubtful precedential value concerning government spending and government programs,[23] none of which come close to allowing the government to engage in the kind of viewpoint discrimination involved when Pleasant Grove refused to allow Summum's aphorisms monument to be placed in a public park where it had allowed Judaism's Ten Commandments monument.

A. Rust

Rust v. Sullivan,[24] Justice Alito's core authority for his viewpoint-discriminating government-speech doctrine, does not involve and does not purport to be about a government-speech doctrine that would justify Pleasant Grove's granting permission to place the Ten Commandments in

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[18] *Id.*

[19] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) (citing Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972)).

[20] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[21] *See Rosenberger*, 515 U.S. at 829 (citing various cases).

[22] *Pleasant Grove*, 129 S. Ct. at 1131 (citations omitted).

[23] *See id.*

[24] Rust v. Sullivan, 500 U.S. 173 (1991).

Pioneer Park. *Rust* was about a government-funded family-planning program.[25] Its author, Chief Justice Rehnquist, went out of his way to say that the case was not about speech and most definitely not about viewpoint.[26]

At issue were the 1988 Department of Health and Human Services regulations to Title X of the 1970 Public Health Service Act.[27] Established three years before *Roe v. Wade*,[28] the Act excluded funding for "programs where abortion was a method of family planning."[29] Fifteen years after *Roe*, the 1988 Reagan administration regulations were promulgated to clarify the definition of "family planning" and to ensure that federal funds were "to be used only to support *preventive* family planning services."[30] Hospitals that received Title X funds and the doctors that worked in them made a facial challenge, claiming that the regulations were not authorized by Title X; violated constitutional rights of the women who were Title X clients; and violated the First Amendment rights of Title X providers.[31]

Chief Justice Rehnquist began the *Rust* opinion by emphasizing the petitioners' heavy burden in sustaining such a facial challenge: "The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid."[32]

The doctors claimed that the regulations violated their free speech rights by imposing "viewpoint-discriminatory conditions on government subsidies."[33] Acknowledging that the government could place conditions on the receipt of federal subsidies, they argued that the government could not "discriminate invidiously in its subsidies in a way as to 'aim at the suppression of dangerous ideas.'"[34] The Court rejected the argument by emphasizing that the issue in the case was about funding a government program and that there was no First Amendment viewpoint discrimination issue:

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[25] *Id.* at 178.

[26] *Id.* at 174–75.

[27] *Id.* at 178.

[28] Roe v. Wade, 410 U.S. 113 (1973).

[29] *Rust*, 500 U.S. at 178.

[30] *Id.* at 179.

[31] *Id.* at 181.

[32] *Id.* at 183 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)) (alteration in original) (internal quotation marks omitted).

[33] *Id.* at 192.

[34] *Id.* (quoting Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983)) (internal quotation marks omitted).

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. . . .
>
> . . . This is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope.[35]

The *Rust* decision, as it relates to government programs, has been distinguished more than it has been followed, but it has had no life at all as a case establishing a government-speech doctrine, let alone one allowing for viewpoint discrimination. *Legal Services Corp. v. Velazquez*,[36] decided a decade after *Rust*, seemed to be the same case, but in lawyer's clothing. Legal Services' lawyers claimed that conditions imposed by Congress on the use of Legal Services Corporation (LSC) funds "violate[d] the First Amendment rights of LSC grantees and their clients."[37] The majority acknowledged that the *Rust* Court "did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech."[38] Concerned, however, with some post-*Rust* funding cases that appeared to distinguish *Rust* on the basis that the government was the speaker,[39] the *Legal Services* majority avoided the *Rust* result with its own distinction between doctors and lawyers: "The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*."[40]

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[35] *Id.* at 193–94.

[36] Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

[37] *Id.* at 536.

[38] *Id.* at 541.

[39] *See id.* at 541–42 ("We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.' As we said in *Rosenberger*, 'when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.' The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, 'when the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.'" (citations omitted)).

[40] *Id.* at 542–43.

The idea that restricting doctor counseling of patients was constitutional because it was government speech, but restricting lawyer counseling of clients was unconstitutional because it was not government speech, must have struck doctors as a distinction only a lawyer could love. It certainly struck Justice Scalia and Chief Justice Rehnquist, the author of *Rust*, that way. Writing for the four *Legal Services* dissenters, Justice Scalia all but laughed out loud at the majority's distinction and dismissed out of hand the notion that *Rust* was about speech:

> The Court contends that *Rust* is different because the program at issue subsidized government speech, while the LSC funds private speech. This is so unpersuasive it hardly needs response. If the private doctors' confidential advice to their patients at issue in *Rust* constituted "government speech," it is hard to imagine what subsidized speech would *not* be government speech. . . . Even respondents agree that "the true speaker in *Rust* was not the government, but a doctor."[41]

Decided during the Rehnquist Court's retreat from earlier post-*Roe* decisions nullifying state laws that burdened a woman's right to terminate a pregnancy, *Rust* is one of those abortion cases rarely cited and never used by the Court as precedent supporting a decision in any other context—at least not until *Pleasant Grove*.

B. Other Corrosions

If *Rust* did not create a government-speech doctrine that allows for viewpoint discrimination, Justice Alito's other *Pleasant Grove* authorities are even less supportive. Not one of the citations represented a holding. None involved the government saying "no" to speech based on content, let alone viewpoint. And none was even close to considering the government as a decider of what speech was appropriate. Most dealt with government subsidies and the non-existence of a taxpayer's "heckler's veto."

The *Pleasant Grove* core idea—"Government is not restrained by the First Amendment from controlling its own expression"[42]—is an aside in a footnote from Justice Stewart's concurrence in *CBS v. Democratic National Committee*.[43] Ironically, Justice Stewart offered the aside to support the proposition that the government had no power to silence speakers based on the content of their speech: "Since when has the First Amendment given

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[41] *Id.* at 554 (Scalia, J., dissenting) (citation omitted).

[42] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009).

[43] *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring).

Government the right to silence all speakers it does not consider 'responsible?'"[44]

The *CBS* case, decided almost two decades before *Rust* and three decades before *Pleasant Grove*, had absolutely nothing to do with the idea that government speech was free of the First Amendment. Rather, it was about whether the FCC's Fairness Doctrine[45] required CBS to accept an editorial advertisement of the Business Executives' Move for Vietnam Peace.[46] The business executives' organization argued that the effect of the Fairness Doctrine was to put CBS in the shoes of the government regarding political speech, prohibiting it from refusing the editorial advertisement.[47] Chief Justice Burger, joined by Justices Stewart and Rehnquist, concluded that a broadcast licensee's refusal to accept a paid editorial advertisement did not constitute "governmental action" for First Amendment purposes.[48]

The Stewart quote from *CBS* about the government "controlling its own expression," was in support of the proposition that "[t]he First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government. To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights."[49] It was an affirmation of the Executive's right to classify government documents in the first instance. It had nothing to do with the nature of government speech. The point that the Executive could classify documents had nothing to do with the Court's decision, which refused to restrain press publication of the Pentagon Papers.[50] Justice Stewart's aside provides no support for the *Pleasant Grove* assertion that "[g]overnment is not restrained by the First Amendment from controlling its own expression."[51]

Justice Alito's reliance on language from two university subsidy cases to suggest a government-speech doctrine permitting viewpoint discrimination is even less justified. Neither case involved government speech.

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[44] *Id.* at 139.

[45] For a discussion of the history and development of the Fairness Doctrine, see *id.* at 110–13 (majority opinion).

[46] *Id.* at 97.

[47] *See id.* at 114–15 ("[W]e next proceed to consider whether a broadcaster's refusal to accept editorial advertisements is governmental action violative of the First Amendment.").

[48] *Id.* at 121.

[49] *Id.* at 139 (Stewart, J., concurring) (footnote omitted).

[50] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 727–30 (1971) (Stewart, J., concurring).

[51] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009).

Rosenberger v. Rector and Visitors of University of Virginia,[52] cited in *Pleasant Grove* for the proposition that "[Government] is entitled to say what it wishes,"[53] neither says it nor implies it.[54] *Rosenberger* was a hotly contested five-to-four decision touching on both religion and subsidy. The university refused to pay the third-party printer of a student organization newspaper that had a Christian editorial viewpoint.[55] It refused to use the university fund established for such payments for fear that the payment would be considered support of religion in violation of the Establishment Clause.[56] The Court decided that the fund was analogous to a limited public forum, in which content discrimination was permissible and viewpoint discrimination was not.[57] A majority found the university had engaged in viewpoint discrimination.[58] The *Rosenberger* Court said specifically that the issue of whether the government was entitled to say what it wishes was not at issue in the case because there was no government speech.[59] Ironically, the *Rosenberger* Court suggested that had the government been the speaker, it would not be allowed to express a viewpoint.[60]

Board of Regents of the University of Wisconsin System v. Southworth,[61] cited for the proposition that the government "has the right to 'speak for itself,'"[62] is equally inapposite. The *Southworth* Court goes out of its way to cite *Rust* as a funding case that stands for the "general rule" that government "may support valid programs and policies by taxes or other exactions binding protesting parties," and then says specifically that "the issue of the government's right . . . to use its own funds to advance a particular message" is not raised in the case before it:[63]

> The University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself. If the challenged speech

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

[53] *Pleasant Grove*, 129 S. Ct. at 1131 (citing *Rosenberger*, 515 U.S. at 833).

[54] *See Rosenberger*, 515 U.S. at 833.

[55] *Id.* at 827.

[56] *See id.* at 828.

[57] *Id.* at 830–31.

[58] *Id.* at 831–32.

[59] *See id.* at 834.

[60] *See id.*

[61] Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

[62] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009) (citing *Southworth*, 529 U.S. at 229 (2000)).

[63] *Southworth*, 529 U.S. at 229.

> here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.[64]

Justice Alito cites *National Endowment for the Arts v. Finley*,[65] for the proposition that government speech is free from any restriction regarding viewpoint.[66] The language cited, "It is the very business of government to favor and disfavor points of view,"[67] was an idea the Court's majority was specifically unwilling to agree to. The claim was made in Justice Scalia's concurrence—a quarrel with the majority's unwillingness to take up the viewpoint issue because the statute did not provide for government viewpoint discrimination.

> "The operation was a success, but the patient died." What such a procedure is to medicine, the Court's opinion in this case is to law. It sustains the constitutionality of 20 U.S.C. § 954(d)(1) by gutting it. The most avid congressional opponents of the provision could not have asked for more. I write separately because, unlike the Court, I think that § 954(d)(1) must be evaluated as written, rather than as distorted by the agency it was meant to control. By its terms, it establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.[68]

The *Pleasant Grove* opinion's use of Justice Scalia's view distorts the real meaning of *National Endowment for the Arts* and its majority's unwillingness to accept Justice Scalia's view.

Justice Alito's first claim in creating a government-speech doctrine that allows viewpoint discrimination—that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech"[69]—would be a First Amendment blockbuster if correct. The notion that the government is constitutionally prohibited from using its power to influence the social dialogue by picking and choosing among private speakers, but is free to use its preemptive megaphone to dominate that dialogue, is an astounding commentary on the purpose of, theory for, and

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[64] *Id.*

[65] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

[66] *Pleasant Grove*, 129 S. Ct. at 1131 (citing Nat'l Endowment for the Arts, 524 U.S. at 598 (Scalia, J. concurring)).

[67] *Nat'l Endowment for the Arts*, 524 U.S. at 598 (Scalia, J., concurring).

[68] *Id.* at 590.

[69] *Pleasant Grove*, 129 S. Ct. at 1131.

operation of the First Amendment. The only support in the opinion for the statement is a "*see*" citation to *Johanns v. Livestock Marketing Ass'n*,[70] a case about whether something in the First Amendment might free a taxpayer from paying a government compelled subsidy.[71] *Johanns* had nothing to do with whether the First Amendment might impose restrictions on the nature of government speech.

The case was about the "Beef. It's What's for Dinner." ads.[72] The government imposed a $1-per-head assessment on all cattle sales and used the funds to create the ads, which were identified as coming from "America's Beef Producers."[73] Some beef producers objected to the ads and challenged the assessment, citing *United States v. United Foods, Inc.*,[74] which four years earlier had held that a similar assessment for mushroom ads violated the First Amendment.[75] The district court found the assessment for beef ads violated the First Amendment in the same fashion as the mushroom assessment had in *United Foods*.[76] The *Johanns* Court agreed with the district court conclusion that "the beef checkoff is, in all material respects, identical to the mushroom checkoff,"[77] but it distinguished *United Foods* on the basis that there had been no claim that the mushroom ads were government speech.[78] Counsel in *United Foods* had stated that the speech was private, so the Court found the compelled subsidy violated the First Amendment rights of private individuals who did not want to support that private activity.[79] Counsel in *Johanns*, faced with the *United Foods* decision, said that the speech was the government's, and because it was the government speaking, the compelled subsidy did not violate the First Amendment.[80] On the way to holding that "respondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments,"[81] Justice Scalia's opinion includes the dictum that the First Amendment "does not regulate government speech."[82] But that was not an issue in the case.

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[70] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005).
[71] *See id.*
[72] *See id.* at 554.
[73] *Id.* at 554–55.
[74] United States v. United Foods, Inc., 533 U.S. 405 (2001).
[75] *See generally id.*
[76] *Johanns*, 544 U.S. at 556.
[77] *Id.* at 558.
[78] *Id.* at 559 n.3.
[79] *See* United Foods, 533 U.S. at 411.
[80] *Johanns*, 544 U.S. at 560.
[81] *Id.* at 564 n.7.
[82] *See id.* at 553 ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

The only First Amendment issue in *Johanns* was whether government speech is a "distinct category of expression that obliterates whatever First Amendment interest persons may have in not being required to subsidize the speech of others."[83] Once the *Johanns* Court distinguished *United Foods* by labeling the advertisement "government speech,"[84] it only had to determine whether the complaining beef producers had some kind of "heckler's veto."[85] To that, the Court said "no."[86] Contrary to Justice Scalia's dictum, the *Johanns* Court decided nothing about what restrictions the First Amendment might place on the content of government speech; it decided only that people taxed for speech they did not like could not avoid the tax.[87]

Even though *Pleasant Grove* involved a government rejection of Summum's private speech; involved no government speech whatsoever; relied on odd snippets from *Rust* and other inapposite dicta; and offered no First Amendment discussion, rationale, or justification for its sweeping invention; it is likely to be viewed as firmly establishing that when the government speaks, the First Amendment places no viewpoint restriction on its speech.

Rust and *Johanns*, to the extent they involve speech, only involve speech that facilitates constitutional government action. They have nothing to say regarding government speech that is not being used to facilitate an appropriate government action. The distinction is critical. *Southworth*,[88] though it involved no government speech, contained dictum acknowledging that government might speak as a part of appropriate government action:

> The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.[89]

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[83] *See* Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195, 207.

[84] *See Johanns*, 544 U.S. at 560; *see also* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 988–89 (2005) (discussing the absurdity of labeling the advertisement attributed to "America's Beef Producers," paid for by beef producers, and written by beef producers as government speech).

[85] *See Johanns*, 544 U.S. at 566.

[86] *See id.* at 564 n.7 ("As we hold today, respondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments . . . .").

[87] *See id.*

[88] Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

[89] *Id.* at 229.

The *Southworth* Court then described the safety net that democracy provides when the electorate does not approve of the lawmaking or the advocacy of it: "[a government entity] is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."[90] The *Southworth* Court's hypothesized democratic control of government lawmaking within areas of its constitutional competence provides nothing for a minority offended by government's use of the Ten Commandments for its religious or moral pronouncements that have nothing to do with the government's function as the maker, interpreter, or facilitator of law.

III. "GOVERNMENT SPEECH" FITS NO FREE SPEECH THEORY

There is no agreement on a single value driving the First Amendment's protection of expressive freedom, despite the best efforts of scholars and judges to find one. John Stuart Mill was an early and important advocate of expressive freedom;[91] Justice Holmes, in his famous *Abrams v. United States* dissent,[92] placed Mill's free speech value—the discovery of truth—firmly in the foundation of the Court's free speech discussion: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[93]

The "marketplace of ideas" metaphor is the most often articulated justification in common parlance for the Free Speech Clause, but the "search for the truth" ideal is only one of the oft cited affirmative values underlying the Free Speech Clause.[94] Professor Thomas Emerson, in his influential article, *Toward a General Theory of the First Amendment*, argued that the various affirmative values that were pursued when protecting speech could be placed in four broad categories: participation in democratic decision making; individual self-fulfillment; attaining the truth; and maintaining a societal balance between stability and change.[95] With occasional additions, caveats, and minor quarrels, the four categories have been the subject of extended debate among scholars about which of the

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[90] *Id.* at 235.

[91] *See generally* JOHN STUART MILL, ON LIBERTY (1859).

[92] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

[93] *Id.*

[94] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 925–30 (3d ed. 2006) (discussing justifications and values underlying the Free Speech Clause).

[95] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963).

values is *the* foundational value upon which free expression rests. Professors Farber and Frickey, observing that the interminable debate has been unavailing in creating agreement on a single First Amendment value,[96] suggest that "[f]ree speech is a powerful idea precisely because it appeals to so many diverse values."[97]

The Supreme Court has never put its imprimatur on a one-and-only free speech theory, perhaps adopting the Farber–Frickey approach without saying so, but not one of the affirmative free speech values supports a government-speech doctrine.

"Participation in decision making" has been an important value for the Court. While it has not gone so far as to adopt Professor Meiklejohn's view that "the freedom of speech springs [only] from the necessities of the program of self-government,"[98] its decision in *New York Times Co. v. Sullivan*[99] supports Justice Black's claim that "freedom to discuss public affairs and public officials is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion."[100] Professor Kalven, commenting on *New York Times*, finds the "central meaning of the First Amendment" in the unconstitutionality of seditious libel.[101] "[D]efamation of the government," he says, "is an impossible notion for a democracy."[102] In support of his thesis, Professor Kalven points to the Court's use of Madison's observations that the democratic process presents an inevitable and healthy tension between the people and the government: "The people, not the government, possess the absolute sovereignty. . . . If we advert to the nature of Republican Government we shall find that the censorial power is in the people over the Government, and not in the Government over the people."[103]

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[96] Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1640 (1987).

[97] *Id.* at 1642–43 ("Some people may support it because they are concerned about political censorship, some because they are libertarians, some because they want vitality in the arts, some because it's the American thing to do, maybe even [for] some . . . it's an exercise in tolerance.").

[98] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960).

[99] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[100] *Id.* at 296–97 (Black, J., concurring).

[101] *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

[102] *Id.* at 205.

[103] *N.Y. Times*, 376 U.S. at 274–75 (internal quotation marks omitted).

The unfettered free expression—the advocacy—of office holders, politicians, and citizens shapes the government and determines its law-making activity. Nothing in the First Amendment theory of "participation in decision making" supports the notion that the government itself could be a speaker in determining its own shape or the laws it should adopt. On the contrary, the theory of democracy is that so long as government maintains its role as the listener of political speech, it will reflect the will of the people as expressed through their speech. It is the speech of the people, not the speech of government qua government, that the Free Speech Clause protects.

The "individual self-fulfillment" value would seem on its face to have nothing to do with government speech. Self-realization, as Professor Redish articulates the value, is about an individual's development in all aspects of life.[104] "There is more to self-realization, however, than private self-government. For it is highly doubtful that fine art, ballet, or literature can be thought to aid one in making concrete life-affecting decisions, yet all three seem deserving of full first amendment protection."[105]

Government is incapable of self-fulfillment in the sense that Professor Redish describes. Government fulfillment comes from the laws that it passes and its ability to respond effectively to the goals of the citizens. More importantly, government viewpoint about what an individual should do, believe, appreciate, abhor, or consider valuable in culture creates a subtle pressure antithetical to the individual self-realization value.

"Attainment of truth" and "attaining a societal balance between stability and change" are the free speech values that might be in the greatest danger from a government-speech doctrine. For these values, unlike "individual self-realization," where it is easy to understand that the government is not an individual; and "participation in decision making," where the government is listener, not speaker; there is no obvious disqualifier of the government as a speaker.

The problem with the government as a speaker in "attaining the truth" or in "attaining a societal balance between stability and change" is one that Professor Meiklejohn identifies when advocating that "participation in decision making" is *the* foundational value underlying the First Amendment.[106] He uses the traditional town meeting, which he describes

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[104] Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 626–27 (1982).

[105] *Id.* at 627.

[106] MEIKLEJOHN, *supra* note 98, at 24, 42.

as "self-government in its simplest, most obvious form,"[107] as a metaphor for the larger representative democracy of American government. In explaining the key role of freedom of speech, including the damage to the decision-making process if "unwise ideas" are censored, he says: "It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed."[108] In seeking truth—a balance between societal stability and change, or any of the affirmative free speech values, for that matter—the government's ideas are not part of the "thinking of the community." The whole idea of the First Amendment is to keep the government's predilections from interfering with the discussion that will create the various free speech benefits that theorists have identified. It matters little for the usefulness of that free expression whether the government restricts the ideas in the marketplace by censorship or by taking up most of the space in the market. Government, with its power of taxes, size, rule making, access to communication, and its information advantage can be an outsized persuader. It can speak more often than others and, in a democratic society, can appear to be speaking with the voice of the majority, even if the particular speech is a minority view.

Professor Emerson, in discussing the value of free expression in attaining societal balance between stability and change, observes that "[t]he traditional doctrine of freedom of expression . . . embodies a theory of social control. . . . [W]here men have learned how to function within the law, an open society will be the stronger and more cohesive one."[109] He warns, however, that "suppression of discussion makes a rational judgment impossible;" and that while a society might show a "superficial conformity" it will ultimately substitute force for logic and will eventually disintegrate or implode because of its inevitable "inflexibility and stultification."[110] The difference between a government that controls its citizens through force of arms and a government that controls its citizens through coercion of thought is a slim reed upon which to build a free society.

Little needs to be said about the danger to the democratic decision-making process of a government that can dominate the political discussion and thereby perpetuate itself. America's representative government, in contrast to professor Meiklejohn's traditional town meeting,[111] is a separate entity from the people whose speech matters in creating or changing the

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[107] *Id.* at 42.
[108] *Id.* at 27.
[109] Emerson, *supra* note 95, at 884.
[110] *See id.*
[111] *See* MEIKLEJOHN, *supra* note 98, at 24.

government or its laws. The *Pleasant Grove* government-speech doctrine purports to enable a government entity's speech as such.[112] A government entity that has a voice in creating itself carries the same evil that Madison saw in one who "is allowed to be a judge in his own cause."[113]

Just because the government should not be a speaker about its shape or its laws does not mean that an office holder, a politician, or a political party that happens to be in power is not a proper speaker. No government-speech doctrine is needed to enable individual viewpoint speech; the Free Speech Clause ensures it without need of a special doctrine.

The First Amendment, at its core, is an anti-government idea. Professors Cass and Blasi, each in his own way, identifies undue government influence as the driving force behind the creation of the First Amendment. Professor Cass, in suggesting a "negative" theory of the First Amendment,[114] observes that "[s]ubstantive constraints on federal power were not the product of general beliefs in liberty, but of more focused fears about its unjustified infringement."[115] Professor Blasi points to the history underlying the First Amendment in arguing that the "checking value" of free speech on government power was an important reason for the First Amendment:[116]

> Thus, the colonial pamphleteers, like the opposition leaders in England whom they so admired, organized much of their political thought around the need they perceived to check the abuse of governmental power. The First Amendment was an outgrowth of this body of thought, as can be discerned from a brief examination of the most important eighteenth-century American writings on freedom of speech and freedom of the press.[117]

The *Pleasant Grove* approach to understanding the First Amendment and justifying a government-speech doctrine is not a very effective way to glean the meaning of the constitutional text. The opinion claims that the government may express a viewpoint because the First Amendment has nothing to say about the government as a speaker, it being concerned only with the government as a suppressor or controller of citizen speech.[118] That narrow understanding of the First Amendment ignores the reason the

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[112] *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131–32 (2009).

[113] THE FEDERALIST NO. 10, at 44 (James Madison) (Buccaneer Books 1992).

[114] *See* Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. Rev. 1405, 1438–65 (1987).

[115] *Id.* at 1440–41.

[116] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527–44.

[117] *Id.* at 533.

[118] *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009).

Amendment was adopted—to protect individuals from government. It blinks reality to ignore that government can suppress and control ideas almost as easily by speaking as it can by refusing to allow others to speak. A government-speech doctrine turns the idea of a democratic government on its head when it allows the entity of government to advocate over its own shape and its own laws. A government-speech doctrine that makes room for the government to speak on issues over which it has no lawmaking power is even more insidious because it invades the kind of individual private thought and belief that the First Amendment exists to protect.

The danger of government viewpoint in areas over which it has no lawmaking power is exemplified by the debate between former Justice O'Conner and Justice Kennedy over how to determine whether a government display of a religious idea violates the Establishment Clause. The approach of each, in its own way, creates an unfortunate result. Justice O'Connor claimed that if a government-sponsored religious display appeared to be an endorsement of religion, it violated the Establishment Clause.[119] Justice Kennedy rejected the approach and argued there would be no violation of the Establishment Clause if the government merely endorsed the religious idea; it had to coerce the citizenry to run afoul of the First Amendment.[120]

Justice Kennedy's "coercion" approach, which has not been accepted by a majority of the Court, would virtually ensure government-sponsored religious displays and ceremonies. He claims that the avenue for objection to government influence beyond its constitutional power to act exists when those who might object are coerced.[121] If they are coerced, however, they are unlikely to object to the government influence. And if they are not coerced, according to Justice Kennedy, the government has done nothing wrong by its attempt to promote a majority religion.[122] The idea that a symbiotic relationship between government and majority religion violates the First Amendment, only when it changes the shape of society by coercing citizens, might be good for majority religionists. But the First Amendment is about the rest of us.

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[119] Lynch v. Donnelly, 465 U.S. 668, 687–88, 690 (1984) (O'Connor, J., concurring).

[120] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 660, 662–63, 670, 679 (1989) (Kennedy, J., concurring in part and dissenting in part).

[121] *See id.* at 660, 670.

[122] *See id.* at 662–63, 679.

Justice O'Connor's approach, which also has not replaced the Establishment Clause test from *Lemon v. Kurtzman*,[123] would prohibit government from "endorsement" of religion.[124] The problem with her approach is not in the theory, but in its application. In *Lynch v. Donnelly*, O'Connor finds the government does not appear to be endorsing the majority religion of Christianity when it sponsors a crèche, so long as there are plastic reindeer and a Santa Claus in the vicinity.[125] It reflects the perspective of someone who has, as most judges have, never been on the other side of the dominant culture. She might have had a different view had she grown up Muslim, atheist, or as a schoolchild who felt apart when her classmates celebrated Christmas in the classroom or sang carols in the school auditorium. There is no doubt that she understands, in the abstract, the danger of government dominance of the marketplace of ideas:

> In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs.[126]

The government-speech doctrine, in addition to not being supported by any of the affirmative values attributed to free expression, is a hindrance to those values. If the entity of government is a proper speaker in the political debate, it will chill contrary citizen speech, monopolize the marketplace of ideas, and not be able to fulfill its critical First Amendment role as listener. It is even worse when the government speaks beyond its constitutional roles as lawmaker, enforcer, or interpreter. Government's size and importance in society makes it an enemy of the idea of the First Amendment when, as a speaker, it is allowed to influence what we think, what entertains us, what we celebrate, what makes us laugh, and what makes us cry.

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[123] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not 'foster an excessive government entanglement with religion.'" (citations omitted)).

[124] *Lynch*, 465 U.S. at 688, 690, 692 (O'Connor, J., concurring).

[125] *See id.* at 692–93.

[126] McCreary Cnty. v. ACLU, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring).

IV. CHANGING PRIVATE SPEECH INTO "GOVERNMENT SPEECH" IS A MONUMENT[AL] MISTAKE

Monuments in parks throughout the country were one of the concerns that brought *Pleasant Grove* to the Court. Many cities and states wrote amicus briefs, concerned that if Pleasant Grove had to allow the Seven Aphorisms monument, they would have to accept any monument in any park that contained other monuments.[127] The problem might have been one in need of a solution, but government speech was neither a necessary nor an appropriate solution.

Forum analysis, used by both the district court and the Tenth Circuit, has been the Court's main tool for calibrating the government's ability to limit speech in government-owned areas. Under the tri-category approach to forum analysis described in *Perry Education Ass'n v. Perry Local Educators' Ass'n*[128]—traditional public forum, designated public forum, and non-public forum—the Court has, for more than a half-century, created a variety of rules that have served to solve the myriad of problems regarding private speech on publicly owned land.[129] It would have worked for the monument problem.

Forum analysis, as with most First Amendment analytic constructs, is sufficiently flexible to reach whatever result the Court seeks in a particular case. *Perry*'s three fora are clearly described, but they mask an analytic construct that can be manipulated to justify almost any result. In this case, the district court found that exclusion of the Summum Aphorisms did not violate the First Amendment because monuments in a public park constitute a non-public forum in which reasonable content discrimination is permitted but viewpoint discrimination is not.[130] The district court identified the historical significance to Pleasant Grove as the content and said that Summum's recently developed Aphorisms did not fit the category.[131] The Tenth Circuit, by contrast, found a First Amendment violation because, unlike the district court's non-public forum conclusion, it labeled Pioneer

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[127] *See, e.g.*, Brief for the Cities of Casper, Wyoming et al. as Amici Curiae Supporting Petitioners, Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (No. 07-665), 2008 WL 2550620; Brief for the City of New York as Amicus Curiae Supporting Petitioners, *Pleasant Grove City*, 129 S. Ct. 1125 (No. 07-665), 2008 WL 2521268; Brief for the Commonwealth of Virginia et al. as Amici Curiae Supporting Petitioners, *Pleasant Grove City*, 129 S. Ct. 1125 (No. 07-665), 2008 WL 2550616.

[128] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

[129] *See id.*

[130] *See* Summum v. Pleasant Grove City, 483 F.3d 1044, 1050–51 (10th Cir. 2007), *rev'd*, 129 S. Ct. 1125 (2009).

[131] *See id.* at 1053–54.

Park a traditional public forum.[132] Under strict scrutiny, Pleasant Grove could not show a compelling interest or a narrowly tailored means for accomplishing its goal.[133] Neither opinion does terrible violence to forum law or past precedent. This is not to suggest that forum analysis is a wonderful construct, but it has been used for more than a half-century. Its weaknesses and unfortunate consequences are well known and can be avoided when necessary.

If, as the district court found, monuments in parks constitute non-public fora in which the government may limit content, but not viewpoint,[134] individual cases can be decided on whether the particular monument fits the content limitation and is viewpoint free. *Rosenberger* and *Perry* are among the many examples of the imprecision of "content" and "viewpoint" and the ability of various Justices to disagree about which label works for any particular speech.[135] If, as the Tenth Circuit and the Supreme Court preferred, the park is a traditional public forum subject to time, place, and manner restrictions—no matter the form and permanence of the speech—individual cases can be determined by the extent to which monuments interfere with the forum's use by others. Either result in *Pleasant Grove* could have been accomplished under forum analysis. The analysis would be subject to the criticism that the Court is misinterpreting the facts or twisting the doctrine, but virtually all First Amendment decisions draw such criticisms from those who agree with the losers—in many cases, four Justices who were in dissent.

In contrast to forum analysis, government speech was not identified as an analytic construct until the *Pleasant Grove* decision. In the various musings about government speech in earlier opinions, which involved no government speech, there is nothing by way of analysis, cautions, or boundaries, and there is no understanding of how the existence of a government-speech doctrine might "affect existing doctrine in ways not yet explored."[136]

As set forth in *Pleasant Grove*, the government-speech doctrine creates the potential for substantial First Amendment mischief.[137] The most monumental mischief allows the government to facilitate private speech by

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[132] *See id.* at 1050, 1052.

[133] *See id.* at 1052.

[134] *Id.* at 1052.

[135] *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

[136] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1141 (2009) (Souter, J., concurring).

[137] *See id.* at 1131 (describing government-speech doctrine).

those whose viewpoint it approves and deny that facilitation of private speech to those whose viewpoint it dislikes. The danger in government sheltering, adopting, or facilitating private speech was not something of which Justice Alito was unaware: "There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation."[138]

There is no better argument for the danger of a government-speech doctrine than a judge's failure to see that allowing one religion's privately contributed monument in a public park, but denying another religion's privately contributed monument, does not present a situation in which a government entity is providing a forum for private speech.

Johanns, the decision cited to establish that "[t]he Free Speech Clause . . . does not regulate government speech,"[139] turned on an argument that the speaker was the government and not a private party.[140] Faced with that problem, most of the *Pleasant Grove* opinion is an attempt to prove that "[p]ermanent monuments displayed on public property *typically represent government speech.*"[141]

Lacking prior case authority for the assertion that those monuments "typically represent government speech," Justice Alito turns for support to the speech of ancient and modern day rulers:

> Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. . . . When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.[142]

After bringing the history of these Ozymandias-like monuments to the *Pleasant Grove* case,[143] Justice Alito observes that neither the Court of Appeals

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[138] *Id.* at 1132.

[139] *Id.* at 1131 (citing Johanns v. Livestock Mkt'g Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.")).

[140] *See Johanns*, 544 U.S. at 553 ("[T]he dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny.").

[141] *Pleasant Grove*, 129 S. Ct. at 1132 (emphasis added).

[142] *Id.* at 1132–33.

[143] *See* Percy Bysshe Shelley, *Ozymandias of Egypt*, POEMS OF PERCY BYSSHE SHELLEY, http://percybysshesheIley.classicauthors.net/PoemsOfPercyBysshe Shelley/PoemsOfPercyBysshe Shelley20.html

nor Summum "disputes the obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech."[144] But the monument being justified—Pleasant Grove's Ten Commandments—was neither commissioned by nor financed by the government.[145]

The remainder of the *Pleasant Grove* opinion attempts to make the case that privately donated monuments not "commissioned and financed by a government body" are, nevertheless, government speech, because the government has adopted the message of the private speech as its own: "It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated."[146] Citing the Statue of Liberty, the Iwo Jima Monument, the Vietnam Veterans Memorial, and other patriotic war monuments, Justice Alito says that the nation has a history of "selective receptivity" and that "[t]he monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech."[147]

Summum rested much of its argument on what the opinion conceded was a "legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint."[148] The argument was dismissed by defining it away, basically saying that words in stone on public property are government speech.[149] "There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for

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(last visited Oct. 10, 2010).

> I met a traveller from an antique land
> Who said: Two vast and trunkless legs of stone
> Stand in the desert. Near them, on the sand
> Half sunk a shatter'd visage lies, whose frown
> And wrinkled lip and sneer of cold command
> Tell that its sculptor well those passions read
> Which yet survive, stamp'd on these lifeless things,
> The hand that mock'd them and the heart that fed;
> And on the pedestal these words appear:
> "My name is Ozymandias, king of kings:
> Look on my works, ye Mighty, and despair!"
> Nothing beside remains. Round the decay
> Of that colossal wreck, boundless and bare,
> The lone and level sands stretch far away.

Id.

[144] *Pleasant Grove*, 129 S. Ct. at 1133.

[145] *See id.* at 1129.

[146] *Id.* at 1133.

[147] *Id.* at 1133–34.

[148] *Id.* at 1134.

[149] *See id.* at 1134–37.

private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech."[150]

Summum next argued that if the monuments in Pioneer Park—the Ten Commandments, in particular—were to be government speech, Pleasant Grove should pass a resolution saying so.[151] Justice Alito might have disposed of the Summum monument problem by saying that Pleasant Grove had, by its decision to allow the monument, adopted the Ten Commandments speech as its own, but he did not. He said that if the decision rested on Pleasant Grove's adoption of the speech as its own, all governments would have to "go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles."[152]

The contention that formal adoptions by governments would be onerous and a "pointless exercise that the Constitution does not mandate"[153] seems out of place, since national monuments were not at issue and no one was claiming that a formal adoption procedure was necessary for all existing national monuments. But if there was a burgeoning problem of existing monuments, the Court could have said that all acceptances of privately commissioned and financed monuments, as with Pleasant Grove's acceptance of the Ten Commandments, constituted government adoption of the private speech as its own. The problem with government adoption of monument speech, which the opinion strove to avoid, was that adoption of the Ten Commandments by Pleasant Grove would bring the Establishment Clause into the case in a way that could cause only trouble for the result sought in the opinion.

In an attempt to avoid the adoption problem, the remainder of the opinion argues that governments cannot adopt the speech of monuments because the monument speech has no meaning, and if it does the meaning changes over time.[154] It is here that the opinion loses all coherence. The argument that it is not reasonable to consider government acceptance of privately commissioned and funded monuments as a government adoption of the private speech, because there is no meaning to adopt, is a direct contradiction of the opinion's core justification for why the government acceptance of a private speech monument is government speech: "The

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[150] *Id.* at 1132.
[151] *See id.* at 1134.
[152] *Id.*
[153] *Id.*
[154] *See id.* at 1135–37.

monuments that are accepted . . . are meant to convey and have the effect of conveying a government message . . . ."[155]

The logic train is extraordinary. 1) Monuments, because they are funded by the government, are government speech and the government may say what it wants. 2) Private speech, when its message is adopted by government, is government speech as much as if the government funded it. 3) The government need not affirm the meaning of a privately donated monument because a monument has no meaning to convey. 4) If, per chance, a private monument has a meaning when given to the government, the meaning evolves into a different meaning. 5) Therefore, since monuments have no meaning, the government should not be stuck with a meaning—original or evolved.

The argument is all the more unfortunate because the effect in the case before the Court is to say that the Ten Commandments had no original meaning to convey and, even if they did, the meaning had changed. The problem will not go away if government speech can express a private viewpoint without adopting it. Most of the future cases that rely upon the newly minted doctrine are likely to be those involving the government sanitizing equally controversial private speech by making it government speech. The "Choose Life" license plate cases are a current example.

Thirty-two years ago, in *Wooley v. Maynard*,[156] the Court struck down a New Hampshire criminal statute that made it a misdemeanor to knowingly obscure the letters or figures on any license plate.[157] George Maynard covered up the New Hampshire state motto, "Live Free or Die," and was arrested for violating the statute.[158] The Court held that the statute violated the First Amendment.[159] Saying that the Free Speech Clause protects the individual's right "to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable,"[160] the Court held that the State could not make it a crime for Maynard to block out the state motto without showing a compelling government interest.[161] Ironically, New Hampshire's compelling-interest claim, that of "promot[ing] appreciation of history,

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[155] *Id.* at 1134.
[156] Wooley v. Maynard, 430 U.S. 705 (1977).
[157] *Id.* at 707, 717.
[158] *Id.* at 707–08.
[159] *Id.* at 717.
[160] *Id.* at 715.
[161] *Id.* at 716–17.

individualism, and state pride,"[162] was strikingly similar to Pleasant Grove's claim that the Pioneer Park displays promoted history.[163] In rejecting the New Hampshire claim, the *Wooley* Court made an important observation about the government as a speaker: "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[164]

The license-plate-motto problem began to change when, a decade after *Wooley*, Florida issued a plate commemorating the astronauts killed in the Challenger tragedy.[165] Rather than place the commemoration on all license plates, Florida created a specialty plate that Florida drivers could purchase for a fee greater than the normal price for Florida plates.[166]

The license-plate-motto issue became ugly when legislatures decided to put controversial, ideological messages on license plates and avoided *Wooley* by charging private individuals a fee for making their private speech part of the government's license plate. It did not take long for legislators who depended upon popular approval for their reelection to pass legislation that approved some specialty-plate speech, but not others. The legislatures of Florida, Louisiana, and South Carolina thought it politically expedient to authorize "Choose Life" specialty plates.[167] No proposal for "Pro-Choice" specialty plates was made in Florida or Louisiana. Such a proposal was made in South Carolina, but it was killed in committee.[168] The cases arising from the initial "Choose Life" push for specialty plates—*Hildreth v. Dickinson*,[169] *Women's Emergency Network v. Bush*,[170] *Henderson v. Stalder*,[171] and *Planned Parenthood of South Carolina v. Rose*[172]—were fought out on issues of standing, forum analysis, and the nature of the speech. *Hildreth* and *Women's Emergency Network* found that the plaintiffs had no standing.[173] In *Henderson*,

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[162] *Id.* at 716.

[163] *See* Summum v. Pleasant Grove City, 483 F.3d 1044, 1053 (10th Cir. 2007), *rev'd*, 129 S. Ct. 1125 (2009) ("The only interest Pleasant Grove asserted is an interest in promoting its history.").

[164] *Wooley*, 430 U.S. at 717.

[165] *See Drivers Taking 'Challenger' Tags to the Streets*, ST. PETERSBURG TIMES (Fla.), Jan. 7, 1987, at 12B.

[166] *See id.*

[167] *See generally* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 788 (4th Cir. 2004) (citing S.C. CODE ANN. § 56-3-8000 (2001)); Henderson v. Stalder, 287 F.3d 374, 377 (5th Cir. 2002) (citing LA. REV. STAT. ANN. § 47:463:61 (2001)); Hildreth v. Dickinson, No. 99-583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at *5-6 (M.D. Fla. Dec. 22, 1999) (citing FLA. STAT. § 320.08058(30)(a) (1999)).

[168] *See Rose*, 361 F.3d at 788.

[169] *Hildreth*, 1999 U.S. Dist. LEXIS 22503.

[170] Women's Emergency Network v. Bush, 323 F.3d 937 (11th Cir. 2003).

[171] *Henderson*, 287 F.3d 374.

[172] *Rose*, 361 F.3d 786.

[173] *See Bush*, 323 F.3d at 947; *Hildreth*, 1999 U.S. Dist. LEXIS 22503, at *18-19.

Louisiana argued that the plaintiffs had no standing and, in any event, that the plates were government speech.[174] The district court rejected both the standing argument and the government-speech analysis, and said that whatever the proper forum determination, the government could not engage in viewpoint discrimination.[175] However, the Fifth Circuit killed the case, finding that the plaintiffs had no standing.[176]

The *Rose* decision is the most intriguing in light of the *Pleasant Grove* creation of a government-speech doctrine that allows viewpoint discrimination even when the viewpoint is the donor's private speech. The *Rose* court said that the specialty license plate mixed private and government speech,[177] but decided the case by incorporating forum analysis. Acknowledging that the hybrid message was viewpoint discrimination,[178] it held that whether it was permissible depended on both the character of the speech and the "nature of the medium."[179] In finding the forum to be even more limited than the school mailboxes in *Perry*, it prohibited the viewpoint discrimination.[180] In language particularly prescient in light of *Pleasant Grove*'s reliance on the *Southworth* "political accountability" rationale, the *Rose* court said: "The State has opened a limited forum for expression, then entered that forum as a covert but dominant speaker, advocating for one viewpoint in the abortion debate without political accountability and without authorizing the expression of the opposing viewpoint."[181]

The Supreme Court denial of certiorari in yet another specialty-license-plate case just one year after the *Pleasant Grove* decision is particularly interesting.[182] *Choose Life of Illinois v. White* involved Illinois' refusal to approve a "Choose Life" specialty license.[183] The State argued in the Seventh Circuit that it could refuse because the proposed speech was government speech, not private speech.[184] The Seventh Circuit upheld Illinois' refusal, but rejected the government-speech claim and decided the

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[174] *Henderson*, 287 F.3d at 377–78.

[175] *Id.*

[176] *Id.* at 376.

[177] *Rose*, 361 F.3d at 794 ("The State speaks by authorizing the Choose Life plate and creating the message, all to promote the pro-life point of view; the individual speaks by displaying the Choose Life plate on her vehicle.").

[178] *See id.* at 795 ("[T]he Act was adopted because of the State's agreement with the pro-life message. South Carolina has therefore discriminated based on viewpoint.").

[179] *See id.* at 798 ("I conclude that in assessing the Act, a court must focus not only on the character of the speech, but also the nature of the medium.").

[180] *See id.* at 799.

[181] *Id.*

[182] *See generally* Choose Life Ill., Inc. v. White, 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009).

[183] *See id.* at 857.

[184] *See id.*

case using forum analysis.[185] It said that the license plate was a non-public forum, but because the subject of abortion was excluded, from any viewpoint, the discrimination was permissible content discrimination, not viewpoint discrimination.[186] The certiorari denial is the latest in a growing line of cases in which the Court has turned back an attempt to put a "Choose Life" license-plate case on its docket. That is unlikely to last forever. The Court will eventually be forced to see if its newly minted government-speech doctrine is as broad as *Pleasant Grove* suggests, or if it will distinguish between words in stone, words on metal, and words in the air.

It seems beyond comprehension that the government should have the power to endorse private speech about potential legislation by making it government speech and thereby diminish the value in the political dialogue of the contrary private speech. Even worse is the notion that government should be able to endorse private speech about things over which it has no lawmaking power and thereby diminish the value of contrary private speech and ideas. Abortion is the current divisive topic over which government lawmaking competence and incompetence is well established, but controversial. It will not always be so; there will be other controversial topics that are beyond the government's lawmaking competence. There was a time when we thought that the last thing the government could do was influence whether we pray or honor the faith of a majority of our citizens.

V. THE "ELEPHANT IN THE ROOM"

Pleasant Grove, at least in its potential effect, is not really about monuments; it is about religion. The monument, after all, was Judaism's Ten Commandments. Justice Scalia, concurring in *Pleasant Grove*, said: "[I]t is also obvious that from the start, the case has been litigated in the shadow of the First Amendment's *Establishment* Clause."[187] He used his entire concurrence to explain why future government exhibition and use of the Ten Commandments will not violate the Establishment Clause.[188] The great danger from Justice Alito's government-speech doctrine, allowing government to express a private viewpoint without adopting its meaning, is that it will facilitate Justice Scalia's view of the Establishment Clause. He believes that the Establishment Clause does not prohibit "disregard of

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[185] *Id.* at 863–67.

[186] *Id.* at 865.

[187] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1139 (2009) (Scalia, J., concurring).

[188] *See id.* at 1139–40.

polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists,"[189] and that its guarantee of "free exercise" means that there is no problem if the "political process will place at a relative disadvantage those religious practices that are not widely engaged in."[190] Bad news for the one in five of our population that does not believe in any religion[191] and for those religionists who believe their God created humankind with a reasoning capacity so it could take care of itself, allowing the deity to be "unconcerned" about the vagaries of human existence, be they as tragic as plague or as trivial as whether one team or another prevails in a game.

Justice Alito did attempt in his *Pleasant Grove* opinion to assure that the government-speech doctrine is not without some restraints. He pointed to religion: "For example, government speech must comport with the Establishment Clause."[192] But nowhere in his opinion does he explain why endorsing the Ten Commandments would not constitute a religious affirmation by the government and therefore be contrary to the Establishment Clause. Moses, were he with us, would probably be surprised at the notion that the tablets delivered by his God on Mt. Sinai were not quintessentially religious—the cornerstone of his religion.

Justice Scalia, at least since his opinion in *Employment Division v. Smith*,[193] has been trying to establish that the First Amendment is designed to give special consideration to majority religions, short shrift to the religious practices of smaller religions, and no consideration to those who do not want the state to endorse or finance the majority religion.

In *Smith*, he took the Court out of protecting the "free exercise" of minority religious practices by replacing the long-standing strict scrutiny of laws impinging on those practices[194] with minimal scrutiny—the Court's version of a free pass for legislation. His assault on the Court's Establishment Clause jurisprudence began at least as early as his dissent in *Lee v. Weisman*,[195] where he argued that the First Amendment did not exist to protect individual rights, but rather, to protect majority rights.[196] He claimed that prohibition of prayer at a government function (a high school

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[189] McCreary Cnty. v. ACLU, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

[190] Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

[191] BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 3 (2009).

[192] *Pleasant Grove*, 129 S. Ct. at 1132.

[193] Justice Scalia delivered the opinion for the Court in *Smith*. *See Smith*, 494 U.S. at 874.

[194] *See* Sherbert v. Verner, 374 U.S. 398 (1963) (applying strict scrutiny to Free Exercise claim).

[195] Lee v. Weisman, 505 U.S. 577 (1992).

[196] *See id.* at 645–46 (Scalia, J., dissenting).

graduation) violated the Establishment Clause because the purpose of the Clause was to empower groups of religionists:

> Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations."[197]

On the subject of religion, and the Ten Commandments in particular, Justice Scalia has said that the specific exclusion from the country's basic law document, the Constitution, of any reference to God or religion, save the specific admonition that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,"[198] is of little moment.[199] He has not yet attained a majority for his comprehensive reworking of the Establishment and Free Exercise Clauses, though he came close in *McCreary County v. ACLU*.[200]

In *Van Orden v. Perry*,[201] argued at the same time as *McCreary County*, Justice Stevens asserted in dissent that "reliance on early religious statements and proclamations made by the Founders is . . . problematic because those views were not espoused at the Constitutional Convention in 1787 nor enshrined in the Constitution's text."[202] In his *McCreary County* dissent, Justice Scalia claims that Washington's Thanksgiving Proclamation and other similar utterances trump the text of the Constitution and show that the real meaning of the Establishment Clause is not about protecting individuals—or possibly the states against the federal government—but is a positive assertion that the government may (should?) endorse the general belief in God and religion.[203] Faced with the argument that display of the Ten Commandments is an endorsement of a particular religious viewpoint, Justice Scalia, who accepts that the Establishment Clause prohibits government from favoring one religion over another, says that display of the Ten Commandments "cannot be reasonably understood as a government

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[197] *Id.* at 645.

[198] U.S. CONST. art. VI, cl. 3.

[199] *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 885–94 (2005) (Scalia, J., dissenting).

[200] *See id.* at 885 ("Justice Scalia, with whom the Chief Justice and Justice Thomas join, and with whom Justice Kennedy joins as to Parts II and III, dissenting.").

[201] Van Orden v. Perry, 545 U.S. 677 (2005).

[202] *Id.* at 724 (Stevens, J., dissenting) (footnote omitted).

[203] *McCreary County*, 545 U.S. at 887–900 (Scalia, J., dissenting).

endorsement of a particular religious viewpoint."[204] He argues that Judaism's Ten Commandments are part of the country's three most popular religions and that "it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."[205]

The government-speech doctrine provides Justice Scalia with another way to reach the result he could not achieve in *McCreary County*. After observing, in his *Pleasant Grove* concurrence, that the city was concerned that it might be breaching "the so-called 'wall of separation between church and State,'"[206] he concluded: "The city can safely exhale. Its residents and visitors can now return to enjoying Pioneer Park's wishing well, its historic granary—and, yes, even its Ten Commandments monument—without fear that they are complicit in an establishment of religion."[207]

There's the rub. For Justice Scalia, the Ten Commandments have lost their centrality to my father's religion, and, because Christianity adopted them and is the overwhelming majority religion in the United States, the Ten Commandments are now merely part of the history of Pleasant Grove, equal in status with the wishing well and the granary. Roger Williams, who as early as 1644 recognized that the "wall of separation between the garden of the church and the wilderness of the world" was needed to protect religion from being devalued if adopted by the state,[208] must be turning in his grave. The danger for religion is manifest in Justice Scalia's failure to understand that the centerpiece of the Jewish religion is devalued when it is reduced to an article of Pleasant Grove's history or commandeered for the majority religion of the United States. He sees no damage to my father's religion and its meaning to my father by his official devaluation of that centerpiece.

The danger from the *Pleasant Grove* decision is that Justice Scalia's never-accepted view that the Establishment Clause is not a protection of an individual's religious freedom, but rather an enabler for the "desire of a religious majority,"[209] will find new life as "government speech." The

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[204] *Id.* at 894 (Scalia, J., dissenting).

[205] *Id.* at 893.

[206] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1139 (2009) (Scalia, J., concurring) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).

[207] *Id.* at 1140.

[208] *See* James C. Davis, *Introduction* to ON RELIGIOUS LIBERTY: SELECTIONS FROM THE WORKS OF ROGER WILLIAMS 1, 1 (James C. Davis ed., 2008).

[209] Lee v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).

Lord's Prayer, Christ as the savior of the world, and the cross as the universal mark of religious reverence are no different than the Ten Commandments in terms of their place in the history of the United States and in the beliefs of the country's majority religion. Justice Scalia defines that majority religion in *McCreary County* as "Christianity, Judaism and Islam—which combined account for 97.7% of all believers,"[210] but his majority religion is, in fact, Christianity, which makes up 97.7% of his three religion "majority."[211] Judaism and Islam are merely protective cover.

Whatever logic there is in saying that the Ten Commandments belong in Pioneer Park because the government can express a viewpoint without offending the Free Speech Clause will apply equally to a monument containing the Lord's Prayer, a statue of the Christian savior, or a large cross. Lest that seems a stretch, consider Justice Scalia's remarks during the Supreme Court argument in *Salazar v. Buono*:

> JUSTICE SCALIA: The cross doesn't honor non-Christians who fought in the war? Is that—is that—
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> MR. ELIASBERG: I believe that's actually correct.
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> JUSTICE SCALIA: Where does it say that?
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> MR. ELIASBERG: It doesn't say that, but a cross is the predominant symbol of Christianity and it signifies that Jesus is the son of God and died to redeem mankind for our sins, and I believe that's why the Jewish war veterans—
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> JUSTICE SCALIA: It's erected as a war memorial. I assume it is erected in honor of all of the war dead. It's the—the cross is the—is the most common symbol of—of—of the resting place of the dead, and it doesn't seem to me—what would you have them erect? A cross—some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?
>
> MR. ELIASBERG: Well, Justice Scalia, if I may go to your first point. The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.
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> (Laughter.)

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[210] *McCreary Cnty.*, 545 U.S. at 894 (Scalia, J., dissenting).

[211] *See* KOSMIN & KEYSAR, *supra* note 191, at 5.

> MR. ELIASBERG: So it is the most common symbol to honor Christians.
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> JUSTICE SCALIA: I don't think you can leap from that to the conclusion that the only war dead that that cross honors are the Christian war dead. I think that's an outrageous conclusion.
>
> MR. ELIASBERG: Well, my—the point of my—point here is to say that there is a reason the Jewish war veterans came in and said we don't feel honored by this cross. This cross can't honor us because it is a religious symbol of another religion.[212]

It is hard to imagine how, for Justice Scalia, any Christian symbol or prayer is not equal to the Ten Commandments in its position as a representation of the majority religion. As such, those symbols could not, any more than a display of the Ten Commandments, "be reasonably understood as a government endorsement of a particular religious viewpoint."[213]

Allowing the government to promote the Ten Commandments, or any other religious idea, is the quintessential example of promoting speech about something over which the government has no power. Justice Scalia's notion that "there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments"[214] could not gain a majority even in *Van Orden*, where the Court did not require the removal of the Ten Commandments. It might be true, as Justice Douglas said in *Zorach v. Clauson*,[215] that "[w]e are a religious people,"[216] but there are not yet five votes for becoming a religious country.

There is a danger that *Pleasant Grove*'s unleashing of the government's tongue in the public dialogue on matters over which it has no lawmaking power will begin leading us in the direction of being a religious country. Nothing could be more antithetical to the core idea of the First Amendment. It allows the government to boost the private belief and speech of some, and diminish the private belief and speech of those who disagree, about a topic over which the government should have no influence because it has no power.

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[212] Transcript of Oral Argument at 35–36, Salazar v. Buono, 130 S. Ct. 1803 (2010) (No. 08-472).
[213] *McCreary Cnty.*, 545 U.S. at 894 (Scalia, J., dissenting).
[214] Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).
[215] Zorach v. Clauson, 343 U.S. 306 (1952).
[216] *Id.* at 313.

Nothing is more likely to cause unnecessary strife within a society, and cause some to feel that they do not belong, than when that expressed government viewpoint is about religion. Religion is a subject about which the long history of humankind shows mostly war, persecution, and death. Ask the early Christians of Rome; ask the Jews of the Middle Ages; ask the Catholics of the mid-nineteenth century United States; ask any religious minority located where the government can express a viewpoint about religion—even if characterized as part and parcel of the nation's history and culture. Ask the Pilgrims and the Puritans. Ask any minority sect in the Middle East.

There was a time when we thought that the last thing the government could do was influence whether we pray or honor the faith of a majority of our citizens.

VI. CONCLUSION

What separates *Pleasant Grove*'s government-speech doctrine from any case cited in its support—and what makes it particularly dangerous—is that it allows the government to express a viewpoint about matters that are unrelated to its lawmaking power. The "individual self-fulfillment" theory of free speech as articulated by Professor Emerson carries an important implication about the difference between action and speech, explaining why a government-speech doctrine that allows the government to express a viewpoint beyond its power to make law is foreign to any First Amendment value:

> [T]he theory rests upon a fundamental distinction between belief, opinion and communication of ideas on the one hand, and different forms of conduct on the other. For shorthand purposes we refer to this distinction . . . as one between "expression" and "action." . . . [I]n order to achieve its desired goals, a society or the state is entitled to exercise control over action—whether by prohibiting or compelling it—on an entirely different and vastly more extensive basis. But expression occupies a specially protected position. In this sector of human conduct, the social right of suppression or compulsion is at its lowest point, in most respects non-existent.[217]

In accord with the notion that action and speech are separate spheres, it seemed axiomatic from the text of the Constitution and from all of the Supreme Court's jurisprudence before *Pleasant Grove* that the government's

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[217] Emerson, *supra* note 95, at 880–81.

role in society is to make law. Even *Johanns*, which on its face seemed to be a gratuitous government promotion of private speech, was related to the government's ability to legislate in favor of beef consumption as a part of a government program permitted under the Commerce Clause. Indeed, Justice Ginsburg's concurrence, which saw no government-speech rationale, was based on her belief "that the assessments in these cases, as in *United States v. United Foods, Inc.* . . . qualify as permissible economic regulation."[218]

It should have been equally axiomatic, at least before *Pleasant Grove*, that if the government had no power to make law on a subject, it had no power to convey a message on the subject. It is important to distinguish between speech by the entity of government and those who are in or aspire to be a part of the government. No government-speech doctrine is needed to enable government officials to speak their minds on any issue, so long as they are speaking in their individual capacities as office holders, politicians, or citizens. The Free Speech Clause protects that speech.

The government-speech doctrine of *Pleasant Grove* applies to government as government. Consider two obvious examples. The government cannot have either a program or a policy against a woman's right to choose termination of pregnancy during the first trimester. Similarly, it cannot have a program or policy that schools should be segregated based on race. It boggles the mind to think that a "government speech" doctrine would allow the government to pay for an advertisement that said: "Abortion, no matter when, is murder;" or one that said: "Move to a school district with no minority families so that your children may attend an all-white school!" Any office holder, politician, or political party for that matter, as individuals or as a group of individuals, could say such things if so inclined, and that right would be protected by the First Amendment.

At least for now, the government cannot subsidize the celebration of the birth of Christ without the proper portions of plastic reindeer and fat elves in red suits.[219] And before *Pleasant Grove*, it would have been obvious that the government could not pay for an advertisement that said "Celebrate Christmas with your family!" After *Pleasant Grove* gave the government the power to offer a viewpoint in an area in which it had no power to make law, it is not so obvious.

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[218] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 570 (2005) (Ginsburg, J., concurring) (citations omitted).

[219] *See generally* Lynch v. Donnelly, 465 U.S. 668 (1984).

Pleasant Grove's characterization of the Ten Commandments as non-religious when displayed next to a wishing well and a granary is no different from the *Lynch v. Donnelly* decision that the crèche was non-religious when displayed next to a plastic reindeer and a Santa Claus.[220] It is hard to imagine how the government speech in an advertisement that said "Celebrate Christmas with your family" would be any more religious than the non-religious reindeer and Santa Claus guarded crèche. The *Pleasant Grove* opinion attempts to persuade that the government-speech doctrine that permits the Ten Commandments monument in Pioneer Park is justified by a Free Speech distinction between words on stone and words in the air,[221] but there is nothing in the explanation of the government-speech doctrine that limits the government's thoughts and words to those written in stone. And if that is the distinction, does that mean that Pleasant Grove could put a permanent reindeer-crèche-Santa Claus stone monument in Pioneer Park?

The government-speech doctrine is counterfeit. Government needs no government-speech doctrine to speak in support of its laws and policies. Government has the power of conduct in making, interpreting, and facilitating its laws. Government speech in support of its conduct may be considered part of that government conduct in the same way that, for First Amendment purposes, an individual's expressive conduct can be considered part of that individual's protected speech. If government wants to promote tourism or its products, discourage the health hazard of cigarette smoking, or urge its form of government on the rest of the world, it is clearly within its various constitutional powers and obligations. If the government speech is an adjunct to its power of conduct, the constitutionality of that speech should be tested in the same way that the constitutionality of the government conduct would be tested. If the government speech is not in pursuit of something over which it has the power of conduct, the government has no power of speech. Government needs no special doctrine to memorialize its victories, its defeats, or its heroes in order to erect monuments to them on its own property.

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[220] *See id.* at 671, 687.

[221] *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1137 (2009) ("Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But 'public forum principles . . . are out of place in the context of this case.'" (quoting United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 205 (2003)) (alteration in original)).