

WERE YOU TALKING TO ME?
AN ANALYSIS OF THE GOVERNMENT SPEECH DOCTRINE
IN THE CONTEXT OF *PLEASANT GROVE CITY, UTAH V. SUMMUM*

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I. Introduction

First Amendment jurisprudence has no one single analysis that applies to every situation. In fact, sometimes an analysis under one doctrine leads to the application of another, and satisfaction of one test is not enough to justify a governmental restriction on speech. One doctrine, however, stops all further First Amendment free-speech analysis as soon as it is satisfied: the Government Speech Doctrine.

The rationale behind the government speech doctrine is that when the government itself speaks, it—like any other speaker—does not have to give equal microphone time to the other side. As such, the doctrine allows the government to discriminate on the basis of both content and viewpoint—normally suspect actions—with impunity. The danger of the government speech doctrine, however, is that the First Amendment is designed to stimulate both self-governance and a free flowing “marketplace” of ideas by limiting excessive governmental interference. In general, therefore, the analysis of burdens on speech balances the weight of those burdens with the governmental interests they purport to further.

When the government speaks, the interests it furthers are typically legitimate governmental goals, but the absolute protection of this speech raises the concern that the effect will be precisely what the First Amendment forbids—abridgement of the freedom of speech of individuals by using the considerable resources, presence, and power of the government to drown out any private speaker’s counterspeech. Therefore, use of the government speech doctrine ought to be rare and to require certain thresholds of proof to ensure that the government

is truly advancing a legitimate message, rather than hiding behind the doctrine as a means of suppressing speech.

In the case of *Pleasant Grove v. Summum*,¹ the Supreme Court expanded the government speech doctrine by making it easier for the state to claim government speech. It did this despite the fact that forum doctrine offers both an adequate method of protecting the governmental interests with which the Court was concerned and a means of protecting the free speech rights of private citizens at the same time.

This article will look at both the government speech doctrine and public forum doctrine to show how the latter could have been more effectively applied in *Summum* to set a better precedent for future free speech cases. Section II will describe the factual situation involved in *Summum*. Section III will analyze the government speech doctrine, particularly in the area of “funding” cases, as they are the most analogous to the facts of *Summum*. Section IV will discuss the Supreme Court’s application of that doctrine in *Summum* and show how the Court’s analysis lowered the threshold to ultimately make it too easy for governments to claim government speech protections. Section V will discuss forum doctrine, including the Court’s analysis in *Summum* and an alternative, more appropriate, application of this doctrine to *Summum*’s facts.

II. *Pleasant Grove v. Summum*: The Facts

Pioneer Park, in Pleasant Grove, Utah, contains a collection of monuments and structures erected at various times by a number of private organizations. The conflict in *Pleasant Grove City, Utah v. Summum* revolved around a request by Summum, a relatively young religion, to

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

place a monument in the park.² The city refused to allow the monument's erection. The case was eventually argued on two grounds, both of which require a fact-specific analysis: the government speech doctrine and the forum doctrine. Appropriate analysis under either doctrine requires a solid understanding of the factual underpinnings of the case in three areas: (1) the characteristics of the park itself; (2) the city's criteria and process for accepting monuments to be placed in the park; and (3) the history of Summum's request.

A. *Pioneer Park*

Pioneer Park was established in 1946.³ The first permanent structures, donated when the park was established, were a log cabin from 1930 and a wishing well from the Lions Club, representing what would be on a historical homestead.⁴ Other monuments include a variety of preserved original structures related to Pleasant Grove's pioneer history.⁵

The park holds more than just historical structures, however. It also houses a variety of monuments and other structures from private donors.⁶ Finally, the park contains a stone

² *Id.*, at 1129-30 (indicating Summum was founded in 1975).

³ Joint Appendix, *Pleasant Grove City, Utah v. Summum*, 2008 WL 2415597, at 99, 101.

⁴ J.A. at 101.

⁵ J.A. at 99-102. Specific structures include: Old Bell School (the oldest known school building still standing in Utah, built in the mid-to-late-1800s; owned by the Daughters of Utah Pioneers, who house a historical museum within); First City Hall (built in 1886); First Fire Station (built in 1912); First Log Cabin of the area (donated in September 2005, date of construction not indicated in the record); First Pioneer Flour Mill (donated in 1967); Winter Sheep Corral (rock structure rebuilt in the park in 1999 by the Pleasant Grove Historic Preservation working with Pleasant Gove Youth City Council and Youth City Court); Granary (built in 1874, moved to park in 1993).

⁶ J.A. at 100-102. Examples include some without any apparent message: park benches donated by the Pleasant Grove Garden Club, the Rocky Mountain Apple Tree donated by the Pleasant Grove Youth City Court/Council and 4-H, and the Nauvoo Temple Stone brought back from the Mormon Temple in Illinois by an ex-police officer and city council member. Others were donated by private groups to honor prominent citizens: a Gingko tree and plaque donated in honor of the City Parks and Recreation Director's twenty years of service; and roses donated in memory of long-time organizers of the garden club. Finally, there is a September 11 monument, donated by an Eagle

monument containing the text of the Ten Commandments and various other symbols, donated by the Utah State Aerie of the Fraternal Order of Eagles (“Eagles”) in 1971 as part of its initiative to promote moral values in youths.⁷

B. *Pleasant Grove’s Criteria and Acceptance Process*

1. *Pleasant Grove’s criteria for submissions to the park*

Before August 2004, Pleasant Grove had no written policy regarding structures in Pioneer Park.⁸ At a meeting held on August 19, the city council adopted Resolution No. 2004-019, titled “A Policy Governing Placement of Plaques, Structures, Displays, Permanent Signs and Monuments in City Parks and on Public Property.”⁹ Prior to this resolution, the city claims to have used “decades-old criteria for accepting and displaying such donations.”¹⁰

The two unwritten criteria supposedly in use before August 2004 were that the donations have historical relevance to the Pleasant Grove community or be donated by individuals or organizations with well-established, or long-standing, connections to Pleasant Grove.¹¹ There were no clear definitions, however, as to what constituted “historical relevance” or “long standing ties.”¹² Further, the criteria were not uniformly understood among city officials, as evidenced by the deposition testimony of Jim Danklef, mayor of Pleasant Grove, which (a) only referenced the requirement of historical relevance, (b) defined “historical relevance” as

Scout with the support of Pleasant Grove fire fighters and local businesses, recognizing “our” Police Officers, Fire Fighters, Emergency Medical Personnel and the members of the Armed Forces.

⁷ J.A. at 101.

⁸ J.A. at 104, 131, 193-94.

⁹ J.A. at 104.

¹⁰ J.A. at 103-04 (deposition of Frank Mills, City Administrator).

¹¹ J.A. at 102 (deposition of Frank Mills, City Administrator).

¹² J.A. at 131 (deposition of Jim Danklef, Mayor), 193-94 (deposition of Frank Mills, City Administrator).

specifically tied to the city's pioneer heritage, and (c) claimed that even people with long-standing ties would need to be donating items relevant to that pioneer heritage.¹³ He also stated that something would need to be over 50 years old to be considered historical, a measuring standard not apparent in communications from other city officials.¹⁴ Those other officials also described other criteria such as aesthetics and safety concerns.¹⁵

City officials also showed confusion as to which justifications were used to allow items previously donated to be erected in the park. Perhaps the best example of this inconsistency is the monument erected by an Eagle Scout which references 9/11 and emergency services personnel. Frank Mills, the city administrator, once said that it was accepted because of the donor's ties to the city,¹⁶ but elsewhere indicated it had historical significance because Pleasant Grove has a local volunteer fire department.¹⁷ Mayor Danklef, by contrast, testified that the monument was accepted because "we have police and fire people in our community" and it had a historical connection to the city because the park contains the first fire station—this despite his earlier statement that historical donations needed to be at least 50 years old.¹⁸

2. Pleasant Grove's process for considering proposed submissions to the park

City officials agreed that by 2003, the year in which Summum first applied to place a monument in the park, the process for donation started with the Historical Society, a private

¹³ J.A. at 132, 152 (deposition of Jim Danklef, Mayor).

¹⁴ J.A. at 136 (deposition of Jim Danklef, Mayor).

¹⁵ J.A. at 181 (deposition of Frank Mills, City Administrator).

¹⁶ J.A. at 100.

¹⁷ J.A. at 196. Note that this would not meet the Mayor's expressed requirement of historical relating to the city's *pioneer* heritage.

¹⁸ J.A. at 140.

organization.¹⁹ The Historical Society would present pieces it thought appropriate for inclusion in the park to the director of Leisure Services, who would then bring it to the city council for a final decision.²⁰ There again, however, discrepancies in understanding of the policy are apparent: Mr. Mills said in his deposition that the city council “always had the final say,”²¹ while Mayor Danklef said in his deposition that not every decision went through the city council.²² In fact, Mayor Danklef indicated that at least one decision was made exclusively by the director of the Leisure Services Department.²³

3. The Eagles’ Ten Commandments Monument

The Eagles’ Ten Commandments monument is especially significant because Sumnum’s proposed monument mirrors it. Mr. Mills indicated that the Eagles’ service in the 30-plus years “it has been a . . . part of the Pleasant Grove community” justified the monument’s inclusion as donated by an organization with “long-standing ties” to the community.²⁴ However, he also stated that the monument was donated in 1971—a mere 2 years after he said the Eagles had moved to Pleasant Grove.²⁵ He stated that the Ten Commandments content represented laws that “all of us ought to try to live by” but that the donation did not relate to the history of Pleasant Grove, to the pioneers, to the founding of Utah or of Pleasant Grove.²⁶ In contrast, Mayor

¹⁹ J.A. at 136, 139, 179.

²⁰ J.A. at 179.

²¹ J.A. at 180.

²² J.A. at 148.

²³ J.A. 140-141.

²⁴ J.A. at 103.

²⁵ J.A. at 103.

²⁶ J.A. at 186, 188-90.

Danklef stated that the monument was accepted, at least in part, because of the ties between the Ten Commandments and the Mormon heritage of the founders of Pleasant Grove.²⁷

C. *Summum's Request*

Summum is a religious organization founded in Salt Lake City in 1975, with followers in areas including Utah County, Utah, which contains Pleasant Grove.²⁸ It teaches ancient principles of creation that it claims are “the basic underlying foundation of all existence.”²⁹ In particular, Summum teaches that many religious theories today share certain common themes summed up in its Seven Aphorisms, which will allow the student to find enlightenment.³⁰

In September 2003, Summum Bonum Amon Ra, then spiritual leader of Summum, sent a letter to the mayor of Pleasant Grove in which he requested to put up a monument in Pioneer Park.³¹ He referred to the Eagles' monument depicting the Ten Commandments and stated that his group's proposed monument would be “complementary in content and appearance” and display Summum's Seven Aphorisms.³² After receiving no response from the city, Mr. Ra sent a second request on September 17, 2003.³³

The city responded in November 2003—before the official adoption of the resolution stating criteria for monuments—with a refusal, stating that all the structures in the park either “(1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with long-

²⁷ J.A. at 146. Note, however, that the translation of the 10 commandments was not the one used by the Mormon church.

²⁸ J.A. at 49, 57.

²⁹ Corky Ra, Sealed Except to the Open Mind (ebook), Introduction, <http://www.summum.us/philosophy/ebook/ebook.htm> (last accessed April 22, 2010).

³⁰ *Id.* at Chapter 1.

³¹ J.A. at 57 (September 5th letter to Danklef, Mayor of Pleasant Grove).

³² J.A. at 57 (September 5th letter to Danklef, Mayor of Pleasant Grove).

³³ J.A. at 59 (September 17th letter to Danklef, Mayor of Pleasant Grove).

standing ties to the Pleasant Grove community.”^{34,35} The city further indicated that Summum met neither criterion.³⁶

After Summum’s request, in 2004, the city adopted its resolution articulating the criteria for monument erection in the park.³⁷ In May of 2006, Summum renewed its request.³⁸ It received no response, which it took as a refusal.³⁹

Other than Summum’s requests, the record contained no evidence of refusals either prior to the 2004 resolution or after its enactment.⁴⁰ Additionally, the only request after its enactment, other than Summum’s, was accepted.⁴¹

III. Government Speech

The Supreme Court has not articulated a specific “test” for whether something is government speech, but analysis under this doctrine commonly focuses on three prongs: (1) message (which can also be stated as intent), (2) control, and (3) transparency.⁴² When the government expends its own, scarce, resources to further a message it wishes to express,

³⁴ J.A. at 61 (November 19^h letter to Ra, president of Summum).

³⁵ *Note*: Summum may never have actually received the letter, as indicated on page 53 of the Joint Appendix. However, this factual dispute makes no pertinent impact on the analysis.

³⁶ J.A. at 61 (November 19^h letter to Ra, president of Summum).

³⁷ J.A. at 104.

³⁸ J.A. at 53, 63.

³⁹ J.A. at 53.

⁴⁰ J.A. at 149, 202.

⁴¹ J.A. at 149, 202. The request was made in 2005 to donate the first log cabin built by original settlers of the community. *Id.*

⁴² By “transparency,” I refer to the concept that it be clearly apparent that the government is the one speaking, which is necessary for political accountability. *See, e.g.,* Gia A. Lee, *Persuasion, Transparency, and Government Speech*, 56 *Hastings L.J.* 983, 989 (2005) (explaining “the legitimacy of [government] communications [in public debate] depends on the public’s ability to identify what the government says and how it does so” in order to uphold “the constitutional commitment to political accountability”).

government speech doctrine applies.⁴³ When it merely grants access, by private citizens, to that resource, however, the analysis shifts away from government speech and into the forum doctrine (discussed in more detail, *infra*, Section V).⁴⁴ The Court developed this analysis in three main cases prior to *Summum*: *Rust v. Sullivan*,⁴⁵ *Rosenberger v. Rectors and Visitors of the University of Virginia*,⁴⁶ and *Johanns v. Livestock Marketing Association*.⁴⁷

The Court's precedent in funding cases sheds the most light on the analysis in *Summum*, although *Summum* does not concern traditional funding in the form of money. Like funding cases, *Summum* deals with government allocation of a scarce resource: allocation of public property on which to display monuments.

A. *The Origin of Government Speech: Rust v. Sullivan*

In 1991, the Court first recognized the concept of "government speech," without officially calling it that, in the case of *Rust v. Sullivan*.⁴⁸ In addition to not articulating a name for its new doctrine, the Court did not specifically articulate the three prongs of message, control, and appearance, but all three were met under the facts presented.⁴⁹

Rust involved the validity of a federally funded family-planning program.⁵⁰ Certain provisions of the funding regulations stated that recipients of federal funding were prohibited from "counseling, referr[ing] . . . [or providing] information regarding abortion as a method of

⁴³ *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

⁴⁴ *Rosenberger v. Rectors & Visitors of the Univ. of VA*, 515 U.S. 819, 834 (1995).

⁴⁵ 500 U.S. 173 (1991).

⁴⁶ 515 U.S. 819 (1995).

⁴⁷ 544 U.S. 550 (2005).

⁴⁸ 500 U.S. 173 (1991).

⁴⁹ *See generally id.*

⁵⁰ *Id.* at 193.

family planning.”⁵¹ The regulations were challenged on the basis of viewpoint discrimination, charging that the requirements established to receive funding had the effect of the government “suppressing” an idea.⁵²

In its opinion, the Court focused primarily on the concept of the “message,” although without using the express term. It stated that this was “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.”⁵³ Within the paradigm of a government-directed project, the Court focused on the concept of funding. It acknowledged that the government can “choose[] to fund a program dedicated to advance certain permissible goals.”⁵⁴ This “choice” in *Rust* fulfilled the message element in that the “goal” it sought to advance was also the message it sought to convey. Similarly, the prerequisite conditions to receive funding represented the government’s control over the message.

The Court refused to find viewpoint discrimination in the regulatory scheme for the program, stating that once the government has chosen to fund such a program, “[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint . . . because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.”⁵⁵ This represents the fundamental underpinning

⁵¹ *Id.*

⁵² *Id.* at 194.

⁵³ *Id.*

⁵⁴ *Id.* Under the doctrine of *parens patriae*, promoting the safety of children is a legitimate state goal. *See, e.g., Prince v. Massachusetts*, 321 U.S. 804 (1944).

⁵⁵ *Rust*, 500 U.S. at 194.

of the government speech doctrine: when the government advances specific messages of its own, it cannot be required to equally subsidize all alternative points of view on the matter.

The important factor from *Rust* is that the Government had made an affirmative choice to fund a specific message and it had done so before it began disseminating the message. In choosing to fund the program, the government had thus chosen to further certain ideas, principles, and goals—in other words, its message. That choice is a conscious one, made by representatives in the government through deliberate, intentional actions. Those actions, resulting in funding or denying funds to a program, are indivisible from the stated goals of the program – or, in other words, from the “viewpoint” the government has chosen to promote. All together, this represents both the message of the government’s speech as well as the control the government exhibited over the message it wished to convey.

The scheme in *Rust* does lack a certain amount of transparency, because the ultimate recipient of the message—the patients seeking family planning advice—would not necessarily know that the government had even made funds available, let alone placed conditions on the receipt of those funds.⁵⁶ However, the actual recipients of the funds, the medical personnel, did know that the government sought to further a specific goal through these conditions, and accepted their role as megaphone for the message when they accepted the funds.⁵⁷ As such, there was knowledge that the government was “speaking” and the message was “visible” at a number of levels (and accessible to the ultimate audience with minimal research). It therefore met the transparency prong for deciding whether speech originates with the government.

⁵⁶ *See id.* at 178-181 .

⁵⁷ *Id.*

B. *Rosenberger*

Four years after *Rust*, the Court again looked at governmental funding in the case of *Rosenberger v. Rectors & Visitors of the University of Virginia*, though differences in the factual situation required a different result.⁵⁸ The Court explicitly acknowledged that, as a general principle, “when the State is the speaker, it may make content-based choices.”⁵⁹ With regard to expending scarce resources, specifically money in both *Rust* and *Rosenberger*, a certain amount of government discretion is necessary. However, the funds at issue in *Rosenberger* differed significantly from those in *Rust*, which made all the difference in informing how much discretion the government retained.

The funds in *Rust* went to a program which was created by the government and which used private speakers (fund recipients) to “transmit certain information pertaining to [the government’s] own program.”⁶⁰ As a result, the government had near-total discretion in determining where to expend the resources, limited only by other, non-free-speech, concerns circumscribing permissible government spending.⁶¹

The funds in *Rosenberger*, by contrast, came from fees paid by students to fund the Student Activities Fund, which in turn was used to fund student groups at the school.⁶² In that case, the University was not speaking for itself, nor was it “subsidiz[ing] transmittal of a message it favors.”⁶³ Rather, it was disbursing funds to all manner of student groups, “to

⁵⁸ *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995).

⁵⁹ *Id.* at 833.

⁶⁰ *Id.*

⁶¹ For example, the government would still be restricted by other constitutional limits on its power, such as the Commerce Clause, the Establishment Clause, etc.

⁶² *Rosenberger*, 515 U.S. at 824.

⁶³ *Id.* at 834.

encourage a diversity of views from private speakers.”⁶⁴ The University’s expenditure of funds to facilitate private expression took it out of the realm of government speech. The government had no message of its own to convey, nor any control over the messages expressed by the individual student groups.⁶⁵

Because the University was supporting private speakers with the purpose of facilitating those speakers’ expression of their individual messages, the University remained bound by First Amendment principles forbidding it to advance one viewpoint, or one subject matter, over any other.⁶⁶ The Court emphasized that “[a] holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University’s own speech,” because the University’s speech, as government speech, “is controlled by different principles.”⁶⁷

C. *Johanns*

The question in *Johanns v. Livestock Marketing Association*, in 2005, again centered on funding—specifically, the source of funds the government uses to create a program geared toward advancing a particular goal or message.⁶⁸ The Court held that the government may solicit assistance from nongovernmental sources to supplement its own resources and then use both sources of funding to advance its message.⁶⁹

⁶⁴ *Id.*

⁶⁵ *Id.* at 835.

⁶⁶ *Id.* at 834-5. Note: The Court also analogized this facilitation of individual messages as a type of metaphysical forum, *id.* at 830, which required the application of forum analysis, to be discussed further below.

⁶⁷ *Id.* at 834.

⁶⁸ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

⁶⁹ *Id.* at 562.

The case dealt in pertinent part with a campaign primarily identified with the slogan “Beef. It’s What’s for Dinner.”⁷⁰ The issue with the funding scheme was that it went beyond mere solicitation to include compelled contributions because it was funded by a fee imposed on all cattle sales and importations.⁷¹

The Court distinguished compelled “speech” from “subsidies,” and further distinguished compelled support of private organizations from support of the government itself.⁷² Compelled speech exists where a private citizen “is obliged personally to express a message he disagrees with, imposed by the government.”⁷³ Compelled support of private entities is most frequently seen in cases where teacher union dues or attorney bar dues are being used to advance political messages with which individual members disagree.⁷⁴

By contrast, “[c]ompelled support of government’—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest.”⁷⁵ As a general rule, the government may use taxes “or other exactions” to support its programs and

⁷⁰ *Id.* at 554. *See also* The Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901-04 (establishing a federal policy to promote marketing and consumption of beef and directing the Secretary of Agriculture to implement this policy through, in part, imposing an assessment on cattle and beef product sales and funding promotional campaigns).

⁷¹ *Id.*

⁷² *Id.* at 557, 559.

⁷³ *Id.* at 557 (citing *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (schools cannot force students to recite the Pledge of Allegiance); and *Wooley v. Maynard*, 430 U.S. 705 (1977) (state could not force vehicle owners to broadcast state motto, “Live Free or Die,” on their private property through its inclusion on their license plates)).

⁷⁴ *Id.* 557-8 (citing *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); and *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) (both holding that using compelled dues to fund speech not germane to the regulatory interests that justified the compelled membership violated the First Amendment rights of the dissenting members)).

⁷⁵ *Id.* at 559.

policies and, by extension, to support its ability to use expression to both advance and defend its policies.⁷⁶

There was little question in *Johanns* that the government had a message it intended to convey—the Act stated several findings regarding the role of beef and beef products in both diet and the marketplace,⁷⁷ and then specifically declared a congressional policy, in the public interest, to implement a “program of promotion and research designed to strengthen the beef industry’s position in the marketplace.”⁷⁸ Rather, the challenge rested primarily on the element of control: whether the design of the particular promotional materials by a nongovernmental entity, the Beef Board’s Operating Committee,⁷⁹ constituted an abdication of control over the message by the government.⁸⁰ If the government does not control its message, it may not be considered to be speaking, which defeats the government speech doctrine.

The Court held that the “message set out in the beef promotions is from beginning to end the message established by the Federal Government.”⁸¹ The particular statutory scheme that required the implementation of the beef promotion program also set out specific terms as to how to do so—terms which included the creation of the Cattlemen’s Beef Promotion and Research Board, the creation of the Operating Committee, and general terms of what the promotional

⁷⁶ *Id.* (citing Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 229 (2000)).

⁷⁷ 7 U.S.C. § 2901(a).

⁷⁸ 7 U.S.C. § 2901 (b).

⁷⁹ Only half of whom were explicitly appointed by the Secretary of Agriculture, but all of whom were “subject to *removal* by the Secretary.” *Johanns*, 544 U.S. at 560 (emphasis in original) (citing 7 C.F.R. § 1260.213 (2004)).

⁸⁰ *Johanns*, 544 U.S. at 560.

⁸¹ *Id.* at 560.

campaign should and should not include.⁸² Despite the role of the board, the Secretary of Agriculture maintained control over all components of the campaign, through approving projects (including promotions and research) and approving the content of each communication.⁸³

The primary disagreement between the majority and the dissent was with the prong of speaker—or government—transparency.⁸⁴ A primary justification allowing compelled funding of government speech is that “government speech is subject to democratic accountability.”⁸⁵ Those challenging the campaign argued that if speech is “attributed to someone other than the government,” in particular to themselves, it cannot qualify as government speech.⁸⁶ The majority dismissed that contention by focusing on the aspect of the attribution being made to the beef producers and stating that the issue there would be compelled speech, rather than the subsidy which was the heart of the case at bar.⁸⁷

In his dissent, however, Justice Souter noted that even more important than the question of whether the speech would be attributed to the private citizens was the question of whether the speech would be attributed to the government itself.⁸⁸ “When the government speaks . . . it is, in the end, accountable to the electorate and the political process for its advocacy.”⁸⁹ For effective political accountability, however, it must be clear to the listener who it is that is actually

⁸² *Id.* at 561.

⁸³ *Id.* at 554.

⁸⁴ *Id.* at 563; *id.* at 577 (Souter, J., dissenting).

⁸⁵ *Johanns*, 544 U.S. at 563.

⁸⁶ *Id.* at 564.

⁸⁷ *Id.* at 564-5.

⁸⁸ *Id.* at 571 (Souter, J., dissenting).

⁸⁹ *Id.* at 577 (Souter, J., dissenting) (quoting *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 235 (2000)).

speaking.⁹⁰ In Justice Souter’s opinion, the ads involved in the beef campaign not only showed no sign of being “spoken” by the government, but the government also effectively masked its role in producing the advertisements in labeling them with the tagline “funded by America’s Beef Producers.”⁹¹ While technically true, the statement almost completely disclaims the federal government’s role in the production of the speech, which would defeat the transparency prong of the doctrine.

IV. Government Speech in *Summum*

The Supreme Court in *Summum* held that, as a general matter, the installation of permanent monuments on public property categorically constitutes government speech.⁹² The Court ignored the nuances of the factual situation in the city of Pleasant Grove, choosing instead to focus on a generic parade of horrors that it viewed as the logical consequence of holding permanent monuments not to be government speech.⁹³ This represents a dangerous broadening of the government speech doctrine, and while even if the ruling may provide appropriate general guidance for future cities, the Court should not have reached the result it did based on the specific facts in *Summum*.

The Court’s ruling begins with government speech analysis, starting with the assumption that “governments have long used monuments to speak to the public.”⁹⁴ The Court added that,

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1138 (2009).

⁹³ *Id.* at 1137-8.

⁹⁴ *Id.* at 1132.

“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.”⁹⁵

Both of these statements presuppose that the city of Pleasant Grove, like the government entities in *Rust* and *Johanns*, had a message it wanted to promulgate. While this might be true of other cities and other permanent structures or monuments, it fails to accurately describe the state of affairs in Pleasant Grove. Namely, it accepts as a fact that the city had a message it wished to convey through the structures in Pioneer Heritage Park. As evidenced by the list of structures in the park, *supra* notes 5 and 6, this assumes a great deal of the city’s intention that is not supported by the record in the case. If the city had truly intended to depict the setting of “a homestead in Pleasant Grove,”⁹⁶ the 9/11 monument and the plaque in honor of service in the undoubtedly modern role of “City Parks and Recreation Director” clearly undermine that message. Furthermore, because the city accepted—but never solicited—proposals for monuments, it is difficult, if not inappropriate, to view Pleasant Grove as “a government entity arrang[ing] for the construction of a monument.”⁹⁷

The Court went on to discuss the funding aspect of permanent monuments in general, noting that “privately financed and donated monuments that the government accepts and displays to the public on government land” similarly “speak for the government.”⁹⁸ Again, this assumes that the government had something it wished to say through these structures *before they were erected*. Unlike *Rust*, where the government had a specific message regarding family planning, or *Johanns*, where the government wished to improve the cattle industry through promoting beef

⁹⁵ *Id.* at 1133.

⁹⁶ J.A. at 177 (deposition of Frank Mills, City Administrator).

⁹⁷ *Summum*, 129 S. Ct. at 1133.

⁹⁸ *Id.*

consumption, the city of Pleasant Grove conveys no cohesive theme or message through the structures in Pioneer Park. Rather, there is simply a hodge-podge of at least 16 separate structures—some full size buildings—crammed haphazardly into 2.5 acre park.

Further, in both *Rust* and *Johanns* explicit, detailed statutes were in place articulating both the goal (“message”) and the procedural steps to take to achieve the stated purpose before any steps were taken by the government to promulgate that message by those means.⁹⁹ In *Johanns* in particular, those detailed parameters served to indicate sufficient control on the government’s part to maintain ownership of the message despite delegation of certain portions of development.¹⁰⁰

That analogy carries over to the park monument context—as the Court noted, government entities exercise selectivity in accepting donated monuments through “editorial control . . . prior submission requirements, written criteria, and legislative approvals of specific content proposals.”¹⁰¹ As far back as 1876, after controversy when New York City turned down a monument donated to honor Daniel Webster, cities have “adopted rules governing the acceptance of artwork for permanent placement in city parks.”¹⁰²

While countless cities may have set up procedural structures to govern acceptance of permanent structures to be displayed on public property, the fact remains that Pleasant Grove had not done so when Summum attempted to donate its monument.¹⁰³ In fact, the city only adopted

⁹⁹ *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553-4 (2005).

¹⁰⁰ *Johanns*, 544 U.S. at 554.

¹⁰¹ *Summum*, 129 S. Ct. at 1133.

¹⁰² *Id.*

¹⁰³ *J.A.* at 104, 131, 193-94.

such procedures in 2004—nearly 60 years after the park was created and, notably, after the first request in those six decades that the city desired to refuse.¹⁰⁴ At that point, the city council apparently traced backward through the items in the park to find a common thread that could *post-hoc* justify all existing structures while still excluding Summum’s proposed monument. As that was not possible, the city found two separate threads: one justifying donations based on speaker identity and the other based on subject matter.¹⁰⁵ However, these two threads do not combine to convey one message; rather, multiple messages are conveyed by subsets of the donations displayed, and some of the subsets overlap. This elicits the question of whether the monuments in the “overlapping” subset can be said to belong to any one particular message. Further, the speaker-identity criterion seems to undercut the city’s claim that it had any sort of message to convey, as donations from long-standing members of the community have absolutely no restraints on subject-matter.¹⁰⁶ With literally any topic allowed so long as the city found the speaker acceptable, there is no way that the continued “message” the park would convey in the future could maintain any level of coherency—and indeed, between monuments to firefighters in 9/11, wishing wells, and ginkgo trees planted to honor park directors, the message conveyed on the date the city turned down Summum’s proposal was hardly coherent.¹⁰⁷

The foregoing demonstrates precisely why the government speech doctrine is so inapposite to the facts of *Summum*: government speech requires a coherent, consistent message—particularly in light of the political accountability justification for the government speech doctrine itself. How can a constituency hold its representatives accountable for what

¹⁰⁴ J.A. at 104, 149, 202.

¹⁰⁵ J.A. at 61.

¹⁰⁶ J.A. at 61.

¹⁰⁷ See *supra* notes 5 and 6.

those representatives say on their behalf if nobody has any idea what is being said, or by whom, or even whether anything is being said at all? Similarly, a message requires an intent to express it; without intent, any communication that occurs is mere happenstance. Pleasant Grove met neither of these factors as it filled Pioneer Park with an accretion of tributes to nothing and anything, so long as it liked their donors.

Political accountability is also served by requiring a government claiming to qualify its actions as government speech to demonstrate clear lines of control: who may make decisions as to what is accepted for display and on what criteria. This allows constituents to hold responsible the appropriate representatives, should they disagree with the message. If the problem is with the criteria, they can vote out those who put the criteria in place. If, by contrast, the problem is with the interpretation of the criteria by a specific official charged with implementation, the blame can appropriately be placed with that particular official. In Pleasant Grove's case, the lack of written criteria for nearly 60 years, as well as an inconsistent understanding of whom to approach when submitting new monuments to the park, meant that officials could easily escape political accountability because nobody would know whom to blame.

The Court, however, appeared to ignore the particular factual situation in Pleasant Grove when reaching its decision, instead relying on general assumptions of what "cities" do.¹⁰⁸ This allowed it to focus on what it saw to be the larger issue: a parade of horrors as to what would happen if governmental bodies were not given exclusive control over monuments as government

¹⁰⁸ *Summum*, 129 S. Ct. at 1133.

speech. It listed examples such as acceptance of the Statue of Liberty requiring the United States to similarly accept a “Statue of Autocracy” from Imperial Russia.¹⁰⁹

However, these “horribles” are unlikely to occur—at least in any great number—for three main reasons: (1) most cities *do* have the procedural structures in place that the Court referenced, and thus could qualify to use the protection of government speech when accepting or denying monuments; (2) as will be discussed below, forum doctrine could still have been used to keep the Summum monument out of Pioneer Park; and (3) even if forum doctrine did not serve to keep Summum’s monument out, allowing it in would serve as a warning to municipalities throughout the country that they need to implement the procedural protections already discussed, while still not opening other cities to the theoretical disaster of having to allow monuments to be erected willy-nilly. Under any of the above hypothetical situations, the only monument Pleasant Grove would have been forced to accept is Summum’s, because it is likewise free to adopt appropriate controls for future use of its public spaces and monuments.

V. Forum Doctrine

Typically, once the determination is made that something constitutes government speech, free speech analysis ends.¹¹⁰ In *Summum*, however, the Court continued its analysis to conduct a superficial forum doctrine application, apparently to corroborate the justification for its government speech label.¹¹¹ However, as it did with the government speech analysis, the Court looked primarily to stereotypes of how public parks work—specifically as a traditional public forum—rather than to the specific facts of the situation, which would allow a limited public

¹⁰⁹ *Id.* at 1138.

¹¹⁰ *See, e.g., Summum*, 129 S. Ct. at 1129 (holding permanent monuments to be “government speech and [t]herefore not subject to scrutiny under the *Free Speech Clause*.”)

¹¹¹ *See Id.* at 1137-8.

forum analysis.¹¹² A more nuanced look at the particulars of the case would have allowed the Court the opportunity to affirmatively adopt the rationale set forth by Justice Kennedy in *International Society for Krishna Consciousness v. Lee*, which looks to both objective and subjective indications of whether a government has “designated” a forum.¹¹³

A. *Forum Doctrine Overview*

Forum doctrine starts with the premise that, just as with any private owner, the government retains the right to “preserve [its] property . . . for the use to which it is lawfully dedicated.”¹¹⁴ Forum doctrine determines the use to which government property is “lawfully dedicated,” in the context of free speech, by balancing “when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.”¹¹⁵

In conducting forum analysis, a court must first define the forum itself, then identify the nature of the forum, and, finally, determine whether the specific restrictions on speech are appropriate under the standard for that forum.¹¹⁶

1. *Definition of the Forum*

The initial threshold definition of a forum depends not on the physicality of the location, but on the access that is sought by the speaker.¹¹⁷ Allowing general access to public property

¹¹² *Id.*

¹¹³ *See, e.g., International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring).

¹¹⁴ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (citation omitted).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 797.

¹¹⁷ *Id.* at 801.

means that the forum encompasses the property itself, whereas permitting only limited access causes the forum to be a particular physical part or specified use of the property.¹¹⁸

2. Nature of the Forum

Once the nature of the forum is determined, it will fall into one of three main categories: public, limited, and nonpublic.¹¹⁹

Public fora include both traditional public fora and designated public fora. Traditional public fora are locations that “by long tradition or by government fiat have been devoted to assembly and debate.”¹²⁰ A “quintessential” example of a public forum is a public street or park.¹²¹ Designated public fora, by contrast, include property that the government intentionally opens to expressive conduct.¹²² When open to expressive conduct “by the public at large,” the forum falls within the same parameters as the traditional public forum and is thus governed by the same rules.¹²³

In contrast to the traditional public forum, which is considered open for all traditional speech activities, the government can also open a forum to expressive conduct “by certain speakers, or for the discussion of certain subjects.”¹²⁴ In that situation, the forum is a “limited

¹¹⁸ *Id.* (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983)); *see also* *Air Line Pilots Ass’n, Int’l v. Department of Aviation*, 45 F.3d 1144, 1151-52 (7th Cir. 1995) (where speaker seeks access to diorama display cases in airport, public forum inquiry focuses on display cases rather than airport as a whole).

¹¹⁹ *Cornelius*, 473 U.S. at 799-800.

¹²⁰ *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983).

¹²¹ *Id.*

¹²² *Cornelius*, 473 U.S. at 802.

¹²³ *Id.*

¹²⁴ *Id.*

public forum.”¹²⁵ The government is not obligated to create a designated public forum, either in a traditional or a limited sense; nor is the government obligated to keep it open infinitely.¹²⁶ However, while the forum exists, it is bound by the standards required under forum doctrine—that is, it must be kept open in the designated area, for the designated purpose, and the government may not apply viewpoint discrimination within those parameters.¹²⁷

Any public property that is not established as a public forum for expressive conduct, either by tradition or designation, remains a nonpublic forum.¹²⁸

3. Restrictions on Access: Applicable Standards

A public forum, whether traditional or designated, is governed by the same standard: specifically, any content-based regulation may only be imposed when it is narrowly drawn to “serve a compelling state interest.”¹²⁹ Content-neutral regulations may control time, place, and manner of speech, but must also be narrowly tailored “to serve a significant government interest” and must “leave open ample alternative channels of communication.”¹³⁰

A limited public forum, by contrast, is held to a standard of viewpoint neutrality and reasonableness in light of the purpose of the forum, confined to “the limited and legitimate purposes for which it was created.”¹³¹ This is the standard that was applied to the disbursement

¹²⁵ *Perry*, 460 U.S. at 46 n7; *see also* *Pfeifer v. City of West Allis*, 91 F. Supp. 2d 1253, 1259 (E.D. Wis. 2000) (citing *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1261 (3d Cir. 1992)).

¹²⁶ *Cornelius*, 473 U.S. at 802.

¹²⁷ *Id.*

¹²⁸ *Id.* at 802-03.

¹²⁹ *Perry*, 460 U.S. at 45.

¹³⁰ *Id.*

¹³¹ *Rosenberger*, 515 U.S. at 829. *See also* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001) (assuming label of limited public forum because both parties agreed to it; requiring viewpoint neutrality and reasonableness in light of purpose).

of student funds in *Rosenberger* after the Court held that the funding it did not fall under the category of government speech.¹³²

Finally, a nonpublic forum is one that has never traditionally been open to expressive activities and has not been opened to expressive activity by affirmative government action and is governed by the same standard as the limited public forum—viewpoint neutrality and reasonableness in light of the forum’s purpose.¹³³

B. *Forum Analysis in Summum*

The decision in *Summum* consists of a majority opinion and four separate concurrences.¹³⁴ In each of these analyses, the Justices focused on the forum doctrine in a single respect: the public forum.¹³⁵ They noted that the traditional public forum, exemplified in public parks, was traditionally used for transient speech.¹³⁶ As such, the “scarce resource” to be allocated was still relatively bountiful—over time, a single park could hold countless demonstrations, rallies, or parades.¹³⁷

In each analysis, forum doctrine applied to permanent monuments was an all or nothing analysis: either the forum is a public park and thus the government must apply strict scrutiny and forbid any discrimination on subject matter or viewpoint, or permanent monuments do not

¹³² *Rosenberger v. Rectors & Visitors of the Univ. of VA*, 515 U.S. 819, 829 (1995).

¹³³ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S.788, 802-03 (1985). *See also* *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (holding sidewalk connecting post office parking lot with post office entrance to be a nonpublic forum because it was a right of access, “never expressly dedicated . . . to any expressive activity”).

¹³⁴ *See Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009).

¹³⁵ *See Summum*, 129 S. Ct at 1137-8; *id.* at 1140-1 (Breyer, J., concurring).

¹³⁶ *See, e.g., Summum*, 129 S. Ct. at 1140 (Breyer, J., concurring).

¹³⁷ *See id.*

constitute a forum at all. This method of application, however, utterly ignores the reality that forum doctrine includes other levels of fora, with stricter permissible access controls.

Specifically, the Court entirely ignored the limited forum analysis, which offers both traditional forum aspects and more limited forum applications. In the case of *Summum*, the permanency of the monuments could—and should—shift the analysis from traditional public forum—with its “traditional” speech activities of demonstrations, leafleting, and speeches—to a different kind of forum, with more limited boundaries.

Proper forum analysis should have begun with defining the forum itself, which is predicated on the access sought.¹³⁸ Here, the access sought was to place a permanent monument in a public park.¹³⁹ This does not fall into the long tradition of “assembly and debate”¹⁴⁰ that typically classifies parks as public fora. Rather, the permanent nature of the speech transforms the forum into one that has never been considered a traditionally open one. As such, the question becomes whether the government has opened the forum to private expression and, if so, to what kind of expression.

In determining whether and what type of access has been granted, the Third Circuit has applied Supreme Court precedent in a helpful three part analysis: (1) governmental intent, (2) the extent of use granted, and (3) consistency in granting or refusing access to the forum.¹⁴¹ The latter two factors, extent of use and consistency of use granted, are clear in *Summum*. The extent of the use granted has been to erect permanent monuments, of various sizes ranging from full-

¹³⁸ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S.788, 801 (1985).

¹³⁹ *Summum*, 129 S. Ct. 1129-30.

¹⁴⁰ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

¹⁴¹ *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1371 (3rd Cir. 1990) (citing *Cornelius*, 473 U.S. at 802, 804-05; *Perry*, 460 U.S. at 46-47).

sized buildings to trees with plaques. The consistency of use granted, as evidenced by the fact that the record is utterly devoid of the city ever denying a proposed monument (barring Sumnum's), shows that the city has consistently and, in fact, without fail, granted use of Pioneer Park for the erection of these permanent monuments.

To determine governmental intent, analysis must include many of the same facts used to determine the government's intent to speak, or message, in the government speech context—the difference being, however, that the standard for what constitutes “intent” is lower when looking at a forum than looking at the government's own speech.¹⁴² While the dual-themed access to Pioneer Park undermines finding a governmental message in the government speech category, it would be less troublesome when applying a limited public forum analysis. There is already more than one forum in the same physical space—the traditional public forum of the park, available for traditional speech uses, as well as the limited public forum of monuments in the park, available for the display of permanent messages—so it does not defy logic to determine that there are two, separate limited public fora within the park. The first would be a limited forum designed to allow private expression honoring the pioneer heritage of the town; the second, a limited forum designed to allow long-standing members of the community¹⁴³ to erect honorifics.

Once the forum and the nature of access are defined, forum analysis shifts to the restrictions placed on access. In a limited forum, any restrictions must be viewpoint neutral and

¹⁴² See, e.g., *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring) (looking at the “objective, physical characteristics of the property at issue and the *actual* public access and uses that have been permitted by the government” to determine the nature of the forum) (emphasis added).

¹⁴³ Restrictions based on speaker identity are legitimate in a limited public forum. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

reasonable in light of the “limited and legitimate purposes for which [the forum] was created.”¹⁴⁴ With two separate fora in Pioneer Park, the restrictions on access would be viewed separately, in light of the purpose of each. One forum’s purpose of honoring the pioneer heritage would legitimately and reasonably limit the content of any proposed monuments to that topic, which would naturally forestall the inclusion of Summum’s monument as the Seven Aphorisms have nothing to do with pioneer times and in fact Summum itself did not exist as a religion back then. The other forum’s purpose of giving a platform to members of the local community would similarly reasonably exclude Summum, as Summum is not and has not been a member of the Pleasant Grove community.¹⁴⁵

An additional benefit of this analysis is that it would have allowed the Court the opportunity to clarify the limited public forum analysis within the public forum doctrine, to elucidate that “designation” of a public forum does not require absolute articulated intent, but rather can also be based on objective evidence as to what the government *has* done.

Similarly, it would ease the Court’s fears of the “parade of horrors” involving cities being required to accept each and every monument submitted for display. In nearly all the examples, the Court referenced individual monuments erected ***individually***.¹⁴⁶ Without the conglomeration of monuments together, as they are in Pioneer Park, the “purpose” in displaying can be interpreted much more narrowly. Even those that have more than one, displayed as a

¹⁴⁴ *Rosenberger*, 515 U.S. at 829.

¹⁴⁵ Note, however, that after enough time had passed, Summum’s status could possibly change to enable them to meet this requirement. If and when it did so, the city could no longer prevent Summum from erecting its monument.

¹⁴⁶ *See, e.g., Summum*, 129 S. Ct. at 1135 (John Lennon “Imagine” mosaic, NYC; bronze statue with the word “peace” in various languages, Fayetteville, Arkansas; statue of Pancho Villa, Tuscon, Arizona); *id.* at 1138 (Statue of Liberty).

group, would typically have a more cohesive purpose which would enable the government to limit access to monuments that would further that purpose.

C. *Alternative Forum Result: Allowing Summun's monument in*

If the Court did not wish to allow the possibility of two separate limited fora within the same physical space, there still remains the alternative possibility of a single limited public forum within the broader public forum of the park. This would change the analysis, however, most likely resulting in the city being required to allow Summun to place a monument in to the park.

The primary difference in the single limited forum analysis is that the purpose for which the limited forum had been created would have to be broader. Where there are two fora, each has a specific nature, with a corresponding purpose—one reasonably defined by subject-matter, the other reasonably defined by speaker identity. Where there is only one, however, the purpose for which the forum was opened would be a much more generic broad purpose: to display permanent monuments. There, because the government had allowed expansive subjects to be displayed, as well as expansive categories of speakers to speak, the refusal to allow Summun access would most likely not be reasonable in light of the forum's purpose. As such, the city's refusal would have failed to satisfy the requirements of limited public forum analysis.¹⁴⁷

However, this result would not necessarily be a “bad” one. At most, only one city would be forced to accept one monument. This is true for two separate reasons. First, most cities

¹⁴⁷ It is also possible to define the limited forum as “displaying monuments related to Pleasant Grove,” which would still permit the city to conduct a *post-hoc* forum analysis that would eliminate Summun's monument from consideration. Because *post-hoc* analysis is not appropriate for government speech, this definition would not help Pleasant Grove to define its message more clearly under that analysis.

which have accepted monuments have clearer, less conflated criteria for display, and thus may make reasonable restrictions based on those criteria. Second, for any cities which have no apparent purpose or theme to their permanent monuments, this result would serve as notice that if they do not currently have clear guidelines governing the donation of permanent monuments for display on public property, they ought to establish those guidelines immediately. In future challenges, this would result in the cities receiving deference on government speech grounds.

VI. Conclusion

In *Summum*, the Supreme Court lowered the threshold for government speech to include everything that appears, as a general matter, as though the government is speaking. Rather than applying the three separate prongs of the government speech analysis—message, control, and speaker transparency—to the factual situation in Pleasant Grove, it simply assumed that all three were met because in most cities they would be. The Court could have, and should have, articulated that the general assumptions would satisfy the test where the facts supported those assumptions, but that the facts in *Summum* failed to do so.

Similarly, it could have and should have applied forum doctrine to hold that Pioneer Park constituted a limited public forum—or, more accurately, two separate limited public fora within the larger traditional public forum of the park. Each rationale for accepting permanent monuments would thus be contained within its own forum and the definition of the purpose of that forum. As such, each rationale would adequately prevent *Summum* from placing its monument in either forum. Alternatively, the Court could have held that the permanent monuments in the Pioneer Park constituted a single limited public forum within the traditional public forum of a public park. As such, *Summum*'s monument would have to be admitted because the rationale for excluding it would no longer be reasonable in light of the mixed

purpose of the limited forum. However, this result would not unleash a “parade of horrors,” as most cities would meet the test for their permanent monuments to constitute government speech, and those that did not would have clear notice that they needed to implement the procedures to meet that standard.