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PLEASANT GROVE CITY v. SUMMUM: MONUMENTS, MESSAGES, AND THE NEXT ESTABLISHMENT CLAUSE

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INTRODUCTION

The facts of *Pleasant Grove City v. Summum*[1] are well known by now: Summum, a small religious group, argued that Pleasant Grove City violated the Free Speech Clause of the First Amendment when it refused to display Summum's monument in the city's Pioneer Park, which already contained fifteen other monuments, including a Ten Commandments display. Summum's unlikely claim won in the Tenth Circuit Court of Appeals, a request for rehearing was denied, and the case ultimately was heard before the U.S. Supreme Court. During the oral arguments, the Justices (along with commentators, Court watchers, and, of course, the litigants themselves) were fully aware that the *Summum* litigation presented a double-edged sword. If Pleasant Grove argued too vigorously the theory that the existing Ten Commandments monument constitutes the city's own message, then it risked violating the Establishment Clause in a follow-up lawsuit based on the same facts. If, on the other hand, Pleasant Grove attributed the monument's message to its 1971 donor,[2] then the city would be hard-pressed to explain why Pioneer Park was not, as Summum claimed, a public forum that must be potentially open to all monuments without discrimination based on content or viewpoint.

The tension pervaded the oral argument. Chief Justice Roberts opened the discussion with an observation that the city was in a double-bind.[3] Justice Scalia guided the city's lawyer into a discussion of *Van Orden v. Perry*,[4] a 2005 case in which the Court upheld the constitutionality of a public

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[1] 129 S. Ct. 1125 (2009) (link).

[2] The Fraternal Order of Eagles donated the Ten Commandments monument in 1971. *Id.* at 1129.

[3] Transcript of Oral Argument at 4, *Summum*, 129 S. Ct. 1125 (No. 07-665), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-665.pdf (link) ("[Y]ou're really just picking your poison, aren't you?").

[4] 545 U.S. 677 (2005) (link).

Ten Commandments display.[5] Justice Souter pondered the possibility of discrimination.[6] And Summum's lawyer frankly acknowledged that the city was "on the horns of a dilemma" facing either a Free Speech or an Establishment Clause violation.[7] Ultimately, however, the U.S. Supreme Court unanimously decided that in selecting monuments for Pioneer Park the city was engaged in government speech; the city could therefore control the content of its message without violating the Free Speech Clause.[8] Significantly, the Court found that the city need not formally adopt the message of an existing park monument in order for that monument to constitute government speech.[9] The stage was set for Summum's Establishment Clause claim, but that claim would have to wait for another day.

Nonetheless, it was precisely those Establishment Clause concerns—for both the litigants and the Justices—that appeared to drive the litigation and, ultimately, the decision. The possibility of a future Establishment Clause claim informed Summum's strategy to frame the arguments in the terms on which it "wanted to lose."[10] Many assumed that the same possibility explained Pleasant Grove's decision to decline Summum's demand that the city formally adopt the message of the Ten Commandments.[11] Liberal, separationist Justices likely sought to avoid a ruling that would potentially immunize monuments from future Establishment Clause challenges on the ground that such monuments are private, rather than government, speech.[12] The conservative, accommodationist wing of the Court, on the other hand, considered whether a finding of government speech would doom Pleasant Grove's existing Ten Commandments monument and others like it.[13] All of

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[5] *See* Transcript of Oral Argument at 6, *Summum*, 129 S. Ct. 1125 (No. 07-665). In a companion case, *McCreary County v. ACLU of Kentucky*, the Court struck down a different Ten Commandments display on Establishment Clause grounds. 545 U.S. 844 (2005) (link).

[6] Transcript of Oral Argument at 21, *Summum*, 129 S. Ct. 1125 (No. 07-665).

[7] *Id.* at 63.

[8] *Summum*, 129 S. Ct. at 1129.

[9] *Id.* at 1134.

[10] *2008–2009 Supreme Court Term* (C-SPAN television broadcast July 6, 2009) (remarks of Pamela Harris), *available at* http://www.c-spanarchives.org/library/index.php?main_page=product_video_info&tID=5&src=atom&atom=todays_events.xml&products_id=287449-1 (link).

[11] *See, e.g.*, Ian Bartrum, Pleasant Grove v. Summum*: Losing the Battle to Win the War*, 95 VA. L. REV. IN BRIEF 43, 44 (2009), http://www.virginialawreview.org/inbrief/2009/05/16/bartrum.pdf (link).

[12] This is the explanation Pamela Harris provides, *see 2008–2009 Supreme Court Term*, *supra* note 10, and it is a plausible one given that the two Justices who have advocated applying the Establishment Clause endorsement test to private speech in a public forum, Justices Souter and O'Connor, are no longer on the Court. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772–83, 783–94 (1995) (O'Connor & Souter, J.J., concurring) (link).

[13] Of course, the 2005 *McCreary* and *Van Orden* decisions at least provide the criteria for arguments by analogy in most Ten Commandments cases. Justice Scalia made one such argument in his *Summum* concurrence, wherein he concluded that the Pleasant Grove Decalogue passed the standards for constitutionality set forth in *Van Orden*. *Summum*, 129 S. Ct. at 1139–1140 (Scalia, J., concurring).

the Justices likely considered the impending decision in *Salazar v. Buono*,[14] an Establishment Clause case carried over from the 2008–2009 to the 2009–2010 term.[15] In light of the fact that the Establishment Clause cast a shadow over the *Summum* case, we should pay particular attention to the *Summum* opinion for any gestures in the direction of the Establishment Clause.

In a 2009 mini-symposium in the Northwestern University Law Review Colloquy, legal scholars discussed the potential impact and meaning of the unanimous decision in *Summum*.[16] Like this Essay, Professors Lund's and Meyler's essays point out some of the intricacies of the case. Professor Meyler's playful opening motif refers to some of the same parts of the oral argument that caught my attention, presumably because those exchanges point out the significance of the Establishment Clause.[17] Both Professors Lund and Meyler discuss the legal disputes surrounding legislative prayer and the potential impact of *Summum* on those controversies.[18] Professor Lund also includes a discussion of the Supreme Court's equal access cases. He argues that there is a conceptual incongruity between the Court's approach in *Summum*, which denied the free speech claim of the religionists seeking access to the park, and the line of cases in which the Court has ruled in favor of religious groups seeking access to public facilities.[19] All of the symposium pieces acknowledge that the Establishment Clause is a player in the case. Nonetheless, the *Summum* decision raises an important question that has yet to be discussed: What about monuments, symbols, and the continued validity of the endorsement test?

Justice Alito, writing for all but Justice Souter, authored the majority opinion in *Summum*. He went to great pains to establish two key points: (1) the holding in the case—that permanent monuments are government speech, and (2) the structurally supporting dicta in the case—that the mes-

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[14] Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, 129 S. Ct. 1313 (2009) (link).

[15] *Buono* involves a transfer of a piece of land in the Mojave Desert atop of which sits a Latin cross donated to the federal government by the Veterans of Foreign Wars. *Id.* The oral argument in *Buono* occurred on October 7, 2009. Docket for Salazar v. Buono, 129 S. Ct. 1313 (No. 08-472), *available at* http://origin.www.supremecourtus.gov/docket/08-472.htm (link). A decision is expected this term.

[16] *See* Christopher C. Lund, *Keeping the Government's Religion Pure:* Pleasant Grove City v. Summum, 104 NW. U. L. REV. COLLOQUY 46 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/28/LRColl2009n28Lund.pdf (link); Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. COLLOQUY 70 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/30/LRColl2009n30Tebbe.pdf (link); Joseph Blocher, *Property and Speech in* Summum, 104 NW. U. L. REV. COLLOQUY 83 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/31/LRColl2009n31Blocher.pdf (link); Bernadette Meyler, Summum *and the Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 95 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/32/LRColl2009n32Meyler.pdf (link).

[17] Meyler, *supra* note 16, at 95–96.

[18] *See id.* at 100–05; Lund, *supra* note 16, at 55–57.

[19] *See* Lund, *supra* note 16 at 53–55. Professor Bartrum argues essentially the same point. *See* Bartrum, *supra* note 11 at 45–46.

sages monuments send are often unclear.[20] Unlike the tension Professor Lund identifies with respect to the access cases, the Court's dicta create an explicit and therefore unavoidable tension with the endorsement test. Justice Alito's dicta about the ambiguity of messages conveyed by monuments suggest that either the Court's observation in *Summum* is accurate or a fundamental assumption underlying the endorsement test is accurate. Both cannot be.

I. UNDERSTANDING THE ENDORSEMENT TEST

To understand the conflict between the endorsement test and the *Summum* opinion, it is necessary to briefly review how the Court has applied the endorsement test in the context of religious display cases. Justice O'Connor introduced the endorsement test in her concurrence in *Lynch v. Donnelly*,[21] which upheld a public crèche display, and in doing so she explained her view of government endorsement prohibited by the Establishment Clause. Justice O'Connor's test asks whether the government's actions "send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[22] The endorsement test subsumed the earlier *Lemon* test's inquiry into the intent and effect of the government's actions, but it settled decidedly on the effect.[23] By definition, a finding of endorsement depends on the existence of a discernible message. The arbiter of the message is the "reasonable observer," a construct O'Connor repeatedly defended against complaints that the doctrinal reasonable observer was either too touchy, too permissive, or a mere mask for a judge's own sensibilities in either direction.[24]

Nonetheless, Justice O'Connor's endorsement test gained traction in the next religious display case following *Lynch*, *County of Allegheny v. ACLU*.[25] A fractured Court adopted the endorsement test to strike down a

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[20] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1135 (2009) ("What, for example, is 'the message' of the Greco-Roman mosaic of the word 'Imagine' that was donated to New York City's Central Park in memory of John Lennon?").

[21] 465 U.S. 668 (1984) (upholding constitutionality of public crèche display) (link).

[22] *Id.* at 688 (O'Connor, J., concurring).

[23] *See* Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1, 17 (2004). It certainly would be the rare case in which the government *intends* to send an outsider message. *Cf.* Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & POL. 499, 523 (2002) ("Most government action that alienates or offends people because it is seen as approving or endorsing religion is not the product of a deliberate government effort to be pejorative toward those who are aggrieved.").

[24] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779–82 (1995) (O'Connor, J., concurring); Elk Grove Unified Sch. Dist. v. Newdow, 524 U.S. 1, 33 (2004) (O'Connor, J., concurring) (link).

[25] 492 U.S. 573 (1989) (link).

crèche display but uphold a separate display that consisted of a Christmas tree and a menorah.[26] Six years later the Court heard *Capitol Square v. Pinette*,[27] a case that Summum argued was the factual and legal predicate for its own challenge.[28] In *Pinette*, the Court held that the Ku Klux Klan had a Free Speech right to erect a Latin cross on the statehouse plaza in Columbus, Ohio.[29] The issue before the Court was whether, as the state review board had argued, the board's permission to erect the cross on the capitol square would amount to a forbidden establishment of religion.[30] Justice Scalia's plurality opinion referred to the endorsement test as the "so-called 'endorsement test'";[31] he applied it with some discussion of the "reasonable" and "intelligent" observer, but with no discussion of any message of alienation or outsider status.[32]

Then, in 2005, after a long break from cases involving religious displays, the Court handed down opposing decisions in a pair of Ten Commandments cases, *McCreary County v. ACLU*[33] and *Van Orden v. Perry*.[34] In *McCreary*, Justice Souter's majority opinion revived the *Lemon* test[35] but imported the concept of the reasonable observer, finding that a reasonable observer would know that the county's Ten Commandments display was fueled by a purpose to advance religion.[36] By contrast, in *Van Orden*, then-Chief Justice Rehnquist's plurality opinion found a display of the Ten Commandments on the Texas capitol mall to be merely an acknowledgment of religion, with no mention of the endorsement test or the reasonable observer.[37]

The Court's next religious display case was *Summum*. Although the Establishment Clause was not an issue in the case, the Court's opinion conflicts with much of the logic of Justice O'Connor's endorsement test.

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[26] *Id.*

[27] 515 U.S. 753.

[28] *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1138 (2009); Transcript of Oral Argument at 61, *Summum*, 129 S. Ct. 1125 (No. 07-665), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-665.pdf.

[29] *Pinette*, 515 U.S. 753.

[30] *Id.* at 757.

[31] *Id.* at 763 (plurality opinion).

[32] *Id.* at 763–70.

[33] 545 U.S. 844 (2005) (striking down Ten Commandments display as unconstitutional).

[34] 545 U.S. 677 (2005) (upholding Ten Commandments display as constitutional).

[35] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (link). In the Court's first Ten Commandments case, *Stone v. Graham*, the Court used *Lemon* to invalidate a Kentucky statute requiring that a Ten Commandments display be posted on public elementary and secondary schools' classroom walls. 449 U.S. 39 (1980) (per curiam) (link).

[36] *McCreary*, 545 U.S. at 862–69.

[37] *See Van Orden*, 545 U.S. 677.

II. *SUMMUM*'S DISCUSSION OF MONUMENTS AND MESSAGES

Consider first what Justice Alito's opinion for the Court observes about monuments and what the government may intend to convey: "A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure."[38] This language is consistent with the underpinnings of the endorsement test, which proceeds on the assumption that monuments send clear messages. Of particular note is the fact that Alito's formulation recognizes the role of government intent[39] (usually discussed in the Establishment Clause context in terms of whether the government has a religious purpose[40]) and his use of the word "feeling," which seizes onto the character of the constitutional harm used by some who criticize the endorsement test.[41] Justice Alito explains that "privately financed and donated monuments that the government accepts and displays to the public on government land" also speak for the government.[42] Thus, the Court's observation covers nearly every public religious display that has been the subject of church-state litigation.[43]

The trouble for the endorsement test begins in Part IV of the opinion. In that portion of the decision the Court rejects Summum's argument that a municipality should be required to formally adopt the message associated with a monument in order to demonstrate that it constitutes government and not private speech.[44] Rather, the Court found to the contrary, explaining that a government may engage in expressive conduct through a monument even if no formal message has been identified and embraced. The Court noted:

> [Summum's] argument fundamentally misunderstands the way monuments convey meaning . . . . Even when a monument features the written word, the monument may be

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[38] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1133 (2009).

[39] Likewise, privately donated monuments displayed on public property "are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* at 1134.

[40] *See, e.g.*, *McCreary County*, 545 U.S. at 881; *Stone*, 449 U.S. at 41.

[41] *See, e.g.*, Roy, *supra* note 23, at 33–39 (2004); Choper, *supra* note 23, at 529.

[42] *Summum*, 129 S. Ct. at 1133.

[43] The only monuments Justice Alito's observation does not directly include are government displays on private property, such as the crèche in *Lynch* and, curiously, the Latin cross in *Buono*—at least if the Court recognizes the land transaction that deeded the portion of government land on which the cross was perched back to the VFW.

[44] *Summum*, 129 S. Ct. at 1134–36.

> intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.[45]

The Court observed, for example, that the "Imagine" mosaic in Central Park and an Arkansas statue displaying the word "peace" in many world languages are examples of monuments "almost certain to evoke different thoughts and sentiments in the minds of different observers."[46] The Court found the message of monuments containing no text "likely to be even more variable."[47] Because it "frequently is not possible to identify a single 'message' that is conveyed by an object or structure," the Court reasoned, the government's intended message might differ from that of its creator or donor.[48]

So how does such language affect the Court's Establishment Clause jurisprudence generally and the endorsement test in particular? *Summum* would not preclude the Court from finding under *Lemon* that the government has a religious purpose that is completely aligned with its donor,[49] and that finding need not be based on the asserted message conveyed by a monument. The endorsement test, on the other hand, requires a judge to discern a single, identifiable message of exclusion conveyed by a monument to the reasonable observer. The *Summum* opinion seriously undermines the proposition that a monument sends only one message or any particular message. Likewise, the Court's discussion in *Summum* seems to exclude the possibility of a reasonable observer, another important feature of the endorsement test, either as an actual person or as a judicial amalgam of a range of different observers. Indeed, this lengthy discussion of messages creates a nuanced, open-ended view of the impact on passers-by of public displays that is at odds with the Court's jurisprudence applying the endorsement test.

In terms of the other opinions in *Summum*, it is useful to note that in the concurring opinions in *Summum*, Justice Scalia applies *Van Orden* to the city's existing Ten Commandments display without mentioning the endorsement test.[50] Justice Souter, meanwhile, again raises the reasonable observer, though this time to argue that it should be used to determine whether a monument is government speech or private speech.[51] Only Tenth Circuit

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[45] *Id.* at 1135. Professor Carol Nackenoff argues that this language obscures the possibility that the government may favor one particular speaker's viewpoint over others. Carol Nackenoff, *The Dueling First Amendments: Government as Funder, as Speaker, and the Establishment Clause*, 69 MD. L. REV. 132, 144–45 (2009) (citing concerns raised in Justice Souter's concurrence in *Summum*).

[46] *Summum*, 129 S. Ct. at 1135.

[47] *Id.*

[48] *Id.* at 1136.

[49] *Cf.* McCreary County v. ACLU of Ky., 545 U.S. 844, 881 (2005) (invalidating Ten Commandments display on the ground that the government acted with a "predominantly religious purpose").

[50] *See Summum*, 129 S. Ct. at 1139–40 (Scalia, J., concurring).

[51] *Id.* at 1142 (Souter, J., concurring).

Judge Tacha's dissent to the dissents in the Court of Appeals's decision in *Summum* recognized and applied the endorsement test's core inquiry (though Judge Tacha was ultimately wrong about how the Court would resolve the government speech issue).[52] Tacha argued that the government's display of a religious monument sends an "ancillary message" to nonadherents that they are political outsiders.[53]

It is possible that the Court's opinion in *Summum* could be parsed finely enough to distinguish between a monument's religious message and a perceived exclusionary message sent by a government's display of that monument in a public setting. However, the language of the Court's opinion seems to rule out in advance the possibility of an outsider message that is perceptible to a reasonable observer. According to the language in *Summum*, it is not necessarily clear what the government's actual message is; different observers walk away from the same monument with different messages. Without the input of the authoritative reasonable observer, it would seem that the interpretation of a monument's message is entirely subjective.

Whether the Court's reasoning in *Summum* is an inattentive blow to an earlier insight about public religious displays, or a potential improvement to a doctrine built on artificial assumptions about shared public space, it would seem that the Court in *Summum* is making basic assertions about the nature of reality that contradict its existing doctrine. This contradiction may have little practical significance, however, if the endorsement test is no longer viable.

III. THE STATUS OF THE ENDORSEMENT TEST AFTER *SUMMUM*

Given its decreased use in recent years, one might be tempted to conclude that even before *Summum* the endorsement test—at least as it was originally framed by Justice O'Connor—is a dead letter. The Court has not explicitly relied on it in a case involving a religious display since *County of Allegheny*. Even Justice Souter, an ardent defender of the reasonable observer, did not apply the endorsement test in the most recent pair of cases involving the Ten Commandments. Perhaps expediency caused the Court to adopt O'Connor's formulation given her role as the crucial swing vote in many cases. Now, however, with both Justices O'Connor and Souter no longer on the Court, there are no remaining justices with an ideological commitment to the test.[54] Moreover, there may be few occasions to apply it,

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[52] Summum v. Pleasant Grove City, 499 F.3d 1170, 1181 (10th Cir. 2007) (Tacha, J., responding to dissent from denial of rehearing en banc) (link).

[53] *Id.* (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (link)).

[54] It remains to be seen what the addition of Justice Sotomayor means for the endorsement test in particular and the Establishment Clause in general. In at least one of her decisions as a district court judge, she ruled in favor of a plaintiff who wanted to erect a menorah in a public park during the holidays. Flamer v. City of White Plains, 841 F. Supp. 1365 (S.D.N.Y. 1993) (link). Judge Sotomayor re-

given that there appears to be (at least in the display cases) an accommodationist majority.[55]

Yet scholars and observers who have spent any time with the Supreme Court's church and state decisions have learned that one can seldom predict the next doctrinal turn. The *Lemon* test has survived many near-death experiences, only to resurface in a case involving the Ten Commandments.[56] There is the elusive requirement of neutrality, which one wing of the Court appears to oppose in the access and funding cases[57] and the other opposes in the symbol and display cases.[58] Finally, the history test in *Marsh v. Chambers*[59] is (presumably) held in reserve for the rare case in which a particular practice has a direct, historical antecedent. And that is just to name a few examples. Perhaps we should pay attention to the jurisprudence of Justice Breyer, the crucial swing vote in *Van Orden*; he candidly stated in that case that he could perceive "no test-related substitute for the exercise of legal judgment."[60]

Putting aside general thoughts about unpredictability, however, there is another, specific reason to pay attention to *Summum*'s conflict with the endorsement test in the context of cases involving symbols and displays. My initial title for this Essay was: "*If Justice O'Connor's endorsement test is alive, does Justice Alito's opinion in Summum kill it?*" Fleshing out the conflict between *Summum* and the endorsement test tells us more about whether the endorsement test is likely to resurface again, and that small piece of information may be helpful going forward, particularly as we await the decision in *Salazar v. Buono*.[61]

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solved the city's Establishment Clause defense by finding the park to be a public forum open to private speakers on equal terms. *Id.* at 1376–82.

[55] *See* County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Kennedy is often a swing vote, but in the context of public religious displays he has explicitly rejected the endorsement test. *See id.* at 664 (noting that passers-by are free to "turn their backs" to the offense of government speech).

[56] *Compare*, *e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844 (2005), *with* Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993) (anticipating the demise of *Lemon* after Lee v. Weisman, 505 U.S. 577 (1992) (link)).

[57] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 863 (1995) (Souter, J., dissenting) (link).

[58] *See, e.g.*, *McCreary*, 545 U.S. at 889 (Scalia, J., dissenting).

[59] Marsh v. Chambers, 463 U.S. 783 (1983) (finding legislative prayer constitutional based on the history of the practice at the time of the framing of the First Amendment) (link).

[60] Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

[61] *Salazar* is not likely to reach the merits of whether a Latin cross on public land violates the Establishment Clause, though at least Justice Scalia raised the issue at oral argument. Transcript of Oral Argument at 6–8, Salazar v. Buono, No. 08-472 (U.S. argued Oct. 7, 2009), *available at* www.supremecourtus.gov/oral_arguments/argument_transcripts/08-472.pdf (link).

CONCLUSION

Whatever the status of the Court's Establishment Clause doctrine prior to *Summum*, this government speech case has something to say about Justice O'Connor's endorsement test.[62] Justice Alito's opinion in *Summum* points out that the government has a legitimate role as a *speaker*, bringing balance to the endorsement test's exclusive focus on what some observers may prefer not to see. The Court's ambivalence about whether a government monument sends a discernible message may signal that the Court is prepared to dial back an earlier view. Nor should it be lost on the reader that the author of the majority opinion in *Summum*, Justice Alito, assumed Justice O'Connor's seat on the Court, which has both symbolic and practical implications.

[62] *Cf.* Richard M. Esenberg, *Must God Be Dead or Irrelevant: Drawing a Circle That Lets Me In*, 18 WM. & MARY BILL RTS. J. 1, 3 (2009) ("*Summum* . . . does not itself alter our Establishment Clause jurisprudence. . . . Nevertheless, *Summum*'s recognition that government speech may convey a number of messages, and that evenhandedness in that speech is impractical, suggests further clarification of just when and how government speech is limited by the Establishment Clause.").