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# *SUMMUM* AND THE ESTABLISHMENT CLAUSE

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Chief Justice Roberts: [T]he more you say that the monument is Government speech to get out of the first, free speech—the Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause. If it's Government speech, it may not present a free speech problem, but what is the Government doing speaking—supporting the Ten Commandments?

Justice Kennedy: [I]t does seem to me that if you say it's Government speech that in later cases, including the case of the existing monument, you're going to say it's Government speech and you have an Establishment Clause problem. I don't know if—I'm not saying it would necessarily be resolved one way or the other, but it certainly raises . . . an Establishment Clause problem.

Justice Souter: But . . . [t]he Government isn't disclaiming [the Ten Commandments monument]. And the difference[,] it seems to me[,] between you and your friends on the other side is you want this clear statement [that the city has adopted the monument]. You want a statement—for example if you took Justice Scalia's statement, that would satisfy you, and it would also be the poison pill in the Establishment Clause. Isn't that what's—I mean, that's okay with me. I don't see that as an illegitimate object. I was a *Van Orden* dissenter . . . .[1]

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[*] Professor, Cornell University School of Law. I am grateful to my colleagues Josh Chafetz and Steve Shiffrin for discussing the *Summum* case with me, as well as for the thoughtful comments of my co-panelists Joe Blocher, Chris Lund, and Nelson Tebbe on an earlier draft and the careful work of the editors of the Northwestern University Law Review.

[1] Transcript of Oral Argument at 4, 5–6, 63, Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (No. 07-665), 2008 WL 4892845 (link). In *Van Orden v. Perry*, a majority of the Court had upheld the display of a Ten Commandments monument on the grounds of the Texas State Capitol that had been donated by the Fraternal Order of Eagles. 545 U.S. 677 (2005) (plurality opinion) (link). Justice Breyer cast the deciding vote, eschewing a "single mechanical formula," and instead relying on the broader principle that the Establishment Clause was designed to avoid "religiously based divisiveness." *Id.* at 699, 704 (Breyer, J., concurring in the judgment). In his opinion, Breyer emphasized in particular that the lack of any prior challenges during the course of the monument's forty-year history:

> suggest[s] more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to 'engage in' any 'religious practice[e],' to 'compel' any 'religious practice[e],' or to 'work deterrence' of any 'religious belief.' . . . Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tab-

## I. A GHOSTLY DIALOGUE

A specter haunts *Pleasant Grove City v. Summum*[2]—the specter of religion. Although both sides insistently litigated the case under the Free Speech Clause, the prospect of an Establishment Clause violation continually emerged during oral argument, slightly beyond the Supreme Court's purview. The written statements that the Court ultimately produced conjured a similar ghostly apparition located just outside the boundaries of the holding. Whereas Justice Alito's majority opinion simply determined that the display of the Ten Commandments monument constituted government speech, a circumstance that precluded the possibility of a free speech-based challenge, the concurring opinions of Justices Scalia (joined by Justice Thomas) and Souter again raised the Establishment Clause specter.[3]

Anticipating the potential for further litigation that might emerge from what was left unsaid by Justice Alito's opinion, Justice Scalia hastened to reassure Pleasant Grove City that the decision in the case had not "propelled it from the Free Speech Clause frying pan into the Establishment Clause fire."[4] To Scalia, although the "shadow" of the Establishment Clause may have hung over the proceedings, the light cast by the precedent of *Van Orden v. Perry*,[5] which involved a Ten Commandments display nearly identical to the one in *Summum*, should exorcise it.[6] In 1961, the Fraternal Order of Eagles donated a Ten Commandments monument to Texas that was subsequently displayed on the grounds of the state capitol.[7] In 1971, continuing to pursue the goal of reducing juvenile delinquency, the Fraternal Order of Eagles furnished Pleasant Grove with a nearly identical Ten Commandments monument.[8] When confronted with an Establishment Clause challenge against the Texas arrangement in *Van Orden*, the Court

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> lets' message as part of what is a broader moral and historical message reflective of a cultural heritage.

*Id.* at 702–03.

[2] 129 S. Ct. 1125 (link).

[3] *Compare* Christopher C. Lund, *Keeping the Government's Religion Pure:* Pleasant Grove City v. Summum, 104 NW. U. L. REV. COLLOQUY 46, 49 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/28/LRColl2009n28Lund.pdf (noting that "[f]orms of the word 'religion' appear only five times in the majority opinion") (link), *with Summum*, 129 S. Ct. at 1139–40 (Scalia, J., concurring) ("[F]rom the start, the case has been litigated in the shadow of the First Amendment's *Establishment* Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called wall of separation between church and State . . . ." (internal quotation marks omitted)), *and id.* at 1141–42 (Souter, J., concurring in the judgment) (stating that "there is no doubt that this case and its government speech claim has been litigated by the parties with one eye on the Establishment Clause").

[4] *Summum*, 129 S. Ct. at 1139 (Scalia, J., concurring).

[5] 545 U.S. 677 (plurality opinion). *See also supra* note 1.

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

[7] Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003) (link).

[8] *Summum*, 129 S. Ct. at 1129 (majority opinion); Transcript of Oral Argument, *supra* note 1, at 6 (counsel for Petitioner Pleasant Grove City Jay Sekulow commenting that "[t]his monument is very similar to what was in play in *Van Orden*").

narrowly rejected it.[9] With seemingly straightforward reasoning, and emphasizing that "[n]othing in [*Van Orden*] suggested that the outcome turned on a finding that the monument was only 'private' speech," Justice Scalia concluded that the decision in *Van Orden* would preclude any finding that Pleasant Grove had violated the Establishment Clause.[10]

By contrast, Justice Souter's concurrence suggested that the Establishment Clause might continue to haunt analogous cases involving government speech. As he maintained: "It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis . . . ."[11] His resolution of this lack of clarity would entail applying a "reasonable observer" test similar to that employed under the Establishment Clause.[12] Under this analysis, he would "ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land."[13] Although Justice Souter refrained from mentioning *Van Orden* in his concurrence, the reasonable observer test could serve to distinguish the Texas and Pleasant Grove contexts for both Free Speech and Establishment Clause purposes. If the surroundings or placement of the Ten Commandments monuments diverged sufficiently in the two cases, the determination as to whether they constituted government speech or government endorsement of religion might also differ.

On Justice Souter's view, a successful Establishment Clause challenge could arise out of circumstances similar to, if not precisely the same as,

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[9] 545 U.S. 677 (deciding five to four in favor of the state).

[10] *Summum*, 129 S. Ct. at 1140 (Scalia, J., concurring).

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

[12] In the Establishment Clause arena, the "reasonable observer" or "objective observer" inquiry developed out of Justice O'Connor's emphasis on government endorsement of religion. As Kent Greenawalt has explained:

> Justice O'Connor's endorsement test figured prominently in the last two decades. One reason is that O'Connor has been the crucial swing vote in many cases under the Establishment Clause and she has reviewed most of them in terms of endorsement.
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> . . .
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> The relevant issue . . . [is] whether an objective observer, "acquainted with the Free Exercise Clause and the values it promotes and with the text, legislative history, and implementation of the statute, would perceive a law as a state endorsement" of religion.
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> . . .
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> Justice O'Connor made clear that she thought that judges should imagine an objective observer, not attached to any religious group. This objective observer is familiar not only with a law's text, legislative history, and implementation, but also with free exercise values (and presumably other relevant constitutional values).

2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 87, 80, 183 (2008) (quoting Wallace v. Jaffree, 472 U.S. 38, 67–84 (1985) (O'Connor, J., concurring)) (link).

[13] *Id.*

those presented in *Summum*. What lies behind the apparent disagreement between Justices Scalia and Souter? Does Justice Souter's account of the requirements of the Establishment Clause contrast with that of Scalia simply because the former was, as he himself observed in oral argument, "a *Van Orden* dissenter,"[14] or does a further quandary about the implications of *Van Orden* emanate from the margins of the *Summum* case? The remainder of this Essay contends that taking Justice Souter's concurrence in *Summum* seriously points to the possible limitations of the norms of equality and neutrality in Establishment Clause jurisprudence that have been both suggested by a number of the Court's recent cases and endorsed to varying extents by scholars.[15] These limitations come to the fore when, as in the *Summum* case, the government is permitted to engage in some seemingly religious displays or exercises—whether because of their venerable history, their minimally religious character, the secular context in which they are placed, or for some other reason[16]—but simultaneously resist the inclusion of certain religions within those displays or exercises. An emphasis on equality under the Establishment Clause would suggest that the Court should not permit this governmental strategy. If, however, the Court were to mandate that the government sponsor the displays and exercises of all religions equally, this decision might undermine a number of the justifications under the Establishment Clause for permitting the government to engage in such *de minimis* religious activities in the first place. In either case, an incompatibility emerges between several lines of Establishment Clause reasoning.

## II. AN UNTIMELY DEMISE

Among the other mysteries the *Summum* case poses is one that seems to have perplexed even the Justices during oral argument—the puzzle of why any Establishment Clause claim died off before being presented to the Court. The technical explanation is relatively straightforward; although the Summum complaint initially included appeals to the establishment provisions of the Utah Constitution,[17] the group did not continue to press its state-law challenges after the District Court's denial of a preliminary injunction,

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[14] Transcript of Oral Argument, *supra* note 1, at 63.

[15] *See infra* notes 54–55 and accompanying text.

[16] For some examples of these rationales, see Marsh v. Chambers, 463 U.S. 783, 792 (1983) (citing the "unique history" of legislative prayer, which suggested its coexistence with nonestablishment, to uphold the practice in Nebraska) (link); Lynch v. Donnelly, 465 U.S. 668, 678-86 (1984) (determining that the display of a crèche, when surrounded by other icons of the "Christmas Holiday season," was permitted by the Establishment Clause) (link); GREENAWALT, *supra* note 12, at 92 (observing that one mode of reconciling government invocation of religion with the Establishment Clause "emphasizes the minor significance of [the] various practices. Yes, they have religious content, but it does not figure importantly in anyone's life. Perhaps a kind of de minimis approach should treat practices as tolerable if they involve no serious impairment of appropriate church-state relations.").

[17] *See infra* note 21 and accompanying text.

and the Tenth Circuit therefore deemed this challenge waived.[18] Slightly murkier is the reason for Summum's reliance on state rather than federal religious liberty protections. Prior Tenth Circuit cases shifting arguments similar to Summum's from the domain of religious establishment into that of free speech provide part of the rationale; the precedent furnished by the Supreme Court in *Van Orden v. Perry* supplies another.[19] A third, deeper explanation may also arise from the difficulty of formulating an Establishment Clause-based argument that would encourage a court to grant Summum the capacity to erect its own display in Pleasant Grove's Pioneer Park, rather than simply to dictate removal of the monument donated by the Fraternal Order of Eagles.[20]

A brief examination of Utah's religious liberty jurisprudence suggests some compelling arguments for Summum's position. In its complaint, Summum contended that Pleasant Grove's "refusal . . . to allow the religious monument of SUMMUM on the lawn of the City Park while allowing the display of the Eagles' religious monument . . . [and] while providing a forum to the Eagles for the display of a religious monument violates the Establishment provision of the Utah Constitution."[21] The parts of the Utah Constitution treating the establishment of religion are somewhat more detailed than those of the U.S. Constitution. The former does echo the latter's language regarding establishment.[22] In addition, however, the Utah Constitution specifies that "[t]here shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment."[23]

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[18] *See* Summum v. Pleasant Grove City, 483 F.3d 1044, 1048 n.3 (10th Cir. 2007) (link), *rev'd sub nom.* Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009).

[19] *See infra* notes 46–51 and accompanying text.

[20] In his contribution to this Symposium, Nelson Tebbe discusses a similar quandary raised by *Salazar v. Buono*, involving the transfer of the land housing a white cross from the government to the Veterans of Foreign Wars. As he explains, the constitutional difficulty and corresponding remedy are quite different if one construes the challengers as seeking equal treatment of their religious symbols instead of elimination of the cross itself. *See* 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); Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008) (link), *cert. granted sub nom.* Salazar v. Buono, 129 S. Ct. 1313 (2009).

[21] Joint Appendix at 20, *Summum*, 129 S. Ct. 1125 (No. 07-665), 2008 WL 2415597.

[22] *See* U.S. CONST. amend. I (link); U.S. CONST. art. VI, § 3 (link); UTAH CONST. art. I, § 4 (link). *See also* Soc'y of Separationists, Inc. v. Whitehead, 870 P.2d 916, 935 (Utah 1993) ("[P]ortions of article I, section 4 were drawn directly from outside sources, [but] certain aspects of the provision are unique to Utah." (footnote omitted)).

[23] UTAH CONST. art I, § 4.

In *Society of Separationists, Inc. v. Whitehead*,[24] the Utah Supreme Court analyzed this language in the context of legislative prayer. Rejecting a challenge to the Salt Lake City council's practice of opening its sessions with a religious invocation, the court determined that, although the prayer constituted a "religious exercise" within the meaning of the state constitution, it did not violate the state constitution's restriction on the appropriation of public money.[25] Nor did the activity foster a "union of Church and State" of a variety that would run afoul of the state constitution's prohibition.[26]

Rather than interpreting the relevant sections of the Utah Constitution according to their plain meaning, as the Society of Separationists itself had urged, the Utah Supreme Court engaged in a lengthy discussion of the historical events leading to the constitution's adoption in 1895 and of details concerning the document's framing.[27] In doing so, the court rehearsed the events surrounding the Mormon settlement of the territory, the heated disputes with the federal government concerning polygamy, and the growing division in the late nineteenth-century between Mormons and members of other religious groups as well as those who had been excommunicated from the Mormon church.

From this history, the court derived a conclusion about the fundamental principles bolstering the constitutional protections for religious liberty. It determined that the "dominant theme[s] . . . underl[ying] the various provisions on freedom of religion and conscience" consist of: "(i) a distancing of government from involvement with religion, (ii) nonsectarianism to the extent there is government involvement with religion, and (iii) government neutrality—the maintenance of a level playing field in civil matters—as between religious and nonreligious sentiments."[28] While emphasizing equality, both among religious sects, and between religion and non-religion, these principles do not, as the court explained, entail an estrangement between church and state.[29]

As a result, religions in Utah can receive government resources so long as the government's aid is "indirect" and "neutral"—terms that the Utah

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[24] 870 P.2d 916.

[25] *Id.* at 938–39.

[26] *Id.* at 939–40.

[27] *Id.* at 921–29, 935–36, 939–40.

[28] *Id.* at 934, 936. The second and third of these principles might be thought to map roughly onto what Chris Eisgruber and Larry Sager have termed the "antidiscrimination" and "neutrality" principles of their conception of "equal liberty." *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 52–53 (2007) (link).

[29] *Soc'y of Separationists, Inc.*, 870 P.2d at 939 (disagreeing "with the Separationists that the framers of the Utah Constitution intended a complete separation between religion and the state," and holding that "the union-of-church-and-state ban applies only to circumstances that join a particular religious denomination and the state so that the two function in tandem on an ongoing basis"). The implicit avoidance of the "wall of separation" model here is also reminiscent of Eisgruber and Sager. *See* EISGRUBER & SAGER, *supra* note 28, at 22–24.

Supreme Court appears to have conflated. According to the court, "[w]hen the state is neutral, any benefit flowing to religious worship, exercise, or instruction can be fairly characterized as indirect because the benefit flows to all those who are beneficiaries of the use of government money or property, which may include, but is not limited to, those engaged in religious worship, exercise, or instruction."[30] The court therefore "read [a] neutrality requirement into the 'no public money or property' language of article I, section 4,"[31] and held that two elements of neutrality were crucial to the constitutionality of a challenged government act: "[f]irst, the money or property must be provided on a nondiscriminatory basis"; and "[s]econd, the public money or property must be equally accessible to all."[32] The prayer opening city council meetings violated neither of these prohibitions.

A city council's refusal to allow a different *kind* of prayer did, however, contravene them. While the Utah Supreme Court upheld the Salt Lake City council's practice of engaging in prayer in *Society of Separationists*, in *Snyder v. Murray City Corp.* it deemed the Murray city council's rejection of a proposed alternative prayer to be a violation of the neutrality requirement.[33] The Murray city council solicited and accepted prayers produced by disparate religious denominations, including Christian, Jewish, Buddhist, and Native American, but it claimed that the prayer language Snyder suggested fell outside the guidelines for opening invocations.[34] The prayer implored the female deity to whom it appealed: "We fervently ask that you guide the leaders of this city, Salt Lake County and the state of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions . . . ."[35] Despite challenging the premise of the neutrality approach to religious liberty, this invocation should have been accepted, according to the Utah Supreme Court, if Murray City were selecting the council's opening prayers on a nondiscriminatory basis.[36] The court presented two alternative remedies for the city council's violation of Utah's establishment provisions. On the one hand, it suggested that the employment of discriminatory selection criteria invalidated the entire practice and, on the other hand, it indicated that the individual seeking to present his prayer should simply be allowed to do so.[37]

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[30] *Soc'y of Separationists, Inc.*, 870 P.2d at 937.

[31] *Id.* at 938.

[32] *Id.*

[33] Snyder v. Murray City Corp., 73 P.3d 325, 331–32 (Utah 2003) (link).

[34] *See* Snyder v. Murray City Corp., 159 F.3d 1227, 1228–30 (10th Cir. 1998) (en banc) (link).

[35] *Snyder*, 73 P.3d at 327 n.1.

[36] *Id.* at 331.

[37] *Compare Snyder*, 73 P.3d at 331–32 ("Because Murray City's means of selecting those entitled to offer the prayer at the opening of its city council meetings was not nondiscriminatory, and therefore not neutral, the city's practice of opening its meetings with prayer constitutes a direct benefit to the exercise of religion and violates article I, section 4's prohibition that '[n]o public money or property shall be ap-

It is worth emphasizing the relationship between the constitutionality determinations in *Society of Separationists* and *Snyder*. Whereas a particular mode of state support for religion—permitting legislative prayer—might in isolation be deemed constitutional (as it was in *Society of Separationists*), that same mode of state support could become unconstitutional once a new set of circumstances arises (as it did in *Snyder*). In the absence of conspicuous evidence that proposals for prayer were being rejected, the practice involved in *Society of Separationists* was upheld; once a third-party's attempt to intervene and furnish his or her version of religious exercise was denied, however, that event rendered the continuation of the prior practice unconstitutional.

From this perspective, it becomes evident why Summum included an appeal to the Utah Constitution's establishment provisions and their interpretation by the Utah Supreme Court in its original complaint. Even if the Ten Commandments monument could legitimately be situated in Pioneer Park without raising concern about the potential establishment of religion, Pleasant Grove's refusal to accept an alternative religious monument might make the original display itself unconstitutional. Nevertheless, for unknown reasons, Summum failed to press these state-law claims on its appeal to the Tenth Circuit.

Turning to Summum's federal claims, a variety of Tenth Circuit opinions suggest the rationale behind Summum's neglect of the federal Establishment Clause. Whereas the Tenth Circuit, in an en banc decision also labeled *Snyder v. Murray City Corp.*,[38] had foreclosed the possibility that it would interpret the Establishment Clause of the U.S. Constitution in the manner that the Utah Supreme Court analyzed the religious liberty provisions of the Utah Constitution, it shifted several challenges to Ten Commandments displays from the register of religion to that of speech. Both the initial panel decision in *Snyder v. Murray City Corp.*[39] and the full circuit's reconsideration of the case relied on the Supreme Court's determination in *Marsh v. Chambers*,[40] which upheld the Nebraska legislature's practice of opening sessions with a prayer by a publicly funded chaplain. The analysis performed by Judge Ebel, the author of the en banc majority opinion in *Snyder*, was particularly suggestive. According to Ebel, the Supreme Court had treated "the constitutionality of legislative prayers" as a "*sui generis* legal question," and deemed such legislative prayers "a kind of religious genre" whose compatibility with the Establishment Clause was demonstrated

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propriated for or applied to any religious worship, exercise or instruction . . . .'"), *with id.* at 332 ("If Murray City chooses to continue to open its city council meetings with prayer, it must strictly adhere to the neutrality requirements set forth herein and in *Society of Separationists*. Under those neutrality requirements, Snyder should be allowed to offer his prayer.").

[38] 159 F.3d 1227.

[39] 124 F.3d 1349 (10th Cir. 1997) (link), *rev'd* 159 F.3d 1227.

[40] 463 U.S. 783 (1983).

by its historical roots.[41] Legislative prayer might fall outside the genre protected by *Marsh* only if it entailed, on the one hand, "proselytiz[ing] a particular religious tenet or belief" or "aggressively advocat[ing] a specific religious creed," or, on the other hand, "select[ing] the person who is to recite the legislative body's invocational prayer" with an impermissible motive.[42] Neither of these concerns, the court determined, was raised by the facts in *Snyder*.[43]

Judge Lucero's concurring opinion emphasized an additional aspect of the *Marsh* decision: that the genre of legislative prayer constitutes a form of governmental speech. According to Lucero, "the opinion's historical treatment of legislative prayer shows that *Marsh* involves, and should be limited to, *established chaplaincies*—chaplaincies that are so structured that they become an arm or an office of the legislature."[44] For this reason, Lucero would have rejected not only Snyder's claim, but also the very form of prayer encouraged by the Murray city council, because the selection of private speakers to publicly pronounce religious views would encourage impermissible proselytizing. As he explained:

> Under the foregoing analysis, government would have to seek the sanctuary of *Marsh* should it wish to maintain leg-

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[41] *Snyder*, 159 F.3d at 1232–33. History has been invoked in a number of different ways to suggest the compatibility of various kinds of government activities with the Establishment Clause. Kent Greenawalt has summarized three principal approaches:

> One reliance on history is to conclude that if the very practice that is challenged was accepted without controversy at the founding, that counts powerfully against a conclusion that the practice is unconstitutional. . . . A broader reliance builds analogies from historically accepted practices. . . . A third use of history encourages more flexible constitutional development. One looks to the basic evils nonestablishment was meant to correct and asks whether the challenged practice presents some of those evils.

GREENAWALT, *supra* note 12, at 192. The treatment of legislative prayer generally falls into the first of these categories. *See id.*

History's role in the *Van Orden* decision, although crucial, is slightly more difficult to categorize. Justice Rehnquist's plurality opinion invokes the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789," enumerates several other long-standing displays of the Ten Commandments, and suggests that "[o]ur opinions, like our building, have recognized the role the Decalogue plays in America's heritage." Van Orden v. Perry, 545 U.S. 677, 686, 689 (2005) (plurality opinion) (opinion of Rehnquist, J.) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). Unlike the *Marsh* Court, the *Van Orden* plurality does not appeal to the presence of the precise practice in question at the time of the Founding, but instead contends that the governmental acknowledgment of religion since that moment and the number of decades-old Ten Commandments displays should together provide a historical justification for the Texas monument. In addition, Rehnquist associates the Ten Commandments with America's cultural heritage rather than exclusively with a religious message. For Breyer, in concurrence, the history of the monument's acceptance over forty years renders it more secular than religious. *See supra* note 1.

[42] *Snyder*, 159 F.3d at 1234.

[43] *Id.* at 1235.

[44] *Id.* at 1237 (Lucero, J., concurring in the judgment).

> islative prayer. It may appear ironic that the Establishment Clause should endorse official chaplaincies, while proscribing a practice of inviting prayer volunteers who may represent many and varied religious faiths. But though this effect may appear establishmentarian, a closer inspection proves otherwise. In fact, the strength and diversity of religious life is doubly benefitted by a legislative retreat to *Marsh*.[45]

Counter-intuitively, the state must maintain the historically established genre of legislative prayer as governmental, rather than succumbing to the temptation to transform it into a forum for private speakers furnishing disparate invocations. On this account, the very existence of governmental control helps to limit the extent to which the prayer may proselytize or endorse one religion over another. Hence the fact that the government itself is speaking renders certain forms of legislative prayer less subject to Establishment Clause challenge than those forms of legislative prayer that simply furnish an opportunity, on a nondiscriminatory basis, for individuals to speak.

Although the Tenth Circuit rejected the possibility of an equality-based Establishment Clause challenge in *Snyder*, it shifted its equality analysis to the free speech arena in several cases involving Ten Commandments monuments. After the 1973 case *Anderson v. Salt Lake City Corp.*,[46] in which the Tenth Circuit held that a Ten Commandments monument donated by the Fraternal Order of Eagles could withstand Establishment Clause challenge because it was "primarily secular, and not religious in character," and "neither its purpose or effect tends to establish religious belief,"[47] both lower courts and litigants have avoided treading the Establishment Clause path.[48] Instead, in *Summum v. Callaghan*, the Tenth Circuit opined that the presence of a Ten Commandments monument on a courthouse lawn had produced a limited public forum from which Summum's speech could not be excluded.[49] Subsequently, in *Summum v. City of Ogden*, the Tenth Circuit

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[45] *Id.* at 1243.

[46] 475 F.2d 29 (10th Cir. 1973) (link), *superceded by Van Orden*, 545 U.S. 677. *See* Soc'y of Separationists v. Pleasant Grove City, 416 F.3d 1239 (10th Cir. 2005).

[47] *Anderson*, 475 F.2d at 34.

[48] *See* Summum v. City of Ogden, 297 F.3d 995, 999–1000, 1000 n.3 (10th Cir. 2002) (link) (elaborating that, "[a]t oral argument, Summum's counsel conceded that, absent en banc reconsideration of [*Anderson*], this panel could not reverse the district court's grant of summary judgment, in favor of the City of Ogden, on Summum's Establishment Clause claim," although also opining that "Summum's concession may have been unwise" and that "the Establishment Clause issue is certainly not so straightforward as the City would presume"); Summum v. Callaghan, 130 F.3d 906, 911 (10th Cir. 1997) (link) (explaining that the district court had dismissed Summum's Establishment Clause-based challenge to Salt Lake County's refusal to allow the organization to place its monolith on the lawn of the courthouse despite the presence on that lawn of a Ten Commandments monument).

[49] *Callaghan*, 130 F.3d at 919.

determined that the City of Ogden had impermissibly discriminated against Summum's viewpoint in violation of the Free Speech Clause of the First Amendment.[50] Despite eschewing an antidiscrimination framework in the Establishment Clause context, the Tenth Circuit advanced such an approach to the same kinds of cases through appealing to freedom of expression principles instead. Furthermore, the Supreme Court's decision in *Van Orden* had placed the final nail in the coffin for Establishment Clause-based challenges to Ten Commandments monuments,[51] thereby channeling such litigants into Free Speech Clause claims instead.

The contrast between the Utah Supreme Court's and the Tenth Circuit's treatments of legislative prayer suggests a clash between two logics. As the Utah Supreme Court's decisions demonstrate, following a strict antidiscrimination norm would lead to requiring that the government either allow all forms of legislative prayer or that it desist from the practice entirely. As Judge Lucero's concurrence in *Snyder v. Murray City Corp.* indicates, however, long-standing Establishment Clause principles, like the restriction against government endorsement of religion or proselytizing, might mandate against opening a government forum to all kinds of religious speech. As the following section argues, Justice Souter's opinion in *Summum* points to the persistence of this clash in the context of Ten Commandments monuments.

## III. THE SPECTER RAISED

A close examination of Justice Souter's concurrence in *Summum* serves to foreground a fundamental contradiction between, on the one hand, both the decision in *Van Orden* and the Court's developing position on government speech, and, on the other, the Court's general move in the direction of equality-based reasoning in the religious liberty arena. Although the rhetoric of Justice Breyer's concurrence in *Van Orden* resonated with the goal of eliminating divisive debates over religion,[52] taking that case together with *Summum* demonstrates the potential for inter-denominational conflict that the Court's jurisprudence has generated. Unless the Court adopts a position on the potential Establishment Clause claim arising out of

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[50] *City of Ogden*, 297 F.3d at 1000.

[51] In 2005, the Tenth Circuit remanded another lawsuit challenging the Ten Commandments display on Establishment Clause grounds in light of *Van Orden*, and the suit was eventually voluntarily dismissed. *See* Lund, *supra* note 3 (discussing the procedural history of this case); *Soc'y of Separationists*,, 416 F.3d 1239; Order Granting Plaintiffs' Motion for Voluntary Dismissal Under Fed. R. Civ. P. 41(a), Soc'y of Separationists v. Pleasant Grove City, No. 2:03-CV-839 BSJ (D. Utah Feb. 15, 2006).

[52] Van Orden v. Perry, 545 U.S. 677, 703–04 (2005) (plurality opinion) (Breyer, J., concurring in the judgment) ("[A]s I have said, in reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less on a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves. This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive.").

the facts in *Summum* that partakes of an anti-discrimination rationale, it will move increasingly toward affirming a Judeo-Christian American heritage and allowing for the exclusion of other religious traditions from government displays. At the same time, if the Court does indicate in a future case that the government must not prefer the monuments of one religion over those of another, it may increase the likelihood that the state will be seen as impermissibly endorsing religion, which could vitiate the historical and other rationales given for permitting activities like legislative prayer or Ten Commandments displays under the Establishment Clause.[53]

A number of scholars, including, most prominently, Chris Eisgruber and Larry Sager, have espoused equality-based approaches to adjudication under the religion clauses—though the underlying conception of equality endorsed differs significantly among its advocates.[54] Furthermore, the Court itself has been moving in the direction of an equality norm in its Free Exercise and Establishment Clause jurisprudence.[55] For example, in *Zelman v. Simmons-Harris*[56] the Court upheld a program that allowed public support for religious schools because the voucher model at issue permitted private individuals to determine where to allocate governmental resources and did not discriminate between religion and non-religion or on the basis of particular religious affiliations.[57]

As Justice Souter's concurrence in *Summum* illuminates, however, the equality emphasis in the Establishment Clause context may interact oddly with the emerging doctrine concerning government speech. According to Souter:

> After today's decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech. If the monument has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of a flat-out establishment of religion, in the sense of the government's adoption of the tenets expressed or symbolized.

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[53] For a discussion of these rationales, *see supra* notes 16 & 41 and accompanying text.

[54] *See* MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008) (link); EISGRUBER & SAGER, *supra* note 28; Bernadette Meyler, *The Limits of Group Rights: Religious Institutions and Religious Minorities in International Law*, 22 ST. JOHN'S J. LEGAL COMMENT. 535, 553–58 (2007) [hereinafter Meyler, *The Limits of Group Rights*] (link); Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275 (2006) [hereinafter Meyler, *The Equal Protection of Free Exercise*] (link); Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L.Q. 1529 (2005) (link) (elaborating upon the obstacles to formulating a unified account of equality in the religious liberty context).

[55] *See* Meyler, *The Limits of Group Rights*, *supra* note 54, at 553–58; Meyler, *The Equal Protection of Free Exercise*, *supra* note 54, at 278–80.

[56] 536 U.S. 639 (2002) (link).

[57] *Id.* at 653 (emphasizing that the voucher scheme involved a "program of true private choice" and was neutral toward religion). *See* EISGRUBER & SAGER, *supra* note 28, at 38, 198–239.

> In such an instance, there will be safety in numbers, and it will be in the interest of a careful government to accept other monuments to stand nearby, to dilute the appearance of adopting whatever particular religious position the single example alone might stand for. As mementoes and testimonials pile up, however, the chatter may well make it less intuitively obvious that the government is speaking in its own right simply by maintaining the monuments.[58]

In earlier cases involving potentially suspect displays, like *Lynch v. Donnelly*[59] and *County of Allegheny v. ACLU*,[60] the Court had insisted that public presentation of even an iconic object, like a crèche, could be more a manifestation of tradition than an endorsement of religion if surrounded by items with secular significance, and that the inclusion of a Christmas tree with a menorah tended to minimize the religious import of the latter rather than serving to endorse both Christianity and Judaism.[61] Souter's suggestion thus implies that the state may not only try to inoculate itself against attack by placing symbols that might otherwise be construed as religious in contexts that serve to displace that significance, but also by multiplying the number of religions invoked in order to demonstrate that it has not preferred one sect over another. Although this latter mode of inoculation is not one suggested directly by the cases involving religious displays, it is consistent with other areas of the Court's Establishment Clause jurisprudence.[62]

As Souter accurately observes, however, given the outcome in *Summum*, a governmental entity may, counter-intuitively, face less fear of constitutional challenge if it simply presents a Ten Commandments monument

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[58] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1141–42 (2009) (Souter, J., concurring in the judgment).

[59] 465 U.S. 668 (1984).

[60] 492 U.S. 573 (1989) (link).

[61] *Id.* at 598–602 (analyzing the problematic nature of the display of a crèche while ultimately upholding the display as constitutional); *id.* at 613–21 (explaining that the juxtaposition of a Christmas tree with a menorah suggested a general celebration of two cultural holidays rather than a "simultaneous endorsement" of Judaism and Christianity); *Lynch*, 465 U.S. at 671 (elaborating that the city's exhibit "comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue here"); *id.* at 691 (O'Connor, J. concurring) ("The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.").

[62] *See* Larson v. Valente, 456 U.S. 228, 244 (1982) (link) (striking down a Minnesota statute that imposed registration and reporting requirements on certain religious groups but not others and explaining that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another").

or another relic of the Judeo-Christian tradition than if it provides a more ecumenical set of religious icons. If the government appeared to be furnishing a forum for the expression of private religious views, it would not be permitted to discriminate among them; by contrast, when speaking on its own behalf, the government could contend that it is allowed to prioritize some religions over others. As Souter explained:

> [T]he government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.[63]

The historicity of a monument that has been in place for decades might, like the historical legacy of legislative prayer, be thought to protect a government against Establishment Clause challenges. This result would, however, render the government speech cases incompatible with the anti-discrimination principle that has characterized much of the Court's recent religious liberty jurisprudence.

## IV. CONCLUSION

Despite Justice Scalia's effort in *Summum* to exorcise the spirit of the Establishment Clause,[64] its specter may continue to haunt the Court in similar cases. Even if *Van Orden* itself was correctly decided, the presence of another religious group demanding equal treatment legally differentiates the facts in *Summum* from those present in the earlier case. If the U.S. Supreme Court were to follow the model set forth by the Utah Supreme Court in the context of legislative prayer, it would permit the Ten Commandments monument to remain in *Van Orden*, but either order the monument's removal or the inclusion of the other religion's display when faced with an Establishment Clause challenge in a case similar to *Summum*. Were this to occur, however, the historical reasoning underpinning the outcome in *Marsh*—or even in *Van Orden* itself—would be undermined. Fully following the path of religious equality when the government is speaking could thereby lead to an apparent governmental endorsement of religion. Although Souter's retirement from the Court will remove him from further consideration of these issues, the questions that he raised in his *Summum* concurrence will play out long after his departure.

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[63] *Summum*, 129 S. Ct. at 1142 (Souter, J., concurring in the judgment).

[64] *See supra* notes 4–6 and accompanying text.