2009

Pleasant Grove v. Summum: Losing the Battle to Win the War

Ian C. Bartrum
University of Nevada, Las Vegas -- William S. Boyd School of Law

VIRGINIA LAW REVIEW
IN BRIEF

VOLUME 95 MAY 16, 2009 PAGES 43-48

ESSAY

PLEASANT GROVE V. SUMMUM: LOSING THE BATTLE TO WIN THE WAR

Ian Bartrum[*]

IN February, the Supreme Court announced its unanimous decision in a case that represents the first step in a well calculated attack on the conservative wing's efforts to conflate Establishment Clause doctrine with Free Speech analysis. The case, *Pleasant Grove City, Utah v. Summum*, pitted a Salt Lake City church headed by Summum Ra against the city of Pleasant Grove in a fight over monuments displayed in a public park.[1] For over thirty years, a monument of the Ten Commandments—originally donated by the Fraternal Order of Eagles—has stood in the city's Pioneer Park. In 2003, and again in 2005, Summum asked Pleasant Grove also to display a monument dedicated to the "Seven Aphorisms of Summum" on park grounds.[2] The city rejected Summum's request, claiming that monuments in the park must have some significant connection to Pleasant Grove's civic history. Summum, however, argued that, by opening Pioneer Park to privately donated monuments, the city has created a public forum for free expression purposes and cannot now discriminate against donations based on their content. In a forceful display of unanimity from a Court that might have fractured along a number of doctrinal lines, Summum lost—for now.

Samuel Alito's majority opinion makes the decision out as a straightforward application of the government speech rule, which

[*] Irving S. Ribicoff Fellow in Law, Yale Law School.
[1] Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125 (2009).
[2] Id. at 1129–30.

permits the state to formulate and express its own opinions without also having to present any and all others. In one court's words, if "authorities place a statute [sic] of Ulysses S. Grant in [a] park, the First Amendment does not require them also to install a statue of Robert E. Lee."[3] This rule hinges, of course, on whether or not it is in fact the *government* speaking; the doctrine does not, by definition, apply to private speech that takes place on public grounds. Thus, much of the argument in *Pleasant Grove* centered on whether the city has "adopted" or "effectively controlled" the message of the Fraternal Order of Eagles' monument by displaying it in Pioneer Park. Were this truly the only issue in play, however, it would seem that Pleasant Grove had an easy way out: simply pass an ordinance or install a placard adopting the Ten Commandments monument as its own speech. This would have removed all doubt as to whether the monument falls under the government speech rule—but Pleasant Grove resolutely refused to take either action. Why? The obvious answer is that such an explicit endorsement of the Decalogue would raise serious Establishment Clause concerns. Although Alito's opinion studiously avoids this question, its long-term significance was not lost on others on the Court. While Antonin Scalia and Clarence Thomas blustered in concurrence that "[t]he city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire,"[4] John Paul Stevens and Ruth Ginsburg seemed quietly pleased—perhaps even confident—about the potential future implications: "For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses."[5] To understand what is really at stake here—to put Scalia's Gertrudian protest and Stevens' Machiavellian calm in context—it is worth taking a brief look at the unsettled state of Establishment Clause jurisprudence.

When it incorporated the Establishment Clause against the states in 1947, the Court both adopted a doctrine of state "neutrality" towards religion and made an explicit choice about the practical shape this neutrality would take: "Neither a state nor the Federal government can . . . pass laws which aid one religion, aid all religions, or prefer one

[3] PETA v. Gittens, 414 F.3d 23, 29 (D.C. Cir. 2005).
[4] *Pleasant Grove*, 129 S. Ct. at 1139 (Scalia, J., concurring).
[5] Id. (Stevens, J., concurring).

religion over another."[6] To be neutral, then, the state must *exclude* all religion from government speech or aid programs. This "exclusive" conception of neutrality met with immediate opposition, however, from those who claimed that the doctrine actually establishes a secular viewpoint at the expense of all others. And so, just five years later, a different vision of neutrality briefly captured a majority of the Court: "When the state encourages religious instruction or cooperates with religious authorities . . . . it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would . . . . be preferring those who believe in no religion over those who do believe."[7] But this "inclusive" version of neutrality—which sees the state as neutral when it *includes* or accommodates all religious views equally—did not long hold sway. A decade later the Court excluded nondenominational prayer from public schools,[8] and it has since applied exclusivism to strike down moments of silence, nondenominational graduate prayers, public funding for Catholic school field trips, and tax benefits to parochial school parents.[9]

But inclusivism has remained alive—simmering just below the surface in Potter Stewart's dissents in the school prayer decisions—and has reemerged, cloaked in free expression robes, in a series of cases running from *Widmar v. Vincent*, through *Lamb's Chapel v. Center for Moriches Union Free School District* and *Rosenberger v. University of Virginia*, to *Good News Club v. Milford Central School*.[10] In these decisions the Court has held that, the Establishment Clause notwithstanding, the Free Speech Clause prevents the government from discriminating against groups with a religious viewpoint when allocating resources for use as, or in, a public forum—so long as the government itself does not endorse a particular religious message. In this way, inclusivists on the Court have begun to chip away at the exclusivist wall of separation by suggesting that some forms of exclusivism are tantamount to a denial of free speech. While not unnoticed, these efforts

[6] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[7] Zorach v. Clauson, 343 U.S. 306, 313–14 (1952).

[8] See Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[9] See Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985); Wolman v. Walter, 433 U.S. 229 (1977); Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[10] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. for Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

have remained underpublicized; but they continue to present puzzling doctrinal problems. Summum's near certain follow-up appeal on Establishment Clause grounds—which Scalia is at unseemly pains to prevent—threatens to expose these problems in the months ahead.

From the outside looking in, this two-step litigation tactic has the appearance of a well conceived divide-and-conquer strategy. If the *Good News* approach has been to muddy the Establishment water with Free Speech analysis, *Pleasant Grove* seeks to clarify each clause and its derivative doctrine separately. The first step forces the Court to acknowledge the true parameters of Free Speech in a public forum; thus the recent decision reaffirms that a public entity that sponsors a particular viewpoint—while excluding others—must actually endorse that viewpoint as "government speech." The second step, presumably, will ask the Court to decide whether the Establishment Clause permits "government speech" that presents a particular *religious* viewpoint. This is precisely the doctrinal problem that Thomas papers over in his *Good News* opinion, cryptically suggesting that, "it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination."[11] It is this very clarity that *Pleasant Grove* would seem to demand. By taking these issues apart and resolving them separately, Summum's advocates may yet demonstrate that Scalia and Thomas cannot have their constitutional cake and eat it too: If there is room at the public forum for the Good News Club, there must also be room for Summum.

The view from the inside must seem equally troubling, at least judging from Chief Justice John Roberts's very first question to the petitioners at oral argument: "[Y]ou're really just picking your poison, aren't you? I mean, the more you say that the monument is Government speech to get out of the . . . Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause."[12] Scalia expressed similar unease with the respondents: "You will say just the opposite when you come back here to challenge the Ten Commandments monument . . . on Establishment Clause grounds. You will say something like this: Anybody who comes into this park and sees this monument owned by the Government, on Government land, will

[11] *Good News Club*, 533 U.S. at 114.

[12] Transcript of Oral Argument at 4, Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125 (2009) (No. 07-665).

think that the Government is endorsing the message."[13] Indeed, by invoking the government speech rule based on these facts, the Court would effectively kick out the doctrinal leg upon which the *Widmar*/*Good News* cases stand—the idea that the state does not endorse religious speech simply by opening its doors to religious viewpoints on an equal basis. The only Establishment defense then left to the inclusivists—derived from 2005's *Van Orden v. Perry*—is to argue that the state is only endorsing the Ten Commandments' "historical meaning" to Pleasant Grove; not the religious message.[14] This is the tack that Scalia has preemptively taken in concurrence: "Even accepting the narrowest reading of the narrowest opinion necessary to the judgment in *Van Orden*, there is little basis to distinguish the monument in this case . . . ."[15] But, in truth, this is a flimsy doctrine fraught with peril; it transparently prefers well established or "historically significant" religions—likely to be local majorities—to newer minority groups. And it is unclear that this frail fiction can survive recent turnover on the bench—neither Alito nor Roberts took the opportunity to sign on here.

Admittedly, it is difficult to imagine the Court overturning a case decided just four years ago, but—Scalia's wishful thinking notwithstanding—a direct repudiation of *Van Orden* hardly seems necessary. Stephen Breyer's concurrence was the swing vote in that decision (the aforementioned "narrowest opinion") and in it he made clear that the fundamental inquiry in such "borderline cases" must be whether the outcome "assure[s] the fullest possible scope of religious liberty and tolerance for all," and prevents "divisiveness based upon religion that promotes social conflict . . . ."[16] He concluded that the particular context of the monument at issue in *Van Orden* made its message "predominantly secular" and "unlikely to prove divisive," thus placing it narrowly "on the permissible side of the constitutional line . . . ."[17] Given the peculiar facts and implications of *Pleasant Grove*, however, Breyer's fundamental inquiry could easily yield different results. Indeed, Scalia's recent concurrence practically begs a troubling hypothetical: What if the city had *accepted* Summum's monument, and

[13] Id. at 47.
[14] See Van Orden v. Perry, 545 U.S. 677, 690 (2005).
[15] *Pleasant Grove*, 129 S. Ct. at 1140 (Scalia, J., concurring).
[16] *Van Orden*, 545 U.S. at 698, 700 (Breyer, J., concurring).
[17] Id. at 702, 704.

now faced an Establishment Clause challenge from a local Christian group? Given the decisive importance Scalia wants to place on a monument's historical meaning or significance, such a challenge would seem likely to succeed. But a doctrine that finds the Ten Commandments constitutional, yet would hold the Ten Commandments *plus* the Seven Aphorisms unconstitutional, hardly seems to assure the fullest scope of "tolerance for all"[18]—nor, truth be told, does it mesh particularly well with Establishment inclusivism. And because such an approach actually threatens to encourage religious divisiveness, it does not seem sympathetic to Breyer's calculus. For now, the once and future swing voter was careful not to give anything away, saying in concurrence only that we must treat the "'government speech' doctrine [as] a rule of thumb, not a rigid category."[19]

Thus *Pleasant Grove*, in both its current and future manifestations, seems poised to cut at least part way through the now tangled strands of First Amendment doctrine. In what is likely a deliberate, two-step litigation strategy, Summum has brought the Court to a potentially transformative Establishment crossroads. For his part, David Souter, another pivotal voter on this issue, clearly sees the coming storm: "[While] Establishment Clause issues have been neither raised nor briefed before us, 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. The interaction between the 'government speech doctrine' and Establishment Clause principles has not, however, begun to be worked out."[20] This call to begin "work[ing] out" the relevant Establishment principles certainly tempers Scalia's loud confidence in *Van Orden*, and, when combined with Stevens and Ginsburg's quiet contentment and Roberts and Alito's abstinence, Souter's concurrence may signal a sea change in favor of Establishment exclusivists. At the very least, Summum Ra (and perhaps others) will have the pleasure of seeing the Court's conservatives squirm through a doctrinal minefield of their own making.

[18] Id. 700.
[19] *Pleasant Grove*, 129 S. Ct. at 1140 (Breyer, J. concurring).
[20] Id. at 1141 (Souter, J., concurring).