

## PROPERTY AND SPEECH IN *SUMMUM*

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### INTRODUCTION

*City of Pleasant Grove v. Summum*<sup>1</sup> is, by its own reckoning, a case about government speech under the Free Speech Clause of the First Amendment.<sup>2</sup> Even so, most commentary has justifiably focused on the decision's implications for another part of the First Amendment: the Establishment Clause.<sup>3</sup> This brief Article addresses yet another feature of *Summum*—what it draws from, and says about, the relationship between speech rights and property ownership.<sup>4</sup> This relationship is not only the driving force behind the majority's opinion, but is also an important tool for understanding government speech in other cases involving government intrusion into speech markets, which often involve speech that is less physical than the monuments at issue in *Summum*.<sup>5</sup>

Part I of this Article discusses the intersection of property rights and government speech in *Summum*. Part II explores how that intersection illuminates three often-hidden characteristics of all speech: ownership, rivalry, and excludability. Focusing on these concepts may help explain the property-like characteristics of speech (even when it takes forms less physical than the monuments in *Summum*), and whether property ownership is itself a communicative act.

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<sup>1</sup> 129 S. Ct. 1125 (2009) (link).

<sup>2</sup> *Id.* at 1129 (“[T]he placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”).

<sup>3</sup> See, e.g., Christopher C. Lund, *Keeping the Government's Religion Pure: Pleasant Grove City v. Summum*, 104 NW. U. L. REV. COLLOQUY 46, 46 (2009) (noting that *Summum* “was not an Establishment Clause case,” but that it “nevertheless reveals much about the course that the Supreme Court is now charting with the Establishment Clause”) (link).

<sup>4</sup> Justices Stevens and Ginsburg characterized the case as being one about property. See *Summum*, 129 S. Ct. at 1138 (Stevens, J., concurring) (“This case involves a property owner's rejection of an offer to place a permanent display on its land.”).

<sup>5</sup> Writing years before the contemporary government speech doctrine took shape, Steven Shiffrin presciently noted that “[t]he government speech question has usually reached the Supreme Court in controversies concerning how public *property* should be used.” Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 572 (1980) (emphasis added).

I. PROPERTY AND SPEECH IN *SUMMUM*

In *Summum*, the Supreme Court held that the First Amendment did not require the City of Pleasant Grove—which had established a public park that presented various privately donated monuments—to accept a monument donated by Summum, a religious organization. Rather than analyzing the case as a restriction on Summum’s speech, however, the Court held that the City’s selection of monuments was a form of government speech and therefore entirely beyond the reach of the Free Speech Clause.

Despite the apparent clarity of its bright-line conclusion, *Summum* was decided in a heavy shadow. Looming in the background was the fact that the monuments—both Summum’s and those earlier accepted by the City, such as the Ten Commandments monument donated by the Fraternal Order of the Eagles<sup>6</sup>—were arguably “religious,” such that the City’s adoption of them threatened to violate the Establishment Clause. But it was not the Establishment Clause that drove the Court’s opinion; nor was it solely a concern for protecting the government’s need (or perhaps “right”) to express its own viewpoints, which was the rationale behind other government speech cases like *Rust v. Sullivan*<sup>7</sup> and *Johanns v. Livestock Marketing Association*.<sup>8</sup> Rather, *Summum* was, at its heart, a case about the relationship between property ownership and speech—about the communicative value of ownership, the physical impossibility of allowing free construction of communicative monuments on government property, and the right of a speaker-property owner to exclude other speakers and property users. These three incidents of the relationship between property and speech reveal much about the nature of government speech more generally.

First, *Summum* held that by deciding which monuments would appear in the park and which would be excluded, the City was effectively “speaking.”<sup>9</sup> In other words, the court held that by exercising its property rights, Pleasant Grove was exercising its speech rights as well. There are at least two ways to make sense of this relationship between communication and property. First, it could be said that the act of selecting and approving a monument is itself a communicative act on the part of the property owner, regardless of its impact on observers. Alternatively, and drawing on the reasonable viewer principle articulated by some Justices in Establishment

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<sup>6</sup> Although the issue was not presented in *Summum*, in *Van Orden v. Perry*, 545 U.S. 677 (2005) (link), the Supreme Court rejected an Establishment Clause challenge to a Ten Commandments monument donated by the Fraternal Order of Eagles.

<sup>7</sup> 500 U.S. 173 (1991) (rejecting a First Amendment challenge to a regulation denying federal money to family planners who provided information about abortion) (link).

<sup>8</sup> 544 U.S. 550 (2005) (finding that the government speech doctrine precluded the First Amendment claim of cattle producers who were forced to pay a fee for generic beef advertising) (link).

<sup>9</sup> *Summum*, 129 S. Ct. at 1134 (majority opinion).

Clause cases like *Capitol Square Review & Advisory Board v. Pinette*,<sup>10</sup> it could be said that—no matter what the property owner subjectively intends—speech occurs where a reasonable observer would *think* that a property owner’s acceptance of a monument or other speech act on his property amounts to approval and communication of its message.<sup>11</sup> And although this viewer-centered approach may incorporate some notion of property ownership (as Justice Stevens has noted, we generally presume that a person endorses messages displayed on his property<sup>12</sup>), it is not entirely coincident with the property-owner-as-speaker approach.<sup>13</sup> In *Summum*, the Court found it unnecessary to choose between these two theories, holding that the City was “speaking” in its selection of monuments *and* that a reasonable viewer would recognize it as doing so: “The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”<sup>14</sup> Whether either or both—intent to speak and effect on the viewer—are prerequisites of government speech therefore remains unclear.

Second, the Court pointed to the physicality and permanence of monuments, and suggested that if the government had no power to regulate them then the park in Pleasant Grove—as well as many other federal lands—could become overrun, thus effectively (even if not officially) limiting the ability of other would-be speakers to communicate.<sup>15</sup> But it seems that it is neither monuments’ permanence nor their physicality that helps transform them into government speech; rather, it is the combination of the two. Were it otherwise, the government would “own” the speech of any private speaker temporarily located on public land. And just as physical presence on public property is not determinative, neither does the “permanence” of the communication occurring there turn it into government speech. A powerful speech delivered on public property may live longer in public memory than the sturdiest monument, but that permanence, alone, does not make it government speech. The Rev. Martin Luther King, Jr.’s “I Have a Dream” speech may well be a cultural touchstone long after the

<sup>10</sup> See 515 U.S. 753, 773, 779 (1995) (O’Connor, J., concurring in part and concurring in the judgment) (concluding that a Latin cross in a park across from the Ohio Statehouse did not violate the Establishment Clause because a reasonable observer would not see it as an endorsement of religion) (link).

<sup>11</sup> Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 588 (2008) (arguing that “a public entity seeking to claim the government speech defense must establish that the contested expression is governmental in origin both formally . . . and functionally”) (link).

<sup>12</sup> *Pinette*, 515 U.S. at 800 (Stevens, J., dissenting).

<sup>13</sup> See *infra* notes 54–55 and accompanying text (discussing *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (link), *cert. granted sub. nom. Salazar v. Buono*, 129 S. Ct. 1313 (2009) (link), to be argued before the Court in the Fall of 2009).

<sup>14</sup> *Summum*, 129 S. Ct. at 1134.

<sup>15</sup> *Id.* at 1138. See also *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc) (noting that a requirement of viewpoint neutrality would require governments to “brace themselves for an influx of clutter”) (link).

steps of the Lincoln Memorial where he delivered it have crumbled into dust, but that does not mean the government can claim the speech as its own.

Instead, it seems that what troubled the Court was the *combination* of monuments' permanence and their physicality. Because of these two characteristics, the Court noted, "parks can accommodate only a limited number of permanent monuments."<sup>16</sup> Monuments "monopolize the use of the land on which they stand and interfere permanently with other uses of public space."<sup>17</sup> In economics and in property law, the idea that one person's use of a private good precludes another person's enjoyment of its benefits is a fundamental concept known as *rivalrousness*. Along with excludability, rivalrousness is considered to be the defining characteristic of a private good,<sup>18</sup> which, in turn, is a basic building block of property theory.

It is unclear whether First Amendment law has—or should have—a parallel concept. In most cases, the "marketplace of ideas" is presumed to be infinitely elastic, a place where multiple people can hold and express identical viewpoints without anyone's right to that viewpoint being infringed.<sup>19</sup> But when acts of speech (as opposed to the "viewpoints" they express) rely on some kind of physical manifestation, rivalrousness becomes a serious problem. If Pleasant Grove's park must be open to all monuments, then some would-be speakers (both private and public) may be crowded out by those who arrive and construct their monuments first. In *Summum*, the mere possibility of this outcome drove the Court to accept the government speech argument and to reject its main competitor—public forum analysis: "[W]here the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place."<sup>20</sup> The Court has, of course, faced this problem most prominently in a series of cases that attempted to define the role of the government as a regulator. And in some of those cases—including those involving "physical" speech, like ads on the sides of buses—the Court has endorsed the clutter-prevention rationale, as it did in *Summum*.<sup>21</sup>

Finally, and drawing on these principles of communication and clutter prevention, the Court held that in order to express its own viewpoint and protect the ability of private parties to express theirs, Pleasant Grove had the right to *exclude* unwanted speakers such as Summum by rejecting their monuments. The right to exclude is, of course, frequently considered to be

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<sup>16</sup> *Summum*, 129 S. Ct. at 1137.

<sup>17</sup> *Id.*

<sup>18</sup> See DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS 16 (2005).

<sup>19</sup> Intellectual property scholars might rightly object that this is an over-simplification—the law *does* protect ideas through patent, copyright, trademark, and trade secret. I agree, and discuss those concepts below.

<sup>20</sup> *Summum*, 129 S. Ct. at 1138.

<sup>21</sup> See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (link).

the most important stick in the “bundle” of property rights.<sup>22</sup> But the right to exclude—whether held by a public or private property owner—also limits the potential forums in which speakers can deliver constitutionally protected speech: the right to exclude conflicts with the right to speak where one wants. Consequently, the First Amendment may permit (or even require) limits on a property owner’s ability to exclude.<sup>23</sup> The Court has, for example, upheld a state statute forcing mall owners to allow protesters on their private property, even though they disagreed with the protesters’ viewpoints and would otherwise have had the right to exclude them.<sup>24</sup> That limit on a property owner’s right to exclude seems to disappear, however, when it is the government that is the speaker-property owner, at least where the government can claim that decisions about inclusion and exclusion are an aspect of the government’s speech.

## II. SPEECH AND NON-PHYSICAL PROPERTY

*Sumnum* is thus in many ways a case about government property as well as government speech, and the specific *type* of property at issue in the case is both physical and permanent. But of course principles of property and ownership are not limited to physical, permanent property such as monuments,<sup>25</sup> and the doctrine of government speech covers (indeed, arose in) cases involving speech acts that were much more ephemeral.<sup>26</sup> It is therefore worth asking how the three principles discussed above—the relationship between ownership and speech, the nature of rivalry, and the right to exclude—apply to non-physical government speech.

### A. Ownership and Speech

Speech rights and property rights have been intertwined for as long as both have existed. Effective speech is in many ways dependent on private property rights,<sup>27</sup> and some scholars have gone so far as to celebrate the

<sup>22</sup> See *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (describing the right to exclude as “universally held to be a fundamental element of the property right”) (link); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1405 (2009) (noting that excludability has dominated property scholarship) (link).

<sup>23</sup> Richard A. Epstein, *Takings, Exclusivity, and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 56 (1997) (criticizing First Amendment decisions that “force[] the holders of private property to surrender their right to exclude”).

<sup>24</sup> *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (link).

<sup>25</sup> Were it otherwise, intellectual property would be a very shallow doctrine indeed.

<sup>26</sup> See *Rust v. Sullivan*, 500 U.S. 173 (1991) (evaluating as “government speech” a regulation that prevented public funds from being used in programs where abortion is a method of family planning).

<sup>27</sup> See Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1547 (2008) (arguing that “[i]n order to give free speech rights content, . . . the Court must shield economic entitlements from political revision”) (link); Epstein, *supra* note 23, at 52 (“As a general matter, freedom of speech is best protected when property rights are well-defined.”).

“Once and Future Property-Based Vision of the First Amendment.”<sup>28</sup> While it is far beyond the scope of this Article to explore in detail the intersection of speech rights and property rights in constitutional doctrine, some generalizations may be useful, particularly as they relate to the connection between government property and government speech.

First Amendment doctrine often has been concerned with the questions of if and when private property rights must yield to private speakers.<sup>29</sup> The *Summum* paradigm addresses if and when *public* property rights must do so. In some limited cases involving “quasi-public” private property, the First Amendment creates a kind of constitutionally mandated easement, allowing a would-be speaker to use the property regardless of its owner’s property and speech rights.<sup>30</sup> To be sure, this abrogation applies more commonly to non-physical property than to physical property like malls.<sup>31</sup> In *Red Lion Broadcasting Co. v. FCC*, for example, the Court upheld the FCC fairness doctrine, endorsing a rule that certain circumstances may require a property owner (i.e., broadcaster) to broadcast speech with which he disagrees.<sup>32</sup> But *Summum* suggests that such easements do not exist at all on government-owned property—at least not if the Court applies the government speech doctrine instead of forum analysis. Government speech is simply absolute. In fact, it is worth asking if *Summum* would have prevailed if the park, a “quasi-public” space at the very least, had been privately owned. In such a case, the private property owner would not have the benefit of the absolutist protection the government gets under government speech doctrine. It is not enough to say that no private property owner would be forced to accept a monument on his property, because it would be too significant of an intrusion on his property rights. In *Summum*, the Court’s reliance on government speech doctrine neither requires nor permits consideration of the *degree* to which the government’s property rights were burdened. Where

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<sup>28</sup> See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996).

<sup>29</sup> See, e.g., *PruneYard*, 447 U.S. 74; *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 254–56 (1974) (rejecting an argument that the First Amendment compels newspapers to provide politicians with a right of reply) (link).

<sup>30</sup> E.g., *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (upholding First Amendment claims on privately owned land) (link). See Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13 (describing the “First Amendment easement”); Paul E. McGreal, *The Case for a Constitutional Easement Approach to Permanent Monuments in Traditional Public Forums*, 103 NW. U. L. REV. COLLOQUY 185 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/41/LRColl2008n41McGreal.pdf> (link).

<sup>31</sup> See *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319 (1968) (bringing shopping malls within the *Marsh* rule) (link); *Hudgens v. NLRB*, 424 U.S. 507, 518–21 (1976) (overturning *Logan Valley* and upholding a mall owner’s right to exclude picketers) (link); Seidman, *supra* note 27, at 1565 (noting that the Supreme Court “has sharply constrained the reach of the constitutional theory” underlying the *Marsh* line of cases).

<sup>32</sup> 395 U.S. 367 (1969) (link). See also *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737, 740–53 (1996) (plurality opinion) (Breyer, J.) (evaluating the constitutionality of a federal statute permitting private cable operators to limit “indecent” programs) (link).

government speech applies, it operates as a total exemption from the First Amendment, not as a trigger for a balancing test.

On this score, one could perhaps compare the category of “quasi-public” private property to the “limited public forum.” The former category consists of private land that has been partially opened to the public; the latter of public land that has been partially closed. But in *Summum*, the Court explicitly rejected *Summum*’s invitation to view the case through the lens of forum analysis.<sup>33</sup> Had the Court applied forum analysis, it almost certainly would have concluded (as the Tenth Circuit did<sup>34</sup>) that the public park was, like most parks, a public forum. Such public forums may, of course, be “owned” by the government as a matter of property law, but that does not mean that the government retains the most important stick in its bundle of property rights—the right to exclude.<sup>35</sup> Indeed, the purpose and effect of public forum analysis is to limit the government’s ability to invoke that basic property right by subjecting such exclusions (at least when they involve constitutionally protected speech) to a rigorous and often fatal form of strict scrutiny that requires the government to show a compelling justification that could not be served by more narrowly tailored means.

The Court—to Pleasant Grove’s great relief—avoided this road by applying government speech doctrine instead. And there is a big difference between saying that the government as a property owner can exclude unwanted speech acts without violating the free speech clause and saying that doing so is itself a speech act *exempt* from scrutiny. The difference is not merely semantic, because when the government speaks (as opposed to when it excludes), it has a near-absolute right to control its message. The following subsections consider the degree to which the government’s message—like any speaker’s—can be controlled in property-like fashion.

### B. *Speech and Rivalry*

As noted above, the outcome in *Summum* was dictated by a view of the particular speech market at issue—the monuments in Pleasant Grove’s park—as one in which every private speaker’s speech threatened to displace another’s, since the construction of one monument necessarily limits the space available for the next one. This, of course, is rivalrousness—the notion that one person’s use of a good (here, space in the park) precludes another person from using it. The Court seemed to think that the physicality of the monuments created this problem of rivalrousness. But is it true that *only* permanent, physical speech acts like monuments threaten to preclude other speakers? It may well be that other non-physical speech acts, or even viewpoints themselves, can be rivalrous. If so, then speech and prop-

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<sup>33</sup> City of Pleasant Grove v. *Summum*, 129 S. Ct. 1125, 1131 (2009).

<sup>34</sup> See *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002) (link).

<sup>35</sup> See *supra* note 22.

erty share a defining characteristic, and the connection between them is that much stronger.

It is often supposed that non-physical viewpoints are not rivalrous because speech markets are infinitely elastic—adding one speaker does not limit another’s ability to speak. But this is not necessarily true. Nearly all speech in the marketplace of ideas defeats, displaces, or drowns out other speech. It is, in fact, a baseline assumption of the competitive marketplace of ideas that some speech acts will prevail over others.<sup>36</sup> Accordingly, free speech scholarship and doctrine have long struggled with what to do when large, powerful private speakers such as wealthy corporations drown out other private speakers.<sup>37</sup> Such concerns carry special weight when the government speaks because it not only has a booming voice, but can also back its words with unique coercive power. Accordingly, many of the primary objections to government speech doctrine are derived from the threat that the government will crowd out other voices or distort discourse due to the authority of its voice.<sup>38</sup>

Even holding aside these communication-related complications, as a simple matter of *doctrine*, government speech jurisprudence gives the government enormous power to crowd out rivalrous speech. As *Sumnum* demonstrates, government speech completely displaces the rights of private speakers because government speech falls entirely outside the ambit of the Free Speech Clause. The Court explained in *Johanns* that “the Government’s own speech . . . is exempt from First Amendment scrutiny.”<sup>39</sup> This makes the doctrine particularly potent because First Amendment jurisprudence does not recognize a category of “mixed” government-private speech.<sup>40</sup> Thus, where the government is speaking, no private actor can share rights in the message. Private speakers may be allowed to share the government’s platform as a matter of government grace—indeed, government speech doctrine arose from cases in which the government spoke through private actors<sup>41</sup>—but these private speakers have no more First Amendment *right* regarding the government’s position than a guest in a private home has a property right to the house.

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<sup>36</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (creating the marketplace metaphor and stating that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”) (link).

<sup>37</sup> See, e.g., *Federal Election Comm’n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (upholding a challenge to a campaign finance law preventing corporations from purchasing “issue ads” close to election day) (link).

<sup>38</sup> See, e.g., Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380–81 (2001); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005).

<sup>39</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

<sup>40</sup> See Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2008) (“We generally characterize speech as either private or governmental, and this dichotomy is embedded in First Amendment jurisprudence.”) (link).

<sup>41</sup> See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (link).



Of course, private speakers remain free to agree or disagree with the message the government delivers; they just cannot do so in a way that interferes too much with the government's chosen method of delivering its message. The government does not have the right to exclude people from having viewpoints altogether. But that is not necessarily any different than saying that Suzette Kelo is free to live in a house, just not the one whose physical taking was upheld in *Kelo v. City of New London*.<sup>42</sup> To be sure, the justifications and means by which private property and private speech can be "taken" are not the same, and the cases differ in that Suzette Kelo's home was privately owned before the government took ownership of it. But this may be troubling for First Amendment theorists who think of the speech market as a place that (like the property market) is presumptively private, even when speech acts take place on public property. Whether or not the cases can be distinguished on those grounds, an underlying principle of both *Summum* and *Kelo* is that a private actor's rights may be displaced by the government's presence in a market. Private and public speech, considered in this sense, are rivalrous. The following subsection considers the degree to which that intervention carries with it the right to exclude.

### C. Excludability

It is impossible to describe the intersection of speech and property without at least attempting to incorporate the right to exclude. In terms of the speech-property paradigm, the right to exclude is not easy to conceptualize (how can one "exclude" somebody from having a viewpoint?), but the issues it raises are nonetheless fundamental. If the speech-property metaphor is expanded to include the ephemeral "marketplace of ideas," rather than just physical speech monuments, can the concept of exclusion usefully inform the metaphor? In other words, can viewpoints and ideas—even if not represented in physical form—be "excludable"?

The answer to these questions is quite clearly yes, at least sometimes. Intellectual property rights, for example, extend property-like protections (including, of course, excludability) to ideas, even if those ideas are not reduced to some kind of physical form like a monument. Once an idea is patented or copyrighted, the owner of the idea can seek injunctive relief to prevent others from utilizing it without the owner's permission. She can, effectively, prevent trespass on her property, thereby limiting the rights of others, including their speech rights.<sup>43</sup> In other areas, the exclusion or rejection of other viewpoints is the very essence of a speech act. As Christopher Lund rightly points out in his thoughtful article, religious endorsements *only work* when other views are rejected—because "to endorse every message

<sup>42</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005) (link).

<sup>43</sup> Of course, these property-like protections have their own First Amendment implications. See generally DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT (2009).

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is really to endorse no message at all.”<sup>44</sup> Without a right to exclude other messages, the speaker cannot communicate his own.

In one important but underappreciated regard, government speech behaves in the same way. This is because courts have found that where government speech exists, it is absolute.<sup>45</sup> That is, no other speaker can assert a free speech right in the government’s message, no matter how closely bound up with the government’s speech that private speaker’s message might be. In an effort to do away with this bright line, scholars have advocated<sup>46</sup>—and courts have considered<sup>47</sup>—recognizing a category of “mixed,” public-private speech. Justice Kennedy signaled some sympathy for this approach when, at oral argument in *Summum*, he lamented “the tyranny of labels.”<sup>48</sup> Justice Souter wondered, “Isn’t the tough issue here the claim that there is—is in fact a mixture, that it is both Government and private[?]”<sup>49</sup> Justice Breyer added, “[T]he problem I have is that we seem to applying these subcategories in a very absolute way. Why can’t we call this what it is—it’s a mixture of private speech with Government decisionmaking . . . [?]”<sup>50</sup> But unless and until the Court actually calls things like they are, the government will retain an absolute and exclusive “right” to its speech.

The rejection of the *Summum* monument presents one obvious way in which this absolutist doctrine allows the government to exclude speakers seeking to join the government’s speech. But it is also useful to ask what happens to private speakers whose messages (and perhaps property rights) are already mixed with the government’s. They, no less than *Summum*, have a direct stake in how the government chooses to express its message. Consider, for example, what would happen if the City had accepted the Fraternal Order of Eagles’ Ten Commandments monument but then altered it with a plaque saying, “The City has accepted and adopted this monument to serve as a stark reminder of the oppression and violence celebrated by reprehensible groups like the Fraternal Eagles.” Would the Fraternal Order have a free speech claim under the First Amendment? Under *Summum*, it’s hard to see how they would. As the Court noted: “[T]he thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.”<sup>51</sup>

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<sup>44</sup> Lund, *supra* note 3, at 52.

<sup>45</sup> See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) (holding that if the City “were engaging in [its] own expressive conduct, then the Free Speech Clause has no application”).

<sup>46</sup> See Corbin, *supra* note 40.

<sup>47</sup> See *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 794, 799 (4th Cir. 2004) (link).

<sup>48</sup> Transcript of Oral Argument at 35, *Summum*, 129 S. Ct. 1125 (No. 07-665), 2008 WL 4892845 (link).

<sup>49</sup> *Id.* at 10–11.

<sup>50</sup> *Id.* at 23–24. He joined the Court’s opinion only “on the understanding that the ‘government speech’ doctrine is a rule of thumb, not a rigid category.” *Summum*, 129 S. Ct. at 1140 (Breyer, J., concurring).

<sup>51</sup> See *Summum*, 129 S. Ct. at 1136.

The Order's most plausible First Amendment claim would probably be that the City's re-branding of the plaque violates the rule against compelled speech by forcing the Order to be a part of a message it obviously does not endorse. The essence of the claim would be that the Eagles did not stop "speaking" when they gave the City the property rights to the monument, but that the City, through its plaque, had distorted the Eagles' message. Unable to stop speaking so long as the monument was identified as theirs, the Eagles would thereby be compelled to speak.<sup>52</sup> But recognizing a private speaker's compelled speech claim would mean abandoning the view that government speech is beyond the purview of the Free Speech Clause. Who gets to exclude whom?

These are all just preliminary questions about excludability and government speech. Any conception of excludability in the property-speech paradigm depends almost entirely on the view of rivalrousness sketched out in the previous sections. If speech rights are non-rivalrous—if everyone can equally use and possess them—then it makes less sense to talk about "exclusion." But if speech acts, or viewpoints themselves, *are* rivalrous, and for the reasons explained above there are good reasons to think that they are, then it naturally follows that some speakers must have a right to "exclude" others.

#### CONCLUSION

Despite its unanimity and the apparent clarity of its holding, *Summum* raises complicated questions about how the marketplace of ideas incorporates conceptions of property, including such fundamental questions as how physical property is or can be transposed into the marketplace of ideas and how ideas themselves have property-like characteristics. Is ownership a speech act, and under what conditions? Does establishing property rights in the real world market necessarily establish rights in the marketplace of ideas, and vice versa? Are viewpoints in the marketplace of ideas really non-rivalrous? Intellectual property rights aside, does a speaker have a right to "exclude" other speakers from the physical (or non-physical) manifestations of his viewpoint? And why do the answers to these questions seem to differ when the government, rather than a private party, is speaking?

Of course, *Summum* is not the first case to raise (or fail to answer) these questions. The intersection of property and speech frequently arises in Establishment Clause cases, where courts must analyze whether the government's ownership of certain displays "respect[s] an establishment of re-

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<sup>52</sup> Consider the example of moral rights in copyright law, which allow artists to preserve the integrity of their work even after it has become somebody else's property. My thanks to Nelson Tebbe for bringing this fascinating point to my attention.

ligion.”<sup>53</sup> In this sense, the interesting private speaker in *Summum* is not Summum, but the Fraternal Order of the Eagles. At some point, the Ten Commandments monument the Order built was undoubtedly private speech. And it seems quite likely that, eventually, it became government speech within the meaning of the Establishment Clause. The key questions are *how* and *when*. As noted above, there are at least two ways to answer this problem—either speech occurs when a property owner (i.e., the government) selects which speech acts to allow on its property, or speech occurs when a reasonable viewer (i.e., the public) would believe that the property owner is engaging in speech of its own by permitting the speech acts of others to take place on its property.

In *Summum*, the Court was able to avoid choosing between these conceptions by finding that the distinction would not change the result.<sup>54</sup> But matters are not always so simple. In *Buono v. Kempthorne*,<sup>55</sup> scheduled for oral argument this Fall, the Court will consider whether the Establishment Clause requires the government to tear down a cross, privately constructed and maintained, that stood for 70 years on public property in a large federal park. For purposes of the present discussion, the complicating factor in *Buono* is that Congress has attempted to convey to a private party the small bit of land on which the cross stands. Congress’s evident intent was to remedy any Establishment Clause problem by transferring the property to private owners. But despite the formal transfer of ownership, the cross and the land on which it stands will almost certainly continue to be perceived as government-owned. Will the transfer of property from the government to a private party suffice to destroy government speech, just as transfer from a private party to the government in *Summum* was sufficient to create it? And if not, what is the government supposed to do?

Like *Summum*, *Buono* is a case about public and private property as much as it is a case about public and private speech. Both cases require courts and scholars to confront difficult and still-unanswered questions about the relationship between speech and ownership.

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<sup>53</sup> U.S. CONST. amend. I (link). See generally *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (establishing a three-prong test to evaluate legislation under the Establishment Clause) (link).

<sup>54</sup> *Summum*, 129 S. Ct. 1134.

<sup>55</sup> *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), cert. granted sub. nom. *Salazar v. Buono*, 129 S.Ct. 1313 (2009).