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Commentary: Exploiting Mixed Speech

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ABSTRACT

The Supreme Court has been taking advantage of mixed speech—that is, speech that is both private and governmental—to characterize challenged speech in a way that ultimately permits the government to sponsor Christian speech. In Pleasant Grove City v. Summum*, a free speech case where the government accepted a Christian Ten Commandments monument but rejected a Summum Seven Aphorisms monument, the Court held that privately donated monuments displayed in public parks were government speech as opposed to private speech and therefore not subject to free speech limits on viewpoint discrimination. In* Town of Greece v. Galloway*, an establishment case where the local government invited overwhelmingly Christian clergy to give a prayer before town meetings, the Court found no Establishment Clause violation in part by attributing constitutionally troubling aspects of the speech to the private speakers rather than to the government.*

INTRODUCTION

Currently, speech tends to be classified as either private speech or government speech, and this classification can be dispositive. If a private person is speaking, say with a bumper sticker, then the Free Speech Clause protections—such as those against viewpoint discrimination—apply but Establishment Clause limits on religious speech do not. If the government is

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speaking, as with a government press release, the reverse is true: free speech restrictions on viewpoint discrimination do not apply but Establishment Clause restrictions on religious speech do.

Despite this doctrinal dichotomy, a great deal of speech is actually neither purely private, nor purely governmental, but a combination of the two.[1] No single factor necessarily determines who the speaker is. Instead, when deciding who is speaking, one might consider: who is the literal speaker, who controls the message, who pays for the speech, what is the goal of the program in which the speech occurs, and ultimately, to whom would a reasonable person attribute the speech.[2] When the factors point to both private and government speakers, the result is mixed speech—speech that cannot be cleanly designated into one category or the other.

Examples of mixed speech abound. Specialty license plates, the subject of a free speech case the Supreme Court will decide this term, are a classic example.[3] On the one hand, the government authorizes, manufactures, and owns the specialty license plates. On the other hand, private individuals select them, pay extra for them, and put them on their cars.

Recent religious speech cases, particularly *Pleasant Grove City v. Summum*[4] and last term's *Town of Greece v. Galloway*,[5] also arguably involved mixed speech. *Pleasant Grove* involved privately donated monuments displayed in a public park. Members of the minority Summum religion complained that the government violated the Free Speech Clause by favoring Christianity because the city had chosen to display a Ten Commandments monument but refused to display the group's religious monument. In *Greece*, a municipal government invited private clergy from local congregations to give prayers at official town meetings. Religious minorities complained that the prayer program violated the Establishment Clause by favoring Christianity over other religions because almost all of the government-sponsored prayers were explicitly Christian. In both cases, the Court took advantage of the mixed nature of the speech at issue to characterize it in a way that permitted state sponsorship of Christianity.

1. *See generally* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008).

2. *Id.* at 626–40.

3. Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388 (5th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3101 (U.S. Dec. 5, 2014) (No. 14-144).

4. 555 U.S. 460 (2009).

5. 134 S. Ct. 1811 (2014).

I.
PLEASANT GROVE CITY V. SUMMUM: GOVERNMENT-SELECTED TEN COMMANDMENTS MONUMENT AS GOVERNMENT SPEECH

Pleasant Grove was a free speech case. The city had placed eleven monuments donated by private individuals in its Pioneer Park. Among them was a Ten Commandments monument given by the Fraternal Order of Eagles (Eagles). The Summum, a small religious group, attempted to donate a religious monument listing its own tenets, the Seven Aphorisms. The city rejected it, explaining that it only took monuments that "directly relate" to the town's history or were donated by groups "with longstanding ties" to the community.[6] Public parks, where citizens have historically gathered to speak on public issues, are considered "traditional public forums."[7] Any content-based discrimination by the state in traditional public forums is subject to strict scrutiny, lest the state "use content-based restrictions to advance a particular ideology."[8] The Summum argued that by accepting a Christian religious monument while rejecting their Summum religious monument, the government discriminated not just based on content, but on viewpoint as well. After finding a free speech violation, the Tenth Circuit ordered the city to erect the group's monument.[9]

According to the Supreme Court, the pivotal question was whether the government was "engaging in [its] own expressive conduct" or "providing a forum for private speech."[10] In other words, was the government itself speaking or was it merely providing an opportunity for private citizens to speak? The best answer may well be both. While it is difficult to pinpoint the "literal speaker" of a monument, the Eagles essentially signed the monument by carving their name on it.[11] As for who controlled the message, the Eagles designed the monument without any input from the government,[12] while the government decided whether to display it or not. Although there was no

6. *Pleasant Grove*, 555 U.S. at 465.

7. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (noting that streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

8. Summum v. Pleasant Grove City, 483 F.3d 1044, 1054 (10th Cir. 2007), *rev'd*, 555 U.S. 460 (2009).

9. *Id.* at 1057. The Court held that Pioneer Park was a traditional public forum and that the city's content-based refusal failed strict scrutiny.

10. *Pleasant Grove*, 555 U.S. at 467.

11. "Presented to the City of Pleasant Grove and Utah County, Utah by Utah State Aerie Fraternal Order of Eagles" is carved on a scroll at the base of the monument.

12. The Pleasant Grove City Ten Commandments monolith was one of over a hundred that the Fraternal Order of Eagles designed, produced, and gave to local municipalities. *See, e.g.*, Summum v. City of Ogden, 297 F.3d 995, 998 (10th Cir. 2002) ("During the 1950s and 1960s, the Eagles donated similar [Ten Commandments] monuments to communities across the United States.").

question that the Eagles paid for the Ten Commandments,[13] there was disagreement about whether monuments differed from other speech in public parks, which had always been treated as a traditional public forum. If forced to choose between private and government speech, reasonable people might easily come to difficult conclusions, as the lower courts and the Supreme Court did. In the end, the Supreme Court held that monuments in public parks amounted to government speech: "Permanent monuments displayed on public property typically represent government speech."[14]

Because they were deemed government speech, the monuments were not subject to free speech limits on content and viewpoint discrimination. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[15] That is, under the Free Speech Clause, the government is free to prefer one viewpoint over another in its own speech. As for the obvious Establishment Clause problem created by a government endorsing the Ten Commandments but not the Seven Aphorisms, the question was not before the Court and the majority never addressed it. The Court, perhaps, meant to finesse the issue with its exegesis about the difficulty of pinpointing the meaning of symbols that may carry multiple meanings and whose meaning may change over time.[16] While this is true, a Ten Commandments engraved with "I AM the LORD thy God; Thou shalt have no other gods before me; Thou shalt not make to thyself any graven images; Thou shalt not take the name of the Lord thy God in vain; Remember the Sabbath day, to keep it holy"[17] does not necessarily possess these ambiguities.

II.
TOWN OF GREECE V. GALLOWAY: GOVERNMENT-SPONSORED PRAYERS AS PRIVATE SPEECH

The Establishment Clause question was front and center in *Town of Greece v. Galloway*. The town invited local clergy—"chaplain[s] for the month"[18]—to give a prayer at the beginning of town meetings. At first, the town chose these unpaid chaplains by calling congregations in the town directory and asking for volunteers.[19] Later, the town solicited chaplains from a list of people who had agreed to come.[20] Because all the congregations listed in

13. *Id*.
14. *Pleasant Grove*, 555 U.S. at 470.
15. *Id.* at 467.
16. *Id*. at 474–77.
17. *Summum*, 297 F.3d at 997 (describing parallel Eagles Ten Commandments monument).
18. Town of Greece v. Galloway, 134 S. Ct. 1811, 1816 (2014).
19. *Id*.
20. *Id.*

the directory were Christian,[21] all the invited chaplains were Christian, as were their prayers.[22] Despite the overwhelmingly Christian prayers at the very seat of government at the very moment of self-governance,[23] the Supreme Court concluded that the town's prayer program did not violate the Establishment Clause.

Greece's government-sponsored prayers are a paradigmatic example of mixed speech. The message is the result of private and government control—the government created the prayer program and invited clergy to give prayers, while the clergy determined the content of the prayers. Although the literal speakers were private individuals, the purpose of the legislative prayers was not to create a forum for individual debate on prayer, but rather to use prayer for governmental ends: specifically to "lend gravity"[24] to the town meetings and "to accommodate the spiritual needs of lawmakers."[25] As with the park monuments, reasonable people could attribute the prayers to the government that sponsored them, to the private individuals who gave them, or to both.

The Court's exploitation of mixed speech was more subtle in *Greece* than in *Summum*. Unlike in *Summum*, where it completely avoided Free Speech Clause questions by defining the challenged religious speech as purely governmental, the Supreme Court did not completely avoid Establishment Clause questions by categorizing the challenged religious speech as purely private.[26] Even the Supreme Court could not deny the strong governmental component of the speech. After all, the town started the prayer practice, chose the speakers, held the prayers at town meetings, and described the prayers as meant for the town's lawmakers. Instead, the Court evaded the establishment problems raised by the Christian prayers by strategically emphasizing the private nature of the speech. This tactic is evident in both its argument that the predominantly Christian nature of the prayers was unintentional and

21. In fact, there was a Buddhist temple in town, but it was not listed and never contacted. *Id.* at 1828 n.2 (Alito, J., concurring).

22. *Id.* at 1816. Notably, the town never suggested that the chaplains give nonsectarian prayers. *Id.*

23. *Id.* at 1825 ("Citizens attend town meetings . . . [to] speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances.").

24. *Id.* at 1823.

25. *Id.* at 1826.

26. Recall that if prayers were categorized as purely private speech, they would not trigger the Establishment Clause at all.

unavoidable,[27] and its argument that the government did not coerce religious minorities into participating in predominantly Christian prayers.[28]

Crucial to the Court's ruling was the fact that the almost exclusively Christian prayers occurred without any discriminatory intent by government officials. Had the town purposely excluded non-Christian chaplains, the outcome might have been different. But here, according to the Court, it just happened that the local congregations were Christian: "Although most of the prayer-givers were Christian, this fact reflected only the predominately Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths."[29] Perhaps in order to stave off complaints that the Establishment Clause obliges the town to do more to avoid overwhelmingly Christian prayers such as recommending nonsectarian prayers,[30] the majority suggests, but never actually holds, that requiring the town's "chaplain[s] for the month" to keep their prayers nonsectarian might infringe on their First Amendment rights. For example, the Court states, "to hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide cases to act as *supervisors and censors* of religious speech."[31] Note the word *censors*. Censorship, of course, means that the government is silencing private speakers and is anathema in free speech.

The free speech concern about government regulation of private speech runs throughout the opinion, even though *Greece* is not a free speech case, and the speech at issue is not purely private speech. The Court invokes free speech once more when it suggests—again, it does not hold but merely suggests—that the state has created a forum for private speech and therefore cannot discriminate based on content or viewpoint: "Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates."[32]

The Court again waves the free speech banner when grappling with whether citizens attending the town meeting in order to petition the government might feel compelled to participate in the prayers. In dismissing the notion, the

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27. *See Greece*, 134 S. Ct. at 1820–24; *see also id.* at 1824 ("That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers . . . .").

28. *See id.* at 1824–27; *see also id.* at 1825 ("[T]he Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance.").

29. *Id.* at 1817 (summarizing with approval the district court's findings).

30. *See supra* note 23 and accompanying text.

31. *Greece*, 134 S. Ct. at 1822; *see id.* ("Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.").

32. *Id.*

Court writes, "Adults often encounter speech they find disagreeable."[33] This deliberately echoes the famous Supreme Court passage: "'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'"[34] In short, the Court implies that government attempts at nonsectarian prayers would raise free speech problems, and that objectors are childish hecklers trying to censor speech they find to be "offensive or disagreeable" instead of accepting it as an inevitable by-product of our free speech regime.

These insinuations, made possible by the mixed nature of the challenged speech, do not withstand closer scrutiny. To start, *Greece* involved no forum for private speech: the government selected the speakers, and the prayer practice was explicitly held to be for the government's benefit.[35] Indeed, how could the prayers amount to a forum open to private speakers when almost no one knew about it[36] and it is unclear whether all viewpoints would be welcome.[37] In addition, the argument that grown ups must learn to tolerate disagreeable speech makes more sense when the speakers are private people expressing their varied viewpoints as opposed to the government speaking for its own benefit. Granted, the speech is not purely governmental either.[38] Nonetheless, the Court's willingness to think of it as mixed in this case stands in sharp contrast to its insistence in *Pleasant Grove* that once the speech falls into the government speech category, the Free Speech Clause simply does not apply. In other words, if the prayers represent government speech, then under the Supreme Court's own government speech doctrine, the government may dictate the content of its own speech without worrying about the Free Speech Clause.

In addition to using the mixed nature of the prayers to raise phantom free speech issues, the Supreme Court uses it to dissociate the government from the prayers. Although the Court acknowledges that certain prayers risk violating the Establishment Clause, it distances the town from the very qualities it identifies as problematic by attributing them to the private speakers. For example, in rejecting the coercion claim, the Court writes, "[T]he analysis would be different if town board members directed the public to participate in

33. *Id.* at 1826.

34. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (quoting United States v. Eichman, 496 U.S. 310, 319 (1990)).

35. *Greece*, 134 S. Ct. at 1825 ("The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing.").

36. *Id.* at 1839 (Breyer, J., dissenting) (noting the town's "failure to infor[m] members of the general public that volunteers would be acceptable prayer givers" (internal citation omitted)).

37. While the town states they would welcome prayers other than Christian ones praising God and Jesus, they presumably would not welcome prayers that attacked Christian beliefs.

38. I argue elsewhere that regulation of mixed speech should be subject to a rigorous intermediate scrutiny. *See* Corbin, *supra* note 1, at 675–80.

prayers."[39] When confronted by the fact that on several occasions, the town's chaplains of the month asked audience members to rise and join the prayer, the Court responds that "[t]hese requests, however, came not from the town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way."[40] In other words, the Court determined these requests to join in Christian prayer came from private speakers, not from the government. In short, the *Greece* Court took advantage of the mixed nature of speech to dissociate the government from speech that would otherwise violate the Establishment Clause.

CONCLUSION

In both of these cases, the Supreme Court exploited the mixed nature of challenged speech to characterize it in a way that permits state sponsorship of Christian speech. In *Pleasant Grove*, the Court evaded the viewpoint discrimination issue by characterizing the speech as government speech and then refusing to consider the Establishment Clause issue as not before the Court. The bottom line was that the city could display a Christian monument while refusing to display a non-Christian monument. In *Greece*, the Court distanced the government from the Christian prayers the government itself invited by suggesting the speech was private speech, and therefore not attributable to the government. The Court went so far as to imply that regulating the religious content to be more inclusive might violate the free speech rights of the private religious speakers, even though no free speech claim was before the Court. The bottom line was that the town could continue opening its meetings with predominantly Christian prayers. In sum, by selectively emphasizing the governmental or private nature of mixed speech, the Supreme Court made possible state-sponsored religious speech.

39. *Greece*, 134 S. Ct. at 1826.
40. *Id.*