

## THE CASE FOR A CONSTITUTIONAL EASEMENT APPROACH TO PERMANENT MONUMENTS IN TRADITIONAL PUBLIC FORUMS

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Imagine that you are mayor of a small town that has a picturesque public park, removed from the town center, where your residents come to escape the hustle and bustle of everyday life. To make the space inviting, you have built a gazebo, a picnic area, and a playground for the local children. You have also allowed a local veterans group to erect a permanent monument honoring those from the town who died in war. Then, a local group asks permission to hold a political rally in the park. You deny the request, explaining that the park is for peaceful recreation and not for noisy demonstrations.

By denying the political rally, you have violated the First Amendment. The First Amendment severely limits the government's power to place content-based restrictions on speech in traditional public forums, which the Court defines as public parks, streets, and other "places which by long tradition or by government fiat have been devoted to assembly and debate."<sup>1</sup> Further, government may not ban speech activities in such forums. Thus, your town must allow at least some assembly and debate in the park.

Next, a local religious group asks permission to place a permanent monument in the park. They explain that the monument will display the central tenets of their faith, which they consider their equivalent of the Ten Commandments. You deny this request and explain that the only permanent structures allowed are those that serve the park's recreational purpose. The religious group points out, however, that you have already allowed placement of a veterans monument. You respond that a war memorial is a more appropriate message for a public park than a religious monument. The religious group catches your slip here. They explain that the park is a traditional public forum, and that you are excluding their speech (the monument) from that forum (the park) based on its content (a religious monument rather than a war memorial). As a result, they claim, your decision to

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<sup>1</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (link).

exclude the religious monument violates the First Amendment. Incredulous, you object that a permanent monument must be different than more temporary speech, such as a rally or movable display. After all, if the city had to accept every monument offered by a private group, the park would soon look like a graveyard peppered with headstones. The religious group persists. Are they right?

This November, the Supreme Court will hear arguments on this question in *City of Pleasant Grove v. Sumnum*.<sup>2</sup> The precise issue is whether placement of a permanent monument is part of the public's right to use a traditional public forum. This question falls in a gap in current public forum doctrine, and the lower courts have reached conflicting results in applying that doctrine. On the one hand, the Tenth Circuit held in *City of Pleasant Grove* that permanent monuments are within the public's right to use a traditional public forum. This ruling bars the government from regulating private monuments based on their content, effectively leaving a choice between allowing all or no such monuments. On the other hand, other courts have held that the public's right to use a traditional public forum does not include placement of permanent structures.<sup>3</sup> These courts typically announce the rule as a matter of judicial fiat, offering little, if any, reasoning.<sup>4</sup> Their logic is internally inconsistent and, if applied generally, would lead to unacceptable consequences.

Both of the lower court approaches ultimately prove unsatisfactory because the decisions lack a principled basis to distinguish temporary speech from permanent monuments. This is not surprising given that the Supreme Court's existing public forum doctrine provides no basis for doing so. The lower courts, then, have been trapped in the current doctrinal box.

This Essay looks outside the current public forum framework to propose a new approach built on an analogy to the real property law of easements. Under this view, courts should treat the public's right to use a traditional public forum as if it were a constitutional easement over government property. As with any easement, a private citizen must not use her constitutional easement in a manner that "unreasonably interferes" with the government's use of its property or the use rights of other members of the public. This Essay asserts that a permanent monument would unreasonably interfere by indefinitely excluding both the land owner (i.e., the government) and the other easement holders (i.e., other members of the public) from use of the occupied land. Thus, the public does not have a right to place a permanent monument in a traditional public forum.

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<sup>2</sup> 483 F.3d 1044 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008).

<sup>3</sup> *See, e.g.*, *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989); *Tucker v. City of Fairfield*, 398 F.3d 457, 462–63 (6th Cir. 2005); *see also* *People for Ethical Treatment of Animals v. Gittens*, 414 F.3d 23, 28–29 (D.C. Cir. 2005) (noting that the First Amendment does guarantee a right for private actors to erect permanent structures in public forums).

<sup>4</sup> *See, e.g.*, *Graff*, 9 F.3d at 1314; *Gittens*, 414 F.3d at 29–30.

This Essay has four Parts. Part I outlines the Supreme Court's current public forum doctrine. Part II critiques the prevailing lower court approaches to permanent monuments in traditional public forums, and finds them wanting. Part III builds a new test—the constitutional easement approach—drawing an analogy to the real property law of easements. Part IV then explains why the constitutional easement approach best balances the competing interests of the government and the public in a traditional public forum.

## I. CURRENT PUBLIC FORUM DOCTRINE

The Supreme Court's First Amendment free speech analysis recognizes three types of government property: traditional public forums, designated public forums, and nonpublic forums. Traditional public forums are “places which by long tradition or by government fiat have been devoted to assembly and debate.”<sup>5</sup> Such forums include public streets and parks,<sup>6</sup> but not locations, such as airports and prisons,<sup>7</sup> that lack such a tradition.

First and foremost, the government may not close a traditional public forum to speech.<sup>8</sup> For regulations short of a complete ban, the proper constitutional test depends on the type of government action. If the government limits speech based on its content, then the government must show that its action is narrowly tailored to a compelling interest.<sup>9</sup> If the restriction is content-neutral, the government action must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>10</sup> Content-neutral regulations include limits on the times (e.g., no amplified sound after 10 p.m.), places (e.g., protests only in designated portions of a public park), and manner (e.g., no fireworks) of speech activities.<sup>11</sup>

Government property that is not a traditional public forum is, by default, a nonpublic forum. The government may, however, convert a nonpublic forum into a designated public forum by permitting public use for designated purposes. For example, a public high school building is not a

<sup>5</sup> *Perry*, 460 U.S. at 45.

<sup>6</sup> *Id.*

<sup>7</sup> *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (airport) (link); *Adderley v. Florida*, 385 U.S. 39 (1966) (prison) (link).

<sup>8</sup> *Perry*, 460 U.S. at 45. Of course, the government could dedicate the property to a different use, which would change the type of forum. For example, the government could build its new prison on property that is currently a public park, thereby converting the property to a nonpublic forum. *Cf. Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 53 (D. Me. 2002) (“[T]he Supreme Court has never intimated that, if a city decides to close even a traditional public forum like a public park—for, say, six months—thereby ending all expressive activities in the park, and if that temporary shutdown is content neutral, that the ‘narrow tailoring’ and ‘ample alternative channels’ analysis nevertheless applies.”).

<sup>9</sup> *Perry*, 460 U.S. at 45.

<sup>10</sup> *Id.*

<sup>11</sup> *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (link).

traditional public forum because the public has not historically had access to the lunchrooms, classrooms, and the like. But a school district could create a designated public forum by opening the high school's gymnasium to the public on evenings and weekends.<sup>12</sup> The government must intentionally open the property "for expressive use by the *general public* or by a particular *class of speakers*."<sup>13</sup> Allowing only selective access to the property does not create a designated public forum.<sup>14</sup> And even if the government creates a designated public forum, it may later close the forum to expressive activity. While the designated public forum is open, however, speech restrictions are subject to the same constitutional tests that apply to a traditional public forum.<sup>15</sup>

Government property that is neither a traditional nor a designated public forum is treated as a nonpublic forum. Regulations of speech in nonpublic forums must be reasonable and viewpoint neutral. Reasonable regulations "preserve the property under its control for the use to which it is lawfully dedicated."<sup>16</sup> So, for example, a rule that library patrons must not speak above a whisper preserves the forum—the public library—for its dedicated use—a place for reading and quiet reflection.

## II. PREVAILING APPROACHES TO PLACEMENT OF PUBLIC MONUMENTS

Because *City of Pleasant Grove v. Summum* will be before the Supreme Court this Term, it is worth using that case to illustrate the lower court approaches to the permanent monument issue. In 1971, the city had accepted a Ten Commandments monument donated by the local chapter of the Fraternal Order of Eagles. The monument was set for permanent display in the city park, along with "a number of buildings, artifacts, and permanent displays."<sup>17</sup> Twenty-two years later, members of the Summum religion requested that the city place a monument displaying the Seven Aphorisms of Summum in that same park.<sup>18</sup> The monument would be about the same size as the existing Ten Commandments monument. The city re-

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<sup>12</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (link).

<sup>13</sup> *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998) (emphasis added) (link).

<sup>14</sup> *Id.* at 679.

<sup>15</sup> See *Perry*, 460 U.S. at 45–46.

<sup>16</sup> *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 130 (1981) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)) (internal quotation marks omitted) (link).

<sup>17</sup> *City of Pleasant Grove v. Summum*, 483 F.3d 1044, 1047 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008).

<sup>18</sup> Brief for Respondent at 1, *City of Pleasant Grove v. Summum*, No. 07-665 (U.S. Aug. 15, 2008) ("The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.'" (quoting The Teachings of Summum are the Teachings of Gnostic Christianity, available at <http://www.summum.us/philosophy/gnosticism.shtml> (visited Aug. 15, 2008)), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-665\\_Respondent.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-665_Respondent.pdf) (link)).

jected the proposed Summum monument because its content was inconsistent with the park's current use.<sup>19</sup> Summum brought suit, and the district court denied their First Amendment claim.<sup>20</sup>

All parties and all courts to address the issue have agreed that the city park, as a whole, is a traditional public forum.<sup>21</sup> The question, then, is whether placement of a permanent monument falls within the public's right to use a traditional public forum. On appeal, a panel of the Tenth Circuit held that the public does have such a right, and the full court denied Summum's motion for rehearing en banc. The en banc denial generated three opinions that succinctly state three approaches to the permanent monument issue: two separate opinions by Judges McConnell and Lucero, who dissented from the Tenth Circuit's denial of rehearing en banc; and an opinion by Judge Tacha, author of the panel opinion, responding to Judges McConnell and Lucero.

#### A. *Permanent Monuments Allowed*

Judge Tacha broadly defined the public's rights in a traditional public forum:

[T]he Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis. In fact, this distinction . . . lacks the support of both precedent and logic. If a city allows a private message to be heard in a public park, why would the permanent nature of the expression limit the First Amendment scrutiny we apply?<sup>22</sup>

The nature of the activity, then, does not affect the analysis. The mere fact that a public park is a traditional public forum triggers the proper First Amendment test. Here, because the city concededly refused the Seven Aphorisms monument based on its content, strict scrutiny applied. The city lost because it had not demonstrated that its asserted "interest in promoting its history" was compelling.<sup>23</sup> Further, even if the city had shown a compelling interest, such as public safety, it could not plausibly claim that the content of a permanent monument is connected with such interests.<sup>24</sup>

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<sup>19</sup> See *Summum*, 483 F.3d at 1047. The parties dispute the city's actual motive in refusing the Seven Aphorisms monument. The city claims that the park is reserved for monuments honoring the city's history, and Summum claims that the city simply disapproved of the Summum religion. In Part III, I discuss what reasons would be acceptable under this Essay's proposed approach.

<sup>20</sup> *Id.* at 1048.

<sup>21</sup> See, e.g., *Summum v. Pleasant City Grove*, 499 F.3d 1170, 1172–73 (10th Cir. 2007) (Lucero, J., dissenting from denial of rehearing en banc); *id.* at 1175 (McConnell, J., dissenting from denial of rehearing en banc); *id.* at 1178–79 (Tacha, J., response to dissent from denial of rehearing en banc).

<sup>22</sup> *Id.* at 1178 (Tacha, J., response to dissent from denial of rehearing en banc).

<sup>23</sup> *Summum*, 483 F.3d at 1053.

<sup>24</sup> See *id.* at 1054–55 ("We need not decide whether the city's interests in aesthetics and safety are compelling because the resolution is not narrowly tailored to achieve its stated interests.")

There are three problems with Judge Tacha's approach. First, despite her claim to the contrary, logic *does* support a distinction between transitory and permanent speech in a traditional public forum. A permanent display forever reduces the space available to both the city and the remainder of the public to make use of the traditional public forum. In doing so, the permanent monument diminishes the rights of other parties to the traditional public forum. In terms of the property metaphor of the bundle of sticks,<sup>25</sup> Judge Tacha's approach assigns the monument owner the stick of "exclusive right to use," and does so to the exclusion of the government and other members of the public. Judge Tacha does not explain why the proponent of a permanent monument ought to receive this uniquely valuable right.

Second, Judge Tacha's approach forces the government into an all or nothing position. She explains that while the public may not have a right to erect a permanent display in a park bereft of monuments, the right arises as soon as the government "permit[s] the permanent display of a private message."<sup>26</sup> If the government wants to deny permanent monuments based on content, its only practical option is to close its traditional public forums to permanent monuments. Otherwise, the government must open its public parks<sup>27</sup> to monuments from all manner of groups, including the Ku Klux Klan and other hate groups. Judge Tacha never explains why we should accept a result that flies in the face of over two hundred years of practice.

Third, Judge Tacha's approach, followed to its logical conclusion, would give the public a right to place permanent monuments in an otherwise empty traditional public forum. This right would flow from equating transitory and permanent displays. Under current First Amendment doctrine, the right to speak and assemble in a public park is triggered by the nature of the forum, and not by the government's decision to let one group use the park for speech. Indeed, the Supreme Court has unequivocally stated that the government must keep a traditional public forum open to speech activities.<sup>28</sup> If permanent displays are to be treated the same as transitory activities, then, the simple fact that a park is a traditional public forum would trigger the public's right to place permanent monuments there.<sup>29</sup> Judge Ta-

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<sup>25</sup> See *United States v. Craft*, 535 U.S. 274, 278 (2002) ("A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property.") (link).

<sup>26</sup> *Sumnum*, 499 F.3d at 1179 n.1 (denial of rehearing en banc).

<sup>27</sup> Cities surely have a compelling interest from keeping permanent monuments from their streets and sidewalks: public safety. See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (link). Consequently, the problem really arises only for public parks.

<sup>28</sup> *Perry*, 460 U.S. at 45.

<sup>29</sup> In dicta, four Justices have stated that the public does not have such a right. See *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 783 (1995) (Souter, J., concurring in part and concurring in the judgment) (joined by O'Connor and Breyer, JJ.) (link); *id.* at 802–03 (Stevens, J., dissenting). Four other Justices stated that such a ban may be justified as a time, place, and manner restriction. *Id.* at 761 (Scalia, J., announcing the judgment of the Court) (joined by Rehnquist, CJ, and Thomas and Kennedy, JJ.). In other contexts, however, the Court has held that a complete ban on general mode of

cha blinked at accepting this implication of her reasoning, claiming that her approach applies “even if we accept the view that a speaker does not have a constitutional right to erect a permanent display in a public forum.”<sup>30</sup> Her opinion, however, provides no basis for this assurance.

### *B. Permanent Monuments Are Government Speech*

Judge McConnell would hold that a permanent monument becomes government speech the moment that the government allows the private display onto public property. He reasons, that by deciding which permanent monuments to allow, “[i]t follows that any messages conveyed by the monuments [that the government officials] have chosen to display are ‘government speech.’”<sup>31</sup> Thus, because the First Amendment free speech guarantee does not limit government speech,<sup>32</sup> the decision whether to place the monument is no longer subject to traditional public forum analysis.<sup>33</sup>

There are three problems with Judge McConnell’s approach. First, factually speaking, Judge McConnell overstates his case. Simply accepting a permanent monument does not necessarily endorse the monument’s message. Indeed, the point of placing a permanent monument could be to stir debate on an issue, in which case the government remains studiously agnostic about the monument’s message. For example, the government could place permanent sculptures in a public park to give the public free access to works of art, without endorsing any artist’s message.

Second, because Judge McConnell’s logic does not distinguish permanent and transitory speech activities, his approach is in tension with the entire concept of a traditional public forum. Recall that Judge McConnell believes that the government’s decision to allow a monument in a public park effectively converts the monument’s message into government speech. This logic, however, applies equally to temporary speech or displays allowed in a public park. Consequently, *all* speech activity in a public park is government, *not private*, speech. Judge McConnell’s logic, then, contradicts the very idea of a traditional public park as a place where *private* speakers assemble and debate.

Third, placing such a hair trigger on government speech creates a collateral problem under the Establishment Clause. For example, if simply accepting a Ten Commandments monument is enough for the content of the monument to become government speech, such action would seem to

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speech, such as yard signs and handbilling, violates the First Amendment. *See, e.g.,* City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994) (link); Schneider v. State, 308 U.S. 147, 162–163 (1939) (link); Martin v. Struthers, 319 U.S. 141, 145–47 (1943) (link).

<sup>30</sup> *Sumnum*, 499 F.3d at 1179 n.1 (denial of rehearing en banc).

<sup>31</sup> *Id.* at 1175.

<sup>32</sup> *See* Johanns v. Livestock Marketing Ass’n, 544 U.S. 550 (2005) (link).

<sup>33</sup> Government speech that endorses religion may still run afoul of the Establishment Clause of the First Amendment. *See infra* note 36 and accompanying text.

present a straightforward endorsement of specific religious beliefs. The Court has held that such government endorsement violates the Establishment Clause.<sup>34</sup> Judge McConnell's solution to the public forum problem would create an Establishment Clause problem, at least for religious themed permanent monuments.<sup>35</sup> This flies in the face of the Supreme Court's recent decision that such monuments do not necessarily violate the Establishment Clause.<sup>36</sup>

### C. *Changing the Forum*

Judge Lucero altered traditional public forum analysis by changing how courts define the forum at issue. The prevailing approach is to define the forum as the location in question—public park, street, sidewalk, airport etc.—and then ask whether that place is a traditional public forum. Judge Lucero redefined the forum to include both the location *and the requested use*. So, instead of asking whether the city park was a traditional public forum (which it clearly was), Judge Lucero asked whether “*permanent monuments in the city parks*” was such a forum.<sup>37</sup> He could then plausibly conclude that the United States does not have a “long tradition”—from time immemorial—of allowing private parties to place monuments in public parks.

There are three problems with defining a proposed traditional public forum with reference to the requested use as well as the location. First, the Supreme Court has never taken this approach.<sup>38</sup> Neither Supreme Court case cited by Judge Lucero addressed a traditional public forum, such as a park or street.<sup>39</sup> Further, the Court's decision in *International Society for Krishna Consciousness v. Lee*<sup>40</sup> (*ISKCON*) implicitly rejects such an approach. There, the Court addressed restrictions on solicitation in a public airport. The Court concluded that the airport was not a traditional public forum, and then applied lenient scrutiny in upholding the city's regulation. The Court could have redefined the forum to combine the location and the proposed use, such as “solicitation of contributions in a public airport.” By

<sup>34</sup> See *County of Allegheny v. A.C.L.U.*, 492 U.S. 573 (1989) (unattended crèche on courthouse steps sent message endorsing religion in violation of the Establishment Clause) (link).

<sup>35</sup> The Establishment Clause problem would fall away if the Supreme Court adopted then-Professor McConnell's view that such government endorsements of religion are permissible. See Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 187–94 (2002).

<sup>36</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005) (link).

<sup>37</sup> *Sumnum v. Pleasant City Grove*, 499 F.3d 1170, 1172 (10th Cir. 2007) (emphasis added) (denial of rehearing en banc).

<sup>38</sup> *Id.* at 1178–79 & n.1 (Tacha, J., response to dissent from denial of rehearing en banc).

<sup>39</sup> The two cited cases discuss whether a nontraditional public forum—teacher mailboxes in a public school and a government charity drive—should be treated as a designated public forum or a nonpublic forum. *Sumnum*, 499 F.3d at 1172–73 (citing *Perry*, 460 U.S. at 49 (teacher mailboxes were a nonpublic forum); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (federal government charitable solicitation material was a nonpublic forum)).

<sup>40</sup> 505 U.S. 672 (1992) (link).

defining the forum solely in terms of the location, the Court implicitly rejected Judge Lucero's combination approach.<sup>41</sup>

Second, Judge Lucero's approach sows the seeds of its own undoing. Almost every use of a traditional public forum could be defined at such a specific level that no "long tradition" of similar use exists. For example, consider a political group that wishes to hold a rally in a public park that would use an LCD display and sound amplification equipment. Under Judge Lucero's approach, the government could define the forum as "a rally in a public park that makes use of an LCD display and sound amplification equipment." Given that LCD displays and sound amplification equipment are of relatively recent origin,<sup>42</sup> and are thus not supported by a long tradition, there would be no traditional public forum. Of course, the political group could argue that the forum should be defined at a greater level of abstraction, such as "political protest in a public park." Judge Lucero, however, provides no rule or principle to determine the proper level of generality.

Third, and more fundamentally, Judge Lucero's approach conflates the categories of traditional and designated public forums. Recall that a designated public forum is government property that would otherwise be a non-public forum, but that the government has opened to specified public uses. Consequently, the scope of a designated public forum, *by definition*, incorporates the speaker's use of the property.<sup>43</sup> Conversely, the traditional public forum is open generally to speech activities, and so the specific use does not define the forum. Thus, by defining the relevant forum with reference to the requested use, Judge Lucero ignores the key distinction between traditional and designated public forums.

### III. THE CONSTITUTIONAL EASEMENT APPROACH

Part II showed that attempts to adapt existing public forum doctrine do not work. Instead of further tinkering with current law, this Essay proposes a new test that looks outside the prevailing framework, drawing on an analogy to the real property law of easements. This Part explains how the constitutional easement approach would work.

The Third Restatement of Servitudes defines an easement as "a non-possessory right to enter and use land in the possession of another and [that] obligates the possessor not to interfere with the uses authorized by the

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<sup>41</sup> See also *United States v. Kokinda*, 497 U.S. 720, 726–30 (1990) (focusing traditional public forum analysis on the location—sidewalk in front of the post office—without regard for the proposed use—soliciting contributions) (link).

<sup>42</sup> One could argue that analogous technology existed at the time of either the Founding or ratification of the Fourteenth Amendment, but the Court rejected such an approach in *ISKCON*. See 505 U.S. at 680. There, the Court refused to analogize airports to other historical transportation nodes, such as a bus and train stations.

<sup>43</sup> *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998) (emphasis added) (link).

easement.<sup>44</sup> An easement confers three main rights and obligations: first, the holder of the easement has a right to use property owned by another; second, the owner of the servient land must not unreasonably interfere with the easement holder's use; and third, the easement holder must not unreasonably interfere with use by the servient owner.<sup>45</sup> In a traditional public forum, members of the public are the easement holders, and the government is the servient owner. The public, then, has the right to enter and use the traditional public forum, the government must not unreasonably interfere with that use, and the public must not unreasonably interfere with the government's continued ownership.

Next, we must define the scope of the easement—that is, what uses the public's easement includes. The Supreme Court's traditional public forum cases are instructive here. Uniformly, the Court's opinions describe the public's right as one to use the forum for purposes of “assembly and debate.”<sup>46</sup> The Court has treated unattended temporary displays on public property as part of the speech and debate in a traditional public forum.<sup>47</sup> While this scope is somewhat imprecise, it will suffice for present purposes.

Another aspect of the public's constitutional easement is relevant to the public's right to use a traditional public forum to erect a permanent monument: the right is nonexclusive, meaning that it is held by multiple parties (i.e., members of the public) simultaneously.<sup>48</sup> Restatement § 4.12 addresses the rights of simultaneous easement holders: “[H]olders of separate servitudes creating rights to use the same property must exercise their rights so that *they do not unreasonably interfere with each other.*”<sup>49</sup> Courts have held that permanent structures can unreasonably interfere with a nonexclusive easement. For example, in *Goss v. Johnson*,<sup>50</sup> a group of residents held an easement over the roads throughout their development. To prevent the public from using these private roads as through streets to a highway, some residents constructed a barricade at the entrance to the development. The court held that the barricade unreasonably interfered with the easement.<sup>51</sup> Similarly, in *Aladdin Petroleum Corp. v. Gold Crown Properties, Inc.*,<sup>52</sup> a

<sup>44</sup> RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2 (2000).

<sup>45</sup> See *id.* §§ 4.9, 4.10.

<sup>46</sup> See, e.g., *Forbes*, 523 U.S. at 677 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 781 (1995) (O'Connor, J., concurring in part and concurring in judgment) (quoting *Perry*, 460 U.S. at 45) (link).

<sup>47</sup> *Pinette*, 515 U.S. at 760–61 (unattended temporary display of a cross erected by the Ku Klux Klan was protected speech in a traditional public forum).

<sup>48</sup> See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2 cmt. c.

<sup>49</sup> *Id.* § 4.12 (2000) (emphasis added).

<sup>50</sup> 243 N.W.2d 590 (Iowa 1976).

<sup>51</sup> *Id.* at 596.

<sup>52</sup> 561 P.2d 818 (Kan. 1977).

servient land owner unreasonably interfered with an easement for ingress and egress by building a carport over the right of way.<sup>53</sup>

The analogy to the permanent monument context is straightforward. Members of the public simultaneously hold a constitutional easement to use a traditional public forum for assembly and debate. This easement extends to all portions of the forum that are not reasonably used by the government to maintain the park. As with the barricade and carport, a permanent monument would exclude others from making use of a portion of the constitutional easement. In the words of the Third Restatement, the permanent monument would “unreasonably interfere” with use of the park by other constitutional easement holders—that is, by other members of the public.

Placement of a permanent monument, then, is not part of the public’s constitutional easement over a traditional public forum. Further, “permanent monuments in the public park” would not be a designated public forum because the government gives private monuments selective—not general—access to the park.<sup>54</sup> This would leave the right to place a monument in the category of the public’s right to use a nonpublic forum. As discussed above, speech regulations in a nonpublic forum must be viewpoint neutral, and they must be reasonable. Limits on placement of public monuments will surely be reasonable, in that they “preserve the property under its control for the use to which it is lawfully dedicated.”<sup>55</sup> Government maintains its parks to allow the public a place for recreation, entertainment, and other activities. Because overcrowding with permanent structures would interfere with those purposes, a limit on monuments helps preserve the park for its intended use.

The second requirement—that the regulation be viewpoint neutral—places greater limits on the government. In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,<sup>56</sup> the Court explained that viewpoint neutrality is violated when the government “denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”<sup>57</sup> *Cornelius* illustrates how the government may take content-based action that is viewpoint neutral. There, the Court considered a federal policy that barred advocacy groups from participating in a federal government charity drive. The Court held that nonpublic forum analysis applied to the charity drive, and that barring advocacy groups was not impermissible viewpoint discrimination.<sup>58</sup> The Court explained that the government’s purpose—to avoid controversy that might discourage participation in the

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<sup>53</sup> *Id.* at 825.

<sup>54</sup> See *supra* notes 12–13 and accompanying text.

<sup>55</sup> *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 130 (1981) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)) (link).

<sup>56</sup> 473 U.S. 788 (1985) (link).

<sup>57</sup> *Id.* at 806.

<sup>58</sup> See *id.* at 806–11.

charity drive—was viewpoint neutral. Of course, this asserted purpose must not “conceal a bias against the viewpoint advanced by the excluded speakers.”<sup>59</sup>

The purpose described in *Cornelius* translates well to the public park context. For example, a local government could plausibly claim that politically charged or inflammatory permanent monuments, and their attendant controversy, would make the park less inviting for its intended use by the *entire* community. And while a controversial protest or rally might keep people away from the park temporarily, a controversial permanent monument would work an indefinite exclusion. The government, however, must show that avoiding controversy is its actual purpose, and not simply a cover for disagreement with a speaker’s message.

Under the constitutional easements approach, the outcome of the *Summum* case would depend on the government’s reason for excluding the Seven Aphorisms’ monument. The City’s asserted purpose was to promote its history by including only those permanent monuments either related to the City’s history or donated by groups with strong community ties.<sup>60</sup> Because this purpose concerns the topic of the monument and the identity of the donor, it would be the type of viewpoint neutral reason permitted by *Cornelius*. Conversely, if, as argued by *Summum*, the City’s true purpose was to suppress the *Summum*’s message, the City’s decision would be unconstitutional viewpoint discrimination. This fact issue, which the Tenth Circuit did not decide, would control the outcome of the case.<sup>61</sup>

#### IV. WHY ADOPT THE CONSTITUTIONAL EASEMENT APPROACH?

The constitutional easement approach described in Part III has rhetorical, functional, and doctrinal support in the Supreme Court’s public forum decisions. Rhetorically, the Court has consistently described traditional public forums as subject to a right of “*use* of the public,” with such property having “been *used* for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>62</sup> So, the Court’s public forum cases already speak the language of easements.

Functionally, it makes sense to treat the public’s right to use a traditional public forum as a type of constitutional easement. The law of easements defines the respective rights and responsibilities of the easement holder and the owner of the land burdened by the easement, as well as the rights and responsibilities among parties who simultaneously hold an easement in the same piece of land. These rights and obligations aim to simultaneously maximize the value of each party’s interest in the property.

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<sup>59</sup> *Id.* at 812.

<sup>60</sup> *City of Pleasant Grove v. Summum*, 483 F.3d 1044, 1047 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008).

<sup>61</sup> *Id.* at 1055 n.9.

<sup>62</sup> *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (link).

Rights in the traditional public forum have the same structure as easements. The traditional public forum has a land owner (the government) whose real property (the traditional public forum) is burdened by the right of third parties (the public) to use the property. Also, the right to use is held by multiple easement owners (again, the public) concurrently. The First Amendment public forum doctrine must balance the public's interest in using the traditional public forum with the government's interest in controlling its property as well as the interest of each member of the public to make the same use. In other words, use by each member of the public is subject to both the government's right to continued use of the forum, as well as the right of other members of the public to make similar use. This is the same functional balance sought by the law of easements.

Doctrinally, the constitutional easement approach makes sense for two reasons. First, there is precedent for resort to private property doctrines in implementing constitutional principles. For example, in *Dolan v. City of Tigard*,<sup>63</sup> the Court held that a property exaction<sup>64</sup> is not a taking as long as it is roughly proportional to a legitimate government concern regarding the land.<sup>65</sup> The Court borrowed the concept of rough proportionality from state zoning law, which provided a rich body of precedent to guide future decisions. Such use of established legal concepts has the twin benefit of guiding judicial discretion, and increasing the predictability of judicial decisions.

Second, the Court has adapted its public forum doctrine to specific government functions. For example, when the government acts as a public broadcaster, the Court has tailored its analysis to the government's editorial role.<sup>66</sup> Or when the government acts as a patron of the arts or a librarian, the public forum doctrine is tailored to those contexts.<sup>67</sup> With a public park, the government is playing the role of landowner. The constitutional easement approach tailors First Amendment doctrine to the government's rights and obligations as the owner of a traditional public forum.

## CONCLUSION

Permanent monuments pose a puzzle for current public forum doctrine: how can we distinguish temporary speech from permanent monuments

<sup>63</sup> 512 U.S. 374 (1994) (link).

<sup>64</sup> An exaction occurs when the government conditions the grant of approval on surrender of a property right. For example, in *Dolan*, the city approved proposed development plans in exchange for a public easement and other concessions from the property owner. *Id.* at 379–80.

<sup>65</sup> *Id.* at 391.

<sup>66</sup> See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672–75 (1998) (permitting the government's exercise of editorial judgment as a public broadcaster) (link).

<sup>67</sup> See *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (permitting the government as the operator of a public library to decide what materials are made available to the public) (link); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (permitting the government to make decisions about art funding based on content) (link).

without causing doctrinal incoherence or unintended consequences? Lower courts have bent and stretched the existing public forum rules in their attempt to solve the puzzle, but without success. This Essay finds its solution outside the current framework. The analogy to easement law, and its rule against unreasonable interference with property rights, provides a principled basis for distinguishing permanent and temporary uses of property. By thinking of the public's right to use a traditional public forum as a constitutional easement, courts can now solve the puzzle: a permanent monument would be an exclusive use of the forum that unreasonably interferes with the government's ownership and the public's right to use. Thus, such monuments are not within the public's right to use public parks, streets, and other traditional public forums.