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ARTICLES

PROPERTY AND THE FIRST AMENDMENT

Mark Cordes*

The last decade has seen an increased recognition of property rights in Supreme Court analysis. This is most evident in the area of takings law, where the Court has on at least four occasions expanded property rights relative to government regulation.1 Perhaps even more significant than the results themselves has been the Court's tone in these decisions, where it has emphasized that property rights are to be taken seriously2 and are not a "poor relation" to other constitutional safeguards.3 This has led some commentators to suggest that recognition of property rights is becoming a primary agenda item of the Court.4

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2. See, e.g., Dolan, 114 S. Ct. at 2320; Nollan, 483 U.S. at 841 (remarking that the Fifth Amendment's Property Clause is "more than a pleading requirement and compliance with it [is] more than an exercise in cleverness and imagination.").


A more subtle form of emerging property rights is seen in their interplay with First Amendment rights. This theme was first explored in a provocative 1982 article by Professors Norman Dorsen and Joel Gora, in which they examined the impact of property rights on First Amendment analysis during the Burger Court years. They argued that during that period property interests emerged as a significant factor in the Court’s First Amendment jurisprudence, concluding that “when free speech claims are weighed in the balance, property interests determine on which side of the scales ‘the thumb of the Court’ will be placed.”

This “thumb on the scales” has arguably become even weightier in subsequent years, with the Court’s First Amendment jurisprudence continuing to place an emphasis on property related values, at least as they relate to land. This can be seen


5. A much different type of speech-property relationship is discussed in a recent article which argues that speech should be viewed as a property right of people. See John O. McGinnis, The Once and Future Property-Based Vision of the First Amendment, 63 U. CHI. L. REV. 49 (1996). Professor McGinnis notes that in recent decades First Amendment theorists have largely focused on the First Amendment’s essential role in self-governance by guaranteeing open political dialogue and process in the face of an expanding federal government. Id. at 50 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 112 (1980)). He suggests that this theory is now under attack, and argues that a more proper theoretical basis for the First Amendment, and one more consistent with the amendment’s original purpose, is to view the First Amendment as a property right of the individual. Thus, he argues that “the function of the First Amendment is not to promote the collective interest in self-governance; . . . [but] to prohibit regulation of an important property right peculiarly threatened by the government.” Id. at 57.

Professor McGinnis’s thesis does not directly relate to the speech-property relationship examined in this article. In a subtle way, however, it does suggest the potential impact perceptions of property interests can have on speech rights.


7. Id. at 197.

8. Unlike this article, which focuses only on the relationship between real property interests and speech, the Dorsen and Gora article also examined instances where other forms of property ownership, such as media and financial wealth, related to speech. They concluded that in these areas too the Burger Court gave deference to property interests, either in expanding or limiting speech opportunities. See Dorsen & Gora, supra note 6, at 207-12 (discussing corporate and campaign speech cases) and 215-19 (discussing access to private media cases). In a recent decision, however, Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994), the Court did not give any significance to property interests in regulating private media. In Turner, the Court addressed the validity of a congressional mandate that cable operators devote
in recent Court decisions such as *City of Ladue v. Gilleo*, where it recognized a right to display residential signs, and *Frisby v. Schultz*, which limited residential picketing, both of which relied heavily upon property related concerns. At least one other decision, *City Council of Los Angeles v. Taxpayers for Vincent* has more subtly suggested special protection for First Amendment exercise associated with private property interests. Perhaps most significant, the Court's recent retrenchment of the "public forum" doctrine in cases like *United States v. Kokinda* and *International Society for Krishna Consciousness, Inc. v. Lee* is largely grounded in an analysis focusing on the "property rights" of the state as owner of the property.

The Court's recognition of property-related values in these cases is not altogether new nor necessarily alarming. Each of the above cases was built on early precedent, often preceding the Burger Court years, that to varying degrees recognized property interests in analyzing speech rights. Moreover, the accommodation of property values in analyzing First Amendment rights is not necessarily inconsistent with traditional perceptions of personal liberty. At times, property values might support a more expansive reading of First Amendment exercise. Even where property interests limit speech rights, they might reflect values which themselves relate to liberty and autonomy. Nevertheless, these cases demonstrate the frequent ways that property interests might relate to First Amendment rights and suggest increased judicial attention to such relationships.

up to one-third of their stations to local broadcasters. *Id.* at 2453. Although the Court recognized there was not the showing of scarcity in this case that had justified intrusive regulation of broadcast media in other cases, it found the regulation to be a valid, content-neutral restriction under the test set out in *United States v. O'Brien*, 391 U.S. 367 (1968). *Turner*, 114 S. Ct. at 2469. This arguably reflects a significant intrusion on nonreal property interests of cable operators.

This article will examine the relationship of property interests to First Amendment exercise, and in particular the Supreme Court's treatment of the ways property interests might interact with First Amendment rights. Although where appropriate it will emphasize the increased attention to property interests in recent years, the article's primary intent is to more broadly examine the types of property-speech relationships that have arisen and how the Court has viewed property values in those various contexts. Beyond that, it will attempt to discern the more basic values reflected in the Court's analysis and, to a limited degree, critique the Court's treatment of the property-speech relationship.

To some extent, of course, all First Amendment activity inevitably intersects with property, whether it be the paper a message is printed on or ownership of media such as radio or television stations. This article, however, will focus on the relationship between speech and real property: the locational dimension of speech. In this respect, the article will examine three general areas in which property interests and speech intersect. First is where speech occurs on publicly owned property and the property rights of the government are set against First Amendment rights, traditionally analyzed under the rubric of the "public forum" doctrine. Although not a dominant form of analysis, the Court's retrenchment of the public forum doctrine in recent years is in part explained by increased recognition of property interests on the part of the government to control public property.\(^{16}\)

A second area of property-speech relationship is the extent to which speech interests can be limited to avoid interference with private property interests. This most obviously occurs where a property owner denies access to his or her property for speech purposes. Although at one time the Court had recognized a First Amendment access right to quasi-public property,\(^{17}\) it now has largely closed that door.\(^{18}\) The Court has also recognized that, apart from the right to exclude, property owners

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have the right to be free from unreasonable speech intrusions that interfere with the quiet enjoyment of property. This is clearly most pronounced with the home, but also occurs with non-residential property.

A third area of property-speech relationship is where property interests do not limit, but instead enhance First Amendment rights. Although this is the least developed of the three areas, the Court has on occasion suggested that property interests strengthen First Amendment claims, particularly where the speech occurs on a person's own property. This was most clearly seen in the Court's recent decision in City of Ladue v. Gilleo, where it emphasized values related to residential property in recognizing a First Amendment right to residential lawn signs.

Not surprisingly, this article will suggest that the way in which property values affect First Amendment rights in each of the above categories turns on the relative importance of both the First Amendment exercise and property interests involved. To some extent, First Amendment exercise is quasi-fungible; that is, other forms of First Amendment exercise can be substituted, though not perfectly, for the means of expression at issue. At other times, a particular manner or place of exercise is uniquely important in serving First Amendment objectives, with no adequate alternatives. Similarly, property interests vary in their degree of importance. Some interests are subject to substantial limitations, such as on use and enjoyment, where courts have long subjected property interests to a reasonableness balancing test. Other interests, such as the right to exclude, are viewed as more central to property, and are thus provided significant protection.

22. The Supreme Court's time, place and manner jurisprudence largely reflects this fact, which provides that the state can put reasonable restrictions on where, when or how speech is exercised. See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Kovacs v. Cooper, 336 U.S. 77 (1949).
23. See RESTATEMENT (SECOND) OF TORTS § 822(b) (1979), which defines nuisance as unreasonable interference with the use and enjoyment of land. Reasonable interferences must be tolerated.
24. This is reflected in both trespass law, see, e.g., ROGER A. CUNNINGHAM ET
Of particular importance in assessing the relationship of property to speech is the extent property interests relate to liberty and autonomy values. This is most clearly seen with First Amendment exercise that intersects with the home, where the Court has indicated that privacy, autonomy and liberty interests associated with residential property substantially affect First Amendment rights. This includes not only limiting speech where it might intrude on residential privacy and autonomy, but also enhancing speech when it is exercised in connection with residential property.

Part One of this article will begin by discussing the manner in which perceptions of government property interests affect speech rights on public property. Part Two will then discuss the Court's treatment of instances where First Amendment exercise conflicts with private property interests. Part Three will then examine where property interests enhance speech interests. Finally, Part Four will provide some concluding observations.

I. SPEECH ON PUBLIC PROPERTY: THE PUBLIC FORUM DOCTRINE

An initial area in which property rights intersect with free speech concerns access to government property for speech purposes. A significant amount of free speech jurisprudence has addressed the extent to which individuals can use public property for expression, which offers clear advantages to speakers and has thus been a popular vehicle for communication. Importantly, public property often provides a cheap and convenient form of communication to reach a large number of people. The Court's doctrinal response to these concerns has become known as the "public forum" doctrine. This doctrine has evolved to determine the extent to which citizens can have access to public property for speech purposes and the manner in which government can regulate such access.

AL., THE LAW OF PROPERTY § 7.1 (1984) ("the right physically to exclude others is the most nearly absolute of the many property rights that flow from the ownership . . . of land") and takings law, see, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (recognizing right to exclude others as one of the most essential sticks in bundle of property rights).
A full discussion of the public forum doctrine is beyond the scope of this paper and has been frequently examined by others.\textsuperscript{25} Rather, this article will examine the manner in which property rights, in this context the property ownership rights of the state, affect analysis of "public forum" issues. A property rights analysis has not necessarily been the dominant analytical mode, but has been a consistent theme throughout the doctrine's development, both to recognize and to limit free speech rights. In recent years, it has implicitly emerged as a significant limitation on speech rights.

A. Development of the Public Forum Doctrine

Discussion of the public forum doctrine\textsuperscript{26} often begins with Justice Holmes' opinion for the Massachusetts Supreme Court in \textit{Commonwealth v. Davis}.\textsuperscript{27} In \textit{Davis}, the defendant was convicted of speaking in a commons area without a permit. Upholding the conviction, Justice Holmes noted in dictum that even an absolute ban would have been valid, stating "[f]or the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."\textsuperscript{28}

The United States Supreme Court affirmed,\textsuperscript{29} largely adopting Justice Holmes' reasoning and emphasizing the state's right to control its own property. In particular, the Court stated that


\textsuperscript{26} See, e.g., Day, supra note 25, at 150-52; Stone, supra note 25; Keith Werhan, \textit{The Supreme Court's Public Forum Doctrine and the Return to Formalism}, 7 CARDOZO L. REV. 335, 344-47 (1986).

\textsuperscript{27} 162 Mass. 510 (1895), \textit{aff'd sub nom.} Davis v. Massachusetts, 167 U.S. 43 (1897).

\textsuperscript{28} See \textit{Davis}, 162 Mass. at 511.

\textsuperscript{29} See \textit{Davis} v. Massachusetts, 167 U.S. 43 (1897).
"the right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power includes the lesser."30 Thus, the Supreme Court, as did Justice Holmes, adopted what might be viewed as a pure property rights approach to the issue: the state has the right to control its property the same as a private citizen, which includes the right to deny access altogether for First Amendment activities.31 As such, there was no public forum.

The first recognition of a public forum, in which citizens had a right to some use of public property for public speech, came nearly half a century later in 1939 in *Hague v. CIO.*32 There, the Court struck down an ordinance which prohibited public meetings in streets and other places without a permit. In rejecting the permissibility of such an ordinance under *Davis,* Justice Roberts' plurality opinion stated now famous dictum:

Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been part of the privileges, immunities, rights and liberties of citizens.33

Justice Roberts proceeded to note that the privilege was not absolute and could be regulated to avoid interference with public interests; but it could not be altogether denied.34

The public forum doctrine began with the above-quoted language. As noted by both Professors Kalven and Stone, the recognition of a public forum in *Hague* was implicitly grounded in

30. See id. at 48. Professor Post has argued that *Davis* established that government can control speech when it acts in a "proprietary capacity." Post, supra note 25, at 1722-23. He suggests that a significant amount of public forum doctrine can be explained by what he refers to as the *Davis* syllogism, with the major premise being the above principle and the minor premise being whether in any particular instance the government in fact acts in a proprietary capacity.

31. See Werhan, supra note 26, at 344-46 (*Davis* decided on basis of state's property rights).

32. 307 U.S. 496 (1939).

33. See id. at 515.

34. See id. at 515-16.
a property rights analysis.\textsuperscript{35} Citizens have a right to use streets and parks for speech because they have been dedicated to that purpose. This dedication theory, in essence, recognizes a First Amendment right by "adverse possession"\textsuperscript{36} or "a kind of First Amendment easement."\textsuperscript{37} As such, Hague's plurality did not necessarily reject the property rights model of the Davis Court; rather, it used the property related idea of a dedication to establish a First Amendment right to the public forum.

In a subsequent series of decisions beginning with \textit{Schneider v. New Jersey}\textsuperscript{38} in 1939, the Supreme Court firmly adopted and began to define the concept of the public forum. In \textit{Schneider}, which involved four consolidated cases, the Court struck down several ordinances which prohibited distributing pamphlets on public streets. Although the Court recognized that such activities can be regulated to avoid unnecessary interference with state interests,\textsuperscript{39} it held that the state's interest in preventing littering was insufficient to justify such a restriction on free speech.\textsuperscript{40} The Court further noted that the ordinances could not be justified on the grounds that they allow leafletting elsewhere, stating that "the streets are natural and proper places for the dissemination of information and opinion."\textsuperscript{41}

\textit{Schneider} and its progeny in the 1940s and 1950s established that government must allow some accommodation, or minimum access, for speech activities in the public forum. Although the state can regulate the time, place, and manner of expression, it cannot altogether exclude expression from places such as streets and parks, except for compelling reasons. This was a natural consequence of the Hague plurality's dedication theory and appeared to be at least in part based on that rationale.\textsuperscript{42}

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\textsuperscript{35} See Stone, supra note 25, at 238; see also Dienes, supra note 25, at 112 (noting Hague plurality did not reject property concepts); Post, supra note 25, at 1721-23 (same).
\textsuperscript{36} See id.
\textsuperscript{37} See Kalven, supra note 25, at 13.
\textsuperscript{38} 308 U.S. 147 (1939).
\textsuperscript{39} See id. at 160-61. For example, the Court noted that the state could prohibit a person from leafletting in the middle of the street, which would block traffic.
\textsuperscript{40} See id. at 162-63.
\textsuperscript{41} Id. at 163.
\textsuperscript{42} This was alluded to in \textit{Schneider} and other cases by their emphasis on the right to use public streets. See \textit{Schneider}, 308 U.S. at 163. Moreover, in \textit{Jamison v. Texas}, the Court explicitly rejected the argument that Davis permitted a flat ban. 318
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of these decisions, however, appeared to go beyond a mere dedication rationale and noted the important role such fora and media play in the effective exercise of First Amendment rights as a basis to require some accommodation. For example, the Court noted the important role that streets and parks played in reaching people. Similarly, in striking down bans on various media of expression, such as sound trucks in public streets and door-to-door solicitation, the Court emphasized the important role they played in guaranteeing effective communication, especially for the poor. Although such concerns were, at times, intertwined with notions of tradition and dedication, they nevertheless suggested a separate rationale for permitting use of public property: not only was it dedicated to some speech use, it was necessary for effective communication.

By the mid-1960s the Court had firmly established and affirmed in a number of decisions the public forum nature of the streets and parks. Although these decisions frequently turned on factors other than the public forum, it was clear that state ownership of such property did not automatically give the state the right to limit speech. Moreover, the Court frequently emphasized the important role of streets, parks and similar fora in the effective exercise of First Amendment rights. What was less clear was whether the concept of the public forum extended beyond such traditional fora, and in particular how such a determination was made.

This issue was raised in Adderley v. Florida, where the Court in a narrow five-to-four decision upheld the criminal trespass convictions of a group of students who staged a peaceful protest on the grounds of a county jail. The Court began its analysis by noting that, unlike prior cases in which it had recognized First Amendment rights on public property, the jailhouse grounds were not normally open to the public. The

U.S. 413, 416 (citing to the Hague plurality opinion). Thus, Jamison explicitly incorporated the Hague dedication rationale as at least one basis for insuring access to streets and parks.

44. See Martin v. City of Struthers, 319 U.S. 141 (1943).
46. See id. at 41-42. In an earlier decision, Edwards v. South Carolina, the Court held that students could not be prohibited from protesting on the sidewalks surrounding the State Capital grounds. 372 U.S. 229 (1963). In distinguishing Edwards, the
Court also rejected the argument that the jail was a particularly important and effective forum for the protests, noting that it had never recognized a constitutional right to exercise First Amendment rights “whenever and however and wherever” a person might please.\textsuperscript{47} Importantly, the Court emphasized the state’s right to control its own property, stating:

Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff’s order to remove themselves from what amounted to the curtilage of the jailhouse. The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. . . . The United States Constitution does not forbid a state to control the use of its own property for its own lawful nondiscriminatory use.\textsuperscript{48}

The four dissenting justices, in an opinion by Justice Douglas, strongly rejected the property rights analysis foundation of the majority opinion. Justice Douglas instead emphasized the need for effective avenues of communication, especially for those who might not have access to more conventional forms of expression.\textsuperscript{49} For such people, use of public property might be a uniquely important means to petition the government. Although he recognized that not all public places might be appropriate for protests because of their dedicated purposes, he would focus on whether the activity was “consistent with . . . [the] purpose

\textsuperscript{47} Id. at 47-48.

\textsuperscript{48} Id.

\textsuperscript{49} See id. at 49-51. Justice Douglas stated:

Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were.

\textsuperscript{Id.} at 50-51.
Thus, rather than focus on the ownership of the state as the dispositive factor in access to nontraditional fora, the four dissenting justices would focus on both the need for effective avenues of expression and compatibility with intended uses to determine whether public property can be used for expressive activities. Justice Douglas was particularly concerned that the majority's property-oriented analysis, in which the state, as custodian of the property, was given the discretion to dedicate property to speech purposes or not, put individuals at the state's mercy.

This tension between a property rights perspective, in which the state can largely limit First Amendment rights on property not previously dedicated to such use, and a more functional analysis which primarily focuses on efficacy and compatibility in determining rights, continued over the next several decades. For a short time it appeared that the Court might totally eschew the property rights focus in favor of a compatibility standard, most clearly articulated by the Court's 1972 decision in Grayned v. City of Rockford. In Grayned, the Court upheld an ordinance that prohibited anyone on property adjacent to schools from making noise that would disturb the peace or good order of the school. In recognizing this as a valid time, place and manner regulation, the Court stated that "the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned suggested that, rather than looking to see whether public property was dedicated to speech purposes, access should be determined by compatibility with the forum.

50. Id. at 54.
51. See id. at 54.
52. 408 U.S. 104 (1972).
53. See id. at 108.
54. Id. at 116-17.
Despite this potential shift in thinking, the Court in several decisions in the 1970s applied a more property oriented analysis, suggesting the compatibility standard was limited in scope. First, two years after Grayned, in Lehman v. City of Shaker Heights, the Court held that a city could exclude certain advertising from city buses based on content. A four justice plurality found it was not a First Amendment forum. The plurality’s analysis relied in part on a compatibility standard, noting that “the nature of the forum and the conflicting interests” were important in determining the extent of First Amendment rights. The plurality proceeded to discuss the unique characteristics of the forum before it. The plurality also appeared to rely on the state’s property rights. The Court stated at the end of the opinion that “[n]o First Amendment forum” was involved and that the city had consciously limited access in this case, suggesting that the buses were the city’s property that it could control.

55. In a 1974 article, Professor Geoffrey Stone suggested that Grayned marked a clear break from common law property rights notions of the public forum, derived from Hague, and instead established a compatibility standard to be applied to all public property. “The streets, parks, public libraries and other publicly owned property are all brought under the same roof.” Stone, supra note 25, at 251-52. In a later article, he suggested that his earlier analysis was premature. See Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. CHI. L. REV. 46, 89 n.171 (1987); see also, Day, supra note 25, at 156-57 (stating that in Grayned the Court adopted an “incompatibility standard,” but that it was short-lived).


57. See id. at 304.

58. Id. at 302-03.

59. The plurality noted that this case did not involve open spaces, meeting halls, parks, street corners or the like, but instead commerce by the city. As such, the city was required to “provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights.” Id. at 303; see also Stone, supra note 25, at 252 (stating that plurality’s analysis in Lehman seems consistent with Grayned compatibility standard).

60. See Lehman, 418 U.S. at 304. Justice Douglas’s concurring opinion, which was necessary for a majority, relied on “captive audience” concerns to uphold the ordinance, stating that “the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.” Id. at 307. Earlier in his opinion, however, Douglas hinted at a property rights analysis, noting that the fact the city owns the property “does not without more make it a forum.” Id. at 306.

The property rights perspective was even more apparent in *Greer v. Spock*, a 1976 decision. In *Greer*, the Court held that a military base could bar people from entering the base to make political speeches and distribute campaign literature. The Court found that the base was not a forum for First Amendment purposes. Again, the Court noted the unique characteristics of a military base, but essentially grounded the opinion on the right of the military to control its property absent a dedication to First Amendment purposes. The Court noted that unlike municipal streets and parks, military bases have not traditionally served a free speech function, thus dispelling any dedication based rights. The Court also quoted from *Adderley*, noting that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." At bottom, the Court basically held that the military could control its own property unless a decision was made to dedicate it to First Amendment activities.

Despite the uncertainty regarding the extension of the public forum doctrine, one area in which the Court was clear was in the need for content-neutrality. This applied not only to time, place and manner regulations within established fora, but also to equal access within newly dedicated fora. Thus, in several decisions the Court noted that even if the state were not required to open a particular forum for expression, once it did it could not exclude any speakers based on their content. Indeed, the content-neutrality requirement became the Court's

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63. See id. at 839-40.
64. See id.
65. See id. at 837-39.
66. See id. at 838.
67. Id. at 836 (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)).
68. See *Dorsen & Gora, supra* note 6, at 228-29 (stating that *Greer* is an example of the Burger Court's deference to the State's property interest to limit speech rights); *Post, supra* note 25, at 1743 (stating that *Greer* resurrected the major premise of *Davis* that government can control speech when acting in a proprietary capacity).
70. See *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (although university was not necessarily required to allow any group to meet, once it allowed some groups to meet it could not selectively exclude others based on content).
primary analytical vehicle, allowing the Court to often evade the more difficult question of whether speakers have a guaranteed right to a particular forum. In one sense, this theory acted as a limitation on the state's property rights since, unlike private property owners, it could not pick and choose among speakers. Implicit in the Court's reasoning, however, was the idea that the state could choose not to open up the forum at all, thus affirming the state's property rights.\footnote{71}

Going into the early 1980s, therefore, the Court had at various times focused on state property rights theory and on compatibility concerns. In recognizing rights to traditional fora such as streets and parks, the Court had not only noted the traditional dedication of such property to reasonable speech purposes, but frequently analyzed their role in effective communication and compatibility with state interests. As analysis moved to less traditional arenas, the Court often resorted to state property rights in controlling its property. Though compatibility was a factor in assessing rights within established public fora, it was less clear what role it played in identifying new fora.

B. The Modern Public Forum Doctrine

Most commentators\footnote{72} recognize that the Supreme Court established a modern public forum doctrine in its 1983 decision in\cite{Perry Education Ass'n v. Perry Local Educators' Ass'n.} In Perry, two rival school unions had enjoyed equal access to an interschool mail system.\footnote{460 U.S. 37 (1983).} One union then became the duly elected exclusive bargaining agent, with a subsequent collective-bargaining agreement granting that union, but no other union, access to the interschool mail system and teacher mailboxes.\footnote{See id. at 39.} Although other groups, such as church groups and Cub Scouts, had access to the mail system,\footnote{See id. at 38-40.} no other union was granted

\footnote{71. See, e.g., id. at 277 (suggesting that the university did not need to open up the forum at all).}
\footnote{72. See, e.g., Day, supra note 25, at 160-63; Ronald D. Rotunda & John E. Nowak, 4 TREATISE ON CONSTITUTIONAL LAW 306-09 (2d ed. 1992); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 987 (2d ed. 1988).}
\footnote{73. See id. at 38-40.}
access. The rival union sued, claiming that the regulation violated its First Amendment rights.  

The Court began its analysis by attempting to synthesize previous cases and announcing that there are three categories of fora for speech purposes. First are traditional public fora, such as streets and parks, which "have immemorially been held in trust for the use of the public." Although the state may enact reasonable time, place and manner of expression regulations of such fora, it may not prohibit all communicative activities.

Second are designated fora, which is public property "the State has opened for use by the public as a place for expressive activity." Even though the state might not have been required to open such fora for speech, as long as it provides such a forum it is subject to the standards governing traditional fora. The most important requirement is that access be content-neutral. Examples of such designated fora cited by the Court were university meeting facilities, school board meetings, and a municipal theater.

The third category of public property identified in Perry is the nonforum, property "which is not by tradition or designation a forum for public communication." Such property is not a public forum for speech purposes, and restrictions on speech will be upheld as long as they are "reasonable and not an effort to suppress expression." The Court explicitly grounded recognition of such nonfora on the state's interest in controlling its property, quoting Adderley that "[t]he State, no less than a

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77. See id. at 39.
78. Id. at 45.
79. See id.
80. Id.
81. See id. at 45-46.
82. See id. In a footnote the Court noted that a public forum may be created for limited purposes, thus permitting exclusion of speakers outside of those purpose. See id. at 45 n.7.
86. 460 U.S. at 46.
87. See id.
private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.\textsuperscript{88}

The Court then applied this test to the facts before it, concluding that the internal mail system was a nonforum. It was not open to the public by tradition\textsuperscript{89} and the school board had designated the system as being at most, a limited forum that would not extend to the excluded union.\textsuperscript{90} The Court further found the regulation to be reasonable and viewpoint neutral.\textsuperscript{91}

\textit{Perry} signalled a significant shift in public forum analysis by its pronouncement of the highly formalistic tripartite test. As noted by a number of commentators,\textsuperscript{92} after \textit{Perry}, the category of property in which the regulation falls is critical. Although the Court's synthesis of its prior cases was not necessarily inaccurate, it suggested a more formalistic approach than had previously been employed with the category of property being the critical component. The importance of the fora in ensuring effective opportunities for speech and compatibility becomes secondary; the type of property involved becomes outcome determinative.

Significantly, \textit{Perry} implicitly recognized property right principles as being largely determinative of First Amendment exercise allowed on public property. Only in the first category of traditional fora, such as streets and parks, did the Court recognize a guaranteed access for communicative purposes. In doing so, the Court quoted the classic language of \textit{Hague}, 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."\textsuperscript{93} As noted earlier, this suggests a dedication theory or First Amendment easement by longstanding use.

\textsuperscript{89} See id.
\textsuperscript{90} See id. at 47-48.
\textsuperscript{91} See id. at 48-54.
\textsuperscript{92} See, e.g., ROTUNDA & NOWAK, supra note 72, at 309; see also, Day, supra note 25, at 176.
\textsuperscript{93} \textit{Perry}, 460 U.S. at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).
The other two categories of public property identified in Perry, the designated forum and the nonforum, are largely subject to the State's property interest as owner. Although once established the designated forum is subject to the same rules as a traditional forum, the Court stated that such fora are not necessarily required to be opened to the public in the first place. Moreover, the Court stated that the "State is not required to indefinitely retain the open character of the facility," indicating the State's substantial degree of control in deciding how the property will be used. As noted earlier, the concept of the nonforum was explicitly grounded on the State's right to control its property similar to a private property owner.

Admittedly, the State's rights as owner of the property fall short of a private owner's rights. Unlike private owners, the State is not free to pick and choose who will speak on its property. Moreover, even on nonforum property, state restrictions must be reasonable, thus denying the State the right to arbitrarily or oppressively restrict access. Nevertheless, recognizing the property interests of the State as the owner seems to be a significant, if not the major, analytical ground in the Perry framework.

The ascendancy of a property rights theory of the public forum was further affirmed two years after Perry in Cornelius v. NCAAP Legal Defense and Education Fund. There the Court reviewed the validity of a presidential order which excluded various advocacy groups from participating in the Combined Federal Campaign (CFC), an annual charity drive conducted in the federal workplace. The advocacy groups, which had previously been allowed to participate in the campaign, challenged their exclusion as constituting a content-based restriction in violation of the First Amendment.

94. See id. at 45.
95. Id. at 46.
96. See id.
97. See Werhan, supra note 26, at 410-11; Post, supra note 25, at 1749-50 (Perry decisively reaffirmed categorical framework of Greer).
99. See id. at 790-95.
After first identifying the relevant forum as the CFC, rather than the federal workplace,\textsuperscript{100} the Court proceeded to follow the \textit{Perry} tripartite test as its framework for analysis.\textsuperscript{101} What was most significant about \textit{Cornelius}, however, was that it established a “government-intent” standard to determine what type of forum was involved.\textsuperscript{102} In determining whether the CFC was a dedicated forum, the Court stated that “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”\textsuperscript{103} It noted that it looks to policy and practice for such intent, as well as possibly inferring intent from “the nature of the property and its compatibility with expressive activity.”\textsuperscript{104} However, the Court stressed that it will not find a public forum “in the face of clear evidence of a contrary intent.”\textsuperscript{105} On this basis, the Court concluded that there was no intent to create a forum.\textsuperscript{106} Thus, the government’s actions were subject to the lenient standards governing nonfora, which were met.\textsuperscript{107}

\textit{Cornelius} thus established government intent as the basis for determining which category of property is involved. Although this was arguably implied in \textit{Perry}, it was undeniably stated in \textit{Cornelius}. This does not give government carte blanche power, since courts can clearly infer intent from actions, policies, and compatibility. Furthermore, if a designated forum is found, it will be subject to some scrutiny. But it does indicate that ultimate control, with the exception of traditional fora such as streets and parks, lies with the state itself. This affirms that the Court views questions of the public forum as essentially flowing from the rights and decisions of the government as owner of the property.\textsuperscript{108}

\begin{flushright}
100. See \textit{id.} at 801-02.
101. See \textit{id.} at 802.
102. See \textit{id.}; \textit{Day}, supra note 25, at 166; \textit{Post}, supra note 25, at 1756.
104. \textit{Id.}
105. \textit{Id.} at 803.
106. See \textit{id.} at 804-06.
107. See \textit{id.} at 809-11.
108. See \textit{Dienes}, supra note 25, at 119 (suggesting that \textit{Cornelius “reflects the property orientation embodied in Adderley and its progeny”}).
\end{flushright}
The extent to which this approach, focusing on the state’s property rights, might be taken is seen in two more recent decisions, United States v. Kokinda and International Society for Krishna Consciousness, Inc. v. Lee. Whereas previous cases in which the Court emphasized the state’s right to control its own property often involved clearly nontraditional areas, such as jails or military bases, both Lee and Kokinda involved fora arguably similar to streets and parks. The Court in Lee, and a plurality in Kokinda, applied a property analysis to limit speech. Both decisions reflected deep divisions on the Court, however, and lend uncertainty as to how far the Perry analysis can be pursued.

In the first case, Kokinda, two volunteers for the National Democratic Committee set up a table on a sidewalk, near a post office entrance, in order to solicit contributions and sell and distribute literature. The sidewalk was located entirely on Postal Service property and was the only means of entrance to the building from the parking lot. Postal regulations prohibited any solicitation from postal premises. After receiving numerous complaints, the postmaster asked the two to leave, but they refused. They were ultimately arrested and convicted, and appealed their arrest and conviction on First Amendment grounds.

Once again, the Court began its analysis with the Perry tripartite test. As would be expected, the respondents argued that sidewalks were traditional public fora and must accommodate First Amendment speech. Indeed, the Court itself seven years earlier in United States v. Grace had held that

112. 497 U.S. at 723.
113. See id.
115. See Kokinda, 497 U.S. at 723.
116. See id. at 723-24.
117. See id. at 726-27.
118. See id. at 727.
the sidewalks surrounding the Supreme Court building were traditional public fora for First Amendment purposes.\footnote{120}{See id. at 179-80.}

The plurality, however, stated that the postal sidewalk in \textit{Kokinda} did not have the characteristics of traditional sidewalks and thus did not qualify as a traditional forum.\footnote{121}{497 U.S. at 727-28.} Unlike the sidewalk in \textit{Grace}, which the Court had labelled “indistinguishable from any other sidewalks in Washington, D.C.”,\footnote{122}{461 U.S. at 179.} the postal sidewalk in \textit{Kokinda} was not adjacent to a thoroughfare.\footnote{123}{497 U.S. at 727.} Instead, it was constructed solely for those members of the public engaged in postal business.\footnote{124}{See id.} In that sense the plurality believed the facts were more similar to the military base in \textit{Greer v. Spock},\footnote{125}{424 U.S. 828 (1976).} where the internal streets and sidewalks did not qualify as traditional fora.\footnote{126}{See \textit{Kokinda}, 497 U.S. at 729 (quoting \textit{Greer}, 424 U.S. at 838).}

The plurality further concluded that the postal sidewalk did not fit into the second category of a designated public forum. Although it recognized that some individuals had been permitted to “leaflet, speak, and picket” on the premises, it stated that allowing some speech activities does not constitute a dedication.\footnote{127}{Id. (quoting \textit{Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.}, 473 U.S. 788, 802 (1985)).} Quoting \textit{Cornelius}, it stated that “[t]he government does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”\footnote{128}{Id. at 730.} Under this standard, the plurality noted that the Postal Service had never expressly dedicated its sidewalks to First Amendment activity; rather, postal regulations only expressly permitted communication on designated bulletin boards.\footnote{129}{See \textit{Kokinda}, 497 U.S. at 730.} Thus, according to the plurality, there was no clear intent to dedicate the sidewalks to speech activity.

The plurality concluded that the postal sidewalks were nonpublic fora and speech restrictions must simply be tested for

\begin{footnotes}
\footnote{120}{See id. at 179-80.}\footnote{121}{497 U.S. at 727-28.}\footnote{122}{461 U.S. at 179.}\footnote{123}{497 U.S. at 727.}\footnote{124}{See id.}\footnote{125}{424 U.S. 828 (1976).}\footnote{126}{See \textit{Kokinda}, 497 U.S. at 729 (quoting \textit{Greer}, 424 U.S. at 838).}\footnote{127}{Id. (quoting \textit{Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.}, 473 U.S. 788, 802 (1985)).}\footnote{128}{Id. at 730.}\footnote{129}{See \textit{Kokinda}, 497 U.S. at 730.}
\end{footnotes}
their reasonableness and viewpoint neutrality. In finding the solicitation ban reasonable, the plurality primarily focused on the nature of the property, and the potentially disruptive impact that solicitation might have on postal business. The Court noted both the unique mission and business environment of the postal service and the distinctive characteristics of solicitation on others. In a sense, therefore, the plurality applied a compatibility analysis in upholding the regulation, though in a very deferential manner.

Justice Kennedy's concurring opinion, necessary for a majority, avoided deciding whether the postal sidewalk was a public forum. Instead, he assumed without deciding that it was a designated forum but concluded that the postal regulation was a reasonable time, place, and manner restriction for such a forum. He expressed some concern, however, about the plurality's conclusion that the postal sidewalk was not a public forum, noting that it is "essential to protect public places where traditional modes of speech and forms of expression can take place" and "there remains a powerful argument that, because of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonforum."

In an opinion written by Justice Brennan, the four dissenting justices even more severely took issue with the plurality's analysis, arguing that application of the modern Perry tripartite test to traditional fora such as sidewalks makes little sense and "obfuscates" the issue. They particularly disagreed with those aspects of the plurality's opinion that concerned the government's intent to create a forum, criticizing the plurality's "particularized inquiry into the precise nature" of the forum.

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130. See id.
131. See id. at 732-33.
132. See id. at 738 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).
133. Id. at 737.
134. See id. at 741, 746-47 (Brennan, J., dissenting) (stating that "whatever the proper public forum doctrine to novel situations like fund-raising drives in the federal workplace . . . or the internal mail systems of public schools . . . we ought not unreflectively transfer principles of analysis developed in those specialized and difficult contexts to traditional forums such as streets, sidewalks, and parks.").
135. See id. at 740-42, 744-45 (quoting Frisby v. Shultz, 487 U.S. 474, 480-81
and stating that "why the sidewalk was built is not salient." They instead suggested that public access to sidewalks and other traditional fora is not a matter of government "grace" but inherent in the nature of the forum.  

The Court's most recent public forum decision, *International Society for Krishna Consciousness, Inc. v. Lee,* again showed a badly divided Court on the manner in which the *Perry* tripartite test should apply to what was arguably a more traditional forum, this time an airport terminal. In that case, the Port Authority of New York and New Jersey, which owned and operated three major airports in the New York area, passed separate regulations banning solicitation and distribution of literature within terminal areas. The Krishna Society, a religious organization actively engaged in solicitation and distribution at airports, challenged the regulations as violating the First Amendment.  

In two separate, but closely related cases, the Court upheld the antisolicitation regulation, but struck down the regulation banning distribution of literature within the terminal. Importantly, however, a majority of the Court held that the *Perry* test was applicable and found that the airport terminal was a nonpublic forum, indicating a strong property rights perspective. At the same time, however, four justices vigorously dissented from the *Perry* property rights approach. Moreover, Justice O'Connor, though joining the majority in finding the terminal a nonforum, found the ban on literature distribution unreasonable, adding further confusion to the outcome by suggesting greater scrutiny of nonforum restrictions than previously required under the tripartite test.  

Chief Justice Rehnquist first wrote an opinion for a five member majority in which the Court upheld the ban on solicitation. He began his discussion once again with the *Perry* tripar-

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136. *Id.* at 744 (emphasis in original).
137. See *id.* at 745.
139. See *id.* at 674-76.
tite analysis, concluding that it was a nonpublic forum. The Court began its discussion of whether the terminal was a traditional public forum by citing Hague v. CIO, where it said the public forum status flowed from use of streets and parks from time immemorial for expressive activities. It further noted that the government does not create a public forum by inaction or opening the property to the public; rather, there must be a clear governmental intent to create a forum.

The Court then proceeded to conclude that neither by tradition nor intentional dedication did airport terminals qualify as public fora. First, given the relative lateness of air travel in our history, airport terminals have clearly not been dedicated to First Amendment uses from "time immemorial." Further, even within the short history of aviation, the practice of using terminals for First Amendment activities is recent. Finally, the court found no intent or purpose to dedicate the terminals for speech. As such, airport terminals are neither traditional nor dedicated fora, and to be valid, regulations need only be reasonable and viewpoint neutral.

The five person majority proceeded to find that the solicitation ban was a reasonable regulation and therefore valid. Four of the five justices also found the leafletting ban reasonable. Justice O'Connor, however, left the majority at this point and concluded, in a separate opinion, that the ban on distribution was unreasonable. Although she clearly agreed that the terminal was a nonforum, she applied some rigor

141. See Lee, 505 U.S. at 679.
142. 307 U.S. 496 (1939).
143. See Lee, 505 U.S. at 679.
144. See id. at 679-80.
145. See id. at 680-83. "Thus, we think that neither by tradition nor purpose can the terminals be described as satisfying the standards we have previously set out for identifying a public forum." Id. at 683.
146. See id. at 680.
147. See id. at 680-81.
148. See id. at 683-84.
149. The ban on leafletting actually came before the Court as a separate case, thus adding to the Court's confusion. See Lee v. International Soc'y for Krishna Consciousness, Inc., 505 U.S. 830 (1992) (per curiam). Thus, the four person opinion arguing in favor of the ban appeared as a dissent in the subsequent decision. Id. at 831-32.
150. See Lee, 505 U.S. at 690-92 (O'Connor, J., concurring).
151. Not only did Justice O'Connor join the five person majority which held the
to the reasonableness requirement for a nonpublic forum and found the distribution ban lacking.

The remaining four justices strongly rejected the majority's public forum analysis.\textsuperscript{152} In particular, those justices severely criticized the Perry forum analysis as giving government the "almost unlimited authority to restrict speech on its property" by simply stating a non-speech purpose, and as a consequence leaves no room for the development of new public fora.\textsuperscript{153} Instead, they suggested an analysis similar to the old compatibility standard, stating: "If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum."\textsuperscript{154}

The Court remained deeply divided in Lee concerning the applicability of the Perry property focused analysis to all public property. On the one hand, with the replacement of Justice Marshall by Justice Thomas, a five member majority was willing to apply an intent standard to even relatively open areas such as terminals. This suggests a significant recognition of the state's property rights as determining public forum questions. At the same time, the four remaining justices even more clearly rejected the property rights and intent analysis. Adding more uncertainty to the analysis was Justice O'Connor's concurrence in Lee, which, while applying the property rights analysis of Perry, suggested a degree of scrutiny to nonpublic fora greater than had previously been recognized. Thus, while the property rights analysis has arguably come to dominate public forum questions, its current status is precarious at best.

\begin{itemize}
\item terminal was a nonforum, but she separately reiterated that under the Perry forum analysis terminals were a nonforum. See id. at 686 (O'Connor, J., concurring).
\item 152. Justice Kennedy wrote a concurring opinion in the solicitation ban case, the first section of which strongly criticized the majority's public forum analysis. See id. at 693-703 (Kennedy, J., concurring). Justices Blackmun, Stevens, and Souter joined this part of the concurrence. Justice Kennedy would have upheld the solicitation ban as a reasonable time, place and manner restriction within a public forum. See id. at 703-05 (Kennedy, J., concurring). The other justices would have invalidated it. See id. at 709-16 (Souter, J., dissenting). All four found the leafletting ban invalid, which, together with Justice O'Connor, formed a majority.
\item 153. Lee, 505 U.S. at 695 (Kennedy, J., concurring).
\item 154. Id. at 698 (Kennedy, J., concurring); see also, Day, supra note 25, at 196 (noting similarity to the Grayned "compatibility standard").
\end{itemize}
C. Summary

As suggested by the above discussion, a property rights analysis, focusing on the state's right to control use of and access to its own property, has long played a role in the public forum question. This is not surprising, since the state, like any other property owner, clearly has rights attendant to property ownership. The modern forum doctrine, however, initiated in *Perry* and reflected in the tripartite test, has arguably made the state's property rights the dominant focus of current analysis. This is particularly seen in the test's formalistic approach to whether state owned property is subject to First Amendment use, which looks to see whether the property has been traditionally or intentionally designated a forum for speech purposes. Thus, even though the state is not afforded the same degree of protection as a private owner, the test strongly presumes the state's right to control property to the extent it has not given up such rights. This "property rights" hold on public forum analysis is quite tenuous, however, as the *Kokinda* and *Lee* decisions reflect a deep division within the Court concerning whether a property rights perspective or a compatibility approach best addresses the difficult policy issues inherent in the public forum doctrine.

Certainly any resolution of public forum questions must recognize and protect the state's status as property owner to some extent. Just as a private owner, the state has an interest in assuring that property can be used for its intended purposes and any substantial interference with dedicated uses of state property should be permitted only for the most compelling of reasons. The issue, however, is not whether to accommodate state property interests, but rather, how to best do it while at the same time accommodating First Amendment interests.155

In this respect, the Court's current emphasis on property rights is potentially problematic for two reasons. First, the

155. Cf. *Stone*, supra note 55, at 93 ("right to engage in expressive activities on public property should turn not on the common law property rights of the government . . . but on a reasonable accommodation of the competing speech and governmental interests"); *Werhan*, supra note 26, at 423-26 (arguing for rejection of *Perry* formalism and return to *Grayned* compatibility test).
Court seems to assume the property interests of the state are largely the same as that of a private citizen, and that is not altogether accurate. In some respects, of course, the state's property interests are similar to that of a private owner. In particular, the state like a private owner has an interest in being free from unreasonable interference with its property.

But in several other respects, publicly owned property is arguably different than private property and thus not necessitating the same treatment. Depending on the nature of the property in question, expectations of control and the right to exclude are less than what a private owner would have. Publicly owned property is often open to the public with diminished expectations of privacy or exclusion. Thus, the normal expectation that others cannot be on the property is considerably less if not altogether absent with many forms of public property.

Related to this, is the fact that publicly owned property does not have the same autonomy concerns attached to it as private property. As noted by various commentators, the right to control private property reflects not only utilitarian values, but also values closely associated with autonomy and personhood. Such values are arguably most threatened when a person is unable to control what is done and who enters their property. Thus, although a private property owner's use of property might well be limited to serve societal objectives, such objectives generally do not justify physical invasion of the property. The need to respect autonomy is arguably an im-

156. Cf. Marsh v. Alabama, 326 U.S. 501 (1946). In Marsh, the Court stated “[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.” Id. at 506.

157. See MARGARET J. RADIN, REINTERPRETING PROPERTY 35-71 (1995). Professor Radin has proposed a personhood theory of property, which argues that the law has and should provide greater protection when property is “bound up with personhood.”

158. Cf. Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 HARV. L. REV. 1165, 1228 (1967) (noting “[t]he psychological shock, the emotional protest, the symbolic threat to all property and security” that may occur when government physically invades private property).

159. Some societal objectives would require limiting a private property owner's right to exclude, such as prohibiting a retail store from discriminating on the basis of
important component in giving private property owners the right to control access to and use of property by others.

No such concerns exist for state property. Although the state has a very significant interest in avoiding interference with the dedicated use of its property, neither its personhood nor autonomy is threatened when others are permitted on its property. The state’s interests are principally functional, as important as they are. This suggests that the state’s interests should be protected in a functional fashion, that focuses on avoiding unnecessary interferences with the property’s dedicated use. This, of course, doesn’t mean the state should have no rights as owner of property; it clearly must. It does suggest, however, that an analytical model that presupposes the same right to control as a private owner is flawed, since significant differences do exist.160

A second significant and related problem of grounding public forum analysis in a “property rights” approach is its distributive impact on speech opportunities. Implicit in the Court’s property rights focus is that the state need not subsidize speech opportunities; rather, an individual’s own resources should be used for speech. This places a greater emphasis on private property’s role in effective communication. Thus, an indirect consequence of the modern public forum doctrine’s emphasis on the state’s property rights is to elevate the importance of private property in speech. Indeed, this arguably coincides with the Court’s suggestion that use of private property might have special constitutional significance.161

An obvious concern is that a shift away from public to private property to accommodate speech will have a disproportion-

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160. See Post, supra note 25, at 1797-98 (noting differences between private and public property and stating that with public forum focus should be an “instrumental” nature of property).

161. See, e.g., City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 811 (1984) (banning signs on public property, but not on private property is disparate treatment that is justified because of “[t]he private citizen’s interest in controlling the use of his own property”).
ate impact on the poor. Access to public forum property for expression has long been a means by which the less advantaged can have some minimal opportunity for expression. By treating all but the most clearly traditional public fora as the state's property to control as it pleases, the Court significantly limits speech opportunities. This is particularly true as new and distinct types of public fora emerge in society.

The extent of this distributive impact should not be overemphasized. Certainly, important speech opportunities remain, even with a property oriented analysis. Moreover, significant imbalances are inevitable because of the role money plays in effective communication and the great disparity of wealth distribution in our society. No matter what type of public forum doctrine the Court adopts, there will remain significant differences in people's ability to communicate because of significant differences in the resources they can devote to speech. Nevertheless, by emphasizing the state's right to control its property, and thus denying access to state property for expression, the Court is clearly moving towards placing a greater reliance on private property in facilitating First Amendment exercise.

These two concerns—the distinctive nature of public property and the distributive impact of a property rights approach—do not mean that the state should have no rights as an owner of property. As noted above, any public forum doctrine must seriously protect against unreasonable interferences with use of state property. The concerns do suggest, however, that an overemphasis on the state's right as property owner is problematic and unnecessary. Rather, a compatibility analysis, at least with property that is arguably analogous to more traditional fora, better serves First Amendment interests while helping ensure protection of legitimate state interests.

162. See Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (“Door to door distribution of circulars is essential to the poorly financed causes of little people.”); TRIBE, supra note 72, §§ 12-24.
163. See Stone, supra note 55, at 93 (access to public property for speech should not turn on property rights of the government but on “a reasonable accommodation of the competing speech and governmental interests”).
II. SPEECH AGAINST PROPERTY

A second major way in which property interests might affect speech is where First Amendment exercise conflicts with property interests. This might occur in one of two general ways. First, is where a speaker seeks physical access to property and thus, interferes with the property owner's right to exclusive possession. Second, is where speech interferes with use and enjoyment of land. This article will treat each of these two issues separately.

A. Access Issues

The most apparent way in which property rights limit free speech is by the right to exclude others, including those seeking to exercise First Amendment rights, from property. The Court has frequently identified the right to exclude others as one of the most essential sticks in the bundle of property rights. It is not surprising, therefore, that the Court has often noted in dicta that private property owners, especially homeowners, are free to exclude others from their property. Indeed, in recognizing the state's right to control nonforum public property the Court has often drawn an analogy to the right of private property owners to exclude others.

A private property owner's right to exclude First Amendment activity from the property in most instances is quite easy to understand. On the one hand, there are strong expectations that one can control use and access to property. This is particularly strong with regard to residential property, where privacy and autonomy concerns require that a property owner be able to deny access to the property. Conversely, ample alterna-

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tive forms of expression would usually exist, since only a rela-
tively minor area has been restricted. Thus, any restraint on
expression would be very minor when compared to the signifi-
cant property and privacy interests affected.

Occasionally, however, the balance is not so one-sided. This
would usually occur where private property is generally open to
the public, thus decreasing privacy expectations and making
more minimal any interference with dedicated use. Moreover,
alternative channels of communication might be less effective
where the property encompasses a large area or duplicates in
some fashion a public fora. For these reasons the Court has, in
a series of decisions, addressed the issue of under what circum-
stances First Amendment concerns might require that a person
be permitted on private property for expressive purposes. Al-
though in several early decisions the Court established signifi-
cant First Amendment access rights to private property, in later
decisions it substantially limited such rights.\footnote{168}

This issue was first brought before the Court in 1946 in
\textit{Marsh v. Alabama}.\footnote{169} In \textit{Marsh}, a Jehovah's Witness attempt-
eted to enter a privately owned company town to distribute reli-
gious literature. The town was owned by a shipbuilding compa-
ny, but in all other respects resembled a typical American
town, consisting of residences, regular streets and sidewalks,
and a business section. Title to all property, including streets
and sidewalks, was held by the private company.\footnote{170} On that
basis, the town refused to let the Jehovah's Witness distribute
literature, noting that it controlled access to the town because
it was privately owned property.\footnote{171}

In a five-to-three decision, the Supreme Court held that the
appellant had a First Amendment right to distribute literature
in the town despite its private ownership.\footnote{172} In rejecting the

\footnote{168. See generally Dorsen & Gora, supra note 6, at 220-26, for a discussion of how
the Burger Court's property rights bias limited the earlier recognized First
Amendment access right to quasi-public property.}

\footnote{169. 326 U.S. 501 (1946).}

\footnote{170. See id. at 502-03.}

\footnote{171. See id. at 503-04.}

\footnote{172. See id. at 508-09.}
argument that the company’s private property interest settled the question, the Court stated:

The State urges in effect that the corporation’s right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.173

The Court proceeded to note that the town of Chickasaw functioned as a normal town in almost every respect, and therefore, the public had “an identical interest” in ensuring that “the channels of communication remain free.”174 In such circumstances any property interests that exist cannot deny reasonable First Amendment activities. Marsh thus recognized that at least in some circumstances, most notably where private property acts as the equivalent of a town, a property owner’s right to exclude must yield to First Amendment rights.

More than two decades later, in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza,175 the Court extended the rationale of Marsh to peaceful picketing of a store located in a large shopping center. In that case, between four and thirteen people picketed a newly opened supermarket, carrying signs saying that it was a non-union market and that employees did not receive union benefits.176 The picketing was carried out almost entirely in the parcel pickup area immediately adjacent to the store and on an adjacent parking lot, areas that were privately owned by the shopping center.177

Because the picketing was peaceful and for lawful purposes, the case presented the issue of whether state laws against trespass to private property could be used to bar First Amendment picketing on the supermarket property. In holding that there was a right to picket on the shopping center land,

173. Id. at 505-06 (citations omitted).
174. Id. at 507.
175. 391 U.S. 308 (1968).
176. See id. at 311.
177. See id.
the Court relied strongly on its previous holding in *Marsh*. In particular, the Court stated that "the shopping center here is clearly the functional equivalent of the business district"\(^{178}\) in *Marsh*. Thus, because the "shopping center serve[d] as the community business block 'and [was] freely accessible and open to the people in the area and those passing through,'" the state could not, through its trespass laws, prohibit First Amendment rights to be exercised on such property.\(^{179}\) The Court also emphasized that the picketing was directed at only one business within the shopping center, and that alternative sites would be less effective, and in some cases dangerous.\(^{180}\)

Together, *Marsh* and *Logan Valley* seemed to establish that where privately owned property served a quasi-public function, it was subject to some right of access for First Amendment purposes. Thus, even though in most instances a private property owner could refuse entry to those desiring to exercise First Amendment rights, such a right of refusal was not automatic simply by virtue of one's status as property owner. Rather, the characteristics of the property in question and, in particular, its openness to the public, together with the adequacy of alternatives, would dictate questions of access.

These First Amendment in-roads on a property owner's right to exclude were short-lived, however. Four years after *Logan Valley*, in *Lloyd Corp. v. Tanner*,\(^{181}\) the Court substantially limited the potential reach of its earlier decisions when it held that a shopping center could ban handbilling unrelated to activity in the center.\(^{182}\) In that case, several young people attempted to distribute handbills inviting people to a meeting to protest the draft and Vietnam War. Although their activity was peaceful and orderly, they were told that they were trespassing and must stop distribution of the handbills.\(^{183}\)

\(^{178}\) Id. at 318.
\(^{179}\) Id. at 319-20.
\(^{180}\) See id. at 321-22.
\(^{181}\) 407 U.S. 551 (1972).
\(^{182}\) See id. at 570.
\(^{183}\) See id. at 553-56.
Both the district court\(^{184}\) and court of appeals\(^{185}\) held that, under the Supreme Court’s previous decisions in *Marsh* and *Logan Valley*, the shopping center was the functional equivalent of a public business district and could not be completely closed to expressive activities. The Supreme Court reversed, however, and held that there was no First Amendment right to distribute handbills in a privately owned shopping center. In doing so, it distinguished *Logan Valley* by noting that the speech in that case concerned activity at the center itself; thus, there were no other reasonable means of communicating the message to the intended audience.\(^{186}\) Conversely, in *Lloyd*, the handbilling was altogether unrelated to the locale. The Court also distinguished *Marsh* by noting that a shopping center was not the functional equivalent of an entire town.\(^{187}\)

The Court then proceeded to what it considered to be the central issue in the case: whether a person may exercise First Amendment rights on private property contrary to the wishes of the owner.\(^{188}\) The Court said no, stressing the private property rights of the shopping center in controlling the types of activities that might occur on the property.\(^{189}\) It specifically rejected the argument that by opening the property to the public there was an implied dedication to First Amendment activity, noting that property does not lose its private character “merely because the public is generally invited to use it for designated purposes.”\(^{190}\) The focus of analysis thus shifted from the quasi-public nature of the property emphasized in *Marsh* and *Logan Valley* to the rights of the private property owner emphasized in *Lloyd*.\(^{191}\)

Although the Court in *Lloyd* was careful to distinguish rather than overrule *Logan Valley*, the Court’s emphasis in *Lloyd* on

\(^{185}\) See Tanner v. Lloyd Corp., 446 F.2d 545 (1971).
\(^{186}\) See Tanner, 407 U.S. at 563-64.
\(^{187}\) See id. at 569.
\(^{188}\) See id. at 567.
\(^{189}\) See id. at 568.
\(^{190}\) Id. at 569.
\(^{191}\) See Dorsen & Gora, *supra* note 6, at 222, stating that whereas in *Marsh* speech had a preferred position over property rights, in *Lloyd* “the priority of speech over property had yielded to a parity between speech and property, if not a preference for the latter.”
the shopping center's private property rights is difficult to reconcile with the Logan Valley decision. Indeed, four years later, in Hudgens v. NLRB, the Court specifically stated that the rationale of Logan Valley did not survive the Lloyd decision. On that basis, the Court held that striking members of a union did not have a First Amendment right to enter a shopping center to advertise a strike against their employer, whose store was located in the shopping center. In so holding, the Court effectively said that a private property owner's right to exclude others outweighs any First Amendment rights, even when inadequate alternatives exist.

The combined result of Lloyd and Hudgens is to place a property owner's right to exclude others above First Amendment concerns in almost all cases. Both decisions appear to affirm the continuing viability of Marsh, which involved a company town which "was performing the full spectrum of municipal powers and stood in the shoes of the State." As a practical matter, however, such situations are quite limited, with company towns and similar institutions largely a relic of the past. Conversely, shopping centers have increasingly become an integral part of the American experience. The streets and sidewalks of a downtown business district, perhaps the quintessential concept of a traditional public forum, have been replaced by shopping centers. However, the Court has clearly limited any concomitant shift in First Amendment interests.

193. The Court in Hudgens noted that Lloyd did not overrule Logan Valley, but concluded that "the reasoning of the Court's opinion in Lloyd cannot be squared with the reasoning of the Court's opinion in Logan Valley." Id. at 518. In particular, the Court stated that a true First Amendment forum must be content-neutral. See id. at 520. Thus, the Court concluded that "if the respondents in the Lloyd case did not have a First Amendment right to enter this shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co." Id. at 520-21. Even beyond this content-neutrality analysis, however, the Court's strong emphasis in Lloyd on private property rights is difficult to reconcile with the Logan Valley result.
194. See id. at 520-21.
Striking the balance in this way, giving a property owner's interest in excluding others clear preference over speech interests, might be criticized on two grounds. First, as suggested above, the private shopping mall has become the equivalent of the early downtown district. This, in turn, might suggest the need for a similar shift in the provision of opportunities for expression, especially in light of the Court's frequent focus on the need for adequate alternatives in speech cases. This, in itself, should not necessarily negate the landowner's rights, but certainly can factor into the balancing of interests.

Second, and more importantly, the Court's treatment in *Lloyd* and *Hudgens* of the property owner's right to exclude showed little sensitivity to the actual importance of that right for quasi-public property. The right to exclude others from land is most certainly a core value that has been accorded significant protection in the law. In most circumstances, however, this involves intrusions where the property is not open to the public and expectations of privacy and autonomous control of the property are high. Such concerns are certainly diluted when property is generally open to others. Since the concept of property is a social construct, any property interest, including the right to exclude, must necessarily be defined relative to competing social concerns.


199. For example, the Supreme Court's highly protective stance against even minimal physical invasions in takings law has involved instances where the property was not generally open to the public. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

200. See Singer, *supra* note 159, at 1450. Professor Singer's article engages in an in-depth examination of a property owner's right to exclude in providing public accommodations, most notably retail businesses. He notes that there is a "puzzling gap" in public accommodations law in some states that would permit racial and gender discrimination by retail stores. See id. at 1286-94. He then engages in an in-depth examination of the historical origins of public accommodations law. See id. at 1303-1412. Even though the traditional common law rule limits the duty to serve to inn-
prohibiting racial discrimination on property open to the public, society has, in effect, redefined the scope of the right to exclude. This certainly does not establish that people should have access to shopping centers for speech, but it does indicate that the issue is more debatable than the Court's reasoning in *Lloyd* and *Hudgens* might suggest.

In a subsequent decision, however, *Pruneyard Shopping Center v. Robins*, the Court demonstrated some sensitivity to how the quasi-public nature of property should affect the right to exclude. There the Court held that private property interests, though sufficient to preclude exercise of federal First Amendment rights, were not so substantial so as to preclude exercise of state free speech rights. In *Pruneyard*, several high school students, who were prohibited from distributing pamphlets and passing a petition in a privately owned shopping center, brought suit to enjoin their denial. Although recognition of any federal free speech rights was precluded by *Lloyd* and *Hudgens*, the California Supreme Court held that its own state Constitution protected reasonable speech and petitioning activities even in privately owned shopping centers and thus held for the students. The shopping center in response argued that recognition of a state free speech right requiring access to the property constituted a Fifth Amendment taking of property and would also violate the shopping center's own federal free speech rights.

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keepers and common carriers, Singer argues that a more plausible reading of early cases was that all businesses open to the public had a duty to serve everyone and could not exclude. *See id.* at 1298; 1321-31. He then uses this analysis to argue that the common law right of access should be extended to all places open to the public. *See id.* at 1443-49. Singer concludes his article with a discussion of "what public accommodations law teaches us about the concept of property." *Id.* at 1450-77. He forcefully argues that a landowner's right to exclude at common law was far from absolute, at least as to property open to the public. In particular, he states "the history of public accommodations law suggests that the model of ownership built on the privacy and autonomy interests of a homeowner may be an inappropriate paradigm for conceptualizing the obligations and rights of owners of property open to the public. It further suggests that all rights—even the basic right to exclude—are limited by the rights of others and by social interests." *Id.* at 1450.

201. *See id.* at 1302 (noting that antidiscrimination laws belie the view that ownership of private property includes the absolute right to exclude others).


203. *See id.* at 77-78.

The Supreme Court rejected both arguments. It acknowledged that the right to exclude others is one of the most essential sticks in the bundle of property rights and that that stick had been taken by the California Constitution. It stated, however, that takings analysis requires consideration of several factors, including "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." The Court concluded that there was no taking under that analysis, since the speech activities in question would neither impair the property's value or interfere with its use as a shopping center. The Court also found that there was no First Amendment violation, since the state did not prescribe any particular message and there was little likelihood, given the public nature of the center, that people would identify speech activities with the center.

The Court's rejection of the takings argument in Pruneyard might seem surprising considering the importance normally given the right to exclude. Although the Court has stated that takings analysis requires examination of several factors, including the interference with investment-backed expectations, it has usually not considered the economic impact when a physical invasion is involved. Indeed, in several decisions since Pruneyard the Court has held that any physical invasion, no matter how minimal the economic impact, constitutes a taking. This includes not only where the government itself invades a person's property, but also where the government requires that third parties be permitted onto the property. In either instance, the state has interfered with the right to exclude others, which the Court has consistently recognized as lying at the center of property rights. Such an analysis ar-

205. See Pruneyard, 447 U.S. at 82.
206. Id. at 83.
207. See id.
208. See id. at 87. Thus, unlike Wooley v. Maynard, 430 U.S. 705 (1977), where the Court struck down a state required message on license plates, shopping centers are not compelled to carry or identify with any particular message.
211. See Nollan, 483 U.S. at 825 (required easement to allow public to walk across property); Loretto, 458 U.S. at 419 (law that required landlords to permit cable companies to run cables on property).
212. See, e.g., Nollan, 483 U.S. at 831; Loretto, 458 U.S. at 433; Kaiser Aetna v.
guably suggests a taking in Pruneyard, since the State of California was forcing private property owners to permit speech activities on their land.

The distinguishing factor in Pruneyard, however, would appear to be its quasi-public nature, where expectations of exclusion are considerably less. In each of the cases where the Court has found a physical occupation to be a taking, despite minimal economic impact, the property was not generally open to the public. Indeed, in Loretto v. Teleprompter Manhattan CATV Corp., decided two years after Pruneyard, the Court held that a New York law that required landlords to permit cable access to tenants constituted a taking since it involved a physical invasion. It distinguished Pruneyard on the grounds that in Pruneyard the invasion was not permanent and that "the owner had not exhibited an interest in excluding all persons from his property."

Despite Pruneyard, it is fair to say that the Court has generally recognized the right to exclude as sufficient to limit First Amendment rights. As noted earlier, this is not surprising considering the often-perceived, near-absolute nature of that right under common law and constitutional analysis. Pruneyard demonstrates, however, that the Court is partially sensitive to the actual infringement of autonomy interests that might result, permitting state speech rights at least where the property is quasi-public.

This sensitivity to the actual nature of the property interests implicated has apparently continued in the years since Pruneyard. During that time, the Court has given increased recognition to property rights, including several cases in-
volving physical invasions by third persons.\textsuperscript{218} Yet the Court has declined to reconsider its holding in \textit{Pruneyard} and recently denied certiorari in a case involving state recognition of speech rights to shopping centers.\textsuperscript{219} This has left state courts to decide if access is required.\textsuperscript{220} As such, the Court has apparently chosen to stop short of where an uncritical acceptance of property rights might have led.\textsuperscript{221}

\section*{B. Speech Interfering with Property}

A second and more common conflict between speech and property interests is where speech activity somehow interferes with the use and enjoyment of property. A soundtruck blaring a message in a residential neighborhood,\textsuperscript{222} signs and billboards that pose an aesthetic blight to surrounding property,\textsuperscript{223} pic-


\textsuperscript{221} But see Dorsen & Gora, \textit{supra} note 6, at 225-26 (stating that \textit{Pruneyard} simply reflected deference to "the expansive power of the state to define, expand, or contract property rights," not necessarily a yielding of property rights to speech rights).


\textsuperscript{223} See City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789
eting of a home,\textsuperscript{224} and door-to-door solicitation\textsuperscript{225} are all examples of speech originating somewhere else, but which potentially interferes with the use and enjoyment of land.

As might be expected, the Court implicitly balances the respective speech and property interests in these situations. It has recognized protection of the use and enjoyment of land, especially residential property, as a substantial interest sufficient to justify restrictions on speech. Conversely, property owners, including homeowners, must tolerate some inconvenience and interference with property use.

This balancing of interests reflects both property and First Amendment principles. Unlike the right to exclude, the right to use and enjoyment of property is nowhere near absolute. Zoning and nuisance law both recognize that conflicts between property uses are inevitable and reasonable accommodations must be made by landowners. Thus, nuisance law, which is designed to promote protection of the use and enjoyment of property, nevertheless recognizes that some interference with property use is reasonable and must be accepted by the landowner.\textsuperscript{226} Only unreasonable interferences, usually determined by balancing a number of factors, are prohibited.\textsuperscript{227}

Similarly, First Amendment jurisprudence has long engaged in implicit balancing when reviewing time, place and manner restrictions.\textsuperscript{228} As noted in Part One, speech activities cannot be altogether banned from traditional public fora, but can be made subject to reasonable time, place and manner restrictions to avoid unnecessary interference with state interests.\textsuperscript{229} In striking a reasonable balance, the Court generally considers the availability of adequate alternatives, the importance of the state interest, and the ability to further that interest in less restric-

\textsuperscript{225} See Martin v. City of Struthers, 319 U.S. 141 (1943).
\textsuperscript{226} See, e.g., Restatement (Second) of Torts § 822(b) (1979).
\textsuperscript{227} See id.
\textsuperscript{228} See generally, Tribe, supra note 72, § 12-2, at 791; Stone, supra note 55, at 58.
tive ways. At bottom, this type of balancing is quite similar to nuisance law balancing, in which reasonable interferences with a person’s property interests are permitted, and unreasonable interferences prohibited.

Although First Amendment activities might interfere with any type of property, the Court has most seriously addressed them when they concern residential property. For this reason, this article will first examine the Court’s treatment of conflicts between First Amendment exercise and residential privacy. It will then examine First Amendment conflicts with other types of property ownership.

1. Interferences With the Home

Conflicts between First Amendment exercise and residential property interests often arise when people use public fora or other traditional communicative media in residential neighborhoods. Although streets and sidewalks do not lose their special First Amendment status in such situations, the Court has long recognized that residential interests, especially privacy and autonomy concerns, can be protected from First Amendment intrusion. In its earlier decisions, the Court recognized the importance of such interests, but noted that the state could further them in less restrictive ways. In more recent years, however, the Court has increasingly recognized residential privacy as an extremely important interest sufficient to limit communication activities.

One of the earliest cases to involve a First Amendment conflict with residential privacy was Martin v. City of Struthers in which the Court reviewed an ordinance that prohibited door-to-door residential distribution of handbills and advertisements. The city defended the ordinance on the grounds that

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234. 319 U.S. 141 (1943).
235. The ordinance in question stated:
it served to protect householders from annoying intrusions and interruptions of their privacy and rest. It argued that “constant callers” may significantly intrude on residential enjoyment, especially for those who work nights and sleep during the day. The solicitation ban also helped prevent crime, since burglars might pose as canvassers to spy on a house.

The Court rejected this argument, however, in essence saying that less restrictive means existed for furthering the ordinance’s purposes.\(^{236}\) It began by noting that even though door-to-door distributors might be a nuisance in some instances, they also may be “useful members of society” engaged in a longstanding and highly important means of communication.\(^{237}\) Although the Court did not dispute the importance of the residential privacy concerns supporting the ordinance, it noted that the problems could be addressed by letting each householder decide whether to post signs prohibiting solicitation and canvassing.\(^{238}\) It noted that a city could then validly punish those who ignore such signs.\(^{239}\) Such a scheme would protect the rights of householders while still preserving essential First Amendment freedoms.

The Court distinguished *Martin* six years later, however, in *Kovacs v. Cooper*,\(^{240}\) when it upheld as valid a municipal ordinance which prohibited sound trucks on city streets that emitted “loud and raucous noises.”\(^{241}\) Although only a year earlier the Court had struck down an ordinance which gave a police chief uncontrolled discretion in deciding to permit sound amplification,\(^{242}\) no such defect existed in *Kovacs*.\(^{243}\) Instead, the

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\(^{236}\) It is unlawful for any person distributing handbills, circulars or other advertisements to ring the doorbell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing.

\(^{237}\) *Id.* at 142.

\(^{238}\) *See id.* at 145-49.

\(^{239}\) *Id.* at 145-46. In particular the Court emphasized that door-to-door canvassing had played an important role for religious groups and in political campaigns, and that it was “essential to the poorly financed causes of little people.” *Id.* at 146.

\(^{240}\) *See id.* at 147-48.

\(^{241}\) *Id.* at 148.

\(^{242}\) 336 U.S. 77 (1949).

\(^{243}\) *Id.* at 78.


\(^{245}\) It was argued that the term “loud and raucous” was too vague and obscure to
Court focused on the captive audience problem posed by sound trucks, noting that listeners are unable to escape their intrusive effect. Unlike *Martin*, where householders could themselves take measures to stop unwanted messages, citizens are “practically helpless to escape this interference with... privacy by loud speakers.”

The right of homeowners to be free from unwanted communication, suggested in *Martin* and clearly recognized in *Kovacs*, was affirmed two decades later in *Rowan v. United States Post Office*. There, the Court reviewed the constitutionality of a federal statute under which a person could require that a mailer remove the person's name from mailing lists and stop sending future mail to the person. Various publishers, distributors and operators of mailing services challenged the statute as violating their First Amendment rights, since it prohibited those groups from communicating with certain people. In upholding the statute, the Court acknowledged it had the effect of “impeding the flow of ideas, information, and arguments,” but found it a reasonable measure to protect residential privacy interests from unwanted communication.

In recognizing residential privacy concerns as sufficient to limit First Amendment expression, the Court noted that “the ancient concept that 'a man’s home is his castle’... has lost

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244. See id. at 86-87.

245. Id. The Court's analysis in *Kovacs* was not limited to invasions of residential privacy, but also included captive audiences anywhere the message might carry, including streets and office buildings. See id. at 87, 89. Yet in several places the Court expressed particular concern for residential privacy interests that might be invaded by “loud and raucous” loud speakers. For example, the Court noted that in the absence of such an ordinance, “In the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions.” Id. at 87. Similarly, the Court concluded by stating the ordinance was justified by “the need for reasonable protection in the houses or business houses from the distracting noises of vehicles equipped with such sound amplifying equipment.” Id. at 89.


247. See id. at 729-30.

248. See id. at 735-36.

249. Id. at 736-37.
none of its vitality." Thus, in striking a balance between speech and privacy rights, the Court stated that a "right to communicate must stop at the mailbox of an unreceptive addressee." Further, the decision to withhold communication was given to the resident, making it consistent with the Court's suggestion in Martin that households could decide for themselves to prohibit solicitation. Thus, the statute was no broader than necessary to address the core concern of avoiding intrusions of unwanted communication into residential privacy.

Read together, Martin, Kovacs and Rowan clearly establish residential privacy as a substantial government interest sufficient to restrain First Amendment activities. In doing so, they recognize that the inner confines of a residence should be a sanctuary from outside interferences, including unwanted First Amendment intrusions. Yet the Court was quite cognizant of First Amendment concerns, including the need to preserve traditional means of expression necessary for effective communication. Thus, where less effective means of ensuring privacy existed, such as the use of "no solicitation" signs in Martin, the Court was quick to strike the restriction down.

Moreover, the Court's primary concern in these cases was to protect residential privacy within the inner confines of the home. This is not to say that there might not be other important interests in preserving more general residential amenities, such as quiet streets and aesthetically pleasing surroundings. But such "neighborhood" interests are arguably less compelling than the "privacy" interests emphasized in Martin, Kovacs, and Rowan. In particular, there was no suggestion in those decisions that streets, parks, and sidewalks lost their First Amendment significance because of their proximity to homes. Instead, the Court seemed to say that the reach of

250. Id. at 737 (citations omitted).
251. Id. at 736.
252. Id. at 736-37.
254. See Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) ("a quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines" in zoning).
speech originating in such places or through such means must stop at a householder's door.

The Court's solicitude for residential privacy was again reinforced and arguably expanded in two recent decisions concerning residential picketing. In the first decision, Carey v. Brown, the Court reviewed an Illinois statute which prohibited residential picketing, but exempted "peaceful picketing of place of employment involved in a labor dispute." Although the Court struck down the ordinance because it was content-based, in dictum it affirmed the statute's important purpose of preserving residential privacy. In a strong endorsement of residential values, the Court stated:

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick." The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.

The Court revisited the issue of residential picketing eight years later, in Frisby v. Schultz, in what is arguably its most far-reaching protection of residential property interests against First Amendment exercise to date. In that case, a number of people opposed to abortion had picketed on a public street outside the home of a doctor who performed abortions. In response, the town council passed an ordinance which completely prohibited all picketing "before or about" any residence. The protestors discontinued their

256. 447 U.S. 455 (1980).
257. Id. at 457.
258. See id. at 461-62.
259. Id. at 471 (citations omitted).
261. See id. at 476.
262. See id. at 476-77.
picketing, but filed suit challenging the ordinance on First Amendment grounds.\textsuperscript{263}

The Court began its analysis by first determining whether the residential streets in question constituted a traditional public forum requiring some accommodation of First Amendment rights.\textsuperscript{264} The city argued that the streets in question were not traditional fora because they were physically narrow and located in residential neighborhoods, and thus never dedicated to public communication.\textsuperscript{265} The Court rejected this argument, however, strongly stating that “a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood.”\textsuperscript{266} Thus, some accommodation must be made for First Amendment activities such as picketing.

The Court then proceeded to narrowly construe the ordinance as only prohibiting “picketing focused on, and taking place in front of, a particular residence,”\textsuperscript{267} rather than banning all picketing in residential areas, which would clearly be invalid. Thus narrowed, the Court found the restriction reasonable.\textsuperscript{268} First, it noted that by prohibiting only picketing focused on a single home, the ordinance provided ample alternative means of expression.\textsuperscript{269}

Second, and more importantly, the Court held that the residential privacy interests were sufficiently substantial to justify the First Amendment restriction. It began by quoting from \textit{Carey} and reiterating that the state’s interest in protecting the tranquility of the home is “of the highest order” and that “preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.”\textsuperscript{270}

\begin{itemize}
\item \textsuperscript{263} See id. at 477.
\item \textsuperscript{264} See id. at 479-80.
\item \textsuperscript{265} See id. at 480.
\item \textsuperscript{266} Id.
\item \textsuperscript{267} Id. at 482.
\item \textsuperscript{268} See id. at 483.
\item \textsuperscript{269} See id. at 483-84.
\item \textsuperscript{270} Id. at 484 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).
\end{itemize}
The Court then focused on the primary aspect of residential privacy presented in the case—"protection of the unwilling listener." Although outside the home people are often expected to avoid unwanted speech, the Court stated that the home was different, where within its walls citizens should be free from unwanted intrusions. Thus, it noted that the Court had frequently held that the state could protect against unwanted intrusions, such as offensive radio broadcasts, offensive mailings, and excessive noise from sound trucks.

It then held that the ordinance, as narrowly interpreted, was designed to serve such a purpose. As interpreted by the Court, the ordinance did not ban picketing aimed at the general public, but only picketing targeted at a particular residence, which it stated could have a "devastating effect" on the quiet enjoyment of the home. In particular, the Court noted that "the tensions and pressures may be psychological, not physical," but they still intrude on residential privacy and tranquility. Indeed, the Court stated that "even a solitary picket can invade residential privacy," noting that "there are few of us that would feel comfortable knowing that a stranger lurks outside our home." Thus, the Court suggested that a complete ban on picketing targeted at a home, even when it involved only a single, quiet picketer, would be valid.

Although the Court in Frisby attempted to ground its holding in earlier Court cases protecting residential privacy, it clearly expanded the type of residential interests that could be protected. As suggested by Justice Brennan's dissent, the type of residential interests protected in prior decisions involved actual intrusions into the home—an unwelcome solicitor.

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271. Id.
272. See id. at 484-85.
277. Id. at 486 (citations omitted).
278. Id. at 487 (citations omitted).
280. See id. at 491-96 (Brennan, J., dissenting).
mail,\textsuperscript{282} excessive noise,\textsuperscript{283} or radio messages.\textsuperscript{284} In some real sense, these gained entry into the home itself. Although targeted residential picketing might at times be similarly intrusive, depending on the level of noise, hours of protest, and number of picketers, such problems can be addressed by a more narrowly drawn ordinance that regulates each of the above concerns.\textsuperscript{285} The Court indicated, however, that any targeted residential picketing, no matter how limited in scope, could be prohibited.\textsuperscript{286}

Therefore, it appears that the type of residential privacy interests protected in \textit{Frisby} clearly extend beyond the intrusive and coercive activities previously justifying First Amendment restrictions. Rather, the Court elevated the home to a sanctuary from even the psychological effects of speech taking place entirely outside the home. Although grounded in the Court's recognition that the state can protect residential privacy and tranquility, it seemed to shift the balance between speech and residential property interests even more toward the latter. As such, the autonomy and privacy concerns associated with a residence become an even more dominant factor when weighed against speech interests.

2. Non-Residential Property

Whereas the Court has clearly addressed the potential conflict between residential values and First Amendment exercise, it has had less occasion to examine speech conflicts with nonresidential property. Certainly some of the same considerations are relevant here, since the owner of nonresidential property

\textsuperscript{283} See \textit{Kovacs v. Cooper}, 336 U.S. 77 (1949).
\textsuperscript{286} See \textit{Frisby}, 487 U.S. at 487-88.
also has a right to be free from unreasonable interference with use and enjoyment of the land, even when caused by First Amendment exercise. Thus, the Court in Kovacs, though emphasizing the interference sound trucks would cause to residential privacy, also noted that businesses and other property uses would have a right to be free from such intrusions. Nevertheless, it seems safe to say that the strength of the property interests are generally not as strong as residential interests. In particular, the autonomy and privacy concerns, so strongly emphasized in the residential cases, are certainly less significant when speech interferes with nonresidential property.

Perhaps the primary example of where nonresidential property interests might be seen as restricting speech is with zoning of certain First Amendment activities. Although zoning decisions often reflect a multitude of concerns, it is fair to say that minimizing interferences with surrounding property often is a central purpose. A decision to prohibit or limit a particular land use in a certain location is at least in part justified because of its potential interference with the use and enjoyment of surrounding property. Thus, zoning restrictions on First Amendment exercise, such as sign or billboard regulations or restrictions on the location of adult theaters or churches, can be viewed at least in part as limiting expressive activity in order to protect surrounding property interests.

As a practical matter, however, the Court has not exclusively emphasized property interests as such in examining the validity of zoning restrictions on First Amendment land uses. Rather, it has more generally applied a time, place and manner analysis to such restrictions, essentially balancing the impact on speech against the importance of asserted state interests. Unlike

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287. See Kovacs, 336 U.S. at 87, 89.
288. Zoning restrictions obviously also protect residential property interests. The residential property interests protected by zoning, however, are usually not the autonomy and privacy concerns reflected in decisions such as Frisby, but instead more "neighborhood" amenities like traffic and noise. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (emphasizing quiet streets, reduced traffic, and few people).
289. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926) (elimination of noise and traffic from residential districts valid basis for zoning); see generally DANIEL MANDELKER, LAND USE LAW § 1.3 (1982).
290. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986);
intrusions into residential autonomy and privacy, where the Court has been quite solicitous of property-related values, the Court has more clearly sought to balance the respective interests when nonresidential property is involved. Thus, the Court has indicated that state interests behind zoning, which often concern minimizing interferences with neighborhoods and surrounding property, are sufficient to justify restrictions on speech, as long as there is no suppressive effect. 291 However, where the impact on speech is significant, or where the state fails to establish a significant interest, the restriction must fail.292

It might be argued, however, that recent Supreme Court decisions upholding restrictions on adult uses reflect a preference for property interests over First Amendment concerns.293 This is particularly true of City of Renton v. Playtime Theatres,294 where the Court held that a city could restrict adult theaters to 5% of a town’s area, even though there were few properties in that area actually available for use.295 Among the asserted state interests were several that concerned protection of property, including preserving property values and “preserving and protecting the quality of the city’s neighborhoods.”296 The Court held that these interests were sufficient to justify what would appear to be a quite significant limitation on speech.

To some extent, Renton might therefore be further evidence of the Court’s increasing willingness to let property interests limit speech, especially since property related interests played an important role in upholding the restrictions. It should be noted, however, that the asserted state interests also included more general rationales, such as crime prevention and

291. See Renton, 475 U.S. at 53-54.
292. See Schad, 452 U.S. at 72.
293. See Dorsen & Gora, supra note 6, at 234-35 (suggesting that the Court’s decision in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), upholding a zoning restriction on adult uses, demonstrated the Burger Court’s willingness to protect private property interests at the expense of First Amendment interests).
295. See id. at 53-54.
296. Id. at 48 (alterations in original).
“preserv[ing] the quality of urban life.” Moreover, though pornography is protected First Amendment speech, there is an undertone in the Court’s cases in this area that suggest some lower status. Nevertheless, it is fair to say that Renton does demonstrate that zoning might be used to limit First Amendment exercise to preserve property interests.

Generally speaking, using zoning to preserve surrounding property values and enjoyment by limiting speech such as adult theaters is quite appropriate. In such situations, the location of primary land uses is essentially fungible, since there is no special relationship to any particular site and thus, requiring that speech occur in some other location is rarely inherently suppressive. Conversely, the interference with surrounding property, resulting in reduced property values and diminished use and enjoyment, can be substantial and less easily avoided. Assuming that adequate alternative sites are available for the First Amendment use, such zoning restrictions would appear to be an appropriate balancing of the respective concerns since speech is not significantly affected. Where speech opportunities are significantly suppressed, however, which might have been the case in Renton, a more sensitive balancing of interests should occur.

III. Speech Enhanced By Property

A third and final way in which property interests might affect First Amendment analysis is that property rights might enhance First Amendment exercise. On one level, of course, private property interests enhance expression in a number of obvious ways. Those with property and wealth are able to communicate more effectively simply by greater access to a wide variety of media. Television, radio and print media all cost money, and those with significant financial resources can obviously use those media with greater efficacy than the average citizen. Although the Court has been sensitive to ensuring that inexpensive media and traditional public fora remain available

297. Id. at 50 (quoting American Mini Theatres, Inc., 427 U.S. at 71).
298. See id. at 49 n.2 (noting that the plurality opinion in American Mini Theatres, stated “[I]t is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser magnitude than the interest in untrammeled political debate. . . . ”).
for expression, all this does is guarantee the availability of some minimum means of expression; it certainly does not create a level First Amendment playing field. The Court has generally permitted such a disparity to continue, rejecting in most instances attempts to limit a person's greater First Amendment abilities generated by wealth.

Similarly, a person's speech rights can be enhanced by ownership of real property. Unlike the public forum, where access for First Amendment exercise is based on dedicated use, an owner can decide to dedicate private property to any First Amendment use within reason. Thus, the property can be used for religious meetings, speeches, political coffees, political gatherings, protests, or informational activities. As noted earlier, the state needs a substantial interest to regulate speech, which usually concerns the secondary effects of the activity. Where speech is exercised on private property, such secondary effects might not come into play.

At times, of course, speech originating from private property can conflict with broader state interests. The Court has made clear that the fact that the speech occurs on private property does not insulate it from regulation. Zoning of First Amendment activities is the most obvious example, with both the Supreme Court and lower courts consistently holding that zoning ordinances may prohibit some First Amendment activities on certain properties. Similarly, no one would seriously dispute that the state can regulate the level of noise, even of...


300. See Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curium) (invalidating expenditure limitations of 1971 Federal Election Campaign Act); see also Dorsen & Gora, supra note 6, at 209-12 (discussing Court's rejection of "effort[s] to equalize" public debate).

301. See, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. at 41 (1986) (adult theaters subject to zoning restrictions); Metromedia v. City of San Diego, 453 U.S. 490 (1981) (signs and billboards on private property can be subject to regulation).

302. See, e.g., Playtime Theatres, Inc., 475 U.S. at 41 (zoning ordinance can limit adult uses to small area of town); Metromedia, 453 U.S. at 490 (signs and billboards on private property can be subject to zoning restrictions); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (zoning can restrict First Amendment activities, but is subject to heightened scrutiny).
political speech, emanating from a house despite private ownership.\textsuperscript{303}

The conflict in such cases is clear. Although the speech might originate from private property, it extends into the broader community and potentially interferes with significant state interests. Assuming content-neutrality, the Court will resolve such a conflict by weighing the significance of the state's interest and the availability of First Amendment alternatives. In many instances, the asserted state interest will in fact be the protection of surrounding property interests of neighbors. Thus, assuming adequate alternatives exist for the expression, the Court might well choose to regulate speech originating from private property in order to protect the property interests of surrounding neighbors.\textsuperscript{304}

The Court has indicated on several occasions, however, that speech interests can be enhanced by their association with property rights, even where they conflict with state interests that would normally justify regulation. In other words, even where substantial state interests exist that would otherwise justify regulation, the association with property interests shifts the balance in favor of speech interests. In such situations, the association with property interests is a factor, perhaps even the deciding factor, in preserving First Amendment exercise. Of course, it is not the property per se that justifies the greater protection, but values attendant to property, such as privacy and autonomy concerns. Nevertheless, it is fair to say that property—related values might enhance speech interests vis-a-vis competing government interests.

An early and significant recognition of the way in which property interests can enhance speech interests came in \textit{Stanley v. Georgia}.\textsuperscript{305} In that case, police officers searched a home for evidence of bookmaking activity. Although no evidence of bookmaking was found, in the course of the search obscene films

\textsuperscript{303} Cf. Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (can regulate “loud and raucous” sound trucks on public streets).

\textsuperscript{304} Although zoning serves various purposes, its primary objective is usually considered to be minimizing conflicting land uses and thus preserving the use and enjoyment of land and respective economic values.

\textsuperscript{305} 394 U.S. 557 (1969).
were discovered. The person was arrested and later convicted under a Georgia statute that prohibited knowing possession of obscene matter.\textsuperscript{306}

On appeal, the Supreme Court overturned the convictions, holding that possession of obscene material in the privacy of the home was constitutionally protected.\textsuperscript{307} Although the Court acknowledged that the First Amendment "recognize[s] a valid governmental interest in dealing with the problem of obscenity," that interest does not mean that all other constitutional protections are lost.\textsuperscript{308} Particularly significant to the Court's holding was that the obscene materials were found in the privacy of a person's home, where the First Amendment right to receive information and ideas take on added significance.\textsuperscript{309} Thus, the Court stated that:

Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.\textsuperscript{310}

Stanley thus held that residential privacy concerns can enhance speech rights by protecting First Amendment activity that would otherwise be subject to regulation. Indeed, in a more recent decision, \textit{Bowers v. Hardwick},\textsuperscript{311} the Court expressly interpreted Stanley in such a fashion, stating "Stanley did protect conduct that would not have been protected outside the home."\textsuperscript{312} At the same time, Hardwick noted that Stanley was not a mere privacy decision protecting any conduct in the privacy of the home; rather, it said Stanley "was firmly grounded in the First Amendment."\textsuperscript{313} On that basis, the Court in Hardwick refused to recognize a constitutional right to engage

\textsuperscript{306} See id. at 558-59.
\textsuperscript{307} See id. at 559, 565.
\textsuperscript{308} See id. at 563.
\textsuperscript{309} See id. at 564.
\textsuperscript{310} Id. at 565.
\textsuperscript{311} 478 U.S. 186 (1986).
\textsuperscript{312} Id. at 195.
\textsuperscript{313} Id.
in homosexual conduct in the privacy of the home. Thus, the Hardwick Court seemed to clearly interpret Stanley as recognizing residential privacy rights as being particularly relevant when associated with First Amendment interests.

Five years after Stanley the Court again recognized in Spence v. Washington, that speech rights might be enhanced by property interests. In that case a college student hung an American flag upside down from his apartment window, with a peace symbol attached to the flag. He was charged with and subsequently convicted of a statute prohibiting "improper use" of the flag, which prohibited inter alia placing or attaching designs on a flag.

The Supreme Court reversed the convictions on First Amendment grounds. In doing so, it began by noting that several factors were important in deciding the case, among them that the flag was privately owned and that the flag was displayed on private property. Later in the decision the Court reemphasized the fact that the flag was displayed on private property, stating:

> We are confronted [here] with a case of prosecution for the expression of an idea through activity. Moreover, the activity occurred on private property, rather than in an environment over which the State by necessity must have certain supervisory powers unrelated to expression. Accordingly, we must examine with particular care the interests advanced by appellee to support its prosecution.

Having established this need for a more rigorous review, the Court proceeded to reject each of the asserted state interests.

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314. See id. at 195-96.
316. See id. at 406-07.
317. See id. at 415.
318. See id. at 408-09.
319. Id. at 411 (citations omitted).
320. The Court rejected each of the following possible state interests: breach of the peace; protecting the sensibilities of passersby; failure to show proper respect for our national emblem; and the state of Washington's interest in preserving the national flag as an "unalloyed symbol of our country." See id. at 412-15.
Admittedly, the recognition of private property interests was not dispositive in *Spence*. Arguably, the Court would have reached the same result even if the flag had not been displayed from private property, but was instead displayed in an appropriate manner in a traditional public fora. Moreover, the Court’s rationale for more closely reviewing First Amendment restraints when applied to private property was rather modest. Although it is true that the state lacks a supervisory interest in the same way it does when speech takes place on public property, there still might be state interests sufficient to justify reasonable restrictions. Nevertheless, the Court clearly indicated that whether speech was exercised on public or private property was at least a factor in analyzing the validity of restrictions.

The Court’s most recent and clearest recognition of how private property rights enhance speech rights came in *City of Ladue v. Gilleo*. In *Ladue* the Court reviewed an ordinance which prohibited all residential signs with a few limited exceptions. The ordinance was challenged by a citizen who was told that a lawn sign and later, a small window sign protesting the war in the Persian Gulf were prohibited. The Supreme Court held the prohibition on residential signs unconstitutional, stating it involved a unique and venerable means of communication which could not be entirely foreclosed.

In finding the restriction unconstitutional, the Court stated that the ordinance restricted “too much” speech by foreclosing a venerable and a uniquely important means of communication. Although the Court suggested that residential signs constituted a distinct medium of communication and therefore, could not be altogether banned, it primarily focused on the

322. The ordinance exempted “residence identification” signs, “for sale” signs, and safety hazard signs, and also permitted churches and several other organizations to display signs not permitted by homeowners. See id. at 2040.
323. See id.
324. See id. at 2045.
325. The Court began its analysis by noting that a sign restriction might be infirm either because it restricted “too little” speech by violating content-neutrality concerns or by restricting “too much” speech by affecting a uniquely important means of communication. See id. at 2043. Although the content exemptions in the ordinance arguably violated content-neutrality, the Court instead chose to invalidate the ordinance because it restricted “too much” speech.
326. See id. at 2046. The Court noted that it had previously held that bans on
uniquely important role that residential signs played in effective communication. In this regard, the Court first noted that residential signs are unique because their location provides information about the identity of the speaker, which is a critical component in evaluating a message. Further, residential signs are a convenient and inexpensive form of communication, which for people of modest means has no practical alternative. Thus, residential signs offer a special utility not easily replicated by alternative media.

The Court then proceeded to emphasize in more specific terms the special role played by the home in the exercise of First Amendment rights, stating:

A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there. Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8 - by - 11 inch sign expressing their political views. Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, its need to regulate temperate speech from the home is surely much less pressing.

The Court also thought it significant that homeowners have a strong incentive to maintain property values and avoid visual clutter on their property— incentives that don't exist when placing signs on the property of others. Although this self-policing by private property owners does not make a medium uniquely valuable, the Court seemed to treat it as a factor in assessing the strength of the state's interest when deciding whether an ordinance restricts "too much" speech.

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327. See id. at 2047.
328. See id.
329. Id. (citations omitted).
330. See id.
Ladue is the Court’s clearest statement yet of the constitutional significance of the home as a First Amendment forum and how it might enhance speech rights. In noting its significance the Court suggested several different reasons why speech interests might deserve special protection when associated with the home. First are functional concerns which reflect the home’s unique characteristics for expression. Signs are cheap and convenient, and provide information regarding the speaker’s identity, an important component in communication. Although such functional concerns are not controlling, the Court has frequently focused on them in balancing speech interests against state interests. Because the home offers advantages not easily interchangeable with other media, the balance might easily shift to the speaker.

Second, the Court suggested that while speech interests are enhanced in the home, competing government interests are generally less pressing. Both Spence and Ladue alluded to the fact that the government does not need to “mediate among various competing uses,” with regard to public property. Similarly, the Court in Ladue suggested that the state’s interest is further dissipated by the self-regulating nature of home ownership.

The final, and perhaps most significant rationale supporting the exercise of First Amendment rights in the home is tradition and its relationship to autonomy and self-fulfillment. As noted earlier, tradition has long been an important factor in determining access to public fora. In a similar way, the Court suggested that the longstanding association of the home with expressive activities not only testifies to its utility, but creates strong expectations on the part of citizens. The Court in Ladue noted that “a special respect for individual liberty in the home has long been a part of our culture and our law,” and stated that people would be “dismayed” to learn that they could not display a sign from their windows.

This “special respect for individual liberty in the home” argu-

331. See id.
332. See id.
333. Id.
334. See id.
ably reflects more fundamental values concerning human autonomy and self-fulfillment. Although certainly not immune from regulation, the home is the most logical locale for self-expression and liberty. Whereas in the public arena social convention necessitates compromise, in the home the individual is supreme. The home plays a central role in ensuring a place where a person is free to pursue self-expression and fulfillment.

These same concerns about autonomy and self-fulfillment have often been noted by First Amendment theorists as central values. Although articulating the standard differently, a number of writers have suggested that the First Amendment primarily serves to maximize self-expression and development. Central to such thinking is that the First Amendment provides a realm where identity of self can be discovered, explored and developed free from state control.

It is not surprising, therefore, that the home should have special significance when analyzing First Amendment rights. Interests in autonomy and self-fulfillment, central to First Amendment jurisprudence, are quite logically pursued there. The home provides an arena where self-expression can be pursued most clearly and where respect for such values is strongest. Thus, in the Court's words, there should be a "special resonance" for speech in the home.

Stanley, Spence, and Ladue all involved expression associated with the home, where the speech enhancing values of property would appear to be strongest. Although the Court has not clearly articulated a similar First Amendment value for nonresidential property, in at least one relatively recent decision, City Council of Los Angeles v. Taxpayers for Vincent, the Court


336. See MARGARET JANE RADIN, REINTERPRETING PROPERTY 56 (1993) ("the home is a moral nexus between liberty, privacy and freedom of association").

337. See Ladue v. Gilleo, 114 S. Ct. at 2047.

suggested a similar interest for even nonresidential property. In that case, the Court reviewed a Los Angeles ordinance which prohibited the posting of any sign on public property. The asserted interests behind the regulation were traffic safety and aesthetics—the “elimination of visual clutter.”\textsuperscript{339} The ordinance was challenged by Taxpayers for Vincent, a group which attached cardboard political signs to public utility poles. The Supreme Court upheld the ordinance as a valid time, place, and manner restriction on speech, finding that it furthered a substantial state interest, was no broader than necessary, and left ample alternatives for expression.\textsuperscript{340}

Although the Court focused its analysis on the ordinance's general validity as a time, place, and manner restriction, it did suggest as part of its analysis a special deference to the use of private property for exercising speech. The court of appeals had held that the ordinance could not be justified on aesthetic grounds, since it was underinclusive by not prohibiting signs on private property despite their equally unattractive nature.\textsuperscript{341} The Supreme Court did not contest that signs on private property are equally unattractive, but rejected the under-inclusiveness argument, stating that “[t]he private citizen’s interest in controlling the use of his own property justifies the disparate treatment.”\textsuperscript{342} This ruling, while not definitive, does indicate that the Court is willing to recognize some significance to even nonresidential private property for speech purposes,\textsuperscript{343} at least where the speech is ancillary to another primary use. This is arguably justified by the fact that even the owner of non-resi-
dential property has some autonomy interest in the property, though obviously not nearly to the same extent as the owner of a home.

In contrast to Ladue and Vincent, both of which involved speech ancillary to property ownership, the Court has made clear that government may place zoning restrictions on various First Amendment activities, such as religious and adult uses, despite the fact that the activity is to occur on private property. The Court has generally reviewed such restrictions subject to a time, place and manner standard, and, assuming that adequate alternatives were permitted, has upheld them. As a practical matter, the fact that the activity was to occur on private property was of no consequence in the Court’s deliberations.

There are two rationales for essentially ignoring the property interests of the restricted landowner in such situations. First, as discussed in the previous section, zoning restrictions are often designed to protect the private property interests of surrounding neighbors, which would be in conflict with those of the restricted property. Thus, property interests are on both sides of the zoning equation, and the neighbor’s right to be free from interference outweighs the restricted owner’s right to settle in any particular location if adequate locations are available elsewhere.

Second, and more significantly, the property interests in Ladue, and to a lesser extent Vincent, enhanced speech because

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344. The Supreme Court has not itself decided a case involving a zoning restriction on churches. In recent years, lower courts have generally upheld such restrictions, however, usually applying the equivalent of a time, place, and manner analysis. The Supreme Court has declined to review the decisions. See, e.g., Lakewood, Oh. Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983). Assuming adequate alternative sites are available, the Supreme Court’s time, place, and manner analysis strongly suggests that certain locational restrictions on churches, such as their exclusion from residential neighborhoods, would be valid. For discussions of church zoning issues, see Mark W. Cordes, Where to Pray? Religious Zoning and the First Amendment, 35 U. Kan. L. Rev. 697 (1987), and Laurie Reynolds, Zoning the Church: The Police Power Versus the First Amendment, 64 B.U.L. Rev. 767 (1984).


346. See, e.g., Playtime Theatres, Inc., 475 U.S. at 47.

347. See id. at 48; see generally MANDELKER, supra note 289, at 4.
of the property's unique connection to the speech in question, which could not be duplicated if exercised elsewhere. In contrast, the property interests involved in typical zoning decisions are more fungible in nature, since they simply involve the location of a primary land use activity. Although there might be some advantages to locating a church or adult theater in one place or another, there is generally no uniquely important connection to the land itself. Rather, location is an allocative decision designed to minimize conflicting land uses. Unlike speech ancillary to some other primary use, such as a home, the zoning of speech activities which constitute the primary use of the land would not concern speech uniquely connected to the land. It makes sense, therefore, for the Court essentially to ignore any private property interest on the part of the regulated landowner.

IV. CONCLUSION

This article began by suggesting that in recent years the Supreme Court has given increasing deference to property interests in First Amendment analysis, and that would appear to be true. Although the Court has long recognized property interests in First Amendment analysis, it has arguably increased in recent years. This can be seen in a number of decisions, including further retrenching of the public forum doctrine in Kokinda and Lee, limiting the scope of residential picketing in Frisby, upholding severe restrictions on adult uses in Renton, and enhancing speech rights in Ladue.

To some extent, these decisions might simply reflect the Court's growing recognition of property rights in general. Indeed, it is fair to say that some of the same considerations that guide the Court's takings jurisprudence would also lead to a greater deference to property interests in First Amendment analysis. Thus, the Court's sensitivity to physical invasions in takings might also help explain its reluctance to revisit Lloyd and even its deference to state control in the public forum. On a more general level, the Court's declarations that property

rights are not a "poor relation" to other constitutional safeguards.\textsuperscript{349} Certainly sets a tone that might influence the Court's thinking when property interests intersect with those other constitutional safeguards.

It would be a mistake, however, to simply assume that the Court is developing a kneejerk reaction toward property interests in its First Amendment jurisprudence. Although at times property interests are given significant weight, attention to property related values is by no means dispositive in all instances. Rather, it might be one of several factors involved in a case, and its significance turns on the nature of both the property interest involved as well as the impact on speech opportunities. In particular, not all property interests are equal and, at least with regard to private property, the more central or core the nature of the property interest, the more likely it will impact speech analysis, either by being a reason to restrict speech or enhance speech.

In this regard, there are several clear observations. First, a private property owner's right to exclude limits most First Amendment activity. This is not surprising considering the important nature of the interest, which touches upon both autonomy and privacy concerns. Thus, the Court has made clear that the right to exclude is sufficient to limit the exercise of federal free speech rights under almost all circumstances.\textsuperscript{350} Even here, however, the Court has indicated that the actual nature of the property interests might be assessed in particular cases, and where private property has been generally made open to the public it will permit state recognition of speech rights.\textsuperscript{351} Although one might well disagree with how the Court has struck the balance on this issue,\textsuperscript{352} it seems apparent that the Court has not pushed the right to exclude to the potential extent suggested by its takings jurisprudence.

A second and equally clear factor to emerge from the private

\textsuperscript{349} See Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994).
\textsuperscript{350} See Lloyd Corp. v. Tanner, 407 U.S. 551, 567-70 (1972).
\textsuperscript{351} See Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).
\textsuperscript{352} See supra notes 180-83 and accompanying text; see also Berger, supra note 198, at 633 (arguing that court has given too much weight to property interests over speech concerns in the shopping center cases).
property cases is the important role of the home as influencing First Amendment analysis. Although respect for residential privacy goes as far back as *Martin v. City of Struthers*, the last several decades have seen increased recognition of the home as a constitutionally significant locale in two respects. On the one hand, the Court has viewed the home as a sanctuary from First Amendment intrusions, justifying restrictions on various First Amendment activities that would otherwise intrude on privacy and autonomy. On the other hand, the Court in *Stanley, Spence* and *Ladue* recognized the unique nature of the home for speech purposes. Indeed, the two lines of cases come together in this regard— that the home serves as a connection to a person’s development and autonomy, providing it with a unique status for expression and privacy.

This special solicitude for the home in First Amendment analysis is easy to understand. As noted in the previous section, the home is the most logical locale for recognizing individual autonomy and self-expression, both important First Amendment values. More than that, the home is society’s agreed upon place where one can be free from outside interferences. It is here that a person is most able to define him or herself free from societal and state coercion. Thus, insulating the home from outside intrusions helps to promote the autonomy and self-realization values inherent in the First Amendment itself. Similarly, the self-realization dimension of the First Amendment arguably is most meaningful where it can be exercised in a setting closely aligned with a person’s identity.

An additional reason for the home’s special First Amendment status is suggested by Professor Margaret Radin’s “personhood perspective” of property. Professor Radin has suggested that property interests take on special significance when they are “closely bound up with personhood.” Following a largely pragmatic approach, Radin has argued that there is a “tacit legal and cultural understanding” of two kinds of property: that

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353. 319 U.S. 141 (1943).
356. Id. at 959.
for which there is a personal attachment and that which is more fungible in nature. Personal property is that which is closely related to one's person, where the person's identity is bound up with the object. Conversely, fungible property is that held "for purely instrumental reasons." Radin argues that people should be accorded broad liberty with respect to personhood property, since such property plays a special role in self-development, and people are especially violated by its loss.

Under this theory, the home is one of the clearest examples of property reflecting personhood. Not only is it the agreed upon societal locale for privacy and autonomy, but most people clearly identify with their home in some personal way. To give significant weight to the home in First Amendment analysis is to facilitate personhood itself.

Other than the right to exclude and property interests related to the home, private property interests have played a less obvious, though not necessarily insignificant role in First

357. Rardin, supra note 336, at 2.
358. Radin, Property and Personhood, supra note 355, at 959-60. Rardin builds her "personhood" theory initially on an "intuitive view" of how people relate to different types of property, discussing examples of how people become bound up with certain types of property, such as a wedding ring, while other forms of property one might own are easily replaceable with other goods. See id. at 959-61. She later reinforces and refines this intuitive basis by resort to the writings of several philosophers, most notably Hegel. See id. at 971-78. Her analysis of Hegel is complex, but notes the ways in which Hegel saw "object-relations" as essential to the "full development of the individual." See id. at 972-75. In the final analysis, her work primarily concerns "a cultural description/critique of American institutions of property" and how our particular "culture of property" is best understood, rather than adopting Hegel's or Kant's views of property. See Rardin, supra note 336, at 9.

Radin's "personhood theory" of property has been quite influential in academic circles. For a sympathetic critique of her theory, which briefly discusses the scope of its influence, see Stephen J. Schnably, Property and Pragmatism: A Critique of Rardin's Theory of Property and Personhood, 45 Stan. L. Rev. 347 (1992-93).

360. Rardin presents the home as a prime example of property for which there is significant personal attachment. She notes that there is . . . the feeling that it would be an insult for the state to invade one's home because it is the scene of one's history and future, one's life and growth. In other words, one embodies or constitutes oneself there. The home is affirmatively part of oneself—property for personhood—and not just the agreed on locale for protection from outside interference. Id. at 992.
Amendment analysis. At times, protecting private property has been an important factor in limiting speech, such as in Renton. In most instances, however, property interests are simply a factor in the Court’s balancing and typically do not come to the forefront of analysis. This is consistent not only with First Amendment jurisprudence, but also with traditional notions of property rights. Courts have long defined property rights, in particular those involving the use and enjoyment of property, in less than absolute terms, recognizing that landowners must tolerate reasonable interferences with the use and enjoyment of land. The Court’s First Amendment caselaw implicitly recognizes this inherent limitation of property by recognizing that property rights are necessarily limited by other social concerns, including expression.

Similarly, the Court’s lack of deference to the property interests of regulated landowners when placing zoning restrictions on First Amendment activities is sensible. Unlike Ladue, where the property in question served a unique function for speech because of personhood and autonomy concerns, zoning restrictions typically just allocate where First Amendment exercise will take place. In this respect, the property owner holds at most a fungible interest in the land, since other locations can be substituted. Assuming that the zoning scheme provides for adequate alternative sites, the restriction can be viewed as a reasonable time, place, and manner regulation.

Thus, at least with respect to private property, the Court’s increased attention to property interests seems for the most part a sensible and reasonably balanced approach to the interests involved. Property interests do not automatically determine the outcome of First Amendment issues, but instead are evaluated for their particular function and how they might relate to or affect speech. Where they reflect core interests, they have been given substantial weight. In other instances, they have been given less significance. Although the Court’s treatment might be subject to some criticism, such as with regard to access to quasi-public property, it generally reflects sensitivity

361. See Restatement (Second) of Torts § 822(b) (1979).
362. See supra Part II.A.
to important functions of private property without giving undue deference to property interests.

The Court’s attention to property values is more disturbing with regard to the public forum, however, where in recent years the Court has arguably made the state’s property rights the dominant analytical vehicle. Although the Court’s analysis falls short of treating state property the same as private, the Court’s current tripartite test largely permits the state to determine the use of property simply based on its status as owner. Any resolution of public forum questions must, of course, recognize and protect against unreasonable interference with the state’s property. However, as noted in Part One, public property is arguably different than private property in several important respects, and does not necessitate the same treatment. In particular, expectations of exclusive control and autonomy concerns, important considerations in regulating access to private property, are certainly less significant with regard to public property.

What is most troublesome about a “property rights” approach to the public forum issue is its distributive impact on speech opportunities. Access to public forum property has long been a means by which the less advantaged can have some minimal opportunity for expression. By treating all but the most clearly traditional property as the state’s property to control as it pleases, the Court significantly limits speech opportunities, especially as new and distinct types of public fora emerge in society.

A better alternative to the current focus on the state’s property rights is the compatibility standard championed by a significant minority of the Court. Instead of letting the government’s decision whether to dedicate property to speech be the controlling factor, this approach would consider the actual characteristics of the property in question and whether “expressive activity would be appropriate and compatible” with the property’s purposes.\(^\text{363}\) This would protect the state against

363. See International Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring) (joined in part by Justices Blackmun, Stevens and Souter) (“If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the
unreasonable interferences with its property while still permitting speech in appropriate circumstances. The compatibility standard is also more consistent with an approach that assesses the particular function of asserted property interests, an approach the Court has demonstrated in instances where private property interests affect First Amendment exercise.