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Government Property and Government Speech

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GOVERNMENT PROPERTY AND GOVERNMENT SPEECH

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ABSTRACT

The relationship between property and speech is close, but complicated. Speakers use places and things to deliver their messages, and rely on property rights both to protect expressive acts and to serve as an independent means of expression. And yet courts and scholars have struggled to make sense of the property-speech connection. Is property merely a means of expression, or can it be expressive in and of itself? And what kind of “property” do speakers need to have—physical things, bundles of rights, or something else entirely?

In the context of government property and government speech, the ill-defined relationship between property and speech creates a massive but underappreciated theoretical and doctrinal problem, which threatens the very existence of the public forum. The arc of First Amendment jurisprudence, particularly as manifested in public forum doctrine, has been toward limiting the government’s right to exclude unwanted private speakers. Government speech doctrine,

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however, effectively reinvigorates the government's right to exclude unwanted speakers by transforming speech regulations into governmental expressive conduct, which under current government speech doctrine is entirely exempt from constitutional review. The government can therefore invoke not only its property rights, but also the expressive nature of their exercise.

*Something has to give. Either not all property is expressive, or else not all expressive uses of government property are government "speech" exempt from constitutional scrutiny. Part I of this Article explores the first of these propositions, arguing that the relationship between speech and property requires a more nuanced treatment than it has heretofore received, and that property—whether conceived of as a thing, a legal entitlement, or a social relationship—both enables and is expression. But, as Part II of the Article shows, that conclusion cannot easily be extended into the context of government property and government speech. In government property/government speech cases such as *Pleasant Grove City v. Summum*, the question should be whether the government has the right to exclude unwanted speakers, not whether the exercise of such a right—assuming the government has it—is expressive. And the best way to answer the correct question is by looking not to formal property rights, but to social understandings of property.*

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INTRODUCTION

Property and property rights are the basic mechanisms of expression. Without them, the marketplace of ideas as we know it would not exist. Access to the public forum allows speakers to communicate, intellectual property rights incentivize and protect creative expression, and the very exercise of property rights can itself be an expressive act—excluding protestors with whom one does not agree, for example. Property and speech are therefore deeply intertwined.

This close relationship, however, raises thorny problems when the property or speech at issue belong to the government.¹ Under current First Amendment doctrine, the growing category of government speech is totally exempt from scrutiny.² And if government property is “expressive” in the same way as private property, then the exclusion of unwanted speakers from public property would seem to be an act of government expression beyond the reach of the First Amendment. Of course, this runs directly counter to the very notion of the public forum, in which the government—despite having formal property rights—has only a limited right to exclude private speakers. The viability of meaningful public forum doctrine, therefore, depends on showing that government property and government speech are *not* totally intertwined. And this leads to a host of difficult questions. If the government decides to exercise its putative right to exclude an unwanted speaker, is it being expressive—and thus shielded by government speech doctrine—or is it engaging in impermissible viewpoint discrimination in a public forum?³ What if the government divests itself of formal legal title to

1. See Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 572 (1980) (“The government speech question has usually reached the Supreme Court in controversies concerning how public property should be used.”).

2. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“[T]he Government’s own speech ... is exempt from First Amendment scrutiny.”); Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587 (2008) (noting increasing number of government speech cases).

3. This was the major issue that divided the Tenth Circuit in *Summum v. Pleasant Grove City*. The panel opinion concluded that the public park was a public forum, *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1050 (10th Cir. 2007), and an equally divided vote of the court refused to rehear that decision en banc, *Summum v. Pleasant Grove City*, 499 F.3d

a piece of property that is linked to unconstitutional government expression—religious speech, for example⁴—but a reasonable observer would still perceive the property as belonging to the government?⁵ Does the divestiture of formal property rights serve to erase government speech, just as their exercise in the former example arguably creates it?

Two recent Supreme Court cases illustrate and complicate these questions.⁶ In *Pleasant Grove City v. Summum*, a religious order called the Summum sought to erect a monument in a government-owned park that already featured other religious iconography, including a prominent Ten Commandments monument.⁷ The City of Pleasant Grove refused to permit the Summum monument, and litigation ensued—not under the Establishment Clause, but under the Free Speech Clause.⁸ Framed thus, the question became whether the exclusion of the Summum monument was government speech, and therefore exempt from the First Amendment, or a restriction of private speech in a public forum, and therefore subject

1170, 1171 (10th Cir. 2007). Judge Lucero dissented from the denial of rehearing, arguing that the park was not a public forum, *id.* at 1171 (Lucero, J., dissenting), and Judge McConnell also dissented, arguing that the monuments were government speech, *id.* at 1175 (McConnell, J., dissenting).

4. Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 145 (2009-10) (“The only clear limit on government speech is the Establishment Clause of the U.S. Constitution.”).

5. See *infra* notes 12-18 and accompanying text (discussing *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub. nom.* Salazar v. Buono, 129 S. Ct. 1313 (2009)).

6. For a more complete discussion of the role of property in *Summum* and *Buono*, see Joseph Blocher, *Property and Speech in Summum*, 104 NW. U. L. REV. COLLOQUY 83, 94 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/31/LRColl2009n31Blocher.pdf>; see also Christopher C. Lund, *Keeping the Government’s Religion Pure: Pleasant Grove City v. Summum*, 104 NW. U. L. REV. COLLOQUY 46, 52 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/28/LRColl2009n28Lund.pdf> (“[T]he government speech doctrine applied in *Summum* is actually a prerequisite to the government’s very ability to endorse religion—the government needs the power to exclude contrary messages simply in order to create a religious endorsement at all.”); Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 NW. U. L. REV. COLLOQUY 70 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/30/LRColl2009n30Tebbe.pdf> (discussing government use of private-law rules to avoid public-law obligations).

7. 129 S. Ct. 1125 (2009).

8. For an explanation as to why *Summum* was not an Establishment Clause case, see Bernadette Meyler, *Summum and the Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 95 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/32/LRColl2009n32Meyler.pdf>.

to heightened scrutiny. In finding the former, the Court emphasized that the city had “taken ownership of most of the monuments in the Park”⁹ and that “[t]he monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”¹⁰ In other words, the Court held that by exercising its property rights—both formally and as they were socially recognized—Pleasant Grove was also engaging in expression. Justice Stevens’s concurring opinion put the matter simply: “This case involves a property owner’s rejection of an offer to place a permanent display on its land.”¹¹

But in *Salazar v. Buono*, which many scholars see as a companion to *Summum*,¹² the Court faced a different scenario, because the formal and social understandings of property pointed in different directions.¹³ In that case, a Latin cross had been privately constructed and maintained for almost seventy years in the midst of a vast public park.¹⁴ In an effort to remedy this recognized Establishment Clause violation, Congress attempted to convey to a private party the small piece of property on which the cross stood, with the apparent understanding that the cross would remain in place.¹⁵ However effective this transfer would be as a matter of formal property law, it surely would do little to change the public *perception* of who owned and approved the cross. The cross is set back hundreds of feet from the road in a huge park that is clearly public,¹⁶ and a reasonable observer unfamiliar with the *Buono* litigation would almost certainly still perceive it to be public property and therefore, perhaps, government speech.¹⁷ But in a fractured set of

9. *Summum*, 129 S. Ct. at 1134.

10. *Id.*

11. *Id.* at 1138 (Stevens, J., concurring); see also Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 803 (1995) (Stevens, J., dissenting) (“The [First] Amendment ... does not destroy all property rights. In particular, it does not empower individuals to erect structures of any kind on public property.”).

12. See *supra* note 6 (referring to articles comparing the two cases).

13. 130 S. Ct. 1803 (2010).

14. *Buono v. Kempthorne*, 527 F.3d 758, 760 (9th Cir. 2008).

15. *Id.*

16. *Id.* at 769 (“When uncovered, the cross is visible from vehicles traveling on Cima Road, which passes through the Preserve, from a distance of approximately 100 yards away. No sign indicates that the cross was or is intended to act as a memorial for war veterans.”).

17. *Id.* at 772 (“We [have] also held that a reasonable observer, even without knowing whether Sunrise Rock is federally owned, would believe—or at least suspect—that the cross

opinions, the Supreme Court remanded the case to the district court for further consideration of “the context in which the [land transfer] statute was enacted and the reasons for its passage.”¹⁸ That the Court left open the possibility of a continuing Establishment Clause violation, despite the government’s divestiture of formal title, indicates its willingness to consider the relationship between government speech and government property as involving more than simply formal property rights.

This Article explores the deep structure of the relationship between government property and government speech—a relationship that underlies *Summum* and *Buono* and upon which the very idea of the public forum depends. It argues that the approach taken in cases like *Summum*—one which focuses on the expressiveness of formal property rights—supplies the correct answer to the wrong question. The Article begins by explaining in detail why the *Summum* Court was right to conclude that property and the exercise of property rights can be expressive. Part I of the Article explores this principle by disaggregating the idea of property into three major conceptions—a thing or place, a legal entitlement, and a social norm or understanding—and addressing each in turn. In doing so, Part I argues that property rights not only enable expressive acts, but also can serve as an independent means of expression. The government’s rejection of the *Summum* monument, for example, both protected whatever preexisting message the government was communicating through its maintenance of the park (for example, “Pleasant Grove is wonderful”) and also served as its own separate communicative act of rejection (for example, “Pleasant Grove disagrees with the *Summum*”). Thus, it is too simplistic to treat speech as if it were dependent on property; the two are interdependent and intertwined.

The *Summum* Court was therefore right, albeit for reasons it did not state, that property and property rights are expressive. In another respect, however, the Court erred—not by giving the wrong answer, but by asking the wrong question. The inquiry should have been *whether* the City of Pleasant Grove had a right to exclude the

rests on public land because of the vast size of the Preserve, more than 90 percent of which is federally owned.”).

18. *Salazar*, 130 S. Ct. at 1816.

Summum monument, not whether the use of such a right was expressive. After all, the basic rule of the First Amendment is that the government does *not* have a right to exclude speakers on the basis of their viewpoint.¹⁹ Answering the correct question requires not only making sense of the notion that property both enables and *is* expression, but also reconciling the doctrines of government speech and the public forum. This is the major project of Part II. Part II.A begins by showing how the growth of the public forum changed the meaning of government “property” from a simple matter of formal ownership to something based more on “tradition” and social norms, thereby limiting the government’s right to exclude. Government speech doctrine, however, has effectively restored that right, albeit in the guise of expression rather than property. Parts II.B and II.C therefore try to draw lines between expressive and nonexpressive government property, and to explain how the principles described in this Article can illuminate past government property disputes and help resolve others.

In many ways, government property has *become* government speech because the Court has characterized the government’s right to exclude as a form of expression rather than as a property right. And because the government’s expression is entirely exempt from First Amendment scrutiny, it seems to follow that there is no constitutional bar to such expressive exclusions from government property. This Article describes and evaluates this development and suggests ways to prevent it from destroying the public forum.

I. THREE CONCEPTIONS OF PROPERTY AND EXPRESSION

The relationship between property and expression is even more important, and more complicated, than it first appears. Certainly, various forms of property—public parks, newspapers, loudspeakers, and currency, for example—enable and facilitate expression. But these places and things are not what lawyers mean by “property.” In law, the concept denotes something more ephemeral: the formal bundle of rights, or even the social norms and understandings,

19. See Shiffrin, *supra* note 1, at 569-70.

governing ownership of a particular thing.²⁰ Moreover, property—no matter how it is defined—is more than just an instrumental aid to expression; it can itself *be* expressive. When a property owner excludes an unwanted monument from her land, for example, the very act is expressive. Does it follow, then, that formal ownership is an ongoing act of expression that should be accorded First Amendment protection? Does expressive ownership mean something more than holding a title? If a property owner’s exclusion of an unwanted monument from her front lawn is “expressive,” can she also raise a First Amendment challenge, and not simply a takings claim, when the telephone company wants an easement? Surely not every exclusion is expression, just as not every sound is speech. But where should the lines be drawn?

Courts and scholars have not answered these questions, and few have even asked them.²¹ Those few who have tried have made limited—albeit sometimes successful—inroads describing the property-speech connection within particular contexts. For example, it has been convincingly demonstrated that property rights can incentivize expression by permitting exclusion, the central concern of intellectual property doctrines like copyright,²² and that free speech needs “breathing space” that can only be provided by property and place, the central concern of First Amendment doctrines like forum analysis and the time, place, and manner test.²³

But these observations, although undoubtedly true, are only part of a much more nuanced story. Because property and expression are complex concepts, it is surprisingly difficult even to describe their relationship, much less make sense of it. This Article therefore

20. J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 1-2 (1997).

21. *Cf.* Timothy Zick, *Speech and Spatial Tactics*, 84 *TEX. L. REV.* 581, 586 (2006) [hereinafter Zick, *Speech and Spatial Tactics*] (noting that such questions “have not received concentrated attention from First Amendment scholars”).

22. *See generally* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 *HARV. L. REV.* 1569 (2009); Alan Devlin & Neel Sukhatme, *Self-Realizing Inventions and the Utilitarian Foundation of Patent Law*, 51 *WM. & MARY L. REV.* 897 (2009). For a sustained analysis, see DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 149-91 (2009).

23. *See generally* MARGARET KOHN, *BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE* (2004); TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* (2009); Kevin Francis O’Neill, *Privatizing Public Forums To Eliminate Dissent*, 5 *FIRST AMENDMENT L. REV.* 201, 207-13 (2007).

begins by disaggregating the notion of “property” into three major conceptions: a place or thing, a legal entitlement, and a social norm or understanding. In doing so, it argues that property—however conceived—not only enables, limits, and incentivizes expression, but also has its own independent expressive value. Part I thus attempts to address the relationship between expression and property in all its forms and to show that property is more than just an instrument of expression. It is in many cases not just a means, but an end. Before beginning the analysis, a brief discussion of terms is in order.

A. Disaggregating “Property,” Defining “Expression”

1. Three Conceptions of Property

Although the definition of “property” has always been contested and undoubtedly will continue to evolve,²⁴ the leading definitions tend to treat it as one of three things: a place or thing, legal entitlement, or a social norm or understanding.²⁵

The first and simplest definition of property conceives of it as a place or thing—a piece of land, for example, or a monument.²⁶ This is the popular, nonlegal understanding of property, and it is a useful starting point for thinking about property’s speech-enabling functions. Most people have little difficulty concluding that Speaker’s Corner (a prototypical piece of property-as-place) must be open to political speeches (a prototypical act of First Amendment-protected expression) in order for the public forum to have any meaning. The same can be said, of course, for possession of nonphysical “things” like broadcast frequencies,²⁷ or access to nonphysical “places” like

24. See, e.g., J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 713 n.8 (1996) (tracing development of the “bundle of rights” metaphor).

25. For a useful exposition of the first two views, see Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1188-94 (1999). For the canonical statement of the third view, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

26. BLACK’S LAW DICTIONARY 1335-36 (9th ed. 2009) (giving second definition of “property” as “[a]ny external thing over which the rights of possession, use, and enjoyment are exercised”).

27. See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636-38 (1993).

publicly funded legal services,²⁸ charitable campaigns,²⁹ or an intraschool mail system.³⁰

In the law's eyes, however, property refers not to places and things but to the set of legal entitlements governing them.³¹ As Ronald Coase himself explained: "[W]hat are traded in the market are not, as is often supposed by economists, physical entities, but the rights to perform certain actions and the rights which individuals possess [as] established by the legal system."³² This "bundle of rights" view—which has roots even deeper than Coase—has come to dominate legal doctrine and scholarship.³³ The second conception of property that must be addressed, then, is the view of property as a set of legal entitlements. By far the most important of these legal entitlements is the right to exclude—often considered the *sine qua non* of property. As Thomas Merrill puts it: "[P]roperty means the right to exclude others from valued resources, no more and no less."³⁴ The exercise of that right, in turn, is at the heart of much expressive activity, including expressive association.³⁵ Thus, although scholars who have addressed the connection between property and speech rightly bemoan the fact that "[c]ourts and commentators cannot seem to get past the idea that place is merely a form of

28. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 537 (2001).

29. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985).

30. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

31. See BLACK'S LAW DICTIONARY, *supra* note 26, at 1335 (9th ed. 2009) (giving first definition of "property" as "[t]he right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership Also termed *bundle of rights*." (emphasis added); Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 731-32 (1998) ("[N]early everyone agrees that the institution of property is not concerned with scarce resources themselves ('things'), but rather with the rights of persons with respect to such resources.").

32. Ronald H. Coase, *The Institutional Structure of Production*, in NOBEL LECTURES IN ECONOMIC SCIENCES 11, 17 (Torsten Persson ed., 1997).

33. See *Heller*, *supra* note 25, at 1192 n.150 ("Since its first adoption by the Court in the early 1940s, the bundle metaphor has been making upward progress in property cases to near ubiquity."). It should be noted that *Heller* and others have argued that the bundle of rights view may not fully capture the nuance of property as an institution. See *id.* at 1188-89 ("In particular, the idea of property as things misses the complex internal relations among owners of a thing, while the modern bundle metaphor suggests more fluidity than appears in existing property relations.").

34. Merrill, *supra* note 31, at 754.

35. See *infra* Part I.C.2.

property,”³⁶ some of these scholars in turn treat property as if it is merely place.³⁷ Each of these approaches, standing alone, is insufficient.

Complicating matters further, there is a third way to conceive of property: as an institution that depends not on formal legal entitlements, but on social norms or social understandings.³⁸ Scholars like Robert Ellickson have shown that informal property norms and customs are sometimes preferable to “legal” entitlements, and that, at least under certain circumstances, people rely on social norms to resolve “property” disputes rather than turning to the formal legal system.³⁹ People generally do not interfere with objects around them, for example, even when they have no reason to fear legal sanction.⁴⁰ This is the pure *social norm* view of property. Sometimes, however, seemingly informal property protections are based not on social norms themselves, but on a misinterpretation of formal rules. For example, if I shovel snow from a parking space, other people might refrain from taking the space, not because they respect my informal claim,⁴¹ but because they mistakenly believe that doing so would violate a local ordinance. This amounts not to a social norm, but to what might be called a *social understanding*—a view of

36. Zick, *Speech and Spatial Tactics*, *supra* note 21, at 617.

37. Zick himself does not fall into this trap—his account of “place” is broadly socio-legal. *See id.* at 618-25.

38. Richard A. Epstein, *Takings, Exclusivity, and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 26 (1997) [hereinafter Epstein, *Takings, Exclusivity, and Speech*] (“[O]ne powerful strand of the American constitutional tradition treats property as created by private actions alone.”); *see also* ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION, AND WELFARE* 58-91 (2d ed. 2004) (arguing that property norms can emerge through repeated interactions that create expectations about how others will behave in resource disputes).

39. *See* ELLICKSON, *supra* note 25, at 167 (arguing that “members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another”); *see also* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 344 (1997) (“*Order Without Law* created, or at least anticipated, a burgeoning new subfield of legal studies.”).

40. James Penner, whose book-length exploration of the nature of property is one of the most thoughtful recent treatments of the subject, calls this the “duty of noninterference.” PENNER, *supra* note 20, at 128; *see also* Shyamkrishna Balganes, *Demystifying the Right To Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 612 (2008) (arguing that the right to exclude carries with it a corresponding duty to stay away from owned resources).

41. *But see* Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. S515, S528-29 (2002) [hereinafter Epstein, *Allocation of Commons*].

property that is based on what a reasonable observer would perceive formal rights to be. For example, a reasonable observer might assume that the government owns a cross that stands in the middle of a public park, even if in reality the small plot of land on which the cross stands has been formally conveyed to a private party.⁴² By focusing on the social norms and understandings that make the institution of property function, this third conception demonstrates not only that property is more than a physical thing, but also that the institution of property depends on “informal” rules, both in theory and in practice.

All three of these forms of property—things, legal rights, and social norms—can be expressive, albeit in different ways and for different reasons. Again, the *Summum* context is illustrative. Certainly, the monuments—the things—at issue were expressive.⁴³ And the city’s decision to formally exclude the *Summum*’s monument⁴⁴—the city’s exercise of its legal rights—was also arguably expressive, at least if one accepts that the city *had* such a right. This second conception is somewhat fuzzier, however, because there was no explicit disapproval of the *Summum*, at least not until litigation began.⁴⁵ The disapproval had to be inferred, which leads to the third variation of property: the social norms or understandings surrounding the park itself.⁴⁶

2. Expression

Defining “expression”—or its siblings, “speech” and “communication,” which this Article will treat as triplets—is in many ways an even more difficult project than defining property.⁴⁷ My goal here is

42. See *infra* Part I.D.2.

43. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009).

44. *Id.* at 1130.

45. *Id.* The city denied the *Summum*’s requests on the grounds that “its practice was to limit monuments in the park to those that ‘either directly relate[d] to the history of Pleasant Grove or were donated by groups with longstanding ties to the Pleasant Grove community.’” *Id.*

46. See Timothy Zick, *Summum, the Vocality of Public Places, and the Public Forum*, *BYU L. REV.* (forthcoming 2011), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1687059 (discussing the expressiveness of the public forum itself).

47. See John Greenman, *On Communication*, 106 *MICH. L. REV.* 1337, 1338-39 (2008) (“Everybody knows that communication is important, but nobody knows how to define it. The

not to come up with a new definition,⁴⁸ nor even to categorize existing efforts, but simply to show that the kinds of expression involved in the three conceptions of property discussed above have First Amendment salience.⁴⁹

Because it is generally presumed that nearly every act of “expressive” conduct falls within the scope of the First Amendment, the simplest starting point for arguing that property-based expression is covered by the First Amendment is to answer the objection that it is not.⁵⁰ Such an objection might involve two related points. First, it could be that the exercise of property rights is not the kind of “expressive conduct” that the First Amendment protects; in other words, it is not a *means* of expression protected by the First Amendment. The Supreme Court, after all, has rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”⁵¹ Second, one might argue that the *content* of any message conveyed by the exercise of property rights is not protected by the First Amendment. In other words, the First

best scholars refer to it. Free-speech law protects it.... But no one—no scholar or judge—has successfully captured it. Few have even tried.”) (internal footnotes omitted).

48. *Cf. id.* at 1340 (arguing that “communication occurs when Person A tries to convey a thought—some idea or feeling—to Person B, and Person B can freely *choose* whether to accept that thought”).

49. See generally Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004) (describing coverage and protections of the First Amendment).

50. In order to give the objection its due, I will assume that some conduct is *not* expressive enough to earn First Amendment protection, rather than falling back on the proposition, endorsed by a majority of the Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), that no “categories of expression” are beyond the scope of the First Amendment. *Id.* at 383.

The question of what it means to be uncovered by the First Amendment is a surprisingly complicated one. For more thoughtful discussions of the First Amendment’s scope, see Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Schauer, *supra* note 49; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 269-72 (1981).

51. See *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968) (holding that, despite the defendant’s assertion that having a draft card was “symbolic speech,” the government could punish knowing destruction or mutilation of such draft cards because the government had sufficiently important interests to justify such “incidental limitations” on First Amendment freedoms).

Amendment is primarily concerned with protecting viewpoints⁵²—especially political ones⁵³—not with preserving property rights.

Both versions of the objection fail, however, because they misjudge the expressiveness of property and the scope of the First Amendment. The “means” objection fails because it is clear that the First Amendment protects property-based “expressive conduct” as diverse as burning a flag⁵⁴ or draft card,⁵⁵ publicizing computer source code,⁵⁶ operating an establishment that permits nude dancing,⁵⁷ marching in a parade,⁵⁸ or even the simple act of excluding people or property from groups or places.⁵⁹ For example, the First Amendment—not just property law—protects a person’s decision to accept or reject a campaign poster on her front lawn,⁶⁰ or a town’s decision to reject a monument in a public park.⁶¹ Even inert “things” receive protection under the First Amendment whenever they convey messages that are “direct, likely to be understood, and within the contours of the First Amendment.”⁶² Of course, not every incident of property or property-related action is “expressive,” just

52. See Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 613, 614 & n.33 (2008) (explaining that the “inviolable rule of the First Amendment is that viewpoint discrimination is prohibited,” but noting that “this rule is frequently broken”).

53. See, e.g., *Boos v. Barry*, 485 U.S. 312, 318 (1988) (noting that regulation “operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech”); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).

54. *Texas v. Johnson*, 491 U.S. 397, 404-06 (1989).

55. Cf. *O’Brien*, 391 U.S. at 376 (declining to resolve whether the communicative element in burning a draft card was sufficient to “bring into play the First Amendment”).

56. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 448 (2d Cir. 2001).

57. *City of Erie v. Pap’s A. M.*, 529 U.S. 277, 289 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991).

58. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995).

59. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that the First Amendment right to freedom of association permitted Boy Scouts to exclude homosexual members, despite state law forbidding such exclusion); see also *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010).

60. *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (holding that a “ban on almost all residential signs violates the First Amendment”).

61. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009).

62. *Spence v. Washington*, 418 U.S. 405, 415 (1974).

as not every sound is constitutionally protected “speech.” The simple registration of a land title, for example, may not be protected by the First Amendment.⁶³ Recognizing that some property is nonexpressive, however, no more demonstrates that property falls outside the First Amendment than recognizing that some sounds are nonexpressive shows as much for speech.

Nor does the second objection—that the content of property-based expression falls outside the First Amendment—withstand scrutiny. The right to exclude is often used to express viewpoints on race,⁶⁴ religion,⁶⁵ politics,⁶⁶ and other topics at the heart of public discourse; and even property-based speech that involves something less than political viewpoints may still fall under the First Amendment’s umbrella. Commercial speech, for example, is protected by the First Amendment whether or not it expresses any particular political viewpoint.⁶⁷ And communicating the “idea” that I own my house is not necessarily any less expressive than the advertisement of price information and other speech that does “no more than propose a commercial transaction.”⁶⁸ If the expressive value of tobacco billboards is constitutionally protected,⁶⁹ it is difficult to see why the communicative value of property ownership or specific uses of property rights would not be.

Finally, it might be argued that the distinction between “enabling” and “being” expression is a false one: in either case, property is simply “used” to convey an idea. The argument in Parts I.B, I.C,

63. Of course, in some circumstances title registration *might* be enormously expressive—the first registration by an African American in a previously all-white neighborhood, for example.

64. *See infra* Part II.C.2.

65. *See infra* Part II.C.3.

66. *See City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (striking down ban that prevented private property owner from posting antiwar sign).

67. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (holding that commercial speech is not “so removed from any ‘exposition of ideas,’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government’” that it should be completely without protection) (internal citations omitted).

68. *Id.* (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)); *see also* Thomas C. Goldstein, *Nike v. Kasky and the Definition of “Commercial Speech,”* 2003 CATO SUP. CT. REV. 63, 72 (referring to this as the “most often-repeated” definition of commercial speech the Court has offered).

69. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001).

and I.D, however, is not dependent on the enabling/being distinction. The point is simply that property, no matter how it is conceived, plays a crucial role in expression.⁷⁰ Even so, it seems reasonable to recognize a difference between excluding those who would distort or interfere with one's message (what this Article calls "enabling" expression) and excluding others in order to signal disapproval of their message ("being" expression). When Pleasant Grove excluded the Summum monument, for example, it both protected its own preexisting message from being distorted by the Summum and *also* signaled that it did not support the Summum's message. These are different expressive acts—one essentially defensive, and the other affirmative.

B. Property as a Place or Thing

1. Places and Things Enable Expression

This Section begins by analyzing property in its most colloquial sense: a place or thing over which a person or entity has rights.⁷¹ Defined thusly, property clearly plays a prominent role in the means of interpersonal expression and communication. We speak on and through property, from computers and newspapers to bullhorns and posters.⁷² Unsurprisingly, then, restrictions on things and places are often recognized as restrictions on speech itself.⁷³ Indeed, First Amendment doctrine is built around uses of "property" as diverse as

70. Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1543 (2008).

71. See BLACK'S LAW DICTIONARY, *supra* note 26, at 1335-36 (giving second definition of "property" as "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised").

72. Seidman, *supra* note 70, at 1543 (evaluating the proposition that "all speech requires the use of some property," finding "[f]or the most part, speech requires the use of a physical object, whether it is a megaphone, paper and pen, a printing press, a television camera, or a computer terminal").

73. See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring) (stating that the "failure to recognize ... that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity").

newspapers,⁷⁴ money,⁷⁵ sound trucks,⁷⁶ and leather jackets.⁷⁷ These and other cases illustrate at least one basic lesson: property, defined in the simplest possible terms, enables speech.

But aside from defending the idea of the public forum⁷⁸ and exploring the impact of intellectual property rights on free speech,⁷⁹ scholars have generally given little direct attention to the importance of places and things in enabling speech. Fortunately, some have begun to remedy this shortfall. In a recent and thoughtful analysis of the relationship between property and speech, Michael Seidman emphasizes the degree to which speech rights are dependent on property rights:

If it is true that economic entitlements, including most property rights, are subject to political revision, and if it is true that there is no right to use another's property for speech, and if it is true that speech requires property, then it cannot also be true that speech rights are immune from political revision.⁸⁰

Others have similarly noted that would-be speakers must be able to own the means of expression in order to ensure that their expression is free and effective.⁸¹ And in a comprehensive series of

74. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282-83, 292 (1964) (giving citizens and newspaper immunity from liability for nonmalicious misstatements of fact regarding public officials).

75. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899 (2010) (striking down limitations on corporate political spending); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part and dissenting in part) ("The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.").

76. *Kovacs v. Cooper*, 336 U.S. 77, 81, 89 (1949) (upholding New Jersey ordinance that barred sound amplification devices on "sound trucks").

77. *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that First Amendment limits state's ability to prosecute a person for wearing a jacket bearing the words "Fuck the Draft" in a courthouse).

78. *See infra* note 91.

79. *See generally* LANGE & POWELL, *supra* note 22.

80. Seidman, *supra* note 70, at 1543.

81. Epstein, *Takings, Exclusivity, and Speech*, *supra* note 38, at 52-53 (noting importance of "rules that allow private individuals to own and operate their printing presses as they see fit, or to conduct political meetings and rallies by invitation on private property"); *see also* John O. McGinnis, *The Once and Future Property-Based Vision of First Amendment*, 63 U. CHI. L. REV. 49, 57 (1996). I confess that I do not know quite how to classify McGinnis's vision of "property" as it relates to speech. He argues for a "property-based system in which the First

articles⁸² and accompanying book,⁸³ Timothy Zick has persuasively demonstrated that control over place is a powerful means of social and political dominance, and that governments seeking to restrain speech have often done so “through a variety of spatial techniques.”⁸⁴ In other words, governments regulate speech by regulating places and things.⁸⁵

The increasing scholarly concern with speech’s dependence on property builds on decades-old (though recently growing) concerns about threats to the public forum itself. As Part II.A explains in more detail, the public forum is, as a formal matter, a kind of government “property,” but private access to the public forum is crucial to the marketplace of ideas. When the government sells or closes places like public parks that “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,”⁸⁶ avenues of private expression are inevitably narrowed.⁸⁷ If government property—that is, the public forum—is not open to private individuals, then the free speech “right” is essentially a matter of government grace. And as the Court noted in the equally controversial context of habeas protections at Guantanamo, if the government has an unlimited right to “acquire, dispose of, and govern” public property, then it may “switch the Constitution on or off at will.”⁸⁸ The closing of the public forum is not limited to the privatization of government-owned

Amendment simply protects the individual’s right to transmit his information,” suggesting that the First Amendment is primarily concerned with individuals, rather than with “collective ... self-governance.” *Id.* None of the versions of “property” discussed here are dependent on the individual/collective self-governance division, and so I do not discuss McGinnis’s work in any detail.

82. *See, e.g.*, Timothy Zick, *Property as/and Constitutional Settlement*, 104 NW. U. L. REV. 1361 (2010) [hereinafter Zick, *Property as/and Constitutional Settlement*]; Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 518 (2009) [hereinafter Zick, *Constitutional Displacement*]; Zick, *Speech and Spatial Tactics*, *supra* note 21.

83. ZICK, *supra* note 23.

84. Zick, *Speech and Spatial Tactics*, *supra* note 21, at 581. Zick recognizes that place is more than an inert res. *See infra* note 91 and accompanying text.

85. *Cf. Seidman, supra* note 70, at 1547 (“In order to give free speech rights content, ... the Court must shield economic entitlements from political revision.”).

86. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

87. *See* Robert A. Sedler, *Property and Speech*, 21 WASH. U. J.L. & POL’Y 123, 127 (2006) (noting that there is no First Amendment right to protest on another’s private property).

88. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

land and other threats to the physical public square. Private expression is also limited by the government's allocation or extension of intellectual property rights such as copyrights.⁸⁹ These rights, no less than ownership of land, give property owners the power to limit private speakers.⁹⁰

Whether First Amendment doctrine has kept pace with these concerns is a difficult question. Many scholars have criticized the Court's public forum jurisprudence for not permitting sufficient space for speech acts,⁹¹ and many more have criticized the expansion of intellectual property rights as stifling expression without sufficient gains in terms of increased incentives.⁹² Part II discusses government speech and protection of the public forum, but it is far beyond the scope of this Article to analyze these objections in any depth. For present purposes, it is sufficient to say that the strength of these concerns illustrates the basic proposition that property enables speech, or, to flip the equation, that speech requires property.

2. Things and Places Are Expressive

Of course, the fact that places and things enable expression does not necessarily mean that they are themselves expressive. And yet a closer analysis suggests that, even when defined simply as a thing or place, property does have expressive value.

Beginning with the lowest hanging fruit, it is surely uncontroversial that "things" can be expressive. Posters, flags, billboards, flyers, newspapers, and plays are all ownable things and are all expressive. Far more interesting, and, for legal scholars, far more novel, is the notion that place has expressive qualities. Although First Amendment doctrine has yet to embrace this idea, philosophers, anthropologists, geographers, and other nonlegal scholars have long

89. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (finding the Sonny Bono Copyright Term Extension Act constitutional despite plaintiffs' objections on First Amendment grounds).

90. For a critical discussion of the right to exclude as it applies to sampling of songs, see JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 122-59 (2008).

91. See, e.g., ZICK, *supra* note 23, at 168; Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998).

92. See, e.g., C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999).

endorsed it.⁹³ Aristotle himself recognized that “[t]he power of place will be remarkable.”⁹⁴ That “power,” later thinkers demonstrated, shapes the way that people interact with one another⁹⁵ and manifests itself in the ways that places are themselves expressive. Indeed, inasmuch as place “is actively *produced* by the interaction, combination, and collision of laws, rules, norms of behavior, and social practices,”⁹⁶ it almost inevitably has expressive characteristics. It is therefore unsurprising that geographers understand their trade to encompass far more than mapping physical dimensions. Geographer Robert Sack, for example, employs the concept of “territoriality” to describe “the attempt by an individual or group to affect, influence, or control people, phenomena, and relationships, by delimiting and asserting control over a geographic area.”⁹⁷ In that same vein, sociologists and philosophers like Michel Foucault have recognized that prisons and asylums are not just a means of incapacitating the dangerous, but of “separating and branding” the disfavored.⁹⁸

A few legal scholars—especially those concerned with free speech and the preservation of the public forum—have built on these insights in recent years. Zick, for example, argues not only that the public square must be preserved as a venue for expression,⁹⁹ but also that the government uses place (and related concepts like “territory”) to express messages regarding punishment, purity, and national identity.¹⁰⁰ In his words: “Place, in other words, is not

93. I owe my familiarity with these nonlegal sources to Timothy Zick’s invaluable exposition. See Zick, *Speech and Spatial Tactics*, *supra* note 21, at 617-30.

94. EDWARD S. CASEY, *THE FATE OF PLACE: A PHILOSOPHICAL HISTORY*, at ix (1998), *quoted in* Zick, *Speech and Spatial Tactics*, *supra* note 21, at 619.

95. See generally GEORG SIMMEL, *The Sociology of Space*, reprinted in SIMMEL ON CULTURE: SELECTED WRITINGS 137 (David Frisby & Mike Featherstone eds., 1997).

96. Zick, *Speech and Spatial Tactics*, *supra* note 21, at 622.

97. ROBERT DAVID SACK, *HUMAN TERRITORIALITY: ITS THEORY AND HISTORY* 19 (1986), *quoted in* Zick, *Constitutional Displacement*, *supra* note 82, at 518.

98. See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 231 (Alan Sheridan trans., Vintage Books 1979) (1977), *quoted in* Zick, *Speech and Spatial Tactics*, *supra* note 21, at 637; Jonathan A. Willens, *Structure, Content, and the Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 AM. U. L. REV. 41, 48 (1987) (noting that prisons “hold, feed, shelter, accept, and release prisoners,” but also “beat, stab, rape, isolate, humiliate, terrify, inspect, objectify, disable, demoralize, brutalize, and discipline” them).

99. See generally ZICK, *supra* note 23.

100. See Zick, *Constitutional Displacement*, *supra* note 82, at 515 (examining “the intersection between territory and constitutional liberty”).

merely an inert *res*. It is an expression of power, message, and meaning.”¹⁰¹ Things and places therefore do not simply enable expression; they *are* expression. How they come to be expressive, however, is a more complicated story, one that requires analysis of property rights and not just of place. The following Section undertakes that analysis.

C. Property as a Legal Entitlement

Although the idea of property as a place or thing undoubtedly is widely shared, “property” as a legal matter refers not to things but to the formal bundle of rights governing their protection, use, and transfer. Chief among these legal entitlements is the right to exclude. Blackstone himself defined property as “that sole and despotic dominion ... exercise[d] over the external things ... in total exclusion of the right of any other.”¹⁰² Justice Holmes echoed this definition when he wrote more than a century ago that “[t]he notion of property ... consists in the right to exclude others from interference with the more or less free doing with it as one wills.”¹⁰³ And in the one hundred years since then, the Supreme Court has repeatedly reaffirmed Blackstone and Holmes’s conclusion that “[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”¹⁰⁴

Summing up and continuing this tradition, Merrill and others argue that the right to exclude is not only the most important stick in the bundle of property rights, but is actually the one necessary stick.¹⁰⁵ The right to exclude, in other words, is the *sine qua non* of

101. Zick, *Speech and Spatial Tactics*, *supra* note 21, at 588.

102. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Univ. of Chicago Press 1979) (1766), *quoted in* Balganes, *supra* note 40, at 596.

103. *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

104. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *see also* *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (“In this case, we hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”) (internal citations omitted); David L. Callies & J. David Breemer, *The Right To Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL’Y 39 (2000) (collecting and analyzing cases).

105. Merrill, *supra* note 31, at 730; *see, e.g.*, J.W. HARRIS, PROPERTY AND JUSTICE 13 (1996) (defining property as including the right to exclude trespassers); PENNER, *supra* note 20, at

property. The prominence of the right to exclude at the core of the concept of “property” is all the more striking because, as noted above,¹⁰⁶ the basic definition of property has otherwise changed dramatically over the years. In moving to a new understanding of their subject matter, property scholars abandoned many of the conceptions once thought essential to the very basis of the discipline, including the primacy of state-backed protection.¹⁰⁷ And yet the right to exclude has generally survived the trip, and is an increasingly important part of the modern view of property. The following Sections evaluate its role in a formal regime; Part I.D addresses in more detail the status and expressive nature of the right to exclude in “informal” property regimes.

1. Legal Entitlements (Especially the Right To Exclude) Enable Expression

Different sticks in the “bundle” of formal property rights enable expression in different ways. Voluntary and continuous possession, for example, can enable—or may even be—an ongoing act of approval. As the Supreme Court has recognized, “[e]ven on private property, signs and symbols are generally understood to express the owner’s views.”¹⁰⁸ Of course, a property owner (or apparent property owner¹⁰⁹) wishing to disassociate himself from what is (or appears to be) in his possession may be able to do so through disclaimers. For example, as discussed in more detail below,¹¹⁰ many public landowners have attempted to avoid Establishment Clause challenges by erecting disclaimers around religious monuments. Such disclaimers may or may not be effective, but the fact that landowners often treat them as necessary demonstrates that possession enables (or perhaps even is) expression.

71 (same); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1405 (2009) (noting that excludability has dominated property scholarship).

106. See *supra* Part I.A.1.

107. See *infra* Part I.D (describing view of property based on informal norms).

108. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 800 (1995) (Stevens, J., dissenting).

109. See *infra* Part I.D (discussing the difference between social norms and misunderstood formal rules).

110. See *infra* Part II.C.3 (discussing cases in which courts have found state action even when the government lacks formal title to a piece of property).

Even so, possession enables expression only when it is volitional, or at least is perceived to be. In other words, my possession of something is generally unexpressive if I had no choice (and/or I am generally understood to have had no choice) but to accept it. And thus even the expressive power of possession is dependent on the right to exclude—the right *not* to possess or, in the case of group membership, not to include. Freedom of association, for example, is premised in part on groups' First Amendment right to protect their "messages" by excluding those with whom they disagree.¹¹¹ Excluding such people is both a means of protecting an association's message and an expressive act unto itself.

The use of exclusion to protect messages, not simply to deliver them, is important not just for associations but for all speakers. The right to exclude allows a speaker to prevent his messages from being distorted and thus to ensure that they are heard. This dynamic is at work in many of the government speech cases addressed in Part II. Those cases usually arise not simply because the government is speaking, but because it seeks to exclude a private speaker whose contrary message might be mistaken for the government's.¹¹² In *Summum*, for example, the City of Pleasant Grove claimed that it had to exclude the Summum monument in order to preserve its own message.¹¹³ The same might be said of the government's alleged expressive interest in denying public funding to health care providers who distribute information about abortion,¹¹⁴ or to defense attorneys who advocate government reform.¹¹⁵ In those cases, exclusion is thought of as a means of enabling or protecting a preexisting message. The government excludes in order to "ensure that its message is neither garbled nor distorted."¹¹⁶

111. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.").

112. This is not always the case. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), for example, involved a party's attempt to avoid inclusion in a government message—a publicly funded message supporting beef. *Id.* at 555-56.

113. See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133-34 (2009).

114. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding regulations that prohibited recipients of public funding from advocating, counseling, or referring patients for abortion).

115. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (reviewing public funding provision that limited arguments legal services attorneys could make on behalf of welfare claimants).

116. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

There is also another functional way in which the right to exclude enables expression: it permits a person to exclude others from capturing the economic and other benefits flowing from her expression. This, of course, is not simply the effect, but a primary purpose, of intellectual property rights. The right to exclude others from intellectual property is “deeply functional”¹¹⁷ and is generally understood, at least in the American system, as necessary to incentivize creative and expressive activity (and not, for example, to protect the “moral rights” of creators).¹¹⁸ Without the power to exclude others from his creation, a property owner would not have the power to profit from it and would therefore have less incentive to create it in the first place.

Thus, like places and things, the right to exclude enables speech, albeit for different and, in some sense, “opposite” reasons. In the cases discussed in Part I.B.1, speech depends on access to a place—speakers *need not be* excluded from a public forum. The right to exclude, by contrast, enables expression by allowing property owners to *prevent* access—protecting their messages from being distorted or stolen by others.

2. *The Right To Exclude Is Expressive*

Property scholarship celebrates the functional nature of the right to exclude, but generally has not addressed its expressive dimension. Instead, as Shyam Balganesch notes, “courts and scholars have developed a view that identifies property’s right to exclude as meaning little more than an entitlement to injunctive relief against a continuing (or repeated) interference with a resource.”¹¹⁹ In other

117. Balganesch, *supra* note 40, at 629 (“[T]he use of the right to exclude in the patent statute begins to appear logical and deeply functional.”).

118. See John B. Fowles, *The Utility of a Bright-Line Rule in Copyright Law: Freeing Judges from Aesthetic Controversy and Conceptual Separability in Leicester v. Warner Bros.*, 12 UCLA ENT. L. REV. 301, 324 (2005) (noting that the United States conceptualizes “economic rights in copyright,” whereas European countries more commonly recognize “artists’ moral rights”). *But see* BOYLE, *supra* note 90, at 27 (“Even in the *droits d’auteur* countries, which have a markedly different copyright law regime, [the utilitarian view] largely holds for their patent and trademark law systems, and utilitarian strands suffuse even ‘the sacred rights of authors.’”).

119. Balganesch, *supra* note 40, at 595; *see also id.* at 595-96 (criticizing the view that “attributes to the right an entirely consequentialist meaning, under which the right—and indeed all of property—is normatively meaningless except when sought to be enforced in a

words, the right to exclude is generally seen as instrumental, lacking its own independent expressive or social meaning.

And yet the inclusion or exclusion of a person or thing can itself be an expressive act, as the law of expressive association demonstrates. The precise justification, nature, and scope of associational rights is debatable,¹²⁰ but it is clear that the Supreme Court has “long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”¹²¹ Although right-to-association cases are generally not treated as involving “property,”¹²² the very fact that they so easily transform exclusion into expression demonstrates quite clearly the close relationship between speech and the right to exclude. The interests behind expressive association can be conceptualized in at least two ways: as a right of the individual to join associations,¹²³ and as a right of associations to manage their membership.¹²⁴ Although the former is important and constitutionally protected,¹²⁵ it is the latter that truly casts light on the expressive nature of the right to exclude. It can in turn be divided into two concepts: *enabling* a group’s expression, that is, protecting its message, and *being* a form of expression.

On the one hand, groups may seek to exclude those who do not share—or would distort—their messages. In *Christian Legal Society v. Martinez*, for example, the Christian Legal Society (CLS) at Hastings Law School sought to exclude those students who would

court of law”).

120. See John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 606-11 (2010) (criticizing the shift to a right of “association” rather than “assembly”); John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010) (criticizing the distinction between “expressive” and “intimate” association).

121. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

122. ZICK, *supra* note 23, at 8.

123. See *Lathrop v. Donohue*, 367 U.S. 820, 882 (1961) (Douglas, J., dissenting) (“Joining is one method of expression.”).

124. Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech To Protect Its Own Expression*, 59 DUKE L.J. 1, 41 (2009) (“A growing body of social science supports courts’ intuition that an organization’s association with individuals engaged in certain speech can communicate a message that may undermine—or further—the organization’s ability to communicate its own views effectively.”).

125. See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (noting that the right of association “includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means”).

not pledge adherence to the group's core religious principles.¹²⁶ Hastings determined that, because these principles would exclude homosexuals, the requirement would violate a school policy that required student groups to admit all comers,¹²⁷ and so denied CLS various benefits extended to other student organizations.¹²⁸ Whatever the merits of the other legal issues in the case, CLS's exclusion of homosexuals was undoubtedly expressive.¹²⁹ It both "protected" the group's preexisting expression and sent a separate but effective message of disapproval. Recognizing this, the Court analyzed the all-comers policy as a restriction on CLS's speech, and upheld it in part because the group was *not* forced to give up its right to exclude: "CLS may exclude any person for any reason if it forgoes the benefits of official recognition."¹³⁰

Similarly, homeowners have the right to exclude campaign posters from their front lawns. If someone declines to exclude a particular poster, despite having a right and opportunity to do so, she has, barring any unusual indications to the contrary, signaled approval of it. As Justice Stevens noted in a prominent Establishment Clause case, "[T]he location of a stationary, unattended sign generally is both a component of its message and an implicit endorsement of that message by the party with the power to decide whether it may be conveyed from that location."¹³¹ In the same case, Justice Souter argued that a person watching an individual speak in a public forum will attribute the speech to the speaker, whereas a person observing "an unattended display [and any message it conveys]" will attribute its message "to the owner of the land on which it stands."¹³² Thus, intentional inclusion expresses not only the message of the included thing—for example, the campaign poster's pro-candidate message—but also the message of the includer.¹³³ The

126. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2980 (2010).

127. *Id.* at 2979. The Court explicitly declined to consider whether it would reach the same result under the school's nondiscrimination policy. *Id.* at 2984 n.10.

128. *Id.* at 2981.

129. See *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006) ("It would be hard to argue—and no one does—that CLS is not an expressive association.").

130. *Christian Legal Soc'y*, 130 S. Ct. at 2986.

131. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 801 (1995) (Stevens, J., dissenting).

132. *Id.* at 786 (Souter, J., concurring).

133. *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994) ("Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else,

right to exclude—the right to reject, as well as the ability to accept—allows the property owner to express a message. Indeed, inclusion is expressive only to the extent that exclusion is expressive, and vice versa.

The precise content of a message will of course depend on context. Inclusions generally denote approval, and exclusions disapproval, but this will not always be the case. Nor, in many cases, will it be easy to distinguish one from the other. When the State “includes” people in jails, for example, it does not necessarily signal approval of them. Nor does the State communicate approval by restricting political protest to “free speech zones,” even when those are located on government property.¹³⁴ For that matter, the State does not necessarily communicate anything at all by excluding, or declining to exclude, private speakers from public forums. Thus, it is generally true that “[t]hrough the edifice of place, the state communicates *something* about the nature and character of those inside to those who remain outside,”¹³⁵ but that “something” will vary according to the precise method of inclusion/exclusion and the social context in which it is embedded. And, of course, it might be said with equal accuracy that a prisoner is “included” in a prison, or that he is “excluded” from the outside world. This demonstrates that the *right* to exclude—the right to control someone else’s access to a particular place or thing—and not simply exclusion itself, is the heart of expression.

It must be noted, however, that there are some situations in which exclusion and inclusion do not express, or at least are not intended to express, anything at all. For example, some speakers may simply be physically or otherwise crowded out—that is, excluded—by others. If one person builds a monument on a particular corner of a public park, others are effectively precluded from

or conveying the same text or picture by other means.... [T]he identity of the speaker is an important component of many attempts to persuade. A sign advocating ‘Peace in the Gulf’ in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child’s bedroom window or the same message on a bumper sticker of a passing automobile.” (internal footnotes omitted).

134. See, e.g., James J. Knicely & John W. Whitehead, *The Caging of Free Speech in America*, 14 TEMP. POL. & CIV. RTS. L. REV. 455, 457 (2005); Nick Suplina, Note, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395, 396 (2005).

135. Zick, *Speech and Spatial Tactics*, *supra* note 21, at 637 (emphasis added).

doing the same. Part II.B.2 argues that such incompatibility is not by itself expressive. In fact, incompatibility does not even involve the invocation of the “right” to exclude; it is a law of physics rather than a constitutional rule.¹³⁶

Even when the right to exclude has been invoked, some reasons for exclusion are—or at least are intended to be—nonexpressive. I might reject a campaign poster in an effort to reduce clutter, for example, or accept it because I like its colors or want to use it as a window shade. I might even flatly refuse to accept *any* political propaganda in an effort to express nothing at all except, perhaps, my opposition to political propaganda.¹³⁷ Such reasons are, at least from the perspective of the person invoking them, value- and viewpoint-neutral, and in that sense unexpressive in the same way that a time, place, and manner restriction on speech is “content-neutral.”¹³⁸

But these exclusions are nonexpressive only from the point of view of the person with the right to exclude—from the “speaker’s” perspective, in other words, rather than the listener’s. A stranger who sees a political poster in my window will almost certainly conclude that it is there because I endorse the candidate, not because I am using it as a window shade. From this perspective, the expressiveness of an exclusion or inclusion has nothing to do with the intentions of the person who has exercised or declined to exercise the right to exclude, and instead depends on whether that person appears to have engaged in expressive exclusion or inclusion.

Just as endorsement-by-inclusion can occur even when a party has not intended to communicate anything at all, an inclusion can also express a message contrary to what the property owner intends. This situation could happen when the right to exclude is limited,

136. See *infra* note 203 and accompanying text.

137. Cf. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985) (upholding the government’s decision to limit participation in the Combined Federal Campaign “to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups”); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (suggesting that the government may flatly reject various forms of politically expressive speech because of the government’s interest in avoiding “lurking doubts about favoritism”).

138. I do not mean here to take a position on whether there is indeed such a thing as a content-neutral speech restriction, only to suggest that some reasons for exclusion may not themselves be *intentionally* expressive. The classic discussion of content neutrality remains. See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

for example, by antidiscrimination laws prohibiting a group from excluding others.¹³⁹ In one sense, such forced inclusions are simply unexpressive: if a group has no control over who joins it, then it has no ability to *willfully* express anything through its membership. But perhaps by being forced to include unwanted members, groups are not simply prevented from expressing their chosen messages, but are in fact forced to express messages they do not support. That, after all, was the essence of the Boy Scouts' claim in *Boy Scouts of America v. Dale*—not only that having a gay scoutmaster would distort the Scouts' stance on homosexuality, but also that it would force the Scouts to project an acceptance of homosexuality that they did not support.¹⁴⁰ Limitations on the right to exclude therefore both compel and limit speech.

Exclusion almost inevitably communicates something—usually incompatibility, if not outright inferiority—about those whom are excluded, and thus about those whom are included. Ascribing expressive impact to an involuntary inclusion or exclusion inevitably means asking whether *observers* would construe the inclusion as voluntary. But does such an observer-focused view mean abandoning the notion of property altogether? The next Section argues that it does not and that social meanings are sometimes more important than legal entitlements when it comes to understanding property and its expressive impact.

D. “Informal” Property as Social Norms or Understandings

Over the past twenty years, much property-related scholarship has argued that sometimes “property” is neither a place nor a formal right, but rather a social norm or understanding.¹⁴¹ Although

139. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000) (concluding that being forced to include a homosexual “assistant scoutmaster would just as surely interfere with the Boy Scouts’ choice not to propound a point of view contrary to its beliefs”).

140. *Id.* at 655-56 (“The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.”).

141. See ELLICKSON, *supra* note 25, at 123; Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1790 (2008) (arguing that comedians have evolved a system of social norms to incentivize and protect their productions rather than rely on a system of formal intellectual property); see also Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19

this account of “informal” property has been largely successful as both a descriptive and a normative matter, it further complicates efforts to describe the relationship between property and expression.

The difficulty arises in part because the notion of informal property is itself so complex. On the one hand, Ellickson and other scholars have demonstrated that property rights are often defined and enforced through informal mechanisms that are totally independent of state laws and sanctions.¹⁴² Indeed, “as David Hume first suggested, conventions of property may slowly emerge from an iterated process that creates a pattern of expectations of how people will behave in resource disputes.”¹⁴³ I call this the *social norm* view, which treats property as existing entirely apart from formal rules.

In practice, however, informal understandings may not be easy to separate from formal legal entitlements. If, for example, informal property rights are not based on social norms, but rather on mistaken impressions about whom has formal ownership, then the social view begins to collapse into the formal one. I call this the *social understanding* view of property. For example, in Establishment Clause cases, courts have found government involvement when religious iconography was located on private property but appeared to be owned by the government.¹⁴⁴ In such cases, the expressive value comes not from social norms, but from *misunderstandings* about formal rights. As the Supreme Court emphasized in *Summum*: “[B]ecause property owners typically do not permit the construction of such monuments [conveying a message with which the property owners do not wish to be associated], persons who observe donated monuments routinely—and reasonably—interpret

ORG. SCI. 187 (2008); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006).

142. See *supra* note 141.

143. Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 246 (2009) (citing DAVID HUME, A TREATISE OF HUMAN NATURE 490 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739)).

144. See *infra* Parts II.C.1, II.C.3; see also *Buono v. Kempthorne*, 527 F.3d 758, 783 (9th Cir. 2008) (“Even a less informed reasonable observer would perceive governmental endorsement of the message, given that ‘[n]ational parklands and preserves embody the notion of government ownership,’ that the Sunrise Rock area is used as a public campground, and finally, because of the ‘the ratio of publicly-owned to privately-owned land in the Preserve.’”).

them as conveying some message on the property owner's behalf."¹⁴⁵ If the observer reasonably though incorrectly believes a piece of property to be owned by a particular party, then she will also reasonably but erroneously attribute any expression arising from that property to that apparent owner.

The line between the social norm and social understanding approaches is undoubtedly fuzzy. But for the purposes of this Article, it makes little difference whether any particular case falls on one side of that line or the other. Either way, the point is simply that property, however conceived, both enables expression and *is* expressive.

1. Social Norms and Understandings Enable Expression

Part I.C.1 argued at length that the right to exclude—the most important right in the bundle of formal property entitlements—facilitates speech by permitting speakers to protect and maintain control of their expression.¹⁴⁶ It would seem to follow that if “informal” property has a similar enabling function, it should rest on an informal version of the right to exclude.

At first glance, it is unclear how the right to exclude fits into the vision of property as an informal system of social relations. If I have only informal ownership over a piece of property, I generally cannot call on formal enforcement mechanisms to protect it. The police will not help me eject a “trespasser” from land I do not officially own. And yet the right to exclude is generally thought to be the *sine qua non* of property.¹⁴⁷ If the right to exclude does not exist in informal property regimes, then the very concept of informal “property” would be a misnomer, and Ellickson and other scholars would be wrong to suggest that they are studying property at all.

Fortunately, on closer examination, it seems that the right to exclude does indeed exist in “informal” property regimes. It follows that informal rights holders can use their powers of exclusion in expressive ways, just like those with “formal” rights to exclude. For example, Person A may be able to effectively exclude Person B if she

145. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009).

146. See *supra* notes 102-08 and accompanying text.

147. See Merrill, *supra* note 31, at 730.

can successfully capitalize on B's misunderstanding that a place or thing formally belongs to her. Inasmuch as this approach—bluffing, essentially—relies on the excluded party's misconception that Person A actually has formal title to the property, it does not necessarily show that social norms have any independent influence of their own. Person B may acquiesce because he unnecessarily fears state-backed sanctions, not because he respects some shared social norm that the property is rightfully Person A's and should not be disturbed. This conceptualization is the social understanding view of informal property.¹⁴⁸

But there may also be situations in which, rather than mistakenly thinking that someone has formal title, the excluded party simply does not know or does not care. In such a case, social norms provide both "rights" independent of the legal system and informal enforcement mechanisms.¹⁴⁹ These mechanisms can be just as efficient and effective as formal legal proceedings, for example, when it comes to creating a recognized right to return to a parking space from which one has shoveled snow.¹⁵⁰ Moreover, as Balganesch has argued at length, the right to exclude implies a corresponding duty to stay away from an ownable resource.¹⁵¹ Inasmuch as that duty has been internalized, the right to exclude may be effectuated even when no state-backed sanctions are threatened, or available. People tend to effectively exclude themselves from property that they know is not theirs.¹⁵² Thus, even without a formal legal right, property owners may still be able to exclude others. That power to exclude in turn enables expression for all the same reasons as the formal exclusionary right.¹⁵³

148. See *supra* text accompanying note 144.

149. Steven A. Hetcher, *Using Social Norms To Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1877 (2009) ("[N]orms qua patterns of social behavior typically have sanctions attached, and conformity to them is typically prescribed by one person to another, although these characteristics are not essential.").

150. See Epstein, *Allocation of Commons*, *supra* note 41, at S528-29.

151. Balganesch, *supra* note 40, at 600 (arguing that the right to exclude "is best understood as a normative device, which derives from the norm of resource inviolability").

152. PENNER, *supra* note 20, at 128 (describing this behavior as a "duty of noninterference"); see also Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1852 (2007) (describing "duties of abstention").

153. See *supra* Part I.C.

2. *Social Norms and Understandings of Property Are Expressive*

Although the precise nature of informal property may be somewhat fuzzy, one thing is clear: it is expressive, perhaps even innately so. Indeed, because norms are essentially *social* practices,¹⁵⁴ it is almost inevitable that they are expressive.

Consider again the situation of the property owners or expressive associations discussed in Part I.C.2—specifically, those whose formal right to exclude has been limited, for example, by an antidiscrimination statute.¹⁵⁵ As noted above, such nonexclusion rules make it more difficult for associations or individuals to express their preferred messages.¹⁵⁶ But limitations on the right to exclude may also effectively compel groups to *express* messages they do not support. In *Dale*, for example, the Supreme Court found that requiring the Boy Scouts to comply with a New Jersey law that prohibited discrimination against gays and lesbians would have “force[d] the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct.”¹⁵⁷

If expression is defined based on audience impact, the relevant question is not whether a particular property owner actually has the right to exclude as a formal matter, but whether he is *perceived* as having such a right. If, prior to *Dale*, the general public did not know that state law required the Boy Scouts to include gay scoutmasters, then the Scouts could rightly say that they were being forced to communicate a message of approval that they did not support. On the other hand, if the general public understood that the Scouts had no choice but to admit homosexuals—that is, no right to exclude—then the inclusion might not be seen as volitional, much less as an expression of approval.¹⁵⁸ Thus, a *well-known* and

154. See Hetcher, *supra* note 149, at 1877 (“Norms are best viewed not as linguistic entities but rather as social practices of a certain sort (albeit ones that typically have linguistic entities attached).”).

155. See *supra* note 139 and accompanying text.

156. See *supra* Part I.C.2.

157. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (holding that Boy Scouts had a First Amendment right to exclude homosexual scoutmasters, notwithstanding New Jersey antidiscrimination law to the contrary).

158. Cf. Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 603 (2001) (“[T]he Boy Scouts easily could proclaim to the world

broadly enforced rule forcing groups to accept unwanted members would, perhaps counterintuitively, harm the groups' expressive interests less than a narrower and less well-known principle.¹⁵⁹ After all, no one would have mistaken as an expression of acceptance or approval Southern schools' grudging enrollment of black students following *Brown v. Board of Education*,¹⁶⁰ *Brown II*,¹⁶¹ and the countless other cases in which Southern schools and politicians were ordered to comply with the requirements of the Equal Protection Clause.¹⁶²

* * *

Disaggregating the idea of property helps illuminate the various ways in which "property"—whether conceived of as a place or thing, a legal entitlement, or a social norm or understanding—enables expression or is itself expressive. But illuminating property's many facets also casts light on an underappreciated problem: those facets sometimes reflect in different directions. This situation happens, for example, when the government, aware that it is either violating the Constitution or is in danger of doing so, conveys a piece of property to a private party in order to avoid constitutional obligations.¹⁶³ Although such transactions may effectuate a formal transfer of land, albeit sometimes with the possibility of reverter or reversion to the government,¹⁶⁴ they do not necessarily change a

that it is anti-gay and that it was accepting gay scoutleaders, like James Dale, because the law required it to do so. In other words, the Boy Scouts could use the forced inclusion of homosexuals as the occasion for making clear its anti-gay message, and that the inclusion of Dale was a result of legal compulsion and not a matter of condoning his sexual orientation.”).

159. This is not to say that other associational interests—those akin to privacy or autonomy—would not be harmed, only that any interference with the “message” sent by the group to the outside world would be minimal.

160. 347 U.S. 483 (1954) (holding that segregated schools violated the Equal Protection Clause of the U.S. Constitution).

161. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (requiring schools to be desegregated with “all deliberate speed”).

162. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (recognizing that “integration forces an association upon those for whom it is unpleasant or repugnant”). See generally MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* (2007) (discussing *Brown* and its impact).

163. For a thorough account of this phenomenon, see Zick, *Constitutional Displacement*, *supra* note 82, at 604 (describing state efforts to avoid constitutional claims and concerns by privatizing property, and arguing that such efforts must comply with constitutional covenants that run with the property and may even bind successors in interest); see also Tebbe, *supra* note 6 (discussing the use of private-law arrangements to avoid public-law obligations).

164. See, e.g., *Buono v. Kempthorne*, 527 F.3d 758, 761 (9th Cir. 2008) (O’Scannlain, J.,

reasonable observer's understanding of whom owns the property—it probably still appears to be government-owned. In other words, the transactions do not alter the social understanding of ownership. How is one to make sense of the “expression” in such a case?

No simple answers exist. Part II attempts to advance the inquiry by addressing some of the problems that arise when conceptions of property diverge in cases involving government property and government expression. Focusing on formal property rights in those cases would allow the government to effectively “hide” unconstitutional government expression by privatizing troublesome corners of the public square. But employing a reasonable observer test—that is, focusing on informal property—would bring private property owners within the ambit of constitutional restrictions. Inevitably, then, making sense of government property and government expression requires a vision of property itself.

II. GOVERNMENT PROPERTY AND GOVERNMENT EXPRESSION

The property/expression interface explored in Part I is important throughout First Amendment theory and doctrine, but it is especially crucial in the context of government property and government speech. If the government's exercise of its property rights is characterized as government expression, then it is exempt from First Amendment scrutiny under government speech doctrine. But if it is characterized as the exclusion of an unwanted speaker from a public forum, then it may be subject to the highest levels of scrutiny under traditional forum analysis.¹⁶⁵ The line between government speech and the public forum cannot be drawn based simply on formal property rights, because public forums are almost always govern-

dissenting) (noting that “the government retained a reversionary interest in the property”); *Eaton v. Grubbs*, 329 F.2d 710, 713 (4th Cir. 1964) (finding state action in a case in which a city had donated a hospital to a private board, and noting that “[p]erhaps the most significant evidence of the state's involvement in the hospital's affairs is the presence of the reverter clause in the deed”); *Hampton v. City of Jacksonville*, 304 F.2d 320, 320-22 (5th Cir. 1962) (finding state action following the sale of two public golf courses to private parties because of the existence of a reversionary clause that effectively gave the government “complete present control” over the property).

165. See Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2412 (2004) (describing this dichotomy).

ment owned.¹⁶⁶ The question of government speech is therefore intertwined with, not defined by, the scope of the government's property rights.

This problem is both difficult and important because “cases in which government invokes the government-speech defense almost always implicate government property or instrumentalities.”¹⁶⁷ *Summum*, of course, involved the placement of monuments in a public park.¹⁶⁸ Other leading government speech cases have also involved the expressive use of government property, whether physical or not: *Rust v. Sullivan* involved the exclusion of certain health care providers from a government funding program;¹⁶⁹ *Legal Services Corp. v. Velazquez*, the exclusion of defense lawyers from public funding;¹⁷⁰ and *Johanns v. Livestock Marketing Ass'n*, the inclusion of beef producers in a government-run advertising program.¹⁷¹ In resolving these cases, the Court has emphasized the expressive nature of government property and government property rights. And, as explained in Part I, it is surely true that property—however conceived—can be deeply expressive.

But in the context of government property, this is the right answer to the wrong question. The issue is not whether excluding an unwanted speaker is an expressive act—it surely is, or at least can be—but rather whether the government has the right to exclude in the first place. The Court starts its analysis in cases like *Summum* from the wrong place, by assuming that the government has a right to exclude, and then asking whether that right has been used in an expressive way. Instead, courts must ask the more fundamental and important question of *whether* the government has that right. The first principle of the First Amendment, after all, is that public property owners may not engage in certain types of

166. This is so, of course, because of the state action requirement. Private property owners generally do not own public forums in the First Amendment sense because private parties are almost never bound by the Amendment at all.

167. Lilia Lim, Comment, *Four-Factor Disaster: Courts Should Abandon the Circuit Test for Distinguishing Government Speech from Private Speech*, 83 WASH. L. REV. 569, 571 (2008); see also Shiffrin, *supra* note 1, at 572.

168. See *supra* note 3 and accompanying text.

169. 500 U.S. 173, 200 (1991).

170. 531 U.S. 533, 534 (2001).

171. 544 U.S. 550, 553 (2005).

exclusion—that based on viewpoint, for example.¹⁷² This is the very idea of the public forum.

In an effort to resolve the mess, this Part unpacks the relationship between government property and government speech. Part II.A analyzes the public forum as a type of government property in light of the principles articulated in Part I. It demonstrates that public forum analysis has moved away from reliance on the government's formal property rights and toward a focus on social understandings of the forum, which are manifested in the fact that the public forum is defined based on its "character" rather than on whom holds title to it. Parts II.B and II.C consider the other side of the coin—government speech—and ask why and under what conditions the government's right to exclude should be considered "expressive." One common rationale for government speech's First Amendment exemption is that the government must make "expressive" decisions when managing scarce or incompatible resources.¹⁷³ Part II.B, however, argues that, just as incompatibility itself is not an expressive form of exclusion, management of incompatibility need not be expressive. Finally, Part II.C considers the possibility of an "endorsement test" approach to government speech. Such an approach would effectively mean following the informal conception of property to its logical conclusion, harmonizing government property and government speech by judging both according to what a reasonable observer would perceive them to be.

A. *The Public Forum as Government Property*

The development of the public forum is essentially a century-long erosion of the government's right to exclude.¹⁷⁴ In the early cases,

172. *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

173. *See, e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that it would be "simply inconceivable" to require scarce arts funding to be allocated in a neutral manner); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998) (holding that public forum principles do not generally apply to a public television station's editorial judgments).

174. *Cf.* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1406 (2001) ("In its origin, and perhaps even in its most characteristic form, the public forum doctrine was an exception to government control of its own property.").

courts treated the government, like any other property owner, as having an unlimited power to exclude unwanted speakers. As Oliver Wendell Holmes put it when he was a justice of the Massachusetts Supreme Judicial Court, “For 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.”¹⁷⁵ Holmes’s future colleagues on the U.S. Supreme Court affirmed both his holding and his basic conception of government property: “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 contains the lesser*.”¹⁷⁶ Under this view, there was no need to determine whether the government “expressed” anything by excluding unwanted speakers. Because there could be no First Amendment claim against the government for exclusion from government property, the government’s property rights were enough to settle the matter, as is the case today for owners of private property.

For the most part,¹⁷⁷ public forum doctrine has been premised on a gradual rejection of Holmes’s early view. Perhaps the clearest statement of the change came in *Hague v. Committee for Industrial Organization*, in which the Court explained that, “*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.*”¹⁷⁸

By signaling the relevance of a forum’s character and tradition, and by declaring ambivalence about “[w]here [] the title ... may rest,” *Hague*’s famous statement about the public forum rejected the

175. *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895) (upholding conviction of public speaker who delivered speech on Boston Common without a proper permit), *aff’d sub nom. Davis v. Massachusetts*, 167 U.S. 43 (1897); *see also United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (“Like any other owner, [Congress] may provide when, how, and to whom its land can be sold.”).

176. *Davis*, 167 U.S. at 48 (emphasis added).

177. Although public forum doctrine indicates otherwise, the Court has occasionally suggested that the government has the same exclusion rights as private property owners. *See, e.g., Adderley v. Florida*, 385 U.S. 39, 47 (1966) (“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.”).

178. 307 U.S. 496, 515 (1939) (emphasis added).

formalist conception of the forum as public property and moved towards a conception based instead on social norms and understandings. Scholars embraced and elaborated that approach. Harry Kalven's massively influential¹⁷⁹ article, *The Concept of the Public Forum*, argued for recognition of a "First-Amendment easement" to certain publicly owned places.¹⁸⁰ Kalven claimed that such easements had in fact already been implicitly recognized by Civil-Rights-Era cases like *Cox v. Louisiana*.¹⁸¹ Easements, of course, are the language of formal property, but Kalven's easement did not depend on notice, privity, registration, and the other prerequisites of a formal easement.¹⁸² Rather, he employed the language of formal property to describe what was essentially a social understanding, which in turn amounted to a very real limitation on the government's formal power to exclude.

These changing concepts of the public forum did not alter the government's formal ownership rights; the government did not lose title to public lands. Yet it was, and is, clear that, contrary to the Supreme Court's statement in *Davis*, "the greater power" of excludability that generally inheres in a property right does *not* "contain[] the lesser" power to exclude on the basis of viewpoint. This is true even if the government must in some sense retain the authority to sell or close a public forum.¹⁸³ Thus, although the Court has recognized the government's right "to preserve the property under its control for the use to which it is lawfully dedicated,"¹⁸⁴ it has simultaneously stated a "key caveat: any access barrier must be

179. Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1221-22 (1984) (noting Kalven's influence on dozens of Supreme Court decisions).

180. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13, 26-27.

181. 379 U.S. 536, 551 (1965) (overturning, on First Amendment grounds, conviction for engaging in demonstration outside courthouse).

182. See JESSE DUKEMINIER ET AL., PROPERTY 671-709 (6th ed. 2006) (describing creation of easements).

183. *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897); see Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 699-700 (1992) (Kennedy, J., concurring); see also *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.").

184. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

reasonable and viewpoint neutral.”¹⁸⁵ The implications of this change were enormous. Indeed, if the right to exclude is the *sine qua non* of property, then it would seem that the development of the public forum stripped the government of property just as surely as if its formal title had been shredded. As Merrill explains, “Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.”¹⁸⁶ At the very least, the public forum doctrine severely limits that right.

The public forum is therefore not coterminous with those things and places over which the government has a formal legal entitlement. Just as the public forum does not encompass all government property, it has not always been limited to it, either. Occasionally, private property rights have been abrogated in the name of protecting the public forum.¹⁸⁷ In those cases, as in the racial segregation and Establishment Clause cases discussed below,¹⁸⁸ courts have looked beyond property ownership as a formal matter and considered the social norms and understandings surrounding it. In his concurring opinion in *Marsh v. Alabama*, which extended First Amendment rights to would-be speakers in a privately owned company town, Justice Frankfurter wrote:

Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations. And similarly the technical distinctions on which a finding of “trespass” so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution.¹⁸⁹

185. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2984 (2010).

186. Merrill, *supra* note 31, at 730.

187. *See, e.g., Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (upholding First Amendment claims on privately owned land); *see also* Paul E. McGreal, *The Case for a Constitutional Easement Approach to Permanent Monuments in Traditional Public Forums*, 103 NW. U. L. REV. COLLOQUY 185, 197 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/41/LRColl2008n41McGreal.pdf>.

188. *See infra* Parts II.C.2, II.C.3.

189. 326 U.S. 501, 511 (1946) (Frankfurter, J., concurring).

The Court has generally moved away from *Marsh* in cases involving physical property like malls, and thus it is true that private title generally trumps would-be speakers' access rights.¹⁹⁰ But as the cases discussed in Part II.C demonstrate, the Court has sometimes restricted private property rights in the name of the First Amendment, and has occasionally upheld abridgements of private property owners' rights to exclude, for example, by approving the fairness requirement in *Red Lion Broadcasting Co. v. FCC*.¹⁹¹

So if the boundaries of the public forum cannot be established by determining which party has the formal right to exclude, how *can* those boundaries be defined? And based on what conception of "property"? Holmes's early view that the government's right to exclude unwanted speakers is akin to that of the "owner of a private house," and includes "[t]he right to absolutely exclude all right to use,"¹⁹² clearly imagines property as a formal legal entitlement in line with the conception of property discussed in Part I.C above. But *Hague* dispelled that notion by turning attention away from the question of where "the title of streets and parks may rest."¹⁹³ Instead, *Hague* essentially adopted the property-as-social understandings approach described in Part I.D. Under that view, vesting property rights in the government is not sufficient (nor even necessary) to demonstrate the existence of a public forum.¹⁹⁴ As the

190. See *Hudgens v. NLRB*, 424 U.S. 507, 518-21 (1976) (overturning *Logan Valley* and upholding a mall owner's right to exclude picketers); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319 (1968) (bringing shopping malls within the *Marsh* rule); Seidman, *supra* note 70, at 1550, 1565 (noting that the Supreme Court "has sharply constrained the reach of the constitutional theory" underlying the *Marsh* line of cases, but *Marsh*'s "approach continue[s] to influence some corners of free speech jurisprudence").

191. 395 U.S. 367, 367 (1969); *cf.* Seidman, *supra* note 70, at 1567 (comparing *Red Lion* and *Dale*, and concluding that "[i]n both cases, one entity (Red Lion or BSA) 'owns' property (a television license or the Boy Scouts), and in both cases the government provides someone else (someone taking advantage of the fairness doctrine or *Dale*) access to the property so that the nonowner can engage in expressive activity opposed by the owner").

192. *Davis v. Massachusetts*, 167 U.S. 43, 47-48 (1897); *see also supra* notes 174-75 and accompanying text.

193. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

194. *Cf.* *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122, 1123 n.5 (10th Cir. 2002) (concluding that "a deed does not insulate government action from constitutional review," and that determining whether a public easement constituted a public forum would depend on "the characteristics of the easement, the practical considerations of applying forum principles, and the particular context the case presents").

Supreme Court has explained, “the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”¹⁹⁵ And as the *Marsh* line demonstrates, access is not automatically denied if the property is private. Instead, “[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the *character of the property at issue*.”¹⁹⁶

That “character,” in turn, is defined by looking to the prior use, or nonuse, of the right to exclude. If, over time, the government declines to exercise that right, it creates a “tradition” of openness, which denotes the existence of a public forum, which in turn precludes further exercise of the right to exclude no matter who actually holds the formal legal entitlement to do so. On the other hand, a tradition of exclusion denotes a nonpublic forum, from which the government remains largely free to exclude private speakers.¹⁹⁷ If the government fails to exercise its right to exclude, it does not lose its formal ownership over a piece of land; it is not divested of title. And yet, in the eyes of the public, the character of the property has changed. The right to exclude no longer has the legitimacy it once did. Indeed, because the public forum has crept even onto private property, notions of informal property have in many cases effectively trumped formal property rights.

This is a descriptive observation, not a doctrinal prescription. It is not easy to build doctrine around the idea that the government’s right to exclude is an informal property right, defined by social understandings about the “tradition” and “character” of a forum. As Robert Post has forcefully argued, “[t]he Court’s present focus ‘on the character of the property at issue’ is a theoretical dead end, because there is no satisfactory theory connecting the classification of government property with the exercise of First Amendment rights.”¹⁹⁸ If nothing else, there is a certain circularity in saying that

195. U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns, 453 U.S. 114, 129 (1981).

196. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 44 (1983) (emphasis added).

197. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (holding that regulations on speech in nonpublic forums are acceptable so long as they “are reasonable in light of the purpose served by the forum and are viewpoint neutral”).

198. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1777 (1987) (criticizing the tradition-based approach) (internal footnotes omitted).

the government's authority to regulate speech in a public forum is dependent on how much the government has regulated speech in that forum in the past.

The purpose of this Part is not to put forward a new theory of the public forum, but simply to show that the development of public forum doctrine represents a move away from the formal property-as-legal entitlement view—that is, that the government can exclude speakers from land over which it holds title—and toward something approaching a property-as-social relations view—that is, that the government's right to exclude is based on the “character” of a place. The practical impact of this shift has been to remove the right to exclude from the government's bundle of property rights, or at least to greatly limit it.¹⁹⁹

Decades after *Hague* and its progeny took that right away, however, it has returned in a different guise and with a different justification. In government speech cases from *Rust* to *Summum*, the Court has held that the government's right to exclude is not a property right but a means of expression.²⁰⁰ And because the government's expression is entirely exempt from First Amendment scrutiny, it seems to follow that there is no constitutional bar to such expressive exclusions. The government, therefore, has again become like any other property owner. Parts II.B and II.C consider some of the circumstances in which government property rights are, or are not, expressive.

B. Nonexpressive Government Property

One of the most common rationales advanced for government speech doctrine is that the government must allocate scarce resources. Making allocative decisions requires the government to make “expressive” decisions, or so the theory goes.²⁰¹ But the fact that the government must exclude some would-be speakers from a

199. As a practical matter, the government may still have broad power to regulate private speech in a public forum using time, place, manner, and other restrictions. But that is a different matter from simply invoking the right to exclude.

200. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *Rust v. Sullivan*, 500 U.S. 73 (1991).

201. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998).

scarce resource does not necessarily mean that the government has “expressed” anything by excluding them. Exclusion-by-scarcity is simply inescapable, a product of the laws of physics rather than the laws of property. The Supreme Court, acknowledging this higher law, has recognized that “two parades cannot march on the same street simultaneously, and government may allow only one.”²⁰² This kind of exclusion—which I call incompatibility, but which could just as accurately be described as scarcity or rivalrousness—is not in and of itself expressive, but it nonetheless raises important questions about the relationship between property, expression, and exclusion. The following Sections attempt to address those questions.

1. *Incompatibility*

The physical monuments in *Summum* demonstrate in particularly tactile fashion that expressive acts are not always compatible with one another. Although it may not be as easy to visualize as the incompatibility of two monuments on the same plot of land, incompatibility is a problem in nonphysical forums as well, for example, when it comes to two broadcasts on the same bandwidth.²⁰³ Even in an infinitely large Speakers’ Corner, expansive enough to physically accommodate all speakers, problems of incompatibility would arise: the volume, pitch, and persuasiveness of some messages would inevitably drown out others. As the Supreme Court explained in *Red Lion Broadcasting Co. v. FCC*, “When two people converse face to face, both should not speak at once if either is to be clearly understood.”²⁰⁴

202. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *see also id.* at 116 (suggesting that “[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time”); NORMAN REDLICH ET AL., *CONSTITUTIONAL LAW* 1211 (3d ed. 1996) (“[I]f a number of speakers want to use the same public forum at the same time, they will drown each other out and no speaker could convey her particular message. Thus, ... the Court has permitted government to place certain restrictions on this right.”).

203. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388-89 (1969) (finding that the scarcity of broadcast bandwidth justifies limitations on First Amendment protections); *see also* Erwin Chemerinsky, *A Dangerous Free Speech Ruling*, 45 *TRIAL* 60, 61 (2009) (“Perhaps a distinction could be drawn between permanent monuments, as in *Summum*, and transitory speech, such as demonstrations. It is impossible to explain, though, why this is a distinction that would matter under the First Amendment’s requirements.”).

204. *Red Lion*, 395 U.S. at 387.

One might argue that incompatibility is not a problem for messages, even if it is for the means by which they are expressed. After all, we generally believe that ideas beget, rather than preclude, more ideas.²⁰⁵ As Thomas Jefferson explained when discussing the desirability of intellectual property rights—that is, rights to exclude others from using a particular idea or expression:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possess the whole of it.²⁰⁶

Indeed, in many ways, and under most conditions, speech can be reproduced so easily that it probably is less rivalrous than other goods.²⁰⁷ The same has been said of government speech, even government religious speech. Noah Feldman, for example, argues that “[t]alk can always be reinterpreted, and more talk can always be added, so religious speech and symbols need not exclude.”²⁰⁸

Even so, it is undoubtedly true that, to the degree speech employs or relies on places and things—and as Part I.B.1 argued, it almost always does—it raises problems of incompatibility for precisely the same reasons as ownership of property. We cannot all shout on Speakers’ Corner at the same time. Moreover, it is simply not the case that speech markets are infinitely elastic, nor can they accommodate all speakers on equal footing.²⁰⁹ The marketplace of ideas is

205. McGinnis, *supra* note 81, at 67 (“There does not seem to be a limited supply of ideas, and one person’s production and transmission of ideas does not deny those opportunities to others.”).

206. BOYLE, *supra* note 90, at 20 (quoting Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 333-34 (Albert Ellery Bergh ed., 1907)).

207. See, e.g., *id.* at 2-3.

208. NOAH FELDMAN, DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 238-39 (2005).

209. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 16-17; cf. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1555-72 (1993) (arguing that intellectual property rights can threaten to violate the Lockean proviso by not leaving enough and as good for others).

a competitive place—that is the very justification for its existence, after all—and thus it is inevitable that some ideas will win out over others. As Holmes himself put it: “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”²¹⁰

Thus the marketplace of ideas—or, at the very least, the marketplace of expression—faces issues of scarcity and incompatibility. Speakers are often unable to express themselves, or at least cannot do so in their preferred method, because some other speaker has already claimed their desired spot. In that sense, the would-be speaker has been “excluded.” But this is not the kind of *expressive* exclusion discussed at length in Part I. Indeed, this kind of exclusion is not even volitional. The later-arriving speaker has simply been crowded out by others wishing to express their messages, not to stifle his.

2. Managing Incompatibility: Public Forum Regulation as Commons Management

As noted above, government speech doctrine has often been justified as necessary to manage problems of incompatibility. Indeed, government speech cases almost always involve allocation of scarce resources like public funding or space in a public park.²¹¹ And although such cases typically are not classified as involving government speech, the same basic questions arise in cases involving the government’s role as an editor or patron of the arts.²¹² The resources available to private speakers—funding, venues, and so on—are scarce, and therefore not all private speakers can be accommodated at once. In those cases, the Court has often, though

210. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 27 (1977) (“The rationale of the First Amendment is that only if an idea is subject to competition in the marketplace can it be discovered (through acceptance or rejection) whether it is false or not.”).

211. See, e.g., *Schneider v. State*, 308 U.S. 147, 149 (1939) (recognizing that the State holds title to public streets and parks as a trustee of the people).

212. See, e.g., *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (upholding enabling statute vesting the National Endowment for the Arts with substantial discretion to award grants through content-based inquiry).

not always, invoked the *Rust* principle, holding, for example, that “[j]ust as forum analysis and heightened judicial scrutiny are incompatible with the role ... of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.”²¹³

But if incompatibility itself is not expressive, it is not immediately clear why managing incompatibility should be. Here, the concept of property makes its dramatic reentrance, for “law and economics scholars note that the payoffs from property are very strongly associated with scarcity. Nobody bothers to create property for some resource that lies around in abundance.”²¹⁴ In other words, incompatibility and scarcity are the root of property itself.

What this means for the expressiveness of the right to exclude is a complicated question, one that involves the very idea of the public forum. As explained above, the public forum, though formally owned by the government, is in many ways an odd form of property. That is, the right to exclude is the *sine qua non* of property, but the government’s ability to exercise that right in a public forum is severely circumscribed. As a result, in theory the public forum appears and behaves somewhat like a commons, what James Boyle calls the “commons of the mind.”²¹⁵ At least ideally, the public forum is a place where all members of society can contribute and consume ideas and forms of expression.

Property scholars may already be shaking their heads. The combination of open access and incompatibility just described as characterizing the public forum is what gives rise to the central “tragedy” in property scholarship, and indeed to the very notion of property itself. Put in its simplest form, the tragedy of the commons arises where there are no property rights in a shared but scarce resource.²¹⁶ In such circumstances, each individual user has an

213. *United States v. Am. Library Ass’n*, 539 U.S. 194, 205 (2003) (citing *Finley*, 524 U.S. at 569). *Finley* itself cites *Rust* directly. See *Finley*, 524 U.S. at 588.

214. Carol Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emissions Trades, and Ecosystems*, 83 MINN. L. REV. 129, 134 (1998).

215. BOYLE, *supra* note 90, at 47. Boyle differentiates between the public domain, which is generally used to refer to “material that is not covered by intellectual property rights,” and the commons, to which all of society has access. *Id.* at 38-39.

216. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 712 (1986) (noting that “[w]hen things are left open to the public, they are thought to be wasted by overuse or underuse”).

incentive to overuse the resource, because she will reap the full benefits of her individual use but will bear only a fraction of the cost of the overuse to which she contributes.²¹⁷ In his canonical statement of the commons problem, Garrett Hardin illustrated the problem using the example of a field (“commons”) being overgrazed by sheep.²¹⁸ Without property rights, each shepherd will graze his sheep as much as possible. But if they all do so, the commons will be destroyed and net utility lost.

Extending the analogy to speech acts in a public forum is relatively straightforward.²¹⁹ As with farmers and their sheep—who gain the full benefits of their grazing but bear only a fraction of the cost of overuse—a speaker who erects a monument in the park captures the full gains of his expression but bears only a fraction of the cost of the clutter it causes. In either case, the initial user does not leave as much and as good for later users.²²⁰ The result is destruction of the speech commons through overuse. Once again, *Summum* provides a useful example. The Court noted that “forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program.”²²¹ But the Court found that treating Pleasant Grove’s park as a public forum—thus allowing relatively free construction of monuments by private speakers—would inevitably threaten other private speakers’ ability to erect their own monuments.²²² “And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.”²²³ The Court thus essentially treated the park as something of a speech “commons,” subject to overuse by individuals who could capture the full benefit

217. *Id.*

218. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968).

219. See, e.g., Yochai Benkler, Property, Commons, and the First Amendment: Towards a Core Common Infrastructure 47-48 (2001) (unpublished manuscript), available at <http://www.benkler.org/WhitePaper.pdf>.

220. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305-09 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

221. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1137 (2009).

222. *Id.* at 1138.

223. *Id.*; see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969) (“[T]he licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.”).

of using the commons—that is, those who could express their own views through a statue or monument—while bearing only a fraction of the cost of this overuse.

One way to respond to problems of scarcity is by assigning property rights. When rights are clearly allocated and protected, individual property owners have a direct stake in how the commons is used, and thus a reason to prevent overgrazing.²²⁴ As long as their rights are enforceable, property owners also have a *means* to prevent overgrazing: they can exclude some would-be grazers. As Coase famously argued, under ideal conditions it does not even matter to whom property rights are initially allocated. As long as they are clearly defined and protected, they will end up in the hands of those who value them most.²²⁵

But this is not the solution the Court chose in *Summum*. Rather than giving property rights to individuals, *Summum* vested the right to exclude in the government. Essentially, it endorsed public, rather than private, management of the commons. This was not inevitable. The tragedy of the speech commons does not compel the conclusion that the government must be given the right—let alone an almost unlimited²²⁶ “expressive” right—to exclude speakers, any more than the tragedy of the commons compels government management of grazing. The speech commons could just as easily be saved if property rights were given to *private* actors—would-be speakers, that is—on some content-neutral basis. This, of course, is precisely the conclusion many property scholars have reached with regard to other commons problems.²²⁷ The person who values his speech—or sheep—or simply has more speech acts he wishes to

224. See generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002).

225. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19 (1960) (“[I]f market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast.”). Coase recognized that the theorem which bears his name was simply a thought experiment, because the assumptions on which it relies do not reflect reality. R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 717 (1992).

226. *Summum*, 129 S. Ct. at 1127 (“[G]overnment speech must comport with the Establishment Clause.”).

227. See generally James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003) (describing and criticizing such approaches).

perform—or sheep he wants to graze—will presumably pay more than someone who does not.²²⁸ If the Summum truly value their speech, for example, they will demand a high premium for relinquishing their right to speak, or else be willing to pay a correspondingly high premium to buy someone else's. The same could be said for many other areas of speech in which scarcity is the justification for speech regulations.²²⁹ And if *someone* must have the right to exclude, why not simply give it to those who speak first? Granting the right to exclude to the first speaker might well encourage more speech, in much the same way as property laws that vest rights in the first person to utilize water,²³⁰ find a shipwreck,²³¹ or strike oil²³² are thought to encourage those useful activities. Indeed, this is one of the basic theories behind our current system of copyright.²³³

In any event, giving the government the power to “protect” the public forum by excluding private speakers is not an inevitable solution to the tragedy of the speech commons, nor does it show that such exclusions are somehow “expressive.” The Court has implicitly noted as much in cases like *Rosenberger v. Rector & Visitors of University of Virginia*, in which the Court held unconstitutional the denial of funding to a Christian student newspaper, saying that it is “incumbent on the State ... to ration or allocate the scarce

228. Of course, the Coase Theorem is famously insensitive to distributional concerns, so it might well be that some speakers could afford more speech than others.

229. See LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 201 (1987) (“It is not technological scarcity that is at work [in broadcasting cases], but lack of a property mechanism to allocate the right to broadcast.”); R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959) (arguing that nearly all resources are scarce and that market mechanisms can generally allocate them).

230. See generally Andrew P. Morriss, *Lessons from the Development of Western Water Law for Emerging Water Markets: Common Law vs. Central Planning*, 80 OR. L. REV. 861 (2001).

231. See William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 105-06 (1978); see also Paul Hallwood & Thomas J. Miceli, *Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks*, 35 J. LEGAL STUD. 285, 285-86 (2006) (arguing that current doctrine, which “entitles salvors to a share of the value of salvaged ships whose owners can be located ... and the full value of abandoned ships,” provides financial incentives for salvors but could do more to encourage salvage of historic wrecks with solely historical value).

232. *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 13 (Tex. 2008) (“The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation.” (citing 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, *TEXAS LAW OF OIL AND GAS* § 1.1(A) (2d ed. 1998))).

233. See *supra* note 22 and accompanying text.

resources on *some acceptable neutral principle*.”²³⁴ Such a principle need not be related to the government’s own expressive interests. If a particular forum is indeed scarce—broadcast bandwidth, for example—then the government may have a “compelling” interest in limiting some private speakers in order to protect others.²³⁵ But that interest has nothing at all to do with the government’s own message, which is what is so problematic about the Court’s ultimate, and unanimous, conclusion that Pleasant Grove’s management of its park constitutes “speech.” The Court essentially took a nonexpressive exclusion—the incompatibility of multiple monuments—and transformed it into an expressive one by giving the government the right to exclude and characterizing that right as expressive.

C. *Expressive Government Property*

If not all government exclusions are expressive, how are we to decide which ones *are*? This Section argues that one way to do so—and perhaps the best way—is by applying a listener-focused test that would ask both whether the government intended to communicate a particularized message, and whether a reasonable observer would believe the government to be speaking. Other scholars have convincingly advocated this approach for democracy-related reasons: if the government is to be held accountable for its speech, it must be transparent in making it.²³⁶ This Section attempts to show that the listener-focused view of government speech would also reflect a more accurate treatment of public property. Like public forum doctrine itself, such an approach would invoke a more nuanced view of government property as a social institution and not just as a formal entitlement.

234. 515 U.S. 819, 834 (1995) (emphasis added).

235. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 367 (1969) (holding that broadcast stations are protected by the First Amendment, but nonetheless upholding federal requirement that broadcasters give “fair coverage” to “each side” of “public issues”).

236. See, e.g., Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1005-15 (2005); Norton, *supra* note 2, at 590.

1. *The Reasonable Observer Approach to Government Speech*

Part II.B.2 considered, and rejected, the scarcity management justification for government speech doctrine. But scholars have also justified the doctrine for “listener-based” reasons—not the government’s “right” to speak, but rather the interests of citizens in hearing what the government has to say. As Abner Greene points out, “government speech can help foster debate, fleshing out views, and leading toward a more educated citizenry and a better chance of reaching the right answer.”²³⁷ At the very least, Steve Shiffrin notes, transparent and clear government speech should aid democratic accountability by giving the public “the advantage of knowing the collective judgment of the legislature and of knowing the views of its representatives, which would in turn be useful for evaluating them.”²³⁸

If the true value of government speech lies in its impact on listeners, how should it be operationalized in doctrine? One possibility is to adopt a viewer-focused test that defines government speech based on the perspective of a reasonable observer. Variations on this kind of test already exist in other areas of First Amendment law. The *Spence* test, for example, accords First Amendment protection to symbols wherever they convey messages that are “direct, likely to be understood, and within the contours of the First Amendment.”²³⁹ The “endorsement” test that the Court has occasionally applied in Establishment Clause cases is similar. That test was first articulated in *County of Allegheny v. ACLU*, and since then has been used widely, if somewhat sporadically.²⁴⁰ Simply stated, it asks whether a “reasonable observer” would perceive the govern-

237. Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 11 (2000).

238. Shiffrin, *supra* note 1, at 604.

239. *Spence v. Washington*, 418 U.S. 405, 415 (1974).

240. Alberto B. Lopez, *Equal Access and the Public Forum: Pinette’s Imbalance of Free Speech and Establishment*, 55 BAYLOR L. REV. 167, 195 (2003) (arguing that the endorsement test became the preferred test for Establishment Clause cases after *Allegheny*). *But see* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 87 (2008) (connecting prominence of the endorsement test to the fact that Justice O’Connor was the swing vote in many Establishment Clause cases); Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 137 (“With the departure of Justice O’Connor—the author and most committed supporter of the endorsement notion—there is a good chance that the test will retire along with her.”).

ment as having endorsed a particular religious message, such as a Ten Commandments monument.²⁴¹

It requires only a slight tweak to transform these into a straightforward government speech test: government speech exists wherever a reasonable observer would perceive the government to be speaking. This is effectively what Justice Souter suggested when he argued in his *Summum* concurrence that the question of government speech should not be based on mere property ownership. His preferred approach would instead “ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.”²⁴² Some courts already seem to apply just such a test.²⁴³ In keeping with the principles discussed in this Article, such a listener-focused approach would be consistent with the character-based approach to “property” that prevails in public forum doctrine.²⁴⁴ If the public forum is not defined by formal legal entitlements, why should government speech be?

Of course, adopting a reasonable observer test would not mean ignoring entirely the government’s formal property rights. As noted above,²⁴⁵ a reasonable observer is likely to base her interpretation of an expression at least in part on her understanding of who has a right to exclude, thus effectively combining the social understandings and legal entitlement views of property. Just how much weight the latter should receive, however, is debatable. The Seventh Circuit has adopted, and the Ninth Circuit has rejected, the presumption that “a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion” in the absence of

241. *See, e.g.,* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773, 779, 782 (1995) (O’Connor, J., concurring in part and concurring in the judgment) (concluding that a Latin cross in a park across from the Ohio Statehouse did not violate the Establishment Clause because a reasonable observer would not see it as an endorsement of religion).

242. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring).

243. *See, e.g.,* *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (noting that the four-prong government speech inquiry applied in the Tenth Circuit “can be distilled (and simplified) by focusing on the following inquiry: under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?”).

244. *See supra* Part II.A (discussing public forum doctrine); *see also* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (holding that the existence of a public forum cannot be identified “merely by identifying the government property at issue”).

245. *See supra* Part I.D.2.

unusual circumstances.²⁴⁶ Other courts have used the reasonable observer test only inasmuch as it conforms with the legal entitlement view.²⁴⁷ The Supreme Court seemed to endorse this principle in *Buono* and *Summum*.²⁴⁸

Justice Kennedy's plurality opinion in *Buono* also seemingly introduced a new twist on the reasonable observer test.²⁴⁹ The plurality noted that the district court had enjoined the land transfer statute on the grounds that it would create a perception of endorsement, but faulted the district court for failing to inquire "into the effect that knowledge of the transfer of the land to private ownership would have had on any perceived governmental endorsement of religion, the harm to which the 2002 injunction was addressed."²⁵⁰ In other words, the plurality would include formal land ownership among "the pertinent facts and circumstances surrounding the symbol and its placement."²⁵¹ But it seems likely that the plurality's discussion of the reasonable observer was specific to the unusual facts of *Buono* and to the plurality's conclusion that the district court had erred by granting an injunction for one reason but then using it to enjoin government conduct for another. Thus, even holding aside the fact that *Buono* contained no majority opinion, there is reason to doubt whether it altered the reasonable observer approach to endorsement, even in the Establishment Clause context.

The reasonable observer test would therefore be fully consistent with a property-based approach to government speech, even though it would also require serious changes in current government speech doctrine. Presently, the doctrine does not even require the govern-

246. *Buono v. Kempthorne*, 527 F.3d 758, 779 n.13 (9th Cir. 2008) (describing and rejecting the Seventh Circuit rule), *rev'd sub nom.* *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

247. *Roach v. Stouffer*, 560 F.3d 860, 868 (8th Cir. 2009) (finding that "under all the circumstances a reasonable and fully informed observer would recognize the message on the 'Choose Life' specialty plate as the message of a private party, not the state").

248. *Buono*, 130 S. Ct. at 1819 ("Even if [the injunction's] purpose were characterized more generally as avoiding the perception of governmental endorsement, that purpose would favor—or at least not oppose—ownership of the cross by a private party rather than by the Government." (citing *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009))).

249. *Buono* was not the first time Justice Kennedy had criticized the test. See *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part).

250. *Buono*, 130 S. Ct. at 1819.

251. *Id.* at 1819-20.

ment to identify itself when speaking, much less that reasonable observers be able to identify it. In *Johanns v. Livestock Marketing Ass'n*, for example, the Court held that government speech was not dependent on “whether or not the reasonable viewer would identify the speech as the government’s.”²⁵² This demonstrates one of the central difficulties in harmonizing property- and endorsement-based approaches to government speech doctrine: once the concept of property is disaggregated in line with Part I’s approach, cases will inevitably arise in which different conceptions of property point in different expressive directions. For example, an observer—even a reasonable one—may understand property rights in a way that differs sharply from the way those rights are formally recognized.

Nowhere is this more common, or problematic, than in situations in which private property appears to be publicly owned, or vice versa. This was the difficult question at issue in *Buono*: how does one “fix” a situation in which the government appears to be endorsing a religious message that is actually being communicated through or on a piece of private property? Such cases also leave open the question whether courts should find Establishment Clause violations in the reverse situation: when a cross *is* government property but appears to be private. The fact-intensive inquiries necessary in these cases are the same inquiries that would be needed to establish who is a “real” property owner.

The cases discussed in Parts II.C.2, II.C.3, and II.C.4 illustrate this phenomenon. The first set of cases involves situations in which the government has attempted to transfer formal title of racially segregated property to a private actor in order to avoid Equal Protection obligations. In those cases, the underlying (and impermissible) property-based expression is based on the *exclusion* of African Americans.²⁵³ The second set of cases involves situations in which the government has attempted to do the same in cases involving Establishment Clause violations. The underlying expression in these cases is based on the *inclusion* of religious iconography.²⁵⁴

252. 544 U.S. 550, 564 n.7 (2005); *see also* *Wells v. City & County of Denver*, 257 F.3d 1132, 1142 (10th Cir. 2001) (refusing to consider, as part of a multifactor test, “who the listener believes to be the speaker”); *Lim*, *supra* note 167 (criticizing the test as a “four-factor disaster”).

253. *See infra* Part II.C.2.

254. *See infra* Part II.C.3.

Finally, the third set of cases involves an ongoing government speech controversy that has divided the circuits: whether specialty license plates constitute government speech.²⁵⁵

Together these cases demonstrate that the endorsement approach can be applied usefully even to situations in which the government has no formal property rights. In other words, courts are rightly willing to look beyond formal property relations and to consider social understandings of property. Were it otherwise, the government could avoid its constitutional obligations simply by privatizing its property in such a way as to continue constitutionally problematic practices such as racial exclusion or religious expression.²⁵⁶ Courts have recognized, in other words, that a doctrine focused on title transfers and other aspects of formal ownership “invites manipulation.”²⁵⁷ Moreover, courts are attuned to the expressive nature of exclusion. By recognizing the social nature of property, courts also recognize the expressive power of exclusion, and vice versa.²⁵⁸

Crucially, none of this analysis means ignoring “property.” It simply requires courts to focus on property as it is socially recognized and understood, not as it is recorded in title registries. Parts II.C.2 and II.C.3 show how the theory works in practice.

2. *Racial Exclusion Cases*

The use of racial segregation as a form of expressive exclusion is a central element not just of our constitutional history, but of our national narrative. In cases involving efforts to exclude racial minorities from land that was formally private but apparently public, courts have affirmed two of the central propositions discussed here: exclusion is itself an expressive act, and formal property rights are part—but only part—of identifying the source and effect of such an exclusion.

255. See *infra* Part II.C.4.

256. See generally John C. Crees, Note, *The Right and Wrong Ways To Sell a Public Forum*, 94 IOWA L. REV. 1419 (2009).

257. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000).

258. See *supra* Part I.C.

Expressive exclusion was at the heart of segregation and segregated society, and its importance to segregationists and white supremacists was demonstrated by their extraordinary efforts to preserve it.²⁵⁹ One well-known legal example should suffice to illustrate the point. In *Palmer v. Thompson*, the Jackson, Mississippi, city council voted to close its public pools rather than comply with a court order that they be desegregated.²⁶⁰ The town's white citizens apparently thought it was more important to exclude blacks from the pools than to use them themselves. The Supreme Court held that this decision did not violate the Equal Protection Clause because the pools were equally closed to all users.²⁶¹ But the Court did not question whether the city council's decision expressed a message of racial superiority.²⁶²

This expressive exclusion was undoubtedly effective—it conveyed a powerful message of racial hierarchy, no matter how strenuously its defenders disingenuously tried to insist that excluding people on the basis of race was consistent with treating them as equals. Charles Black treated such arguments with the seriousness they deserved, explaining that whenever it is “solemnly propounded” that segregation was consistent with equality “we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.”²⁶³ No black person denied access to a restaurant, school, or water fountain could fail to grasp that his or her exclusion was an expression of white superiority. Indeed, that basic insight was the foundational principle of *Brown v. Board of Education*, in which the Court recognized that “separate but equal” schools were “inherently unequal” because they signaled to excluded black students that the State considered them to be inferior.²⁶⁴ “Segregation of white and colored children in public schools has a detrimental effect upon the colored

259. See generally DAVID DELANEY, RACE, PLACE, AND THE LAW 1836-1948 (1998).

260. 403 U.S. 217 (1971).

261. *Id.* at 226.

262. Justice Black's majority opinion implicitly recognized the contrary, turning instead on his conclusion that “no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.” *Id.* at 224; see also *id.* at 240-41 (White, J., dissenting) (arguing that the pool closings were “an expression of official policy that Negroes are unfit to associate with whites”).

263. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

264. 347 U.S. 483, 495 (1954).

children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”²⁶⁵

Brown may be the best-known example, but it is not the only one worth exploring. Perhaps even more demonstrative of both the expressive nature of exclusion and the social nature of property rights are *Evans v. Newton*²⁶⁶ and *Evans v. Abney*.²⁶⁷ Those cases involved a park left to the city of Macon, Georgia, by a private party. The terms of the trust governing the park provided that it was to be used as “a park and pleasure ground” for whites only.²⁶⁸ Private citizens challenged the restriction on Equal Protection grounds, arguing—as had the petitioners in *Brown*—that the exclusion of racial minorities sent an impermissible message of racial discrimination. Rather than try to argue that the exclusion was *not* expressive, the city resigned as trustee of the park.

Three private citizens were appointed to replace the city as trustee,²⁶⁹ thus effectively transferring the legal title out of public hands. If property ownership were simply a matter of formal entitlements, this should have sufficed to end any constitutional concerns, since the Equal Protection Clause does not bind private individuals. But despite the transfer of formal “ownership”—that is, trusteeship—the Supreme Court held in *Newton* that, in light of the fact that the city was “entwined” with the management and maintenance of the park, the “momentum it acquired as a public facility is certainly not dissipated ... by the appointment of ‘private’ trustees.”²⁷⁰ Thus the courts—as they would in other cases—proved to be attuned not just to property as a legal entitlement, but as a social understanding.

Following the Supreme Court’s decision in *Newton*, the Georgia courts held that the trust had failed and that the park must be closed because the trust’s exclusionary clause could not constitutionally be enforced.²⁷¹ Private citizens this time challenged the decision

265. *Id.* at 494 (quoting finding of the Kansas court) (internal citation omitted).

266. 382 U.S. 296 (1966).

267. 396 U.S. 435 (1970).

268. *Newton*, 382 U.S. at 297.

269. *Id.* at 298.

270. *Id.* at 301.

271. *Abney*, 396 U.S. at 436.

to close the park, and the case again came before the Court, which, as it later would in *Palmer*, upheld the decision to close the park rather than integrate it.²⁷² As in *Palmer*, it did not escape the Justices' notice that the park's closing was done "for the sole reason that the public authority that owns and maintains it cannot keep it segregated"²⁷³ and that the closing "conveys an unambiguous message of community involvement in racial discrimination" which, like the segregation of schools in *Brown*, effectively signaled a belief in the inferiority of blacks.²⁷⁴

Of course, these cases all arose under the Equal Protection Clause rather than the First Amendment. That may explain why most free speech scholars ignore them.²⁷⁵ But what *makes* them cases about racial discrimination, and not simply about trespass, is the expressive nature of property. By excluding African Americans, the park's managers (whether the city or private trustees) conveyed messages of white superiority and black inferiority. What makes *Newton* and *Abney* constitutional cases—involving state action, that is, despite the right to exclude being exercised by private property owners as a formal matter—is courts' willingness to recognize implicitly that "property" is not just a legal entitlement but also a system of shared social understandings.

Newton and *Abney* are not the only cases addressing the expressive value of racial exclusion and the government's attempt to distance itself from that expression by transferring formal ownership.²⁷⁶ In many of these cases, as in *Newton* itself, courts looked to social understandings of ownership rather than formal title.²⁷⁷ In other words, the perception of exclusion, and the expression it sent, trumped formal legal rights. These cases are of course closely related to—in fact, are a subset of—those in which the Court has

272. *Id.* at 444.

273. *Id.* at 452 (Brennan, J., dissenting).

274. *Id.* at 453-54.

275. As usual, Zick is the exception. See Zick, *Property as/and Constitutional Settlement*, *supra* note 82, at 9-11 (analyzing *Newton* and *Abney*, as well as the Establishment Clause cases discussed below).

276. See *id.*

277. See, e.g., *City of Greensboro v. Simkins*, 246 F.2d 425, 426 (4th Cir. 1957) (holding, in a case involving a racially exclusive golf club leasing property from the city, that "the right of citizens to use public property without discrimination on the ground of race may not be abridged by the mere leasing of the property").

found state action to exist even when a private actor appears to be the one engaged in constitutionally questionable activity.²⁷⁸ They are not inconsistent with property law; they simply recognize it as encompassing more than title ownership.

3. Inclusion of Religious Symbolism

Racial discrimination cases are not the only ones in which the government has attempted to use private property law arrangements to avoid constitutional obligations. Perhaps even more common—and certainly more recent—are those cases in which public actors have tried to evade not the Equal Protection Clause, but the Establishment Clause.

At least until the Supreme Court decided *Sumnum* and *Buono*, the leading analysis of public-private property transfers involving religious iconography came in a pair of Seventh Circuit cases. The first was *Freedom from Religion Foundation, Inc. v. City of Marshfield*, in which the Seventh Circuit considered the constitutionality of a fifteen-foot tall statue of Jesus Christ that stood in a public park.²⁷⁹ A private citizen sued, claiming that the statue violated the Establishment Clause, and the city responded by selling to a private organization the small piece of land on which the statue stood, retaining a restrictive covenant requiring the land to be used for a public park.²⁸⁰ Despite the title transfer, the property itself was not visibly differentiated from the rest of the park, which was clearly public property. The city did, however, put up a disclaimer noting that the location of the statue did not reflect the city's endorsement of its religious message.²⁸¹

In evaluating whether this rearrangement of formal property rights cured the alleged Establishment Clause violation, the Seventh Circuit concluded that courts must “look to the substance of the transaction as well as its form to determine whether govern-

278. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961) (holding that a private party and the State had become so closely connected that the private party's racial discrimination constituted state action subject to scrutiny under the Equal Protection Clause).

279. 203 F.3d 487 (7th Cir. 2000).

280. *Id.* at 490.

281. *Id.* at 489.

ment action endorsing religion has actually ceased.”²⁸² So, although the Seventh Circuit considered the formal transfer to be evidence of a “real” transfer,²⁸³ it did not decide the case based on who held title to the property, or the fact that the city retained formal rights through a possibility of reverter.²⁸⁴ Instead, the court considered the statue from the point of view of a reasonable observer and decided that such an observer would conclude, based on the location of the statue and the layout of the park, that the statue was still part of the park and was endorsed by the park’s perceived owner—the government.²⁸⁵ In other words, a reasonable observer would perceive that the religious statue was on city property, infer that the city had the power to exclude it, and conclude, based on its failure to do, that the city endorsed it—exactly what the Establishment Clause forbids. Thus the social understanding of the government’s property rights trumped its rights as a formal matter.

In *Mercier v. Fraternal Order of Eagles*, the Seventh Circuit considered a slightly different scenario but viewed it through the same lens.²⁸⁶ In *Mercier*, citizens brought an Establishment Clause challenge against a Ten Commandments monument that had been placed in a La Crosse, Wisconsin, public park to honor volunteers who had fought local flooding.²⁸⁷ After years of litigation and refusal to move the monument, the city council sold the property on which the monument was located back to its original donor—the Fraternal Order of Eagles.²⁸⁸ But, unlike Marshfield, La Crosse and the Fraternal Order did far more than put up a simple disclaimer stating that the town did not endorse the Ten Commandments’ religious message. Instead, the Order built a four-foot tall metal fence around the land and put signs on all sides of the fence emphasizing that the parcel was privately owned and that the

282. *Id.* at 491.

283. *Id.* (“Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion.”).

284. *Id.* at 492.

285. *Id.* at 495.

286. 395 F.3d 693 (7th Cir. 2005).

287. *Id.* at 696.

288. *Id.* at 696-97. The Fraternal Order of Eagles donated the Ten Commandments monument whose presentation was found to violate the Establishment Clause in *Van Orden v. Perry*, 545 U.S. 677 (2005), and the monument in the park to which the Summum sought access, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009).

monument was dedicated to flood volunteers.²⁸⁹ The city then built another fence around the Order's fence and added signs on two sides stating that the city neither owned the property nor endorsed "the religious expression thereon."²⁹⁰ These steps—which were strong evidence to any reasonable observer that the city had no power to exclude the monument—ultimately differentiated *Mercier* from *Marshfield*. Although the district court in *Mercier* found an Establishment Clause violation, a divided panel of the Seventh Circuit reversed on the grounds that the location of, fences surrounding, and disclaimers regarding the Ten Commandments monument adequately addressed any danger that the public would impute ownership or endorsement to the government.²⁹¹

What makes these cases particularly valuable for highlighting the relationship between expression and property is the fact that, like the segregation cases discussed above,²⁹² they involve divergences between formal and social understandings of property. Although *Marshfield* and *Mercier* reached different results, they asked the same question: did *observable*—not simply formal—indications of ownership show the government to be in control of the relevant location? Where they did, the government was found to have endorsed the religious symbolism located there, because it would appear that the government had declined to exclude it.²⁹³ Where they did not, however, the government was not found to be speaking.²⁹⁴ In both

289. *Mercier*, 395 F.3d at 697.

290. *Id.* at 697-98.

291. *Id.* at 702-04.

292. *See supra* Part II.C.2.

293. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000) ("[B]ecause the sale does not relieve the continued perception of government endorsement and grants the Fund preferential access to express its views in Prashak Wayside Park, we find that the current visual condition of the park constitutes a continuing violation of the Establishment Clause.").

294. *Mercier*, 395 F.3d at 705 (describing efforts which, "when coupled with the authority established under *Marshfield* and the extensive efforts taken by the City to separate itself from any religious message the Monument might convey, would surely overcome any doubts a reasonable observer might have once he or she views the double fencing and multiple signs surrounding the Monument"); *see also* *Chambers v. Frederick*, 373 F. Supp. 2d 567, 572-73 (D. Md. 2005) (refusing to enjoin display of Ten Commandments monument on land that had been sold from the city to the Fraternal Order of Eagles on the grounds that a reasonable observer would understand that the sale was a genuine attempt to "dissociate" from the religious monument).

cases, the social perception of property ownership was equated with expression.²⁹⁵

This essentially amounts to a property-based version of the endorsement test. And that test maps perfectly with the social relations view of property described in Part I.D. It also strongly supports the argument in Part I.C that the right to exclude is at the heart of the relationship between property and expression. By exercising—or, in some cases, not exercising—the right to exclude, the government as a property owner effectively expresses its approval or disapproval of religious symbols. Thus, the Establishment Clause cases, like the racial segregation cases, generally demonstrate both that property and expression are intertwined and that their relationship is dependent on more than simply formal ownership.

The central problem is that the cases involve two strong constitutional concerns that pull in opposite directions: the statue in *Marshfield*, like the cross in *Buono*, is either flatly impermissible government speech or else highly protected private speech. A decision to categorize a particular symbol one way has immensely important implications for the other and raises difficult problems when it comes to remedy. In *Marshfield*, for example, the Seventh Circuit concluded that the statue constituted impermissible government speech despite the fact that the land on which it stood had been formally transferred to a private party.²⁹⁶ To remedy that constitutional violation, either the statue could be removed, or “some way must be found to differentiate between property owned by the [private owner] and property owned by the City.”²⁹⁷ The former would obviously limit private speech—that of the private organization that now owned the statue. To avoid this limitation, the court suggested the addition of “some defining structure, such as a permanent gated fence or wall, to separate City property from [private] property accompanied by a clearly visible disclaimer.”²⁹⁸ This proposed remedy was consistent with Justice Kennedy’s observation in *International Society of Krishna Consciousness, Inc.*

295. See also *Gonzales v. N. Twp. of Lake County*, 4 F.3d 1412, 1422-23 (7th Cir. 1993) (concluding that, when a private organization donated a crucifix to the township, it became government property and therefore also became prohibited religious government speech).

296. 203 F.3d at 495.

297. *Id.* at 497.

298. *Id.*

v. Lee that to change the character of a public forum, the government must “alter the objective physical character or uses of the property, and bear the attendant costs.”²⁹⁹ Thus, the *Marshfield* court’s remedy, as well as its holding, confirm that the property’s social meaning may trump its formal entitlements.

4. Specialty License Plates

Setting aside the Establishment Clause cases, perhaps the most important ongoing government speech controversy is that involving so-called “specialty” license plates bearing political or social messages like “Choose Life.” The circuits are divided about whether to classify such plates as private or government speech,³⁰⁰ and the issue might well reach the Supreme Court. It might be useful, therefore, to consider whether the principles discussed here—particularly the three conceptions of property discussed in Part I and the reasonable observer approach set out in Part II.C.1—can illuminate the problem.

Part I.B argued that property as a place or thing can be expressive, and that certainly holds true in the case of specialty plates. A license plate that says “Choose Life,” for example, clearly communicates that very message. But of course the difficult question with regard to specialty plates is not whether they are expressive, but what they express and, most importantly as far as government speech doctrine is concerned, to whom their expression should be imputed.

The second conception of property—as a formal property right—comes closer to addressing that question. As a formal matter, license plates, like many public forums, are generally government prop-

299. 505 U.S. 672, 700 (1992) (Kennedy, J., concurring).

300. Although the facts of the cases differ slightly, four circuits have found specialty plates to be private speech. *See* *Roach v. Stouffer*, 560 F.3d 860, 867-68 (8th Cir. 2009); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863-64 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009); *Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008); *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002). By contrast, a different panel of the Fourth Circuit held that license plates are a hybrid of government and private speech, *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004), and the Sixth Circuit has found them to be government speech, *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006).

erty.³⁰¹ Not only do states own the actual plates, they also retain control over the process by which specialty plates are selected. Sometimes this is done through an administrative procedure, and sometimes by the legislature, but in any case the states have the power to authorize messages and therefore to exclude unauthorized ones.³⁰² As in *Sumnum*, the exercise of those rights—assuming that they are not bounded by public forum principles—is undoubtedly expressive. Thus, following the second conception of property, if the exercise of formal legal rights is sufficient to create expression, then license plates are almost certainly government speech. This conclusion is only strengthened by the fact that the other potential speakers have no such formal right to exclude: as a pure matter of formal property, individual drivers have no right to remove their plates.³⁰³

Finally, the third conception of property—as a social institution—may be able to cast light on the expressiveness of specialty plates. As explained in Part II.C, that conception of property lends itself to a reasonable observer test, which in turn takes into account the social understandings of exclusionary rights. So, for example, it stands to reason that “[m]any observers will attribute the presence of the Confederate flag—on state-issued, state-owned identification plates embossed with the name of ‘VIRGINIA’—to the Commonwealth’s endorsement of the symbol and some portion of the cultural associations it carries.”³⁰⁴ This conclusion flows directly from the state’s formal exclusionary rights. As the Seventh Circuit put it: “The State can reasonably be viewed as having approved the message; it is commonly understood that specialty license plates require State authorization.”³⁰⁵

301. See *Choose Life*, 547 F.3d at 866.

302. See Stephanie S. Bell, Note, *The First Amendment and Specialty License Plates: The “Choose Life” Controversy*, 73 MO. L. REV. 1279, 1281-84 (2008) (describing administrative, legislative, and hybrid models).

303. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

304. *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1291 (2010) [hereinafter *Developments in the Law*] (citing *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 252 (4th Cir. 2002) (Gregory, J., dissenting from denial of rehearing en banc) (“[T]he display of the Confederate Flag will be attributed to Virginia.”)).

305. *Choose Life*, 547 F.3d at 864; see also *Developments in the Law*, *supra* note 304, at 1298 (“For a number of reasons, observers reasonably assume that states approve and endorse the messages on their license plates.”).

Despite the arguable “expressiveness” of specialty plates, current Supreme Court doctrine forecloses a finding of pure government speech, because in *Wooley v. Maynard* the Court held that “the State may [not] constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”³⁰⁶ Among other things, the Court’s decision is notable because it found that private individuals would be compelled to speak despite the fact that they had no formal right to exclude the state plates.³⁰⁷ In other words, even though displaying the state motto on a license plate is essentially nonvolitional (and presumably recognized as such), it still amounted to compelled speech.³⁰⁸ In his dissent, Justice Rehnquist argued that the license plates did not force private expression because “membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no requirement that they endorse the motto or profess to adopt it as a matter of belief.”³⁰⁹

The *Wooley* majority’s analysis thus suggests that, despite the government’s formal rights over them, license plates are also expressive for the private individuals who design, select, or display them on their cars. The appellate courts that have considered the question have reached this conclusion as well. In *Planned Parenthood of South Carolina, Inc. v. Rose*, the Fourth Circuit concluded that a reasonable observer seeing a “pro-life” license plate would conclude that the owner of the vehicle is the actual speaker and holds the pro-life viewpoint.³¹⁰ Similarly, in *Roach v. Stouffer*, the Eighth Circuit held that “a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate.”³¹¹

The unavoidable implication is that the expression emanating from specialty license plates is *both* governmental and private.³¹²

306. *Wooley*, 430 U.S. at 713.

307. *Id.* at 715.

308. *Id.*

309. *Id.* at 721-22 (Rehnquist, J., dissenting) (quoting *State v. Hoskin*, 295 A.2d 454, 457 (N.H. 1972)).

310. 361 F.3d 786, 794 (4th Cir. 2004).

311. 560 F.3d 860, 867 (8th Cir. 2009).

312. See Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1378-81 (2001); Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 88 DENV. U.

This makes sense for many reasons, not least of which is the fact that a reasonable observer would probably conclude that both the owner of the vehicle displaying the plate and the state government that authorized it support the plate's message. Although government speech doctrine does not yet recognize such "hybrid" speech, scholars and judges have increasingly expressed their support for it,³¹³ especially in the context of specialty license plates.³¹⁴ The analysis here suggests that they are right, not only as a matter of logic, but also as a matter of property.

CONCLUSION

Much First Amendment theory and doctrine is built around the premise that property and expression are related, and yet courts and scholars have few answers—in fact, have asked few broad questions—regarding the nature of that relationship. Making sense of it requires a far more nuanced understanding of both concepts. Expression is more than speech, and "property" can be a place, thing, legal entitlement, or even a social norm or understanding. Disaggregating the notion of property helps make sense of those not-uncommon cases in which concepts of property diverge—for example, when a private party has formal legal title to a piece of property, but reasonable observers believe it to be owned by the government. It also illuminates the various ways in which property not only enables expression, but *is* itself expressive. In other words, the relationship between property and expression is not, as is commonly supposed, merely an instrumental one.

But applying these principles to government property threatens the whole edifice of free speech doctrine, because government speech is exempt from First Amendment scrutiny. If the government's use of property rights is "expressive," then *any* exclusion from the public forum is government speech beyond the reach of the First Amend-

L. REV. 899, 917-19 (2010).

313. See generally Corbin, *supra* note 52.

314. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 247 (4th Cir. 2002) (Luttig, J., concurring in denial of rehearing en banc) ("I have stated herein that the speech at issue is hybrid in nature."); *id.* at 252 (Gregory, J., dissenting from denial of rehearing en banc) (lamenting the failure to recognize the "blurry and sometimes overlapping line between private and government speech"); see also *Developments in the Law*, *supra* note 304, at 1298-1302.

ment. This simply cannot be. And although the connection between property and expression causes this mess, it might also provide a way to clean it up: the line between government speech and the public forum can be drawn not by abandoning the concept of property, but by giving up on a formalistic account of what property means.

Making sense of the relationship between government property and government expression requires the untangling of a knot that seems to worsen the more one picks at it. Many of the propositions discussed here—that property enables expression, for example, or that exclusions can be expressive—seem simple enough standing alone. But it is much easier to consider those threads separately than to make sense of their tangled relationship, much less weave them into a new tapestry. What is a court to do when formal property ownership diverges from perceived property ownership? Doctrinally, how are courts and scholars to make sense of the relationship between government speech and public forum analysis? This Article represents an initial effort to frame these questions properly and to suggest preliminary and partial answers.