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Transforming Property Into Speech

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One of the most important relationships in constitutional law is that between two concepts at the heart of the American legal system: property and speech. Yet despite increased scholarly attention, the relationship remains largely mysterious. Does property simply enable speech acts, or can it have its own expressive content? And what kind of "property" is important to speech—places and things, formal legal entitlements, or social norms? This short Article and the longer piece on which it is based attempt to explain why those questions matter, and to offer some tentative answers.

The close connection between property and speech not only underlies much First Amendment doctrine, but has the potential to transform it, not least by breaking down the line between forum analysis and government speech. The former holds that the government's right as a property owner to exclude unwanted speakers is tightly limited. The latter, on the other hand, holds that when the government "speaks"—including, as in *Pleasant Grove v. City of Summum*, through exercise of the right to exclude[1]—it is exempt from First Amendment scrutiny. In other words, government speech doctrine can reinvigorate the government's power to exclude unwanted private speakers by, in effect, transforming government property into government speech and thereby placing it beyond the reach of the First Amendment.

This conclusion cannot be right, but showing why it is wrong and how it could be improved is no easy matter. The government speech-government property cases, I argue, have given the right answer to the wrong question. The issue is not whether the government has been expressive by exercising its right to exclude, but rather whether the government has that right in the first place. How should we begin to answer *that* question? A partial answer may lie in the simple recognition that, at least when it comes to speech, property is not simply a matter of legal entitlements.

I. Speech and Three Types of Property

One of the many reasons that the relationship between property and speech has proven so difficult to define is because property itself is a hard concept to pin down. It has at least three meanings: a place or thing, a legal entitlement, and a social norm. Those three conceptions of property lead to three different views of the property-speech interface, though in each of them property can both enable speech acts and have its own expressive qualities.

First, property can be understood as a place or thing: a house, a sign, a newspaper, a park, or a monument, for example. This concept is undoubtedly what most people—non-lawyers anyway—mean when they refer to property.[2] And certainly such property is essential to free speech, which is why restrictions on the ownership or use of physical property—whether Speaker's Corner, a loudspeaker, or a printing press—are often recognized as restrictions on speech. People communicate on and through places and things. Therefore, in the simplest sense, it is clearly correct to say that property is related to speech.

But of course lawyers use the word "property" to refer to something different: not places or things, but the "bundle of rights" that includes the power to exclude, transfer, and so on. [3] Even at this level of abstraction, however, property is still very much a part of a system of

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free expression. The right to exclude, to take only the most important stick in the bundle of rights, is essential to many forms of speech. Associations, for example, send messages of approval and disapproval by excluding and including members. The Boy Scouts' exclusion of an openly gay scoutmaster in *Boy Scouts of America v. Dale* comes to mind. [4] Similarly, when a person chooses to include campaign posters on his front lawn, he sends a message of approval by declining to exclude them. Thus it also seems true that this second conception of property—as a form of legal entitlement—is closely intertwined with speech.

There is at least one more important approach to thinking about property; one that focuses less on formal, state-backed entitlements and instead on "informal" entitlements like social norms. This vision of property as a social relationship or custom is perhaps less recognized than the first two conceptions, but it is nonetheless a powerful strand of property theory and doctrine. As Robert Ellickson and others have shown, formal legal entitlements are not always as practically important as the socially recognized norms and customs governing property's use. [5] Again, *Dale* is potentially illustrative. In that case, a New Jersey antidiscrimination statute forbade the Boy Scouts from excluding homosexuals. In effect, the Scouts had been stripped of their formal legal right to exclude. And yet the Scouts argued that being forced to include unwanted members would force them to project a message they did not support. [6] It follows that the unwanted communication must derive from something other than formal legal entitlements.

Separating these three definitions of property is useful for many reasons. First, it demonstrates that "property" is itself a contested and complicated idea, and that any efforts to make sense of the property-speech relationship must come to grips with property's many faces. Second, the distinct definitions show that the various meanings of property will not necessarily point in the same direction. At times, the social understanding of property will not match up with underlying legal entitlements. Imagine, for example, that the government grants a private party the formal rights to a small plot of land in the midst of a vast public park. On that small plot, the private party constructs and maintains a piece of religious iconography. A casual observer, unaware of the precise metes and bounds of the government's legal entitlements, will almost certainly perceive the cross to be standing on government land, and will therefore perceive a potential Establishment Clause violation, even though the cross is, in fact, privately owned. [7]

These complications are to some degree inevitable, and it is not the purpose of this Article to resolve them fully. To the contrary, the fact that different conceptions of property can enable different types of speech tends to confirm the central argument that property, of whatever kind, plays an essential role in speech.

II. The Thorny Problem of Government Property and Government Speech

So far so good. It seems intuitively correct that property rights, however conceived, are closely related to speech, and that the exercise of those rights should at times be considered an expressive act within the protection of the First Amendment. But the implications of that simple-sounding conclusion become complicated when the property owner at issue is the government. For if exclusions are expressive, then excluding unwanted speakers from public property may itself be a form of "government speech" exempt from First Amendment scrutiny. And this characterization, in turn, would suggest that the public forum itself might disappear in a puff of government speech.

The evolution of forum doctrine is essentially a century-long erosion of the government's right to exclude unwanted speakers from its land. Accordingly, the government has no power to exclude private speakers simply because it disagrees with their viewpoints. But the Court's newly minted government speech doctrine, whose reach and import remain unclear, exempts the government's own speech from First Amendment coverage. [8] When the government is speaking, the rule goes, it can say what it wants. That doctrine, combined with the property-speech relationship discussed above, creates a dangerous and potentially enormous loophole to the usual public forum rules. For if by excluding the unwanted speaker the government is "speaking," then its actions are exempt from the First Amendment, rather than bound by it.

Consider the archetypical First Amendment scenario of a person wishing to speak in a public park. The government owns the land, and thus, constitutional considerations aside, it has a presumptive right to exclude people and things, just like any property owner. The right to exclude, after all, is often called the *sine qua non* of property. Under basic forum analysis, however, nothing could be clearer than the fact that the government has no right to exclude the speaker based simply on a disagreement with his message.

But what if the government were to characterize its exclusion of the unwanted speaker as the government's own speech? Part I of this Article, after all, has argued that the exercise of property rights can itself be an expressive act. If I eject protestors from my land because I disagree with their message (or allow them to use it because I agree), then surely I have engaged in expressive conduct that would fall within the First Amendment's bounds. Why should this action be any less expressive when the government is the one doing the excluding? And if the government's exercise of its right to exclude is expressive and therefore exempt from First Amendment scrutiny, of what use is the public forum?

The Supreme Court's recent decisions in *Summum* and *Buono* frame the issues nicely. In the former case, 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.[9] Pleasant Grove City refused to permit the Summum monument, thus exercising its right to exclude. The Summum sued, arguing that the exclusion represented impermissible viewpoint discrimination in a public forum. Pleasant Grove City responded that the exclusion was in fact government speech, and therefore exempt from First Amendment scrutiny. The Court sided with the City, emphasizing that the City had "taken ownership of most of the monuments in the Park," 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 City was also engaging in expression.

In *Buono*, the Court faced a scenario in which the formal and social understandings of property pointed in different directions. In that case, a Latin cross had been privately constructed and maintained for almost seventy years in the midst of a vast public park. [11] 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. However complete and effective this transfer would be as a matter of formal property law in accordance with the second conception of property described above, it surely would not be sufficient to totally change public perception of who owned and approved the cross under the third conception. In a fractured set of opinions, the Supreme Court remanded the case to the district court for further consideration of the context and intent of the Congressional enactment. The Court's decision to leave 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.

Summum and *Buono* demonstrate the complications of the government property-government speech interface. The line separating government speech and the public forum is exceptionally thin, but it divides vastly different worlds of doctrine. In one, viewpoint-based exclusions are strictly forbidden; in the other, they are entirely exempt from scrutiny.

III. Saving the Public Forum from Government Speech

Part II of this short Article explores the Pandora's Box that Part I opens—namely, that the connection between property and speech, innocuous as it may be in the context of private property, threatens the very existence of the public forum in the context of government property. This Part attempts to close the box, at least partially, by suggesting ways to save the public forum from being swallowed by "expressive" uses of government property.

One important and potentially useful starting point is the fact that not all exercises of property rights are necessarily expressive, just as not all sounds are speech. That is, simply because exclusion *can* express a message does not mean that it always does. Consider, for example, a park that is not large enough to permit all would-be speakers to speak at once. If the park's owner—the government, let's say—sets a rule permitting the first twenty speakers to talk for half an hour each, then the twenty-first speaker to arrive will be excluded, but not for any reason that we would recognize as expressive. The same could be said of possible allocation rules for any scarce resource: parade permits, bandwidth access, broadcast rights, and so on. The basic laws of physics may require the forum's owner to exclude some private parties in order to protect the forum from being totally overrun, but do not require the owner to "say" anything in doing so.

This concern over scarce allocation of resources, in fact, seems to underlie the result in *Summum*. The Court was troubled by the fact that Pleasant Grove City's park could not support an infinite number of monuments, and the prospect of a private First Amendment

right to place monuments in the park seemed to threaten the very existence of the forum. The Court recognized 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." [12] But, the Court found, treating monument construction in the park as a public forum would lead to clutter that would effectively limit the ability of private speakers to express themselves. 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." [13]

This may well be so. The Court has recognized, for example, that "two parades cannot march on the same street simultaneously, and government may allow only one." [14] But recognizing that the government must be able to manage the forum is not the same as concluding that the government speaks by doing so. It is easy to imagine rules that would prevent overuse of a public forum without necessarily communicating the government's own view. A first-come first-served rule, for example, would prevent a tragedy of the speech commons without itself *being* speech. Indeed, such forum-protecting rules would presumably withstand scrutiny under the First Amendment's usual tests for time, place, and manner restrictions.[15] This suggests that the government can enact speech-making rules that would pass constitutional muster without being exempted from the First Amendment entirely.

The question therefore remains, albeit in narrowed form: Even if not all exclusions are expressive, how are we to separate those that are from those that are not? There is no easy answer, any more, or less, than there is an easy way to identify public forums. Certainly the answer cannot lie entirely within the formal view of property as a legal entitlement. Were that the case, then the government could transform public forums into government speech at will, since the government holds formal legal entitlements over nearly all public forums.

A more promising place to start is with the idea of property as it is socially recognized. Consider, for example, a test that would ask whether the government intended to convey a particularized message and whether a reasonable observer would believe it to be doing so. Such a test would shift attention away from the formal allocation of property rights (the second conception from Part I) and toward the way they are socially recognized (the third conception). As noted above, the Court in *Buono* seemed to approve just such a test, looking past the fact that the disputed cross stood on private land, and thus implicitly taking into account the fact that a reasonable viewer might well attribute its ownership to the government.

This approach may sound attractive in theory but impossible in practice. After all, can we really expect courts to view property through the lens of social recognition rather than the comparatively bright lines offered by the legal entitlements approach? In practice, it turns out, courts have often been willing to consider social understandings of property, rather than simply title ownership. In *Evans v. Newton* [16] and *Evans v. Abney*, [17] for example, the Court found that Equal Protection was implicated by the administration of a whites-only park even though the park was, as a formal matter, administered by private trustees. In other words, the Court recognized both that exclusion of blacks amounted to expression of white supremacy *and* that the "momentum [the park] acquired as a public facility is certainly not dissipated ipso facto by the appointment of 'private' trustees." [18] Formal ownership was therefore only part of the story.

If government property is itself expressive, then the very search for a line between public forum and government speech that has so bedeviled courts and scholars is itself somewhat misguided. Instead, what is needed is a way to separate expressive exclusions from those that are not or should not be recognized as such. This short Article has attempted to take a step in that direction.

Conclusion

The relationship between property and expression was complicated enough before government speech doctrine came along. Courts and scholars have sometimes concluded that expression relies on physical things and places to be effective; or that proper allocation of intellectual property rights can incentivize creative expression; or, as some philosophers and sociologists argue, that places themselves convey meaning. But making sense of the property-expression interface requires an even more nuanced understanding of both concepts. Expression is more than just speech, and "property" is far more multifaceted than First Amendment scholars have recognized. It can be a place or thing, a legal entitlement, or even a social norm or understanding. Disaggregating the notion of property in this threefold way illuminates the various ways in which the relationship

between property and expression is not simply a simplistic or instrumental one.

But even as it sheds light on the mechanisms of free speech, this account threatens the very doctrine that protects it. For if property is expressive, then government property might effectively become government speech, which is in turn exempt from First Amendment scrutiny. That simple move of characterization therefore threatens to dissolve the public forum, which has heretofore been thought of as central to free expression.

There is no easy way to close this Pandora's Box. The exercise of property rights is undoubtedly expressive, and—as a formal matter, anyway—the government has property rights over many public forums. But the answer to the conundrum may lie in looking past formal legal entitlements, and instead embracing a thicker, richer view of property as a social institution.

Acknowledgements

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1. 129 S. Ct. 1125 (2009).
2. BLACK'S LAW DICTIONARY 1335-36 (9th ed. 2009) (giving second definition of "property" as "any external thing over which the rights of possession, use, and enjoyment are exercised").
3. *Id.* at 1335 (giving first definition of "property" as "the 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).
4. 530 U.S. 640 (2000).
5. *See* ROBERT E. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).
6. *Dale*, 530 U.S. 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.").
7. These are roughly the facts of *Salazar v. Buono*, 130 S. Ct. 1803 (2010).
8. *See* Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrine*, 117 HARV. L. REV. 2411 (2004).
9. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129-30 (2009).
10. *Id.* at 1134.
11. *Buono*, 130 S. Ct. at 1811-12.
12. *Summum*, 129 S. Ct. at 1137.
13. *Id.* at 1138.
14. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).
15. *See generally* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2009).
16. 382 U.S. 296 (1966).
17. 396 U.S. 435 (1970).
18. *Evans*, 382 U.S. at 301.

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