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Free Speech, Property, and the Burger Court: Old Values, New Balances

Joel Gora

Norman Dorsen

NORMAN DORSEN

JOEL GORA

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> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.
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> *Marsh v. Alabama* (1946)[1]

> It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.
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> *Lloyd Corp. v. Tanner* (1972)[2]

I. INTRODUCTION

More than a decade has passed since Lewis F. Powell and William H. Rehnquist were appointed to the Supreme Court by

Norman Dorsen is Stokes Professor of Law, New York University Law School; President, American Civil Liberties Union (ACLU). Joel Gora is Professor of Law, Brooklyn Law School; General Counsel, New York Civil Liberties Union. The views expressed here are personal and not necessarily those of the organizations with which the authors are affiliated. This article is based on Professor Dorsen's 1979 Cooley Lecture at the University of Michigan Law School.

[1] 326 U.S. 501, 509 (1946).

[2] 407 U.S. 551, 567 (1972).

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Richard Nixon, bringing to full complement the judicial institution now known as the "Burger Court." Scholars and commentators have begun to assess the Court's work in a systematic way.[3] A few years ago we had occasion to begin our own analysis, focusing on the Court's seemingly disharmonious free speech rulings. In some instances, the Burger Court's free speech decisions seemed to contract earlier rulings of the Warren Court, in others to expand on those decisions. In some cases they dramatically chart new ground.[4]

The Burger Court's commercial speech rulings have now established that substantial First Amendment protection is accorded to speech about goods and services, no matter how commonplace a product may be.[5] A free speech claim has been given heightened protection where it was augmented by the speaker's right to use and control his own items of property.[6] Conversely, where a free speech claim, especially a claimed right to use a particular forum, conflicted with the interests of the private or governmental owner of the forum, the Court has frequently rejected the free speech claim.[7] Further, the Court has upheld restrictions on use of property for sexually oriented speech, in large part because of the impact on surrounding property owners.[8] Finally, the Court has con-

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[3] See generally Symposium, *The Burger Court: Reflections on the First Decade*, 43 LAW & CONTEMP. PROB. (1980); Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969–1979)*, 21 SANTA CLARA L. REV. 891 (1981). See also the forthcoming selection of essays, edited by Professor Vince Blasi, entitled THE BURGER COURT: CONTINUITY, REACTION, OR DRIFT? (1983). In addition to the four Justices appointed by Richard Nixon, there have been two more recent changes in personnel: Justice Stevens replaced Justice Douglas, and Justice O'Connor replaced Justice Stewart. Three members of the Warren Court—Justices Brennan, White, and Marshall—remain. Although we use the name "Burger Court" to describe the present Court, we are aware, of course, that it is not a monolithic body and that every member has differed with some of the Court's free speech decisions.

[4] For a general discussion of the Burger Court's work in the First Amendment area, see Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422 (1980); Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1 (1980).

[5] See, *e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[6] This has been particularly true, for example, in certain cases involving claims of misuse of the American flag for speech purposes. See, *e.g.*, Spence v. Washington, 418 U.S. 405 (1974).

[7] See, *e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Greer v. Spock, 424 U.S. 828 (1976); Hudgens v. NLRB, 424 U.S. 507 (1976); CBS v. Democratic National Committee, 412 U.S. 94 (1973); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); FCC v. WNCN Listeners Guild, 101 S. Ct. 1266 (1981). But *cf.* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); CBS, Inc. v. FCC, 101 S. Ct. 2813 (1981).

[8] See, *e.g.*, Young v. American Mini-Theaters, 427 U.S. 50 (1976). But see Schad v. Mt. Ephraim, 101 S. Ct. 2176 (1981).

sistently held that speech may not be restricted in order to redress inequalities in the competitive "marketplace of ideas" resulting from disparities in wealth.[9]

These cases suggested a new dimension to free speech rulings which can be summarized by the word "property."[10] With some exceptions, whether free speech claims receive protection in the Burger Court turns on the presence of an underlying "proprietary" interest, private or governmental. Free speech values are protected when they coincide with or are augmented by property interests. Conversely, free expression has received diminished protection when First Amendment claims clash with property interests. To borrow Professor Kalven's useful phrase, when free speech claims are weighed in the balance, property interests determine on which side of the scales "the thumb of the Court" will be placed.[11]

In the 1981 Term the Court's docket contained two pertinent free speech cases. In *Princeton University v. Schmid*,[12] Schmid had been convicted of criminal trespass for distributing political leaflets on a privately owned campus without obtaining the prior approval required by University regulations. The New Jersey Supreme Court overturned the conviction.[13] But the New Jersey court declined to decide Schmid's claimed First Amendment right of access.[14] Instead, encouraged by the *PruneYard* case,[15] the state court turned to the New Jersey constitution to determine whether its free

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[9] See, *e.g.*, Miami Herald Pub. Co. v. Tornillo, note 7 *supra;* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976); First National Bank v. Bellotti, 435 U.S. 765 (1978). *Cf.* Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980).

[10] The property element in free speech adjudication is not new. As early as 1919, Justice Holmes employed a commercial metaphor in his first dissenting opinion in a free speech case: "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919). But to use a marketplace concept as a formula for protecting speech is very different from the "new dimension" for property in recent First Amendment cases. Nor has Holmes's language of commerce escaped criticism. See TRIBE, AMERICAN CONSTITUTIONAL LAW 576–77 (1978); Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A.L. REV. 964, 966 (1978).

[11] See Kalven, *The Concept of the Public Forum*, 1965 SUPREME COURT REVIEW 1, 28 (1965).

[12] 102 S. Ct. 867 (1982).

[13] State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980).

[14] 84 N.J. at 522, 423 A.2d at 624.

[15] Robins v. PruneYard Shopping Center, 23 Cal.3d 899, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74 (1980).

speech clause protected the defendant's activity.[16] The court found that such free speech rights were available even upon private property, where the property is in some fashion devoted to a public use. Applying the test to Princeton University, the court concluded that the defendant's activity was consonant with the purposes and institutional integrity of a university and that Princeton's regulations contained no reasonable standards to justify limiting that activity. Princeton vigorously contended that the ruling deprived it of First and Fourteenth Amendment rights of speech and property and appealed the decision to the Supreme Court. The Court dismissed the appeal for lack of a justiciable controversy.[17]

The second case was *Loretto v. Teleprompter Manhattan CATV Corp.*[18] A New York statute required landlords to permit cable television companies to install wires on the landlord's property so that tenants could subscribe to the cable service. The statute was based on the State's speech-related interest in "rapid development of and maximum penetration by a means of communication which has important educational and community aspects."[19] A landlord filed suit, maintaining that the statute authorized a physical trespass on her property and thereby constituted a "taking" without compensation. The New York Court of Appeals, six to one, rejected her claims,[20] but the Supreme Court reversed. The Court held that the trespass sanctioned by the New York statute constituted a traditional taking of property interests which was not justified by the State's concerns with facilitating tenant access to a new medium of communication.

The *Loretto* case provides evidence to support the hypothesis that property concepts are of critical importance in the current Supreme

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[16] State v. Schmid, 84 N.J. at 563–69, 423 A.2d at 630–33. On the increasingly common resort to state constitutional provisions to protect individual liberty, see Dorsen, *State Constitutional Law: An Introductory Survey*, 15 CONN. L. REV. 99 (1982).

[17] The Court's *per curiam* ruling noted that the State of New Jersey, whose prosecution had been terminated by the state Supreme Court's decision, had not filed an appeal, and there appeared to be no contest between the State and Schmid. The claims of Princeton University, which had intervened in the state appellate proceedings to protect its interests, were found moot because the University had, in the interim, amended its regulations whose violation had prompted the original trespass conviction. See 102 S. Ct. 867 (1982). See discussion in text at notes 147 and 148 *infra*.

[18] 102 S. Ct. 3164 (1982).

[19] *Ibid.*

[20] 53 N.Y.2d 124 (1981).

Court's disposition of free speech interests. This article will test this hypothesis.

II. THE BURGER COURT AND PROPERTY RIGHTS

"[T]he concept of property never has been, is not, and never can be of definite content."[21] Traditionally, property rights were synonymous with ownership and control of corporeal things such as land and chattels, and certain intangibles such as bills, notes, stocks, and bonds.[22] More recently, the concept has expanded to encompass claimed entitlements to governmental benefits, status, and other economic rights—the "new property":[23]

> Wealth or value is created by culture and by society; it is culture that makes a diamond valuable and a pebble worthless. Property, on the other hand, is the creation of law. A man who has property has certain legal rights with respect to an item of wealth; property represents a relationship between wealth and its "owner."

American law has been torn by ambivalence between viewing property as something over which individuals have "sole and despotic dominion"[24] or as something less than that as defined by community interests. Judge James L. Oakes has described this dualism as follows:[25]

> [O]ne view of "property" emphasizes that we are independent individuals; the other emphasizes that we are parts of a social whole. Obviously, under the former, or "dominion," view of property, the legal system will tolerate a lesser degree of interference from the state by way of taxation or regulation than would be the case under the latter, or "social" view of property. Most judges, including those on the Supreme Court, . . . commence analysis with both views as part of their value apparatus.

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[21] Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 696 (1938).

[22] *Id.* at 691–92; see Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 453 (1977).

[23] Reich, *The New Property*, 73 YALE L.J. 733 (1964); see Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH L. REV. 583, 587 (1981).

[24] Blackstone spoke of private property as the "sole and despotic dominion . . . over the external things of the world, in total exclusion of the right of any other individual in the universe." Quoted in Powell, *The Relationship between Property Rights and Civil Rights*, 15 HAST. L.J. 135, 139 (1963).

[25] Oakes, note 23 *supra*, at 587.

Although the Burger Court may have included both views of property as part of its "value apparatus," it has pretty firmly resolved the ambivalence by protecting individual "dominion" rather than communal interests. It has done this by extolling economic autonomy and entrepreneurial freedom at the expense of public regulation and movement toward equality. Several lines of decision are instructive.

The first traces to the tentative judicial stirrings during the 1960s that poverty, or lack of wealth, could not constitutionally deprive Americans of certain benefits enjoyed by others.[26] Starting in 1970, the Burger Court rejected the imposition of wealth redistribution as constitutionally compelled in the areas of minimum family assistance, housing, and expenditures on public education.[27] More recently, it has upheld wealth-based obstacles to the exercise of a series of rights that the Court had previously determined to be "fundamental"—access to the courts,[28] voting rights,[29] and abortion.[30] In these cases the Court has made plain that, while the Constitution "does not enact Mr. Herbert Spencer's Social Statics,"[31] neither does it embody John Rawls's A Theory of Justice.

Second, the Burger Court has cramped the development of the Warren Court's constitutional protection for the "new property."[32] The Court has not denied the existence of the new property. It has understood that property interests may include entitlements arising from reasonable expectations and reliances generated by statutory and regulatory schemes.[33] But it has proved stingy in the protection

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[26] See Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Douglas v. California, 372 U.S. 353 (1963); Boddie v. Connecticut, 401 U.S. 371 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

[27] See, *e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); James v. Valtierra, 402 U.S. 137 (1971); San Antonio Indep. School District v. Rodriguez, 411 U.S. 1 (1973).

[28] See United States v. Kras, 409 U.S. 434 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973); Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981). But see Little v. Streater, 452 U.S. 1 (1981). On the criminal side, as well, the Burger Court has tolerated disparities based on wealth in access to legal assistance. See Ross v. Moffitt, 417 U.S. 600 (1974); Fuller v. Oregon, 417 U.S. 40, 53 (1974).

[29] See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 738 (1973) (Douglas, J., dissenting). See also Ball v. James, 451 U.S. 355 (1981).

[30] See Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[31] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[32] See Goldberg v. Kelly, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971).

[33] See Board of Regents v. Roth, 408 U.S. 564, 576–77 (1972); Goss v. Lopez, 419 U.S. 565 (1975). In Lynch v. Household Finance, 405 U.S. 538, 552 (1972), the Court spoke

of such property interests by imposing two critical limitations on them. First, what constitutes an entitlement would be defined by federal or state law:[34]

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Second, the same source of law that established the "entitlement" could also restrict it, either expressly, as by limiting a faculty appointment to a one-year term, or, indirectly, by circumscribing the procedures available to protect that interest.[35]

The Burger Court has not shown the same parsimonious protection of more traditional forms of property and entrepreneurial interests.[36] Indeed, the Court has dusted off a long disused constitutional provision designed to thwart governmental interference with economic rights—the constitutional prohibition against any state law "impairing the Obligation of Contracts." In 1977, after more than forty years of desuetude, the Clause was invoked to invalidate the statutory repeal of a restriction on the ability of the Port of New York Authority to use revenues and reserves to subsidize mass transit contrary to the terms of the bond indenture.[37] In dissent, Justice Brennan charged that such use of the Contracts Clause created a "constitutional safe haven for property rights embodied in a contract," and "substantially distorts modern constitutional juris-

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broadly of the important relationship between liberty and rights in property—even "new" property: "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."

[34] *Roth*, 408 U.S. at 577; see Perry v. Sinderman, 408 U.S. 593 (1972).

[35] See Bishop v. Wood, 426 U.S. 341 (1976). But see Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Van Alstyne, *Cracks in "The New Property,"* 62 CORNELL L. REV. 445 (1977); Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUPREME COURT REVIEW 261.

[36] See Oakes, note 23 *supra;* Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981).

[37] United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

prudence governing regulation of private economic interests."[38] The next year, the Contract Clause was used to invalidate a state statute that imposed financial obligations, beyond the terms of labor contracts, on private companies that terminated existing pension plans.[39] Three dissenters insisted that the decision threatened "to undermine the jurisprudence of property rights":[40] "Decisions over the past 50 years have developed a coherent, unified interpretation of all the Constitutional provisions that may protect economic expectations and these decisions have recognized a broad latitude in States to effect even severe interference with existing economic values when reasonably necessary to promote the general welfare."

Finally, the Court has wholly removed many economic activities from the sphere of governmental or "state action" and thereby from potential constitutional restraints. As Professor Nowak has observed:[41]

> The issue in such [state action] cases is whether the actions of nominally private parties should be subject to constitutional restraints. . . . The libertarian Burger Court has reduced government regulation and limitation of property rights by leaving broadcasters free to refuse editorial advertising, private clubs free to discriminate by race, private utilities free to turn off a customer's power, shopping center owners free to exclude picketers and speakers from their property, and creditors free to engage in self-help.

In sum, the Burger Court has restricted the constitutional scope of

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[38] *Id.* at 33.

[39] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

[40] *Id.* at 260. Outside the Contracts Clause cases, see also Kaiser Aetna v. United States, 444 U.S. 164 (1979); Loretto v. Teleprompter, 102 S. Ct. 3164 (1982); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978); Philadelphia v. New Jersey, 437 U.S. 617 (1978); Hughes v. Oklahoma, 441 U.S. 322 (1979); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981). Where the state in its "proprietary" capacity has entered the market, the Court has allowed it, as buyer or seller, to discriminate against competing business interests. See, *e.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves v. Stake, 447 U.S. 429 (1980); see generally Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980). The Court has nevertheless stopped well short of a full-scale return to the *Lochner* era and the use of substantive due process or equal protection to protect property interests. See, *e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

[41] Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS L.Q. 263, 288 (1980).

government regulation of private economic activity, thereby expanding the "dominion" of owners over their property. Or as depicted by Professor Van Alstyne, the Court has expressed:[42]

> . . . a different, tighter, more conservative view of liberty: liberty as security of private property; liberty as freedom of entrepreneurial skill; liberty from the impositions of government and of third parties from disposing of "one's own." Liberty, in brief, more in the mode of John Locke and of Adam Smith and somewhat less in the mode of John Mill (or of John Rawls).

It should not be surprising, therefore, that the Court's free speech cases have revealed a similar sensitivity to private economic interests.

III. THE BURGER COURT AND FREE SPEECH

What did the free speech landscape look like in early 1972, when Justices Powell and Rehnquist joined the Court? Even a casual observer might have been struck by a remarkable series of free speech decisions rendered toward the end of the Warren Court era. Two decisions in June 1971 seemed particularly noteworthy. The first was a characteristically careful analysis by Justice Harlan holding that California could not punish as disorderly conduct the public display of the words "Fuck the Draft" in a Los Angeles courthouse. Justice Harlan said:[43]

> For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

In the other 1971 decision, the Pentagon Papers case, the Supreme Court defended the First Amendment's basic purposes against a direct attack. In his concurring opinion Justice Black said:[44]

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[42] Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROB. 66, 70 (1980). See also Nowak, note 41 *supra*.

[43] Cohen v. California, 403 U.S. 15, 25 (1971).

[44] New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (concurring opinion).

> Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

These two cases capped a number of speech-protective rulings that led free speech partisans to unaccustomed satisfaction. The Court had adopted what appeared to be a rigorous standard for testing restraints on political advocacy and in the process overruled one of the most scorned decisions of an earlier era.[45] It took steps to cope with the "intractable" obscenity problem under normal First Amendment criteria.[46] It accorded the media broad protection against defamation suits arising out of news stories on "matters of public or general interest."[47]

But trouble brewed beneath the surface even then. The precise condition of the First Amendment, if closely inspected, was more uneven and less happy than appeared. First Amendment doctrine was, in the view of one renowned scholar, in "chaos." At the time of the notable free speech victories described above, Professor Emerson decried the lack of a coherent First Amendment policy:[48]

> At various times the Court has employed the bad tendency test, the clear and present danger test, an incitement test, and different forms of the ad hoc balancing test. Sometimes it has not clearly enunciated the theory upon which it proceeds. Frequently it has avoided decision on basic First Amendment issues by invoking doctrines of vagueness, overbreadth, or the use of less drastic alternatives. . . . The Supreme Court has also utilized other doctrines, such as the preferred position of the First Amendment and prior restraint. Recently it has begun to address itself to problems of "symbolic speech" and the place in which First Amendment activities can be carried on. But it has totally failed to settle on any coherent approach.

The absence of a "coherent approach," regrettable in itself, also seems pertinent to the use of property concepts in the Court's recent free speech cases, because the more the Court relies on ad

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[45] Brandenburg v. Ohio, 395 U.S. 444 (1969), *overruling* Whitney v. California, 274 U.S. 357 (1927).

[46] Stanley v. Georgia, 394 U.S. 557 (1969).

[47] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

[48] EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15–16 (1970).

hoc First Amendment theories, the more influential can be "unrelated" grounds of decision. Put another way, when the Court persistently balances free speech interests, there is a doctrinal vacuum, and the property "thumb" on the scale can be dispositive.[49]

A. PROPERTY AND SPEECH UNITED

1. *Speech linked to property.* We start with the deceptively simple flag cases. The principal case involved a young man convicted under a statute prohibiting improper use of the American flag for taping a peace symbol on a flag to protest national policies.[50] Although a number of factors were relevant to the decision—absence of a breach of the peace, the impermissibility of punishing the appellant merely because others found his message offensive—the Court treated property concepts as central in overturning the conviction:[51]

> A number of factors are important in the instant case. First, this was a privately owned flag. In a technical property sense it was not the property of any government. . . . Second, appellant displayed his flag on private property.

As the dissenters saw it, private ownership of the flag could not be

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[49] Scholars have suggested formulations for protecting free speech values from dilution. Professor Tribe's elaborate "two track" theoretical structure attempts to identify all governmental restrictions aimed at the "communicative impact" of expressive activity and treats such restrictions as invalid. TRIBE, AMERICAN CONSTITUTIONAL LAW 580–601 (1978). Professor Baker's formulation protects all speech "that manifests or contributes to the speaker's values or visions—speech which furthers the two key First Amendment values of self-fulfillment and participation in change—as long as the speech does not involve violence or coercion of another." Baker, *Scope of First Amendment Freedom of Speech*, 25 U.C.L.A.L. REV. 964, 1001–02 (1978). Others have suggested a "revitalized" clear-and-present-danger test, Shaman, *Revitalizing the Clear-and-Present-Danger Test: Toward a Principled Interpretation of the First Amendment*, 22 VILL. L. REV. 60 (1976); rules forbidding controls based on content, Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech*, 35 MD. L. REV. 555 (1976); the "presumptive unconstitutionality of content discrimination," Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247, 255 (1976); or a "heavily negative presumption" against control of public speech, Meiklejohn, *Public Speech in the Burger Court: The Influence of Mr. Justice Black*, 8 TOLEDO L. REV. 301, 304 (1977). A thoughtful analysis is found in HAIMAN, SPEECH AND LAW IN A FREE SOCIETY (1981). See generally, DORSEN, BENDER, & NEUBORNE, 1 EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 51–59 (4th ed. 1976).

[50] Spence v. Washington, 418 U.S. 405 (1974); see also Smith v. Goguen, 415 U.S. 566 (1974).

[51] 418 U.S. at 408–9. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1483 n.5 (1975).

decisive, because the flag is a "special kind of personality,"[52] "a national property, and the Nation may regulate those who would make, imitate, sell, possess or use it."[53] In this view, the flag as a national symbol may be protected against misuse just as the Coca-Cola insignia as a corporate symbol may be protected against misappropriation. In each instance, there is protection of the intangible property interest in the integrity of a trademark. Thus, the flag use case pitted the tangible property interest in private ownership of a flag against the less tangible interest in public control of the symbol, and the traditional property interest prevailed.[54]

The potency of the property factor can also be seen in a Burger Court decision involving the right *not* to speak, or at least not to have the state appropriate private property as a forum for the state's message. The case involved the right of a Jehovah's Witness to object to the New Hampshire motto, "Live Free or Die," appearing on his automobile license plates. Although the case might have been decided on the established right of persons of conscience to be free from compelled state orthodoxy,[55] the property element was a key factor in the Court's analysis:[56]

> We are thus faced with the question of whether the State may 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. We hold that the State may not do so. . . .
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> [The law] in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message. . . .

The property motifs evident in these cases have been sounded elsewhere. In one case, the Court invalidated a sweeping local ordi-

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[52] 418 U.S. at 422.

[53] *Ibid.*

[54] This theme of the flag as a national trademark was emphasized by Justice Rehnquist three months earlier in his dissent in Smith v. Goguen, 415 U.S. at 594.

[55] See West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[56] Wooley v. Maynard, 430 U.S. 705, 713, 715 (1977). In *Wooley*, the Court relied on an earlier case holding that a newspaper could not be compelled to use its property to carry a "reply" message from a political candidate whom the paper had criticized. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974). And see Abood v. Detroit Board of Education, 431 U.S. 209 (1977). See generally Gaebler, *First Amendment Protection against Government Compelled Expression and Association*, 23 B.C.L. REV. 995 (1982).

nance that prohibited drive-in movie theaters with screens visible from the street from showing scenes of nudity alleged to be offensive to unwilling viewers.[57] The prevailing opinion emphasized that the speech sought to be regulated emanated from the claimant's property and that the financial costs that drive-in operators would have to incur to shield their screens from passersby would be substantial.[58]

Speech and property were similarly entwined in a 1977 ruling that a municipality, allegedly attempting to stem "white flight" from a residential neighborhood, could not ban the posting of "For Sale" or "Sold" signs on homeowners' property.[59] While the Court's strong free speech opinion applied the traditional doctrine that speech cannot be restricted merely because people may be stimulated to act, the consequence of the decision was to permit use of residential property for speech concerning sale of that property.

The Court has also been impressed with speech claims when an individual or corporation used its funds or property in order to facilitate the speech. In *Buckley v. Valeo*,[60] the campaign finance case, the central issue was stated as whether "money is speech,"[61] that is, whether restrictions on the amount of money that could be spent in political campaigns were restrictions on free speech. Despite powerful countervailing arguments, the Court held that they were:[62] "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." The Court went on to hold that quantitative

[57] Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

[58] In *Erznoznik*, the Court left open the question whether the use of property to show sexually oriented movies could be regulated through "a properly drawn zoning ordinance restricting the location of drive-in theaters." 422 U.S. at 212 n.9. A year later, a sharply divided Court held that municipalities could, as part of a zoning plan, single out "adult only" bookstores and movie houses and prohibit them from clustering together in the same areas. Young v. American Mini-Theaters, 427 U.S. 50 (1976). Schad v. Mt. Ephraim, 452 U.S. 61 (1981), invalidated the application of zoning rules to prohibit "live entertainment," including nude dancing, in downtown areas. *Young* was distinguished on the ground that it involved a comprehensive zoning plan aimed at the problem represented by the particular establishments. See also Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

[59] Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977).

[60] 424 U.S. 1 (1976).

[61] Transcript of Oral Argument, p. 67.

[62] 424 U.S. at 19. *Cf.* 519 F.2d 821 (D.C. Cir. 1975) (*en banc*).

restrictions on how much money candidates, campaigns, or independent supporters could spend violated the First Amendment.

The Court's protection of the overt use of property and economic resources to facilitate speech was even clearer in a 1978 case where it protected the free speech rights of entities embodying the quintessential modern form of property: the corporation.[63] The Court held that business corporations cannot be prohibited from spending corporate funds to express corporate views on referendum issues, even where those issues do not "materially affect" the corporation's business or property. Although the Court's analysis emphasized the importance of public debate and the emerging First Amendment "right to hear," the specific holding was that speech could not be stripped of First Amendment protection because the source of the speech was a corporation.[64] The dissenters believed that a State may "prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business."[65]

A final example of the Court's willingness to give heightened protection to speech paid for by the speaker concerned speech by public utilities—corporate entities traditionally subject to comprehensive state regulation. A New York public service commission rule barred utility companies from inserting material that expressed the utility's viewpoint on "controversial matters of public policy" in monthly billing statements to consumers (in this case, the benefits of nuclear power). The Court invalidated the commission ban.[66] After reaffirming broad First Amendment protections for corporate speech, the Court distinguished earlier cases:[67]

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[63] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[64] The main line of cases relied on to uphold restrictions on corporate speech involved rulings that corporations and labor unions could be wholly barred from engaging in political campaigns in order "to avoid deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." United States v. Automobile Workers, 352 U.S. 567, 585 (1957). See also Pipefitters v. United States, 407 U.S. 385, 415–16 (1972); United States v. CIO, 335 U.S. 106, 113 (1948). Although the Court indicated that its ruling "implies no comparable right" of corporations or unions to contribute or to become involved in partisan political campaigns, 435 U.S. at 788 n.26, the dissenters thought the decision "casts considerable doubt" upon the constitutionality of such restrictions.

[65] 435 U.S. at 803.

[66] See Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980).

[67] 447 U.S. at 539–40 (emphasis added). See Greer v. Spock, 424 U.S. 828 (1976); Lehman v. Shaker Heights, 418 U.S. 298 (1974).

> Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize *its own billing envelopes* to promulgate its views on controversial issues of public policy. . . . [The] Commission's attempt to restrict free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

Once again, the use of property as a platform for speech validates speech interests.

2. *Speech enhanced by property.* The corporate and campaign speech cases reflect another and perhaps more profound property theme in the Burger Court's decisions: There will be no compelled equalization of the resources to compete in the marketplace of ideas. Time and again the Court has insisted that government cannot limit the free speech rights of the wealthy and powerful in order to afford those with lesser resources the ability to debate on a more equal footing.

During the 1970s, the Court was confronted with litigants seeking price controls and supports in the marketplace of ideas. One set of equalization claims came under the rubric of "access to the media."[68] In *Miami Herald Pub. Co. v. Tornillo*,[69] a candidate for local elective office invoked a 1902 statute to compel a newspaper that had criticized him to publish his editorial reply. The Court sympathetically surveyed the plaintiff's showing that media ownership had become highly concentrated and that the combination of fewer media outlets and the economic barriers to entry had reduced participation in public debate and had constricted the scope of debate.[70] But the Court unanimously rejected an equalizing right of access:[71]

The New York Court of Appeals thereafter held that a utility could, consistent with the First Amendment, be made to bear the expense of informational advertising, by a commission order excluding such costs from the rate base as an allowable expense and thus requiring the cost to be subsidized by the shareholders. See Rochester Gas & Electric Corp. v. Public Service Commission, 51 N.Y.2d 823 (1980), *cert. den.*, 450 U.S. 961 (1981).

[68] See generally Barron, *Access to the Press—a New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); SCHMIDT, FREEDOM OF THE PRESS V. PUBLIC ACCESS (1976).

[69] 418 U.S. 241 (1974).

[70] *Id.* at 247–54.

[71] *Id.* at 254. See also CBS, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); but *cf.* CBS, Inc. v. FCC, 453 U.S. 367 (1981).

> . . . [A]t each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment.

One might discount this decision on the ground that it reflected a special solicitude for the press. But *Tornillo* previewed the more sweeping issues that surfaced two years later in *Buckley v. Valeo.* The plaintiffs had challenged new statutory restrictions on contributions to federal candidates and expenditures by federal candidates, their campaigns and their independent supporters. The governmental interests alleged to sustain these restrictions were prevention of corruption through unlimited contributions, as symbolized by Watergate, equalization of the ability to compete in the political marketplace, and prevention of "skyrocketing" campaign expenditures.[72] Concluding that the restrictions were consonant with the First Amendment, the District of Columbia Court of Appeals upheld the monetary restrictions in their entirety.[73]

The Supreme Court reversed much of the decision below in an opinion characterized as the "key to understanding the Burger Court's protection of speech connected to economic activity."[74] Initially, the Court rejected the global theory that the application of wealth to subsidize political speech constituted regulable "conduct" rather than speech, or could be subjected to "volume" restraints:[75] "A restriction on the amount of money a person or group can spend . . . necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." It then turned to particular restraints. After upholding some contribution limitations on anticor-

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[72] 424 U.S. at 55–57.

[73] 519 F.2d 817 (D.C. Cir. 1975) (*per curiam, en banc*).

[74] Nowak, note 41 *supra*, at 309. Nowak observed that the statutory limitations on campaign expenditures "were based on Congressional adoption of a philosophy like that of Rawls, which required equalized political voices to protect the principles of the social compact." *Id.* at 309. See also Nicholson, Buckley v. Valeo: *The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323; Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Equality?* 82 COLUM. L. REV. 609 (1982).

[75] 424 U.S. at 15–19.

ruption grounds,[76] the Court sharply rejected the power of government to restrict expenditures by wealthy speakers in order to enhance the voice of others:[77] "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

Finally, the Court struck down the ceilings on overall expenditures in a campaign by observing categorically that:[78]

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.

Those whose personal wealth and property permit them a greater opportunity to speak on partisan campaign issues cannot be restricted from doing so in the interests of equality. The decision thus stands as a potent example of wealth and speech uniting to defeat claims based on an equality principle.[79]

The link between property and speech and the refusal to tolerate legislative efforts to "equalize" public discourse by reducing wealth-based differences in the ability to enter the marketplace of ideas were again evident in *Bellotti*. The step from the campaign finance case to the corporate speech case was short in doctrine but long in implication. The issue was whether corporations could be prohibited by statute from spending funds to influence the electorate on a referendum question "other than one materially affecting any of the property, business or assets of the corporation."[80] The

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[76] *Id.* at 24–29. The Court found that the contribution limits served the compelling interest of preventing the potential and appearance of political corruption associated with unlimited private campaign contributions and that these interests were sufficient to overcome the speech and associational rights implicit in making contributions to candidates.

[77] *Id.* at 48–49, 54.

[78] *Id.* at 57.

[79] Two recent cases under the federal campaign finance laws have generally hewn to the *Buckley* approach. See California Medical Ass'n v. Federal Election Commission, 453 U.S. 182 (1981); Federal Election Commission v. Democratic Senatorial Campaign Committee, 102 S. Ct. 38 (1981).

[80] 435 U.S. at 785.

highest Massachusetts court upheld the restriction on the ground that a corporation's right to speak was a function of—and therefore limited by—its right to protect its property and that the statute allowed corporate speech on issues that affected its economic and property interest.

A sharply divided Supreme Court reversed. Justice Powell's opinion for the Court framed the issue as "whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection."[81] The Court found that the limitation on corporate speech infringed two First Amendment concerns: (1) prohibiting government from "limiting the stock of information" available to the public and (2) disqualifying government from "dictating the subjects about which persons may speak and the speakers who may address a public issue."[82] The claims that corporate wealth, capital, and power would "drown out" other points of view and exert an undue influence on referendum campaigns were rejected with the observation that there had been no record showing to that effect. More significantly, the Court once again rejected the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others."[83]

It is difficult to avoid viewing *Bellotti* as a Magna Carta for corporate speech on public issues. Taken in tandem with *Buckley v. Valeo*, it provides a broad basis for individuals and corporations to employ aggregations of wealth and property to influence the citizenry on public issues, public questions, and perhaps even candidates for public office. The Court rejected the effort to equalize the debate.[84]

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[81] *Id.* at 778.

[82] *Id.* at 783, 785.

[83] *Id.* at 790–91. The Court did not foreclose the possibility of a different result where there were "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests . . . " *Id.* at 789. But such a showing may be difficult to make. *Cf.* Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434 (1981). See generally Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U.L. REV. 157 (1980).

[84] It might be suggested that *Bellotti* should be viewed as a "right to hear" case, reflecting the revival of that free speech interest in the commercial speech cases. But the Court's recognition of a "right to hear" as a discrete First Amendment component has been less than consistent. Compare, *e.g.*, Gannett Co. v. De Pasquale, 443 U.S. 368, 391–93 (1979), with, *e.g.*, Richmond Newspapers v. Virginia, 448 U.S. 555, 576 (1980); Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982). For an incisive analysis of *Bellotti*, see Ratner, *Corporations and the Constitution*, 15 U.S.F.L. REV. 11 (1981).

3. *Speech promoting property.* The Burger Court's principal First Amendment innovation has been to incorporate "commercial speech" within the zone of protected speech and, in less than a decade, elaborate an entire doctrine for this purpose. It has done so by explicit reliance on traditional free market models linking the protection of free enterprise and economic interests with the protection of speech. "The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."[85]

In 1942 the Court held that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising."[86] Although this doctrine was subsequently limited,[87] not until 1975 did the Court rule, in the context of advertising of abortion services, that "commercial" speech merited some constitutional protection, the precise extent depending on whether the public interest in the speech outweighed the state's need for regulation.[88]

A year later the Court revised its doctrine by holding that speech which does "no more than propose a commercial transaction" cannot for that reason alone be denied First Amendment protection.[89] The case involved a statutory restriction on price advertising of prescription drugs, where the content of the prohibited message—"I will sell you the X prescription drug at the Y price"—was wholly commercial. The Court rested on three grounds: (1) speech does not lose its protection because it is paid for by the advertiser or flows from an economic motivation; (2) individuals and society have a strong interest in "the free flow of commercial information"; and (3) commercial advertising is indispensable in our "predominantly free enterprise economy." The Court nevertheless disclaimed any suggestion that commercial speech would be as immune from regu-

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[85] Bigelow v. Virginia, 421 U.S. 809, 826 (1975).

[86] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[87] Pittsburgh Press Co. v. Commission on Human Relations, 413 U.S. 376 (1973).

[88] Bigelow v. Virginia, note 85 *supra.* The case involved a Virginia statutory prohibition on "encouraging . . . the procuring of abortion . . ." applied to the editor of a local weekly newspaper that had run an advertisement for lawful abortion services available in New York. Because the information was of arguable public interest, the Court did not have to address squarely the "purely commercial speech" issues. Two years earlier, in *Pittsburgh Press,* the Court did not east doubt on the continued vitality of the commercial speech exception where an illegal commercial proposal was concerned.

[89] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

lation as other more "protected" forms of speech or that the "commonsense" differences between commercial speech and other forms of speech could not be taken into account in justifying differing kinds of government regulations.[90]

The Court soon extended the protection of commercial speech to "For Sale" sigus to sell private homes,[91] to advertisements for contraceptives,[92] and to advertising of low-cost legal services.[93] These cases made clear that *Virginia Board* was to be a powerful precedent for protecting speech promoting goods and services. But they also demonstrated that the "commonsense" distinctions between commercial and political speech had teeth. Such distinctions differentiated the letter solicitation of clients for public interest litigation by ACLU lawyers[94] from in-person solicitation of clients in commonplace personal injury cases.[95] A year later similar distinctions supplied the basis for upholding a Texas statute that, in the interest of avoiding potential consumer deception as to the quality of services, prohibited the practice of optometry under a trade name.[96] The Court revisited these doctrinal problems and reformulated the rules governing commercial speech in a 1980 ruling invalidating a New York Public Service Commission order prohibiting regulated electric utilities from "promoting the use of electricity through . . . advertising."[97]

It has been argued that speech proceeding from economic and profit motives is too remote from the First Amendment values of self-expression and self-governance to warrant protection and that

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[90] *Id.* at 770–72. Justice Rehnquist, the sole dissenter, took sharp issue with "elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas." *Id.* at 781. He also rejected the consumerist perspective on the Court's opinion, insisting that the First Amendment's primary function is to facilitate public decisionmaking in a democracy, not to facilitate "the choice of shampoo." *Id.* at 787.

[91] Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977).

[92] Carey v. Population Services Int'l, 431 U.S. 678 (1977).

[93] Bates v. State Bar of Arizona, 433 U.S. 350 (1977). See In re R.M.J., 102 S. Ct. 929 (1982).

[94] In re Primus, 436 U.S. 412 (1978).

[95] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

[96] Friedman v. Rogers, 440 U.S. 1 (1979). Justice Powell observed for the Court that "a property interest in a means of communication does not enlarge or diminish the First Amendment protection of that communication." *Id.* at 12 n.11.

[97] Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980).

these decisions can only be justified in terms of economic liberty values of the *Lochner* genre.[98] This is a doubtful conclusion. Although the commercial speech doctrine primarily provides succor to economic interests, it is consistent with at least some of the purposes of the First Amendment. Commercial speech provides information of value to private consumers and affects public economic activity. However one resolves the dispute, it is plain that the Burger Court, through the use of the First Amendment, is producing results consonant with free market competition and the maintenance of property values.[99]

4. *Speech and media "property."* The Burger Court's linkage of property rights and speech protection is also reflected in a series of cases that permit owners of mass media to use "their" property for whatever speech they prefer and to refuse access to those who would use their facilities for contrary messages. The cases tend to confirm A. J. Liebling's remark that "Freedom of the press belongs to those who own one."[100]

The Supreme Court's initial encounter with the issue came in 1969 in *Red Lion Broadcasting Co. v. FCC*,[101] where it upheld the personal attack and political editorial branches of the fairness doctrine and thus sustained a narrow form of compelled access to electronic news media. At issue was the broadcasters' asserted First Amendment right to use their allotted frequencies "to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency."[102] A unanimous Court rejected the

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[98] See, *e.g.*, Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979); but see Roberts, *Toward a General Theory of Commercial Speech and the First Amendment*, 40 OHIO ST. L.J. 115 (1979); see generally, Symposium, *Commercial Speech*, 46 BROOKLYN L. REV. 389; Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720 (1982).

[99] Professor Farber, note 98 *supra*, suggests that a commercial message can be broken down into two components: informational and contractual. Where government is seeking to regulate the former, normal First Amendment doctrines are applicable to assess the restriction. Where the regulation is aimed at the contractual component of the message, even though words are used in the transaction, government's broad power to regulate breaches of contract and warranty comes into play. In this view, a false advertisement can be regulated not because it is "bad" speech, but because it is like a breach of warranty. The equation is not easily made.

[100] Quoted in LIEBERMAN, FREE SPEECH, FREE PRESS, AND THE LAW 121 (1980).

[101] 395 U.S. 367 (1969).

[102] *Id.* at 386.

argument, relying on two grounds to uphold limited incursions on broadcasters' rights. First, the Court found that the fairness doctrine advanced the free speech values of "an uninhibited marketplace of ideas in which truth will ultimately prevail," as opposed to permitting "monopolization of that market."[103] That view plainly prefers speech values over the combined property and speech interests of broadcasters. But the Court found it necessary to express a second reason for the fairness doctrine based on a competing "property" interest, public "ownership" of the airwaves: "the First Amendment confers . . . no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use. . . . Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them."[104] Thus, although *Red Lion* in fact subordinated broadcasters' property rights to First Amendment claims, the Court employed a property metaphor in the form of the public's superior title to the airwaves.[105]

The Burger Court's first encounter with these issues came in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[106] where it sharply limited *Red Lion* by upholding the right of broadcasters to refuse to accept paid public issue advertisements. Chief Justice Berger's opinion, although noting that the broadcast media "utilize a valuable and limited public resource," found broad Congressional intent to uphold the prerogatives of media owners:[107]

> . . . Congress opted for a system of private broadcasters licensed and regulated by Government. . . . [T]his choice was influenced not only by traditional attitudes toward private enterprise, but by a desire to maintain for licensees, so far as consistent with necessary regulation, a traditional journalistic role.

Thus, principles of journalistic freedom, augmented by congressionally sanctioned concepts of private ownership of broadcast outlets, resulted in protection of the private broadcasters' prerogatives.

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[103] *Id.* at 390.

[104] *Id.* at 391, 394.

[105] In unanimously rejecting a similar fairness and access claim against privately owned print media, with no comparable public media "ownership" interests affecting the balance, the Court did not even cite *Red Lion*. See Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[106] 412 U.S. 94 (1973).

[107] *Id.* at 116.

Abuses could be controlled through the fairness doctrine and the license renewal system.[108]

The broadest protection for the journalistic and entrepreneurial freedom of media owners, and the sharpest rejection of access claims, came in *Miami Herald Pub. Co. v. Tornillo*.[109] The Court unanimously overturned a limited statutory form of compelled access by political candidates seeking equal space to reply to personal attacks, notwithstanding a powerful demonstration that "economic factors" have resulted in the concentration of media ownership "in a few hands [with] the power to inform the American people and shape public opinion."[110] Despite the "monopoly of the means of communication," the Court held that any effort to remedy the problem inevitably entailed either government controls or self-censorship, both of which were anathema to free press values.[111] Once again, the First Amendment interests of those whose ownership enhanced their right to speak were to prevail. Compelled access to the pages of their newspapers would not be permitted.[112]

Two cases decided in the 1980 Term reaffirmed the Court's protection of media owners against broad access claims, although in one of these cases it recognized a limited right of access. In the first case a radio station with a particular program format of classical music was sold to a new licensee who planned to change to "popular" musical fare. Access advocates challenged the sale, claiming that the Commission had to take account of the diminution of programming diversity in deciding whether to allow it. The Commission disagreed, reasoning that "market forces" would insure diversity more effectively than "government intervention." The Supreme Court rejected the access claims and upheld the Commis-

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[108] The Court did observe one flaw in the proposed access scheme for the mandated right to purchase air time for editorial messages: that the statutory public interest standard "would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth. . . . Even under a first-come-first-served system, . . . the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently." *Id.* at 123.

[109] 418 U.S. 241 (1974).

[110] *Id.* at 249–50.

[111] *Id.* at 254–58.

[112] In FCC v. Midwest Video Corp., 440 U.S. 689 (1979), the Court held that the FCC had exceeded its statutory authority to regulate cable television in promulgating "public access" rules that required cable television operators to set aside a number of cable channels for public use.

sion's policy as consistent with the statute and First Amendment values.[113] The effect of the ruling was a victory for the journalistic and property interests of station owners.

The second decision tested a federal campaign reform statute providing that candidates for federal elective office have a right of reasonable access to the use of stations for paid political broadcasts on behalf of their candidacies.[114] The statute was challenged by the three major networks, which had refused, in late 1979, to make airtime available to President Carter's 1980 reelection campaign. The lower court upheld the statute, and the Supreme Court affirmed.[115] Chief Justice Burger's opinion concentrated on whether Congress had intended to create such a limited right of access and whether the Commission could manageably enforce the requirement. With respect to the broadcaster's First Amendment objections, the Chief Justice acknowledged the tension between journalistic freedom and public control of the airwaves but resolved the conflict by concluding that the facilitating of campaign speech justified the limited right of access:[116]

> Petitioners are correct that the Court has never approved a *general* right of access to the media. [Citations omitted.] Nor do we do so today. Section 312(a)(7) creates a *limited* right to "reasonable" access that pertains only to legally qualified federal candidates. . . .
>
> Section 312(a)(7) represents an effort by Congress to assure that an important resource—the airwaves—will be used in the public interest. We hold that the statutory right of access . . . properly balances the First Amendment rights of federal candidates, the public, and broadcasters.

This *CBS* case hews more closely to *Red Lion* than it does to the first *CBS* decision. In order to enhance campaign speech, it permits a limited incursion on broadcasters' interests that it justifies by reference to public "ownership" of "an important resource." On the other hand, the "limited" right to access will be limited to candidates who can pay for it.[117]

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[113] FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

[114] 47 U.S.C. §312(a)(7) (1971).

[115] CBS, Inc. v. FCC, 453 U.S. 367 (1981).

[116] *Id.* at 396–97 (emphasis in original).

[117] The other instance where the Burger Court allowed some government intrusion upon the property and speech interests of media owners was the 1978 decision upholding FCC "cross-ownership" rules generally prohibiting formation of jointly owned newspaper-

What emerges is that both the First Amendment and property rights that attach to media ownership will generally prevail over broad access and diversity claims. Print media owners cannot be compelled to supply access. In limited instances, electronic media owners are subject to compelled access in a narrow and discrete fashion by virtue of overriding public "ownership" interests.

B. PROPERTY AND SPEECH IN CONFLICT

1. *Speech and the "public forum."* The Court's "public forum" cases supply the most powerful example of a tension between speech rights and property rights. The Burger Court, expressly overruling Warren Court precedent, has held that the First Amendment does not require that facilities open to the public generally must allow speech activity over the objections of the owner—private, corporate, or governmental.

The use of public and private property for First Amendment activities inevitably involves an adjustment of property rights and speech interests. Almost a century ago, Justice Holmes took the position in Massachusetts that property rights would invariably prevail:[118] "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." A different view was taken by Justice Roberts in his oft-cited opinion in *Hague v. CIO:*[119] "Wherever the title of the 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." The Burger Court's adjustment of the interests gives primary weight to property.

a) Private property. In *Marsh v. Alabama,*[120] the Court held in 1946 that corporate ownership of legal title to a "company town" could not override the public's interest "in the functioning of the commu-

broadcast outlet combinations in the same locality and requiring divestiture of certain existing combinations. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). See generally Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media,* 32 VAND. L. REV. 1249 (1979).

[118] 162 Mass. 510, 511 (1895), *aff'd,* 167 U.S. 43 (1897).

[119] 307 U.S. 496, 515 (1939) (concurring opinion).

[120] 326 U.S. 501, 507 (1964).

nity in such a manner that the channels of communication remain free." The decision overturned the conviction of a Jehovah's Witness for handing out literature on the streets of Chickasaw, Alabama, a community whose buildings and streets were owned by a private corporation. Finding that the town resembled a typical municipality in every way but ownership, the Court held that the property factor should not control:[121]

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . .
>
> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. . . . [T]he circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties. . .

Justice Frankfurter's concurring opinion added: "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."[122]

In 1968, the Warren Court significantly extended *Marsh* by holding that a state court injunction which prohibited peaceful labor picketers from entering the property of a privately owned shopping center in order to protest the labor policies of a store located in that center violated the First Amendment.[123] The injunction barred the demonstrators from trespassing on shopping center property and relegated them to a public roadway at the entrance to the center parking lot several hundred feet from the supermarket.

Starting from the premise that "peaceful picketing carried on in a location generally open to the public" is presumptively protected

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[121] *Id.* at 506, 509.

[122] *Id.* at 511. On the same day, the Court invalidated a similar conviction for distributing literature in a company town owned and controlled by the federal government. Tucker v. Texas, 326 U.S. 517 (1946).

[123] Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).

by the First Amendment, the Court characterized the issue "squarely" presented as "whether Pennsylvania's generally valid rules against trespass to private property" could be applied to bar labor picketing of a store in a shopping center.[124] The Court held they could not. The most striking part of the Court's opinion was its rejection of the shopping center's claimed traditional right to exclude from private property, a right "part and parcel of the rights traditionally associated with ownership of private property."[125] Given the contemporary development of shopping centers as the "functional equivalent" of downtown business districts, the Court concluded that the *Marsh* principles, that ownership does not "always mean absolute dominion" and that the rights of an owner who opens property to the public can be circumscribed, compelled a reversal of the injunction.[126] The shopping center case, taken together with *Red Lion* decided the following year, represented the high point for First Amendment access advocates.

The Burger Court's reversal of this momentum began in 1972 in *Lloyd Corp. v. Tanner*.[127] Responding to property rights arguments, Justice Powell wrote that depriving the private owner of a shopping mall of the right to exclude from its premises people who wished to distribute antiwar leaflets was a violation of the owner's rights to private property and one not required by the First Amendment:[128] "[T]here has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." The record showed that the mall was open to all members of the public, that space in the mall had frequently been made available to civic groups, and that the land upon which the mall was built had originally been publicly owned. Nevertheless, in an elaborate explication of the clash between free speech rights and property interests, the Court found that *Marsh* and *Logan Valley* were not controlling. As time would prove, the grounds upon which those cases were

[124] *Id.* at 315.

[125] *Id.* at 319.

[126] *Id.* at 324–25. Justice Black dissented in *Logan Valley Plaza* on the ground that "whether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property." *Id.* at 330.

[127] 407 U.S. 551 (1972).

[128] *Id.* at 570.

distinguished were unpersuasive and contained the seeds of the overruling of *Logan Valley*.

In his *Lloyd* opinion Justice Powell insisted that *Logan Valley* was wrong in treating a shopping center as the "functional equivalent" of a municipal business district, since the "invitation extended to the public . . . is to come to the Center to do business with the tenants," and not an "open-ended invitation to the public to use the Center for any and all purposes. . . ."[129] In addition, he maintained that *Logan Valley* could be limited to situations where the First Amendment message was related to an activity at the shopping center because "[i]t would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist."[130]

Finally, the Court addressed the conflict between property interests and speech rights on a broader plane:[131]

> [T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speech, pickets, or other communicative activity . . .

When one compares these observations with the statement in *Marsh* that judicial balancing of property rights against First Amendment rights must be "mindful of the fact that the latter occupy a preferred position,"[132] it becomes clear that the priority of speech over property had yielded to a parity between speech and property, if not a new preference for the latter.[133]

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[129] *Id.* at 564–65. Thus the Court employed a subject-matter basis for differentiating *Lloyd* from *Logan Valley*, even though less than one week later the Court would observe that "above all else, the First Amendment means that government has no right to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department of Chicago v. Moseley, 408 U.S. 92, 95 (1972).

[130] 407 U.S. at 567. This ground of distinction also contravened settled doctrine: ". . . one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939).

[131] *Id.* at 568–70.

[132] 326 U.S. at 509.

[133] See 407 U.S. at 580 (Marshall, J., dissenting). Similar issues were similarly resolved the same day in Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972).

Four years later, the preference for property rights over speech rights was again evident in *Hudgens v. NLRB*.[134] Eschewing pretense of distinguishing *Logan Valley* by expressly overruling it and confining *Marsh* to its facts, the Court held that the First Amendment had no role to play in determining whether union picketers had a right of speech access to privately owned shopping centers. Viewing the issue and the precedents through the prism of the state action requirement, the Court reasoned that while *Marsh* was still sound—since the "company town" was more town than company—*Logan Valley* was out of line in treating the privately owned shopping center as the "functional equivalent" of a business district.[135] Accordingly, the only rights which the union speakers had were those made available by statute.

In dissent, Justice Marshall, joined by Justice Brennan, sharply criticized the Court's property-based approach to the issues and its gratuitous "bypassing of [a] purely statutory issue to overrule a First Amendment decision less than 10 years old."[136] He argued that "courts ought not let the formalities of title put an end to analysis": the important point, underlying *Marsh*, was that "traditional public channels of communication remain free, regardless of the incidence of ownership."[137] The dissent concluded:[138]

> In the final analysis, the Court's rejection of any role for the First Amendment in the privately owned shopping center complex stems, I believe, from an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment's guarantee of freedom of speech. No one would seriously question the legitimacy of the values of privacy and individual autonomy traditionally associated with privately owned property. But property that is privately owned is not always held for private use, and when a property owner opens his property to public use the force of those values diminishes.

The next decision in the line had an ironic twist, with the Court's

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[134] 424 U.S. 507 (1976).

[135] *Id.* at 520–21.

[136] *Id.* at 532.

[137] *Id.* at 538, 539.

[138] *Id.* at 542–43. For decisions involving statutory claims by employees to use employers' property for union activity, see Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978); Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); NLRB v. Baptist Hospital, 442 U.S. 773 (1979).

1980 ruling in *PruneYard Shopping Center v. Robins.*[139] The case involved an attempt by a political group to solicit petition signatures at a California shopping center, privately owned but open to the general public. The owners prohibited all such activity at the shopping center. Blocked by *Lloyd*'s overruling of *Logan Valley* from asserting a First Amendment right of access, the group persuaded the California Supreme Court that the state constitution's guarantee of "liberty of speech," coupled with the state's police power to regulate private property in the public interest, required a rule permitting access to shopping centers to vindicate state-created free speech rights.[140]

The Supreme Court, speaking through Justice Rehnquist, unanimously affirmed. The Court ruled that the State restriction of property rights in favor of state-recognized free speech rights did not deprive the shopping center owner of federally protected property rights. The Court treated *Lloyd Corp. v. Tanner*, whose continuing validity was not questioned, as having protected private property rights against a First Amendment right of access. But that decision did not limit the state's general police power to regulate property rights:[141]

> In *Lloyd* there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found by the California Supreme Court here. It is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.

Having concluded that *Lloyd* was not controlling, the Court addressed the shopping center's claims that the state restriction of its right to exclude speakers from its premises constituted a "taking" of its property without just compensation and "deprived" it of property without due process of law. Justice Rehnquist observed that "one of the essential sticks in the bundle of property rights is the right to exclude others,"[142] and agreed that there had been such a

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[139] 447 U.S. 74 (1980).

[140] 23 Cal.3d 899 (1979).

[141] 447 U.S. at 81.

[142] *Id.* at 82.

"taking" by the recognition of a state right to engage in free speech on shopping center property over the owner's objections. But this was not a violation of the Fifth Amendment's Takings Clause, as traditionally interpreted, because it did not "unreasonably impair the value or use" of the property as a shopping center or interfere with "reasonable investment-backed expectations."[143] In addition, the Court found no deprivation of general property rights, given the broad state authority to define and reorder such rights.[144]

At first glance, the shopping center case would appear to confound the thesis that the Burger Court has preferred property rights over free speech interests. On closer examination the decision does not sustain this view.

The Court left undisturbed its holding in *Lloyd* that First Amendment rights of access to private property will be wholly subordinated to state-sanctioned rights to exclude. Except where a State has chosen, as California did, to withdraw the right to exclude from the bundle of property rights, *Lloyd* will control.[145] Had the Court reversed the California court's restriction of the shopping center's right to exclude, it would have had to employ the Due Process Clause to place severe limits on the State's ability to define and condition property rights. Such a ruling would have altered settled doctrine governing the state's police power to regulate property rights and possibly invited a return to the discredited "*Lochner* era."[146]

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[143] *Id.* at 83.

[144] *Id.* at 85–88. The Court distinguished Wooley v. Maynard, 430 U.S. 705 (1977), the license plate motto case, by reasoning that, unlike the automobile registrant, the shopping center owner had opened his property to the public generally, was not being compelled to carry a specific, state-mandated message on his property, would not be identified with the views expressed by the speakers, and could easily and expressly disavow any connection with or support for the message. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) was held inapposite as an editorial discretion case. See generally Gaebler, note 5 *supra*.

[145] Justice Marshall, the author of the Warren Court's *Logan Valley* decision, reiterated his objection to the Court's approach. *Id.* at 91.

[146] Some members of the Court have hurled the Lochner charge at decisions revitalizing the Contract Clause. See United States Trust Co. v. New Jersey, 431 U.S. 1, 60–61 (1977) (Brennan, J., dissenting); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 259–62 (1978) (Brennan, J., dissenting). But the Court has not evinced an inclination to return to *Lochner*. See, *e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). See Bishop v. Wood, 426 U.S. 341 (1976); Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Agins v. Tiburon, 447 U.S. 255 (1980); Texaco, Inc. v. Short, 102 S. Ct. 781 (1982). *Cf.* Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264 (1981); Donovan v. Dewey, 452 U.S. 594 (1981).

In short, the Court's *PruneYard* decision did not prefer First Amendment rights at the expense of property rights. It upheld the expansive power of states to define, expand, or contract property rights.

The Princeton University case, had it not been mooted,[147] would have permitted the Supreme Court to test the reach of *PruneYard*. In *PruneYard* the state law readjustment of property rights was targeted, in a civil proceeding, on a traditional commercial enterprise which advanced no strong First Amendment interests of its own. In the Princeton case, state criminal law was applied to property owned by a private educational institution claiming both property and speech rights in controlling its premises. In such circumstances, following the *Hudgens* theory, the balance might tilt against allowance of a free speech easement for demonstrators. That was certainly the thrust of the *Loretto* decision,[148] where the Court upheld the rights of landlords to refuse to allow cable television wires to be installed on their property for tenants' use. In finding a "taking" by virtue of "a permanent physical occupation of real property," the Court again manifested its inclination to protect property rights against speech-related claims.

b) *"Public" property.* Just as *Marsh v. Alabama* is the baseline to examine speech rights on private property, Justice Robert's plurality opinion in *Hague v. CIO* is the standard to measure speech rights on publicly owned property. Rejecting a property-centered conception of the First Amendment, he said: "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."[149] The Warren Court was generous in applying this principle to invalidate government restrictions on the use of streets and other public places for First Amendment purposes, including demonstrations before a State House,[150] the home of a mayor,[151] and an Army recruiting station.[152]

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[147] See text *supra* at notes 12–17.

[148] See text *supra* at notes 18–20.

[149] 307 U.S. at 515.

[150] Edwards v. South Carolina, 372 U.S. 229 (1963).

[151] Gregory v. City of Chicago, 394 U.S. 111 (1969).

[152] Bachellar v. Maryland, 397 U.S. 564 (1970).

These decisions reflect the tension between two approaches to free speech use of publicly owned property. Either government premises open to the public are appropriate forums for speech activity which does not interfere with the functioning of the facility or government may control its property in the same fashion as a private owner to exclude those who would enter for speech activity. The speech-protective approach was demonstrated in *Brown v. Louisiana*,[153] where the Court overturned a breach of the peace conviction of five young black protesters who conducted a silent vigil inside a segregated public library. Justice Fortas found that First Amendment freedoms included "the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."[154] Justice Black's sharp dissent made the contrary point: "[The First Amendment] does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas."[155] Just a few months later, Justice Black's property views prevailed in a case upholding trespass convictions of civil rights protesters for gathering outside a jail, but upon jail premises. In rejecting the First Amendment claim, Justice Black insisted:[156]

> 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. For this reason, there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate."

Since the Warren Court was sharply divided in both cases, the Burger Court was free from precedential restraint in determining its approach to governmental control of speech uses of public property. The initial results were inconclusive.

In a 1974 case, *Lehman v. City of Shaker Heights*,[157] the Court split over whether a municipally owned and operated bus company

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[153] 383 U.S. 131 (1966).

[154] *Id.* at 142.

[155] *Id.* at 166.

[156] Adderley v. Florida, 385 U.S. 39, 47 (1966).

[157] 418 U.S. 298 (1974).

could refuse to accept political advertisements on city-owned buses while allowing commercial messages to be displayed. Justice Blackmun's plurality opinion, finding that no public forum for ideas had been created, characterized the city as acting like a private entrepreneur:[158]

> [T]he city is engaged in commerce. . . . The car card space . . . is a part of the commercial venture. . . . No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing on a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

Justice Douglas concurred, observing that the advertising space, if a forum at all, "is more akin to a newspaper than to a park" and, like a newspaper, the city "owner cannot be forced to include in his offerings news or other items which outsiders may desire but which the owner abhors."[159] The dissenters insisted that the city had created a public forum by permitting some advertising and that it was thereby impermissible to deny access on the basis of content or subject matter or to permit commercial messages while prohibiting political communication.

The *Lehman* decision tends to confirm our property thesis in two ways. The Court sanctioned municipal dominion over its property as a sufficient basis to restrict speech and it upheld state discrimination in favor of commercial speech over political speech.[160]

Government's control of its property was solidified in 1976 when the Army prohibited political speeches and leaflet distribution on the premises of Fort Dix, New Jersey, even on portions of the military post generally open to the public. In *Greer v. Spock*,[161] the

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[158] *Id.* at 303–4.

[159] *Id.* at 306.

[160] In Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), a city had denied the use of its municipal theater to the rock musical *Hair* on the ground that the production was obscene. Justice Blackmun, without reference to his *Lehman* opinion, concluded that the city's action "was no less a prior restraint because the public facilities under their control happened to be municipal theaters. The [facilities] were public forums designed for and dedicated to expressive activities," 420 U.S. at 555. Justice Rehnquist dissented, relying on *Adderley* for the position that the city, as owner of the theater, had broad leeway to decide what productions should be permitted. See Karst, *Public Enterprise and the Public Forum: A Comment on* Southeastern Promotions, Ltd. v. Conrad, 37 OHIO ST. L.J. 247, 248–52 (1976); Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 90–92 (1978).

[161] 424 U.S. 828 (1976).

Court sharply limited a 1972 decision that had permitted such activity on the open portions of a base.[162] It said:[163]

> The Court of Appeals was mistaken . . . in thinking that [the 1972 decision] stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment. . . . "The State, no less than a private owner of property, has power to preserve the property under its control for the use of which it is lawfully dedicated."

The Court readily upheld the military regulation.[164]

The Court has since applied these principles to permit military commanders broad power to regulate speech activities within a military base even by military personnel properly on the base[165] and to treat prison facilities as "off-limits" to the application of normal First Amendment activities: "A prison may be no more easily converted into a public forum than a military base."[166]

Most recently, in *United States Postal Service v. Council of Greenburgh Civic Associations*,[167] the Court has confirmed its willingness to accord government broad power to restrict speech that impairs governmental control of its property. The issue was whether a postal statute, prohibiting the deposit of unstamped "mailable matter" in a letter box approved as an "authorized depository" by the postal service, violated the First Amendment rights of civic groups which delivered unstamped messages and leaflets in the letter boxes

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[162] Flower v. United States, 407 U.S. 197 (1972).

[163] 424 U.S. at 836. The Court also observed that excluding the political speakers served the "American constitutional tradition of a politically neutral military establishment under civilian control." *Id.* at 839.

[164] *Greer*'s sharp limitation of *Flower* was similar to the Court's analysis two weeks earlier, in Hudgens v. NLRB, 424 U.S. 507 (1976) of the *Logan Valley/Lloyd Center* sequence. Justice Rehnquist has described *Greer* as a case reflecting the "sovereign's" role as "proprietor and owner of property, such as buildings or parks." *The First Amendment: Freedom, Philosophy and the Law*, 12 GONZ. L. REV. 1, 10–11 (1976). See also Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980); Board of Education, Island Trees Union Free School District v. Pico, 102 S. Ct. 2799, 2812 (1982) (Blackmun, J., concurring); *id.* at 2827 (Rehnquist, J., dissenting). Justice Rehnquist recently reiterated his views on government's power over its property. Dallas County Hospital District v. Dallas Ass'n of Community Organizations for Reform Now, *cert. denied*, 51 U.S.L.W. 3417 (Nov. 29, 1982) (Rehnquist, J., dissenting).

[165] See Brown v. Glines, 444 U.S. 348 (1980).

[166] Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 134 (1977); see also Bell v. Wolfish, 441 U.S. 520, 548–55 (1979); Houchins v. KQED, 438 U.S. 1 (1978).

[167] 453 U.S. 114 (1981).

of private homes. After canvassing the history and functions of the postal service, Justice Rehnquist concluded that even though the homeowner "pays for the physical components" of the "authorized depository," the homeowner "agrees to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his mail."[168] The Court analyzed the case in terms of government ownership of the property in question. In this light, the result was foreordained:[169]

> Indeed, it is difficult to conceive of any reason why this Court should treat a letterbox differently for First Amendment access purposes than it has in the past treated the military base in *Greer* . . . , the jail or prison in *Jones*, . . . or the advertising space made available in city rapid transit cars in *Lehman*, . . . In all these cases, this Court recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.

The Court determined that it was unnecessary to address "time, place and manner" issues in order to conclude that the postal statute restriction did not violate the First Amendment.

As he had in *Adderley*, *Lehman*, and *Greer*, Justice Brennan adopted a different approach:[170]

> . . . Our cases have recognized generally that public properties are appropriate fora for exercise of First Amendment rights. . . . While First Amendment rights exercised on public property may be subject to reasonable time, place and manner restrictions, that is very different from saying that government-controlled property, such as a letterbox, does not constitute a public forum.

And Justice Marshall maintained in dissent that "[t]he determinative question in each of these [earlier] cases was not whether the government owned or controlled the property, but whether the nature of the governmental interests warranted the restrictions on expression. That is the question properly asked in this case."[171]

Justice Marshall's point is telling. For the Burger Court, the

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[168] *Id.* at 128.

[169] *Id.* at 129–30.

[170] *Id.* at 136–37. Justice Brennan found the statute a reasonable time, place, and manner rule.

[171] *Id.* at 149 n.7. *Cf.* Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640 (1981); Widmar v. Vincent, 102 S. Ct. 269 (1981).

question "whether the government owned or controlled the property" has been central, and the issue "whether the nature of the governmental interest warranted the restrictions on expression" has been marginal. Instead of determining whether the precise nature of the facility rendered the speech activity "anomalous" or "basically incompatible" with the property's primary functions, the Court has permitted formal ownership and control of property to be decisive.

2. *Residential property.* The government won the postal case because it was found to have had the superior property-type interests in the mailbox. Justice Stevens's dissenting opinion was equally steeped in property considerations:[172]

> The mailbox is private property; it is not a public forum to which the owner must grant access. If the owner does not want to receive any written communications other than stamped mail, he should be permitted to post the equivalent of a "no trespassing" sign on his mailbox. A statute that protects his privacy by prohibiting unsolicited and unwanted deposits on his property would surely be valid.

Justice Stevens's concern with "unwanted deposits" of free speech on private property evokes other instances of tension between free speech claims and protection of the value of residential and commercial property.

In a cluster of cases involving diverse issues such as door-to-door canvassing, regulation of pornography and sexually oriented material, and zoning, the Court has approached First Amendment claims with the zeal of urban planners. This tendency was evident in three cases putting homeowners' rights of property and privacy against the rights of free speech of canvassers and picketers. In each instance the Court was able to decide the case without resolving the clash between property rights and speech claims, but it used strong language indicating that homeowners' rights would prevail over speakers'.

In 1976, the Court reviewed an ordinance that required, for "identification" purposes, advance notice in writing to the police by "any person desiring to canvass . . . or call from house to house [for] a recognized charitable [or] political . . . cause."[173] The Court in-

[172] 453 U.S. at 152. Justice Stevens dissented because the statute interfered with the homeowners' right to decide whether they wanted to receive the messages.

[173] Hynes v. Mayor of Oradell, 425 U.S. 610 (1976).

validated the ordinance on vagueness grounds. Six Justices concluded that, "vagueness defects aside, an ordinance of this kind would ordinarily withstand constitutional attack."[174] A similar approach was taken in a case involving a local ordinance that prohibited door-to-door solicitation by charitable organizations that devoted more than twenty-five percent of their revenue to organizational expenses. The Court reaffirmed that such solicitation, even though involving political and charitable causes, can be regulated by government in order to protect the privacy of homeowners against fraud, crime, or annoyance.[175] The particular ordinance was invalidated, however, because the twenty-five-percent limitation did not bear a sufficiently substantial relationship to such goals.

The Court also addressed these issues in a case involving residential picketing. A civil rights group challenged an Illinois statute that had the effect of preventing demonstrations on the public sidewalks in front of the home of the Mayor of Chicago. The Court invalidated the statute on equal protection grounds because it exempted certain kinds of labor dispute picketing from the general prohibition on residential picketing.[176] It expressly left unresolved the question "whether a statute barring all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments."[177] But, in dictum, the majority asserted the broad protection that it would afford to privacy, even against free speech claims, where the ban on residential picketing was content neutral:[178] "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." While the Court's decision invalidated a particular ban on residential picketing at the behest of free speech claimants, its message that homeowners be permitted the quiet use and enjoyment of their property against free speech claims may be its more lasting element.

3. *Property "values."* A series of Burger Court First Amendment rulings reflect basic concern for the protection of property interests.

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[174] *Id.* at 623. This was Justice Brennan's characterization of the majority opinion.

[175] Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

[176] Carey v. Brown, 447 U.S. 445 (1980). Justice Brennan's opinion found the case "constitutionally indistinguishable" from Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

[177] 447 U.S. at 459 n.2.

[178] *Id.* at 470, 471.

The most important of these relate to sexually oriented speech. For example, the Court rejected a challenge to the notion that there exists a distinct category of "obscene" speech, which can be regulated in ways constitutionally unacceptable for other forms of expression.[179] These decisions also confound normal First Amendment doctrine by permitting plenary regulation of a category of speech causing no demonstrable harm.[180]

In the watershed case, *Paris Adult Theaters I*, the majority relied on the proposition, foreign to First Amendment adjudication, that the Court is not "a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions."[181] The preoccupation with commercial, economic, and property matters is particularly noteworthy when it is recalled that the issue was whether government could prohibit the availability of "adults only" sexual ideas to willing adult recipients. A 1969 Warren Court decision had found a First Amendment right to receive such ideas, albeit in the privacy of the home, superior to the claimed harm resulting from access to obscenity.[182] In rejecting that precedent, Chief Justice Burger emphasized governmental interests of a different order:[183]

> [T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. . . . [These] include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.

It is surprising that such interests, primarily rooted in notions of environmental pollution, aesthetic zoning, and preservation of commercial areas, would be found paramount to free speech concerns. Similarly curious was the Court's insistence that just as government is free to act on the basis of "unprovable assumptions" in the "regulation of commercial and business affairs," it has compar-

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[179] Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[180] The Report of the Commission on Obscenity and Pornography (1970); DE GRAZIA & NEWMAN, BANNED FILMS: MOVIES, CENSORS AND THE FIRST AMENDMENT (1982).

[181] U.S. at 64 (quoting Griswold v. Connecticut, 381 U.S. 479, 482 [1965]).

[182] See Stanley v. Georgia, 394 U.S. 557 (1969).

[183] 413 U.S. at 57–58.

ably broad leeway to regulate speech:[184] "Understandably, those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography." In this view, if government is permitted to regulate speech in the economic marketplace to further the community welfare, it can regulate other forms of speech in the same fashion. Speech interests will be subordinated to the goal of achieving clean, stable, and orderly downtown areas, and the property and economic interests promoted by such developments.

These priorities became more explicit three years later in *Young v. American Mini Theatres.*[185] The Court upheld a Detroit zoning ordinance which differentiated between motion picture theaters and bookstores that exhibited sexually explicit "adult" books and movies and those which did not. The ordinance required that such establishments not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. All Justices recognized that the regulated establishments offered materials that were not within the constitutional definition of obscenity. Nevertheless, a five-to-four majority upheld the ordinance, relying in part on a finding of the Detroit Common Council that "some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas."[186] Justice Powell's concurring opinion is even more clearly dominated by property considerations. He viewed the case as "an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent."[187]

In many of these cases property interests conflict—the free speech and property rights of commercial purveyors of books and movies are arrayed against the property owners of the surrounding community. The *Detroit* case curbed the rights of the owners of regulated establishments in the course of protecting the value of the surrounding property against uses which, in the city's words, "ad-

[184] *Id.* at 62.

[185] 427 U.S. 50 (1976).

[186] *Id.* at 54.

[187] *Id.* at 73.

versely affect[ed] property values."[188] By contrast, when the proprietor of a drive-in movie showing sexually suggestive films succeeded in invalidating a restrictive ordinance, the counterpoised property interests of the community were not deemed as weighty—the screen was on a busy highway and visible only from two adjacent streets and a little used church parking lot—and the restriction was not imposed as part of a comprehensive zoning plan designed to protect property values.[189]

The concept that speech may be controlled to the extent of its deleterious effect on surrounding property interests also worked its way into a decision that upheld FCC regulation of a radio monologue that was found to be "indecent but not obscene" because it included "dirty words."[190] Although the case can be explained in terms of federal power over the air waves, as well as domestic privacy, Justice Stevens, who wrote the *Detroit* decision, underscored his rejection of the free speech claim by analogy to the zoning power:[191]

> The Commission's decision rested entirely on a nuisance rationale under which context is all important. . . . As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." *Euclid v. Ambler Realty Co.* . . . We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

Speech and property values clashed again in *Metromedia, Inc. v. City of San Diego*,[192] which tested the validity of municipal zoning restrictions against billboards. Five separate opinions resulted in a narrow invalidation of the ordinance because some forms of bill-

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[188] *Id.* at 55.

[189] Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). See also Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[190] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[191] *Id.* at 750. Recent Burger Court decisions confirm that local government, at least in some contexts, may subordinate speech interests to property and community values through the careful exercise of the zoning power. Vance v. Universal Amusement Co., 445 U.S. 308 (1980); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). Recently, however, the Court invalidated, on separation grounds, a statute designed to shield churches from close proximity to premises where liquor is sold. Larkin v. Grendel's Den, Inc., 103 S. Ct. ——— (1982).

[192] 453 U.S. 490 (1981).

board advertising were permitted while others were proscribed. But seven members of the Court, relying in part on the ordinance's purpose "to safeguard and enhance property values," would permit broad, nondiscriminatory prohibition of billboards in order to achieve the "twin goals [of] traffic safety and the appearance of the city."[193]

A four-Justice plurality interpreted the ordinance as permitting some "on-site" billboard advertising: "The occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most noncommercial messages."[194] The plurality found it constitutionally permissible for a city allowing on-site billboards to ban "off-site" commercial advertising on billboards, because commercial speech is entitled to lesser protection and thus subject to broader regulation. To that extent, the "city's land-use interests" outweighed "the commercial interests of those seeking to purvey goods and services within the city."[195] The defect in the ordinance was that the city allowed some kinds of commercial billboards but prohibited other kinds of noncommercial messages without adequate justification for the content distinctions.

Justices Brennan and Blackmun, though willing to recognize the validity of some "place and manner" restrictions on billboards, found the ordinance broadly unconstitutional as an unjustified total ban on an important medium of communication:[196]

> . . . the city has failed to show that its asserted interest in aesthetics is sufficiently substantial in the commercial and industrial areas of San Diego. I do not doubt that "[i]t is within the power of the [city] to determine that the community should be beautiful," . . . but that power may not be exercised in contravention of the First Amendment.

Chief Justice Burger's dissent, evoking his opinions in the 1973 obscenity decisions, saw the issues differently:[197]

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[193] *Id.* at 507.

[194] *Id.* at 503.

[195] *Id.* at 512.

[196] *Id.* at 530.

[197] *Id.* at 557, 559–60. Justice Rehnquist's dissent was even more succinct: "[T]he aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community." *Id.* at 570.

> [W]e are discussing a very simple and basic question: the authority of local government to protect its citizens' legitimate interests in traffic safety and the environment by eliminating distracting and ugly structures from its building and roadways, to define which billboards actually pose that danger, and to decide whether, in certain instances, the public's need for the information outweighs the dangers perceived.

Justice Stevens also stressed the property theme in his dissent. Comparing billboards to graffiti, he reasoned that both forms of expression could be banned:[198]

> It seems to be accepted by all that a zoning regulation excluding billboards from residential neighborhoods is justified by the interest in maintaining pleasant surroundings and *enhancing property values*. The same interests are at work in commercial and industrial zones. . . . Those interests are both psychological and economic. *The character of the environment affects property values* and the quality of life not only for the suburban resident, but equally for the individual who toils in a factory or invests his capital in industrial properties.

Finding no censorial motive for the ordinance, Justice Stevens found it constitutional.

The billboard decision is instructive. When speech interests conflict with property and environmental values protected by government through zoning measures, speech will take second place to the interests in "enhancing property values" and preventing "ugly" and "unsightly eyesores." Attractive urban centers and quiet and orderly residential communities are surely important, but they should not be achieved at the expense of the First Amendment. Urban planning goals and zoning schemes should not enjoy "talismanic immunity"[199] from close First Amendment scrutiny. Moreover, the Court's preference for neat, orderly commercial and residential environments, wholly uncluttered by "unsightly" manifestations of free speech, stands in sharp contrast to a different perception of the untidiness that society must tolerate to maintain

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[198] *Id.* at 552 (emphasis added).

[199] Young v. American Mini Theatres, 427 U.S. 50, 75 (1976) (Powell, J., concurring); Schad v. Mt. Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 2187 (1981) (Blackmun, J., concurring). For an extremely helpful analysis of these issues, see Costonis, *Law and Aesthetics: A Critique and a Reformation of the Dilemmas*, 80 MICH. L. REV. 355, 446–58 (1972).

the values of free expression. As Justice Harlan stated in *Cohen v. California*:[200]

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness, but of strength.

IV. CONCLUSION

The apparently close link between the Burger Court's free speech decisions and traditional property interests is consistent with a decade of jurisprudence in the Supreme Court. An older concept that a primary office of civil liberties is to safeguard the liberty of property and contract has reemerged. For most of two centuries the protection of property and contract was viewed as the cornerstone of the protection of liberty. John Adams went so far as to say, "Property must be secured or liberty cannot exist."[201] More recently Justice Stewart observed: " . . . a fundamental interdependence exists between the personal right to liberty and the personal right in property. . . . That rights in property are basic civil rights has long been recognized."[202] And the originator of the "new property" concept believed that property—"new" or "old"—and liberty were inextricably intertwined in providing the individual a buffer against the state.[203]

We do not denigrate the important role of private property as a protector of civil liberties. Nor do we suggest that free speech and property are inherently antithetical. Although they may frequently be in conflict, the values embodied in the two concepts play a complementary role in the maintenance of liberal democracy, however imperfect. As the Court has observed: "[T]he Framers of the

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[200] 403 U.S. at 24–25 (1971).

[201] ADAMS, DISCOURSES ON DAVILA (1789–90), *quoted in* COKER, DEMOCRACY, LIBERTY, AND PROPERTY 466 (1947). See FREUND, THE SUPREME COURT OF THE UNITED STATES 35–37 (1961).

[202] Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

[203] Reich, note 21 *supra*, at 786–87. See also MICHELMAN, note 36 *supra*.

Constitution certainly did not think these fundamental rights of a free society are incompatible with each other."[204]

By the same token, it is unnecessary to take the position that property interests should always be subordinated to free speech values. Thus, even a low-decibel speaker could not properly assert a right to orate or even to converse in another's living room without permission. Nor is it clear that someone wishing to open a bookstore in a neighborhood zoned for residential use could validly complain that the First Amendment provided a right that overrode a neutrally applied zoning law.

Individual ownership of property is thus closely linked to civil liberty. That is not to say that property concepts must underlie protection of free speech. We see no basis in principle for this in light of the independent values that gird the First Amendment. These purposes are well known and can be briefly summarized. The first is individual fulfillment through self-expression. As Justice Brandeis put it: "the final end of the State [is] to make men free to develop their faculties."[205] The second major justification stresses concepts of self-government and political democracy. This theory of free speech was powerfully formulated by Professor Alexander Meiklejohn and, in a well-known passage, underlined by Justice Brennan, who affirmed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[206] The third major purpose of the First Amendment is its purifying quality in advancing knowledge and discovering truth. Or, in Justice Holmes' metaphor, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[207] And finally, "freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus."[208]

These are the classic purposes of the First Amendment. Each alone may not be compelling, but their sum posits a powerful case

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[204] Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972).

[205] Whitney v. California, 274 U.S. 357, 375 (1927).

[206] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[207] Abrams v. United States, 250 U.S. 616, 630 (1919).

[208] EMERSON, note 48 *supra*, at 7.

for free expression. We see no reason to diminish constitutional protection when property interests clash with free speech values. After considerable exposure to both academic discourse and courtroom combat relating to free speech, we have rarely found a person who openly belittles the worth of the constitutional guarantee. To the contrary, everyone professes to support it. Why then the sharp differences among judges and scholars? We suggest that these turn not merely on whether the disputants agree with purposes of the First Amendment but rather on the degree to which they embrace them.[209] The degree of adherence cannot of course be measured, but it is palpable when one reads judicial opinions, law review articles, or even the briefs of lawyers. Like Justice Stewart's approach to hard-core obscenity, one knows it when one sees it. Contrast, for example, Justice Holmes' opinion in *Schenck*[210] with his dissent in *Abrams*.[211] Compare the opinion of Justice Harlan in *Barenblatt*[212] with the Harlan of *Cohen v. California*.[213] Stack up the opinions of Justice Frankfurter against those of Justices Black and Douglas, and the articles of Alexander Bickel and Philip Kurland against those of Thomas Emerson and Harry Kalven, Jr. The differences are intellectual only in part.

The Court's pattern of downgrading free speech when it has appeared to conflict with proprietary rights asserted by individuals, corporations, or even government expresses an erroneous set of priorities. The Court has treated the First Amendment merely as one more factor to be weighed in the constitutional balance rather than as the first among equals in the American pantheon of liberty.[214]

Free speech and property in fact represent different sorts of constitutional liberty. Property is bottomed on protection of wealth

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[209] Justice Frankfurter was making much the same point when he responded to Justice Holmes's famous dictum that "[g]eneral propositions do not decide concrete cases," Lochner v. New York, 198 U.S. 45, 76 (1905), by observing, "Whether they do or not often depends on the strength of the conviction with which such 'general propositions' are held." Harris v. United States, 331 U.S. 145, 157 (1947) (dissenting opinion). See Dorsen, Book Review, 95 HARV. L. REV. 367, 384 (1981).

[210] Schenck v. United States, 249 U.S. 47 (1919).

[211] Abrams v. United States, 250 U.S. 616 (1919).

[212] Barenblatt v. United States, 360 U.S. 109 (1959).

[213] 403 U.S. 15 (1971).

[214] See McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

and "settled expectations," within the larger context of a model of society that is orderly, stable, prudent, and rational. Robust free speech, by contrast, can be untidy, boisterous, and risky. But the alternative of viewing free speech as just another "value" among many presents far greater costs. We cast our lot with the risk takers: Justice Brandeis of *Whitney*,[215] Justice Douglas of *Brandenburg*,[216] and Justice Harlan of *Cohen*, when he expressed his conservative faith in freedom as follows:[217]

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

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[215] Whitney v. California, 274 U.S. 357 (1927).

[216] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[217] Cohen v. California, 403 U.S. 15, 24 (1971).