

The Dale Problem:
Property and Speech under the Regulatory State

Louis Michael Seidman

A contradiction lies at the core of the modern law of speech and property. The contradiction is captured by four propositions, all of which are widely accepted, but all of which cannot be true.

First, freedom of speech is not subject to political revision. Of course, beneath this seemingly simple statement lies a body of immensely complex doctrine. The proposition says nothing about what freedom of speech consists of or what levels of review should apply to political decisions regulating or channeling speech. Still, few would quarrel with the notion that there is some core content to the freedom of speech and that this core content is constitutionally protected.

Second, within broad limits, economic entitlements are subject to political revision. As we shall see, this proposition has not always been true, and it is not completely true now. As a generalization, though, it is not only true but also a central tenet of the modern regulatory state. Of course, the Constitution prevents the taking of property unless the taking is for a public purpose and, in the case of certain kinds of interferences with property rights, just compensation must be paid. But the courts have read the public purpose requirement very broadly. As a consequence, if the government is willing to pay for property, it can usually seize it. Moreover, even if the government is unwilling to pay, it can usually regulate and restrict property rights very extensively. If the economic entitlement does not count as property, then the scope of permissible political revision is even broader.

Third, the freedom of speech does not include the right to use another person's property

in order to convey one's message. This proposition is also less true one might think, but it is nonetheless often true, and it captures an intuition that most people unreflectively hold. For example, when the Supreme Court upheld the free speech right of a protestor to burn an American flag, it took pains to point out that "nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea." Similarly, the Court has made clear no one has the right to commandeer someone else's printing press, or automobile, or shopping center to engage in communication.

The final proposition is that all speech requires the use of some property. For the most part, speech requires the use of physical objects, whether it is a megaphone, paper and pen, a printing press, a television camera, or a computer terminal. Even speech that depends on nothing more than the human vocal cords must occur somewhere. The physical things that speakers use and the physical places where they use them are owned by someone. Without access to these things and places, no speech is possible.

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

Two Supreme Court cases illustrate this simple but puzzling syllogism. In *City of Ladue v. Gilleo*, the Supreme Court invalidated a statute that prohibited a home owner from posting a sign in her own window. In *U.S. Postal Service v. Council of Greenburgh Civic Associations*, the Court upheld a statute prohibiting the placing of unstamped mailable matter in letter boxes in private homes. What is the difference between the two cases? In *Gilleo*, the

Court emphasized that the sign was placed in the speaker's own home. In contrast, the *Greenburgh* Court relied on the fact that the government had transferred ownership and control of the letter box from the private owner to the government itself. Because the individual no longer had a property interest in the letter box, he had no right to use it for speech purposes.

And so the questions beg to be asked: If the government can shift the property interest in a mailbox, why can't it shift the property interest in a window? And if it can shift the property interest in a window, doesn't this mean that it can shift the speech interest in using a window to display a sign?

As it happens, one can trace the origins of these questions to a tension that emerged at the very dawn of the modern regulatory state. Once ensconced in power, the Supreme Court Justices appointed by Franklin Roosevelt faced a dilemma. One part of the New Deal attack on the old order consisted of a criticism of status quo distributions of wealth and power in the private sphere. Another part consisted of criticism of a brand of judicial intervention that stood in the way of New Deal reforms. How, then, should the Justices react when the Court was urged to intervene in order to change status quo distributions?

To understand the Court's answer to this question, we must divide legal rules into three categories: Those that are constitutionally impermissible, those that are constitutionally discretionary, and those that are constitutionally mandatory. Rules are constitutionally impermissible when a the Constitution prohibits their enactment. Rules are constitutionally discretionary when the Constitution leaves the political branches free to enact them or not. Rules are constitutionally mandatory when the Constitution requires them even if the political branches do not enact them.

At the risk of considerable oversimplification, it is possible to sketch how the *Lochner* and Roosevelt courts slotted various disputes into these categories. During the *Lochner* era, redistributive economic legislation that deviated from a “natural” pre-political baseline was sometimes treated as impermissible, and legal rules protecting existing distributions were occasionally treated as mandatory. For example, in *Lochner* itself, the Court held that maximum hours legislation for bakers was impermissible. In a smattering of other cases, the Court interpreted the Constitution to impose mandatory rules protecting property rights even when the political branches had not provided for them.

The Roosevelt Court moved both classes of rules into the discretionary category. Courts would not read the Constitution to prohibit such measures, but neither would they read it to require them. Thus, what came to be called ordinary “social and economic legislation” was subject to only minimal review, even when the laws arguably protected existing distributions. With respect to these laws, objections to judicial activism prevailed over objections to maldistribution.

Statutes trenching on noneconomic liberties like freedom of speech and racial equality were treated very differently. The *Lochner* court sometimes categorized these measures as discretionary. For example, in *Plessy v. Ferguson*, the Court held that states had discretion whether or not to mandate separation of the races on privately owned railroads. Similarly, in the World War I free speech cases, the Court held that Congress could choose whether or not to outlaw speech supposedly obstructing the war effort. In contrast, the Roosevelt Court subjected similar statutes to heightened review. The statutes were effectively shifted from the discretionary to the impermissible category, and occasionally, rules guaranteeing exercise of these rights were

treated as constitutionally mandatory .

At first, the Roosevelt court focused primarily on free speech claims, but later, statutes involving race, gender, and sexual autonomy were added to the list of measures that risked judicial invalidation. For New Deal liberals, many of these laws were thought to be unjust because they entrenched maldistributions of social power. Hence, in this area, the objection to maldistribution prevailed over the objection to judicial intervention.

For more than a half century, this approach has dominated constitutional law. It has nonetheless been subject to vigorous attack. Critics on the right have complained that there is no principled basis for distinguishing between property-based and liberty-based constitutional rights, that the right to hold and use property is itself an important liberty, and that other liberties are extremely fragile in a world where the legislative power to redistribute property is left unchecked. Critics on the left, much more muted these days, have complained that noneconomic liberties are meaningless in a society where there is serious maldistribution of property and that economic redistribution therefore should be mandatory rather than merely discretionary. On the far left, some critics have argued that some noneconomic liberties, which the Court has treated as mandatory, have obstructed, rather than aided redistribution.

In this article, I advance a different and, I hope, original objection to the New Deal approach. For the reasons I have already explained, it will not do to distinguish between economic and noneconomic liberties, because noneconomic freedoms are parasitic on underlying economic entitlements. Although I believe that my claim is generalizable, I will focus here on the relationship between free speech and property-like entitlements. In order to give free speech rights content, I argue, the Court must constitutionalize property distributions in a fashion that is

in deep tension with the New Deal compromise. It can do so in one of two ways: by making supposedly prepolitical distributions mandatory, as the *Lochner* court did, or by making these distributions impermissible, as radical critics of the New Deal compromise demand. What does not work is making property distributions discretionary and liberty rights mandatory. This compromise reproduces, rather than eliminates, the contradiction that provided the motive for it in the first place.

Part I of this article uses a single Supreme Court decision -- *Boy Scouts of America v. Dale* -- to illustrate the problem. The *Dale* Court held that a New Jersey public accommodations law, interpreted to prohibit the Boy Scouts of America (BSA) from dismissing a scout master on account of his sexual orientation, violated the BSA's first amendment right to "expressive association." I argue that the decision depends on an implicit constitutionalization of property distributions and that this approach, by making prepolitical property rights mandatory, cannot easily be reconciled with one branch of the New Deal compromise. Nor can the problem be resolved by overruling *Dale*. Doing so would make free speech rights discretionary across a broad range of cases, thereby coming into conflict with the other branch of the compromise.

Parts II and III survey some of these cases. I argue that the Court has taken inconsistent positions concerning the permissibility of shifting property and other economic entitlements when they impact on putative free speech rights, and that when it has permitted a shifting of these entitlements, free speech rights have not survived. Part II concerns cases where property distributions are left in the discretionary realm, thereby placing free speech rights in that realm as well. Part III focuses on cases like *Dale* where the Court has constitutionalized property rights by making redistribution either constitutionally impermissible or mandatory. In a brief,

concluding Part, I suggest some implications my analysis holds for the future of free speech rights.

I. The “*Dale*” Problem and Four Failed Solutions

The Boy Scouts of America (BSA) unceremoniously removed James Dale from his position as scout master after discovering that he was gay. Dale filed suit, claiming that BSA had violated a New Jersey statute that prohibited discrimination based upon sexual orientation in public accommodations. The New Jersey Supreme Court sided with Dale, but a 5-4 majority of the United States Supreme Court, in an opinion written by Chief Justice William Rehnquist, reversed. According to the majority, application of the New Jersey statute in this context violated the BSA’s free speech right to “expressive association.”

Dale has been subject to widespread criticism, but neither the *Dale* Court nor its critics have noticed a key problem posed by the case. Suppose we assume that BSA was, indeed, engaged in first amendment expression when it excluded Dale, and suppose that the New Jersey statute did, in fact, interfere with that expression. These suppositions do not resolve the case, as the Court thought, because there are complementary free speech interests on the other side of the ledger. Surely, Dale, too, was making a political point when he insisted on Boy Scout membership. Dale’s status as an openly gay man who served effectively as a scout master forcefully communicated opposition to negative stereotypes about male homosexuals. Why

were *his* free speech rights not abridged when the Court upheld BSA's right to expel him?¹

A. The *Marsh* Solution

An early decision by the Roosevelt Court recognized just such a claim, albeit in a dramatically different setting. In *Marsh v. Alabama*, a religious leafleter was prosecuted for trespass when he refused to obey an order to leave the town of Chicasaw, which was wholly owned by the Gulf Shipbuilding Corporation. In an opinion expressly invoking “preferred freedom” rhetoric that sharply distinguished between property claims and civil liberties, the Court held that Marsh's conviction violated his free speech rights. Writing for the majority, Justice Hugo Black was unimpressed by the argument that Gulf was simply enforcing the right of exclusion associated with private property. Instead, the Court held, ordinary principles of state property law did not trump free speech claims. Background property entitlements were unconstitutional to the extent that they interfered with Marsh's ability to communicate his message. Put differently, the *Marsh* Court rejected the third of the four propositions with which

¹ Perhaps the Court should not be faulted for failing to notice this problem since Dale, himself did not advance a first amendment claim. My argument therefore should be taken as a general exposition of the *Dale* problem rather than a criticism of the Court's resolution of the *Dale* case.

we began: At least in this context, it held that a speaker did have the right to commandeer the property of another for speech purposes.

Just as *Gulf* interfered with Marsh's right of free expression, so, too, it might be said that BSA interfered with Dale's free expression rights. Of course, the prerequisite of state action means that in both cases, a constitutional violation requires some sort of support or complicity by the state. But *Marsh* seems to stand for the proposition that the enforcement of background state property and contract laws is sufficient to satisfy the state action requirement. Thus, if *Marsh*-style reasoning were applied to the facts of *Dale*, the Court would have had to weigh Dale's first amendment interests against those of BSA.

We cannot know how the Court would have struck the balance, but it is at least possible that it would have concluded that Dale's first amendment rights should prevail. Significantly, such a holding would have made BSA's exclusion of Dale illegal even if New Jersey had never enacted a public accommodations statute, just as Marsh's expulsion from Chicasaw was illegal even in the absence of a statute protecting his right to be there. To put the same point slightly differently, this decision would have made antidiscrimination law mandatory, rather than merely discretionary as the *Dale* dissenters argued, or impermissible as the *Dale* Court held.

One way to conceptualize *Marsh*, then, is that, like *Lochner*, it constitutionalizes state decisions concerning allocation of property rights,. But although both cases move the question out of the discretionary sphere, there is nonetheless a crucial difference between them. Whereas *Lochner* made redistribution constitutionally impermissible, *Marsh* made it mandatory. *Lochner* provided constitutional protection for the rights of the "original" property holder, who was thought to have a natural or prepolitical entitlement. In contrast, *Marsh* protected the

dispossessed by requiring redistribution from owners to nonowners. *Marsh* in effect created a constitutionally compelled first amendment easement.

Marsh, then, spells big trouble for *Dale*. Fortunately for the *Dale* Court, however, *Marsh*-style reasoning is not much in fashion these days. As we shall see, *Marsh* has never been overruled, and remnants of the *Marsh* approach continue to influence some corners of free speech jurisprudence. Still, *Marsh*'s modern domain has been sharply limited.

Its partial demise is almost certainly related to its failure to deal with one horn of the New Deal compromise. *Marsh* tended toward maximization of the government's potential to reallocate distributions produced by private markets, but it did so by also maximizing judicial power. Taken to the limits of its logic, *Marsh* constitutionalizes virtually all of public policy. *Every* decision concerning the allocation of property rights has implications for the total amount of speech society produces. Hence, all such decisions become constitutionally mandatory and, therefore, outside the sphere open to political control. Had *Marsh* prevailed, it would have proved the Justices in the *Lochner* majority right. Just as they warned, there would have been no middle ground between making redistribution impermissible and making it mandatory. Once the constitutional restraints on redistribution are lifted, we are on a road headed inexorably toward judicially imposed socialism.

B. The "Deconstitutionalization" Solution

Of course, this outcome was unacceptable. The liberals on the Court attempted to avoid it by deconstitutionalizing "neutral" background property law entitlements. The establishment of such entitlements is generally said not to involve "state action," and, therefore, does not raise first amendment problems. Put differently, decisions about these entitlements are usually treated

as discretionary rather than either impermissible or mandatory. For example, a state is entitled to enact a system subsidizing the speech of impoverished political candidates, but it is not required to do so. The inability of impoverished candidates to speak is said not to involve state action.

Whether to provide subsidies is therefore a political, rather than a judicial decision.

New Deal liberals thought that placing property law in the permissive sphere while shifting laws invading civil liberties to the impermissible sphere produced a sensible and workable compromise between the two, conflicting branches of the New Deal critique of the old order. They were wrong. Deconstitutionalizing property rights satisfies the demands of judicial restraint, but only at the cost of jeopardizing civil liberties.

Their mistake is, again, illustrated by *Dale*. We have already seen that constitutionalizing background property rules spells big trouble for *Dale*, but, surprisingly, deconstitutionalizing them also spells big trouble. It would seem to follow from deconstitutionalization that the state is free, at least within broad constraints, to shift property rights from one party to the other. True, the partial demise of *Marsh* means that this shift is not mandatory, but it remains discretionary.

In fact, post-New Deal takings jurisprudence recognizes just this freedom. In recent years, the freedom has eroded slightly as the Court has recognized some limits on the government's power to engage in "regulatory takings." Still, it remains true that unless the government engages in a physical taking or trespass or unless its regulatory measures destroy most, if not all, of the value of property, the government retains broad discretion to regulate the use of property without paying compensation.

Suppose, then, that we treat the New Jersey antidiscrimination statute as constituting such

a regulation. In effect, the statute grants Dale a property-law, antidiscrimination easement. On this reading of the statute, BSA's property rights have now been modified so as to prohibit use of the property in a manner that prevents individuals from becoming members on the ground that they are gay. If our original Proposition 2 is correct, then, this transfer of property interests is constitutionally permissible. And, indeed, on current doctrine, it is unlike that such an easement would be treated as a "seizure" of the property. It is an "adjust[ment] of the benefits and burdens of economic life to promote the common good" that is neither a physical invasion of real property nor a total destruction of the property's value. Moreover, even if the statute did amount to a taking, the very most that can be said is that BSA would be entitled to compensation for the reduction in the value of its property, which was likely to be quite minimal.

Perhaps it seems silly to go to this length to refute a claim no one has advanced. The refutation is nonetheless critical because it destroys not only a fifth amendment takings clause argument that was never made, but also a first amendment speech clause argument that was made successfully. Oddly, New Jersey's shift of the property law entitlement now means that BSA rather than Dale is forced to rely on *Marsh-style* reasoning.

The critical point is that the New Jersey statute turns access to the Boy Scouts into Dale's property. At this point, our Proposition Three takes hold: In a world where *Marsh* has been repudiated, the BSA can no longer claim that the speech clause requires the forced use of what is now Dale's property to engage in expressive activity. Just as a trespasser has no general constitutional right to use the property of another so as to maximize the trespasser's speech, so too, BSA have no right to infringe Dale's newly granted property right for the sake of its expressive association. How, then, were BSA's first amendment rights violated when Dale

chose to exercise his property right by remaining within the organization?

C. The Overruling *Dale* Solution

If this analysis is correct, it demonstrates that it is not possible, at least in the this context, to move property distributions into the discretionary sphere while making laws that impinge on speech rights impermissible. By constitutionalizing speech rights, the Court implicitly constitutionalized supposedly prepolitical property distributions mandatory as well.

We might, of course, conclude that *Dale* was simply wrongly decided. The result in *Dale* is problematic in any event. It seems to bring into question not just New Jersey's expansive public accommodations law, but also other bedrock nondiscrimination statutes protecting Americans from racial and gender discrimination, especially given the Court's reluctance to look behind BSA's claim to expressive association. In many quarters, *Dale*'s demise would not be much mourned.

But we are talking about more than just *Dale*. Recognizing a government right to shift property entitlements in the fashion of the New Jersey antidiscrimination law has the potential to remake broad swaths of first amendment law, thereby coming into conflict with Proposition 1. Three examples suffice to make the point.

In *Miami Herald Publishing Co. v. Tornillo*, the Court addressed the constitutionality of a "right-of-reply" statute that required newspapers to print responses from candidates whom the newspapers had attacked. A unanimous court held that the statute violated core first amendment principles. Overturning *Dale* on the grounds suggested above might bring this result into question. If the government can create a nondiscrimination easement, then, it would seem, it can also create a right-of-reply easement. It will not do to claim that the creation of this property

right itself violates the first amendment any more than, in a world without *Marsh*, the granting of a property entitlement to the Gulf Shipbuilding Company violated a trespassing leafleter's first amendment rights.

In *Texas v. Johnson*, the Supreme Court invalidated a federal statute prohibiting flag burning. In response to the decision, some members of Congress proposed a regulation of the private property interest in the flag to prohibit uses thought to denigrate it. Would such a statute effectively overrule *Johnson*? As noted above, *Johnson* itself, recognized that one has no constitutional right to burn someone else's flag. A shift in property entitlements would *make it* someone else's flag. Perhaps it bears repeating that this shift is not, itself, subject to first amendment challenge at least if one takes seriously the deconstitutionalization of property rights claims.

In *Hague v. CIO*, oft-quoted dicta created what, significantly, has been characterized as a "first amendment easement," granting the right to use government property in some circumstances to engage in expressive activity. *Hague* has given rise to a complex and much contested body of law regulating access to a "public forum." Although this doctrine has survived (at least in some form) for more than half a century, it is far from clear that it could survive the overruling of *Dale* on the grounds suggested above. Overruling *Dale* would mean that shifts in property rights are discretionary even when they impact on freedom of expression. Suppose, then, that we have two rival groups that have inconsistent views about the use of government property. Protestors want to use the property for free speech purposes. Nonprotestors object to this use of the property. Placement of property rights in the discretionary, nonconstitutional category means that the political branches are free to resolve this

dispute in any way they choose. Indeed, they are less constrained than on the facts of *Dale*. If the government could grant a nondiscrimination easement that reduces the property rights of a private person without running afoul of either the takings or the free speech, clause, then surely it can grant private individuals property rights in its own property without violating either clause. To be sure, granting exclusive rights to the nonprotesters may reduce the total amount of free speech activity, but granting exclusive property rights to The Miami Herald might also might have reduced total first amendment activity. If we are to avoid the *Marsh* trap of constitutionalizing the entire social realm, then the government must be left free from first amendment constraints when it allocates property rights.

D. The Formal Solution

Is there a way to distinguish *Dale* from these other cases so that *Dale* could be overruled without jeopardizing broad areas of settled first amendment law? The most promising approach is to emphasize the requirement of government neutrality. Not coincidentally, this requirement has been a central preoccupation of post-New Deal constitutionalism. In order to understand it, we must distinguish between two different conceptions of constitutional law.

On what I will call the “as-applied” conception, the Constitution’s concern is with the right of individuals to engage in specified activity without government interference. This conception, like its rival, requires us to examine government actions, but the focus is on how these actions affect individuals. To the extent that decisions attributable to the government hinder individuals in the exercise of their constitutional rights, the decisions are subject to special scrutiny.

A second approach, which I will call the “formal” conception, is the mirror image of the

first. On the formal approach, the Constitution's primary focus is on government decisions rather than on individual freedom. To be sure, this conception requires us to notice when individuals are hindered in the exercise of their rights, but its main concern is with certain kinds of government malfunctions thought to have unfortunate systemic effects. On the formal approach, then, even if some government action hinders an individual in the exercise of constitutional rights, the action is permissible so long as it is not a symptom of broader government malfunction.

Many debates in modern constitutional law can be organized around the disagreement between defenders of the as-applied and formal conceptions. Disputes about the state action requirement, about "purpose" and "effect" tests under the equal protection clause, and about "incidental" and "direct" tests for invasions of fundamental rights (what is sometimes called "track one" and "track two" cases in the first amendment context) all relate to this argument.

For our purposes, the distinction is important because it bears on the disagreement between the *Marsh* Court and its critics. The *Marsh* Court was strongly influenced by the as-applied conception. Marsh's claim was not that neutral, background property rules demonstrated some sort of pervasive government malfunction. Instead, his claim was that, whatever the motive of those who wrote the rules, when they were applied to him, they reduced his freedom of speech.

We have already seen why this approach has fallen into disfavor. All legal rules reduce the freedom of some people in order to expand the freedom of others. A court that set out to maximize overall freedom would make all government decisions either mandatory or impermissible. At least in part for this reason, the formal conception has become dominant. On

this view, the question is not whether individual litigants have more or less freedom, but whether there is evidence of government malfunction.

The main evidence the Court has been concerned with is nonneutrality, which can manifest itself either through facial discrimination or discriminatory intent. Nonneutrality is facial when the words of the statute itself discriminate in a constitutionally problematic fashion. Discriminatory intent is present when the statute, even though facially neutral, is written in order to achieve a constitutionally problematic outcome. It bears emphasis that in either case, what is important is not the actual effect of the statute on the freedom of the individuals before the court, but the evidence the statute provides of government malfunction..

How does this distinction play out in the free speech context? An advocate of the as-applied approach would ask whether the statute in question had the effect in a particular case of reducing freedom that the Constitution protects. Thus, any application of a statute that prevented a person from expressing herself would be constitutionally suspect. On this approach, for example, the trespass statute in *Marsh* posed a serious constitutional issue because of the statute's effect on Marsh's ability to convey his message. Similarly, a failure to enact the New Jersey antidiscrimination law might be constitutionally suspect because it might diminish Dale's ability to make his point about gay rights.

In contrast, the formal approach focuses on the nature of government intervention. The Court has created a byzantine body of doctrine relating to content neutrality, subject matter neutrality, and viewpoint neutrality to distinguish between permissible and suspect interventions. Without parsing this doctrine here, we can see the main point through a single example.

Consider again the problem of flag burning. Despite its critics claims to the contrary, the

Court has never held that there is a constitutional right to burn an American flag, at least if by “constitutional right” one means that individuals have immunity from punishment when they engage in this conduct. Under a properly drawn statute that exhibited no evidence of malfunction -- for example a statute that generally prohibited setting fires in public places -- a flag burner could indeed be punished even if the punishment prevented him from expressing a point of view. A problem has arisen only because flag burning statutes have not been properly drawn. They have been nonneutral, either because on their face they have made punishment turn on the message conveyed by the burning, or because they have been written with the intent of discouraging certain messages.

For the most part, modern constitutional law reflects the victory of the formal approach. For example, in *Washington v. Davis*, the Court held that “neutral” statutes are subject to only rational basis review even if they have a disproportionate adverse effect on racial minorities. Similarly, a government decision not to fund abortions does not violate the due process clause even if, on the individual level, the failure to fund makes it impossible for poor women to exercise reproductive choice. Facially neutral statutes that severely impinge on an individual’s religious activities do not violate the free exercise clause. And, as the flag burning example illustrates, in general the Court has been unsympathetic to free speech claims that arise incidentally from even handed, content neutral regulation that is not motivated by the desire to suppress speech.

Dale stands in sharp contrast to this general trend. As many critics of the decision have pointed out, the New Jersey antidiscrimination law was a facially neutral measure unrelated to speech. It was motivated by the desire to suppress discrimination, not a desire to inhibit any

message BSA wished to convey. Under standard first amendment doctrine, then, the Court should have applied only low level scrutiny to it. Moreover, on this theory, *Dale* could be overruled without jeopardizing decisions like *Tornillo*, *Johnson*, or *Hague*. Unlike the *Dale* statute, the *Tornillo* “right-of- reply” statute was content based in the sense that the right to reply was triggered by the content of the newspaper’s speech. Although a hypothetical shift in the property interests in flags might be facially neutral, it would almost certainly be motivated by the purpose of discouraging the political message conveyed by flag desecration. As we shall see, the *Hague* problem is more complex, but at least some of the “public forum” law that has grown out of *Hague* rests on requirements of content neutrality and permissible motivation.

Thus, critics of *Dale* may be justified in their outrage at the Court’s inconsistency. They should nonetheless be careful what they wish for. Some of these same critics regularly castigate the Court for its more general adherence to a formal conception of constitutional law. With some justification, they have claimed that constitutional rights lose much of their force when the Court ignores the adverse effects “neutral” government policies have on their exercise. Poor women hardly have a “right” to an abortion when they have no money to pay for them, and African Americans are hardly free of discrimination when “neutral” standards and tests exclude them from positions of power and influence. Perhaps, then, the *Dale* Court can be chastised for hypocrisy when it failed to apply its usual deference to facially neutral laws when they have the effect of protecting the rights of gay men and lesbians, but the Court’s liberal critics are also flirting with hypocrisy. It will take some work to explain how both *Dale* and *Washington v. Davis* can be overruled.

Moreover, even people who are generally sympathetic to the formal approach are bound

to have reservations about a complete victory for it. True, the particular statute in *Tornillo* was not content neutral, but it is easy to imagine a similar statute that might be. Suppose that the government simply nationalized all newspapers, without regard to their content and turned them over to “the people?” Or imagine that the government, without regard to content, simply prohibited speech in all public spaces, thereby leaving those without property of their own no place at all where they could express their opinions?

Indeed, the very distinction between the formal and the as-applied approach is fragile and, perhaps, unsustainable. As many critics of *Washington v. Davis* have pointed out, government indifference to the impact of its programs on constitutional values is, itself, a kind of malfunction. And even if indifference were not constitutionally problematic, the tools the court has developed to detect government malfunction are insufficiently sensitive. For example, rules that have an adverse effects on speech but that are not content based may nonetheless evidence government malfunction if government officials are willing to suppress some speech they approve of in order to outlaw speech that they disapprove of. And more generally (and radically) background principles of property and contract may reflect a tolerance for constricted speech opportunities that is so pervasive it is not even noticed.

E. Where This Leaves Us

The upshot of this analysis is that we are confronted with two overlapping dilemmas. The first dilemma emphasizes the conflict between the modern Court’s rejection of *Lochner* and *Marsh* on the one hand and its acceptance of civil liberties on the other. We could protect civil liberties by making prepolitical property distributions either mandatory or impermissible, but if we insist on leaving these distributions in the discretionary, political sphere, then we cannot also

place civil liberties in a mandatory sphere.

The formal rights approach suggests an escape from this dilemma, but only at the price of creating another one. This approach leaves property in the discretionary sphere, but only so long as redistribution does not exhibit government malfunction (here defined as a reallocation that is facially related to speech or that is motivated by speech-related reasons). The upshot is some space for civil liberties without constitutionalizing everything. On this theory, *Dale* could be overruled (because the antidiscrimination statute is unrelated to speech), without jeopardizing *Tornillo*, *Johnson* and some aspects of *Hague*, (because in each of these cases the reallocation of property rights is related to speech).

The problem, though, is that formal constitutionalism significantly waters down speech rights. Facially neutral and properly motivated laws may nonetheless have a dramatically negative incidental impact on individual freedoms. Conversely, nonneutral laws that reallocate property rights so as to achieve speech objectives, which are unconstitutional under the formal approach, may in fact increase speech opportunities. One can avoid arid formalism, but this solution also comes at the price of constitutionalizing the entire social sphere. It is worth emphasizing again that every allocation of every property right affects who speaks and what they say. As applied rights are therefore as much in tension with maintaining room for discretionary politics as the old *Lochner* regime.

More importantly, according to at least one standard account of free speech, an as-applied regime is deeply inconsistent with fundamental first amendment premises. On this view, political speech is important precisely because politics is important. Speech is the means by which we implement the goal of community self-governance. But community self-governance

presupposes the existence of a discretionary, political sphere. If all allocations are mandatory, there remains nothing to speak about.

The upshot is an unattractive choice between a formal property regime (*Lochner*), a formal rights regime (*Tornillo, Johnson, and Hague*) or , a thoroughly constitutionalized and depoliticized social sphere (*Marsh*). There is no obvious escape from this trilemma, and, so, it hardly comes as a surprise that first amendment law is a mess. The next Parts survey the unpretty landscape.

II. Discretionary Property Regimes and the Collapse of Free Speech

A. The Marginalization of *Marsh* and *Lochner*

The story of the repudiation of *Lochner* is exceedingly well known, and need not be repeated here. What is less well understood is the link between that repudiation and the discrediting of *Marsh*. In one sense, *Marsh* and *Lochner* are located at opposite poles. Whereas *Marsh* makes supposedly prepolitical property distributions impermissible, *Lochner* makes them mandatory. Yet in another sense, the cases are cousins: Both provide a grounding for constitutionally mandatory speech rights by constitutionalizing property rights. It is not a surprise then that, as the Court has dismantled *Marsh*, it has sometimes relied on earlier cases attacking *Lochner*.

Forty years ago, the Court flirted with the notion of expanding *Marsh* by constitutionalizing state trespass laws in the context of the sit-in movement to desegregate southern public accommodations. In retrospect, perhaps the most significant fact about this episode is that the Court resisted the temptation to do so. It awkwardly managed to reverse each of the sit-in convictions that reached it without deciding the ultimate constitutional question.

The most significant opinion opposing constitutionalization was written by Justice Black, the author of *Marsh* and Roosevelt's first appointee to the Court. Given what he had said in *Marsh*, it is perhaps surprising that Black's opinion in the sit-in case expressly tied free speech rights to property right entitlements. He emphasized that the right of sit-in demonstrators to express their point of view depended upon their having a property interest in the place where the view is expressed. Whereas in *Marsh* he endorsed a constitutionally mandated shift of property entitlements to facilitate speech, in the sit-in context he emphasized that property rights were in the discretionary sphere. While legislatures were free to make the shift (a point he emphasized a year later by joining the Court's opinions upholding the public accommodations sections of the 1964 Civil Rights Act) the Court acting under constitutional compulsion were not. Significantly, Black's opinion relies for this proposition on *Nebbia v. New York*, perhaps the earliest Supreme Court case rejecting *Lochner*-like line drawing that relegated some government market regulations to the impermissible sphere.

During the 1970's, the Court briefly experimented with a more modest expansion of *Marsh* to picketing activity at privately owned shopping centers. After initially extending *Marsh* to apply to this situation, it quickly reversed course. Once again, the Court held that shifts in property rights were constitutionally discretionary rather than mandatory. Thus, while upholding a statute that obligated shopping malls to permit picketing, it also held that the Constitution of its own force did not require this result. And once again, the Court linked its repudiation of *Marsh*-like redistributive rights to a discrediting of *Lochner*-like constitutional protections for existing distributions. As Justice Rehnquist wrote in the course of upholding a statute requiring access to shopping centers for speech activity "[i]t is, . . . 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.”

More broadly, the Court has sharply constrained the reach of the constitutional theory under which *Marsh* was decided. The theory of *Marsh* was that if the government delegated a “public function” to a private entity, the government was responsible when that entity took action that impinged on constitutional values. What made something a “public function”? The Court’s decisions suggested two possibilities. A private entity might be engaged in a public function when it was able to exert extraordinary coercive power over individuals comparable to state power. Alternatively, an entity might be engaged in a “public function” when it voluntarily opened itself to the public in a fashion that made its claims to immunity from government regulation implausible.

In the more recent cases, the presence of neither factor has been sufficient to trigger the public function doctrine. For example, in *Jackson v. Metropolitan Edison Co.*, the Court held that a privately owned public utility was not engaged in a public function even though, under modern conditions, its ability to terminate electric service gave it extraordinary power over individuals and even though its business was generally open to the public. It bears emphasis that the court announcing these principles yet again coupled the discrediting of *Marsh* with a quotation from *Nebbia*, where an earlier Court had distanced itself from *Lochner*.

[As] we stated long ago . . . in the course of rejecting a substantive due process attack on state legislation: ‘It is clear that there is no closed class or category of businesses affected with a public interest . .

.. The phrase ‘affected with a public interest’ can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions ‘affected with a public interest,’ and ‘clothed with a public use,’ have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test”

Similarly, in *Flagg Brothers v. Brooks*, another case rejecting the public function doctrine, the Court emphasized in post-*Lochner* fashion the discretionary character of property rights. Chief Justice Rehnquist, once again writing for the majority, insisted that a “property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State.”

B. Free Speech in a World of Discretionary Property Entitlements

As the preceding discussion illustrates, the post-New Deal compromise holds that the protection of existing property distributions is neither mandatory nor impermissible. The twin rejections of *Lochner* and *Marsh* are linked by a commitment to the discretionary, political sphere.

What, though, are we to make of free speech rights in this environment? The New Deal compromise places laws impinging on these rights in the impermissible sphere, but the cases make plain that this categorization is, to say the least, unstable. When property rights are discretionary, free speech rights tend to become discretionary as well.

One can think about this erosion in two different ways. One might view the destabilization of free speech rights as simply the consequence of the demise of *Lochner* and *Marsh*. It turns out, though, that the relationship between *Lochner* and free speech rights is more complex than might first appear. The problem is that cultural power of free speech rights is strong enough to make the total abandonment of the first amendment an unsatisfactory outcome. There is a need, therefore, to cabin the erosive force of a discretionary property regime. A second way to see the cases, then, is that, even as it rejects *Lochner*, the Court is sometimes forced into line drawing that is strongly reminiscent of the *Lochner* era. Despite the disclaimer in *Nebbia*, now as during the *Lochner* era, the Court finds itself caught up in the slotting of cases into natural categories – those involving activity “affected with the public interest” and therefore within the police power on the one hand, and those that are located in the private sphere of freedom on the other.

The cases where the Court finds speech rights discretionary therefore present an odd mix of *Lochner* and post-*Lochner* reasoning. Whichever technique the Court uses, however, the outcome is the same. Either prepolitical property distributions are treated as completely discretionary, or the Court attempts to draw a line between discretionary and mandatory distribution. Whichever choice it makes, free speech rights never survive placement of property rights in the discretionary category. This Part canvasses cases illustrating this proposition. The next Part examines cases where the Court has attempted to fix property rights and, with them, free speech protections.

1. *Broadcast Regulation*. Consider first government regulation of broadcasters. In the well-known case of *Red Lion Broadcasting Co. v. FCC*, the Court upheld the Commission’s

fairness doctrine and personal attack rule, which under some circumstances, required license holders to broadcast speech that they opposed.

Red Lion is in obvious tension with *Tornillo*, where the court invalidated a “right-of-reply” statute in the context of print media. More significant for our purposes, however, is the precise parallel between the *Red Lion* problem and the *Dale* problem. In both cases, one entity (Red Lion or BSA) “owns” property (a television license or the Boy Scouts), and in both cases the government provides someone else (someone taking advantage of the fairness doctrine or Dale) access to the property so that the nonowner can engage in expressive activity opposed by the owner. But whereas in *Dale*, the Court implicitly treats the original property allocation as fixed, the *Red Lion* court emphasizes its discretionary character.

A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

It does not follow from this that reallocation of the property interest is constitutionally mandatory in *Marsh*-like fashion. In *Columbia Broadcasting System v. Democratic National Committee*, the Court found that the constitution by its own force did not prohibit a broadcaster’s exclusion of competing views, with three of the six justices in the majority finding that the broadcaster’s decision was not “state action.” and three others finding that even if it was state action, it was not unconstitutional. Thus, in this area, neither *Lochner* nor *Marsh* has force.

What does follow is that, in a world without *Lochner* and *Marsh*, the first amendment protects the speech rights of neither the broadcaster nor the nonowner. Precisely because

government can shift the property entitlement (“the licensee has no constitutional right to be the one who holds the license”) first amendment right of the owner disappears (“[t]here is nothing in the First Amendment which prevents the government from requiring a licensee to share his frequency with others”). And precisely because background rules of property entitlement are not “state action,” the nonowner, too, is left without speech rights.

Why is the property right fixed in *Dale* and discretionary in *Red Lion*? The *Red Lion* court pointed to the fact of physical scarcity in the broadcast spectrum to justify regulatory intervention. More recently, the Court has reemphasized this difference. In *Turner Broadcasting System v. FCC*, the Court considered a first amendment challenge to a statute requiring cable companies to carry the signals of local, over-the-air broadcasters. Although it ultimately upheld the statute, it did so despite finding that the *Red Lion* rationale was inapplicable to cable television, which is not burdened by the spectrum limitations of broadcast television.

As many others have pointed out, it is harder to restrict application of the scarcity theory than the Court supposes. After all, market pricing is always based on the fact that the resources bought and sold are scarce. It has less often been noticed that not as much turns on the scarcity rationale as one might suppose from the Court’s rhetoric. In *Turner*, for example, although the Court brings out the heavy machinery of first amendment analysis to determine whether the statute violates free speech rights, it is not clear how much work this machinery actually does. When the dust settles, after a lengthy discussion of levels of scrutiny, content neutrality, and narrow tailoring, the Court once again upholds the statute granting access, thereby treating the property interest as discretionary. Similarly, the Court has specifically disclaimed a distinction

based on spectrum scarcity in the course up upholding some restrictions on indecent speech in the cable context.

It should be noted as well that even in the absence of spectrum scarcity, the Court has sometimes used a rationale for regulation that closely parallels the *Red Lion* argument. Thus, in *Turner*, the Court ends up crediting government concerns about the monopoly power exercised by cable operators, much as it worried about the exclusive control of over-the-air broadcasters over the limited broadcast spectrum.

If scarcity does not explain the distinction between *Dale* and *Red Lion*, what does? I will have more to say about this question in Part IV. For now, it is enough to note that the problem is a familiar one. In an earlier generation, the *Lochner*-era Court faced similarly skeptical questions about the distinction between permissible and impermissible government regulation. In his *Lochner* dissent, for example, Justice Harlan pressed the majority on the distinction between bakers (who could not be subject to hours legislation) and miners (who could be). To the extent it responded at all, the *Lochner* majority treated the difference as the consequence of a natural category the nature of which was too obvious to require explication.

Turner and *Red Lion* illustrate the reemergence of this sort of line drawing despite the Court's supposed abandonment of it in cases like *Nebbia*. Here, as in pre-*Nebbia* days, the Court is, in effect making a distinction between businesses "affected by the public interest" and therefore subject to regulation under the police power, and "ordinary" businesses where property rights are fixed. Television broadcasters, whether cable or over-the air, like innkeepers and common carriers of old, are subject to regulation, while the Boy Scouts, like "ordinary businesses," are not. It turns out, in other words, that there is, indeed, a "closed category" of

businesses affected with the public interest that are appropriately subject to government regulation. Much as during the *Lochner* era, the boundaries are treated as forming a natural category apparently defined by some version of market failure derived from a contestable economic theory adopted by the court. And, it turns out, only businesses lucky enough to stay outside of the closed category have first amendment protection.

2. “*New*” *Property and Freedom of Speech*. One explanation for the different treatment of broadcasters is that the property at stake seems to derive from the very regulation being challenged. Unlike “old” or “natural” property, it is claimed, broadcast licenses exist only because the government created them. Because the property is the creation of the government, its allocation is necessarily discretionary. It seems to follow – or at least sometimes it seems to follow – that the government can condition the grant of the property right on a relinquishment of free speech claims.

Reasoning of this kind has a special place in the history of *Lochner*’s decline. At the very close of the *Lochner* era, the Court decided *United States v. Butler*, which invalidated an important New Deal agricultural program on the theory that the conditioning of grants to farmers on their curtailment of production coerced the curtailment, thereby invading the reserved power of the states. Justice Owen Roberts’ opinion for the Court has been widely derided, but it is strikingly modern in its recognition that the failure to provide a benefit can be just as coercive as the imposition of a burden. Agricultural subsidies, like broadcast licenses, seem to be “new property” created by the state. Yet Justice Roberts recognized that the conditional withholding of this property might nonetheless jeopardize constitutional value..

The legacy of *Butler* is deeply ironic. For the *Butler* Court’s conservative majority, the

isomorphism of imposing burdens and withholding benefits provided an argument for the constitutionalization of boundaries between state and federal power. In different hands, however, the *Butler* insight can easily give rise to *Marsh*-like rights.

After all, if the withholding of a benefit counts as coercion, then publicly imposed coercion is implicated in all private arrangements because there is always some sort of failure to subsidize alternative arrangements. All such arrangements are therefore subject to constitutional challenge and to judicially imposed reallocations to further constitutional values. Broad based constitutionalization of this sort threatened the part of the New Deal compromise that left ordinary social and economic legislation in the discretionary sphere. It therefore became necessary to reestablish some sort of distinction between the imposition of burdens and the withholding of benefits.

The Court's effort to maintain this distinction has been famously unsuccessful. For present purposes it is enough to notice that when the Court insists on the distinction, it makes the property interests created by government subsidies discretionary, and that, once the property interest is slotted in this category, free speech claims disappear.

Consider, for example, *Rust v. Sullivan*. A federal regulation prohibited private entities receiving public funds from encouraging the use of abortion as a method of family planning. An organization receiving such funds claimed that its first amendment rights were violated, but the Court rejected its claim. According to the Court, the government had "not denied [petitioner] the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc."

The reasoning here is familiar and is rooted in Proposition 3. Family planning

organizations have the right to use their own property to advocate abortions, but not the government's property. The money they receive from federal grants is the government's property because the government has discretion whether to spend it or not. It has this discretion, in turn, because, it has no affirmative obligation to provide benefits in order to facilitate abortions. Since the property right is discretionary, it follows that the government can condition use of the property on relinquishment of speech rights.

There are well known difficulties with this line of argument, however. Recall that one half of the New Deal compromise involved shifting even "natural" property rights into the discretionary sphere. An important part of the theoretical foundation for doing so was a destabilization of the burden/benefit distinction. Ultimately, the distinction must rest on the difference between upward and downward departures from a fixed baseline. At one time, natural law concepts established such a baseline, but the New Deal compromise entailed giving up on these concepts as limits on government action. Because the New Deal compromise also rejected constitutionalization of the entire social sphere – a necessary consequence of treating the withholding of a benefit as equivalent to a burden – the various branches of the compromise lead to contradictory results.

The upshot is that sometimes the modern court rejects free speech rights when dealing with "new" property and sometimes it doesn't. There is no need to go through the various doctrinal gyrations the Court has deployed in its attempt to make sense of this contradiction. For present purposes, it is enough to note that on some occasions, even when it appears that the Court has fixed the property right, and so seemingly paved the way for first amendment protection, it has actually left both speech and property in the discretionary category.

Compare, for example, *Rust* with *Rosenberger v. Rector and Visitors of the University of Virginia*. The University of Virginia administered a “student activities fund” that paid for the costs of student publications. However, the University prohibited payments to publication that “primarily promotes or manifests a particular belief in or about the deity or an ultimate reality.” A group of students publishing a Christian magazine challenged the limitation.

Given *Rust*, one might have supposed that the challenge would fail. Here, as in *Rust*, the group was claiming the right to use the state’s money, rather than its own. The Court distinguished *Rust*, however, and, in this context, upheld the free speech claim. According to the *Rosenberger* Court’s retrospective reconstruction, *Rust* stood for the proposition that “the government [is permitted to] regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.” In contrast, *Rosenberger* involved a case where the government was “not itself speak[ing] or subsidiz[ing] transmittal of a message it favors but instead expend[ing] funds to encourage a diversity of views from private speakers.”

Does this distinction make sense? There is less here than meets the eye. It is easy to recharacterize the *Rust* program as the provision of money to facilitate private choice. Conversely, the very limitations on the use of funds invalidated in *Rosenberger* might have been taken as evidence that the government meant to finance its own secular message.

This ease of recharacterization, in turn, suggests that the *Rosenberger* Court has not really fixed the property right. *Rosenberger* maintains, rather than destroys, government discretion either to keep the money itself and use it to promote its own message or give it to private individuals who can use it for whatever message they desire. True, when the government

exercises that discretion in favor of distribution to private individuals, those individuals have free speech rights. The point of *Rust*, though, is that this choice is not constitutionally compelled. The government might instead keep the money and use it for its own purposes. When it does so, even if it uses private individuals to achieve those purposes, free speech rights disappear. The government discretion to keep or dispose of its own property therefore morphs into government discretion to allow or forbid speech.

3. “*Old*” *Property and Private Fora*. As the previous section indicates, part of the New Deal compromise depends on maintaining a distinction between “new” property (the result of the provision of government benefits) and “old” property (that somehow exists prior to government). The discretionary character of new property is more readily apparent and free speech rights are therefore more fragile in this environment. But because another part of the New Deal approach involved placing even old property rights in the discretionary category, first amendment claims sometimes seem fragile in this environment as well.

Comparing the outcome in three cases – *Members of City Council of Los Angeles v. Taxpayers for Vincent*, *City of Ladue v. Gilleo* and *U.S. Postal Service v. Council of Greenburgh Civic Associations* – demonstrates the problem.

In *Taxpayers for Vincent* the Court upheld an ordinance that prohibited the posting of signs on public property. As we shall see, there is a limited first amendment right to access to such property when the property in question is a “traditional public forum.” However, the *Taxpayers for Vincent* Court concluded that lamp poles and other kinds of public property where signs are posted did not constitute public fora. Once this determination was made, it followed that those posting signs were using someone else’s property, rather than their own, in order to

communicate their message. Of course, the first amendment gives them no right to commandeer property in this fashion. The Court brought the point home by rejecting an argument that the City's putative esthetic interest in prohibiting the signs was impeached by the fact that the ordinance permitted signs on private property. In the Court's view, the use of one's own property to communicate a message was fundamentally different from the use of public property.

This distinction between the use of one's own and someone else's property is sharpened in *Gilleo*, where the Court distinguished *Taxpayers for Vincent* and struck down an ordinance prohibiting the posting of most signs on one's own property. Significantly, the "special respect for individual liberty in the home" was strong enough to invalidate the ordinance on an "as-applied" theory even on the assumption that it satisfied the formal demands of content neutrality. The Court thought that even if the restriction was content neutral and, in this sense, did not manifest government malfunction, it nonetheless "unduly constrict[ed] opportunities for free expression."

Taken together, *Taxpayers for Vincent* and *Gilleo* make clear yet again that first amendment rights turn on property entitlements. When the property does not belong to the speaker, she has no first amendment rights, but if the speaker is using her own property, she has at least a prima facie free speech claim. However, this analysis assumes that the property entitlement is fixed and not subject to reallocation. A property entitlement in the window of one's own home (where *Gilleo* wanted to place his sign) might seem about as fixed as one can imagine and, indeed, the Court did not pause to inquire whether the City could transfer ownership of the window.

Yet in a post New Deal environment, even this entitlement is unstable. What are we to make, for example, of the City's claim that Gilleo's sign and others like it were reducing the property value of property owned by her neighbors? There is a sense in which Gilleo was using not just her property, but her neighbor's as well, to make her point. Nuisance law recognizes the competing property entitlement of surrounding land owners to prevent certain uses of property. The holding in *Gilleo* in effect makes nuisance law unconstitutional in this setting. The holding therefore amounts to a constitutionally mandatory shift of the property entitlement from the neighbors to Gilleo.

Might the entitlement be shifted in the other direction? Consider *Greenburgh Civic Associations*. There, as discussed above, the Court rejected a first amendment challenge to a federal statute that, with certain exceptions, prohibited depositing unstamped "mailable matter" into letter boxes in private homes. Why is the private mailbox in *Greenburgh Civic Associations* different from the private window in *Gilleo*? One might suppose that the distinction lies in the fact that Gilleo was using her own window for his sign, whereas the Greenburgh Civic Associations was placing leaflets in someone else's letterbox. But this distinction ignores the well-established first amendment right of individuals to receive, as well as to send, mail. As the dissents pointed out, a more narrowly tailored statute might have prohibited the placing of mailable matter in letter boxes only when the owner of the box indicated that he did not want the material.

Remarkably, the majority in *Greenburgh Civic Associations* met this point by claiming that the letter box did not in fact belong to the home owner. Instead, the court insisted, this case fell within the category of cases like *Taxpayers for Vincent* where people were attempting to use

“property owned or controlled by the government” for first amendment purposes. On the majority’s view

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. . . , the jail or prison, . . . or the advertising space made available in city rapid transit cars. . . . 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.

In one sense, the outcome of *Greenburgh Civic Associations* is quite surprising. Most of us do not think of a letter box, erected by the homeowner and affixed to her property, as something “owned or controlled by the government.” In another sense, however, the decision is completely unexceptional. What the rejection of *Lochner* means is that if we put aside a few limiting cases, the government has the power to transfer property entitlements when doing so advances the public interest broadly conceived.

Greenburgh Civic Associations is startling only because it emphasizes what we have in some sense known all along: That when property transfers occur, they affect first amendment entitlements. People have the right to use their own property, but not the property of others, to make their point. It follows that in the absence of constitutional principles making a property allocation either impermissible or mandatory, first amendment rights become discretionary.

If such a transfer is unexceptional when dealing with a homeowner’s letterbox, what about her window? There is no obvious way to distinguish between *Gilleo and Greenburgh Civic Associations*. It is true, for example, that the statute limiting access to letter boxes is content neutral, but recall that the *Gilleo* Court held that the sign limitation was unconstitutional without regard to whether it was content based. Perhaps the government interest in regulation is stronger, or the first amendment interest weaker, in *Greenburgh Civic Associations* than in

Gileo. Still, if we are to take seriously the claim that the letter box or the window is not owned or controlled by the homeowner, the strength of the government and speech interests should be irrelevant. After all, Dale's first amendment interest might be stronger than BSA's, but so long as the Boy Scouts "belong" to BSA, Dale has no first amendment right to use its property to advance his speech interests.

What we are left with, then, are two modest points that support the distinction. First, as a matter of social fact if not logic, it simply makes more intuitive sense to think of the letter box as under government control or ownership than to think of a home window as government property.

Second, we need to hold onto this intuition because, without it, all speech rights become discretionary. It is precisely to avoid this fate that the Court sometimes ignores the first branch of the New Deal compromise and treats property rights as fixed so as to make speech rights fixed as well. The next section provides some examples.

III. Constitutionally Mandatory and Impermissible Property Distributions

A. The Need for Fixed Entitlements

The marginalization of *Marsh* and *Lochner* – and with it, the placement of property rights in the discretionary sphere – was necessary to protect one branch of the New Deal compromise, but it jeopardized the other branch. Property rights must be discretionary so as to allow for the wealth transfers at the heart of New Deal reforms but if property rights are discretionary how can speech rights be mandatory? Precisely because they cannot be, remnants of both *Marsh* and *Lochner* survives.

One need go no further than *Dale* itself to demonstrate this fact. As explained above, *Dale* can only be understood as a constitutionally mandated revision of background property

rules thought necessary to vindicate first amendment rights. Nor is *Dale* alone. We have already seen that even when the Court treats property rights – and, therefore, speech rights – as discretionary, it often does so against the backdrop of another class of cases, sometimes defined in a manner reminiscent of the *Lochner* era, where the rights are mandatory. This section focuses on this other class of cases.

B. Some Examples

For the most part, when the Court fixes property entitlements, it makes prepolitical property arrangements mandatory in the fashion of *Lochner*. Occasionally, however, it makes such arrangements impermissible in the fashion of *Marsh*. Either way, it fixes speech rights by fixing property rights as well. Some of these cases can be domesticated as examples of formal constitutionalism, but not all of them can be. At least occasionally and sporadically, the Court continues to require either maintenance of prepolitical property distributions or property reallocations thought necessary to protect free speech. Some examples follow

1. *Trademark and Copyright Law*. Consider first *San Francisco Arts & Athletics., Inc. v. United States Olympic Committee*. In general, the Lanham Act provides for trademark protection against unauthorized uses only when they are “likely to cause confusion, or to cause mistake, or to deceive.” However, a special statutory provision allows the United States Olympic Committee (USOC) to control use of the word “Olympic” even in the absence of these conditions. The USOC sought relief against petitioners for promoting the “Gay Olympic Games,” and petitioners responded by claiming that the statute violated its equal protection and free speech rights.

The Court rejected both these claims, but it did so in a puzzling fashion. With respect to

the equal protection claim, the Court expressly disclaimed *Marsh*-style reasoning. Because background property rules were not “state action,” it followed that USOC’s decision to permit some, but not other groups to use the word “Olympic” did not raise an equal protection issue. The free speech clause, like the equal protection guarantee, can only be triggered by state action, so one would have thought that the equal protection holding would dispose of the free speech claim as well. Yet mysteriously, the Court responded to the free speech claim on the merits without resort to the “no state action” argument.

A careful reading of the section of the opinion dealing with the free speech claim suggests a reason for this difference in treatment. A rejection of *Lochner*- or *Marsh*-style state action means that the Constitution has nothing whatever to say about the impact of a private individual’s use of her property. The Court was willing to swallow this in the context of equal protection, but it was unwilling to do so in the first amendment context. Thus, it carefully reserved the question “whether Congress ever could grant a private entity exclusive use of a generic word.” On the Court’s view, this case did not require it to confront this issue because here “Congress reasonably could conclude that the commercial and promotional value of the word ‘Olympic’ was the product of USOC’s ‘own talents and energy, the end result of much time, effort, and expense.’” Apparently, it was only because “Congress could reasonably conclude that the USOC has distinguished the word ‘Olympic’ through its own efforts” that Congress’ decision “to grant USOC a limited property right . . . falls within the scope of trademark law protections, and thus certainly within constitutional bounds.”

It would be overreading *San Francisco Arts & Athletics* to insist that it contains a negative pregnant. The Court does no more than avoid a question it did not need to decide. Still,

the desire to avoid the question was strong enough to generate a blatant and embarrassing inconsistency between its treatment of the equal protection and free speech claims. This inconsistency, in turn, at least suggests that the Court is unready to treat property allocations as completely discretionary when they severely impact on speech opportunities.

It is easy to imagine hypotheticals that justify this reluctance. Suppose, for example, that Congress provided that only the Republican National Committee could use the expression “family values,” or that only Democrats could speak of protecting people who “play by the rules.” If one takes seriously an obligation to arrange property entitlements so as to maximize speech opportunities, as *Marsh* requires, laws like this are intolerable. And lest one think that these examples are entirely hypothetical, a real case brings the point home: The Los Angeles Police Department recently attempted to suppress movie and television shows critical of its performance by claiming that it had a property interest in use of the abbreviation “LAPD.”

Interestingly, however, the Court’s emphasis was on property rights of the *Lochner*, rather than the *Marsh* variety. The Court limited the scope of its holding on the ground that the Olympic Committee had invested the term “Olympics” with meaning “through its own efforts.” The suggestion is that the property entitlement is not merely statutory in origin, but stems from a prepolitical, Lockean natural right to the fruits of one’s labor. This right is apparently not strong enough to move its recognition to the mandatory sphere (Congress did not have to give the Olympic committee statutory protection), but it is strong enough to keep it out of the impermissible sphere.

The Court’s *Lochner*-style rhetoric, however, conceals a possibility, latent in its decision, of *Marsh*-style redistributions. The question that must be asked is what outcome the Court

would reach in a case where there were not prepolitical *Lochner*-like property rights. Suppose, for example, that a statute gave the Kraft company the exclusive right to use the word “cheese.” The opinion at least holds open the possibility that in such a case, the free speech argument might make existing property distributions unconstitutional.

A closely analogous problem is at the center of copyright law, but here the court’s choice between *Lochner* and *Marsh*-style reasoning is more muddled. There has been much ink spilled about the effort to reconcile copyright protection with the first amendment, but if *Marsh* and *Lochner* have really been disowned, it is hard to see what the difficulty is. What copyright amounts to is the discretionary allocation of property rights to the creators of copyrighted works. Without a constitutionalized property regime, there simply is no first amendment problem. Just as I have no first amendment right to burn someone else’s flag, so, too, one might suppose, I have no first amendment right to sing someone else’s song.

But, of course, there is a problem, and the Supreme Court has recognized as much. Although the Court has upheld copyright against first amendment challenge, it has never suggested that the mere existence of a property right disposes of the issue. On the contrary, it has squarely rejected the proposition that copyrights are “categorically immune from challenges under the First Amendment.” Instead, it has held that the “traditional contours of copyright protection” satisfy free speech rights because of copyright’s “built-in First Amendment accommodations.” The Court has placed special emphasis on the fact that copyright protects only ideas and not expression and that the fair use exception to copyright “affords considerable ‘latitude for scholarship and comment,’ . . . and even for parody.”

What are the justifications for these limits? Sometimes, the Court relies upon the same

sort of *Lochner*-type reasoning that it has used in the trade-mark context. Creators of copyrighted work have a natural right to the fruits of their labors that is strong enough to ward off first amendment concerns, at least in some contexts. On other occasions, though, the Court seems to have endorsed a *Marsh*-style property regime designed to maximize speech opportunities. Thus, the Court has claimed that copyright's allocation of property rights is an "engine of free expression." This is so, in the Court's view, because "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." The Court's claim, then, is not that the property allocations embodied in copyright law are immune from constitutional review, but that these particular allocations best satisfy first amendment values.

Copyright might be thought to be a special case because of the Constitution's express endorsement of at least some sort of copyright regime, but the Court has applied similar principles to creation of state-law right to publicity with no underpinnings in the constitutional text. For example, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that the media did not have a free speech right to broadcast Zucchini's entire, fifteen-second "human cannonball" act without compensating him. The Court once again relied on a mix of *Lochner* and *Marsh* style reasoning to reach this outcome. The state allocation of property interests was within the discretionary sphere both because Zacchini had created the act through his own efforts (a natural-law, *Lochner*-style justification) and because permitting him to control a property interest in his act provided appropriate incentives to develop the act (a *Marsh*-style speech maximization approach). While neither the *Lochner* nor *Marsh* property interest was sufficient to make the allocation mandatory, the interest was once again sufficiently powerful to move the

allocation from the impermissible to the discretionary column.

Might these interests ever be sufficiently powerful to make the allocation mandatory? The Court seems to have at least suggested a mandatory allocation in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*. There, the Court invalidated a New York statute that required that the proceeds derived from a work created by a criminal that depicted the crime in question must be reallocated to the victims of the crime.

Perhaps *Simon and Schuster* can be explained on the ground that the New York statute violated the formal requirement of content neutrality. The Court's discussion of this issue can be fairly characterized as garbled. It begins its analysis with the assertion that "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech" and that "the [New York law] is such a content-based statute." Later in its opinion, however, the Court states that it "need not address the Board's contention that the statute is content neutral" and that "whether the . . . law is analyzed as content neutral . . . or content based . . . it is too overinclusive to satisfy the requirements of the First Amendment."

There is no good way to resolve this contradiction, but it seems quite implausible that the statute would have survived constitutional scrutiny if it had been content neutral and, thereby, applied to even more speech. If a statute that deprived criminals of royalties derived from their crimes is unconstitutionally overbroad, then surely a still broader based statute depriving ordinary authors of royalties regardless of the content of their work would be unconstitutional as well. It seems fair, therefore, to read *Simon & Schuster* as establishing the principle that some kinds of market rewards for the creation of artistic work are constitutionally compelled. Put differently,

this is a context where the court treats the property allocations produced by the market for creative works as mandatory.

Conversely, it also seems reasonably clear that other protections for artistic work are impermissible. The Court has strongly suggested that a hypothetical copyright law that “altered the traditional contours of copyright protection,” perhaps by abolishing the fact/expression distinction or limiting fair use, would be subject to constitutional scrutiny. Here, some sort of reallocation of property rights from the creator to the copier are required in order to maximize free speech opportunities.

The bottom line, then, is that there seem to be some (admittedly ill-defined) features of property allocations in the use and publication of works that are constitutionalized, whether in the form of making copyright protection mandatory or impermissible.

Of course, the recognition of such limits is a long way from a full-blown reaffirmation of *Marsh* or *Lochner*. Copyright and trade mark are arguably special cases because the property interest they recognize is in speech itself. It is one thing to say that there are limits on the extent to which the government can grant exclusive property interests in speech itself and quite another to say that a broader-based property rights scheme is unconstitutional because of its indirect effect on speech. What we are left with, then, is a strong suggestion that speech rights in this area are grounded in a constitutionalized property regime without a clear definition of either the contours of that regime or the extent to which the reasoning of these cases extends to other situations.

2. *Libel and Defamation, Privacy Invasion, and Sexual Harassment*, As just noted, copyright and trademark might be taken to be a special cases because they involve the creation

of property interests in speech itself. In contrast, constitutional limits on libel and defamation law, tort actions for invasion of privacy, and enforcement of pornography and antidiscrimination statutes seem to redistribute nonspeech entitlements. Instead of a property interest in speech, they involve a property interest in things like reputation, secrecy, or freedom from sexual or racial harassment. These entitlements are established by the common law or by statute, but the first amendment shifts them (at least to some extent) so as to provide a constitutionally mandatory level of free expression. In this sense, cases like *New York Times v. Sullivan*, *Cox Broadcasting Corp. v. Cohn*, and *American Booksellers Association v. Hudnut* are in the *Marsh* tradition.

Consider first libel law. The common law of libel establishes a state-protected interest in one's reputation. One could imagine a *Lochner*-like argument that the protection of this interest is mandatory. At least, though, protection should be discretionary under the terms of the New Deal compromise. Yet in certain contexts, *Sullivan* makes protection impermissible. The Court has held that when a libel action is brought by a public figure, state allocation of an interest in reputation must give way to a constitutionally mandated redistribution unless the speaker exhibits actual malice. Thus, *Sullivan* in effect reallocates property-like ownership rights so as to maximize speech opportunities.

Whereas the *Sullivan* rule reallocates property entitlements for public figures, cases like *Cox Broadcasting* suggests a similar reallocation with regard to private individuals. The Court has made clear that neither state common law rules nor criminal statutes can enforce an entitlement to information like the name of a deceased rape victim or the identity of a juvenile defendant, at least so long as the media lawfully obtains the information. Here, too, the

Constitution creates a mandatory reallocation of entitlements so as to maximize speech freedom.

The story regarding sexual harassment is somewhat more complicated. When Indianapolis tried to create a property-like entitlement in freedom from the putative humiliation, degradation, and violence produced by pornography, the Seventh Circuit Court of Appeals held that the entitlement had to be reallocated to pornographers so as to protect speech interests. In contrast, courts have generally been unsympathetic to the claim that Title VII's creation of an entitlement to be free from sexually harassing speech in the employment context is unconstitutional. The creation of Title VII rights is not mandatory, but neither is it impermissible.

What are we to make of these mixed results? *Sullivan*, *Cox Broadcasting*, and *Hudnut* are more radical than the copyright and trademark cases. First, in each case, the property-like interest trumped by the first amendment is not in speech itself, but in something else. It is one thing to say that the state may not defeat speech freedom by allocating to a narrow class of individuals the right to use certain words. It is quite a different matter to say that a speaker must be allowed to use someone else's nonspeech entitlements in order to get her message across. Yet this is just what *Sullivan*, *Cox Broadcasting*, and *Hudnut* require. I cannot destroy someone else's flag in order to make my political point, but apparently I can destroy someone's reputation in order to sell newspapers.

Second, *Sullivan*, *Cox Broadcasting*, and *Hudnut* all involve *Marsh*-, rather than *Lochner*-style reasoning. In the copyright, publicity, and trade-mark contexts, the Court's constitutionalized property regime was at least partially premised respect for pre-political distributions. In contrast, *Sullivan*, *Cox Broadcasting*, and *Hudnut* all require redistribution. For

example, a person “owns” her reputation because of a life-time of work creating and protecting it in the same sense that the USOC has invested in the word “Olympics.”. Yet *Sullivan* reallocates the right to someone who did not earn it in order to promote that person’s speech opportunities. Similarly, one might have thought that a right to be free from sexual humiliation or the right to privacy about certain facts concerning one’s life is an essential aspect of personhood, rather than merely a discretionary allocation of entitlements. Yet the Court treats these allocations as neither mandatory nor discretionary, but impermissible when they conflict with free speech interests.

Just because these results are more radical, they are also more problematic. They bring to the fore questions about why constitutionally mandated redistributions are required here, but not elsewhere. If newspapers can exact what amounts to a subsidy from the public figures they libel, why are they not also entitled to a constitutionally mandated redistribution from the paper companies that provide them with newsprint? Why, for that matter, are the flag makers not obligated to provide impoverished potential flag burners with the flags to burn?

These concerns, in turn, bleed over into the worry about constitutionalizing the entire social sphere. On the most general level, it is far from obvious that current distributions of wealth maximize speech opportunities. Why, then, does the reasoning of *Sullivan*, *Cox Broadcasting*, and *Hudnut* not lead to constitutionally mandated, broad based income redistribution?

These worries intensify as soon as one realizes that when the scope of constitutionally mandated redistributions becomes this broad, it runs into other constitutional rights. Recall, for example, the suggestion in *Simon & Schuster* that some reallocations of the proceeds from

artistic creations are impermissible because they leave constitutionally inadequate incentives for the production of such works. Might not a similar argument be made about reputation? True, the media is engaged in first amendment activity when they publish information about public figures, but public figures are also engaged in first amendment activity when they do the things necessary to become public figures. If they are to be deprived of the rewards for their efforts – their reputation and everything that that entails – might not they be chilled from the exercise of their own speech rights?

No doubt, courts have been influenced by just this sort of concern when they have rejected free speech demands for reallocation of the right to be free from sexual harassment while on the job. To be sure, no court has held that Title VII protections are constitutionally mandatory, but the interest in freedom from sexual harassment is strong enough to ward off claims that it is constitutionally impermissible. Why, then, are not the interests of women in avoiding the humiliation, degradation, and violence allegedly produced by pornography similarly powerful?

3. *Campaign finance.* The Court has reached similarly mixed and inconclusive results concerning the regulation of campaign finance. Commentators often suppose that the issue concerning this regulation is whether the expenditure of money should count as “speech” within the meaning of the first amendment. Suppose, though, one concedes that the expenditure of money is not speech. The concession would not resolve the issue. The real controversy about campaign finance regulation is not about defining “speech,” but about determining whether the government can shift nonspeech entitlements in a fashion that adversely impacts on speech.

Justice Scalia therefore directed our attention to just the right place when he argued that

meaningful freedom of speech required fixed entitlements that can form the basis for market exchange:

It was said . . . that since [campaign finance legislation] regulates nothing but the expenditure of money for speech, as opposed to speech itself, the burden it imposes is not subject to full First Amendment scrutiny. . . . In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others. . . . Control any cog in the machine, and you halt the whole apparatus. License printers, and it matters little whether authors are still free to write. . . .

What good is the right to print books without a right to buy works from authors? Or the right to publish newspapers without the right to pay deliverymen? The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.

These words appear in a dissenting opinion objecting to the Court's endorsement of the Bipartisan Campaign Reform Act of 2002 (the so-called "McCain-Feingold" statute), but in fact, the Court has afforded some measure of constitutional protection against the regulation of campaign expenditures and has done so more forcefully since Justice Scalia wrote his dissent. When the Court has afforded this protection, it has done so by effectively constitutionalizing the property entitlements that make speech possible.

Even before its most recent decision, the Court made clear that the first amendment prevented the outlawing of personal expenditures, whether by the candidate herself or by a noncandidate acting independently. More recently, it has effectively gutted the provision in McCain-Feingold outlawing so-called "issue ads" purchased by corporations in the immediate run-up to elections.

These constitutional limits, in turn, rest on an implicit constitutionalization of property-like claims. The assumption behind the restrictions is that the money "belongs" to the entity

making the expenditure and that the government is constitutionally prohibited from changing this entitlement. It does not take much work to see why this assumption is problematic.

Consider, for example, two campaign finance cases decided during the 2006 Term. *Davenport v. Washington Education Association*, arose in the context of an “agency-shop” agreement with a public-sector union. Under the agreement, workers who did not join the union were nonetheless obligated to pay a fee to the union so as to prevent “free riding” on the union’s efforts on behalf of the workers. The Court had previously held that the first amendment prohibited the union from using fees collected from objecting nonmembers for ideological purposes not germane to the union’s collective-bargaining duties. In *Davenport*, the Court upheld a state statute requiring affirmative permission from dissenters before money could be so spent.

In so holding, the Court found it “entirely immaterial that [the statute] restricts a union’s use of funds only after those funds are already within the union’s lawful possession under Washington law.” Put differently, the Court held that the statute could constitutionally shift a state recognized entitlement even though the shift impeded the union’s first amendment activities. In the Court’s view the statute was “not fairly described as a restriction on how the union can spend ‘its’ money; it is a condition placed upon the union’s extraordinary *state* entitlement to acquire and spend *other* people’s money.” In this context, then, the analysis begins a step before the union gains ownership of the money, with the property entitlement vested in the nonmembers. State law permissibly shifts this entitlement to the union, but on the constitutionally mandatory condition that it not be spent on political purposes over the objection of the nonmembers and the constitutionally permissible condition that it not be spent without

their affirmative approval.

Compare this outcome to the result reached in a much more widely publicized case, *Federal Election Commission v. Wisconsin Right to Life, Inc.* Here, the Court upheld a case-specific challenge to the McCain-Feingold Law, which prohibited expenditures by corporations for so-called “issue ads” broadcast close to an election. This time, for reasons that are not explained, the Court’s analysis begins a step later than in *Davenport*, with the money already “belonging” to the corporation rather than in the hands of the individuals who provide it to the corporation. The regulation of the corporation’s speech expenditures is therefore a limitation on the use of “its money” constituting an unconstitutional shift of the entitlement.

What, precisely, is the difference between the two cases? An obvious answer is that in *Davenport*, the union got the money in the first place only because of state coercion. The government had negotiated a contract providing for an agency shop arrangement that compelled employees to contribute money to the union. In contrast, no one is compelled to buy stock in or contribute money to a corporation. But this response again begs the question of which stage of the transaction to focus on. Just as no one is compelled to buy stock in a corporation, so too, no one is compelled to accept a job from an employer who has agreed to an agency shop. Once one accepts the job, then certain obligations come with it. True, some of those obligations may be ideologically distasteful, but that is true as well of someone who contributes money to a corporation, and then finds that the corporation has spent the money to support ideological positions that the contributor opposes.

Perhaps, then, the point is that the government may not condition the benefit of employment on the sacrifice of ideological positions, whereas private corporations can so

condition stock ownership. The *Davenport* court reserved the question whether the affirmative permission requirement could be imposed in the case of nonstate employers, and the Court's earlier treatment of the issue has not clearly established the extent to which the governmental status of the employer matters.

The trouble with this distinction, however, is that it enmeshes us again in the confused case law concerning the failure to provide government benefits. As we have already seen, it will not do to say that the government may never condition access to benefits on the funding of ideologically distasteful speech. Nor can it be claimed that people generally have the right to avoid coerced contributions to ideological speech they oppose. For example, the Court has upheld against first amendment attack state-imposed mandatory student activity fees that fund ideologically charged activities. Indeed, during the very Term in which *Davenport* was decided, the Court held that an athletic association, deemed to be a state actor, could condition "voluntary" membership on the relinquishment of the right to engage in activity that would otherwise be protected by the free speech clause.

Nor is it clear which way the unconstitutional condition argument cuts. Recall that the union also advanced such an argument. It claimed that its access to the funds in question was unconstitutionally conditioned on its forgoing use of the funds for activities otherwise protected by the first amendment. Why is this condition constitutionally permissible, while conditioning access to a job is not?

However these anomalies are resolved, the important point for our purposes is that free speech protection in this area turns on the willingness of the Court to fix property entitlements. When it does so, as in *Wisconsin Right to Life*, the result is a robust free speech regime. When

it fails to do so, in cases like *Davenport*, free speech rights evaporate.

Moreover, when it chooses the constitutionalization option, it confronts all the problems that gave rise to the New Deal compromise in the first place. Chief among these is how to fix property rights without constitutionalizing the entire social sphere? Justice Scalia is surely correct when he claims that it does no good to publish a newspaper if one cannot pay the deliveryman, but what if, say, one lacks the money to pay the deliveryman because government imposed payroll taxes make the payment prohibitively expensive?

The government malfunction test provides a potential answer to this problem. When the government prohibits spending money for campaign speech, it is acting nonneutrally in the sense that it is limiting expenditures for speech, but not other types of spending. When it imposes a social security tax, its regulation is unrelated to and facially neutral with regard to speech. The problem with this response, however, is that it begs the question whether speech-specific regulation is really evidence of malfunction. There is no particular reason to think that unregulated or neutrally regulated markets in nonspeech commodities will produce the optimal level of speech. It is at least possible that the people with more money will outbid the people with more to say for the services of the deliveryman.

This problem intersects with a second difficulty: why are the entitlements in question of the *Lochner* rather than the *Marsh* variety? If it is indeed true that a speech right is meaningless without the ability to control other entitlements that make speech possible, then why does it not follow that the government is obligated to provide the other entitlements? If the government were so obligated then some forms of campaign regulation – perhaps a “free speech voucher” to be spent on the candidate of one’s choice – would be constitutionally mandatory rather than

impermissible.

Here as elsewhere, the Court has resolved these difficulties mostly by ignoring them. It has sometimes treated entitlements as constitutionally fixed so as to provide first amendment protection and sometimes treated them as constitutionally discretionary, so as to defeat first amendment claims. And without any real discussion, and contrary to the tenets of the New Deal compromise, when it has treated them as fixed, it has generally assumed that they are *Lochner* rather than *Marsh* entitlements.

4. *Public fora and other “as-applied” cases.* In sharp contrast to its campaign finance jurisprudence, the Court’s public forum doctrine makes some property regimes constitutionally impermissible. *Marsh*-style transfers are therefore constitutionally mandatory.

In the campaign finance cases, where the Court has provided first amendment protection to existing distributions, it has assumed that the resources belong to the entity that is planning to use them. Thus, in *Wisconsin Right to Life*, the Court starts with the assumption that it is the corporation’s money, and restrictions on corporate expenditures are therefore constitutionally problematic. The Court has ignored the objection that we might facilitate more speech by transferring entitlement of the money to other entities. Indeed, when states attempt such transfers, as in *Davenport*, the transfer itself is treated as constitutionally troublesome.

In contrast, public forum cases proceed on the assumption that allowing pure market distributions of nonspeech entitlements may provide insufficient speech opportunities. For this reason, the Court has read the first amendment as requiring a kind of free speech subsidy in the form of constitutionally mandatory private use of government property for speech purposes.

The law of the public forum is complex, inconsistent, and notoriously subject to

manipulation. I will not attempt to summarize all of the doctrine here. However, two points stand out. First, citizens have no general constitutional right to use public property for first amendment activities. For example, the Court has held that the first amendment does not protect the right of protestors to use the property immediately adjacent to a jail house:

Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff's order to remove themselves from what amounted to the curtilage of the jailhouse. The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.

In this context, then, speech rights are discretionary because they are dependent on preexisting property rights that the government is free to shift (at least so long as it does so in content neutral fashion)..

The first point is qualified by a second point, however. In the case of “quintessential” or “traditional” public fora – streets, sidewalks, and parks – the government is constitutionally required to provide some access in order to facilitate first amendment activity. Moreover, when the government opens a nontraditional area to speech activity – thereby creating a “designated forum” – it is limited in the extent to which it can pick and choose between speakers. To be sure, the access to both traditional and designated fora can be regulated in a variety of ways. In the case of traditional fora, however, restrictions must also be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” An absolute prohibition of a particular kind of expression is permissible only if it is “narrowly drawn to accomplish a compelling governmental interest.”

In this context, then, the Constitution makes an unfettered government property right impermissible. There is a constitutionally compelled redistribution from the government to

speakers in order to facilitate communication.

Ironically, the redistributive thrust of public forum law is best captured in a dissenting opinion. Objecting to the Court's refusal to invalidate a statute that prohibited persons from using a sound truck or other instrument emitting "loud and raucous noises," Justice Black wrote that

unless constitutionally prohibited, laws like this Trenton ordinance can give an overpowering influence to views of owners of legally favored instruments of communication. This favoritism, it seems to me, is the inevitable result of today's decision. . . .

There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse. It is no reflection on the value of preserving freedom for dissemination of the ideas of publishers of newspapers, magazines, and other literature, to believe that transmission of ideas through public speaking is also essential to the sound thinking of a fully informed citizenry.

It would be a mistake to overstate the extent of the the redistributive thrust of public forum law. After all, Justice Black's opinion was a dissent. Moreover, in recent years, the Court has substantially limited the reach of public forum doctrine. It has resisted the expansion of the category of "traditional" fora and, even within the category, has upheld restrictive permit regimes and extensive "time, place, and manner" restrictions (like the ban on sound trucks). Moreover, the Court has begun to define designated fora in a disturbingly circular way, treating the very restrictions under attack as conclusively establishing that the forum has not been designated for speech in the first place.

Even as so limited, though, the doctrine continues to have considerable bite. The most significant point is that, at least in the case of traditional fora, the requirement it is not merely formal. Content neutrality is a necessary but insufficient condition for restricting speech in this context. Public forum doctrine is therefore an unusual example of as-applied constitutionalism. The constitutionally guaranteed subsidy takes hold even if the government policy lacks the usual indicia of government malfunction.

Moreover, although the level of judicial scrutiny is sharply reduced once outside the realm of traditional fora, even in these situations, the Court continues to evaluate the reasonableness of government limitations, occasionally invalidating even neutral restrictions when they allow insufficient speech.

Why have *Marsh*-like constitutionally mandatory redistributions survived in this area when they are not required elsewhere? Perhaps the point is that the Constitution requires reallocation of government property, but not property held by private individuals. As in the campaign finance context, however, this distinction depends on specifying the point at which the analysis begins. As Republicans never tire of telling us, the money belonged to private individuals before the government took it through taxation. Why don't these private individuals have *Davenport*-like rights to object to its reallocation to subsidize ideological causes they oppose.

Moreover, on admittedly rare occasions, the Court has required redistributions even with respect to private property. Consider, for example, *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*. At issue was a federal statute that authorized private cable operators to prohibit "indecent" programming over

leased channels, which federal law requires cable operators to reserve for commercial use by third parties, and public access channels, which local governments have required cable operators to carry.

A badly fractured Court upheld the leased channel provision and struck down the public access provision. For present purposes, the important point is that a majority of the justices seem to have assumed that both provisions were subject to constitutional challenge even though they did no more than reaffirm the right of the private cable company to exercise editorial control. Although the leased channel provision ends up surviving this first amendment scrutiny, the public access provision does not survive. The outcome is public forum law seen through the looking glass. Instead of mandating redistribution from the government to private speakers, the Constitution in this context requires redistribution from private speakers to the government.

Denver is surprising in a second respect as well. As we have seen, the fact that broadcast licenses are, themselves, the product of regulation has made them seem like “new” property. In cases like *Red Lion*, the Court has emphasized this factor to shift the analysis from the mandatory (*Lochner*) sphere to the permissive sphere. Thus, the fairness doctrine is constitutionally permissible, but not constitutionally required. In contrast, *Denver* goes the whole way by moving the analysis all the way to the impermissible (*Marsh*) sphere. The destabilization of traditional property concepts produced by pervasive regulation not only defeats *Lochner*-like claims to constitutionally protected private ownership but, contrary to the New Deal compromise, also makes such ownership impermissible.

It bears emphasis that *Denver* is aberrational. We have not, in fact, started down the road to judicially imposed socialism under the cover of the first amendment. Although there are

a smattering of other cases outside of the public forum category where the Court has used as-applied analysis to make existing distributions impermissible, the dominant method of review remains formal.

It should be emphasized as well how limited public forum law is. Perhaps the most disturbing limitation is the requirement that the forum be “traditional.” In fact, recent scholarship makes clear that we have retreated a long way from the kind of free speech access to streets and parks that our eighteenth and nineteenth century traditions permitted. But even if the Court had been more protective of our traditions, the traditional forum approach fails to take account of how modes of communication change over time. As these changes occur, traditional modes inevitably lose importance. In the eighteenth century, streets and parks were the primary loci for speech. Today, the primary locus is the electronic media. If we are to preserve the speech opportunities that existed at the founding, we need to provide people with internet connections as well as public parks.

There is no mystery why the Court has nonetheless been eager to cabin the requirement of *Marsh*-like redistributions, or, for that matter, *Lochner*-like protections of existing distributions. We are back to the dilemma we started with. The failure to cabin these doctrines would lead to the judicialization of the entire political sphere, thereby violating one branch of the New Deal compromise. Yet the total extirpation of the doctrines would lead to making all first amendment claims discretionary, thereby violating the other branch. The upshot is that sometimes the Court treats property rights as constitutionally fixed and sometimes it does not. When does it reach one result and when the other? Part IV offers some speculations on this subject.

IV. The Invisible First Amendment

In this final section, I address a puzzle that lies at the core of my argument. If that argument is correct, then there is a sense in which first amendment rights are impossible. This is so because we are committed to a discretionary property regime, and such a regime entails a discretionary speech regime. Why, then does it appear to so many of us that we have a remarkably robust free speech culture protected by constitutionally fixed first amendment rules?

There are two responses to this paradox, which I explore separately below. The first answer is that we are less committed to a discretionary property regime than we think we are. Free speech rights thrive only when we deviate from the New Deal compromise by constitutionalizing either *Lochner* or *Marsh* property entitlements, but in fact, as Part III demonstrates, we have deviated quite a bit.

This answer, in turn, raises a question of its own. When are these rights constitutionalized, and when do they remain discretionary? Writing thirty years ago, Bruce Ackerman attempted to understand our constitutional practices regarding private property by comparing the perspective of the ordinary observer with that of the scientific policymaker. For the ordinary observer, “the test of a sound legal rule is the extent to which it vindicates the practices and expectations embedded in, and generated by, dominant social institutions.” In contrast, for the scientific policymaker “[t]he rules of the system are understood to be the product of legislative and judicial efforts to implement [a] comprehensive view in the best practical way.” On the speech side of the ledger, Robert Post has made similar, although not identical observations. He has contrasted an approach that sees speech as embedded in and formed by a set of social practices on the one hand with an approach that treats these rights as

formed by a coherent set of legal rules on the other.

Suppose we view our problem from the ordinary-observer/social practices perspective. Then the answer to our question about when property and speech rights are constitutionalized lies outside of law. The distinction between fixed and discretionary rights is no more (and no less) than a social fact. The fact is contingent, but it is nonetheless extremely powerful. As things stand now, it simply seems to us that the that the Boy Scouts belong to BSA, rather than to Dale. This is the first sense in which we have an invisible first amendment. The contours of the doctrine are formed by a set of social understandings that are so thoroughly internalized that they do not even come into consciousness.

Of course, a scientific policymaker is not going to be satisfied with this response. She will want to dig deeper by asking where these social practices come from. As a positive matter, one might see them as emerging from a comprehensive view that drives and explains the law. As a normative matter, one might be able to get critical traction by comparing them to a comprehensive view that we should, but have not, adopted.

What sort of comprehensive view might be at work? Given my own biases, I am drawn to a view that emphasizes the material and class circumstances of the winners and losers produced by our invisible social practices. It is no accident, on this view, that *Wisconsin Right to Life* is about corporations, while *Davenport is* about unions or that *Dale, San Francisco Arts and Athletics*, and *Rust* are about the rights of women and gays, while *Rosenberger* is about the rights of Christians.

I have to concede, though, that this is not the only way to organize the data. I am sure one could tell stories about efficiency, natural rights, historicism, or any of a host of other

approaches that would also explain the cases. When I try to step away from my own biases, it becomes apparent that our social practices are simply too complex and subject to too many cross-currents to be captured by any simple structural theory. Yes, the unions lost in *Davenport*, but unions also joined corporations in opposing the section of the McCain-Feingold statute invalidated in *Wisconsin Right to Life*.

This complexity, in turn, suggests that the rigidity of scientific explanations may make them both descriptively inaccurate and counterproductive. A comprehensive view provides a grounding for critique, but ironically, it also can make critique seem pointless. Such a view suggests that the current state of affairs is driven by overpowering forces that prevent change.

Here, I want to introduce a second sense in which the first amendment is invisible as well as a second response to the paradox of a seemingly robust first amendment culture linked to a doctrinal framework that is incompatible with speech rights. Once we get over a belief grounded in a comprehensive view that things must be the way they are, we can begin to see that our free speech culture may not be as robust as it could be. We see plenty of speech around us, but there is simply no way to know how much more speech, or what different kinds of speech, there might be if we had a different set of property entitlements. Our first amendment regime is invisible in the sense that we cannot see or know what our public debate would look like in a possible alternative world where we stuck more closely to either a *Lochner* or *Marsh* regime.

If I am right that the social forces that have produced the current regime are too complex and subject to too many cross-currents to be captured in a single comprehensive view, then they may well be more subject to change than they appear. Instead of the product of a single,

overpowering cause, they may result from a fragile confluence of forces. The attempt to imagine a different, more robust speech regime that might accompany different property distributions could conceivably upset this balance.

The first step of this imagining is to see the contradictions and vulnerability at the core of the regime we currently have. And the first step in doing that is to understand why our current first amendment doctrine cannot resolve the *Dale* problem.