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CASES:

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-289

PRUNE YARD SHOPPING CENTER, *et al.*,

Appellants,

v.

MICHAEL ROBINS, *et al.*,

Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF AMICUS CURIAE OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations, a federation of national and international labor organizations having a total membership of approximately 13,500,000 working men and women, with the consent of the parties as provided for in Rule 42 of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The constitutional claim pressed by appellants and the *amici curiae* appearing on their behalf is notably imprecise in several respects.

First, the nature of the right of free expression in shopping centers provided by the California Constitution is

never brought into focus. Upon close viewing, the so-called "right of access"[1] or, more extremely, the supposed right to "appropriation of private property"[2] or "to commandeer . . . private property"[3] turns out to be a regulation of the use of private property far less intrusive than this rhetoric seeks to suggest. For, appellees did not seek a court injunction to permit them to gain access to the Prune Yard. They had no need to do so, since it was not appellees' presence on its property which the Prune Yard sought to curtail, but their expressive activities while present. (Cf. *Hudgens* v. *NLRB,* 424 U.S. 507, 521-522 n. 10; *Eastex, Inc.* v. *NLRB,* 437 U.S. 556, 572-573; compare *Agriculture Labor Relations Bd.* v. *Superior Court,* 16 Cal. 3d 392, appeal dismissed for want of a substantial federal question, 429 U.S. 802.)

Further, the California Supreme Court expressly declared that Article I, Section 2 of the California Constitution protects speech in private shopping centers only if "reasonably exercised," specifying that appellants may adopt "reasonable regulations to assure that these activities *do not interfere with normal business operations.*" (23 Cal. 3d at 911, emphasis supplied). Except in the trivial sense that "any visitor to a [shopping center] necessarily occupies a certain area of ground or floor space wherever he stands . . ." (*In re Wallace,* 3 Cal. 3d 289, 295; see *Diamond* v. *Bland,* 3 Cal. 3d 653, 665 n. 3), no "obstruction" of the Prune Yard's walkways has been sanctioned. The Prune Yard's patrons remain free, without coercion or physical interference, to enter the stores and use the Center's other facilities, and the

[1] Brief of Appellants ("App. Br.") at 9.

[2] Brief of Homart Development Co. as Amicus Curiae ("Homart Br..") at 7.

[3] Brief Amicus Curiae of the Taubman Co., Inc., et al., at 9.

Prune Yard remains free economically to exploit its property as a retail commercial facility.[4]

The California Constitution, consequently, recognizes a right of expression upon private shopping center property only because, and only to the extent that, such expression is compatible with the basic use to which that property has been devoted by its owner.[5] It does not attempt to limit that basic use, nor does it sanction expressive activity which impedes that use.

Second, appellants' concrete interest in avoiding the very limited regulation of the Prune Yard's operations imposed by the decision below is left vague. Appellants have not even alleged, much less proved, that appellees' activities would cause appellants any loss.[6] Nor do appellants, although seeking to discover in the First Amendment as well as the Fifth Amendment some basis for their contentions (App. Br. at 12), suggest that there has been

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[4] Thus, to suggest that California's construction of the state's Constitution presents "safety problems involving crowd control" and "dangers of violence" (Homart Br., at 4) is sheer fabrication, without support in either the facts of this case or the legal rights recognized in the opinion below.

[5] Despite representations to the contrary, it is *not* "likely that the private forums established by the decision below would be extended to the smallest business and even to private residences." (Homart Br., at 4). Indeed, the California Supreme Court expressedly abjured any such implication, emphasizing that the case does not involve "the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment." (23 Cal. 3d at 910.)

[6] While appellee Homart does attempt to fill this gap with imaginative suggestions of "substantial adverse impact on normal commercial activities" (Homart Br., at 7), the allegations of a projected loss of revenue are not only entirely without any support in the record but are in this context contrary to reason: Since all competing shopping centers in California will be subject to the

any interference with their right to speak; indeed, they advance no interest other than the commercial interest in running their business, and that interest is not protected by the First Amendment. Further, the use to which appellants have chosen to devote the Prune Yard precludes any claim of an interest in privacy, quiet or solitude for their own sake as might pertain in a private home. Thus, it appears that appellants assert only the abstract "interest of the shopping center's owner in controlling the use of his propery." (App. Br., at 17.) To isolate that interest is not to denigrate it, but it is to make clear that appellants' arguments rest squarely upon a claimed federal constitutional right of absolute, arbitrary control over private property which does not exist. (*Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365.)

Third, appellants refuse to recognize the governmental interest underlying Article I, Section 2, of the California Constitution as applied in this case.[6] The California Supreme Court, however, was quite clear in identifying that interest, and in stressing its importance to the state:

> [C]entral business districts . . . have continued to yield their functions more and more to suburban centers. Evidence submitted by appellants in this case helps dramatize the potential impact. Shopping centers . . .

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same requirement of tolerating peaceful expressive activity, and since retail centers fronting on public sidewalks can not prevent such activity, there is likely to be no relative loss or gain of business due to the requirement. (See *Atlanta Motel* v. *United States*, 379 U.S. 241, 260.)

[7] "This is a case involving, on the one hand, the interest of appellees in utilizing the property of the shopping center owners to convert others to their cause and, on the other hand, the interest of the shopping center's owner in controlling the use of his property." (App. Br. at 17).

> provide essential and invaluable forum . . . [23 Cal. 3d at 907, 910] [8]

Thus, the premise of the decision below is that the growth of shopping centers and consequent decline of traditional business districts threaten to eliminate the "assembly, communicating thoughts between citizens, and discussing public questions [which has taken place on] streets and public places . . . from ancient times" (*Hague* v. *CIO,* 307 U.S. 496, 515), and that there is a governmental as well as private interest in preventing the erosion of that opportunity to communicate.[9]

Fourth, finally, and perhaps most important, the precise parameters of appellants' alleged federal constitutional right to resist state regulation of expressive activity on

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[8] The evidence showed that, in the San Jose vicinity, the downtown area has been entirely supplanted as a commercial center and gathering area by suburban shopping centers, to the degree that by 1973 retail sales in the central business district were negligible. (23 Cal. 3d at 907).

[9] The connection between shopping center growth and traditional business district decline shown by the expert testimony in this case has been demonstrated as well by careful studies conducted in other areas. One review of such studies concluded that "[t]he opening of regional shopping malls in the smaller urban areas . . . reduced the level of sales in central business districts . . . [and diverted] shoppers to new malls while [in larger urban areas] . . . Central Business District sales activity declined during the same period that large regional malls opened." (J. Miller & C. Soble, *Shopping Malls and CBD Activity—A Survey of Studies and Their Urban Policy Implications* (The Urban Institute, June, 1979) (at 2). Concomitant effects have been decline in tax revenues of central cities as well as substantial decreases in property values. (*Id.*, at 36-37.) As a result of such impact, several states now are attempting to assess the likely effect of proposed shopping centers upon central cities before issuing required approvals or aiding development by providing transportation, sewage, or other public facilities. (*Id.*, at 40-43.)

shopping center property are conveniently left cryptic. Thus, despite reliance upon cases construing the takings clause of the Fifth Amendment (App. Br., at 11-12), appellants do not squarely rely upon that clause as the basis for the constitutional invalidity they claim. Rather, recognizing that "this is not a condemnation case" (*id.* at 11 n. 4), they merely observe that the takings cases are "relevant" in the present context, and that the right to control speech on private property is "rooted in" the takings clause. Similarly, appellants look to the First Amendment not for its own force but, instead, as one of the "origins" of the "constitutional rights of private property owners." (Juris. Stat., 12.)

This imprecision about the source and character of the constitutional rights infringed is not surprising. For, as we discuss in Part I of this brief, the Constitution, far from establishing a principle of absolute private control over property, recognizes that the specific rights which inhere in the ownership of property vary from place to place, and from time to time. The states, not the federal government, generally create and define property rights. Consequently, in a case claiming a violation by a state of constitutionally protected property rights, the first issue is whether the state has merely acted to define the property right in question and not to contract a right already established. If so, there is an independent state ground for the decision and no jurisdiction in this Court. The evolution of the California law indicates that this may well be the situation here.

Even in cases in which there has been a discernible and detrimental change in state law concerning control over private property, or in which the federal government acts to alter property rights as defined by the state, there are only

two narrow constitutional barriers. The first, the takings clause, is inapplicable in this instance because the economic effect of the protection of speech here at issue is either minimal or non-existent; because only a minute portion of the property rights of a shopping center owner have been affected; and because no investment expectations have been defeated. The second, the substantive aspect of the due process clause, has long been construed to protect property interests only to the extent of assuring a rational connection between the governmental regulation and the legitimate interest pursued. Appellant's representation to the contrary notwithstanding the interest of California in maintaining a viable public dialogue is one at least as legitimate and therefore at least as entitled to broad deference, as those involved in the decided cases involving substantive due process challenges to economic regulations. And surely the means of reaching that goal—limiting the right of shopping center owners to oust those engaged in expressive activity—is a logical one.

There remains appellant's attempt to escape the relevant property cases by discovering some "fundamental" right which has been abridged. Appellants posit that the "right to exclude" is such a right. While the "right to exclude" theory is premised largely upon a recent case, *Kaiser Aetna* v. *United States,* 48 L.W. 4045, the opinion there did not even remotely declare that private property is immune from governmental control. Rather in *Kaiser Aetna* it was critical the "right to exclude" was precisely the aspect of property ownership that the company was economically exploiting. Indeed, the so-called "right to exclude," while traditionally a valued aspect of property ownership, has like all the other "rights" which inhere in such ownership,

been limited and regulated over the years to meet emerging social needs. Perhaps the most important examples are the public accommodations regulations such as Title II of the Civil Rights Act of 1964. *Atlanta Motel* v. *United States,* 379 U.S. 241 reviewed the relevant history and expressly upheld Title II's limit on the "right to exclude." Since the regulation here is indistinguishable in principle, this aspect of this case is controlled by *Atlanta Motel.* (See also *Andrus* v. *Allard,* 48 L.W. 4013 (right to alienate property subject to severe diminution).) A second attempt to reach a more exacting constitutional review standard is presented by appellants' somewhat paradoxical claim that the First Amendment bars the States from granting the public a right to engage in expressive activity within shopping centers. This argument is in fact nothing more than a semantic subterfuge. For, upon analysis it becomes clear that the right asserted is simply the same right of absolute property control discussed above and not an interest involving any First Amendment values at all.

In part II of our argument we show that appellants' heavy reliance on *Lloyd Corp.* v. *Tanner,* 407 U.S. 556, is entirely misplaced. That case said and decided nothing concerning the power of the federal or state governments to require the owner of a shopping center to permit members of the public to engage in expressive activity thereon. What *Lloyd* did decide was that a privately owned shopping center, like that of the present appellants, was not so dedicated to public use as to entitle members of the public to claim a right derived directly from the First Amendment to distribute handbills, to picket, or to circulate petitions. This reading is confirmed by the Court's lengthy quotation of *Lloyd's* "ultimate holding" in *Hudgens* v. *NLRB,* 424 U.S. at 518-520. In the present case, by contrast, the ap-

pellees' right to circulate petitions on appellants' property is based not on the First Amendment "state action" theory rejected in *Lloyd* and *Hudgens,* but on Article I, Section 2, of the California Constitution, which has been authoritatively construed to grant them that right. In this respect, the case therefore parallels *Hudgens* and *Central Hardware Co.* v. *NLRB,* 407 U.S. 539 (which was decided together with *Lloyd*): In each of those cases the union seeking to engage in expressive activity on privately owned property asserted a right to do so under the National Labor Relations Act. Having held that the unions could not rely on the First Amendment, the Court remanded for further consideration by lower tribunals the question whether the NLRA grants that right.

The distinction between a claim based on the Constitution, on the theory that the owner of property is subject to constitutional restraints because he has assumed some of the power or functions of government, and a claim based on some state or federal law which regulates the respective rights and duties of members of the public owners of property, is recognized in this Court's decisions. (Compare, e.g., *Moose Lodge* v. *Irvis,* 407 U.S. 163, with *Runyon* v. *McCrary,* 427 U.S. 160.) It was articulated with special force by Mr. Justice Black in his separate opinions in *Bell* v. *Maryland,* 378 U.S. 226, 318, and *Atlanta Motel* v. *United States,* 379 U.S. at 261-278: Justice Black's views in this connection merit particular attention because his dissenting opinion in *Bell* anticipated his dissenting opinion in *Food Employees* v. *Logan Plaza,* 391 U.S. 308, 327, which was approved by the Court *Lloyd* and *Hudgens.*

ARGUMENT

I

The Fifth and First Amendments Do Not Limit the States' Authority to Regulate Land Use in Order to Permit the Discussion of Public Issues in Areas Open to the Public.

(A.) California has determined that modern-day land use patterns—principally, the increasing suburbanization of which shopping centers are both a cause and an effect—require shopping centers to permit expressive activity if the public dialogue is to be maintained.[10] This felt need to respond to a novel form of land use and the problems that use creates is similar to the dynamic which led, when the trend was not suburbanization but urbanization, to comprehensive zoning ordinances:

> Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, addi-

[10] This condition upon the use of land as a shopping center is a very minor aspect of government involvement in the establishment and operation of shopping centers in California. A chapter on shopping centers in 13 W. Bell & C. Seneker, California Real Estate Law & Practice (1978) advises potential developers as follows:

> Local zoning regulations should be investigated to determine if the area is zoned for commercial development. . . . In order to have an area suitably rezoned or to obtain building permits, a developer should examine the local regulations and any underlying plans or policies, such as a general plan which may affect the construction of a shopping center in that particular location.
>
> The necessity for and cost of compliance with other land use regulations such as California Environmental Quality Act [Pub. Res. Code § 21000-21179], the California Coastal Zone Conservation Act [Pub. Res. Code §§ 27000-27650], the federal Clean Air Act [42 U.S.C. §§ 1857-1858(a)] or the California

> tional restrictions in respect of the use and occupation of private lands in urban communities. [*Village of Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 386-387.]

And, indeed, the dynamic is similar to that underlying the evolution of the law of property generally:

> "Even as regards things recognized for seven centuries as property, the rights in them recognized by law have been forever changing. . . . Instances of new rights thus recognized, and of old rights that have decayed or totally disappeared, might be given in great numbers. . . . In short, the concept of property never has been, is not, and never can be of definite content. . . . Changing culture causes the law to speak with new imperatives, invigorates some concepts, devitalizes and brings to obsolesence others." [Philbrick, *Changing Conceptions of Property In Law*, 86 Univ. of Pa. L. Rev. 691, 692, 696 (1938).]

Further in this country, the task of defining those interests which comprise the "'bundle' of property rights" (*Andrus* v. *Allard*, 48 L.W. 4013, 4017) is ordinarily not a question of federal constitutional law but one of state law:

> [A] . . . property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personality, the metes and bounds

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Water Quality Control Act [Wat. Code §§ 13000-13998] must also be considered. The effect of such regulation may make the project practically impossible or may increase its cost or the time necessary to obtain the all-necessary approvals.

If two or more buildings are to be constructed on the parcel for the purposes of later sale, leasing, or financing, compliance with the Subdivision Map Act [Gov. Code §§ 66410-66499.3] may be necessary. If five or more buildings are to be constructed for purposes of sale or least, compliance with the Subdivided Lands Act [Bus. & Prof. Code § 11000-11030] may be necessary although the requirement for a public report can be waived by the Real Estate Commission [*Id.*, § 474.03.]

> of which are determined by the decisional and statutory law of the [state]. The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on [state] law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on [state] law. [*Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 160 n. 10.]

Therefore "[w]hile the meaning of 'property' as used in the Fifth Amendment [is] a federal question, 'it will normally obtain its content by reference to local law.' " (*United States* v. *Causby*, 328 U.S. 256, 260, quoting *United States ex rel TVA* v. *Powelson*, 319 U.S. 266, 279. See also *Board of Regents* v. *Roth*, 408 U.S. 564, 577; *Bishop* v. *Wood*, 426 U.S. 341, 343 n. 7.) The incidents of private property ownership, then, traditionally vary both temporally and geographically:

> [P]roperty has not the same meaning in this country with respect to any particular thing as one passes from state to state. If one owns land in different states, one's enjoyment therefore is restricted by varying policies of public control under the state police power; under municipal ordinances respecting public nuisances. . . . under state statutes respecting rural drainage . . .; and so on. The non-statutory law respecting nuisance similarly varies. [Philbrick, *supra*, at 693.][11]

(B.) This diversity means that in takings clause cases challenging state, rather than federal, action there is often a threshold question whether established property rights

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[11] Other examples of incidents of real property ownership which vary from state to state and from time to time include: the rights of secured and unsecured creditors; the rules governing intestate transfers and transfer by devise; marital property principles; rules governing adverse possession; landlord-tenant laws; and the availability of trespass actions.

have been diminished at all, or whether the parties alleging a taking "have" never possessed under [state] law such a property right as they claim has been taken from them. If this is the case, appellants have no question for [this Court]." (*Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 42.) See also *Sauer* v. *New York*, 206 U.S. 536, 548:

> This court has neither the right nor the duty to reconcile . . . conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the 14th Amendment is shown.

As the postponement of jurisdiction suggests this threshold issue appears to be implicated by this case. For, while on private shopping center walkways under Article I, Section 2 of the California Constitution, that opinion did not overrule any existing precedent in this regard and, indeed followed earlier California cases suggesting such a right. (See p. 16, n. 13, *infra.*) The majority in *Diamond* v. *Bland*, 11 Cal. 3d 331 (*Diamond II*), never reach the state constitutional question decided here, but rather, based upon its reading of *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, decided to "expressly leave open that question." (11 Cal. 3d at 335 n. 4). And California's free speech provision, which is worded quite differently from the First Amendment, has long been regarded as "[a] protective provision more definitive and inclusive than the First Amendment. . . . *Dailey* v. *Superior Court*, (1896), 112 Cal. 94." (*Wilson* v. *Superior Court*, 13 Cal. 3d 652, 658.) In particular, Article I, Section 2 varies

from the First Amendment in that state action is *not* an express limitation upon the reach of the protection.

Thus, neither the language of the California Constitution nor its previous construction gave appellants and others in their situation reason to believe that they had a right under California law to oust from shopping centers individuals seeking to engage in speech-related activity. Consequently, "the nonfederal ground of decision has fair support [and] this Court [should] not inquire whether the rule applied by the state court is right or wrong or substitute its own view of what should be deemed the better rule for that of the state court." (*Demorest, supra,* 321 U.S. at 42.)

(C.) Even where state law does change, the federal Constitution, far from attempting to foreclose such experimentation and evolution from state to state imposes only two narrow limitations. The first, the takings clause of the Fifth Amendment, applicable to the states through the due process clause of the Fourteenth Amendment (*Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 266), "is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States,* 364 U.S. 40, 49). While this Court has not set out an "abstract or fixed point at which judicial intervention under the takings clause becomes appropriate," (*Andrus* v. *Allard, supra,* 48 L.W. at 3017), the takings clause is generally satisfied by a land-use regulation which is "substantially related to the promotion of the general welfare . . . and permit[s] reasonable beneficial use of the . . . site." (*Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104, 138.) In the present case both the "exercise of judgment [and] . . . the application of logic" (*Andrus* v. *Allard, supra,* 48 L.W. at 3017) demonstrate plainly that the minimal regulation here is not the

sort of burden upon property owners with which the takings clause is concerned. Even those cases which deemphasize the degree of economic loss which must occur before a taking is found concede that *at the least* "the damage [must be] substantial" (*United States* v. *Cress,* 243 U.S. 316, 328; *United States* v. *Causby, supra,* 328 U.S. at 266). Here, as noted, there is no allegation of any compensable damage at all, nor is it likely that such could be proven.[12] Further, it would not matter if some slight monetary value could be assigned to the right to oust appellees and others seeking to engage in speech activity. For,

> "Taking" jurisprudence does not divide a [single parcel] into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the *nature and extent* of the interference with rights in the parcel as a whole. [*Penn Central, supra,* 438 U.S. at 130-131, emphasis added; see also *Andrus, supra,* 48 L.W. at 4017.]

Appellants certainly have no "distinct investment-backed expectations" (*Penn Central, supra,* 438 U.S. at 127) in the asserted right to prohibit expressive activities. Even if one were to regard such a right to be central to the economic investment motive in the way that the right to mine coal was

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[12] Consequential damage, as opposed to diminution in the sale value of the property, is not compensable under the takings clause. "[T]he Fifth Amendment concerns itself solely with the 'property,' i.e., with the owner's relation as such to the physical thing and not with other collateral intended which may be incident to his ownership." (*United States* v. *General Motors Corp.,* 323 U.S. 373, 378.) Under this rule, it would appear that losses in revenues of the shopping center due to the *message* conveyed by persons engaging in expressive activity ought not to be a basis for compensation.

central in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 —a highly dubious proposition to begin with—it would be difficult to credit any expectation of absolute control in this regard, given the nearly twenty years of litigation on the issue.[18]

The substantive protection accorded property rights under the due process clause itself has a somewhat different thrust: to protect against government by whim and caprice. As long as a land use regulation is not "clearly arbitrary and unreasonable, having no substantial relation to the publice health, safety, morals, or general welfare" (*Euclid, supra,* 272 U.S. at 395), this requirement is considered to be met. Appellants do not suggest that requiring shopping centers to permit expressive activity that formerly took place in the public forums the centers have had a hand in destroying is not a rational solution to the problem addressed.[14] Obviously, a sensible way to solve the problem of

[18] It was not until *Hudgens* v. *NLRB,* 424 U.S. 507 (1976)—*after* the incident which led to this litigation, and therefore plainly long after appellant determined to use its land for a shopping center—that *Food Employees* v. *Logan Plaza,* 391 U.S. 308 (1968) (hereafter "*Logan Valley*") which declared a *federal* First Amendment right to speech activity in shopping centers in certain instances was definitely overruled. And, in California, a principle parallel to that established in *Logan Valley* had been announced previously (*Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers Union,* 61 Cal. 2d 766 (1964) cert. denied 380 U.S. 906.) Since the Prune Yard—as well as, we would suspect, almost all of the major shopping centers in California—was built after 1964 but before 1976, appellants had no legitimate expectation when they determined a use for their land that they could absolutely bar all expressive activity on the center.

[14] Amicus Homart does complain that "[n]o attempt was made by the court below to determine the necessity for or reasonableness of the impairment of Pruneyard's rights." (Homart Br., at 9). This criticism is unmerited, in light of the careful attention given by the court below to documenting the need for new areas of public dia-

the disappearing public forum is to permit the speakers to follow their intended audience to its new location. While there is a suggestion (App. Br. at 17) that this case is not within the *Euclid* rule because the state's objective is not legitimate, "[l]ater cases have emphasized that the general welfare is not to be narrowly understood: it embraces a broad range of government purposes." (*Moore* v. *City of East Cleveland,* 431 U.S. 494, 498 n. 6.) And the Court

> has recognized, in a number of settings, that states and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirability aesthetic features of a city; see *City of New Orleans* v. *Dukes,* 427 U.S. 297 (1976); *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 9-10 (1974); *Berman* v. *Parker,* 348 U.S. 26 (1954). *Welch* v. *Swasey,* 214 U.S. [91] at 108 (1909). [*Penn Central, supra,* 438 U.S. at 129.]

The state's interest here is in some ways quite similar to that in *Penn Central*—that is, in both instances preservation of traditional urban attributes is at the core of the regulation. And surely, as a "spiritual" purpose (*Berman,* 348 U.S. at 32), the interest in free expression and meaningful exchange of ideas is central to our national values.[15]

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logue and the capacity of shopping centers to serve that role. And it is, in any event, wrong-headed: it was *appellants'* burden to demonstrate the requirement to be unreasonable in order to substantiate their constitutional attack.

[15] The Court said in *Berman,* 348 U.S. at 33:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

The precise issue in *Berman* was whether a conceded taking which

(D.) The restriction imposed by Article I, Section 2 of the California Constitution is, then, well within the broad boundaries within which the federal Constitution leaves the states free to determine the scope of private property rights. Appellants, however, seek to erect from the due process clause a new constitutional barrier to adaptation of state property laws to changing conditions. Seizing upon a phrase from this Court's recent decision in *Kaiser Aetna et al.* v. *United States,* 48 L.W. 4045, 4049 (1979)—"the right to exclude others"—appellants claim, seemingly, that while all the other incidents of property are subject to substantial diminution and regulation under the test of the *Penn Central* case, the "right to exclude others" is so "fundamental" a right of property that it cannot constitutionally be impaired.

Kaiser Aetna, supra, establishes no such principle, nor does it depart at all from the holding of the *Penn Central* case. Following *Penn Central, Kaiser Aetna* rests upon an "interference with reasonable investment backed expectations" (48 L.W. at 4048); and upon a determination of substantial "devaluation of petitioner's private property" (*id.* at 4049). Indeed, the public use the government wanted to make of the property was the very use for which the owner had invested large sums of money, and exclusion of the public from those premises was central to the owner's business expectations. Charging people for entry (*id.* at 4050) was the essence of the owner's property interest in *Kaiser Aetna,* just as taking coal was the essence of the property owner's interest in *Pennsylvania Coal* v. *Mahon, supra,* 260 U.S. 393.

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was compensated was for a "public," as opposed to a private purpose. Thus, as *Berman* shows, the "public interest" limitation is applicable under *both* the branches of constitutional property protection.

Thus, *Kaiser Aetna* decides at most that the "right to exclude others" has become a test of constitutionality when exclusion is the key to the profit-making capacity of the enterprise. In that instance, exclusion is a surrogate for the essence of the property claim, the ability to make reasonable economic gain. Were this not the case, to take but the most obvious example, New York would have been able to prevent Penn Central from building a multi-million dollar skyscraper above its terminal without compensation, but would have violated the Constitution if it had restricted Penn Central from excluding a single individual from the use of the "public" portions of its terminal building.

It is clear that *Kaiser Aetna* did not rule that "the right to exclude" is immune from state control or even subject to lesser restriction than *other* elements of the property right such as use or alienation. No issue of state power to define or limit property rights was presented in *Kaiser Aetna*. Indeed, the Court declared at the very outset of its opinion that "under Hawaii law Kuapa Pond was private property." (48 L.W. at 4046). The issues were whether the United States enjoyed a superior property right by virtue of the "navigational servitude" and if not whether its assertion of that servitude to compel Kaiser Aetna to permit free public access to the pond was a "taking" of the property as defined by the state. By answering the first of these questions in the negative and the second in the affirmative, the Court did not purport to draw back from prior Fifth and Fourteenth Amendment cases which have recognized broad governmental authority to regulate and limit various property rights.

Moreover, "right to exclude" decisions cited in *Kaiser Aetna* did not involve, or discuss, the power of the federal government to regulate or limit that right, or when such

limitation or regulation amounts to a taking for which compensation must be paid.

The passage in *United States* v. *Lutz*, 285 F.2d 736, 740 (C.A. 5), which is referred to in *Kaiser Aetna* reads as follows:

> Ownership of property comprises numerous different attributes. The owner has the right to use and control the property, to exclude others from the use of it, and to sue to regain possession from one who has taken it without permission or to obtain damages from one who has injured it.[16]

This Court has of course sustained, against challenge under the due process clause and against the charge that there was a taking, countless laws which have regulated or prohibited uses which the owner wishes to make of his property.[17]

In *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl.), the court said:

> Implicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. In order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used

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[16] The issue in *Lutz* was whether the United States, as the owner of certain tomatoes was entitled to the insurance proceeds collected for their loss by fire.

[17] The point of this portion of the court's discussion was that "[w]hen property is sold the question occurs as to when these attributes of ownership pass to the purchaser. The sale does not obscure the individuality of the various attributes of ownership, and the contracting parties may provide that certain attributes pass separately and at a different time from the others." [295 F.2d at 741.]

> and occupied the land to the exclusion of other Indian groups.[18]

There is no suggestion that "full dominion and control of property" is not subject to the regulatory authority of Congress and of the states.

Finally, Mr. Justice Brandeis' dissenting opinion in *International News Service* v. *Associated Press, Inc.*, 248 U.S. 215, 250, could not have been cited in support of the proposition that the right to exclude alone among the bundle of rights embraced in the ownership of property has some special sanctity. For, in the sentence immediately following that which was quoted in *Kaiser Aetna* he wrote:

> If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified.[19]

(E.) There has, in fact, never been anything like an absolute right to exclude others. The right of exclusion is

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[18] The issue in *Pueblo of San Ildefonso* was whether a certain Indian tribe had enjoyed aboriginal title in certain land.

[19] In addition to *Kaiser Aetna*, appellants rely on *Delaware L. & W. R. R.* v. *Morristown*, 276 U.S. 182 (1928) to support the notion that the "right to exclude" occupies a favored position in the complex of rights in property. *Morristown*, however, does not stand for such a proposition. Rather, it is derived from a series of cases on related questions (see, *Cherokee Nation* v. *Kansas City Ry. Co.*, 138 U.S. 691, 657; see also *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279 and cases cited therein) which are all relics from the era when it was thought that *no* incident of property ownership could be compromised by governmental regulation unless the property in question was "affected with a public interest." Thus, in *Delaware*, the Court approached the issue as one of discovering whether providing taxicab service is part of the business of running a railroad and therefore affected with a public interest; if not, the teaching of the time went, no regulation whatever was permissible, whether of the "right to exclude" or of any other interest in property. Of course, the "affected with a public interest" approach,

simply an incident of property like every other incident of property, and is likewise subject to limitation and to regulation.[20] For, the exceptions to an absolute property right to exclude others have ranged so widely over time and subject matter as to comprehend the entirety of American legal history. In the Seventeenth Century, laws permitted individuals to cross the property of others to reach Great Ponds for fishing. (Smith, *The Great Pond Ordinance — Collectivism in Northern New England*, 30 Boston Univ. L.

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has long since been discarded as "little more than a fiction . . . [meaning] no more than that an industry, for adequate reason, is subject to control for the public good," (*Nebbia* v. *New York*, 291 U.S. 502, 536), and replaced by the very limited "rational nexus" scrutiny applicable to all forms of property use. (See *Olsen* v. *State of Nebraska*, 313 U.S. 236, 244–247; *Ferguson* v. *Skrupa*, 372 U.S. 726.)

[20] *Andrus* v. *Allard*, *supra*, decided just one week prior to *Kaiser Aetna*, involved another attribute of the right of private property—the right to dispose of that which is owned. This has been recognized to be a fundamental element of property ownership since Aristotle. (Aristotle, *Rhetoric*, Bk. I, c. 5, § 1361. See also Powell, *The Relationship Between Property Rights and Civil Rights*, 15 Hastings L.J. 132, 140 (1963); Pound, *The Law of Property & Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1929).) No reason appears why the "right to exclude" should be exalted above the right economically to exploit, also part of the power to use land or the right of disposition. And, of course, limitations upon that latter right are legion in the common law (*e.g.*, the rule against perpetuities and the limitations upon unlawful restraints on alienation).

In *Andrus*, the Court said (in an opinion which all but the Chief Justice joined) that

> the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety. Compare *Penn Central*, *supra*, at 130–131, and *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956) with *Pennsylvania Coal Co.* v. *Mahon*, *supra*, and *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624

Rev. 178 (1950).) North and South Carolina at one time required landowners to permit entry for public highways. (Grant, "The 'Higher Law' Background of the Law of Eminent Domain," in 2 Selected Essays on Constitutional Law 912, 925 (1938). In our own time, the State of New Jersey has required a municipally-owned beach to grant access to the sea over its lands to nonresidents (*Borough of Neptune City 1. Borough of Avon-by-the-Sea,* 61 N.J. 296, 294 A.2d 47 (1972), and a farm owner has been held to have to permit access to farm workers who live on his land (*State of New Jersey* v. *Shack,* 58 N.J. 297, 277 A.2d 369 (1971)).

Perhaps the classic example of imposition by common law of an access right upon private property is the easement by necessity:

> The most frequently encountered type of easement by necessity is a right-of-way. When an owner of land conveys to another an inner portion thereof, which is entirely surrounded by lands owned by the conveyor, or by the conveyor plus strangers, a right of access across the retained land of the conveyor is normally found. Without such a finding the conveyed inner portion would have little use, save by helicopter, and helicopters were not a factor in the thinking of the centuries in which this law crystallized. Thus, unless the contrary intent is inescapably reinfested, the conveyee is found to have a right-of-way across the retained land of the conveyor for access to, and egress from, the landlocked

(1961). See also Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1230–1233 (1967). In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking [48 LW at 4017.]

parcel. By the middle of the seventeenth century, the finding of an easement by necessity came to be supported also as required by public policy, in order to prevent land from remaining nonusable. This approach ripened into Sergeant Williams' position that easements by necessity originated "by operation of law." [R. Powell & P. Rohan, Powell on Real Property, 544 (Abridged Ed. 1968). See Simonton, *Ways By Necessity*, 25 Colum. L. Rev. 571, 572 (1925), tracing the history of this doctrine. See also Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 51 (1964).]

Another major example of a restriction upon exclusive right to control the use of property by others are state laws limiting the right to evict tenants and, indeed, landlord-tenant law generally both common law and statutory. (See *Block* v. *Hirsh*, 56 U.S. 135 (which involved principally a restriction upon ouster of tenants, and only secondarily control of rents).) Recent statutes, for instance, prohibit eviction of a rent-withholding tenant (e.g., Mass. Ann. Laws., Ch. 239, § 8A; Pa. Stat. Ann., tit. 35, § 1700-1: N.J. Stat. Ann., §§ 2A:42-85. 2A:42-97; Mo. Rev. Stat. §§ 441.500, 441.640).[21]

Closest, perhaps, of all exclusion restrictions to that here involved are the common law and, more recently, statutory restrictions requiring private commercial operations to

[21] Infringements upon the "exclusive use" principle could probably be multiplied indefinitely. A few such restrictions as to which there has been relatively recent litigation include: requiring a land developer to permit private entry by giving up a right of way for a canal (*Wald Corp.* v. *Metro. Dade County*, 338 So. 2d 863 (Fla. Ct. App., 1976); requiring an owner to give access across his land to others to permit them to get to public lands, at a price set by government (Cross, *The Diminishing Fee*, 20 Law & Contemp. Problems, 517, 521 (1955); requiring dedication of a street right of way as a condition for rezoning (*Transamerica Title Ins. Co.* v. *City of Tucson*, 533 P.2d 693 (Ariz. Ct. App.; 1975); *State ex rel Myhre* v. *Spokane*, 70 Wash. 2d 207, 422 P. 2d 790

serve the public generally and not to discriminate, on the basis of race or otherwise, among prospective patrons:

> Another common law limitation on property use [other than nuisance] was imposed on innkeepers. It was vital to safeguard travellers at a time when travel was slow, inns were few and highwaymen were numerous . . . The policy reasons were so compelling that the law had to respond by restricting individual property rights. [Hecht, *From Seisin to Sit-In,* 44 Boston U.L. Rev. 435, 453 (1964); see also Powell & Hohan, *supra,* at 956.]

Nonetheless, when Congress, in 1964, chose to forbid private owners of public accommodations from discriminating upon the basis of race among customers, it was accused, as California has been in this case, of compromising an inalienable, absolute aspect of property ownership. This Court gave short shrift to this accusation:

> Nor does the Act deprive appellant of . . . property under the Fifth Amendment. . . . There is nothing novel about such legislation. Thirty-two States now have it on their books either by statute or executive order, and many cities provide such regulation. Some of these Acts go back fourscore years. It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment. Perhaps the first such holding was in the *Civil Rights Cases* themselves, where Mr. Justice Bradley for the Court inferentially found that innkeepers, "by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." At 25.

(1967); *City of Redmond* v. *Kezner,* 10 Wash. App. 332, 517 P. 2d 625 (1974)); granting a fisherman a right to 'trespass' legally (*Elder* v. *Delcour,* 364 Mo. 835, 269 S.W. 2d 17 (1954); *Day* v. *Armstrong,* 362 P. 2d 137 (Wyo., 1961); *Attorney General ex rel. Dir. of Conserv.* v. *Taggart,* 306 Mich. 432, 11 N.W. 2d 193 (1943)).

> As we have pointed out, 32 States now have such provisions and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts. Indeed, in some cases the Due Process and Equal Protection Clause objections have been specifically discarded in this Court. *Bob-Lo Excursion Co.* v. *People of State of Michigan,* 333 U.S. 28, 34 (1948). As a result the constitutionality of such state statutes stands unquestioned. . . .
>
> Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary. See *Legal Tender Cases,* 12 Wall. 457, 551 (1870); *Omnia Commercial Co.* v. *United States,* 261 U.S. 502 (1923); *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155 (1958). [*Atlanta Motel, supra,* 379, U.S. at 258-261.]

In a concurring opinion Mr. Justice Black, too, emphatically rejected the argument of the restaurant and motel proprietors that Congress violated the due process clause of the Fifth Amendment by requiring that they serve Negroes if they serve others:

> This argument comes down to this: that the broad power of Congress to enact laws deemed necessary and proper to regulate and protect interstate commerce is practically nullified by the negative constituional commands that no person shall be deprived of "life, liberty, or property, without due process of law" and that private property shall not be "taken" for public use without just compensation. In the past this Court has consistent held that regulation of the use of property by the Federal Government or by the States does not violate either the Fifth or the Fourteenth Amendment. See, *e.g., Ferguson v. Skrupa,* 372 U.S. 726; *District of Columbia* v. *John R. Thompson Co.,* 346 U.S. 100; *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365; *Nebbia* v. *New York,* 291 U.S. 502. A regulation such as that found in Title II does not even come close to

> being a "taking" in the constitutional sense. Cf. *United States v. Central Eureka Mining Co.*, 857 U.S. 155, [379 U.S. at 277.]

There is no difference between appellant's exaltation of the "right to exclude" in this case and the Fifth and Fourteenth Amendment contentions in *Atlanta Motel.* In each instance, the required use is compatible with the use to which the owner has determined to put his property; in each instance, the property owner's exploitation of his property is based not on its exclusivity but on its accessibility to the public, and in each instance, because of that accessibility there is no "privacy" interest at stake. Finally, in each instance,

> It is doubtful if in the long run appellant will suffer economic loss as a result of the exclusion restriction. . . . But whether this true or not is of no consequence since this Court has specifically held that the fact that a 'member of a class which is regulated may suffer economic losses not shared by others . . . has never been a barrier to such legislation. *Bowles* v. *Willingham,* 321 U.S. [503], 518 [*Atlanta Motel,* 379 U.S. at 260.]

To revive at this late date the notion that operators of commercial properties open to the public may not constitutionally be required, in rational pursuit of a legitimate state interest, to abide activities and actors they would rather oust would be to reopen basic questions concerning the inviolability of property rights long since put to rest.[22]

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[22] Not only the public accommodations portion of the 1964 Civil Rights Act would seem to be endangered if the "right to exclude" was elevated to a preferred constitutional place. Such a ruling would also jeopardize other federal legislation which has been held to grant rights of access to private property. See, *e.g.*, 42 U.S.C. § 1982 as construed in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229; 42 U.S.C. § 1981 as construed in *Runyon* v. *McCrary,* 427 U.S. 160; § 7 of the National Labor Relations Act.

(F.) Seeking refuge in the special constitutional solicitude accorded violations of rights of free speech, appellants suggest that:

> The constitutional rights or private property owners also have their origins in the First Amendment right of the property owner not to be forced by the state to use his property as a forum for the speech of others. [App. Br. 12.]

That appellants cast about for a constitutional haven other than the limited protection accorded property rights as such is not surprising. Indeed, it has become routine for land owners challenging land use restrictions, and hoping to invoke a higher level of review under some new constitutional rubric, to restructure their cases as ones which involve state action impinging on other broader constitutional rights. Courts are then urged to undertake a detailed balancing of interests, to inquire meticulously into the weight of the state interest, and to search out allegedly less costly alternatives, even though this is precisely what the Court declined to do in *Euclid* v. *Ambler Reality Co. supra,* over fifty years ago.[23]

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as construed in, *e.g., Hudgens* v. *NLRB, supra.* Moreover, with respect to discrimination in employment statutes such as Title VII of the Civil Rights Act of 1964 and § 8(a)(3) of the NLRA, it is apparent that an employer required to hire an individual must abide his or her physical presence if that requirement is to be meaningful; to that extent, the "right to exclude" has plainly been limited by such legislation.

[23] While the facts are essentially the same, the theories keep changing. For example, in *Construction Industry Association* v. *City of Petaluma,* 522 F.2d 897 (C.A. 9, 1975), cert. den. 424 U.S. 934 (1976), it was the right to travel. In *City of Eastlake* v. *Forest City Enterprises, Inc.,* 426 U.S. 668 (1976), it was a denial of due process due to a misuse of the referendum technique. In *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, the house owners sought to raise the rights of association and of travel.

There may be instances, of course, in which a limitation upon property use so implicates the interests underlying some constitutional provision other than those involving property as such that more exacting judicial scrutiny would be merited.[24] But, in this context the claimed First Amendment right is nothing but the property rights contention—more precisely, the "right to exclude" argument disussed above—masquerading under another name.

That the purported "right not to be compelled by the state to use . . . private property as a forum for the views of others" (App. Br. at 13) has nothing to do with any First Amendment values—and indeed, is the antithesis of those values—can be seen most clearly by considering the following: If appellants operated a private store abutting on a publicly owned sidewalk, appellees and others would, of course, have a First Amendment right to engage in expressive activity in front of appellants' store. (*Hague* v. *CIO, supra.*) This would be so even if appellants found the message offensive (see *Cohen* v. *California,* 403 U.S. 15, 21) or simply preferred that their potential customers not be exposed to potential distractions. Appellants cite no case holding that there is a right inhering in the First Amend-

[24] There is no recent case in which a majority of the Court has accepted the invitation to apply a heightened standard of review to a land use regulation. In *Young* v. *American Mini Theatres,* 427 U.S. 50 and *Moore* v. *City of East Cleveland,* 431 U.S. 494, pluralities of the Court did agree that fundamental interests were implicated. However, in *Young* that plurality ultimately declined to find any constitutional infirmity even though the challenged ordinance was directed against a particular form of speech which, it was acknowledged (427 U.S. at 62), was protected by the First Amendment. And in both *Young* and *Moore* there was a concurrence, essential to the judgment, which maintained that the *Euclid* approach was controlling. (See *Young,* 427 U.S. at 73 (Powell, J., concurring); *Moore,* 431 U.S. at 313 (Stevens, J., concurring).)

ment—or in any other constitutional provision—to silence others. And *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451, the one case that appears in point, holds that there is no such right.

Yet, it is precisely the right to keep other people from stating their own ideas which appellants here claim. Since they acquired this right, if at all, when they acquired ownership of the Prune Yard, the asserted "right" is traceable solely and exclusively to the acquisition of a property interest. As such, it is merely part of the general "right" traditionally conveyed with a fee interest in property to control use of the property by others for any purpose, expressive or otherwise. But the right of control, we have seen, is regulable by the state in rational pursuit of a valid state interest.

Appellants purport, nonetheless, to find in a handful of this Court's decisions support for the contention that there is, in fact, a right, conveyed with real property but superior to the ordinary incidents of land ownership, to silence the speech activities of others. In this they err.

Surely, *Board of Education* v. *Barnette,* 319 U.S. 624 cannot be the source of such a special species of property right: It had nothing to do with property at all, or with sliencing *others'* speech.[25] Rather, at the core of *Barnette* was

> the fixed star in our constitutional constellation . . . that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other

[25] "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one another and those of another begin. . . . The sole conflict is between authority and rights of the individual." (*Id.* at 630.)

> matters of opinion or force citizens to confess by word or act their faith therein. [*Id.* at 642]

Plainly, this fundamental First Amendment value is not at issue here. California is quite indifferent to what message appellees seek to convey and, indeed, Article I, Section 2, of the California Constitution would itself preclude the state from requiring appellants to provide a forum for some views but not others.

Similarly beside the point is *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241. For, *Tornillo* did not find the right to refuse to publish a reply to the Herald's editorial in bare property interests alone. To the contrary, it was central to the Court's conclusion that:

> A newspaper is *more* than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. [*Tornillo, supra,* 418 U.S. at 258 (emphasis supplied).]

Thus, it was not the fact that the Herald owned some property, but the fact that the owners engaged in the First Amendment activity of running a *newspaper* which was critical. Here, appellants are not themselves engaging in any First Amendment activity, and there is consequently no danger whatever of adversely affecting such activity.

The final case in the sequence, and the one upon which appellants most heavily depend, is *Wooley* v. *Maynard,* 430 U.S. 705. *Wooley* is of a piece with *Barnette,* upon which it strongly relies. Both concern an attempt to require

an individual to convey "the *State's* ideological message" (*Wooley,* 430 U.S. at 715, emphasis supplied); and in both "the freedom asserted . . . [did] not bring [the claimant] into collision with rights asserted by any other individual" (*Barnette,* 319 U.S. at 630). Moreover, in *Wooley,* the Court, while conceding that "the affirmative act of a flag salute involved a more serious infringement on personal liberties than the passive act of carying the state motto on a license plate," nonetheless based its decision on *Barnette,* believing that "the difference is essentially one of degree." (430 U.S. at 715.) Thus, the Court understood that to the extent that the interference with the right to be let alone was less obtrusive, *Wooley* extended *Barnette* toward the very limits of its logic.

Appellants now seek to cut *Wooley* entirely lose from its moorings in *Barnette's* rationale and to maintain that its result rests on the proposition that property was used for expressive purposes without the owner's consent. But, as the California Supreme Court recognized, such broad protection for property owners would limit the free speech rights of others and undermine the state's interest in encouraging the interchange of ideas. Moreover, it would have these effects even though the regulation in question is based on the property owner's voluntary decision to open his property to others in a manner that demonstrates that he has no interest in preserving, and no expectation of, a right of privacy.[26] Appellants' mindless extension of the Chief Justice's *Wooley* opinion brings to mind his admonition in an earlier case:

The seductive plausibility of single steps in a chain

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[26] Justice Powell's discussion of the right of association argument in *Runyon v. McCrary, supra,* is informative here:

As the Court of Appeals said, the petitioning "schools are

of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond." [*United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123, 127.]

II

Lloyd Corp. v. Tanner, 407 U.S. 551, Did Not Consider or Decide the Issue of State Authority Presented by This Case

Appellants center their argument on *Lloyd Corp.* v. *Tan-*

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private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private." 515 F.2d, at 1089. The schools extended a public offer open, on its face, to any child meeting certain minimum qualifications who chose to accept. They advertised in the "Yellow Pages" of the telephone directories and engaged extensively in general mail solicitations to attract students. The schools are operated strictly on a commercial basis, and one fairly could construct their open-end invitation as offers that matured into binding contracts when accepted by those who met the academic, financial, and other racially neutral specified conditions as to qualifications for entrance. There is no reason to assume that the schools had any special reason for exercising an option of personal choice among those who responded to their public offers. [427 U.S. at 188.]

This distinction between "acts . . . 'private' in the sense that they involve no state action [and those] . . . 'private' in the sense that they are . . . part of a commercial relationship offered generally or widely and that reflect the selectivity exercised by an individual entering into a personal relationship" is parallel to a distinction between "private private" property, as to which the right to exclude may have some independent constitutional content and "commercial private" property, as to which the right to exclude is protected only if it is the central aspect of the property exploited.

ner, 407 U.S. 551, which they declare to be "controlling here" (App. Br. 9). That contention rests on a pervasive misunderstanding of the issue in *Lloyd* and of the Court's holding resolving that issue.

(A.) As stated at the outset of Part III of the *Lloyd* opinion, the "basic issue in [that] case" was:

> whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling. [407 U.S. at 567., emphasis in the original.]

By contrast, the issue in this case is whether the Fifth and Fourteenth Amendments preclude the federal and state governments from requiring the owner of a shopping center to permit members of the public to engage in communicative activity there. That issue was not presented in *Lloyd,* because there was no such federal or state law; those who sought access had to rely entirely on the First Amendment. But in the present case the plaintiffs are armed with the authority of the Constitution of the State of California which, as construed by the state's highest court, grants them the right to handbill and circulate petitions in shopping centers even when the centers are privately owned.

The holding of the *Lloyd* decision is commensurate with the issue as there stated.[27] Appellants therefore err in stating that

> *Lloyd* held both that the actions of the shopping center owner at issue did not rise to the level of state action

[27] At the outset of the opinion the Court stated the question in somewhat narrower terms:

> This case presents the question reserved by the Court in *Amalgamated Food Employees Union* v. *Logan Valley Plaza,*

> because the shopping center in that case was not the "functional equivalent of a municipality", and that federally protected property rights of the owners were paramount under the circumstances presented there. [App. Br. 9]

Appellants misread *Lloyd,* for that case held only the first of these propositions, viz., that "the actions of the shopping center owner at issue did not rise to the level of state action." And since the First Amendment is a limitation only on *state* action, the Court concluded that the First Amendment does not grant members of the public the right to distribute handbills on Lloyd's privately-owned shopping center. The Court stated its holding as follows:

> We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. [407 U.S. at 570.]

Our understanding of what *Lloyd* decided is further confirmed by the Court's opinion in *Hudgens* v. *NLRB,* 424

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391 U.S. 308 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. [407 U.S. at 552]

This statement (of which App. Br. 9 presents a misleadingly truncated version) likewise says nothing about the extent of governmental power to require the shopping center to permit handbilling. Rather, it focused on the difference, recognized in *Logan Valley,* and discussed in Part I of the *Lloyd* opinion, between communications which are and those which are not related to the operations of the shopping center on which the communications take place. As thus stated, the issue was even narrower than that stated in Part III, and which was, as the Court explained in a subsequent decision, actually decided in *Lloyd.* (See p. 35-37, *infra,* discussing *Hudgens* v. *NLRB,* 424 U.S. 507.)

U.S. 507, where the question of the right of members of the public to handbill or picket on a privately-owned shopping center was revisited. The Court quoted *in extenso* what it described as "the ultimate holding in *Lloyd*" (*Id.* at 518).[28] It is clear that *Hudgens* understood *Lloyd* to have held that a shopping center is not the functional equivalent of a municipality (thereby repudiating the premise of *Food Employees* v. *Logan Plaza,* 391 U.S. 308) and that, therefore, the First Amendment does not provide a right to distribute literature there.

The language of the *Lloyd* opinion on which appellants rely, that dealing with the Fifth Amendment (see App. Br. 9-10), was not included in *Hudgens'* lengthy quotation of *Lloyd*'s "ultimate holding" and was unnecessary to the *Lloyd* decision. For, since the plaintiffs there relied only on the First Amendment as a source of their right of access, the Court's "no state action" holding was sufficient to establish that they were not entitled to relief. Conversely, if the Court had decided the issue in this case—if it had determined, as appellants contend, that the shopping center owner has a paramount Fifth Amendment right to bar communicative activity on its property—there would have been no need for the Court's "no state action" holding.

That the Court did not decide the present issue in *Lloyd*

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[28] "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. . ." 407 U.S., at 567.

"Respondents contend . . . that the property of a large shopping center is 'open to the public,' serves the same purposes

is further evidenced by its companion case—*Central Hardware Co.* v. *NLRB*, 407 U.S. 539—as well as by the later analysis in *Hudgens*. In the *Central Hardware* and *Hudgens* cases the National Labor Relations Board had directed the petitioner to permit a union to picket on its property. In both, the Court held, in accord with *Lloyd*, that the union had no such right under the First Amendment. (407 U.S. at 545-548; 424 U.S. at 512-521.) But in both the Court held also that the union might have such a right under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, and remanded the case for consideration of that statutory issue. If the Court in *Central Hardware* and *Hudgens* had understood *Lloyd* to decide that the Fifth Amendment restricts the power of government to require

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as a "business district of a municipality, and therefore has been dedicated to certain types of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

"The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh* v. *Alabama*, [326 U.S. 501] involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power." *Id.*, at 568-569 (footnote omitted).

"We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. . . ." *Id.*, at 570 [424 U.S. at 518-520; emphasis in original].

shopping centers to permit picketing or the distribution of literature, the rights and liabilities of the parties would not have been exclusively dependent upon the NLRA, as there held; rather, Central Hardware and Hudgens would have been entitled to judgments denying enforcement of the NLRB's orders on the ground that they were unconstitutional.[29]

(B.) We by no means suggest that the language on which appellants rely was out of place in the *Lloyd* opinion. The due process clauses of the Fifth and Fourteenth Amendments were, as the Court said, "also relevant to [that] case" (407 U.S. at 567) because the basic point of the decision was that property which is opened for public use does not thereby become public property subject to direct constitutional constraints rather than private property.[30] Moreover, since the *Lloyd* plaintiffs could derive no rights against the owners from the First Amendment, the order there requiring that the plaintiffs be permitted to handbill deprived the owners of property without due process of law, that is, without legal authority.

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[29] Unlike the National Labor Relations Act, the Fifth Amendment contains nothing to support the distinction between economic strike activity and organizational activity, which the *Hudgens* Court called to the Board's attention. (424 U.S. at 522.)

[30] See also the companion *Central Hardware* case, where in rejecting the argument that *Logan Valley*'s "state action" analysis could be applied to Central's parking lots merely because they were "open to the public" the Court said:

> Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments. We hold that the Board and the Court of Appeals erred in applying *Logan Valley* to this case. [407 U.S. at 539.]

But the conclusion in *Lloyd*, that the property owners' rights under the Fifth and Fourteenth Amendments must prevail in the absence of some law by which the shopping center was bound, is far from a holding, or even a suggestion, that those amendments bar the federal and state governments from enacting laws which would require the owners to permit handbilling on their property. For, as we have previously developed, the Fifth Amendment by no means prohibits all governmental regulation of private property nor does it declare all such regulation to be a taking for which government must provide just compensation. The constitutional limits of this governmental power were not in issue in *Lloyd* and were not addressed in the opinion, let alone decided "on constitutional grounds controlling here" (App. Br. 9).

In short, a decision by this Court that a private party A is not required to accord certain rights to B because A's conduct is not "state action" governed by constitutional limitations, is not a precedent for the proposition that a law which requires A to accord such rights to B is unconstitutional. Mr. Justice Black's separate opinions in the "sit-in" litigation merit particular attention in this connection because of the care with which he drew this critical distinction.

In *Bell* v. *Maryland*, 378 U.S. 226, and companion cases, the parties and many *amici curiae* vigorously argued the question whether a state may, consistent with the Fourteenth Amendment, convict a Negro for trespass on private property when he has refused to leave a place of public accommodation which refused to serve him because of his race. The Court decided those cases without resolving that question, but it was fully discussed in concurring and dissenting opinions in *Bell*. Mr. Justice Black, joined by Jus-

tices Harlan and White, believed that such convictions were constitutional; the contrary argument relied heavily on *Shelley* v. *Kraemer,* 334 U.S. 1, and *Buchanan* v. *Warley,* 245 U.S. 60. Mr. Justice Black reasoned that those precedents, correctly understood, were not in point:

> Thus, the line of cases from *Buchanan* through *Shelley* establishes these propositions: (1) When an owner of property is willing to sell and a would be purchased is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to "inherit, purchase, lease, sell, hold, and convey" property, prohibits a State, whether through its legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. *Shelley* v. *Kraemer, supra,* 334 U.S., at 19. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership: "the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." *Buchanan* v. *Warley, supra,* 245 U.S., at 74. This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as *both* parties are willing parties, then the principles stated in *Buchanan* and *Shelley* protect this right. But equally, when one party is unwilling, as when the property owner chooses *not* to sell to a particular person or *not* to admit that person, then, as this Court emphasized in *Buchanan,* he is entitled to rely on the guarantee of due process of law, that is, "law of the land," to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use. But petitioners here would have us hold that, despite the absence of any valid statute restricting the use of his property, the owner of Hooper's restaurant in Baltimore must not be accorded the same federally guaranteed right to

> occupy, enjoy, and use property given to the parties in *Buchanan* and *Shelley;* instead, petitioners would have us say that Hooper's federal right must be cut down and he must be compelled—though no statute said he must—to allow people to force their way into his restaurant and remain there over his protest. We cannot subscribe to such a mutilating, one-sided interpretation of federal guarantees the very heart of which is equal treatment under law to all. We must never forget that the Fourteenth Amendment protects "life liberty, or property" of all people generally, not just some people's "liberty," and some kinds of "property." [378 U.S. at 330-332, emphasis in original.]

Thus, the property owner was deemed to have an absolute right to exclude even on the basis of race *unless there is valid legislation which disturbs his free use,* a qualification expressed four times in this single passage.

Congress enacted such legislation in Title II of the Civil Rights Act of 1964, which broadly prohibits "any place of public accommodation" (as defined therein) from discriminating against or segregating any persons on the ground or race, color, religion or national origin. As earlier discussed, in *Atlanta Motel, supra,* the Court sustained Title II against the claim, among others, that the Title violates the property owners' rights under the Fifth Amendment. And Mr. Justice Black emphatically agreed in a separate concurrence. What matters for present purposes is that he took pains to contrast his conclusion that Congress was empowered to enact Title II with his

> dissenting opinion in *Bell* v. *State of Maryland,* 378 U.S. 226, 318 in which Mr. Justice Harlan and Mr. Justice White joined, * * * for that opinion stated only that the Fourteenth Amendment in and of itself, without implementation by a law passed by Congress, does not bar racial discrimination in privately owned places

> of business in the absence of state action. [379 U.S. at 278.]

Justice Black's opinions in *Bell* and *Atlanta Motel* forcefully state the principle which differentiates this case from *Lloyd Corp.* v. *Tanner, supra.*[31] It is striking, therefore, that in his *Bell* opinion he also rejected a claim, identical to that of the petitioners in *Logan Valley,* that the trespass convictions violated the First Amendment. In *Bell,* Mr. Justice Black said:

> Unquestionably petitioners had a constitutional right to express these views wherever they had an unquestioned legal right to be. Cf. *Marsh* v. *Alabama, supra.* But there is the rub in this case. The contention that petitioners had a constitutional right to enter or to stay on Hooper's premises against his will because, if there, they would have had a constitutional right to express their desire to have restaurant service over Hooper's protest, is a bootstrap argument. The right to freedom of expression is a right to express views—not a right to force other people to supply a platform

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[31] Of course, the decisions of the Court likewise teach that a property owner may be required by positive legislation to do that which the Constitution of its own force does not command. When the *Atlanta Motel* Court sustained the constitutionality of Title II of the Civil Rights Act (see pp. 25-27, *supra*) the decision left unresolved the state action issue which had divided the *Bell* Court.

The *Atlanta Motel* opinion was written by Mr. Justice Clark who had not reached the state action issue in *Bell,* and was joined by Justices Harlan and White who had dissented with Mr. Justice Black.

It is also useful to compare *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (refusal of a private club to serve plaintiff because he was a Negro was not "state action" subject to the equal protection clause of the Fourteenth Amendment) with *Runyon* v. *McCrary,* 427 U.S. 160 (42 U.S.C. § 1981 constitutionally requires private schools to admit students without discrimination on the basis of race).

> or a pulpit. It is argued that this supposed constitutional right to invade other people's property would not mean that a man's home, his private club, or his church could be forcibly entered or used against his will—only his store or place of business which he has himself "opened to the public" by selling goods or services for money. In the first place, that argument assumes that Hooper's restaurant *had* been opened to the public. But the whole quarrel of petitioners with Hooper was that instead of being open to all, the restaurant refused service to Negroes. Furthermore, legislative bodies with power to act could of course draw lines like this, but if the Constitution itself fixes its own lines, as is argued, legislative bodies are powerless to change them, and homeowners, churches, private clubs, and other property owners would have to await case-by-case determination by this Court before they knew who had a constitutional right to trespass on their property. And even if the supposed constitutional right is confined to places where goods and services are offered for sale, it must be realized that such a constitutional rule would apply to all businesses and professions alike. A statute can be drafted to create such exceptions as legislators think wise, but a constitutional rule could as well be applied to the smallest business as to the largest, to the most personal professional relationship as to the most impersonal business, to a family business conducted on a man's farm or in his home as to businesses carried on elsewhere. [378 U.S. at 344-346, emphasis in original.]

This is the core of the position which Justice Black articulated at greater length, and with a fuller discussion of *Marsh,* in his dissent in *Logan Valley,* which was cited approvingly in *Lloyd*, and which ultimately prevailed in *Hudgens*. It provides no comfort to appellants in the present case which comes here on the Supreme Court of California's conclusive determination that the people of the

State of California, a "legislative bod[y] with the power to act" (*cf. Eastlake* v. *Forest City Enterprises, Inc.* 426 U.S. 668), have drawn just such lines in adopting Article I, Section 2 of the California Constitution. (See p. 2 and p. 3, n.4, *supra.*)

CONCLUSION

For the foregoing reasons the appeal should be dismissed for want of a substantial federal question; alternatively the judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,

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