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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER, ET AL., APPELLANTS

v.

MICHAEL ROBINS, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether state constitutional provisions protecting the reasonable exercise of speech and petition rights on the property of privately-owned shopping centers to which the public is invited violate the property rights under the Fifth and Fourteenth Amendments or the free speech rights under the First and Fourteenth Amendments of shopping center owners who

wish to prohibit all non-business-related petitioning on their property.

INTEREST OF THE UNITED STATES

The National Labor Relations Act, 29 U.S.C. 151 *et seq.*, which, *inter alia*, protects employees' right of self-organization, Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, which prohibits discrimination on the grounds of race, color, religion, or national origin in the furnishing of public accommodations, and the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, which prohibits discrimination on the grounds of race, color, religion, sex, or national origin in the sale or rental of most categories of dwellings, all confer rights on individuals that are inconsistent with the notion that the owner of a shopping center such as the one involved in the present case must be paid just compensation by any government whose laws require him to admit persons onto his property against his will. Although appellants do not claim any federal constitutional right to exclude persons on the basis of race, and although they concede (App. Br. 18-20) that this Court has recognized the existence of rights under the NLRA that sometimes require a shopping center owner to admit onto his property persons whom he would rather exclude, appellants nonetheless make an argument inconsistent with these implicit and explicit concessions. In particular, they argue (App. Br. 11-12) that the right to exclude "is such a central ele-

ment of private property that the government, even in the name of reasonable regulation, cannot diminish that right without paying compensation." In addition, appellants contend (App. Br. 13) that the First Amendment gives the owner of a shopping center a right to bar the use of his property "as a forum for the views of others"—a contention that is inconsistent with rights under the NLRA that appellants purport to recognize.

Because rights under the aforementioned federal statutes could be affected by the Court's decision in this case, the United States has an interest in filing this brief amicus curiae.

STATEMENT

1. Appellant PruneYard Shopping Center ("the Center") is a shopping center, owned by appellant Fred Sahadi, that occupies a 21-acre site in Campbell, California (J.S. App. A-1, B-1; A. 13).[1] A supermarket, a cinema and a number of specialty shops, restaurants, and banks do business there (*id.* at A-2, B-1). Although the Center is generally open to members of the public, neither visitors nor tenants are permitted to pass out handbills or to circulate petitions (*id.* at A-2).

On November 17, 1975, appellees, who are high school students, came to the Center to solicit signatures for a petition, to be sent to the White House in

[1] "J.S. App." refers to the appendix to the Jurisdictional Statement. "A." refers to the joint appendix to the briefs.

Washington, D.C., opposing a United Nations resolution against "Zionism" (*id.* at A-2, B-2). In carrying out this activity, they set up a card table in the Center's central plaza and asked passersby to sign their petition (*id.* at B-2). Their conduct was at all times peaceful and orderly, and their efforts were apparently well-received by the Center's patrons (*id.* at B-2). Soon after they began soliciting signatures, a uniformed security officer told them they were violating the Center's no-solicitation regulations (*ibid.*). Appellees left after speaking to another security officer, who told them they would have to leave, but suggested they might resume their activity on public sidewalks at the edge of the Center property (A. 27). Appellees sought to resume their petition effort at another privately-owned shopping center in the same county, but they were denied access for this purpose there as well (J.S. App. B-2).

2. Appellees filed suit in the Superior Court of California, County of Santa Clara, seeking to enjoin appellants from prohibiting them from soliciting signatures on their petitions on the Center's grounds. The court declined to grant the injunction (J.S. App. A-1 to A-3), and its judgment was affirmed by the Court of Appeal for the First Appellate District (*id.* at B-1 to B-11).

3. On appeal to the California Supreme Court, the judgment denying the injunction request was reversed (J.S. App. C-1 to C-20). The court concluded that appellees' petition effort was protected by Article I,

Sections 2 and 3 of the California Constitution, the liberty of speech and petition clauses in that Constitution.

The court rejected appellants' contention that this Court's decision in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), compelled a holding that property rights of a shopping center owner protected under the Fifth and Fourteenth Amendments were paramount to speech and petition rights whenever public parks, streets, and the like are available for the exercise of the latter rights. Stating that *Lloyd* was "primarily a First Amendment case" that "did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally" (J.S. App. C-4), the court concluded that the broader and more definitive protection of speech and petitioning in the California Constitution could be vindicated only by permitting peaceful handbilling or solicitation of signatures at shopping centers under appropriate time, place, and manner rules (*id.* at C-9 to C-13). This was so, the court reasoned, because shopping centers had replaced central business districts as the location where large segments of the population were concentrated during the day (*id.* at C-7 to C-8, C-11 to C-13). Such a regulation of property in the public interest does not infringe property rights protected by the United States Constitution, the Court concluded (*id.* at C-5 to C-7, C-13).

SUMMARY OF ARGUMENT

1. In *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), this Court held that the First and Fourteenth Amendments, which "safeguard the rights of free speech and assembly by limitations on *state* action" (407 U.S. at 567; emphasis in original), do not entitle persons to distribute handbills on the grounds of a privately-owned shopping center which is generally open to the public, where handbilling is prohibited by the center's owner. Although the Court referred to rights of property owners under the Fifth and Fourteenth Amendments, it did not decide whether such property rights would permit shopping center owners to prohibit handbilling and similar activities where statutory or state constitutional provisions going beyond the First Amendment protect those activities. Thereafter, in *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), the Court held that the First Amendment did not protect certain labor picketing on the property if the shopping center owner objected to it, but it remanded the case to the National Labor Relations Board for a determination whether the picketing might be protected under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* Just as *Lloyd* did not answer the question whether the picketing in *Hudgens* might be protected under the NLRA, so it did not strike any balance between property rights and rights of free expression that would preclude a state court from holding that a state law or constitutional provision validly authorizes indi-

viduals to circulate petitions and distribute handbills at privately owned shopping centers.

2. The California Supreme Court held that appellees were entitled to engage in orderly petitioning at the Center because the affirmative speech and petition guarantees in the California Constitution cannot be fully effectuated when suburban shopping malls like the Center, where large numbers of people congregate daily, are closed to such activities. In order to minimize any interference with the commercial functions of the Center, the court made it clear that the Center would be free to impose reasonable time, place, and manner rules on the petitioning. Under principles applied in this Court's decisions construing the Takings Clause of the Fifth Amendment and the correlative guarantee against deprivation of property without due process under the Fourteenth Amendment, that holding of the court below does not effect a taking of appellants' property.

Recognizing a right to distribute literature or to circulate petitions in an orderly manner at shopping centers open to the general public without charge (1) does not interfere with any "distinct investment-backed expectations" (*Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978)) of the owners; (2) does not permit a physical invasion of property that was intended to be kept private; and (3) does not benefit the government in any of its entrepreneurial functions. Moreover, the right recognized by the California Supreme Court and the

corresponding obligations placed on the owner of the shopping center represent a reasonable exercise of the police power. This limitation on owners' rights to exclude persons from their property does not differ in any essential way from restrictions imposed by zoning laws on owners' rights to build whatever they choose on their property or from obligations imposed by states on developers of residential subdivisions to dedicate portions of privately owned land to public use. State law is the definitional source of property rights in relation to the rights of others, and so long as the state's limitations on property rights are reasonably related to promotion of the public welfare and do not frustrate expectations for reasonable return on investment, they do not amount to a taking of property giving rise to a claim for compensation. The burden of proving unreasonableness is on the party asserting a taking, and in the present case appellants have not carried that burden.

3. Recognizing a right of access to shopping center property for the exercise of speech and petition rights under the California Constitution does not infringe the rights of the owners under the First Amendment. Unlike the requirement of the State in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), that each owner of an automobile registered in the State display a state-prescribed motto on his license plate, the state constitutional provisions here merely require that property which is already open to the general public for shopping and strolling also be open

to persons who wish to express their views on various issues to the general public. There is little likelihood that the public will attribute to the owners of the property any of the diverse views represented, and the owners can dispel any possible misconceptions by posting appropriate signs disavowing any connection with the views expressed. First Amendment values would hardly be served in the circumstances of this case by sacrificing the state-sanctioned opportunity for the dissemination of a variety of ideas to the sensibilities of the property owner.

ARGUMENT

STATE PROTECTION OF THE REASONABLE EXERCISE OF SPEECH AND PETITION RIGHTS ON THE PROPERTY OF PRIVATELY-OWNED SHOPPING CENTERS TO WHICH THE PUBLIC IS INVITED IS CONSISTENT WITH THE PROPERTY RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND THE FREE SPEECH RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE SHOPPING CENTER OWNERS

A. *Lloyd Corp.* v. *Tanner* Does Not Require Appellees' Rights Under the California Constitution to Yield to Appellants' Property Rights

The "basic issue" in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), was "whether respondents, in the exercise of asserted First Amendment rights," were entitled to "distribute handbills on Lloyd's private property [a retail shopping center] contrary to its wishes and contrary to a policy enforced against *all* handbilling" (407 U.S. at 567; emphasis in origi-

nal). This Court answered that question in the negative essentially because "the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action" and a property owner could not, for purposes of those constitutional provisions, be held to stand "in the shoes of the State" where he had merely invited the public "to use [his property] for designated purposes" and had not assumed all the functions of "a state-created municipality" (407 U.S. at 567, 569; emphasis in original). This is the meaning ascribed to *Lloyd* in *Hudgens* v. *NLRB*, 424 U.S. 507, 518-521 (1976). Thus, despite references in *Lloyd* to "the Fifth and Fourteenth Amendment rights of private property owners" (407 U.S. at 570), the Court did not there purport to decide the extent to which shopping center owners were constitutionally privileged to bar the use of their premises for peaceful expressive activities where statutory or state constitutional protection going beyond the First Amendment has been extended to such activities.

The action taken by the Court in *Hudgens* underlines this point. The activity at issue there was picketing in support of collective-bargaining demands by the warehouse employees of Butler Shoe Co., which had a retail store (but not a warehouse) on the premises of the shopping center owned by petitioner Hudgens. The picketing, which was not determined to be unlawful in its manner or purpose, was clearly speech activity protected against governmental prohibition under the First Amendment (see *Interna-*

tional Brotherhood of Teamsters, Local 695 v. *Vogt, Inc.*, 354 U.S. 284, 294-295 (1957)); and both the National Labor Relations Board, which had found an unfair labor practice on the basis of the shopping center manager's threats to have the picketers arrested (205 N.L.R.B. 628 (1973)), and the Fifth Circuit, which had enforced the Board's order (501 F.2d 161 (1974)), had at least implicated First Amendment rights in their decisions by reliance on this Court's decision in *Food Employees Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), a First Amendment case. After determining that *Logan Valley*, which had recognized a First Amendment right protecting certain union picketing on the premises of a privately owned shopping center,[2] had been

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[2] The picketers in *Logan Valley* were union members protesting the opening of a supermarket employing nonunion employees who were "not 'receiving union wages or other union benefits.'" 391 U.S. at 311. The picketers had marched in an area in front of the supermarket in the middle of the shopping center grounds. The Court concluded that the lower courts, which had enjoined the picketing, had done so solely because it was a trespass under state law and not because it was directed at any illegal end; thus, had the picketing occurred on publicly owned property, such as parks or public sidewalks, it would have enjoyed the protection of the First Amendment. Relying on *Marsh* v. *Alabama*, 326 U.S. 501 (1946), in which the First Amendment had been extended to the distribution of religious literature on the streets of a privately owned "company town," the Court held that the picketing was protected because the roadways and sidewalks of the shopping center, which were open to the public, were "functional equivalents of the streets and sidewalks of a normal municipal business district" (391 U.S. at 319).

effectively overruled by *Lloyd*, and that, accordingly, "under the present state of the law the [federal] constitutional guarantee of free expression has no part to play in a case such as this" (*Hudgens, supra*, 424 U.S. at 521), the Court held that "the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act" (*ibid.*); and it remanded to the Board for a determination of the accommodation to be made between rights of the employees under Section 7 of the Act, 29 U.S.C. 157, and the private property rights of Hudgens (424 U.S. at 521-523).

In identifying the principles applicable to reaching that accommodation of rights, the *Hudgens* Court did not advert to *Lloyd* for a definition of the extent of a shopping center owner's constitutional right to exclude picketers or handbillers from his property. Rather, it noted the broad principle announced in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), and reaffirmed in *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 544 (1972), that the accommodation between Section 7 rights and property rights must be made " 'with as little destruction of one as is consistent with the maintenance of the other' " (*Hudgens, supra*, 424 U.S. at 522). Moreover, the Court observed that the "locus of that accommodation * * * may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context" and that "[i]n each

generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance" (*ibid.*).[3]

Just as *Lloyd* provided no basis for defining the extent of a private shopping center owner's right to exclude persons claiming the protections of the National Labor Relations Act, so it provides no firm definition of such an owner's right to exclude persons claiming the protection of Sections 2 and 3 of Article I of the California Constitution, which state that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. * * *" (Section 2) and that "people have the right to * * * petition government for redress of grievances" (Section 3). Unlike the First Amendment to the United States Constitution (but like Section 7 of the NLRA), these provi-

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[3] Homart Development Co., in its brief as amicus curiae in support of appellants (Homart Br. 12-13), contends that the California Supreme Court's construction of the state constitutional provisions at issue here "impermissibly regulates conduct encompassed by the national labor law" because it would apply to both union and non-union speech and petitioning. Homart asserts that this would compel "the Center to forego its federally protected right to exclude *union* speech and petitioning" in the case of non-employee union activities that would not be entitled to access to the Center's property under the NLRA.

That, however, is an issue not presented in this case. The present case involves only petitioning unrelated to any concerns of the NLRA, and this Court need not here decide whether or to what extent the NLRA may preempt application of the California Constitution to union speech and petitioning at privately owned shopping centers.

sions are affirmative statements of rights to be enjoyed, not simply statements cast in the negative prohibiting government from abridging rights of free expression.[4] The highest court of California has construed them as protecting the right, under appropriate time, place, and manner rules, to circulate petitions and distribute handbills at shopping centers "even when the centers are privately owned" (J.S. App. C-12). That construction of these state constitutional provisions is, of course, binding on this Court, even though the question whether appellants enjoy paramount federal rights is for this Court to determine. Thus, even accepting appellants' view (Br. 9-10) that an essential part of the *Lloyd* holding was a balance struck between First Amendment free speech rights and a shopping center owner's property rights under the Takings Clause of the Fifth Amendment, incorporated in the Due Process Clause of the Fourteenth Amendment, it cannot be concluded that the balance must be struck in favor of the shopping center owner here simply because that was the result in *Lloyd*. In *Lloyd* the Court stated that "[i]t would be an unwarranted infringement of property rights to require them to yield to the exercise of *First Amendment rights* under circumstances where adequate alternative avenues of communication exist" (407 U.S. at 567; emphasis added), and it concluded that avail-

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[4] Section 2, Article I of the California Constitution also includes a provision similar to the First Amendment: "A law may not restrain or abridge liberty of speech or press."

able public areas such as sidewalks, streets, and parks are adequate alternatives where messages unrelated "to any purpose for which the center was built and being used" are concerned (*id.* at 564, 566-567). But that determination does not answer the question whether affirmative free-expression rights conferred by the California Constitution can be vindicated where public parks, streets and the like are open to the exercise of such rights but shopping centers in which great concentrations of the population are to be found during the course of a day are closed for that purpose.[5]

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[5] As appellants note (Br. 18-19), the "adequate alternatives" formula of *Lloyd* appears to be an adaptation of the *Babcock & Wilcox* test for accommodating the Section 7 rights of employees vindicated through nonemployee union organizers with the property rights of an employer (*NLRB* v. *Babcock & Wilcox Co., supra,* 351 U.S. at 112-113). This Court has not, however, locked in even the Board to applying that test in precisely the way it was applied in *Babcock & Wilcox.* (It would be reasonable, for example, to require stronger proof that nonemployee union organizers have no adequate alternatives for conveying their message to employees in a case involving fenced-off industrial property, such as that concerned in *Babcock & Wilcox,* than in a case involving property open to the public; the employer's interest in keeping nonemployees off his property is more attenuated in the latter case.) Nonemployee status of picketers or organizers is simply a factor to be considered in determining the "locus of [the] accommodation" between conflicting rights (*Hudgens* v. *NLRB, supra,* 424 U.S. at 522). This Court has never held that "the Board [is] confined to its earliest experience in administering the [*Babcock & Wilcox*] test." *Sears, Roebuck & Co.* v. *Carpenters,* 436 U.S. 180, 211 (1978) (Blackmun, J., concurring).

It follows that, contrary to appellants' contention (Br. 10-12), the decision in *Lloyd* does not compel the conclusion that construing Article I, Sections 2 and 3 of the California Constitution to grant appellees the right to engage in the peaceful and orderly solicitation of petition signatures in a corner of the central courtyard of the Center effects a taking of property for which just compensation must be given under the Fifth and Fourteenth Amendments of the United States Constitution. The conclusion of the California Supreme Court that this restriction on appellants' right to exclude persons from its property is not a taking requiring compensation is, moreover, supported by this Court's decisions construing the Fifth and Fourteenth Amendments as they apply to property right claims.

B. Under Principles Developed in This Court's Decisions Construing the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, the Limited Restriction Imposed by the California Constitution on Appellants' Freedom to Exclude Persons From the Shopping Center Premises Is Not a Taking of Their Property

In *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), this Court had occasion to summarize principles developed in its decisions construing the Takings Clause and the correlative guarantee against deprivation of property without due process in the Fourteenth Amendment. Noting that those decisions amounted to "essentially ad hoc, factual inquiries" to determine in each case whether " 'justice and fairness' require[d] that economic in-

juries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons" (438 U.S. at 124), the Court nonetheless discerned "several factors that have particular significance" (*ibid.*). See also *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 14. The factors identified by the Court were (1) "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" (438 U.S. at 124); (2) whether there is an "interference with property [that] can be characterized as a physical invasion by government" (*ibid.*); (3) whether the government actions in question "may be characterized as acquisitions of resources to permit or facilitate uniquely public functions" (*id.* at 128); and (4), in the case of use restrictions on real property, whether the restrictions are "reasonably necessary to the effectuation of a substantial public purpose" (*id.* at 127).[6]

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[6] In some cases, it is readily apparent whether there has been a taking of property, and the Court need not engage in a complex weighing of factors. Thus, in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), the Court quickly and firmly rejected the contention that because Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, made it unlawful for owners of motels and other public accommodations to select customers on the basis of race, the Act constituted a taking of property without just compensation. 379 U.S. at 261. Appellants in the present case do not claim any right to exclude members of the public on the basis of race,

The first factor clearly weighs against the finding of a taking in the present case. Appellants do not describe any specific way in which they will be economically harmed by the presence on their property of persons, such as appellees, who solicit signatures on petitions in an orderly manner. One may speculate that the Center's maintenance and security costs might be slightly increased or that a slight decrease in sales might result because some shoppers, hostile to views expressed by those distributing literature or soliciting petition signatures, might leave the Center without buying anything (see brief filed by Homart Development Co. as amicus curiae in support of

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yet their unqualified statement (Br. 11-12) in reliance on *Kaiser Aetna* v. *United States*, No. 78-738 (Dec. 4, 1979), slip op. 15, that "the 'right to exclude' is such a central element of private property that the government, even in the name of reasonable regulation, cannot diminish that right without paying compensation" might well encompass such a right. *Kaiser Aetna* neither questioned the holding with respect to the taking claim in *Heart of Atlanta Motel* nor otherwise suggested any change in the settled law with respect to antidiscrimination statutes. See, *e.g.*, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). As to the labor laws, appellants concede, as they must (Br. 18-19), that employers enjoy no absolute right to exclude from their property persons, such as nonemployee union organizers, whose presence there is essential to the employees' exercise of their Section 7 rights under the NLRA. The reference to a "right to exclude" in *Kaiser Aetna* should, in sum, be read in the context of that case, where the property owners' ability to charge a fee was indispensable to securing a reasonable return on their investment (see pages 22-23, note 8, *infra*).

appellants at 10-11). But, to the extent any such impact may exist (and is not offset by the protected activities' attraction of patrons to the shopping center), it is a far less substantial impact than that present in many cases in which takings claims have been rejected. See, *e.g.*, *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958) (company forced to close down gold mines); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in land value caused by zoning laws).

Certainly appellants have shown no substantial interference with "distinct, investment-backed expectations" (*Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124) or with the opportunity for a reasonable return on their investment. The use of private property in our society has always been subject to restrictions imposed in the public interest, and the trend has been away from, not towards, an absolute right to treat one's property as one chooses without regard to the impact on public welfare. Powell, *The Relationship Between Property Rights and Civil Rights*, 15 Hastings L.J. 135, 140-150 (1963). Some common examples are rent control laws; zoning restrictions prohibiting owners from constructing more than a certain number of buildings on their property or from constructing buildings above a certain height or closer than a given distance to the public streets; nuisance laws restricting or prohibiting entirely the operation of particular kinds of businesses; historic preservation laws restricting

the changes that may be made to buildings of historic importance; and laws requiring the developers of large residential subdivisions to dedicate parts of their property to public use.

The "liberty of speech" provision now embodied in Article I, Section 2 of the California Constitution has existed in that constitution since 1849 (see Note, *Rediscovering the California Declaration of Rights*, 26 Hastings L.J. 481, 495 (1974)); and for that length of time it has qualified the property rights of those whose use of their property would infringe on its guarantee. Appellants and owners of other large shopping centers have, according to the findings of the California Supreme Court, used large tracts of property in such a way as to divert large potential audiences from the public areas where, under this Court's decisions, First Amendment rights may be exercised, to private shopping areas, walkways, and courtyards (J.S. App. C-7 to C-9, C-11 to C-13). A determination, such as that made by the California Supreme Court, that this use of property entails obligations under the affirmative free speech guarantee of the California Constitution is not unreasonable or unforeseeable. "[I]f one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue." *Nebbia* v. *New York*, 291 U.S. 502, 534 (1934). See 86 Harv. L. Rev. 1592, 1606 (1973).

Moreover, it is not without significance that this restriction on appellants' right to exclude persons

from their property is imposed by state law. As this Court has recently observed, " '[T]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' " *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977), quoting *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 155 (1944). See also *Kaiser Aetna* v. *United States*, No. 78-738 (Dec. 4, 1979), slip op. 15. State law conferring rights in property and defining the limitations of those rights is, accordingly, ordinarily the source of those rights, rather than a taking of them—especially where, as here, the pertinent state constitutional provision long antedates any claim or investment by the appellants.

The question whether there is a "physical invasion by government" is another factor that, despite appellants' suggestion to the contrary (Br. 11 n.4), is not significantly in their favor. In nearly all the cases in which this factor has played a significant part it is the government in its entrepreneurial role that has invaded the property. See, *e.g.*, *Griggs* v. *Allegheny County*, 369 U.S. 84, 89 (1962) (invasion of air easements by low-flying planes that leased landing and takeoff rights from airport owned and promoted by the county); *United States* v. *Causby*, 328 U.S. 256 (1946) (physical invasion of land by low overflights of military aircraft); *Portsmouth*

Harbor Land & Hotel Co. v. *United States*, 260 U.S. 327 (1922) (gunfire from military installations across private lands). This additional factor that government, as an enterprise, was benefiting directly from the invasion of the claimant's property reinforced the significance of the invasion in each case. See Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62-63 (1964).[7]

Even more significantly, it is difficult to characterize the use of appellants' property by leafleters or petitioners as an "invasion" at all, in view of the fact that appellants have issued a general invitation to the public to enter the premises, and that the invitation is not conditioned, as was the case in *Kaiser Aetna* v. *United States*, *supra*, on the payment of an admission or user charge.[8] It is true that appellants

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[7] Professor Sax has since revised his theory distinguishing between actions by which the government as an enterprise competes for resources (giving rise to a claim for compensation) and actions by which government mediates between private claimants to use of resources (seen as not compensable); but the change in his theory has resulted in the conclusion that "[m]uch of what was formerly deemed a taking is better seen as an exercise of the police power in vindication of * * * 'public rights.'" Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 151 (1971).

[8] In *Kaiser Aetna*, petitioners, at considerable expense, had developed a private pond into an exclusive marina, the use of which was offered to boatowners for a fee. The Court held that the mere fact that dredging and filling operations by petitioners had linked the pond to the ocean and thereby connected it to a navigable water of the United States was not a sufficient basis for requiring public access without charge. The government had not suggested in consenting to petition-

do not wish persons to engage in handbilling or the like on their property, but it is the activity—not the presence of additional people—they object to; and the California Supreme Court has made it clear that shopping centers are free to restrict that activity by time, place, and manner rules that will minimize any interference with the commercial functions of the property (J.S. App. C-12).[9]

Finally, there is the factor whether the statutory or constitutional provision in question is "reasonably necessary to the effectuation of a substantial public purpose" (*Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 127). This is fundamentally a question whether that provision represents a reasonable exercise of the police power. *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962). See also *Nebbia* v. *New York*, *supra*, 291 U.S. at 525. The cases "leave no doubt" that those contending that a taking has occurred have "the burden on 'reasonableness.' *E.g.*, *Bibb* v. *Navajo Freight Lines*, 359

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ers' dredging and filling that such a public-access condition would be imposed, and the Court noted that such conduct by officials "can lead to the fruition of a number of expectancies" (slip op. 15). In short, *Kaiser Aetna* was a case of interference with "distinct investment-backed expectations."

[9] In addition, as one commentator has observed, the rule favoring compensation in cases involving physical invasion is sometimes justified on the ground that "physical appropriation" may be a ready basis for calculating damages; yet damages are not at all easy to calculate when the asserted injury to property rights is conduct engaged in on property open to the general public at no charge. 86 Harv. L. Rev. 1592, 1604 n. 55 (1973).

U.S. 520, 529 (1959) (exercise of the police power is presumed to be constitutionally valid); *Salzburg* v. *Maryland*, 346 U.S. 545, 553 (1954) (the presumption of reasonableness is with the State); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it)." *Goldblatt* v. *Hempstead*, *supra*, 369 U.S. at 596. In the present case the California Supreme Court has found that a substantial public purpose embodied in the California Constitution—assuring free expression of ideas and the right to petition—cannot be effectuated without permitting orderly exercise of those rights on the grounds of shopping centers; for it is there, rather than in traditional downtown business districts, where the largest segments of the population congregate to shop, attend theaters, and take advantage of banking and other services. Construing the California Constitution to protect the rights of appellees in this case to solicit signatures on their petitions in the courtyard of the Center is, therefore, not a shift in principle but merely a reasonable response to changed conditions. As this Court observed with respect to zoning regulations in *Euclid* v. *Ambler Realty Co.*, *supra*, 272 U.S. at 387:

> Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbi-

> trary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. * * *.

C. The Right of Access to Shopping Center Property for the Exercise of Speech and Petition Rights Under the California Constitution Does Not Infringe the Property Owner's Rights Under the First and Fourteenth Amendments

Appellants (Br. 12-14, 21) and amici (Taubman Co. Br. 17-18;[10] Homart Br. 11-12), relying principally on this Court's decision in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), assert that the decision of the court below violates the First Amendment rights of appellant Sahadi because it robs him of his "rights to remain silent" (App. Br. 13) and requires him to "sponsor positions that are not [his]" (Taubman Co. Br. 17), or at least to " 'participate in the dissemination of an ideological message by displaying it on his private property' " (Homart Br. 12, quoting *Wooley* v. *Maynard*, *supra*, 430 U.S. at 713). These

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[10] Brief amicus curiae filed by the Taubman Co., Inc., and California Business Properties Ass'n in support of appellants.

contentions rest on an inapt analogy between the circumstances of an individual compelled to display a motto, prescribed by the government, on an automobile that he drives "as part of his daily life" (430 U.S. at 715) and those of the owner of business property, open to the public, who is required to grant limited access to his property to other persons so that they may communicate their views to the public. In the present case there is no particular "ideological message" dictated by the State (*ibid.*), and each one of the variety of messages disseminated by different persons exercising their rights under the California Constitution is immediately identifiable with its source—the person who expresses it orally or in writings that he personally distributes. Such a message is, at most, only remotely linked to the owner of the property on which that person stands.[11] And

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[11] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), upon which appellants also rely, is even less apposite in this respect, since it involved a compelled recitation of a message containing an affirmation of belief. The connection between the compelled message and the one complaining of a First Amendment violation was also closer in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), than it is here. The statute at issue there—a law requiring newspapers to publish replies by politicians whom the newspapers attacked in print if the politicians demanded a right to reply—was, moreover, treated fundamentally as an abridgment of First Amendment guarantees of a free press. The Court observed that the law interfered with editorial judgment of what to publish or not publish (418 U.S. at 256) and that it might induce newspapers to avoid the trouble and expense of complying with the law by avoiding controversial coverage of political candidates (*id.* at 257). No such considerations are present here.

even that tenuous link between the property owner and the message can be overcome by the simple expedient of posting signs in the area where the speakers or handbillers stand, disavowing any sponsorship of the messages and explaining that the persons communicating the messages are there by virtue of state law.[12] As a realistic matter, therefore, the owner's involuntary "participation" in the dissemination of any message is de minimis or non-existent. It would hardly further First Amendment values to require in such circumstances that a uniquely available state-sanctioned opportunity for the dissemination of a variety of ideas be sacrificed to the property owner's sensibilities.

CONCLUSION

The judgment of the Supreme Court of the State of California should be affirmed.

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[12] Because shopping center owners are free to establish time, place, and manner rules, they may designate the particular places where the rights concerned here could be exercised.

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