

which denies to the state either on due process or contract clause grounds the power to change by legislation benefits which they have granted and which are in some sense vested. *See, e.g.*, Opinion of the Justices, 364 Mass. 847, 303 N.E.2d 320 (1973) (state employees' pension plan); *cf.* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (contract clause forbids New Jersey from withdrawing promised support for deficit transit operations from Port of New York Authority).

The twenty-fifth anniversary of Reich's article and the twentieth anniversary of *Goldberg v. Kelly*, *supra*, occasioned a number of "new property" retrospectives. *See Symposium: The New Property and the Individual-25 Years Later*, 24 U.S.F. L. REV. 221 (1990); *The Legacy of Goldberg v. Kelly: a Twenty Year Perspective*, 56 BROOKLYN L. REV. 729 (1990); Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295 (1990); Fleischmann, *A Cultural Historian's Reading of Charles Reich's Impact on the Contemporary Discourse on "Welfare"*, 31 WM. & MARY L. REV. 307 (1990); Verkuil, *Revisiting the New Property After Twenty-Five Years*, 31 WM. & MARY L. REV. 365 (1990). [p*172]

Section 3. THE MARXIST ATTACK AND THE LIBERAL RESPONSE— HEREIN OF PROPERTY RIGHTS VS. CIVIL RIGHTS

Hegel's is perhaps the last great philosophical theory of property. Since Hegel's time the theorists of property have tended to come from the social sciences (categorizing broadly and regarding Marx as a social scientist). Here the problem of selection becomes even more difficult than it was among the philosophers. We have chosen to bypass the contributions of anthropology to the theory of property (except for a few references, *supra* p. 114) and those of psychology (*See, e.g.*, E. BEAGLEHOLD, *PROPERTY: A STUDY IN SOCIAL PSYCHOLOGY* (1932)).

K. MARX & F. ENGLES, MANIFESTO OF THE COMMUNIST PARTY (1902)¹

. . . .

The history of all hitherto existing society is the history of class struggles.

Freeman and slave, patrician and plebeian, lord and serf, guild-master and journeyman, in a word, oppressor and oppressed, stood in constant opposition to one another, carried on an uninterrupted, now hidden, now open fight, a fight that each time ended, either in a revolutionary re-constitution of society at large, or in the common ruin of the contending classes.

In the earlier epochs of history, we find almost everywhere a complicated arrangement of society into various orders, a manifold graduation of social rank. In ancient Rome we have patricians, knights, plebeians, slaves; in the middle ages, feudal lords, vassals, guild-masters, journeymen, apprentices, serfs; in almost all of these classes, again, subordinate gradations.

The modern bourgeois society that has sprouted from the ruins of feudal society, has not done away with class antagonisms. It has but established new classes, new conditions of oppression,

¹ First edition 1848.

new forms of struggle in place of the old ones.

Our epoch, the epoch of the bourgeoisie,² possesses, however, this distinctive feature; it has simplified the class antagonisms. Society as a whole is more and more splitting up into two great hostile camps, into two great classes directly facing each other: Bourgeoisie and Proletariat. . . .

Hitherto, every form of society has been based, as we have already seen, on the antagonism of oppressing and oppressed classes. But in order to oppress a class, certain conditions must be assured to it under which it can, at least, continue its slavish existence. The serf, in the period of serfdom, raised himself to membership in the commune, just as the petty bourgeois, under the yoke of feudal absolutism, managed to develop into a bourgeois. The modern laborer, on the contrary, instead of rising with the progress of industry, sinks deeper and deeper below the conditions of existence of his [p*173] own class. He becomes a pauper, and pauperism develops more rapidly than population and wealth. And here it becomes evident, that the bourgeoisie is unfit any longer to be the ruling class in society, and to impose its conditions of existence upon society as an over-riding law. It is unfit to rule, because it is incompetent to assure an existence to its slave within his slavery, because it cannot help letting him sink into such a state that it has to feed him, instead of being fed by him. Society can no longer live under this bourgeoisie, in other words, its existence is no longer compatible with society.

The essential condition for the existence, and for the sway of the bourgeois class, is the formation and augmentation of capital; the condition for capital is wage-labor. Wage-labor rests exclusively on competition between the laborers. The advance of industry, whose involuntary promoter is the bourgeoisie, replaces the isolation of the laborers, due to competition, by their involuntary combination, due to association. The development of Modern Industry, therefore, cuts from under its feet the very foundation on which the bourgeoisie produces and appropriates products. What the bourgeoisie therefore produces, above all, are its own grave-diggers. Its fall and the victory of the proletariat are equally inevitable. . . .

The theoretical conclusions of the Communists are in no way based on ideas or principles that have been invented, or discovered, by this or that would-be universal reformer.

They merely express, in general terms, actual relations springing from an existing class struggle, from a historical movement going on under our very eyes. The abolition of existing property relations is not at all a distinctive feature of Communism.

All property relations in the past have continually been subject to historical change consequent upon the change in historical conditions.

The French Revolution, for example, abolished feudal property in favor of bourgeois property.

The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property. But modern bourgeois private property is the final and most complete expression of the system of producing and appropriating products, that is based on class antagonism, on the exploitation of the many by the few.

In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property.

We Communists have been reproached with the desire of abolishing the right of personally acquiring property as the fruit of a man's own labor, which property is alleged to be the ground work of all personal freedom, activity and independence.

² By bourgeoisie is meant the class of modern Capitalists, owners of the means of social production and employers of wage-labor. By proletariat, the class of modern wage-laborers who, having no means of production of their own, are reduced to selling their labor-power in order to live.

Hard-worn, self-acquired, self-earned property Do you mean the property of the petty artisan and of the small peasant, a form of property that preceded the bourgeois form? There is no need to abolish that; the development of industry has to a great extent already destroyed it, and is still destroying it daily.

Or do you mean modern bourgeois private property?

But does wage-labor create any property for the laborer? Not a bit. It creates capital, i.e., that kind of property which exploits wage-labor, and which cannot increase except upon condition of getting a new supply of wage-labor for fresh exploitation. Property, in its present form, is based on [p*174] the antagonism of capital and wage-labor. Let us examine both sides of this antagonism.

To be a capitalist, is to have not only a purely personal, but a social status in production. Capital is a collective product, and only by the united action of many members, nay, in the last resort, only by the united action of all members of society, can it be set in motion.

Capital is therefore not a personal, it is a social power.

When, therefore, capital is converted into common property, into the property of all members of society, personal property is not thereby transformed into social property. It is only the social character of the property that is changed. It loses its class-character.

Let us now take wage-labor.

The average price of wage-labor is the minimum wage, i.e., that quantum of the means of subsistence, which is absolutely requisite to keep the laborer in bare existence as a laborer. What, therefore, the wage-laborer appropriates by means of his labor, merely suffices to prolong and reproduce a bare existence. We by no means intend to abolish this personal appropriation of the products of labor, an appropriation that is made for the maintenance and reproduction of human life, and that leaves no surplus wherewith to command the labor of others. All that we want to do away with is the miserable character of this appropriation, under which the laborer lives merely to increase capital, and is allowed to live only in so far as the interest of the ruling class requires it.

In bourgeois society, living labor is but a means to increase accumulated labor. In Communist society, accumulated labor is but a means to widen, to enrich, to promote the existence of the laborer.

In bourgeois society, therefore, the past dominates the present; in Communist society, the present dominates the past. In bourgeois society capital is independent and has individuality, while the living person is dependent and has no individuality.

And the abolition of this state of things is called by the bourgeois, abolition of individuality and freedom- And rightly so. The abolition of bourgeois individuality, bourgeois independence, and bourgeois freedom is undoubtedly aimed at.

By freedom is meant, under the present bourgeois conditions of production, free trade, free selling and buying.

But if selling and buying disappears, free selling and buying disappears also. This talk about free selling and buying, and all the other “brave words” of our bourgeoisie about freedom in general, having a meaning, if any, only in contrast with restricted selling and buying, with the fettered traders of the Middle Ages, but have no meaning when opposed to the Communistic abolition of buying and selling, of the bourgeois conditions of production, and of the bourgeoisie itself.

You are horrified at our intending to do away with private property. But in your existing society, private property is already done away with for nine-tenths of the population; its existence for the few is solely due to its nonexistence in the hands of those nine-tenths. You reproach us,

therefore, with intending to do away with a form of property, the necessary condition for whose existence is, the non-existence of any property for the immense majority of society. [p*175]

In one word, you reproach us with intending to do away with your property. Precisely so; that is just what we intend.

From the moment when labor can no longer be converted into capital, money, or rent, into a social power capable of being monopolized, i.e., from the moment when individual property can no longer be transformed into bourgeois property, into capital, from that moment, you say, individuality vanishes.

You must, therefore, confess that by “individual” you mean no other person than the bourgeois, than the middle-class owner of property. This person must, indeed, be swept out of the way, and made impossible.

Communism deprives no man of the power to appropriate the products of society: all that it does is to deprive him of the power to subjugate the labor of others by means of such appropriation.

It has been objected, that upon the abolition of private property all work will cease, and universal laziness will overtake us.

According to this, bourgeois society ought long ago to have gone to the dogs through sheer idleness; for those of its members who work, acquire nothing, and those who acquire anything, do not work. The whole of this objection is but another expression of the tautology: that there can no longer be any wage-labor when there is no longer any capital.

All objections urged against the Communistic mode of producing and appropriating material products, have, in the same way, been urged against the Communistic modes of producing and appropriating intellectual products. Just as, to the bourgeois, the disappearance of class property is the disappearance of production itself, so the disappearance of class culture is to him identical with the disappearance of all culture.

That culture, the loss of which he laments, is, for the enormous majority, a mere training to act as a machine.

But don't wrangle with us so long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, law, etc. Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economic conditions of existence of your class.

The selfish misconception that induces you to transform into eternal laws of nature and of reason, the social forms springing from your present mode of production and form of property-historical relations that rise and disappear in the progress of production-this misconception you share with every ruling class that has preceded you. What you see clearly in the case of ancient property, what you admit in the case of feudal property, you are of course forbidden to admit in the case of your own bourgeois form of property. . . .

We have seen above, that the first step in the revolution by the working class, is to raise the proletariat to the position of ruling class, to win the battle of democracy.

The proletariat will use its political supremacy, to wrest, by degrees, all capital from the bourgeoisie, to centralize all instruments of production in the hands of the State, i.e., of the proletariat organized as the ruling class; and to increase the total of productive forces as rapidly as possible. [p*176]

Of course, in the beginning, this cannot be effected except by means of despotic inroads on the rights of property, and on the conditions of bourgeois production; by means of measures,

therefore, which appear economically insufficient and untenable, but which, in the course of the movement, outstrip themselves, necessitate further inroads upon the old social order, and are unavoidable as a means of entirely revolutionizing the mode of production.

These measures will of course be different in different countries.

Nevertheless in the most advanced countries the following will be pretty generally applicable:

1. Abolition of property in land and application of all rents of land to public purposes.
2. A heavy progressive or graduated income tax.
3. Abolition of all right of inheritance.
4. Confiscation of the property of all emigrants and rebels.
5. Centralization of credit in the hands of the state, by means of a national bank with State capital and an exclusive monopoly.
6. Centralization of the means of communication and transport in the hands of the State.
7. Extension of factories and instruments of production owned by the State; the bringing into cultivation of waste lands, and the improvement of the soil generally in accordance with a common plan.
8. Equal liability of all to labor. Establishment of industrial armies, especially for agriculture.
9. Combination of agriculture with manufacturing industries: gradual abolition of the distinction between town and country, by a more equable distribution of population over the country.
10. Free education for all children in public schools. Abolition of children's factory labor in its present form. Combination of education with industrial production, etc., etc.

When, in the course of development, class distinctions have disappeared, and all production has been concentrated in the hands of a vast association of the whole nation, the public power will lose its political character. Political power, properly so called, is merely the organized power of one class for oppressing another. If the proletariat during its contest with the bourgeoisie is compelled, by the force of circumstances, to organize itself as a class, if, by means of a revolution, it makes itself the ruling class, and, as such, sweeps away by force the old conditions of production, then it will, along with these conditions, have swept away the conditions for the existence of class antagonisms, and of classes generally, and will thereby have abolished its own supremacy as a class.

In place of the old bourgeois society, with its classes and class antagonisms, we shall have an association, in which the free development of each is the condition for the free development of all. . . .

The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win. [p*177]

Working men of all countries, unite!

Note

Marx's attack on property has provoked numerous responses. Consider, for example, Professor Demsetz' piece, *supra* p. 134. To what extent can it be considered an "answer" to Marx? The following pieces, severely edited, give some flavor of the kinds of contemporary responses one is likely to find to Marx:

Note on State Action and the Right to Exclude

1. The Civil Rights Act of 1875, ch. 114, 18 Stat. 335, involved, among other things, an attempt by Congress to pass legislation, pursuant to section 5 of the [p*192] Fourteenth Amendment, guaranteeing equal accommodations to members of all races in “inns, public conveyances, . . . theatres, and other places of public amusement” 18 Stat. at 336. In *In re The Civil Rights Cases*, 109 U.S. 3 (1883), the Court not only announced the proposition that the Fourteenth Amendment applies only to “state action” but also invalidated the 1875 Civil Rights Act. *Shelley v. Kraemer*, *supra* p. 179, however, suggested an expansive interpretation of the notion of “state action,” and in the landmark decision of *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the Court held that state-enforced segregation could not be justified on the ground that the state was providing “separate but equal” facilities. Decisions invalidating state laws and city ordinances which required racial segregation in places of public accommodation and which enforced segregation in publicly-owned facilities, such as parks, quickly followed. *See, e.g.*, *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Lee v. Washington*, 390 U.S. 333 (1968). But what of a privately-owned hotel or restaurant? Would the Court apply *Shelley v. Kraemer* to the situation where, for example, a restaurant owner sought the aid of the state in ejecting a group of civil rights protesters from his segregated restaurant?

The Court never squarely faced the issue. The closest which it came was in *Bell v. Maryland*, 378 U.S. 226 (1964), in which it reversed the trespass convictions of a group which had sat-in at a segregated restaurant and remanded the case to the Maryland courts for consideration in the light of the newly-passed Maryland equal accommodations law. Four justices dissented and argued that the Court should have reached the merits of the case. Justice Douglas argued that the case involved no conflict between property rights and civil rights because the personal privacy of the property owner was not at stake and that *Shelley* should be applied to the situation. Justices Black, Harlan and White, in an opinion by Justice Black, argued that *Shelley* should be confined to its facts: judicial interference in a transaction between a willing buyer and a willing seller. Justice Goldberg, in a special concurring opinion, argued that the common law status of innkeepers and the history of the fourteenth amendment and of the Reconstruction civil rights acts required that if the merits had been reached the convictions be reversed. All three opinions are well worth reading as a study in how value-conflicts are handled in the context of highly-charged constitutional litigation.

Other sit-in cases in the 1960's produced similar results. For a detailed discussion of the whole problem, see Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None"*, 1964 SUP. CT. REV. 137.

The Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-d, 2000a-h (1988), which prohibits discrimination in any place of public accommodation which is in any way involved in interstate commerce has taken the heat off the Court in this area at least for the time being. The Court sustained the constitutionality of the Act as an exercise of the Congressional power to regulate commerce in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

In the Introduction to this book we suggested that the topic of property could be divided into three questions: What have you got? How do you transfer it? How can you use it? These three topics can now be roughly equated to: (1) the right of possession (the *jus possidendi* and the *jus prohibendi* in the civil law, see *infra*), (2) the power of transfer (*jus disponendi*), and (3) the privilege of use (divided into the *jus utendi* [right of user], *jus fruendi* [right to fruits or profits], and *jus abutendi* [right of abuse or consumption] in the civil law). *See* Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 996 (1939). [p*193]

For obvious reasons the privilege of use has never been absolute. Two absolute privileges of

use cannot coexist in close proximity, and the law has always recognized this fact. The Assize of Nuisance originates at about the same time as the Assize of Novel Disseisin, *supra* p. 54. The power of transfer, as we shall see later in this book, has had a somewhat checkered career. The law has always regulated the manner of transfer in order to achieve certain desired goals. *Shelley v. Kraemer*, in one sense, is novel only in that it imparts a new set of values into the law of land transfers. Fair housing legislation, as its opponents were quick to point out, goes a step further in that it directly limits the freedom of transfer of the current possessor of the land. Shelley, by contrast, enhances that freedom at the expense of a prior possessor. See Note on Fair Housing, *supra*. The right of possession, on the other hand, seems to sit on a kind of pinnacle in the value scheme. This is the interest which the king's courts first sought to protect. Since that time the focus of legal historians on the development of the king's courts (at the expense of focus on the interests which the local courts would protect) and the philosophical notions of scholars like Jhering have served to heighten the importance of possession in the law's scheme of values. Indeed, Blackstone and many other commentators focus on property as the right to exclude. See Note on Property as the Right to Exclude, *infra* p. 208. Thus, *Bell v. Maryland* represents a headlong collision between two cherished values.

The civilians have always distinguished between the *jus possidendi* (the right to possess) and the *jus prohibendi* (the right to exclude). Does such a distinction help in resolving the conflict in *Bell v. Maryland*?

2. The Supreme Court has never held that the judicial action involved in the enforcement of a private citizen's right to exclude is sufficiently "state action" so as to require that the citizen comply with some or all of the limitations on a state's exercise of its right to exclude. William Pitt, the elder, an eighteenth century English statesman, is alleged to have said: "The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail; the roof may shake; the wind may blow through it; the storms may enter; the rain may enter-but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement." Perhaps there is a fear that if the Court did apply Shelley in a situation involving the right to exclude, it might no longer be possible to make that statement. Indeed, one might go further and say that subsequent Supreme Court opinions have cast substantial doubt on the proposition which might be derived from Shelley that legal protection of a given activity equals state action, even in contexts where the right to exclude is only slightly involved or is not involved at all. See, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), *supra* p. 54, (self-help repossession authorized by state statute not sufficiently state action to require a due process hearing); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (regulated utility need not comply with due process before cutting off customer's service); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (private association holding state-granted liquor license may exclude members' guests on racial grounds).

There is, however, a substantial difference between "the poorest man in his cottage" and some forms of modern corporate ownership of property. Consider the following case: The town of Chickasaw, Alabama, was owned lock, stock, houses, stores and sewers by the Gulf Shipbuilding Corporation. The company posted in prominent places the following sign: "This is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." Appellant was a Jehovah's Witness who had [p*194] entered the town for the purpose of distributing religious literature on the street. She was warned that she could not distribute such literature without a permit and that no permit would be issued to her. She persisted, was arrested and convicted under the state criminal trespass statute and appealed to the Supreme Court. The Court, in an opinion per Mr. Justice Black, reversed. *Marsh v. Alabama*, 326 U.S. 501 (1946). Can you see why? Can you distinguish *Bell*? Are you persuaded by your distinction?

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308

(1968), applied the doctrine of *Marsh* to a suburban shopping center's attempt to enjoin peaceful labor picketing in the portion of the center's parking lot adjacent to a supermarket the union sought to organize. *Marsh* and *Logan Valley* form an important part of the background of the following case:

STATE V. SHACK

Supreme Court of New Jersey.
58 N.J. 297, 277 A.2d 369 (1971).

WEINTRAUB, C.J. Defendants entered upon private property to aid migrant farmworkers employed and housed there. Having refused to depart upon the demand of the owner, defendants were charged with violating N.J.S.A. 2A:170–31 which provides that “[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner . . . is a disorderly person and shall be punished by a fine of not more than \$50.” Defendants were convicted in the Municipal Court of Deerfield Township and again on appeal in the County Court of Cumberland County on a trial de novo. R. 3:23–8(a). We certified their further appeal before argument in the Appellate Division.

Before us, no one seeks to sustain these convictions. The complaints were prosecuted in the Municipal Court and in the County Court by counsel engaged by the complaining landowner, Tedesco. However Tedesco did not respond to this appeal, and the county prosecutor, while defending abstractly the constitutionality of the trespass statute, expressly disclaimed any position as to whether the statute reached the activity of these defendants.

Complainant, Tedesco, a farmer, employs migrant workers for his seasonal needs. As part of their compensation, these workers are housed at a camp on his property.

Defendant Tejas is a field worker for the Farm Workers Division of the Southwest Citizens Organization for Poverty Elimination, known by the acronym SCOPE, a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. §§ 2861–2864. The role of SCOPE includes providing for the “health services of the migrant farm worker.”

Defendant Shack is a staff attorney with the Farm Workers Division of Camden Regional Legal Services, Inc., known as “CRLS,” also a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. § 2809(a)(3). The mission of CRLS includes legal advice and representation for these workers.

Differences had developed between Tedesco and these defendants prior to the events which led to the trespass charges now before us. Hence when defendant Tejas wanted to go upon Tedesco's farm to find a migrant worker who needed medical aid for the removal of 28 sutures, he called upon [p*195] defendant Shack for his help with respect to the legalities involved. Shack, too, had a mission to perform on Tedesco's farm; he wanted to discuss a legal problem with another migrant worker there employed and housed. Defendants arranged to go to the farm together. Shack carried literature to inform the migrant farmworkers of the assistance available to them under federal statutes, but no mention seems to have been made of that literature when Shack was later confronted by Tedesco.

Defendants entered upon Tedesco's property and as they neared the camp site where the farmworkers were housed, they were confronted by Tedesco who inquired of their purpose. Tejas and Shack stated their missions. In response, Tedesco offered to find the injured worker, and as to the worker who needed legal advice, Tedesco also offered to locate the man but insisted that the consultation would have to take place in Tedesco's office and in his presence. Defendants declined, saying they had the right to see the men in the privacy of their living quarters and without Tedesco's supervision. Tedesco thereupon summoned a State Trooper who, however,

refused to remove defendants except upon Tedesco's written complaint. Tedesco then executed the formal complaints charging violations of the trespass statute.

I

The constitutionality of the trespass statute, as applied here, is challenged on several scores.

It is urged that the First Amendment rights of the defendants and of the migrant farmworkers were thereby offended. Reliance is placed on *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), where it was held that free speech was assured by the First Amendment in a company-owned town which was open to the public generally and was indistinguishable from any other town except for the fact that the title to the property was vested in a private corporation. Hence a Jehovah's Witness who distributed literature on a sidewalk within the town could not be held as a trespasser. Later, on the strength of that case, it was held that there was a First Amendment right to picket peacefully in a privately owned shopping center which was found to be the functional equivalent of the business district of the company-owned town in *Marsh. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968). [Citation omitted.] Those cases rest upon the fact that the property was in fact opened to the general public. There may be some migrant camps with the attributes of the company town in Marsh and of course they would come within its holding. But there is nothing of that character in the case before us, and hence there would have to be an extension of Marsh to embrace the immediate situation.

Defendants also maintain that the application of the trespass statute to them is barred by the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and this on the premise that the application of the trespass statute would defeat the purpose of the federal statutes, under which SCOPE and CRLS are funded, to reach and aid the migrant farmworker. The brief of the United States, *amicus curiae*, supports that approach. Here defendants rely upon cases construing the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., and holding that an employer may in some circumstances be guilty of an unfair labor practice in violation of that statute if the employer denies union organizers an opportunity to communicate with his employees at some suitable place upon the employer's premises. See *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105, 76 S. Ct. 679, 100 L. Ed. 975 (1956), [p*196] and annotation, 100 L. Ed. 984 (1956). The brief of New Jersey State Office of Legal Services, *amicus curia* [e], asserts the workers' Sixth Amendment right to counsel in criminal matters is involved and suggests also that a right to counsel in civil matters is a "penumbra" right emanating from the whole Bill of Rights under the thinking of *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), or is a privilege of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment, or is a right "retained by the people" under the Ninth Amendment, citing a dictum in *United Public Workers v. Mitchell*, 330 U.S. 75, 94, 67 S. Ct. 556, 91 L. Ed. 754, 770 (1947).

These constitutional claims are not established by any definitive holding. We think it unnecessary to explore their validity. The reason is that we are satisfied that under our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute. The policy considerations which underlie that conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.

II

Property rights serve human values. They are recognized to that end, and are limited by it.

Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their wellbeing must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.

Here we are concerned with a highly disadvantaged segment of our society. We are told that every year farmworkers and their families numbering more than one million leave their home areas to fill the seasonal demand for farm labor in the United States. *The Migratory Farm Labor Problem in the United States* (1969 Report of Subcommittee on Migratory Labor of the United States Senate Committee on Labor and Public Welfare), p. 1. The migrant farmworkers come to New Jersey in substantial numbers. The report just cited places at 55,700 the number of man-months of such employment in our State in 1968 (p. 7). The numbers of workers so employed here in that year are estimated at 1,300 in April; 6,500 in May; 9,800 in June; 10,600 in July; 12,100 in August; 9,600 in September; and 5,500 in October (p. 9).

The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power. It is their plight alone that summoned government to their aid. In response, Congress provided under Title III-B of the Economic Opportunity Act of 1964 (42 U.S.C.A. § 2701 et seq.) for "assistance for migrant and other seasonally employed farmworkers and their families." Section 2861 states "the purpose of this part is to assist migrant and seasonal farmworkers and their families to improve their living conditions and develop skills necessary for a productive and self-sufficient life in an increasingly complex and technological society." Section 2862(b)(1) provides for funding of programs [p*197] "to meet the immediate needs of migrant and seasonal farmworkers and their families, such as day care for children, education, health services, improved housing and sanitation (including the provision and maintenance of emergency and temporary housing and sanitation facilities), legal advice and representation, and consumer training and counseling." As we have said, SCOPE is engaged in a program funded under this section, and CRLS also pursues the objectives of this section although, we gather, it is funded under section 2809(a)(3), which is not limited in its concern to the migrant and other seasonally employed farmworkers and seeks "to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, counseling, education, and other appropriate services."

These ends would not be gained if the intended beneficiaries could be insulated from efforts to reach them. It is in this framework that we must decide whether the camp operator's rights in his lands may stand between the migrant workers and those who would aid them. The key to that aid is communication. Since the migrant workers are outside the mainstream of the communities in which they are housed and are unaware of their rights and opportunities and of the services available to them, they can be reached only by positive efforts tailored to that end. *The Report of the Governor's Task Force on Migrant Farm Labor* (1968) noted that "One of the major problems related to seasonal farm labor is the lack of adequate direct information with regard to the availability of public services," and that "there is a dire need to provide the workers with basic educational and informational material in a language and style that can be readily understood by the migrant" (pp. 101-102). The report stressed the problem of access and deplored the notion that property rights may stand as a barrier, saying "In our judgment, 'no trespass' signs represent the last dying remnants of paternalistic behavior" (p. 63).

A man's right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to injure the rights of others. *Broom, Legal Maxims* (10th ed. Kersley 1939), p. 238; 39 *Words and Phrases*, "*Sic Utere Tuo ut Alienum Non Laedas*,"

p. 335. Although hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet. Hence it has long been true that necessity, private or public, may justify entry upon the lands of another. For a catalogue of such situations, see *Prosser, Torts* (3d ed. 1964), § 24, pp. 127–129; 6A *American Law of Property* (A.J. Casner ed. 1954) 28.10, p. 31; 52 *Am. Jr., "Trespass,"* §§ 40–41, pp. 867–869. See also *Restatement, Second, Torts* (1965) §§ 197–211; *Krauth v. Geller*, 31 *N.J.* 270, 272–273 (1960).

The subject is not static. As pointed out in 5 *Powell, Real Property* (Rohan 1970) § 745, pp. 493–494, while society will protect the owner in his permissible interest in land, yet

“... [S]uch an owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion.”

Professor Powell added in § 746, pp. 494–496: [p*198]

“As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interests in the utilization of things. . . .

To one seeing history through the glasses of religion, these changes may seem to evidence increasing embodiments of the golden rule. To one thinking in terms of political and economic ideologies, they are likely to be labeled evidences of “social enlightenment,” or of “creeping socialism” or even of “communistic infiltration,” according to the individual’s assumed definitions and retained or acquired prejudices. With slight attention to words or labels, time marches on toward new adjustments between individualism and the social interests.”

This process involves not only the accommodation between the right of the owner and the interests of the general public in his use of his property, but involves also an accommodation between the right of the owner and the right of individuals who are parties with him in consensual transactions relating to the use of the property. Accordingly substantial alterations have been made as between a landlord and his tenant. See *Reste Realty Corp. v. Cooper*, 53 *N.J.* 444, 451–453 (1969); *Marini v. Ireland*, 56 *N.J.* 130, 141–143 (1970).

The argument in this case understandably included the question whether the migrant worker should be deemed to be a tenant and thus entitled to the tenant’s right to receive visitors, *Williams v. Lubbering*, 73 *N.J.L.* 317, 319–320 (Sup. Ct. 1906), or whether his residence on the employer’s property should be deemed to be merely incidental and in aid of his employment, and hence to involve no possessory interest in the realty. . . .

We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility.

Thus approaching the case, we find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker’s well-being. The farmer, of course, is entitled to pursue his farming activities without interference, and this defendants readily concede. But we see no legitimate need for a right in the farmer to deny the worker the

opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him. Hence representatives of these agencies and organizations may enter upon the premises to seek out the worker at his living quarters. So, too, the migrant worker must be allowed to receive visitors there of his own choice, so long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them.

It is not our purpose to open the employer's premises to the general public if in fact the employer himself has not done so. We do not say, for example, that solicitors or peddlers of all kinds may enter on their own; we may assume for the present that the employer may regulate their entry or bar them, at least if the employer's purpose is not to gain a commercial advantage for himself or if the regulation does not deprive the migrant worker of practical access to things he needs. [p*199]

And we are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected. But the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties. [Citations omitted.]

It follows that defendants here invaded no possessory right of the farmer-employer. Their conduct was therefore beyond the reach of the trespass statute. The judgments are accordingly reversed and the matters remanded to the County Court with directions to enter judgments of acquittal.

For reversal and remandment—CHIEF JUSTICE WEINTRAUB and JUSTICES JACOBS, FRANCIS, PROCTOR, HALL and SCHETTINO—6.

For affirmance—None.

Notes and Questions

1. Suppose that Tedesco brings an action against SCOPE or CRLS to enjoin further trespass. Same result? Why or why not?
2. If this is not a constitutional decision, where does the court get the authority to strike down the state trespass statute, or did it?
3. The maxim "sic utere tuo ut alienum non laedas" is most frequently used in the context of nuisance litigation. Is it applicable here? Why or why not?
4. To what extent is this case simply an application of the principle of cases like *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908), *infra* p. 210, that necessity will justify entry onto the lands of another?
5. Could Tedesco exclude a Jehovah's Witness seeking to proselytize among his predominantly Catholic workers? A competitor seeking to recruit some of his labor force? A public official seeking evidence of violations of state migrant housing standards, without a warrant? Could he insist that any visitor be registered as the guest of some particular tenant?
6. Would the principle of this case apply to a large industrial plant? To a huge high-rise apartment building?
7. Does this case reflect a more general strand in property law, a protection of relationships of mutual dependence through recognition of property interests even though the interests were neither explicitly agreed to by the parties nor clearly framed at the time they entered into the

relevant relationship? In *The Reliance Interest in Property*, 40 STANFORD L. REV. 611 (1988), Professor Joseph Singer constructs a model of “property as social relations” out of this case and diverse other examples. His examples range from adverse possession, through the recognition of a warranty of habitability in landlord-tenant law, to marriage and other intimate relationships. The full article is well worth reading.

8. In *Folgueras v. Hassle*, 331 F. Supp. 615 (W.D. Mich. 1971), the court squarely faced the constitutional issue avoided in the principal case and held on the strength of *Marsh* and *Logan Valley* that there was a constitutional right of access to a migrant camp. The court also sustained the right on the ground that the state criminal trespass statute did not apply and on the ground that the [p*200] migrants, as tenants of the owner paying for their “rent free” housing in labor, were entitled to the beneficial use and enjoyment of their demised premises including a right to invite and receive guests. The camp involved in *Folgueras* was relatively small-thirty-five cabins in dense foliage with minimal facilities.

The migrant camp which was the setting for *People v. Rewald*, 65 Misc. 2d 453, 318 N.Y.S.2d 40 (Cayuga County Ct. 1971), cited and relied on in *Folgueras*, bore a far closer resemblance to the company town of Chickasaw, Alabama than did the *Folgueras* camp. It contained in season a population of nearly 450, housed in barracks-like block buildings, many with restaurant-like food service. There were such public facilities as a church, grocery store, recreation building, shower room, and barber shop. Although it was posted “LABOR CAMP-PRIVATE PROPERTY-Open to Residents-Nonresidents Must Register at Office-Violators Will be Prosecuted,” the camp was visited by many non-residents, and there was evidence that the registration requirement was only sporadically enforced. The court, in overturning the criminal trespass conviction of the defendant newspaper reporter, considered both the circumscription of the property rights of an owner who opens up his property to the public and the first amendment implications of exclusion of the press.

State v. Fox, 82 Wash. 2d 289, 510 P.2d 230 (1973), *cert. denied*, 414 U.S. 1130 (1974), arrived at substantially the same conclusion as *State v. Shack* with regard to access by a legal aid attorney and a labor organizer. In *Fox* the court made use of the fact that the workers paid a nominal rent and thus were “tenants” entitled, as *Folgueras* notes, to invite and receive guests. The court also relied on a Washington statute prohibiting the prosecution of persons working to organize labor unions by lawful means.

9. The Supreme Court did not leave *Logan Valley* for long. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), involved the distribution of handbills in opposition to the Vietnam War. The distribution took place in a huge 50-acre shopping center, totally owned (except for the streets) by the Corporation. The Court thus had the opportunity to address a question which it had specifically left open in *Logan Valley*. In a 5-4 decision, per Powell, J., the Court held: “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. *Marsh* was distinguished on the grounds suggested in Justice Black’s dissent in *Logan Valley*-namely, that it involved the special case of a full company town. The Court stated that in balancing the First Amendment against the property clauses of the Fifth and Fourteenth it had “never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. . . . [P]roperty [does not lose] its private character merely because the public is generally invited to use it for designated purposes.” *Id.* at 569.

Lower courts soon had the opportunity to consider the implications of *Tanner* for cases involving access to migrant labor camps. *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973) holds that there is no right to exclude labor organizers from a migrant labor camp and suggests that the distinction to be drawn between the *Marsh* and *Tanner* lines of cases is the

provision of “municipal” services, fire protection, garbage disposal, etc. *Illinois Migrant Council v. Campbell Soup Co.*, 574 F.2d 374 (7th Cir. 1978) arrives at essentially the same conclusion. In *Asociacion de Trabajadores Agricolas v. Green Giant Co.*, 518 F.2d 130 (3d Cir. 1975), however, the court, applying the Tanner test [p*201] strictly, held that although the labor camp in question served a quasi-public function and that the speech of the petitioners (labor organizers) was directly related to that public use, nonetheless, the petitioners had failed to satisfy their burden of proof that they had no alternative means of communicating with the migrant workers. For a good note discussing all the migrant-labor-camp cases, see Note, *First Amendment and the Problem of Access to Migrant Labor Camps after Lloyd Corporation v. Tanner*, 61 CORNELL L. REV. 560 (1976).

10. In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court returned to the problem posed in Logan Valley, labor picketing in a shopping center, and expressly overruled the earlier decision. The Court remanded the case to the NLRB for consideration of whether the corporation’s action could be regarded as an unfair labor practice under the National Labor Relations Act.

Where are we now? Must states adopt the *Marsh-Hudgens* line as a matter of federal constitutional law? Is the decision in *State v. Shack* unconstitutional? The California Supreme Court thought that it still had some maneuvering room and its decision on the basis of state constitutional law gave rise to the following case:

PRUNEYARD SHOPPING CENTER V. ROBINS

Supreme Court of the United States.

447 U.S. 74 (1980).

REHNQUIST, J. . . .

I

Appellant PruneYard is a privately owned shopping center in the city of Campbell, Cal. It covers approximately 21 acres-5 devoted to parking and 16 occupied by walkways, plazas, sidewalks, and buildings that contain more than 65 specialty shops, 10 restaurants, and a movie theater. The PruneYard is open to the public for the purpose of encouraging the patronizing of its commercial establishments. It has a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes. This policy has been strictly enforced in a nondiscriminatory fashion. The PruneYard is owned by appellant Fred Sahadi.

Appellees are high school students who sought to solicit support for their opposition to a United Nations resolution against “Zionism.” On a Saturday afternoon they set up a card table in a corner of PruneYard’s central courtyard. They distributed pamphlets and asked passersby to sign petitions, which were to be sent to the President and Members of Congress. Their activity was peaceful and orderly and so far as the record indicates was not objected to by PruneYard’s patrons.

Soon after appellees had begun soliciting signatures, a security guard informed them that they would have to leave because their activity violated PruneYard regulations. The guard suggested that they move to the public sidewalk at the PruneYard’s perimeter. Appellees immediately left the premises and later filed this lawsuit in the California Superior Court of Santa Clara County. They sought to enjoin appellants from denying them access to the PruneYard for the purpose of circulating their petitions.

The Superior Court held that appellees were not entitled under either the Federal or California Constitution to exercise their asserted rights on the shopping center property. . . . It concluded that there were “adequate, [p*202] effective channels of communication for [appellees] other than soliciting on the private property of the [PruneYard].” . . .

The California Supreme Court reversed, holding that the California Constitution protects “speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.” 23 Cal. 3d 899, 910, 592 P.2d 341, 347 (1979). It concluded that appellees are entitled to conduct their activity on PruneYard property. . . .

II

We initially conclude that this case is properly before us as an appeal under 28 U.S.C. § 1257(2) [which gives the Supreme Court jurisdiction over appeals from state court rulings which have sustained the constitutionality of a state statute in the face of a federal constitutional challenge]. It has long been established that a state constitutional provision is a “statute” within the meaning of section 1257(2). [Citations omitted.] Here the California Supreme Court decided that Art. 1, §§ 2 and 3, of the California Constitution gave appellees the right to solicit signatures on appellants’ property in exercising their state rights of free expression and petition. In so doing, the California Supreme Court rejected appellants’ claim that recognition of such a right violated appellants’ “right to exclude others,” which is a fundamental component of their federally protected property rights. Appeal is thus the proper method of review.

III

Appellants first contend that *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), prevents the State from requiring a private shopping center owner to provide access to persons exercising their state constitutional rights of free speech and petition when adequate alternative avenues of communication are available. . . .

Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. [Citations omitted.] In *Lloyd*, *supra*, there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found to exist by the California Supreme Court here. It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). *Lloyd* held that when a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in expression beyond those already existing under applicable law. See also *Hudgens v. NLRB*, [424 U.S. 507,] 517–521 [(1976)].

IV

Appellants next contend that a right to exclude others underlies the Fifth Amendment guarantee against the taking of property without just compensation and the Fourteenth Amendment guarantee against the deprivation of property without due process of law.

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. *Kaiser Aetna v. United States*, 444 U.S. 164, [p*203] 179–180 (1979). And here there has literally been a “taking” of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property.¹ But it is well established that “not every destruction or injury

¹ The term “property” as used in the Taking Clause includes the entire “group of rights inhering in the citizen’s [ownership].” *United States v. General Motors Corp.*, 323 U.S. 373 (1945). It is not used in the “vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the group of rights inhering in the citizen’s relation to the

to property by governmental action has been held to be a “taking” in the constitutional sense.” *Armstrong v. United States*, 364 U.S. 40, 48 (1960). Rather, the determination whether a state law unlawfully infringes a landowner’s property in violation of the Taking Clause requires an examination of whether the restriction on private property “forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Id.*, at 49. This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. *Kaiser Aetna v. United States*, *supra*, at 175. When “regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants’ property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions. Appellees were orderly, and they limited their activity to the common areas of the shopping center. In these circumstances, the fact that they may have “physically invaded” appellants’ property cannot be viewed as determinative. This case is quite different from *Kaiser Aetna v. United States*, *supra*.

[In *Kaiser Aetna* t]he Government’s attempt to create a public right of access to the improved pond interfered with *Kaiser Aetna*’s “reasonable investment backed expectations.” We held that it went “so far beyond ordinary regulation or improvement for navigation as to amount to a taking. . . .” *Id.*, at 178. Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define “property” in the first instance. A State is, of course, bound by the Just Compensation Clause of the Fifth Amendment, [citation omitted] but here appellants have failed to demonstrate that the “right to exclude others” is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a “taking.”

There is also little merit to appellants’ argument that they have been denied their property without due process of law. In *Nebbia v. New York*, 291 U.S. 502 (1934), this Court stated: [p*204]

“[N]either property rights nor contract rights are absolute. . . . Equally fundamental with the private right is that of the public to regulate it in the common interest. . . .

. . .

“. . . [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained.” *Id.*, at 523, 525.

[Further citations omitted.] Appellants have failed to provide sufficient justification for concluding that this test is not satisfied by the State’s asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution.

V

Appellants finally contend that a private property owner has a First Amendment right not to be

physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.” *Id.*, at 377–378.

forced by the State to use his property as a forum for the speech of others. They state that in *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court concluded that a State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.² This rationale applies here, they argue, because the message of *Wooley* is that the State may not force an individual to display any message at all.

Wooley, however, was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used "as part of his daily life," and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest. Here, by contrast, there are a number of distinguishing factors. Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law. . . .

We conclude that neither appellants' federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state-protected rights of expression and petition on appellants' property. The judgment of the Supreme Court of California is therefore

Affirmed.

BLACKMUN, J., joins the opinion of the Court except that sentence thereof . . . which reads: "Nor as a general proposition is the United States, as [p*205] opposed to the several States, possessed of residual authority that enables it to define "property" in the first instance."

² [*Wooley* held that the state of New Hampshire could not force its citizens to display the motto "Live Free or Die" on their automobile license plates. Ed.]

MARSHALL, J. concurring. . . .

I continue to believe that *Logan Valley* was rightly decided, and that both *Lloyd* and *Hudgens* were incorrect interpretations of the First and Fourteenth Amendments. State action was present in all three cases. In all of them the shopping center owners had opened their centers to the public at large, effectively replacing the State, with respect to such traditional First Amendment forums as streets, sidewalks, and parks. The State had in turn made its laws of trespass available to shopping center owners, enabling them to exclude those who wished to engage in expressive activity on their premises. Rights of free expression become illusory when a State has operated in such a way as to shut off effective channels of communication. I continue to believe, then, that "the Court's rejection of any role for the First Amendment in the privately owned shopping center complex stems . . . from an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment's guarantee of freedom of speech." *Hudgens v. NLRB*, *supra*, at 542 (dissenting opinion). . . .

Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State, notwithstanding the California Supreme Court's finding that state-created rights of expressive activity would be severely hindered if shopping centers were closed to expressive activities by members of the public. If accepted, that claim

would represent a return to the era of *Lochner v. New York*, 198 U.S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result.

On the other hand, I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms “life, liberty, and property” do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.¹ Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish “core” common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

That “core” has not been approached in this case. The California Supreme Court’s decision is limited to shopping centers, which are already open to the general public. The owners are permitted to impose reasonable restrictions on expressive activity. There has been no showing of interference with appellants’ normal business operations. The California court [p*206] has not permitted an invasion of any personal sanctuary. [Citation omitted.] No rights of privacy are implicated. In these circumstances there is no basis for strictly scrutinizing the intrusion authorized by the California Supreme Court.

I join the opinion of the Court. . . .

POWELL, J. with whom WHITE, J., joins, concurring in part and in the judgment. Although I join the judgment, I do not agree with all of the reasoning in Part V of the Court’s opinion. I join Parts I-IV on the understanding that our decision is limited to the type of shopping center involved in this case. Significantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises. Nor does our decision today apply to all “shopping centers.” This generic term may include retail establishments that vary widely in size, location, and other relevant characteristics. Even large establishments may be able to show that the number or type of persons wishing to speak on their premises would create a substantial annoyance to customers that could be eliminated only by elaborate, expensive, and possibly unenforceable time, place, and manner restrictions. As the Court observes, state power to regulate private property is limited to the adoption of reasonable restrictions that “do not amount to a taking without just compensation or contravene any other federal constitutional provision.” . . .

Restrictions on property use, like other state laws, are invalid if they infringe the freedom of expression and belief protected by the First and Fourteenth Amendments. In Part V of today’s opinion, the Court rejects appellants’ contention that “a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.” . . . I agree that the owner of this shopping center has failed to establish a cognizable First Amendment claim in this case. But some of the language in the Court’s opinion is unnecessarily and perhaps confusingly broad. In my view, state action that transforms privately owned property into a forum for the expression of the public’s views could raise serious First Amendment

¹ This understanding is embodied in cases in the procedural due process area holding that at least some “grievous losses” amount to deprivations of “liberty” or “property” within the meaning of the Due Process Clause, even if those losses are not protected by statutory or common law. [Citations omitted.]

questions. . . .

[S]peech interests are affected when listeners are likely to identify opinions expressed by members of the public on commercial property as the views of the owner. If a state law mandated public access to the bulletin board of a freestanding store, hotel, office, or small shopping center, customers might well conclude that the messages reflect the view of the proprietor. The same would be true if the public were allowed to solicit or pamphleteer in the entrance area of a store or in the lobby of a private building. The property owner or proprietor would be faced with a choice: he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he has been forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues. The mere fact that he is free to dissociate himself from the views expressed on his property . . . cannot restore his "right to refrain from speaking at all." *Wooley v. Maynard*, *supra*, at 714. . . .

One easily can identify . . . circumstances in which a right of access to commercial property would burden the owner's First and Fourteenth Amendment right to refrain from speaking. But appellants have identified no such circumstance. . . . [p*207]

On the record before us, I cannot say that customers of this vast center would be likely to assume that appellees' limited speech activity expressed the views of the PruneYard or of its owner. . . .

Appellants have not alleged that they object to the ideas contained in the appellees' petitions. Nor do they assert that some groups who reasonably might be expected to speak at the PruneYard will express views that are so objectionable as to require a response even when listeners will not mistake their source. The record contains no evidence concerning the numbers or types of interest groups that may seek access to this shopping center, and no testimony showing that the appellants strongly disagree with any of them.

Because appellants have not shown that the limited right of access held to be afforded by the California Constitution burdened their First and Fourteenth Amendment rights in the circumstances presented, I join the judgment of the Court. I do not interpret our decision today as a blanket approval for state efforts to transform privately owned commercial property into public forums. Any such state action would raise substantial federal constitutional questions not present in this case.

Notes

1. The principal case has been widely noted, e.g., 32 U. FLA. L. REV. 760 (1980); 94 HARV. L. REV. 169 (1980); 130 U. PA. L. REV. 712 (1982). In several subsequent cases the Court has struck down state or local laws that cut into an owner's right to exclude, distinguishing *PruneYard*. In *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987), which held it to be unconstitutional to require a landowner to grant the public an easement to pass along the beach as a condition for issuance of a building permit on the coast, the Court distinguished *PruneYard* on the ground that "there the owner had already opened his property to the general public, and in addition permanent access was not required." *Id.* at 832 n. 1. The earlier decision of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) found a "taking" in a New York law that required the owner of an apartment building to allow a cable television company to attach a cable and related equipment to its building—a "permanent physical occupation" (though small in scale) as distinguished from the "temporary invasion" at issue in *PruneYard*. *Id.* at 434.

2. *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.*, *Princeton University v. Schmid*, 455 U.S. 100 (1982), involved the arrest for criminal trespass of a non-

student who was distributing political literature and seeking political contributions for the United States Labor Party on the campus of Princeton University. The New Jersey court, applying New Jersey's state version of the first amendment held:

. . . [T]he University regulations that were applied to Schmid . . . contained no standards, aside from the requirement for invitation and permission, for governing the actual exercise of expressional freedom. Indeed, there were no standards extant regulating the granting or withholding of such authorization, nor did the regulations deal adequately with the time, place, or manner for individuals to exercise their rights of speech and assembly. Regulations thus devoid of reasonable standards designed to protect both the legitimate interests of the University as an institution of higher education and the individual exercise of expressional freedom cannot constitutionally be invoked to prohibit the otherwise noninjurious and reasonable exercise of such freedoms. [Citations omitted.] In these circumstances, given the absence of adequate reasonable regulations, the required [p*208] accommodation of Schmid's expressional and associational rights, otherwise reasonably exercised, would not constitute an unconstitutional abridgment of Princeton University's property rights. See *PruneYard Shopping Center v. Robins*, *supra*, 447 U.S. at 82–84 It follows that in the absence of a reasonable regulatory scheme, Princeton University did in fact violate defendant's State constitutional rights of expression in evicting him and securing his arrest for distributing political literature upon its campus.

Id. at 567–68, 423 A.2d at 632–33. The Supreme Court dismissed the University's appeal on the ground that the University was not a party in interest in the criminal case.

The highest courts of two other states have joined California in finding expressive activity at shopping centers protected by state constitutional rights. *See Batchelder v. Allied Stores Intern., Inc.*, 388 Mass. 83, 445 N.E.2d 590 (1983); *Alderwood Associates v. Washington Environmental Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981). Six states have declined to. *See Comment, Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133, 138 (1989). *See, e.g., Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987).

3. The New Jersey courts have also continued to expand the rights of migrant workers. In *Vasquez v. Glassboro Service Ass'n, Inc.*, 83 N.J. 86, 415 A.2d 1156 (1980), *noted in* 12 RUTGERS L.J. 391 (1981), the court held that although a migrant worker was not a "tenant" within the meaning of the state's eviction statutes, he nonetheless could not be evicted except by judicial process. The contract between the worker and his employers is a contract of adhesion and not to be strictly enforced. At the judicial proceeding the worker must be allowed to present "equitable defenses" to the eviction like those authorized in *Marini v. Ireland*, *infra* p. 779.

Note on Property as the Absolute(?) Right to Exclude

In common with the RESTATEMENT OF PROPERTY (Introductory Note to § 1 (1936)), we defined property in the Introduction to this book as “legal relations between persons with respect to a thing,” be that thing tangible or intangible. This definition is for some purposes too all-encompassing (particularly if intangible things are defined to include all rights of action), and for some purposes it has too little substance. For these reasons a popular definition focuses on property as the right to exclude. One legal philosopher puts it this way: “that is property to which the following label can be attached:

To the world: Keep off X unless you have my permission, which I may grant or withhold.

Signed: _____ Private citizen

Endorsed: The state"

Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).³⁰⁹ [p*209]

Identifying property with the right to exclude has been a popular idea over time. Perhaps no one was more insistent on it than Blackstone: “There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. . . .” 2 Commentaries *2. He waxes even more eloquent on the topic in his discussion of the “absolute rights of individuals”:

The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. . . .

So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps, be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and, indeed, frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can

³⁰⁹ Cohen then goes on, however, to warn: “All of the terms of our definition shade off imperceptibly into other things. Private citizen: consider how many imperceptible shadings there are in the range from private citizen through corporate official, public utility employee, and government corporation and the state itself. Or consider the shadings between the state and various other types of organization. Consider the initial words, ‘To the world’, and the large middle ground between a direction to the whole world and a direction to a specific individual.” *Id.* at 374.

be constrained to pay any aids or taxes, even for the defense of the realm, or the support of government, but such as are imposed by his own consent, or that of his representatives in Parliament.

1 W. BLACKSTONE, COMMENTARIES *138–40.

A great deal of agony was devoted, particularly in the first half of this century, to disprove the absolutistic notions inherent in this concept of property. For an introduction, see a particularly telling little piece called *Property and Sovereignty* by the legal philosopher Morris R. Cohen, 13 *Cornell L.Q.* 8 (1927), in M. Cohen, *Law and the Social Order* 41 (1933). Cohen explains the popularity of the absolutist notions of Blackstone as follows: “The traditional theory of rights, and the one that still prevails in this country, was molded by the struggle in the seventeenth and eighteenth centuries against restrictions on individual enterprise. These restrictions in the interest of special privilege were fortified by the divine (and therefore absolute) rights of kings. As is natural in all revolts, absolute claims on one side were met with absolute denials on the other. Hence the theory of the natural rights of the individual took not only an absolute but a [p*210] negative form; men have inalienable rights, the state must never interfere with private property, etc.” 13 *CORNELL L.Q.* at 21, in M. COHEN, *supra* at 57.

Not even in Blackstone’s time was the right to exclude absolute. The common law recognizes a number of situations in which one may be justified in taking another’s property or entering on another’s land without his permission. *See, e.g.*, 3 COMMENTARIES *212–14. You may study in your torts course the case of *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908), in which the plaintiff moored his boat on defendant’s dock during a storm, only to be cast off by the defendant’s servant. Reviewing the authorities the court held that the mooring was privileged if necessary because of the storm and that defendant’s servant had committed a wrong in so casting them off. *Cf. Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910); *Hall & Wigmore, Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 *ILL. L. REV.* 501 (1907).

By the late twentieth century American law’s recognition of the right to exclude has lost a great deal of whatever absolute character it may have had. In the first place, the state may, upon the paying of compensation, take private property for public use. Further, under the rubric of the police power, the state may regulate the exercise of property rights, including the right to exclude, in the interests of the public health, safety, welfare, and morals. We will have occasion to examine both eminent domain and the police power in greater depth, *infra* Chapter 8.

While few today would argue for the absoluteness of the right to exclude and while the days in which the Supreme Court was willing to strike down both federal and state legislation regulating business on the ground that it deprives a person (usually corporate) of “property” without due process of law seem to be over,³¹⁰ it would be wrong to suppose that property, and particularly property as the right to exclude, does not still rank high in the hierarchy of legal values. Today the right to exclude guaranteed by the fourth amendment remains one of the principal means which a citizen has to ensure his privacy against both governmental and non-governmental intruders. The amendment has been held to apply even to searches of buildings for violations of fire, health and safety codes. *Camara v. Municipal Court*, 387 U.S. 523 (1967), *overruling Frank v. Maryland*, 359 U.S. 360 (1959); *see LaFave, Administrative Searches and the Fourteenth Amendment: The*

³¹⁰ You will probably study some of the decisions of this sort in your constitutional law course under the rubric of “substantive” due process. For a lucid retelling of the story *see* Hetherington, *State Economic Regulation and Substantive Due Process of Law* (pts. 1, 2), 53 *Nw. U. L. REV.* 13, 226 (1958); *see also* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 *SUP. CT. REV.* 34.

Camara and See Cases, 1967 SUP. CT. REV. 1.³¹¹ Another area, perhaps not so often litigated, in which property as the right to exclude has enormous importance is the economic. Morris Cohen's analysis is both classic and farsighted: [p*211]

The classical view of property as a right over things resolves it into component rights such as the *jus utendi*, *jus disponendi*, etc. But the essence of private property is always the right to exclude others. The law does not guarantee me the physical or social ability of actually using what it calls mine. By public regulations it may indirectly aid me by removing certain general hindrances to the enjoyment of property. But the law of property helps me directly only to exclude others from using the things that it assigns to me. If, then, somebody else wants to use the food, the house, the land, or the plough that the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbour, the law thus confers on me a power, limited but real, to make him do what I want. If Laban has the sole disposal of his daughters and his cattle, Jacob must serve him if he desires to possess them. In a regime where land is the principal source of obtaining a livelihood, he who has the legal right over the land receives homage and service from those who wish to live on it.

The character of property as sovereign power compelling service and obedience may be obscured for us in a commercial economy by the fiction of the so-called labour contract as a free bargain and by the frequency with which service is rendered indirectly through a money payment. But not only is there actually little freedom to bargain on the part of the steelworker or miner who needs a job, but in some cases the medieval subject had as much power to bargain when he accepted the sovereignty of his lord. Today I do not directly serve my landlord if I wish to live in the city with a roof over my head, but I must work for others to pay him rent with which he obtains the personal services of others. The money needed for purchasing things must for the vast majority be acquired by hard labour and disagreeable service to those to whom the law has accorded dominion over the things necessary for subsistence.

To a philosopher this is of course not at all an argument against private property. It may well be that compulsion in the economic as well as the political realm is necessary for civilized life. But we must not overlook the actual fact that dominion over things is also imperium over our fellow human beings.

The extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated by those who think of the law as merely protecting men in their possession. Property law does more. It determines what men shall acquire. Thus, protecting the property rights of a landlord means giving him the right to collect rent, protecting the property of a railroad or a public-service corporation means charges. Hence the ownership of land and machinery, with the rights of drawing rent, interest, etc., determines the future distribution of the goods that will come into being-determines what share of such goods various individuals shall acquire. The average life of goods that are either consumable or used

³¹¹ The Supreme Court has wavered somewhat from the holding in *Camara*. Certain "pervasively regulated" businesses are said to have no "expectation of privacy" in the sense mentioned in the telephone booth case (*Katz v. United States*, *supra* p. 154). E.g., *United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor). In *Wyman v. James*, *supra* p. 162, the Court authorized the warrantless search of the apartment of a welfare recipient, or at least, allowed the receipt of welfare benefits to be conditioned on consenting to search. On the other hand, the Court has struck down the statutory provision of the Occupational Safety and Health Act (29 U.S.C. § 657(a) (Supp. 1975)) which authorized representatives of the Secretary of Labor to engage in warrantless searches of business premises to check for violations of the Act. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

for production of other goods is very short. Hence a law that merely protected men in their possession and did not also regulate the acquisition of new goods would be of little use.

From this point of view it can readily be seen that when a court rules that a gas company is entitled to a return of 6 per cent on its investment, it is not merely protecting property already possessed, it is also determining that a portion of the future social produce shall under certain conditions go to that company. Thus not only medieval landlords but the owners of all revenue-producing property are in fact granted by the law certain powers to tax the future social product. When to this power of taxation there is added the power to command the services of large numbers who are not economically independent, we have the essence of what historically has constituted political sovereignty. [p*212]

Though the sovereign power possessed by the modern large property owners assumes a somewhat different form from that formerly possessed by the lord of the land, they are not less real and no less extensive. Thus the ancient lord had a limited power to control the modes of expenditure of his subjects by direct sumptuary legislation. The modern captain of industry and of finance has no such direct power himself, though his direct or indirect influence with the legislature may in that respect be considerable. But those who have the power to standardize and advertise certain products do determine what we may buy and use. We cannot well wear clothes except within lines decreed by their manufacturers, and our food is becoming more and more restricted to the kinds that are branded and standardized.

This power of the modern owner of capital to make us feel the necessity of buying more and more of his material goods (that may be more profitable to produce than economical to use) is a phenomenon of the utmost significance to the moral philosopher. The moral philosopher must also note that the modern captain of industry or finance exercises great influence in setting the fashion of expenditure by his personal example. Between a landed aristocracy and the tenantry, the difference is sharp and fixed, so that imitation of the former's mode of life by the latter is regarded as absurd and even immoral. In a money or commercial economy differences of income and mode of life are more gradual and readily hidden, so that there is great pressure to engage in lavish expenditure in order to appear in a higher class than one's income really allows. Such expenditure may even advance one's business credit. This puts pressure not merely on ever greater expenditure but more specifically on expenditure for ostentation rather than for comfort. Though a landed aristocracy may be wasteful in keeping large tracts of land for hunting purposes, the need for discipline to keep in power compels the cultivation of a certain hardihood that the modern wealthy man can ignore. An aristocracy assured of its recognized superiority need not engage in the race of lavish expenditure regardless of enjoyment.

In addition to these indirect ways in which the wealthy few determine the mode of life of the many, there is the somewhat more direct mode that bankers and financiers exercise when they determine the flow of investment, e.g., when they influence building operations by the amount that they will lend on mortgages. This power becomes explicit and obvious when a needy country has to borrow foreign capital to develop its resources.

I have already mentioned that the recognition of private property as a form of sovereignty is not itself an argument against it. Some form of government we must always have. For the most part men prefer to obey and let others take the trouble to think out rules, regulations, and orders. That is why we are always setting up authorities; and when we cannot find any we write to the newspaper as the final arbiter. But although government is a necessity, not all forms of it are of equal value. At any rate it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.

13 CORNELL L.Q. at 12–14, in M. Cohen, *supra*, at 46–49.

If the right to exclude workers from a factory or those helping migrant workers from a farm camp and the right to exclude a government snoop from your heating duct seem distinguishable, you are beginning to arrive at what some have seen as a seminal distinction, that between property for use and property for power. See HOBHOUSE, *THE HISTORICAL EVOLUTION OF PROPERTY, IN FACT AND IDEA, IN PROPERTY, ITS DUTIES AND RIGHTS* 21–24, 32–33 (C. Gore 2d ed. 1922); J. [p*213] COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 18–25, 28–37 (1924). In socialist economies private property for use, including most tangible articles of personal property and certain rights in dwelling places tends to be recognized, even as private property for power, the private ownership of capital goods, the means of production, is not. This still does not mean, however, that a right to exclude, vesting in the state and administered by its bureaucracy is not recognized in such things. See Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 357–59 (1954); Maggs, *The Security of Individually-Owned Property Under Soviet Law*, 1961 DUKE L.J. 525. The recent turn back toward market economies in eastern Europe has raised many complicated issues of how and to what extent to return public property to private ownership. Cf. Maggs, *Constitutional Implications of Changes in Property Rights in the USSR*, 23 CORNELL INT'L L.J. 363 (1990).

Adolf Berle employs a slightly different distinction—that between property for production and property for consumption. A most significant development, as he sees it, has been the increase in the value of the former kind of property and, simultaneously, the divorce of the power to manage such property and its ownership:

Factually, the trend towards dominance of that collective capitalism we call the “corporate system” has continued unabated. Evolution of the corporation has made stock-and-security ownership the dominant form by which individuals own wealth representing property devoted to production (as contrasted with property devoted to consumption). The last great bastion of individually-owned productive property-agriculture-has been dramatically declining in proportion to the total production of the United States, and even in agriculture, corporations have been steadily making inroads. Outside of agriculture, well over ninety percent of all the production in the country is carried on by more than a million corporations. In all of them, management is theoretically distinct from ownership. The directors of the corporation are not the “owners”; they are not agents of the stockholders and are not obliged to follow their instructions. This in itself is not determinative. Numerically most of the million corporations are “close”—the stockholders are also the directors or are so related to them that the decision-making power rests with the stockholders. Quantitatively, however, a thousand or so very large corporations whose stockholders’ lists run from 10,000 up to 2,500,000, as in the case of American Telephone and Telegraph, account for an overwhelmingly large percentage both of asset-holders and of operations. . . . It is not unfair to suggest that . . . 600 or 700 large corporations, whose control nominally is in the hands of their “public” stockholders (actually, of their managers), account for seventy percent of commercial operation of the country-agriculture aside. There has been a slow but continuing trend toward corporate concentration reckoned by the percentage of industry thus controlled. Actually the total is more marked because, in contrast to total economic growth, the proportion of American economic activity represented by individually controlled agriculture has been relatively declining. American economics at present is dominantly, perhaps overwhelmingly, industrial.

The effect of this change upon the property system of the United States has been dramatic. Individually-owned wealth has enormously increased. . . . Relatively little of it is “productive” property—land or things employed by its owners in production or commerce—though figures are hazy at the edges. The largest item of individually-owned wealth, exclusive of productive assets, is described as “owner-occupied homes” These, of course, are primarily for

consumption though a fraction of them are probably farmsteads. The next largest item—consumer durables—... are chiefly [p*214] automobiles and home equipment, again chiefly used for personal convenience and not for capital or productive purposes.

... [F]ar and away, the largest item of personally owned “property” representing productive assets and enterprise is in the form of stock of corporations. In addition, a substantial amount of other assets held by individuals consists of claims against intermediate financial institutions—banks, insurance companies and the like, whose holdings include large amounts of corporation stocks, bonds and securities. “Individually-owned” enterprise is thus steadily disappearing. ...

Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1, 2–3 (1965); see also A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1968); K. POLANYI, *THE GREAT TRANSFORMATION* (1944).

All this, however, is getting us beyond our initial point—a definition of property as the right to exclude. To break down property into its component rights, privileges and powers and to identify the right to exclude as being the most characteristic, however, still doesn’t get us much farther than Justice Jackson’s cynical: property is what courts (or other authoritative bodies) say it is. When we get to the distinction between property for use and property for power, however, we are getting to the point of trying to decide what the courts and other authoritative bodies ought to protect. Unless we are to wallow in total circularity (they ought to protect what they do protect), it is necessary to find some outside idea or combination of ideas which may serve as a rationale for according “property” protection to some interests and not to others. That realization, in turn, leads us back to the questions of value posed in the more general extracts which began each of the sections in this chapter.

While this chapter is organized around a succession of “theories” of property you may have concluded by now that an adequate justification for and definition of property must derive from more than one theory. You may, indeed, have concluded that key theories remain in tension or opposition, that the concept of property is inevitably or predictably the product of a dialectic. If so, you are in good company. See, e.g., Alexander, *Time and Property in the American Legal Culture*, 66 N.Y.U. L. REV. 273 (1991). In *A THEORY OF PROPERTY* (1990) Stephen Munzer undertakes the development of “a pluralist theory that consists of three main principles and an account of how those principles are related.” *Id.* at 3. Jeremy Waldron’s *THE RIGHT TO PRIVATE PROPERTY* (1988) concerns not a “justification” for property but explores what arguments are and not “plausible”—“the space for argument in favour of private property.” Waldron holds as implausible “any right-based argument [purporting to justify] a society in which some people have lots of property and many have next to none.” *Id.* at 5.

For some, no theory or description of property rights can exist apart from broader questions. See, e.g., A. RYAN, *PROPERTY AND POLITICAL THEORY* 192 (1984) (“[P]roperty rights are nowadays important because they are rights rather than because they are property rights.”); Pottage, *Property: Re-appropriating Hegel*, 53 MOD. L. REV. 259 (1990).

Bibliographical Note.

PROPERTY: MAINSTREAM AND CRITICAL POSITIONS (C. Macpherson ed., 1978) contains a wide selection of historical readings on the theory of property. PROPERTY (J. Pennock & J. Chapman eds., Nomos No. 22, 1980) contains a wide-ranging selection of modern essays on the theory of property. It also contains an excellent bibliography by Gerald F. Gaus, *Id.* at 385–406. (A more up-to-date bibliography may be found in the article on “Property” in the Internet Encyclopedia of Philosophy [<https://www.iep.utm.edu/prop-con/>].) In addition, we particularly recommend two fairly recent books to those wanting to continue the theoretical explorations begun here: S. MUNZER, *A THEORY OF PROPERTY* (1990) and J. WALDRON, *THE RIGHT TO*