

RETURNING TO THE *PRUNEYARD*: THE UNCONSTITUTIONALITY OF STATE-SANCTIONED TRESPASS IN THE NAME OF SPEECH

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*In PruneYard Shopping Center v. Robins,*¹ the United States Supreme Court held that the owner of a private shopping center who was required by a state court to grant political solicitation and speaking rights to strangers had thereby suffered neither a constitutional taking of private property without compensation under the Fifth Amendment nor a deprivation of the owner's own free speech rights under the First Amendment. Revisiting this subject more than a quarter-century later, this Essay argues that the *PruneYard* decision never should have been read as an open invitation to the states to impose constitutional obligations upon private landowners regardless of the offensiveness of the speech being expressed over the owner's objection or the permanence and breadth of the government-commandeered access to the property. Moreover, the Supreme Court's decisions over the past quarter-century confirm that imposing a permanent and continuous free-speech easement on private property is a taking for which compensation is due. A judicially created right of trespass in the name of free speech cannot be squared with federal constitutional protections of expressive autonomy and private property.

I. INTRODUCTION AND BACKGROUND

Nearly thirty years ago, the California judiciary construed its state constitution's "liberty of speech" clause to require certain private citizens to allow strangers access to private property as a

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1. 447 U.S. 74 (1980). In keeping with the usage of the Supreme Court, this Essay will refer to this case as *PruneYard*. The California Supreme Court decision, *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979), *aff'd sub nom. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), will be referred to as *Pruneyard*, with a lowercase "y."

venue for expressing political opinions. In *Robins v. Pruneyard Shopping Center*, a bare 4-3 majority of the California Supreme Court held that a group soliciting signatures for a political petition had a state constitutional right to do so in the common areas of the privately owned PruneYard Shopping Center, despite the center's uniform policy prohibiting solicitation inside the mall.² The court rendered this decision, which found no support in the text, structure, or drafting history of the California Constitution,³ "during the closing days of an era of an expansionist and free-wheeling approach to constitutional interpretation."⁴

As a radical departure from the Lockean concept of rights as a check on government power, the California *Pruneyard* decision has found few admirers among the courts. The United States Supreme Court long since confirmed that it is "commonplace that the [federal] constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state."⁵ Likewise, a substantial majority of states⁶ have adhered to the traditional understanding that constitutional rights limit the *government's* power to interfere with our *freedoms*; they do *not* disturb the freedom of *private citizens*.⁷ Thus, nearly every state supreme court

2. See *Pruneyard*, 592 P.2d at 341-42, 347-48.

3. For an extended critique of the California Supreme Court's decision in *Pruneyard* as a policy decision untethered to the constitutional text, history, context, and developed legal reasoning, together with a careful analysis of the typical state liberty of speech clause and an examination of original historical sources on state constitutional drafting, see generally Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145 (2007).

4. *Id.* at 1146.

5. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (holding that a claim of constitutional right did not justify entry onto private property because the conduct of a private shopping center did not constitute state action).

6. For examples of state court decisions rejecting the application of state constitutional liberty of speech provisions against private citizens, see *Cologne v. Westfarms Assocs.*, 469 A.2d 1201, 1210 (Conn. 1984); *City of West Des Moines v. Engler*, 641 N.W.2d 803, 806 (Iowa 2002); *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337, 347-48 (Mich. 1985); *State v. Wicklund*, 589 N.W.2d 793, 803 (Minn. 1999); *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1218 (N.Y. 1985); *Jacobs v. Major*, 407 N.W.2d 832, 848 (Wis. 1987). For a discussion of state court responses to the *Pruneyard* decision, see generally Sisk, *supra* note 3, at 1151-53.

7. See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 16.1, at 994 (4th ed. 2007) (explaining that the Federal Bill of Rights "has been viewed only to limit the freedom of the government when dealing with individuals"). On the purpose and philosophical foundation of constitutional rights in the American historical context, applying to state constitutional drafting as well, see generally Sisk, *supra* note 3, at 1160-63.

to address the matter has refused to convert the shield of state constitutional rights against government power into a sword that one private citizen could wield against another.⁸

New Jersey, however, not only has followed California in enforcing state constitutional duties to facilitate speech against private landowners⁹ but has become “a much more zealous disciple than the teacher.”¹⁰ Ranging well beyond the large shopping center context, New Jersey has aggressively extended the judicially created right of constitutional trespass in the name of free speech to private universities,¹¹ private residential communities,¹² and even the corridors of privately owned residential buildings.¹³

As recently as 2007, the California Supreme Court in *Fashion Valley Mall LLC v. National Labor Relations Board*¹⁴ declined the invitation to overrule *Pruneyard* (by the same single-vote margin

8. See *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 780 P.2d 1282, 1286 (Wash. 1989) (holding that an entitlement to intrude onto private property for political expression over the objection of the owner would be “an entirely new kind of free speech right—one that can be used not only as a shield by private individuals against actions of the state but also as a sword against other private individuals” (emphasis in original)).

9. See *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994). In addition, based upon special state constitutional election or initiative clauses, two states have held that the fundamental right to free elections outweighs property rights, and thus signatures for initiative or candidate election petitions may be solicited at private shopping centers. See *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 595–96 (Mass. 1983); *Alderwood Assocs. v. Wash. Envtl. Council*, 635 P.2d 108, 115–17 (Wash. 1981) (plurality opinion). But see *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 237–44 (Or. 2000) (overruling prior decision upholding a right to gather ballot petition signatures on private property and describing that earlier decision as having failed to “adhere to [the] usual methodology of examining the text, history, and case law surrounding an original [state] constitutional provision”).

10. *Sisk*, *supra* note 3, at 1205; see also *id.* at 1205–12 (describing intrusive expansion of constitutional duties into the private sector in New Jersey).

11. See *State v. Schmid*, 423 A.2d 615, 631–33 (N.J. 1980).

12. See *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 929 A.2d 1060, 1072–74 (N.J. 2007) (holding that homeowner association regulations on posting of signs and use of a community room passed muster under a constitutional scrutiny involving “the general balancing of expressional rights and private property interests” but explaining that the ruling “does not suggest . . . that residents of a homeowners' association may never successfully seek constitutional redress against a governing association that unreasonably infringes their free speech rights”).

13. See *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*, 688 A.2d 156 (N.J. Super. Ct. Ch. Div. 1996), *aff'd*, 688 A.2d 108 (N.J. Super. Ct. App. Div. 1996).

14. 172 P.3d 742 (Cal. 2007).

as in the original decision). A few years earlier, a plurality of the court had acknowledged the severe criticism of the *Pruneyard* decision, recognizing that most other states had rejected it and that it had no basis in the text, history, or structure of the California Constitution.¹⁵ In *Fashion Valley Mall*, however, a majority of the California Supreme Court recited the *Pruneyard* line of cases, without adding to or reevaluating the abbreviated *Pruneyard* reasoning. The court restated that “[a] shopping mall is a public forum in which persons may reasonably exercise their right to free speech guaranteed by article I, section 2 of the California Constitution.”¹⁶ Three justices dissented, arguing that “*Pruneyard* was wrong when decided” and that “jurisdictions throughout the nation have overwhelmingly rejected it.”¹⁷ The dissent urged that “[t]he time has come to recognize that we are virtually alone, and that *Pruneyard* was ill-conceived.”¹⁸

Thus, although generally discredited as an anachronistic vestige of an activist period in constitutional jurisprudence, the *Pruneyard* decision staggers forward into the new century. In California and New Jersey, which represent nearly fifteen percent of the nation’s population, a judicially invented liberty of speech right to occupy another’s private property persists. Moreover, whenever someone advocates “transport[ing] constitutional norms into the private sector,”¹⁹ the *Pruneyard* decision remains as “a jurisprudential attractive nuisance for deformed constitutional interpretation.”²⁰

Unfortunately, when the United States Supreme Court first addressed the issue of state appropriation of private property as a political speech easement nearly three decades ago, it failed to nip the scheme in the bud. Instead, the Court ruled

15. *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 801–06 (Cal. 2001) (plurality opinion).

16. *Fashion Valley Mall*, 172 P.3d at 745–54.

17. *Id.* at 754–55 (Chin, J., dissenting).

18. *Id.* at 759. The dissent further observed that “the *Pruneyard* court made no effort to find anything in the text of article I, section 2, subdivision (a) of the California Constitution, its historical sources, or the process that led to its adoption, that suggests any intent to extend its terms to private property.” *Id.* at 760.

19. Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1541 (1998) (criticizing attempts to “transport constitutional norms into the private sector”).

20. Sisk, *supra* note 3, at 1213.

that California's state constitutional edict was within the permissible range of state police power to regulate private property, at least in the particular circumstances of that case.

In *PruneYard Shopping Center v. Robins*,²¹ the Supreme Court reaffirmed its precedents refusing to enforce federal constitutional rights against private entities.²² The Court reiterated that "property does not 'lose its private character merely because the public is generally invited to use it for designated purposes,' and that '[t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.'"²³ The *PruneYard* Court nonetheless acknowledged "the authority of [California] 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," including adopting "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."²⁴ On the particular facts of the case, the Court rejected claims that there had been a constitutional taking of the shopping center owner's property without compensation in violation of the Fifth and Fourteenth Amendments.²⁵ The Court also found that requiring the owner to facilitate the expressions of others did not violate the owner's First and Fourteenth Amendment free speech rights.²⁶

The Supreme Court's *PruneYard* decision should not be misread to invite the states to impose constitutional obligations upon private landowners, regardless of the speech's offensiveness or the permanence and breadth of the involuntary access to the property.²⁷ Moreover, as free speech and takings jurisprudence has matured during the past twenty-five years, the constitutional legitimacy of state-sanctioned trespass in the name of speech has become increasingly difficult to sustain.²⁸

21. 447 U.S. 74 (1980).

22. *Id.* at 81.

23. *Id.* (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972)).

24. *Id.*

25. *See id.* at 82–83.

26. *Id.* at 88.

27. *See infra* Parts II & III.

28. *See infra* Parts II & III.

In the critical light of subsequent developments, the time has come to renew the expressive and private property rights of landowners against intrusions by others.

II. FORCING PRIVATE LANDOWNERS TO BE INSTRUMENTS FOR OFFENSIVE EXPRESSION INFRINGES FREE SPEECH RIGHTS

Although ignored by the California Supreme Court,²⁹ private landowners suffer a loss of their free speech rights when forced to open their doors to controversial social or political expression, including opinions that they—or, in the case of commercial enterprises, their customers—may find offensive. As Justice Powell said in his concurring opinion in *PruneYard*, “[a] person who has merely invited the public onto his property for commercial purposes cannot fairly be said to have relinquished his right to decline ‘to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.’”³⁰

Although the Supreme Court did not find that California’s imposition of state constitutional duties upon a shopping center owner transgressed the First Amendment, the particular owner in that case had not specifically objected to the message being presented.³¹ In subsequent First Amendment decisions, the Supreme Court has emphasized that the absence of an objection by the shopping center owner in *PruneYard* was crucial to understanding the limited scope of that decision. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,³² the Court noted that, because the mall owner in *PruneYard* never alleged offense, the distribution of pamphlets did not threaten the principle of speaker’s autonomy.³³ Likewise, in *Pacific Gas &*

29. See *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979); see also *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 801 n.3 (Cal. 2001) (plurality opinion) (observing that the *Pruneyard* opinion had not considered the free speech rights of the shopping center owner).

30. *PruneYard*, 447 U.S. at 97–98 (Powell, J., concurring in part and in the judgment) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

31. *Id.* at 101; see also Eule & Varat, *supra* note 19, at 1568 (explaining that the owner of the shopping center in *PruneYard* “never contended that the students’ message offended him” and never made the “case that anyone had or might likely attribute their message to him”).

32. 515 U.S. 557 (1995).

33. *Id.* at 579–80; see also Eule & Varat, *supra* note 19, at 1609 (explaining that *Hurley* distinguished *PruneYard* “because in *PruneYard* there was no threat to

Electric Co. v. Public Utilities Commission,³⁴ a plurality observed that “[n]otably absent from *PruneYard* was any concern that [requiring] access” to the shopping center for others to speak had negatively affected the owner’s own right to speak.³⁵ Accordingly, the decision was never “a blanket approval for state efforts to transform privately owned commercial property into public forums.”³⁶

Moreover, the Supreme Court has reinforced the First Amendment guarantee against forcing one citizen to accommodate the divergent viewpoint of another, even in the context of public activities. In *Hurley*, the Court unanimously held that a Massachusetts state court decision violated the First Amendment by requiring the private organizers of Boston’s St. Patrick’s Day parade to allow a gay rights organization to participate. The Court reasoned that the expressional choices of the private organizers must be respected even though the parade was a public event.³⁷ The Court emphasized that the choice of a private person or organization “not to propound a particular point of view . . . is presumed to lie beyond the government’s power to control.”³⁸ The Court further confirmed its freedom from forced expression jurisprudence in *Boy Scouts of America v. Dale*³⁹ by overturning the New Jersey Supreme Court’s requirement that the Boy Scouts place a gay rights activist in a leadership position despite the organization’s objection to homosexual conduct.⁴⁰ Again, notwithstanding the organization’s large size and generally inclusive nature, the Court held that the First Amendment precluded imposition of a viewpoint the group may not wish to express.⁴¹

The experiences of the past three decades have demonstrated the degree to which forcing private landowners to allow ex-

speaker autonomy, given the lack of concern that compelled access might affect the shopping center owner’s right to speak and his lack of objection to the speech”).

34. 475 U.S. 1 (1986) (plurality opinion).

35. *Id.* at 12.

36. *PruneYard*, 447 U.S. at 101 (Powell, J., concurring in part and in the judgment).

37. *Hurley*, 515 U.S. at 573–75.

38. *Id.* at 575.

39. 530 U.S. 640 (2000).

40. *See id.* at 643–44.

41. *Id.* at 646–61.

pression of controversial opinions on their property intrudes on their rights. For example, in *Cologne v. Westfarm Associates*,⁴² the Connecticut Supreme Court refused to impose such free speech rules on shopping malls. The court discussed the injustice of requiring the owner to allow controversial political groups to demonstrate on his property, regardless of the potential harm to his commercial interests and the “substantial risks of property destruction and liability” to injured persons.⁴³ Indeed, while the appeal was pending in the Connecticut case, the Ku Klux Klan sought to hold a demonstration in the mall, which in turn provoked a disruptive anti-Klan rally that required police from numerous surrounding communities to restore order and forced stores in the mall to close for the day.⁴⁴ Similarly, in refusing to impose free speech duties on shopping centers in *Jacobs v. Major*,⁴⁵ the Wisconsin Supreme Court observed that, when the political activists “perform[ed] a choreographed depiction of the results of nuclear warfare” and distributed leaflets in the mall, “several stores within the mall suffered identifiable reductions in sales that day.”⁴⁶

The more extreme and vigorous the speech, the greater the resulting abuse of the landowner’s hospitality and the more substantial the interference with the owner’s private autonomy. Forcing a shopping center to serve as a public forum for controversial speech interferes with the merchant’s own marketing message. Indeed, California obliges the commercial landowner to serve as the host for his own roasting. Holding that a shopping center’s “purpose to maximize the profits of its merchants is not compelling,” the California Supreme Court overturned mall rules that precluded “messages critical of the mall or its tenants.”⁴⁷ Under this ruling, a shopping center must open its doors even to those who enter to urge a boycott of one or more

42. 469 A.2d 1201 (Conn. 1984).

43. *Id.* at 1210.

44. *Id.* at 1205.

45. 407 N.W.2d 832 (Wis. 1987).

46. *Id.* at 834–35.

47. *Fashion Valley Mall LLC v. NLRB*, 172 P.3d 742, 754 (2007); *see also* *United Bhd. of Carpenters & Joiners of Am. Local 848 v. NLRB*, 540 F.3d 957, 965 (9th Cir. 2008) (relying on California state law in holding that a shopping center could not restrict “messages critical of the mall or its tenants”).

stores, which is patently offensive to the landowner and a hard slap to the merchant's face.⁴⁸

Any landowner would also feel obliged to respond to controversial speech to distance himself from it and, in the case of offensive speech, to express disgust and opposition. The First Amendment protects not only speech, but the choice not to speak.⁴⁹ That right to remain silent becomes hollow if a landowner must make his property a platform for expression he finds offensive. In *Pacific Gas & Electric Co. v. Public Utilities Commission*,⁵⁰ the Supreme Court invalidated a state commission order compelling a privately owned utility company to include a third party's newsletter in its billing envelopes to customers, saying that the utility "may be forced either to appear to agree with [the views expressed in the third party's newsletter] or to respond."⁵¹

To be sure, the *PruneYard* Court observed that the owner of a shopping center "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."⁵² Such an "involuntary disclaimer"⁵³ is an intrusion, if a minimal one, on the right to remain silent. This intrusion is present even in a case like *PruneYard*, where the message was well received by shoppers and the owner had no substantive objection to the speech. But when the expression is offensive, odious, or inflammatory in content or form, passive dissociation would be neither a morally appropriate nor a commercially viable option for the owner. Such circumstances compel a more affirmative response from the owner, thereby intruding into his free speech autonomy.

Nor is a private landowner obliged to share the views of the general public, much less the opinions of those seeking access

48. See *Fashion Valley Mall*, 172 P.3d at 751–52.

49. See *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion) (stating that the First Amendment protects the choice of "what to leave unsaid"); see also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995) (holding that protected speech includes the private speaker's right "to shape its expression by speaking on one subject while remaining silent on another").

50. 475 U.S. 1 (1986) (plurality opinion).

51. *Id.* at 15.

52. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

53. Frederick W. Schoepflin, Comment, Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?, 64 WASH. L. REV. 133, 144 (1989).

to the property, regarding what expression is offensive. As a fundamental aspect of freedom, we each are at liberty to make our own judgments in that regard. In *Dale*, the United States Supreme Court emphasized that, as a basic premise of First Amendment rights, individuals and entities may reach their own conclusions without someone else dictating what are permissible viewpoints: "It is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."⁵⁴

Although a shopping center may not be a typical expressive entity,⁵⁵ the imposition of controversial and even extreme positions through the guise of diverting its commercial property for others' expressive use would effectively convert the owner into a political actor. The shopping center owner who is required to accommodate the expression of others would be forced to make judgments about "the graphic portrayal on a placard," "the strong language in a leaflet," or "the appropriateness of a costume or clothing," as well as "a host of content-based questions."⁵⁶ The private landowner thus would be conscripted into the role of public moderator among contending political or social advocates as well as sometime-commentator on controversial issues being expressed on the site. No citizen is obligated to accept such a "value-laden" assignment.⁵⁷

The First Amendment argument against coerced access to private property for expressive purposes by strangers has been weakened but not overwhelmed by the Supreme Court's 2006 decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*.⁵⁸ In *FAIR*,⁵⁹ the Court rejected the Free Speech Clause objections of a consortium of law schools and law faculties to

54. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651 (2000).

55. *But see Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 15 (1986) (upholding the right of a private utility not to be a platform for another's speech even though a publicly-owned utility is also not a typical expressive entity).

56. *See N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 792-93 (N.J. 1994) (Garibaldi, J., dissenting) (quoting from an appellate brief examples of problems that mall owners would face and arguing that "private-property owners should not be forced to decide those value-laden questions").

57. *See id.*

58. 547 U.S. 47 (2006).

59. *Id.* at 51.

the Solomon Amendment,⁶⁰ a federal statute that required institutions of higher education either to allow military recruiters equal access to campus facilities on the same terms as other employers, or to surrender certain federal funding. The Court unanimously agreed that requiring universities to open their campuses to military recruiters did not interfere with the rights of law schools to express their opposition to federal policies regarding homosexuals in the military.⁶¹

The *FAIR* Court distinguished compelled-speech cases such as *Hurley* and *Pacific Gas & Electric* on the basis that “the complaining speaker’s own message [in those cases] was affected by the speech it was forced to accommodate.”⁶² In response to the argument that allowing access to military recruiters may mean that law schools will be perceived as supporting military policies regarding homosexuals, the Court cited the *PruneYard* decision.⁶³ As described by the *FAIR* Court, when upholding a state requirement that a shopping center owner allow “certain expressive activities by others on its property,” the *PruneYard* opinion had “explained that there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was ‘not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view.’”⁶⁴ Likewise, the *FAIR* Court assured, law students would not likely attribute any speech by military recruiters to the law school.⁶⁵

A cursory read of *FAIR* and its positive citation of *PruneYard* seems to undermine the position that a private entity has a strong First Amendment claim when the government compels it to grant access to others. But *FAIR* does not eliminate the well established right not to be compelled to speak and to refuse to serve as an instrument for controversial political speech. *FAIR* does not dictate a single constitutional answer for all circumstances.

60. 10 U.S.C. § 983 (2006).

61. *FAIR*, 547 U.S. at 52 n.1, 71 (describing 10 U.S.C. § 654 (2006) as providing that “a person generally may not serve in the Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex”).

62. *Id.* at 63.

63. *Id.* at 65.

64. *Id.* (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980)).

65. *Id.*

Upon closer study, three factors are essential to understanding the *FAIR* decision: the military recruitment purpose and judicial deference to the military, the incidental and minimal expressive implications raised by ordering equal access for military recruiters, and the limited nature of the intrusion occasioned by those recruiters' transient presence on campus. So appreciated, the Court's rationale in *FAIR* leaves the door open, if not quite as widely as before, to reexamining the constitutional legitimacy of the government's conversion of private property into a venue for controversial speech by strangers. The military recruitment purpose behind the limited access to university campuses approved in *FAIR* was very different from the agenda for a general transformation of commercial property into a political stage that *PruneYard* presented. The Court perceived the employment interview activities in *FAIR* to have only an incidental expressive quality, in contrast with the primary and deliberate expressive nature of the speech for which the landowner was required to provide a platform in *PruneYard*. The scope and duration of mandated access also varies from *FAIR* to *PruneYard*, differences that concretely and significantly shape the extent of the intrusion on private landowner expressive rights. Let us examine each of these three factors in more detail.

First, in *FAIR*, requiring equal access as a condition of receiving federal funding allowed the armed forces to recruit on campus, not to engage generally in propaganda for military policies through a university platform. The Supreme Court introduced the First Amendment section of its opinion by emphasizing that "[t]he Constitution grants Congress the power to 'provide for the common Defence,' '[t]o raise and support Armies,' and '[t]o provide and maintain a Navy.'"⁶⁶ Although acknowledging First Amendment constraints, the Court insisted that the legislation's purpose remained important when "determining its constitutionality" because "'judicial defer-

66. *Id.* at 58 (quoting U.S. CONST. art. I, § 8, cls. 1, 12-13); see also John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 704 (2007) (noting that the *FAIR* Court "began its constitutional analysis by extolling the virtues of the military deference doctrine when Congress legislates pursuant to its constitutional power to raise and support armies").

ence . . . is at its apogee' when Congress legislates under its authority to raise and support armies."⁶⁷

The cornerstone of the *FAIR* decision is the constitutionally ratified and compelling public policy of raising armed forces and the Court's traditional deference on military matters. As commentators have noted, the *FAIR* Court "invoked the military deference doctrine as its first step in constitutional analysis"⁶⁸ and "deference to the military is a tidal wave in *FAIR*."⁶⁹ Throughout its analysis, the *FAIR* Court never lost sight of the specific purpose of limited access to campuses for military recruiters accomplished through the Solomon Amendment. As the Court explained, "[m]ilitary recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers."⁷⁰ As time passes, the *FAIR* decision likely will be appreciated as grounded in the military recruitment context, justified by the special rule of deference to the military,⁷¹ and reflecting the Court's resistance to the law

67. *FAIR*, 547 U.S. at 58 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

68. O'Connor, *supra* note 66, at 705.

69. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1119 (2008).

70. *FAIR*, 547 U.S. at 67; see also Andrew P. Morriss, *The Market for Legal Education & Freedom of Association: Why the "Solomon Amendment" is Constitutional and Law Schools Are Not Expressive Associations*, 14 WM. & MARY BILL RTS. J. 415, 459–60 (2005) (arguing that, without the Solomon Amendment, "the law schools' cartelization of legal education has resulted in reducing opportunities for students to interview with military recruiters").

71. Commentators have argued that the *FAIR* decision can best be reconciled with longstanding First Amendment doctrine established in the Court's other decisions by reading the *FAIR* opinion as having been written "in the shadow of the military deference doctrine." See Horwitz, *supra* note 69, at 1109, 1113 (noting also that "much of *FAIR*'s seemingly reasonable opinion conflicts with or unsettles current First Amendment doctrine"); see also Erwin Chemerinsky, *Why the Supreme Court was Wrong About the Solomon Amendment*, 1 DUKE J. CONST. L. & PUB. POL'Y 259, 261 (2006) (arguing "that the decision must be understood as part of the Supreme Court's historic—and misguided—deference to the military, especially in wartime"); cf. Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217, 233 (noting that an important part of the cultural backdrop to *FAIR* was "the needs of the military to recruit the best and brightest in a time of war and uncertainty about national security").

schools' concerted attempts "to make it difficult for their students to be recruited by the military."⁷²

The forced conversion of private property into a political forum for outsiders presented in *PruneYard* was not justified by a compelling government interest comparable to building the armed forces, much less a substantial government policy grounded in the very text of the Federal Constitution. Nor does the military deference doctrine, which set the framework for the constitutional analysis in *FAIR*,⁷³ have any application in the *PruneYard* setting.

Second, the *FAIR* Court emphasized that the case involved the conduct of allowing access to military recruiters on campus, only minimally affecting speech.⁷⁴ In summary, the Court stated that "[a]s a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."⁷⁵ In response to the expressed fears of the law school and faculty plaintiffs that their political opposition to military policies on homosexuals would be undermined by the presence of recruiters on campus, the Court said that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters."⁷⁶ Unlike the parade in *Hurley* or

72. See Marci Hamilton, *Is the Solomon Amendment Constitutional? The Supreme Court Looks at the Law that Prohibits Federal Aid If a School Refuses to Permit Military Recruiters on Campus*, FINDLAW'S WRIT, May 5, 2005, <http://writ.news.findlaw.com/hamilton/20050505.html> (arguing that the *FAIR* suit was a "political tactic," not a genuine First Amendment case, by "law schools and their liberal faculty members to try to undermine the policy [of the military on homosexuals]—and to make their point—[by] mak[ing] it difficult for their students to be recruited by the military"); see also Horwitz, *supra* note 69, at 1134 (suggesting that "at least some of the law school plaintiffs in *FAIR*" were motivated "more by the desire to oust the military from campus than by any serious consideration of their academic missions as law schools").

73. See Horwitz, *supra* note 69, at 1118 (describing the "deference to the military" claim as "the most crucial to the Court's opinion" in *FAIR*).

74. See Vikram Amar & Alan Brownstein, *A Different Take on the Supreme Court's Recent Decision Concerning Law Schools' First Amendment Rights and Campus Military Recruitment*, FINDLAW'S WRIT, Mar. 17, 2006, http://writ.news.findlaw.com/commentary/20060317_brownstein.html (noting that "the speech dimension of recruitment is often incidental to the non-speech hiring objective of the government").

75. *FAIR*, 547 U.S. at 60.

76. *Id.* at 65.

the newsletter in *Pacific Gas & Electric*, “host[ing] interviews and recruiting receptions” is not “inherently expressive.”⁷⁷

Moreover, the schools’ acceptance of many other diverse employers with a wide variety of viewpoints undermines the apprehension that students would attribute any statements by military recruiters to the law schools. Military recruiters are entitled to no greater access than any other employer.⁷⁸ The Solomon Amendment requires granting access to government agents for the distinct purpose of military recruiting, in the same manner as other employers gain access to university facilities to seek employees. The government cannot invade the university setting to promote its military policies, and any governmental speech that has such an effect is incidental to military recruiting.

Although any statements by military recruiters touching on political matters would be incidental and subsidiary to the non-expressive conduct of interviewing students, inviting outsiders to engage in speech on political matters was the very point of the coerced access to private property in *PruneYard*. The “expressive quality”⁷⁹ of political solicitation, literature distribution, and speech allowed within the conscripted venue of the mall is indisputable. The quintessential purpose of the state-mandated right of access by trespassers to private property in *PruneYard* was to gain a forum for expression of political and other ideas. That fact connects the *PruneYard* scenario directly to First Amendment principles about compelled speech and association, in a manner that was wholly missing in *FAIR*.

Third, in *FAIR*, “the recruiters’ presence is only temporary and episodic.”⁸⁰ Access to campus by any employer, military or otherwise, tends to be infrequent and sporadic, usually amounting to nothing more than a single visit each year. General school policies that restrict the use of facilities by on-campus interviewers further confine that access. In *PruneYard*, by contrast, access to the private property as a political forum is perpetual and

77. *Id.* at 63–64.

78. See Hamilton, *supra* note 72 (describing the Solomon Amendment as “just requir[ing] the academy to give the military a seat at the table—among all the other legal employers who may visit, including, say, the ACLU—to meet with students who are interested in interviewing with them”).

79. *FAIR*, 547 U.S. at 64 (stating that “recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper”).

80. Carpenter, *supra* note 71, at 223.

constant. Moreover, through the Solomon Amendment at issue in *FAIR*, "Congress required only that law schools that provide some employer services do so on an equal basis for military recruiters. . . . Law schools are under no obligation to provide any employer with access."⁸¹ By contrast, in *PruneYard*, the shopping center owner was not simply obliged to afford equal treatment to all those who entered the premises. The landowner was forced to allow special access to political activists who wished to convert his place of business into a political forum, even if he had uniformly and non-discriminatorily barred all political activity and solicitations.

Under the California approach tolerated in *PruneYard*, a landowner is compelled to provide the theatrical stage for a rotating cast of outside political actors performing an interminable series of dramatic scenes. The nature of the compelled access and the regular dedication of the property to political speech make it much more likely that the public will hold the landowner accountable for the viewpoints of the organizations occupying the property.

To appreciate fully the crucial differences between *FAIR* and *PruneYard* with respect to First Amendment principles, consider this variation on the *FAIR* scenario. Suppose Congress were not only to mandate that military recruiters have equal access to university campuses, but also to require the university to provide equal time to a military spokesperson whenever a speaker on campus criticized military policies. Inviting such a response on campus may be a commendable example of academic freedom. A private university remains entitled, however, to use speaking engagements to promote a particular mission, and even a public university may allocate speaking invitations according to its priorities.

If Congress demanded that institutions of higher education grant a privileged right of access to a government mouthpiece whenever other speakers challenged public policies, even as a condition to federal funding, it is inconceivable that the Supreme Court would turn away free speech objections as readily as in *FAIR*. By the same token, compelling a private landowner to provide a perpetual forum for the expression of political

81. Morriss, *supra* note 70, at 437.

ideas is difficult to square with modern appreciation for robust rights of speech and association.

III. THE COMPELLED DEDICATION OF PRIVATE PROPERTY
TO USE AS A PUBLIC FREE SPEECH EASEMENT
CONSTITUTES A TAKING OF PROPERTY

The two brightest and most securely fixed stars in the often cloudy firmament of the United States Supreme Court's "takings" jurisprudence are the principles that the *right to exclude* others is a fundamental element of the property right, the deprivation of which is a serious trespass upon a defining feature of private property, and that *physical invasion* of private property by the government or by others with the express leave of the government constitutes a taking of property by the government, for which the Fifth and Fourteenth Amendments of the Constitution require just compensation.⁸²

First, as Professor Richard Epstein has explained, "[t]he notion of exclusive possession" of property is "implicit in the basic conception of private property."⁸³ The character of private property depends upon the owner's power of sole possession. In *Kaiser Aetna v. United States*,⁸⁴ the Supreme Court affirmed that "the right to exclude" had universally been recognized as a "fundamental element of the property right."⁸⁵ In *Kaiser*, the Court held that a government-ordered right of public access to a privately owned marina that had been improved to create a link to navigable waters constituted a taking.⁸⁶ In so holding, the Court confirmed "the right to exclude others" as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."⁸⁷ In *Loretto v. Teleprompter*

82. See generally David L. Callies & J. David Breemer, *The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39, 39–51 (2000).

83. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 63 (1985) [hereinafter EPSTEIN, *TAKINGS*]; see also Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 22 (1997) [hereinafter Epstein, *Takings, Exclusivity and Speech*] ("The normal rules of private law treat the right to exclude as an indispensable element of property.").

84. 444 U.S. 164 (1979).

85. *Id.* at 179–80.

86. *Id.* at 170–80.

87. *Id.* at 176; accord *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

Manhattan CATV Corp.,⁸⁸ the Court likewise characterized the “power to exclude” as having “traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”⁸⁹

Second, as reiterated in *Loretto*, the Supreme Court has “emphasized that physical *invasion* cases are special” and “that any permanent physical *occupation* is a taking.”⁹⁰ In holding that government-authorized placement of television cables and a cable box on the rooftop of a privately owned multi-unit apartment building constituted a taking, the Court added that “an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner’s property.”⁹¹ In both *Loretto* and *Kaiser*,⁹² the Court recognized that the government’s grant to other private parties of access to private property necessarily is attributable to the government and demands compensation.⁹³ In *Lucas v. South Carolina Coastal Council*, which was not itself a physical invasion case,⁹⁴ the Court summarized its decisions as holding that, “[i]n general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.”⁹⁵

These binary stellar principles of takings jurisprudence are well illustrated by the easement cases, which are especially pertinent to the present subject of government conversion of private property into a forum for speech by others. In *Nollan v. California Coastal Commission*,⁹⁶ the Court held that a government demand for a permanent passage across private beachfront property to allow others to access public beaches consti-

88. 458 U.S. 419 (1982).

89. *Id.* at 435.

90. *Id.* at 432.

91. *Id.* at 436 (emphasis in original).

92. *Kaiser*, 444 U.S. at 180 (characterizing the imposition of a right of public access as “an actual physical invasion of the privately owned marina”).

93. See Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 301 (1992) (observing that “the Court has been quite willing to find a taking where the effect of the government regulation is not just to restrict the owner’s control over her own property, but to transfer the right to use the property to a third party”).

94. 505 U.S. 1003 (1992) (involving a regulation barring construction of any permanent structures on beachfront property).

95. *Id.* at 1015.

96. 483 U.S. 825 (1987).

tuted a compensable taking.⁹⁷ Given that “the appropriation of a public easement across a landowner’s premises” would plainly constitute a compensable taking,⁹⁸ the city’s demand for the easement as a condition for issuing a building permit likewise was a taking because the condition did not relate to the purpose for the building permit requirement.⁹⁹ If the state wished to provide “a continuous strip of publicly accessible beach along the coast,” it was obliged to pay for it.¹⁰⁰

In *Dolan v. City of Tigard*,¹⁰¹ the Court held that a city’s demand that a private hardware store owner create a public greenway and pathway in exchange for a permit to expand his business and build a parking lot constituted a compensable taking.¹⁰² Once again, the Court emphasized “the loss of [the owner’s] ability to exclude others,”¹⁰³ which the Court characterized as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”¹⁰⁴

Whatever the vagaries and uncertainties of takings law in general, the Supreme Court has consistently emphasized the vital power to exclude and the protection against physical invasion. The notable exception, of course, is the Court’s 1980 decision in *PruneYard*.¹⁰⁵ The *PruneYard* decision rested uneasily within the Court’s case law from the beginning, coming just six months after the Court in *Kaiser* had insisted upon compensation for governmentally compelled access to a private marina. Eight years earlier, in *Lloyd Corp. v. Tanner*,¹⁰⁶ the Court had characterized the argument for a First Amendment right of expression at a shopping center as a request for “dedication of

97. *Id.* at 838–42; see also *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 24 (1990) (O’Connor, J., concurring) (emphasizing in the context of converting a railroad right-of-way to public biking trails that appropriation of a public easement on private property amounts to a compensable taking).

98. *Nollan*, 483 U.S. at 831.

99. *Id.* at 834–41.

100. *Id.* at 841–42.

101. 512 U.S. 374 (1994).

102. See *id.* at 383–96.

103. *Id.* at 393.

104. *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

105. See Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 141 n.55 (2000) (saying that, in *PruneYard*, the Supreme Court “equivocated on the strength of its convictions” about the fundamental nature of the right to exclude as an element of the property right).

106. 407 U.S. 551 (1972).

private property to public use,"¹⁰⁷ language that rings with takings connotation.

Furthermore, the dubious continuing validity of *PruneYard* becomes starkly apparent when set beside subsequent decisions. The Supreme Court has significantly expanded its interpretation of property rights under the Fifth Amendment, broadening the circumstances under which the public owes compensation for intrusions on private property.¹⁰⁸

In the light of the principles established over the past quarter-century, an invasion sanctioned by the coercive power of state government into the physical space of a shopping center fits the definition of a compensable taking to a "T." As in *Kaiser*, the "imposition of [a free speech] servitude . . . will result in an actual physical invasion" of the private shopping center by the individuals entering the enclosure to express political or social opinions.¹⁰⁹ As in *Loretto*, "a stranger directly invades and occupies the [shopping] owner's property"¹¹⁰ to accost customers and to deliver speeches or distribute leaflets. However "minor" some may see the coerced grant of expressive access, it constitutes a "permanent physical occupation of an owner's property."¹¹¹ As explained in *Lucas*, "no matter how minute the intrusion" of the trespasser may appear or "how weighty the public purpose," compensation is required.¹¹² As in *Nollan*, "the appropriation of a public easement across a landowner's premises"¹¹³ is a taking for which compensation is due. These principles should apply equally when the public purpose is the expansion of political or social advocacy.

107. *Id.* at 569.

108. See Jonathan L. Swichar, Recent Decision, *New Jersey Supreme Court Opens Shopping Center Doors to Increased First Amendment Activity—New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 69 TEMP. L. REV. 963, 983 (1996) (arguing that more recent Supreme Court decisions have "expanded the definition of an unconstitutional taking under the Fifth Amendment," unlike *PruneYard*); see also Schoepflin, *supra* note 53, at 148 (citing recent Supreme Court decisions as holding "that a state must provide compensation when it either requires owners to allow permanent physical occupation of property or imposes a permanent right of public access to the property" (citations omitted)).

109. See *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

110. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (emphasis in original).

111. *Id.* at 421.

112. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

113. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987).

To be sure, while formulating a categorical approach toward physical invasions of property, the Supreme Court has paused from time to time to make perfunctory and increasingly strained efforts to distinguish *PruneYard* from more recent cases involving governmentally mandated grants of easements on private property. For example, the Court suggested in *Loretto* that *PruneYard* involved only a “temporary physical invasion,”¹¹⁴ presumably because the trespassing speaker was not a permanent fixture in the shopping center. But the *Loretto* Court’s own description of precedent contradicted that distinction when it cited the scenario presented in *United States v. Causby* of “frequent flights” by government military aircraft low to the ground over a chicken farm as an example of “a permanent physical occupation.”¹¹⁵ In *Causby*, no single aircraft eternally hovered over the property, nor did flyovers occur at every minute of the day. Likewise, in *Kaiser*, specific individuals taking advantage of the government grant of public access to the marina undoubtedly engaged in a “temporary occupation” and did not remain permanently moored in the privately owned pond.

In cases like *Causby* and *Kaiser*, as well as *PruneYard*, the government’s occupation of private property by conferring an ongoing entitlement to public access was permanent. In any event, the *Loretto* Court’s proffered distinction of *PruneYard* became untenable with *Nollan*, which found a taking “where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.”¹¹⁶

In a cursory (and perhaps half-hearted) footnote, the *Nollan* opinion also attempted to distinguish *PruneYard*, observing that the shopping center owner there “had already opened his property to the general public,” and that “permanent access

114. *Loretto*, 458 U.S. at 434.

115. *Id.* at 430–31 (citing *United States v. Causby*, 328 U.S. 256, 261, 264–65 (1946)).

116. *Nollan*, 483 U.S. at 832; see also Alan E. Brownstein & Stephen M. Hankins, Pruning PruneYard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services, 24 U.C. DAVIS L. REV. 1073, 1161 (1991) (acknowledging that “*Nollan*’s language substantially expands the definition of a permanent physical occupation past the narrow parameters” of *Loretto*).

was not required" in *PruneYard*.¹¹⁷ The first point is unpersuasive, and the second is simply mistaken.

Taking the *Nollan* footnote points in reverse order, the commandeered access to the shopping center in *PruneYard* was indeed permanent in the crucial sense that it occurred continuously and did not expire. Admittedly, the shopping center owner could adopt certain time, place, and manner restrictions on outside speakers, which the *Dolan* opinion considered crucial to the holding in *PruneYard*.¹¹⁸ The mall's ability to close its doors at night, prohibit other disruptive behavior, and limit the number of outside speakers at any one time hardly makes the free speech easement any less interminable.

The rulings in *Nollan* and *Dolan* surely would not have turned the other way had the government restricted the easements to daytime use, limited the noise produced, or capped the number of public users at any one time.¹¹⁹ Indeed, the right of access in *Nollan* was not "continuous in literal terms," because "[p]art of the year the easement would be under water because the mean high tide mark reaches the sea wall and the width of the easement collapses into nonexistence during that period."¹²⁰ In both *Nollan* and *Dolan*, the continuous and enduring nature of the governmentally imposed physical occupation made all the difference. There is thus no relevant distinction from the facts in *PruneYard*.¹²¹

117. *Nollan*, 483 U.S. at 832 n.1.

118. See *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994).

119. See Brownstein & Hankins, *supra* note 116, at 1162 (acknowledging that, "standing alone," a distinction based upon the non-specificity or flexibility of the access granted in *PruneYard* is doubtful as "it suggests that a Coastal Commission order requiring a beach front lot owner to generally open her property to public use subject to reasonable time, place, and manner restrictions would not be a taking, although that kind of invasion would be far more burdensome to the owner than the limited easement at issue in *Nollan*").

120. *Id.* at 1161 (citing *Nollan*, 483 U.S. at 853–54 (Brennan, J., dissenting) (citing factual record)).

121. See Epstein, *Takings, Exclusivity and Speech*, *supra* note 83, at 36 ("*PruneYard* strips away the exclusive right of use and converts a private shopping center into a limited commons.>").

As to the first footnote point in *Nollan*,¹²² a merchant's invitation to the public does not amount to a surrender of the essential right to exclude, but rather "creates only a license which may be revoked."¹²³ As Justice White said in his dissent in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,¹²⁴ which the Supreme Court subsequently cited with approval when it reversed course and rejected free speech rights on private property in *Lloyd Corp.*,¹²⁵ "[t]he public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold."¹²⁶

The salience of the limited nature of this license granted to the public, and its essential link to the commercial purpose of the owner, requires an appreciation of the nature of a shopping center. A shopping mall exists only through the efforts of the entrepreneur who formulates the idea, the architect who drafts the plans, and a construction company that employs workers and hires subcontractors to build the facility. The architect, the contractors, and the workers receive payment for their efforts, not from the government, but from the developer who creates the mall. The developer or owner bears that financial burden as an investment in the mall's future commercial success, and not to contribute the fruit of his labors to support the political protests or social movements of others. To convert the investment and labor of the owners, merchants, and employees to the personal use of those who seek a political platform, but who have contributed nothing to the center's creation and commercial survival, constitutes an expropriation of private property.

Moreover, if a shopping center is pressed into service as a public forum, the owner would have to assume the additional burdens of providing security for political protests, allocating limited space to competing special interest groups, suffering

122. See Brownstein & Hankins, *supra* note 116, at 1162 (arguing that this second distinguishing consideration is more compelling because "[i]t is difficult to argue that a shopping center owner has been dispossessed by a permanent occupation when a few leafletters are permitted to mingle with shoppers and browsers").

123. *State v. Wicklund*, 589 N.W.2d 793, 802 (Minn. 1999); see also EPSTEIN, TAKINGS, *supra* note 83, at 65 ("Whatever the status of others [who were invited to the property], there is no invitation to these plaintiffs [who wish to engage in political advocacy at the mall].").

124. 391 U.S. 308, 337–40 (1968) (White, J., dissenting).

125. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 565 (1972).

126. *Logan Valley*, 391 U.S. at 338 (White, J., dissenting).

potential liability if patrons are injured during a disruptive demonstration, and clarifying that the owner and merchants do not support extremist viewpoints,¹²⁷ all at the risk of offended customers and lost sales. The owner would not only lose the essential right to exclude others, but would also suffer the further insult and injury of bearing the expenses and potential liabilities occasioned by that trespass.

Nor does the Supreme Court's decision in *FAIR* reflect any retreat from the Court's precedents requiring compensation when the government imposes an easement.¹²⁸ The plaintiffs in *FAIR*—many of whom were public rather than private institutions¹²⁹—never suggested that the brief and sporadic entry of military recruiters on campus amounted to a taking of private property. The Court thus did not address any Fifth Amendment implications. In any event, in *FAIR*, the “occupancy” of an interview room for a day or two by military recruiters was so “transient and relatively inconsequential” that, at most, it might constitute a common-law trespass but likely would not amount to a compensable taking by the government.¹³⁰ From the perspective of Fifth Amendment doctrine, the government's permanent imposition of an easement on private property to provide a regular venue for political speech moves the analysis to an entirely different level.

In sum, the government's permanent dedication of private property to the expressive use of third parties constitutes a taking. The *PruneYard* opinion did not really deny this fact. In-

127. See *supra* notes 42–53 and accompanying text.

128. For a discussion of *FAIR*'s implications for the First Amendment rights of private landowners, see *supra* notes 58–81 and accompanying text.

129. SolomonResponse.org, *FAIR Participating Schools*, http://www.law.georgetown.edu/solomon/participating_schools.html (last visited July 9, 2008).

130. See *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (explaining that “those governmental activities which involve an occupancy that is transient and relatively inconsequential” would “properly . . . be viewed as no more than a common law trespass *quare clausum fregit*,” rather than a compensable taking which would involve a more substantial physical occupancy of private property); see also S. Jay Plager, *Money and Power: Observations on the Jurisdiction of the U.S. Court of Federal Claims*, 17 FED. CIR. B.J. 371, 376 (2008) (explaining the difference between a noncompensable common-law trespass by a government agent and a compensable taking under the Fifth Amendment by drawing “a distinction between the government truck that one day parks on your land while the driver eats his lunch, and the regular parking of trucks overnight because the spot was convenient”).

deed, the *PruneYard* Court acknowledged that “there has literally been a ‘taking’ of that right” to exclude others,¹³¹ but then justified the state-mandated invasion with the *non sequitur*¹³² that the taking did not “unreasonably impair the value or use of their property as a shopping center.”¹³³ As shown above, subsequent precedent has toppled the central pillar of *PruneYard* by upsetting the holding that the owners had failed to prove “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.’”¹³⁴ That an ongoing physical taking may be minute in size, minimal in appearance, or negligible in harm no longer immunizes the government from its constitutional duty of just compensation.

As the Supreme Court recently stated in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,¹³⁵ “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a *categorical* duty to compensate the former owner.”¹³⁶ Accordingly, case law has long since superseded the odd case out of *PruneYard*. Today, the governmentally encouraged physical invasion by strangers onto private property for speech, distribution of flyers, or any other purpose that the owner does not authorize is a classic example of a *per se* taking.¹³⁷

131. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980).

132. See EPSTEIN, TAKINGS, *supra* note 83, at 65 (explaining that, with respect to *PruneYard*, “any demonstration about the negligible impairment of the appellants’ rights is wholly beside the point,” because “[t]he entire matter of ‘investment backed expectations’ does not go to the taking issue as such; it only goes to the issue of reliance damages, when, as, and if relevant”).

133. *PruneYard*, 447 U.S. at 83. Now that California mandates access even to those who wish to directly picket particular stores or call for boycotts of merchants in the mall, see *supra* notes 47–48 and accompanying text, we have yet another reason to question the *PruneYard* Court’s suggestion that this state-sanctioned behavior does not “unreasonably impair the value or use of their property as a shopping center.”

134. *PruneYard*, 447 U.S. at 84.

135. 535 U.S. 302 (2002).

136. *Id.* at 322 (emphasis added).

137. See *id.* (explaining that the jurisprudence of “physical takings . . . for the most part, involves the straightforward application of *per se* rules”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (declaring physical invasions of property to be one of those “categories” in which a taking is declared and compensation mandated “without case-specific inquiry into the public interest advanced in support of the restraint”).

CONCLUSION

By turning aside federal free speech and taking challenges to California's innovative assignment of constitutional duties to private property owners for the benefit of strangers in *PruneYard*, the United States Supreme Court relaxed the fundamental constitutional guarantees of expressive autonomy and private property against governmental invasion. Even then, the Supreme Court's *PruneYard* ruling was narrower and more tightly bound to the factual circumstances of that case than is often recognized.

From the beginning of the jurisprudential journey three decades ago, a state court's coerced appropriation of one person's private property for the expressive use of another private person approached the outer parameters of legitimate governmental interference with federal free speech and property rights. Given the Supreme Court's increased emphasis on speaker autonomy and freedom of association in recent years, we should expect a greater recognition of the intrusion occasioned by forcing private persons to make their property a stage for political theater by outside actors. Even more clearly, the Supreme Court's doctrinal invigoration of property rights further erodes *PruneYard*. A state court declaration of a permanent easement on private property for third-party political speech is the exercise of eminent domain for which the state must pay. A right to trespass onto the land of another in the name of speech is nothing less than a taking of private property by another name.