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PRUNEYARD SHOPPING CENTER v. ROBINS:
PAST, PRESENT AND FUTURE

LAWRENCE M. COHEN*

The United States Supreme Court's decision last term in *PruneYard Shopping Center v. Robins*¹ represents the latest tack in the zigzag path taken by the Court in seeking to reconcile conflicting free speech and private property claims. Since 1968, in numerous varied situations,² the Court has sought to chart this heretofore largely unexplored area. Unfortunately, despite this repeated examination, the waters remain murky and the future course far from certain. To explore both the wisdom of the new direction now suggested by *PruneYard*, and the potential resolution of the questions left unanswered by that opinion, this article will first examine *PruneYard's* past and present.

PRUNEYARD'S PAST: BRAVE NEW WORLDS

Food Employees Local 590 v. Logan Valley Plaza, Inc.

In 1968, after a silence of more than twenty years,³ the Court again addressed the question of whether private property may, for first amendment purposes, be considered the same as public property. Re-entering these troubled seas in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,⁴ the Court recognized that the nation was doing business at a new location.⁵ Retail establishments had been transformed from individual urban free-standing stores into clusters of stores dis-

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1. 447 U.S. 74 (1980).

2. See, e.g., *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Taggart v. Weinacker's Inc.*, 397 U.S. 223 (1970); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978); *Village of Schaumburg v. Citizens for a Better Environment*, 445 U.S. 972 (1980); *Carey v. Brown*, 447 U.S. 455 (1980).

3. Although the issue had arisen under the National Labor Relations Act, 29 U.S.C. §§ 141-169 (see, e.g., *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)), the last previous occasion that the Court had reached the constitutional issue was in *Marsh v. Alabama*, 326 U.S. 501 (1946).

4. 391 U.S. 308 (1968).

5. *Id.* at 324.

persed in many different configurations⁶ over a broad geographic area. Manufacturing facilities had similarly emigrated from the cities to suburban industrial parks, while many service operations had moved into multi-story office complexes.⁷

Radical alterations had also affected those groups who desired to deliver a message to the customers, employees or owners of such businesses. Those groups had expanded to include not only the "workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies" noted in *Logan Valley*,⁸ but those seeking to propagate an infinite variety of other political, social, religious, commercial, charitable and economic ideas.⁹ These groups encountered a serious logistical problem: they had to overcome the *cordon sanitaire* of parking lots, open areas and lobbies surrounding the object of their proposed communication. If private property rights prevailed over first amendment rights in this contested space, free communication would be greatly impeded and the impact of the desired message would be seriously diluted. The result was a new attack on the bastions of private property. The initial skirmish was *Logan Valley*.

6. These configurations may all be commonly referred to as "shopping centers"; that term can be "applied to any number and variety of merchandising and service operations . . . because there is no legally acceptable definition of the phrase 'shopping center.'" *Freeman v. Retail Clerks Local 1207*, 45 L.R.R.M. 2334, 2337 (Wash. Sup. Ct. 1959), *rev'd on pre-emption grounds*, 58 Wash. 2d 426, 363 P.2d 803 (1961). Shopping centers have ranged, for example, from the small strip center involved in *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970), a single retail store containing a supermarket and a small drug department, all owned and operated by the same company, with adjacent parking spaces for two rows of automobiles, to the large regional center involved in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), which embraced approximately 50 acres, accommodated more than 1000 automobiles and had a perimeter of almost one and one-half miles.

7. There was also a corresponding increase in the variety of public forums which similarly became the situs for the exercise of first amendment activities. *See, e.g.*, *Brown v. Glines*, 444 U.S. 348 (1980) (military base); *Jones v. North Carolina Prison Labor Union, Inc.*, 433 U.S. 119 (1977) (prison); *City of Madison School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (high school classroom); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (public streets); *Knights of the Ku Klux Klan v. East Baton Rouge School Bd.*, 578 F.2d 1122 (5th Cir. 1978) (school gymnasium); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (state capitol grounds); *Wright v. Chief of Transit Police*, 558 F.2d 67 (2d Cir. 1977) (subway system); *Sellers v. Regents of the Univ. of California*, 432 F.2d 493 (9th Cir. 1970) (university building); *Women Strike for Peace v. Hickel*, 420 F.2d 597 (D.C. Cir. 1969) (national park); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968) (university football field); *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir. 1968) (bus terminal).

8. 391 U.S. at 324.

9. *See, e.g.*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (high school students seeking support for their opposition to a United Nations resolution); *Village of Schaumburg v. Citizens for a Better Environment*, 445 U.S. 972 (1980) (environmental organization); *Brown v. Glines*, 444 U.S. 348 (1980) (serviceman protesting the Air Force's grooming standards); *Jones v. North Carolina Prison Union*, 433 U.S. 119 (1977) (inmates soliciting membership in their labor union); *Greer v. Spock*, 424 U.S. 828 (1976) (political candidates).

The confronting parties in *Logan Valley* were a union protesting nonunion wages and the object of that protest, a supermarket located in a small shopping center.¹⁰ After the union commenced area standards protest picketing on the shopping center's property, the owners of the center and the supermarket obtained a state court injunction, subsequently affirmed by the Pennsylvania Supreme Court, enjoining the picketing as a trespass.¹¹

The United States Supreme Court could have resolved the conflict by deciding either that the case was within the exclusive jurisdiction of the National Labor Relations Act¹² or, as advocated by Justice Harlan, that since this determination was precluded because of the union's failure to argue pre-emption in the lower courts, the case was simply "not an appropriate one for [the] Court to decide."¹³ Instead, the Court embarked on what was to be an eight-year odyssey into an uncharted area of constitutional rights. Justice Marshall, on behalf of five members of the Court, concluded that the situs at issue was essentially indistinguishable for first amendment purposes from the company town in *Marsh v. Alabama*;¹⁴ that because the *Logan Valley* shopping center was generally open to the public and functioned the same as the *Marsh* company town business district, the state could not exclude "those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."¹⁵ The lower court's restriction of the pickets to a location outside the shopping center was held to impermissibly "substantially hinder" communication of the union's message, particularly in the absence of any showing that the picketing "was significantly interfering with the use to which the mall property was being put by both respondents and the general

10. Although the Court described Logan Valley Plaza as a "large . . . shopping center complex," at the time the critical events in the case occurred only two tenants had moved into the center: the supermarket (Weis Markets) and a Sears, Roebuck & Co. store. 391 U.S. at 310.

11. *Id.* at 313.

12. 29 U.S.C. §§ 151-169 (1976) [hereinafter referred to as the Labor Act]. The majority opinion observed that, while the petitioners had made such an argument and had also contended that their picketing was protected by section 7 of the Labor Act, 29 U.S.C. § 157 (1976), "[b]ecause of our disposition of the case, we do not reach either contention." 391 U.S. at 309 n.1. Justice Black, dissenting, similarly did not reach any issue under the Labor Act. *Id.* at 329 n.3. The Court's refusal to initially address the pre-emption question, before determining whether the picketing was protected by the first amendment, was criticized by Justice Harlan who correctly prophesied that not only would a pre-emption resolution "avoid interpretation of the Constitution itself . . . [it] would also assure that the Court does not itself disrupt the statutory scheme of labor law established by the Congress . . ." *Id.* at 333 (Harlan, J., dissenting).

13. 391 U.S. at 336 (Harlan, J., dissenting).

14. 326 U.S. 501 (1946).

15. 391 U.S. at 319-20.

public."¹⁶ In contrast to "a situation involving a person's home,"¹⁷ the majority found that "no meaningful claim to protection of a right of privacy can be advanced" nor could the property owners make "any significant claim to protection of the normal business operation." Accordingly, the conflict was reduced to a clash between first amendment rights and the right of "naked title," the latter providing no more support for the property owners in *Logan Valley* than it did for the owners of the company town in *Marsh*.¹⁸

The majority's reliance on *Marsh* was sharply criticized by the author of that opinion, Justice Black. In a vigorous dissent, he argued that, in the absence of the *Marsh* factual situation where the property involved had "taken on *all* the attributes of a town," there was "nothing in *Marsh* which . . . [permits] the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it. . . . To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country."¹⁹ In a separate dissent, Justice White predicted two far reaching ramifications of the majority's views: first, that the *Marsh* "business district" rationale could also be used to "compel the shopping center to permit picketing on its property for other communicative purposes, whether the subject matter concerned a particular business establishment or not," and, second, that "it is not clear how the Court might draw a line between 'shopping centers' and other business establishments which have side-

16. *Id.* at 323. The interference referred to by the Court was that which traditionally has been invoked to permit regulation, albeit not prohibition, of union picketing, *i.e.*, mass picketing, the blocking of ingress or egress, and threats of or actual incidents of violence. The union in *Logan Valley* did not contest these portions of the injunction. *Id.* at 312 n.4, 323 n.13. See also *id.* at 326 (Douglas, J., concurring).

17. The "situation involving a person's home" has not, however, escaped controversy. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Court overturned an injunction prohibiting handbilling in the residential community in which an alleged "blockbuster" resided on the ground that it contravened the first amendment. Ordinances prohibiting certain door-to-door solicitation of contributions and the picketing of residences other than peaceful picketing of a place of employment involved in a labor dispute were recently held unconstitutional in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) and *Carey v. Brown*, 447 U.S. 455 (1980). See also the post-*PruneYard* decision of the California Court of Appeal in *Laguna Publishing Co. v. Golden West Publishing Corp.*, 80 Daily Journal D.A.R. 2513, 2515 (Cal. C.A. 4th, Sept. 4, 1980), holding that if the owners of a private residential community "admit a representative of a given category of activity for purposes of exercising the constitutional right of free speech [*e.g.*, an unsolicited, give-away commercial newspaper], then others of the same category [*e.g.*, distributions of other similar newspapers] cannot be excluded from the exercise of that same right."

18. 391 U.S. at 324-25.

19. *Id.* at 332-33 (Black, J., dissenting).

walks or parking on their own property.”²⁰

Both of Justice White’s concerns—the extension of *Logan Valley* to other private forums and to the communication of unrelated messages—were soon to be tested. The former issue was presented to the Court two years later in *Taggart v. Weinacker’s, Inc.*²¹ The situs of the union picketing there was a narrow sidewalk adjacent to what could only loosely be considered a “shopping center,”²² physical circumstances which led the state courts to conclude that the picketing could be enjoined as obstructive. Subsequently, however, the operation of the businesses changed and that fact, coupled with the “obscure record” and the small remaining “embers of controversy,” resulted in the Supreme Court dismissing the writ of certiorari as improvidently granted. Although the Court did not determine, therefore, whether there was a first amendment right to picket on the particular property at issue, it did suggest that there were at least some private physical surroundings where, notwithstanding that they were generally open to the public and functioned as business districts similar to the Logan Valley Plaza, the exercise of first amendment rights could nevertheless be prohibited.²³

Lloyd Corp. v. Tanner

Justice White’s second concern in *Logan Valley*, the applicability of that case to the situation where the message was unrelated to the shopping center or its tenants, came before the Court in *Lloyd Corp. v. Tanner*.²⁴ Lloyd Center was an extensive regional shopping center, vir-

20. *Id.* at 339 (White, J., dissenting).

21. 397 U.S. 223 (1970).

22. *See* note 6 *supra*.

23. 397 U.S. at 225. The Court added that had it addressed the first amendment legitimacy of the picketing in *Taggart*, that issue would have “come down to whether, in light of the physical circumstances of this narrow sidewalk at the store entrance, . . . [the picketing] ‘will unduly interfere with the normal use of the . . . property by other members of the public with an equal right of access to it.’ ” 397 U.S. at 225. Additionally, both the AFL-CIO, Brief as amicus curiae at 14, *Taggart v. Weinacker’s, Inc.*, 397 U.S. 223 (1970), as well as the NLRB, Brief as amicus curiae at 17, *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 223 (1970), conceded that picketing or handbilling *inside* the store would be properly enjoined.

Taggart also previewed the Labor Act pre-emption dispute, left unresolved in *Logan Valley*, *see* note 11 *supra*, that the Court later decided in *Sears, Roebuck and Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978). Justice Harlan again urged that the state courts should be foreclosed from enjoining the picketing under the pre-emption principles of *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). 397 U.S. at 229-31 (Harlan, J., concurring). Chief Justice Burger disagreed: “In my view any contention that the States are pre-empted in the circumstances is without merit. . . . Nothing in *San Diego Building Trades Council v. Garmon* . . . would warrant this Court to declare state-law trespass remedies to be ineffective . . . redress for illegal trespassory picketing.” *Id.* at 227-28 (Burger, C.J., concurring).

24. 407 U.S. 551 (1972).

tually the diametric opposite of the situs of the *Taggart* dispute.²⁵ In contrast to the union picketing directed at the *Logan Valley* and *Taggart* tenants, however, the handbilling involved in *Lloyd* concerned an unrelated subject, the Vietnam War. Nevertheless, the district court and the Ninth Circuit found *Logan Valley* controlling.

In a five-to-four opinion, a substantially reconstituted Supreme Court²⁶ reversed. Justice Powell's majority opinion, moreover, did not simply utilize the unrelated nature of the *Lloyd* message to differentiate *Logan Valley*. Instead, although the rationale of the majority could have been amply predicated upon either the absence of a relationship "between the purpose of the expressive activity and the business of the shopping center,"²⁷ or even upon the broader *Logan Valley* distinction that the pickets there "would have been deprived of *all* reasonable opportunity to convey the message . . . had they been denied access to the shopping center,"²⁸ the Court went considerably further. It interlaced its opinion with a skepticism as to the applicability, in any case, of the "business district—openness to the public" thesis of *Logan Valley*.²⁹ The Court recognized that the property owner's rights far ex-

25. See note 6 *supra*.

26. Only four of the six majority and concurring Justices in *Logan Valley* were still on the Court at the time of *Lloyd*. These Justices (Brennan, Marshall, Douglas and Stewart) constituted the *Lloyd* dissent. The *Lloyd* majority consisted of *Logan Valley* dissenter Justice White and four newly appointed Justices (Blackmun, Powell, Rehnquist and Chief Justice Burger). The dissent suggested that this "radical change" in the composition of the Court and the corollary displeasure of the new members with "*Logan Valley* itself" was responsible for the different result between *Logan Valley* and *Lloyd*. 407 U.S. at 584 (dissenting opinion). In addition, only eight months before certiorari was granted in *Lloyd*, but prior to the appointment of Justices Powell and Rehnquist, the Court had denied review of a virtually identical dispute. See *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971).

27. 407 U.S. at 564. The Court had previously commented that *Logan Valley* "was carefully phrased to limit its holding to the picketing involved, where the picketing was 'directly related in its purpose to the use to which the shopping center property was being put.'" *Id.* at 563, *citing Logan Valley*, 391 U.S. 308, 320 n.9 (1968). The *Lloyd* dissent would have avoided a decision on the unrelated message issue on the ground that, since *Lloyd Center* had already been opened to some first amendment activities, the respondents could not be denied a similar forum or, alternatively, if this question had to be resolved, then the balance between the conflicting interests "plainly must be struck in favor of speech." *Id.* at 577-83 (dissenting opinion).

28. *Id.* at 566 (emphasis added). Similarly, the Court observed that in *Logan Valley* "the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available." *Id.* at 563. The dissent conversely argued that the "only hope" and "only way [many persons] can express themselves" is "to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent." *Id.* at 580-81 (dissenting opinion). The dissent's position suffers from an internal inconsistency: if the criterion is indeed whether the private forum is the only reasonable situs available, then merely finding that it is "one such area" is insufficient.

29. The Court noted, for example, that the "business district" functional equivalent of public property language in *Logan Valley* was "unnecessary to the decision," 407 U.S. at 562, and that the "open to the public" [argument] would apply to most retail stores and service establishments

ceeded “naked title” and perhaps even reached constitutional proportions;³⁰ curtailed *Marsh* to its actual company town factual setting, as Justice Black had urged in *Logan Valley*;³¹ and concluded “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.”³² The dissenters were understandably concerned with whether the rationale of *Logan Valley* could survive this pervasive frontal attack.³³

Central Hardware Co. v. NLRB and Hudgens v. NLRB

The erosion of *Logan Valley*’s underpinnings occasioned by *Lloyd* was compounded by a second decision issued that same day, *Central Hardware Co. v. NLRB*.³⁴ This dispute involved union organizational activity on the private parking lot of a large free-standing retail store. After the organizers had been arrested for refusing to leave the premises, the union filed unfair labor practice charges which, the NLRB found and the Eighth Circuit concurred, were meritorious, not by reason of *Babcock & Wilcox*³⁵ Labor Act criteria but, rather, as a result of *Logan Valley* constitutional principles.

Again, the decision of the Supreme Court in *Central Hardware* could have been an easy one; all members of the Court agreed that the

across the country.” *Id.* at 565. In addition, to emphasize the point, Justice Powell directly repudiated the “open to the public” rationale:

Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The 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.

Id. at 569.

30. In the course of its opinion, the Court stated: “We granted certiorari to consider petitioner’s contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments.” *Id.* at 552-53. “It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.” *Id.* at 567. “[T]he Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected.” *Id.* at 570.

31. *Id.* at 561-62, 569 n.13.

32. *Id.* at 570.

33. *Id.* at 571, 584-85 (dissenting opinion).

34. 407 U.S. 539 (1972).

35. In *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1954), the Supreme Court held that an employer may validly post his property against nonemployees’ distribution of union literature if reasonable efforts by the union, through other available channels of communication, will enable it to reach the employees with its message, and if the employer’s notice or order does not discriminate against the union by allowing other literature distribution. *Id.* at 112.

Board should not have applied *Logan Valley*. The Court majority,³⁶ however, led as in *Lloyd* by Justice Powell, once more went further. *Logan Valley*'s holding was restricted to only that private property which had "assume[d] to some significant degree the functional attributes of public property devoted to public use"; permitting access in other situations was considered to constitute "an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments."³⁷

The final demise of *Logan Valley* occurred four years later in *Hudgens v. NLRB*.³⁸ The factual setting there was essentially that of *Logan Valley*: union picketing at a shopping center, albeit a shopping center of a considerably greater size.³⁹ *Hudgens*, like *Central Hardware*, came to the Supreme Court as a result of the threatened arrest of the pickets, the filing of an unfair labor practice charge and a subsequent finding of a violation of the Labor Act predicated, in part, on constitutional considerations.

The majority of the Court,⁴⁰ in remanding the case to the NLRB to be considered solely on statutory criteria, made it "clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case."⁴¹ Since there could not be a first amendment distinction based upon the content of speech, there could be no differentiation between related and unrelated messages. Accordingly, "if the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike."⁴² In retrospect, Justice Powell, joined by the Chief Justice, observed, "[t]he law in this area . . . has been less than

36. The composition of the majority was the same as that in *Lloyd* with the addition of Justice Stewart who had previously sided with the proponents of free speech. See note 26 *supra*.

37. 407 U.S. 547 (emphasis added).

38. 424 U.S. 507 (1976).

39. The shopping center involved in *Hudgens* consisted of a large building with an enclosed mall housing 60 retail stores surrounded by a parking area which accommodated 2,640 automobiles. *Id.* at 509.

40. Justice Stewart, who had taken a contrary position until he joined the majority in *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), wrote the majority opinion joined by the Chief Justice and Justices Blackmun, Powell and Rehnquist. Justice Powell and the Chief Justice also added a concurring opinion. Justice White, in a separate concurring opinion, did not agree that *Logan Valley* should be "inter[red]." Rather, he argued that *Logan Valley* could simply be distinguished on the dubious ground that the picketing in *Hudgens* was not "directly related" to the shopping center because the labor dispute had originated at another location of one of the center's tenants. *Id.* at 524-25 (White, J., concurring).

41. *Id.* at 518.

42. *Id.* at 520-21.

clear since *Logan Valley* analogized a shopping center to the 'company town' in *Marsh* . . . I now agree with Mr. Justice Black that the opinions in these cases cannot be harmonized in a principled way. . . . The Court's opinion today clarifies the confusion engendered by these cases by accepting Mr. Justice Black's reading of *Marsh* . . . this clarification of the law is desirable."⁴³

The Court had thus come full circle from *Logan Valley*. In a labor context, a trespassory access dispute was to be resolved by the NLRB utilizing traditional *Babcock & Wilcox* standards,⁴⁴ while in a similar nonlabor controversy, the first amendment did not require access to private property other than in the *Marsh* "economic anomaly of the past, 'the company town.'"⁴⁵ The assumption that the Court had finally ended its lengthy preoccupation with seeking a constitutional reconciliation of free speech and private property rights was soon to be revealed as a false hope. The "desirable clarification" of *Hudgens* was transformed into undesirable confusion by *PruneYard*.

PRUNEYARD'S PRESENT: ONCE MORE INTO THE FRAY

The Diamond v. Bland Decisions

While the forces of private property were slowly slaying the *Logan Valley* dragon in the United States Supreme Court, similar battles were simultaneously occurring at the state level. At first, the state courts were sharply divided on the issue,⁴⁶ but following *Lloyd*, they too ap-

43. *Id.* at 523-24 (Powell, J., and Burger, C.J., concurring).

44. See note 35 *supra*. The Labor Act pre-emption issue which had clouded *Logan Valley* and *Taggart*, see notes 12 & 23 *supra*, was decided by the Court in *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978). The Supreme Court there reversed a decision of the California Supreme Court which, on preemption grounds, had denied an injunction prohibiting trespassory union picketing. The Court held that, in effect, the Chief Justice's position in *Taggart*, see note 23 *supra*, was correct, *i.e.*, that the *Garmon* doctrine did not preclude a state from resolving the trespassory aspects of picketing notwithstanding that such conduct may have been either arguably prohibited or protected by the Labor Act. The "arguably prohibited" prong of *Garmon* was considered inapplicable because of the difference between the issue that would be resolved by the NLRB and that which would be determined by the state courts. The *Garmon* "arguably protected" test was also rejected primarily on the basis that, since the union could have tested the employer's right to exclude the pickets by filing unfair labor practice charges with the NLRB, its failure to invoke Board jurisdiction could not then be utilized to deprive the state courts of jurisdiction to entertain the employer's trespass action. *Id.* at 207-08. Still unresolved, however, was the question whether, assuming the union had promptly filed charges with the NLRB, the employer could nevertheless obtain an injunction prior to a determination that the charges lacked merit. *Cf. id.* at 209 (Blackmun, J., concurring) with *id.* at 213-14 (Powell, J., concurring). See also *May Dep't Stores v. Teamsters*, 64 Ill. 2d 153, 355 N.E.2d 7 (1976), where the Illinois Supreme Court sanctioned the issuance of an injunction against trespassory picketing notwithstanding pending union charges before the NLRB.

45. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 561 (1972).

46. *Cf., e.g., People v. Goduto*, 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied*, 368 U.S. 927

peared to recognize the pre-eminence of private property rights.⁴⁷ The zenith of this triumph took place in California, one of the earliest and strongest fortresses of trespassory free speech,⁴⁸ with the second decision of the California Supreme Court in *Diamond v. Bland*.⁴⁹ That court had previously ruled that there was a constitutional right to circulate initiative petitions and to engage in related conduct on private shopping center premises. The center, as a result, was enjoined in *Diamond I* from prohibiting the peaceful exercise of such first amendment activities.⁵⁰

In *Diamond II*, the court upheld the dissolution of that injunction. The intervening decision in *Lloyd* was found controlling: the court

(1961) (picketing on the private parking lot of a retail store enjoined); *Hood v. Stafford*, 213 Tenn. 684, 378 S.W.2d 766 (1964) (statute prohibiting entering a business or standing outside it for the purpose of enticing anyone therefrom enforced against picketing on private property); *Moreland Corp. v. Retail Store Employees Local 444*, 16 Wis. 2d 499, 114 N.W.2d 876 (1962) (injunction issued prohibiting picketing on the private property of a shopping center) *with, e.g.*, *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers*, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964) (injunction denied on free speech grounds against picketing on the property of a shopping center); *State v. Williams*, 37 Labor Cas. ¶ 65,708 (Md. Crim. Ct., 1959) (trespass statute cannot be applied to picketing on a "quasi-public" shopping center); *Amalgamated Clothing Workers v. Wonderland Shopping Center*, 370 Mich. 547, 122 N.W.2d 785 (1963) (Michigan Supreme Court divides equally on whether there is a constitutional right to handbill on shopping center property); *State v. Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968) (*per curiam* decision that *Logan Valley* precludes application of criminal trespass statute to political activity on a shopping center); *and Sutherland v. Southcenter Shopping Center*, 3 Wash. App. 833, 478 P.2d 792 (1971) (injunction issued to allow environmental organizations to solicit initiative petition signatures in shopping centers).

47. *See, e.g.*, *Lenrich Assoc. v. Heydra*, 264 Or. 122, 504 P.2d 112 (1972) (plurality opinion finds *Lloyd* to be based on the constitutional rights of the property owner and bars Krishna demonstrations on shopping center premises; *Lloyd* is found "controlling," *id.* at 129, 504 P.2d at 116); *Homart Dev. Co. v. Fein*, 110 R.I. 372, 293 A.2d 493 (1972) (shopping center granted injunction prohibiting the solicitation on its premises of signatures on a nominating petition; *Lloyd* is deemed "dispositive," *id.* at 374 n.1, 293 A.2d at 494 n.1); *State v. Marley*, 54 Hawaii 450, 509 P.2d 1095 (1973) (defendants convicted of criminal trespass for engaging in antiwar protests at the private offices of the Honeywell Corporation; *Lloyd* is held to "definitively dispose" of the contention that the trespass statute was unconstitutionally applied, *id.* at 461, 509 P.2d at 1103); *Diamond v. Bland*, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974), *cert. denied*, 419 U.S. 885 (1974).

48. *See, e.g.*, *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers*, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964); *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967); *In re Lane*, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969); *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971).

49. 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468, *cert. denied*, 419 U.S. 885 (1974) [hereinafter referred to as *Diamond I*]. The first decision in *Diamond v. Bland* is found at 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971) [hereinafter referred to as *Diamond I*].

50. The decision was predicated upon the reasoning of *Logan Valley* which, the court concluded, was applicable notwithstanding the availability of other effective sites for the desired first amendment activities. The shopping center premises involved in *Diamond* were deemed to be no different from Union Station in Los Angeles, the private railway station that was held to be a proper location for the distribution of antiwar leaflets in *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967). In either situation, the *Diamond I* court concluded, any disruption could be controlled through "reasonable regulations." 3 Cal. 3d 653, 665, 477 P.2d 733, 741, 91 Cal. Rptr. 501, 509 (1970), *cert. denied*, 402 U.S. 988 (1971).

noted that (1) "as in *Lloyd*, plaintiffs have alternative, effective channels of communication"; (2) "their initiative petition bears no particular relation to the shopping center, its individual stores or patrons"; and (3) "under the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement . . . supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights."⁵¹

The dissent was outraged in much the same manner as the *Lloyd* dissenters. *Diamond I*, the dissent argued, had also been based on an independent nonfederal ground⁵² and, in any event, concerned the circulation of an initiative petition, a constitutionally rooted activity which was clearly distinguishable from the handbilling in *Lloyd*.⁵³ The reversal of *Diamond I* was viewed, therefore, as an abject "surrender" which "ignore[d] basic guarantees of [the] state Constitution" and dealt "a serious blow to state sovereignty and to the independence . . . of this court."⁵⁴

51. 11 Cal. 3d 331, 335 & n.4, 521 P.2d 460, 463 & n.4, 113 Cal. Rptr. 468, 471 & n.4, cert. denied, 419 U.S. 885 (1974). Here the court relied on the *Lloyd* language quoted in note 30 *supra*. The court expressly left undetermined the issue of whether the California Constitution afforded broader protection than the first amendment.

52. The independent nonfederal ground, representing the state's freedom "to adopt higher standards for protection of individual rights than compelled by the federal Constitution," was the protection afforded by section 9 of Article I of the California Constitution: "Every citizen may freely speak, write and publish his statements on all subjects . . . and no law shall be passed to restrain or abridge the liberty of free speech or of the press." *Id.* at 338, 340 n.1, 521 P.2d at 465, 467 n.1, 113 Cal. Rptr. at 473, 475 n.1 (dissenting opinion). *Lloyd* was not construed to constitutionally require a different conclusion; instead of being based on fifth and fourteenth amendment property rights, the dissenters construed that opinion to impose a restriction on first amendment activities "only under the circumstances there involved" and noted that *Lloyd* "recognizes that the size and diversity of activities of a shopping center might warrant a different result in another context." *Id.* at 340 n.1, 521 P.2d at 467 n.1, 113 Cal. Rptr. at 475 n.1.

This view is also expressed in a criticism of *Lenrich Assoc. v. Heydra*, 264 Or. 122, 504 P.2d 112 (1972), a decision which the dissenters refused to follow, which appeared in Note, *Freedom of Speech—Owners' Fifth Amendment Property Rights Prevent a State Constitution from Providing Broader Free Speech Rights Than Provided by the First Amendment*, 86 HARV. L. REV. 1592 (1973) [hereinafter cited as Note, 86 HARV. L. REV.]. The validity of the dissent's position was ultimately upheld in *PruneYard*. See text accompanying notes 62-70 *infra*.

53. The dissent thus emphasized the long standing importance of the "full and free exercise of the right of initiative" in California and the need to permit access on private property for the circulation of initiative petitions lest the process "become the captive of well-financed special interest groups." 11 Cal. 3d at 343, 521 P.2d at 469, 113 Cal. Rptr. at 477 (dissenting opinion). *Diamond* was thus distinguishable from *Lloyd*, according to the dissenters, because it sought "to vindicate a noneconomic right rooted in the Constitution—a right which is an integral part of the constitutionally created legislative process"; because, in contrast to *Lloyd*, there were far less alternative avenues of communication; and because of the corollary greater need for access in the initiative petition situation. *Id.* at 344, 521 P.2d at 469, 113 Cal. Rptr. at 477.

54. *Id.* at 336, 340, 521 P.2d at 464, 467, 113 Cal. Rptr. at 472, 475.

PruneYard in the California Courts

Just as a reshaped United States Supreme Court substantially contributed to *Logan Valley's* reversal in *Lloyd* and *Hudgens*, by 1979 the shifting political sands of California resulted in a reconstituted California Supreme Court.⁵⁵ In *Robins v. PruneYard*,⁵⁶ a four-to-three majority of that court overruled *Diamond II*. The plaintiffs in *PruneYard* were high school students desiring access to a shopping center⁵⁷ for the purpose of obtaining signatures on a petition opposing a United Nations resolution against "Zionism."⁵⁸ When such entry was denied, they sought an injunction against the center and its owner which the lower California courts, primarily on the basis of *Diamond II*, denied. The California Supreme Court, however, granted the injunction. It concluded that, although *Diamond II* "involved facts much like those of the instant case[,] . . . [it] did not examine the liberty of speech clauses of the California Constitution . . . [which] protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."⁵⁹

Contrary to *Diamond II*, the *PruneYard* majority found *Lloyd* to raise no supremacy clause bar; that case was considered to be essentially a first amendment decision which "did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally."⁶⁰ The court was free, therefore, to resurrect the rationale of *Logan Valley* which it had advocated in *Diamond I*, *i.e.*, that because "central business districts apparently have continued to yield their functions more and more to suburban [shopping] centers," such centers provide "an essential and invaluable forum" for the exercise of constitutional speech and petition rights.⁶¹

55. The majority in *PruneYard* consisted of Justices Tobriner and Mosk, Governor Pat Brown appointees, who had been in the majority in *Diamond I* and in the dissent in *Diamond II*, joined by two new Governor Jerry Brown appointees, Justice Newman and Chief Justice Bird. The dissent consisted of two Governor Reagan appointees, Justices Richardson and Clark, and Justice Manuel, a Governor Jerry Brown appointee.

56. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

57. The court observed, citing the *Diamond II* dissent, that "we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment." *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860. The *PruneYard* Center "consists of approximately 21 acres—devoted to parking and 16 occupied by walkways, plazas and buildings that contain 65 shops, 10 restaurants, and a cinema." *Id.* at 902, 592 P.2d at 342, 153 Cal. Rptr. at 855.

58. The court at the outset indicated that its holding was only "that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution." *Id.* (emphasis added).

59. *Id.* at 902, 903, 910, 592 P.2d at 342, 343, 347, 153 Cal. Rptr. at 855, 856, 860.

60. *Id.* at 903, 592 P.2d at 343, 153 Cal. Rptr. at 856.

61. *Id.* at 907, 910, 592 P.2d at 345, 347, 153 Cal. Rptr. at 858, 860.

PruneYard: The United States Supreme Court's Affirmance

On appeal, a unanimous United States Supreme Court affirmed.⁶² The Court agreed with the California Supreme Court that a state, pursuant to 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."⁶³ Thus, although *Lloyd* and *Hudgens* had held that mere openness to the public is not a basis for utilizing the first amendment to "create individual rights in expression beyond those already existing under applicable law,"⁶⁴ those cases did not vitiate the authority of the state to adopt "individual liberties more expansive than those conferred by the Federal Constitution."⁶⁵

The Court found that neither the shopping center owner's fifth amendment property rights nor his first amendment speech rights constituted a supervening federal constitutional limitation. In the case of the former, although there had "literally been a 'taking' " of the owner's right to exclude others, that "taking" did not rise to the level of an "unconstitutional infringement of appellants' property rights."⁶⁶

There were essentially three reasons for concluding that the desired petitioning would not impair the value or use of the shopping center: first, PruneYard could "restrict expressive activity by adopting time, place and manner regulations that [would] . . . minimize any interference with its commercial functions"; second, the students involved "were orderly"; and third, they had restricted their activities "to the common areas of the shopping center."⁶⁷

62. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). The Court's opinion was written by Justice Rehnquist. There was a separate concurring opinion by Justice Marshall who persisted in his view that "*Logan Valley* was rightly decided, and that both *Lloyd* and *Hudgens* were incorrect interpretations of the First and Fourteenth Amendments." *Id.* at 90. He also indicated that, while he considered there to be a "sphere of private autonomy which government is bound to respect . . . including rights against trespass, [which could not be abolished] at least without a compelling showing of necessity or a provision for a reasonable alternative remedy," *id.* at 93-94, these "core" common-law rights" were not involved in *PruneYard* for several reasons: (1) "[t]he California Supreme Court's decision is limited to shopping centers which are already open to the general public"; (2) the shopping center is entitled "to impose reasonable restrictions on expressive activity"; (3) there was "no showing of interference with appellants' normal business operations"; and (4) there was no "invasion of any personal sanctuary. . . . No rights of privacy are implicated." *Id.* at 94. Justice Blackmun added a statement joining in all but one sentence of the opinion. *See id.* at 88-89. Justices White and Powell also added concurring opinions seeking to limit the scope of the main opinion. *See id.* at 95. *See also* text accompanying notes 71-76 *infra*.

63. *Id.* at 81.

64. *Id.*

65. *Id.*

66. *Id.* at 82-83.

67. *Id.* at 83-84. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), was distinguished as

By sanctioning the PruneYard as a forum for the students' proposed conduct, the state also had not unconstitutionally abridged its owner's first amendment rights, *i.e.*, requiring that he disseminate "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."⁶⁸ In *PruneYard*, since the shopping center was freely open to the public and was not limited to the personal use of its owner, it was not "likely" that the views of the petitioners would "be identified with those of the owner"; there was "no specific message . . . dictated by the State" or "danger of governmental discrimination for or against a particular message"; and, if desired, the owner was free to post signs or otherwise disavow any connection with the students' message.⁶⁹ There was, accordingly, no federal constitutional bar to California's recognition of the petitioners' right to exercise "state protected rights of expression and petition" on private shopping center property.⁷⁰

In their concurring opinions, Justices White and Powell carefully explained why they were willing to agree that there had not been an unconstitutional infringement of the center owner's property or speech rights. They noted that only the public or common areas of a large PruneYard type of "shopping center" were involved, not an "individual retail establishment within or without" the center or "a homeowner" or even "large establishments [that] 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."⁷¹ A different situation might also exist, Justices White and Powell suggested, if the owner was compelled to "supply a forum for causes he finds objectionable,"⁷² if the customers were "likely to identify opinions expressed by members of the public on commercial property as the views of the owner"⁷³ or if there was "state action that

involving governmental interference with "reasonable investment backed expectations" since in that case there was a compelled free public use of property which had theretofore been open only to fee-paying members who had paid such fees, in part, to maintain the "privacy and security" of their property. *Id.*

68. *Id.* at 86-87. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977).

69. *Id.* at 87.

70. *Id.* at 88.

71. *Id.* at 95 (White & Powell, JJ., concurring).

72. *Id.* at 98 n.2 (Powell, J., concurring). One such situation, Justice Powell inferred by his citation of *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), and *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), was the right to exclude, where permitted by the Labor Act, undesired union organizers.

73. *Id.* at 99 (Powell, J., concurring).

force[d] individual exposure to third party messages.”⁷⁴ In sum, if the center patrons would be likely to assume that the third party’s speech was that of the property owner, or if the views expressed were “so objectionable as to require a response even when listeners will not mistake their source,”⁷⁵ then there would be substantial federal constitutional questions raised by state mandated access rules.

In *PruneYard*, however, these considerations were not present. The center was a vast area of which the petitioning students occupied only a small corner, thereby negating any inference that their views were those of the center owner; there was no allegation that the owner disagreed with the petitioners’ views or that their message was so inherently “objectionable as to require a response”; and there was “no evidence concerning the number of types of interest groups that may seek access to this shopping center.”⁷⁶

PRUNEYARD’S FUTURE: UNCERTAIN WATERS

While there is considerable uncertainty as to the future metes and bounds of *PruneYard*, the decision represents more than an isolated California phenomenon. All but six states have a constitutional free speech clause resembling that incorporated in the California Constitution, with only Hawaii, Massachusetts, Mississippi, New Hampshire, Vermont and South Carolina retaining a short clause such as that found in the Federal Constitution.⁷⁷ In addition, statutory speech and/or petition protection probably will be enacted in various states. For example, a bill passed the Illinois Senate⁷⁸ in 1979, expressly sanctioning political campaign literature distribution on the premises of private shopping centers. A similar proposal, which would have precluded *any* business open to the public from excluding either political candidates or those “seeking signatures from members of the public,” was introduced this year in the Rhode Island House.⁷⁹ The anomolous result is that, although the Federal Constitution does “not prevent the property owner from excluding those who would demonstrate or communicate on his property,”⁸⁰ the various states will likely

74. *Id.* at 100 n.4 (Powell, J., concurring).

75. *Id.* at 101 (Powell, J., concurring).

76. *Id.*

77. Z. Chafee, *FREE SPEECH IN THE UNITED STATES* 5 n.2 (1967).

78. S. 104, 81st Gen. Assy. (1979).

79. 80, R.I. Gen. Assy., 1980, reported in the *PROVIDENCE JOURNAL-BULLETIN* (Feb. 1, 1980).

80. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 95 (1980). 100 U.S. at 2048 (White, J., concurring).

now each impose their own variety of such limitations on property rights.

Does this mean, as Justice White inquired in *PruneYard*, that a state may require a private property owner "to subsidize any and all political, religious or social action groups by furnishing a convenient place for them to urge their views on the public and to solicit funds from likely prospects?"⁸¹ One answer, of course, is that the states will themselves no doubt each arrive at different restrictions; some activities may be tolerated in one state, more conduct sanctioned in another state, and in still a third state, the federal *Lloyd-Hudgens* approach may prevail with the property owner having the right to bar all distribution or solicitation on his property. Apart from this inherent lack of uniformity, if the history recited above provides any guide, the dimensions of such restrictions may also be dependent on the political composition of state legislatures and courts.

Finally, in addition to these vagaries, the more perplexing inquiry is whether, as Justice White responded to his own question, "there are some limits on state authority to impose such requirements."⁸² Any such limitations would primarily have to be concentrated in four areas: (1) the nature of the private property involved; (2) the conduct of those seeking to engage in the particular expressive activity; (3) the nature of the message at issue; and (4) the "reasonableness" of the property owner's time, place and manner regulations. An examination of the limitations that are likely to ensue in each of these areas, however, discloses only minimal hope for the property owner.

Nature of the Property Involved

Justices White and Powell, as noted above, would limit *PruneYard's* applicability to only the common areas of large shopping centers, thereby prohibiting the states from extending speech activities into either other areas of a center or to smaller centers, single establishments or private homes.⁸³ Post-*PruneYard* litigation does not necessarily suggest this narrow interpretation. California courts, for example, have applied *PruneYard* to permit at least limited access to private residential communities.⁸⁴ Moreover, it is difficult to perceive how the

81. *Id.*

82. *Id.*

83. There is similarly limiting language contained in the California Supreme Court's opinion, see note 57 *supra*, and Justice Marshall's concurring opinion in *PruneYard*, see note 62 *supra*.

84. See *Laguna Publishing Co. v. Golden West Publishing Corp.*, 80 Daily Journal D.A.R. 2513 (Cal. C.A. 4th, Sept. 4, 1980), discussed at note 17 *supra*.

PruneYard views of Justices White and Powell can be reconciled with their own position in *Lloyd* that “there are differences only of degree—not of principle—between a free-standing store and one located in a shopping center, between a small store and a large one, between a single store with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping.”⁸⁵

The close similarity of the language used by the California Supreme Court in *PruneYard* and that contained in *Logan Valley* also cannot be ignored; if the objective is to insure that “businesses situated in the suburbs” may not “immunize themselves from criticism” and speech activities on their premises any differently than “[b]usiness enterprises located in downtown areas . . . [that are] subject to on-the-spot public criticism for their practices,”⁸⁶ then the commercial property distinctions⁸⁷ advocated by Justices White and Powell would appear to be inconsequential.

Conduct of Those Engaging in Expressive Activities

There is no dispute that the conduct of those engaged in the expressive activity must be “peaceful and orderly.”⁸⁸ Both the California Supreme Court and Justice Rehnquist stressed that they were not countenancing physical obstruction of ingress or egress to an establishment or any other interference with the normal operations of a business.⁸⁹ In practice, however, this limitation will probably afford no greater protection to the property owner than the normal restrictions that apply to picketing, *i.e.*, that the expressive activity cannot be prohibited but, instead, may only be limited with respect to numbers or place or conduct, in order to provide that it is peaceful.⁹⁰ Since the rationale is to protect against the likelihood of violence, “the exception

85. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 565-66 (1972).

86. *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 324-25 (1968).

87. The rights of homeowners and noncommercial property owners are, as both Justice Powell in *PruneYard*, 447 U.S. at 100 n.4, and Justice Marshall, *id.* at 93, observed, of a different order and may be immune from state-mandated intrusion by virtue of personal privacy rights. See *Stanley v. Georgia*, 394 U.S. 557 (1969). See also note 17 *supra*. A similar distinction in a commercial property situation could also be made, regardless of the size of the establishment, where the activity occurs “in the entrance area of a store or in the lobby of a private building,” (*PruneYard*, 447 at 99) (Powell, J., concurring) or in the interior of a store, see note 23 *supra*, on the ground that these locations too greatly interfere with normal business operations. A distinction predicated solely on the size of an establishment or whether it is part of a shopping center is, however, suspect for the reasons set forth in the text. See note 100 *infra*.

88. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 77 (1980).

89. *Id.* at 83.

90. See, *e.g.*, *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 308 n.2 (1968); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 208-09 (1978) (Blackmun, J., concurring). See also note 16 *supra*.

is only as broad as its justification. . . . A blanket injunction against all picketing . . . will be sustained only if the consequences of violent and peaceful conduct are not separable."⁹¹

From the standpoint of the property owner, however, even peaceful and orderly solicitation, petitioning or other free speech activity on private property inherently constitutes an interference with normal business operations. The property owner is still required to provide, free of charge, commercial facilities to be utilized in a manner that will distract or even drive away those very customers he has attracted, frequently through the expenditure of considerable money and effort, to its premises.⁹² The objective of the desired activity, after all, is to entice patrons to devote their limited shopping time and even their monies to a variety of competing uses. Additionally, the property owner must also exercise "semi-official municipal functions as a delegate of the State"⁹³—to provide, for example, the requisite maintenance and security services and to assume the risk of any potential disruption or damage liability. The contrary assumption of *PruneYard* that, regardless of this substantial and expensive burden, "[t]here is nothing to suggest that preventing [property owners] . . . from prohibiting this sort of activity will unreasonably impair the value or use of their property," is

91. Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552, 560 (1970). There is an added practical difficulty. An injunction limiting the number of persons involved or the place of the expressive activity will normally not issue unless "actual violence was a recurring or imminently threatening condition . . . [rather than merely] peaceful activity which shows no signs of presently becoming violent and which does not physically interfere with the employer's operations or others' access to his place of business." *Id.* at 565-66. Those engaging in obstructive or violent speech thus have two bites at the apple. Unless the prohibited conduct is recurring, the property owner will probably not be able to obtain an injunction and, even thereafter, assuming that the misconduct still continues, there will be an order to show cause issued and little likelihood of contempt if the unprotected activity then ceases. By that time the property owner may either have suffered irreparable injury or, assuming that police resources are unavailable, which is a substantial concern because of a reluctance of the police to act in light of *PruneYard*, resorted to self-help with its concomitant risk of a tort suit or, in a union context, an unfair labor practice charge.

92. The public frequents a commercial facility because of the investment that has been made by that facility to gain and retain patronage. Customers doing business with a shopping center have been led to believe, for example, that the center is a comfortable and convenient place to shop. This objective may entail, of course, various noncommercial promotional activity "to create 'customer motivation' as well as customer goodwill in the community." An auditorium may be made available to groups, such as the Cancer Society and Boy and Girl Scouts, free of charge; American Legion poppy distribution and Salvation Army charitable solicitation may be tolerated; prominent political candidates may be allowed to speak at the center; and other similar conduct may be sanctioned in the belief that these activities will "bring a great many people to . . . [the] Center who may shop before they leave." This type of conduct, however, cannot be equated with other undesired behavior which the property owner wants to preclude because it is "considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 555-56 (1972).

93. *Id.* at 569. See also *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976).

surely questionable.⁹⁴

Nature of the Message at Issue

It has also been argued that *PruneYard* “carries a number of signals to warn that the result is narrowly based. The emphasis on ‘police power’ and ‘economic impact’ is not accidental.”⁹⁵ For example, since the fifth amendment language of *PruneYard* is pegged to the absence of any interference with “reasonable investment backed expectations,” and its first amendment conclusions are tied to the absence of both a government prescribed message and any evidence that the *PruneYard* owner or patrons objected to the ideas contained in the students’ petitions, it is presumed that highly objectionable union picketing, which is clearly designed to interfere with the business of a particular establishment, would “obviously” dictate a different result.⁹⁶ No such difference in result, in fact, has occurred.

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,⁹⁷ following the Supreme Court’s remand, the California Supreme Court again refused to enjoin the union picketing at issue. It did so on the basis of a subsequently enacted state statute⁹⁸ which declared that peaceful union activity on private property was “an exception to the [California] criminal trespass statutes” which must be found to be a “lawful activity.”⁹⁹ As in the case of *PruneYard*, the court found *Lloyd* and *Hudgens* inapplicable because “they did not involve a constitutionally protected right of property at all.”¹⁰⁰ The United

94. 447 U.S. at 83. Both the California Supreme Court in *PruneYard*, 23 Cal. 3d 899, 905-07, 592 P.2d 341, 344-45, 153 Cal. Rptr. 854, 857-58 (1979), and the Solicitor General, Brief as amicus curiae at 19-20, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), similarly stressed that the *PruneYard* obligation was essentially no different from that imposed by zoning, rent control, environmental laws and other governmental restrictions on the use of private property. This view was predicated upon the mistaken assumption that “the impairment of the owner’s interest must be largely theoretical,” 23 Cal. 3d at 905-07, 592 P.2d at 344-45, 153 Cal. Rptr. at 857-58, and that while “[o]ne may speculate that the Center’s maintenance and security costs might be slightly increased or that a slight decrease in sales might result . . . to the extent any such impact may exist . . .” it is not significant. Solicitor General’s brief at 18-19.

95. Taylor, *PruneYard: No Access for Anti-Business Picketing?*, LEGAL TIMES OF WASH., July 21, 1980.

96. *Id.* See 447 U.S. at 83, 87, 100-01 (Powell, J., concurring).

97. 436 U.S. 180 (1978). See note 44 *supra*.

98. CAL. CODE OF CIV. PROC. § 527.3 (1979), known as the Moscone Act. The court, accordingly, did not have to address the applicability of the *PruneYard* constitutional rationale. 25 Cal. 3d 317, 327 n.5, 599 P.2d 676, 683 n.5, 158 Cal. Rptr. 370, 377 n.5 (1979).

99. *Id.* at 323, 599 P.2d at 680, 158 Cal. Rptr. at 341.

100. *Id.* at 331, 599 P.2d at 686, 158 Cal. Rptr. at 380. The court, in finding that “Sears can assert no claim based upon the federal Constitution, statutes, or cases which would require the California courts to enjoin the picketing in the present case,” also disposed of the contention that

States Supreme Court subsequently declined review.¹⁰¹

The implications of *Sears* are plain: "no matter how controversial, offensive, distracting or extensive"¹⁰² the expressive conduct may be, unless it exceeds the limited bounds of peacefulness described above or transgresses "reasonable regulations," the states are free to mandate access. Permissible free speech messages are not to be confined to their governmental petitioning roots of *Diamond I* and *PruneYard*.¹⁰³ Such a result is also consistent with *PruneYard*. Nothing in Justice Rehnquist's discussion of property rights would warrant an interpretation that the requisite unconstitutional "taking" should turn on the content of the speech at issue. The property owner's first amendment rights would similarly not be predicated on such a distinction. Expressive conduct that is directed at protesting the behavior of a particular establishment is clearly less, rather than more, likely to be identified with that establishment or to be viewed as a government decreed opinion. Indeed, it would be an ironic twist to *Hudgens'* interment of *Logan Valley*, based on a refusal to differentiate between speech,¹⁰⁴ if such a difference were now to be resurrected to allow the communication of unrelated, but not related, messages.

It is similarly difficult to perceive how, if protest conduct is to be allowed, other free speech activities should be precluded merely because, although they are not even directed at the property owner, he nevertheless deems the views expressed to be objectionable. If it had been shown, for example, that the owner of PruneYard Center was a supporter of the PLO and was adamantly opposed to Zionism, should

Sears should be distinguished from *PruneYard* because the former only involved a single free-standing store:

[T]he sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store. Recognized as lawful by the decisions of this court, such picketing likewise finds statutory sanction in the Moscone Act, and enjoys protection from injunction by the terms of that act. In such context the location of the store whether it is on the main street of the downtown section of the metropolitan area, in a suburban shopping center or in a parking lot, does not make any difference. Peaceful picketing outside the store, involving neither fraud, violence, breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the courts.

Id. at 332-33, 599 P.2d at 687, 158 Cal. Rptr. at 381.

101. 100 U.S. 3038 (1980). The petition for certiorari had sought review on the basis of an alleged violation of fifth amendment property rights, on the ground that the Moscone Act was preempted because it impermissibly frustrated the implementation of the Labor Act and on the theory that the state law, by withholding any remedy as well as precluding employer self-help against unprotected union activity on private property, constituted a denial of procedural due process.

102. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 564 n.11 (1972).

103. *See* notes 52 & 53 *supra*.

104. *See* text accompanying note 42 *supra*.

the result really have been any different? A property owner would be precluded from engaging in any content discrimination by *Babcock & Wilcox*¹⁰⁵ in a Labor Act setting and by *Lloyd* in a first amendment situation.¹⁰⁶ State differentiation between free speech activities would similarly be given careful equal protection scrutiny.¹⁰⁷ *PruneYard*, it is submitted, requires the same conclusion. Where a particular determination can pass equal protection muster, a state presumably is free to make its own decision as to whether access to private property should be granted for such diverse activities as religious proselytization,¹⁰⁸ union picketing or organizational activities, the solicitation of funds, political campaigning, competing commercial activities¹⁰⁹ and public assemblies.

Reasonableness of Regulations

In *PruneYard*, the reliance placed by the California Supreme Court¹¹⁰ and Justice Rehnquist¹¹¹ upon the ability of "reasonable" time, place and manner regulations to negate any interference is also illusory. There is patently no consensus as to the appropriate time,¹¹² location,¹¹³ number of individuals or exhibits involved,¹¹⁴ manner of

105. See note 35 *supra*.

106. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 555-56 (1972). See also *id.* at 577-79 (dissenting opinion).

107. See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't v. Mosley*, 408 U.S. 92 (1972). See also Note, 86 HARV. L. REV., *supra* note 52, at 1600 n.40.

108. Proselytization by the Krishna and other similar groups is presently being litigated before various lower courts in California. One difficulty that property owners have encountered is the position taken by local District Attorneys, *viz.*, as stated by the Riverside (Ca.) County District Attorney in a June 25, 1980 letter to the law enforcement agencies in his jurisdiction, "as long as religious zealots do not grab, touch, yell into the individual faces of, or block the individual paths of particular stores, but merely shout their message of religion to the people in general, they are not in violation of [the criminal trespass statute]."

109. As one court recently noted, "[c]ommercial solicitation has traditionally been accorded less protection than has political or religious solicitation." *Connecticut Citizens Action Group v. Town of Southington*, 508 F. Supp. 43 (D. Conn. 1980). In that case, however, the court invalidated a local ordinance that confined door-to-door solicitation to the hours between 8:00 a.m. and 6:00 p.m. on the ground, *inter alia*, "that the ordinance treats one form of commercial speech *less restrictively* than it treats any form of political speech" (emphasis the court's). *Id.* at 2312.

110. See 23 Cal. 3d 899, 909, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979).

111. 447 U.S. at 83.

112. Some regulations preclude expressive activity during peak hours; others confine such activity only to any time that the establishment involved is open for business. Some regulations also limit the duration of any particular activity, e.g., a one or two consecutive day or a "no more than five hours in any two days" restriction while others have no such limitation. Some, but not all, of the regulations additionally prohibit more than one activity from occurring simultaneously.

113. Many regulations provide that the owner may designate a particular area in which the desired activity is permitted, a designation that will necessarily vary, of course, from establishment to establishment. In addition, some regulations expressly confine certain activities, such as petitioning or soliciting, to a particular number of feet from a table.

114. The number of individuals permitted by different regulations ranges from two to six per-

representation,¹¹⁵ security factors,¹¹⁶ type of activity permitted¹¹⁷ or other considerations¹¹⁸ that any such regulations would have to delineate. The provision for "reasonable regulations," accordingly, only promises to be a harbinger of litigation.¹¹⁹

Moreover, contrary to the view of some observers, the burden of promulgating and enforcing regulations cannot be dismissed as insignificant.¹²⁰ Even before *PruneYard*, one shopping center owner estimated that he received an average of three requests each week, for each of his seventeen centers, to use his premises for nonbusiness related expressive activity.¹²¹ With such volume, the cost of assuming the state's responsibility to determine and enforce the appropriate time, place and manner restrictions, in addition to the attendant maintenance and security expense, the risk of any potential disruption or damage and the concomitant loss of business,¹²² is substantial. "The problem of creating 'reasonable regulations' for each case," as the California Court of Appeal observed in *Diamond I*, "assumes epic proportions . . . [and causes] policing problems of staggering proportions."¹²³

CONCLUSION

The Supreme Court, through a painful evolution from *Logan Valley* to *Hudgens*, finally concluded that equating a private store or shop-

sons. There are also often elaborate limitations on the exhibits that may be used, e.g., a requirement that posters to be utilized "may not exceed 15 inches along any dimension," and even requirements that any exhibits cannot be used without prior approval.

115. For example, various regulations forbid certain types of dress; the use of microphones, other noise emitting devices, additional lighting or displays having moving parts that could cause injury; the vending or peddling of merchandise, books or periodicals; the solicitation of funds; the creation of safety or litter hazards; the use of electrical or mechanical equipment; and a multitude of other restrictions.

116. Most regulations require some form of security deposit, which may or may not be refundable, that may vary from \$50 to \$250. The regulations also frequently provide that the user must first execute a hold harmless agreement and shall be responsible for cleaning up any garbage or debris occasioned by his activity.

117. Some regulations have adopted an express "political petitioning" limitation that may either be defined or left to the "good faith" of the property manager. Many regulations also provide that a disclaimer by the establishment is to be posted at the location of the expressive activity.

118. For example, some regulations are translated into Spanish, others provide that "a responsible adult individual . . . expressly accepts full responsibility," some require a waiting period between the time of the permit application and the desired activity, certain regulations provide that the user must obtain insurance, and there are many other variables as well.

119. *Cf.*, e.g., *Esteban v. Central Mo. State College*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970), and *Powe v. Mills*, 407 F.2d 73 (2d Cir. 1968).

120. *See Note*, 86 HARV. L. REV., *supra* note 52, at 1603-04.

121. Brief of Homart Dev. Co. as amicus curiae at 2-3, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

122. *See notes 92 & 94 supra* and accompanying text.

123. 8 Cal. App. 3d 58, 74, 87 Cal. Rptr. 97, 107 (1970).

ping center to a company town or public market place improperly creates an overwhelming burden of regulation for the private property owner, with private concerns, as contrasted with a public body with responsibility over public areas. The *PruneYard* decision now permits the states to once again place that burden on the private property owner. It is an opinion which could have, if other states follow the lead of California, a significant impact on the long-term development of commercial establishments.¹²⁴ It is also an opinion which has the unfortunate result of imposing upon private property rights, as stated by the dissent in the California Supreme Court, "varying and shifting interpretations of state constitutional [and even statutory] law for their safeguard and survival."¹²⁵

The reason for this substantial imposition upon property rights—the belief on the part of the California Supreme Court that shopping centers and other private property "provide an essential and invaluable forum for exercising . . . [speech and petitioning] rights"¹²⁶—is also open to doubt. The economic development of shopping centers, after all, has not occurred in a vacuum. The communication of a message, which many years ago in a less technological era of face-to-face contact may have been largely restricted to the public market place, is clearly no longer so inhibited. Today, there are radio and television, newspapers, telephones, numerous public forums and an endless variety of other alternative media of expression apart from the use of private property. The principle for state courts and legislatures to bear in mind is that they must accommodate speech and property rights "with as little destruction of one as is consistent with the maintenance of the other,"¹²⁷ not create laws which "wholly disregar[d] the constitutional basis on which private ownership of property rests in this country."¹²⁸

124. For example, while vertical shopping centers, as exemplified by Water Tower Place in Chicago, may not be totally exempt from *PruneYard*'s coverage, if that case creates costly repercussions, shopping center developers may in the future stress vertical, as opposed to horizontal, centers. Cf. *Seattle-First Nat'l Bank v. NLRB*, 638 F.2d 1221 (9th Cir. 1981) (permitted union picketing on the 46th floor of an office building). In any event, the rental fees of participating stores will inevitably be increased to cover the added cost of security protection and the enforcement of "reasonable" regulations. *PruneYard*'s suggestion that a fee paying arrangement by users of a center might cause a different result, see 447 U.S. at 84, may also encourage adoption of such measures. Such customer-imposed fees would, of course, have a corollary adverse effect on the future development and use of shopping centers.

125. 23 Cal. 3d 899, 912, 592 P.2d 341, 348, 153 Cal. Rptr. 854, 861(1979) (dissenting opinion).

126. *Id.* at 347.

127. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1954).

128. *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976), quoting *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332-33 (1968) (Black, J., dissenting).

