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Transforming the Privately Owned Shopping Center into a Public Forum: Pruneyard Shopping Center v. Robins

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COMMENTS

TRANSFORMING THE PRIVATELY OWNED SHOPPING CENTER INTO A PUBLIC FORUM: *PRUNEYARD SHOPPING CENTER v. ROBINS*

I. INTRODUCTION

A recent Supreme Court decision has affirmed a state's choice to provide its citizens access to privately owned shopping centers for the purpose of exercising free speech and petition rights. The United States Supreme Court in *Pruneyard Shopping Center v. Robins*[1] held that state consitutional provisions permitting individuals to exercise free speech and petition rights on private shopping center property do not violate the shopping center owner's property rights under the fifth and fourteenth amendments or his free speech rights under the first and fourteenth amendments.[2] There exists a delicate balance between the competing interests of the shopping center owner and the interests of those who seek to exercise free speech on his property. Thus, when an attempt is made to exercise free speech on private property that is held open to the general public, and the owner seeks to prohibit that free expression, a clash of fundamental constitutional rights can result.

This comment first will examine the major United States Supreme Court decisions addressing the exercise of first amendment rights on private shopping center property. The discussion will show how the Burger Court has chosen to resolve the conflict in favor of the shopping center owner unless state law has authorized public access to shopping centers

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

2. *Id.* at 88. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The fifth amendment in pertinent part provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fourteenth amendment makes both the first and fifth amendments applicable to the states. *See* Gitlow v. New York, 268 U.S. 652 (1925) (first amendment rights protected by the fourteenth amendment's due process clause); Chicago, B.& Q. R.R. v. Chicago, 166 U.S. 226 (1897) (fifth amendment command that property not be taken without just compensation is absorbed into the fourteenth amendment's due process guarantee).

for free speech purposes. Focus will then turn to the California Supreme Court's departure from the current law as articulated by our highest Court. Finally, this comment will examine the United States Supreme Court's affirmance of the California Supreme Court's decision requiring shopping center owners to provide public access to their property for the purpose of exercising free speech.

II. The Earlier Supreme Court Decisions

While judicial interpretation of first amendment rights is a twentieth century phenomenon, the issue of first amendment rights on private property has not been the object of extensive litigation.[3] Most of the case law deals with government, rather than private, suppression of free speech.[4]

The first Supreme Court case dealing with the exercise of free speech on private property was *Marsh v. Alabama*,[5] decided in 1946. The case involved a Jehovah's Witness who was arrested for violating Alabama's trespass laws after he had distributed religious literature in the major business district of a company owned town. Prior to *Marsh*, it was well settled that municipalities could not absolutely bar free speech activity on *public* streets or sidewalks.[6] The problem in *Marsh*, however, was that the private corporation had title to all the sidewalks, streets, stores, residences, and everythinng else that goes to make up a town. Thus, the Court had to determine to what extent the corporation, as owner of the town, could control the use of its private property and whether it could

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3. Note, *The Shopping Center as a Forum for the Exercise of First Amendment Rights*, 37 Alb. L. Rev. 556, 557 (1973).

4. *Id.* at 557 n.13. The author cites Van Alstyne and Karst in their article, *State Action*, 14 Stan. L. Rev. 3, 4 (1961), noting:

> Those who struggle to protect free speech . . . have their hands full with government; they have little spare time for the more sophisticated forms of private repression. As a consequence, the battle lines have formed around the substantive definition of the rights in question rather than the source of threats to the rights.

5. 326 U.S. 501 (1946).

6. Justice Black, author of the *Marsh* opinion, wrote: "[N]either a State nor a municipality [could] completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places . . . ." *Id.* at 504. *See, e.g.*, Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

The freedoms of speech and press guaranteed by the first amendment are among those fundamental rights protected by the fourteenth amendment's due process clause against abridgement by the state or local governments. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 570-71 (1942); DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

prohibit free speech in the town by virtue of its private ownership.

The *Marsh* Court, without calling it by name,[7] initiated the "public function" state action theory.[8] Since the company town, albeit privately owned, had assumed the regular governmental functions of a state-created municipality, the private corporate owner was subject to the same fourteenth amendment restrictions imposed on the states.[9] Therefore a privately owned town, like the public municipality, could not enforce the state's trespass laws in order to absolutely prohibit free speech.[10]

Marsh v. Alabama was not a shopping center case, but the Supreme Court enunciated two general principles which, in later decisions involving shopping centers, became the source of heated controversy. The first principle was that when a private property owner opens his land for general public use, his private property rights are diminished and circumscribed by the constitutional rights of the invited public.[11] The second principle was that in balancing the rights of property owners to regulate the use of their property against the rights of invitees to exercise freedom of speech, "the latter occupy a preferred position."[12] These principles suggested that private property at times could be an appropriate public forum.

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7. The *Marsh* opinion never explicitly referred to state action. The "public function" rationale is a strand of the state action concept.

8. It was necessary to ascertain whether the deprivation of first amendment rights was the result of state action because U.S. CONST. amend. XIV, § 1 provides in pertinent part: "No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property without due process of law . . . ." (emphasis added). The Supreme Court will apply strict scrutiny to any governmental regulation of public solicitation. *See* Hynes v. Mayor of Oradell, 425 U.S. 610 (1976).

Private wrongdoing may sometimes rise to the level of state action. Basically the "public function" rationale holds that if private parties carry out inherently governmental functions, these functions may be deemed public—as if the state itself had performed them. Some activities have been held by the Court to be inherently public and, therefore, state action, regardless of how or by whom they are performed. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (the public character of a privately owned park makes it subject to the fourteenth amendment prohibition against racial segregation); Terry v. Adams, 345 U.S. 461 (1953) ("white primaries" conducted by private political association were state action and violated fifteenth amendment). In *Marsh*, the owners of the company town were performing the full spectrum of municipal powers and therefore stood in the shoes of the state. Thus, the company town's act of prohibiting the distribution of religious literature was state action. *See also* Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

9. 326 U.S. at 508.

10. *Id.* at 509.

11. *Id.* at 506.

12. *Id.* at 509.

The first case involving the exercise of first amendment rights in a privately owned shopping center did not come before the Court until twenty-two years later when the Justices decided *Food Employees Local 590 v. Logan Valley Plaza, Inc.*[13] The issue was whether the owner of a private shopping center could prohibit certain persons from picketing a supermarket located within the shopping center. The picketing was conducted by union members protesting the hiring of non-union employees by the supermarket. In a six to three decision, the Court relied in part on *Marsh*, holding that a state trespass law could not be applied to enjoin peaceful labor picketing on the shopping center premises. Justice Marshall's majority opinion held that the pickets could not be enjoined on the ground that the picketing was an invasion of private property rights because the shopping center was "clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*."[14] Thus, according to Marshall, "the shopping center serves as the community business block"[15] so that the state cannot delegate power, through the use of its trespass laws, to exclude the public from exercising its first amendment rights on shopping center premises.[16]

However, after deciding that the shopping center was the "functional equivalent" of the business district in *Marsh*, the *Logan Valley* Court seemed to narrow its holding. First, the decision implicitly sanctioned only free speech related to the operation of the shopping center.[17] The union picketing was directly related to the manner in which the supermarket was operating on the shopping center premises and was therefore permissible. Second, the Court concluded that there were no effective alternate forums for the union to convey its message.[18] There were no public streets or sidewalks close enough to the shopping center that would allow the union to target its activity to the supermarket and its patrons. The best forum, therefore, was the shopping center premises.

It is unclear from the opinion why the *Logan Valley* Court found it necessary to emphasize the two factors mentioned above. The case really turned upon the "functional equivalency" of the shopping center to the business district in *Marsh*,[19] not upon whether the speech was related to

13. 391 U.S. 308 (1968).
14. *Id.* at 318.
15. *Id.* at 319.
16. *Id.*
17. *Id.* at 319-20.
18. *Id.* at 322-23.
19. Despite Justice Black's dissent, *see* note 22 *infra*, the majority in *Logan Valley* adopted a more conceptual application of *Marsh:*

> We see no reason why access to a business district in a company town for the pur-

the shopping center's use or whether alternative forums were available to the union. In *Marsh,* the literature distributed by the Jehovah's Witness had nothing to do with the business district's operations nor did the Court concern itself with whether the religious canvasser could have gone elsewhere to communicate her views. Further, to deny a person the right to speak in one place because he can speak freely in another seems to beg the entire question of free speech.[20] Therefore, if the *Logan Valley* Court did rely on the "functional equivalency" test as being dispositive, it was unnecessary to limit the decision to its facts.

Notwithstanding the limited scope of *Logan Valley,* Justice Black, the author of the *Marsh* opinion, dissented vigorously. The majority, he insisted, had misinterpreted *Marsh:* "The question is, Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town . . . ."[21] According to Justice Black, a small, two-store shopping center was a far cry from the "business district" in *Marsh.*[22] Therefore, he concluded that the shopping center owner's prohibition of the union activity did not constitute state action because the shopping center had still retained its largely private character.

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pose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the "business district" is not under the same ownership.

391 U.S. at 319.

20. The Supreme Court in Schneider v. State, 308 U.S. 147, 163 (1939) declared: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Accord, In re* Hoffman, 67 Cal. 2d 845, ____ n.7, 434 P.2d 353, 357 n.7, 64 Cal. Rptr. 97, 101 n.7 (1967): "It is immaterial that another forum, equally effective may have been available to petitioners . . . . Absent the presence of some conflicting interest that could be protected in no other way, petitioners have the right to choose their own forum."

21. 391 U.S. at 332 (Black, J., dissenting) (emphasis in original).

22. *Id.* at 331. Justice Black believed the *Marsh* rationale should not be applied to the Logan Valley Shopping Center because the small shopping center was not a state-created municipality:

> I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town." Indeed, at the time this injunction was issued, there were only two stores on the property . . . . All I can say is that this sounds like a very strange "town" to me.

Id. at 331.

The majority, however, saw no need for Justice Black's narrow reading of *Marsh*. It was not necessary for the shopping center to take on all the attributes of a municipality before it could be regarded as an appropriate forum for individuals to exercise free speech.[23] Justice Marshall emphasized that the "naked title" of the shopping center owner, without more, was not a sufficient property interest to justify suppression of free speech on property that was largely public in nature.[24] The owner, having made his property open to the public, could not argue that his privacy or exclusive possession and enjoyment were impaired by an additional group of people on his premises conducting an orderly speech activity.

Nevertheless, the *Logan Valley* decision was a limited ruling, allowing free speech activity on shopping center premises because the purpose of the speech was related to the shopping center's use. Therefore, the question of whether private shopping center owners could, consistent with the first amendment, enjoin picketing (or any other form of speech) not directly related to the shopping center's use was not resolved by the decision.[25]

Four years later, the Supreme Court, in *Lloyd Corp. v. Tanner*,[26] had the opportunity to decide the question reserved in *Logan Valley*. *Lloyd* involved the constitutionality of a large shopping center's ban on the distribution of handbills on its premises. The lower courts, relying on *Marsh* and *Logan Valley*, held the ban was unconstitutional and upheld the anti-war leafleteers' rights to circulate handbills in the mall complex.[27] In a five to four decision, the Supreme Court reversed, holding that the private shopping center had been so dedicated to public use as to permit the handbillers to assert their first amendment rights on the shopping

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23. The dispute between Justice Marshall and Justice Black was whether private control over the full spectrum of governmental duties was necessary in order to subject private property to the same constitutional restrictions imposed on state-created municipalities. Language in *Marsh* indicates that its holding might apply in situations where the private assumption of public or governmental functions was less than complete. *See* Marsh v. Alabama, 326 U.S. at 506.

24. Writing for the majority, Justice Marshall asserted that mere ownership of the shopping center did not justify the owner's prohibition of the pickets' activity:

> [U]nlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue.

391 U.S. at 324.

25. *Id.* at 320 n.9.

26. 407 U.S. 551 (1972).

27. Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Or. 1970), *aff'd*, 446 F.2d 545 (9th Cir. 1971).

center's property.[28]

Justice Powell, writing for the majority in *Lloyd,* criticized the *Logan Valley* Court for its interpretation of *Marsh.*[29] After restating of Justice Black's dissent in *Logan Valley,*[30] he distinguished *Lloyd* from *Logan Valley* on the facts. Unlike the labor picketing in *Logan Valley,* the anti-war handbilling "had no relation to any purpose for which the center was built and being used."[31] Moreover, as the *Logan Valley* Court had indicated, the pickets' message could not reach the patrons of the supermarket unless the union was allowed to picket on the shopping center property. The handbilling in *Lloyd,* however, was not directed to anyone specifically using the shopping center; the shopping center's customers could be easily solicited in public areas (streets and sidewalks) just outside the shopping center's interior mall.[32] Thus, absent a showing that the speech activity warranted expression on the shopping center premises, the handbillers were required to utilize alternative forums to convey their message.

With regard to the *Logan Valley* "functional equivalent" rationale, Justice Powell emphasized that *Marsh,* which the *Logan Valley* Court had relied on, had involved a company town which, although privately owned, had assumed "all the attributes of a state-created municipality."[33] Therefore, while the *Marsh* Court may have correctly found state action because of the public nature of the corporate town, that rationale could not extend to a shopping center; the shopping center was not the functional equivalent of the public business district involved in *Marsh.*[34] The "functional equivalent" language in *Logan Valley* was unnecessary to the decision.[35] The argument stressing the functional similarity of a shopping center to a full-fledged business district "reache[d] too far."[36]

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28. 407 U.S. at 570. The lower courts had granted the anti-war handbillers an injunction against the shopping center. The Supreme Court ordered the injunction vacated.

29. *Id.* at 562-63.

30. *Id. See* note 22 *supra* and accompanying text.

31. 407 U.S. at 564.

32. *Id.* at 566-67.

33. *Id.* at 569.

34. *Id.*

35. *Id.* at 563.

36. *Id.* at 569. Justice Powell's opinion in *Lloyd* adopts a very strict "public function" state action test. Regarding the *Lloyd* Court's refusal to expand the basic principles enunciated in *Marsh,* one commentator notes:

> The efforts by the majority in *Lloyd* to distinguish *Marsh* by finding technical, physical differences were a consequence of their decision to limit the thrust of *Marsh.* But *Marsh* was a sound decision; its strength lay in its awareness of the importance to the public that the channels of communication remain unobstructed. The decision

Thus, Justice Powell distinguished the *Lloyd* case from the *Logan Valley* decision by citing the two factors mentioned in *Logan Valley:* first, the speech activity must be related to the shopping center's use; and, second, there must be no other available forum for the communicators to convey their message. Both *Marsh* and *Logan Valley* were restricted to their respective fact situations and were diluted considerably in their precedential value in affirming the right to exercise free speech in privately owned shopping centers.

Justice Marshall dissented in *Lloyd* and found the characteristics of the Lloyd Shopping Center sufficient to apply the *Logan Valley* "functional equivalent" rationale.[37] Justice Marshall argued that the Lloyd Center had large parking areas, privately owned walkways leading from store to store, commercial facilities, professional offices, and a network of public access roads running through the center itself. The shopping center had employed its own police force of private guards who were given full police power by the City of Portland.[38] Justice Marshall also pointed to evidence in the record which indicated that the City of Portland intended the Lloyd Center to function as a "public business district."[39] Thus, in Justice Marshall's view, the Lloyd Center was in fact a public business district and could not escape its obligations under the first and fourteenth amendments simply because it was privately owned.

Justice Marshall further added that, like the shopping center owner in *Logan Valley,* the owner in *Lloyd* had not shown that a substantial property interest was affected by the handbilling activity.[40] Therefore, he felt

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should not be read as setting forth guidelines for the number of post offices and sewage treatment plants which must be present on private property in order for it to be found that the owner may no longer prohibit free expression there.

25 ALA. L. REV. 76, 85-86 (1972). Another commentator, however, suggests that a restrictive view of state action is warranted: " 'Without the state function as a limiting device, the concept of constitutional rights would potentially spill over into the whole domain of traditionally private affairs, and the courts could easily be forced into the position of drawing lines founded on artificial distinctions.' " 44 GEO. WASH. L. REV. 130, 136 n.41 (1975) (quoting Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083, 1098 (1960)).

37. 407 U.S. at 570, 575 (Marshall, J., dissenting).

38. *Id.*

39. *Id.* at 575-76. Justice Marshall asserted that the city ordinance requiring the vacation of about eight acres of public streets for the Lloyd Center set forth the city's view of the shopping center's function. The ordinance in pertinent part provided: "WHEREAS the Council finds that the reason for these vacations is for general building purposes to be used in the development of a *general retail business district* . . . the Council . . . finds that . . . it is necessary to vacate the streets above mentioned . . . ." (emphasis in original) (citation omitted). *Id.*

40. Justice Marshall could not accept Lloyd Center's argument that permitting free speech activity on the premises would drive customers away:

that the outcome of the case should not turn on the relation of the activity to the shopping center's use, but on a balancing of the conflicting free speech and property rights of the litigants.[41] According to the four dissenting Justices,[42] the handbillers' rights of free speech outweighed the shopping center owner's right to control the use of his property.[43]

The *Lloyd* decision's attack on *Logan Valley* relied on the dissents to the latter case[44] and signaled a shortened life for *Logan Valley*. Subsequently, *Logan Valley* was explicitly overruled in *Hudgens v. NLRB*.[45] Hudgens owned a mall of sixty retail stores in suburban Atlanta. One of the sixty stores was leased by Butler Shoe Company which also owned a warehouse in another part of town. As a result of a labor dispute, the warehouse employees picketed all of Butler's retail stores, including the one at Hudgens' shopping center. After threats of arrest, the union members left and filed an unfair labor practice charge. Basing its decision on

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> It is undisputed that some patrons will be disturbed by any First Amendment activity that goes on, regardless of its object. But, there is no evidence to indicate that speech directed to topics unrelated to the shopping center would be more likely to impair the motivation of customers to buy than speech directed to the uses to which the Center is put, which . . . is constitutionally protected under *Logan Valley*. On the contrary, common sense would indicate that speech that is critical of a shopping center or one or more of its stores is more likely to deter consumers from purchasing goods or services than speech on any other subject.

Id. at 581-82.

41. *Id.* at 573, 585. Justice Marshall also attacked the majority's position that the Lloyd Center was open to the public solely for the purpose of shopping. The shopping center was open to the public and used for conducting first amendment activity:

> The District Court observed that Lloyd Center invites schools to hold football rallies, presidential candidates to give speeches, and service organizations to hold Veterans Day ceremonies on its premises. The court also observed that the Center permits the Salvation Army, the Volunteers of America, and the American Legion to solicit funds in the Mall.
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> . . . . .
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> I believe that the lower courts correctly held that the respondents' activities were directly related in purpose to the use to which the shopping center was being put.

Id. at 578-79.

42. Justices Douglas, Brennan and Stewart joined Marshall in the dissent.

43. 407 U.S. at 573. Neither the Lloyd Corporation nor the American Retail Federation as *amicus curiae* had urged that *Logan Valley* was incorrectly decided. Both parties agreed that a balance must be struck between the property interests of shopping centers and first amendment rights of shopping center users. *Id.* at 585.

44. In *Lloyd*, Justice Powell incorporated, in part, both Justice Black's and Justice White's dissent to *Logan Valley*. Justice Powell believed that since Justice Black was the author of the *Marsh* opinion, his criticism of the *Logan Valley* majority's interpretation of *Marsh* was "especially meaningful." 407 U.S. at 562 n.10.

45. 424 U.S. 507 (1976). Justice Stewart, who had joined in Justice Marshall's dissent in *Lloyd*, wrote this plurality opinion.

Logan Valley, the NLRB ruled that Hudgens had committed an unfair labor practice.[46] The Board found that the *Logan Valley* decision had protected labor picketing at shopping centers because the activity was directly related to the center's use. The Fifth Circuit affirmed[47] and the Supreme Court granted certiorari to determine whether access to private property for labor picketing was a matter of constitutional law, labor law, a combination of both, or neither.[48]

In determining the first amendment issue, the Court reviewed *Marsh*, *Logan Valley* and *Lloyd* and concluded that the rationale in *Logan Valley* had not survived *Lloyd*.[49] Justice Stewart put to rest the state action "government function" test enunciated in *Logan Valley*: "If a large self-contained shopping center *is* the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content."[50] Justice Stewart cited several cases supporting the principle that a municipality or government could not regulate free speech on the basis of its subject matter.[51]

In Justice Stewart's view either *Logan Valley* or *Lloyd* was decided incorrectly. The Court chose *Logan Valley* because its weakness was in its attempt to expand the *Marsh* state action concept. Justice Stewart concluded "that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this."[52]

Arguably *Hudgens* has removed *all* speech activity at shopping centers from the protection of the first amendment. With *Logan Valley* overruled, there is no protection of free speech even where the speech is related to the shopping center's use. Under the *Lloyd* rationale, speech that

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46. Scott Hudgens, 192 N.L.R.B. 671, 672 (1971).

47. Hudgens v. NLRB, 501 F.2d 161 (5th Cir. 1974).

48. 424 U.S. at 512.

49. *Id.* at 518.

50. *Id.* at 520. Justice Stewart stated that if shopping centers were to be treated as municipalities then shopping centers must necessarily be governed by the same constitutional limitations imposed on municipal governments. *Id.*

51. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

Logan Valley permitted labor picketing on shopping center premises but did not protect speech unrelated to the purpose for which the shopping center was being used. Thus the decision permitted the shopping center to prohibit or allow free speech on the basis of its content. *Lloyd*, however, rejected the premise that a shopping center was the functional equivalent of a state-created municipality. Accordingly the shopping center was not governed by the constitutional prohibition against governmental regulation of the content of speech.

52. 424 U.S. at 521.

is unrelated to the shopping center's use is also not protected by the first amendment. The Court in *Hudgens* did not explain how or why the *Lloyd* decision survived or the pertinence of the distinction between "related speech" and "unrelated speech" after *Hudgens*. The final position of the Supreme Court appears to be that the shopping center owner is free to prohibit or permit speech on his property regardless of the speech's content unless the shoppping center fits under the Court's narrow definition of a state-created municipality.[53]

The *Hudgens* Court, concluding that the first amendment could not be the basis for its decision, held that the rights of the union and the shopping center owner were dependent exclusively on section 7 of the National Labor Relations Act.[54] In its first hearing, the NLRB relied in part on *Logan Valley* and held that because the union had a right to picket at a location open and accessible to the public, the shopping center's threats to have the pickets arrested interfered with protected labor activity.[55] While Hudgens' petition to review and set aside the Board's cease and desist order was before the United States Court of Appeals for the Fifth Circuit, the Supreme Court decided *Central Hardware Co. v. NLRB*[56] and *Lloyd*. The court of appeals therefore remanded *Hudgens* to the Board for reconsideration in light of those decisions.[57] The NLRB again

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53. It should be noted that the speech (picketing) in *Hudgens* was for the purpose of advertising a strike against a warehouse located on the opposite side of town. The picketing, therefore, was *not* related to the tenant retail store picketed. The Court could have applied *Lloyd* by holding that the first amendment does not protect speech unrelated to the shopping center's use. However, the opinion made no reference to this issue. Such omission may indicate that the "related speech" test used in *Lloyd* is no longer significant in determining the rights of the parties.

54. 424 U.S. at 521. Section 7 of the National Labor Relations Act, as amended, provides in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1970). The union charged that Hudgens had violated section 8 (a)(1) of the NLRA which provides in pertinent part: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7 of this title." 29 U.S.C. § 158(a)(1) (1970).

55. Scott Hudgens, 192 N.L.R.B. at 672.

56. 407 U.S. 539 (1972). Decided on the same day as the *Lloyd* decision, *Central Hardware* involved labor picketing carried on by non-employees in the parking lot of a free-standing store (not part of a shopping center or cluster of buildings). The Court reaffirmed that the Constitution does not restrict private action. The lot was open to the public but this fact alone did not trigger first amendment protection. The Court dismissed the constitutional claims of the union and remanded to the Board for consideration solely in light of labor law principles. *Id.* at 548.

57. 501 F.2d at 164.

ruled in favor of the union[58] and the Fifth Circuit affirmed, holding that the pickets could not be denied access to the shopping center where their message was directly related to the business conducted on the property and where no effective alternative means for conveying their message was available.[59]

In his appeal to the Supreme Court, Hudgens argued that *NLRB v. Babcock & Wilcox*[60] was controlling precedent.[61] The thrust of the *Babcock & Wilcox* rule was that "stranger picketing" upon private property was only protected in limited situations where the employer had to allow access to non-employee trespassers in order to effectuate national labor policy.[62] Therefore, Hudgens argued that labor law principles would compel a reversal of the court of appeal's decision by tipping the balance in favor of the shopping center's private property rights as against the union's right of access to organize.

The Supreme Court declined to rule on the labor law issue and remanded so that the NLRB could consider the case under the National Labor Relations Act's statutory criteria alone.[63] The significance of the Court's decision is that it left a "loophole" through which free speech advocates could gain access to privately owned shopping centers. The Court, by permitting the NLRB to decide whether the union activity was protected, recognized that "statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others."[64] With this loophole in mind, the California Supreme Court's decision to provide state mandated access to shopping centers for free speech purposes and the United States Supreme Court's affirmance of that decision can be examined.

III. The California Supreme Court Decision

The California Supreme Court in *Robins v. Pruneyard Shopping Center*,[65] a four-three decision, held that the California Constitution[66]

58. Scott Hudgens, 205 N.L.R.B. No. 104, 84 L.R.R.M. 1008, 1009 (Aug. 21, 1973).

59. 501 F.2d at 167-69.

60. 351 U.S. 105 (1956) (a company could properly exclude non-employee labor organizers if the union possessed other ways of reaching the employees with its message).

61. Hudgens v. NLRB, 424 U.S. at 512.

62. 351 U.S. at 112.

63. 424 U.S. at 523.

64. *Id.* at 513.

65. 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979).

66. Cal. Const. art. I, § 2 provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may

protects the rights of free speech and petition, reasonably exercised, in privately-owned shopping centers.

The plaintiff-appellant, Michael Robins, and other high school students entered the Pruneyard Shopping Center[67] and attempted to solicit signatures for their petition in opposition to a United Nations resolution condemning "Zionism." While the shopping center was open to the general public, the management had strictly and disinterestedly enforced a policy prohibiting any visitor or tenant from engaging in any "publicly expressive activity, including the circulation of petitions, that [was] not directly related to the [shopping center's] commercial purposes."[68]

Soon after the appellants began their solicitation, they were told to leave, their conduct being a violation of the shopping center's regulations. The students complied but subsequently brought suit to enjoin Pruneyard from denying them access to the center for the purpose of circulating their petitions. The trial court rejected their request and the First District Court of Appeals affirmed.[69]

On appeal the California Supreme Court was faced with two issues. The first issue was whether *Lloyd Corp. v. Tanner* recognized federally protected property rights to such a degree that the court was barred from ruling that the California Constitution created broader speech rights with regard to private property than did the Federal Constitution. The second issue was whether the California Constitution protected free speech and petitioning at shopping centers even if *Lloyd* had not created federally protected property rights.[70]

In addressing the first issue, the court accepted the position that *Lloyd* was primarily a first amendment case[71] which defined and limited the exercise of free speech in shopping centers. However, the court reasoned that *Lloyd* did not define the nature and scope of a shopping center owner's property rights.[72] After a rereading of the *Hudgens* opinion, the California Supreme Court concluded that Congress, through the National La-

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not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 3 provides: "[P]eople have the right to . . . petition government for redress of grievances."

67. The center is a privately owned shopping center in Campbell, California, covering roughly 21 acres. Five acres are devoted to parking and sixteen are covered by walkways, plazas and sidewalks. The center has more than 65 specialty shops, 10 restaurants, and a movie theater. 23 Cal. 3d at 902, 592 P.2d at 342, 153 Cal. Rptr. at 855.

68. *Id.*

69. *Id.* at 902-03, 592 P.2d at 342, 153 Cal. Rptr. at 855.

70. *Id.*

71. *Id.* at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856.

72. *Id.*

bor Relations Act, could protect union picketing by statute.[73] The court implied that if Congress could fiat union access to shopping centers pursuant to a national labor policy and if the Supreme Court merely deferred to the National Labor Relations Board as it had done in *Hudgens*, then *Lloyd* had not immunized the shopping center from the government's power to regulate private property for the public welfare.[74]

It was well settled that property rights must yield to certain public interests served by such governmental regulations as zoning and environmental laws.[75] Since the state could regulate private property for the public welfare, it could also require shopping center owners to provide public forums for individuals to exercise free speech. The court stated that protecting free speech was a goal at least as important as those interests served by zoning and environmental protection regulation.[76] Therefore, if the state required shopping center owners to permit individual members of the public to exercise free speech and petition rights on the owner's property, it would amount to nothing more than a reasonable regulation of the owner's private property.

Once the court determined that the state had the power to regulate private property, it next considered whether state-created access to private shopping centers would protect or enhance free speech. The court relied on statistics[77] to support its view that suburban shopping centers are multiplying and assuming the functions of yesterday's central business block.[78] Therefore, because private shopping centers are supplanting those public business districts where free speech could flourish, the court concluded that the property rights of the shopping center owner must be

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73. *Id.* at 905, 592 P.2d at 344, 153 Cal. Rptr. at 857.

74. *Id.*

75. *Id.* at 906, 592 P.2d at 344, 153 Cal. Rptr. at 857.

76. *Id.* at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859.

77. With respect to the growth of privately owned shopping centers the court observed:

> The importance assumed by the shopping center as a place for large groups of citizens to congregate is revealed by statistics: in 21 of the largest metropolitan areas of the country shopping centers account for 50 percent of the retail trade; in some communities the figure is even higher, such as St. Louis (67 percent) and Boston (70 percent).

Id. at 910 n.5, 592 P.2d at 347 n.5, 153 Cal. Rptr. at 860 n.5 (quoting Note, 1973 WIS. L. REV. 612, 618 & n.51).

78. *Id.* at 907, 592 P.2d at 345, 153 Cal. Rptr. at 858. The impact of the data relied on by the California Supreme Court was that central business districts were declining in economic growth because the general public was continually turning to suburban shopping centers for its needs. For a recent update of this growing trend, *see* note 120 *infra*. The court concluded that, because of the importance of the shopping center as a potential public forum, prohibiting speech activity at shopping centers impinged on constitutionally protected speech rights.

" 'redefined in response to a swelling demand that ownership be responsible and responsive to the needs of the social whole. . . .' "[79] The justices were convinced that the modern shopping center was an effective public forum because large groups of citizens congregate therein daily.[80] Therefore, it seemed apparent that state-created access to privately-owned shopping centers would serve the purpose of enhancing and securing free speech—a valid state interest.

The California Supreme Court then balanced the state's interest in securing greater free speech rights for the public against the shopping center owner's interest in controlling the use of his property. With respect to the constitutional guarantees protecting the private ownership of property, the court stated that property interests emanate from exclusive possession and enjoyment of the property; when the owner invites the general public to enter onto his property, his interests become largely theoretical.[81] On the other hand, the court determined that "[s]hopping centers to which the public is invited can provide an essential and invaluable forum for those exercising [speech] rights."[82] With respect to the issue concerning the scope of *Lloyd,* the court determined that *Lloyd* did not prevent California from providing greater protection than that which the first amendment seemed to provide.[83]

The court then proceeded to the question whether the California Constitution insured access to shopping centers for free speech and petition purposes. The shopping center owner conceded that state courts were free to construe state constitutions more liberally than the United States Supreme Court's interpretion of identical or similar provisions found in the Federal Constitution.[84] However, the owner's argument was that while

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79. 23 Cal. 3d at 906-07, 592 P.2d at 345, 153 Cal. Rptr. at 858 (quoting Powell, *The Relationship Between Property Rights and Civil Rights,* 15 HASTINGS L.J. 134, 149-50 (1963)).

80. *See* note 86 *infra.*

81. 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

82. *Id.*

83. The Supreme Court of California, after reviewing several labor picketing cases, concluded that *Lloyd* did "not preclude law-making in California which requires that shopping center owners permit expressive activity on their property." *Id.* at 905, 592 P.2d at 344, 153 Cal. Rptr. at 857. The court noted the United States Supreme Court's decision in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), holding that the National Labor Relations Act could provide statutory protection for labor picketing despite any asserted interference with the shopping center owner's property rights.

84. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856. Numerous cases and commentators recognize that state judges are not required to conform their interpretations of state constitutions to the Supreme Court's interpretation of similar or identical provisions in the Federal Constitution. For a thorough discussion of the "new states' rights" theme, *see*

state courts may create broader rights under their own constitutions, a state may not expand one right if doing so would diminish another right protected under the Federal Constitution.[85] The court largely disposed of this argument by ruling that the *Lloyd* decision had not defined any federally protected property rights. Moreover, even if *Lloyd* had recognized constitutionally protected property rights, California was still free to regulate the shopping center for the valid state purpose of safeguarding the rights of free speech and petition. Therefore, the California Supreme Court could interpret the California Constitution as requiring public access to shopping center property for free speech purposes without contravening the Federal Constitution.

The California court, however, impliedly limited the scope of its holding to large shopping centers attracting large crowds and did not apply the public access requirement to the modest retail establishment.[86] Further, the public's right to exercise free speech on private shopping center property was subject to the owner's "reasonable regulations" of time,

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generally Falk, *The State Constitution: A More Than "Adequate" Non-federal Ground,* 61 CAL. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976).

85. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856. This argument was based on the supremacy doctrine whereby the Supreme Court has the authority to bind state executives, legislators, and judges to the Court's decisions. *See* Cooper v. Aaron, 358 U.S. 1 (1958) (governor and legislature of Arkansas were bound by Supreme Court decision in Brown v. Board of Education, 347 U.S. 483 (1954)). The U.S. CONST. art. VI, cl. 2 provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the Judges in evey State shall be bound thereby, anything in the Constitution or laws of any State notwithstanding." CAL. CONST. art. III, § 1 provides: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."

The supremacy doctrine presented no obstacle to the California court because it is well settled that the Constitution tolerated a divergence from Supreme Court decisions where the result is greater protection of individual reights under state law than under federal law. *See* Oregon v. Hass, 420 U.S. 714 (1975).

86. Citing from an earlier case involving a "large" shopping center, the opinion stated:

> It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center there]. A handful of additional orderly persons soliciting signatures and distributing handbills . . . under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations . . . would not markedly dilute defendant's property rights.

23 Cal. 3d at 910-11, 592 P.2d at 347-48, 153 Cal. Rptr. at 860 (quoting Diamond v. Bland, 3 Cal. 3d at 665, 477 P.2d at 733, 91 Cal. Rptr. at 501).

place, and manner of the protected speech activity.[87]

IV. The United States Supreme Court Decision

The shopping center owner appealed from the judgment of the California Supreme Court holding that the California Constitution protects speech and petitioning in privately-owned shopping centers. Justice Rehnquist delivered the opinion of the Court which affirmed the California Supreme Court's judgment.[88]

The appellant-shopping center owner first contended that *Lloyd Corp. v. Tanner* prevented California from requiring him to provide access to persons exercising their state constitutional rights of free speech and petition if adequate alternative forums were available.[89] The Supreme Court rejected this argument and reiterated the California court's position that *Lloyd* did not preclude the state from regulating a shopping center for the valid state purpose of safeguarding appellees' rights of speech and petition.[90] Distinguishing *Lloyd* from the instant case, the Justices found no comparable state constitutional or statutory provision in *Lloyd* that could have been interpreted to create a right of access to shopping centers for speech purposes.[91]

Because the *Lloyd* Court had decided that the private character of a shopping center was not changed merely because it was open to the pub-

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87. The California Court indicated that the owner could in some way regulate the protected speech activity through time, place and manner rules 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860. As examples of reasonable regulation, the activity could be regulated with regard to time, area, and number of persons participating, in order to avoid congestion during peak hours, blocking of passageways, and personal danger. Litter could be controlled by penalizing those who litter rather than prohibiting the distribution of handbills. *See, e.g.*, Wolin v. Port Authority, 392 F.2d 83, 94 (2d Cir. 1968); *In re* Hoffman, 67 Cal. 2d 845, _____, 434 P.2d 353, 357-58, 64 Cal. Rptr. 97, 101-03 (1967). So long as the regulations are reasonable and do not, in effect, amount to a prohibition of expression, there is no reason why they should not be acceptable.

88. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88 (1980).

89. *Id.* at 80.

90. In refusing to apply *Lloyd* to the instant case, Justice Rehnquist stated: "Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.* at 81 (citation omitted).

91. *Id.* In *Lloyd*, the respondent-handbillers relied on their *federal* rights as a basis for their claim that the shopping center must permit members of the public to exercise free speech on its premises. California's free speech and petition clauses are set out in note 66 *supra*.

lic,[92] the *Pruneyard* appellants asserted that, as private property owners, they held the "right to exclude others."[93] This right formed the basis of their second contention that the California restriction on the use of their property amounted to the state's taking of property without just compensation, an action which is prohibited by the fifth and fourteenth amendments.[94]

The Court acknowledged that the "right to exlude others" is "one of the essential sticks in the bundle of property rights," but that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense."[95] The test for determining whether a state has unlawfully infringed upon a landowner's rights under the "taking clause" is whether the state's restriction "forc[es] some people alone to bear the public burdens which, in all fairness and justice, should be borne by the pulic as a whole."[96] Justice Rehnquist concluded that the shopping center owners had not shown that their right to exclude others was so "essential to the use or economic value" of the shopping center property that the California court's restriction amounted to a

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92. The Court in *Lloyd* noted:

> Nor does property lose its private character merely because the public is generally invited to use it for designated purposes . . . . 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.

407 U.S. at 569.

93. 447 U.S. at 82.

94. *Id.* The *Pruneyard* appellants argued that since California had judicially granted the appellees the right to invade the appellants' private property, albeit to exercise free speech, this action constituted a state taking of property without just compensation.

95. *Id.* The Court defined a "taking" in a more tangible sense than just the denial of the shopping center's right to repulse intruders. The Justices distinguished appellants' claim in the instant case from a claim raised in the recent "taking clause" case of Kaiser Aetna v. United States, 444 U.S. 164 (1979). *Id.* at 83. In *Kaiser,* owners and investors had built an exclusive, private marina which was open only to fee-paying members. Part of the fees were in fact paid to maintain the privacy and security of the marina. The federal government attempted to create a public right of access to the marina because the owners had dredged a channel linking the pond to navigable waters. The owners objected because such government action interfered with their "reasonable investment-backed expectations." The Court agreed, holding that the government had gone "so far beyond ordinary regulation or improvement for navigation as to amount to a taking . . . ." 444 U.S. at 178.

96. 447 U.S. at 83 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)). Justice Rehnquist, describing the Court's methodology in determining what constitutes a "taking," stated: "This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. When a 'regulation goes too far it will be recognized as a taking.' " 447 U.S. at 83 (citations omitted).

"taking."[97]

The Court also found little merit to the appellants' third contention that they had been deprived of their property without due process.[98] Finding that California's interest in securing free speech and petition rights at shopping centers was as fundamental as the owner's right to control the use of his property, the Court applied the deferential "rational basis" test.[99] By such application, the Court concluded that state-created access to shopping centers was a reasonable means of furthering California's "interests in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution."[100] Furthermore it did not matter that the appellee-students had effective alternate forums available for communicating their message because California had determined that access to appellants' property was necessary to promote the state's goal.[101]

The shopping center-appellants' final contention was that *their* constitutional right to free speech would be impaired if compelled by the state of California to make their property available to others for the purposes of speech and petition.[102] To support their position, they cited cases which proved that the government could not compel individuals to affirmatively express ideas against their will or to participate in the expression of an ideological message to which they may have been opposed.[103] The

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97. *Id.* at 84.

98. *Id.*

99. The Court articulated the "rational basis" test as follows:

> [Neither] property rights nor contract rights are absolute . . . . . Equally fundamental with the private right is that of the public to regulate it in the common interest . . . .
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> . . . .
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> . . . [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be [obtained].

Id. at 84-85 (quoting Nebbia v. New York, 291 U.S. 502, 523 (1934)). The Court concluded that California's "asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution" satisfied the due process requirement. 447 U.S. at 85.

100. 447 U.S. at 85.

101. *Id.* at 85 n.8.

102. *Id.* at 85. This final contention was not discussed in the California Supreme Court decision. Nevertheless the United States Supreme Court found this claim to have been adequately presented in state court and therefore a properly raised federal question. *Id.* at 85 n.9.

103. *Id.* at 87-88 (citing Wooley v. Maynard, 430 U.S. 705 (1977) (state may not constitutionally enforce criminal penalties against those who cover the motto "live free or die" on motor vehicle license plates because that motto is repugnant to their moral and religious

appellants contended that California, by requiring them to provide a forum for the speech of others, had compelled the shopping center owners to express or affirm beliefs contrary to their first amendment right not to speak.

The Supreme Court rejected this contention, holding that the freedom of the shopping center owner to dissociate himself from a speech made on his property was not infringed by the California decision.[104] The Court distinguished the "state compulsion" cases cited by the appellants from the instant case. First, the decisions which appellants had relied on involved situations where the government had required individuals to affirm or participate in the dissemination of a particular belief or ideological message. The *Pruneyard* appellants, on the other hand, were not compelled to accept or reject the views expressed by individuals on the shopping center's property. Therefore, California was not dictating what particular views may or may not be expressed on the shopping center property.[105] Second, the Court held that a shopping center may disclaim endorsement of particular views expressed by members of the public on its property.[106] Third, because the shopping center is large and open to the public, it is unlikely that any views expressed by handbillers or pamphleteers would be identified as those of the shopping center owner.[107]

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beliefs); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (statute requiring newspaper to publish political candidate's reply to a critical editorial in that newspaper is unconstitutional); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory flag salute in public schools held violative of first amendment)). The Court distinguished the cases as ones which involved situations where the government had either imposed requirements demanding affirmative expression of belief or required individuals to disseminate a particular message. Such government-imposed requirements do invade the individual's first amendment rights, as Justice Jackson noted in *Barnette:*

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act to their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

319 U.S. at 634, 642.

In contrast, by requiring a shopping center to *provide a forum* for members of the public to express themselves *Pruneyard* does not require that the shopping center *affirm* those expressions uttered on its premises. No government-prescribed position or view was being forced on the shopping center in *Pruneyard.* 447 U.S. at 88.

104. 447 U.S. at 88.

105. *Id.*

106. "[A]ppellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Id.*

107. *Id.*

The Court declared that the appellants had failed to raise any cognizable first amendment claim.

In concurring opinions, Justices Powell and White agreed with the Court that the shopping center owner had not been deprived of first amendment rights.[108] Nevertheless, they believed that certain situations could arise where the owner would be forced to do more than merely dissociate himself from the views expressed on his property. Some speech activity expressed by others could be so controversial that the owner would feel compelled to publicly disavow it, particularly if it were undesirable to have the general public assume that the shopping center was sponsoring the speech activity conducted thereon.[109]

Justices Powell and White further argued that even where the public did not assume that the views expressed in the shopping center were those of the owner, the owner might still feel compelled to publicly specify particular views he found objectionable.[110] Such a situation might occur if a minority-owned shopping center were confronted with demonstrations by the Ku Klux Klan or the American Nazi Party, or if a church-owned center were asked to host demonstrations in favor of abortion.[111] In such situations where there exists a strong, emotional conflict of ideologies, the owner may have to speak out rather than remain silent. Therefore, according to Justices Powell and White, the right of the shopping center owner " 'to maintain his own beliefs without public disclosure' "[112] is burdened, "even when listeners will not assume that the messages expressed on private property are those of the owner."[113] Justices Powell and White might have voted to overturn the California decision on the basis of an infringement of the shopping center owner's first amendment rights had the owner shown that he, in fact, lost his right to refrain from speaking. Since the owner in the *Pruneyard* case failed to meet this burden, the two Justices concurred with the Court.[114]

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108. *Id.* at 97 (Powell & White, JJ., concurring in part and in judgment).

109. Both Justices advocated extending the "state compulsion" cases, note 103 *supra*, to situations like *Pruneyard* where a state has required the shopping center owner to subsidize any and all political, religious or social action groups by providing them with a forum to air their views, regardless of how repugnant these views may be to the owner. *Id.* at 98. Neither Justice, however, explained why customers would assume that the messages expressed in a large shopping center were those of the owner. Justice Powell conceded that the *Purneyard* appellants (shopping center) failed to show that they were so burdened by California's limited right of access to their property for free speech purposes. *Id.* at 101.

110. *Id.* at 100.

111. *Id.* at 99.

112. *Id.* at 100 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977)).

113. 447 U.S. at 100.

114. *Id.* at 101.

The *Pruneyard* decision cannot be regarded as a blanket approval of state efforts to transform the privately-owned shopping center into a public forum. A different result may obtain where the shopping center owner can demonstrate a more tangible and less theoretical invasion of his property or first amendment rights. What the Court appears to be looking for is a more concrete injury to the shopping center owner. It is incumbent upon the owner to demonstrate that the speech activity on his premises impairs his commercial investments or interferes with the operation of his business.[115] Therefore, naked title and the right to exclude others are not sufficient by themselves to justify the owner's denial of a right of access to individuals who seek to exercise their freedom of speech on shopping center premises. Consequently the holding in *Pruneyard* applies only where the state has created a public right to exercise free speech in shopping centers. If an individual seeks to exercise free speech based on his first amendment rights, *Hudgens* and *Lloyd* will control and bar access to the shopping center for that purpose.[116] Thus, the *Pruneyard* decision is limited solely to those jurisdictions that have chosen to interpret their constitutions as creating a public right of access to shopping centers for free speech purposes.

Other states may find it difficult to follow California's lead in converting the private shopping center into a public forum. Part of the difficulty lies in the fact that neither *Pruneyard* decision provides any guidance in drawing the line between a "modest retail establishment" whose owner may exclude petitioners and handbillers, and the type of retail complex whose owner must now surrender his property rights to the state's interest in promoting free speech.[117] Some of the factors that appear to be involved are: the size of the shopping center, the number of stores and services provided within the shopping center, the number of customers it attracts daily and the extent to which the shopping center has replaced the role of the public business block. The decision in this respect is confusingly broad.[118]

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115. According to the United States Supreme Court, the mere fact that California had interfered with the owner's right to exclude others and to control the uses of his property was not sufficient to constitute either a "taking" by the state or deprivation of property without due process. *See* notes 94-96 *supra* and accompanying text.

116. Justice White emphasized "that the Federal Constitution does not require that a shopping center permit distributions or solicitations on its property." 447 U.S. at 95.

117. The California Supreme Court appears to have intended its decision to apply to "large" shopping centers. *See* note 86 *supra*. However, what constitutes a "large" shopping center is not clear from a reading of the opinion.

118. Justices Powell and White appear to have wrestled with the scope of the California decision, concluding that the decision is not applicable to privately owned, freestanding stores and other commercial retail establishments. 447 U.S. at 96.

V. CONCLUSION

The strength of the *Pruneyard* decision is that both the California Supreme Court and the United States Supreme Court finally took a hard look at the shopping center owner's asserted property rights and concluded that these rights were, at best, theoretical. After the decision in *Hudgens,* it is questionable whether the *Lloyd* decision retains any vitality. Even if *Lloyd* has survived *Hudgens,* the *Lloyd* decision does an injustice to the first amendment by allowing the exercise of free speech only in those situations where the speech is related to the shopping center's use and where no alternative forums are available. Neither of these factors helps to define realistically the nature and scope of the competing interests involved when an individual seeks to exercise first amendment rights on private shopping center property.

While the California approach is not perfect, it represents a more realistic accommodation of the conflicting constitutional claims. First, it recognizes that privately-owned shopping centers are supplanting those traditional public business districts where free speech once flourished.[119] Because of this trend, private property ownership should be redefined to respond to society as a whole. Second, the California approach has breathed new life into *Marsh* by establishing that once a private landowner opens his land to the general public he can no longer claim the same property rights available to the private homeowner or single-standing store. Finally, allowing a group of orderly individuals to exercise free speech in a privately-owned shopping center, subject to reasonable regulations by the owner, does little to impair the owner's intended use and enjoyment of his property.

Despite its affirmance of the California decision in *Pruneyard,* the United States Supreme Court will remain steadfast in its position that the first amendment does not require the shopping center owner to permit free speech activity on his proprty.[120] Therefore, it will be necessary

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119. Because suburban shopping centers have sapped retail business from the inner cities, private shopping centers are now proliferating in the urban areas as well. Says Ernest Kahn, one of the nation's largest retail complex developers: "One quarter of all metro-area centers started by the mid-1980s will be inside cities. . . ." Rudnitsky, *A Battle No Longer One-Sided,* FORBES, Sept. 17, 1979, at 129. Homart Development Co., the shopping center builder for Sears, Roebuck and Co., plans to build 25 centers during the next five years. At least one-third of these will be inside cities. *A Spurt in Shopping Centers,* BUSINESS WEEK, Jan. 15, 1979, at 92. Along with the usual centers in suburban areas, developers are pushing into inner cities as well as rural areas once viewed as "commercial graveyards." *Id.* It has been predicted that there will be 25,000 shopping centers in the United States by 1985. PUBLISHERS WEEKLY, Feb. 1, 1971, at 54-55.

120. Even in *Pruneyard*-type situations where a state has mandated public access to

for free speech advocates to look toward state constitutions to restore the fundamental right of free speech to its "preferred position."[121]

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shopping centers for free speech purposes, the shopping center owner need only demonstrate that he has been burdened substantially by the public use of his property. For example, Justice Powell intimated that a different result could be obtained where the shopping center owner could establish that *his* first amendment rights were violated. Therefore, even where state law authorizes the conduct of handbillers or solicitors, the shopping center owner could object to such a public access requirement on grounds that the state has forced him to "lend support to the expression of a third party's views" and that such state compulsion "may burden impermissably the freedoms of association and belief protected by the First and Fourteenth Amendments." 447 U.S. at 98 n.2 (Powell, J., concurring).

121. Marsh v. Alabama, 326 U.S. 501, 509 (1946).