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Shopping in the Marketplace of Ideas: Why Fashion Valley Mall Means Target and Trader Joe's are the New Town Squares

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COMMENT

SHOPPING IN THE MARKETPLACE OF IDEAS:

WHY *FASHION VALLEY MALL* MEANS TARGET AND TRADER JOE'S ARE THE NEW TOWN SQUARES

INTRODUCTION

A "soapbox" is defined as "an improvised platform used by a self-appointed, spontaneous, or informal orator."[1] Soapboxes have long been recognized as symbols of the opportunity for any individual in an open society to introduce new ideas to others.[2] Pioneering political activist Harvey Milk famously announced his campaign for San Francisco Supervisor while standing on an old crate labeled "SOAP" on the corner of Castro and Market Streets.[3] But what if Harvey Milk had been told he could not set up his soapbox and speak out on the corner where people gathered, but instead was relegated to giving his speech in an out-of-the-way alley where few people, if any, would be there to hear his words? If

[1] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2160 (1976).

[2] The term "soapbox" was popularized in 1872 at "Speakers' Corner" in the Hyde Park neighborhood of London. *See* Cahal Mimo, *At the Home of the Soap-Box, There is a Lot of Froth but Little Substance,* THE INDEPENDENT UK, Nov. 5 , 2001; Leslie Jones, *Hyde Park and Free Speech*, HYDE PARK SOCIALIST (No. 34, Winter 1976-77).

[3] MILK (Focus Features 2008); *see also* Steven T. Jones, *Politics Behind the Picture*, SAN FRANCISCO BAY GUARDIAN, Nov. 19, 2008.

the grassroots movement Milk sparked[4] had instead sputtered, the loss would not have been merely Milk's, because every constriction of the free flow of ideas in American democracy harms us all.

The right to engage in free expression is merely a hollow promise if people who choose to exercise that right are not afforded the opportunity to speak where their words may be heard. The First Amendment to the United States Constitution provides a foundation for the protection of free expression in American society.[5] Furthermore, some states offer free-speech protection that is more expansive than that provided by the U.S. Constitution.[6] Since the seminal California Supreme Court decision of *Robins v. Pruneyard*,[7] California has stood at the forefront of those states that provide state constitutional protection for free speech broader than the First Amendment.[8]

In *Pruneyard*, the court held that the liberty clause of the California State Constitution mandates that there must be sufficient places available so that citizens who choose to exercise their free-speech rights may do so in a meaningful way.[9] The court held that the California Constitution[10] protects the right of free expression not only in the traditional public forums of parks, sidewalks and downtown business districts, which are the primary protected places for free speech under the First Amendment,[11] but also in shopping malls and on other private property

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[4] When Harvey Milk won a seat on the San Francisco Board of Supervisors in November 1977, he became an instant icon as the most visible openly gay elected official in the nation. He authored a civil rights ordinance outlawing discrimination based on sexual orientation, the strongest such law in the nation, and opened up City Hall to citizen participation by emphasizing grassroots politics and the power of neighborhoods. Time Magazine named Milk one of the "100 Heroes and Icons of the 20th Century" as a "symbol of what gays can accomplish and the dangers they face in doing so." Milk was killed by an assassin's bullet less than one year after taking office but his legacy has endured and continues to inspire. *See* John Cloud, *Harvey Milk*, TIME, June 14, 1999; *see generally* RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK (1982).

[5] U.S. CONST. amend. I.

[6] *See* Harriet D. Milks, Annotation, *Validity, Under State Constitutions, of Private Shopping Center's Prohibitions or Regulation of Political, Social, or Religious Expression or Activity*, 52 A.L.R.5th 195 (1997).

[7] Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899 (1979), *aff'd*, 447 U.S. 74 (1980).

[8] *See* Harriet D. Milks, Annotation, *Validity, Under State Constitutions, of Private Shopping Center's Prohibitions or Regulation of Political, Social, or Religious Expression or Activity*, 52 A.L.R.5th 195 (1997).

[9] *Pruneyard*, 23 Cal. 3d 899.

[10] CAL. CONST. art. I, § 2 (a) ("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 not restrain or abridge liberty of speech or press."); CAL. CONST. art. I, § 3 (a) ("The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.").

[11] Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939) ("The privilege of a citizen of

that has largely replaced the gathering places of old. This became known as the "*Pruneyard* Doctrine."[12]

However, in the three decades since *Pruneyard*, questions have been raised about the scope, and even the viability, of the *Pruneyard* Doctrine in the modern era.[13] The California Supreme Court added to the perception that *Pruneyard* was being narrowed when it held that the liberty clause does not protect the right of tenants to engage in free-speech activity in private apartment buildings.[14] Moreover, California appellate court decisions have utilized an increasingly restrictive interpretation of the *Pruneyard* court's analysis of what kind of private property is a public forum that is constitutionally required to allow free-speech activities.[15]

In late 2007, the California Supreme Court directly answered some of the questions raised in the decades since *Pruneyard* was first decided. This Note asserts that in *Fashion Valley Mall v. NLRB* the court put to rest the concerns about *Pruneyard's* continued viability. This Note explains that in *Fashion Valley Mall*, for the first time since the California high court decided *Pruneyard* nearly thirty years earlier, the court directly affirmed the notion that the California Constitution's liberty clause protects the right to free-speech activities on private property, such as a large shopping mall, that has taken on the characteristics of a traditional downtown business district.[16] This Note further asserts that the majority's opinion in *Fashion Valley Mall* requires a different approach from that taken by the state appellate courts in deciding whether "stand-alone stores" such as Target and Trader Joe's also qualify as public forums where free-speech activity is constitutionally protected.

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the United States to use the streets and parks for communication of views . . . must not, in the guise of regulation, be abridged or denied.").

[12] *Pruneyard*, 23 Cal.3d at 910 ("We conclude that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.").

[13] *See generally* Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633 (1991); Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145 (2007).

[14] *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 26 Cal. 4th 1013 (2001).

[15] *See* Trader Joe's Co. v. Progressive Campaigns, Inc., 73 Cal. App. 4th 425 (1999) (initiative petition signature gathering could be prohibited by Trader Joe's on its property because the signature gatherers failed to provide evidence that the Trader Joe's store had supplanted the town's central business district as the preferred place people chose to come to meet and spend time with one another); *see also* Van v. Target Corp., 155 Cal. App. 4th 1375 (2007) (signature gatherers failed to prove the entrance area of a retail store functioned as a public forum); Albertson's, Inc. v. Young, 107 Cal. App. 4th 106 (2003) (signature gatherers failed to prove a grocery store was the functional equivalent of a traditional public forum).

[16] Fashion Valley Mall, LLC v. NLRB, 42 Cal. 4th 850 (2007).

Part I will provide a brief background of the public forum doctrine, the California Constitution's liberty clause and the key California cases in this area of law. Part II will analyze the status of *Pruneyard* in light of *Fashion Valley Mall* and explore how lower courts currently determine whether private property qualifies as a constitutionally protected free-speech area. Finally, Part III will explain that the current analysis being used by appellate courts overly restricts the number of places that are available for free-speech activities. Following *Fashion Valley Mall*, courts should now presume that free-speech activities on private property that the owner has voluntarily opened to the public are constitutionally protected. Courts should place the burden of proving that free-speech activities would interfere with the use of their property on those property owners who wish to prohibit free-speech activities.

I. THE CALIFORNIA CONSTITUTION PROTECTS PLACES FOR FREE SPEECH: FROM THE PUBLIC FORUM DOCTRINE TO *FASHION VALLEY MALL*

To enhance the discussion of *Fashion Valley Mall,* a review of basic free-speech law and the U.S. Supreme Court's public forum doctrine will be provided. Next, the California Constitution's liberty clause and the seminal decision of the California Supreme Court applying free-speech protection to private property, *Pruneyard*, will be discussed. This section will also present state court decisions since *Pruneyard* that have adopted an increasingly narrow definition of "public forum." Finally, this section will set forth the facts and procedural history of *Fashion Valley Mall.*

A. THE PUBLIC FORUM DOCTRINE

The freedom of speech is widely considered the most fundamental freedom because it is protective of all others.[17] If the government or other powerful forces should seek to constrain a citizen from practicing her preferred religion, raising her family as she sees fit, or exercising her right to be left alone, it is the freedom of speech that allows the citizen to call attention to her plight and rally others to her defense.[18] Without the

[17] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see also* Stromberg v. Cal., 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

[18] *See* Whitney v. Cal., 274 U.S. 357, 375-76 (1927) (Brandeis, J. concurring) ("Those who won our independence believed that public discussion is a political duty; and that this should be a

right to speak freely and be heard by others, each citizen would be left alone to fend for herself against the powers that be.[19] As U.S. Supreme Court Justice Benjamin Cardozo characterized it, free speech is "the indispensable condition of nearly every other freedom."[20]

To express a message in a manner that actually reaches others requires more than just permission to speak – it requires places for that speech to actually occur. However, most people do not have the resources to buy billboards, pay for mass mailings, or place their own ads in the newspaper, on television or on Google.[21] While mass-media communication is by far the most effective way of reaching large numbers of people, one-on-one dialogue provides an avenue for "cheap speech" that everyone can afford.[22] Moreover, particularly in the context of smaller neighborhood quality-of-life issues and local elections, in-person conversations provide the opportunity for meaningful dialogue and two-way interaction. This can produce a "participatory politics" that advances ideas and understanding far beyond what one-way advertisements can achieve.[23] However, to ensure that meaningful in-person dialogue is a real possibility and not merely nostalgia for a bygone era, citizens must have access to physical locations that provide

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fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."), *overruled on other grounds,* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[19] *Id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.").

[20] Palko v. Conn., 302 U.S. 319, 327 (1937), *overruled on other grounds,* Benton v. Md., 395 U.S. 784, 794 (1969).

[21] For example, even during an economic downturn, the average cost of airing a single 30-second television commercial in prime time during the 2007-2008 season was estimated at $130,089. Brian Steinberg, *Price of a 30-Second TV Spot Slumps 4.1%,* ADVERTISING AGE, Oct. 6, 2008.

[22] Owen M. Fiss, *Why the State*, 100 HARV. L. REV. 781, 792 (1987) (discussing the need for the state to play a role in providing access to the general public to mass media outlets and other outlets for effective political expression but also asserting that what one of his colleagues called "cheap speech" is a necessary, albeit not sufficient, component of protected expression).

[23] BENJAMIN BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE, 151, 154-55 (1984) ("Strong democracy is defined by politics in the participatory mode: literally, it is self-government by citizens rather than representative government in the name of citizens . . . . Participatory politics deals with public disputes and conflicts of interest by subjecting them to a never-ending process of deliberation, decision, and action . . . . At the moment when 'masses' start deliberating, acting, sharing, and contributing, they cease to be masses and become citizens.").

them with the opportunity to share ideas with others.[24]

The U.S. Supreme Court initially refused to recognize any constitutional right to use property – public or private – for free-speech purposes.[25] But in a pair of decisions in 1939 the Court changed course and recognized the right to use at least some kinds of *public* property for free-speech activities: "Wherever the tide of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[26] The Court thus articulated what became known and widely accepted as the "public forum doctrine," characterizing government property such as sidewalks and parks as "public forums" that the government is constitutionally obligated to make available for free-speech activities.[27] Later, the Court also considered, but ultimately rejected, claims that the First Amendment of the U.S. Constitution also requires that *private* property that has taken on the characteristics of a public forum must be made available for free-speech activities.[28] However, the Court also held that nothing in the U.S. Constitution bars states from adopting stronger protections for free speech in their state constitutions.[29]

B. BROADER SPEECH PROTECTIONS IN THE CALIFORNIA CONSTITUTION

On a quiet Saturday afternoon in 1978, a group of high-school students set up a card table in the corner of the courtyard at a mall in Campbell, California.[30] The mall was the privately owned Pruneyard

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[24] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1342 (2d ed. 2005) ("Speech often requires a place for it to occur. Most people lack access to the mass media – television, radio, newspapers – to express their message. They need to have a place to distribute leaflets or a corner to place a soapbox.").

[25] Davis v. Mass., 167 U.S. 43 (1897) (holding that a Massachusetts citizen did not have a constitutional right to make a public address in the public park known as the "Boston Common").

[26] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); *see also* Schneider v. N.J., 308 U.S. 147 (1939).

[27] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1348 (2d ed. 2005).

[28] *See* Marsh v. Ala., 326 U.S. 501 (1946); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), *abrogated by* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Hudgens v. NLRB, 424 U.S. 507, 518 (1976) ("[W]e make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in *Lloyd Corp. v. Tanner.*").

[29] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83-84 (1980), *cited with approval in* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 12 (1986) (plurality); Dolan v. City of Tigard, 512 U.S. 374, 393 (1994).

[30] Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 902 (1979), *aff'd*, 447 U.S. 74 (1980).

Shopping Center, a 21-acre facility open to the public with 65 shops, 10 restaurants, a cinema and a central courtyard.[31] The group of students had chosen to give up part of their weekend to work for a cause they believed in – they arrived at the Pruneyard Mall to collect signatures on a petition to the President of the United States supporting Israel and objecting to a United Nations resolution against Israeli "Zionism."[32]

Soon after the students set up their card table, laid out their clipboards, and began asking passersby for a moment of their time, a private mall security guard approached the students and told them to leave.[33] Although by all accounts the students had been peaceful and apparently well-received by mall patrons, the mall ordered them to leave because of a blanket policy prohibiting free-speech activity inside the mall.[34] The students complied with the guard's request and left the mall.[35] Then the students filed a lawsuit.[36] The result was the 1979 California Supreme Court decision of *Pruneyard*.[37] Four years earlier, the California Supreme Court had observed that the state's free-speech clause was "more definitive and inclusive than the First Amendment."[38] But in *Pruneyard*, the court for the first time explicitly held that this meant the California Constitution's liberty clause protects the right to free speech not only in public places but also on private property that has adopted the characteristics of a public forum.[39]

The *Pruneyard* court engaged in a balancing test, weighing the rights of the property owner to control his property against the societal interest in access to valuable places for free-speech activity.[40] The court first reasoned that, since individual property rights must yield to the public interest in a variety of areas such as land use and environmental needs, the same must be true for the equally strong public interest in

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* ("Pruneyard's policy is not to permit any tenant or visitor to engage in publicly expressive activity, including the circulating of petitions, that is not directly related to the commercial purposes.").

[35] *Id.* at 903.

[36] *Id.* at 902.

[37] *Pruneyard*, 23 Cal. 3d 899, *aff'd*, 447 U.S. 74 (1980) (explicitly recognizing states' authority to enact speech protections broader than those in the U.S. Constitution).

[38] Wilson v. Super. Ct., 13 Cal. 3d 652, 658 (1975) (noting that, unlike the U.S. Constitution, which characterizes the First Amendment right to free speech as a limit on Congressional power – "Congress shall make no law . . . abridging the freedom of speech," the California Constitution empowers every person with an affirmative right to free speech without qualification or reference to the state).

[39] *Pruneyard*, 23 Cal. 3d at 908.

[40] *Id.* at 903-10.

protecting the constitutional right of freedom of speech.[41] Then the court assessed the expansion of private shopping malls in modern life.[42] The court noted that private shopping malls had increasingly displaced traditional downtown business districts as shopping venues.[43] Consequently, the court recognized that downtown business districts had become less valuable as outlets for the expression of ideas.[44] In his dissent in an earlier case, Justice Stanley Mosk detailed the rapid growth of private shopping centers in recent years: "Increasingly, such centers are becoming 'miniature downtowns'; some contain major department stores, hotels, apartment houses, office buildings, theatres, and churches."[45] Relying on the words of Justice Mosk, the *Pruneyard* majority concluded:

> His observations on the role of the [shopping] centers in our society are even more forceful now than when he wrote. The California Constitution broadly proclaims speech and petition rights. Shopping centers to which the public is invited provide an essential and invaluable forum for exercising those rights.[46]

C. THE "PRUNING OF *PRUNEYARD*"[47]

In the wake of *Pruneyard*, high courts in five other states – Colorado, Massachusetts, New Jersey, Oregon and Washington – eventually followed California's lead in interpreting their state constitutions to protect at least some free-speech activities in privately

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[41] *Id.* at 905-06 ("To hold otherwise would flout the whole development of law regarding states' power to regulate uses of property and would place a state's interest in strengthening First Amendment rights in an inferior rather than a superior position. '[All] private property is held subject to the power of the government to regulate its use for the public welfare.'" (citation omitted)); *see also* Agric. Lab. Rel. Bd. v. Super. Ct., 16 Cal. 3d 392, 403 (1976) (noting that for 50 years it had already been well established that the right to individual control over private property was subordinate to the general welfare when the two collided).

[42] *Pruneyard*, 23 Cal. 3d at 907.

[43] *Id.*

[44] *Id.* at 910; *see also* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 4 (Vintage Books 1992) (1961) (vividly describing the abandonment of downtowns for the suburbs due to a combination of planning, political and economic decisions, with the resulting disappearance of those traditional public gathering places that are so vital to the life of any healthy community).

[45] Diamond v. Bland, 11 Cal. 3d 331, 342 (1974) (Mosk, J., dissenting), *overruled by Pruneyard*, 23 Cal. 3d at 910.

[46] *Pruneyard*, 23 Cal. 3d at 910.

[47] *See* Alan E. Brownstein & Stephen M. Hankins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073 (1991) ("The authors support the pruning of *Pruneyard*, not the uprooting and overruling of its interpretation of the state constitution.").

owned shopping centers.[48] However, two major developments occurred in the three decades since *Pruneyard* was decided that generated confusion about both its scope and validity. First, the California Supreme Court decision in *Golden Gateway Center v. Golden Gateway Tenants Assn.*,[49] while not addressing *Pruneyard's* core holding, appeared to contradict *Pruneyard's* underlying rationale and fueled commentators' questioning of *Pruneyard's* wisdom and even its vitality as good law.[50] Second, a series of appellate court decisions over the last decade significantly narrowed the scope of *Pruneyard.* The appellate courts held that stand-alone stores such as Trader Joe's, Albertson's, and Target are not covered by the *Pruneyard* doctrine, thus allowing those stores to entirely ban free-speech activities from their property.[51]

1. Golden Gateway

In the two decades following *Pruneyard*, the California Supreme Court did not directly address its central holding, leaving the precise scope of protection provided by California's liberty clause an open question.[52] Then in 2001, the high court in *Golden Gateway* held that the liberty clause in the California Constitution did not protect the right of a tenants' association to distribute its newsletter under the apartment doors

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[48] Bock v. Westminster Mall, 819 P.2d 55 (Colo. 1991); Batchelder v. Allied Stores Int'l, Inc., 455 N.E.2d 590 (Mass. 1983); N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994); Lloyd Corp. v. Whiffen, 849 P.2d 446 (Or. 1993), *abrogated by* Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 243 (Or. 2000); Alderwood Assocs. v. Wash. Envtl. Council, 635 P.2d 108 (Wash. 1981); *see also* Harriet D. Milks, Annotation, *Validity, Under State Constitutions, of Private Shopping Center's Prohibitions or Regulation of Political, Social, or Religious Expression or Activity*, 52 A.L.R.5th 195 (1997) (also noting that courts in ten states – Arizona, Connecticut, Georgia, Michigan, New York, North Carolina, Ohio, Pennsylvania, South Carolina and Wisconsin – have declined to find speech protected in shopping malls).

[49] Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 26 Cal. 4th 1013 (2001).

[50] *See* Gregory C. Sisk, *Uprooting the Pruneyard*, 39 RUTGERS L.J. 1145, 1212 (2007) ("in sharp institutional and methodological contrast with *Pruneyard*, the [*Golden Gateway*] court carefully examined the text, history, and structure of the California Constitution, finding no basis for imposing constitutional obligations upon private citizens."); *see also* Harry G. Hutchison, *Through the Pruneyard Coherently: Resolving the Collisions of Private Property Rights and Nonemployee Union Access Claims*, 78 MARQ. L. REV. 1 (1994); Frederick W. Schoepflin, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133 (1989).

[51] *See* Van v. Target Corp., 155 Cal. App. 4th 1375 (2007) (retail store could prohibit free-speech activity at the entrance of its store); Albertson's, Inc. v. Young, 107 Cal. App. 4th 106 (2003) (grocery store could ban signature gathering); Trader Joe's Co. v. Progressive Campaigns, Inc., 73 Cal. App. 4th 425 (1999) (store not violating free-speech rights by prohibiting initiative petition signature gathering because Trader Joe's was not a public forum).

[52] *Golden Gateway*, 26 Cal. 4th at 1016 ("Since [*Pruneyard*], courts and commentators have struggled to construe [*Pruneyard*] and determine the scope of protection provided by California's free speech clause.").

in its residential complex over the objections of the landlord.[53] The court determined that the exclusionary character of a private apartment complex made it significantly different from places that voluntarily open their doors to the public.[54] The court found that it was this intention to exclude, rather than invite, the general public that disqualified the apartment complex from being a public forum under *Pruneyard*.[55]

The *Golden Gateway* plurality also took the opportunity to criticize *Pruneyard* generally. The court noted that the *Pruneyard* court had been "less than clear" about the scope of the liberty clause's application to private property and exactly what kind of property was affected.[56] The court also pointed out that *Pruneyard* failed to address "the threshold issue of whether California's free-speech clause protects against only state action or also private conduct."[57] Finally, the *Golden Gateway* court noted that *Pruneyard* had simply provided "little guidance on how to apply it outside the large shopping center context."[58]

The *Golden Gateway* court completed its *Pruneyard* critique by pointing out that "most of our sister courts interpreting state constitutional provisions similar in wording to California's free-speech provision have declined to follow [*Pruneyard*]."[59] The court listed numerous decisions that had been critical of *Pruneyard*.[60] While the court stopped short of directly challenging *Pruneyard's* validity, it appeared to do so only because it was "obliged to follow it under the principles of stare decisis."[61] Although the court did not say it was yet prepared to overrule *Pruneyard*,[62] the consequence of *Golden Gateway*

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[53] *Id.* at 1022.

[54] *Id.*

[55] *Id.* at 1033 ("Here, the Complex is privately owned, and Golden Gateway, the owner, restricts the public's access to the Complex. In fact, Golden Gateway carefully limits access to residential tenants and their invitees. Thus, the Complex, unlike the shopping center in [*Pruneyard*], is not the functional equivalent of a traditional public forum."); *id.* at 1039 (George, C.J., concurring) ("[T]here is no state or federal constitutional right to distribute unsolicited pamphlets in a location (whether publicly or privately owned) not open to the general public, such as the closed interior hallways of the apartment buildings here at issue.").

[56] *Id.* at 1021 (plurality opinion).

[57] *Id.*

[58] *Id.*

[59] *Golden Gateway*, 26 Cal. 4th at 1020.

[60] *Golden Gateway*, 26 Cal. 4th at 1020-22 n.5 (listing the court cases from states that declined to follow *Pruneyard*, pointing out that many of them had been sharply critical of *Pruneyard*).

[61] *Golden Gateway*, 26 Cal. 4th at 1020-22.

[62] One reason Justice Brown, writing for the plurality, may have stopped short of a frontal challenge to *Pruneyard* here was that the fifth vote for the judgment, Chief Justice George, distanced himself in his concurrence from broader efforts to rein in *Pruneyard*. *See Golden Gateway*, 26 Cal. 4th at 1036 (George, C.J., concurring).

was that it created doubt about whether California's liberty clause would continue to protect free-speech activity on private property.[63]

2. *State Appellate Decisions on Stand-Alone Stores*

Recent California appellate court decisions have provided a further indication of *Pruneyard's* tenuousness. Over the last several years, three different California state appellate courts addressed the issue of whether California's liberty clause protects free-speech activity on the property of stand-alone stores such as supermarkets and large retail stores.[64] In each case, the appellate courts concluded that the free-speech activity was not protected.[65]

In *Trader Joe's Company v. Progressive Campaigns, Inc.*, the First District Court of Appeal held that a free-standing supermarket's interest in controlling its private property outweighed society's interest in being able to use the sidewalk in front of the store to gather signatures on ballot initiative petitions.[66] Employing the *Pruneyard* analysis to balance the competing interests of the property owner against those of society, the court concluded that the Trader Joe's store had not voluntarily assumed the character of a public forum. The court emphasized the limited nature of what the Trader Joe's store had invited the public to do on its premises: "Trader Joe's invites people to come and shop for food and food-related items. It does not invite them to meet friends, to eat, to rest or to be entertained. Indeed, citizens are not invited to 'congregate' at the Santa Rosa Trader Joe's."[67] The court contrasted this with the decision of the owners of a shopping mall to offer dedicated courtyards, plazas and seating areas in which people could sit and discuss anything from shopping to civic matters.[68] This, the court found, demonstrated that "Trader Joe's interest in maintaining exclusive control over its

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[63] Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145, 1213 (2007) ("While declining to overrule Pruneyard for reasons of stare decisis, the Golden Gateway Center plurality nonetheless undermined the argument for transportation of constitutional rights to the private sector by holding that California's constitutional Liberty of Speech Clause does indeed protect only state action. . . . While the obsolete Pruneyard decision thus has been deprived of much of its precedential and all of whatever analytical support it ever had, the shattered ruin nonetheless remains a jurisprudential attractive nuisance for deformed constitutional interpretation.").

[64] *See* Van v. Target Corp., 155 Cal. App. 4th 1375 (2007); Albertson's, Inc. v. Young, 107 Cal. App. 4th 106 (2003); Trader Joe's Co. v. Progressive Campaigns, Inc., 73 Cal. App. 4th 425 (1999).

[65] *Target*, 155 Cal. App. 4th 1375; *Albertson's*, 107 Cal. App. 4th 106; *Trader Joe's*, 73 Cal. App. 4th 425.

[66] *Trader Joe's*, 73 Cal. App. 4th 425.

[67] *Id.* at 433.

[68] *Id.*

private property is stronger than the interest of a shopping mall."[69]

As for society's need to use the Trader Joe's as a forum for gathering signatures, leafleting or other speech activity, the court concluded that society's interest was not very strong.[70] While many people may gather at the store, the court emphasized that there were no facts showing that people were doing so for the *purpose* of interacting with one other: "[T]hose people come for a single purpose—to buy goods. . . . [T]he Santa Rosa Trader Joe's is not a public meeting place and society has no special interest in using it as such."[71] The court reasoned that private property does not obtain a "public character" when the public visits it for a narrow purpose rather than for a variety of reasons that could potentially include engaging in political discourse or getting educated about the issues of the day.[72]

In further support of its conclusion, the court asserted that the plaintiffs arguing for greater speech protections had failed to meet their evidentiary burden.[73] In the view of the *Trader Joe's* court, the *Pruneyard* court had been able to reach its conclusion only after seeing "tangible evidence that shopping centers were supplanting central business districts as the preferred public forum."[74] In contrast, the *Trader Joe's* court concluded that, since the plaintiffs in that case had presented no such evidence, the court had no basis upon which it could find that the Santa Rosa Trader Joe's qualified as a constitutionally protected public forum.[75]

Similarly, in *Van v. Target Corp* and *Albertson's, Inc. v. Young*, the Second District Court of Appeal and Third District Court of Appeal, respectively, rejected free-speech claims.[76] In each case citizens asserted that they had the right to engage in political activity by registering citizens to vote and gathering voter signatures on ballot petitions while standing in front of large stand-alone stores.[77] Like the *Trader Joe's* court, these courts concluded that, in the context of stand-alone stores, the balance between society's free-speech interests and private property rights favored the rights of property owners to prohibit free-speech

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[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Trader Joe's*, 73 Cal. App. 4th at 434.

[73] *Id.*

[74] *Id.*

[75] *Id.* ("In contrast [to *Pruneyard*], in the present case there is absolutely no evidence in any of appellants' declarations that the Santa Rosa Trader Joe's has assumed a comparable role.").

[76] *See* Van v. Target Corp., 155 Cal. App. 4th 1375 (2007); Albertson's, Inc. v. Young, 107 Cal. App. 4th 106 (2003).

[77] *Target*, 155 Cal. App. 4th 1375; *Albertson's*, 107 Cal. App. 4th 106.

activity on their land.[78]

D. THE CALIFORNIA HIGH COURT SPEAKS: FACTS AND PROCEDURAL HISTORY OF *FASHION VALLEY MALL*

It was another incident in a shopping mall twenty years after *Pruneyard* that prompted the state high court to define the constitutionally protected places for free speech in modern-day California. On October 4, 1998, approximately forty members of the Graphics Communications International Union, Local 432-M, entered the Fashion Valley Mall.[79] The union members began distributing leaflets to customers of the Robinsons-May retail store criticizing the store for advertising in the San Diego Union-Tribune newspaper, which was engaged in a labor dispute.[80] Mall officials appeared and told the union members to leave the property and informed them that they were trespassing since mall policy prohibited any kind of activity that urged customers not to patronize one of its stores.[81] The union members initially protested. However, after a police officer arrived, the union members moved to public property at the entrance of the Mall, where they briefly distributed additional leaflets.[82]

Eleven days later, the union filed a complaint with the National Labor Relations Board (NLRB) alleging that the Fashion Valley Mall had violated the National Labor Relations Act[83] by prohibiting the union members from distributing leaflets inside the mall.[84] An administrative law judge found for the union.[85] The judge ruled that the mall's rules

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[78] *Albertson's*, 107 Cal. App. 4th at 121 ("A location will be considered a quasi-public forum only when it is the functional equivalent of a traditional public forum as a place where people choose to come and meet and talk and spend time. The evidence does not establish that the Albertson's store is such a place."); *Target*, 155 Cal. App. 4th at 1390 ("We decline to extend the holding in *Pruneyard* to the entrance and exit area of an individual retail establishment within a larger shopping center. . . . In view of the undisputed evidence that those particular areas lacked any public forum attributes, the trial court properly concluded that any societal interest in using respondents' stores as forums for exercising expressive activities did not outweigh respondents' interest in maintaining control over the use of their stores.").

[79] Fashion Valley Mall, LLC v. NLRB, 42 Cal. 4th 850, 855 (2007).

[80] *Id.*

[81] *Id.* at 856.

[82] *Id.*

[83] The National Labor Relations Act provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of certain rights, including "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C.A. §§ 157, 158(a)(1) (Westlaw 2009), *quoted in Fashion Valley Mall*, 42 Cal. 4th at 855 n.1.

[84] *Fashion Valley Mall*, 42 Cal. 4th at 854.

[85] *Id.* at 855.

prohibiting consumer boycotts on mall property violated the National Labor Relations Act.[86] The NLRB later affirmed the administrative law judge's decision.[87]

Subsequently, Fashion Valley Mall petitioned for review of the NLRB decision before the United States Court of Appeals for the District of Columbia Circuit.[88] The court of appeals issued an opinion on June 16, 2006, stating that it had to decide whether the mall's prohibition of boycott activity violated the National Labor Relations Act and, if so, whether California law empowered the mall to enforce such a prohibition.[89] Since the court concluded that the answer to the first question was 'yes,' the outcome of the case turned on the answer to the second question.[90] Recognizing that this second question involved an as-yet-undecided issue of California law, the court of appeals requested that the California Supreme Court decide whether California law allowed the mall to enforce an anti-boycott rule on its premises.[91]

The California high court granted review.[92] In a decision issued on December 24, 2007, the California Supreme Court held that California law prohibited Fashion Valley Mall from enforcing its anti-boycott rule.[93] By a 4-3 majority, accompanied by a vigorous dissent, the court concluded that California's Constitution extended broad free-speech protections to the private property of Fashion Valley Mall, thereby affirming the *Pruneyard* doctrine as good law.[94]

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[86] *Id.* at 856.

[87] On October 29, 2004, the NLRB issued an opinion, relying in part on *Pruneyard*, that affirmed the administrative law judge's decision, stating: "California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner. [The rule at issue here], however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law. That is, the rule prohibits speech 'urging or encouraging in any manner' customers to boycott one of the shopping center stores. . . . [I]t appears that the purpose and effect of this rule was to shield [the Mall]'s tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling. Accordingly, we find that [the Mall] violated Section 8(a)(1) . . . ." *Fashion Valley Mall*, 42 Cal. 4th at 856.

[88] *Fashion Valley Mall*, 42 Cal. 4th at 857.

[89] *Id.*

[90] *Id.*

[91] *Id.* ("The court of appeals [for the District of Columbia Circuit] observed that 'no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant'").

[92] *Id.* at 857.

[93] *Id.* at 869-70.

[94] The court's primary holding was that the mall's rule was a content-based restriction on speech that must be subjected to strict scrutiny, a test that the mall's rule failed. "The Mall's purpose to maximize the profits of its merchants is not compelling compared to the Union's right to free expression." *Fashion Valley Mall*, 42 Cal. 4th at 869-70. However, to reach that conclusion the Court first affirmed that the right to free speech extended to the interior of a private shopping mall.

II. THE MEANING OF *FASHION VALLEY MALL*: EXTENDING CONSTITUTIONAL PROTECTION TO FREE-SPEECH ACTIVITY AT STAND-ALONE STORES

The consequence of *Fashion Valley Mall* to the body of law concerning places for free speech in California will be two-fold. First, the state high court's unequivocal affirmation of the *Pruneyard* doctrine[95] will put to rest questions about the continued viability of constitutional protection for free speech on private property in California. The court's holding will be seen as a rejection of claims that *Pruneyard* is an unconstitutional infringement on private property rights and that it is an outdated doctrine from an overly activist 1970's judiciary.[96] Second, by so squarely endorsing the necessity of places for protected speech, *Fashion Valley Mall* will encourage lower courts to apply constitutional free speech protections to private property beyond shopping malls.[97] In doing so, this Note asserts, the reasoning of *Fashion Valley Mall* dictates that those courts should employ the "interference test," an analysis that presumes speech is protected, rather than unprotected.[98] Each of these ideas will be discussed in turn.

A. *FASHION VALLEY MALL* CLEARLY AFFIRMED THE *PRUNEYARD* DOCTRINE

The *Pruneyard* decision made California the first state in the nation to find that its state constitution extended the reach of its free-speech clause to protect speech activity in private shopping centers.[99] This provided significantly greater free-speech protection than the federal constitution, which protects speech activity only on government

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In doing so the Court thereby directly affirmed *Pruneyard* as good law based on its merits, rather than merely due to adherence to stare decisis, for the first time since *Pruneyard* was originally decided.

[95] *Fashion Valley Mall*, 42 Cal. 4th at 870.

[96] *See generally* Frederick W. Schoepflin, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133, 145 (1989); Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145, 1146 (2007).

[97] *Fashion Valley Mall*, 42 Cal. 4th at 870.

[98] The basis of the "interference test" was articulated by the court in *In re Hoffman*, 67 Cal. 2d 845 (1967).

[99] Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J.L. & PUB. POL'Y 533, 550 (2004) (noting that California was the first state in the nation to recognize a right to free speech in private shopping malls under its state constitution after the U.S. Supreme Court in Hudgens v. NLRB, 424 U.S. 507 (1976) held such a right did not exist under the U.S. Constitution).

property.[100] This "groundbreaking decision"[101] generated controversy. *Pruneyard* came under assault and was characterized as an infringement on private property rights that was unconstitutional under prior U.S. Supreme Court decisions.[102] Others simply criticized *Pruneyard* as activist judicial policy-making that would fail the test of time.[103] However, a unanimous decision by the U.S. Supreme Court affirmed *Pruneyard.* The Court held that nothing in the federal constitution or prior U.S. Supreme Court decisions limited "the authority of [a] 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."[104]

While California courts followed *Pruneyard*, its critics never went away. Two main lines of criticism have shadowed *Pruneyard* since its inception: 1) that it was an unconstitutional infringement on private property rights, and 2) that it was the result of a temporarily activist judiciary and no longer relevant in modern times.[105] In light of the fact that the California Supreme Court had never directly affirmed

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[100] *Hudgens*, 424 U.S. 507.

[101] Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 26 Cal. 4th 1013, 1016 (2001) (describing *Pruneyard* as "a groundbreaking decision").

[102] Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 911 (1979) (Richardson, J., dissenting) ("The majority relegates the private property rights of the shopping center owner to a secondary, disfavored, and subservient position vis-à-vis the 'free speech' claims of the plaintiffs. Such a holding clearly violates federal constitutional guarantees announced in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)."), *aff'd*, 447 U.S. 74 (1980); *see also* Frederick W. Schoepflin, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133, 153 (1989) (describing the continued viability of *Pruneyard* as "suspect" in light of recent U.S. Supreme Court decisions requiring the government to compensate private property owners for taking their land for use by others).

[103] Harry G. Hutchison, *Through the Pruneyard Coherently: Resolving the Collisions of Private Property Rights and Nonemployee Union Access Claims*, 78 MARQ. L. REV. 1, 44 (1994) (characterizing *Pruneyard's* impact as an attack on "justice, equity, and coherence"); Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145, 1146 (2007) ("This judicially-fashioned free speech right to trespass on private property found no support in the language, structure, or history of the California Constitution. Indeed, other than a perfunctory quotation of the pertinent clause with no further analysis of the language, the California Supreme Court did not pause in its policy-making zeal to consider text, context or history. In sum, Pruneyard 'appears to be more a decision of desire than analytical conviction.'").

[104] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980). Moreover, the Court also rejected both the mall's claims that restricting its right to exclude citizens who wish to speak to others was a Fifth Amendment violation as a taking of their property without just compensation and a Fourteenth Amendment violation of the mall's guarantee against the deprivation of property without due process of law.

[105] *See Pruneyard*, 23 Cal. 3d at 914 (Richardson, J., dissenting) ("A private shopping owner is protected by the *federal* Constitution from unauthorized invasions by persons who enter the premises to conduct general 'free speech' activities unrelated to the shopping center's purposes and functions.").

Pruneyard, both of these critiques gained traction over time.[106] Following *Golden Gateway* and the state appellate decisions restrictively applying *Pruneyard* it appeared that *Pruneyard* was on the way to becoming "obsolete."[107] However, by directly affirming *Pruneyard* in unqualified terms, the high court in *Fashion Valley Mall* implicitly rejected further challenges to *Pruneyard's* vitality.[108]

1. Pruneyard *is not an unconstitutional infringement on private property rights*

The primary criticism of *Pruneyard* is that by requiring that free-speech activities be allowed on private property it violates property rights protected under the federal Constitution.[109] The crux of this argument is that to deny property owners the right to exclude persons from their property infringes on the prohibition against government deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments.[110] A related argument is that if the government requires free-speech activities on private land, it has engaged in a "taking" of private property for public use as defined by the Fifth Amendment. If a taking has occurred, under the Fifth Amendment the government must provide just compensation to the property owner.[111]

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[106] *See, e.g.*, Harry G. Hutchison, *Through the Pruneyard Coherently: Resolving the Collisions of Private Property Rights and Nonemployee Union Access Claims*, 78 MARQ. L. REV. 1 (1994); Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145 (2007).

[107] Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145, 1213 (2007) (describing the effect of *Golden Gateway* on *Pruneyard* as depriving it of all of its analytical strength and most of its precedential value).

[108] Fashion Valley Mall, LLC v. NLRB, 42 Cal. 4th 850, 870 (2007).

[109] *See Pruneyard*, 23 Cal. 3d at 914 (Richardson, J., dissenting); John A. Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection*, 37 SYRACUSE L. REV. 1 (1986); Frederick W. Schoepflin, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133 (1989).

[110] *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 552-53 (1972) ("We granted certiorari to consider petitioner's contention that the decision below violates right of private property protected by the Fifth and Fourteenth Amendments."); *see also* Frederick W. Schoepflin, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133, 145 (1989) ("The most basic common law property right is the right to exclusive possession. Property owners are generally free to choose who may use their property, when, and for what purposes. Persons who have been invited onto private property become trespassers if they refuse to leave when requested to do so. Persons with permission to be on land for a limited purpose become trespassers when their activities exceed the scope of their invitation. State common law and statutory property rights define the scope of property rights protected under the Constitution. The constitutional right of an owner to control the use of property should not be denied in favor of a competing right that is not based on the Constitution or other federal law.").

[111] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

However, the U.S. Supreme Court specifically declined to find a violation of the Fifth or Fourteenth Amendment in *Pruneyard*.[112] Nevertheless, the property-rights critique of *Pruneyard* gained traction because the California Supreme Court for thirty years following *Pruneyard* declined to affirm that the balance between free-speech rights and private property rights favored speech.[113]

The majority in *Fashion Valley Mall* closed the door on the property rights challenges to *Pruneyard* by unequivocally stating that constitutional free-speech protections extend to free-speech activity on private property: "A shopping mall is a public forum in which persons may reasonably exercise their right to free speech guaranteed by article I, section 2 of the California Constitution."[114] In doing so, the court walked through a detailed history of how it had respected both state and federal constitutional rights in balancing property rights with free-speech needs.[115] Acknowledging the private property rights argument, the *Fashion Valley Mall* court reiterated that such an argument had failed thirty years earlier and would fail again today since requiring a shopping mall to allow free-speech activity did not "unreasonably impair the value or use of their property as a shopping center."[116]

By articulating the foundation of the *Pruneyard* doctrine so directly,

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[112] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83-84 (1980) ("Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. . . . There is also little merit to appellants' argument that they have been denied their property without due process of law.").

[113] Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145, 1205 (2007) ("The greatest rebuttal to the policy advocates of transplanting free speech rights into the foreign soil of the private sector lies in the impossibility of carefully controlling the spread of this alien vegetation into new fields of private human endeavor once it has taken root."); *see also* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1564-1565 (1998) (characterizing *Pruneyard* as a "radical departure" from traditional respect for private property rights).

[114] Fashion Valley Mall, LLC v. NLRB, 42 Cal. 4th 850, 869-70 (2007).

[115] *Id.* at 858-63.

[116] *Fashion Valley Mall*, 42 Cal. 4th at 863 (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. at 83). This entire line of argument against *Pruneyard* is strikingly similar to the claim that "economic substantive due process" rights under the Fifth and Fourteenth Amendments are infringed by government regulation of businesses. That doctrine, known as "Lochnerism" after *Lochner v. N.Y.*, 198 U.S. 45 (1905), held sway for a time in the early twentieth century but was resoundingly rejected by the U.S. Supreme Court in *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state law that required a minimum wage for female employees). *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 545 (2d ed. 2005) ("Since 1937, not one state or federal economic regulation has been found unconstitutional as infringing liberty of contract as protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court has made it clear that economic regulations – laws regulating business and employment practices – will be upheld when challenged under the Due Process Clause so long as they are rationally related to a legitimate government purpose."). Nevertheless, this line of attack on *Pruneyard* has persisted.

the *Fashion Valley Mall* court explicitly rejected the critiques of *Pruneyard* as an unconstitutional taking of private property. The *Fashion Valley Mall* court's affirmation is all the more powerful because it lacked any of the caveats that the *Golden Gateway* plurality used when adhering to *Pruneyard* due to principles of stare decisis.[117]

2. Pruneyard *remains relevant and necessary*

Pruneyard's critics have also engaged in a political assault on the decision, attempting to characterize it as an outdated doctrine that was the product of a radical judiciary that prioritized social policy-making over respect for the Constitution.[118] This criticism of *Pruneyard* appeared to find favor in the *Golden Gateway* plurality, which described in great detail the large number of state courts that had rejected a similar interpretation of their own state constitutional free-speech clauses in the years since *Pruneyard*.[119] In so doing, the *Golden Gateway* plurality suggested it may well have come to the exact opposite conclusion of the *Pruneyard* court had the issue been addressed for the first time under modern conditions rather than decades earlier.[120]

However, in directly affirming the application of *Pruneyard* to keep shopping malls open to free-speech activity in 2007 and beyond, the *Fashion Valley Mall* majority left little room for this line of criticism to credibly persist. The court noted the importance of keeping California's broad constitutional free-speech protections intact in the twenty-first century: "For the California Constitution is now, and has always been, a

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[117] *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 26 Cal. 4th 1013, 1022 (2001) ("Nonetheless, [*Pruneyard*] has been the law in California for over 20 years. Whether or not we would agree with [*Pruneyard's*] recognition of a state constitutional right to free speech in a privately owned shopping center if we were addressing the issue for the first time, we are obliged to follow it under principles of stare decisis.").

[118] *See* Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145 (2007) ("The *Pruneyard* decision should be recognized as the anachronistic product of a transitory era in American legal history during which the courts openly assumed powers to advance preferred social policies through the venue of constitutional litigation, untethered to the words of a constitutional charter or the historical setting in which those words were given legal force .... Pruneyard is a weed in the garden of constitutional jurisprudence. Pruneyard should be shorn off at the roots, lest its noxious vegetation crowd out the growth of a healthier approach to constitutional interpretation."); *see also* John A. Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection*, 37 SYRACUSE L. REV. 1 (1986); Frederick W. Schoepflin, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133 (1989).

[119] *Golden Gateway*, 26 Cal. 4th at 1020-22 n.5.

[120] *Golden Gateway*, 26 Cal. 4th at 1022 ("Whether or not we would agree with [*Pruneyard*'s] recognition of a state constitutional right to free speech in a privately owned shopping center if we were addressing the issue for the first time, we are obliged to follow it under the principles of stare decisis.").

'document of independent force and effect particularly in the area of individual liberties.'"[121] The court observed in *Fashion Valley Mall* that private property has continued to "replace the streets and sidewalks of the central business district" as gathering places for citizens and thus venues for free speech.[122] The *Fashion Valley Mall* court extensively traced the cases finding constitutional protection for free speech on private property, spending nearly half of the opinion detailing those decisions and their rationales.[123] In doing so, the California court indicated that its affirmation of *Pruneyard* was deeply rooted in precedent and principles that remained both relevant and necessary.

B. A POST-*FASHION VALLEY MALL* APPROACH TO WHETHER PRIVATE PROPERTY QUALIFIES AS A PUBLIC FORUM: THE INTERFERENCE TEST

By affirming *Pruneyard*, the *Fashion Valley Mall* court embraced the overarching principle that "[the] California Constitution provides greater, not lesser, protection for . . . free speech."[124] However, the court did not have the opportunity to settle the looming question of when, or whether, that speech protection applies to venues other than shopping malls.[125] That is a question the *Pruneyard* court left unsettled and lower courts have struggled with ever since.[126]

Justice Chin, writing for the three *Fashion Valley Mall* dissenters, attempted to convert the majority's silence regarding the scope of the constitutional protection into a pronouncement limiting the public forum doctrine only to large shopping malls and not to individual stores: "Today's majority opinion carefully says nothing casting doubt on the recent cases involving stand-alone stores, and they are surely correct."[127]

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[121] *Fashion Valley Mall*, 42 Cal. 4th at 863 (quoting Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 491 (2000)).

[122] *Id.* at 858.

[123] Nearly seven pages of the fifteen-page majority opinion were devoted to recounting the cases applying the public forum doctrine to private property under California's Constitution. *Fashion Valley Mall*, 42 Cal. 4th at 858-64.

[124] *Fashion Valley Mall*, 42 Cal. 4th at 868.

[125] The owners of Fashion Valley Mall did not directly challenge the notion that they were constitutionally required to allow free-speech activities on their property, challenging only the extent of that constitutional requirement and whether it prohibited the mall from imposing particular restrictions on speech activity. *Fashion Valley Mall*, 42 Cal. 4th at 858.

[126] *See* Trader Joe's Co. v. Progressive Campaigns, Inc., 73 Cal. App. 4th 425, 433 (1999) ("*Pruneyard* establishes that there is a state constitutional right to exercise free speech and petitioning activity on private property. However, the *Pruneyard* court *did not* purport to articulate the precise scope of that right.").

[127] *Fashion Valley Mall*, 42 Cal. 4th at 880 (Chin, J., dissenting).

But there is every reason to believe that the *Fashion Valley Mall* majority knew exactly what it was doing when it wholeheartedly embraced *Pruneyard*: opening the door to new approaches to preserving places where free speech can thrive in today's world. By issuing an unqualified affirmation of *Pruneyard*,[128] the high court indicated that protecting places for speech remains as necessary now as it was thirty years ago.

1. *There is a need for new public forums for free speech because large individual stores have replaced giant indoor shopping malls as gathering places*

In a series of cases over the last decade, California appellate courts have declined to protect citizens' right to engage in free-speech activity on the property of large stand-alone stores.[129] There is a fundamental problem with this result. Large stand-alone stores, either as the anchors of open air strip-malls or operating on their own, have increasingly replaced *Pruneyard*-era enclosed shopping malls as places where citizens come into contact with others.[130] The courts need to acknowledge this shift by recognizing that the entrances to stand-alone stores should be considered public forums that must be made available for free-speech activity.

The *Pruneyard* court relied heavily on evidence in the record demonstrating that there had been a massive shift in recent decades away from shopping in the traditional downtown business districts in favor of shopping in large shopping malls.[131] Among the evidence the *Pruneyard* court considered were statistics demonstrating that retail sales in central San Jose had dropped so dramatically that the downtown business district only accounted for five percent of the county's total retail sales.[132] Nearly thirty years after *Pruneyard,* there has been a similar shift away

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[128] *Fashion Valley Mall*, 42 Cal. 4th at 870.

[129] *See* Van v. Target Corp., 155 Cal. App. 4th 1375 (2007); Albertson's, Inc. v. Young, 107 Cal. App. 4th 106 (2003); *Trader Joe's*, 73 Cal. App. 4th 425.

[130] *See generally* David Segal, *Our Love Affair With Malls Is On The Rocks*, N.Y. TIMES, Feb. 1, 2009, at B1 ("There are roughly 1,500 malls in the United States, according to the International Council of Shopping Centers, many of them ailing, some of them being converted into office buildings, and others closing their doors for good. At Web sites like deadmalls.com, the carcasses of these abandoned buildings are photographed and toe-tagged, along with tributes from former shoppers."); *The Mall Pall: Have America's Biggest Shopping Centers Lost Their Allure?*, KNOWLEDGE@WHARTON, Dec. 10, 2008, http://knowledge.wharton.upenn.edu/article.cfm?articleid=2111 (last visited Mar. 8, 2009).

[131] Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 907 (1979), *aff'd*, 447 U.S. 74 (1980).

[132] *Id.* ("Retail sales in the central business district declined to such an extent that statistics have not been kept since 1973. In 1972 that district accounted for only 4.67 percent of the county's total retail sales.").

from enclosed large shopping malls to open-air strip malls and stand-alone stores.[133] Individual "big-box" stores have increasingly attracted busy shoppers who are no longer willing to spend whole afternoons wandering around the various stores inside large malls to find the right place to make their purchase.[134] According to the International Council of Shopping Centers, today less than five percent of shopping centers in the U.S. are enclosed malls.[135]

As the venues that have supplanted the small town business districts of old as the places people today gather to shop, meet, and talk, it is inconsistent for the courts to continue to treat large stand-alone stores such as Trader Joe's and Target differently from enclosed shopping malls in terms of free-speech access.[136] One appellate justice recently noted that it is the responsibility of the courts to reconcile the gap between the theory of free speech and the reality of ensuring opportunities for people to speak where their messages can be heard:

> It is anomalous to declare that a shopping center may constitute a public forum and then to exclude from that domain the sidewalks in the vicinity of the anchor business where most people go—the supermarket. It does sponsors of an initiative little good to be able to set up their table on the edge of a parking lot where they have, at best, minimal access to citizens on their way to shop in the supermarket.[137]

Just as changes in the fabric of society led the *Pruneyard* court to recognize the need for new protected gathering places for free-speech activities, a new wave of changes in the marketplace has reshaped the map of where people congregate today.[138] *Fashion Valley Mall* provides

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[133] *See* Tenisha Mercer, *Aging Malls Fight to Remake Their Images*, THE DETROIT NEWS, Mar. 3, 2005, at A1 ("Years ago, avid shoppers like Janet Thomas flocked to places such as Northland Center, which launched the nation's indoor mall craze 50 years ago. Developers built malls as fast as they could and retailers of all sizes clamored to open up shops inside them. America's love affair with malls decimated many of its downtowns. But the winds are shifting again, and this time it's malls that are endangered as department stores consolidate and consumers increasingly choose stand-alone stores and Main Street-style open-air shopping plazas.").

[134] *See* Kortney Stringer, *Abandoning the Mall*, WALL ST. J., Mar. 24, 2004, at B1 (major retailers increasingly opening stand-alone outlets to appeal to busy customers while shuttering stores located inside malls).

[135] International Council of Shopping Centers, Industry Fun Facts, http://www.icsc.org/srch/about/impactofshoppingcenters/02_DidYouKnow.pdf (last visited Mar. 8, 2009).

[136] *See* Van v. Target Corp., 155 Cal. App. 4th 1375 (2007); Albertson's, Inc. v. Young, 107 Cal. App. 4th 106 (2003); Trader Joe's Co. v. Progressive Campaigns, Inc., 73 Cal. App. 4th 425 (1999).

[137] *Albertson's*, 107 Cal. App. 4th at 132 (Sims, J., concurring).

[138] Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899 (1979), *aff'd*, 447 U.S. 74 (1980).

the opportunity for California courts to take the next logical step. They should acknowledge that, since large indoor shopping malls have been significantly replaced by individual stand-alone stores as gathering places, those stand-alone stores represent new locations that must be recognized as protected public forums for free-speech activities.

2. *The prevailing analysis for whether private property qualifies as a public forum creates an improper presumption that citizen speech is not protected anywhere other than malls*

The *Fashion Valley Mall* court considered the application of free-speech protections to a large-scale shopping mall that did not contest that it was constitutionally required to allow at least some expressive activity on its property.[139] Therefore, the state's high court did not need to determine whether constitutional free-speech protections applied, an inquiry that balances the interests of the individual property owner against society's interests in conducting free-speech activities on the particular property.[140] However, the appellate courts that have been called upon to do so have applied this balancing of interests test in a way that effectively creates a heavy presumption against protecting citizen speech.[141]

In rejecting attempts by citizens to register voters and collect petition signatures outside of retail stores, appellate courts have made their decisions based on the presumption that speech activities are not constitutionally protected in a given place unless "the property owner has so opened up his or her property for public use as to make it the functional equivalent of a traditional public forum."[142] The primary factors considered by the courts in determining whether this presumption can be rebutted and the private property rises to the level of a public forum are 1) the extent of the invitation by the property owner to the public, 2) the nature of the primary use of the property, 3) any relationship between the speech activities and the primary use of the property, and 4) the size of the business.[143] Some courts have also

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[139] Fashion Valley Mall, LLC v. NLRB, 42 Cal. 4th 850, 858 (2007).

[140] *Trader Joe's*, 73 Cal. App. 4th at 433.

[141] *See Target*, 155 Cal. App. 4th 1375 (signature gatherers failed to prove the entrance area of a retail store functioned as a public forum); *Albertson's*, 107 Cal. App. 4th 106 (signature gatherers failed to prove a grocery store was the functional equivalent of a traditional public forum); *Trader Joe's*, 73 Cal. App. 4th 425 (signature gatherers failed to provide evidence that the Trader Joe's store had supplanted the town's central business district as the preferred place people chose to come to meet and spend time with one another).

[142] *Albertson's*, 107 Cal. App. 4th at 118 (citing *Trader Joe's*, 73 Cal. App. 4th 425).

[143] *Id.* at 119; *see also* Planned Parenthood v. Wilson, 234 Cal. App. 3d 1662, 1671 (1991).

considered the public's interest in using the particular piece of private property as a venue for free speech.[144] In each case, the courts have concluded that private property smaller than a mall is not a public forum.[145]

Pruneyard specifically declined to make the size of the premises a determinative factor in the public forum balancing test.[146] While the appellate courts acknowledged this, they nevertheless gave heavy weight to the fact that individual stores are vastly different from large shopping malls.[147] Individual stores, even large ones, inherently offer far fewer products than a gigantic mall and have significantly less space to make available for the public to interact with one another. Primarily examining the *purpose* of property owners in inviting the public to their property or the *purpose* of the public in visiting the property, to see if either had a "public character" to it, the appellate courts have been careful not to describe the physical size of the property as the dispositive factor in the public forum determination.[148] However, by focusing on the number of uses the property owner offers to the public, the appellate courts have in effect made size the determinative factor in the public forum analysis since, by their nature, individual stores can offer many fewer uses to their visitors than large, multi-store malls.[149]

While acknowledging that the size of the private property is not the determinative factor, the recent appellate court decisions nevertheless have concluded that, in the balance between free speech and property rights, stores smaller than massive malls are not required to allow free-

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[144] *Trader Joe's*, 73 Cal. App. 4th at 433.

[145] *Id.*; *Target*, 155 Cal. App. 4th 1375; *Albertson's*, 107 Cal. App. 4th 106.

[146] *Albertson's*, 107 Cal. App. 4th at 119 ("*Pruneyard* did not hold that free speech and petitioning activity can be exercised only at large shopping centers or that such activities can be exercised on any property except for individual residences and modest retail establishments. [citation omitted] The size of the business is simply a factor to be weighed in balancing the competing interest of the owner and society—'[t]he smaller the business, the more weight the owners' rights will have.'" (quoting Allred v. Shawley, 232 Cal. App. 3d 1489, 1496 (1991)).

[147] *See Trader Joe's*, 73 Cal. App. 4th at 433, where the court stated that it was not hinging public forum status on the size of the property but effectively did just that by describing size as the critical factor.

[148] *Trader Joe's*, 73 Cal. App. 4th at 434 ("Trader Joe's opens its property to the public so the public can buy goods. It does not offer its property for any other use. Thus, in contrast to Pruneyard and other multipurpose shopping centers, the Santa Rosa Trader Joe's does not have a 'public character.'").

[149] The dispositive effect of the size of the venue on the public-forum analysis was strikingly evident in *Slevin v. Home Depot*, 120 F. Supp. 2d 822, 834 (N.D. Cal. 2000) (concluding that a twelve-person seated area outside a stand-alone store's main exit, which the store itself characterized as a "Public Forum Area" in a posted sign, was not protected for free-speech activity, since the area was not the "hub of activity envisioned in *Pruneyard*, which involved a 21 acres shopping center housing some 65 shops, 10 restaurants, and a cinema").

speech activities.[150] This analysis of whether private property qualifies as a public forum effectively presumes that free-speech activity is not protected on private property other than large shopping malls. Particularly in light of *Fashion Valley Mall,* it is clear that this analysis fails to enforce the vigorous free-speech protections required by California's Constitution.[151]

3. *The proper test for whether private property is a public forum is whether free-speech activities would unreasonably interfere with the primary use of the property*

Until now, California appellate courts have largely declined to extend constitutional protection to citizens who attempt to exercise their speech rights on private property smaller than large malls. However, the *Fashion Valley Mall* court held that the California Constitution's liberty clause continues to require that citizens be allowed to exercise their right to free speech on private property.[152] The appellate courts should take the next logical step and apply the *Pruneyard* balancing test to put the burden of proof on the party who wishes to restrict speech, rather than on citizens wishing to speak. In doing so, the courts would facilitate constitutionally protected free-speech activity rather than discouraging it.

The right of private property owners to exclude others is inherently circumscribed by their voluntary decision to open their venues to the general public.[153] In the case of a large retail store, "access by the public is the very reason for its existence."[154] These property owners impliedly accept as part of the cost of doing business that, in exchange for benefiting from having the public to come onto their premises, they must accommodate the public's reasonable needs.[155] That bargain does not entirely deprive the property owner of the basic rights to "the exclusive

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[150] *Target*, 155 Cal. App. 4th 1375; *Albertson's*, 107 Cal. App. 4th 106; *Trader Joe's*, 73 Cal. App. 4th 425.

[151] Fashion Valley Mall, LLC v. NLRB, 42 Cal. 4th 850, 870 (2007).

[152] *Id.*

[153] *In re* Cox, 3 Cal. 3d 205, 217-18 (1970) ("The shopping center may no more exclude individuals who wear long hair . . . who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations, than may the City of San Rafael.").

[154] Lombard v. La., 373 U.S. 267, 275 (1963) (Douglas, J., concurring).

[155] *See* Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, 61 Cal. 2d 766, 771 (1964) ("[T]he countervailing interest which plaintiff endeavors to vindicate emanates from the exclusive possession and enjoyment of private property. Because of the public character of the shopping center, however, the impairment of plaintiff's interest must be largely theoretical. Plaintiff has fully opened his property to the public."); *see also In re* Lane, 71 Cal. 2d 872, 878 (1969).

possession and enjoyment of private property."[156] However, the decision of a property owner to voluntarily open his doors to benefit from public access is intertwined with the responsibility of respecting the public's constitutionally guaranteed rights.[157]

Property owners should bear the burden of justifying to a court why they should be allowed to require citizens to leave their constitutional rights at the door. The legal analysis of whether a particular private property constitutes a public forum should begin from the presumption that the speech activity is protected and place the burden of proving otherwise on the property owner wishing to restrict free-speech activities. The courts should start from the premise that California's free-speech protections should apply to any private property that has been made "freely and openly accessible to the public."[158] Courts should place the burden of proving that a particular property is not a public forum on the property owner who wishes with one hand to benefit from inviting the public onto their land but with the other to deny citizens their right to communicate with one another about the issues of the day.

The *Fashion Valley Mall* court articulated the proper test for whether private property qualifies as a public forum in its recitation of its holdings in *In re Lane* and *In re Hoffman*.[159] In *In re Lane*, the state high court described the threshold inquiry for whether free-speech protections apply to a particular piece of private property as one that simply asks whether the owner has invited the public to patronize its store and in so doing has allowed the public to freely traverse the sidewalk or walkway in front of its store.[160] If that is the case, then the court asks whether permitting the free-speech activities would unreasonably interfere with the owner's primary use of the property.[161] If there is no unreasonable interference from the free-speech activities, the property owner cannot

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[156] *Schwartz-Torrance*, 61 Cal. 2d at 771. The court in *Fashion Valley Mall* was clear that the owner of private property that qualifies as a public forum retains the ability to impose reasonable time, place, and manner restrictions on speech activities to ensure they do not conflict with the primary use of the property. These can include a wide variety of restrictions, such as the requirement of a cleaning deposit if leaflets are to be distributed, prohibitions on the use of loudspeakers, limits on the location where the speech activities may be conducted, and a cap on the number of people who are conducting speech activities on the premises at any given time. *Fashion Valley Mall*, 42 Cal. 4th at 863-65.

[157] *See In re* Cox, 3 Cal. 3d 205, 217-18 (1970).

[158] Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 26 Cal. 4th 1013, 1033 (2001).

[159] *In re Lane*, 71 Cal. 2d 872; *In re* Hoffman, 67 Cal. 2d 845 (1967).

[160] *In re Lane*, 71 Cal. 2d at 878.

[161] *Id.* ("In utilizing the [private] sidewalk for such purposes those seeking to exercise such rights may not do so in a manner to obstruct or unreasonably interfere with free ingress or egress to or from the premises.").

completely exclude them from the property.[162]

The court's application of this "interference test" in *In re Hoffman* is instructive. There, the high court held that Vietnam War protesters had the right to hand out leaflets in a privately owned train station in Los Angeles as long as the free-speech activity did not interfere with the legitimate conduct of railroad business.[163] The court first noted that the three railroad companies that owned the train station generally invited the public onto their premises, making it accessible without restriction.[164] Then the court examined whether the free-speech activities of leafleting and talking with train patrons impeded the primary use of the railroad station, finding that they did not:

> Those activities in no way interfered with the use of the station. They did not impede the movement of passengers or trains, distract or interfere with the railroad employees' conduct of their business, block access to ticket windows, transportation facilities or other business legitimately on the premises. Petitioners were not noisy, they created no disturbance, and [they] did not harass patrons who did not wish to hear what they had to say. Had petitioners in any way interfered with the conduct of the railroad business, they could legitimately have been asked to leave.[165]

By incorporating the interference test into the *Pruneyard* analysis, the courts would properly balance the speech and property interests protected under California's Constitution. The interference test would shift the burden of proof in public-forum cases to those property owners who wish to block efforts to inform the public about important issues. The way the *Trader Joe's* court conducted the *Pruneyard* analysis requires citizens attempting to stimulate dialogue to bear the burden of providing sufficient evidence that they have the right to engage in free-speech activities on a particular piece of private property.[166] The

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[162] *Id.*

[163] *In re Hoffman*, 67 Cal. 2d at 851.

[164] *Id.* The court implied that the threshold test for finding a public forum is unlikely to have been met if the railroad companies had only allowed ticket-holders to enter the station.

[165] *In re Hoffman*, 67 Cal. 2d at 851.

[166] *See* Trader Joe's Co. v. Progressive Campaigns, Inc., 73 Cal. App. 4th 425, 434 (1999) ("The *Pruneyard* court's conclusion that the societal interest in using shopping centers as forums for expressive activity outweighed the property interests of the shopping center owner was supported by tangible evidence that shopping centers were supplanting central business districts as the preferred public forum, i.e., the place where people chose to come and meet and talk and spend time. In contrast, in the present case there is absolutely no evidence in any of appellants' declarations that the Santa Rosa Trader Joe's has assumed a comparable role. Thus, in contrast to the shopping center discussed in *Pruneyard*, the Santa Rosa Trader Joe's is not a public forum uniquely suitable as a place to exercise free speech and petitioning rights.").

interference test instead would presume that under California's Constitution free-speech activities are protected on private property voluntarily made open to the public. Free-speech activities would be allowed unless the property owner could demonstrate to a court that the free-speech activities would unreasonably interfere with their preferred use of the property.[167]

Property-rights advocates might argue that this new test would harm small shopkeepers who would be forced to tolerate political rallies or petition gatherers who annoy their customers and hurt their business. However, if a property owner can provide credible evidence to a court demonstrating that free-speech activity would impede the free movement of customers, result in harassment of patrons, or create an excessive noise or disturbance, under the interference test that property would not be considered a public forum.[168] Moreover, as has been the case since *Pruneyard*, property owners would continue to be allowed to impose reasonable time, place, and manner restrictions on all free-speech activity.[169] However, when they choose to open up their private property and issue an invitation to the public, property owners in California become bound to respect the broad free-speech rights guaranteed by California's Constitution and affirmed by the state high court in *Fashion Valley Mall.*[170]

III. CONCLUSION

U.S. Supreme Court Justice John Paul Stevens noted that our nation's founding fathers considered the freedom of speech to be at the heart of the "secret of happiness."[171] In light of the *Fashion Valley Mall* court's affirmation of the greater free-speech protections embodied in the

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[167] One example of the kind of "interference" with the preferred use of their property that a property owner could potentially show is that free-speech activities would interrupt the functioning of the property owner's business by discouraging patrons from entering the store. *See generally In re Hoffman*, 67 Cal. 2d at 851.

[168] This follows the Court's description of the interference test in *In re Hoffman*, 67 Cal. 2d at 851.

[169] Fashion Valley Mall, LLC v. NLRB, 42 Cal. 4th 850, 870 (2007).

[170] *Fashion Valley Mall*, 42 Cal. 4th 850.

[171] Justice John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1312 (1993) ("Those who won our independence believed . . . liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

California Constitution, lower courts must take a fresh look at whether those protections safeguard citizen speech on the property of stand-alone stores. The courts shoulder a weighty burden to strike the right balance under California's Constitution between the competing values of free speech and property rights.[172]

As California courts address the question whether stores such as Target and Trader Joe's qualify as public forums for free-speech purposes, they must acknowledge the *Fashion Valley Mall* court's clear affirmation of *Pruneyard*. In doing so, courts should continue to allow property owners to maximize the use of their property by enforcing reasonable time, place, and manner restrictions on free-speech activities. However, courts should presume that free-speech activities on property that the owner has voluntarily opened to the public are constitutionally protected. This presumption means that courts should place the burden of proof on those wishing to restrict speech, not on those wishing to speak. If a property owner can demonstrate that particular free-speech activities would unreasonably interfere with the owner's use of the property, a court should allow those free-speech activities to be prohibited. Otherwise, following *Fashion Valley Mall*, the California Constitution's liberty clause must be broadly construed to protect free speech on private property because the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . ."[173]

JON GOLINGER[*]

[172] Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 908 (1979), *aff'd*, 447 U.S. 74 (1980) ("To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values, and other societal goals that have been held to justify reasonable restrictions on property rights.").

[173] Justice John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1312 (1993).

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