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Independent Interpretation: California's Declaration of Rights or Declaration of Independence

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INDEPENDENT INTERPRETATION: CALIFORNIA'S DECLARATION OF RIGHTS OR DECLARATION OF INDEPENDENCE?

The Burger Court makes life difficult for state judges because it challenges them to make federalism more than a cliche for judicial conservatism and states' rights more than a slogan for obstructionism.[1]

I. INTRODUCTION

The term "states' rights" usually conjures up images of strict constructionist judicial interpretations and separatist movements aimed at retaining the status quo in the face of change. Ironically, a modern version of states' rights, sometimes called the "new federalism,"[2] urges state courts to engage in judicial activism in order to develop a body of state constitutional law for the protection and amplification of civil liberties.[3]

In the recent history of our nation, the federal government has dominated the expansion of individual rights, sometimes through legislation but more often by way of judicial activism.[4] The United States Supreme Court under Chief Justice Earl Warren is generally credited (or criticized) for cen-

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1. Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. REV. 271, 275 (1973).

2. *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977) [hereinafter cited as *New Federalism*].

3. *See, e.g.*, Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Daughtrey, *State Court Activism and Other Symptoms of the New Federalism*, 45 TENN. L. REV. 731 (1978); Falk, *Foreward: The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Linde, *Without "Due Process", Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); Tone, *The Federal Constitution in the State Courts: The Increasing Responsibilities of State Judges*, JUDGES' J., Winter 1977, at 2; Project Report, *supra* note 1; Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974) [hereinafter cited as *Declaration of Rights*]; *New Federalism*, *supra* note 2. *But see* Bice, Anderson *and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972).

4. Falk, *supra* note 3, at 273. *See also* Project Report, *supra* note 1, at 275-84.

tralization of the protection of individual liberties. A substantial change in Supreme Court personnel during the late 1960's and early 1970's, however, has resulted in a curtailment of individual rights in some areas[5] and retardation of the growth of protection in others.[6]

In order to retain the vitality of the Bill of Rights in an era of increasing governmental encroachment on personal liberties, some state courts are beginning to employ the doctrine of independent interpretation.[7] As its name implies, this doctrine basically incorporates two elements. The first element is independence: the state court will look first to state law as the basis for its constitutional analysis before reaching federal issues.[8] The second element is interpretation: the state court judges will reach principled decisions through their own thought processes and will adopt another court's analysis only if its reasoning is persuasive.[9]

The foundation of independent interpretation regarding civil liberties lies in the "double security" of having both federal and state bills of rights.[10] Upholding the state side of this

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5. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (federal constitution does not require that a state prisoner be granted federal habeas corpus relief on grounds that evidence obtained in violation of search and seizure was introduced at trial); Harris v. New York, 401 U.S. 222 (1971) (statements seized in violation of *Miranda* warnings may be used to impeach defendant's credibility). *See also* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976) *Declaration of Rights, supra* note 3, at 510-11 n.171.

6. Howard, *supra* note 5, at 874-75; Project Report, *supra* note 1, at 273-74. *See* Society of American Law Teachers, Statement of the Board of Governors Oct. 10, 1976, for a summary of Burger Court opinions. *See generally* Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1 (1978):

> [T]he Justices appointed since 1968 have manifested in varying degrees and a variety of contexts, a deep concern about the expansion of constitutional law during the 1960s—about too much law, about the trivializing of constitutional safeguards, about interfering with state autonomy and responsibility, and about the effects, in the final analysis, of overactivism upon the legitimacy of the Court's decision.

Id. at 7.

7. Mosk, *Contemporary Federalism*, 9 PAC. L.J. 711 (1978) (adapted from an address delivered at New York University Bicentennial Conference, April 28, 1976, published in *American Law: The Third Century*). Justice Mosk notes that eighteen state courts are basing liberty decisions on their own state constitutions. *Id.* at 718.

8. Linde, *supra* note 3, at 133-34. Professor (now Oregon Supreme Court Justice) Linde argues that there can be no final state action for fourteenth amendment purposes until the highest state court has applied state law to the issues at hand.

9. *See* Falk, *supra* note 3, at 282.

10. THE FEDERALIST No. 51 (Modern Library ed. 1937) (A. Hamilton or J. Madison).

protection, the California Supreme Court has been recognized as the "pre-eminent state forum in the bill of rights area."[11] A pioneer in independent interpretation,[12] many of the court's better known decisions involve the rights of criminal defendants and equal protection challenges.[13]

This comment focuses upon the California court in a fledgling and perhaps precarious area for independent interpretation where rights of free expression and petition are pitted against private property rights. The first section of the comment sketches the background of independent interpretation. The second section explores the evolution of this doctrine through an analysis of California Supreme Court cases where rights of free speech conflicted with private property rights. The final section suggests that the manner of independent interpretation employed by the California Supreme Court in a recent rights conflict case amounts to a judicial declaration of independence from the United States Supreme Court founded upon a revived sense of federalism.

II. INDEPENDENT INTERPRETATION—BACKGROUND

Two parallel charters each purporting to guarantee fundamental rights to the same group of individuals constitutes an embarassment of riches.[14]

Having two constitutions to protect basic individual rights from governmental infringement may seem legally redundant. During the federal constitutional debates, however,

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> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments; and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time each will be controlled by itself.

Id. at 339.

11. Project Report, *supra* note 1, at 326; Falk, *supra* note 3, at 280.

12. *See, e.g.*, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) (six years before the exclusionary rule was adopted by the United States Supreme Court, the California Supreme Court held that evidence seized in violation of the California constitutional prohibition against unreasonable search and seizure will be excluded at trial); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) (allows vicarious use of exclusionary rule which is still not required under the federal constitution).

13. *See* Falk, *supra* note 3, at 277-79 nn.16-18 for an exhaustive list of pre-1973 California Supreme Court opinions based in whole or in part on the California Constitution.

14. Project Report, *supra* note 1, at 275.

James Madison led the movement to retain both documents as restrictions upon each government's separate functions.[15] After all, the United States Constitution carved the powers of the federal government out of what had previously been state powers.[16] At our nation's inception the lines drawn were very clear: the United States Constitution provided only a limited role for the central government and left the remaining governmental functions to the states. The states were, therefore, the original and primary protectors of civil liberties under the federal system.[17] The restrictions on governmental authority expressed in the Bill of Rights applied only to federal government activities.[18] The original states already had their own bills of rights to protect their citizens against state governmental intrusions on individual liberties. Thus, the two separate charters operated independently for nearly 80 years from the beginning of the federation until the Civil War.

After the Civil War, however, a combination of nationalistic spirit and distrust of the minimal protection of civil liberties provided by the states caused the passage of the thirteenth, fourteenth, and fifteenth amendments[19] to the

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15. *Id.* at 276.

16. *See generally* CONGRESSIONAL RESEARCH SERVICE, CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 92-82, 92d Cong., 2d Sess. XVIII (1972) noting that federalism includes the following elements:

> (1) as in all federations, the union of several autonomous political entities, or "States," for common purposes; (2) the division of legislative powers between a "National Government," on the one hand, and constituent "States," on the other, which division is governed by the rule that the former is "a government of enumerated powers" while the latter are governments of "residual powers"; (3) the direct operation, for the most part, of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; (4) the provision of each center with the complete apparatus of law enforcement, both executive and judicial; (5) the supremacy of the "National Government" within its assigned sphere over any conflicting assertion of "State" power; (6) dual citizenship.

See generally Brennan, *The Bill of Rights and the States,* in THE GREAT RIGHTS (E. Cahn ed. 1963).

17. *See* People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975); Mosk *supra* note 7, at 712; Project Report, *supra* note 1, at 275-79.

18. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

19. U.S. CONST. amend. XIII provides in pertinent part:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. CONST. amend. XIV provides in pertinent part:

Constitution. These amendments applied to the states as well as to the federal government and gave rise to nationwide application of certain narrowly defined fundamental rights for all citizens.[20] A rapidly changing society and continued poor performance by state courts in the protection of civil liberties[21] led the United States Supreme Court to apply parts of the federal Bill of Rights to the states through the proscriptions of the fourteenth amendment.[22] Eventually, this "selective incorporation" of the Bill of Rights[23] led to federal dominance in the protection of individual rights.[24]

This history of increasing federal expansion of individual liberties against the power of both governments left little room for independent interpretation of state bills of rights. As long as the Supreme Court was aggressive in protecting civil liberties, state courts found it unnecessary to risk making expansive decisions on their own—they simply deferred to the High Court and adopted the federal precedent.[25] With the un-

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> 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; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XV provides in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

20. Project Report, *supra* note 1, at 279-83.

21. *See* Lay, *States' Rights: The Emergence of a New Judicial Perspective*, 22 S.D. L. REV. 1, 2 (1977); Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620 (1951). An early critic of state court deference to federal reasoning, Paulsen stated: "Although state constitutions contain full statements of our civil liberties, on the whole the record of state court guardianship of 'First Amendment Freedoms' is disappointing. Only occasionally do state cases . . . take a position protecting the freedoms beyond what has been required by the United States Supreme Court." *Id.* at 642. *See generally* Shuford, *Federal Encroachment on States' Rights*, 45 A.B.A.J. 1042 (1959).

22. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493-95 (1977); Project Report, *supra* note 1, at 282-83. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 476-501 (10th ed. 1980). The due process and equal protection clauses of the fourteenth amendment together with the prohibition on state action have been held to require nationwide protection of certain fundamental rights from abridgement by either state or federal government.

23. For a discussion of the theories of "absorption" of the Bill of Rights into the fourteenth amendment in the criminal area see Y. KAMISAR, W. LEFAVE, J. ISRAEL, BASIC CRIMINAL PROCEDURE 19-30 (4th ed. 1974).

24. Project Report, *supra* note 1, at 283-84.

25. Falk, *supra* note 3, at 273; Howard, *supra* note 5, at 878; Mosk, *supra* note

certain implications for individual rights that accompanied the drastic changes in Court membership that occurred in the early 1970's, commentators began urging state courts to fulfill their judicial duties by developing independent interpretations of their own state constitutions.[26]

The theory underlying independent interpretation is as old as the federal government itself. Early cases established the principle that the Supreme Court does not have jurisdiction to review state decisions that are based on adequate and independent state grounds.[27] This principle adds particular significance to the doctrine of independent interpretation since a solid state basis for decision may fulfill the "adequate" and "independent" requirements, even when a federal question is involved.[28]

7, at 713-15; *New Federalism, supra* note 2, at 299 n.13. *See also* CAL. CONST. REVISION COMM'N, ART. I, DECL. OF RIGHTS—BACKGROUND STUDY #3 (1969) which noted that federal law had so pervaded the area of free speech and press rights that little state law was in existence at that time. *Id.* at 16-17. The Commission went on at page 31 of the report to inform the Legislature that ". . . virtually any activity falling short of *substantial impairment* of private property rights or public convenience will be protected by the First Amendment." (emphasis added).

26. Linde, *supra* note 3; Project Report, *supra* note 1; *New Federalism, supra* note 2, at 297.

27. Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487, 491-92 (1965); Herb v. Pitcairn, 324 U.S. 117, 125-28 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210-11 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635 (1875). 28 U.S.C. § 1257 (1976) provides:

> Final judgments of decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> 1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
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> . . .
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> 3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

See also C. WRIGHT, WRIGHT ON FEDERAL COURTS § 107 (1963).

28. *See* Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487 (1965), where the Supreme Court acknowledged that "[e]ven though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision, depriving this court of jurisdiction to review the state judgment." *Id.* at 491-92. *See also* Daughtrey, *supra* note 3, at 736; Howard, *supra* note 5, at 876.

A. *Right-Versus-Government*

It is well settled that states may allow their citizens individual liberties that are more expansive than the minimum guarantees required by the federal constitution as interpreted by the United States Supreme Court.[29] This theory produces few problems in areas where individual civil liberties conflict with governmental powers to regulate—a "right-versus-government" situation.[30] In this context, a decision to expand the rights of the individual merely diminishes the powers of the state and has no effect upon federal powers.[31] Where an individual right conflicts with governmental power, the judicial inquiry usually consists of defining the scope of the right, determining whether the government can regulate the individual's activity, deciding which government has the power to do so, and then ascertaining whether the government has acted within its powers.[32] If it is the state government that has the power to regulate the activity, the state court is free to increase the individual right beyond the federal minimum level. A decision based upon independent interpretation in the right-versus-government situation is usually insulated from United States Supreme Court review.[33]

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29. Alderman v. United States, 394 U.S. 165, 175 (1969); Cooper v. California, 386 U.S. 58, 62 (1967); Johnson v. New Jersey, 384 U.S. 719, 733 (1966).

30. The term right-versus-government will be used throughout this comment to indicate an individual right in opposition to the government acting in its participant capacity. In this role, the government interacts directly with the individual; the expansion of an individual right causes a corresponding restriction on government powers and vice versa.

31. *But see* People v. Ramey, 16 Cal. 3d 263, 277, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (1976) (Clark, J. dissenting); People v. Disbrow, 16 Cal. 3d 101, 118, 545 P.2d 272, 283, 127 Cal. Rptr. 360, 371 (1976) (Richardson, J., dissenting); People v. Norman, 14 Cal. 3d 929, 940, 538 P.2d 237, 245, 123 Cal. Rptr. 109, 117 (1975) (Richardson, J., dissenting); People v. Brisendine, 13 Cal. 3d 528, 553, 531 P.2d 1099, 1115, 119 Cal. Rptr. 315, 331 (1975) (Burke, J., dissenting).

32. The area of criminal procedure provides good examples of the right-versus-government analysis. *See* note 12 *supra*.

33. *But see* California v. Byers, 402 U.S. 424 (1971) (vacating and remanding a state court holding of a violation of the fifth amendment right against self-incrimination); California v. Green, 399 U.S. 149 (1970) (vacating and remanding a state court holding of a violation of the sixth amendment confrontation clause). *See also* Howard, *supra* note 5, at 875 suggesting that the Supreme Court will not allow expansion of individual rights in the criminal context if based on *federal* constitutional law and where the Court itself has refused expansion.

B. *Right-Versus-Right*

A more delicate issue arises, however, when two individual rights protected by *both* constitutions collide—a "right-versus-right" situation.[34] Here, the government sits in its referee capacity and balances the strength of the conflicting rights.[35] The government's only interest is in fairness; governmental powers are not diminished by striking any particular balance.

Where an individual seeks governmental enforcement of a personal right that would infringe upon the rights of another individual, independent interpretation becomes more complex. State courts are *not* free to expand certain rights at the expense of countervailing minimum rights guaranteed by the federal constitution.[36] The validity of independent interpretation in the right-versus-right context depends upon whether a federally protected minimum guarantee has been established and whether the state is precluded from impinging upon that right in all circumstances.[37] Thus, when two rights are in the balance, United States Supreme Court review cannot always be avoided because no matter how independent the state legal foundation may be, it may still be inadequate.[38]

Although the California Supreme Court has relied for a number of years upon the state Declaration of Rights to expand individual liberties in the right-versus-government setting, the right-versus-right conflict presents a new and less secure decisional situation. State courts are required to use particularly creative analyses to either protect their decisions from federal review or to attempt to persuade the United States Supreme Court that greater individual liberties are necessary and workable.

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34. The term right-versus-right will be used throughout this comment to indicate the government acting in its referee capacity.

35. *See generally* Cox, *supra* note 6, at 24, discussing the Supreme Court as an "umpire" between federal and state governmental conflicts. *See also* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) for a discussion of the two governmental roles in an economic context.

36. *See* Falk, *supra* note 3, at 280 n.29; Project Report, *supra* note 1, 315 n.241; *New Federalism*, *supra* note 2, at 317 n.142.

37. Project Report, *supra* note 1, at 312-15. The Report stresses that the state court's willingness to found its decision on state law regardless of the correctness of its federal law decision is the critical factor in independent interpretation.

38. *Id.* at 315. The Project Report points out that a state decision that would bar consideration of important federal interests would be inadequate.

This conflict of rights problem was faced by the California court in a series of three cases[39] spanning nine years which involved the issue of whether shopping center owners may entirely prohibit expressive activities and petitioning on privately owned commercial premises. The history of the California analysis exhibits dramatic changes in the court's perception of the role of state courts, state law, and the use of the independent interpretation doctrine.

III. Evolution of Independent Interpretation In The Right-Versus-Right Content

> *The California Constitution is, and always has been, a document of independent force.*[40]

Independent interpretation by the California Supreme Court in the right-versus-right context began rather tenuously as makeweight support for a largely traditional federal analysis. In the first case, *Diamond v. Bland* (*Diamond I*), the court took a novel question, appraised federal precedent, and buttressed its decision with state case law.[41] The California Constitution was not mentioned. A few years later, with the advent of a contrary Supreme Court holding on the same subject, the court retreated from its initial stance and deferred to the Court in *Diamond v. Bland* (*Diamond II*), but not without a vocal minority statement on its "surrender."[42] The latest California decision involving a right-versus-right conflict marks a notable extension of independent interpretation based solely upon the California Declaration of Rights.[43]

A. *Diamond I—Prophecy*

In 1970, a constitutional issue of first impression came

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39. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980); Diamond v. Bland, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974); Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971).

40. People v. Brisendine, 13 Cal. 3d 548, 549-50, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975).

41. 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971).

42. 11 Cal. 3d 331, 336, 521 P.2d 460, 466, 113 Cal. Rptr. 468, 474 (1974) (Mosk, J., dissenting).

43. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

before the California Supreme Court in *Diamond I*. The plaintiffs in that case asserted that their first and fourteenth amendment rights were violated by shopping center owners who denied them access to solicit signatures for two initiative petitions. The plaintiffs had conducted their activities without permission until they were ordered to leave the premises. They later sought declaratory relief and an injunction against the shopping center's owners.[44]

Because the United States Supreme Court had not squarely faced this question in previous cases, the California Supreme Court sought to reach a principled decision by engaging in traditional constitutional analysis modeled on United States Supreme Court methods. This type of analysis commonly thrusts a state court into a prophecy role.[45] The California court first looked to Supreme Court precedent, then to lower federal court precedent, and finally to state case law. Even though the California Declaration of Rights also protects free speech, petition, and private property, the court never examined those provisions in reaching its decision.

Presuming that the plaintiffs' expressive activity was within the ambit of the first amendment,[46] the court first looked to federal case law to discern guidelines set by the United States Supreme Court that might help resolve the controversy. At that time, only two Supreme Court cases had directly dealt with the conflict between private commercial property interests and free speech rights.

One of these cases, *Marsh v. Alabama*,[47] involved the company town of Chickasaw, Alabama, which had prohibited the dissemination of religious literature on its privately owned streets. Since the federal Bill of Rights applies only to *governmental actions* and the first amendment can be applied to the states only through the fourteenth amendment, the Court had to find state action if it was to prohibit the town's denial of the plaintiff's expressive activities. In a frequently quoted

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44. 3 Cal. 3d at 656-57, 477 P.2d at 734-35, 91 Cal. Rptr. at 502-03.

45. Linde, *supra* note 3, at 160.

46. The California court relied on Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313, 315 (1968) (*see* text accompanying notes 47-51 *infra*) and Hague v. C.I.O., 307 U.S. 496 (1939). *See also* Lovell v. Griffin, 303 U.S. 444, 450 (1938) (freedom of the press extends to every sort of publication of information or opinion including handbills); United States v. Cruickshank, 92 U.S. 542, 552 (1876) (protecting right to petition as essential attribute of government).

47. 326 U.S. 501 (1946).

opinion by Justice Black,[48] the Court held that the state action requirement was satisfied in some circumstances where private property could be treated as public property for first amendment purposes. Thus, the state could not allow the property owner to use state trespass laws to restrain fundamental federally guaranteed liberties of free expression.

The second federal case was newer and more directly on point because it concerned labor picketing at a shopping center. Two years before *Diamond I*, the Court in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*[49] had invalidated the total prohibition of picketing on shopping center premises by applying the principles of *Marsh*. Justice Marshall's *Logan Valley* opinion is probably best remembered for its articulation of the theory of functional equivalency which the *Diamond I* majority found convincing.[50] "The similarities between the business block in *Marsh* and the shopping center in the present case are striking. . . . The shopping center is clearly the functional equivalent of the business district in Chickasaw involved in *Marsh*."[51]

The California court took its cue for the appropriate reasoning from the combination of these two cases. Both *Marsh* and *Logan Valley* had expanded the concept of "state action" to include quasi-public property. At that time the Supreme Court apparently was looking for private property that had assumed significant public functions. When such quasi-public property was identified, a different standard was applied to determine the parameters of free exercise of first amendment rights than would be applied to expressive activity on wholly private property. If the property was wholly private, the Bill of Rights did not apply; but if the property was quasi-public,

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48. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . Whether a corporation or municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free. . . .

Id. at 506-07.

49. 391 U.S. 308 (1968).

50. The theory of functional equivalency declared that some private property became quasi-public when the owners assumed significant public functions normally provided by the government. The term "quasi-public" will be used throughout this comment to indicate privately owned commercial shopping center property.

51. 391 U.S. at 317-18.

the private actions of the owner were deemed equivalent to state action, thus triggering application of the first amendment.

Logan Valley specifically reserved the question now facing the California court—whether non-business-related expression should be permitted on shopping center property.[52] The extension of United States Supreme Court reasoning, however, led inevitably to the conclusion reached by the *Diamond I* majority. Although noting that *Logan Valley* had been limited to its facts, the California court found its reasoning "persuasive authority" for protection of first amendment rights on privately owned shopping center property.[53]

To round out the traditional federal law analysis, the *Diamond I* court cited a recent Oregon federal district court case that supported the extension of quasi-public status to shopping centers. *Tanner v. Lloyd Corp.*,[54] which had facts nearly identical to those before the *Diamond I* court, also relied on both *Marsh* and *Logan Valley* in reaching a result similar to that in *Diamond I.*

This familiar approach to novel questions in liberty areas forced the state court to act much like a prophet—culling an analytical framework from the *Logan Valley* decision, projecting it into a new but similar fact situation, and attempting to divine what the Supreme Court might hold on the same question.

Whereas many state courts would have stopped at this point, the California Supreme Court went one step further and bolstered its reasoning by turning to its own state law precedent, which conceivably provided independent and adequate state grounds as a basis for the decision.

1. *State Case Law*

Although the *Diamond I* majority regarded the federal cases as compelling, they found further support in the reasoning of state cases which provided "additional instructive precedent."[55] The court used the cases to illustrate California's own special adherence to the notion of functional equivalency

52. *Id.* at 320 n.9.
53. 3 Cal. 3d at 659, 447 P.2d at 737, 91 Cal. Rptr. at 505.
54. 308 F. Supp. 128 (D. Or. 1970), *rev'd*, 407 U.S. 551 (1972).
55. 3 Cal. 3d at 661, 477 P.2d at 738, 91 Cal. Rptr. at 506.

and to reject two standards proposed by the defendants for judging when expressive activities could be prohibited.

A few months before the *Diamond I* decision, the California Supreme Court used the theory of functional equivalency to resolve a different right-versus-right conflict. In deciding *In re Cox*,[56] the California court noted that shopping centers served an important public function and substituted as a town center in suburban areas. With this quasi-public status, the property owner was not allowed to arbitrarily refuse admission to the shopping center on the basis of race, politics, or dress.[57] For purposes of analysis, this line of reasoning was in accord with the United States Supreme Court's position in *Logan Valley*.

Analogies concerning the quasi-public designation of shopping centers were also drawn from labor picketing cases. *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union Local 31*[58] was the California fact counterpart of *Logan Valley*. Preceding *Logan Valley* by four years, *Schwartz-Torrance* held that the owner of a shopping center could not enjoin peaceful labor picketing on an employer's leased premises as a trespass. Furthermore, a 1969 California decision, *In re Lane*,[59] extended protection of peaceful union picketing and handbilling to include privately owned sidewalks in front of business premises. The *Diamond I* court noted that in both of the earlier cases it had employed a balancing test and had found that unobstructive first amendment expression outweighed the owner's rights in quasi-public property.

The court in *Diamond I* also expressly rejected two tests proposed by defendants to determine the permissibility of expressive activities on private commercial property. The first test defendants proposed would have required that the expressive activity be directly related to the normal business of

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56. 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970). The case involved a challenge to a shopping center's policy of refusing admittance to males having long hair and to persons in unconventional dress.

57. "In undertaking to provide the necessities of life, the shopping center performs an important public function. . . . Our modern society has become so interdependent and interrelated that those who perform a significant public function may not erect barriers of arbitrary discrimination in the marketplace." *Id.* at 218, 474 P.2d at 1000, 90 Cal. Rptr. at 32.

58. 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964).

59. 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).

the shopping center. Although the state cases relied upon by the court had met this requirement, the petitioning activities involved in *Diamond I* did not. Despite that distinction, the court found that the difference was relevant only as one factor in determining the *strength* of the first amendment claim regarding the location of the activity and, thus, was not conclusive.[60]

The court similarly rejected the availability of alternative sites for expression as a conclusive test of the permissibility of such activities at shopping centers. In doing so, the court made it clear that since the shopping center was the "most effective" location for petitioning, those activities were protected even if other sites might also be effective.[61] Additionally, the "available alternative" test had already been rejected as a limit on first amendment activities on private commercial property in a 1967 state decision.[62]

Balancing the first amendment and property interests at stake, the *Diamond I* court found the owner's property interest was diminished by the open invitation for public usage.[63] When weighed against the "preferred" right of free speech, the property interest in "bare title" could not command a right to absolute control but only allowed the owner to exercise reasonable regulation of expressive activities.[64]

2. *Traditional Analysis*

In *Diamond I*, Justice Mosk crafted a careful opinion that drew six out of seven votes from the court. Since the court was in the uncertain position of interpreting important individual rights without Supreme Court guidance, as it fre-

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60. 3 Cal. 3d at 662, 477 P.2d at 738, 91 Cal. Rptr. at 506.

61. *Id.*

62. *In re* Hoffman, 67 Cal. 2d 845, 852 n.7, 434 P.2d 353, 357 n.7, 64 Cal. Rptr. 97, 101 n.7 (1967) (held a privately owned railway could not absolutely prohibit expressive activities on private property held open for public use). In this opinion, Chief Justice Traynor developed an "interference" test for determining when owners who held their property open for public use could prohibit first amendment activities. *Id.* at 851, 434 P.2d at 356, 64 Cal. Rptr. at 100.

63. 3 Cal. 3d at 662-63, 477 P.2d at 739, 91 Cal. Rptr. at 507.

64. The court held: "Unless there is obstruction of or undue interference with normal business operations, the bare title of the property owners does not outweigh the substantial interest of individuals and groups to engage in peaceful and orderly First Amendment activities on the premises of shopping centers open to the public." *Id.* at 666, 477 P.2d at 741, 91 Cal. Rptr. at 509.

quently will be, its extrapolation of the reasoning of federal and state opinions to a new fact situation served as a sound method of analysis. The *Marsh* company town of 1946 might no longer exist but the 1968 shopping center was similar enough to justify application of the same rationale in a modern context. That rationale took into account the inevitable changes in society. Thus, it appeared the United States Supreme Court and the California Supreme Court were in agreement concerning this rights conflict and that the latter's prophecy was legitimate.

Nonetheless, several potential weaknesses lurked in the decision. The word "constitution" was used without reference to whether the federal or state constitution was being relied upon.[65] The failure to distinguish the two constitutions tended to support a reading of *Diamond I* that assumed coextensive rights protection. Furthermore, the labeling of the expressive rights in federal terms of first and fourteenth amendments left unclear how much reliance had been placed on state law in reaching the decision. Thus, even though *Diamond I* was denied certiorari four times,[66] the arguable federal basis of the decision came back to haunt the court four years later.

B. *Diamond II—Retreat*

In 1974, the *Diamond v. Bland* controversy returned to the California Supreme Court for review as *Diamond II*. Two years earlier, the United States Supreme Court had reversed the *Tanner v. Lloyd Corp.*[67] decision that the *Diamond I* court had cited with approval. A California trial court dissolved the injunction against the shopping center relying on the United States Supreme Court's reversal of *Lloyd*. When

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65. Justice Mosk stated in his *Diamond II* dissent: "I can understand how typical is the majority's dereliction in the area of state constitutional rights. Unfortunately few state courts steadfastly protect their own state constitutional guarantees. . . ." 11 Cal. 3d at 337, 521 P.2d at 464, 113 Cal. Rptr. at 472.

66. 402 U.S. 988 (1971) (cert. denied) (Burger, C.J., and Blackmun, J., of the opinion certiorari should be granted); 404 U.S. 874 (1971) (rehearing denied); 405 U.S. 981 (1972) (rehearing denied) (Burger, C.J., and Blackmun, J., of the opinion rehearing should be granted); 409 U.S. 897 (1972) (motion for leave to file third petition for rehearing denied) (Blackmun, J., would call for response pursuant to Rule 58(3)).

67. 308 F. Supp. 128 (D. Or. 1970), *rev'd*, 407 U.S. 551 (1972). *See* text accompanying note 52 *supra*.

Diamond II was appealed to the California Supreme Court,[68] the court was confronted with the dilemma of whether to accede to the Supreme Court's analysis or to sustain its own prior *Diamond I* analysis. The final vote of 4-3 to reverse *Diamond I* was made over a spirited dissent by Justice Mosk that urged the court to provide adequate state grounds for the prior decision by independent interpretation of the California Declaration of Rights.[69]

1. *The Majority Opinion*

The *Diamond II* majority concluded that a reassessment of *Diamond I* was required because the facts in *Lloyd* were indistinguishable from those in the present case. Two rather formidable problems faced the court in this endeavor. First, determining the legal basis of its own prior holding, and second, extracting the meaning of the *Lloyd* holding.

The court explained that its prior decision was based "primarily" on federal law in *Marsh* and *Logan Valley* and secondarily on state cases that had also been founded on those same two federal cases.[70] Since both *Marsh* and *Logan Valley* were eviscerated in *Lloyd*,[71] they presumably now had little precedential value, which also served to dilute the force of the state cases as precedent.

The bulk of the majority opinion outlined the United States Supreme Court's analysis in *Lloyd* and applied it in full to *Diamond II*. Much of this analysis directly conflicted

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68. 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974).

69. *Id.* at 335-46, 521 P.2d at 463-70, 113 Cal. Rptr. at 471-78.

70. *Id.* at 333-34, 521 P.2d at 462, 113 Cal. Rptr. at 470.

71. *See* Henely, *Property Rights and First Amendment Rights: Balance and Conflict*, 62 A.B.A.J. 77 (1976) (questioning *Lloyd's* requirement that expressive activities relate to the business purpose as regulation based on content and therefore a possible equal protection violation); Note, *Lloyd Corp. v. Tanner: The Demise of Logan Valley and the Disguise of Marsh*, 61 GEO. L.J. 1187 (1973); Note, *Freedom of Speech: Handbilling Unrelated to the Business Purpose of a Shopping Center Not Protected by First Amendment*, 19 N.Y.L.F. 174 (1973); Note, *Lloyd Corp. v. Tanner: Death of a Public Forum?*, 7 U.S.F. L. REV. 582 (1973) (suggesting use of independent interpretation of the California Constitution as a basis for a different result); Note, *First Amendment Rights Versus Property Rights—The Death of the Functional Equivalent*, 27 U. MIAMI L. REV. 219 (1972) (assailing the vagueness of the *Lloyd* tests); Young, *A Change of View on the 1946 Marsh Doctrine*, 58 A.B.A.J. 1307 (1972) (suggesting *Lloyd* was based on a finding of no state action). Scores of casenotes were written about the *Lloyd* case, primarily speculating on the basis for its holding and its significance for first amendment rights.

with the statements of the six member *Diamond I* majority opinion. Three footnotes dealt with the major issues upon which the two courts disagreed. The two tests that the California court had expressly rejected—1) whether the expressive activity relates to the purpose for which the shopping center is being used, and 2) whether the speakers have adequate alternatives for communication—had been adopted by the United States Supreme Court to determine which speech activities were constitutionally permissible.[72] The footnotes in *Diamond II* pointed out that each of the tests had been discussed and were considered as factors in the *Diamond I* decision. What the footnotes did not mention, however, was that both tests had been discounted as not being determinative. Nonetheless, the California court applied the tests to reverse its previous decision.[73]

A third footnote set out the most significant difference in the Supreme Court's interpretation.[74] The *Diamond II* majority noted that *Lloyd* specifically identified a property right of federal constitutional dimensions.[75] Under this reasoning, the Supremacy Clause of the federal constitution prevented state grounds from defeating a federal constitutional claim.[76]

Thus, the majority did not apply the California Constitution, expressed no opinion as to whether it might afford more protection to free speech than the federal constitution, and explicitly said that it would make no difference in any event due to the Supremacy Clause.[77]

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72. Lloyd Corp. v. Tanner, 407 U.S. 551, 563-67 (1972).

73. 11 Cal. 3d at 334-35, 521 P.2d at 463, 113 Cal. Rptr. at 471.

74. *Id.* at 335 n.4, 521 P.2d at 463 n.4, 113 Cal. Rptr. at 471 n.4.

75. *Id.* (citing Lloyd Corp. v. Tanner, 407 U.S. at 552-53).

76. The majority felt the Supremacy Clause precluded a contrary state holding. U.S. CONST. art. VI, cl. 2 provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary 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."

77. 11 Cal. 3d at 335 n.4, 521 P.2d at 463 n.4, 113 Cal. Rptr. at 471 n.4.

2. *The Dissent*

Justice Mosk's dissent in *Diamond II* is a good example of principled independent interpretation. The five parts of the dissent elaborate theories of federalism with well-documented support for a separate state interpretation in this area of rights conflict. Justice Mosk chastised the majority for its "surrender" and characterized the result as a "serious blow to state sovereignty and to the independence which has previously been the hallmark of this court."[78] Only Justice Tobriner joined Justice Mosk in scolding the majority, but Justice Sullivan added a third vote for independent state constitutional grounds as a possible basis for upholding the injunction.[79]

The dissent argued that reliance on California constitutional provisions was not only appropriate, but had been encouraged by the United States Supreme Court itself.[80] Justice Mosk adopted a notion of constitutional hierarchy advocated by a well known commentator[81] which stresses that state courts should always assess state action in light of the state

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78. *Id.* at 340, 521 P.2d at 466-67, 113 Cal. Rptr. at 474-75 (Mosk, J., dissenting).

79. *Id.* at 340-43, 521 P.2d at 467-68, 113 Cal. Rptr. at 475-76.

80. *Id.* at 339, 521 P.2d at 466, 113 Cal. Rptr. at 474 (citing Justice Powell's discussion of the necessity for state constitutional interpretation in the federal system in Apodaca v. Oregon, 406 U.S. 404 (1972) and Johnson v. Louisiana, 406 U.S. 356 (1972), and noting the Warren Court's commendation of California for its 1955 adoption of the exclusionary rule).

81. Linde, *supra* note 3, at 131-35, 182-83.

> The federal source of all "due process" and "equal protection" attacks on state regulations is the fourteenth amendment command that "No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Whether this command has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in a case. . . .

Id. at 133.

> Judicial review of official action under the state constitution thus is logically prior to review of the effect of the state's total action (including rejection of the state constitutional claim) under the fourteenth amendment. *Claims raised under the state constitution should always be dealt with and disposed before reaching a fourteenth amendment claim of deprivation of due process or equal protection.*

Id. at 135 (emphasis in original).

constitution before reaching any federal due process or equal protection claims under the fourteenth amendment.

Justice Mosk rejected the premise that a single body of constitutional law emanates from both state and federal courts, finding California's Declaration of Rights "arguably more embracive" than the federal Bill of Rights plus the fourteenth amendment.[82] Three sections of the California Constitution[83] were deemed particularly important in deciding *Diamond II:* the sections concerning free speech,[84] petition,[85] and privileges and immunities.[86]

The dissent traced the history of the California Constitution to show that it was not based on the federal constitution, but instead was adapted from the constitutions of Iowa and New York.[87] Therefore, the dissent concluded, the safeguards for basic rights contained in the California Constitution were independent of the guarantees of the United States Constitution.

Justice Mosk turned to independent interpretation in the third part of his opinion. Here, his readings of both *Diamond I* and *Lloyd* departed significantly from the majority's views.

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82. 11 Cal. 3d at 337, 521 P.2d at 465, 113 Cal. Rptr. at 473.

83. The California constitutional provisions referred to in *Diamond II* were from a pre-revision version.

84. Former CAL. CONST. art. I, § 9, revised CAL. CONST. art. I. § 2 provides in pertinent part:

> 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.

85. Former CAL. CONST. art. I, § 10 provided:

> The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances.

Revised CAL. CONST. art. I, § 3 provides in pertinent part:

> The people have the right to instruct their representatives, petition the government for redress of grievances, and assemble freely to consult for the common good.

86. Former CAL. CONST. art. I, § 21 provided:

> No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

Revised CAL. CONST. art. I, § 7 provides in pertinent part:

> (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

87. 11 Cal. 3d at 338, 521 P.2d at 465, 113 Cal. Rptr. at 473, (citing P. MASON, CONSTITUTIONAL HISTORY OF CALIFORNIA 83 (1956)).

The dissent read *Diamond I* as a decision based primarily on state rather than federal case law. Justice Mosk saw in *Diamond I* a test that balanced free speech interests against a narrow property interest in exclusive possession. Furthermore, the dissent refused to agree that the United States Supreme Court had articulated a property right of constitutional stature in *Lloyd*.[88] Justice Mosk reiterated that *Lloyd* was a first amendment case restricted to its facts. He concluded that in the absence of a federally created right to exclude others from property, state case precedent and the California Constitution would be controlling. These state grounds would be independent and adequate and thus not subject to review.

Part IV of the dissent continued independent interpretation by analyzing the state constitutional protections afforded the power of initiative[89] and noted that "courts are zealous to preserve its unfettered exercise 'to the fullest tenable measure of spirit as well as letter.' "[90] This argument was deemed compelling by the three dissenting justices. Because the right to petition is a "non-economic right rooted in the Constitution,"[91] it is essential to democracy. After recounting the procedures constitutionally required in California for submitting an initiative petition, the dissent reiterated a longstanding state policy favoring full exercise of the right of initiative. The goal of this policy was to avoid giving effective political guarantees only to those wealthy enough to afford the means to reach California voters for signature solicitation. The unique character of petitioning provided a more traditional method of sustaining *Diamond I* without the risk inherent in outright disagreement with the United States Supreme Court.

Finally, in Part V, the dissent looked at potential harms to the conflicting interests and attempted to factually distinguish *Lloyd*. Because *Lloyd* had considered the existence of available alternative locations to be a major factor in determining permissible first amendment activity, the dissent urged a distinction between handbilling and petitioning for an

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88. 11 Cal. 3d at 340-41 n.1, 521 P.2d at 467 n.1, 113 Cal. Rptr. at 475 n.1.

89. This argument went outside the Declaration of Rights to the basic governmental structure found in CAL. CONST. art. IV, § 1, which provides in pertinent part: "the people reserve to themselves the powers of initiative and referendum."

90. 11 Cal. 3d at 343, 521 P.2d at 468, 113 Cal. Rptr. at 476 (citing McFadden v. Jordan, 32 Cal. 2d 330, 196 P.2d 787 (1948)).

91. *Id.* at 344, 521 P.2d at 469, 113 Cal. Rptr. at 477.

initiative measure. The *Lloyd* court had pointed out that the leafletting could easily be accomplished on public streets or sidewalks. The California dissenters stressed the impracticability of this alternative for signature solicitation.

A second factual distinction between the two cases was the difference in the practical effect of allowing ownership to interfere with the expressive activity involved. Interfering with leafletting might result in reduced circulation of the information. But allowing property owners to prohibit petitioning on private property held open to the public could well result in the failure of an initiative petition to qualify for the ballot. By contrast, upholding the expressive activity under reasonable regulations would have little effect on the property owner's use of his commercial property.[92] Since it was already held open to the public, any rights to exclusive possession were markedly diluted.

3. *Analysis of the Retreat*

Through the reasoning of the *Diamond II* dissent, the seeds were sown for an independent interpretation of the California Declaration of Rights that would provide greater protection for free speech and the right to petition than that provided by the United States Constitution. Justice Mosk's opinion outlined an approach to independent interpretation.

The approach involved several distinct steps that would both exhibit the independence of the law and explain the state rationale for its particular needs.[93] Although Justice Mosk did not discuss in detail the difference in the wording between the federal and state bills of rights, the first step looked at the language of the state constitutional provisions guaranteeing individual rights. The second step reviewed the history surrounding adoption of those provisions. Step three identified the source of power for the state court to engage in independent interpretation which was found implicitly in the structure of the federal form of government and explicitly in the opinions of the United States Supreme Court and the Cal-

92. *Id.* at 345, 521 P.2d at 470, 113 Cal. Rptr. at 478.

93. Several commentators have suggested approaches for state court independent interpretation or for litigants preparing claims solely under state constitutions. These analytical frameworks resemble Justice Mosk's *Diamond II* analysis. *See* Project Report, *supra* note 1, at 315-19; *Declaration of Rights*, *supra* note 3, at 483-84; *New Federalism*, *supra* note 2, at 316-19; Howard, *supra* note 5, at 935-40.

ifornia Supreme Court. The fourth step distilled state policy from the structure of the whole California Constitution, gauging the interrelationship of its parts and assessing their relative weight. Step five involved looking at unique local conditions that required state rather than uniform federal interpretation. Finally, step six distinguished federal precedent on the facts and offered the United States Supreme Court a way to defer to the state court's judgment. The result was the assertion of an independent state interest in protecting individual liberties to a degree beyond that prescribed by the federal constitution. Nonetheless, a majority of the *Diamond II* court was split as to whether it possessed the power to independently interpret this issue under the California Constitution.

Soon after *Diamond II,* the scales tipped in favor of independent interpretation on the California court. In 1974, a revision of the California Constitution containing some key provisions was accepted by state voters at the polls.[94] The legislative study compiled to effect that revision supported the state sovereignty movement advocated by proponents of independent interpretation.[95] Of particular importance was article I, section 24, which declared that individual rights under the California Constitution are independent of federal constitutional guarantees.[96]

Armed with this provision and the basic premise of feder-

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94. The revised California Constitution was passed on the November 1974 ballot.

95. *See* CAL. CONST. REVISION COMM'N, *Declaration of Rights, Background Study* #3 (1964) (quoting National Municipal League, Model State Constitution 27 (1968)).

> Whether or not state constitutional protection of rights are greater than their United States counterparts, it would be more in keeping with a sound functioning of the federal system for the people to look first to the state constitution and the state courts for the vindication of personal liberties that may be challenged by state law or state action.

Id. at 3.

96. CAL. CONST. art. I, § 24 provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution. This Declaration of Rights may not be construed to impair or deny others retained by the people."

See People v. Norman, 14 Cal. 3d 929, 939-40 n.10, 538 P.2d 237, 245 n.10, 123 Cal. Rptr. 109, 117 n.10 (1975) (dubbing section 24 a "declaration of constitutional independence" reaffirming existing law). *See also* Howard, *supra* note 5, at 935-36 which suggests that section 24 is a constitutional invitation to independent state interpretation.

alism, the California Supreme Court declared its intention to engage in independent interpretation in the case of *People v. Brisendine* in 1975.[97] In that case, the court faced a predicament similar to that faced in *Diamond II*—whether to sustain its own precedent or to accede to the United States Supreme Court's reasoning upon the same issue.[98] This time, however, the California Court asserted a right to differ with the Supreme Court. Since that time, numerous California decisions have been based solely on state grounds despite the occasionally emphatic dissents of Justices Clark and Richardson[99] who accuse the majority of using the doctrine to disagree with the decisions of the United States Supreme Court.

In this setting, the particularly thorny question of the *Diamond* cases once again reared its ugly head in 1979 to split the court on the issue of how to resolve conflicting individual rights protected by both constitutions.

C. *Robins v. Pruneyard Shopping Center—Challenge*

Rights of free speech and petition collided with private property interests once again at the Pruneyard Shopping Center when several high school students peacefully solicited signatures for a petition. Their goal was to send a petition to the White House opposing a United Nations' resolution against Zionism. Security guards told the students to leave the premises because they did not have permission to solicit. The students left and later sought an injunction to prevent the shopping center owners from denying them access. The trial court refused to issue the injunction and Robins petitioned for a hearing before the California Supreme Court.[100]

In a 4-3 decision, a majority of the California Supreme Court utilized independent interpretation to transmute the

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97. 13 Cal. 3d 528, 548-52, 531 P.2d 1099, 1111-15, 119 Cal. Rptr. 315, 327-31 (1975) (holding that searches incident to arrest must be limited in scope to a legitimate search for weapons and that other evidence seized without a warrant violates California's constitutional protection against unreasonable search and seizure). *Contra*, United States v. Robinson, 414 U.S. 218 (1973).

98. United States v. Robinson, 414 U.S. 218 (1973).

99. *See* note 31 *supra*.

100. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980). *See* Note, *Constitutional Law—The California Constitution Protects Rights of Free Speech and Petition, Reasonably Exercised, in Privately Owned Shopping Centers*, 20 SANTA CLARA L. REV. 245 (1980).

right-versus-right conflict into a right-versus-government resolution totally within the ambit of state control. The opinion focused on two major issues: 1) whether *Lloyd* had created a fifth amendment property right to prohibit speech and petition activities, and 2) if not, whether the California Constitution guarantees rights of free speech and petition at shopping centers.[101]

In answering the first question, the majority challenged the contention that *Lloyd* had given shopping center owners federally protected fifth and fourteenth amendment property rights that would allow them to deny access for free speech and petition purposes. The majority dispelled the existence of such a federal right by reading *Lloyd* narrowly, by supporting that reading with several other Supreme Court shopping center cases, and by overruling *Diamond II*. Having eliminated the question of a federal minimum property right to exclude, the court was free to find a greater degree of protection for expressive activities in the California Constitution.

1. *Has a Federal Minimum Right Been Established?*

Justice Newman's majority opinion first analyzed whether *Lloyd* had identified property rights of federal constitutional magnitude via the fifth and fourteenth amendments.[102] Although *Diamond II* read *Lloyd* as saying exactly that, the *Robins* court made a 180 degree turn and read *Lloyd* as "primarily a first amendment case."[103] The court summarily dismissed the claim that *Lloyd* defined special constitutional property rights by characterizing the Supreme Court's discussion of the fifth and fourteenth amendments as applying only

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101. Justice Newman framed the issues in these terms:

> (1) Did Lloyd v. Tanner Corp. [citation omitted] recognize federally protected property rights of such a nature that we now are barred from ruling that the California Constitution creates broader speech rights as to private property than does the federal Constitution. (2) If not, does the California Constitution protect speech and petitioning at shopping centers?

23 Cal. 3d at 903, 592 P.2d at 342, 153 Cal. Rptr. at 855.

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

103. *Id.* The *Lloyd* holding stated: "We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise their asserted First Amendment rights." 407 U.S. at 570.

to an examination of state action requirements.[104] Basically, the court glossed over the state action point in conclusory fashion without an in-depth examination of the language of the *Lloyd* opinion.[105]

The court reinforced plaintiffs' position that no minimum property right had been created by citing two subsequent federal cases concerning shopping centers. In *Hudgens v. NLRB*,[106] the United States Supreme Court found no first amendment right to picket at a shopping center, but nevertheless recognized that *private parties* may be subject to statutory or common law restrictions against the abridgement of free expression of others.[107] The *Robins* majority inferred that the Supreme Court's recognition of the controlling nature of the National Labor Relations Act (NLRA) in *Hudgens* had negated the idea that a constitutional "property right immune from regulation" was created by *Lloyd*. Further strengthening this line of reasoning, the Supreme Court's opinion in *Eastex, Inc. v. NLRB*[108] deferred to the NLRA's statutory protections of expressive activity while rejecting the dissent's argument that a fifth amendment property right was violated.[109]

Viewing *Lloyd*, *Hudgens*, and *Eastex* together, the California court concluded that the property right at issue was not absolutely protected but was instead an interest subject to

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104. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856. For several years after it was decided, the rather sticky issue of state action in the *Lloyd* case sparked comment. *See* note 69 *supra*. One study targeted the state action area as a fertile field for independent interpretation claiming that state laws can reach private conduct unless the state constitution specifically prohibits the action. Project Report, *supra* note 1, at 297-301.

105. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856. State action is a threshold requirement before the United States Supreme Court can apply the first or fifth amendments to the state. Both *Marsh* and *Logan Valley* had satisfied this requirement by finding the property quasi-public under the functional equivalency theory. Since *Lloyd* greatly restricted, if not eliminated that theory, the shopping center property was apparently solely private property and the restriction of expressive activities by the owners was private action. The *Lloyd* court did not make clear whether it had found the requisite state action or whether the ultimate holding rested on a finding of no state action.

106. 424 U.S. 507 (1976) (overruling *Logan Valley*).

107. *Id.* at 513.

108. 437 U.S. 556 (1978).

109. Justice Newman quoted language from a dissent by Justice Rehnquist, joined by Chief Justice Burger, that asserted a federally protected fifth amendment property right in the employer's premises. 23 Cal. 3d at 905, 592 P.2d at 344, 153 Cal. Rptr. at 857 (quoting Eastex, Inc. v. NLRB, 437 U.S. at 574-83 (Rehnquist, J., dissenting)).

reasonable regulation by the government. Apparently, the majority felt that if Congress could regulate expressive activities at shopping centers through the provisions of the NLRA, the State of California could also regulate expressive activities at shopping centers by way of its laws. Therefore, California was not precluded by federal law from making laws in the public interest that would require shopping center owners to permit reasonably exercised first amendment activities on their premises.[110] "To hold otherwise would flout the whole development of law regarding states' powers to regulate uses of property and would place a state's interest in strengthening first amendment rights in an inferior rather than a preferred position."[111]

The court braced this line of reasoning with quotes from old[112] and new state cases,[113] with examples of numerous California statutes enacted for the public welfare that validly restrict owner usage of private property,[114] and with statistics illustrating the increasing importance of shopping centers in the modern life of California communities.[115] This supporting material evidenced not only a longstanding history of state regulation of private property in the public interest, but also a continuing need for expansive regulatory practices responsive to societal needs.

Whereas the majority denied the existence of either a federal or state constitutionally protected property right to totally prohibit expressive activities, it *did* recognize a right to petition protected by both constitutions. The right at stake involved more than mere expression because the right to petition the government for redress is central to the California form of government.[116] Comparing the right to petition with other legitimate governmental goals like environmental and aesthetic restrictions on the use of private property, the court

110. *Id.* at 905-06, 592 P.2d at 344, 153 Cal. Rptr. at 857.

111. *Id.*

112. Miller v. Board of Public Works, 195 Cal. 477, 488, 234 P. 381, 385 (1925).

113. Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 403, 546 P.2d 687, 697, 128 Cal. Rptr. 183, 190, *appeal dismissed*, 429 U.S. 802 (1976). Although the court did not express the significance of the Supreme Court's dismissal, presumably the majority felt a substantial federal question would have been present if a fifth amendment property right had been established by *Lloyd*.

114. 23 Cal. 3d at 906, 592 P.2d at 344, 153 Cal. Rptr. at 857.

115. *Id.* at 907, 592 P.2d at 345, 153 Cal. Rptr. at 858.

116. *Id.* at 907-08, 592 P.2d at 345-46, 153 Cal. Rptr. at 858-59.

concluded the state has the sovereign power to reasonably regulate private property to protect free speech and petition through the provisions of the state constitution.[117]

2. *Effect of the California Constitution*

The majority next turned to the issue of whether the California Constitution guarantees a right to petition at shopping centers. While noting that no California statute required shopping center owners to provide public forums, the court relied upon the text of the California Constitution,[118] the history of its adoption,[119] and state case law[120] to illustrate that California gives its citizens greater expressive rights than does the federal constitution. This approach coincides with the sequence for independent interpretation suggested by several commentators[121] and with Justice Mosk's analysis in *Diamond II*.

With the ghost of the *Diamond* cases waiting in the wings, the majority reaffirmed its reasoning in *Diamond I* by a detailed analysis of the same state cases that *Diamond II* had treated as insubstantial precedent. At this point, the court made its strongest statement in support of a state court's right to engage in independent interpretation. First, it declared that state cases that cited "federal law which subsequently took a divergent course"[122] were still good *state* precedent. Second, it noted parenthetically within the text of the opinion that the California Constitution Revision Commission had commented upon the instability of federal legal precedents when it had proposed firmer state constitutional guarantees.[123] Third, it announced its independent duty as a state

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

118. *See* note 82 *supra*.

119. The opinion simply noted the wording of the two constitutions is different and that California could have used the federal terminology if it had so desired.

120. The opinion cited Wilson v. Superior Court, 13 Cal. 3d 652, 532 P.2d 116, 119 Cal. Rptr. 468 (1975), as an example of support for extra state protection of free expression.

121. *See* note 91 *supra*.

122. 23 Cal. 3d at 908-09, 592 P.2d at 346, 153 Cal. Rptr. at 859.

123. Several years later, Justice Mosk addressed the dilemma posed by the instability of federal opinions by stating:

> In the final analysis, as the Supreme Court has careened from one end of the constitutional spectrum to the other, state courts have two alternatives. They can shift gears and once again change directions, thus resuming the course upon which they had embarked in the pre-Warren

court to determine the scope of rights in California, acknowledging that "[f]ederal principles are relevant but not conclusive so long as federal rights are protected."[124] Because the court had already eliminated the idea of a federally protected right, its only remaining duty was to ascertain California law which did not require any use of federal reasoning.

The court admitted its misreading of *Lloyd* in *Diamond II*, overruled that opinion, and concluded that the California Constitution protects the reasonable exercise of speech and petition in privately owned shopping centers.[125] Thus, the court came full circle, arriving at their original *Diamond I* decision, but this time with a firmer state law basis.

3. *The Dissent*

Justice Richardson's dissenting opinion attacked the majority's limitation of property rights as a clear violation of the federal constitution unsupported either by statute or case precedent.[126]

More importantly, the dissent discounted the independent interpretation of California's constitution, stressing that denial of injunctive relief to Robins was *compelled* by both *Lloyd* and *Diamond II*. The minority asserted that fundamental principles of federal supremacy prevented the court from making a decision under the California Constitution that would conflict with federal interpretations of the United States Constitution.[127] Emphatically, the dissent assailed the narrow majority reading of *Lloyd*, citing passages from that

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era. Or they can retain existing individual rights by reliance upon the independent non-federal grounds found in the several state constitutions.

Mosk, *supra* note 7, at 717-18.

124. 23 Cal. 3d at 909, 592 P.2d at 346, 153 Cal. Rptr. at 859. *See* Countryman, *supra* note 3, at 462. Countryman asserts one advantage of state bills of rights is that they may regulate *private conduct*, whereas federal regulation through the fourteenth amendment requires state action.

125. 23 Cal. 3d at 910, 529 P.2d at 347, 153 Cal. Rptr. at 860. *See generally* Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135 (1963) which years ago advocated the balancing of interests used by the majority in *Robins* and concluded that "[p]roperty rights cease when civil rights involving the public welfare are at stake." *Id.* at 150.

126. 23 Cal. 3d at 911-16, 592 P.2d at 348-51, 153 Cal. Rptr. at 861-64 (Richardson, J., dissenting).

127. *See* note 74 *supra*.

opinion that expressly dealt with property rights.[128]

> The United States Supreme Court, interpreting the United States Constitution, has declared that an owner of a private shopping center "when adequate alternative avenues of communication exist" has a property right protected by the Fifth and Fourteenth Amendments which is superior to the First Amendment right of those who come upon the shopping center premises for purposes unrelated to the center.[129]

Conceding that zoning regulations of private property are valid when they bear a substantial relationship to public health, safety, morals, or general welfare, the dissent charged the court with zoning by judicial fiat. "The character of a free speech claim cannot be transmuted into something else by changing the label and invoking the police power."[130]

4. *The Analysis*

The *Robins* decision represents an assertion of states' rights in the modern sense of federalism since the holding was cast solely in terms of the California Constitution.[131] The court reaffirmed the original state law basis of its *Diamond I* rationale despite contrary United States Supreme Court interpretations of the underlying federal precedent. The California court's narrow reading of *Lloyd* was contrary to an Oregon state court interpretation[132] that had perceived federal property rights of a constitutional nature in that case. Furthermore, the court's action required overruling itself a second time on the same subject. The opinion relied upon state decisions spanning many years to demonstrate the existence of a longstanding state policy embodying a preference for rights of expression and petition and a consistent enunciation of the

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128. *Lloyd* mentions property rights at 407 U.S. at 552-53, 567-69.

129. 23 Cal. 3d at 914, 592 P.2d at 350, 153 Cal. Rptr. at 863.

130. *Id.* at 916, 592 P.2d at 351, 153 Cal. Rptr. at 864.

131. "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." *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

132. Lenrich Assocs. v. Heyda, 264 Or. 112, 504 P.2d 112 (1972). *See also* Note, *Constitutional Law—Freedom of Speech—Owners' Fifth Amendment Property Rights Prevent a State Constitution From Providing Broader Free Speech Rights Than Provided by the First Amendment.*—Lenrich Associates v. Heyda, 504 P.2d 112 (Ore. 1972), 86 HARV. L. REV. 1592 (1973).

validity of use restrictions on property in the name of the public welfare.

One advantage of the *Robins* result is its accommodation of individual interests—neither interest is absolute and neither is totally excluded. Petitioners and speakers are subject to reasonable regulation, but they do have a right to speak. Likewise, shopping center owners may not arbitrarily exclude speakers, but may impose reasonable regulations on expressive activities on their commercial property. This fair accommodation allows both rights a circumscribed existence by ensuring a viable public forum for petitioners' activities while safeguarding business from disruptive interference.

Another positive aspect of the opinion is the court's reliance on unique local conditions to give further substance to its independent claim. Modern community life in California may require a different balance than the same rights might yield in another part of the nation. Recalling that federalism was conceived as a solution to governing a large geographical area with some common and some diverse interests, reliance on the state constitution reasserts the ideas of pluralism, diversity, and experimentation that federation envisaged.

The main weakness of the opinion as a foundation for future independent interpretation lies in its avoidance of the state action issue.[133] While mentioning that *Lloyd's* discussion of property rights pertained only to the question of state action, the majority opinion makes no effort to explain how it arrived at that reading nor what significance it holds for interpretation of the state constitution. The fourteenth amendment requires state action[134] and apparently none was found in *Lloyd* since the United States Supreme Court did not require application of the first amendment in that case. But the California Declaration of Rights does *not* require state action to trigger the safeguarding of individual liberties. The lan-

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133. *See* Horowitz and Karst, *The California Supreme Court and State Action Under the Fifth Amendment: The Leader Beclouds the Issue*, 21 U.C.L.A. L. REV. 1421 (1974) criticizing the California Supreme Court's handling of state action issues, including the *Diamond* cases; Hagman, *Furey v. City of Sacramento*, 32 Land Use & Zoning Digest 9 (Jan. 1980) which criticizes the California Supreme Court for "erratic decision making" and opinions that are "sloppily done."

134. *But see* Griffin v. Breckenridge, 403 U.S. 88 (1971), where the United States Supreme Court held that section five of the fourteenth amendment gives Congress authority to pass legislation that reaches private conduct as long as the law reasonably protects a right explicitly contained in the fourteenth amendment.

guage of the sections which guarantee the rights of speech and petition are phrased as affirmative grants to each person, not as restrictions on the government as in the federal constitution. Thus, *Robins* fails to clearly assert the state's sovereign right to regulate infringement of civil rights by *private conduct*.[135]

Though *Robins* presented what had been analyzed in *Diamond I* as a right-versus-right controversy, the California Supreme Court averted a direct confrontation of individual rights by transmuting the conflict into two tandem instances of right-versus-government controversy. Instead of constitutionally protected expression pitted against constitutionally protected property, the court recognized only one *state* constitutional claim. Obviously, rights of expression are guaranteed by both the federal and state constitutions. If federal court interpretation of those rights does *not* require they be given effect on privately owned shopping center property, the only remaining constitutional issue is the scope of the rights of expression and petition under the state Declaration of Rights. Thus, the inquiry was reduced to a right-versus-government analysis.

Using a similar analysis for the property rights claim, the court reasoned that if neither the federal nor state constitutions require an inviolate right to exclude others from private property, then there was no remaining constitutional issue. The controversy became a right-versus-government situation. Since the state has undisputed authority to regulate private property in the public interest, the conclusion in favor of the state was manifest.

The court then took those two separate right-versus-gov-

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135. *See* Countryman, *supra* note 3, at 473: "All provisions of a Bill of Rights need not be directed to or against the government. Some may also regulate private conduct as does the thirteenth amendment to the United States Constitution."

Countryman noted that the proposed New York Constitution that was rejected in 1969 had included a proscription of private discrimination. He went on to point out: "Nor is there any apparent reason why the constitutional proscription should be confined to private discrimination. Other rights which all constitutions guarantee against the state—and particularly rights of belief, speech, and association—are as vulnerable to infringement by 'private governments' and as deserving of protection." *Id.* at 474.

Private governments were defined as concentrations of economic power. "So I commend also to state constitutional conventions the task of attempting to preserve our individual freedoms not merely against those governments we elect but also against those governments we do not elect." *Id.*

ernment conflicts and examined the effects of their interrelationship. The resulting conclusion was that if the public interest involves a preferred constitutional right, at least some types of private property can validly be regulated to give meaningful force to that right.

The effect of the recharacterization of the conflict *should* have been to insulate the state expansion of expressive rights from federal judicial review. Despite its apparent independent state basis, the United States Supreme Court calendared *Robins* for review[136] and postponed consideration of jurisdictional questions until the hearing on the merits.[137]

IV. The Effect of California's Judicial Declaration of Rights

> *I believe the 'new federalism' means more than polite genuflections to comity, more than a mere shift of the work from one judicial pile to another. I believe it requires a return of the state courts to judicial preeminence.*[138]

The California Supreme Court's split in *Robins* illustrates the polarity that exists in judicial spheres concerning the meaning of *Lloyd*, the propriety of state independent interpretation, and the parameters of the rights of free speech, petition, and private property in modern society. These formidable problems challenged the United States Supreme Court when it decided *PruneYard Shopping Center v. Robins*.[139]

The mere calendaring of the case gave pause for speculation that the Court would confirm the notion that a shopping center owner's federally protected property rights include a right to exclude the expressive activity of others. Acceptance of the case signified rejection of adequate state grounds as a basis for abstention. Under that doctrine, the United States Supreme Court would not have jurisdiction unless there was a need to correct an error relating to questions of federal law.[140] The postponement of jurisdictional arguments to coincide

136. 48 U.S.L.W. 3132 (U.S. Sept. 11, 1979) (No. 79-289).

137. 444 U.S. 949 (1980).

138. Daughtrey, *supra* note 3, at 739.

139. PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980) (spelling changed from Pruneyard to PruneYard at the Supreme Court level).

140. *See* note 28 *supra*.

with on the merits, however, left open the possibility that the Court could still be choosing between two strong positions it has taken in the past.

The Burger Court has taken a solid states' rights stance and has increased its deference to the state courts in recent opinions.[141] Current Justices have encouraged state court activism or espoused the older view of states' rights.[142] At the same time, the Burger Court has also shown a strong preference for private property rights and has generally weakened rights of free expression.[143]

The unanimous judgment in favor of Robins, pronounced in the unlikely voice of Justice Rehnquist, is a surprising resolution of the controversy. In essence, the Court affirmed both of the California Supreme Court's right-versus-government holdings. First, while the first amendment does not require that expressive activities be allowed on shopping center property, the federal constitution does not preclude a state constitution from providing more expansive expressive rights within the proscriptions of the fifth amendment takings clause and without infringement upon any other federal constitutional right. Second, California's requirement that shopping centers must allow reasonable exercise of the rights of expression and petition on their property does not amount to taking without just compensation nor does it violate traditional due process standards.

But in addition to these two issues, the Court allowed another right-versus-right issue to be argued which provided the Justices an opportunity to discuss possible limits on a state

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141. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (holding that the additional benefits of federal judicial review of federal habeas corpus petitions when the claim is based upon admission of illegally obtained evidence and the defendant has been afforded an opportunity for a full hearing in state courts are outweighed by the costs); National League of Cities v. Usery, 426 U.S. 833 (1976) (striking down as unconstitutional Congressional extension of the Fair Labor Standard Act's minimum wage and maximum hour provisions to state public employees as a violation of the tenth amendment); Younger v. Harris, 401 U.S. 37 (1971) (holding that federal courts should defer to state courts concerning grant or denial of injunctive relief against state criminal prosecutions).

142. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96, 121 (1975) (Brennan, J., dissenting); Oregon v. Haas, 420 U.S. 714, 719 (1975); Lego v. Twomen, 404 U.S. 477, 489 (1972); Alderman v. United States, 394 U.S. 165, 175 (1969); Cooper v. California, 386 U.S. 58, 62 (1967); Mapp v. Ohio, 367 U.S. 643, 651-52 (1961); Elkins v. United States, 364 U.S. 206, 220 (1960). *See also* Brennan, *supra* note 22.

143. *See* Brennan, *supra* note 22, at 495-98; Howard, *supra* note 5, at 874; *Declaration of Rights*, *supra* note 3, at 497.

power to expand civil liberties. The Court allowed PruneYard Shopping Center to assert its own first amendment rights and ultimately held that, at least in this case, those rights were not violated.[144]

The Court found that the PruneYard had an appeal of right[145] by construing a state constitutional provision as a "statute" within the meaning of 28 U.S.C. section 1257(2). Since the California Supreme Court had rejected the PruneYard's claim that their federal property rights had been violated and had upheld the validity of a state law affecting those rights, the United States Supreme Court found that all the necessary elements of jurisdiction by appeal were met. The opinion thus avoided independent and adequate state grounds as a basis for depriving the Court of jurisdiction in this matter.

The implication that the grant of jurisdiction holds for independent interpretation is difficult to discern. The Court did *not* find an error in the California Supreme Court's interpretation of a federal question that required correction—they affirmed the decision in total. Even more perplexing is the fact that they did not base jurisdiction on the PruneYard's first amendment claim, which was not decided below. Had the Court based jurisdiction on this undecided federal question, the potential danger to federally protected rights caused by the Court's abstention would be palpable.[146] This type of analysis brings the viability of the adequate and independent state grounds abstention theory into serious question.

Justice Rehnquist explained in a lengthy footnote that the question of PruneYard's first amendment rights was at least mentioned below, if not decided. Of particular interest is the notation that the Court will recognize federal claims as adequately presented "when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation."[147] This statement may provide a new test for cases in which a state court expands civil liberties. Since few states have heretofore based such decisions on their own constitutions, nearly all state-law-based decisions might qualify as "unexpected."

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144. 447 U.S. at 82-85.
145. *Id.* at 79-80; *see* note 27 *supra* for text of 28 U.S.C. § 1257(2).
146. *See* note 38 *supra*.
147. 447 U.S. at 85-87 n.9.

The Court took this opportunity to quell the controversy over the meaning of *Lloyd*.[148] Part III of the opinion cloaks *Lloyd* solely in the garb of a first amendment case. The *Lloyd* court found that the Constitution did not create first amendment rights on privately owned property. The distinguishing factor between that case and *PruneYard* is the intervening presence of a state created right of expression. The message to other state courts and legislatures appears to be unanimous Court approval for state expansion of civil liberties within federal boundaries.[149]

Next, the Court addressed PruneYard's unsuccessful fifth amendment taking and due process claims. While reinforcing its recent statement that the right to exclude others was "essential" in the bundle of property rights,[150] and that a literal "taking" had indeed occurred, the opinion differentiated between literal takings and takings "in the constitutional sense."[151] Moreover, the test by which to judge a constitutional taking is whether the regulation causes an individual to bear more than his just share of public burdens.[152] Two of the three factors set out by the Court for making this determination are financial considerations—economic impact and interference with investment-backed expectations. The third factor is the character of the government action itself.[153] Ultimately, the Court unanimously held that the value and use of the PruneYard's property would not be unreasonably impaired by the requirements of the state constitutional provision.[154]

Within this discussion, Justice Rehnquist made a statement that elicited a cryptic one sentence dissent from Justice

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148. *Id.* at 80-81.

149. Justice Marshall's concurrence goes one step further by stating, "I applaud the court's decision, which is part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution." *Id.* at 2046.

150. *Id.* at 82 (citing Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979)).

151. *Id.*

152. *Id.*

153. *See generally* Comment, *Inverse Condemnation and the Alchemist's Lesson: You Can't Turn Regulations Into Gold*, 21 SANTA CLARA L. REV. 169 (1981) for a discussion of both courts' approaches to "taking" cases.

154. Only Justice Marshall discussed the state action issue and the quasi-public nature of the shopping center property. It is apparent that the doctrine of functional equivalency is still alive, at least for Justice Marshall who has defended the correctness of the *Logan Valley* decision through two bitter dissents (both in *Lloyd* and *Hudgens*) and in *PruneYard's* exuberant concurrence.

Blackmun: "Nor as a general proposition is the United States, as opposed to the several States, possessed of a residual authority that enables it to define 'property' in the first instance."[155] In the future, we are likely to see this sentence make an appearance in many different adversary contexts—concerning both tangible and intangible property.

PruneYard's due process argument was quickly dispelled by the Court's reiteration of the "minimum scrutiny" standard for judicial review. The state regulation is not unreasonable, arbitrary or capricious and is substantially related to a legitimate governmental goal. Moreover, the federal constitution does not prohibit a state from deciding that public access to shopping centers for expressive purposes is necessary even where alternative sites are available.[156]

Thus, parts I-IV of the opinion garnered nine votes to affirm both the California Supreme Court's authority to render such a decision and its underlying rationale and also to explain several of the Court's own misunderstood opinions. Justices Powell and White, however, did not join the Court's discussion of PruneYard's first amendment rights in Part V of the opinion.

PruneYard claimed that a private property owner has a "[f]irst [a]mendment right not to be forced by the State to use his property as a forum for the speech of others."[157] The Court rejected this argument because the public was not likely to identify the property owner with the views expressed by the speakers, the state does not dictate the message expressed, and the property owner can easily disavow any particular message.[158]

Justices Powell and White concurred but each wrote separately to stress that the first amendment holding was based on this record.[159] Justice White worried about potential abuse via state exactions from shopping center owners to provide public forums. Further, he pointed out that states *are not required* to allow first amendment activity on private shopping center property.

Justice Powell's concurrence sets out all the limitations

155. 447 U.S. at 88-89.
156. *Id.* at 85 n.8.
157. *Id.* at 85.
158. *Id.* at 85-88.
159. *Id.* at 96-101 (Powell, White, JJ., concurring).

on the Court's holding and hints at infirmities in the PruneYard's arguments that might be overcome in another case. Apparently, had PruneYard asserted disagreement with Robins' message, shown patron hostility to the message, proved impairment of the shopping center's business, or contended that disavowal of the message was essential and too onerous, the first amendment cause of action might have been viable.[160] Of course, these suggestions are but illusory for PruneYard. Since the Court allowed the first amendment issue to be argued without a complete record, it hardly seems fair to hinge an unfavorable decision on an inadequate record. Nevertheless, the message for future property-owner litigants is clear—make a complete record below showing interference with business, unreasonable costs, or enforced repudiation and the Court may take another look at the issue.

V. CONCLUSION

In a right-versus-right situation, it appears a state court cannot insulate its decisions from review. On the other hand, *PruneYard* establishes even clearer precedent that the Supreme Court is in full agreement that state courts may engage in independent interpretation. While the limits of this state power have not been established, the Court has signaled state courts to watch out for "constitutional takings," avoid upholding arbitrary and capricious regulations that are not substantially related to the public interest, and be alert for other federally protected rights, including the right to remain silent.

The California Supreme Court should continue its trend-setting practice of independently assessing state safeguards of individual rights in both right-versus-government and right-versus-right situations. Article I, section 24 is a state constitutional mandate to do so. Even if the independent interpretation does not prevent Supreme Court review, both the courts and litigants will be benefited.

The benefits of independent interpretation to the courts are many. The prophecy role can be largely eliminated if state courts consistently look to their own state law to determine its applicability rather than guessing how another judicial body might reason. Controversies could be resolved at the lowest

160. *Id.* at 97-101.

level. Being closer to local conditions, state courts can provide essential input to the Supreme Court and can experiment with a variety of solutions implausible to attempt at the federal level. Furthermore, independent state solutions that prove successful can serve as a foundation for nationwide application should uniformity become necessary.[161] A well-reasoned state decision clarifies the issues for review and provides the myriad viewpoints of many legal minds that can assure vitality in the law. Without independent interpretation of state constitutions, state courts are in danger of abdicating their responsibility to protect their citizens from abridgement of liberties and from state governmental intrusions as well as avoiding their duty to act as a check against federal government intrusion on the rights of the states.[162] In the quest for uniformity within the federal system, it is important to avoid the rigidity of so complete a centralization of the safeguarding of civil liberties that the judiciary is no longer responsive to modern society. As Justice Mosk has noted: "If the result is fragmentation of a national consciousness, it is justified in furtherance of an expanded liberty."[163]

The advantage to litigants of independent interpretation is that it can provide a well developed body of state constitutional law which more clearly defines parameters and provides predictability. Firmly based state opinions may obviate the need for review in most cases, thus speeding up the legal process and cutting costs of litigation.

In *PruneYard,* the United States Supreme Court recognized a more modern definition of the extent of protection

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161. Justice Brandeis once pointed out the benefits of federalism: "[O]ne of the happy incidents of the federal system is that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 311 (1932) (Brandeis, J., dissenting). *See* Meador, *Some Yins and Yangs of Our Judicial System,* A.B.A.J., Feb. 1980, at 122.

162. *See* Countryman, *supra* note 3, who offers three reasons for strong state bills of rights.

> (1) Many of the Supreme Court's interpretations of federal constitutional guarantees applicable to the states are not clearly acceptable today, much less for the indefinite future. (2) Not all of the federal constitutional guarantees have been held applicable to the states. (3) Modern society is entitled to expect additional guarantees not to be found in the Constitution of the United States.

Id. at 456.

163. Mosk, *supra* note 7, at 721.

that can legitimately be afforded property rights in today's society, as well as offering an opportunity to reaffirm the basic ideals of federalism.

Independent interpretation can be a useful judicial tool in filling the void left by the United States Supreme Court's retreat in the protection of basic individual liberties. The next phase of constitutional analysis may well see the state courts return to their original role as the predominant protectors of the individual through well-reasoned analysis of their own bills of rights.

Betty Ann Smith