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Shopping for a Public Forum: Pruneyard Shopping Center v. Robins, Publicity used Private Property, and Constitutionally Protected Speech Case

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CASE COMMENT

SHOPPING FOR A PUBLIC FORUM: *PRUNEYARD SHOPPING CENTER V. ROBINS*, PUBLICLY USED PRIVATE PROPERTY, AND CONSTITUTIONALLY PROTECTED SPEECH

> *The Greeks had their agora, the Romans had their Forum. Our grandfathers and great-grandfathers had the town square and Main Street. Contemporary Londoners have Hyde Park and the Chinese have their wall posters.*
>
> *For late-20th-Century Americans, the principal place for meeting, mingling and exchanging ideas face-to-face has increasingly become the shopping center.*[1]

I. INTRODUCTION

In *Pruneyard Shopping Center v. Robins (Pruneyard)*,[2] the United States Supreme Court further clarified the status of first amendment rights of expression on private property that is open to the public. In affirming the California Supreme Court's decision in *Robins v. Pruneyard Shopping Center (Robins)*,[3] which upheld speech and petitioning rights in private shopping centers, the Court resolved issues left unanswered by its earlier decisions involving speech rights on

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1. San Jose Mercury, May 17, 1979, at 13B, col. 1.

2. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). The U.S. Supreme Court's decision affirmed the 1979 decision of the California Supreme Court in Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). The California court concluded 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.

For purposes of simplicity and clarity, this case-comment refers to the California Supreme Court decision as *Robins*, and the U.S. Supreme Court decision as *Pruneyard*.

3. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

publicly used private property.[4]

In *Pruneyard,* the Supreme Court continued its refusal to recognize the modern-day suburban shopping center as a "public forum"[5] or as "quasi-public property."[6] Although the California decision was affirmed on adequate and independent state constitutional grounds, the Court made clear that it does not recognize these speech rights as guaranteed by the first amendment to the U.S. Constitution. The Court still maintains that no absolute federal constitutional right of expression exists in shopping centers, and by holding that no intrusion occurred into the owner's fifth amendment property rights,[7] the Court effectively relegated future questions in this area to litigation at the state level under independent inter-

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4. *See* discussion of cases in Part II *infra.*

5. The concept of the "public forum" has captured the interest of legal scholars for the past few decades. *See, e.g.,* Gorlick, *Right To a Forum,* 71 DICK. L. REV. 273 (1967); Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1; Stone, *Fora Americana: Speech in Public Places,* 1974 SUP. CT. REV. 233.

The concept began in the late 1930's when the Supreme Court recognized that public streets, sidewalks, and parks were required to serve as the public forum for constitutionally guaranteed speech purposes. In Lovell v. Griffin, 303 U.S. 444 (1937), the Court declared that a municipality may not prohibit the distribution of literature within the limits of the town. The city ordinance there prohibited every type of distribution of literature without prior approval by the city manager. The Court found the ordinance invalid on its face, declaring that "it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id.* at 451.

Subsequent cases firmly established that neither a state nor a municipality can completely bar the peaceful distribution of religious or political literature on streets, sidewalks, and other public places. *See* Hague v. C.I.O., 307 U.S. 496 (1939); Schneider v. State, 308 U.S. 147 (1939); Thornhill v. Alabama, 310 U.S. 88 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940); Jones v. Opelika, 316 U.S. 584, 600 (1942) (Stone, C.J., dissenting), *majority opinion vacated,* 319 U.S. 103 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Martin v. City of Struthers, 319 U.S. 141 (1946); *See also* Marsh v. Alabama, 326 U.S. 501, 504-05 (1946).

6. In this case-comment, the term "quasi-public property" refers to publicly used private property and the terms are used interchangeably. Although the concept of the public forum on public property was well-developed by the 1950's, it was sometime later that rights to a public forum on private or "quasi-public" property were recognized. The notion of quasi-public property begins with the public forum concept of free exercise of constitutional rights on public property. It then extends that concept and concludes that where private property is held open to the general public or is used to perform essential services, that property becomes "quasi-public" property on which a citizen has the same constitutional rights that are protected on truly public property.

This extension of the public forum to quasi-public property was first accomplished by the Supreme Court in Marsh v. Alabama, 326 U.S. 501 (1946). *See* notes 16-26 and accompanying text *infra.* The reasoning of *Marsh* was extended to a private shopping center in Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968). *See* notes 28-39 and accompanying text *infra.*

7. *See* text accompanying notes 105-20 *infra.*

pretation of state constitutional provisions.

This case-comment begins by analyzing the historical perspective of the free speech and private property issues presented in *Pruneyard* and discusses the rise and fall of federal constitutional protections of first amendment rights on quasi-public property, such as a company town or a large shopping center. It notes the initial growth of speech rights in quasi-public property, the Supreme Court's subsequent abandonment of that concept, and California's later reaffirmation of a "public forum" or "quasi-public property" concept based on independent state grounds.

This case-comment then analyzes the *Pruneyard* decision itself, and the arguments presented to the Court. It also discusses Justice Marshall's concurring opinion and his attempt to reconcile the seemingly inconsistent earlier decisions by the Court on this issue.[8]

Finally, this case-comment outlines the possible future of litigation in this area of the law. It discusses the continuing trend of the "New Federalism"[9] exhibited in this latest Supreme Court term, and the effect of basing the *Pruneyard* affirmance on independent state grounds.

Future litigation in this area will most probably occur in state courts, with an initial determination of whether the state's constitution permits access similar to that given by California in *Robins*. If a state reaches the same result as in *Robins*, three issues will immediately surface regarding the scope of the protections. A major issue will be the constitutionality of rules and regulations limiting the time, place, and manner of the activity in order to protect the commercial interests in the shopping center.[10] Another issue is whether protected expression encompasses all speech, or whether it is limited to petitioning or political speech.[11] A third issue is what type of establishment qualifies as a "shopping center" under the rule in *Robins* and *Pruneyard*, and what centers are exempt "modest retail establishments."[12]

These three issues focus on the broader question of how

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8. *See* text accompanying notes 129-32 *infra*.

9. The term "New Federalism" has been used by many authors to describe state court activism in the wake of conservative constitutional rulings of the Burger Court.

10. *See* notes 147-54 and accompanying text *infra*.

11. *See* notes 156-61 and accompanying text *infra*.

12. *See* note 165 and accompanying text *infra*.

to implement and define the broad, but vague, rule established by *Robins*. A fourth and equally important issue focuses not on the practicalities of implementing the *Robins* rule, but on the potential for broadening the scope of the rule. While *Robins* established that large shopping centers are quasi-public property on which speech rights are protected, it gave little guidance regarding what other quasi-public or publicly used properties might invoke the same rule. This fourth issue includes questions of whether *Robins* applies to property such as private universities, private office buildings, and other places that, although privately owned, attract large segments of the public.

This case-comment concludes that the Supreme Court in *Pruneyard* has essentially resolved the issue of free speech in shopping centers. The Court has given the individual states virtual freedom to grant speech rights in shopping centers if they can find adequate state constitutional grounds. In *Lloyd Corp. v. Tanner,*[13] the Court effectively destroyed the free speech advocates' first amendment claims, and in *Pruneyard,* it vitiated the owner's fifth and first amendment claims, thereby leaving little basis for federal question jurisdiction.

If other states decide to follow *Robins,* shopping center owners will undoubtedly fight such a decision in state courts. Whether the Supreme Court will again consider the constitutional validity of such a state law is somewhat doubtful. Except perhaps for a case presenting extreme infringements of property or speech rights, future litigation in this area appears destined for state courts.

II. HISTORICAL PERSPECTIVE

> *The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.*[14]

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13. 407 U.S. 551 (1972). *See* notes 40-61 *infra.*

14. O.W. HOLMES, THE COMMON LAW 5 (Harvard University Press, 1965).

A. *Federal Precedents*

The precedents for the *Pruneyard* decision date back at least to the 1940's.[15] Since then, a number of decisions have attempted to define what role the first amendment plays on publicly used private property. These decisions often raised more questions than they answered, leaving petitioners and property owners awaiting the next clarification of their rights and liabilities. The following discussion of cases analyzes the questions that have been raised, and those that subsequently have been resolved.

1. Marsh v. Alabama: *First Amendment Protections in the Private Company Town*

In *Marsh v. Alabama*,[16] the first major case in the series dealing with first amendment rights on private property,[17] the Supreme Court considered the unique situation presented by a "company town" where all property within the town was owned by a private corporation, Gulf Shipbuilding Corpora-

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15. Case law has recognized speech rights on select private property since the 1940's. Long before that time, however, the law recognized the right of the public to regulate private property where its use is "affected with a public interest." In Munn v. Illinois, 94 U.S. 113 (1876) the Supreme Court reaffirmed the long established principle of public regulation of private property affected by a public interest. Although *Munn* dealt with a different factual situation (the validity of an Illinois statute regulating prices for storage in grain warehouses), the general principle affirmed by the Court also applies to quasi-public property. The Court stated:

> [W]e find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 HARG. LAW TRACTS, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Id. at 126.

16. 326 U.S. 501 (1946).

17. The Supreme Court had previously considered the scope of first amendment rights on public streets, sidewalks, and parks in a municipality. *See* cases cited at note 5 *supra*. In *Marsh* the Court considered, for the first time, whether principles in the above cases should be applied to private property in the downtown business district of a company town. Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), later expanded the Court's decision in *Marsh*. *See* notes 28-39 and accompanying text *infra*.

tion. Appellant Marsh, a Jehovah's Witness, was arrested and convicted of trespassing following her attempt to distribute religious literature near the U.S. Post Office in the downtown section of the company town of Chickasaw, Alabama.

The majority opinion in *Marsh* stressed that Chickasaw had "all the characteristics of any other American town."[18] Although entirely on private property, the town included residential buildings, streets, sewers, a sewage treatment plant, and a "business block."[19] In an observation that may be important to future cases, the Court noted that "the residents use the business block as their regular shopping center."[20]

In its decision reversing Marsh's trespass conviction, the Court laid the foundation for the developing concept that under certain circumstances, the use and nature of private property may subject it to the public's freedom to exercise constitutionally protected rights of expression. The Court emphasized the fact that Chickasaw was like "any other American town" where an infringement of first amendment rights would not be tolerated:

> Had the title to Chickasaw belonged not to a private but a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear that appellant's conviction must be reversed.[21]

Looking beyond who actually held title to the property, the Court focused on what use was being made of it. Chickasaw's use was completely analogous to a typical town; the only distinguishing feature was in whose name title was held. The Court declared: "Whether a corporation or a 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."[22]

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18. 326 U.S. at 502.

19. *Id.*

20. *Id.* at 503. Although neither the court nor legal scholars have focused on this language, it seems especially significant because current litigation focuses on shopping centers rather than company towns. In the past, courts and scholars have drawn the analogy between the company town of the 1940's and the shopping centers of the 1970's and 1980's. Perhaps such an analogy is not necessary in light of the importance that *Marsh* specifically placed on the fact that the business block was used as the regular "shopping center."

21. 326 U.S. at 504.

22. *Id.* at 507.

As in *Pruneyard*, the Marsh property owners argued that they had the right to exclude others. The Court rejected this contention and held that the rights to exclude diminished in relation to the public's invitation onto the property. "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."[23]

Although perhaps somewhat unaware of the future ramifications of his theories,[24] Justice Black's opinion for the Court in *Marsh* established the notion of "quasi-public property" which has received much attention in more recent years.[25] The Court found that private ownership of property does not give an unqualified right to exclude persons or to obstruct civil liberties where the use of such property is analogous to that of the typical American town and its business block.[26] Although the "functional equivalency" terminology did not appear until Justice Marshall's majority opinion in *Logan Valley*,[27] the *Marsh* holding extended civil liberties on private property based on a rationale that was in effect a finding of functional equivalency between a company town and the typical American town.

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23. *Id.* at 506.

24. *See* notes 37-39 and accompanying text *infra*, discussing Justice Black's vigorous dissent to the application of *Marsh's* rule to property other than a "company town."

25. *See* note 6 *supra*.

26. The Court concluded:

> As we have heretofore stated, the town of Chickasaw does not function differently from any other town. *The "business block" serves as the community shopping center* and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute . . . literature clearly violates the First and Fourteenth Amendments to the Constitution.

326 U.S. at 507-08 (emphasis added). *See* note 20 *supra*, regarding the possible modern importance of Justice Black's "community shopping center" language.

27. *See* note 35 and accompanying text *infra*. In *Logan Valley*, Justice Marshall extended *Marsh's* reasoning to protect labor picketing in a large private shopping center by reasoning that economic changes in American society had resulted in the movement of the business block from downtown to the suburbs. 391 U.S. 308, 324 (1968). Justice Marshall found that shopping centers performed the same role that downtown business centers had played earlier, and thus found shopping centers to be the "functional equivalent" of the company town in *Marsh*. *Id.* at 318.

2. Logan Valley: *Shopping Centers as the "Functional Equivalent" of the Downtown Business District*

In *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[28] the Court further developed the notion that private ownership of property does not justify a prohibition of first amendment activity where such activity would be allowed on municipal property.[29] In *Logan Valley*, the state court had enjoined picketing by employees in front of their employer's store in a large shopping center. The Supreme Court reversed, concluding that such picketing was protected by the first and fourteenth amendments.[30] Speaking for the majority, Justice Marshall emphasized that the picketing was closely related to the particular store's operations and that in order to be effective it needed to occur near the store.[31] Relying on the quasi-public property concept underlying *Marsh*, Marshall asserted that "under some circumstances property that is privately owned may, at least for first amendment purposes, be treated as though it were publicly held."[32]

Justice Marshall went on to point out how the business block in *Marsh* and the shopping center in *Logan Valley* had "striking similarities."[33] They were approximately the same size, had similar commercial establishments, parking areas and public roads, and allowed the general public unrestricted access to the property.[34] Justice Marshall reasoned that the business block in *Marsh* and the shopping center in *Logan Valley* performed the same function for the general public; they were basically identical social entities, merely functioning in different eras. In support of this reasoning, he pointed to statistics which indicated that post-war American economic development had destroyed the downtown business district as a public gathering place and had replaced it with the suburban shopping center.[35] Justice Marshall concluded that "[t]he

28. 391 U.S. 308 (1968).
29. *Id.* at 315.
30. *Id.* at 325.
31. *Id.* at 322-23.
32. *Id.* at 316.
33. *Id.* at 317.
34. *Id.* at 318.
35. Justice Marshall observed:

> The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The large-scaled movement of this country's population from the cities to the suburbs has been accompanied by the advent of the

shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*."[36]

The dissenting opinions in *Logan Valley* emphasized that Logan Valley Plaza did not have *all* the attributes of the Chickasaw company town. Justice Black asserted that private property can be treated as though it were public property *only* "when that property has taken on *all* the attributes of a town, i.e., 'residential buildings, streets, system of sewers, a sewage disposal plant and a business block' on which business places are situated."[37] Justice White also dissented in *Logan*

> suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries.
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> These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have. Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment.

391 U.S. at 324-25.

Justice Marshall's concurrence in *Pruneyard* reiterated his view, first presented in *Logan Valley* and repeated in *Lloyd* and *Hudgens*, that private shopping centers must give way to speech rights because of their role in today's society. After stating his belief that *Logan Valley* had been correctly decided and that both *Lloyd* and *Hudgens* (in overruling *Logan Valley*) had misinterpreted the first and fourteenth amendments, Justice Marshall asserted:

> In all of them [*Logan Valley, Lloyd,* and *Hudgens*] the shopping center owners had opened their centers to the public at large, effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and parks. The State had in turn made its laws of trespass available to shopping center owners, enabling them to exclude those who wished to engage in expressive activity on their premises. Rights of free expression become illusory when a State has operated in such a way as to shut off effective channels of communication. I continue to believe, then, that "the Court's rejection of any role for the First Amendment in the privately owned shopping center complex stems . . . from an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment's guarantee of freedom of speech." Hudgens v. NLRB, 424 U.S. at 542 (dissenting opinion).

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 90-91 (1980) (Marshall, J., concurring).

36. 391 U.S. at 318.

37. 391 U.S. at 332 (Black, J., dissenting) (emphasis added). It is somewhat dif-

Valley, pointing out the differences between Logan Valley Plaza and Chickasaw, Alabama. He emphasized that "Logan Valley Plaza *is not a town* but only a collection of stores."[38]

This emphasis by Justice Black (and others who have followed) that all characteristics of a company town must be found, seems to miss the spirit, if not also the letter, of *Marsh* in spite of the fact that Black authored *Marsh.* The rationale for allowing such first amendment activity is that, where the public gathers to transact business and carry on other communications, first amendment freedoms cannot be chilled merely because the land is privately owned.[39] To rule otherwise would place control of first amendment rights in the hands of private property owners.

The dissenters, Justices Black and White, made a factual distinction between company towns and shopping malls. At first glance this distinction may be appealing, but under closer scrutiny it is evident that those facts are not relevant to the core issue: first amendment protections on private property where the public gathers. Contrary to the dissent's belief, *Marsh's* ruling was not inextricably wed to the anomaly of a completely private company town.

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ficult to explain the change in Justice Black's attitude between *Marsh* in 1946 and *Logan Valley* in 1968. It seems that *Marsh's* ruling was more radical in 1946 than was *Logan Valley's* in 1968. During the intervening 22 years, American society had changed considerably and had undergone extensive "suburbanization." The legal concept underlying Black's *Marsh* decision was undoubtedly more substantial than the mere fact that Chickasaw was a full-blown "company town." It appears that Justice Black's views on the relation between property rights and first amendment rights had shifted from favoring first amendment rights to favoring property rights.

In Hudgens v. NLRB, 424 U.S. 507 (1976), Justice Stewart emphasized Black's dissent in *Logan Valley* and concluded that *Lloyd* had overruled *Logan Valley* even though it had not been expressly stated. 424 U.S. at 516-18.

38. 391 U.S. at 338 (White, J., dissenting) (emphasis added).

39. Justice Marshall, for the majority in *Logan Valley,* also discussed the relevancy of the ownership of the area surrounding the "business district." He stated:

> We see no reason why access to a business district in a company town for the purpose of exercising first amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership.

Id. at 319. Marshall recognized that the single distinguishing feature was that in *Logan Valley* "the *property surrounding* the 'business district' is not under the same ownership" as the mall, whereas in Chickasaw the private property extended beyond the "business district." In both cases, however, the expressive activity was not requested beyond the central business area, nor would it have been effective there. In both cases, the appellants had gone to the central area where the public congregates, so it is immaterial who owned the land in the surrounding residential areas.

3. Lloyd Corp. v. Tanner: *The Court Reconsiders*

In the period between its 1968 *Logan Valley* decision and its 1972 decision in *Lloyd Corp. v. Tanner*,[40] the makeup of the Court was altered considerably.[41] Not only had Justice Marshall lost the majority of votes that joined in his *Logan Valley* opinion, but the liberal Warren Court had also given way to the more conservative Burger Court.

In *Lloyd*, the respondents sought to distribute handbills within Lloyd Corporation's shopping center. The center maintained a policy prohibiting *all* handbilling, and its security guards requested that the handbillers resume their activity on the public property at the center's perimeter. The lower courts found that the respondent's activity was protected by the first amendment through *Marsh* and *Logan Valley*, but the Supreme Court disagreed, finding the activity unrelated to the shopping center's business and the availability of an alternative forum.

From the perspective of *Logan Valley*, the question presented in *Lloyd* was a novel one: whether "unrelated" first amendment activity is protected in a privately owned shopping center. The facts in *Lloyd* carried the first amendment question one step further than prior cases. The private property was a shopping center as in *Logan Valley*, but the first amendment activity in question was not directly related to a certain business within the center; instead it involved the distribution of anti-war handbills. From *Marsh*'s perspective, however, the issue was an old one because the first amendment activity allowed in *Marsh* was also unrelated to the specific operations of the town's business block. *Logan Valley* had specifically reserved the question of whether *unrelated* expressive activity was constitutionally protected in a shopping center.[42]

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40. 407 U.S. 551 (1972).

41. In *Logan Valley*, Justice Marshall wrote the majority opinion and was joined by Chief Justice Warren, and Justices Brennan, Stewart, and Fortas, with Justice Douglas concurring in a separate opinion. In *Lloyd*, Marshall dissented and was joined by Justices Douglas, Brennan, and Stewart. Chief Justice Warren, and Justices Fortas, Black, and Harlan were no longer on the Court. In *Lloyd*, Justice Powell wrote the majority opinion and was joined by Chief Justice Burger and Justices White, Blackmun, and Rehnquist. Of the five justices voting with the majority in *Lloyd*, only Justice White had been on the Court four years earlier when the Court decided *Logan Valley*. Justice White dissented in *Logan Valley*, writing his own opinion and joining in Justice Black's dissent.

42. As the Court stated in *Logan Valley:*

The mall in *Lloyd* had basically the same characteristics as the *Pruneyard* mall,[43] which made it equivalent to what is now the typical modern-day suburban shopping center. In 1972, however, the Court characterized it as "a relatively new concept in shopping center design."[44]

The Court struggled with *Logan Valley's* "functional equivalency" terminology and with *Marsh*'s company town situation, quite obviously trying to find a way to circumvent those precedents. Writing for a five justice majority,[45] Justice Powell dismissed the importance of *Marsh* by characterizing the company town as "an economic anomaly of the past."[46] Powell quoted Justice Black's *Logan Valley* dissent wherein Black objected to applying the rule in *Marsh* to property other than a company town complete with sewers, residences, "and everything else that goes to make a town."[47] This reading is an oversimplification of the reasoning in *Marsh.* It makes the assumption that the basis for *Marsh*'s holding was some superficial quality of company towns. It fails to recognize the legal underpinning for *Marsh:* that private property operating as a public gathering place loses some of the rights to exclude normally associated with purely private property.

Justice Powell asserted that *Logan Valley*'s holding had

> The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the first amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.

391 U.S. at 320 n.9.

43. The *Lloyd* mall covered 50 acres (20 of which were for parking), had a one and one-half mile perimeter of four public streets, and had various private walkways going through the mall. Sixty stores were present in the mall, ranging from small shops to major department stores. The entire mall was privately owned and had gardens, escalators, sidewalks, and parking facilities in addition to the stores. 407 U.S. at 553.

The Pruneyard mall covers 21 acres, 5 of which serve as private parking facilities. It is bounded on two sides by private property, while public streets and sidewalks border the other two sides. The mall has various walkways, fountains, and gardens, and it houses 65 shops, 10 restaurants, and one theater. 23 Cal. 3d at 902, 592 P.2d at 342, 153 Cal. Rptr. at 855.

44. 407 U.S. at 553.

45. Justice Powell was joined by Chief Justice Burger and Justices White, Blackmun, and Rehnquist. *See* note 41 *supra.*

46. 407 U.S. at 561.

47. *Id.* at 563 (quoting 391 U.S. at 330-31 (Black, J., dissenting)).

not depended on a finding that privately owned streets or shopping centers are functionally equivalent, for first amendment purposes, to municipally owned streets.[48] Moreover, he asserted that the holding in *Logan Valley* had been limited to those cases where the activities are directly related to the shopping center's business purposes.[49]

Justice Powell found that the handbilling in *Lloyd* was unrelated to the purposes of the shopping center.[50] He also decided that there was reasonable opportunity to accomplish the handbilling on the public sidewalks at the shopping center's perimeter. These two features, *relatedness* and the *availability of alternative forums,* became the "test" following *Lloyd.*

In *Lloyd,* the issue was whether the first amendment protected handbilling even though the center prohibited all handbilling.[51] The holding was also couched in first amendment terms, finding that there was no absolute right of expression in the mall since the land had not been dedicated to public use.[52] Although the issue and the holding were stated in first amendment terms, the Court noted that the owner's fifth amendment property rights were "also relevant."[53]

The *Lloyd* majority relied heavily on dissenting opinions in *Logan Valley* and *Marsh.*[54] Although it could have merely distinguished *Logan Valley* (since the issue in *Lloyd* had been reserved by *Logan Valley*), the majority instead attempted to infer that precedent without adequately explaining or justify-

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48. Implying that the "functional equivalent" terminology was merely dictum, Justice Powell observed:

> The holding in *Logan Valley* was not dependent upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for first amendment purposes, of municipally owned streets and sidewalks.

407 U.S. at 563.

49. Justice Powell noted two important limitations on *Logan Valley's* decision: 1) that the picketing be directly related to the purposes of the shopping center, and 2) that no other reasonable opportunity exist for the picketers to convey their message to the intended audience. *Id.*

50. *Id.* at 564.

51. *Id.* at 567.

52. *Id.* at 570.

53. *Id.* at 567. This reference to the "relevance" of fifth amendment property rights generated confusion as to whether *Lloyd* was based on the first amendment, the fifth amendment, or both. *Pruneyard* resolved this confusion in concluding that *Lloyd* had been based on the first amendment. *See* note 109 and accompanying text *infra.*

54. *See* 407 U.S. at 562, 565, 569 n.13. *See also* note 37 *supra.*

ing its reasons for doing so.

The question left unanswered in *Lloyd* was whether the *Lloyd* ruling was grounded solely in the absence of a first amendment right, or whether it was based on the presence of the owner's fifth amendment property rights, or a balancing of the two.[55] If based only on the former ground, it would not foreclose the power of a state to grant such expressive rights based on independent state constitutional grounds.

In his lengthy and strenuous dissent, Justice Marshall reemphasized the theory underlying *Marsh* and *Logan Valley:* that private ownership of publicly used property does not confer an absolute right to exclude others or bar first amendment activities.[56] He also reiterated that when first amendment rights are balanced against property rights, the first amendment rights "occupy a preferred position."[57]

Marshall argued that the Lloyd Center was factually similar to the Logan Valley Plaza and that it was functionally equivalent to the business district in *Marsh.*[58] He argued that the shopping center provided people with practically all necessary products and services, and, therefore, was equivalent in function to a traditional business block where first amendment protections are well established.[59]

Focusing on the issue of whether the speech is "related" to the center, Marshall asserted that this factor should not be determinative in considering whether speech is allowed.[60] Marshall pointed out that, if the concern is the degree of harm to the property interest of the owner, "related" speech (i.e., criticising mall policies or practices) may be much more harmful to that property interest than "unrelated" speech. As a result, if "relatedness" is to be considered at all, neutral speech (as in *Robins*) would appear to be more valid and desirable than "related" speech since it invades the correspond-

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55. *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, 247-48 (1980). *See* note 109 and accompanying text *infra.*

56. 407 U.S. at 573 (Marshall, J., dissenting).

57. *Id.* (Marshall, J., dissenting) (quoting Marsh v. Alabama, 326 U.S. 501, 509 (1946)).

58. 407 U.S. at 576 (Marshall, J., dissenting).

59. *See* note 5 *supra* and cases cited therein for a discussion of the long established principle of first amendment protections in public streets and sidewalks.

60. Although not pointed out by Marshall, it is significant to note that the speech in *Marsh* was neither found to be nor required to be "related" to the operation of the business district, but yet it was upheld as constitutionally protected.

ing property right to a much lesser degree.

Noting the large scale movement of people from city to suburb, and stores from downtown to shopping centers, Marshall foresaw an increased reliance on private business to perform functions formerly provided by the government, and the corresponding need for greater first amendment protections.[61]

4. Hudgens v. N.L.R.B.: *Labor Picketing in Shopping Centers—The N.L.R.A. is Determinative of Employees' Rights*

Four years after *Lloyd*, in *Hudgens v. National Labor Relations Board*,[62] the Court considered a case where a mall owner threatened to press trespass charges against employees who were picketing their employer's store situated within the confines of a private shopping center. The picketing employees worked at a warehouse of Butler Shoe Company in Atlanta, Georgia, where the company had failed to meet employee demands in negotiations. They picketed Butler's warehouse plus its nine retail stores in the Atlanta area, including the one in the shopping center where they were subsequently threatened with arrest for trespassing.[63]

The Supreme Court considered the question "whether the respective rights and liabilities of the parties are to be decided under the criteria of the National Labor Relations Act (NLRA) alone, under a first amendment standard, or under some combination of the two."[64] The Court concluded that "the rights and liabilities of the parties in this case are depen-

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61. Justice Marshall's observations and predictions have turned out to be fairly accurate. In *Lloyd* he said:

> It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. Only the wealthy may find effective communication possible unless we adhere to *Marsh v. Alabama* and continue to hold that '[t]he 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.' 326 U.S. at 506.

407 U.S. at 586 (Marshall, J., dissenting).

62. 424 U.S. 507 (1976).

63. *Id.* at 509.

64. *Id.* at 512.

dent exclusively upon the National Labor Relations Act."[65]

Justice Stewart declared that *Lloyd* had overruled *Logan Valley* even though it might not have done so explicitly.[66] Justice Stewart stated that *Logan Valley's* reasoning could not be squared with *Lloyd's*,[67] and thereby quickly dismissed the impact of *Logan Valley* on this area of the law. Stewart's view on the viability of *Logan Valley* was neither a popular one, nor was it necessary or correct.[68] As previously discussed and as seen in Marshall's dissenting opinion, *Lloyd* addressed an issue not decided, but specifically reserved by the Court in *Logan Valley*.[69] Its effect was to limit the scope of *Logan Valley* quite severely, but neither *Lloyd* nor *Hudgens* provide any substantial justification for overruling the *Logan Valley* concepts.[70]

One question answered implicitly in *Hudgens* (although not made explicit until *Pruneyard*) is that the opinion in *Lloyd*, which alluded to both first and fifth amendment rights, was in fact based on the absence of a first amendment right. This fact was implicitly borne out in *Hudgens*, when the Court considered whether the rights at the shopping center were based on the first amendment or the NLRA. Nowhere does the Court in *Hudgens* affirm any fifth amendment property right of the mall owner, thereby clarifying the question

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65. *Id.* at 521.

66. *Id.* at 517-18. The Court's later treatment of *Logan Valley* casts some doubt on the soundness of the legal reasoning in *Lloyd* and *Hudgens*. Although *Lloyd* restricted the scope of *Logan Valley's* holding, it did not overrule it, either explicitly or implicitly. In *Hudgens*, however, Stewart concluded that *Lloyd* had overruled *Logan Valley*. As discussed in notes 69-71 *infra*, the different results in *Logan Valley*, *Lloyd*, and *Hudgens* are perhaps more attributable to the personal philosophies of the justices deciding each case rather than a strict adherence to the principle of *stare decisis*.

67. *Id.* at 518.

68. Justice Stewart authored the majority opinion in *Hudgens* which specifically found that *Lloyd* had effectively overruled *Logan Valley*. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined him in that majority, but Powell (joined by Burger) separately concurred, expressing the belief that *Lloyd* had *not* overruled *Logan Valley*. They nevertheless concurred with Stewart. Justice White concurred in the result only, and also disagreed with the finding that *Logan Valley* was overruled. Justices Marshall and Brennan dissented and Justice Stevens took no part in the consideration of the case. As a result, Justice Stewart's view that *Lloyd* overruled *Logan Valley* was really shared by only *two* other justices, Blackmun and Rehnquist. Five justices specifically stated their objection to this view.

69. *See* notes 38-40 *supra*.

70. Perhaps the change in the makeup of the Court provides the strongest reason for the change in rationale. *See* note 40 *supra*.

left unanswered by the Court in *Lloyd*.[71]

5. Eastex, Inc. v. N.L.R.B.: *Employer's Property Interest Does Not Outweigh Employee's Labor Interest*

In 1978, in *Eastex, Inc. v. National Labor Relations Board*,[72] the Court further limited any claim of a superseding property right over employees rights under the NLRA. In *Eastex*, employees of the corporation were denied the right to distribute a union newsletter in a non-working area of the employer's plant during non-working hours. This non-working area contained the time clocks, as well as an employee bulletin board and area for those waiting to transact business in the plant's administrative offices.[73]

The NLRB found that the employer's ban on newsletter distribution violated the NLRA,[74] and the Supreme Court affirmed. The Court considered whether the NLRA protected the distribution of the newsletter from employer interference, and concluded that the NLRA did protect distribution. Second, the Court considered whether, despite the first finding, the employer had a property interest which outweighed the protection under the NLRA, since the activity was occurring on the employer's private property. The employer asserted that the employees were required to show that no "alternative channels of communication" were available before this intrusion into its property rights was warranted.[75]

The Court disagreed with the employer's asserted property rights stating that its "reliance on its property right is largely misplaced."[76] It emphasized that the employees were "already rightfully on the employer's property"[77] and that the employer had made "no attempt to show that its management interests would be prejudiced in any way by the exercise of section 7 rights proposed by its employees here."[78] Both of these findings are similar to those findings made by the California Supreme Court in *Robins v. Pruneyard Shopping*

71. *See* notes 105-20 and accompanying text *infra* discussing the *Pruneyard* holding and fifth amendment claims.
72. 433 U.S. 556 (1978).
73. *Id.* at 560 n.4.
74. 215 N.L.R.B. 271 (1974). *See also* 433 U.S. at 560 n.4.
75. 433 U.S. at 572.
76. *Id.* at 572-73.
77. *Id.* at 573.
78. *Id.*

Center,[79] where it found that the public is already present by general invitation, and that the shopping center failed to show that the gathering of signatures prejudiced the center's operation.[80]

The Supreme Court also noted *in Eastex* that the employee's intrusion into the employer's property interest is "*quite limited* as long as the employer's management interests are adequately protected."[81] The California Supreme Court in *Robins* similarly found that, if reasonable regulations are enforced, the intrusion into a mall owner's property interest by petitioners is "largely theoretical"[82] because of the presence of thousands of other people on a daily basis.

The *Eastex* decision further developed the property rights issues raised in *Lloyd* and discussed in *Hudgens*. Although *Eastex* is distinguishable because it is a labor relations case rather than a shopping center case, it does add to the developing picture of the relationship between personal rights and property rights. In balancing labor rights with private property rights, the Court in *Eastex* found that the property rights were secondary. This result reflects a growing attitude that property rights occupy a position of less importance when they confront conflicting civil rights.[83]

B. *California Precedents*

The concept of a public forum on quasi-public property had a birth and development under California law similar to the federal cases discussed above. Based on a broad reading of the rationale of *Marsh*, the California Supreme Court has held, in various contexts, that owners of publicly used private property may not totally prohibit free speech on their property.

In 1964, four years before the U.S. Supreme Court reached its *Logan Valley* decision, the California Supreme Court decided that union members had a right to peacefully picket their employer's store and that the shopping center owner could not enjoin their activity. In *Schwartz-Torrance*

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79. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

80. 23 Cal. 3d at 910-11, 592 P.2d at 347, 153 Cal. Rptr. at 859.

81. 433 U.S. at 574 (emphasis added).

82. 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

83. *See, e.g.*, Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135 (1963); Henely, *Property Rights and First Amendment Rights: Balance and Conflict*, 62 A.B.A.J. 76 (Jan. 1976).

Investment Corp. v. Bakery & Confectionery Workers' Union Local No. 31,[84] the court struck a balance between the employees' interests in picketing and the owner's interest in prohibiting the picketing. The court ruled that since the owner had "fully opened his property to the public," his interest did not outweigh the interest of the picketers.

In 1967 the court decided *In re Hoffman*[85] which posed the issue of whether anti-war leafletting in a Los Angeles train station was protected under the state constitution. The facts presented by *Hoffman* were somewhat analogous to *Lloyd* since both cases involved handbilling which was unrelated to the private property upon which it occurred. The leafletters in *Hoffman* challenged a Los Angeles municipal ordinance which only permitted activities in railroad stations which were related to the railroad's business. The leafletting was peaceful and did not interfere with the normal use of the railroad property. Chief Justice Traynor found the ordinance unconstitutional and ruled that the leafletters had a constitutional right to distribute literature in the train station. *Hoffman* is significant because free speech activity was protected despite not being directly related to the property's normal business use, and despite the fact that other equally effective forums existed.

The California Supreme Court, in *In re Lane*[86] extended the free speech protections announced in *Logan Valley* and *Schwartz-Torrance*. In *Lane*, the court held that unobstructive union picketing and handbilling were protected even on the private sidewalk in front of a large, privately owned supermarket.

In 1970, in *In re Cox*,[87] two long-haired and unconventionally dressed young men were ejected from a shopping center, even though they had not been picketing. The center claimed that it had a right to exclude any prospective customer. The court found the center's action arbitrarily discriminatory under the state Unruh Civil Rights Act. The court noted that "[t]he shopping center has undertaken the public function of providing society with the necessities of life and has become the modern suburban counterpart of the town

84. 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964).
85. 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).
86. 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).
87. 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).

center."[88]

In *Diamond v. Bland (Diamond I)*,[89] the California Supreme Court considered whether owners of a large, privately owned shopping center could deny all first amendment activities unrelated to their center's business. The court held:

> We conclude that the line of cases beginning with *Marsh* and including *Schwartz-Torrance, Logan, Lane,* and *Hoffman* compels a reversal of the judgment confirming their right to circulate initiative petitions and to engage in other peaceful and orderly first amendment activities on the premises of the Inland Center and declaring that defendants may not constitutionally impose a prohibition on all first amendment activity on the premises of their shopping center. 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.[90]

The court noted that "no unrealistic burden" was being imposed on the property owners, since "reasonable regulations calculated to protect their business interests" would be valid.[91] The court balanced the property interest against the first amendment interest and concluded that the most desirable solution was to allow expressive activity under regulations which would protect the owner's property interest in the peaceful operation of the mall.

Following the U.S. Supreme Court's *Lloyd* decision in 1972, the California court reconsidered *Diamond I* in light of *Lloyd's* "new" rule that the first amendment did not prevent a mall owner's prohibition of handbilling unrelated to the operation of the mall. In *Diamond v. Bland (Diamond II)*,[92] the court, concluding that *Lloyd* was indistinguishable from *Diamond,* overruled *Diamond I* and reinstated the original injunction barring access to the shopping center. The four to three majority opinion in *Diamond II* said merely that *Lloyd* called for a different result than had been reached in *Diamond I.* Justice Mosk, in his lengthy dissent, rejected the ma-

88. *Id.* at 216 n.11, 474 P.2d at 999 n.11, 90 Cal. Rptr. at 31 n.11.
89. 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970).
90. *Id.* at 665-66, 477 P.2d at 741, 91 Cal. Rptr. at 509.
91. *Id.* at 665, 477 P.2d at 741, 91 Cal. Rptr. at 509.
92. 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974).

jority view that *Lloyd* was controlling. First, there were significant differences between *Diamond* and *Lloyd* in their fact patterns.[93] Second, California constitutional rights are "more embracive than the first 10 amendments, plus the Fourteenth, of the United States Constitution."[94] Therefore, Mosk concluded that despite the ruling in *Lloyd,* California was free to grant greater free speech protections to its citizens.

In 1979 the California Supreme Court again had the opportunity to address the issue of property rights versus free expression in *Robins v. Pruneyard Shopping Center.*[95] The court in *Robins* decided that the California Constitution "protects speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[96] The court stated that *Lloyd* had not granted first amendment rights in shopping centers, but that California was nevertheless free to do so under its own state constitution since *Lloyd* had not found a paramount federal property right of shopping center owners.

It is evident that the California Supreme Court still believed that free speech guarantees were necessary in private shopping centers, but overruled *Diamond I* only because it felt obliged to do so in light of *Lloyd.* Having realized that the same result as in *Diamond I* was available on independant state grounds, the court in *Robins* again embraced the notion that the societal role of shopping centers today requires that peaceful and orderly expressive activity be protected.

California's support of expressive rights on quasi-public property is now quite clear. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,*[97] the California Supreme Court affirmed and strengthened the position it took in *Robins* by upholding the right of union members to picket on their employer's property. The opinion also stated the Cal-

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93. Justice Mosk found three significant factual differences between *Lloyd* and *Diamond:* 1) *Lloyd* involved distribution of leaflets, whereas *Diamond* involved obtaining signatures for an initiative petition; 2) there were alternative forums available in *Lloyd,* whereas alternative forums would not be effective in *Diamond;* and 3) if the activities in *Lloyd* were restricted, the consequence would be a reduction in the leaflet circulation, whereas activity restrictions in *Diamond* would result in decreased signatures and the possibility of total failure of the petition being placed on the ballot.

94. 11 Cal. 3d at 337, 521 P.2d at 465, 113 Cal. Rptr. at 473 (Mosk, J., dissenting).

95. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

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

97. 25 Cal. 3d 317, 599 P.2d 676, 158 Cal. Rptr. 370 (1979).

ifornia court's impression of the history of free speech on private property in the U.S. Supreme Court:

> Thus until 1972, decisions of this court and the United States Supreme Court had moved steadily toward the protection of the exercise of free speech upon private business property open to the public. In that year, however, the Supreme Court changed its views on the scope of the First Amendment's embrace of speech on private premises open to the public. In *Lloyd Corp. v. Tanner* . . . the Supreme Court rejected the reasoning of *Logan Valley*, decreeing that leafleting on shopping center property, which did not relate to any purpose contemplated by the center, found no First Amendment protection.[98]

In addition, the California legislature has enacted the Moscone Act which prevents the state's courts from enjoining peaceful labor picketing.[99]

III. THE PRESENT STATUS OF SPEECH RIGHTS IN SHOPPING CENTERS: *Pruneyard Shopping Center v. Robins*

On November 13, 1979, the United States Supreme Court decided to review the California Supreme Court's decision in *Robins v. Pruneyard Shopping Center*.[100] In *Robins*, the California high court decided that a shopping center owner does not have a property right under the United States Constitution which would allow the owner to prohibit reasonably exercised rights of speech and petitioning.[101] Justice Newman, writing for a four-three majority in *Robins*, held 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."[102] The Cali-

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98. *Id.* at 327, 599 P.2d at 683, 158 Cal. Rptr. at 377.

99. *See* CAL. CIV. PROC. CODE § 527.3 (West 1979), which provides that no court or judge shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which prohibits any person or persons from peacefully picketing or assembling in connection with a labor dispute. The purpose of the statute is to promote workers' rights when such workers act to insure their own protection.

100. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). *See also* 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); Note, *Constitutional Law—First Amendment—State Constitution May Guarantee Broader Rights of Free Speech and Expression Than Those Rights Protected by the Federal Constitution*, 1979 WASH. U.L.Q. 1161.

101. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856.

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

fornia court concluded that the earlier U.S. Supreme Court decision in *Lloyd* did not prevent California from providing more expansive free speech rights under its own constitution.[103]

The U.S. Supreme Court addressed three main issues in *Pruneyard*.[104] First, had *Lloyd* created or affirmed a property right of shopping center owners protected by the federal Constitution which the *Robins* decision violated? Second, did the *Robins* decision amount to a taking of Pruneyard property without just compensation and a deprivation of property without due process of law? And third, were the shopping center owner's first amendment rights violated by the decision which affirmed the speech rights of Robins and the other petitioners?

A. *Did* Lloyd *Establish a Federally Protected Property Right of Shopping Center Owners?*

Appellant Pruneyard, citing *Lloyd*, contended that "owners of shopping centers . . . have a paramount federal right to control the use of their property for speech purposes."[105] Pruneyard correctly asserted that the Court in *Lloyd* had been faced with the question of whether a shopping center owner could prohibit on-site handbilling that was unrelated to the center's operations.[106] Pruneyard was incorrect, however, in its contention that the result in *Lloyd* had been based on a finding of a paramount property right protected by the Federal Constitution.[107] Pruneyard asserted that *Lloyd*'s holding

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103. *Id.* at 903-04, 592 P.2d at 343, 153 Cal. Rptr. at 856.

104. Prior to its discussion of the merits of the case, the Court was faced with appellees' argument that the Supreme Court lacked jurisdiction to consider the case because *Lloyd* had not established a federally protected property right of mall owners, and because California had decided the *Robins* case on adequate and independent state grounds. As discussed at note 7 *supra*, the Supreme Court does not have jurisdiction to overturn state court decisions which are based on adequate and independent state constitutional grounds. Nevertheless, the Court found that a federal question was presented by Pruneyard's claim that the California decision had violated its right to exclude others, claimed to be a federally protected property right based on the Court's decision in *Lloyd*. The Court specifically relied on 28 U.S.C. § 1257(2) to find that the issue was properly before it on appeal.

105. Brief for Appellant, Pruneyard, at 9 (on file at Santa Clara Law Review Office).

106. 407 U.S. at 552. The Court recognized this issue as having been reserved by the Court in *Logan Valley*.

107. The Court made it clear that the *Lloyd* decision was based on a finding that no first amendment rights existed in the mall, rather than being based, as appellant contended, upon a finding that the mall owners had a superior property right

required speech rights to yield to property rights where adequate alternative forums are available.

The Court in *Pruneyard* was not convinced by appellant's arguments and instead agreed with appellee's characterization of *Lloyd*'s rule. The appellees asserted that *Lloyd* had merely defined the scope of first amendment protections and had *not* been based on any paramount property right under the fifth amendment.[108] Finally settling the question of whether *Lloyd* was based on the first or the fifth amendment, Justice Rehnquist, for the unanimous Court, stated:

> *Lloyd* held that when a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in expression beyond those already existing under applicable law.[109]

Rehnquist's focus on rights "already existing under applicable law" leads to his other conclusion, that *Lloyd's* first amendment ruling, although not granting broad first amendment rights, does *authorize* speech rights if granted on adequate and independent state constitutional grounds: "Our reasoning in *Lloyd,* however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[110]

B. *Did* Robins *Amount to Taking of Pruneyard Property Without Just Compensation and Without Due Process of Law?*

Appellant's second argument emphasized one aspect of private property ownership, the right to exclude others. Justice Rehnquist recognized this right as being "one of the essential sticks in the bundle of property rights."[111] Appellant asserted that the *Robins* decision had effectively usurped that

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under the fifth amendment. 447 U.S. at 81. See notes 97-98 and accompanying text *infra.*

108. 447 U.S. at 80-81.

109. *Id.* at 81.

110. *Id.*

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

essential right by requiring mall owners to allow certain petition and expression activities in their malls.

Although agreeing that the property right to exclude others had *literally* been "taken" as a result of the California decision, Justice Rehnquist's opinion reaffirmed that "not every destruction or injury to property by governmental action has been held to be a 'taking' *in the constitutional sense.*"[112] Whether a literal taking qualifies as a constitutional taking depends on a determination that the restriction forces certain individuals to bear public burdens which should be borne by the public as a whole.[113]

The Court cited *Kaiser Aetna v. United States*[114] and *Pennsylvania Coal Co. v. Mahon*[115] in its determination of whether a constitutional taking had occurred. The Court distinguished *Kaiser Aetna,* where the government's attempt to create a public access right to a private marina was thwarted by the Court's holding that such public access would interfere with Kaiser Aetna's "reasonable investment backed expectations."[116]

While the Supreme Court found the regulation in *Kaiser Aetna* so extreme as to amount to a taking,[117] in *Pruneyard* it found that the California regulation did not "unreasonably impair the value or use of their property as a shopping center."[118] This finding, the Court stated, was bolstered by California's affirmance of the use of reasonable time, place, and manner restrictions in order to minimize interference with commercial functions.

Finally, as to the owner's taking claim, the Court implicitly agreed with California's finding that, in a large shopping center, the invasion into appellant's property right by a few petitioners is "largely theoretical."[119]

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112. 447 U.S. at 82 (citing Armstrong v. United States, 364 U.S. 40, 48 (1960)) (emphasis added).

113. 447 U.S. at 82-83 (citing Armstrong v. United States, 364 U.S. at 49).

114. 444 U.S. at 164 (1979).

115. 260 U.S. 393 (1922).

116. 447 U.S. at 83.

117. 444 U.S. at 178.

118. 447 U.S. at 83.

119. In *Robins,* the California Supreme Court regarded the invasion into Pruneyard's property right by the petitioners as "largely theoretical" because of the public character of the mall and because of the thousands who visit there on a daily basis. 23 Cal. 3d at 910, 592 P.2d at 662, 477 P.2d at 739, 91 Cal. Rptr. at 507.

In *Pruneyard,* the U.S. Supreme Court concluded: "There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably

The Court dealt quickly with the owner's due process claim, pointing out that the "guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained."[120] The Court concluded that appellant had failed to show that this test was not satisfied by the expansive free speech ruling in *Robins*.

C. *Did the* Robins *decision violate the Pruneyard owner's first amendment rights?*

Pruneyard's final contention was that the *Robins* ruling, equating the shopping center with a public forum, violated the owner's first amendment right not to be forced by the state to use its property as a forum for other people's speech.[121] Although this claim was not raised in the state courts,[122] the Supreme Court found that a federal question was adequately presented,[123] but then concluded that the owner's first amendment rights had not been infringed.[124]

Appellant cited *Wooley v. Maynard*[125] as support for its proposition that a state cannot require an individual to participate in dissemination of a message as the *Robins* decision would require. Appellant contended that by *granting* the public a right to speak at the center, the California court had *forced* the Pruneyard and its owners to adopt or convey the message presented by the petitioners.

The Court easily distinguished *Wooley*. In *Wooley*, the government had prescribed the message, had required that it

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impair the value or use of their property as a shopping center." 447 U.S. at 83.

120. 447 U.S. at 85 (citing Nebbia v. New York, 291 U.S. 502, 525 (1934)).

121. 447 U.S. at 85.

122. Appellees urged that the Court not address this issue because the appellants had not previously raised this specific claim in any of the state courts. Brief for Appellee, Pruneyard, at 28 (on file at Santa Clara Law Reivew Office).

123. The Court found that the issue had been raised adequately in earlier proceedings. 447 U.S. at 85 n.9 (quoting Bryant v. Zimmerman, 278 U.S. 63, 67 (1928)).

124. The Court stated:

> We conclude that neither appellant's federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state protected rights of expression and petition on appellant's property. The judgment of the Supreme Court of California is therefore affirmed.

447 U.S. at 88.

125. 430 U.S. 705 (1977).

be openly displayed, and had prevented any attempt to hide it, and the message there served no important state interest. By contrast, in *Pruneyard:* 1) the center openly invited the public and, therefore, a connection between the speech and the center would be unlikely; 2) no specific message was dictated by the state; and 3) the owners could use signs to disavow any connection with any message, if such lack of connection was not already obvious.[126]

D. Pruneyard's *Conclusion*

Concluding, Justice Rehnquist stated that the *Robins* decision, recognizing the right of expression in California shopping centers, did not infringe appellant's first amendment rights or its federally recognized property rights.[127]

The *Pruneyard* decision answered some questions about first amendment rights in shopping centers. It affirmed that shopping center owners do *not* have a fifth amendment property right which could supersede petitioners' first amendment rights. *Pruneyard* also refuted the shopping center's claim that it had a first amendment right which could prevent petitioners' activities. Furthermore, the decision concluded that the restriction imposed by *Robins* did not amount to a constitutional taking even though, in a literal sense, a property right was compromised.

The *Pruneyard* decision also raised some new questions. Most notable is the future of federal court jurisdiction on this issue. Since, under *Lloyd* the petitioners have no absolute first amendment free speech right, and under *Pruneyard* the mall owners have no fifth amendment right to absolutely prevent that speech, it appears that the decision will direct most future litigators into the state courts. Since granting the right to petition is now up to the individual states, it is suggested that there no longer exists federal question jurisdiction on this issue.

As discussed below in Part IV, the major questions likely to come before state courts are: what time, place, and manner regulations are regarded as being "reasonable"; what types of expression are to be protected; and what constitutes a "shopping center" for free speech purposes under *Robins* and *Pruneyard?* An additional question, relating to expanding the

126. 447 U.S. at 87.

127. *Id.* at 88. *See* note 124 *supra.*

scope of *Robins* is what quasi-public property other than shopping centers may be included under *Robins'* broad rule?

E. *Justice Marshall's Concurrence—An Evaluation of Precedent*

Justice Marshall's concurring opinion in *Pruneyard* indicates that, while he was satisfied with the result of affirming *Robins,* he was dissatisfied with how that result was reached.[128] A reading of Marshall's majority opinion in *Logan Valley* and his dissents in *Lloyd* and *Hudgens* unmistakably demonstrates his view that the first amendment to the U.S. Constitution protects rights of expression in large, modern-day shopping centers.[129]

Marshall begins his concurrence by recounting what the Court held in *Logan Valley.* Following the reasoning in *Marsh,* Marshall wrote the *Logan Valley* majority opinion to emphasize that economic development in America has transformed the downtown business block into the suburban shopping center. Since the downtown business block had served as the traditional American public forum and gathering place of the people, Marshall argued, the shopping center must also fill that role for first amendment purposes since it already did so for all other purposes. The reasoning which required first amendment guarantees in the business block in *Marsh*'s company town applied with equal force to the shopping center, its "functional equivalent." Both cases involved private property, both served the same public function, and therefore both required first amendment guarantees.

Perhaps the only way to reconcile the line of cases beginning with *Marsh,* is that, as the Court's composition changes, so does the amount of first amendment protection in shopping centers. Dissenting in *Lloyd* and pointing out how *Logan Valley*'s precedent was being ignored, Marshall observed: "I am aware that the composition of this Court has radically changed in four years."[130]

Marshall viewed the California decision in *Robins* as a healthy and correct following of the *Marsh* and *Logan Valley*

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128. *Id.* at 89 (Marshall, J., concurring).

129. *See* notes 31-36, 56-61, 69-70 and accompanying text *supra* for a discussion of Marshall's views expressed in *Logan Valley, Lloyd,* and *Hudgens.*

130. 407 U.S. at 585 (Marshall, J., dissenting). *See* note 37 *supra.*

rationale.[131] Although the U.S. Supreme Court refused to follow the philosophy enunciated in *Marsh* and followed in *Logan Valley,* California chose to do so independently, and Marshall stated, "I applaud the [California Supreme] court's decision."[132] While it appears that Marshall's first amendment philosophy is not likely to gain a Supreme Court majority in the foreseeable future, it appears to be the more consistent view and it is a signal to state courts that his reasoning is viable and can be used under independent state grounds rationales.

IV. FUTURE LITIGATION

A. *The State Action Issue*

Shopping center speech cases generally involve allegations of infringement of either first or fifth amendment rights, depending on which party was successful in the lower courts. Since the first and fifth amendments, through the fourteenth amendment, only protect against infringement *by the state,* in order to grant relief for an infringement under one of these amendments a court must first find that some type of "state action" has occurred.

Virtually all of the cases already discussed have recognized the need to find state action. Although similar basic facts occurred in the various cases, the posture regarding state action has varied considerably. In *Marsh,* for example, the appellant was arrested and jailed for trespassing following her expressive activity in downtown Chickasaw.[133] The arrest and imprisonment clearly fulfilled the requirement that state action occur. In contrast, in cases like *Pruneyard,* the free speech advocates avoided involvement with the police by voluntarily leaving the private property when requested.[134] The

131. 447 U.S. at 91. Justice Marshall stated:

> Like the Court in *Logan Valley,* the California court found that access to shopping centers was crucial to the exercise of rights of free expression. And like the Court in *Logan Valley,* the California court rejected the suggestion that the Fourteenth Amendment barred the intrusion on the property rights of the shopping center owners. 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.

132. *Id.*

133. 326 U.S. at 503-04.

134. 447 U.S. at 77.

injunctive relief sought in such a case essentially amounts to declaratory relief, affirming the right to petition. Under these circumstances, state action is much more difficult to find, but the courts have not let this hurdle stop their consideration of the merits and the public policy implications of private property and the public forum.[135]

This case-comment will not delve into the state action requirement[136] dilemma, but instead merely notes the courts' attitudes regarding it. Although the decisions always at least allude to the state action problem, the courts' treatment of the issue is often cursory and not very convincing.[137] It appears that, for all realistic purposes, the state action requirement no longer has much significance in these cases.

B. *New Federalism Trends*

Particularly since the passing of the era of the Warren Court and its liberal trends, legal scholars have increasingly observed the rise of the "New Federalism."[138] Spurred on by

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135. *See, e.g.*, Diamond v. Bland (Diamond I), 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), where the California Supreme Court reached a conclusion similar to that reached in *Robins*. *Diamond I* is perhaps the best example of the lack of importance that courts have attached to the issue of state action. In *Diamond I*, the very last footnote briefly stated that, though the parties had not raised the state action question, the court "had not overlooked" it. The court concluded that state action is established for fourteenth amendment purposes when a shopping center refuses to permit first amendment rights in the public areas of the center:

> It is elementary constitutional doctrine that the First and Fourteenth Amendments protect individuals only from state action which inhibits their free speech rights. Here we find state action of a character comparable to that in *Logan, Schwartz-Torrance,* and *Lane.* We explained in *In re Cox, supra, ante,* pp. 205, 217, fn. 11: "In *Logan Valley, Lane* and *Schwartz-Torrance,* the United States Supreme Court and this court found 'state action' under the Fourteenth Amendment in a shopping center's refusal to permit the exercise of First Amendment rights in such areas as sidewalks, parks, and malls.

3 Cal. 3d at 666 n.4, 477 P.2d at 741 n.4, 91 Cal. Rptr. at 509 n.4. *See also* Horowitz & Karst, *The California Supreme Court and State Action Under the Fourteenth Amendment,* 21 U.C.L.A. L. REV. 1421 (1974); Note, Robins v. Pruneyard Shopping Center: *Free Speech Access to Shopping Centers Under the California Constitution,* 68 CALIF. L. REV. 641 (1980).

136. For a discussion of state action and its relation to the free speech on private property cases analyzed in this case-comment, *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1163-67 (1978). *See also* Note, *supra* note 135, which suggests a "state action model" for use in analyzing cases such as *Pruneyard.*

137. *See* note 135 *supra.* In *Robins,* the California Supreme Court never even mentioned the state action issue.

138. As the Burger Court has whittled away broad constitutional rights and protections established in the Warren era, liberal state supreme courts (most notably

the conservative tendencies of the Burger Court, individual states have often chosen to rule more liberally than the Supreme Court and have afforded more expansive rights and protections than those granted by the U.S. Supreme Court under the Federal Constitution.[139]

Although the "new federalism" has generally originated under state principles and has occurred in spite of Supreme Court rulings, recent cases, including *Pruneyard,* exhibit a possible shift in the Court's attitude toward states' rights.[140] This shift may be in part attributable to the increasing role played by Justice William Rehnquist's advocacy of states' rights. This shift, demonstrated in *Pruneyard,* reveals a Court that not only tolerates independent state rulings, but actually encourages their development.

Justice Rehnquist's *Pruneyard* opinion can be read as stating that the federal government will not interfere with the issue of expressive rights on publicly used private property. In letting the *Lloyd* decision stand intact, the Court affirmed its position that the first amendment does not protect such expressive activity.[141] The Court also made clear that the first

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California's) have responded by reestablishing those protections based on adequate and independent state grounds. This state court activism was termed "New Federalism." *See, e.g.,* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 KY. L.J. 421 (1974); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution,* 29 STAN. L. REV. 297 (1977); Comment, *Independent Interpretation: California's Declaration of Rights or Declaration of Independence?,* 21 SANTA CLARA L. REV. 199 (1981).

Underlying the New Federalism is the principle that state courts may provide more expansive constitutional rights than are required by the U.S. Supreme Court under the U.S. Constitution. A state may grant these broader rights, limited only by the supremacy clause of the Federal Constitution. If the state court bases its decision on adequate and independent state grounds, the Supreme Court lacks the power to overturn that decision. *See* Murdock v. City of Memphis, 87 U.S. 590 (1874); Janokvich v. Indiana Toll Rd. Comm'n, 379 U.S. 487 (1965).

The California Supreme Court has been in the vanguard of New Federalism decisions, particularly in the Bill of Rights area. For a good analysis of independent interpretation under California law see Falk, *The Supreme Court of California, 1971-72—Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground,* 61 CALIF. L. REV. 273, 278 n.17 (1973); Note, *Rediscovering the California Declaration of Rights,* 26 HASTINGS L.J. 481 (1974).

139. *See* the authorities in note 7 *supra* for analysis of cases which have granted more expansive constitutional rights than afforded under the United States Constitution.

140. *See, e.g.,* Agins v. City of Tiburon, 447 U.S. 255 (1980).

141. Although the *Lloyd* decision was not specifically eroded or disapproved, there is some question as to its continuing significance. First, after the *Lloyd* decision in 1972, much of the literature evaluating the case noted its inconsistencies with *Marsh* and *Logan Valley* and suggested that the result may have been prompted by

amendment does not grant mall owners an absolute right to prohibit free speech by the public,[142] nor does the fifth amendment give the mall owners a right to exclude the petitioners.[143] Under the circumstances of the case, the Court did not find that the intrusion into the mall owner's property right was sufficient to qualify as a taking or an unreasonable exercise of the state's power.[144]

The result following *Pruneyard* is that neither the speech advocates nor the mall owners have any substantial federal constitutional questions to present to the Court. Since *Pruneyard* approved of the use of independent state grounds, if a state chooses to protect either or both the speech rights and property rights in shopping centers, the only remaining question is whether the grounds are adequate.

C. *Unresolved Issues*

Future litigation of expressive rights on quasi-public property will not focus on whether the U.S. Constitution protects it, but whether individual state constitutions protect this expressive activity. Since the question is essentially one of independent state constitutional grounds, this litigation will occur in state courts.

The first question which must be answered by each state is whether it will grant broad expressive rights of a nature as those granted by California in *Robins*. In *Pruneyard*, the U.S. Supreme Court held that such a grant does not violate the U.S. Constitution if it adequately protects the private prop-

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political views rather than by legal precedent. *See, e.g.*, Note, Lloyd Corp. v. Tanner: *The Demise of* Logan Valley *and the Disguise of* Marsh, 61 GEO. L.J. 1187 (1973); Note, *First Amendment Rights vs. Property Rights—The Death of the "Functional Equivalent,"* 27 MIAMI L. REV. 219 (1972). *See also* note 41 *supra* discussing changes in the Court's composition before *Lloyd* and the difficulty in reconciling *Lloyd* with the underlying principles in *Marsh* and *Logan Valley*.

Secondly, during oral argument of *Pruneyard*, Justice Blackmun asked Pruneyard's attorneys if *Lloyd* must be overruled in order to affirm *Robins*, thereby at least implicitly questioning the viability of the decision. *See* 48 U.S.L.W. (U.S. April 1, 1980).

Finally, in the wake of the *Pruneyard* decision which authorizes state courts to grant more expansive speech rights in shopping centers, it is doubtful that *Lloyd* has any meaning. It is clear now that all *Lloyd* stands for is that the first amendment does not afford speech rights in a privately owned shopping center. Since state constitutions may grant such rights independent of the first amendment, the *Lloyd* decision is left as little more than a shell.

142. 447 U.S. at 79.

143. *Id.* at 80.

144. *Id.* at 84.

erty owner's interest and minimizes interference with commercial functions. If a state decides that its constitution, as California's, protects speech and petitioning, reasonably exercised, in privately owned shopping centers, then the next issue is what limitations on that right are valid. On the other hand, a decision that expansive rights of expression are not protected by the state constitution will probably mean the end of the issue in that state. Such a decision would be reinforced by the earlier decision in *Lloyd*, and there will be no need to consider questions discussed below as to limiting the scope of such a right.

The next question to come before the courts of California (and other states to follow) will concern the scope of the rule in *Robins*, and will address four separate issues left unresolved in *Robins*. The first issue is what time, place, and manner restrictions are "reasonable" in attempting to maintain a healthy environment for commercial functions. The second issue is whether the *Robins* rule protects only petitioning and political speech, or whether it encompasses *all* expressive activities. Third is the issue regarding the size and nature of the store and whether it qualifies as a "shopping center" as opposed to being merely a "modest retail establishment"[145] or a "free standing store."[146] Finally, the courts will face the issue of what publicly used private property, other than shopping centers, falls under the rule in *Robins*.

1. *Reasonable Time, Place, and Manner Restrictions*

Both the California Supreme Court in *Robins* and the United States Supreme Court in *Pruneyard* recognized the need for and the appropriateness of restrictions on expressive activity in shopping centers to protect the property interests of the owners.[147] Time, place, and manner restrictions apply in general to any exercise of first amendment rights and they

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145. In *Robins*, the California Supreme Court emphasized that rights of speech and petitioning applied to shopping center owners but not to individual homeowners or proprietors of "modest retail establishments." 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

146. In *Pruneyard*, Justice Powell concurred "on the understanding that our decision is limited to the type of shopping center involved in this case. Significantly different questions would be presented if a State authorized strangers to picket or leafleteer in privately owned, *freestanding stores* and commercial premises." 447 U.S. at 96 (emphasis added).

147. *See* 447 U.S. at 83; 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

function to strike a balance between speech rights and other competing rights and interests, such as protecting private property, preventing inciting to riot, and maintaining an orderly flow of traffic. In recognizing speech rights the courts reaffirmed the established principle that when first amendment rights conflict with other rights, first amendment rights occupy a preferred position[148] and the exercise of those rights should be regulated rather than wholly prohibited.

There exists no elaborate analysis of what limitations on expression are "reasonable," due mostly to the fact that reasonableness is a subjective standard and its determination depends significantly on particular circumstances. Overly broad restrictions act as a prior restraint on expressive activity and are usually struck down as being unconstitutional.

In *Robins*, the California Supreme Court spoke generally of reasonable regulations as being those which are adopted by the owner *to assure non-interference* with normal business operations of the mall.[149] A similar general standard was voiced by the U.S. Supreme Court in *Pruneyard*, stating that "the Pruneyard may restrict expressive activity by adopting time, place, and manner regulations that will *minimize any interference* with its commercial functions."[150]

It is, therefore, evident from *Robins* and *Pruneyard* that the touchstone for the restriction of activity in malls is that the restriction, to be valid, must serve to prevent interference with the business operations of the mall. This is consistent with striking a balance between speech and property rights, since it allows free speech up to the point of actual interference with the countervailing property right.

For a somewhat more specific standard, the *Robins* court referred to Chief Justice Traynor's discussion of specific time,

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148. 326 U.S. at 509.

149. The court concluded:

> A handful of additional orderly persons soliciting signatures and delivering handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations (see *Diamond [I]* 3 Cal. 3d at p. 665, 91 Cal. Rptr. 501, 477 P.2d 733) would not markedly dilute defendant's property rights.

23 Cal. 3d at 911, 592 P.2d at 347-48, 153 Cal. Rptr. at 860-61.

150. 447 U.S. at 83 (emphasis added). *See also* 447 U.S. at 89 (Marshall, J., concurring) (referring to a standard of "interference with appellant's normal business operations"); 477 U.S. at 96 (Powell, J., concurring) (where he suggests a standard evaluating whether "substantial annoyance to customers" has occurred).

place, and manner rules in *In re Hoffman.*[151] Regarding speech rights in railroad stations, the court emphasized that problems such as litter, traffic congestion, danger of personal injury, and the like can be remedied without absolutely prohibiting expressive activity. Congestion can be avoided by limiting the number of people participating and by exercising greater controls during peak hours of business. Likewise, the activity could be totally prohibited in areas of greatest congestion (such as doors, turnstiles, ticket windows) in order to prevent problems. Although such an area may provide the most effective means of contacting the greatest number of people at once, the same people probably can be reached elsewhere on the quasi-public property with little or no congestion. The lesson from *Hoffman* is that the property owner cannot totally prohibit speech, but can limit it as to: 1) time (avoiding rush hours); 2) location (avoiding congestion areas); 3) the number of people or exhibits; 4) the manner of presentation; and 5) relevant security factors.[152]

Even Justice Traynor's time, place, and manner comments in *Hoffman,* which are far more specific than the other California cases discussed above,[153] admittedly leave unresolved questions regarding the reasonableness of regulations. Although the touchstone of the regulations is non-interference with business operations, mall owners undoubtedly perceive interference starting at an earlier point than free speech advocates.

The Pruneyard and other California malls are developing policies (or reevaluating earlier ones) on the regulation of speech and petitioning. Some of these go as far as prescribing the kind of clothing that the petitioners must wear and requiring the acquisition of a permit and the payment of a deposit.[154] Such restrictions constitute a substantial hurdle which must be cleared to gain access to the malls, and could

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151. 67 Cal. 2d 845, 852-53, 434 P.2d 353, 357-58, 64 Cal. Rptr. 97, 101-02 (1967). *See also* note 85 and accompanying text *supra.*

152. 67 Cal. 2d at 852-53, 434 P.2d at 357-58, 64 Cal. Rptr. at 101-02.

153. *See* notes 84-99 and accompanying text *supra.*

154. In general, these permits must be acquired three to five days in advance. Other typical regulations include requiring a $25 to $50 security bond, mall management's prior approval of poster or leaflets, limits on the number of petitioners and the mall area they may occupy. *See, e.g.,* Rules for Political Petitioning At Vallco Fashion Park Shopping Center (distributed upon request by mall management and on file at the office of Santa Clara Law Review). Vallco Fashion Park Shopping Center is located in Cupertino, California.

completely prevent access by persons unable to afford the deposit or unable to secure a permit far enough in advance. Where restrictions effectively prevent access altogether and are much broader than needed to ensure "non-interference with business," the excluded parties could challenge the restrictions in court. Since overly restrictive regulations defeat the free expression *Robins* sought to guarantee, California courts are not apt to be deferential to such regulations.

The foreseeable litigation of these regulations will focus on whether the regulation guarantees non-interference with the mall's business operation or whether it merely restricts the rights of speech and petition. The speech advocates will allege that the regulations are unrelated to the non-interference test, while the mall owners will contend that the regulations are necessary to preserve the commercial function of the mall. It will be up to the trial courts to fashion a standard as to what constitutes "interference" and what amounts to an unreasonable restraint on speech.

2. *Types of Protected Expression*

Another question not clearly resolved in *Robins* or *Pruneyard* is whether the *Robins* rule extends to *all* types of expressive activity, or whether it only applies to petitioning and other activity closely related to the political process. In *Robins*, the petitioners were gathering signatures for a petition to send to the President of the United States. It is not unlikely that mall owners will try to restrict the scope of *Robins* to speech which is likewise closely tied to the right of the people to redress grievances against the government. The earlier California cases in this area lend some aid in resolving this issue, but fail to render a clear rule.[155]

In a number of cases, the activity in the mall was labor picketing by union members protesting policies of a store in the mall.[156] It has been argued that labor picketing deserves a

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155. Those earlier cases include *Schwartz-Torrance* and *Sears, Roebuck* (labor picketing), *In re Lane* (handbilling), *In re Hoffman* (anti-Vietnam war leafletting), *Diamond* (circulating political petitions), and *Robins* (gathering signatures on a petition to be sent to the government). For a discussion of these California decisions, *see* notes 84-99 and accompanying text *supra*.

156. In California, *Schwartz-Torrance* and *Lane* involved labor picketing. *See* notes 84 and 86 *supra*. The federal court cases involving labor picketing include *Logan Valley, Hudgens*, and *Eastex*. *See* notes 22-36, 58-83 and accompanying text *supra*.

higher degree of protection from infringement by property rights. In labor picketing there is a recognized need to be at the target store and there is a close relation between the speech and the concerned property.[157] While the federal court cases seem to give special recognition to labor rights on private property,[158] this fact is not based on a first amendment right, but is instead based on the Supreme Court's interpretation of the National Labor Relations Act.[159] The California Supreme Court has specifically rejected the theory that labor cases present a more compelling case for expressive rights on private property.[160] Although the labor cases seem to have fared better in the courts, it is evident that the California courts do not believe that labor cases require a different balancing of rights in favor of private property owners.

Although *Diamond I, Diamond II,* and *Robins* involved speech in the form of petitioning, there is no substantial support for the proposition that those decisions are limited to that narrow aspect of speech and expressive activity. In *Robins* the court broadly concluded 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."[161] This broad statement

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157. This idea was fostered in *Lloyd* when the Court restricted the holding of *Logan Valley* to situations where the picketing is directly related to a store in the mall and where no adequate alternative forums exist.

158. *Logan Valley, Hudgens,* and *Eastex* are the federal court cases where the speech rights were held to be protected. In each case the speech sought to be protected was labor-oriented.

159. In *Hudgens* and *Eastex* the Court based its protection of the activity, not on first amendment grounds, but on its interpretation of the National Labor Relations Act.

160. In *Diamond I* the shopping center owner argued that the earlier California cases had dealt with labor relations which deserve more protection than general speech rights. The court found that, while that contention had "arguable merit," it did not compel a result in favor of the shopping center owner's property rights:

> [A]lthough there is arguable merit to defendants' position that plaintiffs' interest in the exercise of their First Amendment rights at the Center may be less compelling than the First Amendment interests involved in *Schwartz-Torrance, Logan,* and *Lane* [all of which were labor cases], their contention does not justify striking the balance in favor of defendants' property rights.

3 Cal. 3d at 663, 477 P.2d at 739, 91 Cal. Rptr. at 507.

161. 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860 (emphasis added). Note, however, the discrepancy between the portion quoted protecting speech and petitioning and the opening sentence of the opinion by Justice Newman. There the scope of the holding is much narrower: "[W]e hold that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution." 23 Cal. 3d at 902, 592 P.2d at 342, 153 Cal. Rptr. at 855.

shows that, not only is the petitioning involved in *Robins* protected, but also other "speech" in shopping centers. Although attempts probably will be made to limit this broad rule, the California Supreme Court nevertheless has ruled that all speech is protected if reasonably exercised.

3. *Size and Nature of the Shopping Center*

The holding in *Robins* was stated in terms of protecting speech and petitioning in "shopping centers."[162] The question immediately raised by this terminology is what the courts in the future will characterize as a "shopping center" which must provide access for expressive activity. The underlying rationale for this ruling is that large shopping centers today serve as the "functional equivalent"[163] or the "suburban counterpart"[164] of the traditional town center's business block where first amendment activity is protected. If speech rights are not protected in these centers, the result is that control of speech rights resides in private landowners, since the business block public forum is no longer effective in most towns. Smaller stores or business establishments which are not performing this societal role arguably do not come within the scope of the *Robins* rule.

When it decided *Robins*, the California Supreme Court was obviously concerned with the issue of extending the rule to other forms of private property. The Pruneyard Shopping Center is a fairly typical large shopping center covering over 20 acres and having more than 60 stores providing many different services and products for the community. Any similarly sized shopping center should come within the scope of the *Robins* decision. A smaller shopping center or an individual store, however, is arguably outside of the scope of *Robins'* broad ruling. The court in *Robins* emphasized that "we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment."[165] As a result, a private home or a "modest re-

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162. 23 Cal. 3d at 902, 910, 592 P.2d at 342, 347, 153 Cal. Rptr. at 855, 860.

163. *See* Logan Valley, 391 U.S. at 325.

164. *See* In re Cox, 3 Cal. 3d 205, 216 n.11, 474 P.2d 992, 999 n.11, 90 Cal. Rptr. 24, 31 n.11 (1970).

165. 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860 (quoting Diamond v. Bland, 11 Cal. 3d 331, 345, 521 P.2d 460, 470, 113 Cal. Rptr. 468, 478 (Mosk, J., dissenting)). The court did not, however, clarify what separates a shopping center from a modest retail establishment.

tail establishment" is not subject to the first amendment protections elaborated in *Robins*.

In *Robins*, the court never clarified what constitutes a "modest retail establishment." There have already been attempts to include "free standing stores" under this exception.[166] Likewise, a definitional problem appears in characterizing a small cluster of five or six small stores on the corner of a major street.[167] While these clusters may or may not call themselves a "shopping center," the application of *Robins* should not depend on their own characterization as a shopping center. These smaller "shopping centers" will probably be the focus of future *Robins*-type litigation over the size of the establishment and whether they are included in the rule and, therefore, must provide rights of speech and petitioning.

4. *Expanding the Scope of Robins to Other Publicly Used Private Property*

Whether the free speech protections announced in *Robins* will be extended to cover other types of publicy used private

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Although Justice Rehnquist's opinion for the Court in *Pruneyard* did not mention the issue as to the size of the mall, two of the concurring opinions did. Justice White emphasized the limitation stated by the California Supreme Court:

> The state court recognized, however, that reasonable time and place limitations could be imposed and that it was dealing with the public or common areas in a large shopping center and not with an individual retail establishment within or without the shopping center or with the property or privacy rights of a homeowner.

447 U.S. at 95 (White, J., concurring). Justice Powell likewise expressed his concern over the type of shopping center which would come under the rule:

> I join Parts I-IV on the understanding that our decision is limited to the type of shopping center involved in this case. Significantly different questions would be presented if a State authorized strangers to picket or leafleteer in privately owned, freestanding stores and commercial premises. Nor does our decision today apply to all "shopping centers."

447 U.S. at 96 (Powell, J., concurring).

166. 447 U.S. at 99 (Powell, J., concurring). *See* note 146 *supra* discussing Justice Powell's concurring opinion in *Pruneyard*. *But see* In re Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969). In *Lane*, the California Supreme Court held that unobstructive union picketing was protected on the private sidewalk in front of a large supermarket which was not part of a shopping center, nor was it even part of a larger chain of supermarkets.

167. Such clusters of stores abound in Santa Clara County (where The Pruneyard is located) and undoubtedly exist throughout California's other metropolitan areas. Many of them call themselves "shopping centers," often named after surrounding streets. These shopping centers are only a fraction of the size or economic impact of The Pruneyard, and they attract far fewer people. Nevertheless, free speech advocates likely to solicit signatures there and in mini-shopping centers will undoubtedly play a role in future litigation over this aspect of *Robins*' broad rule.

property remains somewhat speculative. Private university campuses and private office buildings are examples of potential targets of attempts to expand the scope of *Robins* beyond just shopping centers. The concepts underlying the *Robins* decision could be extended theoretically to other private property, and while there is arguable merit to extending free speech protections, for example, at a large private university campus, courts will probably be reluctant to do so in the near future.

Although a large campus may attract as many students in one day as a mall attracts shoppers, the nature of the invitation is different. A mall invites the general public to transact business with the mall's business establishments. In contrast, a university does not extend a general invitation, but instead seeks only the presence of students, professors, and others involved in the educational purposes of the university. Therefore, not only is the invitation different, but the population segment which is present is vastly different when compared to a shopping center which attracts a cross section of the community.

Besides differences as to the breadth of the invitation to the private property, a private campus differs from a mall in the amount of economic impact on a community. A mall is in the business of marketing products and services, and accounts for a large portion of retail sales in a community. A university is not in the business of selling, although a large university may have a substantial economic effect on the surrounding community.

The most important inquiry regarding economic effect is not how large the effect is, but what economic role the private property plays. Courts which have granted speech rights on publicly used private property have done so because such property operates as the "functional equivalent" of public property.

Private property which can be viewed as functionally equivalent to public property is clearly susceptible to an attempt to extend *Robins* and require free speech protections. Although it is not difficult to believe that the shopping center has replaced the downtown business block and is its functional equivalent, it is fairly difficult to characterize a private campus or a private office building as functionally equivalent to any public property. The role of private universities in society today is essentially unchanged from earlier times. Like-

wise, private office buildings do not serve as the functional equivalent of any past or present public property.

The functional equivalent concept used in *Logan Valley* was technically overruled in *Hudgens*. Even though the U.S. Supreme Court does not view shopping centers as performing the same role as yesteryear's business block, the *Robins* decision demonstrates that the California Supreme Court does. The functional equivalent concept formed the basis for California's decision in *Robins*. Therefore, it appears that any extension of *Robins* must be attributable to a finding that the private property where speech rights are sought is functionally equivalent to public property where speech rights are guaranteed.

Besides the functional equivalent aspect of *Robins*, there is the factor that shopping centers serve as the public gathering place and are, therefore, crucial to petitioning and other forms of speech where it is necessary to contact a large segment of the public. Large universities and office buildings can also provide contact with a large number of persons, and in this sense there is some merit to extending *Robins'* rule to these private properties. Such properties do provide an effective avenue for reaching a large number of people in a short period of time, just as in the case of a shopping center. It seems unlikely that this fact, without the further support of a finding of functional equivalence, would be sufficient for a court to find that a university or office building had to provide access for speech purposes.

It is somewhat difficult to project other types of private property which might be subject to *Robins'* rule in the future, partly due to the fact that shopping centers play a unique role in modern society and they have no present day functional equivalent. This is not to say that the rule in *Robins* will not be extended in the future. As American society continues to evolve, it is foreseeable that a totally new public forum may arise which cannot be pinpointed precisely today. Just as the Supreme Court in 1946 probably did not envision the results in *Pruneyard* when it decided *Marsh*, so the Court today cannot envision a subsequent public forum, but one is nevertheless likely to appear within the next few decades.

5. *Future Litigation Summary*

Since *Robins* did not elaborate very specifically what reasonable limitations can be applied by mall owners, and since

these owners will probably attempt to limit the speech and petitioning in every way possible, the next few years will likely see a gradual judicial definition of what restrictions on freedom of expression are reasonable. Likewise, a clarification should gradually develop as to what *types* of speech are protected and as to what *size* of shopping centers are included under the broad, seminal ruling in *Robins*.

Two issues, however, have been clearly resolved in the case law. *Lloyd*, limiting the rule from *Logan Valley*, held that first amendment activity in malls must be related to the operation of the center, and there must be a lack of available alternative forums for the speech. Neither of these factors need be found under California law after *Robins* in order to guarantee rights of speech and petitioning. The activity in *Robins* was not related to the mall, but nevertheless was found to be protected under the California Constitution.[168] Nor is it material that other forums are available, since the California Supreme Court has held that access to shopping centers is based on stronger grounds than lack of other forums.[169] The California view, unlike that of the United States Supreme Court,[170] is that the shopping center forum plays an important role; therefore, free speech must be protected in these centers.

V. CONCLUSION

The *Robins* and *Pruneyard* decisions have reestablished that free speech rights are constitutionally protected on private property that is publicly used. Earlier decisions by the U.S. and California Supreme Courts had pointed toward such protections, but the U.S. Supreme Court's 1972 *Lloyd* decision appeared to retreat from the general trend protecting free speech on publicly used private property. *Robins* and *Pruneyard* demonstrate that protection of speech on quasi-public property must come from state, rather than federal, constitutional provisions.

Several issues were left unresolved in the two cases. This case-comment has suggested possible answers. The courts failed to define with any certainty what regulations on speech

168. *See* note 102 *supra*.

169. *See* Diamond v. Bland (Diamond I), 3 Cal. 3d 653, 662, 477 P.2d 733, 738-39, 91 Cal. Rptr. 501, 506-07 (1970).

170. 407 U.S. at 551.

would be reasonable. Whether *all* types of speech will be protected is another open issue. The courts also failed to define what constitutes a "shopping center" under the rule established in *Robins*. While the rulings in *Robins* and *Pruneyard* technically apply only to *shopping centers*, they fostered the concept that speech rights are protected on *all* publicly used private property. The final question, therefore, is how far will the courts in the future extend *Robins* and *Pruneyard* to include private property other than shopping centers.

As suggested by the quote opening this case-comment, shopping centers today occupy a considerably more significant role in American society than merely providing a place to shop. While the Greeks had their agora and the Romans their Forum, 20th-Century Americans also have a forum in shopping centers. Because an open forum is an essential element of a free society, private interests in property cannot be asserted to defeat society's need for open communication.

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