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California Expansion of First Amendment Does Not Infringe on Federally Protected Rights

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NOTES

California Expansion of First Amendment Does Not Infringe on Federally Protected Rights

In *PruneYard Shopping Center v. Robins*,[1] the United States Supreme Court held that the California Constitution, which protects speech and petitioning in private shopping centers, does not violate the shopping center owner's rights under the federal constitution. The shopping center owner argued unsuccessfully that the state constitution violated federally protected property rights under the fifth and fourteenth amendments and free speech rights under the first and fourteenth amendments.

A group of high school students filed this suit in California Superior Court seeking to enjoin PruneYard Shopping Center from denying them access for the purpose of distributing pamphlets and circulating petitions.[2] The students had been asked by a security guard to leave the shopping center because their activity violated shopping center regulations.[3] There was no evidence that any PruneYard patrons objected to the students' activity, which the record indicated was peaceful and orderly at all times.

The trial court held that neither the federal nor the California Constitution entitled the students to petition on the shopping center property. The California Court of Appeal affirmed the lower court, but the California Supreme Court reversed the decision.[4] It concluded that the Califor-

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1. 100 S. Ct. 2035 (1980).

2. The pamphlets and petitions opposed a United Nations resolution against Zionism. *Id.* at 2038.

3. The PruneYard Shopping Center regulations prohibit any visitor or tenant from engaging in any publicly expressive activity that is not directly related to the center's commercial purposes. However, the shopping center owner would not object to expressive activity conducted on a public sidewalk adjacent to the shopping center. *Id.*

4. Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). For commentary on the state court decision, *see* Note, 10 GOLDEN GATE L. REV. 805 (1980); Note, 20 SANTA CLARA L. REV. 245 (1980); and Note, 2 WHITTIER L. REV. 423

nia Constitution[5] "protects speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[6] On appeal, the United States Supreme Court affirmed, holding that neither federally recognized property rights nor first amendment rights are infringed by state protected rights of expression and petition exercised on shopping center property.[7]

In *Prune Yard,* the Supreme Court sought to weigh competing interests: the state created right of expression of the petitioners[8] versus the property rights of the shopping center owner. On first impression, it would seem obvious that property rights would almost always yield to the fundamental right of freedom of speech.[9] Yet, surprisingly, before *Prune Yard,* property rights had weighed heavier in the balance.[10] In a series of four Supreme Court cases concerning a claimed first amendment right on private property,[11] a method of analysis evolved that focused on the character of the private property on which outsiders claimed a right of expression: public versus private. The theory is that private property will be deemed to be public as a matter of constitutional law when the property is the functional equivalent[12] of public property.[13] This theory was applied in *Lloyd Corp. v. Tanner,*[14] when antiwar protesters, standing on shopping center property, sought to distribute handbill invitations

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(1980).

5. Art. I, § 2 reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2.

6. 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

7. 100 S. Ct. at 2044.

8. In this casenote, "petitioners" refers to the party who sought to solicit signatures and otherwise engage in expressive activity on shopping center property. It does not refer to the appellant, the shopping center owner.

9. Indeed, the Supreme Court has recognized that speech rights enjoy a preferred position over property rights. Marsh v. Alabama, 326 U.S. 501, 509 (1946) and Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

10. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

11. These can be termed the first amendment "public function" cases or, more loosely, "the shopping center cases." "Public function" is a phrase coined in Marsh v. Alabama, 326 U.S. 501 (1946). *See also* Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); and Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

12. *See* 326 U.S. at 507-08 and 391 U.S. at 318.

13. A finding of "publicness" under the functional equivalent doctrine means that private property will be treated as an appropriate first amendment forum: the property owner stands in the shoes of the state and his actions are then considered state action. *See* 326 U.S. at 507-08. However, it is important to remember that the freedom to exercise first amendment rights even on actual public property is not absolute. *See, e.g.* Adderly v. Florida, 385 U.S. 39, 47-48 (1966) and Cox v. Louisiana, 379 U.S. 536, 554-55 (1965).

14. 407 U.S. 551 (1972).

to a meeting to protest the draft and the Vietnam war. The United States Supreme Court held that a private shopping center is not the "functional equivalent" of public property when adequate alternative forums are available.[15]

Lloyd differs from the instant case in that *Lloyd* rested on a claimed federal constitutional right alone; there was no state constitutional provision creating expansive rights of expression on private property.[16] Thus, application of *Lloyd* to the facts in *PruneYard* was determinative only after the court answered the following question about the holding in *Lloyd:* did *Lloyd* merely define the limits of the protection that the first amendment extends to expressive activity on private property or did *Lloyd* recognize a federal right of an owner to control private shopping center property?[17] As is often the case in judicial opinions, the brevity of the two paragraph answer given by the Court in *PruneYard* belies the complexity of this question.[18] Generally, states are free to grant constitutional rights broader than the federal constitution,[19] but the federal supremacy clause[20] prevents an expansive state created right from in-

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15. There were adequate alternative forums available in *PruneYard.* The shopping center was adjacent to a public sidewalk. 100 S. Ct. at 2038. But the California Supreme Court had determined that adequate alternative forums were irrelevant under the California Constitution. This interpretation of a state constitutional provision by a state supreme court was binding on the United States Supreme Court as long as the state construction did not offend the federal constitution. *See* 28 U.S.C. § 1257 (1976).

16. In this respect, *PruneYard* more closely parallels Hudgens v. NLRB, 424 U.S. 507 (1976). In *Hudgens,* members of a union seeking to engage in labor picketing on a privately owned shopping center claimed a federal right under the first amendment. The Supreme Court found that the first amendment did not protect the picketing, but it remanded the case to the National Labor Relations Board for a ruling on whether the picketing might be protected under the National Labor Relations Act. 424 U.S. at 523. Just as *Lloyd* offered no guidance in *Hudgens* in determining whether a federal statute would protect picketing on private property, it also did not instruct how to balance property rights against the state constitutional provision in *PruneYard.*

Lloyd and *Hudgens* have been the subject of extensive commentary. On *Lloyd, see generally* Lewis, *Free Speech and Property Rights Re-Equated: The Supreme Court Ascends from Logan Valley,* 24 LAB. L.J. 195 (1973); Comment, *From Logan Valley to Hyde Park and Back: Shopping Centers and Free Speech,* 26 SW. L.J. 569 (1972); and Note, 1973 WISCONSIN L. REV. 612. On *Hudgens, see generally* Henely, *Property Rights and First Amendment Rights: Balance and Conflict,* 62 A.B.A.J. 77 (1976); Comment, *Constitutional Law—Freedom of Speech: Property Rights Triumphant in the Shopping Center,* 28 FLA. L. REV. 1032 (1976); and Note, 8 ST. MARY'S L.J. 366 (1976).

17. This is the issue the California Supreme Court addressed. 592 P.2d at 343-46, 153 Cal. Rptr. at 856-59.

18. For an example of the confusion that *Lloyd* generated, *see* Tenrich Assocs. v. Heyda, 264 Or. 122, 504 P.2d 112 (1972), in which four judges of the Oregon Supreme Court each offered a different interpretation of *Lloyd.*

19. *See, e.g.,* Cooper v. California, 386 U.S. 58, 62 (1967).

20. U.S. CONST. art. VI, cl. 2.

fringing on a federally protected right.[21] In *PruneYard,* the shopping center owner argued that the court in *Lloyd* had implicitly recognized the existence of federal constitutional property rights as superior to federal rights of free speech in the shopping center setting. He maintained that it would thus violate the supremacy clause to allow the California expanded speech right to infringe on his federal property right as recognized in *Lloyd.* In other words, the supremacy clause would dictate that the balance struck in *Lloyd* between speech and property rights compels a similar result in *PruneYard* because of the similarity of the facts: the shopping center owner's federal property right should be protected against state infringement.

On a close reading of *Lloyd,* one could easily infer that shopping center property rights are protected by the federal constitution.[22] On the other hand, one could as easily infer that *Lloyd* only defined the extent of first amendment protection of speech.[23] In *PruneYard,* the Court has now de-

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21. Arguably, property rights are either state or federally created. *See* Justice Blackmun's one sentence concurrence in *PruneYard:* "Mr. Justice Blackmun joins the opinion of the Court except that sentence thereof, at 2042, which reads 'Nor as a general proposition is the United States, as opposed to the several states, possessed of residual authority that enables it to define "property" in the first instance.' " 100 S. Ct. at 2044. *Compare* Justice Marshall's view in his concurrence: "I do not understand the Court to suggest that rights of property are to be defined solely by state law. . . ." *Id.* at 2047. The prevailing view is that property rights are predominantly a province of the state: "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or private parties is found in the statutes and decisions of the state." Oregon *ex. rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977), *quoting* Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944). The distinction is probably academic though. If property rights are federally created, the supremacy clause would not prevent a state from infringing on that right through its police power when the state regulation has a substantial relation to the public health, safety, morals, or general welfare. *See generally* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). If a property right is state created and defined, the procedural due process protection of the fourteenth amendment of the federal constitution would still prevent the arbitrary state contraction of even a purely state defined right. *See generally* Martinez v. California, 100 S. Ct. 553 (1980); Munn v. Illinois, 94 U.S. 113 (1876). In *PruneYard,* the State of California appeared to have a sufficient interest under its police power in promoting expressive activity in shopping centers. 100 S. Ct. at 2043 n.8.

22. For example, in the first paragraph, Justice Powell stated: "We granted certiorari to consider petitioner's contention that the decision below violates rights of private property protected by the fifth and fourteenth amendments." 407 U.S. at 552-53.

23. The first amendment, through the fourteenth, protects free speech against state action. Similarly, the fifth amendment, through the fourteenth, protects private property against state action. Chicago, Burlington, & Quincey R.R. v. Chicago, 166 U.S. 226, 233, 236-37 (1897). The federal constitution affords no protection to private property against private action. As there was no right of expression claimed under a state constitution or statute in *Lloyd,* it is difficult to find the requisite state action that invokes federal protection; therefore, *Lloyd* could not have recognized a federally protected property right in the absence of

cleared the latter interpretation correct: *Lloyd* rests squarely on the first amendment alone.[24] Thus, deprived of *Lloyd*, the shopping center owner had lost an essential brick in the foundation of his argument.

The Court next considered whether the right to exclude others under the fifth amendment guarantee against the taking of property without just compensation or the fourteenth amendment guarantee against the deprivation of property without due process of law had been unconstitutionally infringed. On the taking issue the shopping center owner relied on *Kaiser Aetna v. United States*.[25] In *Kaiser Aetna*, the owners of a private pond had developed it into an exclusive marina that was open only to fee-paying members. When the owners had dredged a channel connecting the pond to navigable water, the federal government claimed the pond had become subject to federal navigational servitude which entitled the public to its free use. The Supreme Court held the government's attempt to create a public right to the pond interfered to such an extent with Kaiser Aetna's reasonable investment-backed expectations[26] that it amounted to a taking.[27]

The Court in *PruneYard* distinguished *Kaiser Aetna* on the ground that the shopping center owner had "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of [his] property that the State-authorized limitation of it amounted to a 'taking'."[28] As a result, the Court could find no unconstitutional infringement

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a finding that the shopping center was the functional equivalent of a municipality. Also, see Justice Marshall's concurrence in *PruneYard* in which he stated that utilization of a state trespass law by a property owner to exclude others constitutes state action. 100 S. Ct. at 2045. However, this view is not generally accepted since it goes too far; any resort to state law to prevent a trespass on even *purely* private property would then constitute state action. *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

24. "*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." 100 S. Ct. at 2041.

25. 100 S. Ct. 383 (1979).

26. *See* Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), a taking case: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." *Id.* at 124.

27. 100 S. Ct. at 397.

28. 100 S. Ct. at 2042. The distinction could be rationalized in this way: in *Kaiser Aetna*, the admission fee itself economically exploited the right to exclude outsiders from the marina. There would be a direct relation between the denial of that right and the ensuing economic harm, which probably would have been substantial. In the shopping center setting, the shopping center does not economically exploit the right to exclude per se since the owner has extended an invitation to the public to freely enter his property. The shopping center owner objects not to the mere physical invasion of the petitioners, but rather to the activity in which they engage after entering his property. Any compensable harm would, therefore,

of the shopping center owner's property rights under the fifth amendment.

The Court summarily dismissed the shopping center owner's claim that he had been denied property without due process of law.[29] Justice Rehnquist cited *Nebbia v. New York*[30] as providing the appropriate test: "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be [obtained]."[31] He concluded that the shopping center owner had "failed to provide sufficient justification for concluding that this test is not satisfied by the State's asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution."[32]

Finally, the Court addressed the shopping center owner's claim that the first amendment prevents him from being "forced . . . to use his property as a forum for the speech of others."[33] On this issue, the majority relied on *Wooley v. Maynard*,[34] in which the Supreme Court held that the State of New Hampshire could not compel its citizens to display the state motto, "Live Free or Die," on automobile license plates. In *PruneYard*,

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have to result from the state sanctioned activity of soliciting signatures and distributing leaflets. Conceivably, the shopping center's security costs or maintenance costs might increase as a result of the petitioner's activities. Or it is possible some shoppers, incensed by the views expressed by the petitioners, may leave the shopping center before making a purchase. While such harm is speculative, even if demonstrated it would be far less substantial than that present in many cases in which taking claims have been rejected. *See, e.g.*, United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) and Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). It appears the general trend is that the right to exclude outsiders from private property will be limited when necessary to meet emerging social needs. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), in which the Supreme Court held that the public accommodations provision of the Civil Rights Act of 1964 did not deprive a motel owner of property under the fifth amendment.

29. 100 S. Ct. at 2042. The due process clause of the fourteenth amendment of the federal constitution prevents the arbitrary contraction of even a purely state-conferred right. *Id.* at 2046. (Marshall, J., concurring).

30. 291 U.S. 502 (1934).

31. 100 S. Ct. at 2042, *quoting* Nebbia v. New York, 291 U.S. at 525. Although the Court in *Nebbia* applied a rational relationship test, use of the word "substantial" could suggest that a species of "strict scrutiny" analysis was applied. To be sure of the correct test, Justice Marshall stated in *PruneYard* that there is a core of common law rights, including rights against trespass, which the state cannot abolish "without a compelling showing of necessity. . . ." He concluded "that 'core' has not been approached in this case. . . .There is no basis for strictly scrutinizing the intrusion authorized by the California Supreme Court." 100 S. Ct. at 2047. (Marshall, J., concurring).

32. *Id.* at 2042-43.

33. *Id.* at 2043.

34. 430 U.S. 705 (1977).

Justice Rehnquist was able to distinguish *Wooley* on two grounds. Unlike *Wooley,* the state in *PruneYard* had not compelled the display of a specific message; thus there was no chance for "governmental discrimination for or against a particular message."[35] Secondly, the shopping center is not purely personal property, such as an automobile, since the public is openly invited onto the property. He reasoned that, based on this open invitation, it is not likely views of the petitioners will be identified with views of the shopping center owner. He added that the shopping center owner could disclaim any connection with the petitioners by simply posting signs to that effect.

But, as Justice Powell wrote,[36] the freedom of dissociation cannot restore the right to remain silent,[37] a right which the first amendment would seem to entail.[38] Justice Powell was able to concur in the result because he found it unlikely that shopping center customers would ascribe the views of the petitioners to the shopping center management in this instance. He also emphasized that the shopping center owner had failed to allege that he disagreed with the views of the petitioner. However, he was careful to point out that if a shopping center owner was to disagree strongly with the views expressed on his property, a different case would be presented: "The strong emotions evoked by speech in such situations may virtually compel the proprietor to respond. . . .Thus, the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner."[39]

In the alternative, Justice Powell added that even if the speech rights of the shopping center owner were unaffected, the freedom of association protected by the first and fourteenth amendments may be unconstitutionally infringed by the state-compelled support of the expression of views of a third party. In *Abood v. Detroit Board of Education,*[40] the Supreme Court held that nonunion public employees' dues paid to a union under an agency shop clause may not be used to fund political causes which the nonmember opposes. In *PruneYard,* Justice Powell analogized that "[t]o require a landowner to supply a forum for causes he finds objectionable also might be an unacceptable 'compelled subsidiza-

35. 100 S. Ct. at 2044.

36. Justice Powell, with Justice White joining, concurred in part and in the judgment.

37. *Id.* at 2050. *See also* Wooley v. Maynard, 430 U.S. at 705, in which the majority impliedly rejects Justices Rehnquist's and Blackmun's dissenting view that objections to the state motto could be expressed by a display of a counter motto. *Id.* at 722.

38. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" 430 U.S. at 714.

39. 100 S. Ct. at 2050.

40. 431 U.S. 209 (1977). *Abood* is the seminal case on the constitutional doctrine of nonassociation. *See* Note, 14 WAKE FOREST L. REV. 633 (1978).

tion' in some circumstances."[41] But, after raising this profound constitutional question, Justice Powell was able to dismiss it on the ground that the shopping center owner had not relied on *Abood* as supporting his right to exclude speakers from his property.[42] Justice Powell concluded that the instant case suggested substantial federal constitutional questions that were not raised by the facts presented.[43]

Any future litigation in the shopping center context is likely to center on those constitutional questions raised by *PruneYard* that were not necessary for the Court to answer in reaching a decision. The Supreme Court has now made it clear that *Lloyd* did not recognize federal constitutionally protected property rights;[44] therefore, in the face of a state constitutional provision expanding rights of expression, the first amendment will probably become the center of focus as shopping center owners seek to find a haven in the relatively undeveloped first amendment rights of nonexpression and nonassociation. In *PruneYard,* the majority opinion is too broad as it seems to sanction the expression of emotionally charged views on shopping center property that may be bitterly opposed by the shopping center owner.[45] On the other hand, Justice Powell's nonexpression analysis is to narrow as it suggests he would not allow the expression of views on shopping center property when the owner would be emotionally compelled to respond (even if the views would not be associated with the shopping center management). The problem with his reasoning is that it seems just as likely the shopping center owner would feel as emotionally compelled to respond to objectionable views expressed on an adjacent public street as well as on the shopping center property. It is unclear why the latter would foster a cognizable first amendment claim while the former obviously would not.

The first amendment right of nonassociation, as alluded to by Justice Powell,[46] may ultimately prove decisive in future cases. The question unanswered, though, is what is the nature of the state compelled association required to infringe unconstitutionally on first amendment rights. Under Justice Powell's analysis, ideological association is not determinative since it is unlikely shopping center patrons will attribute the views of petitioners to those of the shopping center owner. Similarly, physical association is not determinative because the owner has extended an open invitation to the public to invade his property. Under a close reading of *Abood,* it is

41. 100 S. Ct. at 2049 n.2.

42. The shopping center owner also failed to allege that he disagreed with the views expressed by the petitioners. *Id.* at 2050 n.2, 2051.

43. *Id.* at 2051.

44. *See* 100 S. Ct. at 2041.

45. *Id.* at 2043-44.

46. *Id.* at 2049-50 n.2.

arguable that the association required is found in the forced economic subsidization of the objectionable views of another.

If the *Abood* test were applied to facts similar to *PruneYard*, the question becomes whether it will be enough that the shopping center owner has been forced to provide a forum for the expression of views to which he objects, or will the owner be required to show that he has suffered economic detriment as a result? If the latter is required, the shopping center owner may be faced with the seemingly insurmountable hurdle faced by the owner in *PruneYard:* he simply could not show sufficient economic harm resulting from the activities engaged in on his property.[47] If economic detriment is indeed required under the *Abood* test, future cases will have to determine the extent of the harm required to forge a constitutional claim under the first amendment.

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47. *Id.* at 2042.