THE RIGHT OF FREE SPEECH IN PRIVATELY OWNED PREMISES:

Following up with the Robins v. Pruneyard *Judgment*

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BACKGROUND AND REASONING

In the late 1970s, a group of high school students in Campbell, California sought to solicit signatures from passers-by in the central courtyard of a privately-owned shopping complex, in order to garner support for a political petition.[1] These students were asked by a security guard to leave, on the grounds that it was against the Pruneyard Shopping Center's policy to allow for any visitor to engage in a publicly expressive activity, including the circulating of petitions not directly related to the shopping center's commercial purposes.[2] The students went on to bring a suit against Pruneyard Shopping Center (*Robins v. Pruneyard Shopping Center*, hereafter *Pruneyard*), and the Supreme Court of California, in its 1979 judgment, held that soliciting at a shopping center for signatures for a petition to the

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1 Pruneyard Shopping Center v. Robins, 477 U.S. 74 (1980).

2 Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899 (1979).

government is an activity protected by the free speech guarantee of the California Constitution.[3]

The Court's reasoning on the question of whether the California Constitution guarantees the right to gather signatures at shopping centers drew upon the wording of article 1, section 2 of the California Constitution, which, in the foremost sense, guaranteed a positive right of free speech to its citizens in addition to imposing a negative obligation upon the state not to create any such law that may restrain this liberty of speech. The Court acknowledged this distinction, as regards the First Amendment to the U.S. Constitution, which only places a negative obligation upon the U.S. Congress to make no law abridging free speech, in this regard.[4] The majority opinion issued by Justice Newman, with support from Justices Bird, Tobriner and Mosk, cited a previous decision from the very same Court, in *Wilson v. Superior Court* (1975), where it was noted that California's state constitutional guarantee of the right of free speech and press was more definitive and inclusive than the right contained in the First Amendment to the federal constitution.[5]

The particular situation involving solicitation of signatures and distribution of leaflets by individuals in privately-owned shopping centers was first brought before the California Supreme Court in the 1970 case of *Diamond v. Bland (Diamond I)*, where two volunteer workers for a non-profit had attempted, without success, to solicit signatures on an anti-pollution initiative in a shopping center called Inland Center, as the owner of the shopping center had refused to grant them permission for the same.[6] The Court had affirmed this right of the plaintiff to solicit signatures and distribute leaflets in the defendant's shopping center, by classifying it as a First Amendment concern.

Two years later, the United States Supreme Court, in *Lloyd Corp. v. Tanner* (1972), decided that the owners of a shopping center, Lloyd Center in Oregon, had the right to prohibit the distribution of political handbills unrelated to the operation of the shopping center.[7] The case involved the

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[3] *Id*.

[4] See *supra* note 2.

[5] Wilson v. Superior Court, 34 Cal. 3d 777 (1983).

[6] Diamond v. Bland, 3 Cal. 3d 653 (1970).

[7] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

handing out of handbills for a protest meeting against the draft during the Vietnam War. The U.S. Supreme Court maintained that distribution of anti-war leaflets was not protected under the First Amendment, and such distribution on private property was in violation of the property rights of the owner.

In light of the *Lloyd* ruling, the defendant in *Diamond I*, the owner of Inland Center, appealed the decision to the California Supreme Court. The *Diamond II* ruling of the California Supreme Court followed, where the Court employed the *Lloyd* standard and opined that, as in *Lloyd*, the plaintiffs had alternative, effective channels to solicit these signatures, and customers and employees of the shopping center could be solicited outside of its premises in public sidewalks, parks, or streets adjacent to the center.[8] The California Supreme Court, in its majority judgment, reversed its earlier decision in *Diamond I*, by declaring that the defendant's private property interests outweighed the plaintiff's First Amendment rights in the said matter.

It was Justice Mosk's dissenting opinion in *Diamond II* that was later referred to in the *Robins v. Pruneyard* majority judgment.[9] Justice Mosk classified this act, by the majority bench, of surrendering the previously considered position of the Court in *Diamond I*, as a step that ignored the basic principles of the state constitution of California, and undermined the fundamental principle of federalism. One of his two primary arguments was that the declaration of rights contained within the state constitution was more embracing than the First, Ten, and Fourteenth Amendments to the federal constitution. The guarantees for every citizen to freely speak, write, and publish their statements provided under section 9 was one such relevant component, according to Justice Mosk.

In *Pruneyard*, the majority opinion, while noting the opinion reflected in this dissent of Justice Mosk, overturned the *Diamond II* judgment. This also points to the rapidly evolving nature of constitutional law to more adequately conform with the changing needs of society. In *Diamond II*, the liberty of speech clause of the California Constitution was excluded from the purview of the judgment, such an inquiry being barred by the federal

[8] Diamond v. Bland 11, Cal. 3d 331 (1974).

[9] *Id.*

and state Supremacy Clauses of the United States Constitution, as in the *Lloyd* judgment, where the Due Process Clause of the federal constitution protected the property rights of the shopping center owner.

The California Supreme Court, in *Pruneyard*, clarified that *Lloyd* was primarily a First Amendment case, and the scope of property rights of shopping center owners under the Fifth and Fourteenth Amendments, respectively, was not defined. *Lloyd*, the Court noted, when viewed in conjunction with *Hudgens* and *Eastex* did not preclude law-making in California which requires that shopping center owners permit expressive activity on their property. In *Hudgens v. National Labor Relations Board*,[10] the U.S. Supreme Court, while concluding that the First Amendment did not protect picketing in a shopping center, had recognized that statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others. In *Eastex Inc. v. NLRB*, where the employees had sought to distribute a union newsletter, the U.S. Supreme Court, in its majority opinion, had upheld the *Hudgens* judgment, and acknowledged that the National Labor Relations Act could provide statutory protection for the activity involved.[11] The reasoning following from these two cases was incorporated into the *Robins* judgment, and the California Constitution was recognized as having the authority to accord protection to the freedom of speech of individuals in private shopping centers.

In *Pruneyard*, while a number of factors may have caused the appellants to base their claim on the free speech guarantee of the California Constitution, there is a suggestion that sometimes, dissents from judges aid litigants in their preparation for contesting similar cases in the future, which builds up a stronger possibility for a once-dissenting opinion to then become the Court's adopted reasoning within the course of a few years.[12] This trend is clearly reflective of the reversal of the *Diamond II* majority opinion in the *Pruneyard* judgment, which went to acknowledge the reasoning of Justice Mosk's dissent in *Diamond II*.

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[10] Hudgens v. NRLB, 424 U.S. 507 (1976).

[11] Eastex, Inc. v. NLRB 437 U.S. 556 (1978).

[12] Jesse W. Carter, *Dissenting Opinions*, 4 Hastings L.J. 118 (1953).

IMMEDIATE DEVELOPMENTS

When the defendant, Pruneyard Shopping Center, appealed before the United States Supreme Court in *Pruneyard Shopping Center v. Robins*, the highest federal court upheld the decision of the California Supreme Court. The federal Supreme Court affirmed that state constitutional provisions, as construed to permit individuals to reasonably exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, do not violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments to the United States Constitution.

It was believed that *Pruneyard* had intensified the then-existing tension between private property ownership and freedom of speech, as it had set a precedent that might now allow each state to interpret its constitutional provisions more broadly than corresponding provisions in the federal constitution.[13] Thus, a state could now have the authority to elevate its freedom of speech to a "preferred position," especially when in conflict with rights of private property ownership. It is, however, to be taken into account that the California Supreme Court, while deciding *Pruneyard*, chose to repeatedly emphasize that the property or privacy rights of an individual homeowner or that of a proprietor of a modest retail establishment were not under consideration. The Court stressed that some twenty-five thousand individuals congregated at the shopping center daily to avail themselves of its numerous facilities, as a consequence of advertising and the maintenance of a congenial environment. A small group of additional persons engaged in soliciting signatures for a cause in an orderly manner, therefore, does not interfere with the normal business operations of the shopping center. The United States Supreme Court also reiterated the same view, when upholding the decision of the state Supreme Court.

In *Pruneyard*, the California Supreme Court had adopted a structural reasoning methodology, by analyzing the interplay between the public's right to free speech and that of private individuals over their property, in order to derive a structure that would have been intended by the framers of

[13] Steven D. Pidgeon, *Freedom of Speech: The Florida Implications of PruneYard Shopping Center v. Robins*, 35 U. Miami L. Rev. 559 (1981).

the California Constitution.[14] The Court was indeed quick to note that the framers of the state constitution had not adopted the free speech guarantee from the federal Bill of Rights because they wished this provision to be more embracing than the First Amendment to the Constitution.[15] In forming its interpretation of the interplay between free speech and property rights, the California Supreme Court maintained that prohibiting private shopping center owners from preventing public demonstrations on their property was necessary to give the full effect to the freedom of speech and expression, as enshrined in the California Constitution.[16]

THE EXPANSION OF *PRUNEYARD*

In 1982, the California Court of Appeal sought to expand the purview of the *Robins* standard in a case involving gated communities. In *Laguna Publishing Company v. Golden Rain Foundation of Laguna Hills* (hereafter *Laguna* case), the Court of Appeals decided that denying the live-carrier delivery of the plaintiff's giveaway newspaper in Leisure World, a gated community, when another giveaway newspaper had been permitted to make their delivery, was in violation of the plaintiff's free speech rights under the California Constitution.[17] Laguna Publishing Company had been denied access to Leisure World for delivering its giveaway newspaper, *Laguna News Post*, to the residents of this private, gated community. Another company, Golden West Publishing Corporation had been granted the exclusive privilege of entry into Leisure World, to deliver its giveaway type newspaper, *Leisure World News*.

The Court of Appeal interpreted the conditions of the case, in light of the *Diamond I* and *Pruneyard* standards, by affirming that, while these precedents did not provide any direct assistance, *Pruneyard* could be interpreted in a manner that made it applicable to the case at hand. Where in *Pruneyard*, the California Supreme Court had declared that the plaintiff's

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[14] David E. Somers III, *State Constitutional Law — Free Expression* — Pruneyard *Reloaded: Private Shopping Malls Cannot Restrict Protesters' Free Expression Rights*, 40 Rutgers L.J. 1017, 1026–31 (2009).

[15] Robins v. Pruneyard Shopping Center 23 Cal. 3d 899, 908 (1979).

[16] See *supra* note 5.

[17] Laguna Publishing Company v. Golden Rain Foundation of Laguna Hills 131 Cal. App. 3d 816 (1982).

free speech rights under the state constitution were being abridged by the private shopping center when the former is denied access to the latter's premises, the appellate court noted that the Supreme Court had not considered the phenomenon of "state action," except when discussing the *Lloyd* decision.

The "state action" doctrine contends that the United States Constitution and its provisions, most notably the First and Fourteen Amendments, apply only to state action and not to private action.[18] The concept, pertaining to the situation at hand, had perhaps first been addressed in the U.S. Supreme Court case *Marsh v. Alabama*, which dealt with the distribution of religious literature by the appellant near the post office of a company town, where a single company owned the town's property, distinguishing it from a municipality.[19] The U.S. Supreme Court observed that the company had opened up the township to free public access, and was therefore required to respect the statutory and constitutional rights of the public that it had invited onto its premises.

Pruneyard, as rightfully pointed out by the appellate court in *Laguna*, did not expressly address the relevance of the "state action" doctrine. The appellate court concluded from the *Pruneyard* reasoning that, because the public had been invited onto private property, their constitutional free speech rights would be deemed to remain protected, as long as these rights did not infringe on the property rights of the merchants conducting business in the private shopping center. This rationale resonated very closely with the *Marsh* conclusion. The appellate court took to heart *Pruneyard*'s passing comment that the power to regulate property was not static, but capable of expansion to meet new conditions of modern life. The appellate court, therefore, sought to redefine property rights in response to the social setting's demand that such rights be responsive to the collective needs of the society, such as health, safety, morals, and welfare. As the Court contemplated,

> [T]he gated and walled community is a new phenomenon on the social scene, and, in the spirit of the foregoing pronouncement,

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[18] Richard S. Kay, *The State Action Doctrine, the Public–Private Distinction, and the Independence of Constitutional Law*, 10 Const. Comm. 329, 330 (1993).

[19] Marsh v. Alabama, 326 U.S. 501 (1946).

> the ingenuity of the law will not be deterred in redressing grievances which arise, as here, from a needless and exaggerated insistence upon private property rights incident to such communities where such insistence is irrelevant in preventing any meaningful encroachment upon private property rights and results in a pointless discrimination which causes serious financial detriment to another.[20]

The appellate court was not hesitant in describing the two key factors by which the *Laguna* situation presented a stark difference to the *Pruneyard* circumstances. Having acknowledged that the public was not generally invited into gated communities like Leisure World, as against private shopping centers like Pruneyard, the Court remarked that the residents did indeed invite a variety of vendors and service persons into the premises, from electricians and plumbers to the carriers of newspapers to which the residents had subscribed. The most relevant factor acknowledged by the Court, however, was the significant discrimination that the plaintiff was subjected to, given that *Leisure World News* had unrestricted access to the community, even though not having been subscribed to by any resident. The Court referred back to the text of the judgment in *Lloyd*:

> In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner[s] of private property used *nondiscriminatorily* [emphasis added] for private purposes only. . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful *nondiscriminatory* [emphasis added] purpose.

The California District Appellate Court took a cue from this language of the *Lloyd* judgment, that if the United States Supreme Court had been asked to adjudicate on a discriminatory limitation of free speech on private property, it might have reached a different decision.

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[20] Laguna Publishing Co. v. Golden Rain Foundation, 131 Cal. App. 3d 816, 839 (1982).

THE WAY FORWARD?

The expansion of *Pruneyard*, among several concerns, once again highlighted the dilemma of the horizontal effect of constitutional rights. As the market economy continues to gain greater momentum, privatization becomes a reality of the political sphere, and hardly any domestic policy issue remains untouched by disputes over the scope of private participation in government.[21] Exactly when the action of a private actor is to be placed on the same pedestal as state action, with regard to constitutional restrictions, has not been concretely laid down. Whether imposing conventional governmental duties upon private actors is an act of social engineering, outside of the mandate of the judiciary, also remains open to debate.[22] The fact remains that in *Pruneyard*, and the cases preceding it including *Diamond I*, *Lloyd*, and all the way back to *Marsh*, the circumstances involved privately-owned areas that granted unrestricted access to the public. This factor was clearly absent from the situation in *Laguna*, and the appellate court might actually have gone a step too far, in reading between the lines, as far as the *Pruneyard* standard is concerned. The problem here is not the application of the *Pruneyard* precedent to cases with identical facts, as the California Supreme Court did in its *stare decisis* judgment in *Fashion Valley Mall v. National Labor Relations Board* (2006), but in a problematic broader interpretation of the *Pruneyard* standard to include private gated communities, which are far from an area of public access, and strictly an area of private residence. While the horizontal effect of constitutional standards can be empowering for private citizens, it would also mean the absolute blurring of boundaries between state and private action, which is not a healthy judicial outcome.

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[21] Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367, 1369 (2003).

[22] Gregory C. Sisk, *Uprooting the Pruneyard*, 38 Rutgers L.J. 1145 (2007).