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ARTICLE

Free Speech at Shopping Centers: Quo Vadis, California?

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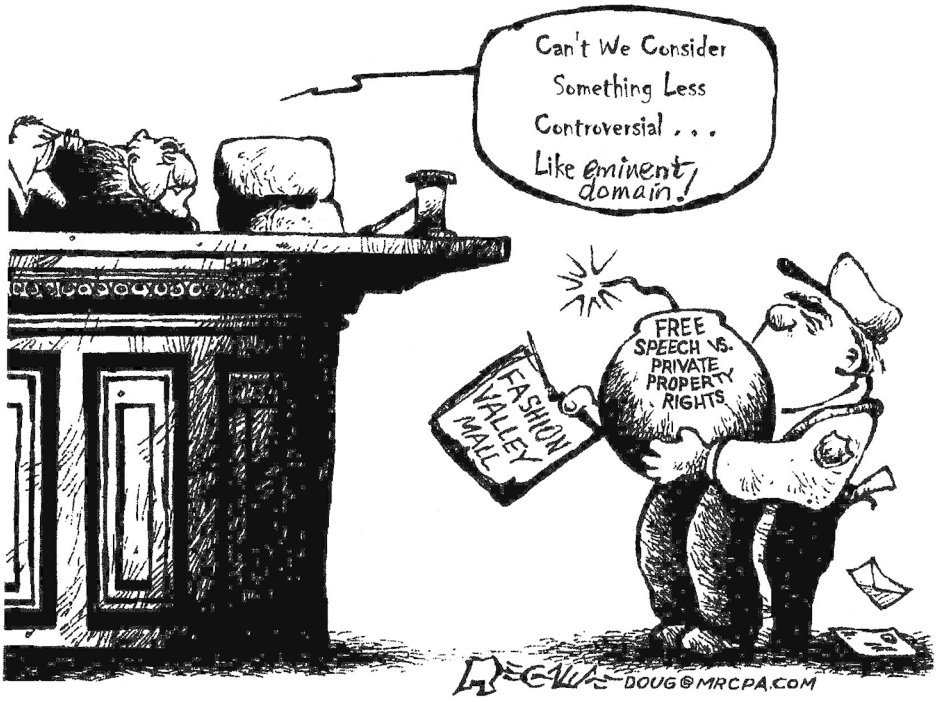

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I. INTRODUCTION

Should advocates of a cause be permitted on a private shopping center property in order to encourage potential customers not to patronize a store in the center? California says yes. In a case decided at the very end of 2007, *Fashion Valley Mall, LLC v. N.L.R.B.,*[1] the California Supreme Court extended California law to the point of allowing union members to distribute leaflets on the shopping center property, encouraging customers not to patronize a large department store which advertised in the newspaper that employed the union members and with which they had an ongoing labor controversy. This decision carried California law well beyond the decision of the same court in 1979, almost 30 years earlier, in *Robins v. Pruneyard Shopping Center (Pruneyard),*[2] when the court sanctioned the use of a San Jose shopping center by a group of students advocating a political cause. In the recent *Fashion Valley Mall* case, the exercise of the right of free speech was a secondary boycott directly aimed at damaging the business of the store for which the property was then in use. Both of these California Supreme Court's decisions, almost 30 years apart, were decided by 4-3 majorities, with strong dissents.

In *Fashion Valley Mall* about 30 to 40 union members distributed leaflets in front of the Robinson-May store, located in the Fashion Valley Mall shopping center in San Diego, in 1998. The store advertised in a newspaper, the publisher of which employed the union members and which, according to them, treated its employees unfairly. In the leaflets the union members urged the store's customers to contact the chief executive officer of the newspaper. After the union members had distributed the leaflets for a short time, mall officials stopped the leafleting. The union members had not sought or acquired a permit, as was required by the shopping center's published rules. However, had they so applied the application would have been futile because the union's objective would have been in direct conflict with one of the shopping center rules, Rule 5.6.2, which prohibited "…interfering with the business of one or more of the stores… by urging or encouraging in any manner, customers not to purchase the merchandise or services offered…."

In an interesting twist on the more usual judicial progression in such matters, the union then filed a charge against *Fashion Valley Mall* with the National Labor Relations Board (N.L.R.B.).[3] The administrative law judge found that the shopping center had violated Section 8(a)(1) of the National Labor Relations Act by barring employees from distributing leaflets. This decision was affirmed, as modified, then transferred to the N.L.R.B. in Washington, D.C. That office also concluded that the shopping center had violated California law, which permits the exercise of free speech at private shopping centers, subject to reasonable time, place and

manner restrictions. The matter was then transferred to the United States Court of Appeals for the District of Columbia, upon petition for review by the shopping center. That court concluded that it could not decide the appeal without reference to California law and accordingly, requested that the California Supreme Court decide whether, under California law, the shopping center could enforce its rule, under the facts of the case.

In a 4-3 decision, the California Supreme Court in *Fashion Valley Mall* held that the right of free speech granted by the California Constitution includes the right to urge customers at a shopping center to boycott one of the stores in the center (a secondary labor boycott). As an initial matter, the court reviewed the development of case law interpreting California's Constitutional clause protecting free speech. As it ruled in the seminal *Pruneyard* case, the court held that the California Constitution grants *broader rights* to free expression than does the First Amendment of the United States Constitution. The court rejected the shopping center's claim that the rule banning speech that advocates a boycott was a reasonable regulation, within the meaning of *Pruneyard*. Rather, the regulation was not *content neutral* because of its ban on an entire category of speech (precluding advocacy which encouraged customers not to patronize a store). The court applied the "strict scrutiny" standard of review to the issue,[4] and held that the shopping center's purpose to maximize profits of its merchants was not compelling compared to the union's right to free expression.[5]

As will be discussed hereafter, the four-judge majority on the California Supreme Court was vigorously challenged by the three-judge minority in a dissent remarkable for its bluntness and disagreement with the law and result of the majority opinion.

II. THE PREDECESSOR: *PRUNEYARD*

A. The Majority Decision.

Adverting to the seminal 1979 *Pruneyard* decision,[6] the shopping center involved in that case consisted of about 21 acres, 5 of which were devoted to parking and 16 of which were occupied by walkways, plazas and buildings that contained 65 shops, 10 restaurants and a cinema. The court noted that the public was invited to visit for the purpose of patronizing the many businesses, but that it was the policy of the shopping center not to permit any tenant or visitor to engage in publicly expressive activity, including the circulation of petitions, not directly related to the commercial purposes for which the center existed.

On a Saturday afternoon, a group of high school students attempted to solicit support for their opposition to a United Nations Resolution

Against "Zionism." They set up a card table in a corner of the Pruneyard's central courtyard and sought to discuss their concerns with shoppers and to solicit signatures for a petition to be sent to the White House in Washington. Their activity was peaceful and, according to the court, was well-received by Pruneyard patrons. After they had begun their soliciting, a security guard informed them that their conduct violated Pruneyard regulations. They spoke to the guard's superior, who informed them that they would have to leave because they did not have permission to solicit. The officer suggested that they could continue their activities on the public sidewalk at the center's perimeter.

The suit which followed ultimately reached the California Supreme Court. The court was not operating with a blank slate. It traced the history of the exercise of free speech rights in shopping centers and similar locations, including historical changes of direction in such cases by the United States Supreme Court. For example, in the 1972 case of *Lloyd Corp., Limited v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972), that court held that under the Federal Constitution the rights of the private property owner pursuant to the Fifth and Fourteenth Amendments were entitled to greater protection than were the rights of free speech under the First Amendment, and this decision appeared to be in conflict with earlier Supreme Court precedents.[7]

In a decision rendered two years before *Lloyd Corp*., the California Supreme Court, in *Diamond v. Bland* (1970) (*Diamond I*),[8] had held that the public *could* engage in expressive activities in shopping centers. However, following *Lloyd Corp.*, and in 1974, in a second case of *Diamond v. Bland* (1974) (*Diamond II*),[9] the California Supreme Court followed *Lloyd Corp.* and reversed its holding in the earlier *Diamond* case stating:

> "*Lloyd's* rationale is controlling here. In this case, as in *Lloyd*, plaintiffs have alternative, effective channels of communication for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the center, and in the communities in which such persons reside."[10]

Five years later, the 1979 California Supreme Court in *Pruneyard* again reversed itself, pointing out that the 1974 *Diamond II* opinion did not examine the liberty of speech clauses of the California Constitution in order to determine whether they provide greater protection for free speech than does the United States Constitution.[11] A footnote in *Diamond II* had suggested that such an inquiry was barred by federal and state supremacy clauses. The *Pruneyard* court overruled *Diamond II*.

In *Diamond II*, Justice Stanley Mosk filed a vigorous dissent to the decision of the majority. He argued that the role of shopping centers in society had developed to the point where, as of 1974, they had replaced traditional downtowns, where people could congregate and exercise advocacy and other rights of free speech. Mosk stated:

> "The importance assumed by the shopping center as a place for large groups of citizens to congregate is revealed by statistics: In 21 of the largest metropolitan areas of the country, shopping centers account for 50% of the retail trade; in some communities, the figure is even higher…increasingly, such centers are becoming 'miniature downtowns'; some contain major department stores, hotels, apartment houses, office buildings, theaters and churches…the significance to shoppers who by choice or necessity avoid travel to the central city is certain to become accentuated in this period of gasoline energy shortage."[12]

The 1979 *Pruneyard* court then adopted the 1974 Mosk view in his dissenting opinion in the overruled *Diamond II* case and stressed that to prohibit expressive activity in such shopping centers would impinge on constitutional rights beyond "speech", because courts have long protected the right to petition as an essential attribute of governing. The court noted that well into the decade of the '70s, decisions involving free speech on private property were essentially in unity with the federal law and that the courts relied in part on federal precedents in reaching their decisions. However, it also referred with approval to its own prior decision in *In re Hoffman,*[13] where it held that Vietnam War protestors could distribute leaflets at the Los Angeles Union Station, because the public interest in peaceful speech outweighs the desire of property owners for control over their property. Also, the *Pruneyard* court stressed that the property owners could impose reasonable time, place and manner regulations on the expression of free speech rights, to assure that such activities do not interfere with normal business operations.[14]

B. The Dissent in *Pruneyard*.

The three-justice minority in *Pruneyard* vigorously dissented, on the basis that the majority decision created an unwarranted infringement of private property rights by requiring that those rights yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication existed. The dissent argued that owners of the Pruneyard Center possessed *federally* protected property rights which do not depend upon the varying and shifting interpretations of state constitutional law for their safeguard and survival. In effect, said the dissent, the supremacy of federal law should prevent the court from em-

ploying state constitutional provisions to defeat the defendant property owners' *federal* constitutional rights. Thus, far from overruling it, the minority would have upheld the precedent value of *Diamond II*, stating:

> "We are bound by the United States Supreme Court interpretations of the United States Constitution. More specifically, in a confrontation between federal and state constitutional interests, federally protected property rights recognized by the United States Supreme Court will prevail against state-protected free speech interests where alternative means of free expression are available."[15]

In an especially blunt criticism of the majority opinion, the dissent opposed the "zoning for free speech uses" which the majority attempted to establish as going far beyond any traditional police power regulation and that such unprecedented "fiat" has no support in constitutional, statutory or decisional law.[16]

III. HISTORICAL DEVELOPMENTS IN THE 30-YEARS BETWEEN *PRUNEYARD* AND *FASHION VALLEY MALL*

As already noted, the 1979 *Pruneyard* decision took California out of lockstep with the federal view of the relative priorities of free speech rights compared with private property rights. Subsequent California decisions at the appellate level were governed by the *Pruneyard* precedent. Over the years, however those decisions appear to have taken a more conservative approach on a case by case basis, with California appellate courts finding factual limitations in the various shopping centers which precluded their being used as public areas for communication. For example, in the 1987 *H-CHH Associates v. Citizens for Representative Government* case[17] (overruled in *Fashion Valley Mall*), the owners of a shopping center prevailed, but only in part, on issues of the reasonableness of the time, place and manner restrictions sanctioned by the Supreme Court in *Pruneyard*. In 1997, in *Union of Needle Trade, Industrial & Textile Employees, AFL-CIO v. Superior Court of Los Angeles County*,[18] the court denied a union request for preliminary injunction restraining several malls from enforcing their rules limiting, but not prohibiting, exercise of free speech rights. The court held that the "time, place and manner rules" created and applied by the malls were constitutional, as were the required application questions about insurance, identification of participants, and identification of prior activities. Further, said the court, the malls could constitutionally impose an insurance requirement, the lodging of a deposit, and could constitutionally require prior submission of signs, leaflets, etc. All of the challenged rules and regulations were sufficiently content-neutral and were narrowly drawn to protect substantial interests, and were applied based on objec-

tive criteria. Given the interests at stake, the union's right to access the malls was properly restricted.

In two more recent decisions, courts of appeal have similarly taken a more conservative case-by-case approach, by noting that the physical characteristics of the shopping centers involved in the attempted exercise of free speech rights were not the same as or similar to those in *Pruneyard*. Thus, in the 2003 decision in *Albertson's Inc. v. James Young*,[19] the court denied relief to individuals who sought to solicit signatures on initiative petitions by stationing themselves on the privately owned walkway immediately outside the entrances to the store. The court of appeal affirmed the trial court ruling that the store was not the functional equivalent of a traditional public forum and, therefore, defendants did not have a constitutional right to solicit signatures. To establish a quasi-public forum at a particular store, it is not enough that a large number of people visit the store; people must choose to come and meet and talk and spend time. The evidence in the case did not establish that the grocery store was such a place and the store's location inside a larger shopping center did not change this conclusion.[20]

Then, most recently, and just three months ahead of the late 2007 *Fashion Mall* decision, a Court of Appeal for the Second District in *Van v. Home Depot U.S.A., Inc.*,[21] held that gatherers of voters' signatures could not congregate in front of three large retail stores located in a commercial retail shopping center. The court distinguished *Pruneyard* because its holding does not apply to the area immediately in front of the entrance of individual retail stores that do not themselves possess characteristics of a public forum, even when the store is part of a larger shopping center.[22]

In these decisions, as well as in others, the California courts of appeal have thus used physical attributes of the particular location, as well as reasonableness of rules and regulations governing the exercise of free speech, to, in effect, limit application of the *Pruneyard* holding.

IV. THE DISSENT IN *FASHION VALLEY MALL* AND THE OUT-OF-STATE TREATMENT OF *PRUNEYARD* SINCE 1979.

A. The Thrust of the Dissent.

The three-judge dissent in *Fashion Valley Mall* was uncharacteristically blunt and direct. Justice Chin, with concurrence of Justices Kennard and Werdegar, summarized the heart of the dissent as follows:

> "A shopping center exists for the individual businesses on the premises to do business. Urging a boycott of those businesses contradicts the very purpose of the shopping center's existence. It is wrong to

> compel a private property owner to allow an activity that contravenes the property's purpose."[23]

The dissenters provided a historical review of the precedents in California and nationally in this area of law, noting that until the 1970s, the jurisprudence of the California Supreme Court was consistent with that of the United States Supreme Court and that both the United States and California Constitutions seemed to be the same in this regard, resulting in decisions which relied upon and treated the two Constitutions as essentially interchangeable. The dissent explained the change in 1979 as due in part to a change in the personnel of the court. It specifically named the judges who constituted the majority in *Pruneyard*, to wit, Justices Newman (who wrote the opinion), Bird, Tobriner and Mosk, all of whom relied heavily on Justice Mosk's dissenting opinion in *Diamond II*. According to the *Fashion Valley Mall* dissent, *Pruneyard* was controversial when decided and in the three decades since then, has received scant support and overwhelming rejection around the country.

B. The Out-of-State Analysis: Only 'State Action' is Proscribed.

The dissent in *Fashion Valley Mall* declined the opportunity to independently review the relevant foreign cases because the Connecticut Supreme Court did so for them in 2004, in *United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associates, L.P.*[24] In that case, a labor union sought injunctive relief against a shopping mall owner and management company to prevent them from denying union access to the mall's common area so that the union could distribute literature and address the patrons regarding the employees' legal rights. The Connecticut Supreme Court made an analysis which pivoted on the question whether the mall's proscription of advocacy rights on its premises was "state action" and concluded that it was not. Accordingly, neither the Federal nor the Connecticut Constitutions protected any rights of free speech on the private property of the shopping center. The court noted that the mall in question was in an enclosed shopping center that included four anchor stores as well as 130 specialty stores, a food court, and common areas consisting of walkways, concourses and several seating areas (i.e., approximately similar to the shopping center in *Pruneyard*). The common areas were open to the general public free-of-charge, but the management reserved the right to exclude any group that, in its opinion, might be detrimental to enhancing the good will and business mission of the mall.

While recognizing that under United States Supreme Court precedent, a state may adopt greater protection than that provided by the U.S. Constitution for free expression on private property (which was the basis for the *Pruneyard* holding), the Connecticut Supreme Court observed that

Pruneyard was the result of some remarkably close divisions of opinion among the judges who considered the matter. It opined that other jurisdictions that have considered the issue overwhelmingly have chosen *not* to interpret their state constitutions (even though the "free speech" language in their constitutions is similar to that in the California Constitution) as requiring private property owners to permit types of speech, even political speech, on their premises. A review of the decisions of a number of states which have rejected the *Pruneyard* approach showed that only five states—California, Colorado, Massachusetts, New Jersey and Washington—currently hold that a state may require private shopping mall owners to permit some form of political activity in common areas of the mall. With regard to California and Washington, the Connecticut Court concluded that the controlling decisions relied in part on the highly significant role that initiative, referendum and recall by citizenry have played in their constitutional schemes, and the practical importance of access to large congregations of voters in order to obtain signatures on petitions used to implement those rights. The Massachusetts law is expressly limited to one function: the solicitation of signatures needed by political candidates for access to the ballot and is based not upon a free speech provision, but on the Massachusetts' constitutional guarantee of an equal right to elect officers for public employment. The Connecticut Supreme Court also found significant limitations on exercise of free speech rights in both Colorado and New Jersey, thus leaving California practically standing alone in the scope of its rule giving priority to the exercise of free speech on private property.[25]

The Connecticut Court summarized its decision by stating:

> Under *Cologne* [a prior Connecticut Supreme Court decision], as in the overwhelming majority of our sister jurisdictions, the size of the mall, the number of patrons it serves, and the fact that the general public is invited to enter the mall free-of-charge, do not, even when considered together, advance the plaintiff's cause *in converting private action into government action*… The essentially private character of a store and its privately owned building property does not change by virtue of being large or clustered with other stores in a modern shopping center… If the furnishing of building permits, police protection and public transportation were deemed to constitute sufficient government involvement to transform the actions of the defendants in refusing the plaintiffs' requests into those of public officials…almost every improved property would be subject to the same burden the plaintiffs seek to impose upon the mall. (Emphasis added.)[26]

C. The *Fashion Valley Mall* Dissent Goes Even Further.

The dissent in *Fashion Valley Mall* went beyond the Connecticut Supreme Court in criticizing and disagreeing with *Pruneyard*. It cited from a 1985 decision of the New York Court of Appeal, in *SHAD Alliance v. Smith Haven Mall*,[27] in which the New York court concluded that the *Pruneyard* decision was dictated by "the accident of a change of personalities in the judges of the Court."[28] Dissenting Justice Chin concluded that California is essentially alone in its approach and that even New Jersey has not carried its jurisprudence to the extreme position that the majority is leading toward in California.

D. Can *Pruneyard Be Distinguished?*

The *Fashion Valley Mall* dissenters also argued that even if *Pruneyard* is not reversed, it can easily be distinguished by virtue of the nature of the expressive activity involved in the two cases. Shopping center owners should be able to impose reasonable regulations to protect their business interests and *Fashion Valley Mall* Regulation 5.6.2 was such a reasonable regulation because it simply prohibited use of the property which would hinder business success and would markedly dilute the owners' property rights. Thus, that mall should have at least been able to protect its business interests by enforcing the rule, despite its lack of content neutrality. The dissent also argued that the strict scrutiny test that applies to *government actions* has no application to action by private owners involving their own property. It criticized the majority opinion because in finding no compelling private property interest, the majority asserted that the right of persons to use property they do not own is more compelling than the landowner's right to use his own property for the very purpose that it exists. Quoting again from the dissent:

> "Because most of the country, including the United States Supreme Court, rejects the very notion of free speech rights on private property, *the issue never arises*. Only in California is the issue relevant. The only *tradition* that is relevant to this case is the tradition, followed in most of the country, of finding no free speech rights on private property. The majority is trampling on tradition, not following it… The time has come for this court to join the judicial mainstream."[29]

E. The "State Action" Analysis.

The dissent, therefore, would adopt the analytical approach used by most courts in the country; to wit, the constitutional guarantees under both the Federal Constitution and the various state constitutions protect free speech rights against undue restriction by *state* (i.e. government) action, and the action of private shopping center owners in regard to their

own property is *not* state action. The majority decisions in *Pruneyard* and *Fashion Valley Mall* are probably subject to criticism in that there is in neither decision any analysis of the "state action" issue. The closest approach to such analysis is the conclusion in *Pruneyard,* based on the then 5-year old Mosk dissent, that shopping center properties resemble more and more the traditional, old downtown, *public* areas where people could congregate and freely discuss issues, and this might arguably substitute for "state action."

However, the "state action" requirement was analyzed in 2001 in another split California Supreme Court decision, *Golden Gateway Center v. Golden Gateway Tenants Ass'n*,[30] but that case involved a *private apartment complex*, not a shopping center. The lead opinion noted that the *Pruneyard* decision did not address the "state action" issue, but that *Pruneyard* relied heavily on the functional equivalence of the shopping center to a traditional downtown *public* forum.[31] Attempting to rationalize the decision with *Pruneyard*, the court concluded that the Golden Gateway Tenants Association had no right to distribute leaflets in the apartment complex, because "the actions of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public."[32]

V. CONCLUSION

In two 4-3 decisions almost thirty years apart, the California Supreme Court emerges almost alone in recognizing expansive rights of free speech and advocacy on private shopping center property. *Pruneyard* was precedent-setting decision when issued, and *Fashion Valley Mall* provides a significant extension to *Pruneyard*, by sanctioning expressive activity which directly and negatively impacts the economic well being of a store in the shopping center, due to the *secondary boycott* nature of the expressive activity.

Obviously, the courts are faced with tough decisions in having to determine the dividing line between private property rights under the First and Fourteenth Amendments and rights of free speech under the First Amendment of the United States Constitution and various provisions in the state constitutions. As noted by the Connecticut Supreme Court, the differences of opinion sometimes results in bare majority decisions, but these nevertheless carry precedential weight for trial courts and appellate courts to apply. While the California appellate courts ostensibly have stayed within the boundaries of the *Pruneyard* holding, they have found methods of limiting free speech rights by turning to factual issues such as the content of the shopping center regulations governing speech rights, imposed by the property owners, and various aspects of the architectural

and physical layouts of the shopping centers themselves. The title of this article asks rhetorically where California is headed on these issues of priority between property rights and free speech rights. Wherever that is, and however it may change, if at all, by even a modest change in high court personnel over the next few years, California currently marches on (almost alone) in the expansive interpretation of free speech and advocacy rights on private shopping center properties.

NOTES

1. *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742, 183 L.R.R.M. (BNA) 2327, 155 Lab. Cas. (CCH) P 60529 (2007).
2. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), judgment aff'd, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741, 6 Media L. Rep. (BNA) 1311 (1980).
3. The decision to proceed in this manner was probably sound, because the cases suggest that union activity in a labor dispute is most effective at the location of the employer's business, i.e. a store in the shopping center, and may have preferential status, because of the rights of collective bargaining recognized by law. See, e.g., *Amalgamated Food Employees Union Local 590 v. Logan Plaza*, 391 U.S. 308 (1968). The difference is that in those cases, the union activity was directed against the employing store and sought to organize the store's employees, whereas in *Fashion Valley Mall*, the boycott was "secondary," that is, directed against a store which did business with the employer involved in the labor dispute, but was not itself involved in a labor or organizing dispute with the union. The California Supreme Court in *Diamond v. Bland*, 11 Cal. 3d 331, 113 Cal. Rptr. 468, 521 P.2d 460 (1974) (overruled by, Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979)) and (overruled by, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 25 Cal. 3d 317, 158 Cal. Rptr. 370, 599 P.2d 676, 102 L.R.R.M. (BNA) 2312, 87 Lab. Cas. (CCH) P 55208 (1979)) distinguished the labor union cases by noting that therein, "the labor activity…had a direct relation to the businesses affected by that activity." See, also, *Hudgens v. N.L.R.B.*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196, 91 L.R.R.M. (BNA) 2489, 78 Lab. Cas. (CCH) P 11278 (1976) (Union employees had no First Amendment right to enter the shopping center to advertise their strike against their employer. Their rights were determined exclusively under the National Labor Relations Act.)
4. Under this standard of review, a content-based restriction must necessarily serve a compelling State interest, and must be narrowly drawn to achieve that interest.
5. Disapproving of *H-CHH Associates v. Citizens for Representative Government*, 193 Cal. App. 3d 1193, 238 Cal. Rptr. 841 (2d Dist. 1987) (disapproved of by, Fashion Valley Mall, LLC v. N.L.R.B., 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742, 183 L.R.R.M. (BNA) 2327, 155 Lab. Cas. (CCH) P 60529 (2007)).
6. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), judgment aff'd, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741, 6 Media L. Rep. (BNA) 1311 (1980).
7. The U.S. Supreme Court in *Lloyd Corp.* reversed direction from its holdings in *Marsh v. State of Ala.*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946) and *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) and *Hudgens v. N.L.R.B.*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196, 91 L.R.R.M. (BNA) 2489, 78 Lab. Cas. (CCH) P 11278 (1976), where the high court recognized that the National Labor Relations Act could provide additional statutory protection for union expressive activities on private property owned by their employers, even though First Amendment protection generally did not extend to picketing or other expressive behavior on private property.
8. *Diamond v. Bland*, 3 Cal. 3d 653, 91 Cal. Rptr. 501, 477 P.2d 733 (1970).
9. *Diamond v. Bland*, 11 Cal. 3d 331, 113 Cal. Rptr. 468, 521 P.2d 460 (1974) (overruled

by, Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979)) and (overruled by, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 25 Cal. 3d 317, 158 Cal. Rptr. 370, 599 P.2d 676, 102 L.R.R.M. (BNA) 2312, 87 Lab. Cas. (CCH) P 55208 (1979)).

10. *Diamond v. Bland*, 11 Cal. 3d 331, 335, 113 Cal. Rptr. 468, 521 P.2d 460 (1974) (overruled by, Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979)) and (overruled by, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 25 Cal. 3d 317, 158 Cal. Rptr. 370, 599 P.2d 676, 102 L.R.R.M. (BNA) 2312, 87 Lab. Cas. (CCH) P 55208 (1979)).
11. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 903, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), judgment aff'd, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741, 6 Media L. Rep. (BNA) 1311 (1980).
12. *Diamond v. Bland*, 11 Cal. 3d 331, 335, 113 Cal. Rptr. 468, 521 P.2d 460 (1974) (overruled by, Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979)) and (overruled by, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 25 Cal. 3d 317, 158 Cal. Rptr. 370, 599 P.2d 676, 102 L.R.R.M. (BNA) 2312, 87 Lab. Cas. (CCH) P 55208 (1979)).
13. *In re Hoffman*, 67 Cal. 2d 845, 64 Cal. Rptr. 97, 434 P.2d 353 (1967).
14. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), judgment aff'd, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741, 6 Media L. Rep. (BNA) 1311 (1980).
15. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 915, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), judgment aff'd, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741, 6 Media L. Rep. (BNA) 1311 (1980).
16. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 916, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), judgment aff'd, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741, 6 Media L. Rep. (BNA) 1311 (1980).
17. *H-CHH Associates v. Citizens for Representative Government*, 193 Cal. App. 3d 1193, 238 Cal. Rptr. 841 (2d Dist. 1987) (disapproved of by, Fashion Valley Mall, LLC v. N.L.R.B., 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742, 183 L.R.R.M. (BNA) 2327, 155 Lab. Cas. (CCH) P 60529 (2007)).
18. *Union of Needletrades, etc. Employees v. Superior Court*, 56 Cal. App. 4th 996, 65 Cal. Rptr. 2d 838, 155 L.R.R.M. (BNA) 3047 (2d Dist. 1997).
19. *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106, 131 Cal. Rptr. 2d 721 (3d Dist. 2003).
20. It is also instructive to note that the *Albertson's Inc*. court further held that the supermarket's corporate policy permitting persons to engage in petitioning and leafleting activity, on a content-neutral and nondiscriminatory basis, did not in itself impress the store with the character of a traditional public forum from which it could not exclude expressive behavior.
21. *Van v. Home Depot, U.S.A., Inc.*, 155 Cal. App. 4th 1375, 66 Cal. Rptr. 3d 497 (2d Dist. 2007).
22. If the implication of these decisions are carried to their logical conclusions, it might be possible to avoid expressive activities by having shopping center architects design future centers to eliminate patios, walkways and other common areas for aggregation of people; this, however, would run counter to good business practices at such centers.
23. *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal. 4th 850, 870, 69 Cal. Rptr. 3d 288, 172 P.3d 742, 183 L.R.R.M. (BNA) 2327, 155 Lab. Cas. (CCH) P 60529 (2007).
24. *United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associate*, L.P., 270 Conn. 261, 852 A.2d 659, 175 L.R.R.M. (BNA) 2347 (2004).
25. *United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associate, L.P.*, 270 Conn. 261, 852 A.2d 659, 666-670, 175 L.R.R.M. (BNA) 2347 (2004).
26. *United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associate, L.P.*, 270 Conn. 261, 852 A.2d 659, 673, 175 L.R.R.M. (BNA) 2347 (2004).

27. *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 498 N.Y.S.2d 99, 488 N.E.2d 1211 (1985).
28. *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal. 4th 850, 874 (fn. 2), 69 Cal. Rptr. 3d 288, 172 P.3d 742, 183 L.R.R.M. (BNA) 2327, 155 Lab. Cas. (CCH) P 60529 (2007).
29. *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal. 4th 850, 881, 69 Cal. Rptr. 3d 288, 172 P.3d 742, 183 L.R.R.M. (BNA) 2327, 155 Lab. Cas. (CCH) P 60529 (2007).
30. *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013, 111 Cal. Rptr. 2d 336, 29 P.3d 797 (2001).
31. *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013, 1032, 111 Cal. Rptr. 2d 336, 29 P.3d 797 (2001).
32. *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013, 1033, 111 Cal. Rptr. 2d 336, 29 P.3d 797 (2001). The dissent in *Golden Gateway* emphasized that the tenants had a substantial interest in the property, along with the landlord and would have applied the *Pruneyard* decision to the apartment property. The heart of the dissent was based on disagreement that the "state action" requirement was necessary, in light of the wording of California Constitution in providing expansive free speech rights which "run against the world." 26 Cal.4th 1043, et seq.

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