

Robins v. Pruneyard Shopping Center: Free Speech Access to Shopping Centers Under the California Constitution

In *Robins v. Pruneyard Shopping Center*,¹ the California Supreme Court held that the provisions of the state constitution guaranteeing freedom of speech and the right to petition² protect the public's right to use privately owned shopping centers as forums for speech-related activities, subject to reasonable regulation. By contrast, the United States Supreme Court has held that the parallel free speech clause in the first amendment to the United States Constitution does not bar a shopping center owner from denying others free speech access to his property.³ In reaching a contrary result under the California Constitution's speech and petition clauses, the California Supreme Court reasserted its right to give a broader interpretation to provisions of California's Declaration of Rights⁴ than is given to parallel provisions of the federal Bill of Rights.⁵

The court rejected its prior determination⁶ that under *Lloyd Corp. v. Tanner*,⁷ the applicable federal precedent, shopping center owners possess a federally protected exclusionary property right immune from regulation. *Lloyd*, the court argued, did not determine the scope of federal property rights; it merely held that the first amendment does not prevent shopping center owners from imposing restraints on speech

1. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) (Newman, J.) (4-3 decision), *aff'd*, 48 U.S.L.W. 4650 (June 9, 1980) (Rehnquist, J.) (unanimous decision).

When this Note was written, Pruneyard's appeal was pending before the United States Supreme Court. 48 U.S.L.W. 3322 (Nov. 13, 1979) (jurisdiction postponed to hearing on the merits). Since the Note was in the final stages of publication when the Court's decision was announced, it was not possible to revise it. The Note addresses questions of both federal and state law. Its analysis of the federal questions, which alone were before the United States Supreme Court, complements that adopted in Justice Rehnquist's majority opinion.

2. CAL. CONST. art. I, §§ 2, 3 (1974) (formerly §§ 9, 10).

3. *Hudgeus v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

4. CAL. CONST. art. I.

5. See note 52 and accompanying text *infra*.

6. *Diamond v. Bland*, 11 Cal. 3d 331, 335 n.4, 521 P.2d 460, 463 n.4, 113 Cal. Rptr. 468, 471 n.4, *cert. denied*, 419 U.S. 885 (1974) [hereinafter cited as *Diamond II*]. This decision reversed the court's prior ruling in *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied sub nom. Homart Dev. Co. v. Diamond*, 402 U.S. 988 (1971) [hereinafter cited as *Diamond I*].

7. 407 U.S. 551 (1972).

because such restraints do not constitute state action.⁸ Finding no other federal precedent that would prohibit a regulation requiring shopping centers to be available for limited use as public forums, the court asked whether it should construe the speech and petition clauses of the California Constitution as imposing such a requirement. It concluded that it should.⁹

Part I of this Note briefly outlines the *Robins* decision. Part II examines the historical development of the state action doctrine as applied to first amendment rights of access to private property. Part III analyzes the two primary components of the decision. The Note rejects the claim that to require a shopping center owner to allow free speech activity on his property would violate his rights under the fourteenth, fifth and first amendments, and examines the reasoning which led the *Robins* majority to conclude that the California Constitution imposes such a requirement. Although the court reached this conclusion without indicating whether it construes the California Constitution's freedom of speech and right to petition clauses to contain an implicit state action requirement, this Note argues in Part IV that they should be so construed. This section also proposes a theory of state action that would protect the right to engage in speech-related activities at entrances to all places of business open to the general public.

I

THE *ROBINS* DECISION

Several high school students set up a card table in the central courtyard of a privately owned shopping center in Santa Clara County. Their dual objective was to express concern about a United Nations resolution against "Zionism" and to circulate a petition to be sent to then-President Ford and the United States Congress. A security guard told them to leave. They departed and later brought suit to enjoin the shopping center from denying them access. The trial court, relying on the California Supreme Court's prior interpretation of *Lloyd*,¹⁰ denied their claim, finding that there were adequate alternative forums for

8. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856.

The first amendment protects only against government-imposed restraints on speech and not against restraints imposed by private parties acting in wholly private capacities. See notes 28-31 and accompanying text *infra*.

9. 23 Cal. 3d at 910-11, 592 P.2d at 347-48, 153 Cal. Rptr. at 860-61. Pruneyard also argued that forcing a shopping center owner to allow his premises to be used as a public forum would violate his *first amendment* right not to dedicate his property to the expression of views with which he disagrees. Brief in Response to Amicus Curiae Briefs at 35-42. This argument, while not addressed by the *Robins* court, is discussed at length in the text accompanying notes 76-83 *infra*.

10. *Diamond II*, 11 Cal. 3d at 335 n.4, 521 P.2d at 463 n.4, 113 Cal. Rptr. at 471 n.4.

conducting their activities.¹¹

The California Supreme Court reversed after reconsidering and rejecting the reasoning which had previously led it¹² to interpret *Lloyd* as recognizing a federally protected property right immune from regulation.¹³ Justice Newman, writing for the majority,¹⁴ argued that *Lloyd* did not define "the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally."¹⁵ *Lloyd*, he argued, merely held that a shopping center owner who exercises his exclusionary property rights under state law is acting in a wholly private capacity. Since the federal "state action" requirement is not met in that situation, the first amendment's prohibition against governmental restraints on speech does not apply.¹⁶

In support of this interpretation of *Lloyd*, the majority noted that subsequent decisions of the United States Supreme Court have consistently upheld the constitutionality of federal legislation requiring employers to allow certain speech-related activities on the worksite.¹⁷ Interpreting *Lloyd* in light of these decisions, Justice Newman concluded that the United States Supreme Court had not intended to immunize shopping center owners from state regulations requiring them to permit speech-related activities on their premises.¹⁸

11. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d at 916, 592 P.2d at 351, 153 Cal. Rptr. at 864 (Richardson, J., dissenting).

12. *Diamond II*, 11 Cal. 3d at 335 n.4, 521 P.2d at 463 n.4, 113 Cal. Rptr. at 471 n.4.

13. Most commentators have also rejected such an interpretation of *Lloyd*. See, e.g., Note, *Constitutional Law—Freedom of Speech—Owner's Fifth Amendment Property Rights Prevent a State Constitution from Providing Broader Free Speech Rights than Provided by the First Amendment*, 86 HARV. L. REV. 1592 (1973) [hereinafter cited as *Property Rights*]; Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L.L. REV. 271, 300 (1973); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 124 n.17 (1972). But see Note, *California Diminishes Federally Protected Constitutional Property Rights*, 2 WHITTIER L. REV. 423, 433 (1980).

14. Justice Newman was joined by Chief Justice Bird and Justices Mosk and Tobriner. Justices Richardson, Manuel, and Clark dissented.

15. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856. The relevant portion of the fourteenth amendment provides that no state shall "deprive any person of . . . property, without due process of law." U.S. CONST. amend. XIV. The fifth amendment contains a similar due process clause and adds that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V.

16. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856.

17. *Id.* at 905, 592 P.2d at 344, 153 Cal. Rptr. at 857 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) and *Hudgens v. NLRB*, 424 U.S. 507 (1976), *remanded*, *Hudgens*, 230 N.L.R.B. No. 73 (1977) (ruling that the employer must allow the picketing activity)).

18. In support of this conclusion, he noted that the reasoning that led the United States Supreme Court to conclude that the government may constitutionally require an employer to permit his employees to conduct certain speech-related activities on his premises also applies to a state regulation requiring shopping center owners to allow the public to use their property as a free speech forum, subject to reasonable regulations. 23 Cal. 3d at 905-06, 592 P.2d at 344, 153 Cal. Rptr. at 857. In each case, the public welfare is promoted without imposing an unfair burden on the property owner. The federal law advances the public interest in collective bargaining; the state regulation advances the public interest in expanding the avenues of communication. And in

The majority opinion also provided two bases for distinguishing *Robins'* factual context from the circumstances presented in *Lloyd*.¹⁹ First, the detrimental impact of suburban shopping centers on the effectiveness of central business districts as free speech forums is more dramatic in California today than it was in Oregon at the time *Lloyd* was decided. Second, the plaintiffs in *Robins* were exercising their right under the state and federal constitutions²⁰ to petition government for redress of grievances. The court argued that these two factors make granting access to shopping centers more appropriate in the *Robins* context than it would have been in *Lloyd's*.

After concluding that federal law does not preclude California from protecting reasonably exercised speech and petitioning on the premises of privately owned shopping centers, the *Robins* majority decided that sections 2 and 3 of article I of the California Constitution²¹ should be construed to afford such protection.²² The majority cited several factors²³ supporting this construction, including the fact that the

each case the burden imposed is slight, since the owner has, in a general sense, opened his property to those parties whose limited expressive activity he is asked to tolerate.

19. 23 Cal. 3d at 907-08, 592 P.2d at 345-46, 153 Cal. Rptr. at 858-59. These bases provide an independent foundation for the *Robins* decision in case *Lloyd* was intended to rule that requiring *Lloyd* Corporation to permit handbilling at its shopping center would violate its property rights under the fifth and fourteenth amendments.

20. U.S. CONST. amend. I; CAL. CONST. art. I, § 3. This right is especially important in California, since its citizens may initiate change through initiative, referendum, and recall. CAL. CONST. art. II, §§ 8, 9, 13. In a footnote, Justice Newman pointed out that, "because of the large number of signatures required to succeed in an initiative, referendum, or recall drive, guaranteeing access to voters is essential to make meaningful the right to mount such a drive." 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859.

21. "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. "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." CAL. CONST. art. I, § 3.

22. Justice Richardson's dissenting opinion did not reach the issue of the independent scope of the California Constitution's speech and petition provisions. He argued that *Lloyd* and *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972), decided the same day as *Lloyd*, established that the fifth and fourteenth amendments give shopping center owners a federally protected property right to exclude general free speech activities unrelated to the shopping center's purposes and functions when adequate alternative avenues of communication exist. 23 Cal. 3d at 914-15, 592 P.2d at 350, 153 Cal. Rptr. at 863. For a discussion of this interpretation of *Lloyd*, see text accompanying notes 52-59 *infra*. The trial court's finding of adequate alternative forums was, in Richardson's view, entirely proper. He therefore concluded that the supremacy clause, U.S. CONST. art. VI, § 2, prevents the California Supreme Court from employing its state constitution to defeat Pruneyard's federally protected exclusionary property rights.

23. The principal factors were the following: (a) the framers chose not to adopt the words of the federal Bill of Rights; (b) California courts have traditionally interpreted article I, § 2, as a "protective provision more definitive and inclusive than the First Amendment." 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859 (quoting *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975) (applying the California Constitution's free speech clause to overturn a court order suppressing publication of a false and misleading political state-

language of these sections "broadly proclaims speech and petition rights."²⁴

Justice Newman's majority opinion does not, however, indicate whether state action plays a role in defining the scope of the speech and petition guarantees contained in sections 2 and 3 of article I. Since these sections contain no express state action limitation, the court need not have construed them to imply one. The majority's reference to sections 2 and 3 as broadly proclaiming speech and petition rights, coupled with the conspicuous absence of any discussion of state action, might indicate that it did not. On the other hand, the majority's heavy reliance on pre-*Lloyd* precedents finding "public function" state action in the operation of the sidewalks, parking areas and malls of shopping centers²⁵ suggests that the court construed sections 2 and 3 to imply a state action requirement. If it did, the standard for finding the requisite state involvement under these sections must be less restrictive than the federal standard, since the United States Supreme Court has ruled that there is insufficient state involvement in the operation of privately owned shopping centers to invoke first amendment protections.²⁶ The remaining possibility is that the court was simply not yet prepared to choose between these alternative constructions.²⁷

II

LEGAL BACKGROUND

A. Federal Cases

The first amendment states that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people . . . to petition the Government for redress of grievances."²⁸ The United States Supreme Court has held that the "due process" clause of the fourteenth amendment extends this prohibition to speech and petitioning restraints imposed by *state* governments.²⁹ The fourteenth amendment does not, however, prohibit restraints imposed by private parties

ment)); (c) a chain of pre-*Lloyd* California precedents, including *Diamond I*, held that the first amendment to the United States Constitution subordinates property rights to free speech rights where the owner "has fully opened his property to the public." 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860 (quoting *Diamond I*, 3 Cal. 3d at 662, 477 P.2d at 739, 91 Cal. Rptr. at 507); and (d) since shopping centers are even more prevalent today than they were at the time of these pre-*Lloyd* decisions, the policies favoring access are more forceful now than ever. 23 Cal. 3d at 910 & n.5, 592 P.2d at 347 & n.5, 153 Cal. Rptr. at 860 & n.5 (citing *Diamond II*, 11 Cal. 3d at 342, 521 P.2d at 468, 113 Cal. Rptr. at 476 (Mosk, J., dissenting)).

24. 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

25. See, e.g., *Diamond I*, 3 Cal. 3d at 666 n.4, 477 P.2d at 741 n.4, 91 Cal. Rptr. at 509 n.4.

26. *Hudgens v. NLRB*, 424 U.S. at 521; *Lloyd Corp. v. Tanner*, 407 U.S. at 570.

27. See text accompanying notes 84-91 *infra*.

28. U.S. CONST. amend. I.

29. See, e.g., *Fiske v. Kansas*, 274 U.S. 380 (1927).

acting in wholly private capacities.³⁰ Hence, in order to invoke first amendment protection for an expressive activity, the litigant must establish that the federal or state government was significantly involved in the abridgement of his freedom of speech.³¹

While the United States Supreme Court has never developed a uniform formula for finding state action, it has articulated three principle contexts in which the requisite state involvement can occur.³² It may arise (1) through the direct intervention of the state or its agents, (2) through state encouragement or authorization of private acts,³³ and (3) under the "public function" doctrine,³⁴ through the delegation to private parties of functions which have traditionally been reserved to the state. Litigants claiming first amendment protection for the right to use another's private property as a forum for speech-related activities have typically invoked the public function doctrine as the basis for alleging state action.³⁵

The first authoritative formulation of the public function doctrine

30. The Civil Rights Cases, 109 U.S. 3 (1883).

31. See *Hudgens v. NLRB*, 424 U.S. at 514 (shopping center may exclude picketers); *Hall v. Commonwealth*, 188 Va. 72, 49 S.E.2d 369, *appeal dismissed*, 335 U.S. 875 (1948) (private owner of apartment house may exclude handbillers).

The requisite state involvement can occur through the activities of any branch of government: legislative, judicial, or administrative. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972); *Shelley v. Kramer*, 334 U.S. 1, 20 (1948); *Virginia v. Rives*, 100 U.S. 313, 318 (1879).

32. See generally Note, Garfinkle v. Superior Court: *No State Action in Nonjudicial Foreclosure*, 67 CALIF. L. REV. 684, 689-94 (1978).

33. It would be possible in almost every private dispute to find that the state had in some manner encouraged or assisted the challenged act. *Moose Lodge No. 107 v. Irvis*, 407 U.S. at 173; *Mulkey v. Reitman*, 64 Cal. 2d 529, 536, 413 P.2d 825, 830, 50 Cal. Rptr. 881, 886 (1966), *aff'd*, 387 U.S. 369 (1967). See also Note, *supra* note 32, at 691 n.50. The United States Supreme Court, however, has consistently refused to construe the fourteenth amendment so broadly, since to do so would eviscerate the state action requirement. Only where the state has "significantly" involved itself with private infringements on personal liberties will the private action be deemed that of the state. See *Reitman v. Mulkey*, 387 U.S. at 380.

The Court's most recent statement on state action casts considerable doubt on the continued viability of the "state encouragement" doctrine as applied to the fourteenth amendment. In upholding a warehouseman's lien statute against a due process challenge, Justice Rehnquist, writing for the majority, rejected the theory that private action can be converted into state action merely because the state has authorized or encouraged the act. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-66 (1978). Only where the state has *compelled* the private action may it be deemed state action. *Id.*

34. Under this doctrine certain functions are recognized as inherently governmental in nature. When a private party performs one of these functions, its action is treated as though it were the action of the state for purposes of the restrictions contained in the Bill of Rights. *Evans v. Newton*, 382 U.S. 296, 299 (1966). See Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U.L.Q. 757, 776-82. This public function doctrine could be applied to shopping centers on the theory that providing a business center is an inherently governmental function.

35. Formal delegation by the state is not required. State action can be predicated solely on the state's acquiescence in allowing a private party to perform a public function. See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953) (conducting primary elections is a traditional state function).

appeared in *Marsh v. Alabama*.³⁶ In *Marsh*, a Jehovah's Witness appealed a criminal trespass conviction for refusing to leave a sidewalk in Chickasaw, a company-owned town in Alabama. The United States Supreme Court reversed her conviction. The Court noted that citizens of a company town have the same need for uncensored information as citizens of a municipality.³⁷ It concluded that the mere fact of private ownership should not insulate a company town from the first amendment's prohibition against placing unreasonable restraints on the use of traditional public forums.³⁸

In *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,³⁹ the Court extended the public function doctrine to reverse, on first amendment grounds, a court order enjoining labor picketing on the premises of a privately owned shopping center. Justice Marshall, writing for the majority, characterized the shopping center as "the functional equivalent of the business district of Chickasaw involved in *Marsh*."⁴⁰ Nevertheless, the *Logan Valley* majority explicitly postponed deciding whether a right of access for *general* free speech purposes should be recognized. It held only that access could not be denied to those whose speech was "directly related in its purpose to the use to which the shopping center [is] being put."⁴¹

Four years later, in *Lloyd*, the Court addressed the question left open in *Logan Valley*.⁴² Justice Powell's majority opinion abandoned the approach taken in *Logan Valley*, stating that state action cannot be predicated on the fact that a shopping center serves the same function as a business district of a municipality.⁴³ Nevertheless, Justice Powell distinguished *Logan Valley* on two grounds: (1) the purpose of the ex-

36. 326 U.S. 501 (1946).

37. *Id.* at 508.

38. *Id.* at 509. City streets, sidewalks, and other public places are traditional forums for speech-related activities. Courts will carefully review the reasonableness and necessity of any government restriction on their use as free speech forums. *Id.* at 504; *Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (invalidating ordinance forbidding all public meetings in streets and other public places without a permit).

39. 391 U.S. 308 (1968).

40. *Id.* at 318.

41. *Id.* at 320 n.9.

42. The case reached the Court on appeal from a court order enjoining Lloyd Corporation from "preventing or interfering with the distribution of non-commercial handbills in a peaceful and orderly manner in the malls and walkways within Lloyd Center at times when they are open to general public access." 407 U.S. at 564 n.11. The district court had relied on the public function doctrine developed in *Marsh* and *Logan Valley* in reaching its conclusion that the first amendment protects the public's right to use a shopping center as a free speech forum. *Tanner v. Lloyd Corp.*, 308 F. Supp. 128, 132 (D. Ore. 1970).

43. Such a ruling would appear to overrule *Logan Valley*. Four years later, in *Hudgens v. NLRB*, the Court declared that it had. 424 U.S. 507, 518 (1976) ("[T]he rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case."); *accord*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 159.

pressive activity in *Logan Valley* was related to the business of the shopping center;⁴⁴ and (2) there was no alternative forum where the union pickets could effectively convey their message to the store's patrons.⁴⁵ He concluded that since neither of these features were present in the *Lloyd* case,⁴⁶ it would be unwarranted to infringe upon the corporation's property rights by granting the public free speech access to the shopping center.⁴⁷ *Lloyd* was the applicable federal precedent in this area at the time of the *Robins* decision.

B. California Cases

The California Supreme Court had previously faced the question of the public's right to use shopping centers as free speech forums in two *Diamond v. Bland* decisions.⁴⁸ In *Diamond I* the court granted injunctive relief to members of a political organization seeking access to a shopping center for the purpose of distributing leaflets and soliciting petition signatures for an anti-pollution initiative.⁴⁹ Relying on *Marsh* and *Logan Valley*, Justice Mosk, writing for the majority, argued that since shopping centers had become the modern suburban counterpart of the town center, the first amendment ensured their availability as public forums.⁵⁰

After *Lloyd*, the California Supreme Court considered it necessary to review its *Diamond I* ruling. Upon reappraisal, the court in *Diamond II* held that requiring a shopping center owner to tolerate petitioning would violate his federally guaranteed property rights as defined by *Lloyd*. Supremacy principles, the court concluded, required the reversal of *Diamond I*.⁵¹

44. 407 U.S. at 564.

45. *Id.* at 566.

46. The handbills concerned the Viet Nam war, not the business operations of Lloyd Center. *Id.* at 556. The majority suggested that handbills could be distributed conveniently to pedestrians and motorists from the public streets at the perimeter of the shopping center's parking lot. *Id.* at 567. *But see* Justice Marshall's dissenting opinion, *id.* at 583 n.7.

47. *Id.* at 567. In drawing this conclusion, Justice Powell referred to the protection accorded property rights under the fifth and fourteenth amendments. *Id.* at 552-53, 567-68, 570. The ultimate significance of this part of the majority opinion is disputed. *See* notes 13-22 and accompanying text *supra*; notes 54-59 and accompanying text *infra*.

48. *See* note 6 *supra*.

49. 3 Cal. 3d at 655, 477 P.2d at 734, 91 Cal. Rptr. at 502.

50. *Id.* at 665-66 & n.4, 477 P.2d at 741 & n.4, 91 Cal. Rptr. at 509 & n.4.

51. Justice Mosk dissented in *Diamond II*, arguing that the freedom of speech and right to petition provisions of California's Declaration of Rights provided an adequate and independent basis for the ruling in *Diamond I*. The majority left open the question of the possibly broader scope of these provisions. Even if their scope were broader, they argued, supremacy principles precluded them from "employing state constitutional provisions to defeat defendant's federal constitutional rights." 11 Cal. 3d at 335 n.4, 521 P.2d at 463 n.4, 113 Cal. Rptr. at 471 n.4 (emphasis added) (citing *Lenrich Assocs. v. Heyda*, 264 Or. 122, 504 P.2d 112 (1972) (plurality opinion)).

III

ANALYSIS

The *Robins* majority analyzed the free speech access issue in two steps. First, it determined that requiring Pruneyard Shopping Center to allow free speech activity would not violate the owner's federal property rights. The supremacy clause therefore would not preclude the court from applying the California Constitution's speech and petition provisions to protect speech at shopping centers. Second, the court determined that these provisions should be construed to afford this protection. Although both conclusions are correct, the reasoning advanced by the court requires additional support.

A. *The Federal Supremacy Issue*

The right of state courts to independently interpret state constitutional provisions which parallel provisions of the United States Constitution is well established.⁵² There are, however, three federal constitutional grounds for arguing that when adequate alternative forums are available, the state cannot compel an individual to allow others to use his shopping center to convey messages unrelated to the center's business. These rationales rely on the "due process" clauses of the fifth and fourteenth amendments, the "taking" clause of the fifth amendment, and the "free speech" clause of the first amendment.⁵³

52. See, e.g., *People v. Pettingill*, 21 Cal. 3d 231, 247-48, 578 P.2d 108, 118, 145 Cal. Rptr. 861, 871 (1978); *Diamond II*, 11 Cal. 3d at 338, 521 P.2d at 465, 113 Cal. Rptr. at 473 (Mosk, J., dissenting); Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 453 (1970); Falk, *The Supreme Court of California, 1971-1972—Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 283 (1973); Note, *People v. Pettingill: The Independent State Ground Debate in California*, 67 CALIF. L. REV. 768 (1979); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 298 (1977) [hereinafter cited as *New Federalism*]. The California Supreme Court has pioneered such independent interpretations. See Project Report, *supra* note 13, at 326; *New Federalism*, *supra* at 301 n.21. CAL. CONST. art. I, § 24, which states that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution," has been interpreted as authorizing this practice. See *People v. Pettingill*, 21 Cal. 3d at 247-48, 578 P.2d at 118, 145 Cal. Rptr. at 871.

53. The claim that the first amendment protects the shopping center owner's right to refuse to allow others to use his property to convey social, political, or religious messages he finds unacceptable was first raised by Pruneyard in Respondent's Brief in Response to Amicus Curiae Briefs at 35-42, *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). The California Supreme Court did not, however, address this issue in its decision. Pruneyard's first amendment claim is one of the bases for its appeal to the United States Supreme Court. 48 U.S.L.W. 3319 (Nov. 13, 1979), *juris. postponed to hearing on merits*, 48 U.S.L.W. 3322 (Nov. 13, 1979).

1. *The Scope of Fifth and Fourteenth Amendment Rights Under Lloyd*

The *Robins* court suggested two reasons for not interpreting *Lloyd* as defining "the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally."⁵⁴ First, subsequent United States Supreme Court decisions, while denying any *first amendment* public right of access to commercial property, have not treated *Lloyd* as undermining the validity of *statutes* requiring the owner to permit others to use his property for communicative purposes.⁵⁵ Second, Justice Powell's references in *Lloyd* to federally protected property rights were intertwined with his discussion of state action and not explicitly set forth as an independent basis for the decision.⁵⁶

These considerations support the California court's view that *Lloyd* did not determine the scope of shopping center owners' fifth and fourteenth amendment property rights. But this account fails to explain the import of Justice Powell's references to property rights,⁵⁷ and

54. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856.

55. These decisions have upheld rulings of the NLRB that interpreted the National Labor Relations Act of 1935, § 8(1), 29 U.S.C. § 158(a)(1) (1973), as requiring employers to permit union organizers or employees to engage in speech-related activities on the worksite. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Hudgens v. NLRB*, 424 U.S. 507 (1976), *remanded*, *Hudgens*, 230 N.L.R.B. No. 73 (1977) (ruling that the employer must allow the picketing activity). *Cf.* *Food Employees Local 590 v. Logan Valley, Inc.*, 391 U.S. 308, 340 (1968) (White, J., dissenting) ("If it were shown that Congress has thought it necessary to permit picketing on private property . . . to implement and enforce the First Amendment, we would have quite a different case.")

In *Central Hardware Co. v. NLRB*, Justice Powell, again writing for the majority, made similar references to fifth and fourteenth amendment property rights while rejecting a *first amendment* claim by labor organizers to solicit union membership in the parking lot of a retail store: "[To grant access] would constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. 539, 547 (1972). But the Court apparently did not intend by that language to preclude the possibility that access could be granted on *statutory* grounds, since it remanded the case to the Court of Appeals with instructions to determine whether access should be granted under the National Labor Relations Act. *Id.* at 548.

56. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856.

57. The first reference appears at the beginning of the opinion where Justice Powell stated that certiorari was granted "to consider petitioner's contention that the decision below violates the rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 552-53. This reference may be read as reflecting the Court's initial concern about the "comprehensive" nature of the district court's injunction: "Irrespective of how controversial, offensive, *distracting* or *extensive* the distribution, *Lloyd* has been ordered to allow all non-commercial handbilling which anyone desires to undertake within its private premises." *Id.* at 564 n.11 (emphasis added). Even if first amendment protections had applied, such a broad injunction might nevertheless have impermissibly interfered with *Lloyd*'s business interests. However, the proper course in that event would have been to remand the case with instructions to modify the injunction to permit *Lloyd* to adopt reasonable time, place, and manner rules to ensure that the handbilling would not be disruptive. Since the first amendment was ruled inapplicable, the Court did not need to consider whether the injunction's overbreadth could be cured.

The other references to property rights were made in passages where Justice Powell spoke of

ignores his attempt to provide a basis for the decision that would fairly distinguish the rule of *Logan Valley*.⁵⁸

The *Lloyd* Court did not need to reach the taking or due process issues to provide an independent basis for its decision consistent with *Logan Valley*'s finding of state action in the operation of shopping centers. Assuming the existence of state action in *Lloyd*, the issue presented was whether the state's restraint on speech was *permissible*. The Court could have found that it was without ruling that the fifth and fourteenth amendments *require* the state to preserve the shopping center owner's exclusionary property rights. The Court's references to property rights should instead be read as establishing only that the first amendment does not prohibit state action which protects private property interests by nondiscriminatorily denying free speech access to shopping centers.⁵⁹ *Lloyd* therefore poses no barrier to legislation imposing a limited free speech easement on shopping centers. It remains to be determined, however, whether there is substantial precedent apart from *Lloyd* for holding that such a law would violate the shopping center owner's federally protected rights.

2. Due Process

In order to comply with the "due process" clauses of the fifth and fourteenth amendments, an exercise of the state's police power must be

the "accommodations" which may be made between property interests and first amendment interests. *Id.* at 567-68, 570.

58. *Id.* at 560-67. The discussion of *Lloyd* and *Logan Valley* in *Hudgens v. NLRB*, 424 U.S. at 517-21, suggests that the result in *Lloyd* would have been the same even if state action had been found. The Court constructed two arguments to show that "the rationale of *Logan Valley* did not survive the Court's decision in *Lloyd*": (1) *Lloyd* held that the operation of a privately owned shopping center does not constitute state action; (2) even if it did constitute state action, the first amendment will not allow courts to, in effect, regulate speech on the basis of its content. *Id.* at 518-21 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), and *Police Dep't v. Mosley*, 408 U.S. 92 (1972)). Since *Lloyd* did not extend first amendment protection to advocates whose message was unrelated to the shopping center's function, the Court reasoned that it could not, without overruling *Lloyd*, extend first amendment protection to those, such as union organizers, whose message *is* directly related to the business function of the center. 424 U.S. at 520-21. For a critique of this argument, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 695 n.15 (1978). That *Hudgens* treated *Lloyd*'s result as viable even if state action had been present supports the view that the references in *Lloyd* to property rights provide an independent basis for the decision.

59. This interpretation is corroborated by the emphasis the *Lloyd* majority gave to the finding that Lloyd Center nondiscriminatorily excluded *all* handbilling. 407 U.S. at 555-56, 567-68. Since the hypothetically "state" action was employed in a content-neutral fashion and did not significantly inhibit speech, *id.* at 567, it would be appropriate to apply a relaxed standard of first amendment scrutiny. See, e.g., *Greer v. Spock*, 424 U.S. 828, 839 (1976) (upholding the policy of a military base to exclude political candidates, partly on the basis that the military personnel stationed there could attend political rallies off base). Under this test, the restraint on speech is permissible if it promotes a legitimate end. Justice Powell's references to the importance which the fifth and fourteenth amendments place on property rights should be interpreted as demonstrating that a legitimate end is served by allowing Lloyd Corporation to exclude all handbilling.

substantially related to the public health, safety, morals, or general welfare.⁶⁰ Nevertheless, in reviewing public welfare legislation, the United States Supreme Court has refused to sit as a "superlegislature to weigh the wisdom of legislation . . ." ⁶¹ It has therefore applied the "public welfare" concept in a liberal manner.⁶² This exercise of judicial restraint is premised on the belief that responsibility for economic and social policies enures to the legislature and not the judiciary,⁶³ and that individual states should have "broad latitude in experimenting with possible solutions to problems of vital concern."⁶⁴

These rationales for judicial restraint also apply where the measure subject to "due process" review is a state constitutional provision directly enacted by the electorate rather than a statute passed by their elected representatives.⁶⁵ Since the United States Supreme Court must follow state supreme court interpretations of the state constitutional provisions,⁶⁶ the California court's determination that the electorate intended the free speech provisions of the California Constitution⁶⁷ to

60. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

61. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963). *Accord*, *Whalen v. Roe*, 429 U.S. 589, 597-98 (1977); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955); *Munn v. Illinois*, 94 U.S. 113, 123, 134 (1876).

62. "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

63. *Ferguson v. Skrupa*, 372 U.S. at 730.

64. *Whalen v. Roe*, 429 U.S. at 597. *Accord*, *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."). Unsuccessful experiments can be terminated through the same legislative process that initiated them. *Whalen v. Roe*, 429 U.S. at 598. By contrast, constitutional adjudication by the United States Supreme Court involves "vital finalities." *Dennis v. United States*, 341 U.S. 494, 552 (1951) (Frankfurter, J., concurring).

65. There are, however, two grounds on which one might argue that the United States Supreme Court should give applications of vague state constitutional provisions a more rigorous "due process" review than it would give a statute. First, state constitutions are harder to modify or repeal than are statutes. *See, e.g.*, CAL. CONST. art. XVIII. Second, vague state constitutional provisions are susceptible to use as pretexts for "law-making" by an imprudent state supreme court.

Neither of these rationales is persuasive. First, it is far more difficult to amend the United States Constitution in order to overturn a "due process" decision of the United States Supreme Court than it is to amend a state constitution in order to overturn a state supreme court decision. Second, the United States Constitution gives Congress the power to determine the appellate jurisdiction of the United States Supreme Court. U.S. CONST. art. III, § 1. From the Judiciary Act of 1789 to the present Judicial Code, 28 U.S.C. § 1257 (1966) (amended 1970), the Court's power to review state court decisions has been congressionally limited to the federal questions decided by the state courts. The Court is not authorized to review the soundness of a state court's interpretation of state law. Therefore, it should not manipulate its standard of "due process" review to expand its own jurisdictional authority.

66. *See Dyer v. Sins*, 341 U.S. 22 (1951); *American Fed. of Lab. v. Watson*, 327 U.S. 582, 596 (1946).

67. The California electorate enacted these provisions in 1974. *See note 87 infra*.

protect the public's right of access to shopping centers is binding on the Court. In light of the judicial restraint policy and the Court's own pronouncements of the fundamental importance of spirited public debate to a democratic society,⁶⁸ it would be inappropriate to rule that creating greater access to effective forums does not promote the public welfare.

3. *Taking*

A regulation which admittedly promotes the public welfare may nevertheless be invalidated under the "taking" clause of the fifth amendment. If the Court finds that enforcement of a regulation would diminish the complaining party's property rights in such a way as to constitute a "taking," the state must provide "just compensation" before it can enforce the regulation against him. In order to prove a taking, the complaining property owner must show that enforcement of the regulation would have two consequences: first, it would impose a severe burden on his property;⁶⁹ and second, the effect of this imposition would be to unjustly and unfairly require him to confer a benefit upon the public.⁷⁰ If, on the contrary, the Court finds that the burden would be slight or that it should be characterized as preventing a harm, the regulation will be upheld.⁷¹

Sections 2 and 3 of article I, as construed and applied in *Robins*, constitute a permissible regulation under both prongs of the test. First, enforcement will not impose a severe burden on the shopping center owner. Since he has already chosen to open his premises to the general public, requiring him to endure the limited speech activity of others will not violate his right to privacy or "create that psychic harm which is thought to justify the more generous standard of compensation in cases of physical invasion."⁷² Neither is he likely to suffer substantial economic loss as a result of the *Robins* decision. Some loss of business

68. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978); *Buckley v. Valeo*, 424 U.S. 1, 49 & n.55 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

69. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922). See generally Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1191-93, 1229-34 (1967); Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 50-60 (1964).

70. The Court will ordinarily uphold a regulation if the burden it imposes on private property can be characterized as one "borne to secure 'the advantage of living and doing business in a civilized community.'" *Andrns v. Allard*, 100 S. Ct. 318, 328 (1979) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting)) (upholding the Eagle Protection Act, 16 U.S.C. § 668(a) (1974), which prohibits trade in eagle parts). *Accord*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593 (1962).

71. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. at 593; *Mugler v. Kansas*, 123 U.S. 623 (1887). See generally *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 75; Michelman, *supra* note 69, at 1196-201, 1235-45; Sax, *supra* note 69, at 48-50.

72. *Property Rights, supra* note 13, at 1604. See also *Food Employees Local 590 v. Logan*

might result if shoppers are subjected to requests for donations or support by political or religious activists. The decision, however, permits the shopping center owner to adopt reasonable regulations to govern speech-related activities. Consequently, any interference with his business interests should be minimal.⁷³

Second, enforcement will not unjustly appropriate a benefit for the public. In light of the court's finding that shopping centers in California have a significant detrimental impact on central business districts,⁷⁴ an important traditional public forum, the court's application of the free speech and petition clauses should be characterized as preventing a harm.⁷⁵ Since neither of the two conditions required to classify a regulation as a taking has been met, enforcement of the *Robins* injunction will not violate the fifth amendment.

4. *The Shopping Center Owner's First Amendment Rights*

The first amendment prohibits governmental attempts to compel an individual to express an ideological view⁷⁶ or to dedicate his property to the expression of select ideological messages.⁷⁷ However, as is

Valley Plaza, Inc., 391 U.S. at 324; Henely, *Property Rights and First Amendment Rights: Balance and Conflict*, 62 A.B.A.J. 77, 86 (1976).

Admittedly, Justice Rehnquist, writing for the majority in *Kaiser Aetna v. United States*, quoted Justice Brandeis for the proposition that "[a]n essential element of individual property is the legal right to exclude others from enjoying it." 100 S. Ct. 383, 393 n.11 (1979) (quoting *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (dissenting opinion)) (federal government must pay just compensation before it can impose a navigational servitude on a privately owned marina that the owner created by dredging a channel from its pond to the bay). However, in the same passage from which Justice Rehnquist quoted, Justice Brandeis noted that even though the right of exclusion may be absolute for most private property, "if the property is affected with a public interest, the right of exclusion is qualified." 248 U.S. at 250. See note 118 *infra*.

73. There may also be increased costs for janitorial services, security, and liability insurance, but such increases in the cost of doing business are insufficient to prove a taking. Cf. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424 (1952) (upholding statute requiring employers to give employees paid time off in order to vote).

74. 23 Cal. 3d at 907, 592 P.2d at 345, 153 Cal. Rptr. at 858.

75. In effect, the shopping center owner is directed to cease employing his property in a manner that diminishes the effectiveness of other forums available to the general public. See *Property Rights*, *supra* note 13, at 1605-06.

76. *West Virginia State Bd. of Educ. v. Barquette*, 319 U.S. 624 (1943) (school children cannot be required to join in flag salute ceremony).

77. The three leading cases applying this doctrine are *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In *Tornillo*, the Court relied on the free press clause of the first amendment to overturn a Florida statute requiring newspapers to give political candidates "equal space" for replies to criticism. The Court expressed two principal concerns. First, allowing governmental intrusions into the editorial function of newspaper publishers would create a great potential for abuse. 418 U.S. at 256, 258. Second, newspaper editors might respond to the right-of-access statute by omitting controversial news or commentary. *Id.* at 257. In *Wooley*, the Court extended the "no forced speech" principle to invalidate, under the free speech clause, a New Hampshire statute which made it illegal to cover the motto "Live Free or Die" on passenger

generally true of governmental impingements on free speech interests, the standard of review will depend on the nature of the measure. If it is *aimed* at controlling, interfering with, or influencing ideological views, the United States Supreme Court will subject it to strict scrutiny.⁷⁸ The Court will usually invalidate such a measure unless the government demonstrates a substantial countervailing interest that outweighs the encroachment on first amendment rights.⁷⁹ If the measure is content-neutral, however, the Court will subject it to a relaxed standard of review.⁸⁰ In such cases, the government's burden of justification is typically minimal.⁸¹ But if a content-neutral measure is shown to have a *substantial* impact on the exercise of first amendment rights, the Court will apply a "less drastic alternative" standard of review rather than give it minimal scrutiny.⁸²

The California court's application of sections 2 and 3 of article I is *not* directed at the content of the messages which the shopping center owners must allow to be expressed on their property.⁸³ It should there-

vehicle license plates. Finally, in *Abood*, the Court ruled that while a state may require nonunion employees to pay a service fee to a public employee's union, the first amendment protects the nonmembers' right to demand the return of that portion of the fee used to subsidize political activity. The first amendment was violated because the state had selected a private association representing only "one segment of the population," 431 U.S. at 259 n.13 (Powell, J., concurring), and forced unwilling individuals to contribute to the dissemination of ideological messages selected by that association.

78. *See, e.g.*, *First Nat'l Bank v. Bellotti*, 435 U.S. at 786 (overturning statute prohibiting use of corporate funds for purpose of expressing views on tax referenda or issues not materially affecting the property, business, or assets of the corporation). *See generally* L. TRIBE, *supra* note 58 at 580-89.

79. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court, noting that the public airwaves are a limited resource requiring regulation, unanimously upheld the validity of the FCC's "fairness doctrine" requiring broadcasters to afford an opportunity to reply to political editorials and personal attacks they broadcast. Similarly, the Court in *Abood*, although holding that nonunion employees could recover "dues" spent on *political* activities, implicitly found that the state's interest in promoting peaceful labor relations outweighed the nonmembers' first amendment interest in not being compelled to contribute to the union's *collective bargaining* activities. 431 U.S. at 243-44 (Rehnquist, J., dissenting).

80. *See* L. TRIBE, *supra* note 58, at 682-85.

81. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding conviction for public burning of draft card in violation of statute prohibiting destruction of draft cards).

82. *See, e.g.*, *Schneider v. State*, 308 U.S. 147, 162, 164 (1939) (overturning antihandbilling ordinance as applied to door-to-door distribution and to distribution on public streets because there are less onerous methods of preventing littering, frauds, and trespasses).

83. In contrast to *Abood*, the shopping center owner must allow his property to be used to disseminate views of a broadly representative group—indeed, the "group" consists of all the members of the general public seeking access. *Cf.* *Buckley v. Valeo*, 424 U.S. at 85-108 (upholding constitutionality of public financing of presidential election campaigns); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) (upholding law requiring employers to give employees paid time off in order to vote). In contrast to *Tornillo*, the spectre of governmental control is not present. Contrary to the suggestion of one commentator, *Schauer, Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433, 450 (1977), a public right of access to shopping centers would not impose upon the owners an obligation to ensure that a "fair

fore be subject to only a relaxed standard of review. It is not, however, clear whether the intrusion on the owners' free speech interests should be characterized as substantial, since the inhibition involves the expressive use of their *commercial* property only. But even if the intrusion is substantial and therefore subject to a "less drastic alternative" standard of review, it should not be held to violate the first amendment since there is no less intrusive means by which the state can achieve its objective of maximizing the availability of effective forums for political communication.

It thus appears that applying a state constitutional provision to require shopping centers to serve as public forums would not violate the owners' property rights under the fourteenth, fifth, or first amendments. The *Robins* majority was therefore correct in concluding that federal supremacy principles did not preclude it from construing the freedom of speech and right to petition clauses of the California Constitution to impose a public forum burden on shopping centers.

B. State Constitutional Protection

The United States Supreme Court has ruled that the public function doctrine of state action does not apply to the operation of shopping

sampling of community opinion" is offered on their premises. The opposite is true: the owners would not be permitted to exercise editorial control over the ideological content of the expressive activities conducted at the shopping center. The reasonable "time, place, and manner" rules which *Robins* allows the shopping center owners to adopt, 23 Cal. 3d at 910-11, 592 P.2d at 347-48, 153 Cal. Rptr. at 860-61, would have to be administered in an evenhanded manner. See *Buckley v. Valeo*, 424 U.S. at 18; *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (state cannot open a public forum to those protesting labor practices and deny access to everyone else).

Nevertheless, the shopping center owner can argue that *Wooley* should be extended to prohibit any government compulsion that would result in forcing him to tolerate the use of his property to convey messages he finds profoundly objectionable. Arguably, such compulsion would violate his rights of privacy and personhood, see generally L. TRIBE, *supra* note 58, at 886-990, and invade "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Wooley v. Maynard*, 430 U.S. at 715 (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). This argument would have merit in the context of a homeowner's right to exclude unwanted views. See L. TRIBE, *supra* note 58, at 694, 984-85. But since the shopping center owner has opened his property to the general public for business purposes, he should be estopped from arguing that to require him to allow his property to be used as a public forum would impermissibly encroach upon his rights of privacy and personhood. Compare *Marsli v. Alabama*, 326 U.S. 501 (1946) (religious worker has first amendment right to distribute literature on the streets of a privately owned town) and *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973) (first amendment gives labor organizers a right of access to privately owned agricultural work camp), both of which were based on the first amendment, with *Eastex, Inc. v. NLRB*, 437 U.S. at 573 (since employees are already rightfully on the employer's property, his management interests rather than his property rights were primarily implicated in a NLRB ruling that the employees could distribute a union newsletter containing political propaganda on the worksite) and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (upholding NLRB ruling requiring employer to permit union organizers to enter his property to solicit for union membership since no other effective means of communication were available), which were based on the National Labor Relations Act.

centers.⁸⁴ Since the requisite state action is absent, the shopping center owner's right to exclude those seeking to engage in speech-related activities is not restricted by the first and fourteenth amendments. *Robins*, however, held that the California Constitution's speech and petition provisions protect speech-related activities at shopping centers. It follows that either state action is not required to invoke the protection of these provisions, or a less stringent standard of state action is applied.

The *Robins* court's failure to raise the state action issue, coupled with its reference to the breadth of the free speech rights proclaimed in sections 2 and 3 of article I,⁸⁵ might indicate that the court did not construe these sections to contain a state action requirement.⁸⁶ The abandonment of a state action requirement for provisions of California's Declaration of Rights that parallel provisions in the federal Bill of Rights would be a significant innovation. The court has been unwilling to take such an approach in construing the California Constitution's "due process" and "equal protection" guarantees.⁸⁷ It has, however,

84. *Hudgens v. NLRB*, 424 U.S. at 521; *Lloyd Corp. v. Tanner*, 407 U.S. at 570.

85. 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

86. Both sections are cast in affirmative language. Section 2 includes, but is not expressly limited to, a prohibition on governmental restraints on speech: "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." Section 3 contains no express prohibitions: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." To construe such provisions as regulating private conduct would not be entirely without precedent. The thirteenth amendment's prohibition against slavery and involuntary servitude, for instance, applies directly to private action. Also, some recent state constitutional provisions in other jurisdictions have been drafted in the form of mandates rather than prohibitions. They define rights which the government is obliged to secure for the people in that state. See *Countryman*, *supra* note 52, at 472.

87. Even though these provisions contain no explicit state action requirement ("A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws." CAL. CONST. art. I, § 7(a) (amended 1979)) and there is no legislative history indicating that they were meant to apply to purely private conduct, *People v. Brisendine*, 13 Cal. 3d 528, 548, 531 P.2d 1099, 1112, 119 Cal. Rptr. 315, 328 (1975), the court has interpreted them as requiring some form of state action. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 468, 595 P.2d 592, 598, 156 Cal. Rptr. 14, 20 (1979) (filed two months after *Robins*). *Accord*, *Garfinkle v. Superior Court*, 21 Cal. 3d 268, 281-82, 578 P.2d 925, 934, 146 Cal. Rptr. 208, 217 (1978); *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 367, 521 P.2d 441, 450, 113 Cal. Rptr. 449, 458 (1974). One would expect the freedom of speech and right to petition provisions to be treated similarly, since they also have no specific language or legislative history regarding a state action requirement. These provisions were originally set forth as §§ 8 and 9 of article I. The 1849 State Constitutional Convention borrowed these sections verbatim from the New York Constitution and adopted them without debate. See R. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 31, 41-42 (1850); Hunt, *The Genesis of California's First Constitution (1846-49)*, VII JOHN HOPKINS UNIV. STUD. IN HIST. & POL. SCI. 56 (1895). In 1974, the provisions were repealed and re-added as the present §§ 2 and 3. Since the language was preserved, pre-1974 interpretations of §§ 8 and 9 are presumed incorporated in §§ 2 and 3. See *Sarracino v. Superior Court*, 13 Cal. 3d 1, 7-8, 529 P.2d 53, 58, 118 Cal. Rptr. 21, 26 (1974).

expressed uncertainty about the proper role of a state action requirement for these guarantees. On the one hand, the court has stressed that it is not obliged to follow federal "state action" decisions in determining the scope of state constitutional protections.⁸⁸ On the other hand, it has cautiously asserted that "the law of state action will evolve, as it has, by measured steps, with one appropriate decision building upon another,"⁸⁹ and has yet to announce any deviation from the federal state action standard.

Viewed against this background, it is unlikely that the *Robins* court intended to drop the state action requirement for sections 2 and 3 without mention. The majority's use of pre-*Lloyd* California precedents⁹⁰ applying the public function doctrine⁹¹ to create first amendment rights of access to shopping centers might indicate that the test for state action formerly applied under the fourteenth amendment is applicable to sections 2 and 3. However, given the court's silence, it is more probable that it was reserving judgment on the state action issue.

IV

A PROPOSED STATE ACTION REQUIREMENT

A. Separation of Powers Implications

Even though the language in the relevant state constitutional provisions could be interpreted to proscribe private restraints on speech-related activities, these provisions should be construed to bar governmental restraints only. Several considerations support this approach. First, it accords with the traditional view that the Declaration of Rights was designed primarily to protect individuals from local officials.⁹² Second, since the court has construed the California Constitution's "due process" and "equal protection" guarantees to contain an implied state action limitation,⁹³ a similar construction of the speech and petition clauses would allow the court to develop a coherent approach to state action. More importantly, a state action requirement reserves to the legislature—not the courts—the primary responsibility for deter-

88. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d at 469, 595 P.2d at 598-99, 156 Cal. Rptr. at 20-21; *Garfinkle v. Superior Court*, 21 Cal. 3d at 282, 578 P.2d at 934, 146 Cal. Rptr. at 217.

89. *Kruger v. Wells Fargo Bank*, 11 Cal. 3d at 365, 521 P.2d at 449, 113 Cal. Rptr. at 457.

90. See note 23 *supra*.

91. 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) ("In . . . *Lane* and *Schwartz-Torrance*, . . . this court found 'state action' under the Fourteenth Amendment . . .").

92. See *People v. Brisendine*, 13 Cal. 3d 528, 548, 531 P.2d 1099, 1112, 119 Cal. Rptr. 315, 328 (1975).

93. See note 87 and accompanying text *supra*.

mining when further incursions on private autonomy are warranted.⁹⁴

Private autonomy, the right to be free from governmental interference, is not expressly protected by either the federal or state constitutions.⁹⁵ Nevertheless, the California Supreme Court and members of the United States Supreme Court have acknowledged that this value is worth protecting.⁹⁶ Without a state action requirement, every private conflict involving competing private autonomy interests and free speech interests would raise a state constitutional issue. Every individual seeking to use another's private property for communicative purposes would have a claim that could be adjudicated on state constitutional grounds. The courts would therefore have to decide, in each case of this nature, whether the private autonomy interests of the property owner outweighed the free speech interests of the other party.⁹⁷

This potentially great expansion of the role of the courts seems unwarranted. Where the state is significantly involved in action impinging upon an individual's constitutionally protected interests, judi-

94. A state action limitation on the free speech guarantee would not give *constitutional* protection to the property owner's private autonomy interest in denying others free speech access to his property. The legislature would retain the authority to require him to permit such access under appropriate circumstances. *See, e.g.,* ALRB v. Superior Court, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183, *appeal dismissed*, 429 U.S. 802 (1976) (upholding regulation by state administrative agency permitting qualified access to agricultural property by farm labor organizers). *See generally* Choper, *supra* note 34, at 757-58, 762.

95. CAL. CONST. art. I, § 1 could be construed to give the right to personal autonomy constitutional stature: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy." The scope of § 1 is as yet unclear, however. *Compare* People v. Privitera, 23 Cal. 3d 697, 709, 591 P.2d 919, 926, 153 Cal. Rptr. 431, 438 (1979) (no right of access to drugs of unproven efficiency) with City of Santa Barbara v. Adamson, L.A. 31126 (Cal. Sup. Ct. May 15, 1980) (right to live in "an alternative family" with persons not related by blood, marriage, or adoption).

96. In its discussion of the state action requirement in relation to the California Constitution's "equal protection" guarantee, the court in *Gay Law Students* acknowledged that the "prerogatives of 'private autonomy' . . . , may possibly attach to a purely private business enterprise." 24 Cal. 3d at 470, 595 P.2d at 599, 156 Cal. Rptr. at 21. Similarly, Justice Harlan of the United States Supreme Court has noted that the preservation of personal autonomy is a value served by the fourteenth amendment's state action limitation:

Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash between competing constitutional claims of a higher order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, and even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction.

Peterson v. City of Greenville, 373 U.S. 244, 249-590 (1963) (concurring opinion). *Accord*, Jackson v. Metropolitan Edison Co., 419 U.S. 241, 345, 372 (1974) (Marshall, J., dissenting).

97. This adjudication would, of course, have to be consistent with the federally guaranteed rights of the parties. *See generally* notes 52-83 and accompanying text *supra*.

cial intervention is required. The government's only involvement in the conflict between a private property owner and a person seeking free speech access, however, is to have implicitly preferred, through the state's system of allocating property rights, the private autonomy interest of the first individual to the free speech interests of the second. If the private autonomy interest is substantial, the legislature's decision to prefer it is not such a serious abuse of the legislative process as to warrant judicial intervention.⁹⁸ A state action requirement would restrict judicial authority to interfere with this legislative function, thereby advancing an important separation of powers policy.⁹⁹

B. A. Shifting Standard

Since the strengths of the competing constitutional and autonomy interests will vary considerably in different contexts, a shifting standard of state action merits serious consideration.¹⁰⁰ The court should em-

98. *But see* *Reitman v. Mulkey*, 387 U.S. 369 (1967) (overturning a state constitutional amendment authorizing private racial discrimination in housing on the ground that it encouraged discrimination and therefore constituted state action in contravention of the fourteenth amendment's equal protection clause).

It should be noted that the courts retain considerable authority to redraw accommodations between conflicting personal and constitutional interests under their inherent judicial power to develop the common law. But unlike an accommodation set as a result of a state constitutional adjudication, common law principles can be modified by ordinary statutes. It is much more difficult to amend the California Constitution. *See* CAL. CONST. art. XVIII. Hence, the court should, as a general policy, exercise more caution and restraint in using the California Constitution to redefine the balance between competing personal and constitutional interests than it does in developing the common law. *See generally* Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247 (1967).

99. Separation of powers is mandated by the California Constitution: "The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." CAL. CONST. art. III, § 3. "The Legislative power of this State is vested in the California Legislature . . . , but the people reserve to themselves the powers of initiative and referendum." CAL. CONST. art. IV, § 1.

While a state action requirement for the California Constitution's speech and petition provisions would limit the court's power to protect free speech interests, it would not "straightjacket" the court. As the court's application of the public function doctrine of state action in *Diamond I* attests, the state action concept can be flexible and adaptable; in principle, it could be expanded to encompass every private transaction. *See* note 33 *supra*. To go so far would of course vitiate the utility of the state action requirement. *See* Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221; Haber, *Notes on the Limits of Shelley v. Kramer*, 18 RUTGERS L. REV. 811 (1964); Henkin, *Shelley v. Kramer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 SO. CAL. L. REV. 208 (1957). Nevertheless, a prudent court could apply the state action concept to expand its constitutional jurisdiction only where the policies favoring judicial intervention are strongest. Constitutional jurisdiction should, however, be declined in cases where the separation of powers principle is cogent.

100. For example, to require a small businessman to abide by state constitutional standards of "equal protection" in hiring and firing personnel might seriously impinge upon his freedom to choose those with whom he wishes to associate. *See* *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d at 470, 595 P.2d at 599, 156 Cal. Rptr. at 21. It might also expose him to the economic costs associated with the threat of meritless employment discrimination litigation. The

ploy a more stringent standard of state action where the private autonomy interests are substantial. In such instances, the separation of powers principle dictates that the court refrain from supplanting the legislature's determination of the proper balance between the competing constitutional and autonomy interests with its own view. When the balance between the conflicting interests decidedly favors the protection of constitutional interests, however, the court should apply a less stringent standard of state action.¹⁰¹

A "shifting standard" approach to the "state encouragement" theory of state action¹⁰² has previously received judicial attention. Several United States Supreme Court Justices have argued that government should be required to make every effort *not* to lend assistance to proponents of racial discrimination.¹⁰³ Judicial enforcement of such a requirement would entail applying a more liberal standard of state action when "equal protection" claims are presented. Although the Court has never officially adopted the policy,¹⁰⁴ numerous federal decisions have observed that the federal courts do in fact apply a more liberal standard to cases presenting "equal protection" claims than to cases presenting "due process" claims.¹⁰⁵

It has been argued that the standard of state action should not turn

losses in terms of private autonomy and efficiency would be similarly great if "due process" guarantees were extended to purely private business transactions. *Cf.* *Garfinkle v. Superior Court*, 21 Cal. 3d at 277, 578 P.2d at 931, 146 Cal. Rptr. at 214 (No state action in nonjudicial foreclosure procedure pursuant to powers of sale clause in deeds of trust); *Kruger v. Wells Fargo Bank*, 11 Cal. 3d at 366, 521 P.2d at 449, 113 Cal. Rptr. at 457 (No state action in bank's procedure of "setting-off" charge account debts against depositor's checking account).

The intrusion on the businessman's private autonomy interests is not so great where he is required to permit limited speech activity on property he has opened to the general public for business purposes. So long as these activities are conducted in such a way as not to interfere with normal business operations, the intrusion on his private autonomy interests will be slight.

101. The merits of using a "shifting standard" approach to state action under a state constitution are even greater than in the fourteenth amendment state action context. Since it is extremely difficult to amend the United States Constitution, expanding federal constitutional rights seriously intrudes upon the legislative domain. Since it is much easier to amend the California Constitution, the potential affront to the legislative process is considerably less for judicial expansions of *state constitutional* guarantees.

102. *See* note 33 *supra*.

103. *See* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 374 (1974) (Marshall, J., dissenting); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring and dissenting).

104. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 373-74 (Marshall, J., dissenting).

105. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d at 473 n.9, 595 P.2d at 601-02 n.9, 156 Cal. Rptr. at 23-24 n.9 (citing *Weise v. Syracuse Univ.*, 522 F.2d 397, 403-08 (2d Cir. 1975), and *R.I. Chapter, Assoc. Gen. Contractors v. Kreps*, 450 F. Supp. 338, 350 n.6 (D.R.I. 1978)).

In *Gay Law Students*, the California Supreme Court spoke approvingly of this practice of the federal courts. 24 Cal. 3d at 473 n.9, 595 P.2d at 602 n.9, 156 Cal. Rptr. at 24 n.9. It did not, however, expressly adopt a "shifting standard" approach to state action analysis in relation to the California Constitution's civil liberties guarantees.

on the importance of the interests at stake, because the constitutional interests do not become relevant to the inquiry until the requisite state action has been established.¹⁰⁶ This argument simply begs the question. Since government involvement can be found in almost every disputed activity,¹⁰⁷ the proper task is to determine whether that involvement is "significant" enough to invoke constitutional safeguards.¹⁰⁸ "Significance" is not a neutral concept. It is therefore appropriate to consider the relative importance of the competing constitutional and private autonomy interests before determining the significance of the state's involvement.

A shifting standard approach should be applied to the public function doctrine of state action¹⁰⁹ as well. The United States Supreme Court has, by contrast, recently taken a uniformly restrictive approach to this doctrine. Only the delegation of a function which traditionally has been *exclusively* reserved to the state will convert a facially private activity into fourteenth amendment state action.¹¹⁰

The California Supreme Court should abandon the exclusivity test in developing a theory of public function state action for the California Constitution.¹¹¹ National uniformity, the primary rationale for the test,¹¹² is outweighed by policies favoring diversity in our federal system.¹¹³ Whether a private party's performance of a function traditionally performed by the state should be deemed state action under the California Constitution should depend in part upon the balance between the competing state constitutional and private autonomy interests. Where the constitutional interests decidedly outweigh the autonomy interests of the party performing the public function, a liberal standard of state action should be applied.

106. See Note, *supra* note 32, at 693 n.59.

107. See note 33 *supra*.

108. See *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967).

109. See note 34 and accompanying text *supra*.

110. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

111. The California Supreme Court has incorporated the exclusivity test in applying the public function doctrine to the California Constitution's "due process" clause. *Garfinkle v. Superior Court*, 21 Cal. 3d at 280-82, 578 P.2d at 933-34, 146 Cal. Rptr. at 216-17. Although this approach should be abandoned, the court might nevertheless continue to apply a restrictive standard of public function state action to cases presenting "due process" claims since the private autonomy interests involved in structuring commercial transactions are typically substantial. See note 100 *supra*.

112. The *Flagg Bros.* Court observed that many functions have traditionally been performed by governments and that traditions may vary from one community to another. The exclusivity test therefore preserves uniformity in the application of federally protected liberties. 436 U.S. at 162-63.

113. See note 64 and accompanying text *supra*.

C. Application to Robins

Robins was an appropriate case for applying a liberal standard of public function state action. Pruneyard Shopping Center performed a traditional public function by providing the functional equivalent of a "town center"¹¹⁴ or "community business block."¹¹⁵ In addition, the public's free speech interests in gaining access were substantial,¹¹⁶ and the owner's private autonomy interest in excluding *all* free speech activity was especially weak.

Exclusionary property rights ordinarily serve two important private autonomy interests: privacy and enjoyment. Where the owner has not opened his property to the public, his discretionary right to exclude unfavored parties serves substantial privacy and enjoyment interests.¹¹⁷ The operation of residential property should therefore clearly not be deemed state action for purposes of determining the scope of free speech access rights. Since the shopping center owner has opened his property to the general public for commercial purposes, however, his expectation of privacy has been substantially diminished.¹¹⁸ Moreover, as long as he may adopt reasonable regulations to ensure that the speech does not interfere with his business operations, the burden on his enjoyment interest will be insubstantial.¹¹⁹

This rationale, suggesting that the businessman who has opened his property to the general public has no substantial private autonomy interest in totally excluding free speech activity, applies to the owner of

114. *Diamond I*, 3 Cal. 3d at 660, 477 P.2d at 737, 91 Cal. Rptr. at 505.

115. *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. at 319.

116. Like the traditional town centers they have displaced, shopping centers are especially well suited to serve as effective forums of communication for citizen groups lacking the financial resources necessary to effectively utilize alternative forums such as the popular media. Moreover, access to effective free speech forums is especially important in states like California where the people enjoy the right to initiate change through initiative, referendum, and recall. CAL. CONST. art. II, §§ 8, 9 & 13-15. *See also* note 20 *supra*.

117. *See* notes 72-73 and accompanying text *supra*.

118. *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. at 324. *Cf.* *Eastex, Inc. v. NLRB*, 437 U.S. 556, 573 (1978) (since employees are already rightfully on the employer's premises, only his management interests and not property interests are implicated in a regulation protecting the employees' right to engage in limited distribution of literature on the worksite). Under the common law, the more a business enterprise became "affected with a public interest," the more it was required to submit to public control for the common good. *Munn v. Illinois*, 94 U.S. 113, 126 (1876). For a more contemporary application of this principle, see *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d at 476, 595 P.2d at 603, 156 Cal. Rptr. at 25. While there may be instances when the owner would be deeply offended by the political or social message an advocate might seek to convey at the shopping center, a businessman opening his commercial premises to the general public must be prepared to tolerate people he finds personally offensive. *In re Cox*, 3 Cal. 3d 205, 224-25, 474 P.2d 992, 1005, 90 Cal. Rptr. 24, 37 (1974).

119. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d at 911, 592 P.2d at 335-36, 153 Cal. Rptr. at 860-61.

a single retail store as well as to the owner of a large shopping center.¹²⁰ Balanced against the store owner's typically insubstantial autonomy interests is the public's interest in maximizing the availability of effective free speech forums. Since the balance between these competing interests decidedly favors the constitutional interest, a liberal standard of state action should be applied in the context of free speech access to single retail stores as well.

The state has traditionally provided streets and sidewalks for access to business establishments. Hence, there is a basis for ruling that a businessman who provides privately owned areas for ingress and egress from his store has undertaken a public function. Since a liberal standard of state action is appropriate in this context, the action of a businessman in performing this public function should be deemed state action for purposes of the applicability of the California Constitution's speech and petition clauses. The state cannot place unreasonable restrictions on the free speech use of state-owned ways of access to business establishments open to the general public.¹²¹ The California Constitution's freedom of speech and right to petition guarantees should be construed to afford similar protection when such access ways are privately owned.

CONCLUSION

The *Robins* court's application of the free speech provisions of the California Constitution promotes the public's interest in gaining greater access to effective channels of communication without imposing an onerous or unfair burden on privately owned shopping centers. It therefore violates neither the "due process" nor "taking" clauses of the fifth and fourteenth amendments. The shopping center owner's first

120. *Lloyd Corp. v. Tanner*, 407 U.S. at 565-66.

In re Lane, a pre-*Lloyd* California Supreme Court decision, employed this line of reasoning in holding that there was a first amendment right to engage in speech-related activities on a privately owned sidewalk leading to a *single* retail store. 71 Cal. 2d 872, 876, 457 P.2d 561, 565, 79 Cal. Rptr. 729, 733 (1969). The *Robins* court reserved judgment on the applicability of §§ 2 and 3 of article I to single retail stores: "It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment." 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860 (quoting *Diamond II*, 11 Cal. 3d at 345, 521 P.2d at 470, 113 Cal. Rptr. at 478 (Mosk, J., dissenting)). Nevertheless, it is noteworthy that the *Robins* majority relied on *Lane*, observing that it had "extended the assurance of protected speech to the privately owned sidewalk of a grocery store." 23 Cal. 3d at 909, 592 P.2d at 346, 153 Cal. Rptr. at 859.

While differences in the size of business establishments may not create intrinsic differences in the owner's privacy and enjoyment interests in excluding speech-related activities, size may be relevant to the reasonableness of regulations designed to prevent interference with business operations. If a commercial outlet's access way is especially small, the proprietor may have to ban *all* free speech activity in order to avoid a substantial burden on his business.

121. See note 38 *supra*.

amendment rights are not violated either because there is no attempt to exercise selective control over the content of expressive activities.

The *Robins* court did not refer to the state action doctrine in its discussion of the California Constitution's freedom of speech and right to petition guarantees. It therefore appears to have postponed deciding whether these guarantees should be construed to imply such a limitation. A state action requirement should be retained in order to reserve to the legislature the primary responsibility for accommodating competing constitutional and private autonomy interests.

The court should nevertheless apply a liberal standard of state action where the constitutional interests decidedly outweigh the private autonomy interests. The public function doctrine of state action in California should accordingly be extended in the free speech context to include privately owned areas open to the general public for ingress to and egress from places of business. These areas are ideally suited for speech-related activities, and the burden imposed on the owners' private autonomy interests would be slight as long as these activities are conducted in a manner that does not interfere with regular business operations.

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