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Freedom of Speech: The Florida Implications of *PruneYard Shopping Center v. Robins*

STEVEN D. PIDGEON*

The expansion of individual liberties by courts interpreting state constitutions more broadly than the Federal Constitution has been a significant trend in recent years. In the area of free speech, the Supreme Court of California recently held that the California Constitution protects speech-related activities in shopping malls, subject to reasonable regulation. The United States Supreme Court found adequate state grounds to uphold that decision in PruneYard Shopping Center v. Robins, although the Federal Constitution does not extend so far. The author examines the series of cases culminating in PruneYard and discusses its relevance to Florida law.

I. INTRODUCTION

Shopping malls¹ have increasingly formed the backdrop for litigation over the competing interests of private property ownership and the guarantees of free speech and religion.² According to traditional notions of state action, the first amendment constrains governmental rather than private abridgment of these guarantees.³ Mall owners have argued, then, that they have a right to prohibit or restrict the exercise of free speech and religion in and about the premises of malls.⁴ After a great deal of confusion had arisen in

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1. For an extensive description of a modern shopping mall, see *Lloyd Corp. v. Tanner*, 407 U.S. 551, 553-55 (1972).

2. The Court has held freedom of speech to include such activities as picketing, *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940), handbilling, *Talley v. California*, 362 U.S. 60 (1960), and distributing religious materials, *Marsh v. Alabama*, 326 U.S. 501 (1946).

Although the Supreme Court has not considered religious freedom in the context of malls, one may analogize from the free speech cases discussed throughout this article. The International Society for Krishna Consciousness has been active in litigation in a number of related contexts. For a summary of the major Krishna cases, see *Edwards v. Maryland State Fair and Agric. Soc'y*, 476 F. Supp. 153 (D. Md. 1979).

3. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114 (1973).

4. *E.g.*, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

this area,⁵ the Supreme Court in *Hudgens v. NLRB*⁶ squarely upheld this argument.⁷

Recently, however, the Supreme Court of California held that the California Constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."⁸ The Supreme Court of the United States in *PruneYard Shopping Center v. Robins*⁹ affirmed this decision, holding that a state could adopt constitutional provisions more protective of individual liberties than the Federal Constitution.¹⁰

This comment will discuss the decisions leading up to and including *Hudgens*,¹¹ as well as the recent *PruneYard* decision.¹² It will conclude with a discussion of the probable effect of these cases on Florida law.¹³ Specifically examined is whether Florida will (or should) adopt the approach of the Supreme Court of California and read the free speech and religion clauses of the Florida Constitution¹⁴ more broadly than the United States Supreme Court has interpreted the Federal Constitution.

II. THE FIRST AMENDMENT CASES

The precursor to the "mall cases"¹⁵ was *Marsh v. Alabama*.¹⁶ In *Marsh*, a Jehovah's Witness was arrested on trespass charges for distributing religious literature on the sidewalk of a company-owned town. Because the town possessed "all the characteristics of any other American town,"¹⁷ the Court held that it could not deny

5. In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Supreme Court commented: "[T]he history of this litigation has been a history of shifting positions on the part of the litigants, the Board, and the Court of Appeals. It has been a history, in short, of considerable confusion, engendered at least in part by decisions of this Court." *Id.* at 512.

6. 424 U.S. 507 (1976).

7. *Id.* at 520-21.

8. *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), *aff'd*, 100 S. Ct. 2035 (1980).

9. 100 S. Ct. 2035 (1980).

10. *Id.* at 2040. For complete discussion of the *PruneYard* decision, see notes 53-71 and accompanying text *infra*.

11. See notes 15-52 and accompanying text *infra*.

12. See notes 53-71 and accompanying text *infra*.

13. See notes 72-142 and accompanying text *infra*.

14. FLA. CONST. art. I, § 4 (freedom of speech); *id.* § 3 (freedom of religion); see notes 74-82 and accompanying text *infra*.

15. The term "mall cases" refers generally to the major cases involving shopping centers and malls discussed throughout this article.

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

17. *Id.* at 502. This "public function" doctrine is one test under the "state action" doctrine. "Under the public function doctrine, the state may regulate the use of private prop-

to individuals the first amendment freedoms that inhere in public property.¹⁸ Relying on those cases holding that publicly owned streets, sidewalks, and parks historically have been so closely associated with the exercise of first amendment rights that access to them for the purpose of exercising such rights cannot be denied,¹⁹ the Court reversed the conviction. Importantly, Justice Black, who authored the opinion, noted that as between the rights of property owners and the rights of "people to enjoy freedom of press and religion, . . . the latter occupy a *preferred position*."²⁰

The Court decided its first "mall case" on the authority of *Marsh*. In *Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,²¹ the owner of a mall sought an injunction to restrain a union from picketing a nonunion supermarket located within the mall. The Supreme Court of Pennsylvania affirmed the issuance of an injunction by the Court of Common Pleas.²² The United States Supreme Court framed the issue before it in this way: "[W]hether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated."²³ Finding that "[t]he shopping center here [was] clearly the functional equivalent of the business district . . . involved in *Marsh*,"²⁴ the Supreme Court reversed the issuance of the injunction, holding that

[b]ecause the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," *Marsh v. Alabama*, 326 U.S. at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public

erty when the property is the type usually owned and operated by the government for the benefit of the public." Note, *Shopping Center Picketing: The Impact of Hudgens v. National Labor Relations Board*, 45 GEO. WASH. L. REV. 812, 814 n.21 (1977). The Court also implied the presence of state action in the town's use of state trespass laws to convict the petitioner. 326 U.S. at 509. For a more complete discussion of the state action requirement, see Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433 (1977); Note, *Robins v. PruneYard Shopping Center: Federalism and State Protection of Free Speech*, 10 GOLDEN GATE L. REV. 805 (1980).

18. The solicitation of donations and distribution of religious literature are first amendment rights. *Murdock v. Pennsylvania*, 319 U.S. 105 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

19. *E.g.*, *Hague v. CIO*, 307 U.S. 496 (1939); *Lovell v. Griffin*, 303 U.S. 442 (1938).

20. 326 U.S. at 509 (emphasis added).

21. 391 U.S. 308 (1968), *overruled by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

22. 391 U.S. at 312-13.

23. *Id.* at 309.

24. *Id.* at 318.

wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally *consonant with the use to which the property is actually put*.²⁵

The Court added, however, that the mall owners were not "without power to make reasonable regulations governing the exercise of First Amendment rights on their property."²⁶ The implication was that, notwithstanding the protection afforded first amendment activities relating to the mall's operation, mall owners could impose reasonable time, place, and manner restrictions on them.²⁷

Justice Black, the author of *Marsh*, dissented vigorously.²⁸ The Court, he argued, had gone too far. The *Logan Valley* case did not implicate the "preferred position" he had alluded to in *Marsh*, because the shopping center was not the functional equivalent of a state-created municipality.

The question is, Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, *i.e.*, "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated."²⁹

Noting that property rights, as well as first amendment rights, are of constitutional proportion,³⁰ Black concluded that the majority's holding amounted to a taking of the mall owner's property without due process of law.³¹

25. *Id.* at 319-20 (emphasis added). The Court specifically omitted the issue whether the first amendment protected picketing unrelated to the use of the mall. *Id.* at 320 n.9. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), discussed at notes 32-40 and accompanying text *infra*, answered this question in the negative.

26. 391 U.S. at 320.

27. *Id.* See generally *Cameron v. Johnson*, 390 U.S. 611 (1968); *Cox v. New Hampshire*, 312 U.S. 569 (1941). The result reached by the Supreme Court in *Logan Valley* is almost precisely that reached by the Supreme Court of California in *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 100 S. Ct. 2035 (1980); see notes 53-71 and accompanying text *infra*. The only distinction is that the former interpreted the Federal Constitution, and the latter applied the California Constitution. Of course, the Supreme Court of the United States subsequently retreated from its position in *Logan Valley* in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and expressly overruled it in *Hudgens v. NLRB*, 424 U.S. 507 (1976); see notes 41-52 and accompanying text *infra*.

28. 391 U.S. at 327-37.

29. *Id.* at 332 (quoting *Marsh v. Alabama*, 326 U.S. at 502).

30. U.S. CONST. amends. V, XIV. See also Henely, *Property Rights and First Amendment Rights: Balance and Conflict*, 62 A.B.A.J. 77, 77 (1976).

31. 391 U.S. at 330. Justice Black argued that the Court, acting as an agent for the government, had taken the mall owner's property and given it to the picketers for their use. *Id.*

Only four years after *Logan Valley*, the Supreme Court handed down *Lloyd Corp. v. Tanner*.³² The question considered in *Lloyd* was whether a privately owned shopping center could prohibit the distribution of handbills on its property when the handbilling was unrelated to the shopping center's operations.³³ This issue arose when a group of draft resisters sought declaratory and injunctive relief after mall owners had threatened them with arrest unless they stopped distributing handbills within the mall complex. Since its inception, the mall owners had strictly enforced a policy prohibiting all handbilling.³⁴

In reversing the lower court's grant of injunctive relief, the Supreme Court distinguished both *Marsh* and *Logan Valley*, limiting each to its facts. *Marsh*, unlike *Lloyd*, "involved the assumption by a private enterprise of *all* of the attributes of a state-created municipality."³⁵ *Logan Valley*, according to the Court, applied only in "a context where the First Amendment activity was related to the shopping center's operations."³⁶ "The handbilling . . . in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used."³⁷ Further, other forums were available to the protestors.³⁸ Thus, the Court held that the lower court had improperly granted the injunction.³⁹

Although the Court in *Lloyd* purported to distinguish *Logan Valley*,⁴⁰ the Court announced in *Hudgens v. NLRB*⁴¹ that *Lloyd* had overruled *Logan Valley* by implication.⁴² Hudgens owned an enclosed mall that contained sixty retail stores. He had leased one

32. 407 U.S. 551 (1972).

33. *Id.* at 552.

34. The mall owner had selectively allowed certain charities to solicit donations within the mall, although this point was not an issue on appeal. *Id.* at 555.

35. *Id.* at 569 (emphasis added). Here, the Court appeared to return to the analysis of Justice Black in his opinion in *Marsh* and his dissent in *Logan Valley*. See notes 28-31 and accompanying text *supra*. See also Comment, *Lloyd v. Tanner: The Demise of Logan Valley and the Disguise of Marsh*, 61 Geo. L.J. 1187 (1973).

36. 407 U.S. at 562.

37. *Id.* at 564.

38. The Court distinguished *Logan Valley* on this ground as well, stating that the "[u]nion pickets in that case would have been deprived of all reasonable opportunity to convey their message to patrons of the . . . store had they been denied access to the shopping center." *Id.* at 566.

39. *Id.* at 570.

40. Some commentators and courts argued before *Hudgens* that *Lloyd* had, in fact, overruled *Logan Valley*. E.g., *Corn v. State*, 332 So. 2d 4, 10 n.2 (Fla. 1976) (Hatchett, J., dissenting); Comment, *supra* note 35.

41. 424 U.S. 507 (1976).

42. *Id.* at 518.

of them to a shoe company, which also owned a warehouse in another part of town.⁴³ As a result of a labor dispute, the warehouse employees picketed the retail store located in the mall. After Hudgens threatened them with arrest if they did not leave, the picketers filed an unfair labor charge against him.⁴⁴ Basing its decision on *Logan Valley*, the NLRB issued a cease-and-desist order against Hudgens.⁴⁵ The Fifth Circuit Court of Appeals affirmed, and the Supreme Court granted certiorari to determine whether constitutional law or federal labor law, or both, governed the right of picketers to picket on private property.⁴⁶

After reviewing *Marsh*, *Logan Valley*, and *Lloyd*, the Supreme Court concluded that the union did not have a first amendment right to picket at the mall,⁴⁷ and remanded to the NLRB for determination of the rights and liabilities of the parties under the National Labor Relations Act.⁴⁸ Relying heavily on the doctrine that the first amendment restricts only governmental bodies, and not private property owners,⁴⁹ the Court found that these privileges did not apply in the context of a mall since it does not possess "all of the attributes of a state-created municipality."⁵⁰ The Court concluded "that the rationale of *Logan Valley* [had] not survive[d] the Court's decision in the *Lloyd* case."⁵¹

43. The shoe company owned nine retail stores in the area, all of which the warehouse employees picketed. *Id.* at 509.

44. The picketers filed the charge under section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976), which provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

45. The Board issued the cease-and-desist order under section 8(a) of the Act, 29 U.S.C. § 158(a)(1) (1976), which provides: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title"

46. 424 U.S. at 510-12.

47. *Id.* at 520-21.

48. *Id.* at 523.

49. *Id.* at 513.

50. *Id.* at 519 (quoting *Lloyd Corp. v. Tanner*, 407 U.S. at 569). Note that the Court once again returned to the analysis of Mr. Justice Black. See notes 28-31 and accompanying text *supra*. For a list of "the attributes of a state-created municipality," see *Marsh v. Alabama*, 326 U.S. 502, 503 (1946).

51. 424 U.S. at 518. Justice Marshall, the author of the *Logan Valley* opinion, dissented vehemently, arguing that the holding of *Logan Valley*, which governed picketing related to use of the mall, remained viable after *Lloyd*, which supposedly struck down picketing unre-

With the *Hudgens* opinion, the Court had come full circle since its decision in *Logan Valley*. In doing so, the Court clearly defined the right of private property ownership vis-à-vis the first amendment guarantees in the context of malls: Since malls are not public property, nor do they possess all the attributes of a state-created municipality, mall owners may prohibit or restrict the exercise of first amendment rights within the boundaries of mall property.

With federal law clearly established, the Court had set the stage for *PruneYard Shopping Center v. Robins*.⁵²

III. PRUNEYARD SHOPPING CENTER V. ROBINS

In *PruneYard Shopping Center v. Robins*,⁵³ the Supreme Court faced the issues of

whether *state constitutional provisions*, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments.⁵⁴

The appellees in *PruneYard* were high school students who were soliciting support for their opposition to a United Nations resolution against "Zionism." They set up a booth in the courtyard of a shopping center, distributed pamphlets, and asked passers-by to sign various petitions.⁵⁵ Informed that their activities violated the shopping center's regulations,⁵⁶ the students complied with a request to leave, but later filed suit for injunctive relief.⁵⁷ The Supreme Court of California reversed the lower court's denial of relief, holding that the California Constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."⁵⁸

lated to the mall's use. *Id.* at 535-36. Additionally, he pointed out that the majority had departed "from traditional modes of adjudication" by bypassing the statutory question and "reaching out to overrule a constitutionally based decision." *Id.* at 526.

52. 100 S. Ct. 2035.

53. *Id.*

54. *Id.* at 2038 (emphasis added).

55. *Id.*

56. The shopping center had a policy of not permitting "any visitor or tenant to engage in any publicly expressive activity . . . not directly related to [the center's] commercial purposes." *Id.*

57. *Id.*

58. *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153

The Supreme Court of the United States affirmed.⁵⁹ The Court rejected the mall owner's reliance on *Lloyd Corp. v. Tanner*,⁶⁰ distinguishing it as a case decided under the Federal Constitution. *Lloyd's* reasoning, then, did not "*ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution."⁶¹ The Court added: "It is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision."⁶²

The mall owner then contended that the right to exclude others underlies the fifth amendment guarantee against the taking

Cal. Rptr. 854, 860 (1979).

In reaching its decision, the Supreme Court of California expressly overruled *Diamond v. Bland*, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974) (hereinafter referred to as *Diamond II*) (overruling *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970) (hereinafter referred to as *Diamond I*)). On the authority of *Logan Valley*, the California Supreme Court in *Diamond I* had held that a mall owner's general prohibition against nonbusiness activity could not prohibit peaceful and orderly first amendment activities. 3 Cal. 3d at 665-66, 477 P.2d at 741, 91 Cal. Rptr. at 509. In *Diamond II*, the California Supreme Court reversed its position on the basis of *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). Significantly, the *Diamond II* court overlooked the liberty of speech provision of the California Constitution, CAL. CONST. art. 1, § 2. A footnote suggested that federal and state supremacy clauses barred such an inquiry and that *Lloyd* was controlling in all respects. 11 Cal. 3d at 335 n.4, 521 P.2d at 463 n.4, 113 Cal. Rptr. at 471 n.4. See U.S. CONST. art. VI, cl. 2; CAL. CONST. art. 1, § 3.

In *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), the Supreme Court of California concluded that *Lloyd* did not bar its holding that the California Constitution creates broader speech rights in relation to private property than does the Federal Constitution. *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860. According to the court, *Lloyd* "merely defined federal free speech rights," *id.*, at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856 (emphasis added). This presumably frees the Supreme Court of California to balance independently speech and property rights created by the California Constitution. Additionally, the court pointed out that California long had subjected private property to overriding public interests. In this connection, the freedoms of speech and religion occupied a "preferred position" in California law, even in the context of private property. *Id.* at 905-06, 592 P.2d at 344, 153 Cal. Rptr. at 857.

For an additional discussion of this line of California cases, see 2 WHITTIER L. REV. 423 (1980).

59. *PruneYard Shopping Center v. Robins*, 100 S. Ct. 2035 (1980).

60. 407 U.S. 551 (1972).

61. 100 S. Ct. at 2040; cf. *Cooper v. California*, 386 U.S. 58, 62 (1967) (state constitutions may impose higher standards than Federal Constitution in search and seizure area if they choose to do so).

62. 100 S. Ct. at 2040-41 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning regulations were valid exercise of police power because of public interest in segregating incompatible land uses)).

of property without just compensation.⁶³ Although the Court agreed that "one of the essential sticks in the bundle of property rights is the right to exclude others,"⁶⁴ it pointed out that not every injury to property by the government is a taking in the constitutional sense.⁶⁵ Since the record failed to reveal that the petitioners' activity "unreasonably impair[ed] the value or use of [the] property as a shopping center,"⁶⁶ no taking had occurred. The Court also noted that the Supreme Court of California had expressly approved the use of reasonable time, place, and manner restrictions,⁶⁷ which could minimize interference with commercial activity.

Finally, the Court rejected the argument that the owner had a first amendment right not to be forced by the state to use his property as a forum for the speech of others.⁶⁸ The owner had, by choice, made the shopping center available to the public. It was open to members of the public to come and go as they pleased, and, from a practical standpoint, there was little danger that the people exercising their right to free speech would be identified with the owner. Additionally, he could expressly disavow any connection with them simply by posting signs.⁶⁹

63. 100 S. Ct. at 2041.

64. *Id.* (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)).

65. 100 S. Ct. at 2041 (citing *Armstrong v. United States*, 364 U.S. 40, 48 (1960)); see *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-10 (1922).

66. 100 S. Ct. at 2042.

67. *Id.* For a discussion of time, place, and manner restrictions, see *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

68. 100 S. Ct. at 2044.

69. *Id.* The Court distinguished the three cases relied on by the mall owner, *Wooley v. Maynard*, 430 U.S. 705 (1977), *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Wooley*, the Court held that the State of New Hampshire could not require that license plates on noncommercial motor vehicles bear the motto "Live Free or Die." Since California did not compel the mall owner to display any specific message on his private property, the Court found *Wooley* distinguishable. 100 S. Ct. at 2044.

Tornillo struck down a Florida statute that required a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. The Court found that the statute contravened the principle that a state cannot dictate what a newspaper may print, and intruded too heavily on the function of editors. 418 U.S. at 256-57. The Court found no such intrusion in *PruneYard*. The decision of the Supreme Court of California intruded upon neither the mall owners' property nor their first amendment rights. 100 S. Ct. at 2044.

In *Barnette*, the Court struck down a resolution of the West Virginia State Board of Education requiring all children to salute and pledge allegiance to the American flag. The Court in *PruneYard* found *Barnette* inapposite. *Barnette*, according to the Court, involved the compelled recitation of a message containing an affirmation of belief because it "require[d] the individual to communicate by word and sign his

PruneYard adds a new dimension to the tension between private property ownership and the freedoms of speech. According to the decision, each state may interpret its constitutional provisions consistently with or more broadly than corresponding federal provisions. Thus, a state may elevate its freedom of speech to a "preferred position" even when in conflict with rights of private property, subject only to due process limitations.⁷⁰ To date, Florida has not done so. The next section considers whether the courts of Florida will (or should) adopt this position.⁷¹

III. FLORIDA LAW

A. Textual Argument

The texts of both the Florida and Federal Constitutions provide the starting point for determining whether Florida will afford greater protection than the federal government for the free exercise of speech. Although evidence of language broader than that of the first amendment would not be conclusive on the Florida courts,⁷² such language should be persuasive.

The Federal Constitution's freedom of speech clause states that "Congress shall make no law . . . abridging the freedom of speech"⁷³ Florida's constitution provides, in part: "Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."⁷⁴

acceptance" of government dictated political ideas, whether or not he subscribed to them. 319 U.S. at 633, 63 S. Ct. at 1183. Appellants [mall owners] are not similarly being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views of the speakers or handbillers.

100 S. Ct. at 2044 (first brackets added by the Court in *PruneYard*; second brackets added by the author).

70. By permitting mall owners to impose reasonable time, place, and manner restrictions, the Supreme Court of California recognized that too great an intrusion on the property rights of the owners would constitute a "taking" without due process of law. The Supreme Court of the United States relied on this limitation in upholding the California court's decision. 100 S. Ct. at 2042.

71. See notes 72-142 and accompanying text *infra*.

72. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *Project Report: Toward an Activist Role for State Bill Of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

73. U.S. CONST. amend. I, cl. 2.

74. FLA. CONST. art. I, § 4. The remainder of section 4 provides: "In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be ac-

Two distinctions are readily apparent from a comparison of these two provisions. First, the Federal Constitution constrains legislative action only.⁷⁵ On the other hand, the Florida provision prohibits all laws abrogating the free exercise of speech, including, presumably, judicially created ones.⁷⁶ Secondly, and more importantly, Florida's constitution protects against restraint or abridgment; the Federal Constitution protects against abridgment only. *Abridgment* suggests contraction or condensation and contemplates a reduction in the scope of the right affected.⁷⁷ *Restraint* has broader meaning. In addition to incorporating the definition of abridgment, restraint comprises acts that hinder or obstruct the full enjoyment of the right granted.⁷⁸ To constitute restraint, an act need not reduce the scope of the right, but may only make it more difficult to enjoy.

For example, suppose a state passed a law subjecting politicians to the payment of a one-hundred dollar fee each time they made a speech. Although one could argue that such a fee "abridged" their right to freedom of speech, an easier argument to make would condemn the fee as a restraint. That is, although the fee would not prevent politicians from making campaign speeches, it certainly would inhibit or "restrain" them from doing so.⁷⁹ In this sense, then, the Florida provision regarding speech appears more expansive than the first amendment.

Significantly, California's free speech provision is nearly identical to Florida's. In relevant portion, it declares: "Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge the liberty of speech or press."⁸⁰ The only major

quitted or exonerated." *Id.*

75. Note that the first amendment provides that "*Congress shall make no law . . .*" U.S. CONST. amend. I, cl. 1 (emphasis added).

76. Although the phrase "no law shall be passed" seems to preclude legislative actions only, the Supreme Court of Florida, in *Lieberman v. Marshall*, 236 So. 2d 120 (1970), declared that "it is undisputed that the command that no law shall be passed also means that no order shall be issued and no regulation adopted in the name of the state which infringes on the liberty herein reserved to the people." *Id.* at 127. In that case, the plaintiffs contended that a court injunction restrained their constitutional right of free speech. The court stated that, in a proper case, it would strike down an injunction that restrained speech. *Id.*

77. BLACK'S LAW DICTIONARY 9 (5th ed. 1979).

78. *Id.* at 1181.

79. *Cf. State ex rel. Singleton v. Woodruff*, 153 Fla. 84, 13 So. 2d 704 (1943) (licensing charge may not be a prerequisite to sale or distribution of religious literature). *But see Sadowski v. Shevin*, 351 So. 2d 44 (Fla. 3d DCA 1976).

80. CAL. CONST. art. 1, § 2.

difference is the addition of the word "freely." Although this addition superficially seems to indicate that the citizens of California enjoy greater protection of speech, press, and religion than do the citizens of Florida, it is important to note that Californians, like Floridians, are "responsible for abuse of [these] right[s]."⁸¹ Thus, even though the rights granted under the California Constitution may be "freely" exercised, they are subject to the same limitation—abuse—as are the rights granted under the Florida Constitution. This qualification undercuts the significance of the addition of the word "freely," which on analysis seems to add little to the otherwise identical language of the Florida Constitution. In this connection, because the provisions of both constitutions are linguistically similar and grant rights of nearly identical scope, it is reasonable to assume that the Florida courts will look long and hard at the *PruneYard* decision in determining the extent of Florida's protection of free speech.⁸²

81. *Id.*

82. In *Project Report*, *supra* note 72, at 317-18, the authors state:

Because courts are naturally reluctant to venture into uncharted territory, it is obviously desirable to adduce decisions from other states that have already done what the litigant is asking

If the litigant can show that the bill of rights provisions of the two states share a common origin or some other telling characteristic, the stature of the sister state precedent will be increased substantially.

Also noteworthy are the distinctions between the freedom of religion clauses in the Florida Constitution and the United States Constitution. The latter provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend I, cl. 1. Again, the clause restrains Congress, not all law-making bodies. Florida's constitution, in comparison, prohibits all laws, without regard to their source: "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof." FLA. CONST. art. I, § 3. The remainder of this section provides:

Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution.

Id.

Secondly, Florida's provision constrains not only laws that "prohibit" the free exercise of religion, but those that merely "penalize" it. Thus, a law that does not actually prohibit religious activity but imposes substantial burdens thereon might violate the Florida Constitution, though permissible under federal standards. For example, suppose that Florida passed a statute requiring every religious organization that received contributions from citizens or residents of Florida to disclose the amount of each contribution so received, the name and address of the corresponding contributor, the reason for the contribution, and so on. Surely this law would not prohibit a religious organization from soliciting or receiving contributions. See generally *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The time and expense of acquiring the information and generating the necessary paperwork, however,

B. Florida Case Law

No Florida case has held that Florida's constitution provides greater free speech protection than the Constitution of the United States, either in the context of shopping malls or otherwise. In fact, few cases have dealt with the tension between this guarantee and the rights attending ownership of private property.⁸³ The discussion that follows⁸⁴ examines those and certain related cases to determine which rights the Florida courts have favored in the past and will probably favor in the future.

One of the first cases in Florida considering the delicate bal-

would unquestionably work a severe hardship on the religious organizations subject to the statute. That is, it would "penalize" them for carrying on necessary activities, the solicitation and acceptance of contributions. Since one could make a strong argument that such a statute would run afoul of the Florida Constitution, but not of the Federal Constitution, the Florida Constitution apparently offers greater protection for religious freedom than does the Federal Constitution.

Although the Florida Constitution limits religious freedom to practices not inconsistent with public morals, peace, or safety, FLA. CONST. art. 1, § 3, the United States Supreme Court also has placed this limitation on the Federal Constitution. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Gitlow v. New York*, 268 U.S. 652 (1925).

The California Constitution's freedom of religion clause provides:

Free exercise and enjoyment of religion without discrimination or preference are granted. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

83. But a number of cases have considered the extent to which the state may limit the privileges of free speech and religion. *E.g.*, *State v. Mayhew*, 288 So. 2d 243 (Fla. 1973) (freedom of speech); *cf. State ex rel. Singleton v. Woodruff*, 153 Fla. 84, 13 So. 2d 704 (1943) (freedom of religion).

In *Downer v. State*, 375 So. 2d 840 (Fla. 1979), the Supreme Court of Florida considered the limitations that a state could place on first amendment rights in the context of public property. In that case an organization known as Women Acting Together to Combat Harassment (WATCH) conducted a "consumer inspection" of a hospital's maternity facilities. The inspection took place after visiting hours had ended for the day. Two days after the inspection, the members of WATCH were arrested under a Florida trespass statute for willfully entering "a structure or conveyance . . . without being authorized, licensed, or invited." *Id.* at 843; see FLA. STAT. § 810.08(1) (1979).

After the trespass convictions, WATCH appealed. The group argued, *inter alia*, that the hospital was a public facility that "impliedly invited" members of the public to enter it. The court agreed, but noted that "as the United States Supreme Court acknowledged in *Adderley v. Florida*, 385 U.S. 39 (1966), this public access may be expressly limited to the extent necessary for the orderly functioning of a private facility." 375 So. 2d at 844. As for WATCH's argument that its members could ignore the hospital's visiting hour prohibitions with impunity, the court stated: "The fact that one is exercising first amendment rights while violating otherwise proper restrictions upon their entry to a public facility does not insulate them from prosecution for trespass." *Id.*

84. See notes 85-114 and accompanying text *infra*.

ance between these competing interests was *NAACP v. Webb's City, Inc.*⁸⁵ In that case, a business sought an injunction against the NAACP to prevent further interference with its business. The NAACP was picketing the business in an attempt to induce a consumer boycott. The chancellor, "mindful of the various rights and freedoms comprehended, expressly or impliedly, within the protective provisions of the State and Federal Constitutions,"⁸⁶ issued a permanent injunction to enjoin the picketing. He noted that the picketing had caused a "tense and inflammatory situation,"⁸⁷ adversely affecting not only the plaintiff's business, but the entire community. Striking down the NAACP's contention that they had an unconditional right to picket, the chancellor ruled that the defendants' actions were "unlawful and . . . not clothed with constitutional protection."⁸⁸

The District Court of Appeal, Second District, affirmed, holding that the commercial expectancies of the business, itself a property right, outweighed the picketers' social objectives.

When considering the plaintiff's interest in its commercial expectancies from its business weighed against the defendants' interest in advancing their social objectives and the injury occasioned by the defendants' coercive picketing causing plaintiff's customers and prospective customers not to enter into or continue business relations with the plaintiff, it appears that the Chancellor has not erred.⁸⁹

The court relied heavily on the notion that "[o]ne's business . . . is in every sense of the word property, and, as such, [is] entitled to protection from all unlawful interference."⁹⁰

The court, in *Webb's City*, emphasized protecting the business owner's property rights. One could interpret this as a signal that Florida courts will be reluctant to construe the free speech protections of the Florida Constitution more broadly than those of the Federal Constitution. More likely, future courts will limit *Webb's City* to its particular facts. Although *Webb's City* involved a shopping center, the picketing was far from peaceful and, in fact, dis-

85. 152 So. 2d 179 (Fla. 2d DCA 1963), *vacated as moot*, 376 U.S. 190 (1964).

86. *Id.* at 181.

87. *Id.*

88. *Id.* at 182.

89. *Id.* at 183.

90. *Id.* at 182. See generally Schwartz, *A Landholder's Right to Possession of Property Versus a Citizen's Right of Free Speech: Tort Law as a Resource for Conflict Resolution*, 45 U. CIN. L. REV. 1 (1976).

rupted the entire community.⁹¹ This situation differs greatly from the facts in *PruneYard* or in the cases decided under the Federal Constitution.⁹² Thus, it is doubtful that Florida courts will consider this case as controlling when they confront the precise issue presented to the California Supreme Court in *Robins v. PruneYard Shopping Center*.⁹³

The only other significant "mall case" of Florida is *Corn v. State*.⁹⁴ The defendant in *Corn*, while patronizing a store in the mall, started an argument with the store's salesperson. A security guard instructed the defendant to leave and informed him that if he returned he would be prosecuted for trespassing. The defendant left but subsequently returned, at which time he was arrested. Eventually he was convicted of trespass.⁹⁵ The defendant appealed his conviction on the ground that the trespass statute⁹⁶ denied equal protection. He offered no argument that the conviction violated his free speech rights under either the federal or the state constitution.⁹⁷

The Supreme Court of Florida, in addition to holding that the trespass statute did not deny equal protection to the defendant,⁹⁸ offered broad dicta, much of which centered on the "inalienable right" that all persons have "to acquire, possess, and protect their property."⁹⁹ With reference to malls, the court stated:

The lobby of a commercial mall is a privately owned building to which the public has been invited to come, to look and to buy. The invitation presupposes that the conduct of persons coming there will be in keeping with such purposes. However, *reasonable nondiscriminatory restrictions* pertaining to the use of the Mall may be placed on the users of such Mall, such as the requirement that shoes be worn. [Like] any invitation, it can be

91. The Supreme Court of California in *PruneYard Shopping Center v. Robins*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 100 S. Ct. 2035 (1980), stated: "It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or proprietor of a modest retail establishment." *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860 (quoting *Diamond v. Bland*, 11 Cal. 3d at 345, 521 P.2d at 470, 113 Cal. Rptr. at 478) (Mosk, J., dissenting).

92. See notes 15-51 and accompanying text *supra*.

93. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 100 S. Ct. 2035 (1980).

94. 332 So. 2d 4 (Fla. 1976).

95. *Id.* at 5-6.

96. FLA. STAT. § 821.01 (repealed 1974).

97. 332 So. 2d at 6, 8.

98. *Id.* at 9. The court remanded the case on a technicality for the entering of a proper judgment.

99. *Id.* at 7.

limited and, upon abuse, be withdrawn or revoked.¹⁰⁰

Paradoxically, *Corn v. State* seems to support two conflicting positions. Its broad language describing the unfettered rights attending private property ownership suggests that those rights occupy a "preferred position" in Florida's constitutional scheme. Yet by noting that mall owners may adopt reasonable regulations relating to the internal activities of a mall, the court implied that certain activities *must* be permitted. Unfortunately, the court failed to detail these activities.

The reason for this failure is obvious. *Corn* was not a freedom of speech case. The court carefully emphasized this point numerous times in its opinion.¹⁰¹ Thus, the precedential value of the dicta in *Corn* for cases on freedom of speech is questionable, seeming to support two competing positions at best. Like *Webb's City*, *Corn* will not bar the Florida courts from holding that freedom of speech occupies a "preferred position" vis-à-vis the private property rights of a mall owner.

In a recent opinion,¹⁰² the Attorney General shed some light on the state of the law in Florida on first amendment rights. He analyzed the issue whether a county fair could refuse to rent a booth to the International Society for Krishna Consciousness (ISKCON).¹⁰³ The fair had a general policy prohibiting all solicitation and feared that ISKCON would rent the booth for just that purpose.¹⁰⁴ ISKCON argued that such a refusal would violate its rights to free speech and religion as guaranteed by the federal and the Florida constitutions.¹⁰⁵

The Attorney General agreed with this contention, finding

100. *Id.* at 8 (emphasis added). Recall that the Supreme Court of California in the *PruneYard* case also provided that a mall owner could adopt reasonable regulations. 23 Cal. 3d at 909-10, 592 P.2d at 347, 153 Cal. Rptr. at 860.

101. 332 So. 2d at 6, 8.

102. [1977] FLA. ATT'Y GEN. ANN. REP. 51.

103. Actually, the Attorney General faced three related questions:

1. May the [fair association] refuse to rent a booth at the fair to [ISKCON], a religious society, on the grounds that said society intends to solicit funds on the fair premises?
2. If the answer to question 1 is in the affirmative, may the association evict [ISKCON] members if the society should breach an agreement not to solicit funds?
3. May the [fair association] deny ISKCON the right to solicit funds on the grounds that the association has a general policy which prohibits all solicitation?

Id. at 51.

104. *Id.*

105. See U.S. CONST. amends. I, IV; FLA. CONST. art. I, §§ 3, 4.

"state action" because the fair was to be held on the Volusia County Fairgrounds, which were "within the class of public facilities that have been determined to be appropriate forums for the exercise of First Amendment rights."¹⁰⁶ He concluded that the first amendment prohibitions against governmental intrusion on these liberties applied. Basing his decision almost wholly on federal case law, the Attorney General held that, subject to reasonable regulation,¹⁰⁷ ISKCON had a right to "distribute literature to, and solicit contributions from, the public and generally propagate their religious beliefs on and in the public areas of the Volusia County Fair," although the fair had adopted "a general policy against all types of solicitation."¹⁰⁸

Like *Webb's City* and *Corn v. State*, this opinion will have little, if any, precedential effect on the issues presented in a case similar to *PruneYard*. Because the Attorney General based his opinion on "state action," he did not address the rights of property ownership in relation to the rights of freedoms of speech and religion.¹⁰⁹ Resort by the Attorney General to federal law further reduces the probable effect of the opinion on Florida law. In this connection, though the Attorney General mentioned the federal and the Florida constitutions simultaneously,¹¹⁰ he failed to differentiate between the two.

More recently, the District Court of Appeal, Second District, had an opportunity to differentiate between these two constitutional provisions but refrained from doing so, preferring to await guidance from the Supreme Court of Florida. In *Florida Canners Association v. State*,¹¹¹ the court reviewed the association's chal-

106. [1977] FLA. ATT'Y GEN. ANN. REP. at 52. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (restaurant operated by private association under lease in building financed by public funds and owned by state agency); *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968) (bus terminal operated by port authority, a public corporation).

107. The Attorney General emphasized that "the rights protected by the First Amendment are not absolute, and the activities of ISKCON may be regulated to the extent necessary to protect legitimate state interests." [1977] FLA. ATT'Y GEN. ANN. REP. at 53.

108. *Id.*

109. Although a lease entitles the lessee to exclusive possession of the premises, the public ownership makes the government, as lessor, the ultimate intruder on first amendment rights; the lessee is merely its agent. Thus "state action" takes private property rights out of the Attorney General's analysis.

110. The opinion stated that the answers to the issues presented depended "upon the constitutional rights of freedom of speech and religion guaranteed by the First Amendment, and applicable to the states via the Fourteenth Amendment, and §§ 3 and 4, Art. I, State Constitution." [1977] FLA. ATT'Y GEN. ANN. REP. at 52.

111. 371 So. 2d 503 (Fla. 2d DCA 1979).

lenge of a rule promulgated by the Department of Citrus; the rule required the declaration of state of origin on grapefruit products packed in retail containers in the state. Before declaring the rule valid under the guarantee of free speech in both the Florida Constitution and the Federal Constitution,¹¹² the court declared:

We have first considered whether the guarantee contained in the Florida constitution is any broader than that contained in the United States Constitution. We have found no case in Florida answering that question. We agree with the observation that Florida courts tend to merge the two limitations to the point that federal and state cases are cited interchangeably. Under the circumstances, and in the absence of any expression by our supreme court that the Florida guarantee is broader in scope than the federal, we conclude that the two are the same and will not treat them separately.¹¹³

This brief look at Florida case law indicates that, should the Supreme Court of Florida be faced with a case like *PruneYard*, it will have no controlling precedent to prevent it from reading the Florida Constitution more broadly than the Federal Constitution. No Florida case has directly confronted the issues presented by *PruneYard*. Although some decisions addressing related issues contain broad dicta that arguably place private property rights in a preferred position vis-à-vis the rights of free speech and religion, one may readily distinguish these cases from *PruneYard* (and the cases preceding it, which were based on the Federal Constitution). Thus, they do not present the supreme court with authority by which it would be bound. Ultimately, resort to the case law of other jurisdictions may be beneficial.¹¹⁴ The next section will examine that possibility, to show where courts of other states are heading in this area of the law and to suggest the probable course that the Supreme Court of Florida will take.

C. Recent Trends

Of late, . . . more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of

112. See U.S. CONST. amends. I, IV; FLA. CONST. art. I, §§ 3, 4.

113. 371 So. 2d at 517.

114. See *Project Report*, *supra* note 72, at 317-18.

federalism.¹¹⁵

In recent years, commentators, practitioners, and judges¹¹⁶ have called upon state courts to construe their respective constitutional guarantees more broadly. Despite some reluctance,¹¹⁷ the courts are following that suggestion with increasing frequency.¹¹⁸ The plea arose, in large part, out of fear that the Burger Court would dismantle "[t]he edifice that the Warren Court had constructed in the name of the Federal Bill of Rights."¹¹⁹ Noting that decisions rendered on independent state grounds would not be reviewable by the Burger Court except in limited circumstances,¹²⁰ commentators argued that a state court should use the tactic of basing its decisions on a broad construction of its state constitution, as an independent state ground.¹²¹ Of course, complete abrogation of Warren Court doctrine by the Burger Court never materialized.¹²² Nonetheless, state courts have reawakened to the possibility of relying on the "adequate state grounds" doctrine to confer greater freedoms on their citizens. Although much of its use has occurred in the area of criminal procedure,¹²³ the courts also have examined the guarantees of freedom of speech and religion.¹²⁴

In expanding the protection of freedom of speech, California remains the leading state. In *Wilson v. Superior Court of Los Angeles County*,¹²⁵ the Supreme Court of California laid the groundwork for its decision in *Robins v. PruneYard Shopping Center*,¹²⁶ stating: "A protective provision more definitive and inclusive than

115. Brennan, *supra* note 72, at 495.

116. *Id.*; Mosk, *The New States' Rights*, 10 CALIF. L. ENFORCEMENT 81 (1976); Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAN. L. REV. 620 (1951); *Project Report*, *supra* note 72.

117. "State court decisions and state constitutional materials are too frequently ignored by both commentator and counsel . . ." Paulsen, *supra* note 116, at 620. *See also Project Report*, *supra* note 72.

118. *See* notes 125-34 and accompanying text *infra*.

119. *Project Report*, *supra* note 72, at 271. *See also* Howard, *The Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

120. Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273, 275 (1973).

121. *Id.* at 286; *see Project Report*, *supra* note 72. *See generally* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 437-51 (1974).

122. *Project Report*, *supra* note 72, at 271. *But see* Howard, *supra* note 119, at 874.

123. Howard, *supra* note 119, at 891-907; Wilkes, *supra* note 121.

124. *See* notes 125-33 and accompanying text *infra*.

125. 13 Cal. 3d 652, 532 P.2d 116, 119 Cal. Rptr. 468 (1975).

126. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 100 S. Ct. 2035 (1980).

the First Amendment is contained in our state constitutional guarantee of the right of free speech and press."¹²⁷

Soon thereafter, the Oregon Supreme Court echoed this language. In *Deras v. Myers*,¹²⁸ the court stated that its free speech and press provision, which is like Florida's,¹²⁹ "provide[d] a larger measure of protection to the citizen[s] [of Oregon]"¹³⁰ than did the Constitution of the United States. The court struck down two Oregon statutes placing limits on funds that could be expended by or on behalf of political candidates, although the Supreme Court of the United States had upheld similar federal acts.¹³¹

An early Virginia case, *Robert v. City of Norfolk*, also concluded that its free speech and press provision offered broader protection than the first amendment. Significantly, Virginia's provision, like California's and Oregon's, is nearly identical to Florida's.¹³²

Thus, a trend in constitutional law has unquestionably emerged. State courts, reawakened to the doctrine of adequate and independent state grounds, have begun to construe their constitutional guarantees so as to provide greater protection than that afforded by their federal counterparts.¹³³ Although only California has expanded its free speech protection to shopping malls, it appears inevitable that other states will follow.

CONCLUSION

No definitive answer can be given to the question whether Florida, like California, will hold that its constitution protects freedom of speech in privately owned malls. Nevertheless, a number of factors favor the adoption of an analysis like that in *PruneYard*.

127. 13 Cal. 3d at 658, 532 P.2d at 120, 119 Cal. Rptr. at 472.

128. 272 Or. 47, 535 P.2d 541 (1975).

129. In relevant part, the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." OR. CONST. art. I, § 8. Compare this provision with the Florida free speech provision, discussed at notes 72-82 and accompanying text *supra*.

130. 272 Or. at 64, 535 P.2d at 549.

131. *Id.* at 67, 535 P.2d at 551.

132. 188 Va. 413, 49 S.E.2d 697 (1948) (solicitation of magazine subscriptions protected by free speech clauses of both the Virginia Constitution and the United States Constitution).

133. The Virginia free speech and press provision states that "any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." VA. CONST. art. I, § 12. Florida's free speech provision, discussed at notes 74-82 and accompanying text *supra*, is similar.

First, the Florida Constitution's broad provisions on free speech offer convincing textual support.¹³⁴ Secondly, though certain Florida cases contain dicta suggesting that Florida case law strongly protects the ownership of private property, these cases also recognize that even private property is subject to some governmental intrusion.¹³⁵ Finally, the trend of state law in general points toward a broadening of state constitutional protection.¹³⁶ Generally, this trend seems in the best interests of society.¹³⁷

One should note that *PruneYard* was a carefully constructed, narrow decision. The court considered the competing interests of free speech and of private property ownership, recognizing constitutional protection for each. The Supreme Court of California recognized that a complete denial of access to malls would unjustifiably eliminate a valuable and increasingly important kind of forum.¹³⁸ But to achieve a fair balance of speakers' rights and owners' rights, the court provided that mall owners could impose reasonable time, place, and manner restrictions on the activities protected as free speech.¹³⁹ Additionally, the court specifically limited its holding to large, modern shopping complexes, expressly ruling out residences and small retail establishments.¹⁴⁰

As in California, malls increasingly are becoming a way of life

134. This trend has not gone unnoticed in the area of freedom of religion. See *Mazor, Notes on a Bill of Rights in a State Constitution*, 1966 UTAH L. REV. 326; Paulsen, *supra* note 116. Here, too, state courts are finding greater protection in their constitutions. In *City of Portland v. Thornton*, 174 Or. 508, 149 P.2d 972 (1944), for example, the Supreme Court of Oregon, although noting that federal decisions construing the first amendment were persuasive as to Oregon's counterparts, stated that the Oregon freedom of religion provision "conveyed . . . [a] more extended declaration of rights." *Id.* at 513, 149 P.2d at 974. Other states, though not expressly holding that their freedom of religion clauses confer greater protection than their first amendment counterpart, have not foreclosed such a holding. *E.g.*, *Seegers v. Parker*, 256 La. 1039, 241 So. 2d 213, *cert. denied*, 403 U.S. 955 (1970). In this connection, at least one commentator has pointed out the great textual differences between the freedom of religion clauses of many state constitutions and the corresponding clause in the Federal Constitution. Paulsen, *supra* note 116, at 636.

135. See notes 72-82 and accompanying text *supra*.

136. *E.g.*, *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364 (1941).

137. See notes 115-33 and accompanying text *supra*.

138. *E.g.*, *Brennan*, *supra* note 72. But see *Bice, Anderson and the Adequate State Ground*, 45 So. CALIF. L. REV. 750 (1972).

139. 23 Cal. 3d at 907, 910-11, 592 P.2d at 345, 347, 153 Cal. Rptr. at 858, 860.

Shopping malls are usually located in central areas serving vast numbers of people. Since malls are natural meeting places, they have gradually extended their original commercial purpose to become the modern "town square." The public uses malls in ways never contemplated by their developers—for polling places, fashion shows, art exhibits, solicitations, concerts, broadcasts, and community fund raising drives. Their value as a local forum for the community is increasingly clear.

140. *Id.* at 909, 592 P.2d at 347, 153 Cal. Rptr. at 860.

in Florida.¹⁴¹ Prohibition from exercising even limited constitutional freedom therein would substantially deny such freedom. The courts can give effect to constitutional protection of the property interests of mall owners by allowing them to impose reasonable time, place, and manner restrictions on activities protected by the freedom of speech. Florida has an abundance of law from which to draw in this area.¹⁴² *PruneYard* has indicated that, at least in the context of malls, courts can reasonably strike the delicate balance between freedom of speech and private property ownership. This writer urges that when the courts of Florida face this issue, they adopt an analysis like that in *PruneYard*.

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

142. *See, e.g., State ex rel. Singleton v. Woodruff*, 153 Fla. 84, 13 So. 2d 704 (1943); *Hord v. City of Fort Myers*, 153 Fla. 99, 13 So. 2d 809 (1943).