The Burger Court Opinion Writing Database

PruneYard Shopping Center v. Robins

447 U.S. 74 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

April 21, 1980

78-289 PruneYard Shopping Center v. Robins

Dear Bill:

Over the weekend, as the author of Lloyd v. Tanner, I read with more than the usual interest your opinion. Subject to the comments below, I think it is a fine draft and I expect to join it.

I do have some suggested changes in language, that I would appreciate your considering. I send you one of my copies on which I have noted the changes on pages 5 and 6. More fundamental is my concern that our opinion may be read more broadly even than that of the California Supreme Court. That Court emphasized that it was reading the California Constitution as it applied to the modern type of diversified shopping centers. I hope the California Court would not reach the same conclusion with respect to a free standing department store, where the leafleteers or picketers would be within the store itself rather than in what in essence is a public mall.

Certainly, it would be unprecedented if a state extended its First Amendment clause to allow picketing in any enterprise that invited the public to patronize it. One could be picketed at his table while dining in a restaurant, or beside the barber's chair when being sheared.

Although your opinion does refer repeatedly to shopping centers, would it not be helpful to address more explicitly the limitations that we perceive to be inherent in the opinion of the California Supreme Court? It is a fact of modern society that an enclosed area - often two or three city blocks - with a central public mall surrounded by dozens of separate stores, presents a unique situation quite different from the stores one finds on the main street of

every city in our country. It seems to me that this should be made quite clear in the opinion.

A somewhat related point is the traditional limitation on First Amendment rights of "time, place and manner". I believe your draft refers to this only in footnote 8 (p. 9), where the reference is limited to stating what was said by the California Court. For me this limitation is central to any holding on this subject. I would never agree that a state constitution - however framed - could allow the type of picketing and pamphleteering that would be conducted by some groups if unrestrained as to time, place and manner. Even a great shopping center mall could become a zoo if some of the mobs we have seen here in Washington supporting various causes occupied it.

In sum, Bill, I think this is an extremely important case. It will prompt special interest groups of all shades of persuasion to go to work immediately on state legislatures to expand the opportunities for promoting causes. We can be sure that every sentence in the opinion will be scrutinized for support of a far broader rule than that enunciated by the California Supreme Court.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

April 22, 1980

79-289 Pruneyard Shopping Center v. Robins

Dear Bill:

Thank you for your letter of April 22.

The addition you propose to page 8 will be helpful. I also understand that you are making the essentially stylistic changes I suggested on pages 5 and 6.

What do you think about my circulating a brief concurring opinion along the lines enclosed?

Sincerely,

Mr. Justice Rehnquist

lfp/ss

May 21, 1980

79-289 Pruneyard v. Robins

Dear Byron:

Here is a first draft of a concurring opinion in Pruneyard.

I would welcome your comments before I circulate.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

May 27, 1980

No. 79-289 Pruneyard

Dear Byron:

Since our talk, I have done some further work on my draft opinion. Two copies of a revised draft are enclosed.

I considered relying specifically on Abood and Central Hardware to support the view that a property owner has a generalized First Amendment right never to have his property used as a public forum. There is language in these cases that lends support to this view. I have concluded, however, that in this case I would prefer not to go quite that far. The case was not argued - as I understand it - on that basis. Moreover, without more study and thought, I am not sure where such a broad rationale would lead one. Nor, indeed, am I sure that this was your thought.

In any event, I have tried to sharpen up, and strengthen, my analysis on fairly well established First Amendment grounds. I still end up with a "concurrence" rather than a "dissent", although I recognize that the question is close. On the record before us, however, I feel more comfortable with a concurrence.

I am sending a copy of my draft down to the printer today to "get in line" down there. I would still welcome, however, any suggestions you may have. I have not yet given Bill Rehnquist a copy, but will do so when I hear from you.

I appreciate your waiting, and giving me the opportunity to draft something we both could join.

Sincerely,

Mr. Justice White

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 22, 1980

Re: No. 79-289 PruneYard Shopping Center v. Robins

Dear Lewis:

In reply to your memorandum of April 21st, I intend to make the following changes in my draft opinion for the Court in this case:

Add after sentence ending on seventh line of page 8: The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place and manner regulations that will minimize any interference with its commercial functions. Appellees were orderly, and they limited their activity to the common areas of the shopping center. In these circumstances, the fact that they may have "physically invaded" appellants' property cannot be viewed as determinative.

Delete footnote 8, which is included in the above addition.

Sincerely,

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

In deference to Bill's views, I'll hold my concurrence until I see how the votes fall. Then I'll decided what to do L.

April 23, 1980

Re: No. 79-289 Pruneyard Shopping Center v. Robins

Dear Lewis:

Thank you very much for your letter of April 22nd, indicating your approval of the addition which I proposed on page 8 of the presently circulating draft of this opinion, and your correct impression that I will incorporate the stylistic changes which you suggested on pages 5 and 6 in a second draft.

The question in your letter of my thoughts as to your circulating a brief concurrence puts me in something of a bind: Potter may have told you, and at any rate asked me to speak to you, about the desirability of having at least a Court opinion in the airport search case in which he recently circulated a proposed Court opinion (United States v. Mendenhall). In the interim, the Chief has come out with a concurrence in what I regard as your very excellent opinion in United States v. Payner which I would have preferred to have remained unwritten. So I am somewhat ambivalent about even answering your question, since there is bound to be a certain amount of self-interest in the answer. Nonetheless, I shall try.

As you will recall, your opinion in Lloyd v. Tanner, and Potter's in Hudgins v. NLRB, were both by divided Courts, and I do not think I am wrong in believing that Bill Brennan and Thurgood would still be of the view that they should have been decided the other way. It seems to me that if you concur specially in this case, you would give them an opportunity to disagree with your concurrence, in effect saying that the Court opinion does reach the issues you quite rightly say it does not reach, and thereby inject some confusion into what we are expressly reserving by reason of my adoption of your suggestions made in your letter of April 22nd. On the whole, therefore, I would prefer to see you not write this particular concurring opinion, but I suppose that is true of the author of almost every proposed Court opinion in history.

I shall incorporate the changes which you have suggested and I have agreed to all as previously referred to, and send around a second draft. My acceptance of your suggestions is in no way conditioned upon your decision whether or not to write a separate concurrence. Naturally, if either John or Potter, who have already joined, should object to the new circulation, I would have to try to work out some sort of an agreement, but I don't believe they will.

Sincerely,

Mr. Justice Powell