Public Speech on Private Property

1. **Panel Discussion**
    a. Introduction of subject and panelists
    b. Summary of Pruneyard and intersection with first amendment and labor law
    c. Summary of *Ralphs*
        i. Public forum holding
        ii. Statutory protections for labor speech holding
    d. Summary of *Waremart*
        i. Content discrimination
        ii. *Waremart* concluded that the Moscone Act violates the First Amendment as it extends greater protection to speech regarding a labor dispute than to speech on other subjects. *Ralphs* distinguished *Waremart*, on the ground that the Moscone Act does not restrict speech and applies on private land that is not a First Amendment public forum.
    e. Critique of *Ralphs* – content discrimination
        i. Is it clear that federal law always requires strict scrutiny for content discrimination? Is that true whether speech is favored or restricted?
            1. *Ralphs* says that SCOTUS decisions on speech regulations "do not require literal or absolute content neutrality, but instead require only that the [content-based] regulation be 'justified' by legitimate concerns that are unrelated to any 'disagreement with the message' conveyed by the speech."
            2. Does that sound like this a correct statement of federal law?
        ii. Does *Ralphs* permit content discrimination?
            1. *Ralphs*: "it is well settled that statutory law—state and federal—may single out *labor-related* speech for particular protection or regulation, in the context of a statutory system of economic regulation of labor relations, without violating the federal Constitution"
            2. So under *Ralphs*, would a statute that favors nonlabor speech on private land be permissible?
        iii. Is *Ralphs* consistent with SCOTUS on content neutrality:
            1. "a restriction is content neutral if it is 'justified without reference to the content of the regulated speech.'" *Clark v. Community for Creative Non–Violence*
            2. … And with previous SCOCA statements on content neutrality:
                a. "A content-based restriction is subjected to strict scrutiny. … Restrictions upon speech "'that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.'" *Fashion Valley*
    f. Critique of *Ralphs* – public forum
        i. Viewing the issue as one of the forum, rather than the content, can *Ralphs* be completely explained by the fact that it's private property (not even a nonpublic forum) where regulation "need only be reasonable, as long as the regulation is not an

effort to suppress the speaker's activity due to disagreement with the speaker's view" and government may "make distinctions in access on the basis of subject matter and speaker identity" (*ISKCON*).

ii. *Golden Gateway* relied on the public character of a site as determining whether California speech rights apply. Since the sidewalk in *Ralphs* was private enough to not be a public forum, shouldn't that mean that no state speech rights exist there?

iii. The *Ralphs* decision distinguished *Carey* and *Mosley* on the ground that those cases involved laws restricting speech in a public forum, while *Ralphs* concerned a statute permitting speech on private property – concluding that the area around the store entrance was not a public forum (under either federal or California law). Is that distinction well-taken, given that *Carey* involved a statute prohibiting picketing at private homes, but excepting (and thus permitting) picketing involving a labor dispute?

g. Critique of *Ralphs* – conflict with federal law

i. *Ralphs* says: "Decisions of the United States Supreme Court support the proposition that labor-related speech may be treated differently than speech on other topics." Is that true? If so, isn't that a complete justification for the Moscone Act and the decision in *Ralphs*?

1. Does *Ralphs* necessarily conflict with federal law on content neutrality?

ii. Justice Chin in dissent said: "The majority claims its interpretation of the Moscone Act is valid because the act does not limit free speech. It is true that the Moscone Act, itself, does not limit speech. But the Court of Appeal cases involving nonlabor speech at stores and medical clinics, which the majority purports to reaffirm, *do* limit speech. Thus, the majority upholds content-based discrimination between labor and nonlabor speech, which presents the difficult constitutional question the *Waremart* court identified."

1. Is Justice Chin right?

iii. What are the ramifications of the public forum aspect of the Ralphs decision going forward?

iv. Given the tensions between *Ralphs* and federal law, what are the possible future options?

1. Going forward, is there any exterior area of a retail establishment that is closed to labor speech in California? What about the interior? Note the Chief's concurrence, rejecting this possibility: "in *Sears* … we observed that 'a strict reading [of the Moscone Act] might appear to authorize picketing in the aisles of the Sears store or even in the private offices of its executives.'"

2. **Federal Law Principles**
    a. First and Fourteenth Amendments protect rights of free speech and assembly by limiting state action
    b. Fifth and Fourteenth Amendment due process clauses protect private property rights
    c. Viewpoint discrimination is prohibited
    d. Content-Neutral v. Content-Based determines level of scrutiny
        i. Content Neutral
            1. "justified without reference to the content of the regulated speech." (*Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293.)
            2. need only be "justified" by legitimate concerns that are unrelated to any "disagreement with the message" conveyed by the speech. (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.)
            3. "serves purposes unrelated to the content of the expression." (*Ward* at 791)
            4. may have "incidental effect on some speakers or messages but not others." (*Ward* at 791)
        ii. Example – speech soliciting the immediate donation of money
3. **Public Forum Doctrine**
    a. Federal law
        i. Traditional
            1. "a place that by long tradition has been used by the public at large for the free exchange of ideas"
            2. Examples:
                a. Public streets
                b. Sidewalks
                c. Parks
            3. Test
                a. Content-based restriction: strict scrutiny
                    i. "necessary to serve a compelling state interest"
                    ii. "narrowly drawn to achieve that end"
                b. Content-neutral: intermediate scrutiny
                    i. "Time, place, and manner" restrictions
                    ii. "narrowly tailored to serve a significant government interest"
                    iii. "leave open ample alternative channels of communication"
        ii. Limited
            1. "property that the State has opened for expressive activity by part or all of the public"
            2. State creates limited public forum "by intentionally opening a nontraditional forum for public discourse"
            3. "government does not create a public forum by inaction or by permitting limited discourse"
            4. To determine "government's intent," consider "policy and practice of the government" "nature of the property" "compatibility with expressive activity"
            5. Test

a. Same as public forum

iii. Non-public

1. "all remaining public property"
    a. Airport (*ISKCON* plur.)
    b. Sidewalk in front of post office (*Kokinda* plur.)
    c. Combined Federal Campaign (*Cornelius*)
2. Test
    a. Regulation "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."
        i. "right to make distinctions in access on the basis of subject matter and speaker identity."

b. California law

i. Alternatives?

1. Basic Incompatibility Test
    a. "question was not whether the government property in question could be considered a public forum, but whether there was a 'basic incompatibility' between the proposed communicative activity and the intended use of the property."

ii. *Golden Gateway* dissent

1. If regulation fails intermediate scrutiny, then "a court considers the extent to which a defendant's actions infringe or intrude upon the plaintiff's constitutionally protected interest and 'balances' or 'weighs' such infringement against the relative importance or 'compelling' nature of the defendant's justifications for its actions (taking into account whether there are other, less intrusive means by which the defendant could achieve its objective.' "

iii. Justice Kennedy dissent in *ISKCON*

1. "If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum"
2. Factors to consider include:
    a. "whether the property shares physical similarities with more traditional public forums"
    b. "whether the government has permitted or acquiesced in broad public access to the property"
    c. "whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property"
    d. "In conducting the last inquiry, courts must consider the consistency of those uses with expressive activities in general, rather than the specific sort of speech at issue in the case before it."

iv. Public forum doctrine
    1. Modified public forum analysis
    2. Expanded definition of public forum
    3. *Ralphs Grocery Co.*
        a. "to be a public forum under our state Constitution, an area within a shopping center must be designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation, and not merely to walk to or from a parking area, or to walk from one store to another, or to view a store's merchandise and advertising displays."
v. Limited public forum doctrine?
    1. Examples:
        a. Public parking lot outside of prison (*Prisoners Union*)
        b. Visitor center (*UC Nuclear Labs*)
        c. Auditorium on lab campus (*UC Nuclear Labs*)

4. <u>Commercial Speech</u>

a. Federal law
    i. Receives less protection than non-commercial speech
    ii. First Amendment only protects "truthful and nonmisleading . . . messages about lawful products and services"
    iii. Central Hudson test: commercial speech regulation must
        1. "serve[] a 'governmental interest' that is 'substantial'"
        2. "'directly advance[]' such interest"
        3. not be "'more extensive than . . . necessary.'"
    iv. Compelled funding of speech (*Glickman*)
        1. Marketing order was merely a "species of economic regulations" and did not even implicate the First Amendment.
b. California law
    i. Provides broader protections for commercial speech than First Amendment
    ii. Only applied in compelled funding of speech cases
    iii. *Gerawan I* (compelled funding implicated free speech)
        1. "article I's right to freedom of speech, without more, would not allow compelling one who engages in commercial speech to say through advertising what he otherwise would not say, when his message is about a lawful product or service and is not otherwise false or misleading."
        2. "article I's right to freedom of speech, without more, would not allow compelling one who engages in commercial speech to fund speech in the form of advertising that he would otherwise not, when his message is about a lawful product or service and is not otherwise false or misleading."
    iv. Gerawan II
        1. Rejected *Abood* (Union funding of speech "germane" to its purpose) and *Keller* (State bar fees to fund speech "germane" to its purpose)
        2. Applied *Central Hudson* test

5. **California Law**
    a. CA const A1s1 (privacy), A1s2 (speech), and A1s3 (assembly) provide broader protections than the federal First Amendment.
        i. A1s2: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right. A law may not restrain or abridge liberty of speech or press."
        ii. History
            1. Adopted in original 1849 constitution, carried over without debate into 1879 constitution, and with minor grammatical changes into 1974 revision.
            2. Modeled verbatim upon article I, section 8 of the 1846 NY Constitution, which was derived from article VII, section 8 of 1821 NY Constitution
            3. May have been derived from Blackstone's formulation of the common law
            4. Pre-incorporation doctrine
                a. *Daily v. Superior Court* (1986) 112 Cal. 94: court enjoined play based on testimony at preliminary hearing in sensational murder trial
                b. Cal Supreme Court found violation of free speech clause, but suggested that free speech clause only protected against prior restraints
                c. Following incorporation doctrine, the California free speech clause went into hiding
                    i. only discussed First Amendment, or
                    ii. relegated California free speech clause to secondary position
            5. *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899
                a. revitalization of California's free speech clause
                b. *Hudgens* (1976) (overruled *Logan Valley*)
                c. *Diamond II* (1974) (4-3 followed *Lloyd*)
                d. *Lloyd* (1972) (held that *Logan Valley* did not apply to speech that was unrelated to business of shopping center)
                e. *Diamond I* (1970) (held that env. org. had right to solicit signatures on initiative petitions in shopping mall)
                f. *Logan Valley* (1968) (shopping center could not prohibit striking workers from picketing store in center)
    b. Viewpoint discrimination is prohibited
        i. Content-Neutral v. Content-Based
            1. California courts appear to follow federal precedents
            2. *LA Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352
                a. acknowledged distinction between content-based and content-neutral regulations of speech in public fora
            3. *Fashion Valley Mall*
                a. applied federal standard for determining content neutrality
    c. Individual speech
        i. Public land
        ii. Semi-public land

1. *UC Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157 (held visitor center of national lab was a semi-public forum, required lab to allow outside group to place literature and give periodic slideshows related to the lab's work in the visitor center of the lab, and required lab to allow use of its auditorium because it had already opened it to other groups)

iii. Private land
   1. Speech related to the business
   2. Speech unrelated to the business
   3. Alternative effective channels
   4. Public forum analysis – still a necessary factor or analysis?
   5. Physical features
      a. Modest retail establishment v. public character
         i. Stand-alone store: *Trader Joe's Co. v. Progressive Campaigns* (1999) 73 Cal.App.4th 425 (single store does not have public character, but store size is not determinative); *Lushbaugh v. Home Depot* (2001) 93 Cal.App.4th 1159 (stand-alone warehouse store could restrict speech to a prescribed area outside entry); *Costco v. Gallant* (2002) 96 Cal.App.4th 740 (stand-alone warehouse store could bar speech)
         ii. Commercial building: *Bank of Stockton v. Church of Soldiers of the Cross of Christ* (1996) 44 Cal.App.4th 1623 (bank located in two-story building with adjoining parking lot was a modest retail establishment could bar church from soliciting donations)
         iii. Stores in shopping centers: *Albertson's v. Young* (2003) 107 Cal.App.4th 106 (retail grocery store in shopping center can bar speech); *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375 (big-box retail store in large retail development can bar speech in perimeter and entrance apron area)
         iv. Shopping center: *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74; *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899
      b. Private residential housing
         i. *Golden Gate Center v. Golden Gateway Tenants Assn*. (2001) 26 Cal.4th 1013 (tenant's association could be barred from distributing unsolicited newsletters to tenants' apartments in privately-owned apartment buildings)
         ii. *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816 (free newspaper could not be barred from private gated residential community, based on substantial invited vendor traffic and existing permission to delivery of other subscription and free publications)

c. Residential neighborhood
    i. *Planned Parenthood Assn. v. Operation Rescue* (1996) 50 Cal.App.4th 290 (overturning injunction ordering protesters to stay at least 250 feet away from doctor's residence)
    ii. *San Jose v. Superior Court (Thompson)* (1995) 32 Cal.App.4th 330 (upholding ordinance that prohibited picketing within 300 feet of private residence)
    iii. *Frisby v. Schultz* (1988) 487 U.S. 474 (upholding complete ban on residential picketing)
d. Private medical facility
    i. *Hill v. Colorado* (2000) 530 U.S. 703 (upholding statutory eight-foot buffer zone)
    ii. *Schenck v. Pro-Choice Network of Western New York* (1997) 519 U.S. 357 (upholding 15-foot buffer zone around abortion clinic entrances, parking lots, and driveways, striking a 15-foot zone around people entering and leaving the clinic)
    iii. *Planned Parenthood Assn. v. Operation Rescue* (1996) 50 Cal.App.4th 290 (upholding 15-foot buffer zone in front of abortion clinic)
    iv. *Madsen v. Women's Health Center* (1994) 512 U.S. 753 (upholding some injunctive limits on protests at abortion clinics)
    v. *Planned Parenthood Shasta-Diablo v. Williams* (1994) 7 Cal.4th 860 (upholding injunction injunction that restricted picketing to the public sidewalk across the street from the clinic building); reaffirmed in *Planned Parenthood Shasta-Diablo v. Williams* (1995) 10 Cal.4th 100
    vi. *Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662 (speech on medical facility's private property can be banned; alternate methods of communication are possible, speech interferes with patients' rights of access and privacy); see also *Allred v. Shawley* (1991) 232 Cal.App.3d 1489; *Allred v. Harris* (1993) 14 Cal.App.4th 1386; *Feminist Women's Health Center v. Blythe* (1993) 17 Cal.App.4th 1543 (upholding injunction prohibiting picketing in "speech free zone" outside front door, blocking parking lot, loud noise, or harassing patients or staff); reaffirmed in *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641
    vii. *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230 (no injunction against picketing in a public street in front of abortion clinic)

6. Permitted activities
    a. Leafleting

b. Signature gathering

7. Kinds of speech
    a. Political
    b. Religious
    c. Labor (see below)
    d. Religious speech
        i. By religious people on others' property
        ii. By other people on church grounds: *Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244 (church can ban non-member disruptive speech on its property)
    e. Anti-abortion speech (see medical facility above)
8. Activities that can be banned
    a. Solicitation of funds
9. Permitted locations
    a. Privately owned sidewalk

iv. Permitted restrictions
1. Reasonable time, place and manner

d. Union speech
i. Federal law
1. *Carey v. Brown* (1980) 447 U.S. 455 (striking on equal protection grounds statute that prohibited picketing residences but exempted labor pickets at places of employment); *Police Dept. of Chicago v. Mosley* (1972) 408 U.S. 92 (nonlabor picketing must be permitted if labor picketing is); *Grayned v. Rockford* (1972) 408 U.S. 104 (same).
2. *Hudgens v. NLRB* (1976) 424 U.S. 507, overruling *Logan Valley*, holding that First Amendment free speech guarantee does not extend to speech activities on privately owned sidewalks in front of the entrances to stores, whether or not those stores are located in shopping centers and whether or not the speech pertains to a labor dispute.

ii. California law
1. *Fashion Valley Mall v. NLRB* (2007) 42 Cal.4th 850
2. *United Farm Workers v. Superior Court* (1975) 14 C.3d 902 (ex parte order limiting picketing without notice to union violated union's speech rights)
3. *Los Angeles Alliance for Survival v. Los Angeles* (2000) 22 Cal.4th 352
4. *Ralphs Grocery Co. v. United Food and Commercial Union Local 8* (2012) 55 Cal.4th 1083
5. *Best Friends Animal Soc. v. Macerich Westside Pavilion Property* (2011) 193 Cal.App.4th 168, holding that mall rules giving preferential treatment to labor-related speech were content-based and did not survive strict scrutiny because they did not serve a compelling interest; shopping malls are not required to give labor speech greater access than other kinds.

6. <u>State Action Requirement</u>

i. Federal law

1. *Marsh v. Alabama* – company town

ii. California law
1. Unclear, but may be moot
2. *Golden Gate Center v. Golden Gateway Tenants Assn*. (2001) 26 Cal.4th 1013 (plurality)
    a. Leafleting in apartment complex
    b. Plurality:
        i. state action requirement (but recognized that actions of private property owner may be considered state action if the property is functionally equivalent to a traditional public forum)
    c. Dissent:
        i. no state action requirement
    d. Chief Justice George
        i. No comment
3. *Hoffman* (train station)
    a. "we reiterated that private property that was open to the public in the same manner as public streets or parks could constitute a public forum for free expression."
4. *Fashion Valley Mall*
    a. "The idea that private property can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks long predates our decision in *Pruneyard*."

7. <u>Some Significant Cases</u>

a. *Ralphs Grocery Co. v. United Food and Commercial Union Local 8* (2012) 55 Cal.4th 1083
b. *San Leandro Teachers Assn. v. Governing Bd. of the San Leandro Unified School Dist*. (2009) 46 Cal.4th 822
c. *Fashion Valley Mall v. NLRB* (2007) 42 Cal.4th 850
d. *Waremart Foods v. N.L.R.B.* (D.C.Cir.2004) 354 F.3d 870 and *Waremart Foods v. United Food & Commercial Workers Union* (2001) 87 Cal.App.4th 145
e. *Katzberg v. UC Regents* (2002) 29 Cal.4th 300
f. *Golden Gate Center v. Golden Gateway Tenants Assn*. (2001) 26 Cal.4th 1013
g. *Gerawan Farming Inc. v. Lyons* (2000) 24 Cal.4th 468
h. *Hill v. Colorado* (2000) 530 U.S. 703
i. *LA Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352
j. *Schenck v. Pro-Choice Network of Western New York* (1997) 519 U.S. 357
k. *Planned Parenthood Shasta-Diablo v. Williams* (1994) 7 Cal.4th 860; reaffirmed in *Planned Parenthood Shasta-Diablo v. Williams* (1995) 10 Cal.4th 100
l. *Madsen v. Women's Health Center* (1994) 512 U.S. 753
m. *ISKCON v. Lee* (1992) 505 U.S. 672
n. *Ward v. Rock Against Racism* (1989) 491 U.S. 781
o. *Frisby v. Schultz* (1988) 487 U.S. 474
p. *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288
q. *Carey v. Brown* (1980) 447 U.S. 455

r. *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899
s. *Grayned v. Rockford* (1972) 408 U.S. 104
t. *Police Dept. of Chicago v. Mosley* (1972) 408 U.S. 92