412 N.W.2d 339
Court of Appeals of Minnesota.

STATE of Minnesota, City
of St. Louis Park, Appellant,
v.
Andrew David SCHOLBERG,
Renee Zitzloff, et al., Respondents.

Nos. C9–87–1008, C8–87–1016. | Sept. 22, 1987. | Review Denied Nov. 13, 1987.

Defendants were charged with trespassing on private property when they attempted to disseminate antiabortion literature and talk to passersby from privately owned sidewalk in front of medical building which contained abortion clinic. The Municipal Court, Hennepin County, Eugene J. Farrell, J., dismissed charges, and State appealed. The Court of Appeals, Parker, J., held that defendants did not have free speech rights on privately owned property.

Reversed.

West Headnotes (6)

[1] Constitutional Law
Abortion and health care

Trespass
Defenses

Privately owned sidewalk was not rendered public forum, in First Amendment context, merely because public was invited to use sidewalk to enter medical building to visit patients, see doctors, make purchases at stores, or have abortions at clinic. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[2] Abortion and Birth Control
Crimes and prosecutions

Constitutional Law
Abortion and health care

Trespass
Defenses

Prior Court of Appeals opinion upholding trespass conviction of antiabortion advocate who was in medical building's lobby did not establish that sidewalk outside building was public property and could be used to disseminate literature; indication in prior opinion that sidewalk outside building was public property referred to those publicly owned sidewalks appurtenant to public streets, rather than sidewalk involved in subsequent trespassing prosecution. M.S.A. § 609.605, subd. 1(5).

[3] Constitutional Law
Commercial establishments

State may not impose criminal liability on individual who distributes literature on sidewalks and streets of company-owned town or its functional equivalent. U.S.C.A. Const.Amend. 1.

[4] Abortion and Birth Control
Access, Interference, and Protests

Constitutional Law
Abortion and health care

Constitutional Law
Commercial establishments

Trespass
Defenses

First Amendment did not entitle antiabortion advocates to disseminate antiabortion literature and talk to passersby from privately owned front sidewalk of medical building, which contained abortion clinic; thus, trespassing charges against advocates should not have been dismissed. M.S.A. § 609.605, subd. 1(5); U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[5] States

Police power

State, in exercise of police power, may, under its own Constitution, adopt liberties more expansive than those conferred by the United States Constitution.

[6] Constitutional Law

Trespass

Minnesota Constitution did not provide free speech rights more expansive than those provided by the United States Constitution, such as would preclude trespassing prosecution of antiabortion advocates who were disseminating literature and talking to passersby from privately owned front sidewalk of medical building. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

340 *Syllabus by the Court

1. The trial court erred in dismissing trespassing charges against respondents.

2. We decline to decide whether the Minnesota Constitution affords respondents greater free speech rights on private property than does the federal Constitution.

Attorneys and Law Firms

Hubert H. Humphrey, III, Atty. Gen., Peter A. Cahill, Asst. St. Louis Park City Atty., Patrick W. Ledray, Minneapolis, for the State.

Daniel Klas, St. Paul, for Ronda Chinn and Renee Zitzloff.

George Kadinger, St. Paul, for Scholberg.

Heard, considered and decided by FOLEY, P.J., and PARKER and SEDGWICK, JJ.

Opinion

OPINION

PARKER, Judge.

Respondents were arrested for trespassing on private property. The trial court dismissed the charges. The state appealed, and the cases were consolidated on appeal. We reverse, holding that the trespassing charges must be reinstated.

FACTS

On November 21, 1986, respondents Renee Zitzloff, Ronda Chinn and Andrew Scholberg attempted to disseminate anti-abortion literature and talk to passersby from the front sidewalk of the Meadowbrook Medical Building. The demonstration took place on a wide sidewalk under an overhang at the building's main entrance. James Quick, Methodist Hospital's security supervisor, informed the demonstrators that they were on private property and asked that they leave. Respondents refused to leave and were subsequently arrested for trespass.

Meadowbrook Medical Building, Inc., leases the sidewalk area and the property on which the Meadowbrook Medical Building (Meadowbrook) is situated from Methodist Hospital. Both the building and the sidewalk area are located entirely within Methodist Hospital's private property. Meadowbrook houses the Meadowbrook Women's Clinic which, among other functions, provides abortion and abortion counseling to pregnant women. Meadowbrook's tenants also include approximately 110 physicians and dentists and 24 businesses.

Two drives with entrances at Excelsior Boulevard and Louisiana Avenue provide access to Meadowbrook. These drives are located on the hospital's property. A semaphore controls traffic at the intersection of one drive and Excelsior Boulevard. Public sidewalks parallel Excelsior Boulevard and Louisiana Avenue.

Meadowbrook's management company and Methodist Hospital prohibit all protest activity and the distribution of

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unapproved literature on their property. Historically, the only solicitation the hospital has permitted ***341** is its own United Way campaign drive. People are free to demonstrate without authorization on the public sidewalk next to Louisiana Avenue and on the center island of the drive intersecting Excelsior Boulevard. On numerous occasions, people at the Excelsior intersection have distributed literature to people entering and leaving hospital property.

The trial court specifically found that the demonstration area was on private property. It also found that demonstrators had access to the property for expressive purposes at the drive entrances to the hospital property at Excelsior Boulevard and Louisiana Avenue. Nevertheless, the court concluded:

> Because of the traffic situation and the distance of the said entrances from the Meadowbrook Office Building, the entrance sites would not offer reasonable access by the defendants to the intended audience to whom they wished to disseminate information.

Thus, the court dismissed the trespassing charges. The state appeals.

ISSUES

1. Did the trial court err in dismissing trespassing charges against respondents?

2. Does the Minnesota Constitution provide respondents with greater expressive rights than the United States Constitution?

ANALYSIS

I

This is a case of conflicting rights—between demonstrators' free speech rights and a private-property owner's right to exclude.

Zitzloff and Chinn were charged with trespassing under Minn.Stat. § 609.605, subd. 1(5) (1986). Scholberg was charged with trespassing under section 12–503 of the St. Louis Park Ordinance Code. They were attempting to distribute anti-abortion literature on private property at the time of their arrests.

As a general rule, the constitutional guarantee of free speech protects only against abridgment by the government. *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 513, 96 S.Ct. 1029, 1033, 47 L.Ed.2d 196 (1976). It does not provide redress against abridgment by private individuals or corporations. *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*, 278 N.W.2d 81, 94 (Minn.1979). It does not permit persons to exercise their first amendment free speech rights on private property over the owner's objections. The Supreme Court has "never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 568, 92 S.Ct. 2219, 2228, 33 L.Ed.2d 131 (1972).

[1] Scholberg presents the novel argument that the nature of a sidewalk's use, and not its title of ownership, governs whether a privately owned sidewalk should be accorded public forum treatment. [1] He contends that Meadowbrook's sidewalk is virtually indistinguishable from any other public sidewalk in a municipality. A public bus stop is within 65 feet of the building's entrance and no gate or chain prevents people from entering the hospital's property on two access drives 24 hours a day. He thus concludes this court should treat the Meadowbrook sidewalk as a public forum.

Scholberg's reliance on *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), is misplaced. *Grace* addressed access to a publicly owned sidewalk. Furthermore, Supreme Court cases clearly distinguish between free speech rights of persons on public, as compared to ***342** private, property. In *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 559–60, 92 S.Ct. 2219, 2224, 33 L.Ed.2d 131 (1972), the Supreme Court noted that "privately owned streets, sidewalks, and other areas of a shopping area" are not for all purposes and uses analogous to publicly owned facilities. There the Court did not find that demonstrators had a constitutional right to demonstrate on a shopping center's private sidewalks simply because the public was invited.

"[O]ne of the essential sticks in the bundle of property rights is the right to exclude others." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741 (1980). Even publicly owned property does not become a "public forum" simply because members of the public are permitted to come and go at will. *Grace*, 461 U.S. at 177, 103 S.Ct. at 1707. Merely because the public is invited to use Meadowbrook's sidewalk to enter the building to visit patients, see doctors, make purchases at the stores, or have abortions at the clinic does not render Meadowbrook's sidewalk a public forum.

[2] Scholberg also claims this court held that the sidewalk in front of Meadowbrook is public in *State v. Scholberg*, 395 N.W.2d 454 (Minn.Ct.App.1986) (*Scholberg I*). In that case this court upheld the conviction of Scholberg, the respondent here, for trespassing in Meadowbrook's lobby and stated, "[t]he sidewalk outside the building is public property and may be used to disseminate literature." *Id.* at 456. Ownership of the sidewalks around Meadowbrook was not essential to the decision in *Scholberg I*. The trespass area in *Scholberg I* was Meadowbrook's privately owned lobby. Moreover, people may demonstrate on the *publicly owned* sidewalks outside the hospital's property along Louisiana Avenue and Excelsior Boulevard. Our reading of *Scholberg I* convinces us that we were there referring to these publicly owned sidewalks appurtenant to public streets. Indeed, people frequently demonstrate there with impunity.

[3] **[4]** Although the general rule is that the constitutional guarantee of free speech is a guarantee only against abridgment by the government, there is an exception. Under *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), a state may not impose criminal liability on an individual who distributes literature on the sidewalks and streets of a company-owned town or its functional equivalent. *Hudgens*, 424 U.S. at 520, 96 S.Ct. at 1036; *Marsh*, 326 U.S. at 509, 66 S.Ct. at 280. In *Marsh* a Jehovah's Witness was convicted of trespass for distributing literature without a license on a sidewalk in Chickasaw, Alabama, a company-owned town. Chickasaw had "all the characteristics of any other American town" including, among other things, residential buildings, streets, a sewer system, a "business block," a deputy serving as the town's policeman, and a United States Post Office.

> In short, the town and its shopping district [were] accessible to and freely used by the public in general and there [was] nothing to distinguish them from any other town and shopping center except the fact that the title to the property belong[ed] to a private corporation.

Marsh, 326 U.S. at 503, 66 S.Ct. at 277. The defendant's activity would clearly have been permitted had title to Chickasaw belonged to a municipal corporation. *Id.* at 504, 66 S.Ct. at 277. Concluding that the company's "property interests" should not be allowed to lead to a different result in Chickasaw, which did not function differently from any other town, the Court reversed defendant's conviction on free speech grounds. *Hudgens*, 424 U.S. at 514, 96 S.Ct. at 1033 (citing *Marsh*, 326 U.S. at 506–08, 66 S.Ct. at 278–79).

Courts have most frequently applied the *Marsh* exception to privately owned shopping centers. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), the Supreme Court examined the similarities between a privately owned shopping center and the "business block" of Chickasaw involved in *Marsh*, concluding that the shopping center was the functional equivalent of that district. *Id.* at 325, 88 S.Ct. at 1612. Based on that ***343** conclusion, the Court held that the peaceful picketing of a business located within the the shopping center could not be enjoined on the ground that the private property owners objected. Rather, the property had to be treated the same as business districts on public property.

After *Logan Valley*, the Supreme Court held in *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, that demonstrators against the Vietnam War had no free speech rights to distribute handbills in a private shopping center contrary to the owner's policy against all handbilling. *See id.* at 567–69, 92 S.Ct. at 2228–29. Although the Court attempted to distinguish *Logan Valley*, in *Hudgens* the Court admitted that *Lloyd* effectively rejected both the rationale and holding of *Logan Valley*. *Hudgens*, 424 U.S. at 517–19, 96 S.Ct. at 1035–36.

In *Hudgens* the Court again concluded that free speech rights were not implicated when demonstrators attempted to

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advertise their strike against a store in an enclosed, privately owned shopping mall. *Hudgens*, 424 U.S. at 521, 96 S.Ct. at 1037. That mall contained 60 retail stores and parking for 2,640 cars. *Id.* at 509, 96 S.Ct. at 1031. The *Hudgens* court found that the shopping center was not the functional equivalent of a municipality. *Id.* at 520–21, 96 S.Ct. at 1036–37. *Hudgens* thus clarified that *Marsh* is a very narrow exception, applicable only when the private "property has taken on *all* the attributes of a town." *See id.* at 516, 96 S.Ct. at 1035 (citing *Logan Valley*, 391 U.S. at 332, 88 S.Ct. at 1615 (Black, J., dissenting)).

Chinn and Zitzloff argue that *State v. Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968), governs this case. In *Miller* the Minnesota Supreme Court summarily applied *Logan Valley* to a case involving defendants who had been convicted of trespassing at the Midway Shopping Center for distributing pamphlets on behalf of a political candidate. Relying exclusively on *Logan Valley* for its holding, the court reversed the defendants' convictions. *Id.* at 567, 159 N.W.2d at 896. Respondents' argument is unpersuasive. Because *Hudgens* overruled *Logan Valley*, *Miller* is no longer good law.

Throughout the proceedings, the trial court and the parties have presumed that current law entitles demonstrators, in general, to a reasonable opportunity to reach their targeted audience. Under *Hudgens*, however, demonstrators are clearly not entitled access—reasonable or otherwise—to their targeted audience on private property over the owner's objections. In *Lloyd* the Court carefully distinguished *Logan Valley*, resting part of its decision on the finding that

> the store [to be picketed in *Logan Valley*] was located in the center of a large private enclave with the consequence that no other *reasonable opportunities for the pickets to convey their message to their intended audience were available.*

Lloyd, 407 U.S. at 563, 92 S.Ct. at 2226 (emphasis added). When the *Hudgens* court overruled both the holding and rationale of *Logan Valley*, it also extinguished any notion that a private owner could be forced to provide demonstrators with a forum in which to vent their views absent the *Marsh* exception. *See Hudgens*, 424 U.S. at 520–21, 96 S.Ct. at 1036–37.

The parties have also made too much of this court's opinion in *Scholberg I*, in which this court stated:

> A person may be permitted to distribute literature on private property over the owner's objections only where the individual has *no other reasonable opportunity to reach the intended audience.*

Id., 395 N.W.2d at 457 (emphasis added). The import of this statement is evident in the context of a paragraph of the opinion discussing the *Marsh* exception. *See id.* at 457. To the extent that clarification is necessary, we reiterate that reasonable access is irrelevant absent the *Marsh* company-town exception.

As is readily apparent from *Hudgens*, respondents have no free speech rights on the hospital's private property. The *Marsh* exception is inapplicable on the facts of this case.

[5] **[6]** Zitzloff and Chinn urge this court to interpret the Minnesota Constitution to protect their expressive activities on private ***344** property. A state, in the exercise of its police power, may under its own constitution adopt liberties more expansive than those conferred by the United States Constitution. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741 (1980). Assuming respondents properly raised this issue below, we note that this court's function is not to adopt constitutional principles more expansive under the Minnesota Constitution than under the United States Constitution. Such decisions are more properly left to the Minnesota Supreme Court. Further, the Minnesota Supreme Court has been cautious in establishing more expansive rights under the Minnesota Constitution. *See, e.g., State v. Fuller*, 374 N.W.2d 722, 726–27 (Minn.1985) (reversing this court's holding that the Minnesota Constitution's double jeopardy clause precluded retrial when the United States Constitution would not); *AFSCME Councils 6, 14, 65 & 96, AFL–CIO v. Sundquist*, 338 N.W.2d 560, 570 n. 12 (Minn.1983) (reiterating that the prohibition against arbitrary legislative action embodied in the state equal protection clause, the state uniformity clause and the state special legislation clause is coextensive with that afforded by the federal equal protection clause); *State v. Century Camera, Inc.*, 309 N.W.2d 735,

738 n. 6, 740 (Minn.1981) (the protection of commercial speech guaranteed by the Minnesota Constitution is no more extensive than the protection provided by the federal constitution).

The trial court erred in dismissing the trespassing charges against respondents. Respondents had no constitutional free speech rights to demonstrate on a private sidewalk over the owner's objections. We decline to interpret the Minnesota Constitution to provide free speech rights more expansive than those provided by the United States Constitution.

DECISION

Reversed.

Footnotes

1 In public forums "the government may enforce reasonable time, place, and manner regulations as long as the restrictions are 'content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983) (citing *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)). "Public places," historically associated with the free exercise of expressive activities, are considered to be "public forums." *Grace*, 461 U.S. at 177, 103 S.Ct. at 1707. Sidewalks, streets and parks are generally included within this definition.

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138 N.J. 326
Supreme Court of New Jersey.

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, Sylvia Ackelsberg, and David Cline, Plaintiffs-Appellants and Cross-Respondents,
v.
J.M.B. REALTY CORPORATION, d/b/a Riverside Square, Prutaub Joint Venture, d/b/a The Mall at Short Hills, Defendants-Respondents and Cross-Appellants,
and
Cherry Hill Center, Inc., d/b/a Cherry Hill Mall, Kravco, Inc., d/b/a Hamilton Mall, Equity Properties & Development Co., Inc., d/b/a Monmouth Mall, Kravco, Inc., d/b/a Quakerbridge Mall, Rockaway Center Associates, d/b/a Rockaway Townsquare, Woodbridge Center, Inc., d/b/a Woodbridge Center, Livingston Mall Venture, d/b/a Livingston Mall, Hartz Mountain Industries, Inc., d/b/a The Mall at Mill Creek, Defendants-Respondents.

Argued March 14, 1994.
| Decided Dec. 20, 1994.

Citizens group sued owners of private shopping malls and sought permanent, mandatory injunctive order to compel owners to grant access to private property to allow group to engage in express activity of leafletting. The Superior Court, Chancery Division, Ciolino, J., 266 N.J.Super. 195, 628 A.2d 1094, upheld rights of shopping mall owners to prohibit or restrict leafletting, and group appealed. The Superior Court, Appellate Division, 266 N.J.Super. 159, 628 A.2d 1075, affirmed. On certification, the Supreme Court, Wilentz, C.J., held that regional shopping centers were required to permit distribution of leaflets on societal issues, subject to reasonable conditions.

Reversed.

Garibaldi, J., filed dissenting opinion with which Clifford, J., and Michels, Judge, joined.

West Headnotes (19)

[1] Evidence
Facts Relating to Human Life, Health, Habits, and Acts

For purpose of determining whether right of free speech requires that regional shopping malls permit distribution of leaflets on political issues, court will take judicial notice of fact that suburban shopping districts have substantially replaced downtown business districts of state as centers of commercial and social activity.

2 Cases that cite this headnote

[2] Constitutional Law
Stores, Shopping Centers, or Malls

Federal Constitution affords no general right to free speech in privately owned shopping centers because the action of privately owned shopping centers is not equivalent to "state action." U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[3] Constitutional Law
Applicability to Governmental or Private Action; State Action

State right of free speech is protected not only from abridgement by government but also from unreasonably restrictive and oppressive conduct by private entities. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[4] Constitutional Law
Private Property

For purposes of determining extent of free speech rights on privately owned property, court takes into account nature, purposes, and primary use of private property to determine its "normal use": extent and nature of public's invitation to use that property; and purpose of expressional activity

undertaken on that property in relation to both private and public use of property. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[5] Constitutional Law
Commercial Establishments

For purposes of determining whether regional shopping centers required to allow distribution of leaflets on political and social issues, regional and community shopping centers involve "public use" that is so pervasive as to include implied invitation for leafletting. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[6] Constitutional Law
Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

To determine whether owner of private property is required to allow leafletting on political and social issues, factual issue is overall nature and extent of invitation to public and is not restricted to subjective "purpose" of property owner's uses or to whether owners extended explicit invitation to guests to speak; issue is whether actual conduct amounted to implied invitation and, if so, nature and extent of that invitation. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[7] Constitutional Law
Commercial Establishments

For purposes of determining whether owner of area shopping mall is required to permit leafletting on social and political issues, predominant characteristic of normal use of shopping area is its all-inclusiveness, even if primary purpose of centers is profit and primary use is commercial, which supports conclusion that leafletting must be permitted. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law
Commercial Establishments

For purposes of determining whether owner of area shopping mall was required to permit leafletting on political and social issues, nonretail uses of mall showed general invitation to use which was all-inclusive and which supported conclusion that leafletting must be permitted. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[9] Constitutional Law
Commercial Establishments

For purposes of determining whether owner of area shopping mall must permit leafletting on political and social issues, exercise of free speech on property is compatible with intended use of property, particularly in light of tradition of compatibility between free speech and downtown business districts. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law
Commercial Establishments

Taken together, use of area shopping centers, invitation to customers and noncustomers to be on premises, and suitability of free speech at centers supported existence of constitutional free speech right and corresponding obligation for shopping center owners to permit leafletting on political and social issues, subject to suitable restrictions. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[11] Constitutional Law
Commercial Establishments

Balancing of expressional rights of public interest groups and private property rights of owners of shopping mall supported conclusion that mall owners be required to allow distribution of leaflets concerning political

and social issues as weight of free speech interest was greater than property owner's interest in controlling and limiting activities on their property; property owners intentionally transformed private property into public square.

5 Cases that cite this headnote

[12] Constitutional Law
Commercial Establishments

Where private ownership of property which serves as functional counterpart of downtown business district has effectively monopolized significant opportunities for free speech, owners cannot eradicate those opportunities, and, thus, owners of area shopping mall may be required to permit leafletting on political and social issues. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[13] Constitutional Law
Stores, Shopping Centers, or Malls

Because state constitutional provisions concerning free speech are interpreted in light of changed society, emergence of suburban shopping centers as competitors of downtown business district requires that constitutional right of free speech present in those districts be continued in area shopping centers, in light of New Jersey State Constitution's affirmative right of free speech which neither government nor private entities can unreasonably restrict.

8 Cases that cite this headnote

[14] Constitutional Law
Private Property

Private property rights are required to yield to right of freedom of speech if private property rights are exercised in way which curtails right of freedom of speech in order to avoid relatively minimal interference with private property.

[15] Constitutional Law
Commercial Establishments

Constitutional Law
Particular Subjects and Regulations

Eminent Domain
Zoning, Planning, or Land Use; Building Codes

Granting political group's right to distribute leaflets in private regional shopping areas did not deprive shopping center owners of property without due process of law, without just compensation, or infringe on right of free speech of center owners absent any showing that leafletting would have slightest impact on either business or profits. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[16] Constitutional Law
Commercial Establishments

Requirement that all regional shopping centers permit leafletting on social issues does not apply to shopping centers which are not functional equivalent of downtown business district, such as highway strip malls, single suburban stores, or small to medium shopping centers, in light of limited implied invitation to public to smaller centers.

4 Cases that cite this headnote

[17] Constitutional Law
Commercial Establishments

Requirement that regional shopping centers permit leafletting on social issues was limited to leafletting and associated speech in support of or in opposition to causes, candidates, and parties and did not confer free speech rights at shopping centers that went beyond political and societal free speech at regional and community shopping centers.

5 Cases that cite this headnote

[18] Constitutional Law
Commercial Establishments

Requirement that leafletting be permitted on social issues at regional shopping centers was limited to leafletting and associated free speech and did not include bullhorns, megaphones, soapboxes, placards, pickets, parades, and demonstrations, or anything other than normal speech as necessary to effectiveness of leafletting.

[19] Constitutional Law
Commercial Establishments

While regional shopping centers were required to permit leafletting on social issues, shopping centers retained broad power to adopt rules and regulations concerning time, place, and manner of exercising right of free speech, which would in most instances include limits on time of leafletting to specific days and specific number of days.

2 Cases that cite this headnote

Attorneys and Law Firms

****760** ***331** Frank Askin and William J. Volonte, Reitman Parsonnet, Newark, on behalf of the American Civil Liberties Union Foundation, for appellants and cross-respondents (Mr. Askin, Howard Moskowitz, and Mr. Volonte, attorneys).

Joseph Aviv, Bloomfield Hills, MI, a member of the Michigan bar, for respondents and cross-appellants (Cuyler, Burk & Matthews, attorneys; Mr. Aviv, Jo Ann Burk, Peter Petrou, and Bruce L. Segal, a member of the Michigan bar, on the brief).

Nicholas deB. Katzenbach, Morristown, for respondents Cherry Hill Center, Inc., d/b/a Cherry Hill Mall and Woodbridge ***332** Center, Inc., d/b/a Woodbridge Center (Riker, Danzig, Scherer, Hyland & Perretti, attorneys; Anne M. Patterson, on the brief).

Ronald E. Wiss, Roseland, for respondents Rockaway Center Associates, d/b/a Rockaway Townsquare and Livingston Mall Venture, d/b/a Livingston Mall (Wolff & Samson, attorneys; Mr. Wiss and Sandra Nachshen, on the brief).

Brian J. McMahon, Newark, for respondents Kravco, Inc., d/b/a Hamilton Mall, Kravco, Inc., d/b/a Quakerbridge Mall (Crummy, Del Deo, Dolan, Griffinger & Vecchione, attorneys).

Mark A. Steinberg, Asbury Park, submitted a letter in lieu of brief on behalf of respondent Equity Properties and Development Co., Inc., d/b/a Monmouth Mall.

Curtis L. Michael, Secaucus, submitted a letter brief on behalf of respondent Hartz Mountain Industries, Inc., d/b/a The Mall at Mill Creek (Horowitz, Rubino & Associates, attorneys).

Bernard A. Kuttner, Millburn, submitted a brief on behalf of amici curiae, United Farm Workers of America, AFL-CIO, and New Jersey Consumer Coalition.

Opinion

The opinion of the Court was delivered by

WILENTZ, C.J.

The question in this case is whether the defendant regional and community shopping centers must permit leafletting on societal issues. We hold that they must, subject to reasonable conditions set by them. Our ruling is limited to leafletting at such centers, and it applies nowhere else. [1] It is based on our citizens' right of free speech embodied in our State Constitution. *N.J. Const.* art. I, ¶¶ 6, 18. It follows the course we set in our decision in *State v. Schmid*, 84 *N.J.* 535, 423 *A.*2d 615 (1980).

***333** In *Schmid* we ruled that our State Constitution conferred on our citizens an affirmative right of free speech that was protected not only from governmental restraint-the extent of First Amendment protection-but from the restraint of private property owners as well. We noted that those state constitutional protections are "available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property." *Id.* at 560, 423 *A.*2d 615.

And we set forth the standard to determine what public use will give rise to that constitutional obligation. The standard takes into account the normal use of the property, the extent and nature of the public's invitation to use it, and the purpose of the expressional activity in relation to both its private and public use. ****761** This "multi-faceted" standard determines whether private property owners "may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly." *Id.* at 563, 423 *A.*2d 615. That is to say, they determine whether, taken together, the normal uses of the property, the extent of the public's invitation, and the purpose of free speech in relation to the property's use result in a suitability for free speech on the property that on balance, is sufficiently compelling to warrant limiting the private property owner's right to exclude it; a suitability so compelling as to be constitutionally required.

Applying *Schmid*, we find the existence of the constitutional obligation to allow free speech at these regional and community shopping centers clear. Although the ultimate purpose of these shopping centers is commercial, their normal use is all-embracing, almost without limit, projecting a community image, serving as their own communities, encompassing practically all aspects of a downtown business district, including expressive uses and community events. We know of no private property that more closely resembles public property. The public's invitation to use the property-the second factor of the standard-is correspondingly broad, its all-inclusive scope suggested by the very few restrictions ***334** on the invitation that are claimed, but not advertised, by defendants. For the ordinary citizen it is not just an invitation to shop, but to do whatever one would do downtown, including doing very little of anything.

As for the third factor of the standard-the relationship between the purposes of the expressional activity and the use of the property-the free speech sought to be exercised, plaintiff's leafletting, is wholly consonant with the use of these properties. Conversely, the right sought is no more discordant with defendants' uses of their property than is the leafletting that has been exercised for centuries within downtown business districts discordant with their use. Furthermore, it is just as consonant with the centers' use as other uses permitted there. Indeed, four of these centers actually *permitted* plaintiff's leafletting (although it took place in only two of those).

We therefore find the existence of a constitutional obligation to permit the leafletting plaintiff seeks at these regional and community shopping centers; we find that the balance of factors clearly predominates in favor of that obligation; its denial in this case is unreasonably restrictive and oppressive of free speech: were it extended to all regional and community shopping centers, it would block a channel of free speech that could reach hundreds of thousands of people, carrying societal messages that are at its very core. The true dimensions of that denial of this constitutional obligation are apparent only when it is understood that the former channel to these people through the downtown business districts has been severely diminished, and that this channel is its practical substitute.

We hold that *Schmid* requires that the free speech sought by the plaintiff-the non-commercial leafletting and its normal accompanying speech (without megaphone, soapbox, speeches, or demonstrations)-be permitted by defendants subject to such reasonable rules and regulations as may be imposed by them. This free speech can be, and we have no doubt will be, carefully controlled by these centers. There will be no pursuit or harassment ***335** of shoppers. Given this limited free speech right-leafletting, given the centers' broad power to regulate it-and given experience elsewhere, we are confident that it is consonant with the commercial purposes of the centers and the varied purposes of their shoppers and non-shoppers.

We recognize the concerns of the defendants, including their concern that they will be hurt. Those concerns bear on the extent and exercise of the constitutional right and we have addressed them in this opinion. We recognize the depth and legitimacy of those concerns even apart from their constitutional relevance. Defendants have expended enormous efforts and funds in bringing about the success of these centers. We hope they recognize the legitimacy of the constitutional concern that in the process of creating new downtown business districts, they will have seriously diminished the value of free speech ****762** if it can be shut off at their centers. Their commercial success has been striking but with that success goes a constitutional responsibility.

Without doubt, despite the fact that the speech permitted-leafletting-is the least obtrusive and the easiest to regulate,

and despite the centers' broad power to regulate, some people will not like it, any more perhaps than they liked free speech at the downtown business districts. Dislike for free speech, however, has never been the determinant of its protection or its benefit. We live with it, we permit it, as we have for more than two hundred years. It is free speech, it is constitutionally protected; it is part of this State, and so are these centers.

I

In the summer and fall of 1990 our government and our country were debating what action, if any, should be taken in response to Iraq's invasion of Kuwait. The issue eclipsed all others. The primary competing policies were military intervention and economic sanctions. On November 8, President Bush announced a major increase in the number of troops stationed in Saudi Arabia and the Persian Gulf in order to provide "an adequate offensive military option." President's News Conference, 26 *Weekly Comp.Pres.Doc.* ***336** 1789, 1792 (Nov. 8, 1990). Plaintiff-a coalition of numerous groups [2] -opposed military intervention and sought public support for its views. For that purpose, plaintiff decided to conduct a massive leafletting campaign on November 9 and November 10, urging the public to contact Congress to persuade Senators and Representatives to vote against military intervention. The November 9 effort was aimed at commuter stops around the State. [3] The November 10 targets were shopping centers, the ten very large regional and community shopping centers whose owners are the defendants herein.

On November 9, plaintiff-aware of the shopping centers' probable refusal-sought judicial relief ordering the centers to permit ***337** the leafletting. That effort was unsuccessful. The trial court ruled that plaintiff had failed to prove refusal; appellate review was also unsuccessful.

On November 10 plaintiff's members and representatives went to the malls and requested permission to leaflet. Four of the defendant malls granted plaintiff permission to leaflet on their premises, and plaintiff did in fact leaflet at two of those malls. Monmouth Mall initially denied plaintiff's request, but later issued plaintiff a permit to use its community booth for two days in January, and even provided professional signs and displays for the group. Plaintiff used the booth on those days. The conditions imposed by mall management, however, made it difficult for plaintiff to reach the public. Among ****763** other restrictions, plaintiff was not allowed to approach passersby to offer them literature. The Mall at Mill Creek, Cherry Hill Mall, and Woodbridge Center granted plaintiff permission to use their community booths, but required that plaintiff obtain or show proof of liability insurance in the amounts of $1,000,000 for bodily injury and $50,000 to $1,000,000 for property damage. Plaintiff was unable to obtain the necessary insurance, and requested that the malls waive the requirement. Woodbridge Center waived the insurance requirements, allowing plaintiff to distribute leaflets from a table, while The Mall at Mill Creek and Cherry Hill Mall refused.

Although the six remaining malls refused permission, one of those malls-Hamilton-ultimately allowed plaintiff to leaflet. While it initially denied permission, asking plaintiff to leave the premises, it eventually allowed plaintiff to leaflet undisturbed for approximately three to four hours.

As a consequence of defendants' refusal to allow plaintiff access to the malls, and the restrictions imposed on such access where allowed, few of the thousands of people at those malls on November 10 learned of plaintiff's views.

Plaintiff again sought emergent judicial relief ordering the centers to permit its members to leaflet in support of their view that those forces already deployed refrain from any military ***338** action. Relief was again denied, both at the trial and appellate level. Plenary trial of the substantive issue of plaintiff's right to leaflet on defendants' premises was thereafter held, but by then the military intervention had occurred and the engagement was over. [4]

Each of the ten defendant shopping centers is very large. For instance, one defendant mall, Woodbridge Center, serves an area with a population of 1,400,000. On an average day in 1990, approximately 28,750 people shopped there. November 10, 1990, however, was not an average day. Not only was the tenth a Saturday, a day that is generally very busy for shopping malls, but it was also part of Veterans' Day weekend. Thus, presumably many more people visited malls on that day than on an average day. Indeed, plaintiff's witnesses testified that they sought to leaflet on that day

because of the large expected turnout of shoppers during the holiday weekend.

Nine of the defendant shopping centers are "regional centers." A regional shopping center is defined in the industry as one that

> provides shopping goods, general merchandise, apparel, furniture and home furnishings in full depth and variety. It is built around the full-line department store, with a minimum GLA [gross leasable area[5]] of 100,000 square feet, as the major drawing power. For even greater comparative shopping, two, three or more department stores may be included. In theory a regional center has a GLA of 400,000 square feet, and can range from 300,000 to more than 1,000,000 square feet.
>
> [National Research Bureau, *Shopping Center Directory 1994, Eastern Volume* (1993).]

***339** The regional centers involved in this case have from 93 to 244 tenants, including not only department stores, but also restaurants and other retail and business establishments, such as art galleries, automotive centers and gas stations, banks, brokerage houses and finance companies, leisure and entertainment centers, optical centers, travel agencies, hair salons, shoe repair shops, theaters, ticket agents, insurance agencies, doctors' offices, and a United States postal booth during the holiday seasons. One housed a United ****764** States Post Office substation until approximately 1990. Each mall is surrounded by parking facilities that hold from 3,075 to 9,000 vehicles. The acreage of the regional centers ranges from 31.44 to 238 acres.

The tenth defendant is a "community" shopping center. A community center is smaller than a regional center and lacks the variety of merchandise available at a regional mall. The industry defines a community center as one that includes

> a wide[ ] range of facilities for the sale of soft lines (apparel) and hardlines (hardware, appliances, etc.).... It is built around a junior department store, variety store or discount department store although it may have a strong specialty store. The typical size of a community center is 150,000 square feet. In practice a community center can range from 100,000 to 300,000 square feet.
>
> [*Ibid.*]

The only community center involved in this case, the Mall at Mill Creek, covers twenty-seven acres. It has a discount department store, a supermarket, sixty-two smaller retail stores, and a seven-restaurant food court.

All of the defendant shopping centers are enclosed malls-enclosures covering not only the tenants of all kinds but also substantial common areas linking them and providing space for people to congregate. In those malls where plaintiff was refused permission to leaflet, the refusal was absolute; plaintiff was denied access to the enclosed areas as well as the parking lots and sidewalks outside of the enclosures.

Although each mall asserts that it does not resemble a downtown business district, like those districts, each of these malls employs or uses part-time (or in some cases, on-duty) municipal ***340** police officers, usually in uniform and armed. Quakerbridge Mall houses a municipal police substation. Police officers, almost always off-duty, patrol the inside of Cherry Hill Mall, Woodbridge Center, Livingston Mall, and the Mall at Short Hills. The interiors of Rockaway Townsquare Mall and Monmouth Mall are patrolled by on-duty municipal police officers. Some of the malls (such as Riverside and Monmouth) hire off-duty police officers for traffic control when necessary. Most of the malls' parking lots are patrolled by municipal police officers.

Each of the defendants permits and encourages a variety of non-shopping activities on its premises.[6] Six of the malls provide access to community groups. Riverside Square Mall has a meeting room, with an occupancy of 150 persons, that is available to the public. Monmouth Mall rents a civic auditorium to various organizations. Monmouth Mall also has a community booth from which various groups are allowed to espouse their causes, distributing leaflets and literature to passersby. Hamilton, the Mall at Mill Creek, Cherry Hill Mall, and Woodbridge Center provide similar community booths.

Some of the non-shopping activities permitted by defendants involved speech, politics, and community issues. Some of these activities, moreover, have been permitted by the very defendants who denied plaintiff permission to leaflet. For example, Rockaway Townsquare Mall held a

Crime Prevention Day, has hosted community weekends, and allowed one of plaintiff's constituent members, Morris County SANE/FREEZE, to participate. Livingston Mall also has sponsored community weekends where civic groups were allowed to position themselves in the common area of the mall, distribute literature and speak about issues relevant to their causes, and Quakerbridge has hosted a similar community day.

***341** In addition to sponsoring community weekends or days, these malls have sponsored other events that included political speech or concerned issues of civic importance. Livingston Mall allowed a voter registration drive to be conducted by the League of Women Voters, and sponsored a Child ID Day with the Livingston Police. Rockaway Townsquare Mall sponsored a voter registration drive in conjunction with the Morris County Republican party, and a United Way Day of Caring where sixty-seven agencies distributed information on diverse ****765** topics, such as substance abuse, homelessness, hunger, literacy, and youth counselling. Local officials and dignitaries participated in the "kick-off" for that event. Quakerbridge Mall hosted an exhibition of local municipal groups with the Mall's Merchants Association and Lawrence Township.

The remaining malls have permitted similar events. For example, Cherry Hill Mall allowed Senator Bill Bradley's office to conduct a voter registration drive in the fall of 1990. Woodbridge Center allowed Senator Bradley to walk through its mall greeting and shaking hands with its patrons in the summer of 1990 when he was running for re-election. Both Cherry Hill Mall and Woodbridge Center allowed the Marines to sponsor "Toys for Tots" drives. Woodbridge Center's press release stressed that the focus of the event would be on children whose mothers or fathers were serving in the Persian Gulf. The Mall at Mill Creek allowed the New Jersey Prosecutor's Victim and Witness Association to present information for crime victims, allowed a Bradley for United States Senate Voter Registration Drive to be held, and allowed military recruitment by the United States Naval Sea Cadets and the United States Army.

Monmouth Mall sponsored a Spring Community Fair, held a Berlin Wall Exhibit, allowed free "Video Postcards From Home" to the Persian Gulf troops to be taped on its premises, and has a senior citizen activity network office. Riverside Square Mall allowed Senator Bradley's office to conduct a non-partisan voter registration drive. Riverside Square also sponsored a United States Marine Corps "Toys for Tots" drive, a Bergen County ***342** Read-In Festival, which involved the participation of local officials, and an Earth Day Celebration with local and national environmental organizations. Hamilton Mall hosted a Coastal Cops Celebration Holiday. This program, which is coordinated by the mall and local businesses, gives children ages six to twelve the opportunity to participate in a clean-up effort of the area's beaches.

Furthermore, based on statements at oral argument (and on our own experience) we deem it likely that defendants permit candidates, accompanied as always by a few aides, to seek support by walking through the mall, approaching shoppers, offering a handshake, and saying a few words (or more) to each. We would be surprised if those aides did not have leaflets available.

Despite the myriad of permitted uses, including many involving the distribution of issue-oriented literature-leaflets-and accompanying speech, despite the explicit permission given to plaintiff to leaflet at four of them, and despite the display of tenants' posters at most of them, posters that were visible from the common areas and expressed support for our armed forces in the Persian Gulf, all of the centers claim to prohibit issue-oriented speech and leafletting.

Defendants presented evidence that issue-oriented free speech, and especially controversial free speech, conflicted with their commercial purpose: that purpose is to get as many shoppers as possible on the premises and to provide an atmosphere that would encourage buying. Leafletting, speaking, and the assumed related consequences of such actions, were described as in conflict with shopping, particularly impulse buying, a major goal of such centers. If designed to prove probable financial loss, the evidence was unpersuasive. At malls of this size, carefully regulated leafletting, limited in duration and frequency, and permitted only in selected areas, seems unlikely to have the slightest impact on actual revenues, even if some shoppers dislike it. At most the impact would be negligible. Despite plaintiff's assertion that California's shopping centers, where leafletting has been permitted since 1979, have suffered no adverse financial consequences ***343** whatsoever, defendants suggested nothing concrete to the contrary.[7] And

the same is true of Bergen Mall, apparently ****766** a regional shopping center, where issue-oriented leafletting has been permitted since 1984 by virtue of a trial court injunction (and where plaintiff leafletted against our Persian Gulf military involvement).

At the plenary trial, plaintiff sought a permanent injunction restraining defendants from preventing or interfering with plaintiff's free speech activities, subject to reasonable conditions. It claimed this substantive right to free speech under New Jersey's Constitution as well as at common law. No claim of right was made under the Federal Constitution. Plaintiff also challenged specific regulations imposed by some of the malls including: 1) content-based regulations prohibiting offensive speech, 2) requirements that the group seeking access to the mall obtain insurance, 3) regulations prohibiting people engaging in expressive activity from approaching mall visitors and 4) arbitrary limitations on mall access.

The trial court entered judgment in favor of defendants, denying all relief, on the ground that defendants' property was dedicated solely to commercial uses inconsistent with political speech; that the invitation to the general public was limited to such use; and that, therefore, under our ruling in *State v. Schmid*, 84 *N.J.* 535, 423 *A.*2d 615 (1980), no State constitutional right of free speech on defendants' premises existed. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 266 *N.J.Super.* 195, 628 *A.*2d 1094 (Ch.Div.1991). The trial court ruled, in effect, that defendants retained the right to exclude those ***344** not invited to its premises to the same extent as any other private property owner. Given that judgment, the trial court found it unnecessary to rule on defendants' contention that the relief sought by plaintiff, if granted, would constitute a taking of their property without just compensation, would deprive them of their property without due process of law, and would abridge *their* freedom of speech by forcing them to provide a forum for the speech of others, all in violation of the Federal and State Constitutions. The Appellate Division affirmed, relying substantially on the trial court's findings and opinion. 266 *N.J.Super.* 159, 628 *A.*2d 1075 (1993).

We granted both plaintiff's petition for certification and cross-petitions filed by two of the defendants. 134 *N.J.* 564, 636 *A.*2d 522 (1993). We reverse, and declare that plaintiff has a State constitutional right to leaflet at defendants' shopping centers, subject to reasonable conditions, and that such right does not infringe on any constitutional right asserted by defendants.

II

Before reaching our discussion of the law, we must first examine the background against which this question is raised. We know its most important outline. Regional and community shopping centers significantly compete with and have in fact significantly displaced downtown business districts as the gathering point of citizens, both here in New Jersey and across America.

Statistical evidence tells the story of the growth of shopping malls. In 1950, privately-owned shopping centers of any size numbered fewer than 100 across the country. Steven J. Eagle, *Shopping Center Control: The Developer Besieged*, 51 *J.Urb.L.* 585, 586 (1974). By 1967, 105 of the larger regional and super-regional malls existed. This number increased to 199 in 1972 and to 333 in 1978. Thomas Muller, *Regional Malls and Central City Retail Sales: An Overview*, in *Shopping Centers: U.S.A.* 180, 189 (George Sternlieb & James W. Hughes eds., 1981). By 1992, the number expanded to at least 1,835. *Shopping Center World/NRB* ***345** *1992 Shopping Center Census*, Shopping Center World, Mar. 1993, at 38. [8] Thus, from 1972 to 1992 the number of regional and super-regional malls in the nation increased by roughly 800%. In New Jersey, the number of malls greater than 400,000 square feet, or, roughly, the number of regional and super-regional malls, has more than doubled over the last twenty years, increasing from 30 in ****767** 1975 to 63 in 1992. *Shopping Center Census ...*, Shopping Center World, Jan. 1977, at 21; *Shopping Center World/NRB 1992 Shopping Center Census*, *supra*, at 46.

The share of retail sales attributable to regional and super-regional malls has demonstrated a similar pattern. Nationally, regional malls' market share of "shopper goods sales" was 13% in 1967 and 31% in 1979. Muller, *supra*, at 187. In 1991 retail sales in "shopping centers," a category that includes not only regional malls but other types of urban and suburban retail centers, "accounted for over 56% of total retail sales in the United States, excluding sales by automotive dealers and gasoline service stations." International Council of Shopping

Centers, *The Scope of the Shopping Center Industry in the United States, 1992-1993,* at 1 (1992). In New Jersey in 1991, retail sales in shopping centers constituted 44% of non-automotive retail sales. *Id.* at 34.

Thus, malls are where the people can be found today. Indeed, 70% of the national adult population shop at regional malls and do so an average of 3.9 times a month, about once a week. *Id.* at 1. Therefore, based on adult population data from the 1990 census, [9] more than four million people on average shop at our regional ***346** shopping centers every week, assuming New Jersey follows this national pattern.

[1] The converse story, the decline of downtown business districts, is not so easily documented by statistics. But for the purposes of this case, we do not need statistics. This Court takes judicial notice of the fact that in every major city of this state, over the past twenty years, there has been not only a decline, but in many cases a disastrous decline. This Court further takes judicial notice of the fact that this decline has been accompanied and caused by the combination of the move of residents from the city to the suburbs and the construction of shopping centers in those suburbs. *See Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.,* 512 *Pa.* 23, 515 *A.*2d 1331, 1336 (1986) ("Both statistics and common experience show that business districts, particularly in small and medium sized towns, have suffered a marked decline. At the same time, shopping malls, replete with creature comforts, have boomed.").

That some downtown business districts have survived, and indeed thrive, is also fact, demonstrated on the record before us. The overriding fact, however, is that the movement from cities to the suburbs has transformed New Jersey, as it has many states. The economic lifeblood once found downtown has moved to suburban shopping centers, which have substantially displaced the downtown business districts as the centers of commercial and social activity.

The defendants in this case cannot rebut this observation. Indeed, the shopping center industry frequently boasts of the achievement. The industry often refers to large malls as " 'the new downtowns.' " Note, *Private Abridgment of Speech and the State Constitutions,* 90 *Yale L.J.* 165, 168 n. 19 (1980) (quoting Shopping Center World, Feb. 1972, at 52). It correctly asserts that "the shopping center is an integral part of the economic and social fabric of America." International Council of Shopping Centers, *The Scope of the Shopping Center Industry in the United States, 1992-1993,* ix (1992).

***347** Industry experts agree. One recent study asserted "[t]he suburban victory in the regional retail war was epitomized by the enclosed regional mall.... [Regional malls] serve as the new 'Main Streets' of the region-the dominant form of general merchandise retailing." James W. Hughes & George Sternlieb, *Rutgers Regional Report Volume III: Retailing and Regional Malls* 71 (1991). Beyond that, one expert maintains that shopping centers have "evolved beyond the strictly retail stage to become a public square where people gather[ ]; it is often the only large contained place in a suburb and it provides a place for exhibitions that no other space can offer." *Specialty Malls Return to the Public Square Image,* Shopping Center World, Nov. 1985, at 104.

****768** Most legal commentators also have endorsed the view that shopping centers are the functional equivalent of yesterday's downtown business district. *E.g.,* James M. McCauley, Comment, *Transforming the Privately Owned Shopping Center into a Public Forum:* PruneYard Shopping Center v. Robins, 15 *U.Rich.L.Rev.* 699, 721 (1981) ("[P]rivately-owned shopping centers are supplanting those traditional public business districts where free speech once flourished."); Note, *Private Abridgment of Speech and the State Constitutions, supra,* 90 *Yale L.J.* at 168 ("[T]he privately held shopping center now serves as the public trading area for much of metropolitan America.").

Statisticians and commentators, however, are not needed: a walk through downtown and a drive through the suburbs tells the whole story. And those of us who have lived through this transformation know it as an indisputable fact of life, and that fact does not escape the notice of this Court.

III

We shall briefly summarize the lengthy history of the law of free speech that underlies this case. The relevant historical starting point is *Marsh v. Alabama,* 326 *U.S.* 501, 66 *S.Ct.* 276, 90 *L.Ed.* 265 (1946). In *Marsh,* the United States Supreme Court held that the First Amendment's guarantee

of free speech was ***348** violated when the private owners of a company town prevented distribution of literature in its downtown business district. Finding that the company town had all the attributes of a municipality, the Court held that the private owner's action was "state action" for constitutional free speech purposes. In a democracy, the Court recognized, citizens "must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored." *Id.* at 508, 66 *S.Ct.* at 280, 90 *L.Ed.* at 270. The paramount right of the citizens to be informed overrode the rights of the property owners in the constitutional balance. *Id.* at 509, 66 *S.Ct.* at 280, 90 *L.Ed.* at 270.

The question whether citizens may exercise a right of free speech at privately-owned shopping centers without permission of the owners has been litigated extensively. The first time the question came before the Supreme Court, the Court upheld the right of free speech at shopping centers. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 *U.S.* 308, 325, 88 *S.Ct.* 1601, 1612, 20 *L.Ed.*2d 603, 616 (1968). Clearly relying on *Marsh*, the majority in *Logan Valley* ruled that shopping centers are the functional equivalent of downtown business districts and that the private owners could therefore not interfere with the exercise of the right of free speech. For First Amendment purposes that interference constituted "state action." The Court implied, but did not hold, that an unrestricted free speech right existed. *Logan Valley* was thereafter "limited" by *Lloyd Corp. v. Tanner*, 407 *U.S.* 551, 92 *S.Ct.* 2219, 33 *L.Ed.*2d 131 (1972), which held that war protesters had no right of free speech at shopping centers. The Court distinguished *Logan Valley*, confining it to the situation in which the speech was related to shopping center activities-a labor dispute involving one of the center's tenants-and in which no alternative was available for the expression of views, *id.* at 563, 92 *S.Ct.* at 2226, 33 *L.Ed.*2d at 139-40- ***349** such as the public sidewalks that surrounded the center in *Lloyd*. [10]

The Court in *Hudgens v. NLRB*, 424 *U.S.* 507, 517-18, 96 *S.Ct.* 1029, 1035-36, 47 *L.Ed.*2d 196, 205-06 (1976), reviewing both *Logan Valley* and *Lloyd*, concluded not only that the reasoning of the latter amounted to a total rejection of the former, but that even the limited right of free speech (namely, that relating to shopping center activities) approved in *Lloyd* did not exist. That view was ****769** reaffirmed in *PruneYard Shopping Center v. Robins*, 447 *U.S.* 74, 81, 100 *S.Ct.* 2035, 2040-41, 64 *L.Ed.*2d 741, 751-52 (1980). Those cases, *Hudgens* and *PruneYard*, essentially held that the First Amendment right found in *Marsh* was limited to a privately-owned factory town, an entity that performed substantially all of the functions of government. Its actions were therefore akin to "state action," thereby triggering First Amendment protection. Not so the actions of shopping centers, whose functional equivalence to a town was limited to the downtown business district.

[2] It is now clear that the Federal Constitution affords no general right to free speech in privately-owned shopping centers, and most State courts facing the issue have ruled the same way when State constitutional rights have been asserted. *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 *Ariz.* 371, 767 *P.*2d 719 (Ct.App.1989); *Cologne v. Westfarms Assocs.*, 192 *Conn.* 48, 469 *A.*2d 1201 (1984); *Citizens for Ethical Gov't v. Gwinnett Place Assoc.*, 260 *Ga.* 245, 392 *S.E.*2d 8 (1990); *Woodland v. Michigan Citizens Lobby*, 423 *Mich.* 188, 378 *N.W.*2d 337 (1985); *SHAD Alliance v. Smith Haven Mall*, 66 *N.Y.*2d 496, 498 *N.Y.S.*2d 99, 488 *N.E.*2d 1211 (1985); ***350** *State v. Felmet*, 302 *N.C.* 173, 273 *S.E.*2d 708 (1981); *Eastwood Mall v. Slanco*, 68 *Ohio St.*3d 221, 626 *N.E.*2d 59 (1994); *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 *Pa.* 23, 515 *A.*2d 1331 (1986); *Charleston Joint Venture v. McPherson*, 308 *S.C.* 145, 417 *S.E.*2d 544 (1992); *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 *Wash.*2d 413, 780 *P.*2d 1282 (1989); *Jacobs v. Major*, 139 *Wis.*2d 492, 407 *N.W.*2d 832 (1987). In most of those decisions, the courts analyzed their state constitutions and concluded that their free speech provisions protected their citizens only against state action. *E.g.*, *SHAD Alliance, supra*, 498 *N.Y.S.*2d 99, 488 *N.E.*2d 1211; *Slanco, supra*, 626 *N.E.*2d 59; *Southcenter Joint Venture, supra*, 780 *P.*2d 1282. Others relied on federal constitutional doctrine without independently analyzing their state constitutions. *E.g.*, *Citizens for Ethical Gov't, supra*, 392 *S.E.*2d 8; *Felmet, supra*, 273 *S.E.*2d 708.

California, Oregon, Massachusetts, Colorado, and Washington, however, have held that their citizens have a right to engage in certain types of expressive conduct at privately-owned malls. Of those five, only California has held that its free speech clause protects citizens from

private action as well as state action and grants issue-oriented free speech rights at a regional shopping center. *Robins v. PruneYard Shopping Ctr.*, 23 *Cal.*3d 899, 153 *Cal.Rptr.* 854, 592 *P.*2d 341, 347 (1979), *aff'd*, 447 *U.S.* 74, 100 *S.Ct.* 2035, 64 *L.Ed.*2d 741 (1980). Massachusetts and Oregon relied on clauses other than their free speech clauses. *Batchelder v. Allied Stores Int'l*, 388 *Mass.* 83, 445 *N.E.*2d 590, 593 (1983) (relying on state constitution's "free-and-equal elections" provision); *Lloyd Corp. v. Whiffen*, 315 *Or.* 500, 849 *P.*2d 446, 453-54 (1993) (*Whiffen* II) (relying on state constitution's initiative and referendum provision and declining to address whether free speech clause was also source of right to collect signatures at mall). Colorado relied on its constitution's free speech provision to hold that political activists had a constitutional right to distribute literature at a privately-owned mall. *Bock v. Westminster Mall Co.*, 819 *P.*2d 55 (Colo.1991). The *Bock* court, however, did not dispense with a state action requirement for its free speech provision; rather, the ***351** court found that the mall that sought to prohibit the distribution of literature was a state actor. *Id.* at 62.

The Washington Supreme Court has done an about-face on this issue. In *Alderwood Associates v. Washington Environmental Council*, 96 *Wash.*2d 230, 635 *P.*2d 108 (1981), a majority of the court reversed an injunction prohibiting a group from collecting signatures at a mall, but only a four-justice plurality concluded that the state constitution's free speech clause did not have a state action requirement. In *Southcenter Joint Venture*, *supra*, 780 *P.*2d 1282, the court, again deeply divided, rejected the plurality position in *Alderwood* and held that the state's free speech provision does not protect speech on private property. However, the remainder of the holding in *Alderwood*-that there was a right to solicit signatures on private property under the state constitution's ****770** initiative provision-was not disturbed. *Id.* at 1290.

Pennsylvania's position on the free speech/state action issue appeared, at one time, to accord with ours in *Schmid.* In *Commonwealth v. Tate*, 495 *Pa.* 158, 432 *A.*2d 1382 (1981), the Pennsylvania Supreme Court held that the state constitution's free speech provision prohibited a private university from preventing people from leafletting outside a university building in which a public symposium was being held. The court specifically held that "the state may reasonably restrict the right to possess and use property in the interests of freedom of speech, assembly, and petition." *Id.*, 432 *A.*2d at 1390. Thus, the court seems to have held that there is no state action requirement in its free speech provision. In *Western Pennsylvania Socialist Workers 1982 Campaign*, *supra*, 515 *A.*2d 1331, however, the same court expressly stated that the state's free speech clause provided protection only from state action, *id.* at 1335, and held that there is no constitutional right to collect signatures in a privately-owned shopping mall. *Id.* at 1339. While not overruling its previous *Tate* decision, the Court distinguished it by concluding that the private college in *Tate* had turned itself into a public forum. *Id.* at 1337.

***352** From these cases we learn that the Federal Constitution does not prevent private owners from prohibiting free speech leafletting at their shopping centers because the owners' conduct does not amount to "state action"; that practically every state, when its constitutional free speech provisions have been asserted, has ruled the same way, again on the basis of a legal conclusion that state action was required. We are not out-of-step, however, for as detailed above, *every* state that has found certain of its constitutional free-speech-related provisions effective regardless of "state action" has ruled that shopping center owners cannot prohibit that free speech. There have been four such rulings: California (general free speech provision), Massachusetts (free and equal election provision), Oregon (initiative and referendum provision), and Washington (initiative provision). Put differently, no state with a constitutional free-speech-related provision unencumbered by any "state action" requirement has allowed shopping centers to prohibit that speech on their premises. Colorado is apparently the only state that found its constitutional "state action" requirement satisfied in the shopping center context, and ruled on that ground that the owners' denial was unconstitutional and required that leafletting be permitted.

IV

In New Jersey, we have once before discussed the application of our State constitutional right of free speech to private conduct. In *State v. Schmid*, 84 *N.J.* 535, 423 *A.*2d 615 (1980), *appeal dismissed sub nom. Princeton University v. Schmid*, 455 *U.S.* 100, 102 *S.Ct.* 867, 70 *L.Ed.*2d 855 (1982), we held that the right conferred by the State Constitution was secure

not only from State interference but-under certain conditions-from the interference of an owner of private property even when exercised on that private property. *Id.* at 559, 423 *A.*2d 615. Specifically, we held that Schmid, though lacking permission from Princeton University, had the right to enter the campus, distribute leaflets, and sell political materials. We ruled that the right of free speech ***353** could be exercised on the campus subject to the University's reasonable regulations.

We thus held that Article I, paragraph 6 of our State Constitution granted substantive free speech rights, and that unlike the First Amendment, those rights were not limited to protection from government interference. In effect, we found that the reach of our constitutional provision was affirmative. Precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment. Our holding in *Schmid* relied on all of these factors, *id.* at 557-60, 423 *A.*2d 615, presaging the criteria of later cases used to determine whether the scope of state constitutional provisions exceeded those of cognate federal provisions. *E.g.*, *State v. Hunt*, 91 *N.J.* 338, 358-68, 450 *A.*2d 952 (1982) (Handler, J., concurring) (explaining principles for interpreting State constitutional provisions).

****771** **[3]** In this case, we continue to explore the extent of our State Constitutional right of free speech. We reach the same conclusion we did in *Schmid:* the State right of free speech is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities. *Schmid, supra,* 84 *N.J.* at 560, 423 *A.*2d 615. Applying the standard developed in *Schmid* to this very different case, we decide today that defendants' rules prohibiting leafletting violate plaintiff's free speech rights.

A

We found in *Schmid* that Princeton University, in pursuit of its own educational mission, had invited the public to participate in the intellectual life of the University in various ways, including participation in discussions of current and controversial issues. The University not only underlined its interest in free speech in various statements of policy, but in the imperative of extending participation beyond the student body so that both different views ***354** and groups would be heard. We found that this invitation included participation in various formal meetings of committees and clubs, invitations to both specific individuals and groups outside of the University body, and on occasion general invitations to the public. We held that all of these factors had the effect of opening up Princeton's property to a limited public use and that the activity sought to be carried on by Schmid was consonant with that use. *Schmid, supra,* 84 *N.J.* at 564-66, 423 *A.*2d 615.

The balancing of the various factors of the *Schmid* standard guided our determination. We also considered alternative channels available to Schmid for the communication of his ideas, not to determine the existence of a right, but rather to evaluate the extent to which Princeton could regulate that right. Given all of those premises, we concluded that Schmid's entry on the University's lands was not a trespass and reversed his conviction, based on our conclusion that Schmid had the right of free speech on Princeton's property. We held further that Princeton's attempts to regulate and condition speech, as those regulations and conditions then existed, were invalid because they were applied without standards. But we affirmed the underlying right of Princeton to adopt reasonable regulations concerning the time, manner, and place of such speech. *Id.* at 567-68, 423 *A.*2d 615.

[4] *Schmid* set forth "several elements" to be considered in determining the existence and extent of the State free speech right on privately-owned property. The three factors mentioned in that opinion as the "relevant considerations," *id.* at 563, 423 *A.*2d 615, have been the focus of the argument before us. As we noted in that case:

> This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.

[*Ibid.*]

***355** **[5]** The balancing of the three factors and the ultimate balance between expressional rights and private property rights was a matter of concern in Justice Schreiber's concurrence in *Schmid.* Noting uncertainty about whether the majority based its constitutional holding on "a balancing process" or on a "dedication to the public of its property," *id.* at 576 & n. 1, 423 *A.*2d 615, the concurrence concluded that the dedication of private property "for a public use involving public discussion," *id.* at 580, 423 *A.*2d 615, was essential to justify our holding. We need not, however, examine what a dedication to the public for public discussion really means, for there is no property more thoroughly "dedicated" to public use than these regional and community shopping centers, a public use so pervasive that its all-embracing invitation to the public necessarily includes ****772** the implied invitation for plaintiff's leafletting.

In this case, the trial court held that the *Schmid* standard was not satisfied and, therefore, that the plaintiff had no constitutional right to leaflet at defendants' premises. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.,* 266 *N.J.Super.* 195, 628 *A.*2d 1094 (Ch.Div.1991). Specifically, after analyzing the proofs, it found that the common areas were not open to the public generally, but rather that "the public's invitation to each of the defendant malls is for the purpose of the owners' and tenants' business and does not extend to the activities of leafletting or the distribution of literature." *Id.* at 203, 628 *A.*2d 1094. Furthermore, it found that the plaintiff failed to prove that the proposed activity was not discordant with the "uses to which these shopping malls are dedicated." *Id.* at 204, 628 *A.*2d 1094. If one focuses only on the owners' "purpose" and "dedication," these findings are literally correct.

Given those findings, the trial court and the Appellate Division concluded that the requirements of *Schmid* were not met. They presumably believed that it would be inappropriate to further probe the possible constitutional implications of *Schmid* when applied to this very different case in a novel, debatable, and most ***356** important area of constitutional law. The tradition of our judiciary under those circumstances is generally to leave constitutional determinations of that kind to this Court, and the lower courts did just that.

[6] However, the lower courts' holdings and the defendants' view of the second factor of *Schmid*-"the extent and nature of the public's invitation to use that property"-misperceive both its essential meaning and the functional role of the standard in determining the outcome of the constitutional issue. The factual issue is the overall nature and extent of the invitation to the public, not somehow restricted to the subjective "purpose" of defendants' uses, and certainly not limited to whether defendants extended an explicit invitation to plaintiff to speak. The issue is whether defendants' actual conduct, the multitude of uses they permitted and encouraged, including expressive uses, amounted to an implied invitation and, if so, the nature and extent of that invitation. The functional role of the standard and its three elements is to measure the strength of the plaintiff's claim of expressional freedom and the strength of the private property owners' claim of a right to exclude such expression-all for the ultimate purpose of "achiev[ing] the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property." *Schmid, supra,* 84 *N.J.* at 562, 423 *A.*2d 615.

We reaffirm our holding in *Schmid.* The test to determine the existence of the constitutional obligation is multi-faceted; the outcome depends on a consideration of all three factors of the standard and ultimately on a balancing between the protections to be accorded the rights of private property owners and the free speech rights of individuals to leaflet on their property.

B

We now examine the standard and determine the resulting balance in this case between free speech and private property rights. We find that each of the elements of the standard and ***357** their ultimate balance support the conclusion that leafletting is constitutionally required to be permitted.

The normal use of these properties and the nature and extent of the public's invitation to use them (the first two elements) are best considered together, for in this case they are most closely interrelated. Our view of these two factors-the normal use and the nature and extent of the invitation to use-is primarily factual, but also constitutional. Factually, we find an implied invitation to leaflet. Though more complex,

ultimately its existence in this case is at least as clear as it was in *Schmid.* Constitutionally, these two elements of the standard point strongly in the direction of a constitutional right.

[7] The predominant characteristic of the normal use of these properties is its all-inclusiveness. Found at these malls are most of the uses and activities citizens engage in outside their homes. That predominant ****773** characteristic is not at all changed by the fact that the primary *purpose* of the centers is profit and the primary use is commercial. Within and without the enclosures are not only stores of every kind and size, but large open spaces available to the public and suitable for numerous uses. There is space to roam, to sit down, and to talk. The public is invited to exercise by walking through the centers before the retail stores have opened for business. There are theaters, restaurants, professional offices, meeting rooms, and almost always a community table or booth where various groups can promote causes and different activities taking place within their local area.

The invitation to the public is simple: "Come here, that's all we ask. We hope you will buy, but you do not have to, and you need not intend to. All we ask is that you come here. You can do *whatever* you want so long as you do not interfere with other visitors." Loitering may be "discouraged" but the record does not contain even one instance of someone ejected on that basis. That policy, if indeed it exists, has not made the slightest dent in the centers' all-embracing invitation to come there. The multitude of non-shoppers testifies to the success of this invitation, and it is a ***358** "success" because the centers know that the phenomenon of "impulse buying" will make shoppers out of many of these non-shoppers. So people go there just to meet, to talk, to "hang out," and no one stops them; indeed, they are wanted and welcome. The activities and uses, the design of the property, the open spaces, the non-retail activities, the expressive uses, all are designed to make the centers attractive to everyone, for all purposes, to make them a magnet for all people, not just shoppers. The hope is that once there they will spend. The certainty is that if they are not there they will not.

The term "expressive uses" is not intended necessarily to suggest free speech as that phrase is conventionally used, or some commitment of the centers to free speech simply because they have invited these uses. They are generally not the same expressive uses encouraged by Princeton University, uses that went to the core of free speech. But almost all are non-retail, non-commercial activities that most likely involve some element of speech, and some involve causes and issues. There are events to which the *entire* public was invited, free of charge. Each one, at some point in the event, in some way, presumably projected some message, even if mostly non-controversial.

[8] These non-retail uses, expressive and otherwise,[11] underline the all-inclusiveness of defendants' invitation to the people. ***359** Not only are there the multiple uses ordinarily found in a downtown business district, and the invitation implied from that alone, but others that may not be found in the downtown business district, all explicitly sponsored by the shopping centers, the sum total amounting to the broadest, indefinable, almost limitless invitation. Speech is included; it is certainly not the goal, but it is inevitably found there, even if in modest portions, along with its inevitable messages, many deemed by most people-but not all-as non-controversial because they agree with the message. These uses, combined with the vast open spaces, the benches, the park-like settings, together carry the message that this is the place to be-this is your community, where you can rest, relax, talk, listen, be entertained and be educated. The multiplicity of uses reflects the intention to bring the entire community-its citizens and its activities- ****774** into the center. The uses and invitation, in effect, reconstitute the community, conveniently, under one roof.

While most centers apparently permit it, some of the centers explicitly authorize issue-oriented speech at community desks and community booths. The community booth policy of Woodbridge Center provides a good illustration:

> Our shopping center is an important part of this community. We invite members of the community to shop at Woodbridge Center and to take advantage of the numerous amenities we offer. We also make our Community Booth available to *community and political organization* of [sic] citizens' groups for the purpose of distributing circulars, petitions and other literature pertaining to their activities and for communication with the public regarding community affairs, subject to our rules and regulations. We have provided a Community Booth to be used for this purpose.

> Your presence, whether as a shopper or as a purveyor of *community or political information,* is welcomed; provided that you recognize and respect our right to maintain our center as clean, neat orderly, pleasant and harassment free environment for everyone.
>
> Our rules and registration form must be submitted *no less than seven days prior to the desired date.* Subject to availability, activities will be calendared on a first-come, first-served basis.
>
> [Plaintiff's Appendix, 149a (first and second emphasis added).]

***360** The centers, moreover, have apparently not excluded the partisan political speech often found in voter registration drives, most of which were sponsored by party organizations or candidates, and especially found in the conduct of the candidates (and presumably their aides) as they walk through the mall.

The breadth of the invitation and of the permitted uses suggests that the real issue in this case is not the constitutional right to leaflet, but the scope of the owners' power to regulate it. Indeed, the constitutional dispute appears to be academic for the four defendants who granted plaintiff permission to leaflet on their premises. In effect, although they deny the existence of a constitutional right, their sole practical issue with plaintiff concerns the extent of regulation, plaintiff claiming it substantially and unnecessarily restrains the effectiveness of its leafletting, and defendants claiming it is essential to protect their market.

We need not devise new legal principles of general application to determine whether defendants' explicit prohibition-wherever it existed, and to the extent there was one-destroys the implicit invitation or vice versa. We consider both the prohibition and the invitation in our evaluation of this element of the standard and in our resolution of the constitutional question.

The almost limitless public use of defendants' property, its inclusion of numerous expressive uses, its total transformation of private property to the mirror image of a downtown business district and beyond that, a replica of the community itself, gives rise to an implied invitation of constitutional dimensions that cannot be obliterated by defendants' attempted denial of that invitation, an implied invitation that includes leafletting on controversial issues. The regional and community shopping centers have achieved their goal: they have become today's downtown and to some extent their own community; their invitation has brought everyone there for all purposes. Those purposes in fact-regardless of their clear subjective profit motive-go far beyond buying goods; they include not only expressive uses but so many different uses without any commonality other than the mix of uses that ***361** define a community, and in terms of the centers' motivation, almost anything that will bring people to the centers. This is the new, the improved, the more attractive downtown business district-the new community-and no use is more closely associated with the old downtown than leafletting. Defendants have taken that old downtown away from its former home and moved all of it, except free speech, to the suburbs. In a country where free speech found its home in the downtown business district, these centers can no more avoid speech than a playground avoid children, a library its readers, or a park its strollers.

****775** Thus, the first two elements of the standard-the normal use of the property, and the nature and extent of the public's invitation to use it-point strongly in the direction of a constitutional right of speech.

[9] The third factor, the relationship between "the purpose of the expressional activity ... to both the private and public use of the property," *Schmid, supra,* 84 *N.J.* at 563, 423 *A.*2d 615, examines the compatibility of the free speech sought to be exercised with the uses of the property. We note preliminarily that where expressive activity is permitted and therefore compatible with those uses, presumptively so is leafletting, and the burden should fall on those who claim it is not. More importantly, we find that the more than two hundred years of compatibility between free speech and the downtown business district is proof enough of its compatibility with these shopping centers. The downtown business districts at one time thrived: no one has ever contended that free speech and leafletting hurt them. The extent of their downfall has had nothing to do with free speech and leafletting. This record does not support the proposition that one dollar's worth of business will disappear because of plaintiff's leafletting even though some shoppers and non-shoppers may not like it. Furthermore, defendants' contention that leafletting on controversial issues is discordant and damaging to their

purposes is inconsistent with the permission to leaflet given to plaintiff in this case by four of these centers.

***362** These centers have full power to minimize whatever slight discordance might otherwise exist; full power to adopt rules and regulations concerning the time, place, and manner of such leafletting, regulations that will assure beyond question that the leafletting does not interfere with the shopping center's business while at the same time preserving the effectiveness of plaintiff's exercise of their constitutional right.

Thus, the third element of the standard-the compatibility between the expressive activity and the purposes of that activity, and the public and private uses of the property-points in the direction of the existence of the constitutional right.

[10] We find that each of the elements of the standard in *Schmid*, the use, the invitation, and the suitability of free speech at the centers, supports the existence of a constitutional free speech right in the plaintiff and a corresponding obligation in the defendants. "Taken together, these ... relevant considerations" of the "multi-faceted" standard set forth in *Schmid* lead to the conclusion that these regional and community shopping centers must "be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly," here the leafletting sought by plaintiff. *Schmid, supra*, 84 *N.J.* at 563, 423 *A.*2d 615.

C

[11] We decide this case not only on the basis of the three-pronged test in *Schmid*, but also by the general balancing of expressional rights and private property rights. *Schmid, supra*, 84 *N.J.* at 560-62, 423 *A.*2d 615. The standard and its elements are specifically designed with that balancing in mind. A more general analysis of the balance provides a further test of the correctness of our determination.

The essence of the balance is fairly described by Justice Handler in *Schmid:*

> ***363** [P]rivate property does not "lose its private character merely because the public is generally invited to use it for designated purposes." Nevertheless, as private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights.
>
> [*Id.* at 561, 423 *A.*2d 615 (quoting *Lloyd Corp. v. Tanner*, 407 *U.S.* 551, 569, 92 *S.Ct.* 2219, 2229, 33 *L.Ed.*2d 131, 143 (1972)) (citations omitted).]

Or, as stated in *Marsh*, "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." ****776** *Marsh v. Alabama*, 326 *U.S.* 501, 506, 66 *S.Ct.* 276, 278, 90 *L.Ed.* 265, 268 (1946), *cited with approval in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 *U.S.* 308, 325, 88 *S.Ct.* 1601, 1612, 20 *L.Ed.*2d 603, 616 (1968).

There is no doubt about the outcome of this balance. On one side, the weight of the private property owners' interest in controlling and limiting activities on their property has greatly diminished in view of the uses permitted and invited on that property. The private property owners in this case, the operators of regional and community malls, have intentionally transformed their property into a public square or market, a public gathering place, a downtown business district, a community; they have told this public in every way possible that the property is theirs, to come to, to visit, to do what they please, and hopefully to shop and spend; they have done so in many ways, but mostly through the practically unlimited permitted public uses found and encouraged on their property. The sliding scale cannot slide any farther in the direction of public use and diminished private property interests.

On the other side of the balance, the weight of plaintiff's free speech interest is the most substantial in our constitutional scheme. Those interests involve speech that is central to the purpose of our right of free speech. At these centers, free speech, such as leafletting, can be exercised without discernible interference with the owners' profits or the shoppers' and non-shoppers' enjoyment. The weight of the free speech interest is thus composed of a constant and a variable: the constant is the quality of ***364** free speech, here free speech that is the most important to society; the variable is its potential interference with this diminished

private property interest of the owner. Given the limited free speech right sought, leafletting accompanied only by that speech normally associated with and necessary for leafletting, and subject to the owners' broad power to regulate, that interference, if any, will be negligible.

The vindication of our State's constitutional free speech right in this case falls at least as clearly within the standard of *Schmid* as did the facts in that case. While the use of the campus of Princeton for free speech was a proportionately greater component of Princeton's total uses, and while Princeton had a strong institutional commitment to political free speech, the potential interference with Princeton's need to control activities on its campus and within its academic community was troublesome. *Schmid, supra,* 84 *N.J.* at 566-67, 423 *A.*2d 615. We acknowledged the sensitivity of the issue-the overriding need of independent private universities to control their mission and to shape it without outside interference-and our determination to respect that independence. Moreover, Princeton's commitment to free speech and its invitation to off-campus organizations and individuals is idiosyncratic, not an essential or inevitable attribute of private universities' role in society or their success. We have no doubt that other private universities may have no such constitutional obligation and assume that Princeton itself could so change its mission, commitment, and policies as to bring into question the continued existence of the free speech right, although we doubt very much that that will occur given the University's tradition and history.

No such sensitivity exists in this case; there is no need to carefully calibrate the risk of damaging the mission of these centers, for the risk is practically non-existent. More than that, the constitutional obligation in this case arises from what we have come to recognize as the essential nature of regional shopping centers-their all-inclusive uses and their corresponding all-embracing ***365** implied invitation to the public. For regional shopping centers, the implied expressional invitation is part of their nature, solidly embedded in their inescapable mission as the intentional successors to downtown business districts and their basic profit-making purpose. We foresee no likely change in that essential nature that would affect the elements of the standard or the ultimate balance between free speech and property rights.

We are totally satisfied that on balance plaintiff's expressional rights prevail over defendants' private property interests. We are further satisfied that the interference by defendants with plaintiff's rights constitutes unreasonably restrictive or oppressive conduct. ****777** The deprivation of free speech would affect more than a private university community, it would affect a substantial portion of the state's population.

We need not deal directly with plaintiff's common law contentions. However, in deciding the case on constitutional grounds, we draw on those sources mentioned in *Hunt, supra,* 91 *N.J.* at 363-68, 450 *A.*2d 952 (Handler, J., concurring), including our common law. It lays a foundation that would vindicate the exercise of speech and assembly rights in this setting.

In *State v. Shack,* 58 *N.J.* 297, 277 *A.*2d 369 (1971), we ruled, on common law grounds, that two employees of federally funded organizations had the right to enter private property of an operator of a migrant labor camp to aid two migrant workers who lived and worked there. The aid included an aspect of free speech, the right to give the workers information about assistance available to them under federal statutes. By bringing migrant workers to their property, the operators of these camps created a need for free speech there that could not be denied because of its private ownership. We recognized in *Shack* that in necessitous circumstances, private property rights must yield to societal interests and needs, that there must be an "accommodation between the right of the owner and the interests of the general public," *id.* at 306, 277 *A.*2d 369, that

> ***366** while society will protect the owner in his permissible interests in land, yet "... [s]uch an owner must expect to find the absoluteness of his property rights curtailed by the organs of society.... The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion."
>
> [*Id.* at 305, 277 *A.*2d 369 (quoting 5 *Powell on Real Property* (Patrick J. Rohan, ed., 1970)).]

[12] We also find as support for our conclusions an enduring principle recognized in *Marsh,* a principle that remains pertinent for our purposes even though it has not been

accepted in this context as a matter of federal constitutional doctrine. The principle of that case (and *Logan*) is that the constitutional right of free speech cannot be determined by title to property alone. Thus, where private ownership of property that is the functional counterpart of the downtown business district has effectively monopolized significant opportunities for free speech, the owners cannot eradicate those opportunities by prohibiting it. [12]

D

[13] Like many constitutional determinations, our decision today applies a constitutional provision written many years ago to a ***367** society changed in ways that could not have been foreseen. One of those changes is relatively modern: the vastly increased capability to achieve mass communication, primarily, for the moment at least, to do so through television. This emergence of television as the preeminent medium for mass communication provides no justification to deny plaintiff this constitutional right. Most fundamentally, the general right of free speech through one means has never depended on a lack of any other means; radio never ****778** diminished the right of free speech at downtown business districts.

Furthermore, television is not available as a practical matter to these issue-oriented groups. In the fourth quarter of 1993 the average cost of a national thirty-second television commercial ranged from $23,000 during daytime hours to $155,000 during prime-time hours. Adweek, *Marketer's Guide to Media, Fall/Winter 1993-1994,* at 27 (1993). While much lower rates for smaller audiences are available, issue-oriented groups simply cannot afford an effective television campaign. The paucity of issues advertised on television proves it. The viewer will see only those issue-oriented groups with the most substantial membership and funds. There are very few.

Although no one can confidently predict the future impact of technological developments on the free speech of these groups, television at present seems in fact to do them more harm than good. As the overwhelming medium of choice, it has somewhat diminished the impact of press coverage traditionally generated by issue-oriented groups. Television's own lack of issue coverage has been widely criticized. When they *are* covered, the coverage almost invariably deals with majoritarian viewpoints on issues that have engaged large sectors of the public. The little-known, often unheard of, small issue-oriented groups and their views are rarely if ever mentioned. Some may not be worth hearing, but that should give little comfort in a country born of dissidents and dissenters. For these small groups, indeed for the country itself, television falls short in serving the core value of free speech-the belief that the unpopular views of a minority, if heard, can in time ***368** become the majority view. We are a poorer nation when these small groups are silenced. The effect of the dominance of television has been to *increase* the need of these issue-oriented groups to reach the public through other means, and their only other practicable means is the leafletting they seek here. Justice Marshall knew it, and said it well:

> For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent. And this is why respondents have a tremendous need to express themselves within Lloyd's center [a regional shopping center].
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> [*Lloyd Corp. v. Tanner,* 407 *U.S.* 551, 580-81, 92 *S.Ct.* 2219, 2234-35, 33 *L.Ed.*2d 131, 149-50 (1972) (Marshall, J., dissenting).]

If constitutional provisions of this magnitude should be interpreted in light of a changed society, and we believe they should, the most important change is the emergence of these centers as the competitors of the downtown business district and to a great extent as the successors to the downtown business district. The significance of the historical path of free speech is unmistakable and compelling: the parks, the squares, and the streets, traditionally the home of free speech, were succeeded by the downtown business districts, often including those areas, the downtown business districts where that free speech followed. Those districts have now been substantially displaced by these centers. If our State constitutional right of free speech has any substance, it

must continue to follow that historic path. It cannot stop at the downtown business district that has become less and less effective as a public forum. It cannot be silenced "as the traditional realm of grassroots political activity withers away." Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 *N.Y.U.L.Rev.* 633, 661 (1991).

Certainty is impossible in determining the undiscoverable intent of this century-old provision in the light of changing times. In the ***369** effort, however, we must not forget that our constitutional free speech provision is different from practically all others in the nation. *Schmid* proclaimed this difference ****779** and it is fundamental. In New Jersey, we have an affirmative *right* of free speech, and neither government nor private entities can unreasonably restrict it. It is the extent of the restriction, and the circumstances of the restriction that are critical, not the identity of the party restricting free speech. Were the government ever to attempt to prohibit free speech in the downtown business district, without doubt our Constitution would prohibit it, and in New Jersey when private entities do the same thing at these centers, our Constitution prohibits that too. We cannot determine precisely the extent of damage to free speech that will call forth our constitutional provision to prevent it, but precision is not required in this case: the damage is massive.

A change of a political nature should also be considered. The recall of elected officials and the adoption or repeal of laws and constitutional provisions through initiative and referendum have become fairly common in this country, the former-recall-now part of New Jersey's Constitution, the latter-initiative and referendum-a realistic possibility. [13] Both depend directly on petitioning and indirectly on the persuasiveness, through free speech, of the candidate, the cause, or the petitioner. In the case of recall, over one million petitioners are required if the official is the Governor, or if a county official, the average is over 48,000 signatures, and for a district, the average is 25,000. [14] As for initiative and referendum, one proposal would require over 300,000 signatures for a constitutional initiative and over 200,000 for a ***370** statutory initiative. [15] Obviously, these centers are the most likely place for realizing the goals of such laws, and perhaps the only practical place. The required number of petition signers cannot be found elsewhere. These are free speech rights of the highest order, the recall provision already approved by the people. It is unthinkable that the free speech provision of our State Constitution will not protect them at these centers.

We look back and we look ahead in an effort to determine what a constitutional provision means. If free speech is to mean anything in the future, it must be exercised at these centers. Our constitutional right encompasses more than leafletting and associated speech on sidewalks located in empty downtown business districts. It means communicating with the people in the new commercial and social centers; if the people have left for the shopping centers, our constitutional right includes the right to go there too, to follow them, and to talk to them.

We do not believe that those who adopted a constitutional provision granting a right of free speech wanted it to diminish in importance as society changed, to be dependent on the unrelated accidents of economic transformation, or to be silenced because of a new way of doing business.

V

[14] **[15]** Two of the defendants contend that granting plaintiff the constitutional right of free speech deprives them of their property without due process of law, takes their property without just compensation, and infringes on *their* right of free speech. *U.S. Const.* amends. I, V; *N.J. Const.* art. I, ¶¶ 6, 20. Each of those contentions, insofar as the Federal Constitution is concerned, was rejected in *PruneYard Shopping Center v. Robins*, 447 *U.S.* 74, 82-88, 100 *S.Ct.* 2035, 2041-44, 64 *L.Ed.*2d 741, 752-56 (1980). Their assertion here includes the same contentions under ***371** New Jersey's Constitution, which we now reject for reasons similar to those expressed by the United States Supreme Court. Other jurisdictions that have addressed this issue have similarly relied on the federal *PruneYard* decision. *Lloyd Corp. v. Whiffen*, 315 *Or.* 500, 849 *P.*2d 446, 449-50 (1992) (*Whiffen* II); *Bock v. Westminster Mall Co.*, 819 *P.*2d 55, 62 (Colo.1991). Insofar as invasion of private property ****780** rights is concerned, our decision in *State v. Shack*, 58 *N.J.* 297, 303-08, 277 *A.*2d 369 (1971), is similarly dispositive. We would add to the United States Supreme Court's response to the private property owners' free speech concerns (concerns underlined in Justice Powell's concurrence in *PruneYard*, *supra*, 447 *U.S.* at 96-101, 100

S.Ct. at 2048-51, 64 *L.Ed.*2d at 761-65) that private property owners who have so transformed the life of society for their profit (and in the process, so diminished its free speech) must be held to have relinquished a part of *their* right of free speech. They have relinquished that part which they would now use to defeat the real and substantial need of society for free speech at their centers; they should not be permitted to claim a theoretically-important right of silence from the multitudes they have invited. No matter how it is analyzed, the right claimed by the property owners is minimal compared to that which their claim would significantly diminish.

We do not interfere lightly with private property rights, but when they are exercised, as in this case, in a way that drastically curtails the right of freedom of speech in order to avoid a relatively minimal interference with private property, the latter must yield to the former. That does not mean that one is fundamentally more important than the other, although we believe it is, but rather that here the correct resolution of the conflict between those rights is self-evident. What is involved in this case is the right of every person and of every group to make their views known, however popular or unpopular they may be, and the right of the public to hear them and learn from them. What is involved here is the fundamental speech right of a free society. The flow of free speech in today's society is too important to be ***372** cut off simply to enhance the shopping ambience in our state's shopping centers.

Defendants, in advancing their private property concerns, contend that plaintiff's activities are discordant with their primary, indeed their exclusive, commercial goals. However, as noted earlier, the assertion of a *negative* effect on defendants' enterprises is not persuasively supported by the record. Even if the issue were in doubt on this record, it is an unavoidable consequence of their own activities. Our Constitution guarantees the right of free speech at their premises with all of its inevitable consequences; and while it also guarantees fair compensation if property is taken, there is no guarantee of compensation for the exercise of constitutional rights that does not result in even the slightest impact on business or profits.

VI

[16] Our holding today applies to all regional shopping centers. That holding is based on their essential nature. [16] The mammoth size of these regional centers, the proliferation of uses, the all-embracing quality of the implied invitation, and the compatibility of free speech with those uses: the inevitable presence and coexistence of all of those factors more than satisfy the three elements of the *Schmid* standard. Furthermore, these regional shopping centers are, in all significant respects, the functional equivalent of a downtown business district, a fact that provides further support for our holding. These are the essential places for the preservation of the free speech that nourishes society and was found in downtown business districts when they flourished.

We are aware of the differences among defendant regional shopping centers regarding the range of non-retail uses. The ***373** Mall at Short Hills apparently offers only musical events, visits by Santa and the Easter Bunny, and a fitness walkers' program. The other malls offer numerous public events and generally allow community groups space to promote local activities and causes; expressive uses of various kinds are common. We emphasize, however, that these differences in the degree of public activity are not material and will not exempt a regional mall from the obligation to permit free speech activity.

The list of "horribles" suggested by defendants as the inevitable consequence of our ****781** holding for other forms of private property should be dealt with now, rather than in some future litigation. No highway strip mall, no football stadium, no theater, no single huge suburban store, no stand-alone use, and no small to medium shopping center sufficiently satisfies the standard of *Schmid* to warrant the constitutional extension of free speech to those premises, and we so hold.

We realize there may be differences of degree and that some cases might approach a closeness that would otherwise give us pause. Similar concerns apparently infused the debate among Justices of the United States Supreme Court on these issues. Addressing precisely the same concerns expressed by defendants, Justice Marshall said: "Every member of the Court was acutely aware [in *Logan*] that we were dealing with degrees, not absolutes. But we found that degrees of difference can be of constitutional dimension." *Lloyd Corp. v. Tanner,* 407 *U.S.* 551, 581 n. 5, 92 *S.Ct.* 2219, 2235 n. 5,

33 *L.Ed.*2d 131, 150 n. 5 (1972) (Marshall, J., dissenting). Despite the degrees, the entity to which we apply the free speech right, the regional shopping center, is clearly and easily discernible and distinguishable from all others in its constitutional satisfaction of the standard of *Schmid;* it is distinguishable in its physical size, its multitude of uses, its layout, and its combination of characteristics that together compel the imposition of the constitutional obligation.

The inclusion of *all* regional shopping centers in our holding, justified by the facts before us and their clear application to all ***374** regional shopping centers, comports with the nature of the obligation as a constitutional command. We are unable, however, to apply that command to community shopping centers with only one such center before us, for while we believe all others share its characteristics, we are not yet sufficiently certain of that fact.

The justification for the limitation of our holding to regional shopping centers is obvious. Defendants' posited multitude of uses to which free speech would allegedly extend under our decision is without substance, as we have held. Using the constitutional analysis of *Schmid*, it is clear that in all of defendants' examples mentioned above, the three elements either will not be satisfied or their degree of satisfaction will be substantially lower than in a regional shopping center. Indeed, some of the locations that defendants suggest we be concerned about include but one use. Their implied invitation is limited since the uses at those locations do not approach the multitude of uses found at regional shopping centers. Furthermore, the limited activity at such locations is such that the exercise of free speech will generate greater interference with their normal use. The common characteristic of defendants' list is crowds, but it takes much more than crowds to trigger the constitutional obligation.

We do not, and cannot, however, foreclose the possibility that in some case with unusual circumstances the free speech right may exist elsewhere, most notably at a shopping center that is neither regional nor community but that has clearly and consistently invited or permitted issue-oriented groups, candidates, and others, to leaflet.

[17] Our holding is limited to leafletting and associated speech in support of, or in opposition to, causes, candidates, and parties-political and societal free speech. We affirmatively rule that our State Constitution does not confer free speech rights at regional and community shopping centers that go beyond such speech. In addition to some doubt-the issue is really not before us-whether our constitutional provision was intended to cover commercial speech in any way at all, we find this limitation the result of our ***375** application of the elements and standard in *Schmid.* Commercial free speech at regional and community shopping centers is fundamentally so discordant with the purposes and uses of those centers as to disqualify it from constitutional protection. It is generally discordant: the owners and managers of the center, as well as the various tenants, carefully plan their merchandising strategy, their advertising programs, and are entitled to reap the rewards of their efforts without commercial interference, even well-intentioned commercial interference, from others. At a somewhat different level, the ****782** commercial free speech could obviously be directly in conflict with the centers' activities, uses, and success, the most obvious example being leafletting seeking to persuade shoppers and non-shoppers to go elsewhere. We will not require these centers to carefully review every application for commercial free speech and put them to the test of justifying its exclusion under some balance. It is obviously a most serious intrusion on the property interests of these owners; it does not satisfy the standard of *Schmid;* it does not have State constitutional protection. [17]

[18] As for the manner of speech, our ruling is confined to leafletting and associated free speech: the speech that normally and necessarily accompanies leafletting. Plaintiff has sought no more. It does not include bullhorns, megaphones, or even a soapbox; it does not include placards, pickets, parades, and demonstrations; it does not include anything other than normal speech ***376** and then only such as is necessary to the effectiveness of the leafletting. The free speech associated with leafletting, handbilling, and pamphleteering, as commonly understood, is only that which is needed to attract the attention of passersby-in a normal voice-to the cause and to the fact that leaflets are available, without pressure, harassment, following, pestering, of any kind. Additionally, the sale of literature and the solicitation of funds on the spot (as distinguished from appeals found in the leaflets themselves) are not covered by the protection. In that connection, we are in accord with the reasoning of decisions in other jurisdictions. *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 *Wash.*2d 413, 780 *P.*2d 1282, 1306 (1989) (Utter, J., concurring) ("The nature of this speech

activity [soliciting memberships and contributions] competed directly with the property interests of the mall owners and tenants-who were in the retail business."); *H-CHH Assoc. v. Citizens For Representative Gov't,* 193 *Cal.App.*3d 1193, 238 *Cal.Rptr.* 841, 859 (1987), *cert. denied,* 485 *U.S.* 971, 108 *S.Ct.* 1248, 99 *L.Ed.*2d 446 (1988) ("Any activity seeking to solicit political contributions necessarily interferes with that function by competing with the merchant tenants for the funds of [mall] patrons.").

[19] These are the basic limits on the manner of exercising the kind of free speech that has been sought in this case. They are not intended at all to foreclose the owners from adopting time, place, and manner rules and regulations that impose further and greater limits-nor are they intended to prevent the owners from granting greater rights.

There is concern, understandable concern, about the possibility of confrontation, disturbance, and even violence-concerns not just for business, but for the safety and security of people at the premises. Freedom of speech has always had this potential, controversy being part of its nature. Defendants' fears are not fanciful, but this is hardly a novel problem. This country, and its cities, and more to the point, its downtown business districts, have successfully dealt with it and lived with it for centuries.

***377** We do not believe our opinion will result in any harm to these centers, to their businesses, nor any less enjoyment for those who visit, shoppers and non-shoppers. The free speech we have permitted-leafletting only, no speeches, no parades, no demonstrations-is the least intrusive form of free speech and the easiest to control. The experience elsewhere proves the ability of those centers to absorb such speech without harm. The rare instances of disturbance resulted from circumstances most unlikely to occur here. [18] Obviously, we cannot guarantee that ****783** disturbances will not occur as a result of our decision. Indeed, we could not guarantee freedom from such disturbances even in the absence of a right to leaflet. However, the slim possibility of disruption is the price we all pay as citizens of this state; the danger that some will abuse their rights is a necessary result of our constitutional commitment to free speech.

The centers' power to impose regulations concerning the time, place, and manner of exercising the right of free speech is extremely broad. We assume that in most cases malls can limit the time of leafletting to specific days, and a specific number of days. Certainly no individual or group will be entitled to be ***378** present any more often than is necessary to convey the message. Under some circumstances, however, a limitation to certain days may constitute an unreasonable regulation. For instance, a blanket prohibition against leafletting on the Saturday or Sunday before an election may be unreasonable. In addition, an otherwise innocuous day restriction may be unreasonable given peculiar characteristics of the speaker or the cause. Depending on the circumstances, and all of these comments depend on the circumstances, it may be necessary, as here, that if only *one* day is sought or permitted, the speech be permitted a fair portion of that day.

Limits on the place of exercise of the right may perhaps properly confine the exercise of free speech rights to the parking lot, or to common sidewalks and other areas outside the enclosed malls. We do not at all, however, exclude the possibility that the leafletting, to be effective, may require access to the enclosed portion of the center. To the extent leafletting is confined to some limited space, we assume that in addition to normal voice contact with passersby, an appropriately sized sign stating the cause will be permitted. Clearly, access by competing or conflicting groups may be staggered to occur on different days, or the groups may be placed far apart.

We need not and should not go beyond that. Problems of this kind concerning regulation of free speech have traditionally been resolved either through discussions and negotiations between the citizens involved and the government, usually the police, and if unsuccessful, then resolved by courts and counsel. We are certain that reasonable accommodations can be reached, though both sides may not be completely satisfied.

We believe that this constitutional free speech right, thus limited, will perform the intended role of assuring that the free speech of New Jersey's citizens can be heard, can be effective, and can reach at least as many people as it used to before the downtown business districts were transported to the malls.

***379** We recognize that these centers will require time to prepare regulations and procedures concerning applications to leaflet and the activity itself. Those regulations and

procedures must satisfy both the legitimate interest of the centers and the constitutional rights of the applicants, not always a simple matter. In order to give the centers time to address these and other matters, our judgment will not take effect until sixty days from the date of this decision.

****784 VII**

The judgment of the Appellate Division is reversed; judgment is hereby entered, effective sixty days from the date of this decision, in favor of plaintiff declaring it has a right to leaflet on defendants' premises as described above; and judgment is entered against defendants Riverside Square Mall and The Mall at Short Hills declaring that the grant of free speech rights to plaintiff does not deprive them of the rights they have asserted under both the Federal and State Constitutions.

APPENDIX

[The following Appendix appeared as Appendix B to the opinion of the Superior Court, Chancery Division, reported at 266 *N.J.Super.* 195, 211, 628 *A.*2d 1094 (Ch.Div.1991).]

APPENDIX B-LIST OF EVENTS

CHERRY HILL CENTER, INC.

Cherry Hill Center sponsored the following public events which were open to Center patrons and other members of the public without admission charge, in the Center's common areas during 1990:

Bel Canto Opera Competition

Spring Fashion Show

Easter Bunny Arrival

Global ReLeaf Tree Seedling Giveaway

***380** Bugs Bunny 50th Anniversary Show

Mickey Mouse Meet and Greet

Back Yard Circus

Fall Fashion Show

Trick or Treat at the Mall

Santa's Arrival

Senior Citizen Thanksgiving Dinner

Breakfast with Santa

Holiday Musical Performers

Mall Walkers Blood Pressure Screening

Mall Walkers 5th Anniversary Salute

Hadassah Holiday Gift Wrap

Toys for Tots

Visit Santa Claus

Signing Santa for the Hearing Impaired

Grand Re-Opening with the New Jersey Pops

Fashion Spectacular

Snoopy's Greatest Adventures

The Jones New York Collection

Concert by the New Jersey Youth Symphony

Voter Registration Campaign

WOODBRIDGE CENTER

Woodbridge Center sponsored the following public events which were open to Center patrons and other members of the public without admission charge in the Center's common areas during 1990:

Ice Sculpture event

Hadassah Gift Wrap

Boat and Leisure Living Show

Fashion Show

Bunny Arrival

Pancake Breakfast

New Jersey Youth Symphony

NJAEYC

St. Elizabeth's Hospital Cholesterol Screening

Global ReLeaf Tree Giveaway

Mademoiselle Fashion Show

***381** Vacation Show

Baby Fest

Father's Day Freeze Modeling

New Jersey Pops Concert Series

Mickey and Minnie Breakfast

Muppet Traffic Safety Show

Children's Fashion Show

Newark Museum Workshop

Ninja Turtle Show

Fall Fashion Show

Safe Halloween Parade

Santa's Arrival

Holiday Community Entertainment

1990 Car Show

16th Annual U.S. Marine Corp. Toys for Tots

****785 LIVINGSTON MALL**

Livingston Mall has sponsored the following events at the Mall in 1990 to which the general public was invited without charge:

Boat & Leisure Show

Bridal Fair

Bridal Fashion Show

Spring Fashion Shows

Easter Bunny Visits Mall

Hand Made in America Craft Show

Child ID Day

Prom Fashion Show

Voter Registration Drive

Home Show

Juvenile Diabetes Walk-a-thon

Trick or Treating in the Mall

Santa Arrives

Santa Visits Mall

Story Hours

Holiday Entertainment Programs

***382 ROCKAWAY TOWNSQUARE**

Rockaway Townsquare sponsored the following events at the mall in 1990 to which the general public was invited without charge:

Antique Show

Annual Bridal Festival

Bridal Fashion Event

Boat Show

Spring Fashion Event

Easter Bunny Photos

Cholesterol Screening

Meet & Greet Mickey & Minnie Mouse

Prom Fashion Event

Double Dare Road Show

Jail-a-thon for Cancer

Leisure Living Show

Meet & Greet Bart Simpson

German Band Performance

Back to School Fashions

Fall Fashion Event

Crime Prevention Day

Handmade in America Show

Santa's Arrival Breakfast

Photos with Santa

Choral Groups

MONMOUTH MALL

Monmouth Mall has sponsored the following events at the mall during 1990 and 1991 to which the public was invited free of charge:

1990:

Monmouth County Census Bureau Display

Children's Dental Health Promotion Day

World Gym Aerobics Presentation

Spring Fashion Show

Photos with the Easter Bunny

Freeze Modeling

***383** Spring Community Fair

Summer Sidewalk Sale

Fall Fashion Show

Halloween Celebration, With Trick-or-Treating for the Children

Photos with Santa

“Sounds of Christmas” Performances

“Makin Music” Holiday Concert

Piano Recital

1991:

4H-Seeing Eye Dog Mall Walk

St. Patrick's Day 5k Run at the Mall

Free “Video Postcards From Home” to the troops in the Gulf Program

Berlin Wall Exhibit

Lighting of the Christmas Tree

Savvy Shopper Sidewalk Sale

Photos of the Easter Bunny

After Hours Savvy Shopper Fashion Show/Cocktail Hour

Halloween at the Mall

Santa Photos Campaign

Santa Entertainment

Spring Fashion Show

July Sidewalk Sale

Fall Fashion Show

Holiday Choral Concerts

Appearance by Soap Opera Character Jackson Montgomery of “All My Children”

****786 THE MALL AT MILL CREEK**

The following activities of non-profit organizations occurred at The Mall at Mill Creek:

1989:

New Jersey Prosecutor's Victim and Witness Association-Information for Crime Victims

Secaucus Recreation Department Art Display

Meadowlands Hospital Medical Center Health Fair

March of Dimes Event

Deborah Hospital Foundation Gift Wrap

1990:

American Cancer Society Daffodil Sale

***384** Bradley for U.S. Senate Voter Registration Drive

Fairleigh Dickinson University Information

March of Dimes Information

PSE & G Information

Secaucus Chapter of Deborah Raffle Sale

Secaucus Lions White Cane Drive

U.S. Naval Sea Cadets Recruitment

U.S. Army Recruiting Information

New Jersey Prosecutor's Victims and Witness Association Information disseminated to the public

U.S. Veterans of Foreign Wars Recruiting

Secaucus High School Art Expo

American Cancer Society Jail-A-Thon

The Mall at Mill Creek sponsors a “Merry Milers Mall Walk”. Participants in this event have access to the Mall during hours when the Mall shops are not yet open for business as well as during regular business hours. There is no requirement that a person shop at the Mall in order to participate in this event.

RIVERSIDE SQUARE SHOPPING CENTER

Riverside Square has sponsored the following events over the last two years:

1989:

Business and Finance Show

Spring Fashion Show

Easter Bunny Show

Spring Events

Spring Kidfest

Springbreak Kidfest

Home and Garden Show

Working Woman Show

Working Woman Seminar

Bergen County Read-In Festival

5th Annual Dell New Jersey Crossword Open

Summer Concert Series

Back-To-School Series

Fashion Show

8th Annual “Riverside Rapids” Speed Chess Tournament

***385** Home Show

Halloween Kidsfest

Holiday Entertainment (Nov. 29, 1989-Dec. 21, 1989)

1989 U.S. Marine Corps. Toys for Tots Drop Box

1990:

Winter Antique Show

“Today's Youth” Art Show

Spring Fashion Show

Earth Day Celebration

Victorian Garden Party

6th Annual Dell New Jersey Crossword Open

Great Outdoors Summer '90 Expo

Summer Antique Show

Music Festival: 5 Mondays (July 1990-Aug. 1990)

Back-to-School Kidsfest 1990

Fall Career Fashion Show

Great Scotland Festival

9th Annual Invitational Masters Speed Chess Tournament

County Craft Festival

“Picasso of Pumpkins” Show

Halloween Activities Day

Holiday Entertainment (Nov. 28, 1990-Dec. 24, 1990)

Most of the events took place during regular mall hours but a few occurred when the mall stores were closed and several occurred ****787** in The Meeting Room. Riverside Square has a meeting room called “The Meeting Place,” which may be used for a fee by the general public. The Meeting Place can fit up to 150 people and is available for bookings Monday through Fridays from 8 A.M. to 12 noon, 1 P.M. to 5 P.M., and 6 P.M. to 9:30 P.M., and Saturday from 8 A.M. to 12 noon, and 1 P.M. to 5 P.M. All bookings must be made in advance and approved by management.

SHORT HILLS MALL

Short Hills has sponsored the following events in 1990 and 1991:

Mini Symphony performance of June 4

Morris Nanton Jazz Trio

String Ensemble of June 25

***386** September Fall Concert Series

1. Nelson Riddle Orchestra

2. Tommy Dorsey Orchestra

3. Classical Beethoven and Bach

4. Guitars of Splendor

5. Glenn Miller Orchestra

6. Morris Nanton Jazz Trio

7. Piano Concerto

8. Classical Mozart by mini-symphony

Special Performance of Count Basie Orchestra

Santa Claus

Peter Rabbit Easter program and display

Valentine's Day piano concert series

These events were scheduled during mall hours. The September concert series was held on eight consecutive Sundays from 2 P.M. to 3 P.M.

Short Hills sponsors a fitness walk program, which allows access to the mall before daily business hours, from 7:30 A.M. until 10:00 A.M. The program is sponsored in cooperation with the Morristown Memorial Hospital and open to all members of the public who register in writing and receive a license. Over two hundred people have registered with the mall for the program.

QUAKERBRIDGE MALL

The Quakerbridge Mall sponsored the following public events at the mall in 1990 to which shoppers and other members of the general public were invited without an admission charge:

Antique Show

January Sidewalk Sale

Colonial Arts Show

Boat Show

Bridal Fair

Interior Design Show

New Car Show

Boy Scouts of America

Home and Garden Show

Antique and Collectibles Show

***387** FFA Floral Design Show

Bunny Arrival

Spring Freeze Modeling

Investment Show

Health and Fitness Show

Iris Sale

Fall Kids Show

Back To Fall Fashion Show

MDA Telethon

Fall Travel Show

Home and Energy Show

Winter Survival Show

Holiday Gifting Show

Holiday Tables Show

Santa's Arrival

Breakfast with Santa

The Quakerbridge Mall had a community day in 1990 where approximately ten non-profit and non-commercial groups, including the American Cancer Society, were present. Each group had its own table located in the common area and was permitted to speak to persons and hand out literature only to persons who approached their tables. No political or religious groups were allowed to participate in community day.

On one occasion, the Quakerbridge Mall allowed representatives of Rider College to come to the mall and set up a tax information ****788** table at which visitors' questions about tax matters were answered.

The Muscular Dystrophy Association sponsored a telethon which was held in the common area of the Quakerbridge Mall. A regional phone bank was set up and entertainment was provided. Information about mall activities and tenant shops was provided by the mall.

On one occasion, the Quakerbridge Mall's Merchant's Association and Lawrence Township jointly sponsored an exhibition and display of local municipal groups such as the volunteer fire department ***388** and the volunteer emergency medical technicians. No fundraising was conducted.

During the holiday season, choirs sing at the Quakerbridge Mall and provide entertainment.

The Merchant's Association of Quakerbridge Mall sponsors a mall walkers program jointly with a local area hospital. Participation is open to the public. No cost or purchase is necessary. The mall is opened at 8 A.M. on weekdays and Saturdays for the convenience of tenants and their employees. Members of the mall walkers program may walk in the mall at this time provided they display a membership button at all times.

HAMILTON MALL

The Hamilton Mall has sponsored the following public events at the mall in 1990 to which shoppers and other members of the general public were invited without an admission charge:

Winter Clearance Sidewalk Sale

Retirement Show and Band performance

Valentine's Celebration/Bridal Fair & Fashion Show

Colonial Arts Show

Spring Home and Garden Show

Atlantic City Magazine Restaurant Gala Fashion Show

Easter Bunny Arrival Parade and Spring Freeze Modeling

Your Cholesterol Counts

Day Of The Young Child

Auto Show

Showcase of Services

Women of the 90's Show

RNS Mother's Day Celebration

Arts and Crafts Show

Master Artists Tour

Toys For Dads

Rose Show

Antique Shoe/Father's Day Event

Informal Modeling At The Atlantic City Race Course

Hamilton Mall Night At The Races

***389** The Artie Shaw Band Performance and Mallwalker Club Reception

ACC Day At The Mall

Key To Success Seminar

Health To You Show

TV 40 Grand Prize Drawing

Key To Success Phase II Awards

Boat Show

Toddler Tryouts

Fall Home Show

4-H Day At The Mall

1991 Auto Preview

Halloween Trick or Treat and Costume Contest

Orchid Society Show

Santa's Arrival

Coastal Cops Celebration Holiday

Holiday Fashion Extravaganza

WKTU Charity Day

Shopper Service Day

After complying with every requirement set forth in the guidelines for non-commercial activity, the Kiwanis and Girl Scouts were permitted to use the Community Booth at the Hamilton Mall in a manner consistent with the mall's policies. A non-partisan voter registration drive was held on consecutive Saturdays in September 1990 and was sponsored by the Atlantic Area Business and Professional Women, Inc.

The mall also coordinates with local businesses a program for children ages six to twelve called “Coastal Cops”. The activities ****789** include a clean-up effort of the area's beaches.

Hamilton Mall Merchant's Association sponsors a mall walkers program. Participation is open to the public. No cost or purchase is necessary. The mall is opened as early as 7 A.M. on weekdays and Saturdays for the convenience of tenants and their ***390** employees. Members of the mall walkers program may walk in the mall at this time provided they display a membership button at all times.

GARIBALDI, J., dissenting.

Today the Court holds that the New Jersey Constitution requires that owners of privately-owned-and-operated shopping malls who invite the public onto their property for commercial purposes must allow the public free access to that property to engage in unrestricted expressional activities, including, through the distribution of leaflets and petitions to shoppers, the promotion of various political or social views. To reach that conclusion, the majority distorts the test announced in *State v. Schmid*, 84 *N.J.* 535, 563, 423 *A.*2d 615

(1980); dismisses completely the rights of private-property owners to regulate and control the use of their own property; disregards the trial court's findings of fact, developed after an extensive eleven-day trial; and instead relies primarily on old theories that the United States Supreme Court and most other state courts long ago discarded.

Under the majority's rudderless standard, whether property is owned privately or publicly is irrelevant; whether the message is discordant with the private property's use and purpose likewise makes no difference; and whether less-convenient but equally-accessible and -effective means of distribution exist is of no moment. So long as the private property, here a shopping mall, offers an opportunity for many people to congregate, the private-property owners must grant those people free access for expressional activity, regardless of the message or of its disruptive effect. Although the Court duly notes that such access will be subject to reasonable restrictions of time, place, and manner, *ante* at 376-379, 650 *A.*2d at 782-783, its opinion reveals that the restrictions will be minimal and will present more problems and lawsuits than they will solve.

***391 I**

The United States Supreme Court has held that the First Amendment allows the owners of private shopping malls to bar the distribution of political literature on mall property. *See PruneYard Shopping Ctr. v. Robins*, 447 *U.S.* 74, 100 *S.Ct.* 2035, 64 *L.Ed.*2d 741 (1980); *Hudgens v. NLRB*, 424 *U.S.* 507, 96 *S.Ct.* 1029, 47 *L.Ed.*2d 196 (1976); *Lloyd Corp. v. Tanner*, 407 *U.S.* 551, 92 *S.Ct.* 2219, 33 *L.Ed.*2d 131 (1972). However, the Supreme Court has held that a state's constitution may furnish an independent basis that surpasses the guarantees of the federal constitution in protecting individual rights of free expression and assembly. *PruneYard, supra*, 447 *U.S.* at 81, 100 *S.Ct.* at 2039-40, 64 *L.Ed.*2d at 752. The vast majority of states do not require that privately-owned shopping malls grant free access for expressional activity on their property. *Ante* at 349-350, 650 A.2d at 769.

Four provisions of Article I of the New Jersey Constitution are at issue: Paragraph 1, which concerns the unalienable right to acquire, possess, and protect property; Paragraph 20, which provides that individual persons or private corporations cannot take private property for public use without just compensation; Paragraph 6, which gives the right to speak, write, and publish freely; and Paragraph 18, which guarantees the right to assemble. We addressed the conflict between those provisions in *Schmid, supra*, 84 *N.J.* 535, 423 *A.*2d 615. However, breaking with our decision in that case, the majority engages in no balancing of those competing constitutional provisions; instead, the majority relies on only the free-speech and assembly provisions, *ante* at 332-333, 650 *A.*2d at 760, ignoring completely the private-property provisions. In so doing, it turns its back on our holding in *Schmid.*

Schmid involved a person's free-speech rights on the private property of Princeton University. Although situated on private ****790** property, Princeton was traditionally a forum for the free exchange of ideas, and Princeton endorsed that tradition as part of its educational mission. We therefore found it appropriate to permit Schmid free access to the University's private property to ***392** express his political views. Rather than endorse *ad hoc* determinations, we established a rational test under the New Jersey Constitution that balanced the rights of private-property owners and the expressional freedom of others on that private property.

> [T]he test to be applied to ascertain the parameters of the rights of speech and assembly upon privately owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.
>
> [84 *N.J.* at 563, 423 *A.*2d 615.]

Using a test essentially the same as *Schmid*, the Pennsylvania Supreme Court established, in *Commonwealth v. Tate*, 495 *Pa.* 158, 432 *A.*2d 1382 (1981), "a limiting rationale for applying [the Pennsylvania] constitution's rights of speech and assembly to property private in name but used as a forum for public debate." *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 *Pa.* 23, 515 *A.*2d 1331, 1336 (1986) (discussing *Tate*). The *Tate* court overturned a trespass conviction for distributing

pamphlets on a college campus. 432 *A.*2d at 1391. Yet when the court reviewed a subsequent case concerning an alleged constitutional right of access to a *shopping mall,* it recognized that unlike a university, the shopping mall was not a public forum for political expression. *Western Pa. Socialist Workers, supra,* 515 *A.*2d at 1337. The court found that the mall "is operated as a market place for the exchange of goods and services but not as a market place for the exchange of ideas." *Ibid.* That rationale is entirely consistent with the *Schmid* Court's own finding that "Princeton University's *raison d'etre* is more consonant with free speech and assembly principles than a shopping center's purposes might be * * *." 84 *N.J.* at 551, 423 *A.*2d 615. Unlike universities, shopping malls are not public forums dedicated to public use or to the exchange of ideas.

***393 II**

Although the majority alleges that it is adhering to *Schmid,* its opinion discloses that it is not. Indeed, the majority has forgotten the primary premise of *Schmid,* that a *balance* must be found between the rights of private-property owners and the expressional freedom of others on that property. A proper application of *Schmid* supports the trial court's judgment, which the Appellate Division affirmed, that the mall owners may bar Coalition from distributing its leaflets in the malls.

After a close and careful examination of the normal use of each mall and the public invitation each mall extended, the trial court set forth its factual findings. The first prong of the *Schmid* test requires a court to take into account the nature, purposes, and primary use of the private property-its "normal" use. In that regard, the trial court concluded:

> It is this court's opinion that that question may be answered unequivocally. *The nature, purpose and primary use of the malls is commercial.* The shopping malls are retail establishments, constructed, designed and maintained to do business and make a profit. *I did not hear one fact at trial which controverts or contradicts this finding.* The plaintiff offered no proofs which will lead this court to any other conclusion.
>
> [266 *N.J.Super.* 195, 200, 628 *A.*2d 1094 (Ch.Div.1991) (emphasis added).]

Moreover, the trial court found "from all of the credible evidence [that] has been offered at this trial that each of these ten malls has dedicated its facilities and property to its primary purpose, that is, business and commercial ventures." *Ibid.*

****791** In respect of the second *Schmid* factor, the extent and nature of the public's invitation to use the private property, the trial court stated:

> From the credible evidence offered by the defendants, that is, the testimony of mall managers, designers and planners, I find that *the public's invitation* to each of the defendant malls *is for the purpose of the owners' and tenants' business* and does not extend to the activities of leafletting or the distribution of literature.
>
> [*Id.* at 203, 628 *A.*2d 1094 (emphasis added).]

Additionally, the trial court determined that "the primary purpose of each and every one of the activities listed [*e.g.*, free concerts, Earth Day celebrations, and Girl Scout Cookie sales] * * * is to ***394** draw people to the mall and thereby maximize sales and increase profits." *Id.* at 202, 628 *A.*2d 1094.

Despite the trial court's findings, the majority baldly asserts that the mall owners issued an invitation to the public to use their private property "to do what they please" and granted "practically unlimited permitted public uses * * * on their property." *Ante* at 363, 650 *A.*2d at 776. Under the majority's reasoning, the nature and extent of the invitation is of no moment. By the majority's analysis, any time the public is invited onto large, privately-owned property, it becomes a place to congregate and therefore becomes the functional equivalent of a downtown area. In *Lloyd Corp., supra,* the United States Supreme Court rejected the "functional equivalent" analysis, finding:

> The invitation is to come to the Center to do business with the tenants. It is true that facilities at the Center are used for certain meetings and for various promotional activities. The obvious purpose, recognized widely as legitimate and responsible business activity, is to bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes, however

incompatible with the interests of both the stores and the shoppers whom they serve.

[407 *U.S.* at 564-65, 92 *S.Ct.* at 2227, 33 *L.Ed.*2d at 140.]

As the Supreme Court further explained, "Nor does property lose its private character merely because the public is generally invited to use it for designated purposes." *Id.* at 569, 92 *S.Ct.* at 2229, 33 *L.Ed.*2d at 143. *See also Schmid, supra,* 84 *N.J.* at 561, 423 *A.*2d 615.

Ignoring the trial court's detailed factual findings, the majority rewrites *Schmid,* lumps the first two factors together into one, and continually misapprehends the test. *Ante* at 356, 650 *A.*2d at 772. The majority repeatedly refers to the first factor as the "normal" use, but ignores the language prior to that: "the nature, purposes and *primary* use of the private property." The primary use of a shopping mall is shopping, an obvious fact that the majority fails to understand.

Indeed, strikingly absent from the majority opinion is any awareness that the primary users of shopping malls are shoppers.

***395** We should not lose sight of the fact that persons who own and operate shopping malls are merchants. As such they should not be required to provide forum, place, or occasion for speech making, petition signing, parades, or cracker barrels, to discuss local or global events. They are in business for business sake. They are not municipalities, states, or villages, and however romantic it may be to believe that the public repair to these galvanic places, of a Saturday morning, for more than bread and salt, they are not yet instruments of the state.

[*Western Pa. Socialist Workers, supra,* 515 *A.*2d at 1341 (McDermott, J., concurring).]

In contrast to the purpose of a shopping mall, the primary purpose of a university is to educate, *i.e.,* to increase the wealth of human knowledge, which can be done only through discourse and discussion, free and open debate. That is the significant difference between Princeton University and The Mall at Short Hills. Shopping can be accomplished even with mouths shut and minds closed.

****792** The majority ignores any distinction between the purpose of Princeton and the purpose of a mall. "We need not, however, examine what a dedication to the public for public discussion really means, for there is no property more thoroughly 'dedicated' to public use than these regional and community shopping centers * * *." *Ante* at 355, 650 *A.*2d at 771. Therefore, under the majority's reasoning, whether the property, like Princeton University, was dedicated to the public for public discussion is irrelevant. All that matters is that the property was open to the public, as is a shopping mall or any other large gathering space. An example of a publicly-accessible place that will become an open forum for expression under the majority's analysis is Great Adventure Theme Park. That result is plainly absurd.

The third prong of the *Schmid* analysis directs a court to consider the "purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." 84 *N.J.* at 563, 423 *A.*2d 615. That requires determining "whether the expressional activities undertaken * * * are discordant in any sense with both the private and public uses of the [property at issue]." *Id.* at 565, 423 *A.*2d 615. The trial court found that the "plaintiffs have not met their burden of proving ***396** that their activities are not discordant with both the public and private uses to which these shopping malls are dedicated." 266 *N.J.Super.* at 204, 628 *A.*2d 1094.

Obviously, the expressed purpose of plaintiffs' activity was to oppose the war in the Middle East, a purpose totally unrelated to the mall owners' commercial purposes and to their invitation to the public to shop there. Additionally, confrontations between groups advocating opposing views on a controversial political or social topic are likely, and those groups' purposes will clearly be discordant with shopping. The abortion debate is an easily-identifiable issue to consider under the Court's opinion. Clearly, a mall allowing a pro-choice group to distribute pamphlets will face opposition from pro-life groups. Yet under the majority's opinion, a mall owner could not restrict such groups from its private property.

When advocates press hotly-contested political and social issues, confrontation is an easily-foreseen outcome. In *Cologne v. Westfarms Associates,* 192 *Conn.* 48, 469 *A.*2d 1201 (1984), a mall refused to permit members of the Ku Klux Klan to rally there. After the Klan's departure, however, a number of anti-Klan demonstrators, responding to reports of the intended appearance of the Klan, engaged in a heated demonstration outside the mall building. Police from several

area towns and the state police were necessary to bring the situation under control. The demonstration resulted in the closing of some shopping-mall doors for the day.

As one of the defendants stated in its brief:

> Should the Ku Klux Klan in their flowing white robes or the Black Separatists in their paramilitary gear be permitted on the mall's property? These groups would offend even the most tolerant of shoppers. What shopper does not have an opinion on abortion, so that same question applies to pro-choice and pro-life advocates with their gruesome displays. Should an animal rights group, regardless of its graphic illustrations, be permitted near a pet shop or fur salon? Should the Vietnam Veterans and SANE be permitted to conduct activities on the same day in proximity to each other? What standards should a mall manager use when considering the graphic portrayal on a placard, when measuring the strong language in a leaflet or when evaluating the appropriateness of a costume or ***397** clothing? Aside from "controversial" issues, a host of content-based questions arise once politicians, religious groups, charities and "causes" invade the mall.

Each mall owner will have to answer those subjective questions, as well as many others, on a daily basis. Although the majority recognizes the difficulty in preparing regulations and procedures concerning leafletting in the malls, *ante* at 379, 650 *A.*2d at 784 (granting sixty day stay), they provide no standards for the mall owners to use in resolving those problems. Moreover, regardless of the standards used, each mall owner will be second-guessed and litigation concerning the private owner's decision will ensue. Public officials ****793** may have to face those issues in granting parade permits, but private-property owners should not be forced to decide those value-laden questions.

The morass that the majority opinion will produce is already demonstrated in the troubles that arise when *public* officials must determine what constitute legitimate time, place, and manner restrictions on the free expression of ideas on *public* property. *See, e.g.*, *National Socialist Party of Am. v. Village of Skokie*, 432 *U.S.* 43, 97 *S.Ct.* 2205, 53 *L.Ed.*2d 96 (1977). Private-property owners should not be compelled to face the same challenges when they decide which groups may or may not champion their causes at these privately-owned-and-operated shopping malls.

III

To circumvent the detailed and meticulous findings of the trial court, the majority departs from the *Schmid* test and argues that shopping malls are the "functional equivalent" of the traditional downtown business districts or town squares. *Ante* at 347, 361-362, 650 *A.*2d at 767, 774-775. In support of that theory, the majority relies on "common knowledge" of the Court outside the record, ignoring the factual findings of the trial court and evidence that many of the towns in Essex, Hudson, and Morris Counties around the malls have become more, not less, vibrant.

Under the majority's theory, private property becomes municipal land and private-property owners become the government. ***398** The United States Supreme Court discredited that proposition over twenty years ago, *Lloyd Corp., supra*, 407 *U.S.* 551, 92 *S.Ct.* 2219, 33 *L.Ed.*2d 131, and likewise almost every state court that has considered it has discarded it. *See, e.g.*, *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 *Ariz.* 371, 767 *P.*2d 719 (Ct.App.1989); *Cologne, supra*, 469 *A.*2d 1201; *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 260 *Ga.* 245, 392 *S.E.*2d 8 (1990); *Woodland v. Michigan Citizens Lobby*, 423 *Mich.* 188, 378 *N.W.*2d 337 (1985); *SHAD Alliance v. Smith Haven Mall*, 66 *N.Y.*2d 496, 488 *N.Y.S.*2d 99, 488 *N.E.*2d 1211 (1985); *State v. Felmet*, 302 *N.C.* 173, 273 *S.E.*2d 708 (1981); *Eastwood Mall v. Slanco*, 68 *Ohio St.*3d 221, 626 *N.E.*2d 59 (1994); *Western Pa. Socialist Workers, supra*, 512 *Pa.* 23, 515 *A.*2d 1331; *Charleston Joint Venture v. McPherson*, 308 *S.C.* 145, 417 *S.E.*2d 544 (1992); *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 *Wash.*2d 413, 780 *P.*2d 1282 (1989); *Jacobs v. Major*, 139 *Wis.*2d 492, 407 *N.W.*2d 832 (1987).

To reach its conclusion, the Court relies on the long-overruled statement in *Logan Valley* that shopping centers are the functional equivalent of downtown areas. *See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza,* 391 *U.S.* 308, 318, 88 *S.Ct.* 1601, 1608, 20 *L.Ed.*2d 603, 612 (1968). The *Logan Valley* Court, in turn, based its holding on *Marsh v. Alabama,* 326 *U.S.* 501, 66 *S.Ct.* 276, 90 *L.Ed.* 265 (1946), and found an analogy between the sidewalks and parking areas of a shopping mall and the company town in *Marsh.* As we noted in *Schmid, supra,* 84 *N.J.* at 550, 423 *A.*2d 615, *Lloyd Corp.* repudiated *Logan Valley.* Nevertheless, the majority, like the *Logan Valley* Court, contends that plaintiffs here should have access to the shopping malls just as the Court gave the petitioner in *Marsh* access to the business district. Indeed, the majority relies on the discredited reasoning of *Logan Valley* and of the dissents in *Lloyd Corp.* and *Hudgens. Ante* at 366, 367, 368, 373, 650 *A.*2d at 777, 777, 778, 780.

Although I question whether *Marsh* still has validity, a "company town" is easily distinguishable from a shopping mall. Justice ***399** Black, who wrote *Marsh,* aptly pointed out the difference in his *Logan Valley* dissent:

> But *Marsh* was never intended to apply to this kind of situation.... I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama.
>
> ....
>
> ... [T]his reasoning completely misreads *Marsh* and begs the question. *The question is, Under what circumstances can private property be treated as though it were public?* ... I can find nothing in *Marsh* which indicates that if one of these features is present, e.g., a business district, ****794** this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.
>
> [391 *U.S.* at 330-32, 88 *S.Ct.* at 1615, 20 *L.Ed.*2d at 619-20 (emphasis added).]

The United States Supreme Court adopted that position in *Lloyd Corp.,* effectively rejecting *Logan Valley*'s "functional equivalent" rationale. 407 *U.S.* at 569, 92 *S.Ct.* at 2229, 33 *L.Ed.*2d at 143; *see also Fiesta Mall, supra,* 159 *Ariz.* 371, 767 *P.*2d 719 (rejecting functional equivalent argument). To borrow from *Lloyd Corp.,* "the instant case provides no comparable assumption or exercise of municipal functions or powers." *Ibid.* Additionally, the *Fiesta Mall* court, relying on *Lloyd Corp.,* found that shopping malls

> are not the functional equivalent of towns. They are simply areas in which a large number of retail businesses is grouped together for convenience and efficiency. Their sole purpose is for shopping, and appellant's argument that they are opened early for joggers and walkers, that large numbers of people are present in them each day, that occasionally non-commercial activities take place in them and that people enjoy air-conditioned comfort in them during Phoenix's scorching summers does not change that basic fact.
>
> [159 *Ariz.* at 376, 767 *P.*2d at 724.]

Relying on the functional-equivalent test, yet paying lip service to *Schmid,* the Court writes:

> No such sensitivity exists in this case; there is no need to carefully calibrate the risk of damaging the mission of these centers, for the risk is practically non-existent. More than that, the constitutional obligation in this case arises from what we have come to recognize as the essential nature of regional shopping centers-their all-inclusive uses and their corresponding all-embracing implied invitation to the public. For regional shopping centers, the implied expressional invitation is part of their nature, solidly embedded in their inescapable mission as the intentional successors to downtown business districts and their basic profit-making purpose. We foresee no likely change in that essential nature that would affect the elements of the standard or the ultimate balance between free speech and property rights.
>
> ***400** [*Ante* at 364-365, 650 *A.*2d at 776].

The inescapable mission of shopping malls is not to be the successor to downtown business districts; rather, it is to provide a comfortable and conducive atmosphere for shopping, a mission into which mall owners have invested large sums and energy.

Common sense also dictates that privately-owned-and-operated shopping malls are not the functional equivalent of

downtown business districts. They are not "replica[s] of the community itself." *Ante* at 360, 650 *A.*2d at 774. Shopping malls do not have housing, town halls, libraries, houses of worship, hospitals, or schools. Nor do they contain the small stores, such as the corner grocer, that used to serve as the forum for exchange of ideas. Indeed, most shopping malls do not allow people even to walk their dogs there.

The shopping mall is not a community. There is no "mayor of the mall." Shoppers do not elect a common council. They do not have a say in the day-to-day affairs of the mall, nor do they expect one. They do not visit the mall to be informed or to inform others of social or political causes; they go to shop. Even though the malls sponsor community events, visits from Santa, and orchestral concerts, visitors do not mistake them for grassroots gathering places, Santa's Workshop, or a mecca of the arts or culture. *See, e.g., Southcenter Joint Venture, supra,* 780 *P.*2d at 1292 ("[S]hopping malls are concerned with just one aspect of their patrons' lives-shopping."); *Jacobs, supra,* 407 *N.W.*2d at 845 ("Opening the mall 'avenues' would be like opening the private businesses in the *Marsh* community. Since neither has an essentially public nature, we cannot hold them subject to the same constitutional requirements with which public property must comply.").

Plaintiffs, and the majority, also rely on this Court's decision in *State v. Shack,* 58 *N.J.* 297, 277 *A.*2d 369 (1971). ****795** *Ante* at 365-366, 650 A.2d at 777. Like *Marsh, Shack* is factually inapposite and therefore provides no basis for the Court's opinion. The circumstances of the instant case stand in stark contrast to those in *Shack.* Here effective alternative means of communication are readily available. Moreover, the people whom the Coalition ***401** sought to reach at the malls are far from the disadvantaged, impoverished people of *Shack* who were subject to the singular authority of the property owner; they are visitors to a mall drawn to that location for commercial purposes. No compelling interest or policy mandates an invasion of the property owner's rights. Nothing in this case forces this Court to subserve the rights of private-property owners to the free-speech rights of the public as we were compelled to do in *Shack.*

IV

The majority states, "What is involved in this case is the right of every person and of every group to make their views known, however popular or unpopular they may be, and the right of the public to hear them and learn from them." *Ante* at 371, 650 *A.*2d at 780. I find it axiomatic that the right to speak freely is inextricably linked with a right to a forum in which to express those thoughts and ideas. Without such a forum, the right of free expression would be nugatory. Traditionally, that forum has been on public property.

Our decision in *Schmid* extended that forum onto private property, but only in those limited situations in which the factors outlined in that opinion weighed in favor of extending that right to private property. The majority's decision today guarantees the right to a forum for free expression not only on public property, or on private property in the limited circumstances as permitted under *Schmid,* but on all private property-not just shopping malls-where a captive audience can readily be found. Like the court in *Cologne,* I too am unable to "discern any legal basis distinguishing this commercial complex from other places where large numbers of people congregate, affording superior opportunities for political solicitation, such as sport stadiums, convention halls, theaters, county fairs, large office or apartment buildings, factories, supermarkets or department stores." 469 *A.*2d at 1209; *see also Southcenter, supra,* 780 *P.*2d at 1292 (same); *Woodland,* ***402** *supra,* 378 *N.W.*2d at 353 (" 'Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.' " (quoting *Lloyd Corp., supra,* 407 *U.S.* at 569, 92 *S.Ct.* at 2229, 33 *L.Ed.*2d at 143)).

The majority attempts to limit its holding to all regional malls and the one community mall involved in this action. *Ante* at 372, 650 *A.*2d at 780. That limitation is based on the Court's understanding of a regional shopping center's "essential nature": "The mammoth size of these regional centers, the proliferation of uses, the all-embracing quality of the implied invitation * * *." *Ibid.* Yet the facts adduced at trial, the descriptions of each of these malls and the activities that did and did not take place in them, even the trade's determination of what constitutes a regional mall, *ante* at 338-339, 650 *A.*2d at 763-764, reveal vast differences among these properties. Their only commonality is that they attract large numbers of people for commercial gain.

Moreover, despite its assertion that its holding is limited to large regional malls, the Court states that

> [i]n New Jersey, we have an affirmative *right* of free speech, and neither government nor private entities can unreasonably restrict it. It is the extent of the restriction, and the circumstances of the restriction that are critical, not the identity of the party restricting free speech.
>
> [*Ante* at 369, 650 *A.*2d at 779].

That broad assertion limits nothing; in fact, it extends this holding far beyond that ever contemplated in *Schmid,* perhaps beyond that ever contemplated by the drafters of New Jersey's constitutional free speech provisions.

In reaching its result, the majority completely ignores the rights the New Jersey Constitution grants to the owners of private ****796** property. *See* art. I, paras. 1, 20. No support exists for the proposition that the majority announces today, that a right to free expression exists anywhere an audience may be found. The constitutional right to free expression does not command such an extreme result. It guarantees a forum, not an audience.

***403 V**

The majority's opinion ignores the basic commercial purpose of these private malls, ascribes to them the downfall of urban business districts, and delegates to them the responsibility to fulfill the role once, and arguably still, played by town squares. It does all of that without any legitimate or rational justification. Moreover, the Court places burdens on the private malls that they are ill-suited to handle. Ultimately, mall owners will pass those burdens on to the consumer. The private property owner and ultimately the consumer, the forgotten person in the majority opinion, will have to pay the increased costs that result from the expanded security and other expenses associated with the public's free access to the mall for expressional activities. Unlike the municipalities that the majority thinks the malls have supplanted, malls are not exempt from most tort claims under the New Jersey Tort Claims Act, *N.J.S.A.* 59:1-1 to :12-3.

Plaintiffs cannot claim that they have no means to express their opinion to the public other than by distributing pamphlets in shopping malls. No evidence shows that plaintiffs could not effectively distribute their pamphlets in other areas. Indeed, according to plaintiffs' November 9, 1990, press release, they distributed their materials in at least thirty locations, including several downtown areas. *Ante* at 336, n. 3, 650 *A.*2d at 702, n. 3. They were able to distribute over 85,000 pamphlets in those locations during a three-day period. Plaintiffs do not need to use the malls, save for their own convenience. See *ante* at 369-370, 650 *A.*2d at 779 (discussing convenience and ease of using shopping malls for petition signing). "Petitioners' convenience, however, does not create a constitutional right of access to private property for political activity." *Citizens For Ethical Gov't, supra,* 392 *S.E.*2d at 9.

The majority seems to assert that absent our creation of a right of free expression on this privately-owned property, the patrons therein would not receive important news and information about significant societal issues. Yet unlike the migrant workers in ***404** *Shack,* shoppers are free to come to and go from these malls as they choose. They can avail themselves of all the burdens and benefits of free society as they like.

Were we to adhere to *Schmid* and deny access to the malls, plaintiffs would nevertheless remain able to reach the public outside supermarkets and movie theaters, at train stations and bus stops, in parks and post offices, in the media, and even in the numerous still-vibrant downtown shopping districts. Plaintiffs can voice their opinions today more readily and more accessibly in more places and in more formats than ever before in human history.

Plaintiffs predicate their desires to express themselves on the private property of these shopping malls not on some constitutional mandate but rather on considerations of efficiency, cost, and convenience. Yet such factors do not a constitutional right create. *Schmid,* properly applied, has adequately served this state, both its protesting citizens and its private-property owners, for more than a decade. The majority's departure from *Schmid* 's established standard is unprecedented. It makes neither good sense nor good law, and for those reasons, I respectfully dissent.

CLIFFORD and MICHELS, JJ., join in this opinion.

For reversal-Justices WILENTZ, HANDLER, O'HERN, and STEIN-4.

For affirmance-Justices CLIFFORD, GARIBALDI and MICHELS-3.

Parallel Citations

650 A.2d 757, 52 A.L.R.5th 777

Footnotes

1 As noted and explained *infra* at 372-374, 650 *A.*2d at 780-781, our ruling applies to *all* regional shopping centers. We do not decide if it applies to all community shopping centers.

2 The Coalition is comprised of several dozen political and religious groups with related but not identical political agendas. There are over 25,000 individual members, including the following groups: New Jersey SANE/FREEZE, New Jersey Citizen Action, Monmouth County Pax Christi, New Jersey Council of Churches, the New Jersey Rainbow Coalition, the Baptist Peace Fellowship, the Coalition for Nuclear Disarmament, Vietnam Veterans Against the War, Drew University Peacemakers, the Monmouth County Coalition for the Homeless, the Jersey Cape Coalition for Peace and Justice, the New Jersey Peace Mission, the New Jersey Pledge of Resistance, the South Jersey Campaign for Peace and Justice and the Women's International League for Peace and Freedom.

The Coalition established the following four objectives: 1) to prevent United States military intervention in the Persian Gulf, 2) to prevent the establishment of a United States base in the Middle East, 3) to obtain a peaceful solution to the Persian Gulf crisis by an international agency and 4) to divert the expenditure of United States tax dollars from defense spending to domestic spending. It sought to achieve these objectives by, among other things, distributing educational literature and obtaining signatures on petitions and sending them to public officials.

3 According to plaintiff's November 9, 1990 press release, their materials were distributed in at least 30 locations including Journal Square in Jersey City, Newark Penn Station, Camden City Hall, the Lewes Ferry in Cape May, the Hoboken PATH station and locations in Atlantic City, New Brunswick, Wrightstown, Princeton, Trenton, Woodbridge, Edison, Rockaway, Bernardsville, Montclair, South Orange, Maplewood, Englewood, Fort Lee, Rutherford, Glen Rock, New Providence, Plainfield, Cranford, Westfield, Haddonfield, Collingswood, Red Bank, Long Branch, and Middletown. Plaintiff's representatives also distributed leaflets at the Port Authority Bus Terminal in New York and Market Street Station in Philadelphia.

4 Congress had voted in January 1991 to authorize the President to use armed force to repel the Iraqi aggression in Kuwait. S.J.Res. 2, 102d Cong., 2d Sess. (1991); H.J.Res. 77, 102d Cong., 2d Sess. (1991). The Senate narrowly approved the joint resolution by a vote of fifty-two to forty-seven. 137 *Cong.Rec.* S403 (daily ed. Jan. 12, 1991). The resolution's margin of success in the House of Representatives was 250 to 183. 137 *Cong.Rec.* H485 (daily ed. Jan. 12, 1991).

5 Gross Leasable Area refers to “the total floor area designed for tenant occupancy and exclusive use.... GLA is the area for which tenants pay rent.” National Research Bureau, *1991 Directory of Shopping Centers in the United States, Eastern Volume* (1990).

6 The myriad of uses permitted at the malls defies description. In the appendix to this opinion, which reproduces Appendix B of the trial court's opinion, we have listed these uses.

7 Defendants presented the affidavit of the general manager of Sunvalley Mall in Concord, California. While noting that in 1990 the mall issued 266 permits for expressive activities on its premises, he provided only one example of disruption: a group of seventy activists handed out condoms in the mall. There is no mention, however, of any financial harm as a result of that incident. Defendants could clearly prohibit such conduct by virtue of their power to regulate leafletting activities.

8 This study reported the number of malls with gross leasing areas (GLAs) greater than 400,000 square feet. Because regional and super-regional malls have GLAs of at least 300,000 square feet, *see* National Research Bureau, *Shopping Center Directory 1994, Eastern Volume* (1993), this number most likely underestimates the number of regional and super-regional malls.

9 In 1990, the adult population in New Jersey was 5,931,524. I Division of Labor, Market and Demographic Research, New Jersey State Data Center 1990 Census Publication, *Profiling New Jersey II: State of New Jersey* (1993).

10 Our observation in *State v. Schmid,* 84 *N.J.* 535, 551, 423 *A.*2d 615 (1980), that “Princeton University's *raison d'etre* is more consonant with free speech and assembly principles than a shopping center's purposes might be” was made in connection with our analysis of *Lloyd.* It did not purport to be dicta based on the issue decided in *Schmid,* but rather noted that under the restrictive ruling in *Lloyd,* Princeton University was a better candidate for First Amendment free speech than was a shopping center.

11 As noted earlier, a list of non-retail activities offered by defendants is included as an appendix to this opinion. Some hint of the future is found at a Camden County mall (Echelon Mall, apparently either a regional or community shopping center, not a defendant in this

case) where the Camden County Board of Chosen Freeholders, in conjunction with the Camden County Library Commission has rented space (the "Camden County Store") where citizens, without charge, can obtain all kinds of information about county services, including specific information about matters pending before other county agencies, advice on a variety of governmental programs, including referrals to other governmental agencies, all presumably formerly available at the downtown business district of Camden city. From time to time, different agencies of county government apparently make presentations concerning their work and services. During its first two months of operations, the center has attracted more than 5,000 people. Herbert Lowe, *Camden County Services Flourishing at Mall,* Philadelphia Inquirer, November 29, 1994, at S1.

12 We note the reasoning of *Logan Valley* and of the dissents in *Lloyd* and *Hudgens.* As noted by Justice Marshall in his dissent in *Hudgens:*

> [T]here is nothing in Marsh to suggest that its general approach was limited to the particular facts of that case. The underlying concern in Marsh was that traditional public channels of communication remain free, regardless of the incidence of ownership. Given that concern, the crucial fact in Marsh was that the company owned the traditional forums essential for effective communication....
>
> In Logan Valley we recognized what the Court today refuses to recognize-that the owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the "State" from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication. The roadways, parking lots, and walkways of the modern shopping center may be as essential for effective speech as the streets and sidewalks in the municipal or company-owned town.
>
> [*Hudgens v. NLRB,* 424 *U.S.* 507, 539-40, 96 *S.Ct.* 1029, 1046, 47 *L.Ed.*2d, 196, 218-19 (1976).]

13 We note the proposals on initiative and referendum introduced in 1994. A.Con.Res. 33, 206th Leg., 1st Sess. (1994); A. 111, 206th Leg., 1st Sess. (1994).

14 These figures are based on the number of registered voters for the 1992 election. Center for Government Services, *1993 New Jersey Legislative District Data Book* 5, 12 (1993).

15 These projections are based on the number of voters in the 1993 gubernatorial election, as reported in the *New Jersey Legislative Manual* 860 (1994).

16 Our holding also applies to the defendant community shopping center (The Mall at Mill Creek) but the record before us is insufficient to satisfy us that it should apply to *all* community shopping centers. More information is necessary before that determination can be made.

17 Our treatment of commercial speech is consistent with the lower level of protection afforded such speech under the Federal Constitution. As noted by Justice Clifford, "Although commercial speech is protected under the First Amendment, there is a 'common-sense' distinction between speech proposing a commercial transaction and other varieties of speech, including political speech, and thus the constitutional protection accorded to commercial speech is less than is provided to other constitutionally guaranteed expression." *State v. Miller,* 83 *N.J.* 402, 412 n. 5, 416 *A.*2d 821 (1980) (citing *Central Hudson Gas & Elec. Corp. v. New York Pub. Serv. Comm'n,* 447 *U.S.* 557, 100 *S.Ct.* 2343, 65 *L.Ed.*2d 341 (1980)). We realize some commercial speech may be regarded as issue-oriented. We do not address that situation.

18 We do not foresee a disturbance such as that which occurred at Westfarms Mall in Connecticut in 1983, due to the unusual nature of the circumstances surrounding that incident. As discussed in *Cologne v. Westfarms Associates,* 192 *Conn.* 48, 469 *A.*2d 1201, 1203 n. 2, 1204 n. 4 (1984), an injunction against the mall allowed the National Organization for Women to solicit signatures in support of specific issues, but the mall continued to deny access to other groups. However, because of the injunction, the local police refused to respond to the mall's requests that groups leafletting without permission be evicted as trespassers. On a Sunday in May of 1983, the Ku Klux Klan attempted to appear at the mall after being denied permission. They were barred from entering the mall with the assistance of the police. After their departure, a demonstration by a number of anti-Klan protestors required the further intervention of local police, as well as that of state police. Several mall stores closed for the day as a result of the incident. It is unclear when the police responded or whether their policy of non-intervention contributed to the disturbance. The fact that this is the only such confrontation brought to the attention of this Court suggests that such incidents are rare. Given the clear terms and conditions of our opinion, the confusion that apparently contributed to the Westfarms Mall disturbance will not exist.

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23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854

MICHAEL ROBINS, a Minor, etc.,
et al., Plaintiffs and Appellants,
v.
PRUNEYARD SHOPPING CENTER
et al., Defendants and Respondents

S.F. No. 23812.
Supreme Court of California
March 30, 1979.

SUMMARY

The trial court denied plaintiffs' request to enjoin defendant shopping center from denying them access to solicit signatures for a petition to the government. The record indicated the shopping center was privately owned, and that the public was invited to visit for the purpose of patronizing the many businesses. The shopping center had a policy not to permit any tenant or visitor to engage in publicly expressive activity, including the circulation of petitions, that was not directly related to the commercial purposes. Plaintiffs had set up a cardtable in a corner of the central courtyard of the shopping center and had peacefully solicited signatures. Security officers for the shopping center forced plaintiffs to move onto a public sidewalk for their solicitations. (Superior Court of Santa Clara County, No. 349363, Homer B. Thompson, Judge.)

The Supreme Court reversed. The court held that the free speech and petition provisions of Cal. Const., art. I, §§ 2 and 3, protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned. (Opinion by Newman, J., with Bird, C. J., Tobriner and Mosk, JJ., concurring. Separate dissenting opinion by Richardson, J., with Clark and Manuel, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c)
Constitutional Law § 55--First Amendment and Other Fundamental Rights of Citizens--Scope and Nature--Freedom of Speech and Expression--Solicitation at Shopping Center of Signatures for Petition--California Constitution.
The free speech and petition provisions of Cal. Const., art. I, §§ 2 and 3, protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned. Thus, the trial court committed reversible error in denying the request of plaintiffs to enjoin defendant shopping center from preventing them access to the center for the purpose of peacefully soliciting signatures for a petition to the government. The record indicated the public was invited to visit the shopping center for the purpose of patronizing the many businesses, but that the center had a policy not to permit any tenant or visitor to engage in publicly expressive conduct, including the circulating of petitions, that was not directly related to the commercial purposes. [Overruling *Diamond v. Bland* (1974) 11 Cal.3d 331 [113 Cal.Rptr. 468, 521 P.2d 460].]

[See **Cal.Jur.3d,** Constitutional Law, § 247; **Am.Jur.2d,** Constitutional Law, § 354.]

(2)
Constitutional Law § 69--Property and Occupation--Right to Sell, Acquire and Hold Property--Rights Associated With Property Ownership--Power of Government to Regulate Use.
All private property is held subject to the power of the government to regulate its use for the public welfare, and property rights must yield to the public interest served by zoning laws, environmental needs, and many other public concerns. The rights preserved to individual property owners by various constitutional provisions are held in subordination to the rights of society. Although one owns property, one may not do with it as one pleases any more than one may act in accordance with one's personal desires. As the interest of society justifies restraint upon individual conduct, so also does it justify restraints on the use to which property may be devoted. These constitutional provisions do not protect the individual in the use of his property so as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare.

(3)

592 P.2d 341, 153 Cal.Rptr. 854

Constitutional Law § 69--Property and Occupation--Right to Sell, Acquire and Hold Property--Rights Associated With Property Ownership--Power of Government to Regulate Use--Changing Power.

The power of the government to regulate the use of private property is not static. Rather, it is capable of expansion to meet new conditions of modern life. Property rights must be redefined in response to a swelling demand that ownership be responsible and responsive to the needs of the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, safety, morals, or welfare of others.

(4)

Constitutional Law § 55--First Amendment and Other Fundamental Rights of Citizens--Scope and Nature--Freedom of Speech and Expression--Freedom to Petition--California Constitution.

The right of the people to petition the government for redress of grievances under Cal. Const., art. I, § 3, is vital to the basic process in the state's constitutional scheme, that is, direct initiation of change by the citizenry through initiative, referendum and recall.

(5)

Constitutional Law § 69--Property and Occupation--Right to Sell, Acquire, and Hold Property--Rights Associated With Property Ownership--Property Rights Conflicting With Free Speech and Petitioning Rights.

To protect the constitutional rights of free speech and freedom to petition the government is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property. The public interest in peaceful speech outweighs the desire of property owners for control over their property.

COUNSEL

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NEWMAN, J.

([1a]) In this appeal from a judgment denying an injunction we hold that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution.

Pruneyard Shopping Center is a privately owned center that consists of approximately 21 acres - 5 devoted to parking and 16 occupied by walkways, plazas, and buildings that contain 65 shops, 10 restaurants, and a cinema. The public is invited to visit for the purpose of patronizing the many businesses. Pruneyard's policy is not to permit any tenant or visitor to engage in publicly expressive activity, including the circulating of petitions, that is not directly related to the commercial purposes. The policy seems to have been strictly and disinterestedly enforced.

Appellants are high school students who attempted one Saturday afternoon to solicit support for their opposition to a United Nations resolution against “Zionism.” They set up a cardtable in a corner of Pruneyard's central courtyard and sought to discuss their concerns with shoppers and to solicit signatures for a petition to be sent to the White House in Washington. Their activity was peaceful and apparently well-received by Pruneyard patrons.

Soon after they had begun their soliciting they were approached by a security guard who informed them that their conduct violated Pruneyard regulations. They spoke to the guard's superior, who informed them they would have to leave because they did not have permission to solicit. The officers suggested that appellants continue their activities on the public sidewalk at the center's perimeter. [1] ***903**

Appellants immediately left the premises and later brought suit. The trial court rejected their request that Pruneyard be enjoined from denying them access.

Our main questions are: (1) Did *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219] recognize federally protected property rights of such a nature that we now are barred from ruling that the California Constitution creates broader speech rights as to private property than does the federal Constitution. (2) If not, does the California Constitution protect speech and petitioning at shopping centers?

This court last faced those issues in *Diamond v. Bland* (1974) 11 Cal.3d 331 [113 Cal.Rptr. 468, 521 P.2d 460] (*Diamond II*), wherein *Diamond v. Bland* (1970) 3 Cal.3d 653 [91 Cal.Rptr. 501, 477 P.2d 733] (*Diamond I*) was reversed because of *Lloyd Corp. v. Tanner, supra*, 407 U.S. 551. The *Diamond* cases involved facts much like those of the instant case. *Diamond II* stated: "*Lloyd's* rationale is controlling here. In this case, as in *Lloyd*, plaintiffs have alternative, effective channels of communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in which such persons reside." (11 Cal.3d at p. 335.)

The opinion articulating that conclusion did not examine the liberty of speech clauses of the California Constitution. A footnote suggested that such an inquiry was barred by federal and state supremacy clauses [2] because "[u]nder the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement

Respondents contend that *Diamond II* was correctly decided and controls this case. They argue that *Lloyd* did more than define parameters of First Amendment free speech, that it recognized identifiable property rights under the Fifth and Fourteenth Amendments. They acknowledge that states are free to establish greater rights under their constitutions ***904** than those guaranteed by the federal Constitution. They contend however that, since a ruling that petitioners' activity here was protected by the California Constitution would diminish respondents' property rights under *Lloyd*, we may not so rule.

Appellants argue that *Lloyd* merely defined federal speech rights and did not prescribe federal property rights. Even if it did prescribe such rights, appellants contend that, since states generally may regulate shopping centers for proper state purposes, California is free to impose public-interest restrictions on the centers in order to safeguard the right of petition. That right, they assert, surely reflects a public interest that equals in importance the interests that justify restrictions designed to ensure health and safety, a natural environment, aesthetics, property values, and other accepted goals. Such restrictions on property routinely are enacted or declared and enforced.

Appellants ask us to overrule *Diamond II* and to hold that the California Constitution does guarantee the right to seek signatures at shopping centers.

Does *Lloyd* Identify Special Property Rights Protected by the Federal Constitution?

Lloyd held that a shopping center owner could prohibit distribution of leaflets when they communicated no information relating to the center's business and when there was an adequate, alternate means of communication. The court stated, "We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." (407 U.S. at p. 570 [33 L.Ed.2d at p. 143].)

Appellants correctly assert that *Lloyd* is primarily a First Amendment case. The references to Fifth and Fourteenth Amendment rights were made specifically in connection with the court's discussion of state action requirements. The court was focusing on *Marsh v. Alabama* (1946) 326 U.S. 501 [90 L.Ed. 265, 66 S.Ct. 276], which held that a property owner's actions in some circumstances are equivalent to state action because of public functions performed by the property. The court in *Lloyd* examined the functions performed by Lloyd's center but did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally. ***905**

Subsequent decisions support that reading of *Lloyd*. In *Hudgens v. NLRB* (1976) 424 U.S. 507 [47 L.Ed.2d 196, 96 S.Ct. 1029] the court again considered First Amendment rights in relation to private property. Though it concluded that

the First Amendment did not protect picketing in a shopping center, it acknowledged that "statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others ...." (*Id.*, p. 513 [47 L.Ed.2d p. 203].) The court's conclusion that the National Labor Relations Act controlled the issues there presented indicates that *Lloyd* by no means created any property right immune from regulation.

Eastex, Inc., v. NLRB (1978) 437 U.S. 556 [57 L.Ed.2d 428, 98 S.Ct. 2505] is comparable. The employees sought to distribute a four-part union newsletter. Two parts involved organizational requests; the other parts were irrelevant to the relations between employer and union.[3] A dissent by Justice Rehnquist, joined by Chief Justice Burger, states that property rights "explicitly protected from federal interference by the Fifth Amendment to the Constitution" were involved in the controversy. Rejecting that view, the majority had little difficulty recognizing that, as noted in *Hudgens, supra*, 424 U.S. at page 513 [47 L.Ed.2d at page 203], the National Labor Relations Act could provide statutory protection for the activity involved. The court observed that prior cases established that the act assures a right to distribute organizational literature on an employer's premises because employees already are rightfully there, to perform the duties of their employment. (See *Republic Aviations Corp.* v. *NLRB* (1945) 324 U.S. 793 [89 L.Ed. 1372, 65 S.Ct. 982, 157 A.L.R. 1081].) The court concluded, "Even if the mere distribution by employees of material ... can be said to intrude on petitioner's property rights in any meaningful sense, the degree of intrusion does not vary with the content of the material." (

The same may be said here. Members of the public are rightfully on Pruneyard's premises because the premises are open to the public during shopping hours. *Lloyd* when viewed in conjunction with *Hudgens* and *Eastex* does not preclude law-making in California which requires that shopping center owners permit expressive activity on their property. To hold otherwise would flout the whole development of law regarding ***906** states' power to regulate uses of property and would place a state's interest in strengthening First Amendment rights in an inferior rather than a preferred position. ([2]) "[A]ll private property is held subject to the power of the government to regulate its use for the public welfare." (*Agricultural Labor Relations Bd.* v. *Superior Court* (1976) 16 Cal.3d 392, 403 [128 Cal.Rptr. 183, 546 P.2d 687]; app. dism. for want of substantial federal question, 429 U.S. 802 [50 L.Ed.2d 63, 97 S.Ct. 33].)

Property rights must yield to the public interest served by zoning laws (*Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 [71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016]), to environmental needs (Pub. Resources Code, § 21000 et seq.), and to many other public concerns. (See, e.g., the California Coastal Act (*id.*, § 30000 et seq.), the California Water Quality Control Act (Wat. Code, § 13000 et seq.) the Subdivision Map Act (Gov. Code, § 66410 et seq.), and the Subdivision Lands Act (Bus & Prof. Code, § 11000 et seq. See also Powell, *The Relationship Between Property Rights and Civil Rights* (1963) 15 Hastings L.J. 135, 148-149.)

"We do not minimize the importance of the constitutional guarantees attaching to private ownership of property; but as long as 50 years ago it was already "' thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so, also, does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare. "'" (*Agricultural Labor Relations Bd. v. Superior Court, supra*, 16 Cal.3d at p. 403, holding that use of private property may be restricted because of the public interest in collective bargaining, and quoting *Miller* v. *Board of Public Works* (1925) 195 Cal. 477, 488 [234 P. 381, 38 A.L.R. 1479].)

([3]) The *Agricultural Labor Relations Board* opinion further observes that the power to regulate property is not static; rather it is capable of expansion to meet new conditions of modern life. Property rights must be "'redefined in response to a swelling demand that ownership be ***907** responsible and responsive to the needs of the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, the safety, the morals, or the

welfare of others."' (16 Cal.3d at p. 404, quoting Powell, *The Relationship Between Property Rights and Civil Rights*, *supra*, 15 Hastings L.J. at pp. 149-150.)

([1b]) Several years have passed since this court decided *Diamond II*. Since that time central business districts apparently have continued to yield their functions more and more to suburban centers. Evidence submitted by appellants in this case helps dramatize the potential impact of the public forums sought here:

(1) As of 1970, 92.2 percent of the county's population lived outside the central San Jose planning area in suburban or rural communities.

(2) From 1960 to 1970 central San Jose experienced a 4.7 percent decrease in population as compared with an overall 67 percent increase for the 19 north county planning areas.

(3) Retail sales in the central business district declined to such an extent that statistics have not been kept since 1973. In 1972 that district accounted for only 4.67 percent of the county's total retail sales.

(4) In a given 30-day period between October 1974 and July 1975 adults making one or more shopping trips to the 15 largest shopping centers in the metropolitan San Jose statistical area totaled 685,000 out of 788,000 adults living within that area.

(5) The largest segment of the county's population is likely to spend the most significant amount of its time in suburban areas where its needs and wants are satisfied; and shopping centers provide the location, goods, and services to satisfy those needs and wants.

In assessing the significance of the growing importance of the shopping center we stress also that to prohibit expressive activity in the centers would impinge on constitutional rights beyond speech rights. Courts have long protected the right to petition as an essential attribute of governing. (*United States v. Cruikshank* (1876) 92 U.S. 542, 552 [23 L.Ed. 588, 591].) The California Constitution declares that "people have the right to ... petition government for redress of grievances ...." (Art. I, § 3.) ([4]) That right in California is, moreover, vital to a basic process in the state's constitutional scheme - direct initiation of change by the ***908** citizenry through initiative, referendum, and recall. (Cal. Const., art. II, §§ 8, 9, and 13.) [4]

([5]) To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights.

Does the California Constitution Guarantee the Right to Gather Signatures at Shopping Centers?

No California statute prescribes that shopping center owners provide public forums. But article I, section 2 of the state Constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Though the framers could have adopted the words of the federal Bill of Rights they chose not to do so. (See Note, *Rediscovering the California Declaration of Rights* (1974) 26 Hastings L.J. 481.) Special protections thus accorded speech are marked in this court's opinions. *Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 658 [119 Cal.Rptr. 468, 532 P.2d 116], for instance, noted that "[a] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press."

Past decisions on speech and private property testify to the strength of "liberty of speech" in this state. *Diamond I* held that distributing leaflets and soliciting initiative signatures at a shopping center are constitutionally protected. Though the court relied partly on federal law, California precedents also were cited. (E.g., *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766 [40 Cal.Rptr. 233, 394 P.2d 921]; *In re Lane* (1969) 71 Cal.2d 872 [79 Cal.Rptr. 729, 457 P.2d 561]; *In re Hoffman* (1967) 67 Cal.2d 845 [64 Cal.Rptr. 97, 434 P.2d 353].) The fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent. (*People v. Pettingill* (1978) 21 Cal.3d 231, 247 ***909** [145 Cal.Rptr. 861, 578 P.2d 108]; and see Cal. Const. Revision Com., Recommendations (1971) art. I, § 3, com., p. 17 ["Federal ... legal precedents are subject to change and uncertain in scope"].) The duty of this court is to help determine what "liberty of speech" means in California.

Federal principles are relevant but not conclusive so long as federal rights are protected.

Schwartz-Torrance, supra, 61 Cal.2d 766, held that a labor union has the right to picket a bakery located in a shopping center. The opinion noted that the basic problem is one of "accommodating conflicting interests: plaintiff's assertion of its right to the exclusive use of the shopping center premises to which the public in general has been invited as against the union's right of communication of its position which, it asserts, rests upon public policy and constitutional protection." (61 Cal.2d at p. 768.)

In re Lane, supra, extended the assurance of protected speech to the privately owned sidewalk of a grocery store. "Certainly, this sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exercise First Amendment rights." (71 Cal.2d at p. 878.)

The issue arose too in *In re Hoffman* (1967) 67 Cal.2d 845 [64 Cal.Rptr. 97, 434 P.2d 353], where Vietnam War protesters had attempted to distribute leaflets in the Los Angeles Union Station, owned by three private companies. It housed a restaurant, snack bar, cocktail lounge, and magazine stand in addition to facilities directly related to transporting passengers. The public was free to use the whole station. Chief Justice Traynor's opinion made it clear that property owners as well as government may regulate speech as to time, place, and manner. (*Id.*, at pp. 852-853.) Nonetheless, "a railway station is like a public street or park." (*Id.*, at p. 851.) Further, "the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use." (*Id.*) The opinion thus affirms that the public interest in peaceful speech outweighs the desire of property owners for control over their property. (See too *In re Cox* (1970) 3 Cal.3d 205, 217-218 [90 Cal.Rptr. 24, 474 P.2d 992]: "The shopping center may no more exclude individuals who wear long hair ... who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations, than may the City of San Rafael.") ***910**

Diamond I, quoting *Schwartz-Torrance, supra*, stated: "'[T]he countervailing interest which [the owner] endeavors to vindicate emanates from the exclusive possession and enjoyment of private property. Because of the public character of the shopping center, however, the impairment of [the owner's] interest must be largely theoretical. [The owner] has fully opened his property to the public. ...'" (*Diamond I, supra,* 3 Cal.3d at p. 662, bracketed material in original.)

In his *Diamond II* dissent Justice Mosk described the extensive use of private shopping centers. [5] His observations on the role of the centers in our society are even more forceful now than when he wrote. The California Constitution broadly proclaims speech and petition rights. Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights.

([1c]) We therefore hold that *Diamond II* must be overruled. (See particularly 11 Cal.3d at p. 335, fn. 4.) A closer look at *Lloyd Corp., supra,* 407 U.S. 551, has revealed that it does not prevent California's providing greater protection than the First Amendment now seems to provide. We conclude that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.

By no means do we imply that those who wish to disseminate ideas have free rein. We noted above Chief Justice Traynor's endorsement of time, place, and manner rules. (*In re Hoffman, supra,* 67 Cal.2d at pp. 852-853.) Further, as Justice Mosk stated in *Diamond II*, "It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping ***911** center there]. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations (see *Diamond* [*I*] at p. 665) would not markedly dilute defendant's property rights." (11 Cal.3d at p. 345 (dis. opn. of Mosk, J.).)

The judgment rejecting appellants' request that Pruneyard be enjoined from denying access to circulate the petition is reversed.

Bird, C. J., Tobriner, J., and Mosk, J., concurred.

RICHARDSON, J.

I respectfully dissent. The majority relegates the private property rights of the shopping center owner to a secondary, disfavored, and subservient position vis-a-vis the "free speech" claims of the plaintiffs. Such a holding clearly violates *federal* constitutional guarantees announced in *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219].

The majority recites, in cursory fashion, that the trial court herein "rejected [plaintiffs'] request that Pruneyard be enjoined from denying them access." (*Ante*, p. 903.) Conspicuously absent from the opinion, however, is any reference to the trial court's careful findings of fact and conclusions of law, which are essential to a proper understanding and disposition of this case.

In brief, following a full evidentiary hearing, the trial court specifically found as follows: The Pruneyard Shopping Center is located entirely on private property, and its owner had adopted a nondiscriminatory policy of prohibiting all handbilling and circulation of petitions by anyone and regardless of content. Plaintiffs entered on Pruneyard property and sought to obtain signatures to petitions entirely unrelated to any activities occurring at the center. (The petitions were to the President of the United States and the Congress opposing a United Nations resolution which condemned Zionism and attacking Syria's emigration policy.) Pruneyard is located in Santa Clara County which contains numerous forums for distributing handbills or gathering signatures, including "many shopping centers, public shopping and business areas, public buildings, parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate." The court further found that numerous alternative public sites were available to plaintiffs for their ***912** purposes. Nonetheless, plaintiffs made no attempt whatever to obtain signatures on their petition in these alternative public areas, whether situated nearby or otherwise.

From the foregoing findings of fact the trial court expressly concluded as matters of law that there had been no dedication of the center's property to public use, that the center is not the "functional equivalent" of a municipality, and that "There are adequate, effective channels of communication for plaintiffs other than soliciting on the private property of the Center." On the basis of these findings of fact and conclusions of law, the trial court denied plaintiffs the injunctive relief which they sought.

With due deference, I suggest that the able trial court's judgment was not only entirely proper, but was compelled by the holdings in *Lloyd Corp. v. Tanner, supra*, 407 U.S. 551, and *Diamond v. Bland* (1974) 11 Cal.3d 331 [113 Cal.Rptr. 468, 521 P.2d 460] (cert. den. 419 U.S. 885 [42 L.Ed.2d 125, 95 S.Ct. 152]). The present majority, unable to escape the controlling force of *Lloyd*, acknowledges that "*Lloyd* held that a shopping center owner could prohibit distribution of leaflets when they communicated no information relating to the center's business and when there was an adequate, alternate means of communication." (*Ante*, p. 904.) However, the majority attempts to circumvent *Lloyd* by relying upon the "liberty of speech clauses" of the California Constitution. I believe that such an analysis is clearly incorrect, because the owners of defendant Pruneyard Shopping Center possess *federally* protected property rights which do not depend upon the varying and shifting interpretations of state constitutional law for their safeguard and survival. Indeed, this was the precise effect of our own express holding in *Diamond v. Bland, supra*, wherein we stated with great clarity that "... we must reject plaintiff's proposal ... that we consider using the 'free speech' provisions of our state Constitution to reach a contrary result in this case. Even were we to hold that the state Constitution in some manner affords broader protection than the First Amendment to the United States Constitution ..., *nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights*." (11 Cal.3d at p. 335, fn. 4, italics added.) This constitutional principle is as sound today as it was less than five years ago when we last expressed it.

The application of our *Diamond* holding to the case before us is clear and inescapable. Nonetheless, the present majority now disavows *Diamond* ***913** and attempts to distinguish *Lloyd* as "primarily a First Amendment case" rather than a private property case. (*Ante*, p. 904.) Apparently, the majority now believes that *Lloyd* merely held that the leaflet distributors in that case lacked any *First Amendment* rights

to assert against the shopping center owners, a deficiency the majority would now cure by creating more substantial "free speech" rights under the California Constitution than are recognized under the First Amendment.

The majority seriously errs in its excessively narrow reading of *Lloyd*, which expressed its fundamental reliance upon the *constitutional private property rights of the owner* throughout the entire opinion. This becomes apparent in the opening paragraph of *Lloyd*, wherein the high court, speaking through Justice Powell, explained that "We granted certiorari to consider petitioner's contention that the decision below *violates rights of private property protected by the Fifth and Fourteenth Amendments*." (407 U.S. at pp. 552-553 [33 L.Ed.2d at p. 133], italics added.) The court further observed that "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling." (P. 567 [33 L.Ed.2d at p. 142], italics in original.) The *Lloyd* court carefully admonished that "It would be *an unwarranted infringement of property rights* to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech." (*Ibid*. [33 L.Ed.2d, pp. 141-142], italics added.) This has precise application to the case before us for, as noted above, the trial court in the present case expressly found that plaintiffs had adequate alternative forums in which to conduct their activities. Contrary to the majority's thesis, *Lloyd* cannot be distinguished. It was, and is, a *property rights case of controlling force* in the litigation before us.

Recognizing the "special solicitude" owed to the First Amendment guarantees, the high court in *Lloyd* nonetheless noted that "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." (P. 568 [33 L.Ed.2d p. 142].) Moreover, the court determined that although a *shopping center* is open to the public, "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes." (P. 569 [33 L.Ed.2d, p. 143].) It is self-evident that the *federally* protected property ***914** rights are the same whether the shopping center is in *Oregon*, as in *Lloyd*, or in *California*, as in the present case.

The *Lloyd* court acknowledged that considerations of public health and safety may justify an "appropriate government response" through police power regulations. (P. 570 [33 L.Ed.2d, p. 143].) However, "the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. *But on the facts presented in this case, the answer is clear*. [¶] We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." (*Ibid*. [33 L.Ed.2d p. 143], italics added.)

The lesson to be learned from *Lloyd* is unmistakable and irrefutable: A private shopping center owner is protected by the *federal* Constitution from unauthorized invasions by persons who enter the premises to conduct general "free speech" activities unrelated to the shopping center's purposes and functions. Nor is the foregoing principle in any way diminished or affected by the fact that the claimed free speech rights are purportedly sanctioned by the California Constitution, given the overriding supremacy of the federal Constitution.

The familiar words of article VI, clause 2, of the United States Constitution read as follows: "*This Constitution*, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land*; and the *Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding*." (Italics added.) The controlling import of the supremacy clause on the issue before us is readily apparent. The United States Supreme Court, interpreting the United States Constitution, has declared that an owner of a private shopping center "when adequate, alternative avenues of communication exist," has a property right protected by the Fifth and Fourteenth Amendments which is superior to the First Amendment right of those who come upon the shopping center premises for purposes unrelated to the center. In such cases, no state court, interpreting a state Constitution, including this court

interpreting the California Constitution, can contravene such a federal constitutionally ***915** protected right. Thus, in this case, the majority is prevented from relying on the California Constitution to impair or interfere with those property rights. We are bound by the United States Supreme Court interpretations of the United States Constitution. More specifically, in a confrontation between federal and state constitutional interests, federally protected property rights recognized by the United States Supreme Court will prevail against state protected free speech interests where alternative means of free expression are available.

The federal cases decided in this area subsequent to *Lloyd* do not support the majority's holding. In *Hudgens v. NLRB* (1976) 424 U.S. 507 [47 L.Ed.2d 196, 96 S.Ct. 1029], the high court cited and quoted from *Lloyd* with obvious approval, and extended *Lloyd's* holding to encompass labor dispute picketing within a private shopping center. The picketers in *Hudgens* had argued that their free speech interests were paramount to the private property rights of the center owner, given the existence of a labor dispute with one of the center's lessees. The high court rejected the argument, relying upon *Lloyd*, and remanded the case to the National Labor Relations Board for disposition. Contrary to the suggestion of the majority herein, the remand to the NLRB was not an implied rejection of the property interests of the center owner, for it is well established (by a companion case to *Lloyd*) that the NLRB *must* uphold the owner's private property rights in such cases unless there has been an outright dedication of the center property to public use. (*Central Hardware Co. v. NLRB* (1972) 407 U.S. 539, 547 [33 L.Ed.2d 122, 128-129, 92 S.Ct. 2238].) As *Central Hardware* explains, and echoing *Lloyd*, to accept the premise that such a dedication occurs merely because private property is "open to the public" for commercial purposes would constitute "an unwarranted infringement of long-settled *rights of private property* protected by the Fifth and Fourteenth Amendments." (*Ibid*. [33 L.Ed.2d 122, 129], italics added.)

Nor does the recent case of *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556 [57 L.Ed.2d 428, 98 S.Ct. 2505], assist the majority. There, the Supreme Court upheld the rights of *employees* to distribute certain organizational material at their work site. The distinction between the rights of employees and nonemployees in this situation is well recognized, as was expressly noted by the *Eastex* court itself: "The Court recently has emphasized the distinction between the two cases: 'A wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests *rather than his property interests* were ***916** there involved.' [Citing *Hudgens*, 424 U.S. 507, and *Central Hardware*, 407 U.S. 539, both *supra*.]." (Pp. 571-572 [57 L.Ed.2d p. 442], italics added.)

The majority correctly observes that "property rights must yield to the public interest served by zoning laws ..., to environmental needs ..., and to many other public concerns." (*Ante*, p. 906.) Yet the "zoning for free speech uses" which the majority attempts to accomplish today goes far beyond any traditional police power regulation. Such unprecedented fiat has no support in constitutional, statutory or decisional law. The character of a free speech claim cannot be transmuted into something else by changing the label and invoking the police power. As noted above, the *Lloyd* case acknowledged that considerations of public health and safety may justify an "appropriate government response," but that "on the facts presented in this case, *the answer is clear*." (407 U.S. at p. 570 [33 L.Ed.2d at p. 143], italics added; see also, *Euclid v. Ambler Co*. (1926) 272 U.S. 365, 395 [71 L.Ed. 303, 314, 47 S.Ct. 114, 54 A.L.R. 1016] [zoning laws, and other police power regulations, must have a substantial relation to the public health, safety, morals or general welfare].)

Because, as the trial court expressly found, plaintiffs had adequate public forums in which to conduct their activities, their unauthorized entries on Pruneyard property manifestly cannot be excused on the basis of any state policy or goal "to protect free speech and petitioning." (*Ante*, p. 908.) The *Lloyd* rationale is applicable and unanswerable. The majority may not evade it by resort, in this instance, to the California Constitution, which must yield to a paramount federal constitutional imperative.

The judgment should be affirmed.

Clark, J., and Manuel, J., concurred.

Respondents' petition for a rehearing was denied May 23, 1979. Clark, J., Richardson, J., and Manuel, J., were of the opinion that the petition should be granted. ***917**

Footnotes

1 Pruneyard is bordered on two sides by private property, on its other sides by public sidewalks and streets.

2 Article V 1, clause 2 of the United States Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."
Article III, section 1 of the California Constitution provides: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land." (407 U.S. at pp. 552-553, 567, 570 [33 L.Ed.2d at pp. 133-134, 141, 143]).” (11 Cal.3d at p. 335, fn. 4.)

3 It was clear prior to *Eastex* that employees' right of self-organization included the right to distribute organizational literature on the employer's property. (*Eastex, supra,* 437 U.S. 556.) The two parts of the newsletter at issue were a request to write the Legislature opposing a "right-to-work" measure and an expression of opposition to a presidential veto of a minimum wage increase. *Eastex, supra,* U.S. 556.)

4 The Fair Political Practices Commission filed an amicus brief supporting appellants here. The commission urges that we consider the impact of our decision on exercise of the right to initiate change through the initiative, referendum, and recall processes. The brief points out that, because of the large number of signatures required to succeed in an initiative, referendum, or recall drive, guaranteeing access to voters is essential to make meaningful the right to mount such a drive.

5 "The importance assumed by the shopping center as a place for large groups of citizens to congregate is revealed by statistics: in 21 of the largest metropolitan areas of the country shopping centers account for 50 percent of the retail trade; in some communities the figure is even higher, such as St. Louis (67 percent) and Boston (70 percent). (Note (1973) Wis.L.Rev. 612, 618 and fn. 51.) Increasingly, such centers are becoming 'miniature downtowns'; some contain major department stores, hotels, apartment houses, office buildings, theatres and churches. (Business Week, Sept. 4, 1971, pp. 34-38; Chain Store Age, Sept. 1971, p. 4.) It has been predicted that there will be 25,000 shopping centers in the United States by 1985. (Publishers Weekly, Feb. 1, 1971, pp. 54-55.) Their significance to shoppers who by choice or necessity avoid travel to the central city is certain to become accentuated in this period of gasoline and energy shortage." (11 Cal.3d at p. 342 (dis. opn. of Mosk, J.).)

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113 Wash.2d 413
Supreme Court of Washington,
En Banc.

SOUTHCENTER JOINT VENTURE, a general partnership; Richard E. Jacobs; and David H. Jacobs, Respondents,
v.
NATIONAL DEMOCRATIC POLICY COMMITTEE; Pat Ruckert; Richard Iaria; Melinda N. Norris; and George Holtzner, individuals, Appellants.

No. 55952–0. | Oct. 19, 1989.

Shopping center owner sought declaratory judgment that political organization and certain of its members or affiliates had no right to solicit contributions and sell literature at shopping center. Counterclaim was asserted for defamation. The Superior Court, King County, Norman W. Quinn, J., entered summary judgment and permanent injunction in favor of shopping center owner and appeal was taken. The Supreme Court accepted certification from the Court of Appeals. The Supreme Court, Andersen, J., held that: (1) doctrine of collateral estoppel did not apply so as to prevent relitigation of free speech issues raised in prior action between previous shopping center owner and political organization; (2) political organization had no right under free speech provision of State Constitution to solicit contributions and sell literature at privately owned shopping center; and (3) statement of shopping center manager contained in affidavit in support of motion for preliminary injunction was privileged precluding recovery for defamation.

Affirmed.

Utter, J., concurred in the result and filed opinion.

Pearson, J., concurred in the result and filed opinion in which Dore, J., joined.

West Headnotes (10)

[1] Judgment

Successive estates or interests

Rule that a successor in interest to a party to an action which determines interests in property is subject to the preclusive effects of that action is not applicable where the previous action involved a personal right as opposed to a property right.

4 Cases that cite this headnote

[2] Judgment

Vendor and Purchaser

Constitutional right of free speech involved in case between shopping center owner and political organization was a "personal right" rather than a "property right" in that it was not unique to the particular shopping center involved and did not affect title, and thus present shopping center owner was not in privity with previous owner who had been party to prior adjudication involving free speech right of political organization to conduct activities at shopping center and collateral estoppel did not apply to prevent relitigation of issues raised in previous action. U.S.C.A. Const.Amend. 1.

25 Cases that cite this headnote

[3] Judgment

Scope and Extent of Estoppel in General

Relitigation of an important issue of law should not be foreclosed by collateral estoppel.

4 Cases that cite this headnote

[4] Constitutional Law

Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Oral and written dissemination of one's views is protected by the First Amendment to the Federal Constitution and is not lost when written materials are sold or contributions are solicited in the course thereof. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law

Applicability to governmental or private action; state action

Fundamental nature of a Constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-a-vis each other.

6 Cases that cite this headnote

[6] Constitutional Law

Policy and purpose in general

Supreme Court is not at liberty to disregard the fundamental nature of the State Constitution in order to advance theories that may be perceived by some to constitute desirable social policy.

2 Cases that cite this headnote

[7] Constitutional Law

Applicability to governmental or private action; state action

Free speech provision of the State Constitution protects an individual only against actions of the state; it does not protect against actions of other private individuals; overruling *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wash.App. 833, 478 P.2d 792. West's RCWA Const. Art. 1, § 5.

9 Cases that cite this headnote

[8] Constitutional Law

Commercial establishments

Political organization had no right under free speech provision of State Constitution to solicit contributions and sell literature at privately owned shopping center. West's RCWA Const. Art. 1, § 5.

8 Cases that cite this headnote

[9] Constitutional Law

Stores, shopping centers, or malls

Free speech provision of State Constitution did not apply to private owners of shopping center under the "public function doctrine" providing that private actors who assume role of state by engaging in governmental functions are subject to same constitutional limitations as the state. West's RCWA Const. Art. 1, § 5.

24 Cases that cite this headnote

[10] Libel and Slander

Judicial Proceedings

Statement of shopping center manager that a member of political organization wore a "swastika-type symbol," which was contained in affidavit in support of shopping center owner's motion for preliminary injunction, was made in a course of a judicial proceeding and pertained to the relief sought in that owner maintained that organization's use of shopping center was in violation of its rules and interfered with business environment of shopping center and was therefore privileged precluding recovery for defamation.

1 Cases that cite this headnote

Attorneys and Law Firms

****1283** ***415** Richard B. Sanders, Bellevue, for appellants.

Ferguson & Burdell, Henry C. Jameson, Alan Bornstein, Seattle, for respondents.

Peter J. Eglick, Seattle, Robert R. Meinig, Kirkland, amicus curiae for appellants on Behalf of the American Civil Liberties Union.

James B. Stoetzer, Michael B. King, Seattle, amicus curiae for respondents on Behalf of Northgate Shopping Center and Merchants Ass'n and Tacoma Mall Merchants Ass'n.

Opinion

ANDERSEN, Justice.

FACTS OF CASE

This case presents the question of whether a political organization has a right under the free speech provision of the Constitution of the State of Washington to solicit contributions and sell literature in a *privately owned* shopping mall. We conclude that it does not.

Southcenter Joint Venture (Southcenter) owns the Southcenter Shopping Center, an enclosed shopping mall ***416** comprised of numerous retail stores. The Southcenter Shopping Center will be referred to herein simply as the "mall". Southcenter acquired the mall from its previous owner in December of 1985. At all times pertinent herein, it maintained a policy of allowing charitable, civic and political groups to use designated "public service centers" within the mall. Southcenter promulgated regulations governing the use of these areas by such outside groups. These regulations required that groups wishing to use the public service centers first submit an application to do so. One of the regulations prohibited solicitation of funds in the mall.

On June 20, 1986, an organization named the National Democratic Policy Committee (NDPC) submitted an application requesting the use of a public service center. The NDPC is a political organization apparently devoted to advancing the political views of one Lyndon LaRouche. Despite its name, the NDPC is not affiliated with the Democratic Party.

In its application, the NDPC stated that it wished to use a public service center for the purposes of distributing literature, signing up members, and soliciting contributions. Southcenter denied the application due to its regulation against soliciting funds. This prompted an attorney representing the NDPC to inform Southcenter that he considered the NDPC's right to ****1284** solicit funds at the mall to have been established when it prevailed in an earlier civil action brought against it by the previous mall owner. The attorney also told Southcenter that he would advise his clients to be present in the mall "at such times and places as they deem appropriate".

In the afternoon of July 17, 1986, four individuals who were members of, or affiliated with, the NDPC appeared unannounced at the mall and undertook to solicit contributions and sell literature. The mall's assistant manager asked them to leave, but they refused. Later that afternoon, they left the mall of their own accord.

Southcenter subsequently brought an action in the Superior Court against the NDPC and the four individuals who ***417** had appeared at the mall. For convenience, the NDPC and these four individuals are hereinafter collectively referred to as the "NDPC". By its action, Southcenter sought a judgment declaring that the NDPC had no right either to solicit funds at the mall or violate Southcenter's other rules concerning the use of its premises. Southcenter then sought issuance of a preliminary injunction and the Superior Court granted it. The NDPC answered Southcenter's complaint and counterclaimed, alleging defamation for a statement contained in the mall manager's affidavit supporting the injunction, stating that "one of the individuals sitting at the NDPC card table wore a swastika-type symbol on his arm." Southcenter moved for summary judgment in its favor, and the NDPC also moved for partial summary judgment.

The Superior Court granted Southcenter's motion and entered judgment permanently enjoining the NDPC from soliciting contributions or selling literature on the mall premises without Southcenter's consent. The NDPC then sought further review. The Court of Appeals certified the case to this court for determination and we accepted certification. [1]

This case presents us with three issues.

ISSUES

ISSUE ONE. Does the doctrine of collateral estoppel apply so as to prevent relitigation of issues raised in a prior action brought by the previous mall owner against the NDPC?

ISSUE TWO. Under the free speech provision of the Constitution of the State of Washington, does a political organization have the constitutional right to solicit contributions and sell literature at a privately owned shopping mall?

ISSUE THREE. Did the trial court err by dismissing the NDPC's counterclaim for defamation?

*418 DECISION

ISSUE ONE.

CONCLUSION. The doctrine of collateral estoppel does not apply in this action because Southcenter is not in privity with a party to the prior litigation.

The NDPC first contends that the doctrine of collateral estoppel applies here. Its contention is based on the fact that issues similar to those raised in this case were litigated in an action brought by the previous mall owner against the NDPC in 1984. In the earlier case, the NDPC prevailed in the Superior Court and the then mall owner did not appeal.

The following elements are required for application of the doctrine of collateral estoppel:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Shoemaker v. Bremerton, 109 Wash.2d 504, 507, 745 P.2d 858 (1987) quoting *Malland v. Department of Retirement Sys.*, 103 Wash.2d 484, 489, 694 P.2d 16 (1985).

[1] Southcenter asserts that the doctrine of collateral estoppel does not apply here because, among other things, collateral ****1285** estoppel element 3 is absent in that Southcenter was not a party to or in privity with a party to the prior adjudication. We agree. It is true that Southcenter did acquire the mall from a party to the prior action. It is also true that a successor in interest to a party to an action that determines interests in property is subject to the preclusive effects of that action. [2] That rule, however, is not applicable where the previous action involved a "personal" right, as opposed to a "property" right. [3]

***419** **[2]** In the prior action, the parties disputed whether the NDPC had a free speech right to solicit contributions and sell literature at the mall. We conclude that a constitutional right of free speech in a case of this sort is more appropriately classified as a "personal" right than a "property" right. This is because such a right is not unique to the particular shopping mall involved, nor does it affect the title thereto. [4]

[3] Thus, since the previous action involved a personal right, Southcenter is not in privity with a party to the prior adjudication and collateral estoppel does not apply to prevent relitigation of issues raised in the previous action. This conclusion is bolstered by our rule that the relitigation of an important issue of law should not be foreclosed by collateral estoppel. [5]

ISSUE TWO.

CONCLUSION. The free speech provision of the Constitution of the State of Washington (Const. art. 1, § 5) affords protection to the individual against actions of the State. It does not protect an individual against the actions of other private individuals. The free speech provision of our state constitution thus does not afford the NDPC a constitutional right to solicit contributions and sell literature at the mall.

[4] It is the NDPC's next contention that it has a free speech right to solicit contributions and sell literature at the mall. It is, of course, true that the oral and written dissemination of one's views is protected by the first amendment to the United States Constitution. [6] Such protection is not lost ***420** when written materials are sold or contributions are solicited in the course thereof. [7] Thus, according to the NDPC's arguments, its activities at the mall constitute protected speech.

In the case of *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972), however, the United States Supreme Court held that the first amendment to the United States Constitution did not protect the distribution of political handbills in a privately owned shopping mall. In so holding, it stressed that

> the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only.

Lloyd, 407 U.S. at 567, 92 S.Ct. at 2228. The Court in *Lloyd* also firmly rejected the argument that the mall had lost its private character because it was open to the public and served the same purpose as a business district. [8] The United States Supreme Court thereby repudiated the position it had taken in the earlier case of ****1286** *Amalgamated Food Employees Local 590 v. Logan Vly. Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968). [9]

A state may, of course, "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741 (1980). [10] The NDPC urges us to so construe the free ***421** speech provision of the Constitution of the State of Washington (Const. art. I, § 5) and conclude that it affords the NDPC the right to solicit contributions and sell literature at the mall. Indeed, we have previously construed this state's constitutional free speech provision to afford greater protection of individual liberties than its federal counterpart. [11] The NDPC, however, is not just asking us to cast a more expansive interpretation of the state constitutional provision; in reality, it is asking us to declare that our state constitution grants *an entirely new kind* of free speech right—one that can be used not only as a shield by private individuals against actions of the state but also as a sword against other private individuals. [12] This we cannot do.

[5] To adopt the position urged by the NDPC would require us to act contrary to the fundamental nature of our own state constitution. Under the American system of government, sovereignty resides in the people. [13] It is the people who ordain a constitution. [14] A constitution, in turn, is "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised." 1 T. Cooley, *Constitutional Limitations* 4 (8th ed. 1927). [15] The whole significance of a constitutional government is that its

> ***422** fundamental rules or maxims not only locate the *sovereign power* in individuals or bodies designated or chosen in some prescribed manner, but also *define the limits of its exercise so as to protect individual rights, and shield them against the assumption of arbitrary power*.
>
> (Italics ours.) 1 T. Cooley, at 5. [16] It is also axiomatic that
>
> [t]he constitution, moreover, is in the nature of a covenant of the sovereign people with each individual thereof, under which, while they intrust the powers of government to political agencies, they also divest themselves of the sovereign power of making changes in the fundamental law except by the method in the constitution agreed upon.
>
> T. Cooley, *General Principles of Constitutional Law* 23 (3d ed. 1898). It follows that the fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-a-vis each other. [17]

****1287** Consistent with the foregoing principles, it is, always has been, and remains basic constitutional doctrine that both the federal and state bills of rights, of which the right of free speech is a part, were adopted *to protect individuals against actions of the state.* [18] As one respected legalauthority succinctly explains:

> The guaranties found in the state and federal constitutions which are intended for the protection of the individual in his person, his liberty, and his property have not been the result of any theorizing as to what ought to be secured to the individual by way of enjoyment; they have been the result of experience, and they relate to the supposed respects in which it has been found necessary to limit the powers of government in order that the largest practicable measure of individual freedom and ***423** opportunity may be secured. *Nearly all of them may be traced more or less directly to struggles on the part of the people against the unjust exercise of powers of government in England and in this country.*
>
> (Italics ours.) E. McClain, *Constitutional Law in the United States* § 205, at 292–93 (2d ed. 1910). We deem it very significant that this was accepted constitutional doctrine at the time of the Washington Constitutional Convention in 1889. [19] Moreover, 22 of the 75 delegates to that constitutional convention were practicing lawyers who were undoubtedly familiar with basic constitutional doctrine of the time. [20]

The notion that the free speech provision of the state constitution creates a right that can be wielded by one private individual against another constitutes nothing short of a radical departure from this well understood and accepted

constitutional doctrine.[21] The NDPC, nonetheless, argues that if one reads the text of this provision in the manner that they urge us to do, it demonstrates that such a departure was in fact intended by the framers of the state constitution. We do not agree. The free speech clause of our state constitution provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Const. art. 1, § 5. Thus, it is true that the state free speech provision contains no express reference to "state action". This contrasts somewhat with its federal counterpart, ***424** which states that: "*Congress shall make no law* ... abridging the freedom of speech, ..." (Italics ours.) U.S. Const. amend. 1. There are contemporaneous newspaper articles indicating that early drafts of the state free speech provision considered by members of the Preamble and Bill of Rights Committee of the state constitutional convention contained reference to "state action" comparable to that contained in the federal constitution.[22] It is a 2–foot leap across a 10–foot ditch, however, to seize upon the absence of a reference to the State as the actor limited by the state free speech provision and conclude therefrom that the framers of our state constitution intended to create a bold new right that conflicts with the fundamental premise on which the entire constitution ****1288** is based. To do so would not be to "interpret" our constitution, but to deny its very nature.

The much more likely and reasonable explanation for the absence of the words in question is that the framers viewed them as redundant and in the interest of simplicity simply deleted them. The framers may well also have wished to avoid limiting the prohibitions of the constitutional free speech provision to just the legislative branch of government. In this connection, language comparable to the "Congress shall make no law" statement contained in the federal constitution could reasonably have been perceived as not being sufficiently broad to also include actions of the executive branch. The fundamental nature of our constitution being as it is, either of these two explanations has greater plausibility than the radical view urged upon us by the NDPC.

***425** We conclude, therefore, that although an express reference to "state action" is absent from the free speech provision of our state constitution, a "state action" limitation is implicit therein.[23]

Furthermore, and much more importantly, the question of whether the state free speech provision requires "state action" also directly implicates the separation of powers doctrine.[24] In our recent decision in *Washington State Motorcycle Dealers Ass'n v. State*, 111 Wash.2d 667, 674, 763 P.2d 442 (1988), we emphasized that this doctrine is *a cardinal and fundamental principle* of the entire American constitutional system. As we there observed,

> "... the division of governmental powers into executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people, and preventing the exercise of autocratic power, and that it is a matter of fundamental necessity, and is essential to the maintenance of a republican form of government."

Motorcycle Dealers, at 674–75, 763 P.2d 442 (quoting 16 Am.Jur.2d *Constitutional Law* § 296, at 808 (1979)). And as we also firmly cautioned:

> "American courts are constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power; ..."

Motorcycle Dealers, at 675, 763 P.2d 442 (quoting 16 Am.Jur.2d § 309, at 829–30).

The NDPC maintains that we should adopt a "balancing test" under which we would weigh the free speech interests of the NDPC against the private property interests of the ***426** mall owner. Were we to assume the role of weighing competing constitutional interests asserted between private parties, as the NDPC urges, we would be violating the separation of powers principles just enunciated by arrogating to the judicial branch of government powers that properly reside with the legislative branch of government. As the Supreme Court of Connecticut aptly observed in the face of a like invitation in a similar case:

> It is not the role of this court to strike precise balances among the fluctuating

> interests of competing private groups which then become rigidified in the granite of constitutional adjudication. That function has traditionally been performed by the legislature, which has far greater competence and flexibility to deal with the myriad complications which may arise from the exercise of constitutional rights by some in diminution of those of others.... *Statutes would become largely obsolete if courts in every instance of the assertion of conflicting constitutional rights should presume to carve out in the immutable form of constitutional adjudication the precise* ****1289** *configuration needed to reconcile the conflict.*

(Italics ours.) *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 65, 469 A.2d 1201 (1984).[25] Furthermore, were we to so usurp the power and authority of the Legislature in this fashion, we would also be encroaching upon the power and authority of the executive branch by bypassing not only the Governor's prerogative to propose legislation, but also the Governor's constitutional power to veto legislative enactments. We decline to do this.

It is significant that the position we adopt herein commands the support of the overwhelming majority of courts that have addressed this issue. The highest courts of Connecticut, Michigan, New York, North Carolina, Pennsylvania and Wisconsin have all recently concluded in cases involving similar facts that the free speech provisions of their respective state constitutions do not protect against ***427** infringement by private individuals.[26] It appears that only the California and New Jersey courts have gone so far as to discover such a right in their state constitutions.[27]

Our decision on the "state action" issue in this case is also consistent with the decision of this court in *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wash.2d 230, 635 P.2d 108 (1981). In *Alderwood*, the Washington Environmental Council asserted that it had the right to solicit signatures for an initiative at a shopping mall. A 4–member plurality of this court, *i.e., less than a majority of the court,* maintained that there was no "state action" requirement under the free speech and initiative provisions of the state constitution.[28] That plurality then followed what it termed a "balancing approach" for determining when these guaranties prevail over the rights of a private property owner and concluded that the balance tipped in favor of the initiative supporters in that case.[29]

***428** Although a fifth member of the court, Justice Dolliver, concurred "with the result", he sharply rejected the plurality's reasoning, branding its free speech analysis "constitution-making by the judiciary of the most egregious sort." *Alderwood*, at 248, 635 P.2d 108 (Dolliver, J., concurring). The concurrence nonetheless reasoned that the activity of soliciting signatures for an initiative was authorized by the initiative provision of the state constitution (Wash. Const. art. 2, § 1(a) (amend. 72)) and the initiative and referendum statute (RCW 29.79).[30] As the concurring opinion pointed out, unlike the free speech provision, the initiative provision is not part of our state constitution's Declaration of Rights and does not establish a right against the government but declares that the people are part of the legislative process.[31]

****1290** The remaining four members of the court in *Alderwood* dissented.[32] The dissent agreed with the objection of the concurrence to the plurality's free speech analysis, though it disagreed with the analysis of the concurrence concerning the initiative provision of the state constitution.[33]

Thus, in *Alderwood, a 5–member majority of this court rejected the argument now posited by the NDPC* that the free speech provision of our state constitution does not require "state action". As a consequence, the holding in *Alderwood* was simply that people have a right under the initiative provision of the Constitution of the State of Washington to solicit signatures for an initiative in a manner that does not violate or unreasonably restrict the rights ***429** of private property owners.[34] We expressly do not here disturb that holding.[35]

[6] We also note that we are indeed familiar with the recent writings of some legal commentators which present an array of theoretical arguments as to why they think that constitutional guaranties of individual liberties should not

be limited to protecting against actions of the state.[36] We are also mindful, however, as we recently and unanimously declared, that

> [r]ecourse to our state constitution as an independent source for recognizing and protecting the individual rights of our citizens must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned.
>
> *State v. Gunwall*, 106 Wash.2d 54, 63, 720 P.2d 808 (1986).[37] Thus, this court is not at liberty to disregard the fundamental nature of our constitution in order to advance theories that may be perceived by some to constitute desirable ***430** social policy.[38] Significantly, as the United States Supreme Court has recently and clearly declared, "*[w]hether [the "state action" requirement] is good or bad policy, it is a fundamental fact of our political order.*" (Italics ours.) *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

Furthermore, as we perceive it, compelling policy reasons exist in support of a "state action" requirement. As Professor Tribe expresses it,

> by exempting private action from the reach of the Constitution's prohibitions, it stops the Constitution short of preempting individual liberty —of denying to individuals the freedom to make certain choices, ... Such freedom is basic under any conception of liberty, but it ****1291** would be lost if individuals had to conform their conduct to the Constitution's demands.

L. Tribe, *American Constitutional Law* § 18–2, at 1691 (2d ed. 1988).[39]

[7] **[8]** Accordingly, we hold that the free speech provision of our state constitution protects an individual only against actions of the State; it does not protect against actions of other private individuals. The NDPC thus has no right under Const. art. 1, § 5 to solicit contributions and sell literature at the mall.

The NDPC proceeds, however, to make the additional argument that our state constitution's free speech provision applies to shopping malls under the "public function" doctrine.

***431** The "public function" doctrine is a means of satisfying the "state action" requirement.[40] It provides:

> The state cannot free itself from the limitations of the Constitution in the operation of its governmental functions merely by delegating certain functions to otherwise private individuals. If private actors assume the role of the state by engaging in these governmental functions then they subject themselves to the same limitations on their freedom of action as would be imposed upon the state itself.
>
> 2 R. Rotunda, J. Nowak & J. Young, *Constitutional Law* § 16.2, at 163 (1986). A "public function" is one that is "traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974).[41]

The "public function" doctrine was applied by the United States Supreme Court in the well-known case of *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). *Marsh* involved the question of whether the management of a privately owned company town could prohibit a Jehovah's Witness from distributing religious literature in the town. The Court held that it could not, reasoning that the private entity which owned the town was subject to the strictures of the First Amendment because it was performing a "public function".[42]

In the more recent case of *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972), however, the United States Supreme Court expressly declined to extend the "public function" doctrine to a privately owned shopping mall. It had been argued in *Lloyd* that since a shopping center has sidewalks, streets, and parking areas ***432** which are functionally similar to those provided by municipalities, the public should have the same right of free speech there as in the streets of a city or town.[43] The United States Supreme Court rejected this contention, declaring:

> The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication

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> of private property to public use. The closest decision in theory, *Marsh v. Alabama*, [326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946)], all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, *the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.* (Footnote omitted. Italics ours.) *Lloyd*, 407 U.S. at 569, 92 S.Ct. at 2229.

****1292** **[9]** Based on *Lloyd*, therefore, it is obvious in the case before us that the "public function" doctrine is inapposite under the Constitution of the United States. Nor do we perceive any persuasive reason why this doctrine should apply any differently under our state constitution. It simply cannot reasonably be said that a shopping mall performs the functions traditionally and exclusively reserved to the state. A shopping mall is not a town and malls do not provide all essential public services such as water, sewers, roads and sanitation; nor do they accept responsibility for such functions as education or public safety. [44] Rather, shopping malls are concerned with just one aspect of their patrons' lives —shopping. [45] The mere fact that shopping malls, like any large department store, have rest rooms for the convenience of their patrons, and security personnel to prevent ***433** shoplifting, cannot by any stretch of the imagination translate into "the full spectrum of municipal powers". [46]

We further agree with the United States Supreme Court in *Lloyd* that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes", and that "[t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." *Lloyd*, 407 U.S. at 569, 92 S.Ct. at 2229. Moreover, if public invitation and size were the relevant criteria, it could well be asked how shopping centers could be legally distinguished from places such as sport stadiums, convention halls, theaters, county and state fairs, large office and apartment buildings, supermarkets, department stores or churches. [47]

We thus hold, in addition to our earlier conclusion that the state constitution's free speech provision does not protect individuals from actions of other private individuals, that the "public function" doctrine is inapplicable here.

ISSUE THREE.

[10] CONCLUSION. The mall manager's statement that an NDPC member wore a "swastika-type symbol" is privileged because it was made in the course of a judicial proceeding and pertained to the relief sought. The trial court correctly granted summary judgment in favor of Southcenter on the NDPC's counterclaim for defamation.

The NDPC argues that the Superior Court erred in granting summary judgment against it on its defamation counterclaim. The NDPC alleges it was defamed by a statement contained in an affidavit submitted by the mall manager that he observed an NDPC member wearing a ***434** "swastika-type symbol". Southcenter maintains this statement is privileged as relevant to court proceedings.

In *McNeal v. Allen*, 95 Wash.2d 265, 621 P.2d 1285 (1980), this court set forth the applicable rule:

> Allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief.

McNeal, at 267, 621 P.2d 1285. The statement at issue in this case was made in the course of a judicial proceeding; it was contained in an affidavit filed in support of Southcenter's motion for a preliminary injunction. The statement also pertained to the relief sought. Southcenter maintained that the NDPC's use of the mall was in violation of its rules and unduly interfered with the business environment within the mall. Southcenter, therefore, sought to enjoin the NDPC from using its premises. ****1293** The statement that one of the NDPC people was wearing a "swastika-type symbol" is pertinent to that claim for relief. Thus, the statement was privileged and the trial court correctly granted summary judgment in favor of Southcenter on the NDPC's defamation counterclaim.

We affirm the Superior Court's order granting Southcenter's motion for summary judgment.

CALLOW, C.J., and BRACHTENBACH, DOLLIVER, DURHAM and SMITH, JJ., concur.

UTTER, Justice (concurring in the result).

I agree with the majority that, given the facts of this case, Const. art. 1, § 5 (hereinafter section 5) does not allow the petitioners the right to solicit donations and memberships within a private shopping mall. The majority's rationale for reaching this result, however, is one with which I cannot agree.

***435** In applying the interpretive criteria we developed in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986), [1] I find a different basis for our common result. There simply is no compelling reason why we should append a state action requirement to section 5 when the plain language and drafting history of the provision suggest otherwise. Worse, the majority fails to address arguments that the state action doctrine is generally inappropriate at the state level. It also does not articulate what form of state action test it means to apply to situations such as the case presented; in so doing, it ignores the possibility of state action in today's case and leaves trial courts, which must frequently apply our rules, without guidance. The majority also fails to discuss the fact that for 8 years the courts of our state —including the court below—have successfully used the balancing test developed in *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wash.2d 230, 635 P.2d 108 (1981). The rulings of these courts indicate that *Alderwood* functions as a more coherent limiting principle than the ill-defined state action doctrine. Such a balancing approach is mandated by *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83–87, 100 S.Ct. 2035, 2041–44, 64 L.Ed.2d 741 (1980), in cases where a state seeks to enforce a state constitutional speech right. The majority leaves undisturbed the result in *Alderwood* which recognizes the state's duty to enforce an individual's right to petition on certain private property. *See Alderwood*, 96 Wash.2d at 251–53, 635 P.2d 108 (Dolliver, J., concurring). Thus, this court must use a balancing approach when analyzing that manifestation of the right to speech; we do not give an adequate rationale why balancing should not be used in the speech issue presented today. Further, in abandoning the *Alderwood* test, the majority also leaves without a principled underpinning the possibility of enforcing speech rights against other types of private infringements— ***436** such as actions by political parties, private universities, labor unions, private clubs, and civic organizations. These are common problems in our complex society. For these reasons, I concur with the majority in result only.

I

Analysis of this case following the nonexclusive criteria developed in *State v. Gunwall*, *supra*, shows that the state action doctrine is incongruent with much of the state constitution in general and with section 5 in particular. The first two *Gunwall* criteria involve the text of the state constitutional provision. These two criteria encourage analysis of the language of the provision itself as well as textual contrasts with its federal parallel. *Gunwall*, 106 Wash.2d at 61, 720 P.2d 808.

The majority does undertake a brief analysis of section 5's language. As the majority must acknowledge, the text makes no reference to governmental actions. The provision states simply: "Every person may freely speak, write and publish on all ****1294** subjects, being responsible for the abuse of that right." The unambiguous nature of these words stands as a major obstacle to any attempt to read a state action requirement into them. If constitutional provisions are textually clear, this court will give the words their plain meaning. *See Anderson v. Chapman*, 86 Wash.2d 189, 191, 543 P.2d 229 (1975). Such a plain meaning here could not include a state action requirement—the language simply is not present in section 5.

Moreover, as the majority also acknowledges, the committee that drafted the speech provision specifically deleted state action language from its finished product. The first version of section 5 read: "*That no law shall be passed* restraining the free expression of opinion or restricting the right to speak, write or print freely on any subject." (Italics mine.) Tacoma Daily Ledger, July 13, 1889, at 4, col. 3; *see also* Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. Puget Sound L.Rev. 157, 172 (1985) ***437** (hereinafter "*Right to Speak*"). After a number of revisions, the Preamble

and Declaration of Rights Committee submitted the text of the speech provision minus the state action language to the convention for passage. This version was based in part on the speech guarantee of the California constitution.[2] *Right to Speak*, at 175–77. The convention passed this version of section 5 without debate.

The most logical and direct conclusion one can draw from this history is that the committee members considered the impact of the state action language and decided against it. One must assume that they were aware of United States Supreme Court cases on state action, notably the seminal *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), decided just a few years before the convention. Likewise, the committee members must have been familiar with Justice Harlan's dissent in that case: he argued that the Fourteenth Amendment would allow Congress to regulate private behavior that discriminated against nonwhites.[3] *Civil Rights Cases*, 3 S.Ct. at 27 (Harlan, J., dissenting). This example, as well as the state-action-less Thirteenth Amendment,[4] demonstrated to the Washington ***438** Constitution's framers that even the federal constitution, when aiming to secure personal liberties, could directly regulate the actions of private individuals.[5]

The deliberateness of omitting the state action language becomes even more apparent when one compares the language of section 5 with other provisions in Washington's Declaration of Rights. Many of these other provisions contain an express state ****1295** action requirement. For example, Const. art. 1, § 12 provides:

> *No law shall be passed* granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

(Italics mine). *See also* Const. art. 1, §§ 8, 11, 23, 28. One can only assume that the inclusion of state action language in some provisions and its omission in others was intentional. Without direct evidence to the contrary, one must conclude that the framers did not wish state action to be a requirement for the free speech provision's operation.

The Preamble to the state constitution, when read in conjunction with the Declaration of Rights, provides further evidence that state action was not intended. The Preamble states:

> We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

The language of the Preamble demonstrates that the framers were not positivists: they did not see the constitution itself as the source of the rights contained within it. Rather, the "liberties" came from a higher source. The ***439** framers, then, subscribed to theories of natural law and inherent rights similar to those that inspired the Declaration of Independence and the Bill of Rights in the federal constitution. *See* L. Tribe, *American Constitutional Law* 1309 (2d ed. 1988) (hereinafter Tribe); Corwin, *The "HigherLaw" Background of American Constitutional Law*, 42 Harv.L.Rev. 149 (1928–29).

According to contemporary evidence, the reference to God or Supreme Ruler was a great point of controversy at the convention. *See* Portland Morning Oregonian, July 30, 1889; Tacoma Daily Ledger, July 30, 1889, at 4. When first presented by the committee, the Preamble read: "We, the people of the state of Washington, to preserve our rights, do ordain this constitution." Debate ensued and the delegates introduced various alternative versions of the Preamble. The convention eventually compromised and adopted the reference to the "Supreme Ruler." Portland Morning Oregonian, July 30, 1889.

Both versions of the Preamble quoted above imply that the rights inhere in the citizenry rather than emanate from the state. This point, then, was not controversial. Consequently, listing the rights in the constitution could only have been meant to protect them. This protective function is further implied by the title of "Declaration" rather than "Bill" of rights: the document does not confer rights, it declares those that naturally exist. *See* Wiggins, *Francis Henry and the Declaration of Rights*, Washington State Bar News, at 54 (May 1989).

The natural law tone of the constitution is strengthened by Const. art. 1, § 32. This section declares: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." The notion of fundamental principles was

central to natural law theories at the time. *See* Tribe, at 560. That the principles are not spelled out further indicates that the framers looked to other, non-governmental sources for the origin of the rights listed in the constitution. If these rights are fundamental and naturally occurring, then ***440** it is incongruous to maintain that they are good only against the government. *See* Chemerinsky, *Rethinking State Action*, 80 Nw.L.Rev. 503, 527–31 (1985).

The majority concludes, however, that the omission of "state action" language in section 5 served another purpose. It posits a "much more likely and reasonable explanation." First, the majority surmises that the framers thought the state action language redundant. Second, it hypothesizes that the framers sought to protect freedom of speech from assaults by all branches of government rather than simply the Legislature, as might be implied by the First Amendment's reference to "Congress shall make no law". Majority, at 1287–88. Given the fact that the majority cites no authority for either prong of this "explanation," ****1296** one must accept it for what it is: mere conjecture.

First, from a purely linguistic point of view, removing from section 5 language referring specifically to acts of state has great effect. Quite simply, it changes the facial meaning of the provision to state it in the absolute rather than in terms of state action. As mentioned previously, in light of contemporary United States Supreme Court precedent, we must assume that the framers knew what they were doing.

Although the majority cites no authority for its second "explanation," a "Congress-only" interpretation of the First Amendment might be inferred in *State v. Haffer*, 94 Wash. 136, 162 P. 45 (1916). In that case, this court referred to the First Amendment as applying to acts of Congress only. *Haffer*, at 143, 162 P. 45. On closer inspection, however, the reference to Congress appears to relate to the federal government as a whole. We stated: " '[I]t is a settled rule of construction that the limitations [the federal constitution] imposes upon the powers of government are in all cases to be understood as limitations upon the government of the Union only, except where the states are expressly mentioned.' " *Haffer*, at 143, 162 P. 45, quoting T. Cooley, *Constitutional Limitations* 46 (7th ed. 1903). Thus, the case simply stands for the then-correct proposition that the First ***441** Amendment applied to the federal government and section 5 applied to speech issues within the state.

Moreover, free speech jurisprudence in state courts contemporaneous with Washington's constitutional convention focused primarily on a municipality's ability to employ the police power to regulate public gatherings. *See, e.g., Anderson v. City of Wellington*, 40 Kan. 173, 19 P. 719 (1888) (peaceful parades lawful without permit); *Commonwealth v. Davis*, 140 Mass. 485, 4 N.E. 577 (1886), *aff'd*, 162 Mass. 510 (1895), *aff'd*, 167 U.S. 43, 17 S.Ct. 731, 42 L.Ed. 71 (1897) (likened city's interest in public forum to that of private property owner, therefore able to regulate at will); *In re Frazee*, 63 Mich. 396, 30 N.W. 72 (1886) (upholding right to parade peaceably with or without permit); *see generally* Anderson, *The Formative Period of First Amendment Theory, 1870–1915*, 24 Am.J. Legal Hist. 56 (1980). [6] At the municipal level, the legislative and executive functions are often blurred. Consequently, a "Legislature-only" approach to state free speech jurisprudence was not clearly established in the 1880's. As a result, there is no basis for reading the majority's second "explanation" into the plain language of section 5.

Further, the second "explanation" also leans toward being overly positivist. In light of the language of the Preamble, the conscious omission of state action language in many sections and its inclusion in others, and the call to look to "fundamental principles" to secure individual rights, it is more likely that the framers had broader visions in mind.

II

Aside from the specific language of section 5, reasons inherent to the structure of our state constitution argue ***442** against a generalized state action requirement in state constitutional jurisprudence. The majority cursorily dismisses commentary developing these reasons as "an array of theoretical arguments" [7] and declares that constitutional analysis " 'must spring not from ****1297** pure intuition, but from a process that is at once articulable, reasonable and reasoned.' " Majority, at 1290, quoting *State v. Gunwall*, 106 Wash.2d at 63, 720 P.2d 808. Ironically, these dismissed reasons relate directly to the fifth criterion we announced in *Gunwall: "[d]ifferences in structure between the federal and state constitutions."* *Gunwall*, at 62, 720 P.2d 808.

One cannot overlook the fact that the state action doctrine was developed around the text of and policies behind the fourteenth amendment to the federal constitution—not the constitution of any individual state. The Fourteenth Amendment is drafted around a scheme specifically aimed at the actions of states:

> *No state shall make or enforce any law* which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within *its* jurisdiction the equal protection of the laws.

(Italics mine.) As mentioned above, the United States Supreme Court formally developed the state action requirement for cases involving federal legislation based on the Fourteenth Amendment in the *Civil Rights Cases, supra.*

The marked contrast between the state and federal texts is, once again, one of the more obvious reasons why "state action" should not be required when interpreting a state ***443** constitution. At a deeper level, however, these textual differences highlight interests of federalism essential to theapplication of the federal constitution but irrelevant to state constitutional jurisprudence.

In our scheme of federal government, an individual state, because it remains a sovereign, retains plenary power. This power is limited only by the state's own constitution, the federal constitution, and federal laws and treaties. *See* U.S. Const. art. 6, cl. 2. Accordingly, the state has direct power to regulate, within these limits, the behavior of private individuals within its own borders. The federal government, on the other hand, enjoys only those powers granted to it in the federal constitution. Therefore, the power of the federal government to regulate private behavior is theoretically less than that of the individual states. Although in recent decades Congress's ability to regulate private activity has expanded, [8] at the time Washington's constitution was drafted, such ability was restricted. *See, e.g., Civil Rights Cases, supra; United States v. Harris,* 106 U.S. (16 Otto) 629, 1 S.Ct. 601, 27 L.Ed. 290 (1882) (criminal provision under Civil Rights Act unconstitutional as it attempts to proscribe private rather than state action and therefore beyond the power of Congress); *United States v. Cruikshank,* 92 U.S. (2 Otto) 542, 23 L.Ed. 588 (1875). Relevant federal constitutional opinions at that time often emphasized the Tenth Amendment, outlining spheres of state vis-a-vis federal regulating ability. This approach became known as the "dual sovereignty" doctrine. *See generally* R. Rotunda, J. Nowak, & J. Young, *Constitutional Law* § 4.6 (1986).

Within this constitutional scheme, the state action doctrine, based on the Fourteenth Amendment's language, ***444** provided a brake on federal action which may have intruded on the as-then-perceived sovereignty of the states. Part of this sovereignty was the ability to regulate private behavior—the police power. *See, e.g., Civil Rights Cases, supra,* 109 U.S. at 13, 3 S.Ct. at 22; [9] *see also* Skover, *The Washington* ****1298** *Constitutional "State Action" Doctrine: A Fundamental Right to State Action,* 8 U. Puget Sound L.Rev. 221, 250–54 (1985). The political realities in the late 1860's may well have been that any greater attempt by the federal government to enforce its will over other sovereigns would have endangered the amendment's ratification.

The use of the state action doctrine at the state level, however, amounts to an importation of a foreign concept fashioned to suit the needs of federalism. The individual state does not face the problem of enforcing its will over other sovereigns. The state ultimately has total power over the municipalities within its boundaries. *See, e.g., Hunter v. Pittsburgh,* 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907). The state has use of the police power and may—within state and federal constitutional limits—regulate private behavior as it wishes. In fact, the tone of United States Supreme Court opinions during the genesis of the Fourteenth Amendment state action doctrine assumes that the states will safeguard individual liberties by regulating private activity where the federal government cannot. *See, e.g., Civil Rights Cases, supra,* 109 U.S. at 13, 3 S.Ct. at 22 (implying that only where a state fails to protect persons of their equal rights will Congress have the authority to remedy the situation); *United States v. Cruikshank, supra* 92 U.S. at 555 ("That duty [of protecting all citizens in the enjoyment of equal rights] was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see ***445** that the States do not deny the right"). Thus, when the state's Declaration of Rights does not expressly limit itself to protecting those rights against government infringement, there is no reason to graft such a limitation onto it. The scheme

of power in the federal system certainly does not compel such a result; if anything, it requires the opposite.

Nonetheless, the majority cites early treatises on constitutional law to support its claim that the state constitution functions only to create and limit the powers of the state government. The Washington Declaration of Rights, the majority argues, guarantees the rights therein from governmental infringement only. Inherent in the concept of a constitution, apparently, the Declaration of Rights can do no more. Earlier expositions of this view have acknowledged that the state has the power to regulate private activity, but that this power is vested in the Legislature, not the courts. *See Alderwood Assocs. v. Washington Envtl. Coun., supra* 96 Wash.2d at 247–53, 635 P.2d 108 (Dolliver, J., concurring); *see also* Dolliver, *The Washington Constitution and "State Action": The View of the Framers*, 22 Willamette L.Rev. 445 (1986) (hereinafter Dolliver). One could call this the "inherent state action" approach.

It is true that the framers sought to protect their rights from government infringement. An air of general distrust of government pervaded the state constitutional convention. *See, e.g., The Journal of the Washington State Constitutional Convention, 1889* vi (B. Rosenow ed. 1962) (hereinafter *Journal*). Despite theories expressed in legal treatises, however, the historical record does not imply that the framers intended to stop at this point. They were in a reform state of mind. In 1889, a wave of populism lapped against the shores of Olympia as the constitution was drafted. A number of "special interest" movements gave the convention, and its product, a legislative flavor: women's suffrage, prohibition of alcohol, and careful regulation of banks and other corporations. Many delegates to the convention feared infringement of their rights from corporate as well as governmental quarters. *See Journal*, at ***446** vi. The constitution today still contains provisions regulating corporations and the liability of officers of bankinginstitutions. *See generally* Const. art. 12; *see also* Const. art. 2, § 33 (generally prohibiting alien ownership of land within the state (repealed in 1966)); Const. art. 1, § 16 ("Private property shall not be taken for private use ..."). Thus, our constitution often directly regulates private activity. ****1299** [10]

The majority contends that the *Alderwood* plurality's balancing approach—a tool for applying section 5 to private infringement—violates the separation of powers principle.[11] It claims that this court would violate the principle by "weighing competing constitutional interests asserted between private parties". Majority, at 1289. I find this statement incomprehensible. A common function of the judicial system is to weigh competing interests. That disputes may be of constitutional magnitude further emphasizes the importance of the courts' roles in resolving them. Put simply, courts in general and this court in particular often must engage in weighing competing constitutional inte ***447** rests. ****447** [12]. *See, e.g., Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (weighing property against speech interests); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (weighing state constitutional right to speech—and the state's police power to enforce its exercise—against Fourteenth Amendment property and due process rights); *Bering v. Share*, 106 Wash.2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987) (weighing competing interests in determining validity of time, place and manner restrictions on speech);[13] *Ingram v. Problem Pregnancy of Worcester, Inc.*, 396 Mass. 720, 488 N.E.2d 408 (1986) (balancing property and speech rights); *State v. Brown*, 212 N.J.Super. 61, 513 A.2d 974, *cert. denied*, 107 N.J. 53, 526 A.2d 140 (1986) (same; no state action required).

***448** It is true nonetheless that the police power is vested in the Legislature, not the courts. *See* Dolliver, at 456. The idea, however, that the courts usurp the police power when applying constitutional provisions against private action is inaccurate. Interpreting a constitutional provision is no more a usurpation of power than construing ****1300** legislation. If the plain language and drafting history of that constitutional provision—as well as compelling conceptual reasons—suggest that the provision should be interpreted a certain way, then the court is simply doing its constitutional duty in doing so. *Cf. Anderson v. Chapman*, *supra*. Merely because the provision may have far-reaching application is not a basis for arguing that the court is usurping power. The exercise of the police power was done by the framers in drafting the constitutional provision, not by the court in interpreting it.

Moreover, democratic pressures on state courts further legitimize those courts' roles in enforcing state constitutional provisions against private action. The voting public always retains the power to express its voice at the ballot box. Judges with whom the public does not agree can be voted out of office when their terms expire. *See* Const. art. 4, § 3. Such democratic pressure lends implicit approval to state court decisions which may appear to expand constitutional liberties. *See* Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is there a Crocodile in the Bathtub?*, 64 Wash.L.Rev. 19 (1989).

Ultimately, however, the majority's "inherent state action" approach does not address the federalist assumptions behind the original development of state action in Fourteenth Amendment jurisprudence: that states would protect rights against private actors. Further, the approach ignores the relevance of section 5's plain language in light of these assumptions. Although it offers "explanations," the majority's position is that it was mere coincidence that the framers specifically dropped state action language from ***449** section 5 a few short years after the United States Supreme Court developed the state action doctrine. In the era of dual sovereignty, such an omission could not have been so fortuitous.

III

The majority neither discusses nor acknowledges that many states have abandoned the state action doctrine at the state level in a number of contexts. In *Sharrock v. Dell Buick–Cadillac, Inc.*, 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978), the New York Court of Appeals developed a flexible "state involvement" test when applying the state constitution's due process clause to a dispute over a nonjudicial foreclosure sale. The court noted that the plain language of the provision did not refer to state action: " '[n]o person shall be deprived of life, liberty or property without due process of law.' " In contrast to the federal Fourteenth Amendment, the court found that the state constitution had "long safeguarded any threat to individual liberties, irrespective of from what quarter that peril arose." 45 N.Y.2d at 160, 408 N.Y.S.2d 39, 379 N.E.2d 1169. *See also Svendsen v. Smith's Moving & Trucking Co.*, 54 N.Y.2d 865, 444 N.Y.S.2d 904, 429 N.E.2d 411 (1981), *cert. denied*, 455 U.S. 927, 102 S.Ct. 1292, 71 L.Ed.2d 471 (1982) (holding nonjudicial sale provision of U.C.C. § 7–210 unconstitutional); *but see Borg–Warner Acceptance Corp. v. Scott*, 86 Wash.2d 276, 543 P.2d 638 (1975) (U.C.C. § 9–503 self-help repossession provision not unconstitutional because no state action involved).

In the criminal search and seizure area, the California Supreme Court has held that intrusive conduct of private security personnel that violated the state constitution was unlawful even though the state was not involved in the search. *People v. Zelinski*, 24 Cal.3d 357, 155 Cal.Rptr. 575, 594 P.2d 1000 (1979). The court overruled precedent limiting the exclusionary rule to state intrusions. *But see State v. Ludvik*, 40 Wash.App. 257, 262, 698 P.2d 1064 (1985) (constitution protects "only against governmental ***450** actions and do[es] not require the application of the exclusionary rule to evidence obtained from private citizens acting on their own initiative.").

Other courts have considered the need for a state action requirement in applying state constitutions to acts of discrimination by private employers. *See, e.g.*, ****1301** *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 469, 156 Cal.Rptr. 14, 595 P.2d 592 (1979) (applying state equal protection provision to private employer); *Peper v. Princeton University Bd. of Trustees*, 77 N.J. 55, 79–80, 389 A.2d 465 (1978) (same); *but see Schreiner v. McKenzie Tank Lines, Inc.*, 432 So.2d 567, 569 (Fla.1983) (restricting application of state constitution's inalienable rights and deprivation clauses to state action).

In the free speech context, a number of states have applied their constitutions to mend private infringements, although many states have not been willing to do so in cases involving shopping malls. *See Spayd v. Ringing Rock Lodge 665*, 270 Pa. 67, 113 A. 70 (1921) (private union could not expel member for signing petition unfavorable to union interests); *Zelenka v. Benevolent & Protective Order of Elks*, 129 N.J.Super. 379, 324 A.2d 35, *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974) (applying state constitution's speech provision to Elk Lodge policy); *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed*, 455 U.S. 100, 102 S.Ct. 867, 70 L.Ed.2d 855 (1982) (applying same provision to actions of a private university);[14] *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d

341 (1979), *aff'd*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (applying state constitution to speech activity in privately owned shopping center); *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 445 N.E.2d 590 (1983) (no ***451** state action required in applying petition guarantee to private shopping mall). It is worthy to note that the California and New Jersey cases bear a special relationship to Washington's constitutional jurisprudence: the constitutionalprovisions at issue there were similar to our own. California's speech provision, as previously mentioned, served as a model for Washington's. *Right to Speak*, at 175–77.

Many jurisdictions have declined to apply their constitutional speech guarantees to disputes involving shopping malls. Most of these courts—often basing their decisions upon constitutional language different from our own—have required some form of state action before enforcing the provision. *See SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 498 N.Y.S.2d 99, 488 N.E.2d 1211 (1985) (court looked at debates at the state constitutional convention and concluded that framers intended a state action requirement; reiterated that Bill of Rights is meant to protect individuals from State, not other private individuals); *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984) (court found "no historical basis" for a lack of a state action requirement); *Jacobs v. Major*, 139 Wis.2d 492, 407 N.W.2d 832 (1987) (construed state action requirement through "plain language" and historical analysis); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 204, 378 N.W.2d 337 (1985) ("constitutionally guaranteed individual rights are drawn to restrict governmental conduct and to provide protection from governmental infringement and excesses ..."); *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986) (constitution concerns the functions and limitations of government, not private individuals; language of this state's provision quite different from Washington's); *see also State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981) (denying speakers access to shopping mall because such speech represented an "abuse" of the right; no state action analysis).

***452** While these courts have rejected the argument against state action, their opinions do not discuss in depth the federalist underpinnings of the doctrine and its inappropriateness at the state level. In Washington, the arguments against state action are even more persuasive than in otherstates: our framers witnessed the birth of the state action doctrine and specifically omitted state action language from section 5.

****1302 IV**

Although the majority decries a balancing approach and advocates a state action requirement, it essentially stops right there. It does not discuss what type of state action test it would adopt in cases such as this. Further, the majority does not tell us why there is not state action in today's case—it simply assumes so. Depending on the formulation of the requirement, there well could be. Because of these unresolved issues, we are left hanging on some of the inherent contradictions of the federal state action doctrine. State constitutional adjudication should leave behind clearer results than this.

In its attempt to overcome the state action doctrine's initial rigidity, the United States Supreme Court developed a number of exceptions to pure governmental action within the doctrine. One of these exceptions, the public function doctrine,[15] does receive some attention by the majority. *See* majority, at 1291–1292. Another line of Supreme Court precedent, however, is ignored altogether.

In *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), the Supreme Court held that judicial enforcement of racially restrictive covenants— ***453** in themselves a purely private operation—sufficed for state action within the meaning of the Fourteenth Amendment. 334 U.S. at 20, 68 S.Ct. at 845. Since *Shelley*, however, the Court has refused to formulate a specific test to determine when the state's enforcement or encouragement of private activity results in state action. Instead, it has held that the determination rests on "sifting facts and weighing circumstances"—ironically putting appellate courts once again in the business of balancing. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961). Today's majority rejects even this approach in favor of an unexplained method —one which apparently reaches the result it favors.

By the logic of *Shelley*, it is possible to find state action in today's case.[16] A court in this state has enforced the wishes of a private property owner to exclude a group seeking to exercise its state constitutional right to speak freely. That

enforcement is being affirmed today. One could construe the present situation as one no longer being a strictly private dispute. As the Supreme Court stated in *Shelley:*

> The judicial action in each case [presented] bears the clear and unmistakable imprimatur of the State.... [J]udicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy.... State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms....
>
> *Shelley*, 334 U.S. at 20, 68 S.Ct. at 845.

Courts and commentators who have entertained this particular state action issue have divided over its applicability. In *Sunnyside v. Lopez*, 50 Wash.App. 786, 751 P.2d 313 (1988), two judges on the ***454** Court of Appeals, Division Three, held that police arresting a speaker on private property did not constitute state action: "To so hold precludes the private property owner from enforcing his right to exclude others and converts his property into a public forum, open to the free use of any person exercising a First Amendment right." ****1303** 50 Wash.App. at 796, 751 P.2d 313. The court did not, however, discuss the ramifications of *Shelley.* Further, the dissent in that case came to the opposite conclusion, citing *Sutherland v. Southcenter Shopping Ctr., Inc.*, 3 Wash.App. 833, 478 P.2d 792 (1970), *review denied*, 79 Wash.2d 1005 (1971). *Sunnyside*, 50 Wash.App. at 798–800, 751 P.2d 313 (Thompson, J., dissenting). *See also State v. Horn*, 139 Wis.2d 473, 407 N.W.2d 854, 859–60 (1987).

Division One of the Court of Appeals reached the opposite result in *Sutherland.* The court there held that a shopping center's use of deputized security personnel to prohibit individuals from collecting petition signatures was a "necessary prelude to establishing an action for criminal trespass." *Sutherland*, 3 Wash.App. at 836, 478 P.2d 792. The court found this to suffice for the purposes of the state action doctrine. Professor Tribe takes a similar view, arguing that state enforcement of trespass laws to remove unwanted speakers from a "self contained area" in which people "live and work" would "violate the first and fourteenth amendments as clearly as if a government official had chosen to exclude the individual from a municipality on the same forbidden basis." L. Tribe, *American Constitutional Law* 999 (2d ed. 1988) (referring to *Marsh v. Alabama*, *supra*). [17]

Thus, while the applicability of state action to a case like the one at hand is apparently a matter of controversy, the majority does not shed any light on the subject. It would have us affix a state action requirement to section 5—when the plain language of that provision suggests otherwise— ***455** and then not tell us how to use it. The majority's adherence to the "conceptual disaster area" [18] of state action leaves behind a number of unanswered questions. Primarily, under the constitutional interpretive criteria adopted by this court, what aspects of the federal doctrine, if any, are appropriate? What exceptions will we adopt? How does the federal requirement—with its numerous exceptions—transpose to a state constitutional provision which is admittedly more protective than its federal counterpart? *See* majority, at 1286. The majority does not answer these questions.

V

This court can dispute the clarity of the historical record surrounding the drafting and passage of section 5. Ultimately, however, we must determine what is presently most appropriate for the jurisprudence of this state. The federal state action doctrine is fraught with contradictions. The Supreme Court itself has admitted that it has "never attempted the 'impossible task' of formulating an infallible test" to apply the doctrine. *Reitman v. Mulkey*, 387 U.S. 369, 378, 87 S.Ct. 1627, 1632, 18 L.Ed.2d 830 (1967). In spite of this, today's majority would turn its back on a workable solution to the state action quandary: the *Alderwood* balancing test, used successfully in this state for 8 years.

***456** In ****1304** *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wash.2d 230, 635 P.2d 108 (1981), a plurality of this court advanced a 3–point test for resolving private disputes between speech and property rights under the state constitution. The first point of inquiry considers the use and nature of the private property. This court stated:

> As property becomes the functional equivalent of a downtown area or other public forum, reasonable speech activities become less of an intrusion on the owner's autonomy interests. When property is open to the public,

> the owner has a reduced expectation of privacy and, as a corollary, any speech activity is less threatening to the property's value.

(Citations omitted.) *Alderwood*, 96 Wash.2d at 244, 635 P.2d 108. The second factor in the test concerns the nature of the speech activity. Because speech is a preferred activity, it is given a greater weight in the balance. *Alderwood*, at 244, 635 P.2d 108. The last factor deals with reasonable possibilities for regulating the speech involved. As we stated:

> No one has an absolute right to free speech. The time, manner, and place of the exercise of that right may be regulated....
>
> Some speech activity may be so unreasonable as to violate the property owner's First Amendment and property rights.... In such a situation, the speech will not be protected.

(Footnote and citations omitted.) *Alderwood*, at 245, 635 P.2d 108.

Trial courts in Washington, including the court below, have been applying the *Alderwood* test to speech disputes since we announced that decision in 1981. The result has not been a revolution, greatly expanding the right to speech. Rather, the *Alderwood* test has provided a clear and coherent limiting principle to the right declared in section 5.

The recent Court of Appeals opinion in *Sunnyside v. Lopez*, *supra*, provides an example of the *Alderwood* test in use. In that case, owners of a clinic offering abortions sought to prohibit anti-abortion leafleters from its grounds. The court focused primarily on the first of the *Alderwood* factors. It concluded that the size and nature of the property involved tipped the weight of the interests in ***457** favor of the medical clinic's owners. [19] *Sunnyside*, 50 Wash.App. at 794–95, 751 P.2d 313.

The trial judge below also considered the balance set forth by *Alderwood*. He stated: "When the interests of the parties are balanced in view of the plaintiffs' conceded right to regulate the time, place, and manner of speech upon its premises, the balance tips in favor of plaintiffs." Clerk's Papers at 196.

The factors in the *Alderwood* test, although specifically developed in light of the language of section 5, are based in part on the United States Supreme Court's own precedent involving competing constitutional interests. *See Pruneyard Shopping Ctr. v. Robins*, *supra*; *Cox v. Louisiana*, 379 U.S. 536, 554–55, 85 S.Ct. 453, 464–65, 13 L.Ed.2d 471 (1965); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). Much of the Supreme Court's balancing approach has involved the "state action" inquiry. [20] Thus, the contexts in which the balancing of interests occurred differ in kind from today's case. Nonetheless, the core inquiry is distinctly similar. In the end, however, *Alderwood* escapes the inherent contradictions which have entered into Supreme Court doctrine in this area over time.

In *Marsh*, the Court considered the nature of the Gulf Corporation's property rights over its company town of Chickasaw. The Court stated: "Ownership does not always mean absolute dominion. The ****1305** more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." ***458** *Marsh*, 326 U.S. at 506, 66 S.Ct. at 279. The Court continued: "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." *Marsh*, at 509, 66 S.Ct. at 280. After balancing these interests, the Court concluded that the state's imposition of criminal sanctions for exercising speech activity on the private property could not stand. *Marsh*, at 509, 66 S.Ct. at 280.

The private nature of the property involved in the balance received attention in *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). There, the Court considered the right of a homeowner, under the authority of federal statute, to exclude unwanted mailings from his home in light of the First Amendment. The unanimous Court stated: "Weighing the highly important right to communicate ... against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Rowan*, 397 U.S. at 736–37, 90 S.Ct. at 1490–91.

The Court used a similar balancing approach in *Amalgamated Food Employees Local 590 v. Logan Vly. Plaza, Inc.*, 391 U.S. 308, 316–19, 88 S.Ct. 1601, 1607–09, 20 L.Ed.2d 603 (1968) (considering the characteristics of the property), and *Lloyd Corp. v. Tanner*, 407 U.S. 551, 564, 92 S.Ct. 2219, 2226, 33 L.Ed.2d 131 (1972) (considering the relationship of the speech activity to the property), cases directly considering the ability to exercise one's First Amendment rights in a privately owned shopping mall. For purposes of reconciling federal rights in shopping mall speech disputes, however, the Supreme Court abandoned the balancing approach in *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976).

Nonetheless, *Hudgens* did not completely remove the balancing approach from the picture. The Court simply changed the focus of the balance: instead of balancing the constitutional right to speech itself, it concentrated on that ***459** right as expressed in statute. That the right was cast in statutory terms did not change the nature of the activity behind it. The Court remanded to the NLRB to scrutinize the relationship between property rights and the right to picket under section 7 of the National Labor Relations Act. *Hudgens*, 424 U.S. at 521–23, 96 S.Ct. at 1037–38. The NLRB eventually compelled the shopping center to allow picketing. *See Scott Hudgens*, 230 NLRB 414, 95 L.R.R.M. (BNA) 1351 (1977); *see also* Tribe, at 1001.

The Court followed a similar approach in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). There, the speech right was secured under the state constitution rather than by federal statute. Under an analysis determining whether the government enforcement of speech rights amounted to a taking of the private property, the Court considered "such factors as the character of the governmental action [in that case, enforcement of speech rights], its economic impact, and its interference with reasonable investment-backed expectations." *Pruneyard*, 447 U.S. at 83, 100 S.Ct. at 2042. The Court engaged in an even more explicit balancing test when it considered whether the shopping center's own First Amendment rights—the right to prevent the expression of contrary opinions on one's property—were violated by California's enforcement of its state constitution. *Pruneyard*, at 87, 100 S.Ct. at 2044.

These latter two cases show that when a government takes "action"—either through federal statute or state constitution—to enforce speech rights, the Supreme Court will continue to analyze the underlying conflicts with a balancing approach, considering many of the factors utilized in the *Alderwood* test. Distinguishing these cases from the present one, however, is not as simple as it might seem. In terms of defining state action, the distinction between the ****1306** state enforcing speech rights through the state constitution and enforcing property rights through trespass laws is, to say the least, not clear. The Supreme Court has not made clear why balancing should be abandoned in the latter case ***460** but not the former. Such an approach favors property over speech rights and contravenes the declaration in *Marsh v. Alabama*, *supra*, that the latter "occupy a preferred position" in relation to the former. *Marsh*, at 506, 66 S.Ct. at 278. [21]

This court, however, need not adopt such contradictions. Federalism allows the states to operate as laboratories for more workable solutions to legal and constitutional problems. *See Alderwood*, 96 Wash.2d at 238, 635 P.2d 108. As part of our obligation to interpret our state's constitution, we have the opportunity to develop a jurisprudence more appropriate to our own constitutional language. By adhering to *Alderwood*, we essentially would engage in analysis similar to what the Supreme Court has done in the past and continues to do in selected cases. The only difference is that *Alderwood* presents a more complete and evenly applied inquiry into the actual rights in conflict. [22]

Using the criteria set forth in *Alderwood*, I would find the NDPC speech rights did not extend to allowing it to solicit memberships and contributions on shopping mall property. The nature of this speech activity competed ***461** directly with the property interests of the mall owners and tenants—who were in the retail business. In contrast to the speech activity at issue in *Alderwood* —that of soliciting signatures for an initiative petition—the NDPC's actions are more incompatible with the uses of the mall itself. For these reasons, and for those I have developed above, I concur with the majority in result only.

PEARSON, Justice (concurring in the result).

In a case analogous to the case at bench, a majority of this court recently held, "[t]he issuance of the permanent

injunction by the trial court constitutes State action." *Bering v. Share*, 106 Wash.2d 212, 221, 721 P.2d 918 (1986). I am persuaded that should be the law of this case as well. Nevertheless, the majority today not only fails to apply the holding in *Bering v. Share*, *supra*, but altogether fails even to acknowledge its existence.

I would hold the granting of the permanent injunction constituted state action sufficient to invoke the protections afforded by Const. art. 1, § 5. Accordingly, the balancing of *Alderwood* criteria engaged in by the concurrence properly resolves the issue at hand. Thus, I concur in the result.

DORE, Acting C.J., concurs.

Parallel Citations

780 P.2d 1282, 58 USLW 2263

Footnotes

1 RCW 2.06.030(d).

2 Restatement (Second) of Judgments § 43(1)(b) (1982). *See also McKown v. Driver*, 54 Wash.2d 46, 54, 337 P.2d 1068 (1959); *Watkins v. Siler Logging Co.*, 9 Wash.2d 703, 721, 116 P.2d 315 (1941).

3 Restatement (Second) of Judgments § 43, comment *a*.

4 *See Watkins*, at 722, 116 P.2d 315.

5 *Kennedy v. Seattle*, 94 Wash.2d 376, 379, 617 P.2d 713 (1980).

6 U.S. Const. amend. 1; *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298 (1981).

7 *Heffron*, 452 U.S. at 647, 101 S.Ct. at 2563; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun., Inc.*, 425 U.S. 748, 761, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976).

8 *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568–69, 92 S.Ct. 2219, 2228–29, 33 L.Ed.2d 131 (1972).

9 *See also Hudgens v. NLRB*, 424 U.S. 507, 518–20, 96 S.Ct. 1029, 1035–36, 47 L.Ed.2d 196 (1976) (following *Lloyd*).

10 *See also State v. Gunwall*, 106 Wash.2d 54, 59, 720 P.2d 808 (1986) (quoting same).

11 *See O'Day v. King Cy.*, 109 Wash.2d 796, 802, 749 P.2d 142 (1988); *Bering v. Share*, 106 Wash.2d 212, 234, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987); *State v. Coe*, 101 Wash.2d 364, 679 P.2d 353 (1984).

12 *See Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wash.2d 230, 250, 635 P.2d 108 (1981) (Dolliver, J., concurring).

13 1 T. Cooley, *Constitutional Limitations* 81 (8th ed. 1927); H. Black, *American Constitutional Law* 23 (4th ed. 1927).

14 U.S. Const. preamble; Wash. Const. preamble; 1 T. Cooley, at 81; 1 J. Story, *Commentaries on the Constitution of the United States* 243 (5th ed. 1891).

15 A more comprehensive definition of a constitution is that:

> [t]he constitution of a state is the fundamental law of the state, containing the principles upon which the government is founded, and regulating the division of the sovereign powers, directing to what persons each of those powers is to be confided and the manner in which it is to be exercised.

H. Black, at 1–2. *See also* 1 T. Cooley, at 4.

16 *See also* H. Black, at 2; 16 Am.Jur.2d *Constitutional Law* §§ 6, 7 (1964).

17 *See* Dolliver, *The Washington Constitution and "State Action": The View of the Framers*, 22 Willamette L.Rev. 445, 448 (1986). We recognize, of course, that state constitutions can and do contain provisions that concern the rights of the people vis-a-vis each other. *See* Wash. Const. art. 1, § 16 (eminent domain). Nonetheless, it is equally clear to us that such provisions are exceptions to the rule only, not the rule itself.

18 *E.g.*, H. Rottschaefer, *American Constitutional Law* § 305, at 724 (1939); H. Black, at 10; E. McClain, *Constitutional Law in the United States* § 205, at 293 (2d ed. 1910).

19 *See* T. Cooley, *Constitutional Law* 22, 200 (1st ed. 1880); J. Jameson, *Constitutional Conventions* 92 (4th ed. 1887); J. Pomeroy, *Constitutional Law* § 230 (10th rev. ed. 1888); 1 J. Hare, *American Constitutional Law* 507–08 (1889).

20 B. Rosenow, *The Journal of the Washington State Constitutional Convention, 1889*, at 465–90 (1962). *See also* A. Mires, *Remarks on the Constitution of the State of Washington*, 22 Wash.Hist.Q. 276, 280, 284–85 (1931); J. Kinnear, *Notes on the Constitutional Convention*, 4 Wash. Hist.Q. 276, 279 (1913).

21 *See United States v. Guest,* 383 U.S. 745, 771, 86 S.Ct. 1170, 1185, 16 L.Ed.2d 239 (1966) (Harlan, J., concurring in part, dissenting in part) ("the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority, not other individuals").

22 *See* Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment,* 8 U. Puget Sound L.Rev. 157, 172–77 (1984–1985).

23 *Cf. MacLean v. First Northwest Indus. of Am., Inc.,* 96 Wash.2d 338, 347, 635 P.2d 683 (1981) ("state action" required for state equal rights amendment); *Borg–Warner Acceptance Corp. v. Scott,* 86 Wash.2d 276, 278, 543 P.2d 638 (1975) ("state action" required under state due process provision); *State v. Ludvik,* 40 Wash.App. 257, 262, 698 P.2d 1064 (1985) ("state action" required for state search and seizure provision).

24 L. Tribe, *American Constitutional Law* § 18–2, at 1691 (2d ed. 1988).

25 *See also Alderwood Assocs. v. Washington Envtl. Coun.,* 96 Wash.2d 230, 250–51, 635 P.2d 108 (1981) (Dolliver, J., concurring).

26 *Cologne v. Westfarms Assocs.,* 192 Conn. 48, 469 A.2d 1201 (1984); *Woodland v. Michigan Citizens Lobby,* 423 Mich. 188, 378 N.W.2d 337 (1985), *reh'g denied,* 424 Mich. 1204 (1986); *SHAD Alliance v. Smith Haven Mall,* 66 N.Y.2d 496, 498 N.Y.S.2d 99, 488 N.E.2d 1211 (1985); *State v. Felmet,* 302 N.C. 173, 273 S.E.2d 708 (1981); *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.,* 512 Pa. 23, 515 A.2d 1331 (1986); *Jacobs v. Major,* 139 Wis.2d 492, 407 N.W.2d 832 (1987). *See also Fiesta Mall Venture v. Mecham Recall Comm.,* 159 Ariz. 371, 767 P.2d 719 (Ct.App.1988), *review denied* (Feb. 7, 1989); Annot., *Validity, Under State Constitutions, of Private Shopping Center's Prohibition or Regulation of Political, Social, or Religious Expression or Activity,* 38 A.L.R.4th 1219 (1985).

27 *Robins v. Pruneyard Shopping Ctr.,* 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979), *aff'd,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); *State v. Schmid,* 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed,* 455 U.S. 100, 102 S.Ct. 867, 70 L.Ed.2d 855 (1982). *See also Batchelder v. Allied Stores Int'l, Inc.,* 388 Mass. 83, 445 N.E.2d 590 (1983) (right to solicit signatures at mall under elections provision of state constitution); *Lloyd Corp. v. Whiffen,* 307 Or. 674, 773 P.2d 1294 (1989) (injunction against soliciting signatures for initiative at shopping mall lifted on non-constitutional grounds).

28 *Alderwood,* 96 Wash.2d at 243, 635 P.2d 108.

29 *Alderwood,* at 243–46, 635 P.2d 108.

30 *Alderwood,* at 251, 635 P.2d 108 (Dolliver, J., concurring).

31 *See Alderwood,* at 253, 635 P.2d 108 (Dolliver, J., concurring).

32 *Alderwood,* at 253, 635 P.2d 108 (Stafford, J., dissenting).

33 *Alderwood,* at 253, 635 P.2d 108 (Stafford, J., dissenting).

34 *See Alderwood,* at 253, 635 P.2d 108 (Dolliver, J., concurring). No reason has been suggested why the holding in *Alderwood* would not apply to referendums of the people as well as to initiatives. *See* Const. art. 2, § 1; RCW 29.79 (both referring to initiatives *and* referendums).

35 The Court of Appeals decision in *Sutherland v. Southcenter Shopping Ctr., Inc.,* 3 Wash.App. 833, 478 P.2d 792 (1970), *review denied,* 79 Wash.2d 1005 (1971), also addressed the question of whether initiative supporters had a constitutional right to solicit signatures at a shopping mall. The Court of Appeals there concluded that the initiative supporters did have such a right. Its decision was based on various grounds, including the free speech provision of the Washington Constitution. *Sutherland,* 3 Wash.App. at 835, 478 P.2d 792. To the extent that the decision in *Sutherland* is inconsistent with our decision herein, it is necessarily hereby overruled.

36 *See, e.g.,* Chemerinsky, *Rethinking State Action,* 80 Nw.U.L.Rev. 503 (1985); Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action,* 8 U.Puget Sound L.Rev. 221 (1984–1986).

37 In *State v. Gunwall,* 106 Wash.2d 54, 61–62, 720 P.2d 808 (1986), we set forth several nonexclusive neutral criteria to assist us in determining when recourse to our state constitution is appropriate. Although it has not been necessary in this opinion to explicitly enumerate the *Gunwall* criteria, as such, we have carefully considered same and our analysis herein reflects consideration of the relevant *Gunwall* criteria.

38 *See* Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution,* 6 Hastings Const. L.Q. 975 (1979); Berger, *"The Supreme Court as a Legislature": A Dissent,* 64 Cornell L.Rev. 988 (1978–1979).

39 *See also Stephanus v. Anderson,* 26 Wash.App. 326, 340–41, 613 P.2d 533, *review denied,* 94 Wash.2d 1014 (1980); Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action",* 80 Nw.U.L.Rev. 558 (1985).

40 *See Marsh v. Alabama,* 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946); 2 R. Rotunda, J. Nowak & J. Young, *Constitutional Law* § 16.2, at 163 (1986).

41 *See also Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 157–58, 98 S.Ct. 1729, 1733–34, 56 L.Ed.2d 185 (1978).

42 *See Marsh,* 326 U.S. at 506–08, 66 S.Ct. at 278–80.

43 *Lloyd Corp. v. Tanner,* 407 U.S. 551, 569, 92 S.Ct. 2219, 2229, 33 L.Ed.2d 131 (1972).

44 *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.,* 512 Pa. 23, 36, 515 A.2d 1331 (1986).

45 *Jacobs v. Major,* 139 Wis.2d 492, 523, 407 N.W.2d 832 (1987).

46 *Lloyd,* 407 U.S. at 569, 92 S.Ct. at 2229.

47 *See Cologne v. Westfarms Assocs.,* 192 Conn. 48, 64, 469 A.2d 1201 (1984); *Woodland v. Michigan Citizens Lobby,* 423 Mich. 188, 225, 378 N.W.2d 337 (1985), *reh'g denied,* 424 Mich. 1204 (1986).

1 The majority claims, at page 1290 n. 37, that its analysis "reflects consideration of the relevant *Gunwall* criteria." Nonetheless, the opinion makes no overt reference to that case's interpretive criteria and their interaction with section 5.

2 The California Supreme Court has construed its constitution's free speech provision to apply to private infringements of the right. *Robins v. Pruneyard Shopping Ctr.,* 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979), *aff'd,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

3 Justice Harlan stressed that section 1 of the Fourteenth Amendment granted state as well as United States citizenship to " '[a]ll persons born or naturalized in the United States ...' " *Civil Rights Cases,* 109 U.S. at 46, 3 S.Ct. at 46. The fifth section of the amendment, he noted, gave Congress the power to enforce "the provisions of this article." Because of this, he found that the amendment authorized Congress to safeguard the privileges and immunities that flowed from state citizenship. Justice Harlan found the essence of these privileges and immunities to be "exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State." *Civil Rights Cases,* at 48, 3 S.Ct. at 48. *See also* L. Tribe, *American Constitutional Law* 1695 n. 16 (2d ed. 1988).

4 The Thirteenth Amendment, ratified in 1865, states:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

In the *Civil Rights Cases, supra,* the Supreme Court held this plain language was "not a mere prohibition of State laws ... but an absolute declaration ..." Thus, no state action was required. 109 U.S. at 20, 3 S.Ct. at 27.

5 Moreover, in light of the impact of the *Civil Rights Cases, supra,* the majority's guess that the deletion of state action language was done merely because the framers thought it redundant appears all the more unlikely. *See* majority, at 1287–88.

6 Many of our own early cases involving speech rights never analyzed the constitutional issues. *See State v. Hestings,* 115 Wash. 19, 196 P. 13 (1921); *State v. Aspelin,* 118 Wash. 331, 203 P. 964 (1922) (both criminal prosecutions of members of the Industrial Workers of the World under the Criminal Syndicalism Act).

7 In this area of state constitutional interpretation, where records of the delegates' debates and committee members' discussions are scanty, reasoned theoretical discussion—supported by legal and historical authority—is essential to our task. In this regard, even the majority's position is no more than a "theoretical argument." Status as such an argument, however, is not necessarily belittling, as the majority would acknowledge in its own argument's case. What is essential is, as the majority tell us, "a process that is at once articulable, reasonable and reasoned"—in other words, a fair examination of ideas, authority, and evidence. The majority fails to do this.

8 The commerce power has been a prime source for the expanding ability of the federal government to regulate private behavior. *See, e.g., Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (upholding marketing quota applied to farmer growing very small amount of wheat for local sale only: affected the "stream of commerce"); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (upholding Title II of the Civil Rights Act under the commerce power).

9 The Supreme Court stated: "[Fourteenth Amendment-based] legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them...." 109 U.S. at 13, 3 S.Ct. at 22.

10 The majority acknowledges that the constitution does regulate private activity and contains provisions "that concern the rights of the people vis-a-vis each other." Majority at 1286, n. 17. The majority dismisses the impact of these provisions by stating that "it is equally clear to us that such provisions are exceptions to the rule only, not the rule itself." Unfortunately, the majority does not tell us why. It does not submit a principled basis for distinguishing the provisions they recognize as reaching private activity and section 5. Using the *Gunwall* criteria, I cannot see why section 5—which contains no state action language—should include a hidden state action requirement when the majority's example of Const. art. 1, § 16—which also contains no state action language—should not.

11 Although the majority, at page 1289, attributes the balancing approach to NDPC ("The NDPC maintains that we should adopt a 'balancing test' "), petitioners are simply urging this court to follow the test developed in *Alderwood.* Thus, the majority's comments, while directed at the NDPC, are more properly aimed at our own plurality decision in that case. Moreover, the characterization that we are being urged to "adopt" something new is inaccurate. The *Alderwood* balancing test has been available to trial courts since we announced that opinion in 1981. *See* part V, *infra.*

12 The weighing of competing constitutional interests has been an essential factor in many United States Supreme Court cases grappling with the state action inquiry. Certainly the majority does not contend that the Court has founded this jurisprudence on an unconstitutional principle. *See* part V, *infra.*

13 We began the *Bering* opinion with this statement: "No judicial task is more difficult than balancing the constitutional rights and freedoms of citizens of this country against conflicting rights and freedoms of their fellow citizens." 106 Wash.2d at 215, 721 P.2d 918. We made no comment on the fact that we might be usurping legislative power.

Bering is firmly founded on the principles of time, place, and manner regulation. This area of jurisprudence, even when analyzing the constitutional validity of statutes, inherently involves balancing competing constitutional interests. *See Cox v. Louisiana,* 379 U.S. 536, 554–55, 85 S.Ct. 453, 464–65, 13 L.Ed.2d 471 (1965). Surely the majority does not mean to imply that courts which have resolved such cases have done so unconstitutionally. Yet, this conclusion arises unescapably from the majority's reasoning. Accordingly, the majority would have us overrule, among others: *Bering v. Share, supra; State v. Lotze,* 92 Wash.2d 52, 593 P.2d 811 (1979) (regulating speech as expressed through privately owned billboard); *Ackerley Communications, Inc. v. Seattle,* 92 Wash.2d 905, 602 P.2d 1177 (1979) (regulating commercial billboards); *Shively v. Garage Employees Local 44,* 6 Wash.2d 560, 569, 108 P.2d 354 (1940) ("we are concerned with balancing appellants' right to carry on lawful businesses, free from unreasonable interference, and respondents' right to freedom of speech").

14 Regrettably, the majority's opinion forecloses any future application of our state's free speech provision to private infringements such as these. Abridgement of speech by unions, clubs, and private universities present different factors to be considered in the balance. The majority today abandons the tools with which to adjudicate such situations.

15 Major cases developing this exception include *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (state political party convention a public function); *Marsh v. Alabama,* 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (private company town embodied public functions); *Evans v. Newton,* 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (operation of a park a public function); *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (private utility, even though monopoly, not a public function).

16 With regard to the implications of *Shelley,* Professor Erwin Chemerinsky argues: "If any decision by a state court represents state action, then ultimately all private actions must comply with the Constitution. Anyone whose rights are violated can file suit in state court. If the court dismisses the case because the state law does not forbid the violation, there is state action sustaining the infringement of the right." Chemerinsky, *Rethinking State Action,* 80 Nw.U.L.Rev. 503, 525 (1985).

17 Professor Tribe argues that excluding unwanted speakers from a private home is a different matter because "the Constitution tolerates (and may even compel) placing the homeowner's right to exclude unwanted views above the speaker's desire to intrude them." (Footnotes omitted.) Tribe, at 999. For further discussion on this inherent balancing of interests, *see* part V, *infra.*

18 Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14,* 81 Harv.L.Rev. 69, 95 (1967). Indeed, law reviews are full of commentary and criticism of the state action doctrine (or "anti-doctrine" as described by Professor Tribe). Some scholars advocate abandoning the doctrine altogether. *See generally* Chemerinsky, *supra* note 16. Professor Chemerinsky argues that one of the original assumptions behind the state action doctrine was that the common law generally protected individual rights from private invasions. Individual rights expanded under constitutional analysis as applied to government action—largely through a normative analysis—while a more positivist common/private law lagged behind. The common law, then, did not fulfill its function of protecting private invasions of natural rights recognized by the courts under the constitution. Chemerinsky goes on to argue that under any theory of individual rights (positivist, natural law, or consensus), the state action doctrine is obsolete.

19 The dissent argued that state action was present, therefore the stricter dictates of section 5's protections against state interference came into play. *Sunnyside,* 50 Wash.App. at 799, 751 P.2d 313 (Thompson, J., dissenting).

20 The Supreme Court's doctrine developing the limits of time, place, and manner speech regulation also provided a basis for the *Alderwood* test. In *Cox v. Louisiana, supra,* the Court balanced a municipality's right to regulate the use of city streets against the petitioners' rights of speech. The Court found that speech rights, to some degree, had to accommodate these interests. *Cox,* 379 U.S. at 554–55, 85 S.Ct. at 464–65.

780 P.2d 1282, 58 USLW 2263

21 One theoretical explanation of the Supreme Court's view draws upon Professor Chemerinsky's idea that the common law has lagged behind public constitutional law in safeguarding rights in the private sphere. *See generally* Chemerinsky, *supra* note 16. The Court apparently recognizes common law property rights—albeit enforced by state and local trespass laws—as having precedence over rights to speech when these latter rights are not supported by statutory or state constitutional enforcement. Because the Court identifies state action in the latter enforcement scenario but not the former, it perpetuates, through the state action doctrine, the ability to safeguard against private actors only those rights long protected by common law. Rights such as speech which, in modern society, hold a "preferred position" but have evolved to maturity after the development of the common law have less capacity for enforcement as a result.

22 Further, *Alderwood* identified two policy considerations in the United States Supreme Court's state action balance approach that are foreign to a state-based inquiry. First, the Supreme Court must establish a rule for the entire country; thus, national considerations are inherent in any decision. Second, federalism prevents the court from adopting a rule which restricts the states from fulfilling their role as experimenters. *Alderwood*, at 242, 635 P.2d 108. Consequently, a state-based jurisprudence, being freed from these constraints, can craft a doctrine more appropriate to a state's culture, locale, and constitutional language.

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481 N.W.2d 51
Supreme Court of Minnesota.

STATE of Minnesota, Petitioner/Appellant,
v.
Willard LeRoy DAVIDSON, Jr., Respondent.

No. CX–90–1304. | Feb. 28, 1992.

Defendant was convicted of gross misdemeanor distribution and sale of obscene material in violation of obscenity statute and sentenced to 91 days in jail and fined after jury trial in the District Court, Winona County, Dennis A. Challeen, J. Defendant appealed. The Court of Appeals, 471 N.W.2d 691, reversed and ordered acquittal. State appealed. The Supreme Court, Tomljanovich, J., held that: (1) obscenity statute satisfied federal guarantees of free speech and press, due process and privacy; (2) use of community standards was not constitutionally fatal; (3) obscenity was not protected under State Constitution free speech/press clauses; (4) statute was not overbroad; (5) right to privacy did not extend to commercial transactions in obscenity; and (6) evidence was sufficient to support defendant's conviction.

Court of Appeals reversed; conviction reinstated.

West Headnotes (23)

[1] **Constitutional Law**
Obscenity in general

Constitutional Law
Obscenity in general

Constitutional Law
Obscenity in General

Constitutional Law
Obscenity and lewdness

Obscenity
Validity of Statutes, Ordinances, and Regulations

Obscenity statute satisfied federal guarantees of free speech and press, due process and privacy. M.S.A. § 617.241; U.S.C.A. Const.Amends. 1, 5, 14.

2 Cases that cite this headnote

[2] **Constitutional Law**
Obscenity and lewdness

Obscenity
Validity of Statutes, Ordinances, and Regulations

Use of community standards did not render obscenity statute so vague as to deny defendant due process of law guaranteed by State Constitution. M.S.A. § 617.241; M.S.A. Const. Art. 1, § 7.

1 Cases that cite this headnote

[3] **Constitutional Law**
Obscenity and lewdness

Due process will bar obscenity conviction if defendant does not have fair warning of what materials are prohibited. M.S.A. § 617.241; M.S.A. Const. Art. 1, § 7; U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[4] **Constitutional Law**
Obscenity and lewdness

Obscenity
Validity of Statutes, Ordinances, and Regulations

Obscenity statute gave law enforcement officials ample guidance as to what conduct was prohibited by specifically listing prohibited depictions and descriptions so as to satisfy due process requirements of State Constitution. M.S.A. § 617.241; M.S.A. Const. Art. 1, § 7.

2 Cases that cite this headnote

[5] **Obscenity**
Validity of Statutes, Ordinances, and Regulations

Obscenity statute must offer guidance to law enforcement officials limiting their discretion

as to what conduct is allowed and what is prohibited in order for statute to survive vagueness challenge. M.S.A. § 617.241; M.S.A. Const. Art. 1, § 7.

2 Cases that cite this headnote

[6] Constitutional Law

Lack of constitutional protection

Obscenity was not protected expression under free speech/press clause of State Constitution. M.S.A. Const. Art. 1, § 3.

1 Cases that cite this headnote

[7] Obscenity

Publications in general

Obscenity statute which only reached those materials which were obscene and therefore not protected under free speech/press clause of State Constitution, was not overbroad on ground that it prohibited dissemination of material to consenting adults or because it had chilling effect on dissemination of legal materials that fall close to line of obscenity. M.S.A. Const. Art. 1, § 3; M.S.A. § 617.241.

2 Cases that cite this headnote

[8] Constitutional Law

Substantial impact, necessity of

Constitutional Law

Prohibition of substantial amount of speech

For overbreadth doctrine to apply, statute must be substantially overbroad; that is, it must reach protected as well as unprotected speech/conduct. M.S.A. Const. Art. 1, § 3; U.S.C.A. Const.Amend. 1.

[9] Constitutional Law

Relation between state and federal rights

Right to privacy under Minnesota Constitution protects only fundamental right; but privacy guaranteed under State Constitution is broader than privacy right read into comparable federal constitutional provision. M.S.A. Const. Art. 1, §§ 1, 2, 10.

2 Cases that cite this headnote

[10] Constitutional Law

Obscenity in general

Under Federal Constitution, right to privacy prohibits government from criminalizing possession of obscene materials by person in his/her home, but right to private possession does not prevent government from controlling obscene material in commerce.

[11] Constitutional Law

Obscenity in general

Right to privacy under State Constitution does not extend to commercial transactions in obscenity. M.S.A. § 617.241; M.S.A. Const. Art. 1, §§ 1, 2, 10.

[12] Obscenity

Definitions; Test for Obscenity

To sustain defendant's conviction for violating obscenity statute, State must prove beyond reasonable doubt that: evidence depicted sexual acts specifically proscribed by statute; applying contemporary community standards, sexual conduct was patently offensive; that average person, applying contemporary community standards, would find material taken as whole appealed to prurient interest in sex; and that material, taken as whole, lacked serious literary, artistic, political or scientific value. M.S.A. § 617.241.

9 Cases that cite this headnote

[13] Criminal Law

Particular issues in general

Criminal Law

Particular offenses and prosecutions

Because of free speech implications, review of obscenity conviction is less deferential and in close cases appellate courts will independently review material found to be obscene. U.S.C.A. Const.Amend. 1; M.S.A. Const. Art. 1, § 3.

3 Cases that cite this headnote

[14] Obscenity

Photographs and Videos in General

Depictions of sexual activity, which were as candid as was photographically possible leaving nothing to imagination, were "patently offensive," within meaning of obscenity statute. M.S.A. § 617.241.

1 Cases that cite this headnote

[15] Obscenity

Weight and Sufficiency

Jury's determination that graphic depictions and descriptions of consensual, mutually pleasurable sexual acts "appealed to prurient interest in sex," within meaning of obscenity statute, was adequately supported by evidence. M.S.A. § 617.241.

1 Cases that cite this headnote

[16] Obscenity

Publications in general

Evidence supported jury's determination that magazine seized from defendant's store lacked serious literary, artistic, political, or scientific value so as to support obscenity conviction; even most liberal construction would be strained to find "idea" in magazine's text which was limited to crude expressions of sexual desire. M.S.A. § 617.241.

16 Cases that cite this headnote

[17] Obscenity

Absence of serious value when taken as a whole

Obscenity

Contemporary community standards

In deciding whether allegedly obscene material has serious literary, political, artistic or scientific value, jury is to apply a reasonable person standard rather than community standards. M.S.A. § 617.241.

[18] Obscenity

Sale, Transportation, or Distribution

Even if videotape seized from defendant had political value, tape did not have serious political value so as to require reversal of conviction for violation of obscenity statute. M.S.A. § 617.241.

[19] Criminal Law

Obscenity; community moral standards

Expert testimony on margin for error when six person jury panel attempts to ascertain and apply community standards in obscenity case was properly excluded as being unhelpful to fact finder. M.S.A. § 617.241.

[20] Obscenity

Instructions

Refusal to instruct jury that if it could not ascertain community standards, it must acquit defendant of obscenity charges was not abuse of discretion. M.S.A. § 617.241.

5 Cases that cite this headnote

[21] Obscenity

Instructions

Framing community standards jury instructions in obscenity case in terms of acceptance, rather than tolerance was proper. M.S.A. § 617.241.

1 Cases that cite this headnote

[22] Obscenity

Disposition of property seized

By ordering seized material returned to defendant charged with obscenity violations, trial court avoided any First Amendment harm resulting from State's failure to initiate preseizure hearing before judge. U.S.C.A. Const.Amends. 1, 4; M.S.A. § 617.241.

[23] Obscenity

Necessity

Purpose of preseizure adversary hearing in obscenity case is to avoid prior restraint on what might ultimately be found to be protected expression. U.S.C.A. Const.Amends. 1, 4; M.S.A. § 617.241.

53** ***Syllabus by the Court

(1) The use of "community standards" did not render Minnesota's obscenity statute, Minn.Stat. § 617.241 (1990), so vague as to deny respondent the due process of law guaranteed by art. I, § 7 of the Minnesota Constitution.

(2) Obscenity is not protected expression under art. I, § 3 of the Minnesota Constitution.

(3) The right to privacy guaranteed by the Minnesota Constitution does not extend to the commercial distribution of obscene materials.

(4) The evidence adequately supported the jury's determination that the materials distributed by respondent were obscene within the meaning of Minn.Stat. § 617.241.

Attorneys and Law Firms

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Heard and decided by the court en banc.

Opinion

TOMLJANOVICH, Justice

In this appeal, the State asks us to overturn a split decision of the court of appeals holding that the state's obscenity statute, Minn.Stat. § 617.241, is void for vagueness under art. I, § 7 of the Minnesota Constitution, thereby invalidating respondent's conviction for distributing obscene materials. Respondent cross appeals on the grounds that (1) the statute violates the free speech/press clause of Minn. Const. art I, § 3; (2) that the statute is overbroad in violation of the state due process clause, Minn. Const. art I, § 7; (3) that the statute violates the right of privacy guaranteed under the state constitution; (4) that the evidence was insufficient as a matter of law to support respondent's conviction; and (5) that respondent was denied a fair trial by a variety of evidentiary rulings.

We hold that Minn.Stat. § 617.241 passes state constitutional muster in all respects. We reject respondent's claim of insufficient evidence and uphold the challenged trial court rulings. We reverse the court of appeals and reinstate respondent's conviction.

In November 1988, a citizens group complained to Winona police about the sale of hard-core pornography at the Ultimate Bookstore. A police detective was assigned to investigate, and on March 20, 1989, he visited the store. Outside, he observed

a sign advertising X-rated movies and another stating that persons must be at least 18 to enter. Inside, he observed several racks of magazines and several booths for coin-operated videos. The magazine covers all depicted sexual acts, visible through clear plastic wrappers.

The officer talked with respondent, the store manager who was working at the counter. The officer bought eight magazines, which were entered into evidence. They were entitled: "Cum Eaters," "Oral Women II," "Horny Women," "Hot for Cock," "Wet Pussy Lips," "Hard and Wet No. II," "Girls on the Make," and "Hard Video No. 4." The magazines feature explicit color photographs of vaginal intercourse, anal intercourse, digital penetration and oral-genital sex. Two days later, the officer returned to the store and asked respondent about the coin-operated video machines in the booths. He was told that the movies play about five minutes for 50 cents. He entered a booth, deposited two quarters and watched a video for 10 minutes, observing numerous sex acts.

On March 23, 1989, police executed a search warrant at the Ultimate Bookstore and seized the video "Krazy for You." In addition, police videotaped and photographed the store's interior to show the kinds of items for sale and how they were displayed.

At trial, respondent called Dr. Janice Amberson, a psychologist and consultant who has treated sex offenders, marital groups and people with sexual dysfunction. Dr. Amberson testified that in her opinion the seized materials depicted normal sexual conduct between consenting adults, which was not shameful or degrading. She stated her opinion that healthy sex encompasses any mutually enjoyable act between consenting adults. She said sex becomes unhealthy if it involves force or a wide disparity in maturity. She testified that she would use materials like those at issue to treat patients, although she has not done so.

The defense also called the manager of a mainstream video rental store that includes an adult movie section. The manager testified that in the previous three years the store had 3,000 to 5,000 members, from all walks of life, and accounts with area schools. She testified that half of all rentals were from the adult section. The trial court denied respondent's request to call Ronald Anderson, a University of Minnesota sociology professor. He would have testified as an expert on public opinion sampling and the margin of error when six ***55** jurors try to discern "community standards."

Respondent was convicted of gross misdemeanor distribution or sale of obscene material in violation of Minn.Stat. § 617.241. He was sentenced to 91 days in jail, all stayed, and a fine of $3,000, of which $2,500 was stayed for two years. A splintered court of appeals reversed. *State v. Davidson*, 471 N.W.2d 691 (Minn.App.1991). Judges Randall and Amundson, writing separately, held the obscenity statute unconstitutionally vague. They also held the statute was not overbroad and that respondent had not been denied a fair trial. They did not address respondent's arguments that the obscenity statute (1) violates Minn. Const. art. I, § 3; (2) that the statute violates the right to privacy; and (3) that the conviction was not supported by the evidence. Judge Huspeni dissented. She would have upheld the trial court in all respects.

[1] We begin our analysis by pointing out that Minnesota's obscenity statute withstands scrutiny under the federal Constitution. Minn.Stat. § 617.241 provides:

> **Subd. 2(a):** It is unlawful for a person, knowing or with reason to know its contents and character, to:
>
> (a) exhibit, sell, print, offer to sell, give away, circulate, publish, distribute or attempt to distribute any obscene material.
>
> **Subd. 1(a):** "Obscene" means that the work, taken as a whole, appeals to the prurient interest in sex and depicts or describes in a patently offensive manner sexual conduct and which, taken as a whole, does not have serious literary, artistic, political, or scientific value. In order to determine that a work is obscene, the trier of fact must find:
>
> (i) that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in sex;
>
> (ii) that the work depicts sexual conduct specifically defined by clause (b) in a patently offensive manner, and
>
> (iii) that the work, taken as a whole, lacks serious literary, artistic, political or scientific value.
>
> **Subd. 1(b)** [defining sexual conduct]:

(i) An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.

(ii) Sadomasochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a sexually revealing costume or the condition of being fettered, bound, or otherwise physically restricted on the part of one so clothed or who is nude.

(iii) Masturbation, excretory functions, or lewd exhibition of the genitals including any explicit, close-up representation of a human genital organ.

(iv) Physical contact or simulated physical contact with a clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual gratification.

This statute satisfies federal guarantees of free speech and press, due process and privacy because Minn.Stat. § 617.241 tracks, virtually verbatim, the United States Supreme Court's obscenity cases, particularly *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Therefore, the statute is invalid only if the demands of the state constitution exceed those of the federal Constitution. We will address respondent's claims one at a time.

Vagueness

[2] The defendant argues, and two court of appeals judges held, that the "community standards" element of Minn.Stat. § 617.241 makes it void for vagueness, in violation of the state constitution. The argument is that unless s/he is a mind reader, a person in respondent's position cannot ***56** know in advance whether his or her conduct is illegal.

[3] Minn. Const. art. I, § 7 provides that no person "shall be held to answer for a criminal offense without due process of law * * *." And it has been held that due process requires that criminal statutes be sufficiently clear and definite to warn a person of what conduct is punishable. *State v. Simmons*, 258 N.W.2d 908, 910 (Minn.1977). The goal is to prevent arbitrary, standardless enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). Due process will bar an obscenity conviction if the defendant does not have fair warning of what materials are prohibited. *State v. Welke*, 298 Minn. 402, 411, 216 N.W.2d 641, 648 (1974).

The Supreme Court has rejected the argument that "community standards" is unconstitutionally vague. *See Miller*, 413 U.S. at 27, 93 S.Ct. at 2616; *Hamling v. United States*, 418 U.S. 87, 115, 94 S.Ct. 2887, 2906, 41 L.Ed.2d 590 (1974); *Smith v. United States*, 431 U.S. 291, 309, 97 S.Ct. 1756, 1768, 52 L.Ed.2d 324 (1977) (4–1–4 plurality decision). So respondent can prevail only if more process is due under art. I, § 7 than under the federal fourteenth amendment.

We have stated that in appropriate cases we will construe liberties more broadly under the state constitution than under the federal, although we will not do so lightly. *See State v. Hamm*, 423 N.W.2d 379, 382 (Minn.1988) (six-member juries violate state constitution); *State v. Gray*, 413 N.W.2d 107, 111 (Minn.1987) (determination of fundamental rights not limited by federal Constitution); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn.1990) (Minnesota Constitution provides greater religious liberty than first amendment); *State v. Russell*, 477 N.W.2d 886 (Minn.1991) (Minnesota equal protection analysis under art. I, § 2 is more demanding than federal).

As for due process, we need not decide in this case whether more process is due under the Minnesota Constitution than under the federal Constitution. Whatever the reach of state due process might ultimately be, it does not reach as far as the court of appeals stretched it. Accordingly, we reverse the court of appeals on this issue, although not without some hesitation. We agree that the "community standards" element of Minn.Stat. § 617.241 lacks precision, but we don't agree that its inexactness is constitutionally fatal. We are satisfied that the statute's proscription of depictions and descriptions of specific sexual acts gives ample warning of what conduct is prohibited. " 'That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.' " *Roth v. United States*, 354 U.S. 476, 491–92, 77 S.Ct. 1304, 1312–

13, 1 L.Ed.2d 1498 (1957) (*quoting United States v. Petrillo*, 332 U.S. 1, 7, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877 (1947)).

[4] **[5]** We next must determine whether any imprecision in the statute promotes arbitrary and discriminatory enforcement. This is the more important element of our vagueness analysis. *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1858. A statute must offer guidance to law enforcement officials limiting their discretion as to what conduct is allowed and what is prohibited. *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn.1985). In this case, we are satisfied that the statute gives law enforcement officials ample guidance as to what conduct is prohibited. Again, by specifically listing the prohibited depictions and descriptions, the statute put law enforcement personnel on notice of what material is subject to prosecution. We hold that the statute gives law enforcement officials sufficient guidance to withstand a vagueness challenge.

Free speech/press

[6] Article I, § 3 of the Minnesota Constitution provides:

> The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

***57** Respondent argues that "all subjects" necessarily includes obscenity. To determine whether the state constitution was intended to protect obscenity, both parties agree that it is necessary to look at the legislature's position at the time the constitution was adopted. The territorial obscenity law at the time the state constitution was adopted reads as follows:

> If any person shall import, print, publish, sell, or distribute any book, or any pamphlet, ballad, printed paper or other thing containing obscene language, or obscene prints, pictures, figures, or other descriptions manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school, or place of education, or shall buy, procure, receive, or have in his possession any such book, pamphlet, ballad, printed paper, or other thing either for the purpose of loan, sale, exhibition, or circulation, or with intent to introduce the same into any family, school, or place of education, he shall be punished by imprisonment in the County jail, not more than six months, or by a fine not exceeding two hundred dollars.

Rev.St. (Terr.) 1851 ch. 107, § 11 (later codified at Pub.St.1858 ch. 96, § 11). Appellant contends that this statute was a general prohibition against obscenity, showing the legislature's intent to outlaw it. Respondent contends that the language acknowledges the lawful existence of obscenity and aims only to keep it from children.

We need not settle this battle of statutory interpretation because the answer can be found in the plain language of the constitution. No matter how broad the freedom to speak and write might be, art. I, § 3 allows the state to hold responsible those who abuse the right. The question is whether obscenity is such an abuse. In an earlier obscenity case, *State v. Oman*, 261 Minn. 10, 110 N.W.2d 514 (1961), we held that obscenity was not protected by the first amendment, and that a prior obscenity statute was "not violative of the Constitution of the United States or of this state." *Id.* at 19, 110 N.W.2d at 521. In another context, this court said the art. I, § 3 protection for speech is "no more extensive in this case" than under the first amendment. *State v. Century Camera, Inc.*, 309 N.W.2d 735, 738 n. 6 (Minn.1981).

The Supreme Court has held that obscenity is not protected speech. *Roth*, 354 U.S. at 485, 77 S.Ct. at 1309. We see no reason to apply our constitution differently. Accordingly we hold that while art. I, § 3 of the Minnesota Constitution may offer broader protection than the federal first amendment, such protection does not extend to obscenity. [1]

Overbreadth

[7] **[8]** This argument is easily dismissed and we hold that there is no overbreadth problem with Minn.Stat. § 617.241. For the overbreadth doctrine to apply, the statute must be substantially overbroad; that is it must reach protected as well as unprotected speech/conduct. *Houston v. Hill,* 482 U.S. 451, 458, 107 S.Ct. 2502, 2507–08, 96 L.Ed.2d 398 (1987). In this opinion we have stated that obscenity is not protected expression, and that the obscenity statute is not unconstitutionally vague. It follows that Minn.Stat. § 617.241 only reaches those materials which are obscene and therefore not protected. There has been no showing whatsoever that the statute reaches protected expression. As we understand it, respondent is arguing that Minn.Stat. § 617.241 is overbroad because it prohibits the dissemination of material to consenting adults and because it has a chilling effect on dissemination of legal materials that fall close to the line of obscenity.

As to the first point, respondent is arguing in the wrong forum. Whether the state should outlaw the distribution of obscene ***58** material to consenting adults is a matter for the legislature, not this court. So long as the statute only reaches obscene materials, we have no role to play in this issue. As for any chilling effect, we believe that concern is addressed by our responsibility to review the record in each case to ensure that trial courts do not find obscenity where materials have serious literary, political, scientific or artistic value. *See Jenkins v. Georgia,* 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974).

Privacy

[9] The right to privacy under the Minnesota Constitution protects only "fundamental rights." *Gray,* 413 N.W.2d at 111. But the privacy guaranteed under art. I, §§ 1, 2 and 10 is broader than the privacy right read into the comparable federal constitutional provision. *Jarvis v. Levine,* 418 N.W.2d 139, 147–49 (Minn.1988).

[10] **[11]** Under the federal constitution, the right to privacy prohibits the government from criminalizing the possession of obscene materials by a person in his/her home. *Stanley v. Georgia,* 394 U.S. 557, 564–65, 89 S.Ct. 1243, 1247–48, 22 L.Ed.2d 542 (1969). But the right to private possession does not prevent the government from controlling obscene material in commerce. *United States v. 12 200–Ft. Reels of Super 8mm Film,* 413 U.S. 123, 128, 93 S.Ct. 2665, 2668–69, 37 L.Ed.2d 500 (1973); *United States v. Reidel,* 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971). Respondent asks this court to reject the reasoning of *Reidel* and *12 200–Ft. Reels* and find that the right to privately possess obscene materials necessarily extends to the right to obtain, thereby protecting the seller/distributor. As authority for that proposition, respondent cites *State v. Kam,* 69 Haw. 483, 748 P.2d 372, 380 (1988), in which the Hawaii Supreme Court invalidated the state's obscenity statute based on an explicit privacy provision of the state constitution, Haw. Const. art. I, § 6.

We reject that approach and hold that the right to privacy does not extend to commercial transactions in obscenity. Even if private possession of obscenity were a fundamental right under *Gray,* it would not necessarily follow that such a right extends to the acquisition, for neither buyer nor seller has a privacy right at the point of sale. *See Stall v. State,* 570 So.2d 257, 260 (Fla.1990), *cert. denied sub nom. Florida v. Long,* 501 U.S. 1250, 111 S.Ct. 2888, 115 L.Ed.2d 1054 (1991).

To summarize, we find that Minn.Stat. § 617.241 satisfies the Minnesota Constitution in all respects addressed by this case. Accordingly, we reject respondent's constitutional claims and turn to the questions of whether respondent's conviction was supported by the evidence and whether certain rulings by the trial court denied him a fair trial.

[12] To sustain respondent's conviction, the state must have proven beyond a reasonable doubt that (1) the evidence depicted sexual acts specifically proscribed by Minn.Stat. § 617.241 (1990); (2) applying contemporary community standards, the sexual conduct was patently offensive; (3) that the average person, applying contemporary community standards, would find that the material, taken as a whole, appealed to the prurient interest in sex; and (4) the material, taken as a whole, lacked serious literary, artistic, political or scientific value.

[13] In reviewing sufficiency of the evidence, we give a great deal of deference to the jury, and a verdict will not be disturbed "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of

the offense charged." *State v. Alton*, 432 N.W.2d 754, 756 (Minn.1988). A reviewing court also must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn.1989). But because of free speech implications, review of an obscenity conviction is less deferential and in close cases appellate courts will independently review the material found to be obscene. *Jacobellis v. Ohio*, 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed.2d 793 (1964); ***59** *Jenkins*, 418 U.S. at 161, 94 S.Ct. at 2755; *Welke*, 298 Minn. at 410, 216 N.W.2d at 647; and *State v. Carlson*, 291 Minn. 368, 192 N.W.2d 421 (1971). In this case, it is undisputed that the seized materials depict the proscribed conduct. So we will focus on the other elements of the offense.

Patent offensiveness

[14] To be patently offensive, it has been said that the material must go beyond customary limits of candor. *Miller*, 413 U.S. at 31, 93 S.Ct. at 2618–19. There is no question but that the depictions of sexual activity in this case are as candid as is photographically possible. Nothing is left to the imagination. The jury, which was in the best position to apply community standards, found the materials patently offensive. We have no basis on which to decide otherwise.

Prurient interest

[15] The Supreme Court has defined a prurient interest in sex as a morbid, shameful interest in sex. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–05, 105 S.Ct. 2794, 2802, 86 L.Ed.2d 394 (1985). Respondent argues that because the materials at issue in this case portray consensual, mutually pleasurable sexual conduct, they appeal to a normal, healthy interest in sex rather than a prurient interest. Respondent's expert witness testified to that effect. But it is apparent from the verdict that the jury rejected that testimony and determined that the average person, applying contemporary community standards, would find that the materials appeal to the prurient interest in sex. We think respondent's argument has some merit, but we are not prepared to hold as a matter of law that graphic depictions and descriptions of consensual, mutually pleasurably sexual acts do not appeal to the prurient interest in sex. In this case, the jury's determination was adequately supported by the evidence and we uphold it.

Serious value

[16] **[17]** In deciding whether allegedly obscene material has serious literary, political, artistic or scientific value, a jury is to apply a reasonable person standard rather than community standards. *Pope v. Illinois*, 481 U.S. 497, 500–01, 107 S.Ct. 1918, 1920–21, 95 L.Ed.2d 439 (1987). We need not go into a lengthy analysis to decide that the jury's verdict was well-supported in this area. The seized magazines have no particularly redeeming qualities. They feature page after page of explicit sexual activity with an occasional caption. Even the most liberal construction would be strained to find an "idea" in the magazines' text. The captions are limited to crude expressions of sexual desire, *i.e.*, who wants what where, when, how, how much and how often. We have no problem accepting the jury's determination that the magazines lack serious literary, artistic, political or scientific value.

[18] The video "Krazy for You" presents a slightly more difficult question. There is no plot, poor production values, bad acting and not much of a script. But in between all the bumping and grinding, there is some dialogue, dumb as it is, from which it would be possible to draw political messages disparaging health-care professionals and police officers. While one might stretch to find political value in the video, we cannot stretch so far as to find *serious* political value. That being the case, we have no reason to disagree with the jury's determination that the material lacked serious value. As a result, we hold that the evidence was sufficient to support respondent's conviction.

[19] We next address respondent's challenges to various rulings by the trial court. These complaints are disposed of easily. Appellant first challenges the trial court's decision to disallow expert testimony on the margin for error when a six-person jury panel attempts to ascertain and apply community standards. Trial courts have broad discretion in deciding whether to admit the testimony of even qualified experts. *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn.1980). The touchstone is whether the testimony will be helpful to the fact finder. *Id.;* Minn.R.Evid. 702. We agree with the trial court

that such expert testimony would not ***60** have been helpful and affirm the decision to exclude it.

[20] Respondent also contends the trial court erred by failing to instruct the jury that if it could not ascertain a community standard it must acquit. This argument has been raised and rejected elsewhere. *See United States v. Easley*, 927 F.2d 1442, 1449 (8th Cir.1991), *cert. denied sub nom. Hunter v. U.S.*, 502 U.S. 868, 112 S.Ct. 199, 116 L.Ed.2d 158 (1991). Certainly it was not error for the trial court to refuse this instruction. *See State v. Daniels*, 361 N.W.2d 819, 831 (Minn.1985) (refusal to give instruction within the sound discretion of trial court). We find no abuse of discretion on these facts and affirm the trial court's ruling.

[21] Respondent next argues that the trial court erred in framing its "community standards" jury instructions in terms of "acceptance" rather than "tolerance." While this argument has some surface appeal, it has no basis in law because the Supreme Court appears to use acceptance and tolerance interchangeably. *See Miller*, 413 U.S. at 32, 93 S.Ct. at 2619; *New York v. Ferber*, 458 U.S. 747, 761 n. 12, 102 S.Ct. 3348, 3357 n. 12, 73 L.Ed.2d 1113 (1982); *Smith v. United States*, 431 U.S. 291, 297–98, 305, 97 S.Ct. 1756, 1761–62, 52 L.Ed.2d 324. *See also Easley*, 927 F.2d at 1446. Although the plain meaning of tolerance might better reflect the appropriate considerations in obscenity cases, we do not believe it was an error for the trial court to speak in terms of acceptance.

[22] **[23]** Respondent's last contention is that the video "Krazy for You" should have been suppressed as evidence because the state failed to initiate a pre-seizure hearing before a judge. This argument has no merit. The purpose of the pre-seizure adversary hearing is to avoid prior restraint on what might ultimately be found to be protected expression. *See City of Duluth v. Wendling*, 306 Minn. 384, 389, 237 N.W.2d 79, 82 (1975). As the court of appeals correctly noted, that implicates the first amendment, not the fourth. By ordering the seized material returned to respondent, the trial court avoided any first amendment harm. There was no basis for suppressing the evidence.

Having determined that respondent's conviction does not violate the state constitution, was supported by the evidence and was not the result of an unfair trial, we reverse the court of appeals and reinstate the conviction.

Footnotes

1 Most other state supreme courts facing the same issue have found obscenity unprotected. *See City of Portland v. Jacobsky*, 496 A.2d 646, 648 (Me.1985); *People v. Ford*, 773 P.2d 1059 (Colo.1989); *State v. Reece*, 110 Wash.2d 766, 757 P.2d 947, 953 (1988) *cert. denied*, 493 U.S. 812, 110 S.Ct. 59, 107 L.Ed.2d 26 (1989); *People v. Neumayer*, 405 Mich. 341, 275 N.W.2d 230, 238 (1979); and *City of Urbana ex rel. Newlin v. Downing*, 43 Ohio St.3d 109, 539 N.E.2d 140, 146 (1989). The sole exception we have found is *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987).

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374 N.W.2d 722
Supreme Court of Minnesota.

STATE of Minnesota, Petitioner, Appellant,
v.
Gary Curtis FULLER, Respondent.

No. C3-83-2002. | Oct. 11, 1985.

Defendant was charged with assault in fifth degree, criminal damage to property, and driving after suspension of his license, and after second mistrial moved to dismiss case and the trial court denied the motion. The defendant appealed, and the Court of Appeals, 350 N.W.2d 382, granted a writ of prohibition barring further prosecution. The State appealed, and the Supreme Court, Peterson, J., held that: (1) finding of trial court that prosecutor did not willfully or intentionally elicit inadmissible evidence was not clearly erroneous, and (2) double jeopardy clause of State Constitution did not bar retrial of defendant.

Reversed and remanded.

Kelley, J., concurred in result.

Wahl, J., dissented and filed opinion.

West Headnotes (7)

[1] Double Jeopardy
Empanelling and swearing jury, or swearing witness and receiving evidence

A person is in jeopardy and the constitutional double jeopardy provisions attach as soon as a jury is sworn. M.S.A. Const. Art. 1, § 7; U.S.C.A. Const.Amend. 5.

4 Cases that cite this headnote

[2] Double Jeopardy
Manifest necessity; other grounds

When a criminal trial is terminated over a defendant's objection, double jeopardy clause of Federal Constitution, U.S.C.A. Const.Amend. 5, bars a second trial unless there was a "manifest necessity" that first trial be terminated; however, if a trial is terminated at defendant's request, double jeopardy clause does not bar second trial unless mistrial resulted from governmental misconduct intended to provoke the mistrial request.

29 Cases that cite this headnote

[3] Criminal Law
Introducing evidence of other misconduct by accused

Finding of trial court that prosecutor did not willfully or intentionally elicit any inadmissible evidence concerning defendant's prior record or fact that defendant had been in jail was not clearly erroneous; since prosecutor had warned witness against referring to defendant's prior acts of driving without license, prosecutor had no reason to expect that his question would elicit the inadmissible evidence.

5 Cases that cite this headnote

[4] Double Jeopardy
Fault of prosecution

Double jeopardy clause, U.S.C.A. Const.Amend. 5, did not bar retrial of defendant, where prosecutor did not willfully or intentionally elicit any inadmissible evidence since he had warned witness against referring to defendant's prior acts of driving without license.

22 Cases that cite this headnote

[5] Constitutional Law
Relation to Constitutions of Other Jurisdictions

A state Supreme Court may interpret its own State Constitution to offer greater protection of individual rights than does the Federal Constitution.

38 Cases that cite this headnote

[6] Constitutional Law

Relation to Constitutions of Other Jurisdictions

A decision of United States Supreme Court interpreting a comparable provision of Federal Constitution that is textually identical to provision of Minnesota Constitution, is of inherently persuasive, although not necessarily compelling, force in construing state constitutional provision.

38 Cases that cite this headnote

[7] Double Jeopardy

Fault of prosecution

Double jeopardy clause of Minnesota Constitution, M.S.A. Const. Art. 1, § 7 did not bar retrial of defendant due to prosecutor's elicitation of inadmissible evidence from witness concerning defendant's prior record and fact that defendant had been in jail, where prosecutor was at worst merely negligent in asking question that elicited the inadmissible evidence, defense counsel did not object to question but only to answer, and trial court suspected that witness was deliberately prolonging the affair by blurting out the testimony.

38 Cases that cite this headnote

723 *Syllabus by the Court

Double jeopardy clause of Minnesota Constitution does not bar retrial of criminal defendant who requested and obtained mistrial following unintentional-at worst, negligent-elicitation of inadmissible evidence by prosecutor.

Attorneys and Law Firms

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Heard, considered, and decided by the court en banc.

Opinion

PETERSON, Justice.

Defendant, Gary Curtis Fuller, was charged in county court with three misdemeanors. Two attempts to try him ended in mistrials because of prejudicial testimony by the alleged victim during direct examination by the prosecutor. Defendant unsuccessfully moved for a dismissal of all charges, claiming that further prosecution was barred by the double jeopardy provisions of the United States and Minnesota Constitutions. Defendant then obtained a writ of prohibition from the court of appeals, based on that court's interpretation of the double jeopardy clause of the Minnesota Constitution. We reverse and remand to the trial court.

On March 14, 1983, defendant was charged in county court with three misdemeanors: assault in the fifth degree, Minn.Stat. § 609.224, subd. 2 (1984), criminal damage to property, Minn.Stat. § 609.595, subd. 2 (1984), and driving after suspension of his license, Minn.Stat. § 171.24 (1984). The charges stemmed from a February 1983 incident reported by a woman with whom defendant had lived in 1978 and with whom he had a son.

On November 7, 1983, the matter came on for trial. Before trial commenced, both parties stipulated (1) that at the time of the incident defendant's driver's license had been suspended and (2) that defendant was aware of the suspension. As a part of the stipulation, the court ruled that other evidence regarding these facts was inadmissible. The stipulation was read to the impaneled jury just before the prosecutor gave his opening statement.

The state's first witness was the alleged victim. She was a reluctant witness, having sought unsuccessfully to persuade the prosecutor to dismiss the charges, which were based on her complaint. After several minutes of direct examination, she and the prosecutor engaged in the following exchange concerning her acceptance of a ride from defendant:

> Q What was discussed at that point in time regarding the license and whether or not [defendant's license] was suspended or revoked?
>
> A I didn't have to ask if it was suspended or revoked. I just knew he didn't have a license.
>
> Q Did you say that to him?
>
> A Yes.
>
> Q What was his response?
>
> A This was his friend's car, no one was going to recognize him in his friend's car so he felt safe.

> Q When did you have any other discussions about whether or not he had a license to drive?
>
> A I just asked how he could drive around the day he got out of jail or being locked up and-

Defense counsel moved for a mistrial, and the trial court granted the motion.

Two weeks later, on November 21, 1983, a new jury was impaneled. The following exchange occurred out of the hearing of the jury:

> THE COURT: The record should reflect that during the testimony of the first witness [the victim] in the mistrial matter, [she] volunteered something to the effect that the defendant knew his license was in a state of revocation because he had just gotten out of jail and at that point there was a motion by defense counsel for a mistrial and that motion was granted. I assume [she] knows at this point that she is not to make such a statement again.
>
> [PROSECUTOR]: Well, I assume she does know. I think she knows. I haven't talked to her today except by telephone.
>
> THE COURT: At the time of the other trial, I assume you explained to her.
>
> [PROSECUTOR]: I explained to her just what happened and she understands at that point why there was a mistrial ***725** and what words that it was that she said that had caused it.
>
> [DEFENSE COUNSEL]: I think there was an order from the prior case that the prosecutor was not to go into my client's prior record and that he was not to go into the fact that my client has been in jail, isn't that correct?
>
> THE COURT: I believe that was the tenor of it. We came to the question of the prosecutor proving that the defendant knew that his license was suspended.
>
> [PROSECUTOR]: That is correct.
>
> THE COURT: And I believe that as a result of the discussion at that time there was a stipulation, the defendant stipulated that the defendant's license was suspended by the State of Minnesota and that he was aware that the license was suspended at the time of the alleged offense of driving after suspension.
>
> [DEFENSE COUNSEL]: That is correct. I think that that stipulation binds us now and I am willing to proceed on that stipulation.
>
> THE COURT: Under the circumstances, the state may not go into anything about prior driving or prior knowledge of the defendant about his driving privilege.
>
> [PROSECUTOR]: I don't intend to in my case in chief.

Before the jurors were sworn, defense counsel informed the court that his wife, who had been summoned for jury duty but dismissed from this case, had spoken during a break with one of the jurors who had been selected to hear defendant's case. Because this discussion had been unrelated to the case, however, neither the prosecutor nor the judge at that time viewed the incident as warranting more than a general cautionary instruction to the jury.

As in the first trial, the jurors were read the stipulation as to defendant's suspended driver's license. The prosecutor once again called the alleged victim as his first witness. During her testimony, the following exchange occurred:

Q Did you have an occasion to express any concern about [defendant's] transporting you that evening?

A No.

Q Did you suspect there might be some difficulty with him doing it legally?

A Well, I knew he didn't have a driver's license. I thought he didn't have one and I know [he] always drives without one, you know.

Defendant again moved for a mistrial. The prosecutor opposed this, saying:

> [PROSECUTOR]: Well, I regret that it happened and it isn't certainly something that I asked her to say. It was basically the same question that I asked her before when she responded that he would drive her home and that he had a friend's car and he wouldn't be recognized and I discussed this with her two weeks ago and that we won't talk about him being in jail and I reiterated that to her again today. The last time I told her she couldn't talk about anything other than the facts of this case and we won't go back to any assault or any other driving or anything and we were only concerned with what happened that day unless I asked a direct question. This isn't the same situation that we had two weeks ago.

The court again declared a mistrial, citing both the testimony of the witness and the contact between defense counsel's wife and the juror.

Defense counsel then moved to dismiss the case, claiming that further prosecution was barred by the double jeopardy clauses of the United States and Minnesota Constitutions. The trial court denied this motion, stating:

> THE COURT: There is no showing that there was any willful or intentional conduct on the part of the prosecution in this case and I am going to deny your motion. I do want to say something on the record about this matter because I know it's coming up again. I think it should occur to everyone here that there is a possibility due to the relationship between the chief witness for the state and the defendant that that witness might be playing games. I guess I will ***726** make it clear. It's clear that they had a child together and it's clear that they lived together for a period of time. They obviously have some feelings toward each other and I am not sure, I am not sure in my own mind that that witness is not deliberately prolonging this affair by doing these things, by blurting out these things.

The court of appeals granted a writ of prohibition barring further prosecution. It recognized that under the federal constitution, as interpreted by the United States Supreme Court, the trial court correctly denied the motion to dismiss because the prosecutor's elicitation of the inadmissible evidence was not intentional or willful. The court of appeals concluded, however, that the prosecutor's conduct in eliciting the evidence was "gross negligence constituting bad faith" and that under the double jeopardy clause of the Minnesota Constitution further prosecution should be barred. *State v. Fuller*, 350 N.W.2d 382, 386 (Minn.App.1984).

[1] Both the United States Constitution and the Minnesota Constitution prohibit putting a person twice in jeopardy for the same offense. The Fifth Amendment of the United States Constitution provides, in relevant part, "No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb." The Minnesota Constitution provides, in Article 1, Section 7, that "[n]o person * * * for the same offense shall be put twice in jeopardy of punishment." A person is in jeopardy and the constitutional provisions attach as soon as a

jury is sworn. *State v. McDonald*, 298 Minn. 449, 452, 215 N.W.2d 607, 608-09 (1974).

[2] When a criminal trial is terminated over a defendant's objection, the double jeopardy clause of the federal constitution bars a second trial unless there was a "manifest necessity" that the first trial be terminated. *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S.Ct. 2083, 2087, 72 L.Ed.2d 416 (1982). However, if a trial is terminated at the defendant's request, the double jeopardy clause does not bar a second trial unless the mistrial resulted from governmental misconduct intended to provoke the mistrial request. *Id.* at 673-79, 102 S.Ct. at 2088-91.

[3] **[4]** The trial court found that the prosecutor did not willfully or intentionally elicit any inadmissible evidence. Since that finding is not clearly erroneous, we conclude, as did the court of appeals, that the double jeopardy clause of the federal constitution does not bar a third trial. The court of appeals, however, gave a broader reading to the scope of the protection provided by the double jeopardy clause of the Minnesota Constitution which, as we said, reads for all practical purposes identical to the federal clause.

[5] **[6]** It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741 (1980); *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975); *see also Wegan v. Village of Lexington*, 309 N.W.2d 273, 281 n. 14 (Minn.1981); *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn.1979); *State v. Olsen*, 258 N.W.2d 898, 907 n. 14 (Minn.1977); *State v. Oman*, 261 Minn. 10, 21, 110 N.W.2d 514, 522-23 (1961). Indeed, as the highest court of this state, we are " 'independently responsible for safeguarding the rights of [our] citizens.' " *O'Connor*, 287 N.W.2d at 405 (quoting *People v. Brisendine*, 13 Cal.3d 528, 551, 119 Cal.Rptr. 315, 330, 531 P.2d 1099, 1114 (1975)). State courts are, and should be, the first line of defense for individual liberties within the federalist system. [1] This, of course, does not mean that we will or should cavalierly construe our constitution more expansively ***727** than the United States Supreme Court has construed the federal constitution. Indeed, a decision of the United States Supreme Court interpreting a comparable provision of the federal constitution that, as here, is textually identical to a provision of our constitution, is of inherently persuasive, although not necessarily compelling, force.

[7] We do not believe that this is an appropriate case in which to decide whether the double jeopardy clause of the Minnesota Constitution gives a criminal defendant greater protection than the federal constitution against retrial following a mistrial provoked by prosecutorial misconduct. This is because the defendant in this case is clearly not entitled to relief under any reasonable alternative to the rule recognized by the United States Supreme Court in *Kennedy*. Looked at in the worst possible light, the prosecutor was merely negligent in asking the question that elicited the evidence that defendant always drove without a license. Given the fact that the record indicates that the prosecutor had warned the witness against referring to defendant's prior acts of driving without a license, the prosecutor had no reason to expect that his question would elicit the inadmissible evidence. Significantly, defense counsel did not object to the question, only to the answer. Also significantly, the trial court suspected that the witness was "deliberately prolonging the affair by doing these things, by blurting out these things." Further, the trial court based its mistrial ruling not just on the witness' answer but also on the contact that defense counsel's wife had with one of the jurors. In short, whether we were to adhere to the test recognized in *Kennedy* or were to adopt some reasonable alternative to it, we would conclude, as we do now, that a retrial of defendant will not violate the provision of the Minnesota Constitution protecting defendant against being twice put in jeopardy for the same offense.

Reversed and remanded.

KELLY, Justice (concurring specially).
I concur in the result.

WAHL, Justice (dissenting).
I respectfully dissent. Whether or not the action of the prosecutor rises to the level of willful or intentional conduct which triggers the double jeopardy clause of the federal constitution as a bar to Fuller's third trial on the charged misdemeanor offense, *Oregon v. Kennedy*, 456 U.S. 667, 673-79, 102 S.Ct. 2083, 2088-91, 72 L.Ed.2d 416 (1982), this court is not precluded and should not be inhibited from

exercising what Justice Brennan termed "the independent protective force of state law." Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Har.L.Rev. 489, 491 (1977). Justice Hans Linde of the Supreme Court of Oregon understood the nature of that force, writing that state constitutional guarantees were "meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics." *State v. Kennedy,* 295 Or. 260, 666 P.2d 1316, 1323 (1983). The purpose of the double jeopardy provision of the Minnesota Constitution is to protect a defendant in a criminal case from a second trial for the same offense, not to punish an official for intentional misconduct. As this court emphasized in *State v. Thompson:*

> The protective doctrine of double jeopardy is nothing more than the declaration of an ancient and well established *public policy* that no man should be unduly harassed by the state's being permitted to try him for the same offense again and again until the desired result is achieved.

241 Minn. 59, 62, 62 N.W.2d 512, 516 (1954) (emphasis in original).

The majority finds this an inappropriate case in which to decide whether the double jeopardy clause of the Minnesota Constitution gives a criminal defendant greater protection than the federal constitution against retrial after a mistrial has been provoked by prosecutorial misconduct because, in the majority's view, there is no reasonable alternative to federal rule in ***728** *Kennedy* under which the defendant in this case would be entitled to relief. This view misperceives the nature and extent of the harm done to this defendant and this court's power under the Minnesota Constitution to craft a reasonable standard to remedy such harm.

Three times this defendant took time off work, left his home in the Twin Cities, and traveled one hundred and fifty miles to Duluth to be tried on three misdemeanor offenses, fifth-degree assault, criminal damage to property, and driving after suspension. At the first trial, the prosecution and defense stipulated that at the time of the incident, the defendant's license to drive had been suspended and he was aware of the suspension. After ordering the prosecution not to go into the defendant's prior record or the fact that he had been in jail, the court read the stipulation to the jury. The prosecutor asked the state's first witness, after several minutes of testimony, when she and the defendant had discussed whether or not he had a license to drive. This question concerned the very facts to which the parties had stipulated. The witness replied "I just asked how he could drive around the day he got out of jail or being locked up * * * " The defendant's motion for a mistrial was granted.

At the second trial, two weeks later, the parties' stipulation regarding the defendant's license revocation and his awareness of that revocation was again accepted by the court. The court asked the prosecutor if he had prepared the witness who had made the prejudicial statement and ordered him, under the circumstances, not to go into "anything about prior driving or prior knowledge of the defendant about his driving privilege." In spite of this warning, during examination of the same first witness, the prosecution asked:

> Q. Did you have an occasion to express any concern about Mr. Fuller transporting you that evening?
>
> A. No.
>
> Q. *Did you suspect there might be some difficulty with him doing it legally?* (emphasis added.)

In response to this direct question, the witness said she knew Fuller did not have a driver's license and she knew he always drove without one. This answer led to a second mistrial on defendant's motion. In light of the stipulation, the only fact regarding the defendant's driving the prosecutor needed to establish by this witness was that he had, indeed, driven the car that evening. Yet, the prosecutor deliberately asked the witness whether she suspected there was some difficulty with the defendant's driving legally. A reasonable prosecutor would expect a witness to answer such a question with exactly the answer she gave. This question and the answer it elicited provoked the second mistrial. [1]

It is not contended that " 'every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment.' " *State v. McDonald,* 298 Minn. 449, 452, 215 N.W.2d 607, 609 (1974) (quoting *Wade v. Hunter,* 336 U.S. 684, 688, 69 S.Ct. 834, 837, 93

L.Ed. 974 (1949)). The public interest in convicting the guilty would be frustrated if retrial were barred when a mistrial was dictated by "manifest necessity," such as a hung jury. There is agreement, however, that in some instances, the prosecutor's actions have so unfairly prejudiced the defendant's chances of acquittal that the defendant has no choice other than a mistrial motion. The disagreement comes over the standard required to bar retrial under double jeopardy protection in such instances.

The *Kennedy* "intent" standard now required by the United States Supreme Court under the double jeopardy clause of the federal constitution inadequately protects the objectives sought to be furthered by the double jeopardy provision of the Minnesota Constitution. Under the "intent" standard, where a defendant requests a ***729** mistrial, retrial is barred only where the governmental conduct in question is intended " 'to goad the [defendant] into requesting a mistrial.' " *Oregon v. Kennedy,* 456 U.S. at 673, 102 S.Ct. at 2088 (citing *United States v. Dinitz,* 424 U.S. 600, 611, 96 S.Ct. 1075, 1081, 47 L.Ed.2d 267 (1976)). This standard uses the federal double jeopardy provision to deter prosecutorial misconduct rather than protect the defendant, which is the purpose of Minnesota's double jeopardy bar. As well as focusing on prosecutorial misconduct, in Justice Stevens words, "[i]t is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant." *Id.* 456 U.S. at 688, 102 S.Ct. at 2096. (Stevens, J., concurring).

The Supreme Court of Oregon, rejected the "intent" standard in considering *Kennedy* on remand from the United States Supreme Court. The court held "a retrial is barred by article I, section 12, of the Oregon Constitution when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal." *State v. Kennedy,* 666 P.2d at 1326. This is a reasonable alternative to the federal "intent" standard and protects the defendant without the burden of an impossible problem of proof. At the same time, this standard protects the state's interest in the administration of justice by requiring that the prosecutor intentionally or knowingly pursue an improper course of action without heed to the consequences.

Applying this standard to the facts in *Kennedy,* the Oregon court concluded that the criteria barring retrial were not met where the prosecutor's misconduct resulting in a mistrial consisted of seeking to impeach an expert witness by asking if the reason he had never done business with the defendant was "because he was a crook." The court noted that there was not "any suggestion that the prosecutor on previous occasions had been warned against similar transgressions." *Id.* at 1327. In the present case, however, the prosecutor had been warned, indeed, ordered by the court, not to go into the defendant's prior driving record or the fact that he had been in jail. Yet the prosecutor deliberately chose to ask the same witness at the second trial if she had any reason to suspect that defendant was driving illegally on the evening in question. Such disregard of the court's order meets the criteria of " 'knowing' misconduct coupled with indifference toward the probable risk of a mistrial" required by the Oregon standard. *Id.*

It is not the intent here to definitively urge this court's adoption of the Oregon standard. It is to indicate the existence of alternative standards which reasonably balance both the defendant's and state's interests refuting the majority's contention that no fair alternative to the federal intent standard exists under which this defendant would receive relief from retrial. The standard applied by the Court of Appeals in this case, gross negligence constituting bad faith, is also a reasonable standard. The failure of the prosecutor to adequately prepare his witness so she would not repeat her mistake in the second trial, then deliberately asking her a question about the legality of defendant's driving after having been warned by the court not to do so, also raises the double jeopardy bar of the Minnesota Constitution to a third trial under either standard. I would affirm the decision of the Court of Appeals. The writ should be made absolute.

YETKA, J., took no part in the consideration or decision of this case.

Footnotes

State v. Fuller, 374 N.W.2d 722 (1985)

1 Law review commentaries addressing the issue include: Fleming & Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist,"* 7 Hamline L.Rev. 51 (1984); Linde, *E Pluribus-Constitutional Theory and State Courts,* 18 Ga.L.Rev. 165 (1984); Pollock, *State Constitutions as Separate Sources of Fundamental Rights,* 35 Rutgers L.Rev. 707 (1983).

1 The parties had agreed earlier that the brief, innocent conversation of a selected juror with the wife of the defense counsel in the hall was not grounds for preventing the defendant from getting a verdict of guilty or not guilty from this second tribunal.

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60 USLW 2239

819 P.2d 55
Supreme Court of Colorado,
En Banc.

Nelson BOCK and Patricia Lawless–Avelar, Petitioners,
v.
WESTMINSTER MALL COMPANY, Respondent.

No. 90SC433. | Oct. 7, 1991.
| Rehearing Denied Nov. 4, 1991.

Members of unincorporated political association brought suit against owner of private shopping mall challenging on free speech grounds mall's policy of prohibiting the distribution of political leaflets within common areas of the mall. The District Court, Jefferson County, Gaspar F. Perricone, J., granted defendant's motion for summary judgment, and plaintiffs appealed. The Court of Appeals, 797 P.2d 797, affirmed, and plaintiffs sought certiorari. The Supreme Court, Mullarkey, J., held that: (1) financial participation of city in development of private shopping mall, and active presence of other governmental agencies in common areas of mall, constituted governmental involvement in operation of mall, sufficient to trigger protections of free speech article of the Colorado Constitution, and (2) free speech article of the Colorado Constitution prevented owner of mall from excluding citizens engaged in nonviolent political speech from common areas of mall, considering that mall effectively functioned as a latter-day public forum, and that there was no showing that nonviolent political speech would adversely affect mall's business operations.

Judgment of Court of Appeals reversed; remanded with directions.

Erickson, J., dissented with opinion in which Rovira, C.J., and Vollack, J., joined.

West Headnotes (3)

[1] Constitutional Law
Government-Sponsored Speech

Constitutional Law
Government Funding

Where governmental entities or public monies are shown by the facts to subsidize, approve of, or encourage private interests and such private interests happen also to restrict liberty to speak and to dissent, Supreme Court may find that such private restrictions run afoul of the protective scope of the free speech article of the Colorado Constitution. West's C.R.S.A. Const. Art. 2, § 10.

23 Cases that cite this headnote

[2] Constitutional Law
Stores, Shopping Centers, or Malls

Financial participation of city in development of shopping mall, and active presence of other governmental agencies in common areas of mall, constituted governmental involvement in operation of private mall, sufficient to trigger protections of the free speech article of the Colorado Constitution. West's C.R.S.A. Const. Art. 2, § 10.

20 Cases that cite this headnote

[3] Constitutional Law
Stores, Shopping Centers, or Malls

Free speech article of the Colorado Constitution prevented owner of enclosed private shopping mall from excluding citizens engaged in nonviolent political speech from common areas of mall, considering that mall effectively functioned as a latter-day public forum, and that there was no showing that nonviolent political speech would adversely affect mall's business operations; moreover, owner was free to impose reasonable time, place and manner restrictions on such activity. West's C.R.S.A. Const. Art. 2, § 10.

18 Cases that cite this headnote

60 USLW 2239

Attorneys and Law Firms

***55** Tim Atkeson, Arnold & Porter, David H. Miller, American Civil Liberties Union, Denver, for petitioners.

James L. Aab, Denver, Elizabeth Drill Nay, Robert Steven Caldwell, Lewis, Rice & Fingersh, Kansas City, Mo., for respondent.

Opinion

Justice MULLARKEY delivered the Opinion of the Court.

We granted certiorari to review *Bock v. Westminster Mall Co.*, 797 P.2d 797 (Colo.App.1990), in which the court of appeals held that individual members of "The Pledge of Resistance" did not have a protected right to distribute leaflets in the common areas of Westminster Mall ***56** ("Mall"), a privately-owned commercial and retail center. The issue here is:

> Whether Article II, Section 10 of the Colorado Constitution prevents the private owner of an enclosed shopping mall from excluding citizens engaged in non-violent political speech from the common areas of the mall? [1]

For the reasons stated below, we reverse the judgment of the court of appeals. Within the public spaces of the Mall, Article II, Section 10 protects petitioners' rights to distribute political pamphlets and to solicit signatures pledging non-violent dissent from the federal government's foreign policy toward Central America.

I.

Petitioners, Nelson Bock and Patricia Lawless–Avelar, are members of an unincorporated political association known as "The Pledge of Resistance." Petitioners sought permission to distribute their pamphlets and to solicit protest signatures in the common areas inside the Mall. Respondent, Westminster Mall Company ("Company"), owner of the Mall, denied petitioners' request.

Petitioners sought declaratory and injunctive relief on the ground that they had a protected right to disseminate information and to solicit signatures from the public as denied by respondent. Following discovery, the parties filed cross-motions for summary judgment. The district court denied petitioners' motion and granted respondent's motion. After we denied a petition for writ of certiorari under C.A.R. 50, the court of appeals affirmed the district court's judgment. We then granted certiorari pursuant to C.A.R. 49.

The Mall is a regional shopping center. Its primary geographic service zone is not limited to the City of Westminster ("City") but includes numerous Denver suburbs and extends to Boulder, Colorado. The Mall is one of two such centers anchored by five large department stores in the Denver metropolitan area. In addition to the five anchor stores, about 130 other retail and service establishments are tenants of the Mall, including a film theatre. Since an expansion in 1986, the Mall sprawls over approximately 118 acres, including parking for more than 6,500 cars. The central Mall area, counting the anchor stores, totals more than 1,390,000 square feet. Of this total, 134,000 square feet comprise the Mall's common areas. These corridors and concourses not only facilitate the flow of the browsing and/or buying public but also offer fountains, plant foliage, and seating for their convenience.

The Mall's common areas are open to the general public without charge, and no purchase is necessary to enter or exit the Mall. This open access to the Mall is proffered year-round, between the hours of 10:00 a.m. and 9:00 p.m., Monday through Saturday, and between noon and 6:00 p.m. on Sundays. These public hours are extended during more profitable shopping seasons, such as Christmas. In years past, retail sales in the Mall have accounted for more than ten percent of such sales in the City.

Regulating the use of the Mall's common areas is what the Company has called a "no solicitation" policy. With this policy, the Company purports strictly to prohibit controversial or political activities, the distribution of leaflets and handbills, and/or solicitation of any kind. Petitioners sought but were denied permission to distribute political leaflets within the common areas of the Mall. The Company relies on the City's trespass ordinance to enforce its policy.

In practice, however, the policy has not barred a variety of public entities and private groups from taking advantage of the common areas to communicate their messages. On the contrary, the Company has spent several thousand dollars each year to promote these activities. The Jefferson ***57** County Clerk has sponsored voter registration drives in the Mall's common areas. The Company has allowed a salute to the armed forces, with accepted displays of equipment and literature by various armed forces agencies. Representatives of these agencies were permitted to answer questions from the public and to provide them other information. There has also been a salute to the presidents of the United States, with a display of presidential portraits and information available to all. Art has been exhibited in the common areas, and dance has been staged there as well. Community bazaars have been permitted. The Boy Scouts and the Girl Scouts used the Mall for activities including cookie sales. The Salvation Army was permitted to solicit funds in the Mall.

There are links between the Company and several governmental entities and public monies. The City operates, rent-free, a police substation with a desk and a holding area in the Mall. From this substation, City police officers respond to complaints originating anywhere in the City. The Mall occupies a prominent location in the City across the street from the City Hall. Although the Company employs a private security service, two to four City police officers patrol the Mall during public hours. In addition, certain street and drainage improvements valued at over two million dollars were acquired by the City from the Company. This purchase was financed under the City's bond authority.

II.

We preface our analysis by re-affirming the high rank which free speech holds in the constellation of freedoms guaranteed by both the United States Constitution and our state constitution. The United States Supreme Court and this court have been extraordinarily diligent in protecting the right to speak and to publish freely. Whether this is because free speech has been conceived as a means to the preservation of a free government or as an end in itself, the results have been the same. Free political speech, such as that involved in this case, occupies a preferred position in this country and this state.

A.

Concurring in *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927), [2] Justice Brandeis wrote a most eloquent defense of the freedom of speech and press:

> Those who won our independence ... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; ... that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American Government.

The role of free speech was re-emphasized in *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), where the United States Supreme Court held that a state could not punish a person for distributing religious pamphlets on the sidewalk of a company town contrary to the company's regulations. In striking the balance with other constitutional rights, the *Marsh* Court was unequivocal:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.

Marsh, 326 U.S. at 509, 66 S.Ct. at 280. The right to speak and to publish under the First Amendment, prevailing in *Marsh* and ***58** other United States Supreme Court cases, [3] has been similarly preferred by this court.

B.

In *People v. Vaughan*, 183 Colo. 40, 49, 514 P.2d 1318, 1323 (1973), we declared unconstitutional a statute criminalizing the mutilation, defacement or defilement of the American flag. The state's interests in preserving the symbols of democracy and/or setting the appropriate limits of dissent, while undeniably important, were insufficient to preserve the statute "[b]ecause of the preferred position of freedom of

speech in the United States Constitution." *Id.* This is so even though the First Amendment is framed solely in the negative: no law shall be made abridging the freedom of speech or of press.

In contrast, Article II, Section 10 of the Colorado Constitution advances beyond the negative command of its first clause to make an affirmative declaration in the second clause. The complete text of our free speech article is as follows:

> No law shall be passed impairing the freedom of speech; *every person shall be free to speak, write or publish whatever he will on any subject,* being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and fact.

Colo. Const. Art. II, Section 10 (emphasis added). [4] In *People v. Ford,* 773 P.2d 1059, 1066 (Colo.1989), we emphasized this dual guarantee: "The object of article II, section 10 is to 'guard the press against the trammels of political power, and secure to the whole people a full and free discussion of public affairs' " (quoting *Cooper v. People,* 13 Colo. 337, 362, 22 P. 790, 798 (1889)). Thus, the second clause of Article II, Section 10 of the Colorado Constitution necessarily enhances the already preferred position of speech under the First Amendment of the United States Constitution.

III.

Consistent with the United States Constitution, we may find that our state constitution guarantees greater protections of petitioners' rights of speech than is guaranteed by the First Amendment. The United States Supreme Court's First Amendment jurisprudence on the scope of free speech in the face of private power has had a rather tortuous history, with speech in nominally private spaces at first accorded protection, *Food Employees v. Logan Valley Plaza,* 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), then eclipsed in *Lloyd Corp. v. Tanner,* 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972), and finally suffering a rejection in *Hudgens v. NLRB,* 424 U.S. 507, 96 S.Ct. 1029 (1976). Respondent urges us to follow the twists and turns of this federal road to the end and deny petitioners' claims. We decline. We are unpersuaded by the United States Supreme Court's various reasonings in this line of cases, especially when given an invitation by that Court in a subsequent case, *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), treated below, to forge our own path. The federal about-face was, therefore, not the United States Supreme Court's last word on free speech in the several states. The definitive word was left to the state courts to write.

A.

In ***59** *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 81, 100 S.Ct. 2035, 41, the United States Supreme Court explicitly acknowledged each State's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." 447 U.S. at 81, 100 S.Ct. at 2040–41. [5] In our discussion above, we have highlighted the second clause of Article II, Section 10 of our own constitution, which is an affirmative acknowledgement of the liberty of speech, and therefore of greater scope than that guaranteed by the First Amendment. Moreover, the United States Supreme Court also has recognized that "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Minnesota v. National Tea Co.,* 309 U.S. 551, 557, 60 S.Ct. 676, 679–80, 84 L.Ed. 920 (1940). We discern no obstacles in the United States Supreme Court's First Amendment jurisprudence which would limit our construction of the Colorado Constitution. Indeed, the converse is true.

The *PruneYard* Court affirmed the California Supreme Court's holding that the California Constitution protected the right of individuals to solicit signatures in opposition to a United Nations resolution in the court-yard of a privately-owned shopping center. In *PruneYard,* the Court rejected the argument that *Lloyd,* 407 U.S. 551, 92 S.Ct. 2219, [6] stood for the proposition that a state is prevented "from requiring a private shopping center owner to provide access to persons exercising their constitutional rights of free speech and petition when alternative avenues of communication [were] available." 447 U.S. at 80, 100 S.Ct. at 2040. This means that, by its constitution, a state may afford individuals

the right of speech and petition in commercial and retail centers otherwise privately owned. The First Amendment is a floor, guaranteeing a high minimum of free speech, while our own Article II, Section 10 is the "applicable law" under which the freedom of speech in Colorado is further guaranteed. *PruneYard*, 447 U.S. at 81, 100 S.Ct. at 2040–41.

B.

Colorado's tradition of ensuring a broader liberty of speech is long. For more than a century, this Court has held that Article II, Section 10 provides greater protection of free speech than does the First Amendment. *See* ***60** *People v. Ford*, 773 P.2d 1059 (Colo.1989); *Parrish v. Lamm*, 758 P.2d 1356, 1365 (Colo.1988); *People v. Seven Thirty–Five East Colfax, Inc.*, 697 P.2d 348, 356 (Colo.1985); *People v. Berger*, 185 Colo. 85, 521 P.2d 1244 (1974); *In Re Hearings Concerning Canon 35*, 132 Colo. 591, 296 P.2d 465 (1956); *Cooper v. People*, 13 Colo. 337, 22 P. 790 (1889).

Earlier in this opinion, we noted *Cooper* 's recognition of the dual guarantee in Article II, Section 10. That early statement of principle, contained in an opinion issued within a few years after the Colorado Constitution was adopted and while its drafting was a living memory, is persuasive evidence of the intended broad scope of Article II, Section 10. In *Canon 35*, concerning a blanket exclusion of press photographers from the courtroom, references to the First and Fourteenth Amendment were omitted "for the reason that the provision [Art. II, Sec. 10] of our Colorado Constitution is more inclusive in its coverage of the subject and is equally binding upon us." 132 Colo. at 592, 296 P.2d at 466–67. In *Berger*, reviewing a conviction for promotion of obscene materials in violation of a state statute, we held that:

> we must find not only that the obscenity standards of the statute, as construed under the First Amendment, are met, but also that there has been some abuse of freedom of speech, as envisioned under the broader protective standard of Article II, Section 10 of the Colorado Constitution.

185 Colo. at 89, 521 P.2d at 1245–46.

This more stringent scrutiny of free speech issues under Article II, Section 10 has continued in recent cases. In *Seven Thirty–Five East Colfax, Inc.*, and *Ford*, we held that a tolerance standard, being the most protective of free expression, was the *only* standard which satisfied Article II, Section 10. Finally, in *Parrish*, while scrutinizing section 18–13–119, 8B C.R.S. (1986), which prohibited health care providers from advertising a willingness to waive an insured's deductible co-payment, we flatly stated that: "Section 10 provides greater protection for freedom of speech than does the first amendment to the United States Constitution." 758 P.2d at 1365. With this precedential background, we turn to the arguments of the parties.

IV.

Petitioners argue that Article II, Section 10 of our constitution guarantees free speech not only as against state or governmental action but also as against certain exercises of private power. Respondents on the other hand argue that the second clause of Section 10 is limited by the first clause and both apply only to direct state action which infringes an individual's right to speak or publish. The facts of the case here, however, belie this simplistic division of the universe into public and private spheres. Indeed, one consequence of the larger measure of protection conferred on speech by our state constitution is the judicial recognition of the impact on constitutional liberties by the many hybrid forms of governmental involvement and/or by private interests performing the equivalent of public functions.

[1] Where governmental entities or public monies are shown by the facts to subsidize, approve of, or encourage private interests and such private interests happen also to restrict the liberty to speak and to dissent, this court may find that such private restrictions run afoul of the protective scope of Article II, Section 10. It is possible for interests, otherwise private, to bear such a close relationship with governmental entities or public monies that such interests are affected with a public interest. Moreover, with or without the benefit of that relationship, a private project may develop and operate in a manner such that it performs a virtual public function.

A.

Our determination of the form or degree of governmental involvement present in a particular case must be based on the "framework of the peculiar facts or circumstances present." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961). "Only by sifting facts and weighing circumstances can the nonobvious involvement of ***61** the State in private conduct be attributed its true significance." *Id.* at 722, 81 S.Ct. at 860. In *Denver Welfare Rights Org. v. Public Util. Comm'n*, 190 Colo. 329, 335–36, 547 P.2d 239, 243–44 (1976), we recognized that the nexus between a governmental authority and private action "is neither readily apparent nor easily discoverable in various factual settings."

Considering all the facts and circumstances underlying the Mall's operation with the preferred liberty of speech in mind, we conclude that there was governmental involvement in this case, most assuredly triggering the protections of Article II, Section 10.[7] Respondent's denial of petitioners' rights to distribute political pamphlets and to solicit pledge signatures in the common areas of the Mall therefore violated that provision of the Colorado Constitution. Because we hold, on the facts of this case, that governmental involvement exists and that the open and public areas of the Mall effectively function as a public place, we leave for another day the issue as to whether some lesser form or degree of governmental involvement is a prerequisite to successfully pleading the protections of Article II, Section 10.

B.

[2] Our finding that governmental involvement exists here is not based on any single factor. Nevertheless, we find significant the City's two million dollar purchase, financed through the sale of municipal bonds, of improvements which the Company made to adjacent streets and drainage systems. It is now common for governmental entities to compete, by providing financial subsidies or inducements, to attract private business so as to reap the benefits of an increased tax base. Economic necessity, however, cannot provide the cover for government-supported infringements of speech.

Also significant is the fact that the City operates a police substation in the Mall from which the police respond to complaints throughout the City. The Company provides the space rent free to the City and, in effect, the Mall thus provides a municipal service. The presence of the substation in the Mall conveys the impression that the City participates, either symbolically or actually, in what are in effect content-based restrictions of speech by the Company. That two to four City police officers routinely patrol the common areas of the Mall does nothing to dispel that impression. The enforcement of the Mall's "no solicitation" policy through the City's trespass ordinance, possibly by those same officers patrolling the Mall, transforms the impression into experience. Thus, there is an ongoing mutual subsidization between the Company and the City. The necessity of keeping the peace likewise cannot camouflage government-aided suppression of non-violent political speech.[8]

***62** Finally, there is a highly visible governmental presence in the Mall. The Army, Navy and the Marine Corps maintain recruiting offices in the Mall. The Jefferson County Clerk conducts voter registration drives in the Mall, reminding citizens of their political duties. In sum, the financial participation of the City in the Mall's progress, the arrangements with the City police substation, and the active presence of other governmental agencies in the common areas of the Mall, constitute governmental involvement in the operation of the Mall.

C.

[3] We are also persuaded that the Mall functions as the equivalent of a downtown business district. As we noted, the Mall is a vast market, now extending over 100 acres. The 130 commercial and retail establishments situated in the Mall are accessible via more than 130,000 square feet of open, common areas, walks and concourses. Walking through or sitting in these open areas each year are many thousands of the public who otherwise engage, no doubt, in conversations on all subjects, including the political. Thus, the historical connection between the marketplace of ideas and the market for goods and services is not severed because goods and services today are bought and sold within the confines of a modern mall. To conclude otherwise would be to allow the vagaries of contemporary urban architecture and planning, or

the lack thereof, to prevail over our valued tradition of free speech. [9]

The range of activities permitted in the common areas of the Mall also indicates the extent to which the Mall effectively functions as a latter-day public forum. The Company allows a variety of groups access to the visiting public through the use of the common areas of the Mall. We have noted that, for example, the Salvation Army solicits donations from the public strolling the Mall. The expressive conduct of artists and dancers has been allowed. Religious expression has not been denied. The common areas are used by a market research firm to survey the public's likes and dislikes. Surely the Mall's theatre has exhibited films of politically controversial content, sparking lively debates among the Mall's patrons. [10] The Company's prohibition of petitioners' non-violent political speech, if allowed to stand, would amount therefore to a non-neutral, content-based restriction. Given that other groups effectively express themselves in the Mall's common areas, those open areas can easily accommodate petitioners' exercise of their liberty of speech. Under these circumstances, the common areas function as virtual public spaces.

We emphasize that there has been no showing that petitioners' activities will adversely affect the Mall's business operations. Petitioners' chosen mode of speech, distributing leaflets and collecting signed pledges, is well within the mainstream. The content of their speech is classically political. In addition, the size of the Mall, the number of visitors the Mall receives, plus the already extensive use of the common areas of the Mall by other individuals and groups, demonstrate that petitioners' activities can be conducted without interfering with the Mall's normal operations and therefore will not affect the Company's property rights. *See PruneYard*, 23 Cal.3d at 909–12, 592 P.2d at 347–48, 153 Cal.Rptr. at 860–61 (*aff'd*, ***63** 447 U.S. 74, 100 S.Ct. 2035) ("[W]e do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment."). Further, the Company is free to impose reasonable time, place and manner restrictions on the conduct of petitioners' activity, similar to those imposed on the other activities which it has permitted in the past.

V.

For these reasons, we reverse the judgment of the court of appeals affirming the district court's denial of petitioners' request to speak freely and solicit signatures in the Mall. The cause is remanded with directions to enter summary judgment for petitioners.

ERICKSON, J., dissents, and ROVIRA, C.J., and VOLLACK, J., join in the dissent.

Justice ERICKSON respectfully dissenting:

Certiorari was granted to review *Bock v. Westminster Mall Co.*, 797 P.2d 797 (Colo.App.1990), on the following issue: "Whether article II, section 10 of the Colorado Constitution prevents the private owner of an enclosed shopping mall from excluding citizens engaged in non-violent political speech from the common areas of the mall." We are not called upon to decide whether the United States Constitution extends protection to the petitioners in this case. As the majority notes, the first and fourteenth amendments of the United States Constitution do not extend to the distribution of political literature inside a privately owned shopping mall. Maj. op. at 56 n. 1 (citing *Hudgens v. NLRB*, 424 U.S. 507, 518, 96 S.Ct. 1029, 1035–36 (1976)). The freedom of speech clauses of the Colorado Constitution protect individuals against unwarranted intrusion by the state. Because Westminster Mall is not an entity of the state nor clothed with state authority, I respectfully dissent and would affirm the judgment of the court of appeals.

I

Westminster Mall opened for business in 1977. Respondent Westminster Mall Company (mall) derives its profit from leasing space to mall stores and taking a percentage of gross sales from the stores. The common areas of the mall, including the interior corridors connecting the stores, are privately owned by the mall. Mall security is provided by a private security firm and a few Westminster police officers who patrol the mall during business hours. Since March 1987, the City of Westminster (Westminster) has operated a small police substation to respond to citizen complaints.

As part of an expansion project, the mall made various street and drainage improvements that were later paid for by Westminster with funds obtained from municipal bonds.

The mall maintains a policy prohibiting the solicitation of shoppers and the distribution of leaflets and handbills. In addition, the mall has instituted a permit procedure for noncommercial activities whereby it evaluates each application by various factors, including the kind of activity and its purpose, the number of participants, the risk of injury, and the risk of unreasonable interference with mall tenants. Under this procedure, the mall has approved certain community and charitable activities, including an antique car show, a rare breed dog show, a Jefferson County voter registration drive, a Salvation Army Christmas fund drive, a salute to law enforcement and the armed forces, and a Boy Scout pine wood derby.

In July 1985, petitioners Nelson Bock and Patricia Lawless–Avelar, members of The Pledge of Resistance, sought permission to hand out literature and solicit signatures for the following pledge:

> If the U.S. invades, bombs, sends combat troops, or otherwise significantly escalates its intervention in Nicaragua or El Salvador, I pledge to join others in nonviolent public protest at U.S. federal facilities and other appropriate places in order to prevent or halt further death and destruction in Central America.

***64** The mall denied petitioners permission to either leaflet or solicit signatures inside the mall. Petitioners filed a complaint in the Jefferson County District Court seeking declaratory and injunctive relief, alleging that they had a protected right to hand out political and public interest leaflets under the Colorado Constitution. After discovery, both parties filed cross-motions for summary judgment. The district court denied the petitioners' motion and granted the mall's motion dismissing the case with prejudice. On appeal, the court of appeals affirmed the summary judgment issued in favor of the mall. In my view, summary judgment was properly entered by the district court. Accordingly, the court of appeals should be affirmed.

II

The first two clauses of article II, section 10, of the Colorado Constitution state: "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty...." Petitioners Bock and Lawless–Avelar contend that these two clauses are independent and that the state action requirement found in the phrase, "No law shall be passed," does not carry over to the second clause. Thus, petitioners reason, the second clause applies to private behavior.

We have recently held that the purpose of article II, section 10 is to " 'guard the press *against the trammels of political power*, and secure to the whole people a full and free discussion of public affairs.' " *People v. Ford*, 773 P.2d 1059, 1066 (Colo.1989) (quoting *Cooper v. People*, 13 Colo. 337, 362, 22 P. 790, 978 (1889)) (emphasis added). The holding in *Ford* was arrived at after we specifically noted that "[o]ur constitution contains two provisions which protect the freedom of expression." *Id.* at 1065. Therefore, whether the first two clauses are read as separate or joint guarantees of freedom of speech, the requirement still exists that the state, or a private entity with a sufficiently close nexus with the state, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453–54, 42 L.Ed.2d 477 (1974), be an actor in the deprivation of these rights before liability will attach. We recognized this fact when we characterized article II, section 10 as a "limitation upon the power of state officials." *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 132 Colo. 591, 592, 296 P.2d 465, 467 (1956). [1]

Our cases have not explored the degree of involvement required to turn a private actor into a state actor for the purposes of article II, section 10. The United States Supreme Court, on the other hand, has reviewed this issue numerous times in the context of the state action requirement of the first and fourteenth amendments to the United States Constitution. [2] The Supreme Court's analysis of this issue is pertinent, thorough, and, I believe, persuasive.

***65** The Supreme Court has emphatically stated that the federal Constitution's guarantees of free speech only protect against governmental intrusion:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. See *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 [1973]. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.

Hudgens v. NLRB, 424 U.S. 507, 513, 96 S.Ct. 1029, 1033 (1976). *Hudgens* reviewed the relevant cases relating to whether a shopping center fell under the "company town exception" to the state action doctrine. The Court first recognized that there was an exception to the state action requirement in its first amendment jurisprudence in *Marsh v. Alabama*, 326 U.S. 501, 502, 66 S.Ct. 276, 277 (1946), where it defined a company town as a privately owned area having "all the characteristics of any other American town." Over the vigorous dissent of *Marsh* 's author, Justice Black, the Court in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 318, 88 S.Ct. 1601, 1608 (1968), extended the company town doctrine to a shopping center by stating that a shopping center was the "functional equivalent" of the business district of a company town. Justice Black felt that the majority had misunderstood the essential elements of a company town:

> But *Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town.... I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town."
>
> ....
>
> 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 building, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U.S., at 502, 66 S.Ct. at 277. I can find nothing in *Marsh* which indicates that if one of these features is present, *e.g.*, "a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it."
>
> ....
>
> To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.

Hudgens, 424 U.S. at 516–17, 96 S.Ct. at 1034–35 (quoting *Logan Valley*, 391 U.S. at 330–33, 88 S.Ct. at 1614–16 (Black, J., dissenting)) (footnotes and citations omitted).

The Supreme Court reached a different conclusion from that in *Logan Valley* in the later case of *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219 (1972). The facts at issue in *Lloyd* are similar to the case before this court. *Lloyd* involved an attempt, in 1968, by five persons to distribute, in a Portland, Oregon, shopping center, handbills protesting the involvement of the United States in Vietnam. Security guards asked the handbillers to leave. They complied and subsequently brought suit. The Supreme Court reversed the Ninth Circuit's affirmance of the trial court's ruling that the Constitution protected the distribution of handbills at a shopping center. After noting that "it must be remembered that the First and Fourteenth Amendments safeguard the rights of free ***66** speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only," *Lloyd*, 407 U.S. at 567, 92 S.Ct. at 2228, the Court observed:

> Respondents contend ... that the property of a large shopping center is "open to the public," serves the same purposes as a "business district" of a municipality, and therefore has been dedicated to certain types of public use. The argument is that such a center has sidewalks,

> streets, and parking area which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.
>
> The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh v. Alabama*, *supra*, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal power.

Hudgens, 424 U.S. at 519, 96 S.Ct. at 1036 (quoting *Lloyd*, 407 U.S. at 568–69, 92 S.Ct. at 2228–29). The Supreme Court explicitly stated in *Hudgens* that *Lloyd* overruled the rationale in *Logan Valley*. *Id.* at 518, 96 S.Ct. at 1035–36.

The import of the thorough and exhaustive review of cases in *Hudgens* is that, although there still exists a company-town exception to the federal free speech state action requirement, a shopping center does not come under this exception. Therefore, a shopping center is outside the safeguards framed in the first amendment. This, I believe, is the proper approach to the interpretation of the Colorado Constitution in the case before us. The Westminster Mall, as a private shopping center, is not within the ambit of article II, section 10.

III

The majority has taken a different tack to this case. Although it does not directly address whether there is a state action requirement inherent in the free speech clauses of article II, section 10, the majority analyzes the case as though one existed. Because there are varying instances of city and county involvement in the mall and its development, the majority concludes that there is sufficient state action to invoke the Colorado Constitution. While the majority, after citing the United States Supreme Court decision in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856 (1961), *see* maj. op. at 60, concludes that "the historical connection between the market place of ideas and the market for goods and services is not severed because goods and services today are bought and sold within the confines of a modern mall," *id.* at 62, it does so without fully examining the elements of the federal state action doctrine.

The fundamental issue in the Supreme Court's state action calculus is the degree of state involvement. "As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.' " *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 190–91, 109 S.Ct. 454, 461, 102 L.Ed.2d 469 (1988) (quoting *Burton*, 365 U.S. at 722, 81 S.Ct. at 860). The Court framed the issue in the following manner:

> In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action.... Thus in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

***67** *Id.* at 192–93, 109 S.Ct. at 462. *See also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, ——, 111 S.Ct. 2077, 2082 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.").

The Court found state action on the part of a private party exercising a peremptory challenge in *Edmonson v. Leesville Concrete Co.* In *Edmonson*, the Court used a two-part test to evaluate state action: "[F]irst[,] whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor." 500 U.S. at ——, 111 S.Ct. at 2082–83 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982))

(citations omitted). The first prong was satisfied because the peremptory challenges at issue in *Edmonson* were exercised pursuant to a federal statute. The second test—whether a private party could fairly be deemed a state actor—was based on three factors: "[1] the extent to which the actor relies on governmental assistance and benefits; [2] whether the actor is performing a traditional governmental function; and [3] whether the injury caused is aggravated in a unique way by the incidents of governmental authority." *Id.* at ——, 111 S.Ct. at 2083 (citations omitted). Since peremptory challenges cannot exist without the overt and significant participation of the government, the Court held that the second prong was also satisfied. *Id.* at ——, 111 S.Ct. at 2083–84.

The question before this court is not whether "governmental entities or public moneys are shown ... to subsidize, approve of, or encourage private interests." *See* maj. op. at ——. Rather, we must determine whether this subsidization, approval, or encouragement rises to a significant level, transforming the act of a private entity into that of the state. On the record before us, I believe the state has not sufficiently clothed the mall in a mantle of state authority.

While I agree with the majority that a determination of state action must be made on a case by case basis, *see* maj. op. at 60, the type of governmental involvement triggering such a determination must be narrowly construed. As the Supreme Court has said,

> although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised *coercive power* or has provided such *significant encouragement*, either overt or covert, that the choice must in law be deemed to be that of the State.

Blum v. Yaretsky, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (emphasis added). The same analysis should be used to impute state action to a private party.

In *Yaretsky*, the court of appeals held that state action was present when medical discharge decisions were made by physicians and nursing homes because New York adjusted the patient's Medicaid benefits accordingly. The Supreme Court rejected this characterization, reasoning:

> That the State responds to such actions by adjusting benefits does not render it *responsible* for those actions. The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits....

Id. Simple action by the state in accordance with the alleged constitutional violation is, therefore, insufficient to turn the actions of a private party into state actions. There must be a nexus between the coercion or encouragement taken by the state and the action that is the subject of the complaint.

The factual setting of *Burton v. Wilmington Parking Authority* is instructive in evaluating the degree of state involvement ***68** with private parties that may give rise to state action. In *Burton*, a restaurant practicing racial discrimination was located in a parking building owned and operated by a state agency. The parking authority constructed the facility, placed official signs on the building indicating its public character, and flew state and national flags from the mastheads on the roof. 365 U.S. at 718, 720, 81 S.Ct. at 858, 859. In addition, the land and building were publicly owned and the building itself was dedicated to "public uses." *Id.* at 723, 81 S.Ct. at 861. The Court thought it would be "irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen." *Id.* at 724, 81 S.Ct. at 861.

Such is not the case here. Westminster Mall was built by private funds and has never been held out as a public building. Apparently, the majority believes a private facility becomes public if it is "develop[ed] and operat[ed] in a manner such that it performs a virtual public function." Maj. op. at 60. Such a rule would impose state action based solely upon the use of a facility rather than the actions of the government. As a result, private businesses would become state actors

whenever their activities seem "public" to a court of law. This conflicts with the stricter requirement of coercive power or significant encouragement in *Yaretsky.*

Furthermore, the mall fails both prongs of the *Edmonson* test. First, there is no specific statutory authority, other than trespass laws, for the mall's refusal of petitioners' application to distribute leaflets. Second, the mall cannot fairly be described as a state actor. Even though the mall has obtained some governmental assistance in the form of street and drainage improvements and the provision of police officers to patrol the mall, there is nothing in the record to suggest that the mall relies on this assistance. More significantly, the mall neither performs a traditional governmental function nor was petitioners' injury aggravated by the incidents of state authority. Unlike the peremptory challenges at issue in *Edmonson,* the mall can exist without the overt and significant participation of government. Thus, on balance, the mall fails the second part of *Edmonson.*

At the heart of the United States Supreme Court reasoning is the long held fact that " '[i]ndividual invasion of individual rights is not the subject-matter of the [fourteenth] amendment,' ... and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." *Burton,* 365 U.S. at 722, 81 S.Ct. at 860 (quoting the *Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883)). I believe the same reasoning applies to article II, section 10 of our state constitution.

IV

The record presents no facts showing that Westminster exercised its power over the mall when the mall made its decision to reject the petitioners' permit application. There are, on the other hand, a few facts that might raise the issue of whether Westminster significantly encouraged the mall in a manner that could convert the mall into a state actor.

First, after the mall made street and drainage improvements, Westminster paid for these improvements with municipal bonds. This, however, shows a general, rather than a significant, encouragement of economic development in Westminster. It is noteworthy that these civic improvements benefitted the city as well as the mall. I would not hold that mere encouragement of private enterprise through subsidization or tax breaks turns a business into a state actor. Moreover, there is no nexus between the street and drainage projects and the mall's alleged deprivation of speech rights.

Second, Westminster has a police station in the mall and provides police officers to patrol the mall during business hours. ***69** Were these officers responsible for ejecting the petitioners from the mall, this might be deemed significant encouragement of the mall's speech policies. When the petitioners, however, requested a permit to pass out leaflets, it was the mall administration, not the Westminster police, who rejected the application. There is no evidence in the record to support a nexus between the existence of the police station and officers and the complained of abuse of free speech. The majority only notes a possibility that the mall's policies could be enforced by the Westminster officers. *See* maj. op. at 61. A mere possibility of state action, however, is insufficient to turn the mall into a state actor.

Finally, the mall allowed a Jefferson County voter registration drive. By using county action in addition to city action to reach its conclusion of state action on the part of the mall, *see* maj. op. at 62, the majority blurs the line of just what "state" is acting. Under this analysis, one could throw Colorado and federal connections into the same mix. This lack of specificity in applying the state action doctrine would create an unwarranted and undesirable expansion of the law.

Because the record is void of any evidence showing a nexus between Westminster's actions and those listed in the petitioners' complaint, the mall's actions belong to it alone as a private party and are not converted to those of the state. Accordingly, the free speech clauses of the Colorado Constitution do not reach the acts of the mall, and summary judgment in its favor was proper.

ROVIRA, C.J., and VOLLACK, J., join in this dissent.

Parallel Citations

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Footnotes

1 The court of appeals analyzed the question of petitioners' rights under both the United States and Colorado Constitutions, but we granted certiorari to address the issue only under the Colorado Constitution. The United States Supreme Court has held that the First and Fourteenth Amendments to the United States Constitution do not protect the distribution of leaflets within a privately-owned mall. *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 518, 96 S.Ct. 1029, 1035–36, 47 L.Ed.2d 196 (1976).

2 *Whitney*, where the Court affirmed defendant's conviction for violating the state's criminal syndicalism act, was one of four cases in the 1920s in which the court announced but then rejected the clear and present danger test. “Brandeis's reason for concurring rather than dissenting was that Whitney had not properly argued to the California courts that their failure to invoke the danger test was error....” Martin Shapiro, in *The First Amendment*, Leonard W. Levy, *et al.*, eds. MacMillan (1990) p. 135. *Whitney* was overruled in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

3 *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 1162, 99 L.Ed.2d 333 (1988), acknowledging that speech which is “classically political” has long been afforded the highest possible protections. *See also Texas v. Johnson*, 491 U.S. 397, 411, 109 S.Ct. 2533, 2543, 105 L.Ed.2d 342 (1989), and *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 2499, 101 L.Ed.2d 420 (1988). *See also Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424–25, 89 L.Ed. 2013 (1945) (“Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.... Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.”).

4 Here, the parties agree that the second clause is the relevant clause.

5 Following *PruneYard*, state courts have divided on the issue. Several states have held that speech activities similar to that involved here were protected by their state constitutions regardless of whether the activity may have been protected by the First Amendment. *Robins v. PruneYard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979); *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom. Princeton University v. Schmid*, 455 U.S. 100, 102 S.Ct. 867, 70 L.Ed.2d 855 (1982); *Alderwood Associates v. Washington Environmental Council*, 96 Wash.2d 230, 635 P.2d 108 (1981). *But cf. Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984); *State v. Felmet*, 273 S.E.2d 708 (N.C.1981); *Western Penn. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986); *Jacobs v. Major*, 139 Wis.2d 492, 407 N.W.2d 832 (1987). Each of the cases holding that the speech was protected under the state constitution dealt with a state constitutional provision similar in wording to Article II, Section 10. The California Constitution, at issue in *PruneYard*, provided: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right.” *PruneYard*, 23 Cal.3d at 908–09, 592 P.2d at 346, 153 Cal.Rptr. at 859. The New Jersey Constitution, at issue in *Schmid*, provided: “Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right.” *Schmid*, 84 N.J. at 556–57, 423 A.2d at 626. The Washington Constitution contained similar wording: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” *Alderwood Associates*, 96 Wash.2d at ——, 635 P.2d at 114.

6 In *Lloyd*, the Court addressed the question “as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations.” *Lloyd*, 407 U.S. at 552, 92 S.Ct. at 2221. The respondents in the case had distributed within a large shopping center handbill invitations to a meeting to protest the draft and Vietnam War. *Id.* at 556, 92 S.Ct. at 2222–23. Security guards informed the respondents they were trespassing and would be arrested unless they stopped distributing the handbills. *Id.* The Court vacated an injunction granted to respondents which permitted them to distribute the handbills within the shopping center. *Id.* at 570, 92 S.Ct. at 2229.

7 Since *PruneYard*, it is apparent that the United States Supreme Court's varied analyses of “state action” in the context of a First Amendment claim, although instructive, are not dispositive of free speech cases arising under our state constitution. 447 U.S. at 81, 100 S.Ct. at 2040–41. When a state constitution like ours is more protective of free speech than is the federal constitution, a finding of “state action” according to federal doctrine is unnecessary. In any event, Supreme Court “cases deciding when private action might be deemed that of the state have not been a model of consistency.” *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, ——, 111 S.Ct. 2077, 2089, 114 L.Ed.2d 660 (1991) (O'Connor, J., dissenting). Thus for example, Justice Marshall, concurring in *PruneYard*, found state action present in all three of the “shopping center” cases, *i.e.*, *Logan Valley*, *Lloyd*, and *Hudgens*. 447 U.S. at 90, 100 S.Ct. at 2045 (citing *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) and *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). We note that none of these cases had the governmental involvement which is present here.

8 *See Logan Valley*, 391 U.S. at 319–20, 88 S.Ct. at 1608–09 (“[T]he State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner

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and for a purpose generally consonant with the use to which the property is actually put."); *Marsh,* 326 U.S. at 509, 66 S.Ct. at 280 ("[Private ownership of property] is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. Insofar as the State has attempted to impose criminal punishment ... for undertaking to distribute religious literature in a company town, its action cannot stand.").

9 Consider *Hudgens v. NLRB,* 424 U.S. at 539–40, 96 S.Ct. at 1045–46 (Marshall, J., dissenting) ("[T]he owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the 'State' from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication. The roadways, parking lots, and walkways of the modern shopping center may be as essential for effective speech as the streets and sidewalks in the municipal or company-owned town.").

10 "[T]he First Amendment and Article II, Section 10 of the Colorado Constitution afford protection to all forms of communications, including moving picture films, which attempt to convey a thought or message to another person." *Houston v. Manerbino,* 185 Colo. 1, 6, 521 P.2d 166, 168 (1974).

1 Although In re Cannon 35 was technically the report of a referee, we specifically approved and adopted the report in its entirety. *See* 132 Colo. at 605, 296 P.2d at 473.

2 The fourteenth amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. Note that this portion of the fourteenth amendment has three clauses. The first two clauses contain the word "State" but the third, the Equal Protection Clause, does not. The federal state action doctrine developed, however, with equal protection cases. See, *e.g., Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). Thus, the state action component of the amendment carries over into a clause lacking specific words of state action. Of course, the second clause of the Colorado Constitution freedom of speech clauses begins with "every person shall" rather than the conjunction "nor" which is used in the federal Constitution to relate back to the prior clauses. Essentially, Colorado's second clause is a definition of the term "freedom of speech" as used in the first clause. It is a natural and reasonable construction, therefore, to read the second clause as a modifier of the first.

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Minnesota Statutes Annotated
Crimes, Criminals (Ch. 609-624)
Chapter 609. Criminal Code (Refs & Annos)
Damage or Trespass to Property

M.S.A. § 609.605

609.605. Trespass

Currentness

Subdivision 1. Misdemeanor. (a) The following terms have the meanings given them for purposes of this section.

(1) “Premises” means real property and any appurtenant building or structure.

(2) “Dwelling” means the building or part of a building used by an individual as a place of residence on either a full-time or a part-time basis. A dwelling may be part of a multidwelling or multipurpose building, or a manufactured home as defined in section 168.002, subdivision 16.

(3) “Construction site” means the site of the construction, alteration, painting, or repair of a building or structure.

(4) “Owner or lawful possessor,” as used in paragraph (b), clause (9), means the person on whose behalf a building or dwelling is being constructed, altered, painted, or repaired and the general contractor or subcontractor engaged in that work.

(5) “Posted,” as used:

(i) in paragraph (b), clause (4), means the placement of a sign at least 8- ½ inches by 11 inches in a conspicuous place on the exterior of the building, or in a conspicuous place within the property on which the building is located. The sign must carry a general notice warning against trespass;

(ii) in paragraph (b), clause (9), means the placement of a sign at least 8- ½ inches by 11 inches in a conspicuous place on the exterior of the building that is under construction, alteration, or repair, or in a conspicuous place within the area being protected. If the area being protected is less than three acres, one additional sign must be conspicuously placed within that area. If the area being protected is three acres but less than ten acres, two additional signs must be conspicuously placed within that area. For each additional full ten acres of area being protected beyond the first ten acres of area, two additional signs must be conspicuously placed within the area being protected. The sign must carry a general notice warning against trespass; and

(iii) in paragraph (b), clause (10), means the placement of signs that:

(A) carry a general notice warning against trespass;

(B) display letters at least two inches high;

(C) state that Minnesota law prohibits trespassing on the property; and

(D) are posted in a conspicuous place and at intervals of 500 feet or less.

(6) “Business licensee,” as used in paragraph (b), clause (9), includes a representative of a building trades labor or management organization.

(7) “Building” has the meaning given in section 609.581, subdivision 2.

(b) A person is guilty of a misdemeanor if the person intentionally:

(1) permits domestic animals or fowls under the actor's control to go on the land of another within a city;

(2) interferes unlawfully with a monument, sign, or pointer erected or marked to designate a point of a boundary, line or a political subdivision, or of a tract of land;

(3) trespasses on the premises of another and, without claim of right, refuses to depart from the premises on demand of the lawful possessor;

(4) occupies or enters the dwelling or locked or posted building of another, without claim of right or consent of the owner or the consent of one who has the right to give consent, except in an emergency situation;

(5) enters the premises of another with intent to take or injure any fruit, fruit trees, or vegetables growing on the premises, without the permission of the owner or occupant;

(6) enters or is found on the premises of a public or private cemetery without authorization during hours the cemetery is posted as closed to the public;

(7) returns to the property of another with the intent to abuse, disturb, or cause distress in or threaten another, after being told to leave the property and not to return, if the actor is without claim of right to the property or consent of one with authority to consent;

(8) returns to the property of another within one year after being told to leave the property and not to return, if the actor is without claim of right to the property or consent of one with authority to consent;

(9) enters the locked or posted construction site of another without the consent of the owner or lawful possessor, unless the person is a business licensee;

(10) enters the locked or posted aggregate mining site of another without the consent of the owner or lawful possessor, unless the person is a business licensee; or

(11) crosses into or enters any public or private area lawfully cordoned off by or at the direction of a peace officer engaged in the performance of official duties. As used in this clause: (i) an area may be "cordoned off" through the use of tape, barriers, or other means conspicuously placed and identifying the area as being restricted by a peace officer and identifying the responsible authority; and (ii) "peace officer" has the meaning given in section 626.84, subdivision 1. It is an affirmative defense to a charge under this clause that a peace officer permitted entry into the restricted area.

Subd. 2. Gross misdemeanor. Whoever trespasses upon the grounds of a facility providing emergency shelter services for battered women, as defined under section 611A.31, subdivision 3, or of a facility providing transitional housing for battered women and their children, without claim of right or consent of one who has right to give consent, and refuses to depart from the grounds of the facility on demand of one who has right to give consent, is guilty of a gross misdemeanor.

Subd. 3. Repealed by Laws 1993, c. 326, art. 2, § 34.

Subd. 4. Trespasses on school property. (a) It is a misdemeanor for a person to enter or be found in a public or nonpublic elementary, middle, or secondary school building unless the person:

(1) is an enrolled student in, a parent or guardian of an enrolled student in, or an employee of the school or school district;

(2) has permission or an invitation from a school official to be in the building;

(3) is attending a school event, class, or meeting to which the person, the public, or a student's family is invited; or

(4) has reported the person's presence in the school building in the manner required for visitors to the school.

(b) It is a misdemeanor for a person to be on the roof of a public or nonpublic elementary, middle, or secondary school building unless the person has permission from a school official to be on the roof of the building.

(c) It is a gross misdemeanor for a group of three or more persons to enter or be found in a public or nonpublic elementary, middle, or secondary school building unless one of the persons:

(1) is an enrolled student in, a parent or guardian of an enrolled student in, or an employee of the school or school district;

(2) has permission or an invitation from a school official to be in the building;

(3) is attending a school event, class, or meeting to which the person, the public, or a student's family is invited; or

(4) has reported the person's presence in the school building in the manner required for visitors to the school.

(d) It is a misdemeanor for a person to enter or be found on school property within one year after being told by the school principal or the principal's designee to leave the property and not to return, unless the principal or the principal's designee has given the person permission to return to the property. As used in this paragraph, “school property” has the meaning given in section 152.01, subdivision 14a, clauses (1) and (3).

(e) A school principal or a school employee designated by the school principal to maintain order on school property, who has reasonable cause to believe that a person is violating this subdivision may detain the person in a reasonable manner for a reasonable period of time pending the arrival of a peace officer. A school principal or designated school employee is not civilly or criminally liable for any action authorized under this paragraph if the person's action is based on reasonable cause.

(f) A peace officer may arrest a person without a warrant if the officer has probable cause to believe the person violated this subdivision within the preceding four hours. The arrest may be made even though the violation did not occur in the peace officer's presence.

Subd. 5. Certain trespass on agricultural land. (a) A person is guilty of a gross misdemeanor if the person enters the posted premises of another on which cattle, bison, sheep, goats, swine, horses, poultry, farmed cervidae, farmed ratitae, aquaculture stock, or other species of domestic animals for commercial production are kept, without the consent of the owner or lawful occupant of the land.

(b) “Domestic animal,” for purposes of this section, has the meaning given in section 609.599.

(c) “Posted,” as used in paragraph (a), means the placement of a sign at least 11 inches square in a conspicuous place at each roadway entry to the premises. The sign must provide notice of a biosecurity area and wording such as: “Biosecurity measures are in force. No entrance beyond this point without authorization.” The sign may also contain a telephone number or a location for obtaining such authorization.

(d) The provisions of this subdivision do not apply to employees or agents of the state or county when serving in a regulatory capacity and conducting an inspection on posted premises where domestic animals are kept.

Credits

Laws 1963, c. 753. Amended by Laws 1971, c. 23, § 61, eff. March 5, 1971; Laws 1973, c. 123, art. 5, § 7; Laws 1976, c. 251, § 1; Laws 1978, c. 512, § 1; Laws 1981, c. 365, § 9; Laws 1982, c. 408, § 2; Laws 1985, c. 159, § 2, eff. Aug. 1, 1985; Laws 1986, c. 444; Laws 1987, c. 307, § 3, eff. Aug. 1, 1987; Laws 1989, c. 5, § 9, eff. Aug. 1, 1989; Laws 1989, c. 261, § 5, eff. Aug. 1, 1989; Laws 1990, c. 426, art. 1, § 54; Laws 1993, c. 326, art. 1, § 14; Laws 1993, c. 326, art. 2, § 13; Laws 1993, c. 326, art. 4, § 32; Laws 1993, c. 366, § 13; Laws 1994, c. 465, art. 1, § 60; Laws 1995, c. 226, art. 3, § 48; Laws 2004, c. 254, § 46; Laws 2005, c. 136, art. 17, §§ 41, 42; Laws 2009, c. 59, art. 5, § 15, eff. Aug. 1, 2009; Laws 2009, c. 123, § 14, eff. Aug. 1, 2009.

Editors' Notes

RULES OF CRIMINAL PROCEDURE

<Section 480.059, subd. 7, provides in part that statutes which relate to substantive criminal law found in chapter 609, except for sections 609.115 and 609.145, remain in full force and effect notwithstanding the Rules of Criminal Procedure.>

ADVISORY COMMITTEE COMMENT [1963]

This section deals with acts which do not raise questions of risk to person or other property. Compare the preceding section.

Clause (1) will supersede Minn.St. § 621.42, relating to buildings, and § 615.12, relating to common carriers. The portion of § 615.12 relating to profanity and quarreling will be covered by the disorderly conduct provision, § 609.72.

Sections relating to smoking appearing outside of the criminal code and not affected are: Minn.St. § 76.48, Subd. 6, regulating smoking in dry cleaning establishments; Minn.St. § 88.22, authorizing Commissioner of Conservation to prohibit smoking in forests to prevent fires; and Minn.St. § 296.22, Subd. 5, which prohibits smoking while a motor vehicle is being supplied with fuel.

Clause (2) will supersede Minn.St. §§ 621.30 and 621.31 which contain similar provisions.

Clause (3) will supersede Minn.St. §§ 561.05 and 561.06, to similar effect.

Clause (4) will supersede Minn.St. § 621.28, (4), to similar effect.

Clause (5) will supersede Minn.St. §§ 621.57 and 621.35. The phrase “without claim of right” in the recommended clause is intended only to covered bona fide claims of right. A false claim would not be a claim at all.

Hunting statutes involving trespass, such as Minn.St. § 100.273, will not be affected by any of the provisions of the recommended section. Also not affected will be Minn.St. §§ 88.20, relating to the duties of railroads with respect to fires, and 90.07, relating to cutting timber and other trespasses to public lands.

Clause (6) will supersede Minn.St. § 621.25, (5), to the same effect.

Clause (7) will supersede a portion of Minn.St. § 615.12, to the same effect.

Clause (8) will supersede the balance of Minn.St. § 615.12, to the same effect.

Clause (9), the first portion, covers like provisions in Minn.St. § 168.47 of the traffic code. The other provisions of that section are considered in the comment to recommended § 609.55.

The latter portion of Clause (9) beginning "rides in or upon ..." is new. It is intended to cover the case where "A" using a car without the permission of the owner invites "B" to ride with him. "B" knows that "A" has no authority to use the car. To ride in the car with this knowledge, it is believed, should be made a misdemeanor. There is a question whether a case of this kind would presently come within the provisions of Minn.St. § 168.49. If it does, the act would constitute a felony, a consequence believed too harsh. See comment to § 609.55.

<Sections Outside the Criminal Law Relating to Criminal Damage or Trespass to Property and Not Affected by the Revision:>

§ 160.27:

This relates to obstruction or damage to highways, road equipment, signs, markers, etc., and appears in the general provisions on roads.

§ 235.12:

This relates to breaking and entering of cars loaded with grain, subject to state inspection.

§ 235.13:

This makes violation of any provision of Chapters 216 to 235 a gross misdemeanor. Those provisions cover 130 pages in the General Statutes. There is a question as to the validity of such an all encompassing criminal provision. Since it is not in the criminal code, the Advisory Committee has not given it further consideration.

COMMENT BY MAYNARD E. PIRSIG [1963]

The words "was taken and" in clause (9) were added prior to submission to the legislature in order to make the clause consistent with the requirement of a taking in § 609.55, subdivision 2.

Notes of Decisions (40)

M. S. A. § 609.605, MN ST § 609.605
Current through the end of the 2012 First Special Session

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Minnesota Statutes Annotated
Constitution of the State of Minnesota (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

M.S.A. Const. Art. 1, § 3

§ 3. Liberty of the press

Currentness

Sec. 3. The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

Editors' Notes

CONSTITUTION OF 1857 AS AMENDED

For prior provisions relating to the same subject matter, see relevant sections of Constitution of 1857, as set forth beginning on page 241 of volume 1 of Minnesota Statutes Annotated.

Notes of Decisions (151)

M. S. A. Const. Art. 1, § 3, MN CONST Art. 1, § 3
Current through the end of the 2012 First Special Session

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