ATTENTION, SHOPPERS: THE FIRST AMENDMENT IN THE MODERN SHOPPING MALL

Mark C. Alexander*

The modern American shopping mall has grown into a central institution of ever-expanding importance in our lives. The mall is a vibrant and dynamic place, offering a seemingly endless variety of activities for all who come. We shop, eat, play, and virtually live there. The modern mall has replaced the downtown of yesteryear. However, with the growth of malls we have seen a reduction in the amount of public debate, as mall owners have shut their doors to those who wish to express themselves. As a result, the millions of Americans who go to malls every day are kept in the dark as to the pressing matters of the day. This state of affairs flies in the face of the core value of the First Amendment—robust public debate.

Unfortunately, the United States Supreme Court has held that there is no constitutional right to engage in expressive activity in privately owned shopping malls. While the Court has recognized the individual states' right to extend to their citizens greater protections under the state constitution, only a few have done so in this area. Many instead have turned a cold shoulder to those seeking to express themselves.

In this context, the promise of American democracy is being thwarted. Given the tremendous development of the modern American mall in recent years, three major changes would help fulfill the promise of the First Amendment in this area. First, the United States Supreme Court should reconsider its approach to the First Amendment. Toward that end, in these pages I suggest a new theory of the First Amendment, one which exalts the value of the collective democracy run by informed individuals through their individual words and collective voice. Second, the Court should reexamine its decades-old precedent in this area in light of the facts today. Even under the Court's First Amendment framework, with the new facts, the result would change, and malls would be opened for expressive activity. Third, the states should stand up

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* Associate Professor, Seton Hall University School of Law. B.A. 1986, J.D. 1992, Yale University. First and foremost, I thank Owen Fiss who has inspired, cajoled, and critiqued me and my work patiently and tirelessly. Many thanks also go to Michelle Adams, Amy Alexander, Frank Askin, Charles Sullivan, Peter Watson, and John Wefing. I sincerely appreciate the research assistance I have received from Priscilla Kugel, Merric Polloway, and Dena Reger.

and be counted on the side of open expression and debate. The United States Supreme Court has opened the door, and the states should step forward and be counted.

Part I sets the stage with an exploration of the growth and development of the modern mall. Next, Part II examines the central meaning of the First Amendment and presents my proposal for a new approach to its interpretation. In Part III, I will review the case law in this area, both from the U.S. Supreme Court and various state high courts. Finally, Part IV will demonstrate why expressive activity should be protected in privately owned shopping malls. Thus, we will see how malls have changed, explore the meaning of the First Amendment, consider a new theory of interpretation, review current case law, and conclude that expressive activity in malls is central to our democracy and must be protected.

I. THE MODERN AMERICAN MALL

The modern American mall is a complex place where people are invited to do far more than just purchase goods. The malls offer large department stores and specialty stores, food courts, non-retail services, special events, and government services.

A prototypical mall might be envisioned as follows. The mall itself covers one hundred acres, surrounded by a perimeter road that runs for miles. There are thousands of parking spots to accommodate the nearly 40,000 daily visitors, with perhaps double that number on a Saturday. The mall is anchored by several major department stores, perhaps Macy's, Nordstrom's, Sears, and Bloomingdale's. Once inside, shoppers are confronted with an additional 150–200 stores, selling pet food, casual clothes, sneakers, and more. Should the choices become overwhelming, the patrons can take a break and relax in the food court that offers dozens of options, from teriyaki to tacos, pizza to pitas. While in the mall, the shoppers might choose to get new eyeglasses, have a roll of film developed, or plan a summer vacation. A family can split up, with the parents going to the health club for a workout while the children hit the video arcade. After that, they can look at the latest cars from Detroit, register to vote, and get a quick cholesterol check, all under the watchful eye of the local police department. After stopping by the bank for more money and the post office to buy stamps, our visitors might stop by the dry cleaners and visit with the children's scouting troop. Hours have passed, and the prototypical mall has been the focal point of the day.

Countless Americans practically live their lives in the modern mall.[1] They not only purchase goods, but they also lounge, eat, perhaps see a movie, work out, or more. The visitors spend time doing a wide variety of activities, above and beyond simply shopping. The visitors do not run through the mall; they linger, shop, hang out, and enjoy life.[2] But the life in the mall is controlled by the mall management. So the

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1. As the New Jersey Supreme Court observed in 1994, "malls are where the people can be found today." New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d. 757, 767 (N.J. 1994).

2. This transformation coincides with the diminishment of downtown areas and shopping districts. *See generally id.* (observing, *inter alia*, "[t]he economic lifeblood once found downtown has moved to suburban shopping centers, which have substantially displaced

visitors live their lives, but they are never exposed to people, activities, or ideas that are not pre-approved by the management. They are not exposed to the individual protesting governmental policies, to a union organizer protesting a non-union store, or to third-party candidates seeking enough signatures to get on the ballot. They do not engage in any discourse of whether the country should pursue certain policies abroad. They are kept in the dark, oblivious to current events and removed from the robust public debate that is essential to the proper functioning of our democracy.

The transformation of the mall into this particular American institution has been occurring most dramatically in recent years. In the late 1960s and the 1970s, the shopping mall had already developed into a significant American institution, but in the intervening decades, malls like the Mall of America in Minnesota, the Sawgrass Mills mall in Florida and many others have literally and figuratively redefined the American landscape.

A factual description of modern malls follows, drawn from case law, trade organizations, news accounts, a survey conducted specifically for purposes of this Article,[3] and literature from the malls themselves. The picture that develops is one of a central, essential American structure, where people conduct their daily lives and should be allowed to speak or listen to the debate and discussion of the day. At the end of this Part we will see a prototypical American mall, reflecting the attributes of the modern mall, drawn from numerous actual examples.

A. Growth and Development of Malls

Writing for the Court in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.* in 1968, Justice Marshall observed:

> The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The largescale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by

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the downtown business districts as the centers of commercial and social activity").

3. It is not a scientific survey, but instead simply provides a glimpse of what today's mall looks like and represents in terms of its social impact on speech rights in American life. The survey was distributed during September and October of 1997 to the one hundred largest malls in America (in terms of square feet), as designated by the International Council of Shopping Centers, 665 Fifth Avenue, New York, NY 10022-5370. Twenty-eight malls completed the majority of the survey [hereinafter Mall Survey].

The Mall Survey contained questions about the major aspects of mall life. In terms of physical configurations, it inquired as to the total leasable area, the number of cars that park at the mall on a daily basis, and the number of stores. Economically, the Mall Survey inquired into the volume of retail sales for five consecutive years. The Mall Survey also looked at the people in malls, inquiring as to the number of shoppers and employees found in malls. Further, it asked about the types of activities that occurred, both retail and non-retail, and special events and activities involving civic groups, special interest groups, and political groups. The Mall Survey is on file with author.

> the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada....[4]

In the thirty years that have followed, much has changed, but Justice Marshall's words are powerful today.[5] Justice Marshall discussed the changing landscape of the late 1960s. At the end of 1994, the New Jersey Supreme Court described the continuing change:

> 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. By 1967, 105 of the larger regional and super-regional malls existed. This number increased to 199 in 1972 and to 333 in 1978. By 1992, the number expanded to at least 1,835. Thus, from 1972 to 1992 the number of regional and super-regional malls in the nation increased by roughly 800%.[6]

Today, privately owned shopping centers number well over 40,000.[7] In a typical month, 185 million adults over the age of 18 visit a shopping mall in the United

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4. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324 (1968).

5. The tremendous development of the mall may be seen as part of a larger pattern of the last half-century. In the decades following World War II, the suburbanization of America arrived in full force. In the 1960s and 1970s the shopping mall grew into a significant American institution. *See* JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER 4 (1991):

> First, we moved our homes out past the traditional idea of what constituted a city. This was the suburbanization of America, especially after World War II.
>
> Then we wearied of returning downtown for the necessities of life, so we moved our marketplaces out to where we lived. This was the malling of America, especially in the 1960s and 1970s.

These demographic and societal trends are also reflected in popular culture:

> I went back to Ohio,
> But my city was gone.
> There was no train station;
> There was no downtown.
> ....
> I went back to Ohio,
> But my pretty countryside
> Had been paved down the middle,
> By a government that had no pride.
> The farms of Ohio
> Had been replaced by shopping malls.
> And Muzak filled the air,
> From Seneca to Cuyahoga Falls

THE PRETENDERS, *My City Was Gone*, *on* LEARNING TO CRAWL (Sire Records, 1983).

6. New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 766 (N.J. 1994) (citations omitted).

7. *See* International Council of Shopping Centers ("ICSC 1995–1996 Report"), *The Scope of the Shopping Center Industry in the United States*, 1995–1996 (1996). This stands in stark contrast with the 10,000–11,000 Justice Marshall discussed thirty years ago in *Logan Valley*.

States.[8] The growth and development of the mall has been staggering, transforming the American landscape.

B. The Modern American Mall

While it is incontrovertible that malls have grown dramatically in the last few decades, the numbers are only a small part of the picture. More importantly, we must ask how the mall has changed—not just how many people come and how large the malls are, but what people do in the mall, what variety of stores exists, and what other activities take place. The information that we will examine now paints a detailed picture of the mall as a thriving institution that is at the heart of America today, where people live a significant portion of their lives.

The survey conducted for this Article represents a small percentage of the total number of the nation's 1897 malls;[9] it looks at some of the largest malls in the United States, ranging in size from 275,000 square feet to 2.1 million square feet.[10] On average, 37,190 shoppers roam through the 208 stores in each of these malls every day.[11] These malls are on the leading edge in the development of malls today and into the twenty-first century.

The largest modern malls, which shall be our focus, fall into two categories. The first is the "super-regional center," defined as one which

> provides for an extensive variety of general merchandise. It is built around three or more major department stores. In theory, a super regional center has a GLA [gross leasable area] of 750,000 square feet and in practice ranges upwards of 1,000,000 square feet. The major department stores generally have a square footage of 100,000 square feet each.[12]

The second category is the "regional center," which is characterized as a mall 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 [gross leasable area] 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 [gross leasable area] of 400,000 square feet, and can range from 300,000 to more than 1,000,000 square feet.[13]

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8. *Id.* This number represents 94% of the population. In 1994, the New Jersey Supreme Court wrote that "70% of the national adult population shop at regional malls and do so an average of 3.9 time per month." *J.M.B. Realty Corp.*, 650 A.2d at 767.

9. ICSC 1995–1996 Report, *supra* note 7.

10. Mall Survey, *supra* note 3.

11. Twenty-three malls reported daily customer counts. *Id.*

12. NATIONAL RESEARCH BUREAU, SHOPPING CENTER DIRECTORY 1996, EASTERN VOLUME (36th ed. 1996).

13. New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 763 (N.J. 1994) (citing NATIONAL RESEARCH BUREAU, *supra* note 12).

In terms of geographical size, the malls responding to the survey range from 39 to 165 acres, combining to cover 2488 acres.[14] The total leasable retail space of these malls averages 1.38 million square feet of gross leasable space for 105 to 330 tenants.[15] As the definitions above note, the major department stores serve as anchors in malls. In addition, scores of individual stores fill in much of the remaining space. However, mall tenants include many non-retail enterprises as well. The seemingly endless range of services offered by the non-retail establishments includes restaurants, movie theaters, automotive repair centers, photo stores, optical stores, hearing aid centers, shoe repair, dry cleaners, tailors, tax preparers, financial planners, banks, fitness centers, computer services, travel agencies, amusement centers, university clubs, hotels, ice rinks and health care services provided by local hospitals.[16] Some of the more unusual services available at malls include a 3,400 square foot Franciscan chapel, an alternative public high school, and a Ford-Hyundai car dealership.[17] A mall in Nevada will soon offer its patrons casino gambling as part of their shopping experience.[18] Modern malls are offering more and more non-retail, entertainment establishments.

In addition to such non-retail fixtures, the malls offer an ever-expanding calendar of special events. Beyond the usual retail-oriented fashion shows, there are community health fairs, maternity fairs, children's events, senior and retirement shows, art exhibitions, craft shows, antique shows, home and garden shows, sport card shows, car shows, boat shows, and gun shows.[19] Other special events include appearances by sports celebrities and authors, and promotional events sponsored by Disney and magazines such as *Golf Digest* and *Better Homes and Gardens*.[20] Today's malls provide a variety of family activities including the circus, a baseball game, hot air balloon races, and beauty pageants.[21] Even trick-or-treating takes place at the mall; every Halloween, 10,000 children trick or treat at the Walden Galleria in Buffalo, New York.[22]

In addition to these non-retail activities, the malls that responded to the survey also welcome all kinds of community groups including the United Way, Girl Scouts, Boy Scouts, Junior League, Hadassah, Kiwanis, Rotary, Red Cross, Lions Club, American Cancer Association, Knights of Columbus, and the Salvation Army.[23] More than half of the responding malls sponsor voter registration on premises.[24] A

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14. *See* Mall Survey, *supra* note 3.
15. *Id.*
16. *Id.*
17. Tim Landis, *Shopping Malls Taking a New Approach to Attract Customers*, STATE J. REG. (Springfield, Ill.), Jan. 2, 1997, at 7.
18. Marc Gleisser, *Forest City Putting Casino, Hotel Next to Nevada Mall*, PLAIN DEALER (Cleveland), Feb. 22, 1997, at 2C.
19. *See* Mall Survey, *supra* note 3.
20. *Id.*
21. *Id.*
22. *Id. See also* New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 764 (N.J. 1994) (examining malls that "sponsor[] other events that include[] political speech or concerned issues of civic importance").
23. *See* Mall Survey, *supra* note 3.
24. *See id. See also J.M.B. Realty Corp.*, 650 A.2d at 764 (mall "allowed a voter

number of them also allow free tax assistance offered to shoppers during tax season.[25] Municipal merchants' associations are frequently allowed to sponsor events as well.[26]

Further, today's malls allow a number of activities that involve local and federal governmental agencies and in many instances report that these agencies are actually on-site. Of the twenty-eight malls responding to the survey, over half stated that the local/municipal police are located on-site, in stations or sub-stations.[27] The United States Postal Service can be found at 40% of these malls as well.[28] Other governmental services available at the mall include job placement assistance by the state Department of Labor and express service from the state Division of Motor Vehicles.[29] Actual governmental offices lease locations at a number of malls, including those of a city treasurer, a state auditor, and a U.S. Congressional representative.[30]

The changes in American society have been dramatic. Tens of thousands of people visit the modern mall every day. They spend their money on all types of goods, services, food, and entertainment. They spend their time in a wide variety of activities. However, they are sheltered from the real world and the discussion of the issues of the day. Why does this matter? Because our democracy requires that we all be exposed to ideas and participate in the debate that defines our nation.

II. THE CENTRAL MEANING OF THE FIRST AMENDMENT

We now know what the modern American mall looks like, but we do not yet know how it promotes the free speech values embodied by the First Amendment. Before we examine the shopping mall speech issue in light of these modern malls under the U.S. Constitution, we first must consider the core principles of the First Amendment. We then can more readily understand the role of the mall in the fulfillment of the goals of the First Amendment. I suggest that the First Amendment is designed to promote our participatory democracy and to protect and enhance the ability of the people to participate in the debate and discussion of the issues of the day. Such a goal requires that individuals be provided opportunities to speak, occasionally allows that some individuals be given assistance in speaking, and may at times mandate that dominant voices be momentarily quieted to ensure that others may be heard.

Over time, the Court and commentators have struggled to define the meaning of the First Amendment, with widely divergent results. Every Justice and scholar seems to find new meaning and perspective. For example, there is the absolutist position, most notably championed by Justice Black. This position held firm to the notion that the First Amendment provided absolute protection of expressive activity from regulation by the government. The First Amendment provides that "Congress

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registration drive to be conducted by the League of Women Voters...").

25. *See* Mall Survey, *supra* note 3.
26. *Id.*
27. *See id.*
28. *Id.*
29. *Id.*
30. *Id.*

shall make no law...abridging the freedom of speech."[31] As interpreted by an absolutist, that means quite simply that no laws may be made that restrict speech. This theory never carried the day in the Court;[32] instead it was relegated to Justice Black's dissenting and concurring opinions.[33] Today the Court seems to have settled on an analysis that revolves around questions of content-neutrality. To this effect, government regulations that are content-based are presumptively invalid, while those that are content-neutral are not.[34] When the government seeks to regulate speech in a content-neutral fashion, the Court imposes a heavy burden upon the government by forcing it to pass strict scrutiny.[35] While strict scrutiny analysis is generally familiar, many questions remain.[36]

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31. U.S. CONST. amend. I.

32. "[T]he absolute view has not prevailed within the Court." William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 5 (1965). *See generally* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 246–51 (discussing Justice Black's absolutist position and Justice Harlan's rejection of it).

33. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring); Barenblatt v. United States, 360 U.S. 109, 133 (1959) (Black, J., dissenting). *See generally* WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT CASES AND MATERIALS 8 n.18 (2d ed. 1995) (providing Justice Black's opinions and secondary sources explaining his absolutist position).

34. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."). *See also* Turner Broadcasting System v. Federal Communications Comm'n., 512 U.S. 622, 641 (1994) ("[T]he First Amendment...does not countenance governmental control over the content of messages expressed by private individuals.... In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 763 (1994).

35. Despite the name "strict scrutiny," this level of scrutiny has been lowered at times with respect to speech regulation. For example, in *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989), the Court announced that it would not impose a heavy burden on the government to show that its regulation of expressive conduct occurred in the least intrusive of means with respect to speech. The Court stated:

> Lest any confusion on the point remain, we reaffirm today that a regulation of time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the...regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

Id. (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

36. In addition to occasionally lowering its level of "strict scrutiny," the Court has sometimes allowed forms of content-based speech regulation. For example, *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47–49 (1986), upheld a local ordinance that imposed harsher restrictions on the locations of adult movie theaters than other businesses. The majority set the foundation for its decision by stating that the regulation did not "fit neatly into either the 'content-based' or the 'content-neutral' category." *Id.* at 47. The Court then declared that the regulation was constitutional because it targeted the secondary effects of the adult movie theaters, and not the movies or their content. *Id.* at 48–49. In justifying speech regulation of this kind by creating an "effect" analysis of the regulated speech, the Court has increased the

A. Working Toward the Meaning of the First Amendment

The Court's analytical framework provides a mechanism for analysis but does not clearly articulate the core values espoused by the First Amendment. While the Justices and countless scholars have suggested theories, there is no clearly accepted or dominant "answer" as to the proper meaning of the First Amendment.[37] The recent debate in the academy has more clearly concerned whether the goals and values served by the First Amendment are those of individual expression or the enhancement of collective democratic self-governance.[38] One school of thought suggests that the First Amendment is designed primarily to ensure that the individual is free to speak without interference from the state.[39] The leading competing theory posits that the First Amendment instead promotes and preserves values of collective self-governance and democracy.[40] I shall now discuss these arguments in greater depth.

1. Individual Expression/Autonomy

To many, the First Amendment is seen as a shield that can protect the individual who seeks to speak from interference by the state.[41] The individual's need and basic human right of expression and self-development necessitate First Amendment protection under this individual expression, or liberty, model.[42] Professor C. Edwin Baker has written:

> The liberty model holds that the free speech clause protects not a marketplace but rather an arena of individual liberty from certain types of governmental restrictions. Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. The liberty theory justifies protection because of the way

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likelihood that a governmental regulation will pass constitutional muster and that expressive activity will be squelched. *See id.*

37. *See, e.g.*, Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999, 1009–10 (1994). ("This brief review of first amendment scholarship demonstrates that the Free Speech Clause has enjoyed no single authoritative interpretation.... Thus, the scholarly understanding of the freedom of speech yields no clear counsel.").

38. *See* DONALD E. LIVELY ET AL., FIRST AMENDMENT ANTHOLOGY (1994).

39. *See infra* notes 41–51 and accompanying text.

40. *See infra* notes 52–69 and accompanying text.

41. In different ways, the First Amendment protects many different forms of speech, and in this context, "speak" can have various meanings, including, but not limited to, "pure" speech.

42. This theory could be described and labeled in various other ways, such as individual autonomy, self-realization, self-actualization, or self-fulfillment. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) ("The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being.").

> the protected conduct fosters individual self-realization and self-determination....[43]

Because of the inherent value of self-expression to an individual, the state must be forbidden from interfering with the individual's speech. Accordingly, the First Amendment protects the individual from attempts by the state to control expressive activity, thereby preserving the ultimate integrity of humankind.

According to those who espouse the liberty model of the First Amendment, our Constitution's guarantee of free speech exists to ensure the capacity of individuals to realize their own selfhood, to locate the meaning within their own lives by making their own decisions, and to fashion their social world through their own ideas. As Jeffrie G. Murphy explains, at the core of this theory lies a justification that freedom of speech is a necessary aspect of our humanity, "not...because it leads to useful social or political consequences, but because it shows respect for...[these] most precious and important things about us as human beings...."[44] This theory does not merely justify the need for freedom of speech from a speaker's perspective (with its stress on the importance of self-expression); it also explains that the assurance of free speech provides an essential comfort to a listener as well. Murphy, for example, emphasizes that it would be "an insult to the humanity of a mature adult that others (particularly the state) should presume to determine for him what expressions he will hear or see in forming his own conception of what is worthy in his life."[45]

In addition, a theory of freedom of speech that focuses on the individual may be consistent with the earliest and foremost principles of American society, even those that pre-date the First Amendment itself. As one commentator observed, the Declaration of Independence implicitly recognized the "worth of the individual and the need for each individual to seek fulfillment and happiness in his own way,"[46] thus setting a general foundation for the First Amendment's subsequent specific protection of the individual's freedom to express himself and reach his maximum potential.[47]

Others argue that the theory of individual self-expression as the meaning for the First Amendment is compelled by a full understanding of the Bill of Rights. "[T]he rights of free religious exercise, freedom from unreasonable searches, the right against self-incrimination, and the Sixth, Seventh, and Eighth Amendment are individual-specific rights,"[48] begging the inference that freedom of speech must primarily be understood in terms of the individual rather than the collective, societal good. Starting with this theory of the probable intentions of the Framers (as a current justification for the liberty model) can also lead to a revised understanding of the liberty model itself that explains both why speech must be protected and why it may be sometimes

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43. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 966 (1978).

44. Jeffrie G. Murphy, *Freedom of Expression and the Arts*, 29 ARIZ. ST. L.J. 549, 556 (1997).

45. *Id.* at 557.

46. Michael S. Van Dyke, Comment, *Regulation of Pornography: Is Erotica Self-Expression Deserving of Protection?*, 33 LOY. L. REV. 445, 465 & n.131 (1987).

47. *See id.*

48. O. Lee Reed, *A Free Speech Metavalue for the Next Millennium: Autonomy of Consciousness in First Amendment Theory and Practice*, 35 AM. BUS. L.J. 1, 10 (1997).

regulated. "The right of autonomy underlying the value of free speech suggests both when speech is protected and when it can be suppressed. [Speech] is protected from government attempts to manipulate the expressive content of what citizens may be exposed to, [but] it can be suppressed when speech harms or infringes on the autonomy of others."[49]

The liberty model thus attempts to justify the individual as the focus of the Constitution's free speech guarantee, either by explaining the inherent necessity of free speech to humanity or by referring to implied intentions of the Framers.[50] There is no doubt that the Bill of Rights was drafted and ultimately ratified at least in significant part to safeguard individual liberties from the potential excesses of a tyrannical state, and individual expression does ultimately empower the individual and uplift the spirit. Still, it is uncertain whether we should read the First Amendment so narrowly as to protect simply the individual's right of expression, or (even more broadly) to ensure the individual's self-fulfillment.[51]

2. The Democracy Theory

While there is merit to the individual autonomy position, there is an argument that is more persuasive. The primary competing theory of the First

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49. *Id.* at 11.

50. This perspective has also been voiced in U.S. Supreme Court opinions. For example, Chief Justice Burger once observed: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)). The Court further held that "it is the purpose of the First Amendment to our Constitution to reserve from all official control" this individual realm of spirit and intellect. *Id.* at 715. *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Justice Powell also expressed similar concerns in his concurrence in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), as he sided with property owners. He was concerned that if speech activity is allowed in shopping malls, then shoppers would assume that the mall or store owners subscribed to those beliefs. "In short," Powell argued, the owner "has lost his control over his freedom to speak or not to speak on certain issues." *PruneYard*, 447 U.S. at 99 (Powell, J., concurring in part and in judgment). Professor Owen Fiss has analyzed this aspect of *PruneYard* in stark terms:

> The autonomy of the mall owners will be compromised, Justice Powell argued, because there is a risk that views of the political activists will be attributed to them. Faced with the fact that the activists gained access by force of law and under conditions that provide access to all, and that, in any event, the owners could protect against the risk of attribution by posting signs disclaiming any support for the views espoused, Justice Powell moved his search for autonomy to an even more absurd level. He insisted that being forced to post a disclaimer might itself be a violation of the autonomy guaranteed by the First Amendment.

OWEN FISS, LIBERALISM DIVIDED 27–28 (1996).

51. Even those who do not subscribe entirely to the individual expression theory recognize that there is some power to its argument. For example, Professor Alexander Meiklejohn wrote that the freedom protected by the First Amendment "implies and requires what we call 'the dignity of the individual.'" Meiklejohn, *supra* note 32, at 255.

Amendment—the democracy theory—essentially suggests that the First Amendment may best be understood as a guarantee of a healthy democracy, via debate and discussion among the people. In *New York Times v. Sullivan*, the Court more fully expounded on the notion that the First Amendment is designed as a guarantor of democracy and preservation of self-government by well-informed people. The case is less remarkable for the actual holding relating to libel than it is noteworthy for is explication of broader constitutional issues.[52]

The *New York Times* had printed a full page advertisement prepared and paid for by southern Black clergy,[53] appealing for support in the struggle for civil rights in Alabama in 1960. The text of the advertisement detailed numerous incidents in the city of Montgomery, and certain portions were alleged to be libelous to respondent Sullivan, the elected Commissioner of Public Affairs of Mobile, Alabama. Not all the statements made were true, but the advertisement department of the *Times* had run the ad without checking the alleged facts because those who submitted the text to the newspaper were known to be responsible.[54] Sullivan brought an action for libel in the Circuit Court of Montgomery County, and a jury awarded $500,000.[55] The Alabama Supreme Court affirmed the trial court's standard that a publication is libelous per se if such publication injures the person.[56] Justice Brennan, writing for the Court, took the opportunity to explore speech rights broadly. Justice Brennan's opinion reached its rhetorical flourish in what is now among the most famous phrases in First Amendment (and perhaps all of constitutional) case law:

> We consider this case against the background of a *profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open*, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.[57]

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52. *See* Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209.

> What emerges as of large importance is the generous sweep of the major premise and not the application of it to the point of defamation law involved in the *Times* case. The touchstone of the First Amendment has become the abolition of seditious libel and what that implies about the function of free speech on public issues in American democracy. The drama of the *Times* case then is that the Court, forced to extricate itself from the political impasse that was presented to it, did so by returning to the essence of the First Amendment to be found in its limitations on seditious libel. It gets to very high ground indeed.

53. The individuals were collectively known as a "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." New York Times Co. v. Sullivan, 376 U.S. 254, 257 (1964).

54. *See id.* at 261.

55. *See id.* at 260.

56. *See id.* at 262–63.

57. *Id.* at 270 (emphasis added). Under this standard, the Court held that actual malice must be shown in order for a public official to recover in libel, reversed, and further held

While the issue may have appeared limited, Justice Brennan took the opportunity to write an expansive opinion that rejected the old way of looking at the First Amendment.[58] Beyond that, the opinion explored the roots of the First Amendment and propounded a theory of its central meaning that has been widely hailed as nothing short of revolutionary. "The choice of language was unusually apt. The Amendment has a 'central meaning'—a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, 'the censorial power' would be in the Government over the people and not 'in the people over the Government.'... The theory of the freedom of speech clause was put right side up for the first time."[59]

The ideas and theories presented in *Times v. Sullivan* were not novel, and had in fact been eloquently and persistently presented by Alexander Meiklejohn.[60] Meiklejohn is widely credited for putting forth what I have been referring to as the democracy theory. As Harry Kalven wrote, the *Times v. Sullivan* "opinion almost literally incorporated Alexander Meiklejohn's thesis that in a democracy the citizen as ruler is our most important public official."[61] We shall now look at the various discussions of the democracy theory, revealing a perspective that values more than just the collective democratic debate. We shall ultimately see that this view of the First Amendment necessarily incorporates a number of values and extends quite widely and deeply.

Broadly speaking, the democracy theory posits that the First Amendment is designed to ensure that there is a robust public debate on issues of importance so that the people can fulfill their ultimate role as the self-governed. In contrast to the self-expression model, it takes a collective rather than individual view of speech. It exalts the debate as the highest value to be protected, instead of the protection of the individual's personal expressive activity. Meiklejohn wrote:

> [T]he First Amendment...is not saying that any man may talk whenever and wherever he chooses. It is not dealing with that private issue. It is saying that, as interests, the integrity of public discussion and the care for the public safety are identical. We Americans, in choosing our form of government, have made, at this point, a momentous decision. We have decided to be self-governed.... We, the People, as we plan for the general welfare, do not choose to be "protected" from the "search for truth." On the contrary, we have

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that the evidence did not support a finding of malice.

58. *See* Kalven, Jr., *supra* note 52, at 210:

> The Court's confrontation of the relevance of truth to a constitutional doctrine of free speech, closely related as it is to the idea of seditious libel, requires further consideration. Here again, Mr. Justice Brennan's observations are refreshing because they far transcend in importance the resolution of the specific issue before the Court.

59. Kalven, Jr., *supra* note 52, at 208.

60. *See generally*, CYNTHIA STOKES BROWN, ALEXANDER MEIKLEJOHN: TEACHER OF FREEDOM (1981).

61. Kalven, Jr., *supra* note 52, at 209. *See also* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 36 (1982) ("The argument from democracy has been most carefully articulated by the American political philosopher Alexander Meiklejohn, although we can see similar ideas in the writings of Spinoza, Hume and Kant.").

> adopted it as our "way of life," our method of doing the work of governing for which, as citizens, we are responsible.[62]

The democracy approach also draws some of its power from the words of the Amendment itself. The Amendment does not refer to the individual's right to speak,[63] instead prohibiting Congress from making laws abridging the freedom of speech.[64] This language—or perhaps this structure—may lend support to the argument that individual rights are not at stake as much as the collective public discourse.[65] In exalting the virtues of this theory, and dismissing the autonomy perspective, Professor Owen Fiss concludes:

> We can thus see that the key to fulfilling the ultimate purposes of the First Amendment is not autonomy, which has a most uncertain or double-edged relationship to public debate, but rather the actual effect of a broadcast: *On the whole does it enrich public debate? Speech is protected when (and only when) it does, and precisely because it does, and not because it is an exercise of autonomy. In fact, at times autonomy might have to be sacrificed to make certain that public debate is sufficiently rich to permit true collective self-determination. What the phrase 'freedom of speech' in the First Amendment refers to is a social state of affairs, not the action of an individual or institution.*[66]

Justice Brennan observed that Meiklejohn "argued that the people created a form of government under which they granted only some powers to the federal and state instruments they established; they reserved very significant powers of government to themselves. This was because their basic decision was to govern themselves rather than be governed by others."[67] Accordingly, this theory ensures that the people remain self-governed, retaining power over the chosen representatives, not vice versa. The individuals retain power over the government; the government does not have the power to censor the people.[68] Thus, it becomes "not only the citizen's privilege to criticize his government, it is his duty."[69] The government's role is not to dictate the correct position on the issues presented, but simply to ensure that the debate will occur under conditions conducive to a meaningful exchange of ideas. Accordingly, Fiss suggests, "The duty of the state is to preserve the integrity of public debate—in much the same way as a great teacher—not to indoctrinate, not to advance the 'Truth,' but to safeguard the conditions for true and free collective self-determination."[70]

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62. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 65 (1948).

63. As we shall see later, however, many of the state constitutions explicitly do reference the right to speak (in various forms). *See infra* notes 149, 198–99.

64. U.S. CONST. amend. I.

65. MEIKLEJOHN, *supra* note 62, at 69.

66. FISS, *supra* note 50, at 15 (emphasis added).

67. Brennan, Jr., *supra* note 32, at 11.

68. *See* Kalven, Jr., *supra* note 52, at 208

69. *Id.* at 209.

70. FISS, *supra* note 50, at 20.

B. A New Approach: Self-Government by Informed Citizens

I propose a new interpretation of the First Amendment, based on the Meiklejohn theory, but enhanced to more clearly and explicitly protect the value of robust public debate, while respecting and incorporating individual self-expression. While this approach may at first sound like a compromise between two competing theories, it is actually one where the robust public debate reigns as the dominant value, but it specifically recognizes the value of and need for individual expression, including arts and literature, as an essential component of that debate.

The Meiklejohn theory remains open to criticism that such an approach fails to protect individual self-expression. I suggest that one need not choose between these allegedly competing theories, because the democracy approach incorporates the value of self-expression. If we recognize the instrumental connection between individual expression and collective debate, we can see that the democracy approach is all the more powerful. Thus, I do not suggest an intermediate position; instead I subscribe to the democracy or Meiklejohn approach, while recognizing the power of individual speech. The beauty of the First Amendment is that it recognizes first and foremost that we are a nation committed to certain values, primary among them democracy and self government. The individual is exalted and essential to our functioning as a nation, but no one person reigns supreme; no individual stands higher than the collective good.

Fiss has suggested a powerful metaphor, involving the basic concepts of education and the teacher. "The duty of the state is to preserve the integrity of public debate—in much the same way as a great teacher—not to indoctrinate, not to advance the 'Truth,' but to safeguard the conditions for true and free collective self-determination."[71] This metaphor supplements and perhaps supplants the parliamentarian metaphor that is often used[72] and provides a useful way of understanding the beauty and strength of the First Amendment. The First Amendment protects the great public debate and must protect our system of self-government. But without an educated public, we surely cannot have an educated, informed and meaningful robust public debate. Meiklejohn also seems to have considered this issue:

> [I]n order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities require, the judgment-making of the people must be self-educated in the ways of freedom.... Moreover, as against Professor Kalven's interpretation, I believe, as a teacher, that the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.' The primary social fact which blocks and hinders the success of our experiment in self-government is that

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71. *Id.* Fiss has not developed this idea elsewhere; instead this one line is almost a mere illustrative tool, yet it illuminates and suggests so much more.

72. *See* Owen M. Fiss, *State Action and State Censorship*, 100 YALE L.J. 2087, 2100 (1991) ("The state must act as a high-minded parliamentarian, making certain that all viewpoints are fully and fairly heard."). *But see* Susan Gellman, *Hate Speech and a New View of the First Amendment*, 24 CAP. U. L. REV. 309, 312–14 (1995) (critiquing Fiss's discussion of the state as a parliamentarian); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997) (critiquing Fiss's use of both the parliamentarian and teacher metaphors together).

> our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned.[73]

I am suggesting that the democracy theory need not elevate the value of public debate at the complete exclusion of the value of individual expression. Meiklejohn likewise recognized that the great democratic discourse requires both speakers and listeners:

> We listen not because [others who espouse different opinions] desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.[74]

Particularly if we return to the education analogy, we can see why we value individual expression. The state must act as a great teacher, to help advance a meaningful discussion and to ensure the robust public debate.[75] This meaningful collective discussion envisions, and even requires, effective speakers. Just as the great teacher must ensure the conditions for a productive debate, the great teacher must also allow students to speak when the teacher could make the ultimate point herself. Why does the teacher do this? To help the student develop her skills as an advocate of a position—to help her self-actualization. The great teacher must help the student become more articulate and capable, which ultimately ensures a well-reasoned, more productive debate. Different ideas are put forward and debated, and conclusions, often divergent ones, are reached.[76] Seen in this light, the greater goal remains that of collective self-governance, but the individual autonomy value is necessarily incorporated within, and even serves the greater goal. The First Amendment first protects the robust public debate, and as a result must also allow and even facilitate individual self-expression.[77] The democracy model remains, but not at the expense of

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73. Meiklejohn, *supra* note 32, at 263.

74. MEIKLEJOHN, *supra* note 62, at 66.

75. *See* FISS, *supra* note 50, at 20. *See also* Meiklejohn, *supra* note 32, at 263.

76. Even the most unpopular ideas have merit and a role in our debates. In *Times v. Sullivan*, "the point was made that falsity could not be penalized because it was a necessary concomitant of 'robust' discussion of public issues." Kalven, Jr., *supra* note 52, at 203. Justice Brandeis, concurring in *Whitney v. California*, 274 U.S. 357, 375 (1927), examined the Framers' words, specifically quoted Jefferson and concluded that the Framers believed "that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."

77. The arts and literature are also essential to the fully functioning democracy. Such individual expression is not just important to, but also protected by the First Amendment. *See* Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959):

> [The Constitution's] guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

See also Meiklejohn, *supra* note 32, at 262:

> [L]iterature and the arts are protected because they have a "social

the autonomy model; both supposedly competing models actually co-exist. Such a perspective more fully explains the beauty of the First Amendment and the role it plays in society.

In sum, the First Amendment must ensure the most effective public debate and promote individual expression. The state must fulfill its role in promoting these values and must ensure the conditions for an educated citizenry to debate the issues of the day. Accordingly, the state must act in at least two ways. First, the state must be the teacher, educating the people so that they may speak effectively. Second, the state must provide and protect opportunities to speak; it must keep meaningful fora open for the free exchange of ideas.[78]

III. SPEECH IN SHOPPING MALLS: CASE LAW

This Article specifically asks whether there is a constitutionally guaranteed right to engage in expressive activity in modern shopping malls. Thus far, we have looked at the modern American mall and considered the core values espoused by the First Amendment. In this Part, I review the current state of the law on point.

In 1968, the U.S. Supreme Court opened malls to expressive activity;[79] in 1972[80] and 1976[81] the Court did a quick about-face and closed the malls; most recently in 1980, the Court held that while the federal constitution offered no guarantees, the

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> importance" which I have called a "governing" importance. For example,...the novel, like all the other creations of literature and the arts, may be produced wisely or unwisely, sensitively or coarsely, for the building up of a way of life which we treasure or for tearing it down. Shall the government establish a censorship to distinguish between "good" novels and "bad" ones? And, more specifically, shall it forbid the publication of novels which portray sexual experiences with a frankness that, to the prevailing conventions of our society, seems "obscene"?
>
> The First Amendment seems to me to answer that question with an unequivocal "no."

Cf. Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (arguing that the Meiklejohn theory leaves artistic and other non-political expression open to suppression).

78. As Fiss has lamented,

> The received tradition presupposes a world that no longer exists and that is beyond our capacity to recall—a world in which the principal political forum was the street corner. The tradition ignores the manifold ways in which the state participates in the construction of all things social and how contemporary social structure will, if left to itself, skew public debate. It also makes the choices that we confront seem all too easy. The received tradition takes no account of the fact that to serve the ultimate purpose of the First Amendment we may sometimes find it necessary to "restrict the speech of some elements of our society in order to enhance the relative voice of others," and that unless the Court allows, and sometimes even requires, the state to do so, we as a people will never truly be free.

FISS, *supra* note 50, at 29–30.

79. *See* Amalgamated Food Employees Union Local, 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

80. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

81. *See* Hudgens v. National Labor Relations Bd., 424 U.S. 507 (1976).

individual states were free to interpret their constitutions as they saw fit.[82] Running throughout this discussion is the state action doctrine, which often shields private property owners. Sixteen states' highest courts have taken up the question under their own constitutions.[83] Most have rejected attempts to engage in expressive activity in malls; only five have opened the malls; three of those opinions rely on free speech provisions in their constitutions.[84]

A. United States Supreme Court Case Law: Speech in Malls

The United States Supreme Court has examined the question of speech in malls in a small number of cases, ultimately holding that no First Amendment expressive right is guaranteed in privately-owned shopping malls under the United States Constitution.[85] The First Amendment does not guarantee such access, and the state action doctrine dictates that the protections of the First Amendment will not apply to activities on purely private property.[86] While the U.S. Constitution currently is interpreted to provide no protection to speech in shopping malls, the states are free to decide whether their constitutions extend greater rights to the individual.[87] The examination of the principles involved must begin with *Marsh v. Alabama*,[88] in which the Court first addressed the question of whether First Amendment free speech guarantees extended to privately owned property.[89] As Justice Black wrote, "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping mall except the fact that the title to the property belongs to a private corporation."[90] A Jehovah's Witness had been arrested and convicted for trespassing while attempting to distribute literature in the town.[91]

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82. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

83. *See infra* notes 147–220 and accompanying text.

84. *See* Robins v. PruneYard Shopping Center, 592 P.2d 341 (Cal. 1979); Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991); Batchelder v. Allied Stores Int'l, 445 N.E.2d 590 (Mass. 1983); New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994); State v. Dameron, 853 P.2d 1285 (Or. 1993).

85. *Hudgens*, 424 U.S. at 518; *Pruneyard*, 447 U.S. at 80–86.

86. *Hudgens*, 424 U.S. at 518–24.

87. *Pruneyard*, 447 U.S. at 81.

88. 326 U.S. 501 (1946).

89. In *Marsh*, the private property was a company town. The "town" was entirely owned by the Gulf Shipbuilding Corporation. The *Marsh* Court took care to define the company town:

> By [a company town] we mean an area occupied by numerous houses, connected by passways, fenced or not, as the owners may choose. These communities may be essential to furnish proper and convenient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-scale farming. The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders.

Marsh, 326 U.S. at 513 (Reed, J., dissenting).

90. *Id.* at 503.

91. *Id.* at 503–04.

Since the town was privately owned, but clearly had a public identity, the question became what to do with this sort of hybrid property.[92] The opinion offered the following analysis: "The 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."[93] In the majority's opinion, the private property had been sufficiently opened to the public to mandate that First Amendment expressive activity be allowed.

> To act as good citizens [the residents of a company town] must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.
>
> 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.[94]

This analysis presents two important points for our discussion. First, the property's function was tantamount, not whether title to the land was publicly or privately held.[95] Second, the majority seemed to adopt the position that the First Amendment guaranteed the people the right to hear and receive information, as opposed to just allowing for a person to speak.[96]

Company towns faded away, but the ideas in *Marsh* did not. Shopping malls started to become a new fixture on the American landscape, embodying many of the same attributes and functions as company towns, and serving the same public function as the typical business district.[97] As gathering places and centers of commercial activity, many saw shopping malls as key locations for engaging in a discussion of the

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92. The Court recognized that the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire, that a municipality could not, without jeopardizing that individual freedom, prohibit door to door distribution of literature. *Id.* at 505 (citing Martin v. Struthers, 319 U.S. 141, 146, 147).

93. *Id.* at 506.

94. *Id.* at 508–09.

95. Justice Frankfurter wrote a concurring opinion, in which he reiterated the basic idea that title is not determinative, and that public function is a matter of actual use, not legal fiction. "Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations." *Id.* at 511 (Frankfurter, J., concurring).

Justice Reed dissented, offering a classic defense of the position of property rights: "The rights of the owner, which the constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech." *Id.* at 516 (Reed, J., dissenting). Justice Reed's opinion formed the perfect counter to Justice Black's opinion, illustrating the tension between speech and property rights, which the majority felt tipped toward speech.

96. *See supra* Part II A.

97. *See* New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 766 (N.J. 1994).

issues of the day. The question for the Court was whether First Amendment protections apply in these malls; in other words, are malls to be protected sites for the free and public exchange of ideas?

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.[98] inaugurated a series of U.S. Supreme Court cases dealing with speech in shopping malls.[99] Members of a local union had picketed a non-union supermarket that had recently opened in a new shopping mall.[100] The mall owners obtained a state court injunction against the picketing.[101] Justice Marshall, writing for the majority, concluded:

> It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality.[102]

After examining *Marsh*, the opinion continued, "the similarities between the business block in *Marsh* and the shopping center in the present case are striking."[103] Then, Justice Marshall arrived at the following point:

> The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract.[104]

The Court held that the First Amendment free speech guarantees compelled Logan Valley Plaza to allow the picketing it had sought to prohibit.[105]

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98. 391 U.S. 308 (1968).

99. *Logan Valley*, 391 U.S. 308, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), often will be referred to collectively in these pages as "the shopping center cases."

100. *Logan Valley*, 391 U.S. at 311–12.

101. *Id.* at 312.

102. *Id.* at 315.

103. *Id.* at 317.

104. *Id.* at 324.

105. The Court also noted that there were no other realistic alternative means for the union to carry out their pickets at Logan Valley Plaza. *See id.* at 325. See discussion of alternative channels for communication, *infra* Part IV.B.1.b.

Justice Douglas concurred: "it is clear that respondents have opened the shopping center to public uses. They hold out the mall as 'public' for purposes of attracting customers and facilitating delivery of merchandise." *Id.* at 326 (Douglas, J., concurring).

Based on the premise that the shopping mall was quite different from the company town he wrote about in *Marsh*, Justice Black, who wrote for the Court in *Marsh*, authored a clear and strong dissent. He argued that *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." *Id.* at 330 (Black, J., dissenting).

Only a few years later, the *Logan Valley* holding came under attack in *Lloyd Corp. v. Tanner.*[106] Several individuals handing out anti-Vietnam war pamphlets in a shopping mall in Portland, Oregon were told that they would either have to leave or would be arrested.[107] The group decided to avoid arrest, continued handbilling outside the mall then filed suit against the mall owner.[108]

Justice Powell, who had voted with the majority in *Logan Valley*, wrote the opinion for the Court and went to great lengths to distinguish *Logan Valley* from *Lloyd.* "This case presents the question reserved by the Court in [*Logan Valley*], 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.*"[109] Justice Powell's opinion characterized *Logan Valley* as having been decided on the very narrow grounds of whether the picketing involved was related to the function of the shopping center.[110]

After favorably citing *Marsh*, the majority opinion rejected the argument that Lloyd Center was open for public debate on all issues.[111] Such a position "misapprehends the scope of the invitation extended to the public. The invitation is to come to the Center to do business with the tenants."[112] The Court then held that Lloyd Center need not accommodate protestors whose targets are not related to the business of the shopkeepers of the mall.[113]

Four years later, the *Logan Valley* position, protecting expressive activity in malls, fell in *Hudgens v. National Labor Relations Board.*[114] Justice Stewart, who had been aligned with Justice Marshall in the previous cases, joined the new majority in this one and wrote the opinion for the Court.[115] In *Hudgens*, union members were threatened with arrest for criminal trespass while picketing a store with which they were embroiled in a labor dispute.[116]

Justice Stewart set up a limited, state action-dependent position, observing that "it is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."[117] Then, after examining the course of the case law from *Marsh* to the present day, the majority acknowledged the truth that was avoided in *Lloyd.* "*Lloyd* cannot be squared with the

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106. 407 U.S. 551 (1972).
107. *See id.* at 556.
108. *Id.*
109. *Id.* at 552 (emphasis added).
110. *Id.* at 563.
111. *Id.* at 564–65.
112. *Id.* at 564.
113. *Id.* at 552, 563–64, 570. Justice Marshall penned a dissent, joined by Justices Douglas, Brennan, and Stewart, the rest of the *Logan Valley* majority. The dissent made a number of factual arguments, to the effect that "Lloyd Center is even more clearly the equivalent of a public business district than was Logan Valley Plaza." *Id.* at 577 (Marshall, J., dissenting).
114. 424 U.S. 507 (1976).
115. *Id.* at 508.
116. *Id.*
117. *Id.* at 513.

reasoning of the Court's opinion in *Logan Valley*...we make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case."[118] The opinion continued: "If a large, self-contained shopping center *is* the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content."[119] The majority declared that *Logan Valley* and *Lloyd* were incompatible, decided that the restrictive holding in *Lloyd* was good law and *Logan Valley* was not, and remanded to the National Labor Relations Board for consideration of certain applicable statutory questions.[120]

These three cases first established the basic proposition that the First Amendment to the United States Constitution protects expressive activity in shopping malls, then rejected the same principle in its entirety. Another issue remained regarding the protection afforded by the states' constitutions. The leading case to take up this question was *PruneYard Shopping Center v. Robins.*[121] In this case, several students went to the PruneYard Shopping Center in Campbell, California, in search of signatures on a petition opposing a United Nations resolution.[122] The students peacefully distributed leaflets and gathered signatures without any apparent objection by the mall customers, but the students were told by a security guard that their actions violated mall policy and that they would have to leave.[123] The California Supreme Court held that "the California Constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[124] Thus, relying on the state rather than the federal constitution, the California Supreme Court found a speech right in shopping malls.

The PruneYard owners appealed to the U.S. Supreme Court, arguing, *inter alia*, that the Court's previous ruling in *Lloyd* prevented the states from ruling as did California.[125] The U.S. Supreme Court disagreed and upheld the California decision. Interestingly enough, the Supreme Court in no way backed down from its previous opinions that the First Amendment to the U.S. Constitution does not provide a guarantee to engage in expressive activity in shopping malls. Instead, the Court's central premise was that its prior pronouncements as to the limitations of the U.S. Constitution do not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[126] While hardly a ringing victory for proponents of free speech rights, the case provided a new opportunity for speech advocates; the federal courts were no longer a proper forum for protecting speech

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118. *Id.* at 518.

119. *Id.* at 520 (emphasis in original).

120. *Id.* at 520–21, 523. As could be expected, Justice Marshall dissented and was joined by Justice Brennan. "I cannot escape the feeling that *Logan Valley* has been laid to rest without ever having been accorded a proper burial." *Id.* at 534 (Marshall, J., dissenting).

121. 447 U.S. 74 (1980).

122. *See id.* at 77.

123. *See id.*

124. Robins v. PruneYard Shopping Center, 592 P.2d 341, 352 (Cal. 1979).

125. *Pruneyard*, 447 U.S. at 80–81.

126. *Id.* at 81.

rights, but the states were explicitly permitted to read their constitutions more broadly than the U.S. Constitution, subject to some limitations.

B. State Action Doctrine

The state action doctrine also plays a role in our discussion. The Court first applied the state action doctrine in 1883 in the *Civil Rights Cases*,[127] holding that the protections of the Constitution apply only where the state has taken some sort of affirmative action against its citizens.[128] The state action doctrine has been interpreted in a number of ways over the past century or so, without any definitive interpretation.[129] The widely varying meanings ascribed to this requirement have caused one leading scholar to write that it is a "conceptual disaster area."[130] Still, several threads have developed, and the doctrine remains a powerful shield.

The state action doctrine requires that in order for the Constitution to protect the rights of individuals, it must do so against some sort of encroachment by the state. Effectively, this stems from the fundamental view that the Constitution is concerned with protecting the people from the excesses of government, not with protecting individual citizens from one another.[131] Simple as this may sound, there still remain

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127. 109 U.S. 3 (1883).

128. The Thirteenth Amendment, prohibiting slavery, is one notable exception. *See* U.S. CONST. amend. XIII, § 1.

129. Several professors have attempted to make sense of the doctrine and refine or otherwise consolidate the meaning of state action. Consistently, these attempts result in frustration with the current state of the law as well as uncertainty as to whether it will ever be sorted out clearly. *See, e.g.*, Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 91 (1967) ("On the cases and on the opinions, 'state action' is a doctrine in trouble. It is just possible...that rescue might be found in the scholarly commentary. But day breaketh not in that quarter of the sky."); Craig Bradley, *The Civil-Criminal Distinction: Untying the State Action Knot*, 7 J. CONTEMP. LEGAL ISSUES 223 (1996); Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1330 (1982) ("In sum, the Court's state action doctrine seems a crude substitute for addressing and accommodating the concerns to prevent abuse of power on the one hand, and to protect individual autonomy and federalist values on the other. [The doctrine embodies a]...Whitmanesque capacity to encompass contradictions [and] invites manipulation and mystification."); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 506 (1985) ("[L]imiting the Constitution's protections of individual rights to state action is anachronistic, harmful to the most important personal liberties, completely unnecessary, and even detrimental to the very goals that it originally intended to accomplish."); Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, 65 S. CAL. L. REV. 781 (1992) ("For generations of legal scholars, the state action doctrine...has been the proverbial constitutional briarpatch—almost hopelessly tangled and tenaciously resistant to reform."); Christopher Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1507 (1982) ("Still, disparities between public and private treatment persist in the doctrines, no matter how difficult they may be to apply to the facts. Should not the lingering disparities be effaced altogether—a final merger of public and private?").

130. Black, Jr., *supra* note 129, at 95.

131. *See* Brest, *supra* note 129, at 1329 ("This strategy might reflect the view that the Constitution should be concerned only with abuses of power visibly engaged in by the

questions as to what constitutes the proper type of action by the state to trigger the protections of the Constitution. The Court's opinions have shackled the doctrine with apparently inconsistent rulings that do not explain why they travel the wandering path they cover. Several key themes have emerged, and it seems as though state action may be found (1) if there is some clear action by the state;[132] (2) if there is some assumption of a public function by a private actor;[133] (3) if there is excessive government entanglement in an otherwise private action;[134] or (4) (closely connected to the third) if there is some significant nexus.[135] We shall briefly consider these interpretive methods.

First, the Court read the state action requirement rather broadly in *Shelley v. Kraemer*,[136] in which the state courts below had enforced restrictive covenants prohibiting certain property from being sold to Blacks. On its surface, the transaction was one purely involving private individuals who had decided to engage in racially discriminatory actions. However, the Court held that the fact that the state courts were ready and willing to enforce said covenants triggered the state action doctrine. "State action ...refers to exertions of state power in all forms.... We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the actions of the state courts cannot stand."[137] Such triggering thus brought about the protections of the Fourteenth Amendment, and the Court held the covenants to be a discriminatory act in violation of the Constitution. State action was found in this seemingly private transaction due to the presence and official imprimatur of the state,[138] through its courts. *Shelley* may be read two ways. First, read simply, *Shelley* suggests that *whenever* courts enforce actions by individuals, there is state action. Second, it may be read to stand for the proposition that there is state action only when a court upholds a private act *which results in a constitutional deprivation of individual rights.* Likely because of its encompassing nature, the broader, former proposition has not been accepted.

Second, *Marsh* provided us with a glimpse of the public function approach to the state action doctrine. As previously discussed,[139] the Court observed that the company town had all the attributes of a traditional town, with streets, sidewalks and sewer lines. As such, the Court found that the Gulf Shipbuilding Corporation had effectively been delegated the powers of a municipality, and therefore its actions in ejecting Mrs. Marsh were subject to—and failed—constitutional scrutiny.[140]

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government....").

132. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948).
133. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946).
134. *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
135. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).
136. 334 U.S. 1 (1948).
137. *Id.* at 20.
138. *See id.*
139. *See supra* notes 85–91 and accompanying text.
140. *Cf.* Flagg Brothers v. Brooks, 436 U.S. 149, 162 (1978).

Third, state action may be found in instances of excessive entanglement between the state and a private actor. In *Burton v. Wilmington Parking Authority*,[141] the Court examined state action in the context of the famous sit-in cases. In this case, a number of Blacks staged a sit-in in a privately owned diner located in a municipal parking structure. The Court held that the municipal parking authority,

> and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property, and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity.[142]

Thus, the entanglement between the state and the private company dictated that state action was implicated in the unconstitutional deprivation of individual rights.

Fourth, in his opinion for the Court in *Moose Lodge No. 107 v. Irvis*,[143] Justice Rehnquist expanded on the idea of the relationship required between the state and the private acts and actors, restricting the reach of the state action requirement.[144] There, the Court confronted a situation where a private club in Pennsylvania discriminated against Blacks. The club received a liquor license as part of a state regulatory scheme. The Court found that although such action would be prohibited under the Fourteenth Amendment, there was no state action when a private club denied service to an individual because of his race. On its way to a conclusion, the opinion acknowledged that private ownership is not determinative in the matter,[145] but without some state involvement, there would be no constitutional implications. Instead of allowing for a finding of state action whenever there was any state involvement, like a liquor licensing scheme, the opinion instead observed: "[o]ur holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' in order for the discriminatory action to fall within the ambit of constitutional prohibition."[146] The net effect of *Moose Lodge* is to establish that something more is required, something like a significant nexus, not just between the state and the private actor, but also between the state and the allegedly unconstitutional act, before the Court will find state action.

This brief discussion indicates that the state action doctrine has been interpreted in various ways with no single definitive meaning. *Shelley*, *Marsh*, and

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141. 365 U.S. 715 (1961).

142. *Id.* at 725.

143. 407 U.S. 163 (1972).

144. As Associate and Chief Justice, Rehnquist has written quite extensively on his limited view of the state action doctrine. *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189 (1989); Brest, *supra* note 129; Madry, *supra* note 129.

145. "Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination." *Moose Lodge*, 407 U.S. at 172 (citation omitted). "State action...may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action." *Id.* at 179 (citations omitted).

146. *Id.* at 173 (citations omitted). The Court then found that on the present facts "there is nothing approaching the *symbiotic relationship*...that was present in *Burton*." *Id.* at 175 (emphasis added). *See id.* at 175–76 (discussing the minimal effect of the state licensing scheme).

Burton have not been overturned, despite the seeming attacks in cases like *Moose Lodge*. In the meantime, we live with this doctrinal swampland and recognize the need to respect its importance.

C. State Supreme Court Opinions

The Court's *PruneYard* decision reopened the debate on speech in malls, allowing and even inviting the states to examine their own constitutions to see whether they extended greater speech rights to individuals than the U.S. Constitution. Not surprisingly, the opinion set in motion a wave of discussion at the state level. Sixteen state supreme courts[147] have made inquiries that shed light on our subject. A few state courts[148] have extended greater speech rights than those guaranteed by the U.S. Constitution. Most, however, have held that their constitution either extends no farther than the federal constitution or have not even analyzed their own constitution, deferring to the federal standard.

1. Greater Rights Under State Constitutions

To date, only five state supreme courts have held that the state's citizens may engage in expressive activity in shopping malls; three of these based their decisions on free speech rights.[149] California, in the original *PruneYard* case, was the first to find a free speech protection; the Colorado Supreme Court also held in favor of speech rights; and the most instructive for these purposes is the recent, lengthy opinion by the New Jersey Supreme Court in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corporation.*[150] The remaining state pro-speech opinions do not necessarily aid our analysis of free speech clauses, but they do shed light on the nature of speech in malls and its role in the democratic process.

a. State Constitution Guarantees Greater Speech Rights

The first state to examine this question—California—granted greater speech rights, pursuant to free speech provisions in the state constitution. In *PruneYard*, the California Supreme Court faced a situation in which high school students sought "support for their opposition to a United Nations resolution against 'Zionism.'"[151] In its analysis, the California court separated out the state constitutional provisions that it was construing from prior U.S. Supreme Court precedent.

> [T]he state Constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for

147. By using the term state supreme courts, I am referring to the highest appellate court in the various states, responsible for the final pronouncement of the state of the law in that state.

148. These states are California, Colorado, New Jersey, Massachusetts, and Oregon.

149. *See* Robins v. PruneYard Shopping Center, 592 P.2d 341 (Cal. 1979); Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991); Batchelder v. Allied Stores Int'l, 445 N.E.2d 590 (Mass. 1983); New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994); State v. Dameron, 853 P.2d 1285 (Or. 1993).

150. 650 A.2d 757 (N.J. 1994).

151. *PruneYard*, 592 P.2d at 341.

> 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.[152]

The California court examined the state's free speech provision and the court's interpretation thereof, observing that the liberty of speech is deeply valued in California. The majority then recognized that malls are not just like any other place in the state.[153] The California Court then quoted at length from a prior dissenting opinion that suggested that malls were growing rapidly in size and number,[154] and that malls were important to the free exchange of ideas in California. Thus, the California Supreme Court held that the mall must be opened for expressive activity, subject to reasonable time, place, and manner restrictions.[155]

The Supreme Court of Colorado has also specifically construed its state constitution to permit expressive activity within shopping malls. In 1991, in *Bock v. Westminster Mall Co.*,[156] the Supreme Court of Colorado determined that quasi-public areas within a shopping mall were public spaces for the purposes of affording free speech protection under Article II, Section 10 of the Colorado Constitution.[157] In *Bock*, two individuals sought to distribute pamphlets and solicit signatures in the Westminster Mall, a privately-owned shopping mall.[158] The Colorado court described Westminster as a "regional shopping center," with five anchor stores, 130 other retail and service establishments, and a movie theater.[159] The opinion detailed a modern mall that allows for a range of activity in an area that "sprawls over 118 acres, including parking for more than 6,500 cars."[160] The Colorado court also observed the various connections between the developer and the state, including a police substation, and street and drainage improvements valued at over two million dollars, financed under the city's bond authority.[161]

In analyzing speech rights, the Colorado court first explained that its decision to interpret the Colorado Constitution with respect to expressive rights in the shopping mall setting was both acknowledged and invited by the U.S. Supreme Court in

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152. *Id.* at 346 (discussing CAL. CONST. art. I, § 2) (citation omitted).

153. *Id.* at 345.

154. *Id.* at 347. The California court, citing Justice Mosk's dissent in *Diamond v. Bland*, 521 P.2d 460 (Cal. 1974) ("*Diamond II*"), decided that the Mosk dissent was most sensible and held "that *Diamond II* must be overruled." *Pruneyard*, 592 P.2d at 347. The figures cited from the Mosk dissent in *Diamond II* projected that by 1985 there would be 25,000 malls in America. *See id.* at 347 n.5 (citing *Diamond II*, 521 P.2d at 468 (Mosk, J., dissenting)). Compare this with the 10,000 to 11,000 that Justice Marshall discussed in *Logan Valley* in 1968 and the 40,000 in the country in 1996. *See J.M.B. Realty Corp.*, 650 A.2d at 766.

155. *See PruneYard*, 592 P.2d at 347–48.

156. 819 P.2d 55 (Colo. 1991).

157. "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...." COLO. CONST. art. II, § 10.

158. *See Bock*, 819 P.2d at 56.

159. *Id.*

160. *Id.*

161. *See id.* at 57.

PruneYard.[162] The Colorado court also announced, "[t]he 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."[163] Given the federal floor and the more permissive Colorado constitutional guarantees, the Colorado Court extended greater access to the individuals.[164]

In 1994 in *J.M.B. Realty Corp.*,[165] the New Jersey Supreme Court held that its state constitution provides a right to engage in expressive activities in private regional shopping malls.[166] An anti-war coalition sought to raise public support for their cause by leafleting in the defendants' twelve privately-owned regional and community shopping malls. Most mall owners either denied the plaintiff permission to leaflet or imposed stringent restrictions on the expressive activity.[167] The owners asserted that New Jersey's right to free speech did not protect citizens from the restraint of private property owners.

The New Jersey Supreme Court, however, held that the state constitution did confer a right of speech in privately-owned, regional shopping centers because these shopping centers had essentially assumed the role of a new downtown business district.[168] The defendant shopping centers had 93 to 244 tenants, covering 31 to 238 acres, with 400,000 to 1,000,000 square feet of gross leasable area, and 3,075 to 9,000 vehicle parking spaces.[169] The court noted that these shopping centers included not only department stores, but also housed several enterprises traditionally found in a downtown business district. In addition, the centers were the sites for community

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162. *See id.* at 59 (citing PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980)).

163. *Id.* at 59 (citing *PruneYard*, 447 U.S. at 81).

164. The Colorado court specifically allowed for the imposition of time, place and manner restrictions on speech in shopping malls. *Bock*, 819 P.2d at 63.

165. New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994).

166. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. CONST. art. I, ¶ 6.

167. *J.M.B. Realty Corp.*, 650 A.2d at 762–63.

168. *See id.* at 761 (limiting the application of its holding to "regional" privately-owned shopping centers, as distinguished from "community" privately-owned shopping centers because the former more resembled a traditional downtown business district; also stating that a regional shopping center is physically larger than a community shopping center, includes more retail business establishments in addition to department stores, and serves more than one community).

Interestingly, in an earlier case the New Jersey Court observed that the New Jersey "free speech provision was modeled after Article 7, Section 8 of the 1821 Constitution of the State of New York...." State v. Schmid, 423 A.2d 615, 627 (N.J. 1980). However, the New York high court has ruled that speech is not protected in malls, under its constitution, absent state action. See *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211 (N.Y. 1985), discussed *infra* Part III.C.2.a. Of course, any state supreme court is free to interpret its own charter as it sees fit, and another state's case law is not binding precedent.

169. *J.M.B. Realty Corp.*, 650 A.2d at 763.

events and expressive use.[170] For example, the shopping centers included "restaurants and other retail 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,...doctors' offices, and a United States postal booth during the holiday season."[171]

The New Jersey Supreme Court cited three reasons to support the proposition that the state constitution obligated shopping centers to allow free speech even though these centers were privately-owned.[172] First, it looked to the normal use of the shopping centers and concluded that it knew of "no private property that more closely resembles public property,"[173] because the shopping centers were "projecting a community image, serving as their own communities."[174] Second, the New Jersey Court considered the extent of the public's invitation to use the shopping centers.[175] It rejected the defendants' contention that a shopping center remained private in nature because its invitation to the public was limited to commercial purposes.[176] Instead, the New Jersey court reasoned that "[f]or 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."[177] Third, the majority opinion rationalized that the relationship was consonant between the purpose of the leafleting and the property's use because leafleting occurred for centuries in downtown business district areas.[178]

The *J.M.B.* opinion also emphasized that the true importance of obligating a privately-owned shopping center to allow free speech only becomes apparent "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."[179] Addressing the shopping centers' concerns of diminished control of their private property and negative commercial ramifications resulting from free speech, the majority assured that the shopping centers' broad power to regulate would accord to them sufficient means of control so that shoppers would not be harassed.[180] In conclusion, the New Jersey Court reasoned that the modern shopping center's role as a new downtown business district created a legitimate New Jersey constitutional concern that was appropriately resolved by imposing on the shopping center a constitutional responsibility.[181]

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170. *See id.*
171. *Id.*
172. *See id.* at 760–61 (citing standard set forth in *State v. Schmid*, 423 A.2d 615 (N.J. 1980)).
173. *Id.* at 761.
174. *Id.*
175. *See id. Cf.* Lloyd v. Tanner, 407 U.S. 551 (1972) (addressing the same issue of the extent of the public's invitation, yet yielding a different result).
176. *See J.M.B. Realty Corp.*, 650 A.2d at 761.
177. *Id.*
178. *See id.*
179. *Id.*
180. *See id.*
181. *See id.* at 761–62.

b. Other State Constitutional Analysis Opens Malls to Expressive Activity

While the California, Colorado, and New Jersey courts have allowed access to the malls based upon analyses of the free speech provisions in their constitutions, other states have founded the right to engage in expressive activity on other state constitutional grounds. Although these state court opinions shed little light on the specific question of how to interpret constitutional free speech provisions, they do show that these state courts view the malls as important sites for the functioning of a democratic society devoted to robust public discourse.

Massachusetts has protected speech-related activities in shopping malls via an entirely distinct state constitutional right. In *Batchelder v. Allied Stores Int'l*,[182] the Supreme Judicial Court of Massachusetts held that any person soliciting signatures in a mall that would help to provide access to the ballot might enjoy incidental constitutional protection of such speech-related activity because of the protection of the right of free elections.[183] The opinion, however, was careful not to overstate its holding; the Massachusetts court carefully framed its issue as dealing solely with "ballot access and not with any claim of a right to exercise free speech rights apart from the question of ballot access."[184] The opinion further explained how it could reconcile a mandate protecting the solicitation of signatures on private property, a speech-related activity, without affording the same protection for all speech-related activity. "Ideas and views can be transmitted through the press, by door-to-door distributions, or through the mail, without personal contact. On the other hand, a person needing signatures for ballot access requires personal contact with voters. He or she cannot reasonably obtain them in any other way."[185] Based upon this reasoning, the Massachusetts court orchestrated a victory for free speech in the shopping mall setting, albeit a victory that was both indirect and limited.

Oregon has also provided protection of speech in shopping malls without implicating the free speech provision of its state constitution. In *Lloyd Corp. v. Whiffen*,[186] the Supreme Court of Oregon overturned an order that would have prevented the solicitation of signatures for ballot initiatives within shopping malls. In finding that the public interest in political discussion would be seriously threatened if a complete ban on signature solicitation at shopping malls were allowed, the Oregon Court admittedly called upon its equitable powers in lieu of constitutional authority. The opinion specifically stated, "Although court involvement may trigger constitutional analysis, it does not prove a constitutional violation.... In this case, we conclude on a subconstitutional level that plaintiff is not entitled to the broad injunction it sought and received."[187]

Less than one year later, in *State v. Cargill*,[188] the Oregon appellate court supplemented the non-constitutional approach with a state constitutional analysis to

182. 445 N.E.2d 590 (Mass. 1983).
183. *See id.* at 591.
184. *Id.* at 595.
185. *Id.*
186. 773 P.2d 1294 (Or. 1989).
187. *Id.* at 1297.
188. 786 P.2d 208 (Or. Ct. App. 1990).

find protection for speech-related activity in privately-owned malls. The appeals court ruled that the right to solicit signatures was implicitly protected under Article IV, section 1 of the Oregon state constitution.[189] In other words, the Oregon constitutional guarantee of a ballot initiative and referendum necessarily brought with it an affirmative expressive right to seek signatures to effect the ballot initiative and referendum.[190] The ruling chronicled the development of the modern mall into the present-day analogy to the town square[191] and acknowledged that "[t]he process of gathering signatures is substantially impaired—almost doubled in time—if conducted on the public walkways or in parks instead of in the mall and on its walkways."[192] In so ruling, the court stressed that, while the ballot initiative and referendum does not create an unlimited right,[193] this state constitutional right is successfully implicated upon the facts of the shopping mall setting because of the strong public interest involved in the many potential signatures as well as the strong public character of the shopping mall itself. Three years later, the Oregon Supreme Court endorsed this broader approach, reaffirming the right to solicit signatures on privately-owned mall premises via the state constitutional right to initiative and referendum.[194]

While these courts found in favor of speakers, they did so on non-free speech grounds. Still, these opinions help us see that the malls can be important places for the exchange of ideas and the robust public debate. These courts specifically have recognized that the activities of these individuals in malls add to the political discourse and that therefore access should be granted. All of the states just examined recognize the centrality of the mall in society, and their case law protects some speech rights in shopping malls.

2. Same Rights Under State Constitutions

Most states that have addressed our question have held that individuals do not have a right to engage in expressive activity in shopping malls. Unfortunately, most state supreme courts do not undertake a thorough analysis, often relying upon the state action doctrine.[195] Two state supreme courts have been fully deferential to the U.S. Supreme Court's prior holdings.

a. Independent Analysis of State Constitutions

The courts of nine states have held that their state constitutions do not guarantee freedom of speech in privately owned shopping malls; in other words, their state constitutions do not confer broader speech rights than those guaranteed by the First Amendment to the United States Constitution.[196] Three basic arguments have

189. *See* OR. CONST. art. IV., §1.
190. *See id.* at 211.
191. *See id.* at 211–12.
192. *Id.* at 212.
193. *Id.* at 213. (There is no "right to go anywhere one likes in pursuit of signatures.").
194. *See* State v. Dameron, 853 P.2d 1285 (Or. 1993).
195. *See* discussion *supra* Part III.B.
196. These states are: Arizona, Connecticut, Michigan, New York, Ohio, Pennsylvania, South Carolina, Washington, and Wisconsin. *See* Fiesta Mall Venture v.

been forwarded in support of this constricted interpretation: (1) that free speech provisions apply only to state action; (2) that privately owned shopping malls are not public fora; and (3) that separation of powers principles preclude the judiciary from interpreting free speech provisions to govern actions between private individuals.[197] These courts do not ask the broader question of whether the property is the type where robust public debate should occur.

All nine state courts have relied on state action arguments in denying the right to free speech in privately owned shopping malls.[198] Unlike the United States Constitution,[199] however, these state constitutions' free speech provisions do not include or incorporate a state action requirement. For example, the constitutions of Arizona, Michigan, Washington, and Wisconsin state in pertinent part: "Every person may freely, speak, write, and publish on all subjects...."[200] Despite the absence of any reference to state action, all nine state courts have interpreted their free speech provisions to restrict only state conduct. For example, the Washington Supreme Court explained, "the fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of people vis-a-vis each other."[201] By so framing the issue, the state courts assure the conclusion without ever joining the issue. These courts do not thoroughly consider whether a guarantee of access to privately owned malls is necessary to preserve for "every person" an audience to whom one "may freely speak, write, and publish on all subjects."

Mecham Recall Comm., 767 P.2d 719 (Ariz. 1989); Cologne v. Westfarms Assoc., 469 A.2d 1201 (Conn. 1984); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985); Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59 (Ohio 1994); Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Penn. 1986); Charleston Joint Venture v. McPherson, 417 S.E.2d 544 (S.C. 1992); Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989) (the Washington Supreme Court had once held that malls must be opened for expressive activity, *see, e.g.*, Alderwood Assocs. v. Washington Envtl. Council, 653 P.2d 108 (Wash. 1981), but like the U.S. Supreme Court, subsequently reversed course here); Jacobs v. Major, 407 N.W.2d 832 (Wisc. 1987).

197. Some state courts have also held that state constitutional rights to initiate referendums do not guarantee the right to solicit signatures on private property, but such an argument is not directly relevant to our analysis.

198. *See* Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719 (Ariz. 1989); Cologne v. Westfarms Assoc., 469 A.2d 1201 (Conn. 1984); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1983); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985); Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59 (Ohio 1994); Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Penn. 1986); Charleston Joint Venture v. McPherson, 417 S.E.2d 544 (S.C. 1992); Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989) (the Washington Supreme Court had once held that malls must be opened for expressive activity, (*see, e.g.*, Alderwood Assocs. v. Washington Envtl. Council, 635 P.2d 108 (Wash. 1981)), but like the U.S. Supreme Court, subsequently reversed course here); Jacobs v. Major, 407 N.W.2d 832 (Wisc. 1987).

199. "*Congress* shall make no law...." U.S. CONST. amend. I (emphasis added).

200. ARIZ. CONST. art. II, § 6; MICH. CONST. art. I, § 5; WASH. CONST. art. I, § 5; WISC. CONST. art. I, § 3.

201. *Southcenter*, 780 P.2d at 1286 (footnote omitted).

The high courts in these states have also relied upon the U.S. Supreme Court's determination in *Lloyd Corp. v. Tanner*,[202] that a privately owned shopping center was not a public forum in finding that the activities occurring in a shopping center do not alter its private character. For example, the Ohio Supreme Court determined that a shopping center did not lose its private character by inviting the public on its premises, because the right to marshal business was a right inherent to a private owner's bundle of property rights.[203] The South Carolina Supreme Court found that a shopping center did not become a public forum by allowing some civic and charitable organizations to set up an informational table on its premises, because the objective of this limited invitation was to generate a favorable impression on shoppers for commercial purposes, not to invite the public for free speech purposes.[204] The Pennsylvania Supreme Court stated that the mall's social function did not change its private character because social benefits such as jogging, food courts, and other non-commercial activities were ancillary to the mall's purely commercial purpose of creating a favorable environment for its patrons.[205] In addition, the Pennsylvania court reasoned that a shopping mall did not resemble a new town square because a mall did not "provide essential public services such as water, sewers, roads, sanitation or vital records, nor are they responsible for education, recreation or transportation."[206] Finally, the Wisconsin Supreme Court asserted that the preclusion of free speech in a privately owned mall did not threaten free speech rights because the town's traditional centers were still available as alternate channels of communication.[207] In sum, these state courts have focused on the preservation of private property owners' autonomy and have avoided the larger issue of whether the new regional shopping centers should provide an additional opportunity for robust public debate.[208]

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202. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

203. *See Eastwood Mall*, 626 N.E.2d at 61. *See also Cologne*, 469 A.2d at 1210; *Woodland*, 378 N.W.2d at 357; *Southcenter*, 780 P.2d at 1292; *SHAD Alliance*, 488 N.E.2d at 1218 (finding that the use of private property by the public cannot transform it into a public forum).

204. *See* Charleston Joint Venture v. McPherson, 417 S.E.2d 544, 548 (S.C. 1992).

205. *See* Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1336 (Penn. 1986). *See also* Fiesta Mall Venture v. Meecham Recall Comm., 767 P.2d 719, 724 (Ariz. 1989) (finding that the joggers and large numbers of people in the mall are the mere result of the grouping of many shops in one area for business purposes); Jacobs v. Major, 407 N.W.2d 832, 845 (Wisc. 1987) (finding that the mall has no appeal to its patrons independent of its shops).

206. *Western Pennsylvania Socialist Workers*, 515 A.2d at 1338. *See also Jacobs*, 407 N.W.2d at 845 (finding that a mall differed from a public forum because it was closed to the public for several hours a day and did not provide residential areas); *Southcenter*, 780 P.2d at 1292 (finding that a mall did not provide necessary state services such as water, sewers, roads, sanitation, education, or public safety).

207. *See Jacobs*, 407 N.W.2d at 844. *Cf.* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

208. The Washington Supreme Court reasoned that the size of a mall could not convert it into a public forum, because there was not a legal difference in size from "stadiums, convention halls, theaters, county and state fairs, large office and apartment buildings, supermarkets, department stores or churches." *Southcenter*, 780 P.2d at 1292. *See also Fiesta Mall*, 767 P.2d at 724 (finding that size alone cannot establish a public forum).

Some state courts[209] also turn to separation of powers principles to deny speech rights in privately owned shopping malls. For example, the Connecticut Supreme Court reasoned that it was not the role of the judiciary to set as constitutional law a balance between the fluctuating societal interests of free speech and private property rights.[210] The Michigan Supreme Court stated that the state action limitation set by the legislature in the state constitution's free speech provision precluded the judiciary from expanding the free speech rights.[211] These arguments effectively decline the invitation[212] to make judicial determinations as to the proper state constitutional analysis.

In conclusion, nine state courts have used the doctrines of state action, public forum, and separation of powers,[213] as rationales for denying free speech rights in privately owned shopping malls. However, these opinions are somewhat lacking because they fail to address the more complex issues presented by prior case law, specific constitutional provisions, and current facts.

b. No Independent Analysis of State Constitution

Two states have failed to engage in any significant analysis of their state constitution in deciding this question. Instead, the supreme courts of Georgia[214] and North Carolina[215] have relied exclusively on the U. S. Supreme Court's declarations, in holding that their citizens have no right to engage in expressive activity in shopping malls. Even though the question presented was how to interpret the state constitution, the Georgia Supreme Court wrote, without elaboration: "we adopt the reasoning of [*Lloyd,*] and decline to follow the reasoning of the California Supreme Court found in [*PruneYard (CA).*]"[216] The North Carolina Supreme Court offered a similarly perfunctory analysis. It did not address the basic question until the last full paragraph of the opinion, and when it did, the state court did not even address the merits at issue. The North Carolina Court's discussion of the state constitutional issue went as

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209. The states are Connecticut, Michigan, Washington, and Wisconsin.

210. *See Cologne*, 469 A.2d at 1210.

211. *See* Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337, 357 (Mich. 1983). *See also Jacobs*, 407 N.W.2d at 844 (finding that it was not the judiciary's role to expand state constitutional rights of free speech already defined by the legislature because that would be to allow the judiciary to arbitrarily impose its own interests on society).

212. This invitation was extended by the United States Supreme Court in *PruneYard*, 447 U.S. 74 (1980).

213. Also as mentioned earlier, the courts of Arizona, Michigan, and Washington have also asserted the rationale that their states' constitutional provisions which guarantee the right to initiate referendums do not guarantee the right to free speech on private property. These courts have reasoned that the right to initiate referenda guarantees that the legislature must comply with the petition after the petition requirements are satisfied but that the initiative provision does not guarantee the solicitation of signatures on private property. *See Fiesta*, 767 P.2d at 724; *Southcenter*, 780 P.2d at 1286; *Woodland*, 378 N.W.2d at 348. Such arguments do not directly address the free speech analysis with which we are concerned.

214. *See* Citizens for Ethical Government, Inc. v. Gwinnett Place Assocs., 392 S.E.2d 8, 10 (Ga. 1990).

215. *See* State v. Felmet, 273 S.E.2d 708, 712 (1981).

216. *Gwinnett Place*, 392 S.E.2d at 10.

follows: "This Court could...interpret our State Constitution to protect conduct similar to that of defendant without infringing on any federally protected property right of the owners of private shopping centers. However, we are not so disposed."[217] These two courts thus offer no insights into the substantive analysis of the constitutional issue, shying away from the difficult ideas involved. The only contribution these opinions make to this discussion is that they indicate that some state courts will rely exclusively on the U.S. Supreme Court, taking a lock step approach and foregoing an independent analysis.

3. End Result

This survey of the various state courts' analyses of speech rights in shopping malls reveals four major points. First, over twenty years ago the United States Supreme Court held that the First Amendment does not protect those wishing to engage in expressive activity in privately-owned shopping malls.[218] Second, the Court subsequently opened the door for the states to offer some protection for expression in malls, via state constitutional analysis.[219] Third, a few states that have engaged in a thorough inquiry have found protection for the mall speaker.[220] Fourth, most states have not extended greater protections to their citizens, but these state high courts have not squarely confronted the challenging issues raised. We next consider why expressive activity should be protected in modern shopping malls.

IV. EXPRESSIVE ACTIVITY SHOULD BE PROTECTED IN MODERN SHOPPING MALLS

Now I will outline why shopping malls must be held open for expressive activity under three different approaches. First, under the First Amendment theory I have proposed, malls are central to the robust public debate and must be held open for expressive activity. Second, I suggest that the existing United States Supreme Court case law, as applied to the facts of today, dictates this result. Third, state courts can also provide protections pursuant to state constitutions; the state courts can and should stand up, confront the issue, and extend their citizens access to the malls.

A. Speech Rights in Modern Malls: Examination Under a New Theory

In recent years, the Court has consistently acted in ways which run counter to the First Amendment theory I have forwarded.[221] This pattern may be seen in two ways: (1) by exalting the individual speaker at the expense of the democratic debate, and (2) by closing off important fora for the debate itself. First, instead of recognizing the primacy of robust public debate, as declared in *Times v. Sullivan*, the Court has elevated individual expression as the central value protected. The Supreme Court's

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217. *Felmet*, 273 S.E.2d at 712 (citing PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)).

218. *See* Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976).

219. *See PruneYard*, 447 U.S. 74 (1980).

220. *See supra* notes 149–94.

221. *See supra* text accompanying notes 81–126.

tendency toward the advancement of individual expression despite its own *Times v. Sullivan* mandate is exemplified by *Pacific Gas & Electric Company v. Public Utilities Commission of California.*[222] In *PG & E*, the Court overturned an order of the California Public Utilities Commission that would have required the Pacific Gas & Electric Company, a privately-owned utility that distributed its own monthly newsletter in its billing envelopes, to include in those same billing envelopes the newsletter of a third party that opposed the utility's rate policies.[223] The Court declared that the order violated the utility's First Amendment rights.[224] In total, the Court solidified its stance that the "State cannot advance some points of view by burdening the expression of others,"[225] even if the viewpoint it intended to advance would provide a great contribution to a necessary public debate of an issue. The value of individual (albeit corporate) expression trumped that of robust public debate.

In addition to its elevation of individual expression as the central value protected by the First Amendment, sometimes to the detriment of robust public debate, the Supreme Court also has been reducing the opportunities for public debate. In *United States v. Kokinda*,[226] for example, the Court held that a sidewalk adjacent to the Bowie, Maryland Post Office was a non-public forum subject to a regulation that prohibited solicitation on the premises.[227] The Court initially recognized that sidewalks traditionally have been held open to the public, serving First Amendment values.[228] However, the Court then found that the purpose of the sidewalk in question was solely to serve as a safe passageway from the parking lot to the front entrance of the post office, and, thus, the sidewalk did not have the quality of those public sidewalks traditionally opened to the public for expressive activity.[229]

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222. 475 U.S. 1 (1985).

223. *See id.* at 6.

224. The majority suggested that a duty to disseminate the viewpoints of a third party as an alternative to its own viewpoints would likely induce the utility to cease expression of its own viewpoints entirely upon an expected decision that "the safe course is to avoid controversy." *Id.* at 14. Alternatively, the Court decided that imposing a duty to include the viewpoints of its opposition may also have the effect of forcing the utility to respond to issues on which it would not otherwise have spoken, thus infringing upon the aspect of free speech that guarantees a freedom to remain silent within the public discourse. *See id.* at 16. To this effect, the Court stated that if the third party's grant of access was upheld, "there can be little doubt that [the utility] will feel compelled to respond to arguments and allegations...." *Id.* The Court reminded that "[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Id.*

225. *Id.* at 20.

226. 497 U.S. 720 (1990).

227. *See id.* at 723.

228. Sidewalks "are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *Id.* at 728. However, the Court stated that it would be "incorrect in asserting that every public sidewalk is a public forum." *Id.*

229. *See id.* at 727. Justice Brennan's dissent lamented the majority's approach. He noted that the requirement of a factual determination of the purpose of some piece of property would defeat the purpose of the First Amendment's protection. Quoting the Court of Appeals, Justice Brennan wrote, "It ill behooves us to undertake too intricate a task of designation,

The Supreme Court's decision in *International Society for Krishna Consciousness v. Lee*[230] further illustrates the Court's unsatisfactory analysis. In *Krishna*, the Supreme Court upheld a ban on solicitation within an airport terminal because the terminal was found to be a non-public forum for such purposes. In its explanation of its holding, the Court reinforced the "purpose" analysis of *Kokinda* by noting that whatever comfort an airport may give to the general public toward free expression (via its commercial aspects) must not be used to characterize it as a traditional public forum unless its *principal purpose* was the promotion of the free exchange of ideas.

This focus on purpose ill-serves First Amendment analysis. It looks backwards at a created "use" for property instead of looking at the present, actual use of the property and whether it serves a role in promoting First Amendment values. The manufactured purpose may hide the central question of the role the location plays in the fulfillment of First Amendment goals. In his opinion in the *Krishna* cases, Justice Souter correctly highlighted the outdated mode of analysis employed by other members of the Court:

> The designation of a given piece of public property as a traditional public forum must not merely state a conclusion that the property falls within a static category including streets, parks, sidewalks, and perhaps not much more, but must represent a conclusion that the property is no different in principle from such examples, which we have previously described as "archetypes" of property from which the government was and is powerless to exclude speech. To treat the class of such forums as closed by their description as "traditional," taking that word merely as a charter for examining the history of the particular public property claimed as a forum, has no warrant in a Constitution whose values are not to be left behind in the city streets that are no longer the only focus of our community life. If that were the line of our direction, we might as well abandon the public forum doctrine altogether.[231]

These cases highlight that the current Supreme Court's analysis fails to move us forward toward the twenty-first century and decimates the First Amendment. While we find a small amount of protection of some individual speakers, much speech is silenced and essential fora are closed off for discussion. As a result, the individual speakers are thwarted *and* the public is left in the dark.[232]

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holding this sidewalk public and that one not.... [S]uch labeling loses sight of the fact that most sidewalks are designed as outdoor public thoroughfares and that *citizens should not be left to wonder at which ones they will be permitted to speak and which ones not.*" *Id.* at 745 (Brennan, J., dissenting (quoting United States v. Kokinda, 866 F.2d 699, 702 (1989)) (emphasis added). Effectively, he decried the majority's ruling as one closing locations for speech, thereby reducing the democratic dialogue.

230. 505 U.S. 672 (1992).

231. *Id.* at 710 (Souter, J., concurring in part and dissenting in part) (citation omitted).

232. Likewise,

> A body of doctrine that fully protects the street corner speaker is indeed an accomplishment of some note; the battles to secure that protection were hard fought and their outcome far from certain. *Brandenburg* is one of the

First Amendment values are underserved, at best, by the current state of U.S. Supreme Court case law. Professor Cass Sunstein has protested, in our specific context:

> [T]he Court upheld the use of the trespass laws to exclude speakers from shopping centers. This is a controversial conclusion in light of the fact that the result may be to eliminate speakers from the only meeting place in town, and for perhaps inadequate reasons, since the shopping center is made open to the public in any case and so no real privacy interests are at stake.[233]

Professor Owen Fiss also mourns the change that the Court has wrought.

> In this context [of a changing society], we return to the street corner with a sense of despair. Its significance for public debate pales compared to that of the mass media, but it endures as one of the few arenas in which radical activists can make an appeal to the public: The street corner is their last, desperate forum. One would have hoped that the Supreme Court would accommodate the changes it has wrought in the law governing the media by increasing the protection of the street corner and other spaces that now are important locations of public social interaction, including bus terminals, airports, post offices, and shopping malls. In fact, just the opposite has happened. Rather than compensating for its media decisions by expanding the protection of alternative means of speech, the Court has pursued a policy which aggravates or compounds the effect of those decisions.[234]

No doubt the Court's course has diminished the available speech opportunities.

The shortcomings of the current U.S. Supreme Court approach are illustrated by our specific subject. As developed in Part I, the shopping mall is a central institution in modern American society. It is a place where people gather to live their lives. It is a place where, particularly in light of the demise of the downtown street corner, people should be exposed to the robust public debate that is envisioned and guaranteed by the First Amendment. Justice Marshall made this point thirty years ago in *Logan Valley*.[235] If the people are to be well-informed, able to understand the debate, and play their democratic role, they cannot be shielded from speech in their daily lives. However, that is the result of the current state of federal law. People live in a vacuum without meaningful debate. Without such debate, the shielded individuals

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> blessings of our liberty. The problem, however, is that today the street corner has become marginal to public debate, and the doctrinal edifice that seemed to someone like Kalven so glorious with the street corner speaker in mind is largely unresponsive to the conditions of modern society.

FISS, *supra* note 50, at 13.

The Internet is the newest medium for communication, and the same general issues raised here also will arise, in slightly different form, with the Internet. *See* Symposium, *Emerging Media Technology and the First Amendment*, 104 YALE L.J. No. 7 (1995).

233. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 42–43 (1993).

234. FISS, *supra* note 50, at 50.

235. *See* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 324–25 (1968).

are unable to fully understand and participate in the great democratic debate. And with fewer and fewer well-informed participants, we all suffer and our nation suffers. Certain institutions or structures are so essential to the fabric of our society that they must be held open for discussion and debate. Constitutionally speaking, I specifically propose that the malls *must* be held open as a site for the exchange of ideas and the fulfillment of the goals of the First Amendment.[236] While I believe this to be essential, the theory I have propounded dictates a result contrary to that which the U.S. Supreme Court has held in this area. I shall now address this problem.

B. Under Existing U.S. Supreme Court Analysis, Modern Malls Must Be Open

I have argued that many modern shopping malls should be open to expressive activities. However, current United States Supreme Court case law does not agree—*Hudgens* is good law and *Logan Valley* is not. Nonetheless, even if the current Court rejects the theory of the First Amendment I have proposed and instead apply existing precedent, the analytical end result should be the same—modern malls should be open for expressive activities.

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236. Time, place, and manner restrictions serve to limit in some ways the access the speaker (and listener) have to a forum. Such restrictions actually serve more than one purpose. On the one hand, they protect the private property owner's rights, allowing for some limitations on the use of property for the robust public debate. At the same time, they help focus the debate and discussion, preventing speech and debate from becoming a cacophonous free-for-all where the ultimate quality of discourse is eviscerated. These restrictions on speech are permissible as reasonable conditions likely to enhance the quality of the debate and to serve important governmental interests. *See generally* Grayned v. Rockford, 408 U.S. 104 (1972) (upholding an anti-noise ordinance as a reasonable regulation of time, place, and manner for speech whereas the manner of expression, noisy picketing in front of a school during class hours, was found to be wholly incompatible with the regular activities of that location at that particular time); City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding a Los Angeles ordinance that prohibited the posting of signs or handbills on all utility poles and like objects; the government's interest in maintaining the esthetic value of the city as well as the safety of workers who would have to climb the poles was compelling enough to justify such limitations on speech activity); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding a New York City ordinance that regulated the volume of amplified music at amphitheaters and re-affirming that time, place, and manner regulations need only be narrowly tailored to serve a content-neutral interest rather than be the least-restrictive means for regulation); City of Ladue v. Gilleo, 512 U.S. 43 (1994); Madsen v. Women's Health Center, 512 U.S. 753 (1994). *Cf.* Meiklejohn, *supra* note 32, at 261. ("The most striking and perplexing cases of this kind occur when meetings are held on the public streets or in parks whose primary use is, in the opinion of the authorities, blocked or hindered to a degree demanding action. Now if such ordinances are based upon official disapproval of the ideas to be presented at the meeting, they clearly violate the First Amendment. But if no such abridgment of freedom is expressed or implied, regulation or prohibition on other grounds may be enacted and enforced.").

1. First Amendment Analysis of U.S. Supreme Court Shopping Mall Cases

a. *Marsh* as the Foundation

The *Marsh* opinion sets up the possibility that First Amendment rights exist on privately owned property. *Marsh* offered two statements of constitutional principle that open the door for expressive activity in privately-owned shopping malls. First, the *Marsh* Court held: "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...that the latter occupy a preferred position."[237] Thus, it is clear that while there may be clashes of rights, First Amendment rights can effectively trump property rights.

Second, the Court made clear that private property owners sometimes act in such a manner as to change the nature of their property.[238] What might appear to be private has at least some elements of the public. "The 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...rights of those who use it."[239] These two statements reveal that (1) First Amendment rights maintain a particularly high position, and (2) the actual use of privately-owned property may effectively transform that property into a place for public discourse.

b. The *Lloyd* Invitation; the *Hudgens* Conclusion

The *Logan Valley* decision offered a brief opening for those seeking to engage in expressive activity in shopping malls. However, *Lloyd* and then *Hudgens* shut the door. However, those opinions were built upon a factual foundation that has no bearing on today's society. The incident that developed into the *Lloyd* opinion occurred on November 14, 1968;[240] the *Hudgens* facts came from January 1971.[241] Three decades later, the facts are completely different. The mall of today is not the mall of the late 1960s. These new facts demand a new analysis. Applying the principles developed in those cases to the facts of today yields a different result from then. First, we look back at the facts presented, then we can turn to constitutional principles. The *Lloyd* Court described

> a large, modern retail shopping center [which] embraces altogether about 50 acres, including some 20 acres of open and covered parking facilities which accommodate more than 1,000 automobiles.... There are some 60 commercial tenants....

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237. Marsh v. Alabama, 326 U.S. 501, 509 (1946).

238. *See generally* Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1988).

239. *Marsh*, 326 U.S. at 506.

240. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 556 (1972).

241. *See* Hudgens v. National Labor Relations Board, 424 U.S. 507, 509 (1976).

> The Center embodies a relatively new concept in shopping center design. The stores are all located within a single large, multi-level building complex sometimes referred to as the "Mall."[242]

This description is seemingly quaint by today's standards. No doubt the Lloyd Center is still a major mall, but it is hardly at the cutting edge of new mall development.[243] The Court's nearly wondrous description underscores the framework of the times.

The central question the Court asked in *Lloyd* was what was the invitation extended by the Center. The Court concluded that the "invitation is to come to the Center to do business with the tenants.... There is no open-ended invitation to the public to use the Center for any and all purposes..."[244] The *Lloyd* majority relied heavily on Justice White's dissent in *Logan Valley*, in which he observed that the "invitation is to shop for the products which are sold."[245] If the shopping center's invitation to the public is broad, the Court implied, then the privately held property could be required to be held open for First Amendment activity. Instead, the *Lloyd* Court concluded that under those facts "there ha[d] 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."[246] With new facts and a new prototypical mall, the answer surely must be different.

Today's mall is very different from that described in *Lloyd*. The invitation extended is far more encompassing. As we explored earlier,[247] the invitation is to come and engage in numerous different types of activities; to idle; to move through slowly and enjoy one's self. If the question is, as *Lloyd* dictates, what is the invitation, then the current answer is different. Since the Court seemed to hinge its First Amendment analysis on this question, if we look at these different facts, we must come up with a different end conclusion.

The Court asked a question that resulted in an answer suggesting that the malls did not offer an opportunity for anything other than shopping. Now, the answer is that the malls offer much more than shopping. They offer an opportunity for the individual to live life; they offer an opportunity for the people to engage in all kinds of activities, including shopping, eating, and yes, even talking. And as the mall is so different, the First Amendment answer is also different. These are indeed places where

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242. *Lloyd*, 407 U.S. at 553.

243. Note that the Lloyd Center is still one of the 100 largest in the country, but it is the smallest to respond to the survey prepared for this Article, and it is far smaller than the average mall surveyed. The average center covered 110 acres (compared to Lloyd Center's 39), with 180 stores. Still, Lloyd's development mirrors the national trend that is discussed in these pages. For example, when the Lloyd Center opened in 1960 its leasable area was 900,000 square feet; today that number is 1.5 million. The Center's tenants have increased in number during that time, from approximately 100 to approximately 200. *See* Mall Survey, *supra* note 3.

244. *Lloyd*, 407 U.S. at 564–65.

245. *Id.* (quoting Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 388 (1968) (White, J., dissenting)).

246. *Id.* at 570.

247. *See supra* text accompanying notes 10–30.

the individual can realize his potential, and the group can learn from one another. It is an essential forum which the Court should recognize has been transformed in the last three decades so that it should be held open as a forum for expressive activity.[248]

In addition to the invitation issue, the Court also relied on the fact that there were ways to access listeners in the mall, other than through expressive activity in the mall itself. The *Lloyd* Court noted that the result could be distinguished from that in *Logan Valley* where the speakers were "deprived of all reasonable opportunity to convey their message to patrons...."[249] In particular, the Court observed that the Lloyd Center was "surrounded by public sidewalks, totaling 66 linear blocks."[250] The modern mall is typically not at all like that; instead there is often a new exit ramp built off of a highway for the mall, or it is bordered by intersecting highways. Thus, no real alternative access argument may be made. With new facts that effectively eliminate this fallback position, the Court's end analysis again must be different.[251]

The *Hudgens* Court did not add much to the First Amendment analysis, instead relying extensively, almost exclusively, upon the *Lloyd* holding.[252] Thus, the Court reinforced that the question of the dedication of the property to public use and the invitation are the central issues involved. Therefore, if the *Lloyd* question is settled conclusively in favor of the speaker, then the *Hudgens* analysis must also reach the same result on these new facts.

In addition, no case has overturned *Marsh*; nor have any of these cases repudiated one of the essential portions of the *Logan Valley* analysis. The *Hudgens* Court observed: "If a large self-contained shopping center is the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content."[253] Thus, the Court explicitly left open the possibility that a differently configured mall could indeed be the proper location for expressive activity. I contend that today's mall is just the right place.[254]

2. State Action

The state action doctrine may be interpreted to imply that First Amendment violations do not occur when purely private actors suppress expressive activity. Such an argument is too broad, and for several reasons, the state action doctrine is not an impediment to our analysis: (1) there is significant state action in physical removals as well as the courts' involvement with orders preventing expressive activity; (2) there

248. Such access would certainly be subject to time, place, and manner restrictions. *See supra* note 236.

249. *Lloyd*, 407 U.S. at 566.

250. *Id.*

251. *See generally* City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (discussing alternative avenues of communication).

252. The Court's First Amendment analysis consists of six paragraphs, four of which directly quote the holding in *Lloyd*. *See* Hudgens v. National Labor Relations Board, 424 U.S. 507, 518–21 (1976) (citing *Lloyd*, 407 U.S. at 567, 568–69, 570).

253. *Hudgens*, 424 U.S. at 520.

254. In addition, the categories developed by the New Jersey Supreme Court in *J.M.B. Realty Corp.* are helpful in understanding what the modern mall looks like.

is state entanglement in the special deals and other assistance provided by the state to developers; (3) there is significant government entanglement in terms of the state tenants; (4) the modern mall essentially serves a public function as the new downtown; and (5) case law implicitly acknowledges the existence of state action. In today's mall, hiding behind the state action doctrine avoids the difficult First Amendment issue presented;[255] but state action may be shown in various ways. At the very least, I would suggest a more realistic examination of the application of the state action doctrine in this context. State action is a paper shield which should not serve to protect property owners.

First, there is state action in the way in which expressive activity is silenced in malls. The cases we have examined involve protestors who are physically removed by police, and malls that obtain injunctions preventing expressive activity. In this most basic way, just as with *Shelley*,[256] there is state action. The state is actively involved in the suppression of the speech involved, and in this most basic sense state action occurs. In this regard, there is state action even to the greater extent to meet the tougher *Moose Lodge* standard. Not only is the state involved in some way, but it specifically is involved in the removal of the patrons and the issuance of orders that prevent people from engaging in expressive activity. Thus, this is no mere liquor license; the state is directly involved in the particular acts that limit constitutionally protected expression. Sunstein has observed that in the shopping center cases, the

> Supreme Court thinks that the First Amendment is not implicated, since no government regulation of speech is involved. All that has happened is that private property owners have barred people from their land.
>
> In fact, this is a poor way to understand the situation.... The owners of the shopping center are able to exclude the protestors only because government has granted them a legal right to do so.... The public grant of such rights—what we really mean by property rights—is an exercise of state power.... It is a real question whether the grant of exclusionary power violates the First Amendment, at least in circumstances in which it eliminates the only real way of making a protest visible to members of the local community.[257]

Second, today's malls require much in the way of state support, and there is great entanglement between the state and the private developer. The modern mall could not exist without great support from and entanglement with the state. Mall developers typically receive tremendous tax breaks; new roads are constructed; sewer

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255. The U.S. Supreme Court has not taken a realistic look at the state action doctrine in the shopping mall context, and its approach has helped keep mall doors shut to speakers. Instead of looking broadly at the entanglement between the state and the developer, the Court instead asks only whether the owner of the mall is a private entity. Likewise, Fiss objects to the use of the state action doctrine: "In the early 1970s, [the] Court broke with...tradition and began to make ownership a central question in its analysis. Under the guise of implementing the state action requirement, the Court closed off private property, including shopping centers and malls, from speech activities." FISS, *supra* note 50, at 61.

256. *See supra* notes 136–38 and accompanying text.

257. SUNSTEIN, *supra* note 233, at 44.

lines are built.[258] This represents the kind of entanglement with which the Court has been concerned in determining whether there is state action. Shopping malls would be empty if special permits granting rights of way were not issued and sewer lines were not installed. Moreover, developers of malls are greatly aided in their pursuits by special tax incentives and sweetheart property purchasing deals.[259] The state makes it possible to build the mall. Without the helping hand of the state, the modern mall would not exist.

Third, we also see the kind of entanglement that the Court found troublesome in *Burton*.[260] In this regard, recall the prior description of the modern mall.[261] The modern mall is the site of numerous state activities. Today's mall typically has a police substation; there are also post offices, federal and state executive offices, and Congressional offices. The state also lives at the mall with the citizen. This entanglement further suggests that state action is not a true impediment to finding a constitutional deprivation.[262]

Fourth, the modern mall is the new downtown. As was detailed in Part I, the malls of today have replaced the downtowns of yesterday, and as such, the malls have taken on a public function which resembles that of the company town of *Marsh*, even including streets, restaurants, hotels and churches.

Fifth, the U.S. Supreme Court's *PruneYard* opinion implicitly accepts the notion that there is some sort of state action, not even mentioning the term. This caused Dean Brest to observe that the Court "simply *assumed* the existence of state action."[263] This assumption of state action in *PruneYard* serves as a powerful suggestion, perhaps even precedent, for the argument that there is state action in the operation of the modern mall. While the Court has not been receptive to the expressive rights of individuals in privately owned shopping malls, the *PruneYard* opinion at least can be read to suggest that state action is not the barrier.

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258. *See, e.g.*, Maureen Bausch, *Mall of America Will Keep Barring Protests and Disorderly Behavior*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE, Aug. 5, 1997, at 12A ("$105 million was allocated as economic development money by the City of Blomington to finance public improvements such as sewer, roadways and parking."). *See supra* text accompanying note 144.

Note that a case has been working its way through the Minnesota court system presenting our specific issue, in the context of the nation's largest mall, the Mall of America. *See* State v. Wickland, Nos. 96 042987, 96 044022, 96 043061, 96 043228, 1997 WL 426209 (Minn. Dist. Ct. July 24, 1997) (upholding speech rights in the Mall of America); State v. Wickland, 576 N.W.2d 753 (Minn. Ct. App. 1998) (reversing lower court).

259. *See* Bausch, *supra* note 258, at 12A. *See also supra* text accompanying note 144.

260. *See supra* notes 141–42 and accompanying text.

261. *See supra* Part I.

262. As the *Moose Lodge* Court read *Burton*, the parking authority "had so far insinuated itself into a position of interdependence with Eagle (the restaurant owner) that it must be recognized as a joint participant in the challenged activity." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172–73 (1972). Likewise, the state is a joint participant in mall life.

263. Brest, *supra* note 129, at 1319 (emphasis in original). *See id.* at 1323 ("State action is readily assumed in *PruneYard*.").

The state is involved in so many different ways, and to ignore this fact is excessively formalistic.[264] The Court should consider the First Amendment issues involved, without invoking the state action doctrine.

3. No Automatic Unconstitutional Invasion of Property Rights

The next concern to address in this portion of our discussion is that of takings and the possible infringement on property rights.[265] The mall owners legitimately worry that if they must open their malls for expressive activity, such activity will have an impact on the business of the mall. No doubt this is true. The extent or nature of the impact is uncertain. However, the mall owners contend that such an impact ultimately amounts to an unconstitutional taking, in violation of their Fifth and Fourteenth Amendment rights. The *PruneYard* Court laid that debate to rest. It made clear that while allowing expression in privately-owned malls might amount to a taking, it was not automatically an unconstitutional one. Expressive activity in privately-owned malls does not necessarily violate the property owner's Fifth and Fourteenth Amendment rights.

In weighing out the competing interests, the *PruneYard* Court held that

> the determination whether a state law unlawfully infringes a landowner's property in violation of the Taking Clause requires an examination of whether the restriction on private property "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[266]

In the specific context of speech in shopping malls, the Court made clear that expressive activity may be required to a certain degree without involving an unconstitutional taking.[267] And the actual result in that case was to hold that the California state mandate to allow expressive activities to occur in the PruneYard did not amount to an unconstitutional taking under federal constitutional law. There may be a need to limit the nature of the expressive activity, and time, place and manner restrictions are specifically necessary to achieve such a goal.[268] Thus, not only did *PruneYard* effectively invite the states to do their own analyses under their own constitutions, it also reinforced the *Marsh* principles that constitutional protections for

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264. *See also* Chemerinsky, *supra* note 129, at 506 ("Eliminating the concept of state action merely means that the courts would have to reach the merits and decide if a sufficient justification exists; courts could not dismiss cases based solely on the lack of government involvement.").

265. This is a significant issue which is intentionally not discussed at length in these pages. This Article instead focuses on the nature of the First Amendment rights involved.

266. PruneYard Shopping Center v. Robins, 447 U.S. 74, 82–83 (1980) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)) (alteration in original).

267. *PruneYard*, 447 U.S. at 83.

268. For a brief discussion of time, place, and manner case law, see *supra* note 236. Also note that there is currently a matter being litigated in the New Jersey courts that seeks to determine the boundaries of permissible restrictions. *See generally* Green Party and James Mohn v. Hartz Mountain Indus., Inc., d/b/a The Mall at Mill Creek (N.J. Super. Ct., Ch. Div.) (Docket No.: HUD-C-137-96).

property owners may be subordinated and that mandating expressive activity in privately-owned malls might not represent a significant taking.

4. Summary: U.S. Supreme Court Precedent Would Allow Speech in Modern Malls

This examination of U.S. Supreme Court precedent reveals that under the principles developed in the current case law, the Constitution protects expressive activity in modern malls. First, *Marsh* tells us that privately owned property may be transformed into and effectively treated as public space. Next, the principles enunciated in *Lloyd* and *Hudgens* ask about the invitation extended to the public. The invitation is far broader than three decades ago, and supports greater access. In addition, there are not the kinds of alternatives available that ensure effective speech elsewhere, again dictating in favor of opening the malls. Further, the case law explicitly leaves open the possibility that a differently configured mall could be a site for such activity. On those grounds, the First Amendment concerns are satisfied. Plus, state action barriers are inapposite, as the modern mall relies upon the state to exclude speakers and does not exist without the assistance of the state. Finally, there is no unconstitutional infringement upon property rights, and any perceived of potential infringement can be addressed through time, place and manner restrictions.

C. State Courts Play a Role

Until the United States Supreme Court addresses this issue, the state courts are in the best position to recognize the changing nature of malls and to protect the free exchange of ideas in them. There are several ways for the states to stand up and be counted. The New Jersey Supreme Court has provided other states with a prime example of a thorough examination of the relevant facts and analysis.[269] While each state constitution is different, the New Jersey example is helpful.

The states must not hide from a thorough, searching analysis. First, they should not use state action as a screen. State action is omnipresent; the malls would not exist without significant assistance from the state. Moreover, for those states with constitutional provisions which provide that every person may freely speak,[270] the state action requirement provides little legitimate cover. Next, the state courts should stop their blind reliance on the prior United States Supreme Court case law. Looking at the facts of today shows that the old case law is outdated, and it is analytically unsound for the state courts to blindly rely on 1970s results to resolve twenty-first century problems. The United States Supreme Court recognized that the states can undertake their own independent analyses, and such efforts would result in opening malls for the exchange of ideas.

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269. *See* New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 767 (N.J. 1994).

270. *See supra* notes 200–06.

V. CONCLUSION

Under three different approaches to the question of whether expressive activity should be permitted in privately-owned malls, the answer is the same: most definitely. First, I have proposed a new theory of the First Amendment, elevating the democracy value, but built upon the strength and participation of the well-informed individual. Under this theory, the malls are essential fora for the exchange of ideas. These are locations where individuals can express themselves and become better educated in the functioning of our nation. As such, these places must be held open for expressive activity, subject to reasonable time, place and manner restrictions. Second, under the principles enunciated by the Court in *Marsh*, *Logan Valley*, *Lloyd*, *Hudgens* and *PruneYard*, the modern mall must be held open. Looking closely at the mall of today; it is not the same place examined in the late 1960s and 1970s. With the changes in its physical use and purpose, the mall plays a different role in society today. Taking the Supreme Court's prior pronunciations on this general subject and looking at the facts as presented today, the Court should reach a new result. Third, the few state courts which have carefully examined their constitutions have reached the conclusion that speech must be permitted. These states have recognized that both the modern facts and the specific words of their charters dictate such a result. The three separate approaches yield the same result.

In the end, privately-owned malls must be opened for expressive activity. Our nation needs, and even demands, nothing less.