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Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?

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SPEECH ACTIVISTS IN SHOPPING CENTERS: MUST PROPERTY RIGHTS GIVE WAY TO FREE EXPRESSION?

Abstract: The United States Constitution does not require shopping center owners to allow speech activists to engage in expressive activities on shopping center property. The Supreme Court has authorized states to provide greater protections for expressive activities than the Constitution provides. Six state supreme courts have interpreted the constitutions of their states to limit protections to the scope of the United States Constitution. Three state supreme courts have interpreted their constitutions to mandate accommodation of speech activists on private shopping center property. This Comment analyzes the treatment of the shopping center conflict both in the United States Supreme Court and in state courts. The Comment concludes that state authority should be reassessed in view of recent Supreme Court decisions that any taking of property from one private party for use by another is a taking requiring compensation under the United States Constitution.

Shopping center owners and speech activists across the country have clashed over owners' rights to control the use of their property. Owners seek to defend their private property rights. Speech activists seek to expand the areas where expressive activities[1] are protected to include shopping centers. In settling these disputes, courts have followed various lines of reasoning to produce results ranging from expansive protection of expressive activities to full protection of owners' rights. Courts that protect expressive activity in shopping centers under state constitutions arguably infringe shopping center owners' federal constitutional rights.

I. RIGHTS OF SPEECH ACTIVISTS AND SHOPPING CENTER OWNERS

Although the United States Constitution protects both expressive and property rights, neither category is protected absolutely. The Constitution guarantees freedom of expression from abridgement by government only.[2] Thus, the Constitution protects speech activists in

1. The term "expressive activities" refers to activities of individuals who seek to communicate private opinions to the general public. Such activities include demonstrations, distribution of literature, solicitation of signatures, and political activity.

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I; *see* Public Util. Comm'n v. Pollak, 343 U.S. 451, 461 (1952) (first and fifth amendments apply to and restrict federal government only, not private persons).

public areas,[3] but not on private property, except where a private entity owns an entire town.[4]

The Constitution does not define property rights, but it protects them.[5] State statutory and common law, limited by substantive and procedural constitutional considerations, defines the scope of property rights protected.[6] The Constitution protects property owners against deprivation of property without due process and against taking of property for public use without just compensation.[7] The government must compensate a property owner if it takes property through excessive regulation of the owner's use[8] or through an actual taking for public use either by physical occupation[9] or by taking an easement for public use.[10] The government may not take property from one individual for the purely private use of another.[11]

Although the Supreme Court currently does not recognize a first amendment right of expression on the premises of privately owned shopping centers,[12] the Court has authorized states under their own

3. Public property is not necessarily open to speech activists. In Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983), the Court listed three broad categories of public property with varying levels of protection for expressive activity. First, the state cannot ban all expressive activity in streets and parks because these areas traditionally have been public forums for expressive activity. Second, if the state opens up public property for expressive activity, the state is bound by standards applicable to traditional public forums as long as the property is kept open. Third, the state may reserve certain public property, such as school mail facilities, for its intended purposes as long as the state does not discriminate against speakers' viewpoints.

4. *See* Marsh v. Alabama, 326 U.S. 501, 508–09 (1946).

5. U.S. CONST. amend. V; *id.* amend. XIV, § 1; *see infra* note 7.

6. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 473 (3d ed. 1986).

7. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Id.* amend. XIV, § 1.

8. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922) (limiting coal company's right to extract coal was an unconstitutional taking).

9. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421–22, 441 (1982) (requiring apartment building owner to allow television cable company to attach equipment to building was a taking requiring compensation).

10. *See, e.g.,* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3145, 3150 (1987) (commission could not require owners to provide easement for public to reach beach without compensating owners).

11. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 6, at 414–15; *see* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161 (1896) (private property may be taken for public use only); *see also* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243–45 (1984) (government may take land for use by private individuals, but government action must be rationally related to some conceivable public purpose and government must pay just compensation).

12. *See* Hudgens v. NLRB, 424 U.S. 507, 519–21 (1976). The term "shopping center" is ambiguous. Although it connotes a collection of separate businesses on one unified piece of property, the number of businesses so joined and the size of the property can vary tremendously

constitutions to offer more expansive rights than those found under the United States Constitution.[13] The first amendment of the Constitution, incorporated into the fourteenth amendment, sets the minimum level of speech protection that the states must meet.[14] However, in exercising their state constitutional authority in favor of expressive rights, states may not restrict property rights to an extent that constitutes an uncompensated taking or conflicts with owners' first amendment rights.[15]

States that opt to protect expressive rights beyond the scope of federal protection may be infringing on property owners' federal constitutional rights. If a state takes private property to accommodate expanded protection for speech activists, the state has violated the taking clause of the fourteenth amendment unless the state pays the owner just compensation.[16] Some states protect expressive activities on private property to varying degrees.[17] Other states offer no protected access.[18] The following historical survey shows the evolution of

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and still be within the shopping center definition. There is no principled way to distinguish which shopping centers the courts may require to accommodate speech activists. It would be illogical to protect demonstrators in a small shopping center while excluding them from a multidepartmental superstore. Similarly, other private facilities such as sports stadiums, office buildings, and medical complexes also attract large crowds and could provide attractive platforms for expressive rights activists. On the other hand, if shopping centers were protected from forced accommodation of speech activists, these facilities would not need to be distinguished.

13. PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

14. Gitlow v. New York, 268 U.S. 652, 666 (1925).

15. *PruneYard,* 447 U.S. at 81, 87–88.

16. *See* Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226, 241 (1897) (any taking of private property for public use, even if authorized by statute, must be compensated); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161 (1896) (private property may be taken for public use only).

17. California, Massachusetts, and Washington protect expressive activity in shopping centers. *See* Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), *aff'd,* 447 U.S. 74 (1980); Batchelder v. Allied Stores Int'l, 388 Mass. 83, 445 N.E.2d 590, 591 (1983); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 246, 635 P.2d 108, 117 (1981). New Jersey and Pennsylvania protect expressive activity on private college campuses. *See* State v. Schmid, 84 N.J. 535, 423 A.2d 615, 630–33 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982); Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382, 1390 (1981).

18. Courts in Connecticut, Michigan, New York, North Carolina, Pennsylvania, and Wisconsin find no protection for expressive activities in shopping centers under their constitutions. *See* Cologne v. Westfarms Assocs., 192 Conn. 48, 469 A.2d 1201, 1202 (1984); Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 378 N.W.2d 337, 338–39 (1985); SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 488 N.E.2d 1211, 1218, 498 N.Y.S.2d 99, 106 (1985); State v. Felmet, 302 N.C. 173, 273 S.E.2d 708, 712 (1981); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 512 Pa. 23, 515 A.2d 1331, 1333 (1986); Jacobs v. Major, 139 Wis. 2d 492, 407 N.W.2d 832, 846, 848 (1987).

the conflict between expressive and property rights in shopping centers.

II. MANDATORY ACCOMMODATION OF SPEECH ACTIVISTS IN SHOPPING CENTERS AS DETERMINED BY THE COURTS

A. Expressive Rights Under the United States Constitution

The Supreme Court first held that expressive rights extended to private property in *Marsh v. Alabama,*[19] which laid the foundation for the shopping center cases. In *Marsh,* the Court held that the owner of a company town could not deprive an individual of the freedoms of press and religion that neither a state nor municipality could deny.[20] The majority reasoned that because all normally public functions were performed by a private entity, and the town was otherwise indistinguishable from any other town, it was unconstitutional for the town to prohibit expressive activity.[21] The Court further reasoned that the more an owner opened property to use by the public, the more the owner's rights could be circumscribed by the statutory and constitutional rights of those public users.[22] The dissent argued that the owner's rights were also constitutionally protected and that the interests of a trespasser, although trespassing in the name of religion or free speech, could not supersede the owner's rights.[23]

Twenty-two years later, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza,*[24] the Court held that a shopping center owner could not prohibit picketing by individuals against a store located in the shopping center because the center was the functional equivalent of a downtown business district.[25] Although the *Logan Valley* opinion relied on the reasoning of *Marsh,*[26] Justice

19. 326 U.S. 501, 503, 509 (1946) (Jehovah's Witness could not be prevented from handing out religious literature on the streets of a town owned entirely by a private company, where the town was open to the public and had the appearance of any public town).

20. *Id.* at 508–09.

21. *Id.* at 502–03, 509.

22. *Id.* at 506. This incremental approach might have led to an *ad hoc* balancing analysis in all instances where private property owners issued limited invitations to the general public. The Court started to move in that direction when it first analyzed shopping center activity, but quickly retreated. *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), *overruled by* Hudgens v. NLRB, 424 U.S. 507 (1976).

23. *Marsh,* 326 U.S. at 516 (Reed, J., dissenting).

24. 391 U.S. 308 (1968), *overruled by* Hudgens v. NLRB, 424 U.S. 507 (1976).

25. *Logan Valley,* 391 U.S. at 325. The picketing was peaceful and, except for the trespass issue, protected under federal labor law. *See* Thornhill v. Alabama, 310 U.S. 88, 102–06 (1940).

26. *Logan Valley,* 391 U.S. at 316–20.

Black, who had written the majority opinion in *Marsh,* wrote the strongest of three dissents. He stated that *Marsh* required property to have "*all* the attributes of a town," including homes, streets, sewers and a business district, and that courts should not confiscate private property for the use of picketers on the ground that the property resembled a downtown business area.[27]

Logan Valley was the high-water mark for protected expression on private property under the United States Constitution. Four years later, in *Lloyd Corp. v. Tanner,*[28] the Court held that the protection offered under *Logan Valley* extended to expressive activity directly related to some use of the shopping center only.[29] The Court would not extend the principle to protect the expressive activity of individuals demonstrating in a shopping center against the draft and the Vietnam war.[30] The Court reasoned that because the shopping center was not dedicated to public use, individuals had no constitutional right to distribute handbills against the will of the owners.[31] Although the Court did not overrule *Logan Valley,*[32] it adopted the reasoning of Justice Black's *Logan Valley* dissent to distinguish shopping centers from company towns.[33]

In *Hudgens v. NLRB*[34] the Court overruled *Logan Valley.*[35] The issue in *Hudgens* was whether striking union members had a first amendment right to picket a shoe company located in the shopping center.[36] The Court distinguished shopping centers from company towns and held that, because a shopping center was not the functional equivalent of a municipality, the first amendment did not protect expressive rights in shopping centers.[37] Acknowledging that the Constitution protects speech against abridgement by the government only, the Court nevertheless retained the company town exception.[38]

27. *Id.* at 332 (Black, J., dissenting).
28. 407 U.S. 551 (1972).
29. *Id.* at 562–63.
30. *Id.* at 558–70.
31. *Id.* at 570.
32. The Court distinguished *Lloyd* from *Logan Valley* because the activity in *Lloyd* was not related to any of the business operations within the center. *Id.* at 563–64.
33. *Id.* at 562–64; see *supra* note 27 and accompanying text (discussing Justice Black's dissent).
34. 424 U.S. 507 (1976).
35. The Court acknowledged the conflict between *Logan Valley* and *Lloyd,* and stated: "[W]e 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. . . . [T]he ultimate holding in Lloyd amounted to a total rejection of the holding in Logan Valley." *Id.* at 518 (footnote omitted).
36. *Id.* at 509–12.
37. *Id.* at 520–21.
38. *Id.* at 513.

B. Expressive Rights Under State Constitutions

State courts disagree about the rights of speech activists in shopping centers, even though the constitutions of states that have addressed the problem contain similar free speech provisions.[39] Supreme courts in three states have interpreted their state constitutions to protect expressive activities in shopping centers over the objections of owners.[40] Two states have protected expressive rights on private college campuses,[41] and at least two lower courts have predicted that the highest courts of their states might interpret their constitutions to protect expressive rights in shopping centers.[42] Six state supreme courts have declined to hold that their state constitutions protect expressive rights

39. *See* CAL. CONST. art. I, § 2; CONN. CONST. art. I, § 4; MASS. CONST. pt. 1, art. XVI, [§ 17]; MICH. CONST. art. I, § 5; N.J. CONST. art. I, § 6; N.Y. CONST. art. I, § 8; N.C. CONST. art. I, § 14; PA. CONST. art. I, § 7; WASH. CONST. art. I, § 5; WIS. CONST. art. I, § 3.

40. *See* Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), *aff'd*, 447 U.S. 74 (1980); Batchelder v. Allied Stores Int'l, 388 Mass. 83, 445 N.E.2d 590, 591 (1983); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 246, 635 P.2d 108, 117 (1981).

41. State v. Schmid, 84 N.J. 535, 423 A.2d 615, 630–33 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982) (New Jersey Constitution protects right of speech activist to distribute political literature on campus of Princeton University where University regulations state that free speech and assembly are necessary elements in the search for knowledge and insight, a public presence is consonant with the university's mission, and the university's regulatory scheme is not reasonable); Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382, 1384, 1390–91 (1981) (peaceful leafleting on college campus protected in Pennsylvania, where college invites public to campus to hear FBI director give speech). *But see* Brown v. Davis, 203 N.J. Super. 41, 495 A.2d 900, 903–04 (1984) (in New Jersey, individual has no right to place anti-abortion literature on cars in medical complex parking lot where no space is provided for public to congregate, there is no invitation to the public at large, and the expressive activity is incompatible with services rendered by the Women's Center in the complex); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 512 Pa. 23, 515 A.2d 1331, 1333 (1986) (expressive activity not protected in Pennsylvania shopping centers).

42. *See* Fairfield Commons Condominiums Ass'n v. Stasa, 30 Ohio App. 3d 11, 506 N.E.2d 237, 247 (1985) (demonstration at medical complex not protected because less public than shopping center); Right to Life Advocates, Inc. v. Aaron Women's Clinic, 737 S.W.2d 564, 568–69 (Tex. Ct. App. 1987) (speech activity not protected at medical clinic because open policy of mall not applicable).

on private property,[43] and at least two lower courts have suggested that the highest courts of their states would follow suit.[44]

California was the first state to grant speech activists a right of expression in shopping centers under a state constitution. The California Supreme Court, in *Robins v. PruneYard Shopping Center,*[45] held that the California Constitution[46] protected reasonably exercised speech and petitioning activity in privately owned shopping centers.[47] The court reasoned that because *Lloyd Corporation v. Tanner*[48] was primarily a first amendment case and did not define the nature and scope of shopping center owners' constitutional rights generally,[49] the California Constitution could provide more expansive rights of expres-

43. Cologne v. Westfarms Assocs., 192 Conn. 48, 469 A.2d 1201, 1209–10 (1984) (Connecticut Constitution does not protect right to seek signatures for ballot initiative in shopping mall because there is no legal basis for distinguishing large shopping center from other private facilities which attract large numbers of people); Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 378 N.W.2d 337, 338–39 (1985) (Michigan Constitution does not require private property owners to provide access for speech activists' expressive activities); SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 488 N.E.2d 1211, 1217–18, 498 N.Y.S.2d 99, 105–06 (1985) (New York Constitution requires state action before state constitution can be invoked to shield expressive activity in shopping centers); State v. Felmet, 302 N.C. 173, 273 S.E.2d 708, 712 (1981) (North Carolina Constitution does not afford greater free speech protections than the protections afforded by the United States Constitution); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 512 Pa. 23, 515 A.2d 1331, 1333 (1986) (Pennsylvania Constitution does not require private property owner to allow individuals to exercise expressive rights on private property where owner uniformly and indiscriminately prohibits such activity); Jacobs v. Major, 139 Wis. 2d 492, 407 N.W.2d 832, 846, 848 (1987) (Wisconsin Constitution does not protect activity of small dance group demonstrating against war in private shopping center because Wisconsin Constitution protects speech activities against state interference only).

44. State v. Scholberg, 412 N.W.2d 339, 344 (Minn. Ct. App. 1987) (anti-abortion demonstration at clinic not protected, noting that state supreme court is not generous in finding expansive rights under Minnesota Constitution); Kugler v. Ryan, 682 S.W.2d 47, 51 (Mo. Ct. App. 1984) (antiabortion demonstration at medical clinic not protected, on presumption that state supreme court would not interpret Missouri Constitution expansively).

45. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd,* 447 U.S. 74 (1980).

46. The California Constitution protects expressive activities in two clauses. The first clause grants rights of expression, while the second clause prohibits laws restricting expressive rights: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2. The United States Constitution simply prohibits any law restricting expressive rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. The California court held that this difference in emphasis meant that the California Constitution offered more definitive and inclusive speech rights than the first amendment offered. Wilson v. Superior Court, 13 Cal. 3d 652, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975).

47. *Robins,* 592 P.2d at 347, 153 Cal Rptr. at 860. A group of high school students sued a shopping center for access to demonstrate against a United Nations resolution against Zionism.

48. 407 U.S. 551 (1972).

49. *Robins,* 592 P.2d at 343, 153 Cal Rptr. at 856.

sion than those rights provided under the first amendment.[50] Without setting any guidelines for regulation, the California court stated that property owners could regulate expressive activities as to time, place, and manner.[51]

The United States Supreme Court affirmed *Robins,*[52] holding that the expansion of expressive rights under the California Constitution did not violate the shopping center owner's rights under the United States Constitution.[53] The Court reasoned that the negative impact on the owner was insufficient to constitute either a taking or a deprivation of property without due process, because the property value would not be unreasonably impaired by speech activists.[54] The Court also reasoned that the state could require an owner to provide a forum for speech with which the owner might disagree without infringing on the owner's first amendment rights, because of three factors. First, the shopping center was open to the public, making it unlikely that speech activists' views would be identified with the owner. Second, the state did not require that a specific message be displayed, so there was no danger that the government would discriminate for or against any message. Third, the owner could post signs disclaiming any support of the speech activists' message.[55]

Washington followed California's lead in protecting expressive activities in shopping centers. In *Alderwood Associates v. Washington*

50. *Id.* at 347, 153 Cal Rptr. at 860. The decision adopted the reasoning of the United States Supreme Court in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), *overruled by* Hudgens v. NLRB, 424 U.S. 507 (1976). The dissent argued that the majority had exalted rights of free speech over equally important private property rights, contrary to the *Lloyd* holding. The dissent found no justification for the majority's narrow reading of *Lloyd* and suggested that the only proper reading of *Lloyd* was that it relied "upon the *constitutional private property rights of the owner* throughout the entire opinion." *Robins,* 592 P.2d at 349, 153 Cal Rptr. at 862 (Richardson, J., dissenting).

51. *Robins,* 592 P.2d at 347, 153 Cal Rptr. at 860. Post-*Robins* decisions by California appellate courts have not granted speech activists unlimited rights. *Compare* Horton Plaza Assocs. v. Playing for Real Theatre, 184 Cal. App. 3d 10, 228 Cal. Rptr. 817, 827–28 (1986) (no right of access to shopping center for speech activists to present play protesting war, where trial court specified that maximum of four individuals could engage in discussions, solicit signatures, and post signs; shopping center manager had discretion to determine dates of activities and to control offensive language) *with* Northern Cal. Newspaper Org. Comm. v. Solano Assocs., 193 Cal. App. 3d 1644, 239 Cal. Rptr. 227, 229 (1987) (union distribution of literature in shopping center protected under California Constitution, even though no stores in shopping center connected with labor dispute).

52. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

53. *Id.* at 76–77, 81.

54. *Id.* at 82–85.

55. *Id.* at 87–88. *But see* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 15–17 (1986) (infringement on utility's first amendment rights where utility required to affirmatively disavow view with which it disagreed in order to avoid being identified with view).

Environmental Council,[56] a plurality of the Washington Supreme Court concluded that the Washington Constitution[57] protected free expression and voters' initiative rights in an enclosed shopping center mall.[58] A balancing of the interests favored the activities of free expression and initiative over those of property ownership.[59] The plurality identified three balancing factors: The use and nature of the private property,[60] the nature of the speech activity,[61] and the potential for reasonable regulation of the speech.[62] The plurality stated that speech so unreasonable as to violate property owners' expressive or property rights would not be protected.[63] The plurality reasoned that because a municipality could not have barred the expressive activity, the shopping center could not bar it either.[64] The concurring justice limited the scope of protection to voters' initiatives under the Washington Constitution.[65] The Washington court thus granted speech activists a more limited right than did the California court.[66]

56. 96 Wash. 2d 230, 635 P.2d 108 (1981).

57. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. I, § 5. "The first power reserved by the people is the initiative." *Id.* amend. 7.

58. *Alderwood,* 96 Wash. 2d at 246, 635 P.2d at 117.

59. *Id.* The court noted that it could not precisely define the scope of protection afforded expressive activity under the state constitution and that rules must evolve through court decisions.

60. *Id.* at 244, 635 P.2d at 116. The court reasoned that the shopping center was the equivalent of a downtown business district. This rationale had been rejected by the Supreme Court in the shopping center context. *See* Hudgens v. NLRB, 424 U.S. 507 (1976) (first amendment does not protect expressive rights in shopping centers because shopping centers are not the equivalent of municipalities).

61. *Alderwood,* 96 Wash. 2d at 244–45, 635 P.2d at 116. The court stated that the second factor favored speech because speech was a preferred right, and speech involving the initiative process took on added constitutional significance.

62. *Id.* at 245, 635 P.2d at 116. Without further explanation, the court stated that speech could be regulated as to time, manner, and place.

63. *Id.* at 245, 635 P.2d at 116–17.

64. *Id.* at 246, 635 P.2d at 117.

65. *Id.* at 251, 635 P.2d at 120 (Dolliver, J., concurring). The concurring opinion was highly critical of the reasoning of the plurality. It characterized the plurality position as "constitution-making by the judiciary of the most egregious sort," *Id.* at 248, 635 P.2d at 118 (Dolliver, J., concurring), and stated that it was not the place of the court to decree that the Washington Constitution should "be used as a sword by individuals against individuals in addition to being used as a shield against the actions of the state . . . ." *Id.* at 250, 635 P.2d at 119 (Dolliver, J., concurring). The concurring opinion noted that "[n]ow the court will be able to dispense with the inconvenience and cumbersomeness of legislative activity." *Id.* The dissent agreed that protections under the Washington Constitution should be broadened through legislative action only. *Id.* at 254, 635 P.2d at 121 (Stafford, J., dissenting).

66. Massachusetts has limits similar to those in Washington. *See* Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 445 N.E.2d 590, 591, 595 (1983) (Massachusetts protects the gathering of signatures for ballot access in context of large shopping center; allowing owner to regulate activity as to time, place, and manner is sufficient to protect the limited property interest). *But*

III. COURTS INFRINGE ON PROPERTY OWNERS' RIGHTS WHEN THEY MANDATE ACCOMMODATION OF SPEECH ACTIVISTS

A. The Courts' Distorted Perspective in Shopping Center Analysis

Beginning with the United States Supreme Court in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza,*[67] courts that protect expressive rights in shopping centers have viewed the conflict between speech activists and owners from the perspective of the speech activists' rights. Even in *Lloyd Corp. v. Tanner,*[68] where the Court focused its discussion on shopping center owners' rights,[69] instead of defining the scope of owners' rights, the Court withdrew protection for expressive rights because the shopping center was not dedicated to public use.[70] This speech-oriented perspective implicitly construes the conflict as an infringement by shopping center owners on speech activists' rights.

States that allow speech activists to demonstrate in shopping centers may be infringing on the federal constitutional rights of owners. Shopping centers have never been owned by the public; therefore, shopping center owners do not infringe on federal constitutional rights of expression by refusing to accommodate speech activists.[71] Thus, the

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see Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188, 192 (1983) (even if state action is not required for protection of expression in large shopping center, small size and non-business character of the courtyard of research institution is such that antinuclear leafleting is not protected, even though general public is allowed to use the private property as a passageway).

67. 391 U.S. 308 (1968), *overruled by* Hudgens v. NLRB, 424 U.S. 507 (1976).

68. 407 U.S. 551 (1972).

69. In *Lloyd,* the Court stated:

> Although accommodations between the values protected by [the first, fifth, and fourteenth] [a]mendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned . . . [n]or does property lose its private character merely because the public is generally invited to use it for designated purposes. . . . The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center. . . . We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected.

Lloyd, 407 U.S. at 568–70; see also Justice Black's *Logan Valley* dissent, where he said that individuals should not be allowed "under the guise of exercising First Amendment rights, [to] trespass on . . . private property" nor should the Court "confiscate a part of an owner's private property and give its use to people who want to picket on it." *Logan Valley,* 391 U.S. at 329, 332 (Black, J., dissenting).

70. *Lloyd,* 407 U.S. at 570.

71. Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976).

issue is whether to legitimate trespass by speech activists, not whether to remedy wrongful acts by shopping center owners.

B. Infringement on Shopping Center Owners' First Amendment Rights

The Supreme Court has held that individuals have a first amendment right to refrain from supporting or being identified with the views of others.[72] Property owners' first amendment rights arguably are infringed when they either may be perceived as endorsing speech activists' messages or, to avoid such perceptions, must affirmatively dissociate themselves from those messages.[73] Courts that force shopping center owners to furnish forums for speech activists' expressive activity arguably infringe on owners' first amendment rights,[74] because the first amendment forbids burdening one individual's speech to enhance the speech of another.[75] All people must tolerate the views of others in public areas, but the state goes too far when it requires shopping center owners to provide platforms for contrary opinions on private property.

Shopping center owners' rights not to be identified with contrary opinions are analogous to newspapers' rights not to accommodate opposing viewpoints. The Constitution shields a newspaper from accommodating contrary opinions; it should also shield shopping centers. In *Miami Herald Publishing Co. v. Tornillo,*[76] the Court held that a state unacceptably burdened a newspaper's first amendment right to choose which material to publish by requiring the newspaper to print contrary views.[77] Newspapers disseminate opinions and seek to influence thinking. They take positions on issues and invite and dis-

72. *See, e.g.,* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 15–17 (1986) (unconstitutional to put private utility in position where it must respond to opposing view in order to avoid appearance that it agrees with view); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (first amendment includes both right to speak and right to refrain from speaking); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (choice of material printed in newspaper, whether fair or unfair in treatment of issues or public officials, is within discretion of editors).

73. *See, e.g.,* PruneYard Shopping Center v. Robins, 447 U.S. 74, 97–100 (1980) (White, J., concurring). For example, an order forcing a Jewish shopping center owner to provide a platform for neonazi demonstrators would deeply infringe on that owner's expressive rights; a black shopping center owner forced to allow demonstrations by the Ku Klux Klan would suffer a similar infringement on rights.

74. *Id.* at 98–100.

75. Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 25 (1986) (Marshall, J., concurring).

76. 418 U.S. 241 (1974).

77. *Id.* at 258.

seminate the expressions of speakers of their own choosing. A great portion of their mission is to inform and influence the public. Yet, the Constitution shields them from offering space for any opinions with which they disagree. In contrast, shopping centers exist for commercial purposes only. They do not take public stands on issues or try to influence public opinion. They do not represent a point of view. Compared with the Court's liberal protection of newspapers, which exist to engage in expressive activity, it is unreasonable to burden shopping centers with an obligation to provide platforms for the dissemination of views with which the owners may disagree, when expressive activity represents no part of shopping centers' business functions.[78]

In *Wooley v. Maynard,*[79] the Court held that a state requirement that a person display a license plate bearing a state slogan infringed on the individual's first amendment right not to be identified with the state slogan.[80] Most, if not all, observers would not equate a state slogan on a license plate with the personal expression of the driver of the car bearing the plate. On the other hand, in the shopping center context, observers might believe that owners would actively promote their own views through speech activists. If outside observers are more likely to identify speech activists' expressions with shopping center owners than they are to identify automobile license plate mottos with automobile drivers, the states should not require owners to provide platforms for speech activists' views.

Although shopping center owners may disclaim any connection with speech activists,[81] the involuntary disclaimer is itself a burden on owners' first amendment rights.[82] In *Pacific Gas & Electric Co. v. Public Utilities Commission,*[83] the Supreme Court held that the Public Utilities Commission unconstitutionally burdened a private utility's speech by requiring it to provide space in its billing envelopes for a public interest flyer, even if the space in the envelope was publicly owned.[84] The Court stated that "[s]uch forced association . . . risks

78. Some shopping center owners may be indifferent to expressive activity unless it impairs the commercial viability of their centers. However, the indifference of some owners does not justify the burdening of all. Some newspapers freely accept and print opposing views, but that objectivity by some newspapers does not lead the Court to mandate objectivity for all.

79. 430 U.S. 705 (1977).

80. *Id.* at 717. New Hampshire could not place the slogan "Live Free or Die" on automobile license plates, because a system that secures the right to promote ideological causes must also secure "the concomitant right to decline to foster such concepts." *Id.* at 714.

81. PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980).

82. Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 20–21 (1986).

83. 475 U.S. 1 (1986).

84. *Id.* at 17.

forcing appellant to speak where it would prefer to remain silent. Those effects do not depend on who 'owns' the 'extra space.' "[85] The public does not own any space in shopping centers. When speech activists are granted access to shopping centers, they occupy private property. If the Constitution protected Pacific Gas & Electric's right to deny public use of public space, it should certainly protect shopping center owners' rights to control use of their private space.

C. Infringement on Shopping Center Owners' Property Rights

Shopping centers are private businesses. The public is invited for the limited purpose of doing business with the merchants and not to engage in expressive activities. Speech activists may view shopping centers as ideal forums for the exercise of expressive rights, but the attractiveness of shopping centers does not justify infringing owners' constitutional rights.

The most basic common law property right is the right to exclusive possession.[86] Property owners are generally free to choose who may use their property, when, and for what purposes.[87] Persons who have been invited onto private property become trespassers if they refuse to leave when requested to do so.[88] Persons with permission to be on land for a limited purpose become trespassers when their activities exceed the scope of their invitation.[89] State common law and statutory property rights define the scope of property rights protected under the Constitution.[90] The constitutional right of an owner to control the use of property should not be denied in favor of a competing right that is not based on the Constitution or other federal law.[91]

Property owners' rights to exclude must give way to public welfare in emergency situations. In some circumstances, public officials such as police officers may enter private property without the owner's consent[92] because reasonable regulation of private property in an emer-

85. *Id.* at 17–18.

86. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY 411 (1984); *see, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (requirement of public access to private pond took "one of the most essential sticks in the bundle of rights," the right to exclude).

87. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 86, at 410–11.

88. *E.g.*, Rager v. McCloskey, 305 N.Y. 75, 111 N.E.2d 214, 216 (1953).

89. Cartan v. Cruz Constr. Co., 89 N.J. Super. 414, 215 A.2d 356, 360 (1965).

90. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 6, at 473.

91. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

92. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 86, at 412.

gency is necessary for the common good.[93] Emergency entries for the common good, however, are distinguishable from entries by private citizens to engage in expressive activities against a property owner's will because speech activists are neither public officials nor are they responding for the common good to an emergency. Under the private necessity doctrine,[94] private citizens may also enter the property of another in an emergency situation without permission. For example, a boater in a storm may seek refuge at another person's dock.[95] However, even the boater in a storm must pay for any damage done to another person's property.[96] Under the public necessity doctrine,[97] citizens may enter to destroy the property of another to prevent the spread of fire.[98] Individuals also may enter private property to retrieve their own property.[99] Each of these entries is distinguishable from a planned intrusion by a speech activist into a shopping center because the speech activist's entry lacks the element of necessity.

When the Supreme Court first protected expressive activity on private property in *Marsh v. Alabama,*[100] it cited three cases[101] for the proposition that the freedoms of press and religion occupy a preferred position over rights of property owners.[102] However, all three of the cited cases involved claims against government action, not private property owners. None of the cases involved a conflict between free expression and private property rights. Nevertheless, the focus on and favoring of expressive rights was central to later decisions that pro-

93. Nebbia v. New York, 291 U.S. 502, 523–25 (1934).

94. RESTATEMENT (SECOND) OF TORTS § 263 (1965).

95. Ploof v. Putnam, 81 Vt. 471, 71 A. 188, 188–89 (1908).

96. Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221, 222 (1910).

97. RESTATEMENT (SECOND) OF TORTS §§ 196, 262 (1965).

98. Surocco v. Geary, 3 Cal. 69 (1853).

99. PROSSER AND KEETON ON THE LAW OF TORTS 139–41 (W. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. 1984); *see, e.g.,* Polebitzke v. John Week Lumber Co., 173 Wis. 509, 181 N.W. 730, 732 (1921) (individual has right to enter private property of another to retrieve logs).

100. 326 U.S. 501 (1946).

101. Follett v. Town of McCormick, 321 U.S. 573, 575–78 (1944) (weighing rights of Jehovah's Witnesses to distribute literature, not against property rights of individuals, but against right of government to levy tax; sellers of religious material enjoy preferred position over sellers of secular items because persons selling religious material exercise a first amendment right); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (government cannot require Jehovah's Witnesses to pay license fees for the privilege of distributing literature; first amendment rights are preferred over rights of "hucksters and peddlers" in assessing license tax); Jones v. City of Opelika, 316 U.S. 584, 597–600 (1942) (Jehovah's Witnesses can be taxed and required to pay license fees; no comparison with private property rights), *vacated,* 319 U.S. 103 (1943).

102. *Marsh,* 326 U.S. at 509 n.7.

tected expressive activity in shopping centers.[103] Since *Marsh,* courts have failed to focus on property rights. Some courts have protected owners' rights, but they have done so indirectly by holding that expressive rights are not protected, instead of expressly holding that property rights are protected.[104]

IV. FORCED ACCOMMODATION OF SPEECH ACTIVISTS BY SHOPPING CENTERS VIEWED AS A COMPENSABLE TAKING

Property owners have a constitutional right to compensation for any taking of their property by the government for a public use.[105] The Supreme Court has analyzed the taking issue from at least two perspectives, with very different results. A taking may be effected either by excessive regulation of an owner's use of property[106] or by an actual seizure or occupation of property for use by someone other than the owner. The second category of taking can be broken into two categories: Permanent physical occupation,[107] and easement for intermittent use by the public.[108]

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103. *See, e.g.,* Lloyd Corp. v. Tanner, 407 U.S. 551, 573 (1972) (Marshall, J., dissenting); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 242, 635 P.2d 108, 115 (1981) (plurality opinion). *But see* Jacobs v. Major, 139 Wis. 2d 492, 407 N.W.2d 832, 840 (1987) (judges have no right to exercise personal choices that speech rights should prevail over property rights).

104. *See, e.g., Lloyd,* 407 U.S. at 570.

105. *See, e.g.,* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3150 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982). Even though the fourteenth amendment does not contain a taking clause, the United States Supreme Court has held that the fifth amendment taking clause applies to the states through the due process clause of the fourteenth amendment. Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226, 233–41 (1897). Many state constitutions provide protections against the taking of private property similar to or broader than those protections provided by the United States Constitution. *See, e.g.,* CAL. CONST. art. I, §§ 7(a), 19; CONN. CONST. art. I, § 11; MASS. CONST. part 1, art. X; *id.* amends. XXXIX, LI, XCVII; MICH. CONST. art. X, § 2; N.J. CONST. art. I, § 20; N.Y. CONST. art. I, § 7(a); N.C. CONST. art. I, § 19; PA. CONST. art. I, § 1; *id.* art. X, § 4; WASH. CONST. art. I, §§ 3, 16; WIS. CONST. art. I, § 13. This Comment does not analyze property protections provided under individual state constitutions, because the Comment concludes that forced accommodation of speech activists in shopping centers without compensation to the owners is a taking in derogation of the United States Constitution. However, the careful practitioner should always check the applicable state constitution for property protections that might exceed the protections of the United States Constitution.

106. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (excessive regulation will be recognized as a taking).

107. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (government-authorized permanent physical occupation is a taking without regard to public interest served).

108. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3150 (1987) (government may not take easement without paying for it).

A. Taking by Regulation of Owners' Use

Regulatory cases focus on the use of property by owners. Regulation is allowed where the owner's use causes a severe enough detriment to the public. In early regulatory taking cases, the Court showed great deference to state regulations.[109] However, in *Pennsylvania Coal Co. v. Mahon,*[110] the Court focused on the owner's economic loss to hold that a regulation forbidding the mining of coal in a manner likely to destroy homes went too far in depriving the owner of all profitable use.[111] In regulatory cases, the Court balances public interest against burdens on owners. Courts that analyze mandatory accommodation of speech activists as regulatory conclude that there is no taking, because the burden on owners is not severe.[112] Results have been inconsistent because the Court has not developed a precise formula for weighing the balancing factors.[113]

Arguably, it is incorrect to analyze mandatory speech accommodation in shopping centers as regulatory. In the shopping center context, courts do not regulate the owners' own use of their property. Instead, courts take a portion of owners' property rights for the use of speech activists. In the post-*PruneYard* cases, the Court established that the government may not take from one party for the private use of another without paying compensation.[114] By analyzing shopping center cases as actual takings of property, courts will reach results that more accurately reflect the positions of the parties.

B. Taking for Use by Someone Other than the Owner

Recent Supreme Court cases have held that a state must provide compensation when it either requires owners to allow permanent physical occupation of property[115] or imposes a permanent right of public access to the property.[116] These cases identify a compensable taking without balancing public benefit against private burden, and the Court

109. *See, e.g.,* Lawton v. Steele, 152 U.S. 133, 139–40 (1894) (state could seize and destroy illegal fishing nets without compensating the owner); Mugler v. Kansas, 123 U.S. 623, 668–70 (1887) (no compensation required where state prohibited the production of intoxicating liquors, because regulation for the public good was not a taking for the public benefit in the sense that the state's exercise of its power of eminent domain would be a taking).

110. 260 U.S. 393 (1922).

111. *Id.* at 415.

112. *See, e.g.,* PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

113. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 86, at 516–27.

114. *See infra* notes 115–28 and accompanying text.

115. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

116. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3150 (1987).

has shown a willingness to recognize a taking even where the burden to the property owner is minimal.

1. Taking by Permanent Physical Occupation

The physical occupation taking theory was developed in *Loretto v. Teleprompter Manhattan CATV Corp.*[117] The Court held that the state committed an unconstitutional taking by requiring a building owner to allow a cable television company to attach its equipment to the building.[118] The equipment permanently occupied only about one-eighth of a cubic foot on the outside of an apartment building.[119] The Court reasoned that any government-mandated permanent physical occupation was a taking per se even if an important government interest was served.[120] The state had the power to take the property, but in doing so, it had to compensate the owner.[121]

Although speech activists are not permanently present in shopping centers where they have been granted protection, their permanent right to enter is a much greater disability to the shopping center owner than a cable television box on the outside of a building is to an apartment building owner. The building owner's only burden is knowing that someone else's equipment is attached to the building. The shopping center owner, on the other hand, potentially faces a multitude of unpredictable burdens.[122]

2. Taking by Permanent Easement for Public Use

The public easement taking theory was developed in *Nollan v. California Coastal Commission.*[123] The Court held that California could not exercise its power of eminent domain to require a public easement

117. 458 U.S. 419 (1982).

118. *Id.* at 421.

119. *Id.* at 443 (Blackmun, J., dissenting).

120. *Id.* at 426.

121. *Id.* at 441.

122. Owners are saddled with very real and substantial burdens when they are forced to accommodate speech activists. No state has allowed unregulated expressive activity in shopping centers, but states have never formulated regulations. The only guidance the courts have given is that owners may regulate reasonably so that expressive activities will not interfere too much with the regular business of the shopping centers. *See, e.g.,* Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 347–48, 153 Cal. Rptr. 854 (1979), *aff'd,* 447 U.S. 74 (1980). Owners must develop regulations and hope that the courts will find them acceptable. They must also enforce the regulations and clean up debris left by speech activists. The end result is that owners are forced to provide the land for the diminutions of their own rights, and they must bear the administrative expense necessary to facilitate those diminutions.

123. 107 S. Ct. 3141 (1987).

across private property without compensating the owners.[124] In *Nollan,* the California Coastal Commission's permission to rebuild a beachfront house was conditioned on the owner's agreement to grant an easement across the property.[125] The Court distinguished the taking of the easement from the regulation of the owner's use of property. The state could regulate the use of the property to advance legitimate government interests,[126] but the state could not take an easement unconnected to regulation of the owner's use.[127] The Court reasoned that a grant of a permanent and continuous right to the public to cross private property to gain access to a beach was as much a permanent physical occupation as the right to attach television cables in *Loretto,* even though no particular individual would be permanently stationed on the property.[128]

The Court in *Nollan* distinguished *PruneYard Shopping Center v. Robins*[129] on unconvincing grounds. First, the Court reasoned that the shopping center owner had opened up the property to the general public.[130] However, the fact that the public is invited onto private property for limited purposes does not make the property public.[131] Many kinds of private property are opened up to the general public, but it does not necessarily follow that the property is opened to general use. Anyone is invited to enter a church, a theatre, a sports stadium, or the corner drug store for limited and specific purposes. Shopping center owners similarly may issue limited invitations. Invitations for limited purposes do not metamorphose into invitations for purposes of the invitees' choosing merely because some people think that shopping centers should be treated as public areas.[132]

Second, the Court stated that in *PruneYard* there was no permanent access to the shopping center.[133] This distinction is particularly strained. Although the shopping center owner in *PruneYard* was given authority to regulate the expressive activity, the owner had no right to deny access. A distinction between an easement where individuals may come and go at will and a right of speech activists to enter

124. *Id.* at 3150.
125. *Id.* at 3143.
126. *Id.* at 3146.
127. *Id.* at 3145, 3148.
128. *Id.* at 3145.
129. 447 U.S. 74 (1980).
130. *Nollan,* 107 S. Ct. at 3145 n.1.
131. Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).
132. The Supreme Court has overruled the dedication to public use theory. *Lloyd,* 407 U.S. at 570.
133. *Nollan,* 107 S. Ct. at 3145 n.1.

shopping centers with permission only, where the owners are not allowed to withhold that permission, is a distinction without a difference. If the Court applied the *Nollan* reasoning[134] to shopping centers, instead of trying to distinguish the indistinguishable, it would protect owners' rights. Courts that force shopping centers to accommodate speech activists take a partial easement in owners' rights to be used by speech activists.

V. THE COMPANY TOWN REMAINS A UNIQUE EXCEPTION

The Supreme Court resolved an uncommon conflict in *Marsh v. Alabama*[135] when it protected expressive rights in a privately owned company town.[136] Where a company assumes ownership of a town, it puts all areas traditionally open for expressive activities under private control, and it is appropriate that those traditional avenues of communication such as streets and sidewalks be kept open. The only alternative for speech activists wishing to have contact with residents of the company town is to position themselves outside of town on a country road. That alternative is not viable, because residents may never leave the town. Company towns infringe on speakers' first amendment rights by closing off all areas that, in a municipality, would accommodate expressive activities.[137] In contrast, shopping centers do not usurp any traditional public areas. They do not infringe on speakers' first amendment rights because shopping centers do not assume municipal functions.[138]

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134. *Id.* at 3145.

135. 326 U.S. 501 (1946).

136. The law in Alabama imposed criminal punishment on persons who exercised expressive rights in a company town, even though the town was indistinguishable from a municipality and no state or municipality could have completely denied the expressive activity. *Marsh,* 326 U.S. at 502–05.

137. *See Marsh,* 326 U.S. at 507–09. It does not matter that the company may have built the town in the first place and never allowed expressive activity. The infringement comes from prohibiting expressive activity in the areas of the town which have traditionally served as public places of assembly and exchange of ideas. *See* Hague v. CIO, 307 U.S. 496, 515 (1939).

138. Hudgens v. NLRB, 424 U.S. 507, 519–21 (1976). Speech activists can still conduct their activities in downtown areas. They can set up stations on private sidewalks or rights-of-way near shopping center entrances. They can often communicate their ideas through mail, and they can always go door to door if necessary. They can also find large audiences in strategically chosen locations on public property outside of churches, theatres, sports facilities, entertainment parks, and other private facilities. Shopping centers have not infringed on any expressive rights forum.

Public areas may not be as convenient for speech activists as shopping centers, but that handicap is not attributable to shopping centers. Speech activists have never been allowed to engage in their activities inside private stores. To grant access to enclosed shopping centers is to provide comforts not previously known. In the past, people seeking an ear or a signature had to

There are compelling reasons for opening company towns to outside speakers quite apart from providing platforms for speech activists. Town residents may have a real need to receive information.[139] Cases protecting commercial speech are based on the consumer's right to receive information.[140] In addition to owning the town, the company is the employer and landlord for all the town residents. Although residents have a right to travel outside the town, they will often lack the motivation or ability where all their needs are met within the town. This complete domination by the company should be tempered. Since the government does not have a mechanism to monitor conditions in the company town, it is necessary to grant free entry to private citizens to help town residents maintain contact with the outside world and know their rights.[141]

VI. *PRUNEYARD SHOPPING CENTER V. ROBINS* IS NO LONGER THE PROPER STANDARD

The Supreme Court should redefine the scope of state authority to provide expansive protection for expressive activity under state law.

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buttonhole passersby. If the comfortable atmosphere of a covered shopping mall encourages shoppers to linger, it is no detriment to the excluded speech activists. Shopping centers should not be required to give what they never took. Even the collecting of signatures for a ballot initiative was never intended to be easy. *See* 2 OFFICIAL RECORD, CONSTITUTIONAL CONVENTION 1961, at 2394, *quoted in* Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 378 N.W.2d 337, 350 (1985) (proposition stated during arguments over how easy the initiative process should be under the Michigan Constitution: "It's tough. We want to make it tough. It should not be easy. The people should not be writing the laws. That's what we have a senate and house of representatives for.").

139. *Marsh*, 326 U.S. at 508–09. *But see* Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391, 394–97 (7th Cir. 1975) (applying *Marsh v. Alabama* analysis to find protection of expressive activity in residential community of migrant workers), *rev'd*, 574 F.2d 374, 377–79 (1978) (again applying *Marsh* analysis to hold that migrant community not enough like a company town to require access to private property for expressive activity); Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 130, 138 (3d Cir. 1975) (public attributes not strong enough to mandate unlimited first amendment rights in a migrant worker camp).

140. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756–57, 773 (1976) (public has a first amendment right to free flow of truthful information).

141. *See Marsh*, 326 U.S. at 507–09. A recent article concluded that the public function doctrine applied in *Marsh* should be applied narrowly to all private forums to determine the extent of access allowed. Under this application, speech activists would have protected rights to enter company towns, migrant labor camps, nursing homes, and residential college campuses. They would not have access to shopping centers, office complexes, or private residential communities. *See* Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection*, 37 SYRACUSE L. REV. 1, 40 (1986).

In light of the analyses set forth in *Loretto*[142] and *Nollan,*[143] the continued viability of *PruneYard* is suspect. The Court had not yet developed the analysis strictly protecting private property from an uncompensated taking for use by others when it decided *PruneYard.*[144] Therefore, the Court analyzed *PruneYard* as a regulatory taking.[145] The *PruneYard* result relied in part on the minimal impairment to the property's valuable use from the presence of speech activists.[146] However, in the post-*PruneYard* cases, the Court established that states have virtually no authority to take property from one private party for use by another without paying compensation, even if the taking serves a legitimate public interest.[147] Furthermore, the Court established that the extent of impairment of private property use is not a consideration in non-regulatory taking cases.[148] Even in *PruneYard,* the Court implied that if the case had been brought as a condemnation case, the outcome might have been different.[149]

States that have expanded protections of expressive rights in shopping centers at the expense of private property rights have taken a portion of the owners' property for use by others. They have violated the minimum level of protection that the United States Constitution provides for property owners. States cannot address this problem merely by interpreting expressive rights expansively. They must respect both sides of the conflict. The state has the power to take, but if it does so, it must pay just compensation.[150] It is time for the Supreme Court to reexamine the shopping center conflict with a focus on directing the states to respect federal constitutional property rights.[151]

142. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

143. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

144. *PruneYard* was decided in 1980 when the *Mahon* regulatory taking test was the only standard. The Court set forth the taking by physical occupation test in 1982 in *Loretto,* and the taking by easement analysis in 1987 in *Nollan.*

145. PruneYard Shopping Center v. Robins, 447 U.S. 74, 81–83 (1980).

146. *Id.* at 83.

147. *See Nollan,* 107 S. Ct. at 3150; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

148. *Loretto,* 458 U.S. at 434–35.

149. *PruneYard,* 447 U.S. at 82 n.5. The Court noted that "[a]ppellants do not maintain that this is a condemnation case. . . . Here, of course, if the law required the conclusion that there was a 'taking,' there was concededly no compensation, just or otherwise, paid to appellants." *Id.*

150. *Nollan,* 107 S. Ct. at 3150.

151. Even under the *PruneYard* standard, states should protect private property rights under their own constitutions. Like the Supreme Court, state courts have focused on expressive rights in their resolutions of shopping center conflicts. States that have made way for speech activists have held that speech provisions of their constitutions do not require state action in order to take effect. States that have not protected expressive activity in shopping centers have held that their

VII. CONCLUSION

Shopping center owners' property rights are unconstitutionally burdened by forced accommodation of speech activists. Property rights are expressly protected under both the United States Constitution and state constitutions, as well as under the common law. When property rights protected under the United States Constitution conflict with expressive rights protected under state laws only, the property rights must prevail.

The public's need for free expression does not justify invasion of property rights. All public areas which have been traditionally open for expressive activity remain open. Shopping centers have neither acted to isolate the public nor to foreclose traditionally public areas.

Shopping center owners' expressive rights are unconstitutionally burdened when owners are forced to provide platforms on their private property for speech activists. The provisions of the first amendment to the United States Constitution apply to shopping center owners as well as to speech activists. Expressive rights include the right not to advance another person's free expressions.

If the government does force shopping center owners to allow access, the courts should require the government to compensate the owners for taking their property. Courts have repeatedly stated that expressive rights must be protected without infringing on property rights. They should give life to these statements and affirmatively protect the rights of property owners.

Frederick W. Schoepflin

constitutions, like the United States Contitution, do require state action. In all cases, state constitutional provisions protecting property have been ignored.