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Jennifer Niles Coffin

District Court of the U.S. Virgin Islands

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THE UNITED MALL OF AMERICA: FREE SPEECH, STATE CONSTITUTIONS, AND THE GROWING FORTRESS OF PRIVATE PROPERTY

Jennifer Niles Coffin*

*Scholars have called the shopping mall the modern replacement for the traditional town square, a claim that is supported by both public investment in infrastructure through municipal and state bond issues and by the presence of public services and events in many malls. Mall owners and tenants have exploited this quasi public character by inviting government agencies to become tenants in the malls ("City Hall at the Mall") despite claiming that malls are private property where constitutionally protected freedoms do not apply. After an initial and short-lived ruling that mall visitors do indeed have free speech rights, the Supreme Court has held that the standard constitutional protection for political speech does not apply to malls and shopping centers because no state action is involved. Many, though not all, state courts have agreed with the Supreme Court's ruling. This Note addresses two kinds of evolution: the legal evolution of free speech law as it relates to shopping malls, with particular attention to the Minnesota Supreme Court's recent rejection of free speech protection in *State v. Wicklund*; and the cultural evolution in which our public spaces have become private fortresses, "protected" from political speech in the interests of providing "safe" and unmolested shopping experiences for consumers. The Note then discusses the common rationale underlying the decisions in a handful of state courts that have extended free speech protection to those who wish to protest, leaflet, or picket at malls. Based on these decisions, the author argues that state courts should be more flexible in their balancing of free speech rights and property rights if we are to stem an evolutionary process in which our public space becomes a vast emporium where citizens are encouraged to buy but forbidden to speak.*

INTRODUCTION

"THINK OF IT AS EVOLUTION IN ACTION."¹

The setting is sometime in the future. Todos Santos, a massive fortress-like structure, rises ominously from the outskirts of a

* B.A. 1995, University of Tennessee; J.D. 2000, University of Tennessee College of Law. Clerk 2000–02, Hon. Thomas K. Moore, District Judge, U. S. Virgin Islands. I would like to thank Professor Glenn Harlan Reynolds for his continued support and guidance and Judge Danny C. Boggs, United States Court of Appeals for the Sixth Circuit, for bringing Niven & Pournelle's futuristic private mall-city to my attention.

1. LARRY NIVEN & JERRY POURNELLE, OATH OF FEALTY 101, 323 (1981).

crime-ravaged Los Angeles.² Todos Santos is a completely self-contained city, modeled after the Utopian arcologies designed by architect and philosopher Paolo Soleri in the 1950s.³ This futuristic arcology, however, is owned by a huge foreign corporation to whom it must answer for its profits and losses. Notably, Todos Santos is constructed entirely around the most popular shopping mall in Los Angeles. Lucky residents, selected upon application by an elite committee, live, work, go to school, and shop inside Todos Santos, never needing to leave its confines. In exchange for protection, harmony, and police order, residents of Todos Santos are fiercely loyal to the corporation and readily submit to constant surveillance.⁴ While outsiders are permitted access to the shopping areas of Todos Santos, the corporation fiercely reserves its rights as a private property owner to eject unwanted intruders. A sign on a private entrance to the mall-city states simply, "IF YOU GO THROUGH THIS DOOR, YOU WILL BE KILLED."⁵

Not surprisingly, local outsiders resent the mall-city. Small groups of protesters picket the perimeter of the mall, carrying signs that read "END THE NEST BEFORE IT ENDS HUMANITY."⁶ From time to time, members of an organization known as "Friends of Man and the Earth" infiltrate and sabotage the enterprise, believing that Todos Santos wastefully consumes vast resources for an elite few.⁷ One night, a Todos Santos security officer fulfills the threat emblazoned on the sign at the mall-city's entrance when "terrorist" intruders enter the building. Two young trespassers are killed by poison gas. The Los Angeles police bring charges, but in the end, the residents and administrators of Todos Santos prevail over the Los Angeles government. The mall-city and its private interests are vindicated. Eerily, the owners of Todos

2. Science fiction authors Larry Niven and Jerry Pournelle set the scene of their 1981 novel, *Oath of Fealty*, in a futuristic mall-city outside Los Angeles. *Id.* at 21-26.

3. "Arcology" is Paolo Soleri's radical concept of urban development in which planned cities fuse architecture with ecology. According to this theory, crowding is not seen as an evil but as a necessary component of evolution. Soleri envisions a self-contained, pedestrian-centered city as a compact, complex "organism." According to Soleri, "Arcology is the methodology that recognizes the necessity of the radical reorganization of the sprawling urban landscape into dense, integrated, three-dimensional cities. . . . A central tenet of Arcology is that the city is the necessary instrument for the evolution of [humankind]." Paolo Soleri, *The City of the Future*, in *EARTH'S ANSWER* 72, 74 (1977). Soleri's philosophy rejects the structure and effects of suburbia: "*Life's bulk is negated when megalopolis and suburbia are taken as the environmental bulk.*" PAOLO SOLERI, *ARCOLOGY: THE CITY IN THE IMAGE OF MAN* 1 (1969).

4. NIVEN & POURNELLE, *supra* note 1, at 36 ("[T]he residents *want* surveillance. . . . A kind of siege mentality —").

5. *Id.* at 2.

6. *Id.* at 6.

7. *Id.* at 52-53.

Santos escape, and, emboldened by their victory, the residents begin to flaunt a new motto: "THINK OF IT AS EVOLUTION IN ACTION."⁸

I. OVERVIEW

While modern shopping malls may not offer the amenities of a Todos Santos of science fiction origins, they are nevertheless much more than mere groupings of retail establishments. In fact, in their efforts to attract consumers, shopping malls often offer a wide variety of nonretail services. Indeed, it is no longer unusual to find U.S. postal stations, community centers, police substations, and early voting centers in shopping malls. Nor is it unusual for hotels to be part of shopping malls, as in the Galleria Plaza in Houston, Texas,⁹ or an integral element of a hotel-mall combination, as in the Peachtree Plaza in Atlanta, Georgia.¹⁰ Political candidates speak at malls;¹¹ assisted-living facilities transport elderly residents to the mall for afternoon outings;¹² and children flock to the mall on Halloween for trick-or-treating.¹³ Some malls contain chapels that hold regular Sunday church services.¹⁴ Some have libraries.¹⁵ The shopping mall also hosts antique shows, beauty contests, and local art shows.¹⁶ On Friday nights, parents drop off their teenagers at the mall, where they engage in the age-old ritual of "hanging out."¹⁷ Some malls open their common areas early for mallwalkers, primarily elderly people engaging in light exercise.¹⁸ As more of

8. *Id.* at 323.

9. WILLIAM SEVERINI KOWINSKI, *THE MALLING OF AMERICA* 245 (1985). Although his book came out in 1985, Kowinski's descriptions of modern shopping malls remain accurate. For a recent update on the myriad offerings of the modern shopping mall, see Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 2-7 (1999). Professor Alexander conducted a survey of 100 of the largest malls in the United States, with twenty-eight malls completing most of the survey. *Id.* at 3 n.3.

10. KOWINSKI, *supra* note 9, at 276 (describing Peachtree Plaza as an opulent "tour de force" hotel connected to a shopping mall and surrounded by offices and condominiums).

11. *Id.* at 357.

12. *Id.* at 32.

13. Professor Alexander reports that "every Halloween, 10,000 children trick or treat at the Walden Galleria in Buffalo, New York." Alexander, *supra* note 9, at 6.

14. KOWINSKI, *supra* note 9, at 129 (relating the author's attendance at the regular Sunday church service held in the basement community room at Rosedale Mall, a Minnesota shopping center).

15. *Id.* at 358.

16. Alexander, *supra* note 9, at 6.

17. *Id.* at 2.

18. IRA G. ZEPP, JR., *THE NEW RELIGIOUS IMAGE OF URBAN AMERICA: THE SHOPPING MALL AS CEREMONIAL CENTER* 169-70 (2d ed. 1997).

our public life takes place in shopping malls, local and federal government agencies have responded by taking their services, including services of the Department of Labor, the Division of Motor Vehicles, "a city treasurer, a state auditor, and a U.S. Congressional representative," to these malls.¹⁹ In perhaps the most straightforward arrangement, a mall located at the outskirts of Knoxville, Tennessee—curiously named Knoxville Center—leases space to both the city and county in order to provide essential city and county services. In an effort to "take the services to the people,"²⁰ the city invites Knoxville citizens to visit "City Hall at the Mall" to pay their property taxes, renew their driver's licenses, conduct post office business, and apply for marriage licenses from 10:00 A.M. to 9:00 P.M., including Saturdays.²¹ In addition, Knoxville Center houses a fully operational police precinct, which includes a community meeting room available to local community groups by reservation.²²

Commentators have attempted to describe in academic terms the phenomenon of modern shopping malls. For example, one commentator has concluded that the modern shopping mall "is the formal garden of late twentieth-century culture".²³

The contemporary American shopping mall is a commodified version of the great garden styles of Western history with which it shares fundamental characteristics. Set apart from the rest of the world as a place of earthly delight like the medieval walled garden; filled with fountains, statuary, and ingeniously devised machinery like the Italian Renaissance garden; designed on grandiose and symmetrical principles like the seventeenth-century French garden; made up of fragments of cultural and architectural history like the eight-

19. Alexander, *supra* note 9, at 7 (citing his mall survey). Professor Alexander notes that several of these governmental offices actually lease space at the mall. *Id.*

20. Telephone Interview with Kathy Darnell, Policy Analyst, Department of Admin., City of Knoxville, Tenn. (Apr. 14, 1999).

21. CITY OF KNOXVILLE, A CITIZEN'S GUIDE TO CITY SERVICES 17 (Fall 1998).

22. *Id.* at 34.

23. Richard Keller Simon, *The Formal Garden in the Age of Consumer Culture: A Reading of the Twentieth-Century Shopping Mall*, in MAPPING AMERICAN CULTURE 231, 231 (Wayne Franklin & Michael Steiner eds., 1992). By "formal garden," Simon refers to a planned garden whose style reflects the architectural, philosophical, and social values of a given historical moment: "[T]he mall's appropriation of history into idealized spaces of consumption can be nostalgia or parody, or both at the same time. . . . [W]here once the vista was of the grandeur of nature, it is now of the grandeur of manufactured commodities, the second 'nature' of capitalist economy." *Id.* at 236-41. Simon also notes that "[t]he mall is an artful conflation of [the public park and the department store]. The shops and streets of the town enter the park, but the disorderly world of which they are a part does not." *Id.* at 245.

eenth-century irregular English garden; and set aside for the public like the nineteenth-century American park, the mall is the next phase of this garden history, a synthesis of all these styles that have come before.²⁴

Shopping malls have been proclaimed the cathedrals of the religion of consumerism,²⁵ modern pleasure domes,²⁶ the "accidental capitals of suburbia,"²⁷ and private fortresses in which citizens engage in an exchange of loyalty reminiscent of feudal relationships from the Middle Ages.²⁸ One feminist critic has described shopping malls as "substitute cit[ies]"²⁹ that reflect the "social power and status associated with [gender and economic class]."³⁰ The shopping center industry itself has commented on its vision of shopping malls, declaring, among other things, that shopping centers are "the new downtowns."³¹ Some legal scholars and judges have described shopping malls as the modern equivalent of the town square or open marketplace of former times.³² In

24. *Id.* at 231–32.

25. See ZEPF JR., *supra* note 18, at 124–41.

26. See John Hannigan, *The Saturday Essay: Who Wants to Spend Their Life in a Theme Park?*, INDEP. (LONDON), NOV. 28, 1998, T1, at 7. Hannigan cites writer Paul Goldberger, who labels the newest theme-park malls "urbanoid environments" and compares these malls to the "pod-bred clones in the science-fiction movie, *Invasion of the Body Snatchers*." *Id.* Hannigan notes that "[malls] seem to be genuine, but something is not quite right. What is missing is a sense of the serendipity, diversity and humanity of traditional street life." *Id.*

27. KOWINSKI, *supra* note 9, at 139.

28. See KOWINSKI, *supra* note 9, at 389–94; see also Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: "The State Will Make the Call,"* 30 VAL. U. L. REV. 509, 536 (1996) (referring to the mall as a "modern private fortress").

29. LESLIE KANES WEISMAN, *DISCRIMINATION BY DESIGN: A FEMINIST CRITIQUE OF THE MAN-MADE ENVIRONMENT* 46 (1992).

30. *Id.* at 4. Weisman concludes:

[M]alls are neither cities nor suburbs, though they incorporate spatial elements of both. They are racially and economically homogeneous, culturally arid environments skillfully shaped by the hands of merchandisers to promote profits. Malls are insular fantasy worlds where the relatively well-off pursue the study and acquisition of superfluous goods as a form of entertainment, in a society in which millions are in desperate need of something to eat and a safe, warm place to sleep. The mall is the quintessential embodiment of patriarchal dichotomies.

Id. at 49.

31. Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 168 n.19 (1980) (quoting SHOPPING CENTER WORLD, Feb. 1972, at 52).

32. See *id.* at 168; see also *New Jersey Coalition v. J.M.B. Realty Corp.*, 650 A.2d 757, 768 (N.J. 1994); Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229, 1229 (1999) ("Proliferating and ever-expanding malls, usually located along or adjacent to major highways, increasingly have come to replace traditional municipalities as loci for the conduct of a host of activities.").

these attempts to formally describe and categorize the modern shopping mall, patrons are described as consumers who have entered a public arena to engage in behavior that reflects our modern understanding of public citizenship.³³ However, in one significant area, one inexorably linked with our notions of individual rights,³⁴ mall patrons do not enjoy full citizenship: freedom of

In *New Jersey Coalition*, Chief Justice Wilentz commented upon the statistical growth of shopping malls and their displacement of traditional town squares:

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

650 A.2d at 768.

33. See, e.g., Simon, *supra* note 23, at 233 ("Visitors learn the meanings of a consumer society at the mall, not only in the choices they make in their purchases, but also in the symbol systems they walk through . . ."); see also JOHN FISKE, *READING THE POPULAR* 14 (1989). Fiske writes: "[S]hopping malls and the cultural practices . . . that take place within them [] are key arenas of struggle, at both economic and ideological levels, between those with the power of ideological practice . . . and those whose construction as subjects in ideology is never complete Shopping is the crisis of consumerism" *Id.*

34. In one of the more famous passages concerning First Amendment jurisprudence, Justice Brennan wrote in *New York Times v. Sullivan*: "[W]e 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." 376 U.S. 254, 270 (1964). Similarly, in 1927, Justice Brandeis wrote:

[Those who won our independence] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. [T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; 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. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring), *quoted in* *Bock v. Westminster Mall Co.*, 819 P.2d 55, 57 (Colo. 1991); see also Marie A. Failinger, *Five Modern Notions in Search of an Author: The Ideology of the Intimate Society in Constitutional Speech Law*, 30 U. TOL. L. REV. 251, 255 (1999) ("[S]peech is a critical part of creating a public community . . ."). See generally David S. Allen, *The Supreme Court and the Creation of an (In)active Public Sphere*, in *FREEDOM OF EXPRESSION: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION* 93 (David S. Allen & Robert Jensen eds., 1995) (comparing historical and modern notions of public citizenship and discussing the Supreme Court's approach to freedom of expression); Joseph P. Viteritti & Gerald J. Russello, *Community and American*

speech. Upon crossing the threshold of a privately-owned shopping mall, a mall patron enters private property. Because the mall is not a government actor, the First Amendment does not protect the mall patron's speech from suppression by mall owners.³⁵ Thus, despite consensus among commentators that those who visit malls do so in order to consciously or unconsciously manifest modern notions of public interaction, mall patrons in fact become merely temporary "citizens" of the private corporations who own the malls. As "mall-citizens," patrons possess only those rights normally accorded to any person invited onto private property, rights that are determined by the applicable state law.

This Note addresses the evolution of the law of free speech as it relates to shopping malls. Part II briefly traces the short life of First Amendment protection for mall visitors and the birth of a theory of free speech as guaranteed by state constitutional free speech provisions. Part III examines the rationale of various state supreme courts that have addressed the question of whether their state constitution affords greater protection of speech than the First Amendment in the context of shopping malls. Part IV analyzes the recent decision in *State v. Wicklund*,³⁶ in which the Minnesota Supreme Court declined to extend free speech rights to visitors of the vast archetypical shopping mall, the Mall of America in Bloomington, Minnesota.³⁷ Part V discusses the "mall of City Hall," pointing to Knoxville Center in Tennessee, which leases space to the city for its "City Hall at the Mall." This Part encourages state courts to consider the wisdom of the various rationales applied by state supreme courts and suggests that a rigid application of the state action doctrine contributes to the increasing suffocation of public discourse by private ownership in our consumption-driven culture. The Note concludes that as more government and other public entities become lessees of private property owners, state courts should participate in the evolution of malls into public spaces by exercising their authority to protect their citizens' free speech rights.

Federalism: Images Romantic and Real, 4 VA. J. SOC. POL'Y & L. 683 (1997)(discussing the legal status of notions of community and public citizenship).

35. See *Hudgens v. NLRB*, 424 U.S. 507, 518-21 (1976); see also *infra* note 74 (describing state cases in which an analogous rationale is applied under state free speech provisions). The so-called "state action doctrine" is the primary barrier to finding mall owners responsible for protecting the free speech rights of mall patrons. See *infra* note 75 (providing a brief explanation of the origins and development of the state action doctrine, as well as the scholarly debate surrounding it).

36. 589 N.W.2d 793 (Minn. 1999).

37. *Id.* at 799.

II. THE FIRST AMENDMENT AND SHOPPING MALLS: A SHORT HISTORY

The high-water mark for the notion that mall owners may not suppress free expression on mall property came in 1968. In an opinion by Justice Thurgood Marshall, the U.S. Supreme Court in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*³⁸ recognized that suburban shopping malls had replaced the traditional urban town square and downtown business districts:

[T]he roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town. So far as can be determined, the main distinction in practice between use by the public of the Logan Valley Mall and of any other business district . . . would be that those members of the general public who sought to use the mall premises in a manner contrary to the wishes of the [owners] could be prevented from so doing.³⁹

The reasoning in *Logan Valley* was based primarily upon the doctrine articulated in the well-known “company town” case, *Marsh v. Alabama*.⁴⁰ In *Marsh*, the Court held that the First Amendment protected the speech rights of a Jehovah’s Witness proselytizing on the streets of Chickasaw, Alabama.⁴¹ At that time, the town of Chickasaw was wholly owned by the steel mill at which most of the residents were employed.⁴² In reaching its conclusion, the Court reasoned that because Chickasaw displayed many of the attributes of a municipality, the state action requirement was satisfied for constitutional free speech purposes.⁴³ As stated in *Marsh*, “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use

38. 391 U.S. 308 (1968).

39. *Id.* at 319.

40. 326 U.S. 501 (1946).

41. *Id.* at 506.

42. *Id.* at 502.

43. *Id.* at 508.

it."⁴⁴ Striking a balance, the Court determined that the free speech rights of the citizen were paramount to the property rights asserted by the company.⁴⁵

The vitality of the company-town analogy in *Logan Valley* was short-lived, however, with the first blow against it coming in the Court's decision in *Lloyd Corp. v. Tanner*.⁴⁶ In *Lloyd*, the Court held that war protestors enjoyed no First Amendment protection at shopping centers.⁴⁷ The Court distinguished *Logan Valley* as limited to a labor dispute and refused to apply its rationale when the speech activity was not directly related to one of the tenants of the picketed shopping center and when other "reasonable opportunities" existed for the protestors to convey their message.⁴⁸ As a federal question, the issue of free speech protection in shopping centers was finally resolved in *Hudgens v. NLRB*,⁴⁹ in which the Court clarified any confusion generated by *Lloyd*: "[I]f it was not clear before[,] . . . the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case."⁵⁰ Since *Hudgens*, the First Amendment has offered no protection for expressional activities in shopping malls. However, the "public function" rationale of *Marsh* has never been explicitly overruled.

In 1979, the California Supreme Court held in *Robins v. Pruneyard Shopping Center*⁵¹ that the California Constitution required mall owners to allow petitioning for signatures on mall property.⁵² In *Robins*, a group of high school students opposed to a U.N. Resolution against Zionism set up a table and attempted to solicit support for their cause.⁵³ The California court reached its conclusion by focusing on the free speech and petition clauses of the California Constitution and interpreted those provisions to afford more expansive protection than the U.S. Constitution.⁵⁴ In response to the mall owners' claim that their constitutionally protected property

44. *Id.* at 506. The Court reasoned further that citizens "must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored." *Id.* at 508.

45. See Friedelbaum, *supra* note 32, at 1230.

46. 407 U.S. 551 (1972).

47. *Id.* at 563-64.

48. *Id.*

49. 424 U.S. 507 (1976).

50. *Id.* at 518; see also Friedelbaum, *supra* note 32, at 1232 ("The Supreme Court's findings incontestably favored private property rights regardless of claims that other interests were germane and were worthy of serious consideration.").

51. 592 P.2d 341 (Cal. 1979).

52. *Id.* at 346-48.

53. *Id.* at 342.

54. *Id.* at 346-47.

rights would be violated if the law required them to permit free speech on mall property, the California court stated simply: “[A]ll private property is held subject to the power of the government to regulate its use for the public welfare.”⁵⁵ In effect, the California court balanced free speech rights with private property rights and found that the provisions of the state constitution did reach some private action. The court held that the free speech and petition provisions of the California Constitution grant mall visitors a constitutional right to free speech that outweighs the private property interests of mall owners.⁵⁶

In a unanimous decision, the U.S. Supreme Court affirmed the state court’s decision, noting that its own reasoning in *Lloyd* “does not *ex proprio vigore* 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.”⁵⁷ Essentially, “*Pruneyard* was an open invitation from the U.S. Supreme Court to the states—both as a matter of general principle and with respect to speech and assembly specifically—to address state constitutional issues.”⁵⁸ In the process, the Court extended an express invitation to state courts to interpret the free speech provisions within their state constitutions more broadly than the First Amendment by granting protection of speech in shopping malls.⁵⁹

55. *Id.* at 344 (quoting *Agric. Labor Relations Bd. v. Superior Court*, 546 P.2d 687, 694 (Cal. 1976)); see also Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 651–52 (1991) (“[A] state’s interest in promoting political expression in . . . public places may . . . override the values associated with private ownership.”).

56. *Robins*, 592 P.2d at 347 (“We conclude that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.”).

57. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (emphasis added).

58. Brady C. Williamson & James A. Friedman, *State Constitutions: The Shopping Mall Cases*, 1998 WIS. L. REV. 883, 886 (stating further that “the invitation has had few RSVPs”).

59. *Pruneyard*, 447 U.S. at 81 (1980). In upholding the independent state constitutional grounds of *Pruneyard*, the Court was careful to reaffirm *Lloyd*: “*Lloyd* held that when a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment . . . does not thereby create individual rights in expression beyond those already existing under applicable law.” *Id.*

III. STATE CONSTITUTIONAL GROUNDS FOR ALLOWING FREE EXPRESSION IN SHOPPING MALLS

Before the Minnesota Supreme Court weighed in on the question,⁶⁰ the majority of the twenty-one state courts that had considered the issue of free speech rights after *Pruneyard*, including Arizona,⁶¹ Connecticut,⁶² Georgia,⁶³ Hawaii,⁶⁴ Iowa,⁶⁵ Michigan,⁶⁶ New York,⁶⁷ North Carolina,⁶⁸ Ohio,⁶⁹ South Carolina,⁷⁰ Texas,⁷¹ and Wisconsin,⁷² had "declined Chief Justice Rehnquist's express invitation in *Pruneyard*" to adopt free speech rights more expansive than those afforded by the First Amendment.⁷³ These states have chosen neither to read their free speech provisions as affirmative rights that can be asserted against both public and private entities nor to adopt a more flexible state action doctrine.⁷⁴ These states have

60. See *State v. Wicklund*, 589 N.W.2d 793, 799 (Minn. 1999).

61. *Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719, 723-24 (Ariz. Ct. App. 1998).

62. *Cologne v. Westfarms Assocs.*, 469 A.2d 1201, 1208-09 (Conn. 1984).

63. *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 392 S.E.2d 8, 10 (Ga. 1990).

64. *Estes v. Kapiolani Women's and Children's Med. Ctr.*, 787 P.2d 216, 220-21 (Haw. 1990).

65. *State v. Lacey*, 465 N.W.2d 537, 540 (Iowa 1991).

66. *Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337, 347-48 (Mich. 1985).

67. *Shad Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1213 (N.Y. 1985).

68. *State v. Felmet*, 273 S.E.2d 708, 712 (N.C. 1981).

69. *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 61 (Ohio 1994).

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

71. *Republican Party v. Dietz*, 940 S.W.2d 86, 90-91 (Tex. 1997).

72. *Jacobs v. Major*, 407 N.W.2d 832, 841 (Wis. 1987).

73. See *Williamson & Friedman*, *supra* note 58, at 894.

74. See, e.g., *Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719, 723-24 (Ariz. Ct. App. 1998); *Cologne v. Westfarms Assocs.*, 469 A.2d 1201, 1208-09 (Conn. 1984) (stating that the court was "not persuaded that [the] variations in phraseology are sufficient to indicate an intention to allow those rights to be exercised upon every property affording a suitable opportunity for their enjoyment against the objections of the [private] owners."); *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 392 S.E.2d 8, 10 (Ga. 1990) (rejecting argument that shopping malls are the functional equivalent of public forums); *Estes v. Kapiolani Women's and Children's Med. Ctr.*, 787 P.2d 216, 219 (Haw. 1990) (holding that free speech provision "erects no shield against merely private conduct") (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)); *State v. Lacey*, 465 N.W.2d 537, 540 (Iowa 1991) (opining that there is a "proper time and place" for even peaceful protests); *Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337, 348 (Mich. 1985) (holding that state's free speech protection is "implicitly limited to . . . state action"); *Shad Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1213 (N.Y. 1985) (rejecting the argument that no state action requirement exists or should exist under the New York constitution); *State v. Felmet*, 273 S.E.2d 708, 712 (N.C. 1981) (holding that the literal language of free speech provision makes no affirmative declaration and does not address private action); *Eastwood Mall*, 626 N.E.2d at 61 (finding an implied state action requirement and holding that "the free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment");

“reached that conclusion either because of the literal language of the state constitution or, despite that language, based on the exclusive application of the state action to the free speech provision.”⁷⁵ In short, these states have chosen not to interpret their free speech provisions as granting broader protection than the First Amendment.⁷⁶

The most recent RSVP,⁷⁷ to the invitation in *Pruneyard* came from Minnesota. In *State v. Wicklund*,⁷⁸ the issue of whether visitors to the Mall of America are protected by the free speech provision of the Minnesota Constitution came before the Minnesota Supreme Court.⁷⁹ In *Wicklund*, the Minnesota Supreme Court joined the majority of courts considering the issue in holding that mall visitors are no more protected under the state constitution than

McPherson, 417 S.E.2d at 547 (rejecting argument that shopping centers are the functional equivalent of public forums); *Dietz*, 940 S.W.2d at 90–91 (finding original intent on the part of the framers of the Texas constitution to provide for a state action requirement); *Jacobs*, 407 N.W.2d at 841 (refusing to “legislate” and holding that the state’s free speech protections are limited to state action).

75. Williamson & Friedman, *supra* note 58, at 894 (quoting Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 736 (1991)) (“Most state courts have held that their constitutional free speech provisions, like the First Amendment, govern state action only and do not proscribe the conduct of private parties who limit free expression on their own property.”). Although there is no definitive articulation of what has come to be known as the “state action doctrine,” the first clear application of the doctrine came in 1883 in the *Civil Rights Cases*, 109 U.S. 3 (1883), in which the Supreme Court held that civil rights amendments do not apply to limit the conduct of private actors. *Id.* at 25. In other words, “[t]he 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.” Alexander, *supra* note 9, at 23. Thus, “[s]ome finding of ‘state action’ is necessary before challenged conduct can be considered the conduct of the state.” Kevin L. Cole, *Federal and State “State Action”: The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 330 (1990).

Despite the simplicity of the above explanations, the state action doctrine is subject to a wide variety of interpretations, resulting in a “conceptual disaster area.” Alexander, *supra* note 9, at 23 (quoting Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 91 (1967)). Academics have made numerous efforts to “make sense of the doctrine and refine or otherwise consolidate the meaning of state action.” *Id.* at 106 n.129. Despite the criticism and uncertainty, many state courts have adopted the doctrine wholesale, applying it to limit the reach of state constitutional protections. *See* Cole, *supra*, at 329. Further, some state courts have chosen “to incorporate the federal constitutional concept of state action into their state constitutions even though the framers of the state constitutions apparently deliberately stated the right of free expression in broader language than the First Amendment.” Abrahamson, *supra*, at 736. Abrahamson also notes that “[f]orty-three states have constitutional provisions linguistically similar to the California constitution.” *Id.* at 735.

76. *See supra* note 74 and accompanying text.

77. *See* Williamson & Friedman, *supra* note 58, at 886 (referring to each state’s consideration of the issue as an “RSVP”).

78. 589 N.W.2d 793 (Minn. 1999).

79. *Id.* at 799.

under the First Amendment.⁸⁰ Thus, in Minnesota, mall visitors cannot assert free speech rights against mall owners because mall owners are private actors.

In reaching this conclusion, Minnesota has become the newest member of what could be termed the United Mall of America, a loose federation of states willing to subordinate public citizenship to the allegedly inflexible rights claimed by private property owners. This continued subordination of public discourse to private ownership—in the face of obvious changes in our cultural landscape—merely allows the further obliteration of any arena for “public citizenship.”⁸¹ As each state joins the United Mall, the already bloated influence that the values of consumerism exert over our lives grows even larger.⁸²

Not all state courts have declined *Pruneyard's* invitation. In *Bock v. Westminster Mall Co.*,⁸³ the Colorado Supreme Court held that the Colorado Constitution protected political leafletting in a large shopping mall.⁸⁴ In *Bock*, a group calling itself the “Pledge of Resistance” asked permission from Westminster Mall “to distribute political pamphlets and to solicit signatures pledging non-violent dissent from the federal government’s foreign policy toward Central America.”⁸⁵ The mall argued simply that the constitution required state action and that, because the mall was privately owned, the mall could freely deny the permission requested.⁸⁶ The court declined to confront the issue of whether state action is a prerequisite in Colorado for invoking constitutional protection.⁸⁷

80. *Id.*

81. By “public citizenship,” I mean physical participation—within a public arena—in political, social, and community discourse. Other terms that would capture this ideal are “public debate,” “participatory democracy,” “public discourse,” “public conversation,” or “political action.” The notion of an active citizenry in the public sphere is classical in origin and has been the subject of extensive academic discourse. Although I do not intend to address so vast a topic in this Note, by using the term “public citizenship” I cannot avoid invoking its long history. For a recent comprehensive analysis of First Amendment jurisprudence and the concept of public participation in politics and community, see Failing, *supra* note 34, at 255–64. See also Allen, *supra* note 34, at 93 (discussing the theories of Jürgen Habermas and Hannah Arendt in the context of Supreme Court jurisprudence).

82. Writing about growth of leisure complexes where “tourism, entertainment, and retail development are . . . bundled together in a ‘themed’ environment,” John Hannigan comments that “[i]n these new leisure spaces, citizenship becomes equated with brand-name consumption, and the dream of a lively and creative public culture is crowded out by pre-packaged corporate entertainment.” Hannigan, *supra* note 26, at 7. Hannigan also that “this new urbanism of leisure will further encourage the privatisation of public spaces and the erosion of neighbourhood identities.” *Id.* (citing critic Paul Goldberger).

83. 819 P.2d 55 (Colo. 1991).

84. *Id.* at 55.

85. *Id.* at 56.

86. *Id.* at 60.

87. *Id.* at 60 n.7.

Instead, the court acknowledged *Pruneyard's* invitation to interpret the free-speech provision of the Colorado Constitution as conferring broader rights than the First Amendment⁸⁸ and further recognized that the free speech provision of the Colorado Constitution extended "beyond the negative command of its first clause to make an affirmative declaration in the second clause."⁸⁹ But, ultimately, the court decided to examine the issue under the public forum doctrine,⁹⁰ viewing the mall as so entangled with the government that there was, in effect, sufficient state action to trigger the protection of Colorado's free speech provision.⁹¹

While the court did not expressly deny a state action requirement, the court criticized the mall's exclusive reliance on the state action doctrine, stating that "[t]he facts of the case here . . . belie this simplistic division of the universe into public and private spheres."⁹² The court noted the mall's large size and close relationship with the municipality it served.⁹³ The mall was located across the street from city hall.⁹⁴ It covered 100 acres and offered more than 100,000 square feet of common area.⁹⁵ At times, ten percent of the city's retail sales were generated by the mall.⁹⁶ City police officers also patrolled the mall, and the mall permitted the city to maintain a police substation and holding facilities on the property.⁹⁷ The court found particularly persuasive the fact that the city financed improvements that the mall made to adjacent roads.⁹⁸ The mall had a history of allowing various groups to use its common areas for demonstrations, of allowing branches of the Armed

88. *Id.* at 58.

89. *Id.* The second clause of Article II, section 10 of the Colorado Constitution provides that "every person shall be free to speak, write or publish whatever he will on any subject . . ." COLO. CONST. art. II, § 10, cl. 2.

90. Under this doctrine, public forums are those places, such as streets and sidewalks, which are owned by the government and traditionally open to expressive activities. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Lehman v. Shaker Heights*, 418 U.S. 298, 301-02 (1974). The public forum doctrine is the result of the court's "attempt to preserve some public space for speech." *Failingler*, *supra* note 34, at 272. Parks, streets, and sidewalks have emerged as the "quintessential public forums", by a long tradition devoted to assembly and debate, where content regulations are judged by strict scrutiny, and time, place and manner restrictions by a four-part test." *Id.* at 272 n.120 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); see also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1142-43 (5th ed. 1995) (describing the Court's time, place, and manner doctrine in the context of the public forum doctrine).

91. *Bock v. Westminster Mall Co.*, 819 P.2d 55, 61 (Colo. 1991).

92. *Id.* at 60.

93. *Id.* at 62.

94. *Id.* at 57.

95. *Id.* at 62.

96. *Id.* at 56.

97. *Id.* at 61.

98. *Id.*

Forces to display equipment and pass out literature, and of allowing community bazaars, art and dance shows, and solicitation by Boy and Girl Scouts.⁹⁹ The court found not only that the level of government involvement was sufficient to activate the free speech protections of the Colorado Constitution, but also that the mall effectively functioned as a public place.¹⁰⁰

Considering all the facts and circumstances underlying the Mall's operation with the preferred liberty of speech in mind, we conclude that there was governmental involvement in this case, most assuredly triggering the protections of Article II, section 10. Respondent's denial of petitioners' rights to distribute political pamphlets and to solicit pledge signatures in the common areas of the Mall therefore violated that provision of the Colorado Constitution.

Because we hold, on the facts of this case, that governmental involvement exists and that the open and public areas of the Mall effectively function as a public place, we leave for another day the issue as to whether some lesser form or degree of governmental involvement is a prerequisite to successfully pleading the protections of Article II, Section 10.¹⁰¹

In the instance of Westminster Mall, the court "recognized . . . that the mall has replaced, or at least supplemented, the town hall or the town square as a physical forum for protected expression."¹⁰²

Oregon has also accepted *Pruneyard's* invitation, although it did so initially without relying on the free speech provision of the Oregon Constitution. In 1993, the Oregon Supreme Court held in *Lloyd Corp. v. Whiffen*¹⁰³ that persons seeking signatures for ballot initiatives have a right to use the mall's common areas.¹⁰⁴ Rather than basing its holding on the free speech provision of the state's constitution,¹⁰⁵ the court turned to Article IV, section 1 of the

99. *Id.* at 57.

100. *Id.* at 62.

101. *Id.* at 61 (footnote omitted).

102. Williamson & Friedman, *supra* note 58, at 889 n.34 (citing John Michael Vazquez, Case Note, 6 SETON HALL CONST. L.J. 389, 389-90 (1995)) ("American society . . . has changed in recent decades such that urban downtown business districts, areas once effectively utilized as public forums, are now being replaced by suburban shopping malls as the center of social interaction between members of the community.").

103. 849 P.2d 446 (Or. 1993).

104. *Id.* at 456.

105. Unlike the free speech provisions in many state constitutions, and like the First Amendment, Article I, section 8 of the Oregon Constitution makes no affirmative declaration: "No law shall be passed restraining the free expression of opinion, or restricting the

Oregon Constitution, which reserves initiative and referendum powers to the citizens.¹⁰⁶

[W]e hold that to prohibit the gathering of signatures on initiative petitions in the common areas of large shopping centers such as the Lloyd Center would “impinge on constitutional rights” conferred on the citizens of this state by the provisions of Article IV, section 1, of the Oregon Constitution. Such rights, however, are subject to reasonable time, place, and manner restrictions¹⁰⁷

The court’s rationale was drawn from *Marsh v. Alabama*,¹⁰⁸ in which the U.S. Supreme Court stated that “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”¹⁰⁹ The Oregon court further described the initiative process as “one of our society’s most precious rights” and found that the collection of signatures would be substantially impaired if not permitted to be conducted in large shopping malls.¹¹⁰

To date, the New Jersey Supreme Court has provided the most extensive and clearly articulated model for rejecting the traditional state action requirement by holding mall owners accountable for violations of the state’s free speech protections. In 1994, the New Jersey Supreme Court interpreted the free speech provision of the New Jersey Constitution¹¹¹ as extending to private owners of shop-

right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.” OR. CONST. art. I, § 8.

106. OR. CONST. art. IV, § 1.

107. *Lloyd*, 849 P.2d at 453.

108. 326 U.S. 501 (1946).

109. *Id.* at 506.

We do not agree that the corporation’s property interests settle the question. The State urges in effect that the corporation’s right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion.

Id. at 505–06 (footnote omitted).

110. *Lloyd*, 849 P.2d at 453; see also *State v. Dameron*, 853 P.2d 1285, 1293 (Or. 1993) (finding that there is a state constitutional right to gather petition signatures on private property). The Massachusetts Supreme Court reached a similar result in *Batchelder v. Allied Stores International*, 445 N.E.2d 590 (Mass. 1983), narrowly holding that citizens have the right to solicit signatures on mall property for the limited purpose of ballot access. *Id.* at 591 (basing its holding not on free speech provisions, but on the right to free elections).

111. N.J. CONST. art. I, § 6 (“Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right.”).

ping malls as well as state action in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*¹¹² Fifteen years earlier, the court had set forth a standard in *State v. Schmid*¹¹³ that essentially balanced expressional rights and property rights in the context of free speech on property owned by a private university. The court in *New Jersey Coalition* based its decision upon the rationale of *Schmid* and considered in its analysis the three *Schmid* factors:

- (1) the nature, purposes, and primary use of such private property, generally, its “normal” use,
- (2) the extent and nature of the public’s invitation to use that property, and
- (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.¹¹⁴

Applying the *Schmid* test, the court found that the owners of regional malls were constitutionally obligated to permit “leafletting and associate [sic] speech in support of, or in opposition to, causes, candidates, and parties—political and societal free speech.”¹¹⁵

The court noted the reasoning of *Logan Valley* and the dissenting opinions in *Lloyd* and *Hudgens* as it returned to the principles recognized in *Marsh*:

The principle of that case (and *Logan*) is that the constitutional right of free speech cannot be determined by title to property alone. Thus, where private ownership of property that is the functional counterpart of the downtown business district has effectively monopolized significant opportunities

112. 650 A.2d 757, 779 (N.J. 1994).

113. 423 A.2d 615, 630 (N.J. 1980).

114. *New Jersey Coalition*, 650 A.2d at 771 (quoting *Schmid*, 423 A.2d at 630).

115. *Id.* at 781. In their commentary on the various states’ treatment of free speech in shopping malls, Williamson and Friedman noted that “[g]iven the potentially broad and generic definition of ‘cause,’ this decision may be the high-water mark for state constitutional protection of speech and assembly on private property.” Williamson & Friedman, *supra* note 58, at 888.

for free speech, the owners cannot eradicate those opportunities by prohibiting it.¹¹⁶

The court also gave some weight to the language of its free speech provision, which it characterized as conferring “an affirmative *right* of free speech”¹¹⁷ that “neither government nor private entities can unreasonably restrict.”¹¹⁸ In what sounds much like an “estoppel theory,”¹¹⁹ the New Jersey court reasoned that because the mall owners “have intentionally transformed their property into a public square or market, a public gathering place, a downtown business district, a community,”¹²⁰ they cannot later deny their own implied invitation to use the space as it was clearly intended.¹²¹ According to the court, mall owners have “taken that old downtown away from its former home and moved all of it, except free speech, to the suburbs.”¹²² The court reasoned that the mall owners cannot appropriate a traditional public forum without also recognizing “a constitutional responsibility” to allow free expression to follow the public forum.¹²³

As in *Schmid*, the New Jersey Supreme Court refused to apply a narrow state action requirement and found that its free speech provision protected its citizens not only from governmental re-

116. *New Jersey Coalition*, 650 A.2d at 777. The court also noted Justice Marshall’s dissenting opinion in *Hudgens*:

[T]here is nothing in *Marsh* to suggest that its general approach was limited to the particular facts of that case. The underlying concern in *Marsh* was that traditional public channels of communication remain free, regardless of the incidence of ownership. Given that concern, the crucial fact in *Marsh* was that the company owned the traditional forums essential for effective communication. . . .

In Logan Valley we recognized what the Court today refuses to recognize—that the owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the “State” from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication.

Id. at 777 n.12 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 539 (1976)).

117. *New Jersey Coalition*, 650 A.2d at 779.

118. *Id.*

119. Harriet Dinegar Milks, Annotation, *Validity, Under State Constitutions, of Private Shopping Center’s Prohibition or Regulation of Political, Social, or Religious Expression or Activity*, 52 A.L.R.5th 195, 210–11 (1997) (noting that the court used its “own ‘estoppel’ theory that mall owners who have purposely transformed the life of society for their own profit ‘should not be permitted to claim a theoretically-important right of silence from the multitudes they have invited’”).

120. *New Jersey Coalition*, 650 A.2d at 776.

121. *Id.*

122. *Id.* at 774.

123. *Id.* at 777.

straint, but also from the “restraint of private property owners.”¹²⁴ The court engaged in a balancing of interests and did not find the right of free expression more important than the rights of property owners. Rather, the court found that the rights of property owners would not be unreasonably infringed by allowing free expression, while disallowing free expression would be a “massive” infringement on citizens’ freedoms.¹²⁵

IV. MINNESOTA: THE MALL OF AMERICA

Against this backdrop, the Minnesota Supreme Court considered the issue of free speech protections in shopping malls as grounded in the Minnesota Constitution. On the one hand, the conservative decisions of the majority of state courts wielded an advantage through sheer persuasive bulk; on the other, the radical departures of the New Jersey, California, Colorado, Massachusetts, and Oregon courts offered thoughtful alternatives to tradition.¹²⁶ Added to the mix was the fact that the Mall of America is itself a cultural icon whose significance extends—due to both conscious design and the mysteries of popular attraction—beyond a mere

124. *Id.* at 760.

125. *Id.* at 779. For a thorough discussion of the shopping mall cases generally and, in particular, the decision in *New Jersey Coalition*, see Friedelbaum, *supra* note 32. While Friedelbaum acknowledges that “[a] resort to independent state grounds represents the only viable alternative to effectuate the libertarian goals sought to be achieved,” *id.* at 1243, he ultimately concludes:

Shopping malls, notwithstanding their peculiar attributes and the challenges that they present to traditional values, cannot be equated with conventional public fora. This is so no matter how adroit the arguments set forth by judicial proponents who maintain unflinchingly that the centers are obligated to meet the needs of a changed society and to reflect revised community visages.

Id. at 1260. Noting that private property rights “remain firmly embedded in the American constitutional fabric,” Friedelbaum rejects the reasoning of decisions like *New Jersey Coalition* in which economic freedom is “selectively downgraded toward the achievement of ideological objectives currently in vogue.” *Id.* at 1262. Friedelbaum’s conclusion, which is based upon the preeminence of property rights, represents the position most often used to deflect challenges to the state action requirement in the context of shopping malls. *But see* Berger, *supra* note 55, at 635 (suggesting that the “gospel of private ownership” should be subject to balancing against free speech interests). Berger notes that “in setting the fulcrum between speech and property, both state and federal courts have given far greater leverage to property than any sensible weighing of the competing interests dictates.” *Id.* at 636 (footnotes omitted).

126. By referring to these decisions as “thoughtful,” I mean that they “recognize the centrality of the mall in society, and their case law protects some speech rights in shopping malls.” Alexander, *supra* note 9, at 31.

conglomeration of retail establishments. It is *the* Mall of America, a name that signifies a destination that is at once self-consciously grand at a national level and simply a description of the preeminent American leisure activity—shopping.

Measuring 4.2 million square feet, the Mall of America (the Mall), located in Bloomington, Minnesota, is the ultimate shopping mall. The largest shopping mall in the United States, the Mall is a major Minnesota tourist attraction, drawing 37.5 million visitors a year.¹²⁷ The Mall houses the nation's largest indoor amusement park, Camp Snoopy, a 1.2 million-gallon walk-through aquarium, and the World's Largest Pop Tab Collection.¹²⁸ The Mall has hosted the World's Largest Marriage Workshop and the World's Largest Sleepover, as well as a reception for the President of Botswana.¹²⁹ In addition, the Mall is home to a public school, the Metropolitan Learning Alliance, and a branch of a private university, the University of St. Thomas.¹³⁰ The Mall of America maintains a "WCCO Community Booth" for sharing of community events and views.¹³¹ The League of Women voters registers people to vote at the Mall; the Red Cross held a walk-a-thon at the Mall; and the Children's Home Society passes out literature at the community booth.¹³² The City of Bloomington operates a police substation at the mall, which also happens to be the only police substation in the city.¹³³ Under a special contract, Bloomington police officers work hundreds of hours at the Mall and are considered on-duty under the supervision of the city police department.¹³⁴ The Mall compensates the City for the services of the police officers at a rate of time-and-a-half plus a sixteen percent administrative fee.¹³⁵

Substantial public funds were involved in the construction of the Mall. The Bloomington Port Authority issued approximately \$105 million in tax increment financing bonds to be repaid with recaptured tax dollars generated by the Mall.¹³⁶ These funds "financed the site preparation including utilities, parking ramps, access roads

127. Brief for Appellants at 7, *State v. Wicklund*, 589 N.W.2d 793 (Minn. 1999) (No. C7-97-1381).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 5.

132. *Id.* at 6.

133. *Id.*

134. *Id.* at 7.

135. *Id.*

136. *State v. Wicklund*, No. C7-97-1381, 1997 WL 426209, at *2 (Minn. Dist. Ct. July 24, 1997).

between [the Mall] and the ramps, and pedestrian bridges linking the ramps to the [M]all itself."¹³⁷

In addition to the tax increment financing, the Minnesota legislature passed a special law "giving the City of Bloomington permission to issue eighty million dollars in bond financing to cover the cost of highway reconstruction surrounding the [Mall] in time for its opening."¹³⁸ These amounts together, \$186 million, represented twenty-one percent of the total expenditures for the Mall's construction;¹³⁹ the rest, approximately \$700 million, came from privately owned corporations.¹⁴⁰

The public areas of the Mall are represented as "city streets" and a "town square."¹⁴¹ The Mall is "promoted as being more than Disney World, the Grand Canyon and Graceland combined."¹⁴² Indeed, the promoters of the mall describe the project proudly as a "city within a city."¹⁴³

On Sunday, May 19, 1996, a small group of anti-fur protestors positioned themselves inside the Mall of America, adjacent to the entrance to Macy's.¹⁴⁴ Without first seeking permission from the Mall, the protestors held placards and distributed leaflets expressing opposition to the cruel treatment of animals in the fur industry and "urging a boycott of Macy's."¹⁴⁵ They also attempted to engage passersby in discussions "about the ethics of producing and selling fur products."¹⁴⁶ After repeated warnings, Mall security officers arrested the protestors and charged them with misdemeanor trespass.¹⁴⁷

Initially, the protestors moved to dismiss the trespass charges based upon a "claim of right" under the First Amendment, but "at the suggestion of the trial court,"¹⁴⁸ they changed their focus to the Minnesota Constitution, which provides that "all persons may

137. *State v. Wicklund*, 589 N.W.2d 793, 795 (Minn. 1999).

138. *Id.* at 795-96 (footnote omitted).

139. Brief for Appellants at 8, *State v. Wicklund*, 589 N.W.2d 793 (Minn. 1999) (No. C7-97-1381).

140. *Wicklund*, 589 N.W.2d at 795-96.

141. Brief for Appellants at 12 n.6, *Wicklund* (No. C7-97-1381) (citing Order on Motion to Dismiss, State's App. at 238-39).

142. *Id.* at 7.

143. Brief of Amicus Curiae Minnesota Civil Liberties Union at 5, *Wicklund* (No. C7-97-1381). Some of the Mall of America's promotional literature reads: "[The] Mall of America will be a city within a city, unlike other malls . . . It will be divided into four distinctive city streets providing four unique shopping and visual environments." *Id.* at 5-6.

144. *Wicklund*, 589 N.W.2d at 795.

145. *Id.*

146. *Id.* ("The protest was at all times peaceful and nonconfrontational.")

147. *Id.*

148. *Id.*

freely speak, write and publish their sentiments on all subjects, being responsible for an abuse of such right."¹⁴⁹ The trial court, having first wisely framed the issue as one of state constitutional dimensions under *Pruneyard*, was faced with a prior decision of the Minnesota Supreme Court in which the court stated that Minnesota's free speech protection is "no more extensive in this case than the protection provided by the [F]irst [A]mendment."¹⁵⁰ Undaunted, the trial court declared the statement to be no more than "hideous dictum."¹⁵¹ According to the trial court, that statement, which was made in the limited context of the regulation of commercial speech, was not binding authority that would foreclose the extension of free speech protections in other contexts.¹⁵²

Accordingly, the trial court proceeded to interpret the state constitution as protecting speech in shopping malls and held that the Mall was the functional equivalent of public property.¹⁵³ As a result, the Mall could only impose reasonable time, place, and manner restrictions.¹⁵⁴ The trial court reached this conclusion in part because of the public subsidy of the project and the general invitation to the public to enter the Mall.¹⁵⁵ The primary reason for the trial court's conclusion, however, was that the Mall is "as public as any city thoroughfare, as any government grounds"¹⁵⁶ and that it was "born of a union with government."¹⁵⁷ Despite this conclusion,

149. MINN. CONST. art. I, § 3.

150. *State v. Century Camera, Inc.*, 309 N.W.2d 735, 738 n.6 (Minn. 1981) ("The protection of freedom of speech guaranteed by the Minn. Constitution . . . is no more extensive in this case than the protection provided by the [F]irst [A]mendment to the United States Constitution.") (emphasis added).

151. *State v. Wicklund*, No. C7-97-1381, 1997 WL 426209, at *15 (Minn. Dist. Ct. July 24, 1997).

152. *Id.* at *15-18.

153. *Id.* at *24.

154. *Id.*

155. *Id.* at *22. Considering the question of whether there is any threshold to the level of public subsidy that would trigger state action, Judge Nordby wrote:

It [sic] there is a threshold, it is far, far below the public involvement here, where we are confronted not with hundreds or thousands or even modest millions of dollars, but more than a hundred million. There can perhaps be no bright line; at least it need not be drawn here; for if language means anything, if we have not entirely lost our ability to conceive perspective, if we have not bartered our common sense for the right to manipulate words with absolute artificiality, a public investment of this magnitude (to which the enterprise owes its very existence) simply cannot be said rationally to be "private". And Constitutional rights can hardly be *proportional* to the degree of public versus private investment.

Id. at *20 (emphasis added).

156. *Id.* at *23.

157. *Id.* The trial court made extensive findings of fact. Finding 18 is as follows:

the trial court denied the protestors' motion to dismiss because the protestors had failed to "test the Mall's willingness to honor the Constitution"¹⁵⁸ by asking permission before staging the protest.¹⁵⁹

The court of appeals reversed, interpreting the trial court's decision as one that appeared to dispense cavalierly with the traditional "state action" requirement for triggering Minnesota's constitutional protections.¹⁶⁰ The court of appeals based its decision on the lack of support for the trial court's conclusion that the framers of the Minnesota Constitution intended the state's free speech provision to provide more protection than its federal counterpart, and, additionally, on its own historical reluctance to interpret Article I, section 3 of the state's constitution more expansively than the First Amendment of the U.S. Constitution.¹⁶¹ According to the court of appeals, "[i]f the 'state action' requirement is discarded, it is difficult to formulate a principled line between those privately-owned locations in which constitutional free speech guarantees should apply and those where they should not."¹⁶² The court of appeals also noted that the language of the free speech provision of the Minnesota Constitution, while "express[ing] the right of free speech in positive terms," is nevertheless "not unique."¹⁶³ The court of appeals concluded that "the public funding involved in the development of the Mall of America does not satisfy the state action requirement"¹⁶⁴ as established under Minnesota law.

Large shopping malls are a phenomenon of concern to some architects and urban planners. By enclosing many businesses and activities traditionally found on open public streets within largely featureless and sometimes fortress-like exterior walls, the structures displace people who would otherwise shop, entertain themselves, exercise, and exchange ideas on city streets, in public parks or in the town square.

Id. at *3 (citing testimony of Professors Thomas Fisher and Judith Martin, professors of architecture at the University of Minnesota School of Architecture) (footnote omitted).

158. *Id.* at *25.

159. *Id.*

160. *State v. Wicklund*, 576 N.W.2d 753, 757 (Minn. App. 1998) (declaring that the "state action" requirement is a necessary restriction on the powers of the courts under the separation of powers doctrine).

161. *Id.* at 759.

162. *Id.* at 758.

163. *Id.* at 756.

164. *Id.* at 757 (citing *Brennan v. Minneapolis Soc'y for the Blind, Inc.*, 282 N.W.2d 515, 527-28 (Minn. 1979) (holding that more is required for "state action" than public funding)).

In *State v. Wicklund*,¹⁶⁵ the Minnesota Supreme Court held that the free speech protections of the Minnesota Constitution do not, in any context, afford more extensive protection of speech than the First Amendment.¹⁶⁶ The court further held that neither the public access to the Mall of America nor the public financing involved transformed the Mall into public property for purposes of free speech protection.¹⁶⁷

In reaching its conclusion, the court recognized that it “may articulate independent and more protective standards under [the] state constitution than are accorded under comparable provisions of the Federal Constitution.”¹⁶⁸ It declined to do so in the context of shopping malls, however, stating simply that “[t]he Minnesota Constitution does not accord affirmative rights to citizens against each other; its provisions are triggered only by state action.”¹⁶⁹ The court further noted that it had previously defined in *Brennan v. Minneapolis Society for the Blind, Inc.*¹⁷⁰ what constitutes “state action” in the context of the federal constitution: “‘[I]f the conduct that is formally private has become so entwined with governmental character as to become subject to the constitutional limitations placed upon state action,’ federal constitutional restrictions on conduct may be applied against private entities.”¹⁷¹ In *Brennan*, the court made clear that, for such entanglement to exist, “[t]he facts alleged to constitute a symbiosis must indeed convince us that the ‘power, property, and prestige’ of the state has been in fact placed behind the discriminatory conduct.”¹⁷² In *Wicklund*, the court stated that the “lack of evidence connecting the ‘power, property and prestige’ of the State of Minnesota or the City of Bloomington with the actions of [the Mall] management compellingly persuades us that there is neither sufficient nexus nor symbiosis to establish that [the Mall] is the alter ego of a governmental entity.”¹⁷³

The Minnesota Supreme Court took great pains to distinguish the circumstances presented from those of the decisions in California, Colorado, Oregon, and New Jersey. For example, the court

165. 589 N.W.2d 793 (Minn. 1999).

166. *Id.* at 803.

167. *Id.*

168. *Id.* at 798 (citing decisions upholding more protection in the context of due process, search and seizure standards, religious freedom, and equal protection analysis).

169. *Id.* at 801 (citing *State ex rel. Childs v. Sutton*, 65 N.W. 262, 263 (Minn. 1895)).

170. 282 N.W.2d 515 (Minn. 1979).

171. *Wicklund*, 589 N.W.2d at 801 (quoting *Brennan v. Minneapolis Soc’y for the Blind, Inc.*, 282 N.W.2d 515, 524 (Minn. 1979)).

172. 282 N.W.2d at 528 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

173. 589 N.W.2d at 802.

distinguished *Pruneyard* by noting that “California bases its protection of speech inside privately owned shopping malls on two state constitutional provisions—the right to free speech and the right to petition.”¹⁷⁴ There is no similar right to petition under the Minnesota constitution.¹⁷⁵ In making this summary distinction, the court failed to acknowledge the express balancing of constitutionally protected interests engaged in by the California Supreme Court,¹⁷⁶ a balancing that focused on the quality of the rights at stake, not their quantity.

The court distinguished the decision of the Colorado Supreme Court in *Bock v. Westminster Mall Co.*¹⁷⁷ on the grounds that the governmental involvement in *Bock* was “far more of a governmental nature”¹⁷⁸ than the governmental involvement in the Mall of America. Further, the court “simply disagree[d] that the circumstance [in *Bock*] would, under the Minnesota Constitution, rise to the level that the power, property and prestige of the state would implicate the state as the responsible actor.”¹⁷⁹ Setting aside the fact that the descriptions of government involvement in Westminster Mall and the Mall of America are hardly “far” different,¹⁸⁰ the Minnesota court failed to explain why the question would come out differently under the Minnesota Constitution. In fact, not only is Minnesota’s free speech provision virtually identical to California’s¹⁸¹—and thus arguably a purely affirmative right to free speech—but it also lacks a “negative clause” similar to the first clause of Colorado’s free speech provision.¹⁸²

The court in *Wicklund* only briefly noted the decision of the Oregon Supreme Court in *Lloyd Corp. v. Whiffen*,¹⁸³ viewing it as merely granting the right of “state constitutional protection to persons seeking signatures on initiative petitions in common areas of

174. *Id.* at 801 (citing *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (1979), *aff’d* 447 U.S. 74 (1980)).

175. *Id.*

176. *Robins*, 592 P.2d at 346–48.

177. 819 P.2d 55 (Colo. 1991).

178. *Wicklund*, 589 N.W.2d at 802 n.8.

179. *Id.*

180. *See supra* text accompanying notes 91–102. The development of both Westminster Mall and the Mall of America involved public financing. In addition, both housed police substations and hosted similar community activities.

181. The California Constitution provides: “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(a). *Compare id.* with MINN. CONST. art. I, § 3.

182. *Compare* MINN. CONST. art. I, § 3 with COLO. CONST. art. II, § 10, cl. 1.

183. 849 P.2d 446 (Or. 1993).

large shopping centers.”¹⁸⁴ The court found this limited right to be inapplicable to the case at hand, and, in the process, brushed over the Oregon court’s balancing of one right expressly protected by the state constitution—the right to collect signatures—against the property interests of the mall owners.¹⁸⁵ It is, however, precisely this balancing, as drawn from *Marsh v. Alabama*,¹⁸⁶ that makes *Lloyd* significant; if nothing else, the Oregon Supreme Court acknowledged that, in some circumstances, rights granted under a state constitution can outweigh private property interests regardless of whether state action is present. This acknowledgement, although not necessarily authoritative with respect to the interpretation of the Minnesota Constitution, deserves, at the very least, attention and analysis. The Minnesota Supreme Court engaged in neither.

Finally, the court summarily dismissed the persuasive force of *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*¹⁸⁷ by noting that the “[p]rotection extended under the New Jersey constitution is limited to ‘leafletting and associate [sic] speech in support of, or in opposition to causes, candidates, and parties.’”¹⁸⁸ The court’s treatment of *New Jersey Coalition* was notable in light of the “estoppel” theory espoused by the New Jersey court. Invoking the estoppel theory, the appellants in *Wicklund* had not only produced promotional materials and design aspects of the Mall as evidence of an intent to replicate a town hall, but had also offered the expert testimony of architecture professors at the University of Minnesota.¹⁸⁹ Professor Thomas Fisher, Dean of the School of Architecture and Landscape Architecture, testified that malls are “‘simulation[s] of traditional towns’” and “‘have become the one place where there is healthy commerce going on.’”¹⁹⁰ Professor Fisher also noted an ironic inversion of architectural referents: “There has been an invasion of the town square model prototype, in which the mall has become the type for the downtown rather than the downtown being the prototype for the mall.”¹⁹¹ Professor Judith Martin, Director of the Department of Urban Studies at the University of Minnesota, testified that suburban communities do not take pains to create public space,

184. *Wicklund*, 589 N.W.2d at 801.

185. *See id.*

186. 326 U.S. 501 (1946).

187. 650 A.2d 757, 781 (1994).

188. *Wicklund*, 589 N.W.2d at 801 (quoting *New Jersey Coalition*, 650 A.2d at 781).

189. Brief for Appellants at 9, *State v. Wicklund*, 589 N.W.2d 739 (Minn. 1999) (No. C7-97-1381).

190. Record at 43, *State v. Wicklund*, 589 N.W.2d 739 (Minn. 1999) (No. C7-97-1381).

191. Record at 57, *Wicklund* (No. C7-97-1381).

“because it’s assumed the mall is effectively going to be that.”¹⁹² She further testified that “the reduction of public space ‘reduces levels of civility overall for everyone.’”¹⁹³

By including the testimony of experts in architecture and urban studies and by pointing to the Mall’s promotional materials that boast of the Mall as a wondrous tourist attraction and “a city within a city,”¹⁹⁴ the appellants were clearly attempting to persuade the court of the applicability of an estoppel theory like that in *New Jersey Coalition*.¹⁹⁵ However, the court either failed or refused to acknowledge that the limited protection extended under the New Jersey Constitution would apply perfectly to the conduct of the anti-fur protestors at the Mall of America. The protestors were clearly engaged in “leafletting and associate [sic] speech in support of, or in opposition to [a] cause[]”;¹⁹⁶ they supported a boycott of Macy’s and opposed the cruel treatment of animals by the fur trade—both being obvious “causes.”¹⁹⁷ Again, the court in *Wicklund* failed to adequately consider the reasoning of *New Jersey Coalition*, which suggests that the rights of property owners are subject to balancing regardless of a traditional state action requirement.

While the Minnesota Supreme Court is certainly under no obligation to follow the reasoning of other state courts in interpreting the Minnesota Constitution, the court’s mechanical elimination of their reasoning was striking nonetheless. By systematically diminishing the persuasive authority of the decisions from California, Colorado, Oregon, and New Jersey, the court was left with no choice but to follow the “logic” of the courts in states having declined the *Pruneyard* invitation. In doing so, Minnesota has helped to enlarge the United Mall of America.

192. Record at 86, *Wicklund*, (No. C7-97-1381).

193. Record at 44, *Wicklund*, (No. C7-97-1381).

194. Brief for Appellants at 9, *Wicklund* (No. C7-97-1381).

195. *But see* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1542 (1998) (questioning the “wisdom and constitutionality of imposing the speech norms of the First Amendment on the private sector”). Further, Eule and Varat use the decision in *New Jersey Coalition* to illustrate their point that, however appealing the erosion of public and private distinctions may be, transporting free speech norms into the private sector is ultimately a curse. *Id.* at 1570-75. “[T]he theory of waiver . . . is strained to a dangerous degree when it is triggered by operating a private business for profit even on so grand a scale as the large regional shopping center.” *Id.* at 1572.

196. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 781 (N.J. 1994).

197. *Wicklund*, 589 N.W.2d at 801.

V. THE MALLING OF CITY HALL: A PREDICTION
AND SOME FINAL OBSERVATIONS

There is no consistent rationale behind the decisions that grant free speech protections to the visitors of shopping malls. The Colorado Supreme Court found sufficient entanglement with the government to support a finding of state action.¹⁹⁸ The Oregon court based its decision on the initiative and referendum powers reserved to Oregon citizens in the state constitution.¹⁹⁹ The California and New Jersey courts balanced the property rights of mall owners against the free speech protections of the state constitution and held that the right of citizens to engage in free expression outweighed the property interest of the mall owners.²⁰⁰ Both courts dispensed with the traditional state action requirement in that context.²⁰¹ The New Jersey court also noted the "affirmative right" granted by the free speech provision of the New Jersey Constitution.²⁰² Interestingly, the language of New Jersey's free speech provision is nearly identical to that of states in which the courts have refused to extend free speech protection in shopping malls.²⁰³

Because of the inconsistency in past decisions, it would be difficult to predict outcomes in states that have not yet addressed the issue. The one consistent theme is the echo of *Marsh v. Alabama*,²⁰⁴ either as analogous support for the decision or as a ground for distinction. In his dissent in *New Jersey Coalition*, Justice Garibaldi vigorously denied that shopping malls are "replica[s] of the community itself". . . . Shopping malls do not have housing, town halls, libraries, houses of worship, hospitals, or schools.²⁰⁵ In a commonly stated objection to allowing free speech protections in shopping malls, Justice Garibaldi maintained that "[t]he inescapable mission of shopping malls is not to be the successor to downtown business districts; rather, it is to provide a comfortable

198. *Bock v. Westminster Mall Co.*, 819 P.2d 55, 61 (Colo. 1991).

199. *Lloyd Corp. v. Whiffen*, 849 P.2d 446, 453 (Or. 1993).

200. *Robins v. Pruneyard Shopping Center*, 592 P.2d 341, 346-47 (Cal. 1979); *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty*, 650 A.2d 757, 775 (N.J. 1994).

201. *Robins*, 592 P.2d at 346-47; *New Jersey Coalition*, 650 A.2d at 775.

202. *New Jersey Coalition*, 650 A.2d at 760.

203. See *supra* note 111 and accompanying text.

204. 326 U.S. 501 (1946).

205. *New Jersey Coalition*, 650 A.2d at 794 (Garibaldi, J., dissenting) (quoting majority opinion, 650 A.2d at 774).

and conducive atmosphere for shopping.”²⁰⁶ But what about shopping malls that have police stations, schools, housing, libraries, and churches?²⁰⁷ More pointedly, what about the Knoxville Center and the city of Knoxville, Tennessee, which together invite and encourage the public to transact its city and county related business at the “City Hall at the Mall”?²⁰⁸

As Tennessee law currently stands and considering the mall’s explicit acknowledgment that it houses a city hall, it would be quite an exercise for the Tennessee Supreme Court to conclude that Knoxville Center is not a “town hall.”²⁰⁹ As a result, a case presenting this issue in Tennessee—and factually linked to the City Hall in the Mall—has an appreciable chance of resulting in a decision holding that the Tennessee Constitution affords free speech protection to its mall-citizens. To hold otherwise would allow the government to avoid an essential element of its public character

206. *Id.*; see also *Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719 (Ariz. Ct. App. 1988) (rejecting the claim that shopping malls are the functional equivalent of town squares and asserting that malls are no more than retail establishments grouped together for convenience).

207. The Mall of America houses a public school and a private university. Brief for Appellants at 7, *State v. Wicklund*, 589 N.W.2d 793 (Minn. 1999) (No. C7-97-1381).

208. Knoxville Center is wholly owned by the Simon Property Group, Inc. (SPG); the Mall of America is partly owned by SPG. SPG has an interest in over 200 malls all over the United States. Simon Property Group, Corporate Info, List of All Simon Properties, available at <http://about.simon.com/locator/proplist.asp> (last visited Jan. 9, 2001) (on file with the *University of Michigan Journal of Law Reform*).

209. While the question facing the Minnesota Supreme Court has not come up in Tennessee, the Tennessee courts have held that, in certain circumstances, the Tennessee Constitution provides broader rights than the U.S. Constitution. See, e.g., *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989) (finding that citizen was entitled to broader protection against search and seizure under state constitution); *Miller v. State*, 584 S.W.2d 758 (Tenn. 1979) (emphasizing the independence of the state constitution in construing state’s *ex post facto* clause more broadly than Supreme Court’s narrow interpretation); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (striking down the state’s anti-sodomy law by finding that the right to privacy granted by state constitution is broader than that afforded by federal constitution). In *State v. Black*, then-Chief Justice Reid wrote: “Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards and do not relegate Tennessee citizens to the lowest levels of constitutional protection, those guaranteed by the national constitution.” 815 S.W.2d 166, 193 (Tenn. 1991) (Reid, C.J., separate opinion). In addition, the free speech provision of the Tennessee Constitution is worded, like New Jersey’s, as an affirmative right: “The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.” TENN. CONST. art. I, § 19. Interestingly, Tennessee adds that the right to free speech is “one of the invaluable rights of man.” *Id.* Finally, the Tennessee Supreme Court has never explicitly limited the breadth of the state free speech provision to that of the First Amendment of the U.S. Constitution and has even suggested that the right to free speech may be broader than the First Amendment. See *Leech v. Am. Booksellers Ass’n*, 582 S.W.2d 738, 745 (Tenn. 1979) (“Tenn. Const. art. I, § 19, should be construed to have a scope at least as broad as that afforded those freedoms [of speech and press] by the [F]irst [A]mendment.”) (emphasis added).

merely by becoming the tenant of a private property owner. While it is not clear that the state intended to “hide out” in the mall, the effect is the same if citizens are prevented entirely from engaging in public discourse or protest on the mall “streets” in front of the City Hall at the Mall. As our public space becomes increasingly characterized by financial arrangements with private owners, such a result could be seen as the improper elevation of form—property ownership—over content—the location of civic institutions.

By clinging to the state action doctrine, states that refuse to extend free speech rights in the context of shopping malls are involved in the conservative application of “traditional” doctrines.²¹⁰ Further, these states implicitly endorse the notion that streets and sidewalks provide adequate alternatives for active public discourse. In our increasingly suburban culture, however, streets and sidewalks have become no more than sterile conduits for anonymous travel from one private space to another, devoid of public exchanges of civic-minded expression.²¹¹ In addition, the U.S. Supreme Court has minimized somewhat the “public” aspect of sidewalks, further reducing opportunities for public debate²¹²

210. For a recent discussion and criticism of state courts’ embrace of the federal state action doctrine, see Cole, *supra* note 75, at 379 (1990) (noting that a separation of powers justification for a state action requirement is “less compelling” in a state setting than in the federal setting). Through the common law, state courts have demonstrated their competence in ordering private relationships, and to claim that only the legislature can do so is not justified. *See id.* Ultimately, Cole concludes that states could justify a state action doctrine as a limited separation of powers device through “legislative trumping,” but they must do so by developing the doctrine “consciously” and not by “mimicking federal doctrine.” *Id.* at 397.

Although considered well-settled law under *Hudgens*, federal state action doctrine as applied to shopping malls still has its critics. For a very recent discussion of the Supreme Court’s misapplication of the federal state action doctrine to shopping malls, see Alexander, *supra* note 9, at 23–26. Professor Alexander argues that, with respect to modern shopping malls, there is sufficient state action to trigger First Amendment protection:

- (1) [T]here is significant state action in physical removals as well as the courts’ involvement with orders preventing expressive activity;
- (2) there 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 of the new downtown; and
- (5) case law implicitly acknowledges the existence of state action.

Id. at 42–43. Alexander concludes that “[s]tate action is a paper shield which should not serve to protect property owners.” *Id.* at 43.

211. *See* Failing, *supra* note 34, at 275 (“[M]odern Westerners experience public time as a transit tube. . . .”). Failing further notes “that even ‘quintessential’ public forums are simply empty passages or arteries, not places of human community.” *Id.* at 272.

212. *See* *United States v. Kokinda*, 497 U.S. 720, 724 (1989) (holding that the sidewalk leading to the post office was not the same as sidewalks traditionally held to be public forums and thus subject to regulation).

and allowing our freedom to be ever more determined by private owners. State courts that refuse to engage in an active reevaluation of state constitutional principles subject their populations to a different kind of progress, a progress marked by the growing privatization of many aspects of our previously public lives.²¹³ The result is an irony: a conservatism that unmoors us from foundational constitutional protections, sweeping us into the sea of capital, whose tides are determined not by notions of public discourse, but by the wax and wane of the market and dictates of private property owners.

By acknowledging that malls offer more than shopping and that, for the vast number of nonurban Americans, parks and sidewalks do not in reality serve as places of effective public action, the states that extend free speech rights to mall citizens understand that evolution means something other than setting our public citizenship out to private sea. It means conserving not a traditional doctrine, but our *rights*. The law "must either allow new forums for political expression . . . or remain silent as the traditional realm for grassroots political activity withers away."²¹⁴ As Justice Bablitch wrote in a separate opinion in *Jacobs v. Major*,²¹⁵ the framers of the Wisconsin Constitution understood "that government was not the only entity that can substantially infringe on individual liberties."²¹⁶ Justice Bablitch further stressed that "[a]ccumulations of economic power

213. It is no small coincidence that "in the last thirty years . . . Americans have turned increasingly to the security and style of life offered by private communities, neighborhoods, and living associations." Rishikof & Wohl, *supra* note 28, at 512. In an article that predicts the courts' treatment of private communities by examining the shopping mall cases as likely precedent, the authors state that

perhaps the most important reason for the dramatic growth of these planned and protected communities today are the controls and barriers that these communities can offer their residents: an answer to the growing sense of vulnerability and insecurity that many increasingly feel. These associations . . . are comparable to the "walled cities of the medieval world, constructed to keep the hordes at bay."

Id. at 514. (citing Dennis R. Judd, *The Rise of the New Walled Cities*, in SPATIAL PRACTICES 144, 160 (Helen Liggett & David C. Perry eds., 1995)). The authors also note the importance of security in these communities, pointing to a study in which "92 percent of the home buyers in a private senior citizens community rated security as 'very important,' and described the development as one 'surrounded by "six-foot block walls topped with two-foot-high bands of barbed wire," and 'more than three hundred private security officers patrol[ling] the grounds.'" *Id.* at 514 n.29 (citing EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 141 (1994)).

214. Berger, *supra* note 55, at 661.

215. 407 N.W.2d 832 (Wis. 1987) (deciding ultimately not to extend free speech protection to shopping malls).

216. *Id.* at 853 (Bablitch, J., concurring in part and dissenting in part).

by nongovernmental entities can . . . pose as great a threat to individual liberty as can government."²¹⁷

Using common sense and avoiding a rigid public-private dichotomy, state courts that choose to depart from traditional state action doctrine in fact conserve their citizens' rights by correctly locating the substantive locus of our public existence. They see beyond the disingenuous claims of the shopping mall industry that malls are purely commercial ventures. It is no wonder that mall designers and promoters can tap our collective sense of public citizenship, our nostalgic affinity for small town community, in order to attract customers and thereby increase profits. It is no wonder that local government agencies choose to locate their offices "where the people are."²¹⁸ Given the growing centrality of malls to our public lives, state courts should not so cavalierly dismiss a relevant shift in state free speech jurisprudence. As Professor Frank Askin has stated, "state courts now have an alternative model for defining the real public forum in a new millennium where the title to formerly public space resides more and more in private hands."²¹⁹ And as electronic commerce grows, removing malls from the concept of public space serves to

217. *Id.* (citing ROBERT C. NESBIT, *WISCONSIN: A HISTORY* (1973); M. QUAIPE, *THE CONVENTION OF 1846*, at 365 (1919); ALICE E. SMITH, *THE HISTORY OF WISCONSIN* 273-306 (William Fletcher Thompson ed., 1973)). In a graphic example of the selling off of public space, Salt Lake City recently sold a portion of its downtown Main Street to the Church of Jesus Christ of Latter Day Saints. *All Things Considered* (National Public Radio, July 21, 1999). The Church plans to build a pedestrian mall, with the city retaining (as part of the \$8.1 million deal) a limited public easement allowing public access to the property. The development is touted to "bring 'a little bit of Paris'" to downtown Salt Lake City. Letter from Stephen C. Clark, Legal Director, ACLU of Utah, to Mayor Deedee Corradini and Salt Lake City Council (May 5, 1999) (on file with the *University of Michigan Journal of Law Reform*). However, the city agreed to allow the Church to establish restrictions on behavior it deems objectionable, and to allow Church security guards to oust violators. *Id.* The deed permits the Church to prohibit, among other things, "loitering, assembling, . . . demonstrating, picketing, distributing literature, . . . erecting signs or displays, using loudspeakers or other devices to project music, sound, or spoken messages, engaging in any . . . offensive, indecent, . . . lewd or disorderly speech, dress or conduct . . ." *Id.* (quoting section 2.2 of the deed). In a subsequent letter, Stephen Clark argues that the retention of the public easement "only bolsters the case for constitutional protection." Letter from Stephen C. Clark to Roger F. Cutler, City Attorney, Salt Lake City (May 26, 1999) (on file with the *University of Michigan Journal of Law Reform*). By agreeing to transform itself into the Church's tenant, Salt Lake City has provided a vivid demonstration of public rights being subsumed into private norms that are intended to control speech and behavior that are inimical to the property owner's goals.

218. Telephone interview with Kathy Darnell, *supra* note 20 (explaining the city's rationale for opening City Hall at the Mall).

219. Frank Askin, *The Privatization of Public Space and its Impact on Free Speech*, N.J. LAW. MAG., June 1997, at 14.

reduce further the opportunities for citizens to engage each other personally in democratic discourse.²²⁰

As electronic commerce transforms the Internet from the last great frontier for free speech into a vast network of marketing arrangements and shopping platforms, the need for physical public space becomes even more acute.²²¹ As the owners of land-based shopping malls—who have, by design and demographic accident, replaced the traditional town square—profit from the human need for a physical community, they should also be required to pay the minimal cost of providing a space for real public discourse, unmediated by corporate sponsorship. For these reasons, and for the more *traditional* reasons articulated by the New Jersey Supreme Court,²²² state supreme courts that consider the issue in the future should think twice before blindly adopting wholesale the inflexible rationale of the U.S. Supreme Court.

220. For example, in addition to direct access to retailers' websites, many shoppers on the Internet enter the market through carefully controlled "[p]ortal[s]" and "shopping platforms." Barbara Whitaker, *Next New Era: For the Small Retailer, Life on the Internet is One Big Bazaar*, N.Y. TIMES, Mar. 29, 2000, at H9. While a shopper may be able to air complaints and criticism elsewhere about their shopping experience, it is unlikely that by entering the market directly, via a shopping portal, or by entering a shoppers' forum, a shopper will be confronted with anti-fur protestors, anti-war protestors, union organizers, or persons seeking signatures on a petition. In fact, it is more likely that the shopper will be navigating a complex and interrelated web of corporate sponsorship and marketing arrangements, all carefully controlled by the portal owner. See, e.g., Allen R. Myerson, *Behind 'Name Your Own Price' Lies a Mesh of Partners*, N.Y. TIMES, Mar. 29, 2000, at H24 ("More and more, when customers call up a Web site, they see a single entrance to a structure made up of many businesses in a tangle of alliances and subsidies."). Even if they are confronted by messages of protest, the effect of the message is no doubt diluted by the impersonal nature of the contact. Worse, issues of local concern are pushed even further into obscurity as the informative or educational chance encounter becomes even less likely.

221. Shopping center industry analysts note that despite the growth of on-line shopping, retailers are "betting on growing in-store sales." Int'l Council of Shopping Centers, *Report: Internet Growing, but Impact on Retail REITs Will Be Minimal* (Mar. 5, 1999), available at <http://www.icsc.org/srch/front/1999/9903050245.html> (last visited Jan. 5, 2001) (on file with the *University of Michigan Journal of Law Reform*). "Major retailers . . . [a]re signing 10-year leases, committing real dollars in anticipation that store-based volume will grow significantly." *Id.* (quoting REIT analyst Eric Hernel of Merrill Lynch & Co.). And for the 1999 holiday season, when on-line sales soared into the billions, sales per square foot of shopping center *increased* by about two percent. Int'l Council of Shopping Centers, *White Papers: Review of 1999 Holiday Season* (2000), at <http://icsc.org/srch/rsrch/wp/99holsalesreview.html> (last visited Jan. 5, 2001) (on file with the *University of Michigan Journal of Law Reform*).

222. See *supra* notes 111–25 and accompanying text (discussing the decision of the New Jersey Supreme Court in *New Jersey Coalition*).

CONCLUSION

The growth of shopping malls as leisure space is ever increasing and the explosion of shopping as a national pastime is evident.²²³ Even the superficially implausible notion suggested by science fiction writers—that in order to achieve an ideal living or shopping arrangement, we will gladly trade fundamental freedoms in exchange for heightened security and surveillance—is, in fact, not far from reality.²²⁴ If evolution means that our *public citizenship* becomes relegated to the status of a guest or a tenant of private property, gratefully leasing space in the controlled environment of the shopping dome, then perhaps evolution as depicted in the corrupted arcology of *Todos Santos* is not so much science fiction as it might first appear.²²⁵ In that future, evolution finds the private bastion of anti-constitutional principles to be the victor.

The U.S. Supreme Court long ago retreated from a flexible view of the state action doctrine under federal law, one that would afford First Amendment protection to shopping mall visitors; in the process, the Court left little, if any, room to revisit the issue.²²⁶ The

223. Citing statistics from various industry sources, the court in *New Jersey Coalition* noted:

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 [sic]. Thus from 1972 to 1992 the number of regional and super-regional malls in the nation increased by roughly 800%.

... [M]alls are where the people can be found today. Indeed, 70% of the national adult population shop at regional malls and do so . . . about once a week.

650 A.2d 757, 766–67 (1994) (citations omitted).

224. See *supra* note 213 and accompanying text (discussing private communities); see also Hannigan, *supra* note 26, at 7 (“Another significant component of the Disney model is its elaborate but largely invisible surveillance and control system.”). For example, at the World Edmonton Mall, “the first shopping mall to devote a major portion of its space to entertainment, security guards sit behind a glass wall in Central Dispatch, monitoring banks of closed-circuit televisions and computers which reach into every corner of the mall.” *Id.*

225. See *supra* notes 1–8 and accompanying text.

226. See Friedelbaum, *supra* note 32, at 1263.

[I]t is improbable that the United States Supreme Court will be persuaded to intervene in future shopping center cases A major dilution of traditional state action requirements would be necessary to meet federal standards of justiciability [T]he Supreme Court is unlikely to intercede substantively in what has become and doubtless will remain a public-private dichotomous conundrum. The extent of expressional liberty in shopping centers will continue to depend primarily, if not exclusively, on the state courts and the constitutional guarantees that they have come to protect.

New Jersey Supreme Court reached the correct conclusion in *New Jersey Coalition*²²⁷ with its estoppel theory: private property owners should not be permitted to exploit the nostalgia of town squares or of community on the one hand and simultaneously deny that such a marketing strategy has any meaningful effect on the other. If private owners are understandably concerned about the effects of the exercise of free speech on their profits, then they should stop trying to be the new town square and forego the benefits of associations with city, county, or state offices that provide citizens with services. If private owners continue to exploit the benefits of public space for private profit, then state courts should exercise their state constitutions by balancing free speech rights against private ownership so that the latter does not always and inexorably “settle the question.”²²⁸ At the present time, only state courts may stop the evolutionary market process before it becomes so entrenched that it cannot be undone, leaving us in most states with a pre-themed, privately owned brand of citizenship. As the market swallows and exploits the nostalgia of public space, and as what remains falls more and more into the shadow of the commodity, we may find that, rather than enjoying the fundamental freedoms guaranteed by the Constitution of the United States, we are limited to undisturbed shopping in the United Mall of America.

227. 650 A.2d 757 (1994). “The flow of free speech in today’s society is too important to be cut off simply to enhance the shopping ambience in our state’s shopping centers.” *Id.* at 780.

228. *Marsh v. Alabama*, 326 U.S. 501, 505 (1946).

