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# The Case of the Smart City

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ABSTRACT

*January 7, 2021, marked the seventy-fifth anniversary of* Marsh v. Alabama*, the case in which the Supreme Court of the United States extended the protections of the First and Fourteenth Amendments to a privately held "company town." This article makes the case that the longstanding* Marsh *precedent, and the basic jurisprudential framework it set out, remain important in working through twenty-first century problems regarding public-private partnerships and their impact on constitutional rights. We bring this old ruling into our new century by extrapolating a hypothetical legal controversy from legislation currently under consideration in the states. Thus, the heart of our analysis involves an imagined case (and the resulting, imagined judicial opinions) arising from a potential bill that has not yet become law. This speculative approach is an effective way to think through, in advance, stubborn and emergent questions about the constitutional nature and limits of private actions that emulate government functions.*

January 7, 2021, marked the seventy-fifth anniversary of *Marsh v. Alabama*.[1] In its 1946 opinion, the Supreme Court of the United States ruled that Grace Marsh, a Jehovah's Witness, was protected under the U.S. Constitution in distributing religious literature on the sidewalk of Chickasaw, Alabama. At the time, Chickasaw was a "company town"—that is, a territory or municipality "dominated by one large business" that had assumed many of the functions and operations traditionally provided by state, county, or local governments.[2]

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

2. Shaun Richman, *Company Towns Are Still with Us*, THE AM. PROSPECT (Mar. 21, 2018), https://prospect.org/economy/company-towns-still-us/. The *Marsh* Court did not provide a definition

This article makes the case that the longstanding *Marsh* precedent, and the basic jurisprudential framework it set out, remain important in working through twenty-first century problems regarding how we think about public-private partnerships and their impact on constitutional rights. Our take on these issues is somewhat novel. We do not survey existing scholarly paradigms, engage in a detailed exegesis of recent and representative cases, or advance a singular new theory to grapple with the problems at *Marsh's* center. Instead, we bring this old ruling into our new century by extrapolating a hypothetical legal controversy from legislation currently under consideration in the Nevada legislature.[3] Thus the heart of our analysis involves an imagined case (and the resulting, imagined judicial opinions) arising from a potential bill that has not yet become law (as of the writing of this article).

We believe this speculative approach is an effective way to think through, in advance, stubborn and emergent questions about the constitutional nature and limits of private actions that emulate government functions. Among other benefits, our orientation balances the theoretical and the particular. We avoid getting ensnared in the details (and associated politics) of any single legislative proposal, while still offering a level of specificity regarding (again, largely invented) facts and legal issues, allowing us to fashion plausible judicial opinions.

## I. BACKGROUND

Among other implications, *Marsh* sketched some of the outer limits of the U.S. Constitution's state action doctrine, the legal principle that most constitutional protections curb only government actors, institutions, and policies. While the Court conceded that Chickasaw was a privately held, "company-owned town"[4] and that Marsh's actions were "contrary to the wishes of the town's management,"[5] she was nevertheless permitted to share her ideas and writings because the town did "not function differently from"[6] traditionally governed municipalities. As the Court elaborated, the

of a "company town" (or even use that specific phrase). Hardy Green argues that company towns tend to fall into two models: those focused on profits and those based on a more "utopian" vision of "ideal communities." HARDY GREEN, THE COMPANY TOWN: THE INDUSTRIAL EDENS AND SATANIC MILLS THAT SHAPED THE AMERICAN ECONOMY 4–5 (2010).

3. *See Nevada Bill Would Allow Tech Companies to Create Governments*, ASSOCIATED PRESS (Feb. 4, 2021), https://apnews.com/article/legislature-legislation-local-governments-nevada-economy-2fa79128a7bf41073c1e9102e8a0e5f0.

4. *Marsh*, 326 U.S. at 502.

5. *Id.*

6. *Id.* at 508.

"managers appointed by the corporation cannot curtail the liberty of press and religion of . . . people consistently with the purposes of the Constitutional guarantees."[7] In extending constitutional protections to a private entity, the Court seemed to embrace functional analysis over more formalistic line-drawing.[8]

While the state action doctrine has received a great deal of judicial and scholarly attention,[9] historical developments (including the near disappearance of company towns resembling the one featured in *Marsh*) and the Court's subsequent case law arguably cast the case's ongoing significance into some doubt.[10] As the Court itself noted in *Lloyd Corp. v. Tanner,*[11] in extending constitutional safeguards to a private entity, *Marsh* may represent an unusual exception to the supposedly bright lines of the state action doctrine insofar as the company in Chickasaw "was performing the full spectrum of municipal powers[,] and stood in the shoes of the State."[12] In more recent cases the Court has held that private venues (such as shopping malls) that open their doors for general public use and congregation do not necessarily fill the "shoes" of the state and thereby assume obligations to protect constitutional civil liberties.[13]

7. *Id.*

8. *See* John Fee, *The Formal State Action Doctrine and Free Speech Analysis,* 83 N.C. L. REV. 569, 583 (2005); *cf.* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (affirming an essential distinction between public and private acts).

9. *See generally* Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1330 (1982) (criticizing the state action doctrine as inconsistent); Erwin Chemerinsky, *Rethinking State Action,* 80 NW. U. L. REV. 503 (1985) (calling for the end of the state action doctrine); Julian N. Eule as completed by Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse,* 45 UCLA L. REV. 1537 (1998) (examining the public-private divide in the context of free speech); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263–300 (1992) (analyzing the state action doctrine and free speech).

10. *See* THE COMPANY TOWN: ARCHITECTURE AND SOCIETY IN THE EARLY INDUSTRIAL AGE 3–14 (John S. Garner ed., 1992) ("Most company towns appeared between 1830 and 1930 during the early industrial age . . . ." *Id.* at 3.); Kristine Bowman, Marsh v. Alabama *(1946)*, MIDDLE TENN. ST. UNIV.: THE FIRST AMEND. ENCYC. https://www.mtsu.edu/first-amendment/article/571/marsh-v-alabama (last visited Sep. 19, 2021) ("The 'company town' is largely a thing of the past . . . .").

11. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

12. *Id.* at 569.

13. The Court's approach to the issue of whether free speech extends to private entities has been somewhat serpentine. In *Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968), the Court appeared to extend *Marsh* in ruling in favor of peaceful union picketing in front of a nonunion grocery store within a private shopping mall. But just four years later the Court backed away from *Logan Valley* in finding that private malls were not comparable to *Marsh*'s municipal sidewalks. In *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976), the Court officially overruled *Logan Valley* while affirming *Marsh*. Finally, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court unanimously affirmed a state court decision that allowed protests at a private shopping center against the constitutional objections of the owner.

But trends in the U.S. and internationally suggest that the core legal issues in the *Marsh* decision remain apposite. As Hardy Green argues, "company towns are not simply a phenomenon of the past: In an age of transnational corporations and exurban sprawl, [they] remain a basic part of American life" spanning locales from Corning, New York to Google's Project 02 complex in Oregon and Amazon's HQ2 near Washington, D.C.[14] Moreover, nations across the globe are experimenting with granting businesses and private organizations greater autonomy and responsibility in both SEZs (special economic zones) and so-called private "smart" cities.[15]

Indeed, less than two weeks after *Marsh's* anniversary, Nevada Governor Steve Sisolak outlined plans to foster "Innovation Zones" in his State of the State address.[16] Sisolak's proposal, and the related draft legislation under consideration, would seek to attract "[n]ew companies creating groundbreaking technologies" without the leverage of tax breaks or direct government investment.[17] Instead, the law would permit private organizations meeting certain criteria (including sufficient land ownership and a promised level of financial investment in a specific geographic zone) to play the predominant role in creating and directing a Board of Supervisors. This Board would then assume control over governing, regulatory, and personnel decisions traditionally managed by county governments. This authority would cover such matters as being able to levy taxes, run school districts, and hire and direct county-level agents, including but not limited to "the county clerk, recorder, sheriff, treasurer, assessor, auditor, public administrator, and the district attorney."[18]

14. GREEN, *supra* note 2, at 4.

15. *See Political Priority, Economic Gamble*, ECONOMIST, Apr. 4–10, 2015, at 67. While beyond the scope of this article to investigate, we note, in passing, that today's blurring of boundaries between public and private may not be entirely surprising given the extraordinary influence of some corporations in setting the terms of policy debates. *See also* Allan Smith, *'Impressive and a Little Scary': How Amazon and Jeff Bezos Made Washington a Second Home*, NBC NEWS.COM (Sept. 6, 2019, 5:46 AM), https://www.nbcnews.com/politics/politics-news/king-hill-how-amazon-jeff-bezos-made-washington-second-home-n1033296; Richman, *supra* note 2 ("In the 21st century, company towns . . . still wield extraordinary power.").

16. *Full Transcript, Annotations of Sisolak's 2021 State of the State Address*, NEV. INDEP. (Jan. 20, 2021), https://thenevadaindependent.com/article/full-transcript-annotations-of-sisolaks-2021-state-of-the-state-address.

17. *Id.*

18. *Bill Draft Authorizing the Creation of Innovation Zones*, SCRIBD (Jan. 31, 2021), https://www.scribd.com/document/493267147/Innovation-Zone-Bill-Draft-update-1-31-2021. Much of the statutory language in our hypothetical case is directly borrowed from or closely based on this "Bill Draft."

The rest of this article uses this context as an entryway to an imagined set of facts and a resulting, hypothetical court case that raise enduring and nascent legal issues about the reach and purposes of our courts and Constitution. While loosely based on the particulars of the proposed Nevada law, the dispute we consider takes place in the invented GENifer Therapeutics Innovation Zone (GTIZ), which is itself part of an unidentified state in the United States (which we simply identify as the "Commonwealth").

These conceits allow us to transcend any single policy, era, or set of governing laws, bypassing the granularity of specific statutory interpretation and application in favor of more general philosophical and jurisprudential considerations.[19] Moreover, we do not delineate the identity of the court rendering judgment in our hypothetical, and we avoid delving too deeply into the particulars of existing precedents and case law, in part out of a recognition that the law is always evolving. Instead, continuing a tradition that stretches back to Lon Fuller,[20] our "Case of the Smart City" is "intended neither as a work of satire nor as a prediction in any ordinary sense of the term."[21] The six opinions (and judges) we present are invented, although they are based on common ideas in American constitutional law and broadly accepted modalities of constitutional argument.[22] Our speculative exercise explores "divergent philosophies of law and government"[23] and trenchant problems in public affairs more than offering a specific set of legal arguments likely to appear in an actual courtroom or judicial decision.

What follows, then, without additional commentary, are the six separate opinions rendered in our hypothetical case. The opinion is issued seriatim, with no majority decision or opinion of the court.

19. Our approach is also consistent with the "utopian" tradition in political, social, and economic thought. As the scholars Gregory Claeys and Lyman T. Sargent note, "Utopianism generally is the imaginative projection, positive or negative, of a society that is substantially different from the one in which the author lives. The word *utopia* or *outopia* was derived from Greek and means 'no (or not) place' . . . ." THE UTOPIA READER 1 (Gregory Claeys & Lyman T. Sargent eds., 1999).

20. In 1949, legal philosopher and professor of law Lon Fuller published "The Case of the Speluncean Explorers." While based on an actual case from the 19th century, Fuller's hypothetical explores how five different (invented) judges employ different theories of law to resolve a case involving five trapped cave explorers who resort to cannibalism to survive. Lon L. Fuller, *The Case of the Speluncean Explorers,* 62 HARV. L. REV. 616 (1949). *See also* LON FULLER, THE MORALITY OF LAW 245–253 (1969) (setting out the imagined "Case of the Grudge Informer," which is based on how post-war German courts resolved certain cases involving the rule of law under the Nazi regime).

21. Fuller, *The Case of the Speluncean Explorers, supra* note 20, at 645.

22. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1984) (discussing the "modalities" of constitutional interpretation).

23. Fuller, *The Case of the Speluncean Explorers, supra* note 20, at 645.

DURN V. BOARD OF SUPERVISORS

BARRY, J.

We are presented with the question of whether the Constitution's First Amendment protections of speech and religious expression apply through the Fourteenth Amendment to a territory that is both owned and effectively governed by a private organization.

Several years ago, the Commonwealth passed legislation, CRS 4300, allowing for the creation of Innovation Zones. Under the terms of the statute, private businesses are eligible to form their own Zones after meeting certain criteria and having their applications approved by the state. Among other restrictions, Innovation Zone applicants are required to own at least 50,000 contiguous acres (78.125 square miles) of undeveloped land that was not already part of an existing "city, town, tax increment area, or redevelopment area." Furthermore, the law stipulates that the area enclosed by the Zone could not encompass preexisting permanent residents.

Appellee, the biotechnology firm GENifer Therapeutics, submitted a successful Innovation Zone application and was then permitted, under the terms of CRS 4300, to appoint two of the three members of a governing Board of Supervisors; the third member was appointed by the Governor of the Commonwealth.

Once constituted, the Board immediately acquired a set of powers under CRS 4300, Section 14. Specifically, this authorizing provision stipulates that:

> Following final state approval, the Innovation Zone becomes akin to a local government and a political subdivision of the Commonwealth with the powers and duties of a county separate from and independent of the county in which it is located. The Innovation Zone Board of Supervisors then possesses the powers and duties of a Board of County Commissioners, the exercise of which supersede similar powers held by the county government in which the Innovation Zone is located. Nothing in this act shall be construed to otherwise modify or delimit existing legal powers of any other governing entity in the Commonwealth, including, but not limited to the Governor and the General Assembly.

Pursuant to this Section 14 authority, the GENifer Therapeutics Innovation Zone (GTIZ) Board of Supervisors convened and passed a series of measures, including Ordinance 2081, which specifies, in part, that:

> This Zone is a privately held entity focused on developing cutting edge biotechnology research and resulting products and services to benefit our customers, shareholders, and the broader public. Individuals who are not

> employees of GENifer Therapeutics or its authorized subsidiaries, contractors, or service providers must receive written permission before visiting the GENifer Therapeutics Innovation Zone. Anyone discovered within the Zone without this permission is subject to removal and a fine not to exceed $5,000.

Appellant Violet Durn is a member of the Bahá'í Faith and a resident of the Commonwealth. In early May she entered the Central Campus of GTIZ by foot, circumventing the three established entry points (accessible by private roads owned by GENifer Therapeutics). Over the next few hours, Durn distributed religiously oriented leaflets to over two dozen GENifer employees she encountered on the moving walkways that connect the Central Campus parking lots, recharging stations, technology hubs, office parks, and other work and residential centers.

Eventually, a GENifer marketing executive, John Nike, requested that Durn provide written evidence that she was permitted on the premises. When no such permission was presented, Nike phoned GTIZ security and waited with Durn until several deputies arrived. These agents forcibly removed Durn from the Innovation Zone and provided her with written notice that she 1) had violated Ordinance 2081; 2) was liable for a fine of up to $5,000; and 3) had the option to contest the violation before the GTIZ constituted Justice Court, a body authorized by the Board under the terms of CRS 4300.

Appellant Durn declined to appear for her appointed Justice Court date and was issued a $1,000 fine, with the warning that a subsequent offense would trigger a maximum penalty and, potentially, other sanctions consistent with GTIZ Ordinances.

She then brought a petition of error before this court, alleging that her treatment and sentence violated her constitutional rights to free speech and religious freedom. She asks that the judgment of and fine issued by the Justice Court be vacated, and that GENifer Therapeutics and its governing and administrative bodies be enjoined from "additional actions which violate the First and Fourteenth Amendment rights of anyone inside the GTIZ."

Appellee counters that the GTIZ, as a privately held enclosure of lands, people, and property, is not a government entity and is, therefore, beyond the reach of the free speech and religious liberty protections of the U.S. Constitution.[24] In this view, Ms. Durn possesses no more claim to

24. *See* Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.").

share her beliefs on the grounds of the GTIZ than she could in an unwelcoming stranger's home.

The matter before us bears more than a passing resemblance to the Supreme Court case of *Marsh v. Alabama*.[25] *Marsh's* central holding is that a privately held town, exhibiting features and providing services like an ordinary municipality, is bound by the First and Fourteenth Amendments. To prevail, therefore, the GTIZ Board of Supervisors must show that the law established in *Marsh* does not readily apply to the facts and issues in the current controversy.[26]

*Marsh v. Alabama* involved the "company town" of Chickasaw, Alabama, where the Gulf Shipbuilding Corporation owned the local residences, stores, and infrastructure.[27] Marsh stood on the town's (privately owned) sidewalk "and undertook to distribute religious literature"[28] notwithstanding a company warning that "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted."[29] After being asked to leave (and refusing), she was arrested by a deputy sheriff (paid by the Gulf Corporation) and charged with violating a state law barring criminal trespass.

The Court found that since Chickasaw was open "for use by the public in general"[30] and did not operate differently from traditional municipalities, it was bound by the Constitution's First and Fourteenth Amendments as much as any government unit would be.[31] Consequently, Marsh's arrest violated her rights to freedom of speech, press, and religion.

The facts in *Marsh*, and the legal principles it affirmed, directly relate to today's case. As one scholarly commentator summarized: even though a nominally private actor, "the Gulf Shipbuilding Corporation[] was

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

26. Alternatively, appellee could have argued that *Marsh's* holding should be reexamined because its rules have, over time, proven unworkable, unfair, or otherwise unjustified. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (setting out some of the principles used to determine when the Court "reexamines a prior holding").

27. *Marsh*, 326 U.S. at 502.

28. *Id.* at 503.

29. *Id.*

30. *Id.* at 506.

31. In a somewhat cursory analysis, the Court argued that since "the Due Process Clause of the Fourteenth Amendment" absorbed the protections of the First Amendment, Grace Marsh's distribution of "religious writings" was protected from the criminal sanctions imposed by the state of Alabama. *Id.* at 511. But on the wider question of "state action" Marsh does not give clear indicia of when a private company town is effectively a *federal* government unit and when we should regard it as a *state* entity.

deemed a state actor because it acted like a government by managing a whole town with streets open to the general public."[32]

In the instant case, the privately held firm GENifer Therapeutics, acting on its own and through a Board of Supervisors it appointed, similarly manages an entire town—and over 12,000 residents. The corporation acquired territory amounting to almost one hundred square miles, roughly the footprint of the city of Boston, Massachusetts. The properties GENifer Therapeutics owns within the GTIZ include restaurants, shopping centers, a school, recreation buildings, parks, recycling facilities, a theater for artistic performances, a power plant, and a well and processing plant for clean water production and sewage treatment. In addition, under the terms of CRS 4300, the Board of Supervisors has assumed all "the powers and duties of a Board of County Commissioners," including the ability to impose taxes and fees on those living in the Zone, license Zone businesses, and hire and fire designated public employees such as a county clerk and treasurer.

The GTIZ has even created its own justice system to which Ms. Durn has been subjected. This comprehensive law enforcement network (with its unnerving, hybrid public-private character) includes a Zone Sheriff, a dozen deputies answering to the Sherriff, a district attorney, and a Justice Court for handling disputes within the territory.

We should recall that in the original *Marsh* case the services offered by the Gulf Shipbuilding Corporation were comparatively modest. The company town of Chickasaw consisted of "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated."[33] The Gulf Shipbuilding Corporation also paid a single Mobile County Sheriff to "serve[] as the town's policeman."[34]

In contrast, the GENifer Innovation Zone offers a much more elaborate and comprehensive set of services and institutions to those living under its supervision. Furthermore, its oversight of these operations, principally through its Board of Supervisors, is formal, comprehensive, and direct. Thus, the GTIZ Board imposes specific regulations and guidelines for a wide range of behaviors and activities, encompassing such matters as traffic and transportation, minor criminal infractions, proper environmental practices and waste disposal, new building construction,

32. Fee, *supra* note 8.
33. *Marsh*, 326 U.S. at 502.
34. *Id.*

and taxes on certain products and services deemed to be "non-productive and/or inefficient."[35]

It is something of a truism to note that "all politics is local," but the scope of the GTIZ Board's local authority is a striking embodiment of this thesis. By any measure and definition, the GTIZ Board serves as the most important (and often the sole) provider of both vital services and obligatory rules for the thousands of long-term residents who live within the Zone. In short, under the *Marsh* test, the GTIZ is undoubtedly the equivalent of both a company town and a municipality—indeed, one with an especially wide range of authority and power.

But does it follow from this that the GTIZ and its Board of Supervisors owe any constitutional duties to appellant Durn as a visitor to the Zone?

The essence of the state action doctrine is that the Fourteenth Amendment exists to "provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[36] Thus, once we have identified the Board of Supervisors as occupying the same legal position as "State officers," the principal remaining questions are whether such actors are required under the Fourteenth Amendment to uphold the protections of the First Amendment, and whether appellant Durn's actions fall under those protections.

At the time *Marsh* was issued, it was already clear that the Due Process Clause of the Fourteenth Amendment extended the protections of free exercise of religion,[37] freedom of speech,[38] and freedom of the press,[39] to the states and state actors as well as the federal government. In holding that a company town was comparable to a state municipality, the Court logically extended this principle to cover "the dissemination of ideas on the [Chickasaw] city streets."[40]

Following the same rationale, once one agrees that the GTIZ Board of Supervisors is legally cognizable as a state entity, its constitutional responsibilities are coextensive with any other municipality. The Board must therefore uphold all elements of the Bill of Rights incorporated through the Fourteenth Amendment, including the First Amendment.

35. GTIZ Ordinance 2003.

36. The Civil Rights Cases, 109 U.S. 3, 11 (1883).

37. Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934); Cantwell v. Connecticut, 310 U.S. 296 (1940).

38. Gitlow v. New York, 268 U.S. 652 (1925) (extending the free speech and freedom of press protections of the First Amendment to the states through the Fourteenth Amendment).

39. *Id.*; Near v. Minnesota, 283 U.S. 697 (1931).

40. Marsh v. Alabama, 326 U.S. 501, 504 (1946).

Turning to the question of whether Ms. Durn's specific activities were covered under this constitutional aegis, one might note that her claimed interest in sharing her beliefs and faith with Commonwealth citizens is coterminous with the Constitution's "fundamental personal rights and liberties" which include freedom of speech, press, and religion.[41] As the Court has elaborated:

> The phrase [fundamental personal rights and liberties] is not an empty one and [is] not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.[42]

Violet Durn sought nothing more than to share her ideas peaceably with fellow citizens of the Commonwealth. In particular, she hoped to transmit the message of "achieving world peace through unity, justice, and equality amongst people of different faiths and races." Ms. Durn communicated her views respectfully and quietly by distributing leaflets to individuals using the central pedestrian walkway in the GTIZ. Her activities thus fit clearly within the core of what *Marsh* called our rights "to enjoy freedom of press and religion"—a class of liberties that occupy a "preferred position" relative to other interests. Appellant's asserted rights are therefore nested within a particularly sturdy constitutional keep.

My brother Friedman comes to a different judgment in this case, in part because he prioritizes the states' role as "active laboratories" of democracy—experimenting with different social and economic policies including those that creatively delegate authority from government officials to private parties. Such arrangements, he contends, do not compromise liberty so long as the participating citizens can either leave states (and Innovation Zones) they don't like or change state policy through elections. But such an emphasis prioritizes property rights and economic interests over the rights of conscience and expression that courts have long recognized hold a "preferred position" in our constitutional scheme.

Core to the judicial power is a responsibility to identify a floor of liberty that government may not breach.[43] The residents in the GTIZ

41. Schneider v. New Jersey (Town of Irvington), 308 U.S. 147, 161 (1939).

42. *Id.*

43. It is beyond the current case to consider the conditions under which citizens may explicitly waive First Amendment rights in government or private contexts. *See generally* Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938) (setting out the waiver requirements in the context of the Fifth

continue to enjoy the constitutional rights of any other citizen populating the Commonwealth; they do not lose their power to worship, to speak, to assemble, and to debate simply because they work within a statutorily created Zone designed to boost the economic conditions of the sponsoring state.

To hold otherwise would create a two-track democracy in which citizens operating within the protective sphere of traditional governments could claim the full sweep of civil liberties, while those laboring within powerful private entities that accrue public functions could find their freedoms stripped away. The GTIZ is not some Land of Oz where the laws constraining power are warped and Commonwealth citizens shuffle off their rights.[44]

In her State of the State address, Commonwealth Governor Mae Holland hailed the creation of Innovation Zones as "alternative forms of local government" that would bring in an "invigorating torrent" of tax revenue and jobs to the state. But whatever economic benefits these Zones may provide, and whatever their policy merits (or liabilities), they are unmistakably local *governments*, as the Governor's remarks concede. As such, the Commonwealth's Zones owe responsibilities to the citizens they govern and the wider political communities in which they take root. Recognizing the protections of the Bill of Rights is the start of these responsibilities, although certainly not their end. GENifer Therapeutics has chosen to act like a government and now it must contribute its part to the social contract.

The judicial power can be difficult to exercise. Some decisions present conflicts between competing or incompatible legal values, what Justice Felix Frankfurter characterized "as a tragic issue, namely, the clash of rights, not the clash of wrongs."[45] Other times, we must render judgments that can appear to run counter to common sense or desirable public policy.

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Amendment right to assistance of counsel); Snepp v. United States, 444 U.S. 507 (1983) (upholding the power of the Central Intelligence Agency to make an employee sign an agreement that prohibited him from publishing any information relating to his employment without prior approval); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988). No party in this case argues that appellant Durn waived her rights on entering the GTIZ.

44. Of course, some Commonwealth citizens who assume positions within GENifer Therapeutics or official duties within the GTIZ may be limited with respect to when they can exercise their First Amendment rights. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006) (finding that speech by public officials is only protected if conducted in a private capacity, not if engaged in as part of the official's formal duties). But Ms. Durn is clearly not a Commonwealth or GTIZ official.

45. Quoted in James E. Fleming, *Constitutional Tragedy in Dying: Or Whose Tragedy Is It, Anyway?*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 162, 163 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

Sometimes deciding cases is onerous because the law itself is unclear or conflicted.[46]

But the case before us is not difficult along these or any other dimensions. We are asked to apply a longstanding and still viable precedent that pertains clearly to a novel set of facts. If we ignore this clean fit between established law and new circumstance, and break from widely accepted judicial principles, we threaten to undermine the "steady, upright, and impartial administration of the laws"[47] that is the hallmark of an independent and effective judiciary.

I would find for the appellant and enjoin the GENifer Therapeutics Innovation Zone's Justice Courts and other agents from implementing Ordinance 2081 in its current form.

FRIEDMAN, J.

At first glance, as my brother Barry indicates, this case seems to entail a relatively straightforward, perhaps even a facile application of the legal principles laid down in *Marsh v. Alabama*. *Marsh* held that a "company-owned town"[48] sufficiently resembled a "municipal . . . corporation"[49] such that the protections of the First and Fourteenth Amendments applied to it, notwithstanding the venerable judicial rule (and original understanding) that the Constitution generally only binds governments and their representatives, not private parties.[50]

But a closer review of both the facts at hand, and the particulars of the *Marsh* precedent, lead me to a different conclusion.

In its *Marsh* analysis, the Supreme Court emphasized three factors that led it to conclude the private property of the Gulf Shipbuilding Corporation should be subject to the strictures of the Constitution.[51]

First, the Court noted the close *resemblance* of the town of Chickasaw to "any other American town"[52] governed by traditional municipal officials and institutions. Chickasaw, for example, maintained streets for

46. *See generally* Texas v. Johnson, 491 U.S. 397, 420 (1989) (Justice Kennedy noting that sometimes the courts "must make decisions we do not like").

47. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

48. Marsh v. Alabama, 326 U.S. 501, 502 (1946).

49. *Id.* at 504.

50. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment."); Prager Univ. v. Google LLC, 951 F.3d 991 (9th Cir. 2020) (finding that YouTube is not a state actor required to abide by constitutional restrictions regarding free speech).

51. *See Marsh*, 326 U.S. at 503–510.

52. *Id.* at 502.

public use, "a sewage disposal plant,"[53] and hired a sheriff deputy to serve as the town's law enforcement officer. There were no idiosyncratic signs or other identifying features in place to make visitors believe they were in a privately-held space distinct from other towns. In other words, Chickasaw resembled a government in its services and operations.

Second, the *Marsh* opinion found that the geographic and logistical *accessibility* of "the town and its shopping district"[54] made it more like a public entity than a private one. The "company-owned paved street and sidewalk"[55] and its "business block"[56] of stores were reachable via a "four-lane public highway."[57] The public had unobstructed entry to the company town and could take full advantage of its facilities, businesses, and infrastructure. In other words, Chickasaw resembled a government in its public and open character.

The third factor the Court emphasized in its decision was the public's concern with "the functioning of the community in such manner that the channels of communication remain free."[58] Here *Marsh* turned not just on the resemblance of Chickasaw to an ordinary municipality in its public services and general accessibility, but in identifying a critical *national interest* in its activities. More specifically, the Court determined that the wider political order had a legitimate stake in ensuring that the residents of Chickasaw had opportunities to share ideas, debate, and express themselves individually and in groups such that they could capably "make decisions which affect the welfare of community and nation."[59] In the Court's judgment, this interest was sufficiently important that it both helped to mark the public character of Chickasaw and trumped the "property rights"[60] possessed by Gulf Shipbuilding (preempting its power to exclude unwanted visitors). As Justice Hugo Black summarized in the majority opinion: "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."[61]

53. *Id.*
54. *Id.* at 503.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 507.
59. *Id.* at 508.
60. *Id.* at 509.
61. *Id.* at 507.

Taken together, these three factors seem like sensible ones for identifying the rare cases in which a private organization should be regarded as effectively assuming "the full spectrum of municipal powers,"[62] presumably because existing governments have proven ineffective or incapable.[63] But applying each of these considerations to the case at hand exposes a yawning gap between the circumstances in *Marsh* and the dispute we adjudicate today.

To begin with, in considering the resemblance factor, no one entering the GENifer Therapeutics Innovation Zone would mistake it for "any other American town." Under GTIZ Ordinance 1884, every GENifer employee and visitor is required to wear a prescribed uniform or "suitable professional attire along with an identifying lanyard ID" outside of their personal domicile and other designated areas (such as spaces for recreation and fitness or points for delivering goods). Furthermore, every building in the Zone is marked by the distinctive GENifer logo and painted in the company's tasteful teal and crimson colors.

Overall, the GTIZ complex is designed to function as a "smart city," fueled by market forces, industry best practices, and new technological discoveries—to maximize efficiency and utility for workers and company alike. Thus, the GTIZ implements evidence-based policies regarding food and energy distribution, communications, transportation, and sustainability and waste management that mark it as distinct from ordinary urban centers. Indeed, in appellant's own affidavit, she noted that "[w]hen I first entered the Zone I couldn't believe my eyes. Everything was so beautiful and . . . orderly. There wasn't a blade of grass out of place. It was like nothing else I'd ever seen."

Clearly the GTIZ is in a different category than the "company town" of *Marsh,* which was, concededly, indistinguishable from ordinary towns governed by ordinary public officials.

Moreover, in considering the second *Marsh* factor, the degree to which a private corporation makes itself accessible and open (in a manner resembling traditional public spaces), the GTIZ operates very differently than did Chickasaw, Alabama. As stipulated in GTIZ Ordinance 1138, access to the Zone is limited to one of three entry points, each of which is

62. Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

63. In its broad strokes and minute details, the U.S. Constitution imagines and relies upon a partnership between state and federal governments and private actors. *See generally* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 386 (1993) ("[The aim of] American constitutionalism . . . is not to put a brake on popular government but to make it work."). Courts should be wary of setting out legal precedents that stifle innovative power-sharing and rendering decisions that cut short still unfolding policy innovations.

staffed twenty-four hours a day by a uniformed GENifer employee who regulates traffic and ensures that entrants have proper authorization under Ordinance 2081.

Moreover, the GTIZ was developed out of a previously uninhabited geographic area and, as a result, it is a forty-five-minute drive to the nearest conventional town outside of the Zone.[64] No one stumbles into the GTIZ by accident. Indeed, the trial record shows that appellant took elaborate steps (abandoning her vehicle in the synthetic woodlands surrounding the GTIZ and hiking more than a mile past the designated entry points) in order to gain (illegal) access.

As the Court noted in *Marsh*, the "more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[65] The inverse of this proposition is also true: private property owners can lessen their legal responsibilities by restricting access.[66] In fact, the considered actions of the GTIZ's Board of Supervisors show that it took reasonable steps to limit public entry and demarcate the Zone as private territory not available to the uninvited. The fact that Ms. Durn forced her way into the privately held Zone, violating the terms of both the Commonwealth's public law creating Innovation Zones (CRS 4300) and the access Ordinance (2081) issued by the Board under this authority, does not make her entitled to exercise rights any more than an exuberant proselytizer might insist on a personal audience in a private home.[67]

The third and final element in the *Marsh* analysis may seem the most compelling in considering the case at hand. Don't the American people as a whole have a vested interest in creating an active, informed, and dynamic citizenry, and shouldn't this imperative incline us to extend First

64. Hackenstown is 53 miles from the nearest GTIZ entry point.

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

66. The judicial test for whether an area or building is constitutionally protected "curtilage" under the Fourth Amendment is but one example of this proposition. *See* United States v. Dunn, 480 U.S. 294 (1987) (noting that the degree to which a private property owner has taken steps to conceal an area from public view is one of the elements for determining curtilage).

67. The fact that Ordinance 2081 authorizes visitors to the GENifer Innovation Zone (and the observation that school groups, business solicitors, and curious tourists have taken advantage of this policy) does not extinguish the privacy and property interests of GENifer Therapeutics. Private property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corp.*, 407 U.S. at 569.

Amendment rights to private as well as public organizations to ensure that our "channels of communication remain free"?[68]

But identifying and applying this interest requires further specification. The judiciary's general approach has been to recognize that private actors assume distinctive public responsibilities (and are therefore subject to constitutional limitations) when they perform a "public function."[69] But such a function must be "traditionally the *exclusive* prerogative of the State."[70] While the GTIZ provides organized dispute resolution through its Justice Courts, public safety protection via its Zone Sherriff, and energy and infrastructure to its thousands of residents, none of these services can be regarded as "an activity that only governmental entities have traditionally performed."[71] After all, every day, millions of Americans rely on Alternative Dispute Resolution (ADR), seek protection from private security companies, and consume utilities furnished by nongovernmental corporations.

But even if one finds the public function argument inapplicable, we might consider a second, broader claim in ascertaining whether the public has an actionable interest in extending free speech and expression rights to the GTIZ. As my sister Truepenny seems to indicate, perhaps our national interest in free speech and expression (and all the public goods that come with it) is so compelling that courts can superimpose First Amendment protections whenever private entities sufficiently impact (and perhaps threaten) robust "channels of communication."

While presumably well-intentioned, this speech-impact approach is both inconsistent with existing case law[72] and faces inevitable problems of measurement and line drawing. Once we have thrown out the public-private distinction, how are we to determine which entities have sufficient sway on our political discourse and civic character to receive First Amendment protection? Is a privately held corner café that attracts a

68. See generally Abrams v. United States, 250 U.S. 616 (1919), for Justice Holmes's arguments about how free political communication is essential not just for individual "self-expression" but for wider "self-government." That said, we should note that courts are generally reluctant to compromise the rights of individuals for broader social purposes and benefits. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (rejecting an argument that Amish children can be compelled to go to public school because the state has an interest in preparing citizens to "participate effectively and intelligently in our open political system").

69. Evans v. Newton, 382 U.S. 296, 302 (1966).

70. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)); *see also* Lee v. Katz, 276 F.3d 550, 555 (9th Cir. 2002).

71. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019).

72. *See, e.g.*, Prager Univ. v. Google LLC, 951 F.3d 991 (9th Cir. 2020) (rejecting the argument that the popularity and extensive usage of YouTube makes the private organization subject to the First Amendment).

politically passionate clientele more or less deserving of constitutional free speech than the Department of Motor Vehicles? How about a multinational biotechnology corporation committed to product innovation and securing returns to its investors? Is such an organization obligated to offer venues for free speech and religious expression (and where and how many?), even if it judges them to be distracting or even inimical to its central mission?

Another danger of extending *Marsh's* "public interest"[73] argument is that it offers only one, and a rather narrow, vision of a vibrant citizenry. While the employees of and visitors to the GENifer Therapeutics Innovation Zone are somewhat restricted in their movements and activities within the Zone, they are free to leave (both physically and virtually) when not at work. In our age of online communication, citizens have an almost endless variety of resources and forums for acquiring information and countless opportunities and platforms for sharing their ideas (so long as this shared communication does not violate any terms of employment, of course). Moreover, concerned employees of GENifer Therapeutics, and any other Commonwealth citizen, can petition lawmakers to revise the terms of CRS 4300, altering or even reigning in the powers of the Board of Supervisors and, perhaps, extending rights similar to those found in the First Amendment.

Finally, every employee and every concerned citizen has the ultimate freedom of choice: they can start their own business, find employment with a different company, or take up residence in a different state with a purportedly more friendly policy towards free speech and religious expression in private settings.

In all of this, we should not lose sight of Justice Louis Brandeis's reminder that a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[74] The presence of such active laboratories is a sign of political health, not oppression, and they enhance the people's freedom so long as Americans can vote with their feet and ballots regarding the experiments they favor. The Commonwealth's creation of the GTIZ clearly falls within such a tradition, and the state's Innovation Zones should be allowed to develop further (without interference from courts) until the people abandon or alter them through the democratic policy process or their own private choices.

73. Marsh v. Alabama, 326 U.S. 501, 517 (1946).

74. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

Every free state worthy of the name requires a robust and freewheeling marketplace of ideas, opinions, and beliefs. But the environments for such debate and sharing of beliefs must be formed voluntarily by individual citizens, or provided to all by the government itself. Sharing one's speech and faith are the priorities of some but not all of the constituents of a free people. We do not advance the cause of liberty or republicanism by dictating a single vision of acceptable communication in the workplace, or by dogmatically insisting that individuals prioritize freedom of speech and religious exercise over other (and perhaps preferred) interests such as economic well-being or forming communities dedicated to self-expression through work.

For the reasons outlined above, I would rule in favor of the GTIZ Board of Supervisors and sustain both appellant's sanction and the Ordinance upon which it is based.

HANDY, J.

I am persuaded by my brother Justice Barry's analysis that the "longstanding precedent" of *Marsh* "pertains clearly" to the new facts at hand. If the GENifer Therapeutics Innovation Zone and its hand-picked Board of Supervisors is not the functional equivalent of a "company-owned town" then *Marsh* has lost all meaning and must be formally abandoned. However, with the possible exception of my sister Justice Truepenny, none of the opinions on this court signal a readiness to take this dramatic step.

That said, concluding that the GTIZ amounts to a state actor only addresses part of the constitutional puzzle before us. Even traditional state actors and institutions are not required to extend the guarantees of the First Amendment (and other civil liberties) indiscriminately across all government settings.

The courts have developed a so-called "public forum" doctrine to delineate three categories of public spaces in which First Amendment rights apply to differing degrees: traditional, nonpublic, and designated forums.[75] While the case law defining these categories and applying their associated rules is somewhat muddled, one can fairly conclude that the "extent of the first amendment protection varies with the character of the property to which speakers seek access."[76]

75. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

76. Peter Jakab, *Public Forum Analysis After* Perry Education Association v. Perry Local Educator's Association*—A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 FORDHAM L. REV. 545, 545 (1986).

In traditional public forums, "places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."[77] In such settings "a principal purpose . . . is the free exchange of ideas."[78] Therefore, government regulations of speech in these contexts must satisfy "strict judicial scrutiny"; that is, the restrictions must be "narrowly tailored to serve a compelling state interest" or they will be found unconstitutional.[79]

Nonpublic forums involve government "property which is not by tradition or designation a forum for public communication."[80] Here the state "may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Thus, applying this approach, *Greer v. Spock* upheld a regulation at the Fort Dix Army Base prohibiting "[t]he distribution or posting of any publication . . . without prior written approval."[81]

The third category, designated or limited forums, are, in essence, nonpublic forums that the government has chosen to open for public communication and speech (such as auditoriums, theaters, and meeting sites).[82] The government does not need to create such forums, but once it decides to dedicate a public space to an expressive purpose or function, it must grant First Amendment rights to those using it.

If one assumes that the GTIZ and its Board are effectively acting in a government capacity, how should we apply the foregoing forum analysis? Appellant Durn distributed her writings on the heavily used Zone walkways that resemble the sidewalks and streets that are at the very heart of the Court's conception of traditional public forums. As Justice Owen Roberts noted, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[83]

One might well conclude, then, that appellant's First Amendment claims are at something of an apex since she occupied a physical space

77. *Perry*, 460 U.S. at 45.
78. Cornelius v. NAACP Leg. Def. Fund, 473 U.S. 788, 800 (1985).
79. Jakab, *supra* note 76, at 549.
80. *Perry*, 460 U.S. at 46.
81. Greer v. Spock, 424 U.S. 828, 831 (1976).
82. Jakab, *supra* note 76, at 549.
83. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

that seems synonymous with *Hague's* "streets and parks" and the "sidewalks" at issue in *Marsh.*

But a closer look reveals that the "walkways" in the GTIZ actually assume a variety of carefully designated forms, and these distinctions should give us pause as we consider whether they fill the same role as the sidewalks and streets found in "any other American town." For example, the particular walkways appellant occupied are marked by the GTIZ Board with green stripes and clearly identified as "Commerce Paths"—the most efficient and direct routes between important points of business. These moving walkways are distinct from the static "Freight and Transport Paths" (marked in red) and "Recreation Paths" (blue) set aside for "leisure, sport, and gatherings." Furthermore, the GTIZ provides a number of parks, food courts, social hubs, and other designated areas for small group and larger gatherings. In any event, the motile, solar-powered, ergonomic Commerce Paths resemble *Marsh*-style, traditional sidewalks little more than an airport runway resembles a country lane.

So how does the established jurisprudence assist us in judging whether Durn's presence on the GTIZ's Commerce Paths placed her in a traditional, designated, or nonpublic forum—and then in determining what rights she retained in this context, and whether the government (Board) claims against her could overcome these liberty interests?

In *Cornelius v. NAACP Legal Defense Fund*, the Court set out the criteria it employs in identifying the nature of a government space and how much access it must grant with respect to speech forums.[84] Generally, *Cornelius* tells us, "the extent to which the Government can control access depends on the nature of the relevant forum."[85] In determining whether government property should be recognized as a public forum, the Supreme Court has "looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum . . . . [and] the nature of the property and its compatibility with expressive activity to discern the government's intent."[86]

Furthermore, in those instances "where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum."[87] Finally, the Court has "recognized that the location of

84. Cornelius v. NAACP Leg. Def. Fund, 473 U.S. 788 (1985).
85. *Id.* at 800.
86. *Id.* at 802.
87. *Id.* at 804.

property also has bearing because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction."[88]

If we stipulate that the GTIZ Board of Supervisors, at least in effect, occupies the shoes of the government in this case, we can also concede that they have taken some reasonable efforts to distinguish access to different spaces within the Zone. The Commerce Paths appellant occupied have a limited, functional purpose (to assist employees in expediently getting to work sites, other employees, and authorized Zone visitors), and are plainly designated by signs, symbols, and usage. At the same time, the GTIZ provides acknowledged public areas, including the recreational RejuvLands parks, buildings set aside for social gatherings, and the designated blue Recreation Paths.

Thus, the Board has attempted to restrict and demarcate how the Commerce Paths are used, and limit assembly and debate to other locations it deems more compatible with expressive activity. These actions are not only consistent with the guidelines set out in *Cornelius* and related cases, but they serve valuable interests. As the trial court record shows, among the individuals Ms. Durn detained (in her attempt to educate GENifer employees about her faith) was an on-duty Emergency Medical Technician on her way to a patient in distress. While the record stipulates that no harm befell the patient as a result of Ms. Durn's actions, these circumstances suggest that using the green Commerce Paths may not be an ideal choice for expressive purposes, particularly since so many superior alternatives are available. Stated bluntly, appellant's expressive activity undoubtedly "disrupted" the "principal function" of the Commerce Paths.[89]

In short, even granting that appellant has First Amendment rights in the GTIZ, she did not exercise them in a permissible constitutional forum. This judgment may strike some as too fine-tuned—a technicality that threatens the spirit of our commitments to free speech and religious exercise. But it is a judgment consistent with an established law that balances individual liberties and government responsibilities. Appellant's possible ignorance about the availability of alternate spaces for exercising her rights is no defense, particularly since the GTIZ Ordinances are compiled and made public.

For these reasons, I would rule in favor of appellant Durn on the question of whether the GTIZ and its Board is subject to the First

88. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992).

89. *Cornelius*, 473 U.S. at 804.

Amendment, but find in favor of appellee insofar as its actions are consistent with a reasonable policy of directing speech and expression to suitable public and designated forums.

ANDERSON, J.

My brother Handy resolves this matter by turning to a full-blown forum analysis. Some future case may well occasion this inquiry, but it is unnecessary today.

Whatever else it may be, the GENifer Therapeutics Innovation Zone is a functioning town with sidewalks, streets, parks, and public gathering spaces, notwithstanding any market-tested and obfuscating corporate labels. These spaces are subject to First Amendment protections that cannot be abridged by those who govern the town, viz., the GTIZ Board and its agents.

The Board's Ordinance 2081 is written in such blanket terms (applying to anyone not contractually affiliated with GENifer Therapeutics) that it limits free speech across the entire Zone to those who can obtain "written permission" in advance. Such a restriction runs afoul of established case law and enduring constitutional principles.

In *Hague v. Committee for Industrial Organization,* the Court ruled that a Jersey City ordinance barring "public assembly in the streets or parks of the city without a permit from the Director of Safety" effectively "abridged or denied" the rights of the people "to use the streets and parks for communication of [their] views."[90]

Subsequently, in *Marsh*, the Court affirmed that

> neither a State nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will.[91]

Ordinance 2081 clearly violates the rule set out in *Hague*, *Marsh*, and numerous other cases: broad permit restrictions on speech and assembly are presumptively unreasonable and invalid.

For this reason, I would rule in favor of appellant Durn on the question of whether the GTIZ and its Board is subject to the First and Fourteenth Amendments and strike down Ordinance 2081 as unconstitutional on its

90. Hague v. Comm. for Indus. Org., 307 U.S. 496, 498 (1939).

91. Marsh v. Alabama, 326 U.S. 501, 504 (1946).

face. The measure crimps the free speech and religious exercise liberties of any nonauthorized visitor in its powerful and clumsy grasp.[92]

KALDEN, J.

I agree with my colleague Justice Friedman, that the analogy between *Marsh* and the present case is strained at best. The GENifer Innovation Zone does not obviously resemble the 1940s company town of Chickasaw, or, indeed, any other conventionally governed municipality. The GTIZ's distinctive aesthetic, design, operations, and raison d'etre are unusual if not unique.

Consider in this regard that a resident in the GTIZ stays in the Zone for an average of only thirty-eight months before transferring to another city or work site. In contrast, in the nearest traditional municipality, Hackenstown, most inhabitants reside for life. The GTIZ is an environment in which science and product innovation, productivity, and boosting profits serve as the centripetal forces that bring employees together (but only for a time). Hackenstown's citizens, in comparison, remain in and contribute to their community for any number of reasons including pride of place, civic and family ties, and a love of heritage, however they define it. The residents of the GTIZ have a more transitory and transactional relationship with the Board of Supervisors, undercutting the claim that it serves as their de facto government.

Beyond these points, the contention that the GTIZ resembles a traditional municipality is belied by another observation: its powers are merely granted and contingent. If the GTIZ and its Board exercised actual political authority, they could claim an irreducible "monopoly of the legitimate use of physical force within a given territory."[93] But the GTIZ Board possesses no true and indissoluble monopoly over *any* government function or operation. Indeed the GTIZ exists and persists solely because of the authority and support of the Commonwealth legislature, governor, and electorate. Even after its creation, the Board remains dependent on these fonts of power; its existence can be revoked at the whim of the

92. The specific analysis in my opinion makes it unnecessary to consider whether the regulation in question, GTIZ Ordinance 2081, is so broad in its scope that it raises issues, on its face and in application, about the judicial doctrines of due process, overbreadth, and vagueness. *See* United States v. Stevens, 559 U.S. 460 (2010) (finding a prohibition on depictions of animal cruelty to be unconstitutionally overbroad); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (finding a city ordinance violated constitutional standards of due process due to its vagueness); Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589 (1967) (requiring state employees to renounce Communism was unconstitutional in its overbreadth and vagueness).

93. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H.H. Gerth & C. Wright Mills eds., 1958) (italics removed).

General Assembly. Traditional municipalities, in contrast, can point to a founding, a history, and a popular legitimacy independent from an act of legislative willpower.

But while I find myself unmoved by the argument that the GTIZ is indistinguishable from the company town in *Marsh* (and conventional governing bodies), the Commonwealth's hand-in-glove relationship with the Zone may still create state action that allows appellant to prevail.

As the Supreme Court has concluded in other contexts, state action may be implicated by the cooperation or passivity of the state in superintending (or permitting) the actions of private parties or entities.[94] To cite just one example, *Burton v. Wilmington Parking Authority* held that a racially discriminatory private restaurant (the Eagle Coffee Shoppe) leasing space from a state authorized agency (the Wilmington Parking Authority) was subject to the protections of the Equal Protection Clause of the Fourteenth Amendment.[95] The City of Wilmington created the Authority through legislation and then tacitly supported its commercial partnership with the Eagle Coffee Shoppe, thereby "insinuat[ing] itself into a position of interdependence" and making the state a "joint participant" in the discriminatory activity.[96] As the Court summarized, "By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service [to Black customers], but has elected to place its power, property and prestige behind the admitted discrimination."[97] The state's entanglement with the Eagle Coffee Shoppe extended the Fourteenth Amendment's legal roots to an admittedly private organization not otherwise subject to the state action doctrine.

Indeed, a close reading of *Marsh* reveals a similar relationship in play. Justice Black's majority opinion concluded by noting that the private property claims of the Gulf Shipbuilding Corporation were overcome by the state's involvement in "permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties" and the state's attempt "to impose criminal punishment" on Marsh through the Alabama justice system.[98] "[A] state statute . . . which enforces such action by criminally punishing those who attempt to distribute religious

94. *See generally* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." *Id.* at 620.).

95. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

96. *Id.* at 725.

97. *Id.*

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

literature clearly violates the First and Fourteenth Amendments to the Constitution."[99]

Moving to the present case, we might note that the Commonwealth has always had an intimate legal relationship with the GTIZ. The Commonwealth General Assembly and Governor Holland authorized the creation of Innovation Zones through legislation and then approved the specific GENifer Therapeutics Zone application. Today the Commonwealth receives millions of dollars in tax revenues from the GTIZ and accepts criminal cases coming out of the Zone that exceed the jurisdiction of its Justice Courts. But for the deliberate acts and continued support of government, the GTIZ would neither exist nor persist.

At the same time, the scope of the Commonwealth's delegation of authority under CRS 4300, Section 14 is comprehensive, extending to all "the powers and duties of a Board of County Commissioners, [but] the exercise of which supersede similar powers held by the county government in which the Innovation Zone is located." Thus, notwithstanding the statutory basis for the Zone, the law's sweeping cession of power to the GTIZ's governing Board might plausibly distance subsequent corporate activities from the initial governmental authorization, creating a kind of legal circuit breaker to state action claims.

The courts have been reticent "to fashion and apply a precise formula" for recognizing when the state's responsibilities under the Fourteenth Amendment work their way into private parties benefitting from state action, inaction, enforcement, or complicity.[100] It is a genuine challenge "to define the boundary between public and private spheres in a world of overlapping interests and roles."[101] Especially where private entities "perform public functions with government-sanctioned authority, it is not easy to identify where the government domain ends and the private domain begins for purposes of constitutional law."[102]

Thus, the question of whether the Commonwealth has placed sufficient "power, property and prestige behind" the GTIZ's alleged violation of First and Fourteenth Amendment rights is one that requires thorough and careful review. Since this specific issue was not vetted by the courts below, I would remand this case for briefing and reargument, and any further proceedings to be had as may be just under the circumstances.

99. *Id.* at 508.
100. *Burton*, 365 U.S. at 722.
101. Fee, *supra* note 8, at 572.
102. *Id.*

TRUEPENNY, J.

I find myself on a deeply divided court. I count two votes (Justices Barry and Anderson) for appellant Durn and two votes (Justices Friedman and Handy) for appellee, the GTIZ Board of Supervisors. Justice Kalden occupies still another position in declining to offer a judgment beyond ordering the court below to hear argument on the question of whether the Commonwealth's ongoing "entanglement" with the GTIZ is sufficient to extend constitutional responsibilities under the Fourteenth Amendment to the Board of Supervisors. Across the court's various opinions, I can identify few points of convergence in applying doctrine or judging the merits.

But while my learned and able colleagues engage the issues at hand with different emphases and readings of law, they appear quietly unified on one important point: the liberty interests in the Constitution's First and Fourteenth Amendments should be construed in a crabbed manner, recognizing these rights only in the context of government authority. In the prevailing view, a conscientious jurist attempting to apply the Constitution's Bill of Rights cannot disentangle civil liberties from the state's claims to rule. Debates about "state action," and how far it extends to private entities, are still conversations that place individual freedom in a zero-sum struggle with official power to, for example, regulate religious expression or communication about matters of faith.

I come to this case with another perspective. It is high time that the words of the First Amendment be construed not as contingent limits on government action but as broad and affirmative grants to the people. We should follow the example of one of my brother Friedman's vaunted laboratories of democracy, starting with the assumption that every person "may freely speak, write and share his or her sentiments on all subjects, being responsible for the abuse of this right."[103] Such an approach places a presumption on public liberty and a prejudice against its encroachment or diminution.

In contrast, our current First Amendment jurisprudence typically begins by identifying valid exercises of government power and then balancing this authority against constructed, elaborate, and somewhat defensive accounts of why free speech and religious expression are good for political communities. In this conception, rights can only gather in the gaps or interstices of the state's authority, however it is defined.

103. CAL. CONST. art 1, sec. 2.

Instead, we must place We the People and their liberties in the driver's seat, requiring governments, elected officials, and private organizations to explain why any impingements on fundamental rights of individual expression are essential to good governance and healthful political communities.

This shift may strike some as subtle, but it has important and even transformative implications. In addition to putting liberty (and the people) first and power (and government) second, this democratic and affirmative understanding of the First Amendment elides the distinction between public and private restrictions on expressive freedom, a division that is often difficult to sustain (as the different judgments of my brothers and sisters on this court make clear). A citizen journalist hoping to write about municipal corruption on an online forum—and the public that consumes her work—does not care if the story is killed by a local official's instructions or the private host's willful editorial decision (or automatic selection algorithm).[104] But under our existing law, constitutionally protected free speech only finds a foothold where the "*government* . . . intentionally open[s] the property for public discourse."[105] Again, such an orientation makes the state's decisions the driver of our freedom, rather than the other way around.

Whatever its failings and limitations, the proverbial marketplace of ideas needs a lively and accessible space for banter, barter, exchange, and riposte. But in this century this venue is more likely to assume the form of electronic discussions hosted by private businesses rather than quaint brick and mortar squares in the center of town.[106] Regardless of ownership and irrespective of their particular physical or digital contours, these spaces do not grant or facilitate the rights of a free people like rented rooms; instead, they follow and accompany these rights—like footprints or shadows.

104. *See* Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 655–59 (1991) (arguing that the public-private distinction is irrelevant in determining whether a space possesses the characteristics of a traditional public forum).

105. Prager Univ. v. Google LLC, 951 F.3d 991, 999 (9th Cir. 2020) (emphasis added).

106. My proposed jurisprudential shift is certainly at odds with some existing First Amendment decisions. *See, e.g.*, *Prager*, 951 F.3d 991 ("a private entity hosting speech on the Internet is not a state actor." *Id.* at 997.); Howard v. America Online Inc., 208 F.3d 741 (9th Cir. 2000); Manhattan Cmty. Access Corp. v. Halleck 139 S.Ct. 1921 (2019) ("[M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints." *Id.* at 1930.). But it is consistent with another line of cases recognizing that liberty interests regularly affect and even trump claims regarding private property and economic development. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (reviewing the argument that "in order to assure that the institution of private property serves the end of individual freedom and liberty it has been restricted in many instances." *Id.* at 285.).

My brother Friedman's meticulous, eloquent, and ultimately wrong-headed opinion encourages the members of this court to consider how different readings of constitutional law give rise to different visions of an engaged and "vibrant citizenry." I applaud this exercise. But he sketches a portrait of an atomistic public, furtively acquiring information and ideas necessary to build a healthy democracy in whatever territory remains after government powers and private market forces have filled their claims.

I would instead start with the touchstone of the People's rights and the ingredients necessary for our individual autonomy and collective civic health.[107] One of these ingredients is surely our innate right to self-expression with regards to politics, religion, and conscience—a right that can only be infringed upon with the narrowest and most convincing rationale. A model of affirmative and popular liberty is the true basis for an empowered electorate and a democracy populated with fully realized human beings.

In addition to erasing the public-private divide respecting restrictions on free expression, an affirmative reorientation of the First Amendment invites us to consider liberty not just in its philosophically "negative" sense (the absence of constraints or barriers) but in its "positive" and communal dimensions. This shift recognizes the inextinguishable

> wish on the part of the individual to be his own master . . . to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own . . . above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.[108]

Such an empowering, "self-directed," and almost psychological understanding of the First Amendment encourages courts, elected officials, and citizens alike to reflect and act upon their respective and complementary roles in nurturing, preserving, and responsibly exercising liberty. For example, the judiciary might use this new framework to rethink the ways in which "hate speech" or unconstrained corporate spending can threaten or dilute the citizenry's collective capacities to be willfully choosing subjects, rather than emphasizing any single individual's prerogatives and privileges. Legislatures, on the other hand, may rightfully feel the weight of an

107. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980) (arguing for "a participation-oriented, representation-reinforcing approach to judicial review").

108. ISAIAH BERLIN, LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 178 (Henry Hardy ed., 2002).

obligation to provide online access to all citizens under this conception. And for the people, affirmative liberty means understanding that our personal freedom of speech and worship necessarily includes a reciprocal responsibility to protect the same freedoms for our fellow citizens—and not an unconstrained license to attack them.

"Civil liberties" are a special class of freedoms—those that exist because of our participation in a civil order of organized politics and the rule of law. The Constitution and the Bill of Rights is not just "an impenetrable bulwark"[109] against government to be erected and maintained by independent courts; it is also "a book in which people can read the fundamental principles of their political being."[110]

With these considerations in mind, I would reverse the opinion of the lower court and ask that the current case be remanded for further proceedings consistent with this opinion.

109. *See* 1 ANNALS OF CONGRESS (Joseph Gales ed., 1789) (James Madison arguing that with the inclusion of a bill of rights in the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive. . . ." Id. at 457.).

110. Herbert Storing, *The Constitution and the Bill of Rights*, *in* HOW DOES THE CONSTITUTION SECURE RIGHTS? 15, 30-31 (Robert A. Goldwin & William A. Schambra eds., 1985).