NEW JERSEY CONSTITUTION, ARTICLE I, PARAGRAPHS 6 & 18 — FREE SPEECH — REGIONAL SHOPPING MALLS MUST PERMIT LEAFLETTING ON SOCIETAL ISSUES SUBJECT TO REASONABLE TIME, PLACE, AND MANNER CONSTRAINTS CREATED BY THE MALL OWNERS — *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994).

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I. INTRODUCTION

Both the United States and New Jersey Constitutions[1] contain provisions protecting the freedom of speech and assembly.[2] Historically in

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[1]The First Amendment of the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. In 1925, the United States Supreme Court determined that the First Amendment was applicable to the states through the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

The New Jersey Constitution states in part: "Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press . . . ." N.J. CONST. art. I, para. 6. The New Jersey Constitution further denotes: "The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." N.J. CONST. art. I, para. 18.

Since article I, paragraph 6 of the New Jersey Constitution grants an affirmative right to the people it has been deemed more expansive than its federal counterpart, which only provides for a prohibition on the federal government. *See, e.g.*, State v. Schmid, 423 A.2d 615, 626 (N.J. 1980), *appeal dismissed sub nom.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

[2]Free speech has historically been considered to hold a high position in the American hierarchy of civil liberties. *See, e.g.*, John A. Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection*, 37 SYRACUSE L. REV. 1, 1 (1986) (citing Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring)). The Supreme Court of New Jersey has declared that "[t]he First Amendment was designed by its framers to foster unfettered discussion and free dissemination of opinion dealing with matters of public interest and governmental affairs." *Schmid*, 423 A.2d at 618-19 (citing Mills v. Alabama, 384 U.S. 214, 218-19 (1966) (other citations omitted)). For a discussion on the social and political rationale behind the freedom of speech, see COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, 1791-1991: THE BILL OF RIGHTS AND BEYOND 17 (Herbert M. Atherton & J. Jackson Barlow eds.,

America, speech was given its greatest protection in areas deemed "traditional public forums."[3] American society, however, has changed in recent decades such that urban downtown business districts,[4] 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

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1991) (stating that an "informed and involved" citizenry is necessary for the continuation of the United States democratic system).

It is important to note, however, that despite the preferred position accorded to speech in our constitutional framework, not all areas of expression are granted constitutional protection; in fact, several areas have been explicitly excluded. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that there is no constitutional protection for advocacy which is "directed to inciting or producing imminent lawless action," and which is "likely to incite or produce such action"); Roth v. United States, 354 U.S. 476, 485 (1957) (ruling that obscenity was outside the scope of First Amendment protection); Beuaharnais v. Illinois, 343 U.S. 250, 263 (1952) (deeming a state statute prohibiting libel constitutional); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (holding that constitutional protection does not extend to utterances which tend to bring about a violent reaction from the person to whom they are addressed).

[3]Traditional public forums are considered to be streets, sidewalks, and parks, areas whose purpose traditionally has been to further the free exchange of ideas. *See* Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use . . . has, from ancient times, been part of the . . . rights, and liberties of citizens."); *see also* Harold L. Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 441-42 (1986) (quoting *Hague*, 307 U.S. at 515). Professor Berger of Columbia University Law School has argued that maintaining public forums is essential to the American democratic system. *See* Curtis J. Berger, PruneYard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 643-48 (1991) ("[T]he public forum also plays a pivotal role in achieving and maintaining a strong democracy.").

By comparison, speech in areas considered to be non-public forums, land whose use is not particularly related to expression, or semi-public forums, property which has a substantial relation to the exchange of ideas but was not created primarily for furthering speech, have been given much less protection by the courts than the protection afforded to expressive activity in traditional public forums. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (finding that a military base is a non-public forum); Brown v. Louisiana, 383 U.S. 131 (1966) (ruling that a library is the equivalent of a semi-public forum). For an explanation of this treatment, see Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 320 (1968).

[4]In this Casenote "downtown business districts" refers to the large commercial shopping and business areas of urban cities. *See, e.g.*, New Jersey Coalition Against The War In the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 766-68 (N.J. 1994).

community.[5] Many commentators argue that free speech jurisprudence should accommodate this change in society.[6] This approach, however, brings two essential rights of our democratic society into direct conflict, the right of free speech and the rights encompassing ownership of private property.[7]

In addressing this issue, the United States Supreme Court has ruled that shopping centers are not subject to the federal constitutional speech provisions because malls are privately owned and, therefore, are not subject

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[5]*See id.* at 766 ("Regional and community shopping centers significantly compete with and have in fact significantly displaced downtown business districts . . . ."); Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 n.5 (Cal. 1979) (noting that since 1945 business districts have "continued to yield their functions to . . . suburban centers," and that shopping malls are increasingly becoming "miniature downtowns"), *aff'd*, 447 U.S. 74 (1980); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 318 (1968) (asserting a certain shopping center was "clearly the functional equivalent of the business district" of a town in an earlier Court decision); *see also* Note, Lloyd Corp. v. Tanner: *The Demise of* Logan Valley *and the Disguise of* Marsh, 61 GEO. L.J. 1187, 1216-19 (1973) [hereinafter *The Demise of* Logan Valley] (reciting statistics to support the proposition that shopping malls have replaced traditional downtown business districts); James M. McCauley, *Transforming the Privately Owned Shopping Center into a Public Forum:* PruneYard Shopping Center v. Robins, 15 U. RICH. L. REV. 699, 721 (1981) (noting that shopping centers are replacing traditional business districts). *But see J.M.B. Realty Corp.*, 650 A.2d at 796 (Garibaldi, J., dissenting) (asserting that, exclusive of using mall property, citizens "can voice their opinions today more readily and accessibly in more places and in more formats than ever before in human history"); Sam Allis, *Busy Streets*, TIME, Aug. 7, 1989, at 9 (reporting that cities and commercial districts are still vibrant); Kurt Anderson, *Spiffing Up the Urban Heritage After Years of Neglect, Americans Lavish Love and Sweat on Old Downtowns*, TIME, Nov. 23, 1987, at 72.

[6]*See* McCauley, *supra* note 5, at 721 (concluding that free speech at shopping centers is reasonable and necessary); Berger, *supra* note 3, at 648-61 (arguing that the definition of a modern public forum should include large shopping malls); James M. Bowman, Robins v. PruneYard Shopping Centers: *Free Speech Access to Shopping Centers Under the California Constitution*, 68 CAL. L. REV. 641, 663 (1980) ("[Permitting expression in shopping malls] promotes the public's interest in gaining greater access to effective channels of communication without imposing an onerous or unfair burden on privately owned shopping centers."); *see also* ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 560 (1941) (positing that the government should take affirmative steps in creating avenues for speech so that communicative activity could continue to play an important role in American Society); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-25, at 998 (2d ed. 1988) (citing Chafee's argument approvingly).

[7]*See, e.g.*, Joseph H. Hart, *Free Speech on Private Property — When Fundamental Rights Collide*, 68 TEX. L. REV. 1469 (1990).

to the restrictions of the Constitution against intrusive state action.[8] States, however, remain free to give greater protection under their state constitutions than is provided by their federal counterpart.[9] Recently, the New Jersey

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[8]*See* Hudgens v. NLRB, 424 U.S. 507 (1976). The state action doctrine generally requires that the United States Constitution be applied only against governmental, as opposed to private, action. *See, e.g.*, Ragosta, *supra* note 2, at 2 n.5; *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.1, at 452-57. (4th ed. 1991) (discussing the "color of law" requirement).

Under certain circumstances, however, the conduct of private entities can rise to the level of state action. One such instance is the "public function approach," which occurs when a private group performs tasks or takes on responsibilities that are inherently governmental in nature. *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944) (establishing a privately-run electoral process constitutes a public function); Marsh v. Alabama, 326 U.S. 501 (1946) (ruling a that company-owned town had usurped a public function, the operation of a town). Another approach is the "nexus" theory which holds a private individual's activity will be considered state action if there is significant government involvement in the private actor's conduct. *See, e.g.*, Shelly v. Kraemer, 334 U.S. 1 (1948) (finding state action in the judicial enforcement of private racially restrictive covenants); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (asserting that there was state action by a privately-owned restaurant because of its mutually beneficial contract relation with a state agency). Nevertheless, it should be noted that the United States Supreme Court has admitted that there is no clear test for determining whether a private actor meets the state action requirement. *See* Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

For a comprehensive discussion of the state action doctrine, see Elizabeth Hardy, Comment, *Post-*PruneYard *Access to Michigan Shopping Centers: The 'Malling' of Constitutional Rights*, 30 WAYNE L. REV. 93 (1983); *see also* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

[9]As a general rule, states can afford greater protection for individual's rights under their state constitutions than the protection granted under the United States Constitution. *See, e.g.*, Cooper v. California, 386 U.S. 58, 62, 87 (1967); PruneYard Shopping Centers v. Robins, 447 U.S. 74, 81 (1980); *see also* William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Stuart J. Pollock, *State Constitutions as a Separate Source of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983). The exception to this rule occurs when the respective constitutional rights of the parties are in conflict. In that scenario, state courts cannot give greater rights to either party, but must instead follow the United States Supreme Court's constitutional interpretation. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (balancing the press and public's First Amendment right to attend criminal trials with a criminal defendant's right to a fair trial by an impartial jury).

As a threshold matter, a state is not even subject to the United States Constitution unless an aspect of the United States Constitution has been incorporated, through the Fourteenth Amendment, to apply to the states. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (incorporating the First Amendment to the states). Once a constitutional

Supreme Court addressed whether expressive activity conducted on the grounds of privately owned malls is protected under the New Jersey Constitution.[10] In *New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp.*,[11] the New Jersey Court ruled that regional

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provision has been incorporated to the states, a state can only grant greater, as opposed to less, protection to individual rights due to the Supremacy Clause of Article VI, Clause 2 of the United States Constitution. *See, e.g.*, *PruneYard*, 447 U.S. at 81 (asserting a state constitution can confer "more expansive" liberties than those found in the U.S. Constitution). In addition, state courts can only grant greater protection than is found under the United States Constitution if there are "adequate and independent" state grounds on which it is basing its decision. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1875); Michigan v. Long, 463 U.S. 1032 (1983); *see also* Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. U. L. REV. 85, 88 (1985). Examples of adequate and independent state grounds are decisions based on a state's constitution or a state's common law. If a state court's ruling is based on adequate and independent state grounds, the United States Supreme Court will not review it. *See* Hudnut, *supra*, at 88.

State courts will usually adopt one of three approaches in interpreting their own constitutions in light of federal constitutional law: (1) the lockstep approach; (2) the primacy approach; and (3) the supplemental approach. *See id.* at 99-100; James T.R. Jones, *Battered Spouses: State Law Damage Actions Against Unresponsive Police*, 23 RUT.-CAM. L.J. 1, 51-54 (1991). The lockstep approach means that state courts will interpret their constitutions identically to analogous United States Constitution provisions. *See id.* at 53. In contrast, the states primacy approach consists of state courts giving federal constitutional interpretations little deference, thereby construing there state constitutions as if "they were writing on a clean slate." *Id.* at 53-54; *see also* Right to Choose v. Byrne, 450 A.2d 925, 947-49 (N.J. 1982) (Pashman, J., concurring in part and dissenting in part) (advocating the states primacy approach). Finally, the supplemental approach means state courts will generally follow the United States Supreme Court's interpretations of similar constitutional provisions and will only break with federal precedent when they have strong policy reasons for doing so. *See* Jones, *supra*, at 53.

New Jersey has seemingly adopted the third view, the supplemental approach. *See* State v. Hunt, 450 A.2d 952, 955 (N.J. 1982) (announcing that uniformity between state and federal interpretations is generally preferred, however "[s]ound policy reasons . . . may justify departure"). Further, the New Jersey Supreme Court has apparently decided to follow Justice Handler's seven factors, enunciated in *Hunt*, as to what constitutes strong policy reasons that permit a break from federal interpretation. *See* State v. Williams, 459 A.2d 641, 650-51 (N.J. 1983). The seven factors delineated by Justice Handler in *Hunt* were: (1) textual language; (2) legislative history; (3) pre-existing state law; (4) structural differences; (5) matters of a particular state interest; (6) state traditions; and (7) public attitudes. *Hunt*, 450 A.2d at 965-66.(Handler, J., concurring).

[10]For the New Jersey Constitutional provisions pertaining to free speech, see *supra* note 1.

[11]650 A.2d 757 (N.J. 1994).

shopping malls must allow leafletting,[12] and its accompanying speech, on societal issues[13] to occur on mall property.[14]

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[12]Leafletting has been so historically associated with speech that both the federal and New Jersey courts recognize that it is within the scope of protected expressive activity. *See, e.g.*, Lovell v. Griffin 303 U.S. 444, 452 (1938) (finding that free speech "necessarily embraces pamphlets and leaflets [which] have been historic weapons in the defense of liberty"); Jamison v. Texas, 318 U.S. 413, 416 (1943) (stating freedom of expression "extends to the communication of ideas by handbills and literature as well as by the spoken word"); Elizabeth v. Sullivan, 241 A.2d 41, 46 (N.J. Super. Ct. Law. Div. 1968) ("[T]he free and unhampered distribution of pamphlets concerning important political and social problems [constitutes part] . . . of the fundamental rights of our citizenry."); *see also* TRIBE, *supra* note 6, at § 12-24, at 988 ("Activities such as leafletting . . . are by tradition and function so closely linked with free expression that the Court has properly scrutinized restrictions upon those activities with special care . . . .").

[13]*J.M.B Realty Corp.*, 650 A.2d at 760. Expression pertaining to societal and political issues has always been afforded the greatest protection in American jurisprudence. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring) ("[The framers of the Constitution] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery of *political* truth.") (emphasis added); *see also Schmid*, 423 A.2d at 627 ("[W]here political speech is involved our tradition insists that government 'allow the widest room for discussion, the narrowest range for restriction.'") (quoting State v. Miller, 416 A.2d 821, 826 (N.J. 1980)); Quadres, *supra* note 3, at 441 ("[P]olitical speech [is] particularly worthy of constitutional protection because it [is] at the very heart of [the] free speech guarantees." (citing Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (Reqhnquist, J., dissenting) (other citations omitted)); Berger, *supra* note 3, at 635 ("[T]he imperative of an informed, politically conscious electorate requires access to information and opinion . . . .").

[14]*J.M.B. Realty Corp.*, 650 A.2d at 757. In *J.M.B.* the court seemed to have followed the supplemental approach in breaking from federal constitutional precedent. See *supra* note 9 and accompanying text for discussion on the supplemental approach. The *J.M.B.* court announced it was considering the factors enunciated by Justice Handler in *Hunt*, which constituted the basis of strong policy reasons to break from the United States Supreme Court's interpretation. *J.M.B. Realty Corp.*, 650 A.2d at 770 (citing State v. Hunt, 450 A.2d 952 (1982) (Handler, J., concurring)). See *supra* note 9 for Justice Handler's seven factors. Specifically, the *J.M.B.* court found, "[p]recedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment." *J.M.B. Realty Corp*, 630 A.2d at 770. See *supra* note 1 for the pertinent language of the United States and New Jersey Constitutions' free speech provisions.

Apparently, the New Jersey Supreme Court has determined that its constitutional language pertaining to free expression is more expansive than that found in the United States Constitution because it grants an affirmative right, as opposed to a mere governmental prohibition, to the citizenry to speak, write, and publish. *See* State v.

II. STATEMENT OF THE CASE

During the summer and fall of 1990 the United States government was contemplating the use of armed force in the Persian Gulf.[15] Petitioners, New Jersey Coalition Against War In the Middle East ("the Coalition"),[16]

Schmid, 423 A.2d 615, 626-27 (N.J. 1980), *appeal dismissed sub nom.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982); *see also* Hudnut, *supra* note 9, at 100-05 (positing that in a case such as *J.M.B.*, a state court has sufficient reason to break with federal precedent because of the textual difference between the constitutions and because free speech at shopping malls deals with a matter of particular state interest).

The New Jersey Supreme Court has departed from the United States Supreme Court's precedent in interpreting the New Jersey Constitution on several issues. *Compare* California v. Greenwood, 486 U.S. 35 (1988) (finding that police can search curbside garbage without a warrant) *with* State v. Hempele, 576 A.2d 793 (N.J. 1990) (holding that individuals have a protectable privacy interest in curbside garbage); *compare* Arizona v. Tison, 481 U.S. 137 (1987) (permitting the death penalty for a *mens rea* of reckless indifference to human life) *with* State v. Gerald, 549 A.2d 792 (N.J. 1988) (asserting that a defendant could not receive the death penalty without intentionally or knowingly killing a person; however this decision was subsequently overruled through a state constitutional amendment); *compare* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a statute that prohibited sodomy) *with* State v. Saunders, 381 A.2d 333 (N.J. 1977) (finding the right of privacy includes the right to consensual sexual relations between adults); *compare* U.S. v. Leon, 468 U.S. 897 (1984) (ruling that there is a good faith exception to the exclusionary rule) *with* State v. Novembrino, 519 A.2d 820, (N.J. 1987) (holding that there is no good faith exception to the exclusionary rule); *compare* Harris v. McRae, 448 U.S. 297 (1980) (permitting the government to fund pregnancies, but not abortions, that are medically necessary for pregnant women) *with* Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) (holding that a state cannot "restrict funds to those abortions [that] preserve a woman's life, but not her health"); *compare* Smith v. Maryland, 442 U.S. 735 (1979) (finding that police do not need a judicial warrant to install pen registers) *with* State v. Hunt, 450 A.2d 952 (N.J. 1982) (ruling that police need a warrant to obtain toll billing records); *compare* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (adopting the totality of the circumstances test to determine whether a consensual search is voluntary, of which a person's knowledge of her right to refuse is just a factor to be considered) *with* State v. Johnson, 346 A.2d 66 (N.J. 1975) (finding that for a consensual search to be voluntary a person must know of her right to refuse consent).

For an in-depth discussion of the New Jersey Supreme Court's emergence as a national leader in the development of legal doctrine, see G. ALAN TARR & MARY C. ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 184-236 (1988).

[15] *J.M.B. Realty Corp.*, 650 A.2d at 762.

[16] The Coalition was made up of over 25,000 members belonging to several dozen different religious and political groups with similar political philosophies. *Id.* at 762 n.2. The plaintiff was organized around the common theme and belief that the Persian Gulf crisis should be resolved through peaceful means instead of armed conflict. Brief for

were opposed to military intervention and decided to pursue a handbilling campaign exhorting the public to contact Congress expressing opposition to the proposed use of force.[17] On November 10, 1990,[18] the Coalition requested permission from respondents, certain New Jersey shopping malls,[19] to leaflet on their property.[20] The majority of the malls, despite

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Plaintiffs-Appellants at 3, New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp, 650 A.2d 757 (N.J. 1994) (No. A-588-91T5) [hereinafter Petitioner's Brief]. This Casenote refers to petitioner's and respondent's briefs submitted to the New Jersey Appellate Division because those briefs comprise their essential positions and contain their most in depth arguments.

The Coalition had four specific objectives:

> 1) to prevent United States military intervention in the Persian Gulf, 2) to prevent the establishment of a United States base in the Middle East, 3) to obtain a peaceful solution to the Persian Gulf crisis by an international agency and 4) to divert the expenditure of United States tax dollars from defense spending to domestic spending.

J.M.B. Realty Corp., 650 A.2d at 762 n.2. In fact, after the War in the Persian Gulf had concluded, the Coalition continued fund-raising to aid war victims and attempted to influence the United States Government to spend more on the domestic economy instead of the military budget. Petitioner's Brief, *supra*, at 3.

[17]*J.M.B. Realty Corp.*, 650 A.2d at 762.

[18]November tenth was a Saturday and was part of Veteran's Day weekend, therefore more people than normal were expected to visit the mall on that day. *Id.* at 763.

[19]The defendants were comprised of ten shopping malls. They were the Riverside Square Mall, the Short Hills Mall, the Livingston Mall, the Rockaway Townsquare Mall, the Quakerbridge Mall, the Hamilton Mall, the Cherry Hill Mall, the Woodbridge Center Mall, The Mall at Mill Creek, and the Monmouth Mall. Petitioner's Brief, *supra* note 16, at 4-5.

Nine of the defendant's are considered regional shopping centers while The Mall at Mill Creek is defined as a slightly smaller community shopping mall. *J.M.B. Realty Corp.*, 650 A.2d at 763. See *infra* note 33 and accompanying text for the definitions of regional and community shopping malls. The *J.M.B.* court considered the defendants in the aggregate instead of individually. *Cf.* Brief of Defendants-Respondents-Cross-Appellants, Prutaub Joint Venture and J.M.B. Income Properties, L.T.D. at 16, New Jersey Coalition Against War In the Middle East v. J.M.B. Realty Corporation, 650 A.2d 757 (N.J. 1994) (No. A-588-91T5) [hereinafter Respondent's Brief] (arguing implicitly that the defendant shopping malls should be considered on a separate basis). Respondent's brief is that submitted by the defendants who owned The Mall at Short Hills and Riverside Square.

[20]*J.M.B. Realty Corp.*, 650 A.2d at 762.

permitting visits by political canidates, voter registration clinics, and military recruitment booths, denied the Coalition's request[21] claiming that they prohibited all issue-oriented speech.[22] Plaintiffs first sought temporary injunctive relief against the defendants, but were denied.[23]

The Coalition then sought permanent injunctions compelling the defendants to allow the Coalition access to the shopping center property for the purpose of engaging in expressive activity.[24] The trial court[25] first found that the defendant's actions were not in violation of the First Amendment of the United States Constitution.[26] The court then turned to the validity of the prohibition under the New Jersey Constitution. Relying

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[21]*Id.* at 762-63. One mall, the Monmouth Mall, did in fact allow the Coalition to use a community booth in January, 1992. *Id.* Three other malls allowed the Coalition to use their community booths, contingent on the group obtaining liability insurance. *Id.* at 763. The Coalition was unable to obtain the insurance, however, and only one shopping center, the Woodbridge Center Mall, waived its insurance requirements. *Id.* Finally, the Hamilton Mall initially refused the plaintiff's request, but ultimately allowed the Coalition to leaflet. *Id.*

[22]*See, e.g.*, *Constitutional Law — New Jersey Malls Required to Permit Leafletting*, NAT'L L.J., Feb. 20, 1995, at B12 (reporting that "all of the defendants claimed to prohibit issue-oriented speech and the distribution of leaflets . . . ."). Yet the respondents collectively did permit expressive activity on political and community issues which included, among other things, voter registration drives, distributing information on substance abuse and homelessness, allowing campaigning political officials to visit the malls, permitting a United States Marine Corps program designed to gather toys for children whose parents were serving in the Persian Gulf, military recruitment, video postcards to the Persian Gulf troops, tenant's posters voicing support for the Gulf War troops, and an Earth Day celebration. *J.M.B. Realty Corp.*, 650 A.2d at 764-65.

[23]*J.M.B. Realty Corp.*, 650 A.2d at 762-63. Anticipating that the majority of the defendants would reject their request, the plaintiffs sought temporary injunctive relief permitting access to the malls on November 9, 1990. Petitioner's Brief, *supra* note 16, at 1. Nonetheless, the Coalition's attempts were unsuccessful at the trial and appellate levels. *Id.* The plaintiffs again sought temporary restraints against the defendants on November 19, yet the Coalition was again denied relief. *Id.* at 2.

[24]*J.M.B. Realty Corp.*, 650 A.2d at 766.

[25]New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp., 628 A.2d 1094 (N.J. Super Ct. Ch. Div. 1991).

[26]*See id.* at 1096. The trial court judge pronounced, "I am of the opinion that they[, the Coalition,] do not even begin to approach the necessary requirements of the First Amendment." *Id.* See *infra* notes 38-81 for a discussion of the relevant federal cases.

on a three part test enunciated in *State v. Schmid*,[27] the court decided that there was no state constitutional violation and, therefore, denied plaintiff's petition.[28] The New Jersey Appellate Division[29] also found in favor of the shopping malls for essentially the same reasons enunciated in the trial court's opinion.[30]

The New Jersey Supreme Court granted certification[31] to determine whether the defendant shopping malls were subject to the free speech provisions of the New Jersey Constitution.[32] The majority held that certain

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[27]423 A.2d 615 (N.J. 1980), *appeal dismissed sub nom.*, Princeton Univ. v. Schmid 455 U.S. 100 (1982). The *Schmid* court announced a three part test to determine whether a private property owner would be subject to the New Jersey Constitution's free speech provisions. *Id.* at 630. The test considered:

> 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 the property in relation to both the private and public use of that property.

Id. See *infra* notes 82-94 and accompanying text for an in-depth discussion of *Schmid*.

[28]*J.M.B. Realty Corp.*, 628 A.2d at 1099. The trial court applied the three factors of *Schmid*, discussed *infra* notes 82-94, and found that: (1) the nature and purpose of shopping centers is commercial; (2) that the public was only invited to the malls to patronize or visit the tenants' businesses; and (3) the purpose of plaintiff's expressional activity was discordant with the private and public uses of the property, which are, ultimately, for the promotion of sales and profits. *Id.* at 1097-99.

[29]New Jersey Coalition Against The War In The Middle East v. J.M.B. Realty Corp., 628 A.2d 1075 (N.J. Super. Ct. App. Div. 1993).

[30]In addition to finding that the *Schmid* test supported a finding for the defendants, the appellate division also ruled that the plaintiff's common law claims were without merit. *Id.* at 1076.

[31]New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp., 636 A.2d 522 (N.J. 1993). The Supreme Court of New Jersey granted certification despite the fact the Gulf War had ceased and, therefore, petitioner's claims were arguably moot. Hence, they potentially did not have standing to continue the suit. The Court may have found, however, that the issues were of significant public importance and capable of repeating yet evading review, *see, e.g.*, Matter of Conroy, 486 A.2d 1209, 1219 (N.J. 1985), thereby permitting the *J.M.B.* court to hear the case.

[32]New Jersey Coalition Against War In the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 760 (N.J. 1994). At the state supreme court level the plaintiff did not raise any federal constitutional claims, basing its petition solely on the free speech provisions of the

shopping malls[33] were bound by the New Jersey Constitution's free speech provisions.[34] Specifically the *J.M.B.* court found that regional shopping malls in New Jersey must permit leafletting on societal issues to take place on the mall premises.[35] The majority further ruled that the center's owners

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New Jersey Constitution and common law grounds. *Id.* at 766.

[33]The *J.M.B.* court limited its holding to regional shopping centers. *Id.* at 780. The definition of a regional shopping center is a mall:

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

Id. at 763 (quoting NATIONAL RESEARCH BUREAU, SHOPPING CENTER DIRECTORY 1994, EASTERN VOLUME (1993) [hereinafter SHOPPING CENTER DIRECTORY]).

Nine of the ten defendants were regional shopping malls. The Mall at Mill Creek, however, was a smaller community shopping center. While determining that in the present matter its holding applied to The Mall at Mill Creek, the court did not decide whether all community malls would be subject to its decision. *Id.* at 780 n.16. A community shopping center:

> is smaller than a regional center and lacks the variety of merchandise available at a regional mall. [It is defined as] one that includes a wide . . . range of facilities for the sale of soft lines (apparel) and hardlines (hardware, appliances, etc.) . . . . It is built around a junior department store, variety store or discount department store although it may have a strong specialty store. The typical size of a community center is 150,00 square feet. In practice a community center can range from 100,000 to 300,000 square feet.

Id. at 763-64 (quoting SHOPPING CENTER DIRECTORY).

[34]*Id.* at 760. Chief Justice Wilentz delivered the opinion of the court and was joined by Justice Handler, Justice O'Hern, and Justice Stein. *Id.* at 796.

[35]The *J.M.B.* court limited its holding to regional shopping centers and did not decide whether its ruling would pertain to smaller community shopping malls. *Id.* at 780 n.16. See *supra* note 33 and accompanying text for the definitions of regional and community shopping malls.

In addition, the court determined that only leafletting and its accompanying speech would have to be constitutionally permitted. *J.M.B. Realty Corp.*, 650 A.2d at 782. The holding did not encompass "bullhorns, megaphones, . . . soapbox [demonstrations,] . . . placards, pickets, parades, and demonstrations." *Id.*

could implement reasonable time, place, and manner restrictions on the expressive activity.[36]

III. THE DEVELOPMENT OF THE RIGHT OF EXPRESSION ON PRIVATE LANDS IN FEDERAL AND NEW JERSEY CONSTITUTIONAL LAW

The Supreme Court of the United States has oscillated in its decisions regarding whether various types of private property are subject to constitutional restrictions.[37] In *Marsh v. Alabama*[38] the Supreme Court determined that certain private property owners were bound by the United States Constitution.[39] In *Marsh*, a Jehovah's Witness was distributing religious information in the shopping district of a privately owned company-

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Further, the *J.M.B.* court limited the scope of it decision to speech relating to political and societal issues. *Id.* at 781. See *supra* note 13 and accompanying text for an explanation and reasoning on why social and political speech is given a preferred position in the hierarchy of speech.

[36]The *J.M.B.* court determined that the defendant could still fix reasonable time, place, and manner restrictions on the expressive activity of those who enter the property. *J.M.B. Realty Corp.*, 650 A.2d at 760. For a general discussion of what equates to reasonable time, place, and manner restrictions see NOWAK & ROTUNDA, *supra* note 8, § 16.47, at 1087-1106. For an analysis of what may constitute reasonable restrictions in the context of shopping malls see *infra* note 158 and accompanying text.

[37]*See* Hudgens v. National Labor Relations Bd., 424 U.S. 507 (1976) (determining that privately owned shopping malls are not constitutionally required to permit any speech); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (ruling shopping centers do not have to allow expressive activity that does not pertain to the mall's operations); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) (asserting that a privately owned shopping malls must permit speech that relates to issues concerning the malls); Marsh v. Alabama, 326 U.S. 501 (1946) (holding that a privately owned company-town is subject to the First Amendment of the United States Constitution).

[38]326 U.S. 501 (1946).

[39]*Id.* at 509. In a previous decision, the New Jersey Supreme Court interpreted *Marsh* as establishing the "public function doctrine." *See* State v. Schmid, 423 A.2d 615, 622 (N.J. 1980), *appeal dismissed sub nom.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982). The New Jersey Court interpreted this doctrine as meaning a private actor could be subject to the First Amendment if "its property is sufficiently devoted to public uses." *Id.* (citing *Marsh*, 326 U.S. at 506).

town.[40] When she refused to leave the town she was arrested and eventually convicted of trespass.[41]

Writing for a majority of the Court, Justice Black held that, pursuant to the First and Fourteenth Amendments, a company-owned town could not prevent the distribution of certain literature through the enforcement of state trespass laws.[42] The *Marsh* Court considered the type of privately owned property in the case[43] and determined that First Amendment considerations prevailed when balancing the private property owner's rights with those of

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[40]*Marsh*, 326 U.S. at 503. The name of the company-owned town in *Marsh* was Chickasaw, Alabama, and it was the property of the Gulf Shipbuilding Corporation. *Id.* at 502. The Court described the town of Chickasaw as:

> The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy . . . paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office . . . . In short . . . there is nothing to distinguish them [, the town and its shopping district,] from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Id. at 502-03.

[41]*Id.* at 503-04.

[42]*Id.* at 509. The *Marsh* Court declared:

> In our view the circumstance that the property rights to the premises . . . were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute.

Id.

[43]*Id.* at 506. Justice Black found that the type of property was an important consideration in determining the outcome of he litigation. *Id.* The Justice stated, "[O]wnership does not always mean absolute dominion. 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." *Id.* (emphasis added).

the individual's right to free speech.[44] Justice Black also found that the company-owned town had usurped a public function, that of a municipal corporation.[45] The Court, therefore, overturned the trespass conviction.[46]

Twenty-two years later, the Supreme Court extended the *Marsh* rationale to shopping centers in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*.[47] In *Logan Valley*, a labor union sought the right to picket[48] a supermarket located within the respondent shopping center because the store had hired non-union employees.[49] Justice Marshall,

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[44]*Id.* at 509. The *Marsh* Court noted that in balancing the rights of the property owners with those of free speech, "the latter [occupies] a preferred position." *Id.* Likewise, many state courts engage in a balancing test when determining whether expressive activity or private property rights will prevail. *See, e.g.*, New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 761 (N.J. 1994).

In *Marsh*, the Court also discussed the expressive rights of the town's citizens in receiving information, declaring "[t]o act as good citizens they must be informed . . . [and] to be properly informed their information must be uncensored." *Marsh*, 326 U.S. at 508.

[45]*Id.* at 506. Justice Black, in comparing company owned towns with other types of privately held land, posited that since certain facilities are constructed and run mainly for the public benefit "their operation is essentially a *public function*, it is subject to state regulation." *Id.* (emphasis added) (citations omitted).

[46]*Id.* at 509-10.

[47]391 U.S. 308 (1968).

[48]Picketing is not considered purely expressive activity because it encompasses both speech and conduct, and hence can be "more easily regulated than speech alone." *See id.* at 313-15; *see also* Cox v. Louisiana, 379 U.S. 559, 564 (1965) (noting that picketing is "expression mixed with particular conduct," and is therefore not "free speech alone"). For a general discussion and criticism of this "speech plus" categorization, see TRIBE, *supra* note 6, § 12-7, at 825-32.

[49]*Logan Valley Plaza*, 391 U.S. at 311-12. The shopping mall, Logan Valley Plaza, had opened in 1965 and was situated near Altoona, Pennsylvania. *Id.* at 310-11. It was located near a highway and consisted of two tenants, but several other commercial tenants eventually moved into the Plaza. *Id.* The name of the supermarket was Weis Markets. *Id.* The petitioners began picketing Weis soon after it had opened for business on December 17, 1965, carrying signs declaring the supermarket was non-union. *Id.* at 311. The peaceful protest was carried on almost exclusively in a pickup area next to the supermarket until the petitioners were enjoined from picketing in late December, 1965. *Id.* at 311-12.

writing for the Court, held that the shopping mall was subject to the strictures of the First Amendment, hence the picketing was permitted.[50]

After an extensive comparison with *Marsh*,[51] the Court concluded the shopping center in *Logan Valley* was the functional equivalent of a downtown business district.[52] Justice Marshall also determined that limiting the petitioner's expressive activity to areas on the shopping malls perimeters would be unduly restrictive and somewhat dangerous.[53] Nevertheless, the majority permitted the center's owners to place reasonable regulations on the

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[50]*Id.* at 319-20. Justice Marshall wrote:

> [B]ecause the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," the State may not delegate the power, . . . wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner . . . generally consonant with the use to which the property is actually put.

Id. (citations omitted).

[51]*Id.* at 317-18. Justice Marshall noted that the shopping center in *Logan Valley* was similar to the business block in *Marsh* in that both had: (1) like perimeters; (2) substantial commercial enterprises; (3) major roadways nearby; (4) sidewalks for pedestrians to use; (5) parking areas; (6) clearly marked roads for motor vehicle traffic; and (7) unrestricted access to the property for the general public. *Id.*

[52]*Id.* The Court concluded that the shopping plaza in *Logan Valley* was "clearly the functional equivalent" of a business district. *Id.* The *Logan Valley* Court's analysis sparked strong controversy as to whether the *Marsh* decision applied only to a privately held area that was the functional equivalent of a public municipality or also to privately owned property that was the functional equivalent of a public business district. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 520 (1976) (asserting implicitly that *Marsh* only applied if the private property was the functional equivalent of an entire municipality, instead of a mere commercial district); *see also* Ragosta, *supra* note 2, at 28 (implying that the public function analysis should only be utilized when the owner provides the entire spectrum of municipal services).

[53]*Logan Valley Plaza*, 391 U.S. at 321-23. The majority observed, among other things, that if the petitioners had to picket on the outside entrance of the shopping center their message would be "virtually indecipherable" from within the shopping center's grounds. *Id.* at 322. Further, the Court noted that walking along the well-traveled highway was potentially hazardous. *Id.*

petitioner's speech[54] and limited its holding to speech that was directly related to an activity or issue at the shopping center.[55]

In *Lloyd Corp. v. Tanner*,[56] the Court considered the issue left unresolved by *Logan Valley*, whether a shopping mall was required to permit expressive activity unrelated to the mall's operations. In *Lloyd*, a group advocating peace was distributing leaflets pertaining to the Vietnam war and draft at the petitioner shopping mall.[57] The group was requested to, and ultimately did, leave the establishment, but subsequently sought judicial relief.[58] The majority in *Lloyd* held that the mall was not dedicated to the

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[54]*Id.* at 320-22. Justice Marshall declared that the center's owners could place reasonable time, place, and manner restrictions on the petitioner's expressive activity. *Id.*

[55]*Id.* at 320 n.9. In other words, the *Logan Valley* decision applied solely to expressive activity whose message directly concerned a practice at the mall. *Id.* In *Logan Valley*, the speech pertained to the labor practices of the supermarket. *Id.* Thus, the Court purposely did not address the issue of speech that was not related "to the use to which the shopping center property was being put." *Id.* One commentator has criticized this part of the Court's opinion as superfluous and unnecessarily opening up another issue in light of Justice Marshall's reasoning that the center in question was the functional equivalent of a business district. *See* McCauley, *supra* note 6, at 702-03.

In a vigorous dissent, Justice Black, author of the *Marsh* opinion, could not understand, even with the "wildest stretching of *Marsh*," how the *Logan Valley* shopping center could "ever be considered dedicated to the public or the pickets." *Logan Valley*, 391 U.S. at 328 (Black, J., dissenting). The dissent stated that, in following majority's reasoning, it would have been just as reasonable to allow the picketers "to stand on . . . check out counters." *Id.* at 329 (Black, J., dissenting).

Justice Black reasoned that the Pennsylvania state court's injunction did not violate the First Amendment, and that the *Marsh* holding was only meant to apply to the unique situation involving a entire company-owned town, not merely a shopping center that functioned as a commercial district. *Id.* at 329-30 (Black, J., dissenting). The dissent could find very few similarities between the shopping center and the company-owned town, and concluded that the shopping mall "sounds like a very strange 'town' to me." *Id.* at 331 (Black, J., dissenting).

[56]407 U.S. 551 (1972).

[57]*Id.* at 556. The shopping mall in *Lloyd*, the Lloyd Center, was located in Portland, Oregon, and consisted of 50 acres, including 20 acres of parking lots, 60 commercial tenants, an auditorium, and a skating rink. *Id.* at 553. The center was also bounded and crossed by several public streets and sidewalks. *Id.* The respondent group entered the mall's premises on November 14, 1968, and proceeded to distribute literature opposing the war in Vietnam. *Id.* at 556.

[58]*Id.* The respondents were asked to leave by the center security guards, and the leafletters complied to avoid being arrested. *Id.*

public sufficiently enough to compel the mall's tolerance of the respondent's expressive activity.[59]

The majority explained that, unlike *Logan Valley* where the picketing was based on the labor practices of a mall tenant, the handbilling in *Lloyd* was not related to an activity directly concerning the shopping mall since it concerned the federal government's Vietnam policy.[60] The *Lloyd* Court also found that there existed adequate alternate forums for the respondent group's communicative activity.[61] Finally, the majority in *Lloyd* rejected

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[59]*Id.* at 570. Justice Powell authored the opinion for the majority. *Id.* at 552. The majority in *Lloyd* specifically ruled, "[W]e hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." *Id.* at 570. For a general critique of *Lloyd*, see *The Demise of* Logan Valley, *supra* note 5.

[60]*Lloyd Corp.*, 407 U.S. at 564. The *Lloyd* Court asserted, "The handbilling by respondents in the malls of Lloyd Center [has] no relation to any purpose for which the center was built and being used." *Id.* Essentially, the Court was arguing that the respondents' message was one of general protest in regard to the Vietnam war, as opposed to communication solely concerning Lloyd Center's operations or patrons. *Id.* In comparison, the labor union in *Logan Valley* was protesting an issue directly related to the shopping center: the employment practices of one of its tenants. *See* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 320 n.9 (1968). This area of the Court's analysis is similar to the third prong of the test enunciated in State v. Schmid, 423 A.2d 615, 630 (N.J. 1980), *appeal dismissed sub nom.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982), which considers, "the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." *Schmid*, 423 A.2d at 630. For a discussion of the *Schmid* factors, see *infra* notes 88-90 and accompanying text.

Dissenting in *Lloyd*, Justice Marshall declared that the respondent's speech was consistent with and directly related to the uses of the shopping mall. *Lloyd Corp.*, 407 U.S. at 578-79 (Marshall, J., dissenting). Justice Marshall posited that since Lloyd Center had invited a host of activities to be performed on its premises, including those with political and social undertones, it had opened its doors to First Amendment activity in general. *See id.* at 578 (Marshall, J., dissenting) ("Lloyd Center had deliberately chosen to open its private property to a broad range of expression and that having done so it could not constitutionally exclude respondents . . . .").

[61]*Lloyd Corp.*, 407 U.S. at 566-67. The *Lloyd* Court asserted that since the mall was surrounded by public sidewalks and since all persons exiting or entering the malls had to do so on public property, that "adequate alternative avenues of communication exist[ed]." *Id.* at 567. According to the majority, the availability of alternate forums was also a distinguishing factor in comparison to *Logan Valley* where the Court found the proposed alternate channels to be hazardous and impractical for expressive activity. *Id.* at 566. *Cf. Logan Valley Plaza*, 391 U.S. at 321-23. For the *Logan Valley* Court's explanation of the inadequacy of the potential alternate forums in that case, see *supra* note 53.

the respondents' argument that the shopping center was the functional equivalent of a business district.[62] In fact, the *Lloyd* Court implied that the functional equivalent analysis would only be utilized when a private entity comprised an entire municipality, as in *Marsh*, instead of merely a business district, as in *Logan Valley*.[63]

The Supreme Court of the United States retreated further from its decisions protecting expression in *Hudgens v. NLRB*.[64] In *Hudgens*, the Court determined that the *Logan Valley* decision did not survive *Lloyd*.[65] Accordingly, the *Hudgens* Court concluded, privately owned shopping malls were not bound by the First Amendment.[66]

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[62]*Lloyd Corp.*, 407 U.S. at 568-69.

[63]*Id.* By utilizing this more stringent test of when private property will be the "functional equivalent" of public property, and hence be subject to the United States Constitution, the Court seems to have adopted the position advocated by Justice Black in *Logan Valley*. *See Logan Valley Plaza*, 391 U.S. at 329-30 (Black, J., dissenting) (arguing the functional equivalent analysis is only appropriate when a private entity hold title to an entire municipality, as in *Marsh*).

Justice Marshall, joined by Justice Douglas, Justice Brennan, and Justice Stewart, wrote a passionate dissent in *Lloyd*. *Lloyd Corp.*, 407 U.S. at 570 (Marshall, J., dissenting). The dissent disputed the majority's analysis and found that the respondent's handbilling was directly related to the shopping center's operations. *Id.* at 578-79 (Marshall, J., dissenting). See *supra* note 60 for Justice Marshall's reasoning on this matter. In any event, Justice Marshall asserted that when balancing the rights of the private property owners with those of free speech, the latter must prevail because it holds a "preferred place" in our system of liberties. *Lloyd Corp.*, 407 U.S. at 580 (Marshall, J., dissenting).

[64]424 U.S. 507 (1976).

[65]*Id.* at 518 ("[B]ut the fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley* . . . [and] the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case."). On the other hand, Justice Powell, in a concurring opinion, reasoned that *Logan Valley* survived *Lloyd*, yet the Justice declared sound constitutional doctrine required the overturning of *Logan Valley* in the present instance. *Id.* at 523-24 (Powell, J., concurring).

[66]*Id.* at 513 ("[I]t is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." (citation omitted)). For a general criticism of the Court's approach in *Hudgens* see TRIBE, *supra* note 6, § 12-25, at 999-1000 (critiquing the *Hudgens* Court's "wooden approach" in the public forum area by setting forth a "mechanical" rule to follow in future cases instead of ruling according to the particular facts presented in each case).

In *Hudgens*, the Court denied a labor union's attempt to picket a tenant of a shopping mall on the center's premises.[67] Justice Stewart, writing for the majority, ruled that the union could seek statutory relief, but found that the group had no viable cause of action under the United States Constitution.[68]

The *Hudgens* Court concluded that the privately owned malls did not meet the state action requirement of the United States Constitution.[69] The Court, reiterating its position in *Lloyd*, asserted that a private shopping center's activity would only rise to the level of governmental action if it was the functional equivalent of an entire municipality.[70] Moreover, Justice Stewart posited that a private entity would only be able to regulate speech in a content-neutral manner,[71] thereby invalidating the distinction made by the

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[67]*Hudgens*, 424 U.S. at 508-11. The mall, the North DeKalb Shopping Center, located in Atlanta, Georgia, accommodated 60 tenants and over 2,500 motor vehicles. *Id.* at 509. In January, 1971, employees at a shoe company's warehouse went on strike. *Id.* The striking employees attempted to picket one of the shoe company's retail stores located within the North DeKalb Shopping Center, however, the shopping center manager thwarted the attempts by threatening an arrest for trespass if the picketers did not desist. *Id.* The employee's union subsequently sought judicial relief, basing its complaint on both constitutional grounds and the National Labor Relations Act. *Id.* at 509-10.

[68]*Id.* at 521. The *Hudgens* Court concluded that the National Labor Relations Act was the sole source for determining the outcome of the litigation between the parties. *Id.* Conversely, the dissent posited that the labor act possibly provided a sufficient basis for disposing of the case. *Id.* at 525-32 (Marshall, J. dissenting). The dissent argued, therefore, that the First Amendment issue should not have been addressed by the majority based on the principle "that constitutional questions should not be decided unnecessarily." *Id.* at 531 (Marshall, J., dissenting) (citations omitted). For a declaration of this principle in New Jersey constitutional law, see State v. Saunders, 381 A.2d 333, 347 (N.J. 1977) (Clifford, J., dissenting) ("[Courts should follow the] oft-expressed principle that constitutional questions should not be reached and resolved unless absolutely imperative in the disposition of the litigation.").

[69]*Hudgens*, 424 U.S. at 513. In general, the United States Constitution only proscribes and regulates government, as opposed to private action. See *supra* note 8 and accompanying text for a general discussion of the state action doctrine.

[70]*Id.* at 520.

[71]*Id.* As a general rule, when the government is regulating expressive activity it must do so in a content-neutral manner, thus, it cannot govern speech on the basis of its message. *See* Boos v. Barry, 485 U.S. 312 (1988) (striking down a content-based statute that prohibited signs within the vicinity of a foreign embassy that brought the foreign government into "public odium"); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1985) (finding that the government would be in violation of the

Court in *Logan Valley* and *Lloyd* between expressive activity directly related to the mall's operations and communication not aimed at a center's operations.[72]

Shortly thereafter, the Supreme Court of the United States addressed the issue of whether a state's constitution, as opposed to the United States Constitution, could constitute the basis for permitting expressive activity at a shopping mall.[73] In *PruneYard Shopping Center v. Robins*,[74] the Court considered a California Supreme Court decision,[75] based on the California Constitution, granting high school students the right to solicit signatures at

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First Amendment when it suppresses a speaker solely on the basis of his point of view); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that [the] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). For a general discussion of the content-neutral requirement, see TRIBE, *supra* note 6, § 12-3, at 794.

[72]*Hudgens*, 424 U.S. at 520. The *Hudgens* Court noted, however, that speech which was outside the purview of the First Amendment could be prohibited *in toto*. *Id.* at 520 n.9. See *supra* note 2 and accompanying text for areas of expression which are considered to be outside the scope of constitutional protection. The dissent, on the other hand, argued that since shopping malls did not pose any of the dangers of censorship as encountered with the government regulation, some content-based regulation was permissible at the centers. *Hudgens*, 424 U.S. at 541-42 (Marshall, J., dissenting).

As a threshold matter, Justice Marshall, writing for the dissent, asserted that the case should not have even reached a constitutional disposition. *Id.* at 525-32 (Marshall, J., dissenting). See *supra* note 68 for the dissent's reasoning regarding the constitutional issue. Nevertheless, the dissent posited that the labor union had a sufficient First Amendment claim if the Court was going to address the constitutional issues presented in the litigation. *Hudgens*, 424 U.S. at 543 (Marshall, J., dissenting). The *Hudgens* dissent voiced concern that traditional forums of expression needed to remain open regardless of who owned them. *Id.* at 539 (Marshall, J., dissenting). In further support of its position, the dissent noted that private property is not always held for private uses, and the more a private owner opened her property for public use the more her property became subject to constitutional limitations. *Id.* at 542-43 (Marshall, J., dissenting).

[73]*See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). For a general discussion of a state's ability and approach when breaking from the federal constitutional precedent, see *supra* note 9 and accompanying text.

[74]447 U.S. 74 (1980).

[75]*See* Robins v. PruneYard Shopping Ctr., 592 P.2d 341 (Cal. 1979), *aff'd*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). For an in-depth analysis of the California Supreme Court's opinion in *PruneYard*, see Bowman, *supra* note 6, at 641.

a privately owned shopping center.[76] Writing for the Court, Justice Rehnquist held that a state constitutional provision permitting speech at such a shopping center did not violate the mall owner's constitutional rights.[77]

The Court first noted that a state could utilize its sovereign rights or police powers to interpret its constitution as granting greater individual liberties than those furnished by the United States Constitution.[78] Justice

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[76]*PruneYard Shopping Ctr.*, 447 U.S. at 78. The petitioner shopping center was situated in Campbell, California, and consisted of over 75 commercial tenants. *Id.* at 77. The respondents were high school students who had set up a table at the mall to solicit signatures in support of their opposition to a United Nation's resolution denouncing Zionism. *Id.* The respondents left the center's premises when requested to do so by a PruneYard security guard. *Id.* The students, however, filed a lawsuit in the California state courts seeking to enjoin the mall from denying them access to the shopping center. *Id.*

The Supreme Court of California found that the high school students' expressive rights infringed upon by the mall, holding that the California Constitution permits "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." *PruneYard Shopping Ctr.*, 592 P.2d at 347. The California Supreme Court based its decision on the free speech and petition clauses of the California Constitution. *Id.* at 346-47.

[77]*PruneYard Shopping Ctr.*, 447 U.S. at 88. One commentator has averred that *PruneYard*, in effect, "opened the door for state courts to examine their own constitutions and to give to the broadly worded free-speech provisions their full expansive meanings." Hart, *supra* note 7, at 1474.

[78]*PruneYard Shopping Ctr.*, 447 U.S. at 81 (citing Cooper v. California, 386 U.S. 58, 62 (1967) (other citations omitted)). For a discussion of when state courts will diverge from federal constitutional precedent, see *supra* note 9.

Rehnquist then found no merit in the shopping center owner's takings,[79] due process,[80] or free speech claims.[81]

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[79]*PruneYard Shopping Ctr.*, 447 U.S. at 83. The Fifth Amendment of the United States Constitution provides, in part, "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. The Takings Clause or eminent domain power permits the government to take private property provided that it supplies the owner of the property with adequate compensation. *See* TRIBE, *supra* note 6, §§ 9-1 - 9-6, at 587-607. Further, the takings provision has been held to be applicable to the states. *See* Chicago, B & Q R.R. v. Chicago, 166 U.S. 226, 241 (1897).

There are generally two types of takings, an actual physical taking and a regulatory taking. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (asserting that if a regulation denied an owner all economically viable use of his land that a taking had occurred); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (finding a statute which required landlords to permit cable companies to install cable wires in their buildings constituted a permanent physical occupation and, hence, was a taking); *see also* Frederick W. Schoepflin, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133, 147 (1989) (discussing the regulatory and physical seizure forms of takings). In *PruneYard*, the Court seemed to have focused on the regulatory takings aspect instead of the actual physical takings theory. *See PruneYard Shopping Ctr.*, 447 U.S. at 84 (comparing *PruneYard* to Kaiser Aetna v. United States, 444 U.S. 164 (1979), a case based on a regulatory takings).

The petitioner shopping mall in *PruneYard* contended that a taking had occurred because the center had lost one of its essential property rights, the right to exclude others. *Id.* at 82. While acknowledging that the Takings Clause applies to any one of the entire group of property rights, Justice Rehnquist asserted that it was well-established that not every government act which caused an injury to property rights amounted to a constitutional taking. *Id.* at 82 n.6 (citations omitted). The *PruneYard* Court then determined if the California Supreme Court decision had amounted to a taking by deciding if its ruling had forced the shopping mall to bear a public burden which should have been borne by the public. *Id.* at 83 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

Applying this standard, the *PruneYard* Court concluded that the decision granting petitioner's a right to expressive activity on the mall property, "clearly [did] not amount to an unconstitutional infringement of appellant's property rights under the Takings Clause." *Id.* The Court's decision on takings, if decided in the present, may have a different outcome in light of four more recent Takings Clause cases. *See* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); *Loretto*, 458 U.S. at 419; Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); *see also infra* note 150.

[80]*PruneYard Shopping Ctr.*, 447 U.S. at 84-85. The Fourteenth Amendment states in part, "No State shall . . . nor shall any State deprive any person of life, liberty, or property without due process of the law." U.S. CONST. amend. XIV, § 1. Since the shopping mall was arguing it had been denied a property right, the *PruneYard* Court engaged in a rational basis review of the California's Supreme Court's action. *PruneYard*, 447 U.S. at 84-85.

This standard of review requires "that the law not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained." *Id.* at 85 (quoting Nebbia v. New York, 291 U.S. 502, 523, 525 (1934)). Justice Rehnquist summarily disposed of the PruneYard mall's due process argument, finding that the state had a legitimate interest in furnishing greater rights of petition and free speech than those conferred by the United States Constitution. *Id.*

[81]*PruneYard Shopping Ctr.*, 447 U.S. at 87-88. See *supra* note 1 and accompanying text for the pertinent language of the First Amendment pertaining to free speech. The mall owners relied heavily on Wooley v. Maynard, 430 U.S. 705 (1977), in contending that their own First Amendment rights had been violated by permitting the student's expressive activity on the mall grounds. *PruneYard*, 447 U.S. at 85-86.

In *Wooley*, Maynard argued that his free speech rights had been violated because New Hampshire required the motto "Live Free or Die" to be imprinted on his license plate. *Wooley*, 430 U.S. at 707. The *Wooley* Court declared that the state was requiring Maynard to use his property as a "mobile billboard" for the state's message, and, thus, it was violating the petitioner's First Amendment right, namely "the right to refrain from speaking at all." *Id.* at 715.

Justice Rehnquist distinguished *Wooley* from *PruneYard* on several points. *PruneYard Shopping Ctr.*, 447 U.S. at 87. First, as opposed to the petitioner's auto in *Wooley*, the shopping center had not limited its premises to private use, but instead had opened up its property for public use. *Id.* Hence, Justice Rehnquist concluded, the public would probably not identify the views of the high school students with those of the center's owners. *Id.* Further, in *PruneYard*, the state was not prescribing a particular message, thus, there was not a serious threat of government bias in favor of or against a particular message. *Id.* Finally, the *PruneYard* Court announced that the shopping mall could easily disavow any association with a particular message by posting a disclaimer wherever the handbillers were located. *Id.* Likewise, the *PruneYard* Court also found its decisions in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1973), to be inapposite. *Id.* at 87-88. For the foregoing reasons, the Court concluded the shopping mall owners' First Amendment rights had not been infringed upon by the California Supreme Court's decision. *Id.* at 88. For a further analysis distinguishing *PruneYard* from *Wooley*, see TRIBE, *supra* note 6, § 12-25, at 1001.

Nevertheless, Justice Powell, in concurring opinion, expressed some concern about possible impingement on the mall owner's free speech rights. *PruneYard Shopping Ctr.*, 447 U.S. at 97 (Powell, J., concurring). The concurrence reasoned that the mall owners' First Amendment right to maintain their beliefs without public disclosure could be threatened in two particular instances. *Id.* at 97-100 (Powell, J. concurring). First, Justice Powell theorized that when listeners were likely to identify an expressed opinion with that of a property owner, the owner may be compelled to speak when she would have preferred to remain silent. *Id.* at 99 (Powell, J., concurring). In addition, the concurrence posited an owner may be forced to speak when confronted with views she finds "morally repugnant," such as when a religious-based organization would have to permit speech by an organization advocating abortion. *Id.* at 99-100 (Powell, J., concurring). Justice Powell concluded, however, that since the center in *PruneYard* was so prodigious it would be unlikely that any customers would associate the message of the high school students

Against this federal constitutional landscape, the Supreme Court of New Jersey first considered whether the New Jersey Constitution's free speech provisions were applicable against private actors in *State v. Schmid*.[82] In *Schmid*, the petitioner, Chris Schmid, was arrested and convicted of trespass for distributing political materials on the Princeton University campus.[83] Schmid appealed his conviction on both federal and state constitutional grounds,[84] but the court concluded that it would not decide whether Schmid's conviction violated the First Amendment.[85] The majority asserted, however, that the New Jersey Constitution granted greater speech protection than its federal counterpart,[86] and declared that the state

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with that of the shopping center. *Id.* at 101 (Powell, J., concurring).

[82]423 A.2d 615 (N.J. 1980), *appeal dismissed sub nom.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

[83]*Id.* at 616-18. Princeton University is a non-profit, private institution of higher education situated in Princeton, New Jersey. *Id.* at 616. At the time of Schmid's arrest, Princeton had general regulations which required University permission prior to off-campus organizations distributing materials on the University's grounds. *Id.* at 617. Petitioner, who was not a student at Princeton, was a member of the United States Labor Party. *Id.* The information he was distributing pertained to Newark, New Jersey's mayoral campaign and the Labor Party. *Id.* at 616.

[84]*Id.* at 618.

[85]*Id.* at 618-24. In a concurring and dissenting opinion, however, Justice Pashman posited that the handbiller could potentially have had First Amendment protection. *Id.* at 633 (Pashman, J., concurring in part and dissenting in part). Initially, Justice Pashman argued that the defining of property rights in the common law and the enforcement of those rights through the criminal trespass statutes equated to government action, thereby satisfying the state action requirement of the United States Constitution. *Id.* at 635 (Pashman, J., concurring in part and dissenting in part); *see also* TRIBE, *supra* note 6, § 12-25, at 999 (positing that enforcement of a state's trespass law fulfills the demands of the state action doctrine). For an explanation and discussion of the state action doctrine, see *supra* note 8 and accompanying text. The Justice then asserted that it would be necessary to determine if Princeton had dedicated its property to the public use to such an extent that subjected it to the First Amendment. *Schmid*, 23 A.2d at 635-36 (Pashman, J., concurring in part and dissenting in part).

[86]*Id.* at 626; *see also* Freedman v. New Jersey State Police, 343 A.2d 148, 150 (N.J. Super. Ct. Law Div. 1975). See *supra* note 1 and accompanying text for the provisions relating to expression in the New Jersey Constitution. Although, the Constitution of New Jersey does grant an affirmative right of speech in comparison to the United States Constitution, *see supra* note 1, one commentator has questioned whether this distinction is "material or merely semantic." Hart, *supra* note 7, at 1469 (discussing the Texas

Constitution was applicable to non-governmental entities.[87] Justice Handler, writing for the majority, held that Princeton, despite being a private university, was within the purview of the New Jersey Constitution and had violated the petitioner's free speech rights.[88]

In determining when a private actor was bound by the New Jersey Constitution, the court invoked a three-pronged[89] balancing test.[90] First,

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Constitution's free speech requirements, which are nearly identical to New Jersey's, in light of the United States Constitution). *But see* Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980) (finding that the California Constitution's free speech requirements, which are very similar to those in New Jersey's Constitution, were broader than the language of the First Amendment).

The *Schmid* court announced that, even if the state and federal constitutions contained identical language, the state court was still free to give its constitution a different reading than its federal counterpart. *Schmid*, 423 A.2d at 626 n.8. Due to this indecisiveness in its interpretation of the New Jersey's free speech provisions, one commentator has labeled this aspect of the court's analysis as "ambivalent." *See* William Burret Harvey, *Private Restraint of Expressive Freedom: A Post-*PruneYard *Assessment*, 69 B.U. L. REV. 929, 935 (1989).

[87]*Schmid*, 423 A.2d at 628 ("[T]he rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well."). In comparison, the United States Constitution is limited by the state action requirement. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." (citations omitted)). For a discussion of the state action doctrine, see *supra* note 8.

[88]*Schmid*, 423 A.2d at 633. For an in-depth overview and discussion of the *Schmid* decision, see Theodore D. Moskowitz, Note, *State Constitution Creates Right of Access to Private Property Independent of Federal Constitution*, 12 SETON HALL L. REV. 76 (1981).

[89]*Id.* at 630. The *Schmid* court announced that the three elements to be considered were:

> 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.

Id. The New Jersey courts do not look merely at the sum of the favorable factors to determine whether the scale tips in favor of speech, but they also consider the *quality* of each element. *See, e.g.*, Planned Parenthood of Monmouth v. Cannizzaro, 499 A.2d 535, 540 (N.J. Super. Ct. Ch. Div. 1985).

the court inquired into the private property's nature and purpose, its "normal use," and concluded that expression was necessary to Princeton University's primary purpose, the pursuit of truth and knowledge.[91] Next, the *Schmid* court analyzed the nature and extent of the public's invitation to use the property, and asserted that Princeton University encouraged substantial public participation in its academic life.[92] Finally, Justice Handler posited that the petitioner's dissemination of political material was not inconsistent with the University's public and private uses of its facilities.[93] Though finding that

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[90]*Schmid*, 423 A.2d at 628 ("[T]he heart of the problem [is] . . . the need to balance within a constitutional framework legitimate interests in private property with individual freedoms of speech and assembly."). Justice Handler further expounded that, "[A]s private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is actuated, in effect a counterbalancing between expressional and property rights." *Id.* at 629 (quoting Marsh v. Alabama, 326 U.S. 501, 506 (1946)).

Despite the majority's assertion that it was utilizing a balancing test, Justice Schreiber, in a concurring opinion, questioned whether the Court was actually relying on a balancing test or if it was using a "dedication to the public" standard. *Id.* at 637 (Schreiber, J., concurring).

[91]*Id.* at 630-31. The *Schmid* court declared that unrestrained inquiry and expression were necessary to achieve Princeton University's utmost purpose, the pursuit and discovery of truth and knowledge, and the dissemination of such knowledge to the "outside world." *Id.* at 631.

[92]*Id.* Justice Handler observed that because the University had committed its property and resources to an educational objective, it anticipated considerable public involvement in its academic life. *Id.* In fact, the court noted that Princeton University encouraged complete exposure of the University community to the "public at large." *Id.*

The issue raised by the second factor of the court's analysis is whether the University could ultimately take affirmative steps to narrow the scope of its public invitation or whether its invitation would remain constant due to its inherent educational goals. *Id.* at 631-32. The New Jersey Supreme Court has apparently determined that the University could subsequently reduce the extent of its invitation through its action. *See* New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 776 (N.J. 1994) ("We have no doubt that . . . Princeton itself could so change its mission, commitment, and policies as to bring into question the continued existence of the free speech right . . . ."). *But see* Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (en banc).

[93]*Schmid*, 423 A.2d at 630-31. The majority in *Schmid* asserted that there was no evidence that the petitioner's leafletting disrupted Princeton University's operations, and, therefore, it was not incompatible with the University's educational goals. *Id.* at 631. In further support of its position, the *Schmid* court noted that the President of Princeton University deemed it "essential" for educational purposes "to expose students and faculty members to a wide variety of views on controversial questions . . . ." *Id.* at 631 n.11 (quoting William G. Bowen, *The Role of the University as an Institution in Confronting*

the three factors weighed in favor of the petitioner's expressive activity, the majority ruled that Princeton University could prescribe reasonable time, place, and manner regulations on Schmid's speech.[94]

IV. THE NEW JERSEY CONSTITUTION AS A BASIS FOR PROTECTING FREE SPEECH AT PRIVATELY OWNED SHOPPING MALLS

Recently, in *New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corporation*,[95] the Supreme Court of New Jersey addressed whether the New Jersey Constitution's free speech provisions applied to privately owned shopping malls. Writing for a divided court,[96] Chief Justice Wilentz held that regional shopping malls[97] were constitutionally required to permit leafletting, and its normal accompanying speech, relating

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External Issues, PUB., Jan. 6, 1978).

[94]*Id.* at 630. Justice Handler found that it was at this point in the analysis, *after* the determination that there were constitutionally protected speech rights, that the court would consider the existence of alternate forums for expression in determining whether the property owner's regulations were reasonable. *Id.* In contrast, the Supreme Court of the United States considers the existence of adequate alternate means in deciding whether a constitutional right of expression has been created. *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) ("It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.").

Moreover, while *Schmid* was being litigated, Princeton University had rewritten its regulations to provide greater specificity, in comparison to the general provisions the petitioner had been convicted under, as to when, where, and how a person could communicate on University premises. *Schmid*, 423 A.2d at 617 n.2. In fact, the *Schmid* court declared that the revised regulations most likely did not violate the New Jersey Constitution as reasonable standards governing expressive activity. *Id.* at 633.

[95]650 A.2d 757 (N.J. 1994).

[96]*Id.* at 760. Writing for the four-to-three majority, Chief Justice Wilentz was joined by Justices Handler, O'Hern, and Stein. *Id.* at 796. Justice Garibaldi authored a dissenting opinion in which Justice Clifford and Judge Herman Michels, of the New Jersey Appellate Division, joined. *Id.* Judge Michels heard the case due to Justice Pollock's recusal in the matter. *See* Russ Bleemer, *Leafletters Now Await Rules — and a Possible Appeal*, N.J.L.J., Dec. 26, 1994, at 5.

[97]For a definition of regional shopping malls, see *supra* note 33 and accompanying text.

to societal issues.[98] The *J.M.B.* court noted, however, that the shopping centers' owners could place reasonable time, place, and manner restrictions on the communicative activity.[99]

A. CHIEF JUSTICE WILENTZ DETERMINES THAT SHOPPING MALLS HAVE REPLACED DOWNTOWN BUSINESS DISTRICTS

Chief Justice Wilentz began his analysis by recognizing that shopping malls compete with, and have in large part, displaced downtown business districts as a place where large numbers of people congregate.[100] First, the *J.M.B.* court relied on statistical evidence to demonstrate the growth of shopping centers within the past thirty years.[101] The court then took judicial notice[102] of the correlating drastic decline in urban commercial

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[98]*J.M.B. Realty Corp.*, 650 A.2d at 760.

[99]*Id.*

[100]*Id.* at 766. The *J.M.B.* court specifically asserted, "Regional and community shopping centers significantly compete with and have in fact significantly displaced downtown business districts as the gathering point of citizens, both here in New Jersey and across America." *Id.*; *see supra* note 5 and accompanying text (discussing this shift from commercial districts to suburban shopping malls); *see also* Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 168-69 (1980) [hereinafter *Private Abridgement*] ("[S]hopping centers have increasingly assumed other functions traditionally associated with downtown business districts . . . [therefore i]n many communities, shopping centers must be recognized as the most viable forum in which to communicate messages to the public."). The *J.M.B.* dissent, on the other hand, did not agree that such a significant displacement of commercial districts had occurred. *See J.M.B. Realty Corp.*, 650 A.2d at 796 (Garibaldi, J., dissenting) (positing that, exclusive of the malls' land, citizens "can voice their opinions today more readily and accessibly in more places and in more formats than ever before in human history").

[101]*J.M.B. Realty Corp.*, 650 A.2d at 766-67. For example, the majority noted that 56% of the retail sales, excluding gasoline and automotive sales, in the United States occurred at suburban centers in 1991 in comparison to merely 13% in 1967. *Id.* at 767 (citing INTERNATIONAL COUNCIL OF SHOPPING CENTERS, THE SCOPE OF THE CENTER INDUSTRY IN THE UNITED STATES: 1992-1993, 1 (1992)). The court further recognized that 70% of the adult population in the nation visit, on the average, regional malls 3.9 times per month. *Id.* (citations omitted).

[102]Judicial notice is a process by which a court will make certain evidentiary findings without a formal offer of proof. *See* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 328, at 548-51 (J.W. Strong ed., 4th ed. 1992).

centers due to the emigration of urban residents to the suburbs.[103] In addition, Chief Justice Wilentz noted that the mall industry often boasted of the transformation.[104] The Chief Justice concluded that the majority of legal and industry experts also believed that the centers had usurped the cities' traditional business areas.[105]

The *J.M.B.* court then reflected on the pertinent United States Supreme Court decisions,[106] from *Marsh v. Alabama*[107] to *Hudgens v. NLRB*,[108] and noted that the United States Constitution did not protect expressive activity in privately owned shopping malls.[109] The majority next acknowledged that most state courts which had considered the issue had followed federal precedent in interpreting their own constitutions, and precluded any constitutional protection for expressive activity at shopping

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[103]*J.M.B. Realty Corp.*, 650 A.2d at 767. Counsel for the respondent found the court's judicial notice of the decline of commercial districts to be troublesome, in stating that "[h]ow the Court could take notice of something that was not proved and the trial judge found not true is somewhat disconcerting." *See* Bleemer, *supra* note 96, at 19.

[104]*J.M.B. Realty Corp.*, 650 A.2d at 767 (noting that the mall industry asserts that the centers are an "integral part of the economic and social fabric of America" (quoting INTERNATIONAL COUNCIL OF SHOPPING CENTERS, THE SCOPE OF THE SHOPPING CENTER INDUSTRY IN THE UNITED STATES: 1992-1993, ix (1992))). There is also evidence that it was the intent of the center developers for malls to replace downtown business districts as the cultural center of the community. *See, e.g.*, Petitioner's Brief, *supra* note 16, at 30 ("It[, the mall,] should be a lively meeting place as well as a market place. Through imaginative use of its halls, gardens, and spaces it should expose the community to art, music, crafts, and culture." (quoting James W. Rouse, *Must Shopping Centers be Inhuman?*, ARCHITECTURAL FORUM, June 1962)).

[105]*Id.* at 767-68. The court cited James W. Hughes & George Sternleib, *Rutgers Regional Report Volume III: Retailing and Regional Malls* 71 (1991), to support its proposition that industry experts agreed that malls had significantly replaced downtown business districts. *Id.* at 767. For an example of the legal commentators who agree that such a transformation has occurred, see *supra* note 6.

[106]The Coalition's claims were based solely on the New Jersey Constitution's free speech provisions and the common law, not the United States Constitution. *J.M.B. Realty Corp.*, 650 A.2d at 766.

[107]326 U.S. 501 (1946).

[108]424 U.S. 507 (1976).

[109]*J.M.B. Realty Corp.*, 650 A.2d at 769. For a full analysis of the federal cases see *supra* notes 38-81 and accompanying text.

centers.[110] Chief Justice Wilentz noted, however, that all state courts unencumbered by a state action requirement in their constitutions had found constitutional protection existed for communicative activity on mall property.[111]

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[110]*J.M.B. Realty Corp.*, 650 A.2d at 769; *see also* Hardy, *supra* note 8, at 96 ("[A]ny survey of state constitutional protection of free expression must begin by recognizing that expansive interpretations of state charters are the exception rather than the rule." (quoting *Developments in the Laws — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1401 (1982))).

The *J.M.B.* court noted that the state courts following the United States Supreme Court decision were either hampered by a state action requirement in their respective constitutions or simply relied on federal precedent without performing a separate analysis on their state constitutions. *J.M.B. Realty Corp.*, 650 A.2d at 769. Several states have followed the United States Supreme Court and found that no speech protection existed at private malls. *See* Eastwood Mall v. Slanco, 626 N.E.2d 59 (Ohio 1994); Charleston Joint Venture v. McPherson, 417 S.E.2d 544 (S.C. 1992); Citizens for Ethical Gov't v. Gwinnet Place Assoc., 392 S.E.2d 8 (Ga. 1990); Fiesta Mall Venture v. Mecham ReCall Comm., 767 P.2d 719 (Ariz. Ct. App. 1989); Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989); State v. Felmet, 273 S.E.2d 708 (N.C. 1981); Jacobs v. Major, 407 N.W.2d 832 (Wis. 1987); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Pa. 1986); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985); Cologne v. Westfarms Assoc., 469 A.2d 1201 (Conn. 1984).

[111]*J.M.B. Realty Corp.*, 650 A.2d at 770. Therefore, when analyzing whether a state constitution protects expression on privately owned property, an important threshold consideration is whether that constitution is applicable solely to state action. *See, e.g.*, Hardy, *supra* note 8, at 97 ("[B]efore state courts can fully resolve the substantive free speech and property issues, a proper constitutional analysis requires that they first address the threshold issue of whether the petitioner's suits are barred by a state action requirement."). For a discussion of the state action requirement, see *supra* note 8 and accompanying text.

Several states have found that their constitutions protect some form of expressive activity on mall property. *See* Lloyd Corp. v. Whiffen, 849 P.2d 446 (Or. 1993) (relying on the Oregon Constitution's initiative and referendum provision); Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991) (determining that the respondent mall met the requirements of a state actor); Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989) (determining that no protection existed under the Washington Constitution's free speech provision but not overturning an earlier decision finding expressive rights under its initiative clause); Batchelder v. Allied Stores Int'l, 445 N.E.2d 590 (Mass. 1983) (deciding that there was protection under the Massachusetts Constitution's "free-and-equal elections" clause); Robins v. PruneYard Shopping Ctr., 592 P.2d 341 (Cal. 1979) (finding protection under the California Constitution's speech and petitioning provision), *aff'd*, 447 U.S. 74 (1980).

The Chief Justice then discussed the implication of the Court's decision in *State v. Schmid*[112] to the present matter.[113] The majority emphasized that the New Jersey Constitution's free speech provisions[114] were broader in scope than those found in the First Amendment,[115] and that they could protect expressive rights from oppressive private entities.[116] The Court utilized the three factors first enunciated in *Schmid* to balance the petitioner's free speech rights with those of the mall owners' property interests, thereby determining whether a protectable communicative right existed.[117] The

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[112]423 A.2d 615 (N.J. 1980), *appeal dismissed sub nom.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

[113]*J.M.B. Realty Corp.*, 650 A.2d at 770-72.

[114]*Id.* at 770. The free speech and assembly clauses of the New Jersey Constitution are located in Article 1, paragraphs 6 and 8, respectively. *Id.* For the specific language of the New Jersey Constitution Article 1, paragraphs 6 and 18. See *supra* note 1 for text of paragraphs 6 and 18.

[115]*J.M.B. Realty Corp.*, 650 A.2d at 770. The *J.M.B.* court found that "[p]recedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right . . . found in the First Amendment." *Id.*; *see also Schmid*, 423 A.2d at 626-28. See *supra* notes 1 and 86 for a discussion of the scope and application of the New Jersey Constitution's provisions pertaining to expression.

The majority also cited Justice Handler's concurrence in State v. Hunt, 450 A.2d 952 (N.J. 1982) (Handler, J., concurring), as support of when it will give a divergent interpretation to a state constitutional provision in comparison to a federal constitutional clause. *J.M.B. Realty Corp.*, 650 A.2d at 770 (citations omitted). See *supra* note 9 and accompanying text for a discussion of the general theories of when state courts will break from federal precedent in analyzing their constitutions. By citing to *Hunt*, the *J.M.B.* majority has seemingly reaffirmed its position that it will only diverge from federal constitutional law when it has strong policy reasons for doing so. See *supra* note 9 for a discussion of when the Supreme Court of New Jersey will part with the United States Supreme Court's precedent in interpreting the New Jersey Constitution.

[116]*J.M.B. Realty Corp.*, 650 A.2d at 771 (citing *Schmid*, 423 A.2d at 628). In this regard, the New Jersey Constitution is applicable to private conduct as opposed to solely governmental action, which is prescribed by the state action requirement found in most state constitutions. See *supra* note 8 for a discussion of the state action doctrine.

[117]*J.M.B. Realty Corp.*, 650 A.2d at 772. The majority announced that:

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

majority, in discussing *Schmid*, further explained that the existence of alternate forums did not affect the initial determination of whether expressive rights existed, but rather implicated to what extent such a right could be regulated.[118]

The *J.M.B.* court began its analysis by considering together the first two *Schmid* factors, the normal use of the malls' property and the extent and nature of the public's invitation.[119] The majority found that the normal use

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property owners and the free speech rights of individuals to leaflet on their property.

Id. The three elements were to be used, therefore, to attain "the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property." *Id.* (citations omitted); *see also* Gerald E. Weis, *Stepping into the Breach: State Constitutional Protection of Expressive Rights in Privately Owned Commercial Establishments*, 4 EMERGING ISSUES ST. CONST. L. 159 (1991) (advocating a balancing approach between property and speech interests in determining whether expressive rights exist). *But see* Ragosta, *supra* note 2, at 22 (arguing that a balancing test is inappropriate when attempting to determine whether a right of expression has been created).

The majority also addressed the concerns expressed by Justice Schreiber's concurrence in *Schmid* on whether the court was applying a balancing test or a "dedication to the public of its property" standard. *J.M.B. Realty Corp.*, 650 A.2d at 771 (citing *Schmid*, 423 A.2d at 637 n.1 (Schreiber, J., concurring)). See *supra* note 90 for a discussion of Justice Schreiber's concurrence in *Schmid*. The *J.M.B.* court responded that in the present scenario the distinction was essentially moot since "there is no property more thoroughly 'dedicated' to public use than these . . . shopping centers." *J.M.B. Realty Corp.*, 650 A.2d at 771.

[118]*J.M.B. Realty Corp.*, 650 A.2d at 771; *see also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) ("'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea it may be exercised in some other place.'" (quoting Schneider v. State, 308 U.S. 147, 163 (1939))); TRIBE, *supra* note 6, § 12-24, at 990 n.25. In contrast to the New Jersey Supreme Court's approach, the United States Supreme Court considers the existence of substitute forums in determining whether a speech right has been created. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) ("It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.").

[119]*J.M.B. Realty Corp.*, 650 A.2d at 772 ("The normal use of these properties and the nature and extent of the public's invitation to use them . . . are best considered together, for in this case they are most closely interrelated."). The precise language of the first factor is "the nature, purposes, and primary use of such private property, generally its 'normal' use," while the second element consists of considering "the extent and nature of the public's invitation to use that property." *Id.* at 771. The dissent in *J.M.B.* criticized the majority's joining of the first two factors in its analysis. *Id.* at 791 (Garibaldi, J.,

and the predominant aspect of the malls was their "all-inclusiveness," even if their primary purpose was to generate profits.[120] The court posited that the open areas in malls were utilized for a wide range of activities and demonstrated the malls' "all-inclusiveness."[121] Chief Justice Wilentz next found that the centers had extended an extremely broad, nearly limitless invitation to the public.[122] In fact, the majority asserted that the malls had created an implied invitation to handbill on controversial topics.[123]

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dissenting) ("[T]he majority rewrites *Schmid*, lumps the first two factors together into one, and continually misapprehends the test.").

[120]*Id.* at 772-73. The *J.M.B.* court broke down the first *Schmid* element, see *supra* note 89, and focused on the use, as opposed to the purpose, of the respondents' property. *Id.*; *see also* Jeffrey Kanige, *How Free is Speech on Private Property*, N.J.L.J., Mar. 21, 1994, at 4. In contrast, the trial court focused on the primary purpose of the properties, *see supra* note 28, and determined that since the main purpose of the malls was commercial, the first factor clearly weighed in favor of the centers. *See* New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp., 628 A.2d 1094, 1097 (N.J. Super. Ct. Ch. Div. 1991).

[121]*J.M.B. Realty Corp.*, 650 A.2d at 772-73. The *J.M.B.* court emphasized that the malls had areas to walk, rest, communicate, had instituted a "mallwalker's" programs, and had theaters, meeting rooms, and community booths available to local groups to advocate and express their concerns and causes. *Id.* at 773; *see also Private Abridgement*, *supra* note 100, at 168 ("Shopping centers often include banks, restaurants, . . ., parking facilities, post offices, reference libraries, and . . . churches . . .[, s]ome also provide facilities for lectures and industrial conferences." (citations omitted)).

[122]*J.M.B. Realty Corp.*, 650 A.2d at 773. The majority stated that "[t]he invitation to the public is simple: 'Come here, that's all we ask. We hope you will buy, but you do not have to . . . . You can do whatever you want so long as you do not interfere with other visitors.'" *Id.* The court also noted that the invitation encompassed some expressive uses, even though it did not necessarily reach the level of free communication permitted by Princeton University in *Schmid*. *Id.* Thus, the *J.M.B.* court determined that the public's invitation was extremely broad and contemplated some speech. *Id.*

[123]*Id.* at 774. Chief Justice Wilentz further noted that some of the respondent malls explicitly allowed issue-oriented expressive activities. *Id.* Moreover, the court declared that shopping malls had not only replaced downtown business districts, but had become a reproduction of the entire community. The *J.M.B.* court announced that:

> This is the new, the improved, the more attractive downtown business district — the new community — and no use is more closely associated with the old downtown than leafletting. . . . In a country where free speech found its home in the downtown business district, these centers can no more avoid speech than a playground children, a library its readers, or a park its strollers.

The court then turned to the third *Schmid* element and determined that the long history of harmonious coexistence between free speech and commercial districts demonstrated speech's compatibility with shopping malls.[124] The majority concluded, therefore, that the review of the *Schmid* factors supported a constitutional right to communicative activity.[125]

After considering the structured analysis of *Schmid*, the majority performed a general balancing test between free speech and property rights.[126] In analyzing the private owners' interest in regulating conduct on their land, the court found that any weight accorded the mall owners was significantly reduced due to their extensive invitation to the public and the

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Id. at 774.

By stating that the malls had come to represent the community, as opposed to merely commercial districts, the majority may have hurdled the stumbling block of the federal courts' "functional equivalent" test, which distinguished between a private entity that had usurped the function of an entire municipality as opposed to merely a commercial district. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 519 (1976) (implying that a private entity will only be subject to the United States Constitution when it assumes "*all* of the attributes of a state-created municipality" (emphasis added)).

[124]*J.M.B. Realty Corp.*, 650 A.2d at 775. The third component of the *Schmid* test focuses on "the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." *Id.* at 771. The *J.M.B.* court also posited that handbilling was not discordant to the malls' purposes since four of the respondent malls had actually granted the Coalition permission to leaflet. *Id.* at 774. Further, Chief Justice Wilentz determined that any conflict that may exist between the petitioner's expression and the respondent's operations could be resolved through the malls' implementation of reasonable regulations. *Id.* at 775.

[125]*Id.*

[126]*Id.* The *J.M.B.* court relied on Justice Handler's formulation in *Schmid* as a description of the balancing test. *Id.* In *Schmid*, Justice Handler determined that "as private property becomes, on a sliding scale committed either more or less to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights." State v. Schmid, 423 A.2d 615, 629 (1980) (quoting Marsh v. Alabama, 326 U.S. 501, 506 (1946)), *appeal dismissed sub nom.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982). Like the *J.M.B.* court, the California Supreme Court in Robins v. PruneYard Shopping Ctr., 592 P.2d 341 (Cal. 1979), relied on a balancing test to determine whether a free speech right existed on shopping mall property under the California Constitution. *See* McCauley, *supra* note 5, at 713 ("The California Supreme Court then balanced the state's interest in securing greater free speech rights for the public against the shopping center owner's interest in controlling the use of his property.").

various uses they permitted on their property.[127] In discussing the petitioners' communicative activity, on the other hand, the *J.M.B.* court determined that the Coalition's political expression was given great weight because of its preferred position in the state constitutional framework.[128]

Chief Justice Wilentz also declared that even though Princeton's property in *Schmid* had a stronger dedication to political speech than the respondents' land, the concern for the University's ability to control its academic life was also more troublesome for the court in that case.[129] In fact, the *J.M.B.* court declared that the "essential nature" of the malls, which included an "implied expressional invitation," did not present a cause for concern that the centers' mission would be hindered to any recognizable extent.[130] The court asserted, consequently, that the petitioner's speech rights unquestionably outweighed the respondents property interests.[131]

The *J.M.B.* court further noted that although it was basing its decision on the New Jersey Constitution, its ruling in *State v. Shack*,[132] a case

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[127]*J.M.B. Realty Corp.*, 650 A.2d at 776. See *supra* note 22 for an illustration of the political, community, and social uses permitted on shopping center property. Since the respondents had purposefully converted their property into a commercial district, the Chief Justice determined that "[t]he sliding scale cannot slide any farther in the direction of public use and diminished property interests." *J.M.B. Realty Corp.*, 650 A.2d at 776.

[128]*J.M.B. Corp.*, 650 A.2d at 776. The majority decided that the weight of the free speech right was determined by the quality of the speech, here political speech. *Id.* See *supra* note 13 for a discussion of the reasons political speech is granted greater protection in comparison to other forms of expression. The *J.M.B.* court also noted that speech was comprised of a variable, its potential interference with private property interests, which was in this case "negligible." *J.M.B. Realty Corp.*, 650 A.2d at 776.

[129]*J.M.B. Realty Corp.*, 650 A.2d at 776; *see also* Schmid, 423 A.2d at 632 ("[W]e must give substantial deference to the importance of institutional integrity and independence[,] . . . private colleges and universities must be accorded a generous measure of autonomy and self-governance if they are to fulfill their paramount role as vehicles of education and enlightenment.").

[130]*J.M.B. Realty Corp.*, 650 A.2d at 776. The *J.M.B.* court stated that, since the essential nature of the shopping malls consisted of their innumerable uses and expansive public invitation, it was unforeseeable that the malls' essential nature would shift and affect the balancing test in the future. *Id.*

[131]*Id.* at 776-77.

[132]277 A.2d 369 (N.J. 1971).

decided on common law grounds,[133] further buttressed the outcome in *J.M.B.*[134] The majority reflected that in *Shack*, the court determined that employees of nonprofit organizations could enter a farmer's private property and deliver migrant workers aid which included a component of speech.[135] The Chief Justice concluded that, under state common law, property rights did not include the ability to exclude social services from certain individuals.[136] Accordingly, the *J.M.B.* court determined that New Jersey's common law supported the notion that private property interests

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[133]In addition to a state's constitution, a state's common law can also provide an independent and adequate basis for a state court to break with the United States Supreme Court's precedent. *See* Murdock v. City of Memphis, 87 U.S. 590 (20 Wall.) 590, 616 (1875); *Private Abridgement*, *supra* note 100, at 177-78. See *supra* note 9 for a discussion of how and when a state court can part with federal precedent. A decision based on common law grounds, however, can be more easily overturned, through legislative enactment, than cases grounded in constitutional jurisprudence, which may be reversed only by a constitutional amendment. *See Private Abridgement*, *supra* note 100, at 178 n.63.

Although *Shack* is generally considered to have been determined on common law grounds, *see, e.g.*, Berger, *supra* note 3, at 663-64, at least one New Jersey court has implied that the decision in *Shack* has risen to a constitutional level. *See* Freedman v. New Jersey State Police, 343 A.2d 148, 150 (N.J. Super. Ct. Law Div. 1975) (referring to the precedential value of *Shack* and declaring that "[t]his matter, therefore, will be treated as within the scope of the New Jersey constitutional periphery").

[134]*J.M.B. Realty Corp.*, 650 A.2d at 777. In *State v. Hunt*, Justice Handler announced that New Jersey's common law could provide a strong policy basis in interpreting a provision in the state constitution more expansively than a similar clause in the United States Constitution. *See* State v. Hunt, 450 A.2d 952, 965-66 (1982) (Handler, J., concurring). See *supra* notes 9, 14 for a list of the factors enunciated by Justice Handler in *Hunt*. In *J.M.B.*, the court considered the *Hunt* elements produced by Justice Handler, and determined that *Shack's* common law precedential value supported the court's overall interpretation of the New Jersey's Constitution's free speech clauses. *See J.M.B. Realty Corp.*, 650 A.2d at 777 (citing *Hunt*, 450 A.2d at 965-66 (Handler, J., concurring)).

In addition to *Shack*, the majority in *J.M.B.* found support for its holding in Marsh v. Alabama, 326 U.S. 501 (1946). *J.M.B. Realty Corp.*, 650 A.2d at 777. See *supra* notes 38-46 and accompanying text for a discussion of *Marsh*. Following the reasoning of *Marsh*, Chief Justice Wilentz stated that, when privately owned property has usurped the function of a commercial district, the property owners cannot silence the expressive activity by disallowing it. *J.M.B. Realty Corp.*, 650 A.2d at 777.

[135]*J.M.B. Realty Corp.*, 650 A.2d at 777.

[136]*Id.*

must, under certain circumstances, give way to prevailing societal needs.[137]

The Chief Justice then declared that interpretations of the state constitution must be made in light of contemporary shifts in society.[138] The *J.M.B.* court observed that one recent change is the rise of the television as the predominant form of mass communication.[139] Yet, the court stated that the availability of one type of communication has never diminished the right of access to other means.[140] Moreover, the *J.M.B.* court asserted that many citizens needed financially accessible means to distribute their information, and television was economically infeasible.[141] The court

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[137]*Id.* (citations omitted).

[138]*Id.* at 777-79.

[139]*Id.* at 777.

[140]*Id.* at 777-78. The majority reflected that "the general right of free speech through one means has never depended on a lack of any other means; radio never diminished the right of free speech at downtown business districts." *Id.*; *see also* TRIBE, *supra* note 6, § 12-24, at 990 n.25 (reasoning that free speech cannot be abridged in one area based on the argument that it can be exercised elsewhere (citations omitted)).

[141]*J.M.B. Realty Corp.*, 650 A.2d at 778. For example, the *J.M.B.* court noted that a national 30 second commercial on television during prime-time hours costs $155,000.00. *Id.* (citations omitted).

Many courts and commentators have argued that groups who lack extensive funding need access to means that are economically affordable and viable to disperse information. *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 580-81 (1972) (Marshall, J., dissenting) (discussing the need for inexpensive means of communication capable of reaching large groups of people); *see also* Berger, *supra* note 3, at 638-40 ("[M]uch political talk has become enormously expensive . . . [, t]hus, access to the relatively low-cost public forum becomes an integral part of the local campaign effort, and the loss of that forum cannot be replaced easily."); *Private Abridgement*, *supra* note 100, at 166 ("An effective expression system must insure that individuals and groups are afforded inexpensive and easily utilized channels of public communication."). *But see* Ragosta, *supra* note 2, at 25 ("[F]orced access to private property is not necessary for effective use of free speech. Alternative, inexpensive mechanisms for communication exist . . . .").

The *J.M.B.* majority also asserted that television presented other problems besides financial obstacles. *J.M.B. Realty Corp.*, 650 A.2d at 778. For example, the court postulated that, since television broadcasts normally reflect the majority's viewpoint, it undermined "the belief that the unpopular views of a minority, if heard, can in time become the majority view." *Id.*

determined, accordingly, that the rise of the television would not serve to block the Coalition's access to the centers.[142]

Chief Justice Wilentz then pointed to another significant change in society by reiterating that shopping centers have replaced areas where public forums once flourished, the commercial districts.[143] The court concluded that this societal transformation and the breadth of the New Jersey Constitution's free speech provisions[144] supported the constitutionally protected right of expression at the privately owned centers.[145]

The majority then addressed the respondents' contentions that their federal and state constitutional rights would be impinged upon if the petitioner was permitted to leaflet on the malls' property.[146] The center owners claimed that the Coalition's free speech rights would divest the owners of their property without due process,[147] would take their property without just compensation,[148] and would intrude on their free speech rights.[149] The *J.M.B.* court rejected the respondents federal claims for the

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[142]*J.M.B. Realty Corp.*, 650 A.2d at 778.

[143]*Id.* See *supra* note 5 and accompanying text for a discussion of the viewpoint that shopping malls have usurped the function of downtown business districts.

[144]*J.M.B. Realty Corp.*, 650 A.2d at 778-79. The court opined that the clauses in the New Jersey Constitution pertaining to expression not only granted an affirmative right to speak, but also were applicable to private conduct. *Id.* at 779. For the pertinent language and a discussion of the scope of the New Jersey Constitution's free speech provisions see *supra* note 1.

[145]*J.M.B. Realty Corp.*, 650 A.2d at 779. In referring to the shopping malls as "the new commercial and social centers," the *J.M.B.* court postulated, "We do not believe that those who adopted a constitutional provision granting a right of free speech wanted it to diminish in importance as society changed, to be dependent on the unrelated accidents of economic transformation, or to be silenced because of a new way of doing business." *Id.*

[146]*Id.* at 779-80.

[147]*Id.* at 779. For the language and a discussion of the Due Process Clause, see *supra* note 80 and accompanying text.

[148]*J.M.B. Realty Corp.*, 650 A.2d at 779. See *supra* note 79 and accompanying text for the language and a discussion of the takings provision.

[149]*J.M.B. Realty Corp.*, 650 A.2d at 779. For the language and a discussion of the Free Speech Clause, see *supra* note 1.

reasons stated in *PruneYard Shopping Ctr. v. Robins*,[150] and dismissed the

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[150]447 U.S. 74, 82-88 (1980). See *supra* notes 79-81 for an analysis of the United States Supreme Court's treatment of a shopping mall owner's due process, takings, and free speech claims.

Despite the *J.M.B.* court's ruling that no federal constitutional taking had occurred based on the *PruneYard* rationale, several courts and commentators have declared that recent federal takings jurisprudence invalidate the reasoning of *PruneYard*. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 450-51 (1982) (Blackmun, J., dissenting) (implying that the *Loretto* holding overruled the takings rationale of *PruneYard*); *see also* Schoepflin, *supra* note 79, at 47-51; Ragosta, *supra* note 2, at 32-34. *But see* Berger, *supra* note 3, at 678-84 (positing that recent takings decisions should not impact the *PruneYard* holding). See *supra* note 79 for the pertinent language and a general discussion of the federal takings provision. See *supra* note 79 and accompanying text for a discussion of the *PruneYard* Court's treatment of the mall owners' takings claims.

The four most relevant post-*PruneYard* cases pertaining to takings are: Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); and Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

In *Loretto*, New York passed a statute which required landlords to permit cable television companies to install a cable box and lines on the owner's building for a nominal fee. *Loretto*, 458 U.S. at 421, 423. The *Loretto* Court ruled that a taking had occurred. *Id.* at 438. The Court reasoned that government action which authorized permanent physical occupation of an owner's property, regardless of how minute the occupation, constituted a taking. *Id.* at 436.

In *Nollan*, the California Coastal Commission required the Nollans, as a permit condition to rebuild their house, to grant a public easement across the beachfront of their property. *Nollan*, 483 U.S. at 828. The Commission was concerned that the larger structure would, among other things, block the public's view of the ocean from the adjoining street. *Id.* at 828-29. Utilizing a standard that required the permit conditions to "substantially advance" a legitimate state interest, the Court determined that the "lack of nexus" between the condition, the easement, and the reason for the restriction, to safeguard the public's view of the ocean from the street, failed the standard set forth by the Court. *Id.* at 838-39.

The Supreme Court of the United States then added an element to the *Nollan* standard in *Dolan*. *Dolan*, 114 S. Ct. at 2317, 2319-20. The *Dolan* Court announced that not only would state permit conditions need to substantially advance a legitimate government interest, but that the government would also have to demonstrate a "rough proportionality" between the burden of the proposed development and the conditions exacted by the state. *Id.* at 2319-20. In *Dolan*, therefore, the city needed to show that the pedestrian path it required the petitioner to build would roughly decrease as much traffic congestion as would be created by the petitioner's proposed development. *Id.*

Finally, in *Lucas*, a South Carolina statute prevented development in beachfront that was in danger of eroding. *Lucas*, 112 S. Ct. at 2889. Petitioner, however, had already purchased, at considerable expense, two properties to develop but due to the new regulations was prevented from building. *Id.* at 2889-90. The *Lucas* Court found that if the regulations denied the owner all economically viable use of his property then a taking had occurred. *Id.* at 2895. Nevertheless, the *Lucas* majority ruled that the state could

mall owners' state constitutional contentions for similar reasons.[151] Chief

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prohibit activity that had never been part of the owner's property rights. *Id.* at 2899.

Whether these recent cases have overturned or greatly affected the *PruneYard* decision is subject to great debate. *See, e.g.*, Berger, *supra* note 3, at 681-82; Schoepflin, *supra* note 79, at 149-51. The *Lucas* decision most likely does not impact the *PruneYard* rationale since granting free speech rights at shopping centers does not deny the mall owners' all economically viable use of their land. *See, e.g.*, *J.M.B. Realty Corp.*, 650 A.2d at 780 (1994) (noting that there is no proof that free speech will have a "negative impact" on the mall's profit making ability); *see also* Schoepflin, *supra* note 79, at 148 (opining that regulatory takings arguments, like those advanced in *Lucas*, are "incorrect . . . [in analyzing] mandatory speech accommodation in shopping centers"). *But see* Loveladies Harbor, Inc. v United States, 21 Cl. Ct. 153 (1990); Florida Rock Indus. v. United States, 21 Cl. Ct. 161 (1990).

In regard to the *Loretto* and *Nollan* decisions, arguably, neither impinge on the *PruneYard* standard since both Courts explicitly distinguished those case from *PruneYard*. *See Loretto*, 458 U.S. at 434 (ruling that *Loretto* involved a permanent physical occupation, while *PruneYard*'s speech accommodation was a "temporary and limited" occupation); *Nollan*, 483 U.S. at 832 n.1 (declaring that the Nollans were required to permit a permanent access to their property, whereas no such access was required of the *PruneYard* malls).

Loretto and *Nollan*, moreover, are arguably inapplicable in the shopping center-free speech scenario since in those cases the property owners had not allowed public entry onto their land, while the mall owners have given the public a general invitation to enter their property. *See* Berger, *supra* note 3, at 681-82. Hence, since the private center owner has already compromised her exclusionary rights by inviting the public onto her property, "state action to expand the invitee class does not become a fatal taking." *See id.* at 681. Further, *PruneYard* protected political speech, while in *Loretto* and *Nollan* no First Amendment rights were affected. Thus, the Supreme Court of the United States may be willing to go to greater lengths to uphold *PruneYard*. *See id.* at 682.

On the other hand, it is possible that the *Loretto* and *Nollan* holdings cannot be reconciled with *PruneYard* decision. Accordingly, state constitutionally granted expressive rights at shopping centers may rise to the level of a federal taking. For example, center owners may face a greater hardship than the landlords in *Loretto* when speech activists have been granted permanent right of access to the malls, as opposed to merely having to permit cable equipment on their property. *See* Schoepflin, *supra* note 79, at 149. In addition, like the beach easement in *Nollan*, speech activists have arguably gained a permanent right of access to the shopping centers since the owners can never totally prohibit expressive activity on their property. *See id.* at 150-51 ("If the Court applied the *Nollan* reasoning to shopping centers, instead of trying to distinguish the indistinguishable, it would protect owner's rights.").

Hence, a review of the relevant post-*PruneYard* takings cases indicate that the *J.M.B.* court's decision may be subject to a federal takings claim. Nevertheless, even if a taking is found, a secondary question which remains is whether the amount to be paid to the mall owners should be substantial or modest. *See, e.g.*, Berger, *supra* note, at 683 ("[If a taking is found, t]he property owner would be entitled only to 'just compensation' and the measure of compensation in most instances would appear to be nominal.").

Justice Wilentz emphasized that since the mall owners had profited by changing society and also reduced free speech in the process, they had surrendered the portion of their own speech rights that they were attempting to use to defeat the petitioner's rights.[152] In addition, the *J.M.B.* court announced that the property rights of the owners' had to give way to the petitioner's expressive activity due to the mall owners affirmative steps which led to a decline in the use of the traditional public forums.[153]

The majority then turned to a more specific delineation of the scope of its holding.[154] Chief Justice Wilentz first emphasized that the court's holding only extended to regional shopping malls due to those centers' enormous size and the multitude of uses permitted on their grounds.[155] The court explicitly ruled that its decision did not apply to other types of private property, such as highway strip malls or sports stadiums.[156]

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[151]*J.M.B. Realty Corp.*, 650 A.2d at 779.

[152]*Id.* at 780. In deciding that the owners had forfeited certain speech rights, Chief Justice Wilentz was addressing the concerns expressed by Justice Powell's concurrence in *PruneYard*, 447 U.S. at 96-101 (1980) (Powell, J., concurring). *Id.* See *supra* note 81 for a delineation of Justice Powell's concurrence.

In *PruneYard*, Justice Powell expressed concern over two instances when a mall owner's free speech rights would possibly be impinged upon if she was required to permit communicative activity on her land. *See PruneYard*, 447 U.S. at 97-100 (Powell, J., concurring). The first example, the Justice posited, occurred when an owner was required to speak because it was likely for others to identify a speech activist's opinion with that of the center owner. *Id.* at 99 (Powell, J., concurring). Secondly, the concurrence asserted that an owner may be compelled to speak when she was faced with an opinion she found "morally repugnant." *Id.* at 99-100. (Powell, J., concurring).

[153]*J.M.B. Realty Corp.*, 650 A.2d at 780.

[154]*Id.* at 781-83.

[155]*Id.* See *supra* note 33 for the definition of regional shopping malls. The *J.M.B.* court further noted that although its decision did apply the smaller community shopping center involved in the litigation, The Mall at Mill Creek, it would need further information before deciding whether all community malls would be subject to its holding. *J.M.B. Realty Corp.*, 650 A.2d at 780 n.16.

[156]*J.M.B. Realty Corp.*, 650 A.2d at 781. The Chief Justice asserted that:

> No highway strip mall, no football stadium, no theater, no single huge suburban store, no stand-alone use, and no small to medium shopping center sufficiently satisfies the standard of *Schmid* to warrant the constitutional extension of free speech to those premises . . . .

The *J.M.B.* court further limited its holding by reasserting that its decision only protected handbilling pertaining to social and political discourse.[157] The *J.M.B.* majority then proffered that the mall owners were free to impose reasonable time, place, and manner restrictions on the communicative activity.[158] As to the manner of the expression, moreover,

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. . . The common characteristic of . . . [the above] list is crowds, but it takes much more than crowds, to trigger the constitutional obligation.

Id.

In finding that its holding did not apply to the majority of privately-owned lands, the *J.M.B.* court addressed a concern expressed by numerous courts and commentators concerning the potential reach of such a ruling. *See, e.g.*, *PruneYard*, 447 U.S. at 96 (Powell, J., concurring) ("Significantly different questions would be presented if a state authorized strangers to picket or distribute leaflets in privately owned, free standing store and commercial premises."); Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979) (distinguishing between a large shopping mall and property owned by an "individual homeowner or the proprietor of a modest retail establishment"), *aff'd*, 447 U.S. 74 (1980); *see also* Ragosta, *supra* note 2, at 41 ("[T]hese analyses cannot consistently be limited to shopping mall cases. Shopping centers are well down the 'slippery slope' to free speech access to small commercial complexes, individual stores, offices and front yards."). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) ("[S]ize alone [is not] the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.").

In fact, the Supreme Court of New Jersey has been quite protective of smaller property owners' rights, in particular those of private residential owners. *See, e.g.*, Murray v. Lawson, 642 A.2d 338 (N.J. 1994) (ruling that picketers could not demonstrate in the immediate vicinity of a private residence); Murray v. Lawson, 649 A.2d 1253 (N.J. 1994).

The *J.M.B.* court noted, however, that there may be a unique situation where a smaller center maybe subject to the state constitution, particularly when it has in the past allowed handbilling on political and social issues. *J.M.B. Realty Corp.*, 650 A.2d at 781.

[157]*J.M.B. Realty Corp.*, 650 A.2d at 781-82. See *supra* note 12 for a discussion of why leafletting is considered to be encompassed within constitutionally protected expressional rights. See *supra* note 13 for a discussion of why political and social speech is granted more protection than other types of speech. The *J.M.B.* court noted, for example, that commercial speech was unquestionably *outside* the scope of its holding, stating, "[c]ommercial free speech at regional and community shopping centers is fundamentally so discordant with the purposes and uses of those centers as to disqualify it from constitutional protection." *J.M.B. Realty Corp.*, 650 A.2d at 781.

[158]*J.M.B. Realty Corp.*, 650 A.2d at 782. The court noted that the mall owners' power in adopting such regulations was "extremely broad." *Id.* at 783. For that matter, the centers were also free to grant the speech activists greater rights than were provided by the

majority's ruling. *Id.* at 782.

Some commentators have argued that when a court permits a mall owner to define reasonable time, place, and manner regulations it creates an ambiguous standard which will inevitably lead to a flood of litigation. *See, e.g.*, Ragosta, *supra* note 2, at 41 ("[I]f a right of access is recognized, . . . mall owners will [not] be able to define the limits of that right. Such a situation would foster unnecessary litigation and disruption of malls' commercial activities."). On the other hand, counsel for the petitioner asserted that California's post-*PruneYard* decisions have forged thorough and clear guidelines as to what constitutes reasonable regulations. *See* Bleemer, *supra* note 96, at 19.

A review of the California case law stemming from the *PruneYard* decision reveals that the following regulations have been held to be reasonable time, place, and manner conditions at shopping malls. First, to be reasonable, regulations cannot be overinclusive or underinclusive and cannot be vague. H-CHH Associates v. Citizens For Representative Government, 238 Cal. Rptr. 841, 850 (Ct. App. 1987), *rev. denied*, Oct. 29, 1987, *and cert. denied*, 485 U.S. 971 (1988). Moreover, shopping mall regulations must only be designed to prevent the disruption of business operations, prevent the impediment of mall patrons movement through the centers, ensure access to tenant's stores, and prevent extremely loud noises. *Id.* In addition, speech regulation "must provide definite, objective written guidelines for the exercise of discretion" to be valid. *Id.* at 852 (citations omitted).

Further, mall owners cannot simply have unbridled discretion in determining where the expression will occur without first considering the amount of persons certain areas can reasonably accommodate without disrupting mall activities at different times. *Id.* at 853-54. Also, it is *per se* unconstitutional for large malls to limit the number of people who can represent a particular group to two. *Id.* at 854-55. The center can, however, prescribe the type of furniture to be used during the communication as long as it provides clear, written, and advance notice as to what will be permitted. *Id.* at 855.

The shopping malls may also regulate the size and the number of signs that are utilized by speech activists, as well as the style of lettering used on the signs to ensure that they do not clash with the malls. *Id.* at 856. Yet, signs that contain fighting words, obscenities, seriously inflammatory statements, or horrid displays may be prohibited entirely. *Id.*

Likewise, the malls can generally require that speech activists do not interfere with the tenants' businesses or impede the patrons' walkways, but the centers must allow the activists to approach the customers. *Id.* at 857. Further, the centers may request special insurance for potential injury; however, such a request must be based on the history of a particular group of speech activists or incidents stemming from similar types of expression. *Id.* at 857-58. The malls may also draft objective criteria that prevent opposing groups, such as pro-lifer's and pro-choicer's, from using the same area on the same dates during the same times. *Id.* at 855.

In addition, the center owners may ban all speech from the interior of malls during the Christmas holiday season since any open space within the malls during such time is at a premium. *Id.* at 858. The malls may also require all speech activists to submit a cleaning fee deposit, however the deposit cannot exceed an amount reasonably expected to be needed to clean up the centers after the expressive activity takes place. *See, e.g.*, Westside Sane/Freeze v. Ernest W. Hahn, Inc., 274 Cal. Rptr. 51, 61 (Ct. App. 1990) (permitting a $50.00 deposit but finding a $75.00 fee to be excessive). Moreover, since leaflets can be handed directly to a shopping mall's visitors, a center may prohibit the

the court determined that its holding only encompassed leafletting and its normal accompanying speech.[159] The Chief Justice reasoned that the centers probably could limit the time of the handbilling to certain days, and a specific number of days.[160] In addition, the majority asserted that the malls could, for the most part, limit the leafletting to the malls' parking lots or other areas outside the enclosed structures.[161] Finally, the *J.M.B.* court stated that although disruption of the malls' business was always possible, it was highly unlikely to occur given the parameters placed on the expression by the Court.[162]

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placing of handbills on autos parked in the center's lots. *See* Savage v. Trammel Crow, Co., 273 Cal. Rptr. 302 (Ct. App. 1990), *cert. denied*, 500 U.S. 906 (1991). For further discussion of what may constitute reasonable restrictions on leafletting at shopping malls, see *Private Abridgement*, *supra* note 100, at 186-88.

[159]*J.M.B. Realty Corp.*, 650 A.2d at 782. The *J.M.B.* court explained that expression normally accompanying handbilling was that speech "which is needed to attract the attention of [a] passerby — in a normal voice — to the cause and the fact that leaflets are available, without pressure, harassment, following, [or] pestering, of any kind." *Id.* In addition, the court noted that at certain times the constitutional expressive right permitted the speech activists to post an appropriately sized sign reflecting the groups' message or cause. *Id.* at 783.

The majority announced that the constitutional right did *not* include the use of soapboxes, megaphones, bullhorns, demonstrations, parades, placards or pickets. *Id.* at 782. Further, the right did not give the activists the ability to sell information or solicit monies at the centers. *Id.* (citations omitted).

[160]*Id.* at 783. Yet, the court warned that in certain instances limiting speech to certain days, for example excluding any activity on weekends, may be deemed to be unreasonable. *Id.*

[161]*Id.* The Chief Justice noted, however, that certain conditions may dictate the need for access to the interior of the malls. *Id.*

[162]*Id.* at 782-83. The majority reasoned that given the limited scope of its holding and the regulations permitted by the mall owners, chances of a violent disturbance like the one which occurred in Connecticut in Cologne v. Westfarms Assocs., 469 A.2d 1201 (Conn. 1984), were minute. See *infra* note 181 for a discussion of *Cologne*.

The *J.M.B.* court concluded its decision by stating:

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

B. JUSTICE GARIBALDI CONTENDS THAT THE *SCHMID* TEST DOES NOT REQUIRE COMMUNICATIVE ACTIVITY ON SHOPPING CENTER PROPERTY

In a blistering dissent, Justice Garibaldi[163] harshly criticized the majority for misapplying the *Schmid* test[164] and for ignoring the mall owners' right to regulate their private property.[165] The Justice began by asserting that the majority had not engaged in a balancing test, as was required by *Schmid*, but instead had solely considered the petitioner's expressive rights while completely ignoring the respondents' private property rights.[166]

The dissent compared *Schmid* with the present matter and posited that, while both the shopping malls and the university property are open to the public, only the university campus is dedicated to public discussion.[167]

J.M.B. Realty Corp., 650 A.2d at 783.

[163]*J.M.B. Realty Corp.*, 650 A.2d at 789 (Garibaldi, J., dissenting). Justice Garibaldi authored a dissenting opinion in which Justice Clifford and Judge Michels joined. *Id.* at 796 (Garibaldi, J. dissenting). Judge Michels, of the New Jersey Appellate Division, was sitting by designation after Justice Pollock recused himself from the proceedings. *See* Bleemer, *supra* note 96, at 19.

[164]See *supra* notes 88-90 for a delineation and discussion of the *Schmid* test.

[165]*J.M.B. Realty Corp.*, 650 A.2d at 789 (Garibaldi, J., dissenting).

[166]*Id.*

[167]*Id.* at 790-92 (Garibaldi, J., dissenting). Justice Garibaldi declared, "Unlike universities, shopping malls are not public forums dedicated to public use or the exchange of ideas." *Id.* at 790 (Garibaldi, J., dissenting). In other words, "In contrast to . . . a shopping mall, the primary purpose of a university is to educate, i.e., to increase the wealth of human knowledge, which can be done only through discourse and discussion, free and open debate. . . . Shopping can be accomplished even with mouths shut and minds closed." *Id.* at 791 (Garibaldi, J., dissenting). In comparison, Justice Garibaldi said of the majority's approach, "[U]nder the majority's reasoning, whether the property, like Princeton University, was dedicated to the public for public discussion is irrelevant. All that matters is that the property was open to the public, as is a shopping mall or any other large gathering space." *Id.* at 792 (Garibaldi, J., dissenting).

The dissent drew support for its proposition by calling attention to the Pennsylvania Supreme Court's treatment of expressive activity at private universities in comparison to shopping malls. In Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981), the dissent noted that the Pennsylvania Supreme Court found that the Pennsylvania Constitution protected speech on a private college campus. *Id.* at 790 (Garibaldi, J., dissenting) (citations omitted). Nonetheless, in Western Pa. Socialist Workers 1982 Campaign v. Connecticut

Justice Garibaldi averred, therefore, that only university property was subject to the New Jersey Constitution's free speech provisions.[168]

The dissent then argued that the majority should have deferred to the trial court's findings when analyzing the three *Schmid* factors.[169] Regarding the first prong of *Schmid*,[170] the dissent cited the trial court's findings approvingly and determined that the nature and the purpose of the centers clearly was commercial.[171] In addition, Justice Garibaldi criticized the court for focusing solely on the normal use of the malls while neglecting to also analyze their primary purpose, as the first *Schmid* element requires.[172]

The Justice then turned to the second *Schmid* factor,[173] and determined that the public was invited to the centers only to engage in commercial dealings.[174] The dissent asserted that the majority's finding

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Gen. Life Insur. Co., 515 A.2d 1331 (Pa. 1986), Justice Garibaldi stated that the same court determined that the Pennsylvania Constitution did not protect expression at shopping malls since the centers were not forums for public debate. *Id.* (citations omitted). Hence, Justice Garibaldi concluded that only when property is open to the public *and* used for public discussion could it possibly be subject to constitutional expressional activity. *Id.*

[168]*J.M.B. Realty Corp.*, 650 A.2d at 790 (Garibaldi, J., dissenting).

[169]*Id.* at 789-90 (Garibaldi, J., dissenting) ("[T]he majority . . . disregards the trial court's findings of fact . . . [while a] proper application of *Schmid* supports the trial court's judgement . . . that the mall owners may bar [the] Coalition from distributing its leaflets in the malls."). See *supra* notes 88-90 for the language and a discussion of the three *Schmid* factors.

[170]See *supra* note 89 for the language of the first *Schmid* element.

[171]*J.M.B. Realty Corp.*, 650 A.2d at 790 (Garibaldi, J., dissenting) (quoting New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp., 628 A.2d 1094, 1097 (N.J. Super. Ct. Ch. Div. 1991)).

[172]*Id.* at 791 (Garibaldi, J., dissenting). Justice Garibaldi then remarked that, "The primary use of a shopping mall is shopping, an obvious fact that the majority fails to understand." *Id.* The Justice also employed a commonsensical argument and critiqued the majority for failing to admit that the primary users of the malls are shoppers. *Id.* Moreover, the dissent noted that the centers are run by merchants and "[t]hey are in business for business sake. They are not municipalities, states, or villages . . . they are not instruments of the state." *Id.* (citation omitted).

[173]See *supra* note 89 for the language of the second prong of the *Schmid* test.

[174]*J.M.B. Realty Corp.*, 650 A.2d at 791 (Garibaldi, J., dissenting) (citing *J.M.B. Realty Corp.*, 628 A.2d at 1094).

that the malls extended a nearly limitless invitation to the public were without merit.[175] Justice Garibaldi insisted that any community activities[176] actually permitted by the respondents were ultimately allowed only to increase the amount of shoppers and business profits at the malls.[177]

The Justice next examined the third prong of *Schmid*,[178] and argued that when groups, such as the petitioner, leaflet on controversial issues, confrontations were likely to ensue and the resulting disturbance would be clearly discordant with the shopping malls' primary uses.[179] In support of its proposition, the dissent pointed to *Cologne v. Westfarm Associates*,[180] a case in which a heated demonstration at a Connecticut shopping center resulted in several mall tenants having to close their stores for the day.[181] Justice Garibaldi also raised concerns over whether demonstrators would be permitted to wear certain attire, such as the Ku Klux Klan's "flowing white

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[175]*Id.* Justice Garibaldi interpreted the majority's analysis of the second factor to mean that, whenever the public is invited onto private property which is substantial in size, the land becomes a place to assemble, and "therefore becomes the functional equivalent of a downtown area." *Id.* The majority, however, explicitly declared that only large regional shopping malls were to be subject to its holding and other small areas, such as strip malls, would not be required to permit expressive activity. *Id.* at 780-81.

[176]For a list of the political, social, and community events permitted by the respondent malls, see *supra* note 22.

[177]*J.M.B. Realty Corp.*, 650 A.2d at 791 (Garibaldi, J., dissenting) (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 564-65 (1972)). The Justice further asserted that such action by the malls, permitting social activities to maximize profits, was a "legitimate and responsible business activity . . . ." *Id.* (citation omitted).

[178]See *supra* note 89 for the language of the third *Schmid* element.

[179]*J.M.B. Realty Corp.*, 650 A.2d at 792 (Garibaldi, J., dissenting).

[180]469 A.2d 1201 (Conn. 1984).

[181]*J.M.B. Realty Corp.*, 650 A.2d at 792 (Garibaldi, J., dissenting). In *Cologne*, the Ku Klux Klan were denied permission to appear at a Connecticut mall. *Cologne*, 469 A.2d at 1205. The Klan nevertheless attempted to enter the mall but were prevented from doing so by local police. *Id.* After the Klan had dispersed, anti-Klan protestors began a passionate demonstration outside the mall, and local and state police were needed to quell the display. *Id.* As a result of the demonstration, several of the mall's stores closed for the day. *Id.*

The *J.M.B.* majority asserted that since *Cologne* represented the only evidence of disturbance of mall operations due to expressive activity, the chances of another such occurrence were minimal. *J.M.B. Realty Corp.*, 650 A.2d at 782 & n.18.

robes."[182] The Justice further chastised the majority for failing to provide clear and definite standards for the mall owners to utilize when creating their regulations.[183]

Justice Garibaldi next admonished the court for utilizing the "functional equivalent" analysis in ruling that the shopping malls had replaced downtown business districts.[184] The Justice asserted that the functional equivalent test was only appropriate in the *Marsh* scenario when private owners conducted the operations of an entire municipality instead of merely some smaller aspect of it, like a commercial district.[185]

The dissent further claimed that, despite the misapplication of the test in the first place, shopping malls were not the functional equivalent of commercial districts.[186] First, Justice Garibaldi declared that the mission of the centers was not to succeed traditional business districts for purposes of providing a new public forum, but simply to provide a comfortable setting

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[182]*J.M.B. Realty Corp.*, 650 A.2d at 792 (Garibaldi, J., dissenting) (quoting Respondent's Brief, *supra* note 19).

[183]*Id.* at 792-93 (Garibaldi, J., dissenting). Justice Garibaldi insisted that, due to the majority's lack of precise standards, litigation would ensue over the mall owner's time, place, and manner regulations. *Id.* at 792 (Garibaldi, J., dissenting). See *supra* note 158 and accompanying text for a discussion of what potentially may be considered reasonable regulations by the shopping center owners.

[184]*Id.* at 793-94 (Garibaldi, J., dissenting). Justice Garibaldi accused the court of primarily relying on the "functional equivalent" test while simply paying lip service to the *Schmid* factors. *Id.* at 794 (Garibaldi, J., dissenting). As support for its proposition that the majority's reliance on the functional equivalent test was misplaced, the dissent pointed out that the United States Supreme Court had rejected such an analysis twenty years ago in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). *Id.* at 793 (Garibaldi, J., dissenting). In addition, Justice Garibaldi noted that the vast majority of state courts considering the issue have rejected the proposition that malls are the functional equivalent of business districts. *Id.* See *supra* note 110 for a list of the state court decisions failing to find that their constitutions granted speech activists access to shopping centers.

[185]*J.M.B. Realty Corp.*, 650 A.2d at 793-94 (Garibaldi, J., dissenting). For support, the dissent repeated Justice Black's dissent in *Logan Valley*, "I can find nothing in *Marsh* which indicates that if one of these features [of a municipality] is present, e.g., a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it." *Id.* (quoting Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 330-32 (1968) (Black, J., dissenting)).

[186]*Id.* at 794 (Garibaldi, J., dissenting) ("[C]ommon sense also dictates that privately-owned-and-operated shopping malls are not the functional equivalent of downtown business districts.").

for shopping.[187] Moreover, the Justice stated that unlike commercial districts, malls are completely lacking of, among other things, housing, town halls, or schools.[188] Finally, the dissent insisted that the shopping center is not a community since shoppers do not have a voice in its operations.[189]

Justice Garibaldi next opined that the court's holding would not remain limited to regional malls and eventually would expand to other private property where sizable audiences were located.[190] The Justice offered support for the position by declaring that, in the present matter, the respondents were quite different and only shared one common feature, which is that large groups congregate on their property for commercial dealings.[191] The dissent further argued that the New Jersey Constitution

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[187]*Id.*

[188]*Id.* Justice Garibaldi noted, "Even though the malls sponsor community events, visits from Santa, and orchestral concerts, visitors do not mistake them for grassroots gathering places, Santa' workshop, or a mecca of arts or culture." *Id.*

[189]*Id.* The dissent also claimed that the majority's reliance on *State v. Shack* was misplaced. *Id.* at 794-95 (Garibaldi, J., dissenting). Justice Garibaldi posited that *Shack* was inapposite since in the present matter alternate means for expression available, the visitors of the malls were not impoverished or disadvantaged, and there were no other compelling interests present to require the entry. *Id.*

[190]*Id.* at 795 (Garibaldi, J., dissenting). The Justice asserted that:

> The majority's decision today guarantees the right to a forum for free expression not only on public property, or on the private property in the limited circumstances as permitted under *Schmid*, but on all private property — not just shopping malls — where a captive audience can readily be found. . . . I . . . am unable to "discern any legal basis distinguishing this commercial complex from other places where large numbers of people congregate . . . ."

Id. (quoting Cologne v. Westfarms Assocs., 469 A.2d 1201, 1209 (Conn. 1984)).

[191]*Id.* The *J.M.B.* court treated all the respondent shopping malls as a single group despite pleas from the individual centers to be considered on a separate basis. *See, e.g.*, Respondent's Brief, *supra* note 19, at 18-19 (distinguishing between The Mall at Short Hills and the Riverside Square Mall and other shopping centers involved in the litigation); *see also* New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp., 628 A.2d 1094, 1098 (N.J. Super. Ct. Ch. Div. 1991) ("They[, the shopping malls,] are not, however, to be treated as a single entity as the plaintiffs have urged. Each of them is different and distinct.").

guaranteed only a forum for speech, not an audience, and therefore, did not support the court's position.[192]

Finally, the dissent expressed concerns for the consumer since she would ultimately have to bear the burden for the centers' increased costs resulting from the communicative activity.[193] Justice Garibaldi then averred that the petitioner's have an abundance of areas where they can still relay their message to a multitude of citizens.[194] The Justice concluded that although permitting the Coalition to handbill in the malls made it more convenient for the petitioner to reach large numbers of people; considerations of convenience, cost, and efficiency never created a constitutional right.[195]

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[192]New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp, 650 A.2d 757, 795-96 (N.J. 1994) (Garibaldi, J., dissenting). Several courts and commentators have expressed support for the position that constitution's free speech clauses guarantee a forum for expressive activity, yet not necessarily an audience. *See, e.g.*, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 333 (1968) (Black, J., dissenting) ("[P]ickets do have a constitutional right to speak . . ., but they do not have a constitutional right to compel . . . [a shopping center] to furnish them a place to do so on its property."); *see also* Ragosta, *supra* note 2, at 41 ("[A] right to speak freely does not, and should not, imply a right to the best audience.").

On the other hand, a number of courts and legal commentators have argued that speech activists have a right to an *effective* forum, thereby implying the right to an audience. *See, e.g.*, J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 401 ("Effective communication . . . is an unavoidable component of the liberty of speech . . . .").

[193]*J.M.B. Realty Corp.*, 650 A.2d at 796 (Garibaldi, J., dissenting).

[194]*Id.* The dissent noted that even without the use of the shopping center property, the Coalition was able to distribute pamphlets "in at least thirty locations, including several downtown areas. . . . They were able to distribute over 85,000 pamphlets in those locations during a three-day period." *Id.* Justice Garibaldi further declared that:

> [The] plaintiffs . . . remain able to reach the public outside supermarkets and movie theaters, at train stations and bus stops, in parks and post offices, in the media, and even in the numerous still-vibrant downtown shopping districts. Plaintiffs can voice their opinions today more readily and more accessibly in more places and in more formats than ever before in human history.

Id.

[195]*Id.*

V. CONCLUSION

Protecting expressive activity, a right which has always held a preferred position in the American hierarchy of political values,[196] is undoubtedly important. Equally important, however, is preserving forums for speech since without a place to effectively communicate the right of free speech becomes essentially meaningless.[197] Moreover, guaranteeing a location for those of modest financial means to communicate with large groups of citizens seems necessary, unless constitutional rights are only to be exercised by the wealthy and affluent.[198] Therefore, if our society has truly evolved to a point where shopping malls have in essence replaced business districts, and consequently replaced a substantial portion of our public forums, then it seems only equitable to permit a certain amount of expressive activity on the centers' property.[199]

In *J.M.B.*, the court focused on the fact that our culture has transformed such that shopping centers have usurped the functions of

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[196]*See* Berger, *supra* note 3, at 691 ("If speech — the immediate target of every oppressive regime — is muted none of our other cherished liberties ultimately can survive."); *see also supra* note 2 for a discussion of the importance of speech in the American system of civil liberties.

[197]*See* CHAFEE, *supra* note 6, at 560 (discussing the need of the government to take affirmative steps to guarantee that an avenue for speech exists).

[198]See *supra* note 141 for a discussion of the necessity of ensuring those of meager financial resources have a place to effectively assemble and communicate. *But see* Harris v. McRae 448 U.S. 297, 316 (1980) ("Although government may not place obstacles in the path of [a] [woman's] exercise of her freedom of choice it need not remove those not of its own creation. Indigency falls into the latter category."). Hence, the Supreme Court of the United States may not construe the Constitution to require the government to take affirmative steps to ensure certain rights are capable of being exercised.

[199]*See, e.g.*, Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 345 (Cal. 1979) ("It was not intended by these constitutional provisions to so far protect the . . . [private property owner] as to enable him to use it to the detriment of society. . . . [T]he power to regulate property is not static, rather it is capable of expansion to meet new conditions of modern life." (citation omitted)), *aff'd*, 447 U.S. 74 (1980); *see also* State v. Shack, 277 A.2d 369, 372 (N.J. 1971) ("Property rights serve human values. They are recognized to that end, and are limited by it."); Berger, *supra* note 3, at 691 ("[P]roperty should not become a vehicle by which speech is stifled.").

traditional commercial districts.[200] Nevertheless, the *J.M.B.* court also relied on the *Schmid* factors to determine that the malls must permit leafletting. The *Schmid* test, however, seems somewhat out-of-place in the free speech-shopping mall debate.

The elements of *Schmid*, as the *J.M.B.* dissent recognized, are better suited to university-type private property, land that is not only open to the public but which is also utilized for social discourse.[201] For example, in analyzing the first prong of the *Schmid* test, the majority was required to effectively ignore and minimalize the primary purpose of the centers, despite the fact that *Schmid* requires that it be considered. Instead, the *J.M.B.* court focused solely on the normal use of the malls, thereby stripping the first element of part of its scope. Thus, the *J.M.B.* majority should have limited its analysis to focusing on the private property becoming the functional

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[200]*See, e.g.*, New Jersey Coalition Against War In The Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 766 (N.J. 1994) ("Regional and community shopping centers significantly compete with and have in fact significantly displaced downtown business districts as the gathering point of citizens . . . ."); *see also supra* note 5 and accompanying text (discussing the *J.M.B.* court's analysis of how and to what extent the shopping centers have replaced commercial districts).

[201]*See, e.g.*, *J.M.B. Realty Corp.*, 650 A.2d at 790 (Garibaldi, J., dissenting) ("Unlike universities, shopping malls are not public forums dedicated to public use or to the exchange of ideas.").

equivalent of land where speech once flourished,[202] and utilizing only a general balancing test between speech and property rights.[203]

In addition, when contemplating the right of expression to shopping centers, due consideration must be given to the mall owners' property rights.[204] Yet, Justice Garibaldi's contentions that the malls have opened their doors solely for commercial purposes neglects to consider the impression that the centers intentionally have relayed to mall visitors. It would be troubling to allow centers to purposely host a variety of community functions, and attract hundreds or thousands of people to those events, and then permit the mall owners to exclude expression relating to those events on the basis that the malls are only commercial entities. Though the reason shopping centers host civic and political activities may ultimately be to increase their profits, it is somewhat incredulous to assume that people know they are being lured to such events ultimately to fill the mall owners' coffers.

Although the center owners' *subjective* reasons for their extended invitation to the public may be to maximize profits, one must also consider whether the invitees or any reasonable persons who visit one of the malls'

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[202]The functional equivalent analysis also seems to ensure that free speech will only be granted on large shopping center land, as opposed to other types of private property such as smaller retail stores, because only the malls can be said to host the multitude of activities that at one time were found in business districts. As Justice Marshall wrote, "privately opened property must assume to some significant degree the functional attributes of public property devoted to public use [before it will be subject to the Constitution]." Hudgens v. NLRB, 424 U.S. 507, 537 (1976) (Marshall, J., dissenting). The Justice further explained that:

> The only fact relied upon for the argument that . . . [smaller and less diverse properties] have acquired the characteristics of a public municipal facility is that they are "open to the public." Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*.

Id. (quoting Central Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972)).

[203]*See, e.g.*, *PruneYard Shopping Ctr.*, 592 P.2d at 346-48 (invoking a general balancing test in deciding that the California Constitution protected speech rights on shopping center property).

[204]As the *J.M.B.* dissent noted, the majority's focus seems to be exclusively on the petitioner's expressive rights in conducting the balancing test between the expression and the mall owners' property rights. *See J.M.B. Realty Corp.*, 650 A.2d at 789 (Garibaldi, J., dissenting). When conducting the general balancing test, however, the majority did make reference to the mall owners' interests. *See id.* at 776.

many activities realize their invitation is solely based on financial considerations.[205] In actuality, persons attending those gatherings may find it somewhat disconcerting to realize that they are the targets of some nebulous economic ploy. Simply put, when the mall owners permit such numerous activities on their properties they must take the financial "good" with the corresponding "bad" and, therefore, be estopped from arguing that the sole function of their malls is commercial gain.

Theoretically, the *J.M.B.* holding may be extended to other types of private property, however, the court seems to have made it unmistakably clear that their holding only applies to large shopping malls.[206] In addition, because the *J.M.B.* decision only permits leafletting, it sufficiently enables effective expression while also ensuring that the speech will not, to any discernable degree, interfere with the mall owners' business activities. More importantly, the *J.M.B.* majority limited its holding to political speech, yet that category of expression is most critical in advancing our democratic political system and furthering social discourse.[207]

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[205]In fact, Black's Law Dictionary defines invitation to encompass:

> An invitation . . . may be *implied* when such *owner or occupier by acts or conduct leads another to believe* that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared and allowed to be used.

BLACK'S LAW DICTIONARY 827 (6th ed. 1990) (second emphasis added). Therefore, when considering the scope of an invitation, one must not consider the subjective purposes of the property owner, as the *J.M.B.* dissent does, but must objectively define the scope of the invitation based on the property owner's overt conduct and actions.

[206]*See J.M.B. Realty Corp.*, 650 A.2d at 781 ("No highway strip mall, no football stadium, no theater, no single huge suburban store, no stand-alone use, and no small to medium shopping center sufficiently satisfies the standard of *Schmid* to warrant the constitutional extension of free speech to those premises, and we so hold."). In fact the New Jersey Supreme Court has advocated an approach of greatly protecting private residential property rights. *See, e.g.*, Murray v. Lawson, 642 A.2d 338 (N.J. 1994) (holding that anti-abortion picketers may be restrained from demonstrating in the immediate vicinity of a private residence).

[207]For a discussion of the enhanced protection afforded political speech, see *supra* note 13. *See* State v. Miller, 416 A.2d 821, 826 (N.J. 1980) ("[P]olitical speech . . . occupies a preferred position in our system of constitutionally-protected interests. . . . Where political speech is involved, our tradition insists that government 'allow the widest room for discussion, the narrowest range for its restriction.'" (citations omitted)).